ESCHEWING ANTICIPATORY REMEDIES FOR TAKINGS:
A RESPONSE TO PROFESSOR MERRILL

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Professor Thomas Merrill is justly celebrated for the breadth, volume, and creativity of his scholarship. But in *Anticipatory Remedies for Takings*,1 Professor Merrill goes too far in arguing that property owners suing under the Takings Clause2 (often called the Just Compensation Clause) should be permitted to seek anticipatory remedies for takings for public use. I hope and suspect that the Supreme Court will decline to embrace Professor Merrill’s recommendations.

Professor Merrill’s basic argument is straightforward: courts should have authority to issue anticipatory remedies in takings cases and they should commonly (though not necessarily frequently) exercise discretion to grant such remedies. But what he actually means by anticipatory remedies is surprisingly muddled. Merrill obviously knows how to be precise, so I surmise he wishes to be artfully ambiguous in his Essay. He intends to promote the use of a broad set of anticipatory remedies in takings cases, but apparently recognizes that precedent and established understandings of the Takings Clause do not support his ambitious agenda. To advance his project while not contradicting too much existing law, he apparently prefers to be somewhat vague about what he is proposing, perhaps hoping the Supreme Court will take some steps in the future to help make his agenda more plausible.

At one point in the Essay, Merrill offers a concise, comprehensive definition of an anticipatory remedy: “any remedy other than a judgment requiring the government to pay just compensation.”3 This broad definition, on its face, includes, at a minimum, injunctions barring takings, orders invalidating government orders as takings, and declaratory judgments that the government is engaging in a taking. While I believe this definition probably accurately states the ultimate goal of Merrill’s project, elsewhere in the Essay he backs away from this definition. One proposal at the core of his thinking is clear: courts can and should use the Declaratory Judgment Act4 to resolve takings issues, including for the purpose of determining whether certain gov-

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2 U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).
3 Merrill, supra note 1, at 1650.
ernment actions constitute takings justifying awards of compensation (but not actually awarding such relief). But as to injunctions he is less clear. He says that “courts of general jurisdiction ordinarily cannot enjoin takings of property,”5 apparently contradicting his general definition of anticipatory remedies quoted above. But then elsewhere he tacks back again in the opposite direction, asserting that, in some circumstances, “federal courts should be allowed to enjoin federal or state government action under the Takings Clause.”6 In addition, he says that “[a] petition for review of federal agency action under . . . the Administrative Procedure Act”7 should offer a way to raise a takings argument; given the breadth of a court’s remedial power under the APA, a successful takings argument in such a case could effectively block government action.8 Finally, he cites with approval various court decisions that he thinks can plausibly be read to support the availability of injunctions or orders invalidating government actions under the Takings Clause.9

So it is all a little confusing. I choose for the purpose of this Response to read Merrill’s Essay for all its worth, and use his definition of an anticipatory remedy as “any remedy other than a judgment requiring the government to pay just compensation” as my foil. I do so while acknowledging that Merrill does not appear fully committed to this definition, much less persuaded that the definition is permissible under current law.

Part I of this Response explains why current precedent and established takings doctrine do not support Merrill’s anticipatory remedies proposal and why, contrary to Merrill’s argument, the Court’s most recent takings decisions cannot fairly be read as invitations to a revolution in terms of takings remedies. Part II criticizes Merrill’s normative case for anticipatory remedies. Part III identifies the practical disadvantages of Merrill’s remedies proposal and discusses its potential for destabilizing the substantive law of takings.

5 Merrill, supra note 1, at 1650 (emphasis omitted).
6 Id. at 1632.
7 Id.
8 See 5 U.S.C. § 703 (2012) (authorizing a reviewing court to issue “declaratory judgments” or “injunction(s)”; id. § 706 (authorizing a reviewing court to “hold unlawful and set aside agency action”).
9 See Merrill, supra note 1, at 1657–60 (discussing Horne v. Dep’t of Agric., 133 S. Ct. 2053 (2013)); id. at 1660–63 (discussing Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013)).
I. DOCTRINAL OBJECTIONS TO THE ANTICIPATORY REMEDIES PROPOSAL

To the extent Merrill is proposing, suggesting, or only leaving open the possibility that a property owner should be permitted to invoke the Takings Clause to enjoin and/or invalidate a taking for a public use, the suggestion is inconsistent with well-reasoned, established doctrine. The Supreme Court has repeatedly stated that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of. . . a taking." 10 Accordingly, the Court has ruled that, "in general, '[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking." 11

In practical terms, if a state government is building a public road and it is willing to pay just compensation for the right of way, an owner cannot sue to block construction of the road under the Takings Clause. Likewise, if a local government is regulating land use to protect the community and the owner has the opportunity to sue for compensation based on any taking that might result, the owner cannot sue to block enforcement of the regulation under the Takings Clause.

