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Articles

HOARDINGS

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ABSTRACT

The United States Constitution implicitly grants governmental entities the power to exercise eminent domain. But importantly, the Constitution also limits this power. One such limitation, and the focus of this Paper, is the implicit requirement that governments can only take what they need. Perhaps surprisingly, this imbedded constitutional principle is commonly violated. Government entities or their proxies regularly condemn more private property rights than are necessary for the completion of a given public project—hoarding those extra rights for future use, and sometimes, never using them at all. This acquisition strategy has serious consequences that have largely gone unexplored. And even more disturbingly, current takings jurisprudence prevents the judiciary from reviewing the vast majority of challenges to this practice.

This Article builds on prior scholarship that investigates this phenomenon in takings law to more deeply understand the causes and effects of this acquisition strategy, and it proceeds in three parts. First, the paper describes the current status of the law around hoardings and discusses how the status quo both allows and facilitates this practice. Second, it provides examples of hoardings and discusses how hoardings jeopardize the animating principles of the Fifth Amendment Takings

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Clause. And third, it identifies tentative solutions to remedy the effects of hoardings. Ultimately, the Paper concludes that hoardings law needs to be revisited and changed. If not, the poor, the old, the less-educated, renters, and those who identify as non-white will continue to disproportionately shoulder the burden of hoardings.

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INTRODUCTION

> There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[1]

GOVERNMENTS take—it's what they do.[2] But if they take, they must do so constitutionally.[3] Otherwise, our courts fear that governments will abuse the power to take until private property rights become meaningless,[4] and the very constitutional provisions created to protect us from inappropriate government invasion would be "pervert[ed]" and made into "an authority for invasion of private right under the pretext

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1. Calder v. Bull, 3 U.S. 386, 388 (1798) (Chase, J.) (emphasis omitted). Justice Chase signed the Declaration of Independence. *See Signers of the Declaration of Independence*, NAT'L ARCHIVES (June 12, 2023), https://www.archives.gov/founding-docs/signers-factsheet [https://perma.cc/2XWN-L65R].

2. *See* Nikolas Bowie, *The Deregulatory Takings Are Coming!*, LPE PROJECT (Sept. 3, 2019), https://lpeproject.org/blog/the-deregulatory-takings-are-coming [https://perma.cc/HL4X-E5T2] ("Laws take. It's what they're for. Taxes take dollars from some people and distribute them to other people. Traffic laws take away drivers' opportunity to speed through intersections. Zoning restrictions take from neighbors their ability to build apartments in their backyards. Talk to me about a law's requirements and you'll be talking about a taking.").

3. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) (stating that the Constitution was purposefully "designed to limit the flexibility and freedom of governmental authorities" to take property); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 367 (2007). The author states:

> The Takings Clause of the Fifth Amendment—"nor shall private property be taken for public use without just compensation"—has been construed to create two distinct limitations on government. The first limitation is that the government may take private property only for a public use: the government may not take private property for a non-public use, no matter how much compensation is paid. The second limitation is that, when the government does take private property for a public use, it must pay "just compensation."

Id. (quoting U.S. CONST. amend. V).

4. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992). The Court stated:

> [I]f the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be]

of the public good, which had no warrant in the laws or practices of our ancestors."[5]

Typically, when scholars refer to the specific constitutional limitations that exist on a government's ability to take private property, they are referencing two discrete doctrines that are explicitly identified in the Fifth Amendment's text: (1) "the limitation that the government may take private property only for a 'public use,'" and (2) the limitation that, "when the government does take private property for a public use, it must pay 'just compensation.'"[6] Each of these doctrines plays a vital role in protecting the rights and liberties secured by the Constitution.[7]

Yet, there are other limitations on a government's right to condemn private property that are often overlooked, likely because they are implied from the Constitution's text.[8] But these limitations are equally

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> to extend the qualification more and more until at last private property disappear[ed]."

Id. (second and third alterations in original) (citation omitted) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

5. Pumpelly v. Green Bay Co., 80 U.S. 166, 177–78 (1871).

6. Dana, *supra* note 3, at 367 (quoting U.S. CONST. amend. V) (discussing how the Takings Clause has been construed to limit the government's ability to take private property); Gregory J. Robson, Kelo v. City of New London*: Its Ironic Impact on Takings Authority*, 44 URB. LAW. 865, 867–68 (2012) ("The Takings Clause of the Fifth Amendment to the Constitution places two limitations on eminent domain takings authority—the taking must be for a public use and the government must pay the property owner just compensation.").