The understanding that the default remedy for a taking is financial compensation flows from the nature of the eminent domain power and the language of the Takings Clause. The eminent domain power authorizes government to seize private property from individual citizens to advance the common good. It is an inherent attribute of sovereignty that precedes the Constitution; as the Supreme Court put it long ago, eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." 12 The Fifth Amendment Takings Clause — "nor shall private property be taken for public use, without just compensation" — places conditions on the exercise of the eminent domain power. Specifically, it prohibits a taking if it is either not for a "public use" or without "compensation." The Takings Clause, by its terms, places no con-

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10 First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 315 (1987).
12 Boom Co. v. Patterson, 98 U.S. 463, 466 (1878).
straint on the exercise of the eminent domain power if it is exercised for a public use and just compensation is available. 13

With respect to the just compensation requirement, the Court has said that compensation need not be offered “in advance of or even contemporaneously with the taking” in order to comport with the Takings Clause. 14 “All that is required is the existence of a ‘reasonable, certain and adequate provision for obtaining compensation’ at the time of the taking.” 15 In addition, the Court has recognized that a successful takings claimant is constitutionally entitled to prejudgment interest as part of the compensation award. 16 Thus, after-the-fact awards of just compensation are designed, to the extent possible, to equitably protect property owners from economic loss due to takings for public use.

The Court has said that, in exceptional cases, courts can block government from taking private property, but only if the taking is not for a public use or if just compensation is not an available remedy. Thus, pointing to the public use requirement, the Court has said that a taking may be enjoined if the taking would serve an illegitimate purpose, 17 or is contrary to some other law. 18 Pointing to the just compensation requirement, the Court has said that an owner can seek to enjoin a taking if no forum is available in which to sue for compensation, 19 or if the alleged taking would generate “potentially uncompensable damages.” 20 In accord with these precedents, a plurality of the Court has suggested that there should be a presumption that Congress has withdrawn the usual just compensation remedy if an alleged taking involves money, on the theory that Congress could not sensibly embrace the pointless, circular exercise of forcing a citizen to sue the government to get back money the government is simultaneously taking from that citizen. 21

13 See Riverside Bayview, 474 U.S. at 129 n.6 (noting that a government enforcement action is “not the proper forum for resolving” whether a regulatory program effects a taking; instead, a property owner’s proper recourse is “to initiate a suit for compensation in the Claims Court”).
15 Id. (quoting Reg’l Rail Reorg. Act Cases, 419 U.S. 102, 125 (1974)) (internal quotation marks omitted).
21 See E. Enters. v. Apfel, 524 U.S. 498, 521 (1998) (plurality opinion). Undercutting the significance of the plurality’s suggestion is the conclusion by the remaining Justices in Eastern Enterprises, representing a majority of the Court, that the kind of generalized liability at issue in that case cannot give rise to a taking of “property” within the meaning of the Takings Clause. Id. at
These various exceptions do not contradict or detract from the general rule that the exclusive remedy for a taking is a suit for just compensation. Indeed, because these exceptions apply only when either the taking is not for a public use or just compensation is not available, they implicitly uphold and reaffirm the understanding that a suit for just compensation is the exclusive remedy for a taking for public use so long as that remedy is actually available.

To advance his anticipatory remedies proposal, Merrill contends that the Supreme Court takings cases break down into an “A line” of decisions asserting that the exclusive remedy for a taking is just compensation and a “B line” of decisions supporting the availability of anticipatory remedies. He asserts that these two lines of cases are “inconsistent” with each other and that the Supreme Court needs to resolve the question of which line of cases is “correct.” He acknowledges that the B line of cases has not been “adequately rationalized,” but asserts that the B line is correct and urges the Court to embrace that line of cases and reject the A line.

But Merrill’s argument relies on a manufactured conflict. Merrill’s A line cases articulate and apply the general rule that the exclusive remedy for a taking for public use is a suit for just compensation. His B line cases (with one modest exception) fit comfortably into the established exceptions to the general rule. Thus, for the most part, his B line cases involve (1) alleged takings for other than a public use, or (2) alleged takings when compensation is unavailable, whether because Congress has withdrawn the compensation remedy, or the takings claim seeks the return of money from the government. The sole outlier is Kaiser Aetna v. United States, which is not a takings case at all but a suit brought by the government to enforce the navigational servitude; the Court’s statement that the failure of the government’s navigational servitude theory meant that the government could proceed to acquire public ac-

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540 (Kennedy, J., concurring in the judgment and dissenting in part); id. at 554–56 (Breyer, J., dissenting). That viewpoint obviously renders the remedy issue academic.

22 Merrill, supra note 1, at 1634–35.

23 See id. at 1634.

24 See id. at 1636.

25 See id. at 1633.


27 See, e.g., Babbit v. Youpee, 519 U.S. 234 (1997); see also Brief for the Petitioners at 13 n.5, Youpee, 519 U.S. 234 (No. 95-1595) (acknowledging that compensation remedy was unavailable).


31 See id. at 168–69.
cess to the disputed area only through condemnation was arguably idle dictum.  

The B line cases, far from being inconsistent with the A line cases, are actually entirely consistent with them. The A line cases recognize that, where the taking is for a public use and just compensation is available, a suit for just compensation is the exclusive remedy for an alleged taking. The B line cases recognize that the general rule does not apply if either of these conditions is not satisfied. Thus, the A line and the B line are complementary sets of cases that collectively support a single, unified understanding of the Takings Clause. Contrary to Merrill’s argument, there is no need to decide which line of cases is correct. They are both correct.

Merrill also says that “[t]hree of the last four [Supreme Court] takings decisions . . . have embraced” the B line approach, in that “[e]ach decision authorized what were, in effect, anticipatory adjudications of takings liability.”33 This emerging “understanding,” he asserts, now “awaits only being adequately rationalized.”34 In my view, Merrill overreads these decisions, incorrectly suggesting that he has the wind at his back in the modern Supreme Court.

In Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,35 the Court addressed whether a state court’s modification of a common law rule of property can constitute a “judicial taking.” Merrill asserts that the Court implicitly endorsed the anticipatory remedy idea by indicating that the appropriate remedy for a judicial taking would be invalidation of the state court judgment;36 for support he draws on Justice Scalia’s statement that com-

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32 Id. at 179–80. Merrill describes Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), as an example of a case that contains elements of both the A line and B line. See Merrill, supra note 1, at 1635 n.24. But the Court in Ruckelshaus simply applied, in one part of its opinion, the established rule that an alleged taking for public use can only be challenged in a suit seeking just compensation, see 467 U.S. at 1016–19, after applying, in another part of its opinion, the exception to the general rule allowing suit to enjoin a taking alleged to be for other than a public use, see id. at 1014–16.

Another arguable outlier (which Merrill does not cite) is Andrus v. Allard, 444 U.S. 51 (1979), in which the Court addressed on the merits a takings claim seeking equitable and declaratory relief. While the Court analyzed the claim under the takings rubric, it noted that the claim was originally “cast in the District Court in terms of economic substantive due process.” Id. at 64 n.21. Given this procedural history, the fact that injunctive relief clearly is an appropriate remedy under the Due Process Clause, and the fact that the Court for many years was confused about the relationship between the Takings Clause and the Due Process Clause, see Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540–43 (2005), it is not surprising that the Court in Andrus incorrectly assumed that equitable relief would have been available if the plaintiffs had succeeded on the merits of their claims.

33 Merrill, supra note 1, at 1635–36.
34 Id. at 1633.
35 130 S. Ct. 2592 (2010).
36 Merrill, supra note 1, at 1656–57.
pensation need not be “the exclusive remedy for a judicial taking.”

But the divided Court in Stop the Beach did not actually resolve whether judicial takings can occur and Justice Scalia, who supports the idea that judicial takings can exist, spoke only for a plurality of the Court. Justice Kennedy, the usual swing vote in modern takings cases, declined to embrace the judicial takings theory in part because he understood that the normal remedy for a taking is just compensation; he could not see how that remedy could be applied in a judicial takings case. In other words, contrary to Merrill’s argument, the Court in Stop the Beach did not adopt the judicial takings theory and thereby implicitly embrace the use of anticipatory remedies. Moreover, the Court failed to reach agreement on the judicial takings theory in part because it could not agree to jettison the traditional understanding that financial compensation is the exclusive remedy for a taking for public use. In sum, Stop the Beach does not endorse anticipatory remedies theory but instead suggests that a majority of the Supreme Court is unwilling to embrace the theory.

The Court’s decision in Horne v. Department of Agriculture provides no more support for Merrill’s thesis. The narrow holding in that case was that the Hornes, functioning in their capacity as handlers under the Agricultural Marketing Agreement Act, could raise the Takings Clause as a defense to the imposition of monetary sanctions for their failure to comply with the Act, given that the Act created a comprehensive remedial scheme that precluded them from presenting a claim for just compensation in the Court of Federal Claims. Horne merely applies established precedent recognizing that an owner can seek equitable relief based on an alleged taking in an exceptional case when the opportunity to pursue just compensation is foreclosed.

Finally, Merrill relies on Koontz v. St. Johns River Water Management District, a decision so bewildering that it is difficult to pre-