7. Emilio R. Longoria, *Properly Construing the Just Compensation Clause*, 64 B.C. L. REV. 1377, 1381 (2023) (discussing the protective purpose of the Just Compensation Clause in particular). The author notes:

> The Constitution's Framers carefully chose the words of the Just Compensation Clause to serve as an important limitation on the government's right to take, and to protect the rights eminent domain disputes implicate. Even the choice of the word "just," for example, was a deliberate decision to "intensif[y] the meaning of the word compensation, to convey the idea that the equivalent to be rendered for property taken must be real, substantial, full, and ample that no legislature can diminish by one jot the rotund expression of the constitution."

Id. (alteration in original) (footnote omitted) (quoting JULIUS L. SACKMAN, 4 NICHOLS ON EMINENT DOMAIN § 8.06 (3d ed. 2023)); *see also* Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U J.L. & LIBERTY 949, 949 (2005) (discussing important cases interpreting the Public Use Clause, and describing "the harmful consequences of failing to protect property rights and leaving government largely unfettered" by interpreting the Public Use Clause expansively).

8. Indeed, there are many other limitations on a government's right to condemn private property, but this Article is primarily focused on the necessity limitation. However, here are just a few of the other important implicit limitations on the right to take. *See, e.g.*, Richard A. Lavine, *Extent of Judicial Inquiry into Power of Eminent Domain*, 28 S. CAL. L. REV. 369, 370–71 (1955) (describing a number of implicit limitations on the government's right to take, such as the requirement of capacity, the requirement of proper delegation, and the discussion of feasibility); TOBY PRINCE BRIGHAM, Introduction to *Costs and Attorney's Fees*, *in* 8A NICHOLS ON EMINENT DOMAIN § G15.01 (Matthew Bender rev. ed. 2024) (providing an introduction into the discussion on what attorneys' fees condemnors must pay); Emilio R. Longoria, *The Case for the Rodeo: An Analysis of the Houston Livestock Show and Rodeo's Inverse Condemnation Case Against the City of Houston*, 52 ST. MARY'S L.J. 125, 129–31 (2021) [hereinafter

important. One such example, and the focus of this Paper, is the implicit requirement that governments can only take what they need.[9]

Perhaps surprisingly, this imbedded constitutional principle is commonly violated. Government entities or their proxies[10] regularly condemn more private property rights than are necessary for the completion of a given public project—hoarding those extra rights for future use and sometimes never using them at all.[11] Examples of these governmental "hoardings" abound,[12] but they are often disregarded because they are difficult to identify, do not violate the explicit limitations of the Fifth Amendment,[13] and are permitted by the deferential laws relating to takings.[14] However, hoardings

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Longoria, *The Case for the Rodeo*] (an introduction into the discussion over what is a taking); Emilio R. Longoria, Lech*'s Mess with the Tenth Circuit: Why Governmental Entities Are Not Exempt from Paying Just Compensation When They Destroy Property Pursuant to Their Police Powers*, 11 WAKE FOREST J.L. & POL'Y 297 (2021) [hereinafter Longoria, Lech*'s Mess*] (the relationship between the eminent domain power and the police power); Jessica L. Asbridge, *Private Delegations and Eminent Domain*, 101 OR. L. REV. 359 (2023) (whether private delegations of the eminent domain power are constitutional); 1A NICHOLS ON EMINENT DOMAIN § 3.03 (Matthew Bender rev. ed. 2024) (an introduction into the discussion on whether an entity has the right to take at all).

9. 1A NICHOLS ON EMINENT DOMAIN § 4.11, *supra* note 8 ("It follows from the very nature of the power of eminent domain that property cannot be taken by the exercise of the power except when it is needed for the public use. It has also been held that in an eminent domain action the complaint, as a prerequisite to maintenance of the action, must show that the proper governmental authority has found that the taking of the particular land in question is necessary." (footnote omitted)); *see also* U.S. CONST. art. 1, § 8 (Congress's power of eminent domain through the Necessary and Proper Clause). "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* This means that although Congress may pass laws that take property, those takings must be necessary.

10. *See* 1A NICHOLS ON EMINENT DOMAIN § 3.03, *supra* note 8 ("There is no question that Congress or a state legislature may delegate the power of eminent domain to duly accredited agencies."); *see also* Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) ("The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested.").

11. *See infra* notes 18–23.

12. For brevity, I will use the phrase "hoardings" to describe these specific instances where governmental entities take more private property rights than they need to complete a government project.