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37 Stop the Beach, 130 S. Ct. at 2607 (plurality opinion).
38 Id. at 2617 (Kennedy, J., concurring in part and concurring in the judgment).
39 Merrill asserts that Stop the Beach represents an instance in which the Court issued an anticipatory remedy in the form of a declaratory judgment, because the Court “declared — unanimously,” no less — “that the Florida Supreme Court had not committed a judicial taking.” Merrill, supra note 1, at 1656. But the Court did not render a decision on the judicial claim. All of the Justices agreed that the Florida Supreme Court decision made no change in state law, precluding a finding of a judicial taking regardless of whether a judicial taking is even possible. See Stop the Beach, 130 S. Ct. at 2612; see also id. at 2613 (Kennedy, J., concurring in part and concurring in the judgment) (joining Part IV of Justice Scalia’s opinion); id. at 2618 (Breyer, J., concurring in part and concurring in the judgment) (same). The Court’s disposition of Stop the Beach does not support the conclusion that an anticipatory remedy is appropriate when a taking has actually occurred.
40 133 S. Ct. 2053 (2013).
41 Id. at 2063.
42 133 S. Ct. 2586 (2013).
dict what it may turn out to mean.\textsuperscript{43} I am quite certain, however, that
the decision does not support Merrill’s anticipatory takings theory. He
focuses on the Court’s ruling that the so-called \textit{Nollan–Dolan} standards
governing review of development “exactions” apply not only when the government imposes an exaction but also when the government
denies a permit because the owner refuses to accede to a govern-
ment “demand” for an exaction.\textsuperscript{44} Merrill says this ruling supports
his thesis because, “[a]s [he] read[s] the opinion, the Court held that
the Takings Clause . . . prohibits certain government \textit{threats} to take
property without compensation.”\textsuperscript{45} This is certainly a helpful reading
of \textit{Koontz} for Merrill’s argument because it suggests, in effect, that the
Court has already endorsed his anticipatory remedies theory.

But this reads too much into \textit{Koontz}. First, the Court appears to
have foreclosed this potential interpretation of its opinion by explicitly
reaffirming that “the Fifth Amendment mandates a particular 
\textit{remedy} — just compensation — only for takings.”\textsuperscript{46} Second, the Court’s
substantive legal analysis refutes Merrill’s interpretation of the deci-
sion. The Court did not attempt to resolve what the remedy should be
for what it termed a “\textit{Nollan/Dolan} unconstitutional conditions viola-
tion,”\textsuperscript{47} leaving that issue for resolution by the Florida courts. All of
the Justices agreed, however, that the District did not “take” property
by denying the permit application, whether the focus was on \textit{Koontz}’s
property interests in land or the property interests that would have
been exacted if he had acceded to the exactions demand.\textsuperscript{48} These con-
cclusions, endorsed by all the Justices, make it impossible to read the
Court’s opinion to suggest that \textit{Koontz} would be entitled to any 
\textit{remedy} for the permit denial \textit{under the Takings Clause}, whether of the an-
ticipatory variety or any other kind. Many scholars suggest that
\textit{Koontz}’s ruling on the permit denial is comprehensible only as an 
application of the Due Process Clause.\textsuperscript{49} Whether or not that is the best
reading (as I believe), \textit{Koontz} does not support the anticipatory reme-
dies theory.

The foregoing hopefully suffices to demonstrate that there are seri-
ous problems in terms of doctrine and precedent with Merrill’s thesis
that takings claimants should be entitled to sue to enjoin or invalidate

\begin{footnotes}
\textsuperscript{43} See generally John D. Echeverria, \textit{Koontz: The Very Worst Takings Decision Ever?}, 22
\textsuperscript{44} Merrill, \textit{supra} note 1, at 1660–62.
\textsuperscript{45} Id. at 1661.
\textsuperscript{46} \textit{Koontz}, 133 S. Ct. at 2597.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 2597; id. at 2604 (Kagan, J., dissenting).
\textsuperscript{49} See, e.g., Lee Anne Fennell & Eduardo M. Peñalver, \textit{Exactions Creep}, 2013 Sup. Ct. Rev. 287; Mark Fenster, \textit{Substantive Due Process by Another Name: Koontz, Exactions, and the Regu-
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alleged takings for public use rather than seek financial compensation for alleged takings. But there remains the question whether property owners should be permitted to invoke the Declaratory Judgment Act to obtain declarations that the government is engaging in a taking. Some Supreme Court precedent suggests that courts should decline to issue declarations, perhaps as a prudential matter, whenever the availability of the compensation remedy precludes suits seeking injunctions or invalidation. But there is some lower current precedent for courts granting declaratory relief on takings issues, and I know of nothing in the Declaratory Judgment Act that positively bars this possibility. So I conclude that the merits of using this type of anticipatory remedy in takings cases comes down to whether it would be wise for courts to do so, the question to which I now turn.

II. THE WEAK NORMATIVE CASE FOR ANTICIPATORY REMEDIES

Merrill launches his normative case for expanding the remedies under the Takings Clause by asserting that the doctrine is currently a “mess,” with “pitfalls,” and “trap[s]” that burden the prosecution of takings claims. He says these problems are attributable, “in significant part,” to the traditional understanding that compensation is the exclusive remedy for a taking, and he contends that embracing anticipatory remedies could largely solve these problems. In my view, Merrill misdiagnoses the asserted problems and their origins, offers a solution that does not solve the problems he identifies, and overlooks the most obvious legislative solutions.

First, with respect to takings claims involving the federal government, contrary to Merrill’s assertion, there is no serious “mess” to worry about and litigants can easily avoid the supposed “pitfalls.” Most property owners seeking compensation from the federal government under the Takings Clause must sue in the Court of Federal Claims, the only federal court in which Congress has adopted a general waiver of sovereign immunity from compensation claims. At the same time, Congress has not granted the claims court, an Article I court, jurisdiction to hear suits for injunctive relief under the Administrative Procedure Act. Thus, a property owner seeking just compensation for an alleged taking due to the denial of a federal permit must

52 Merrill, supra note 1, at 1631.
53 Id.
54 Id. at 1631–32.
sue in the claims court. If she also, or alternatively, seeks to overturn
the permitting decision on the ground that it violates some federal
statute, she must file a separate lawsuit in federal district court. The
requirement to split claims between courts creates an inconvenience
and wastes resources. But in my view it is a stretch to describe it, as
Merrill does, as a “mess.”

The asserted “pitfall” litigants supposedly encounter in suing the
federal government arises from 28 U.S.C. § 1500, which bars the
claims court from exercising jurisdiction over a claim if the plaintiff
has another claim arising from the same operative facts pending in an-
other court.56 This provision limits the ability of property owners to
prosecute claims for compensation in the claims court and APA claims
in the district court simultaneously. But under the current interpreta-
tion of this provision, litigants can avoid the restriction imposed by
§ 1500 simply by filing their actions in the claims court before filing
suit in the district court.57 To the extent § 1500 creates a pitfall, it can
easily be avoided by any competent litigant.

Merrill’s argument also misfires because, contrary to Merrill’s as-
sertion, the limited remedies available under the Takings Clause are
not the cause of the problems he cites. Congress, not the Supreme
Court, has enacted the jurisdictional provisions that mandate claim
splitting. Moreover, if the Court accepted Merrill’s suggestion that it
reinterpret the Takings Clause to authorize anticipatory remedies, that
step would not solve the claim-splitting problem. Litigants pursuing
financial compensation under the Takings Clause would still have to
sue in the claims court and those pursuing APA claims would still
have to sue in federal district court. Under Merrill’s proposal, litigants
could combine APA claims with takings claims seeking anticipatory
remedies in federal district court; but claimants seeking complete relief
under the Takings Clause would need to split their takings claims be-
 tween federal district court (for equitable relief) and the Court of Fed-
eral Claims (for compensatory relief). They would also still need to
take care not to run afoul of § 1500. As a proposed solution to a
claim-splitting problem, Merrill’s anticipatory remedies idea has little
to recommend it.

Finally, Merrill’s proposal is ill advised in comparison with poten-
tial congressional solutions, which could be much more straightforward
and effective. As some members of Congress have already pro-
posed, Congress could eliminate the need to split takings claims and

56 See also Merrill, supra note 1, at 1630–31.
57 See United States v. Tohono O’Odham Nation, 131 S. Ct. 1723, 1727 (2011) (holding that
§ 1500 bars prosecution of a suit filed in the claims court after a suit has already been filed in the
district court); Starr Int’l Co. v. United States, 106 Fed. Cl. 50, 60 (2012) (ruling that § 1500 does
not apply when the claim was filed first in the claims court).
APA claims by waiving the sovereign immunity of the United States in all takings cases filed in federal district court, allowing claimants to assert just compensation claims and APA equitable relief claims in one lawsuit in one court.58 Congress could relieve lawyers of the burden of having to worry about § 1500 by repealing that provision as well. These two measures would completely solve the asserted problems that Merrill identifies while avoiding the need for the Supreme Court to embark on constitutional adventurism. Contrary to Merrill’s suggestion, the Supreme Court should not rewrite takings doctrine in an attempt to solve jurisdictional problems that Congress created and that Congress can most effectively resolve.

The second “problem” that Merrill cites to justify his project, arising from takings lawsuits against state and local governments, is the so-called “trap” created by the Court’s *Williamson County* decision.59 Under that decision, owners suing local governments under the Takings Clause must first pursue available state remedies before suing for just compensation in federal court.60 The requirement to pursue available state remedies, coupled with standard claim- and issue-preclusion doctrine, effectively mandates that takings claims against local governments be resolved within the state court systems, absent rare intervention by the Supreme Court on a petition for certiorari.

58 Alternatively, Congress could solve the problem by granting the Court of Federal Claims jurisdiction to resolve APA claims, but Congress might be reluctant to grant such broad jurisdiction to an Article I court. Merrill laments that Congress has failed to address this issue, pointing to proposed legislation that failed in the 105th Congress. Merrill, supra note 1, at 1631 & n.4 (discussing the Tucker Act Shuffle Relief Act of 1997; H.R. 992, 105th Cong.). The bill he refers to drew strong opposition because it included controversial provisions unrelated to the claim-splitting issue. See S. REP. NO. 105-242, at 29–58 (1998) (expressing minority views). Opponents of the bill offered an alternative limited to solving the claim-splitting problem, but the bill’s proponents opposed it. Id. at 50 (proposing waiver of sovereign immunity for takings claims filed in Article III courts). One of the controversial provisions of the bill, which closely tracks Merrill’s current proposal, sought to empower the federal courts to grant injunctive relief in takings cases. See id. at 3, 19, 25; see also GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 440 (1st ed. 2000) (“[T]he bill would have conferred upon the Court of Federal Claims the power to grant equitable relief in takings cases . . . .”). In other words, Merrill can be viewed as urging the Court to take up a political battle that has already been waged and lost in Congress. Apart from the questionable merits of this idea as a matter of policy, it is doubtful that Congress has the authority to enact legislation that would change the substantive scope of the Takings Clause by expanding the remedies available for a taking, cf. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress lacks the power to change the substantive meaning of a constitutional provision), but that is another issue.


60 Id. at 194–95. Merrill describes *Williamson County* as a requirement that applies in takings lawsuits against state or local governments, but it has only limited practical impact on the states. As consistently confirmed by the federal appeals courts, compensation claims against states in federal district court are independently barred by the Eleventh Amendment. See, e.g., *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 548–49 (4th Cir. 2014).
But *Williamson County* is accurately described as creating a “trap” only if one starts with the unwarranted assumption that everyone suing under the federal constitution has a right to a federal forum. The Supreme Court has explicitly rejected the idea that “every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court.” The Court’s position is based on the laudable proposition, rooted in our system of federalism, that “[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.” Unless one takes the position that state courts are second-class courts within our constitutional system, the term “trap” is an unfair and unjustified knock on the state courts.

A second, more substantial argument against the *Williamson County* doctrine is that it discriminates against takings claimants, who must proceed in state court, relative to plaintiffs with federal due process or equal protection claims, who can sue in either federal or state court. This discrimination arises from the Court’s reasoning in *Williamson County* that claims for just compensation against local governments do not accrue under the Takings Clause unless and until the state courts have considered and rejected claims for compensation. Critics of *Williamson County* argue that takings claims should accrue when the government takes the action that represents the alleged “taking,” not at a later point when a court denies a claim for compensation. The merits of that issue are a matter of considerable interest, but the debate is tangential to the issue of whether the Takings Clause should be read to support equitable relief. If the critics of *Williamson County* are correct and the Supreme Court accepts their argument, then takings claimants could pursue claims for financial compensation against local governments either in state court or in federal court. But if the Court were to revisit *Williamson County*, it would not need to address, and probably would not address, the scope of the remedies available under the Takings Clause.

Merrill’s proposal that the Court expand the remedies available under the Takings Clause to include equitable relief would indirectly address the alleged discrimination problem created by *Williamson County* by allowing takings claimants to seek anticipatory remedies against state and local governments under the Takings Clause in federal district court. At the same time, because Merrill’s proposal does not directly address the merits of *Williamson County*, his proposal would leave property owners to pursue just compensation against state

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and local government defendants in state court. Apart from being convoluted and likely to encourage forum shopping, this proposed solution simply raises the more basic question of whether, notwithstanding the issue of discrimination, the Supreme Court should generally seek to channel most takings issues involving state and local governments into state courts, regardless of the nature of the relief requested. I and others tend to believe it is worthwhile to defend the Court’s current prudential approach of sending to the state courts most takings suits against local government because they so frequently raise and are intertwined with significant state law property questions. But Merrill does not address the merits of that question, which are entirely distinct from the merits of the question of whether the Takings Clause can properly be read to authorize anticipatory remedies.

Merrill also makes a series of policy arguments in favor of anticipatory remedies, including that allowing anticipatory remedies “can eliminate unnecessary litigation and delay in resolving rights,” “can reduce uncertainty about property rights,” and “would tend to level the playing field between property owners and government regulators.” None of these arguments is persuasive.

First, Merrill’s proposal would not avoid unnecessary litigation or avoid delay but instead would tend to promote unnecessary litigation and increase delay. Under current law, a claimant suing the federal government under the Takings Clause files a single suit for compensation in the claims court, and a takings claimant suing state or local government files a single suit for compensation in state court. Merrill’s proposal would tend to multiply litigation by authorizing the filing of anticipatory lawsuits against any level of government in federal district court, followed by a second lawsuit for compensation in another court (the Court of Federal Claims in the case of the federal government and state courts in the case of state and local governments). It is true that Merrill’s proposal would not necessarily multiply litigation because the anticipatory lawsuit might end the controversy. If the claimant loses in the first suit, that should be the end of the controversy; even if the claimant wins, the ruling in the anticipatory lawsuit might narrow the issues and facilitate settlement of the compensation issue. But, in general, Merrill’s proposal would tend to multiply litigation, not reduce it, relative to current law. Everything

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64 Only if the Court were to overrule Williamson County and embrace Merrill’s anticipatory remedies idea could property owners sue for both monetary and equitable relief under the Takings Clause in either state or federal court.
66 Merrill, supra note 1, at 1667.
67 Id. at 1668.
else being equal, more litigation would mean more, not less, delay in resolving claims.

Nor does the anticipatory remedies idea offer a promising way to reduce uncertainty about legal rights. If an owner claims a taking, but the government disputes there has been a taking, both sides have to live with uncertainty about the merits of their respective positions until the controversy is resolved (or settled). Merrill’s contention that anticipatory remedies would reduce legal uncertainty appears to be based on the assumption that a suit seeking an injunction against a taking would ordinarily be resolved more expeditiously than a suit seeking just compensation. But I am doubtful that there is any solid basis for this assumption. Regardless of the type of relief requested, a litigant can successfully file a claim and initiate the litigation process only if she has a ripe claim. It is, to say the least, not self-evident that a takings claim would become ripe sooner (or later) depending upon the type of relief requested. Moreover, the liability issues in a takings lawsuit will likely take the same amount of time to resolve regardless of what type of relief is requested. If the owner’s ultimate objective is to secure compensation, filing suit in one court to obtain an anticipatory remedy and then a second suit to convert the first judgment into a compensation award would presumably be especially time consuming, prolonging the uncertainty.

Merrill suggests that regulated parties with takings claims suffer a particular burden awaiting the resolution of their claims, especially in comparison with owners who are the objects of direct condemnations, because they have to endure the litigation process before finding out whether they will receive compensation and, if so, how much. But he overlooks the fact that the argument works in the other direction as well. In a condemnation proceeding, once a court has determined the cost of a proposed taking, the government can decide to opt out of the property acquisition if it has turned out to be too expensive. By contrast, when the government is a defendant in an inverse condemnation action, and believes that it has not engaged in a taking, it is subject to the risk of being proven wrong. If it turns out to be wrong, the government cannot, as in an eminent domain proceeding, opt out of the taking, at least for the period between the date of the alleged taking and the date when the government rescinds or modifies the regulation. As the Court said in First English, “where the government’s activities have already worked a taking of all use of property, no subsequent ac-

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68 See id. at 1667.
69 See id. at 1667–68.
70 Danforth v. United States, 308 U.S. 271, 284 (1939).
tion by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”

Merrill’s final argument — that embracing anticipatory remedies would tend to level the playing field between property owners and regulators — is problematic as well. Merrill asserts 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.” Anticipatory remedies would help restore balance, he argues, because they could “push the conflict toward a quicker resolution in some cases.” For the reasons discussed above, I question whether pursuing anticipatory remedies would turn out to be any quicker than pursuing the traditional compensation remedy. But, more importantly, the premise of the argument appears to be mistaken. In evaluating the incentives driving officials’ behavior, the interests of government regulators cannot properly be divorced from those of the taxpayers ultimately responsible for paying government legal fees. In practice, the government’s legal fees have to be paid out of government budgets or with special appropriations, imposing both bureaucratic and political costs on government officials responsible for managing a limited pool of public funds. Thus, the costs of defending against potential takings lawsuits are likely to deter local officials from taking actions that might trigger takings claims as well as from vigorously defending such lawsuits. Moreover, there is a strong argument that potential takings claimants have a significant advantage over public beneficiaries of regulation because local officials’ decisions are more easily influenced by small, organized interests than by large, diffuse groups of citizens.

In sum, Merrill’s normative case for why the Supreme Court should embrace anticipatory remedies is underwhelming.

72 Merrill, supra note 1, at 1668.
73 Id.
75 Merrill also cites three current or potential takings issues that he suggests could be more expeditiously and effectively resolved with anticipatory remedies: municipal bankruptcy, underwater mortgages, and federal copyright legislation. Merrill, supra note 1, at 1663–66. The first two examples present textbook cases of alleged takings of private property for other than a public use (in the bankruptcy case by allegedly enriching other creditors at the expense of pensioners, and in the underwater mortgage example by allegedly enriching homeowners at the expense of their mortgage lenders). The third example involves a speculative takings claim that might arise in the future if a pending proposal to extend federal copyright protection to certain sound recordings were adopted by Congress. The legislation would generally bolster the protections for claimed rights in these recordings, while in the process reducing existing protections under state law. If this takings claim were otherwise viable, I don’t see why a claim for just compensation could not be presented in the Court of Federal Claims the day the bill is signed into law.
III. DISADVANTAGES OF THE ANTICIPATORY REMEDIES PROPOSAL

Finally, there are significant disadvantages to Merrill’s proposal, some of which he frankly acknowledges. He recognizes, for example, that under his proposal, “ultimate relief in a takings case can only be awarded by a compensation court,”76 meaning that those pursuing anticipatory remedies would sometimes have to file two lawsuits to get complete relief. Because a central stated objective of this project is to eliminate claim splitting, this is a serious drawback.

But there are other problems. Adoption of the anticipatory remedies proposal would risk demeaning the Court of Federal Claims and the state courts. Under this proposal, property owners could pursue their takings claims in district court at least to the point of securing a declaration that a taking has occurred. Claimants could then proceed to the claims court or the state court and demand that the second court accept the takings ruling based on issue preclusion, leaving it to the claims court or the state court to calculate the amount of compensation owed. This proposed process could be viewed as converting the claims court and state courts into glorified collection agencies in takings cases.

Adoption of this proposal also would alter the established balance between property owners and local governments in takings litigation, giving property owners more opportunities to prevail in takings litigation and giving developers new negotiating leverage with local governments. Takings claimants would have a wider choice of forums, allowing them to pick and choose between different courts depending on which court has the most favorable precedent and personnel most inclined to look favorably on takings arguments. By expanding the range of potential remedies available to property owners, the proposal would give owners more strategic options in advancing their cases; they could decide whether to pursue compensation or equitable relief depending upon which option would be perceived by a court as imposing the least draconian remedy.

Adoption of the anticipatory remedies idea also would narrow the range of options available to government defendants in takings cases, making the Takings Clause a more onerous constraint on the operations of the democratic branches. As Chief Justice Rehnquist emphasized in *First English*, after a ruling that a regulation represents a taking requiring payment of just compensation, government officials have a range of options.77 While they cannot avoid liability for a temporary taking from the date of the taking, they can limit the government’s fi-

76 Id. at 1669.
nancial liability going forward by rescinding or modifying the regulation. On the other hand, government officials can decide the regulatory objective is so important they wish to continue to enforce the regulation, even if they have to cover the unanticipated cost of paying compensation under the Takings Clause. However, if courts could grant anticipatory injunctions that block takings, government officials would lose the option of maintaining the regulations even if they are able and willing to pay compensation. While governments could theoretically buy their way out of injunctions, this procedure would place the burden of going forward on government officials. More fundamentally, this procedure would be contrary to the basic understanding that the Takings Clause is not designed to prevent government from acting in the first place.78

Merrill’s proposal also would inject significant new kinds of uncertainty into takings litigation. For understandable reasons, Merrill emphasizes that the courts should deploy the Declaratory Judgment Act, and anticipatory remedies generally, with a good deal of discretion, granting anticipatory relief only when it would likely produce an expeditious resolution of a controversy rather than a waste of judicial resources.79 While the goal is laudable, vesting this much discretion in the courts would mean that litigants would face a great deal of uncertainty trying to predict whether a court would grant anticipatory relief. A litigant could waste years unsuccessfully attempting to persuade the judiciary to issue an anticipatory remedy, leaving the owner to re-commence the litigation in the compensation court if the bid for anticipatory relief fails. By contrast, the unambiguous direction to property owners under current law to file takings claims seeking just compensation in courts capable of making such awards avoids this uncertainty and the consequent waste of time and resources.

Finally, expanding the remedies available under the Takings Clause could create new uncertainty about the nature and scope of the substantive protections provided by the Takings Clause. Prior to the Court’s 2005 decision in Lingle v. Chevron U.S.A. Inc.,80 there was considerable confusion about the remedies available under the Takings Clause, including whether an injunction was an appropriate remedy, because the Court had issued confusing and conflicting decisions on the scope of the substantive protection provided by the Takings Clause. For many years the Court had suggested that a taking could occur when a government takes an action that “does not substantially advance legitimate state interests.”81 Because that test implicated the

78 See supra note 12 and accompanying text.
79 See Merrill, supra note 1, at 1651.
validity of the government action as opposed to its economic burdensomeness, it implied that injunctive relief would be an appropriate remedy for a taking.\textsuperscript{82} In \textit{Lingle}, the Court repudiated the “substantially advances” test, and in the process rejected the suggestion that the remedy for such a taking would be an injunction.\textsuperscript{83} Rewinding the clock and reintroducing the idea that equitable remedies might be appropriate in takings cases risks fomenting new controversy and confusion about the substantive scope of the Takings Clause.

\textbf{IV. CONCLUSION}

For the past thirty years or so, the Takings Clause has served as the favorite vehicle for judges, scholars, and advocates seeking to make the Bill of Rights a more robust bulwark against regulation of economic interests by democratically elected government. By virtue of its language and its original intended purpose, the Takings Clause has never been a very good candidate for this role. Nonetheless, the frequently discussed (and probably exaggerated) doctrinal uncertainties of takings law have made it a relatively fertile field for the propagation of new ideas. But too much logic and too much history appear to stand in the way of the latest innovative proposal for expanding takings law: anticipatory remedies. The Takings Clause — also known as the Just Compensation Clause — is all about just compensation, and there is no sound reason for changing that now. Professor Merrill has offered up many useful and important ideas over his distinguished career, but anticipatory remedies for takings is not among them.

\textsuperscript{82} See, \textit{e.g.}, Daniel v. Cnty. of Santa Barbara, 288 F.3d 375, 384–85 (9th Cir. 2002).

\textsuperscript{83} 544 U.S. at 540–45.