13. The only explicit limitations to a government's right to take that are present in the Fifth Amendment are that the government may only take private property for a public use, and if it does, it must pay just compensation. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

14. The Supreme Court has consistently held that the necessity of a governmental entity's taking or the extent of a taking are legislative questions, not judicial. *See* Sears v. City of Akron, 246 U.S. 242, 251 (1918) ("It is well settled that while the question whether the purpose of a taking is a public one is judicial, the necessity and the proper extent of a taking is a legislative question. The legislature may refer such issues, if controverted, to the court for decision." (citations omitted)); *see also* Shoemaker v. United States, 147 U.S. 282, 298 (1893) ("The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact

present a meaningful affront to the security of private property rights.[15]

Nevertheless, governments continue to take more than they need, and the effects of these hoardings have been largely unexplored. But understanding these effects is inextricably related to a coherent takings jurisprudence[16] because they provide important lessons about the limits of the government's ability to take private property consistent with the Fifth Amendment.[17] Moreover, it is important to study and understand hoardings because hoardings can be found in almost every government sector where takings exist. For example, governments effectuate hoardings by taking private property rights to build bigger water pipelines than they need,[18] taking the right to use someone's surface estate longer

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a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made."); United States v. Gettysburg Elec. Ry., 160 U.S. 668, 685 (1896) ("The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative, and not a judicial, question.").

15. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021). The Court notes:

> The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."

Id. (alteration in original) (first quoting John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 151, 188 (Charles Francis Adams ed., 1856); and then quoting Murr v. Wisconsin, 582 U.S. 383, 394 (2017)); *see also* Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589, 590 (2013) ("[A]ny system of weak property rights will necessarily lead to political mischief.").

16. The title of this article and its conceptual framework were greatly inspired by Professors Abraham Bell's and Gideon Parchomovsky's seminal work, "*Givings*," which explores government distributions of property. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 552 (2001) ("[T]akings and givings are so inextricably related that one cannot have a coherent takings jurisprudence without an attendant givings jurisprudence.").

17. *See* McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (discussing the government's limited authority to carry out the functions of government).

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id.

18. In Harris County, Texas, for example, the West Harris County Regional Water Authority (WHCRWA) regularly condemned private property to build a water pipeline of 108 inches in diameter (9 feet). *See, e.g.*, Final Judgment at 1, W. Harris

than is necessary,[19] taking more private property than is needed to pay a fine,[20] taking more private property rights than needed to construct a public project,[21] taking fee simple title to property instead of leasing it,[22] or taking more private property rights than needed to cut costs.[23] Indeed, current takings law reinforces the practice of hoardings by placing a high burden on challengers that argue a government acquisition of property is not necessary or excessive.[24] This makes it nearly impossible

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Cnty. Reg'l Water Auth. v. Guhn Inv. Grp. (Harris Cnty. Civ. Ct. Apr. 9, 2021) (No. 1142782) [hereinafter Guhn Inv. Grp. Final Judgment] ("Plaintiff, West Harris County Regional Water Authority . . . . filed this condemnation action seeking to amend its Original Easement and acquire a permanent and perpetual easement and right-of-way . . . for the purpose of laying . . . in whole or in part, one (1) underground water line which shall not exceed *one hundred eight inches (108")* in internal pipe diameter and which shall transport water . . . ." (emphasis added)); Final Judgment at 3, W. Harris Cnty. Reg'l Water Auth. v. Denny (Harris Cnty. Civ. Ct. Dec. 30, 2021) (No. 1153412) (for the same). However, the WHCRWA only ever constructed (or planned to construct) pipelines of 96 inches in diameter (8 feet) on these properties. *The Surface Water Supply Project*, W. HARRIS CNTY. REG'L WATER AUTH. AND THE N. FORT BEND WATER AUTH. SURFACE WATER SUPPLY PROJECT (June 17, 2023), https://surfacewatersupplyproject.com/about/why-was-this-route-chosen/ [https://perma.cc/E3R2-CSKK] (noting the condemning authority is only building a water pipeline that "will vary in diameter from 96 inches to 42 inches, depending on the pipeline segment").

19. Here, the WHCRWA condemned a permanent easement to the surface estate from a private property owner, but acknowledged that they did not need the surface estate permanently. *See, e.g.*, Final Judgment at 1, 6, W. Harris Cnty. Reg'l Water Auth. v. Zamarripa (Harris Cnty. Civ. Ct. Feb. 21, 2023) (No. 1191330) (stating the WHCRWA sought "to acquire a permanent and perpetual easement and right-of-way," however, they acknowledged that construction of the Project will be completed at some point "and the Authority shall have no responsibility for maintenance of the surface of the Easement Tract" at that point).

20. *See* Tyler v. Hennepin County, 143 S. Ct. 1369, 1376–80 (2023) (until recently, for instance, some governmental entities took more private property than was needed to pay tax debts).

21. *See, e.g.*, Final Judgment at 3, Magellan Pipeline Co. v. M. E. Florence Inv. (Harris Cnty. Civ. Ct. Mar. 7, 2020) (No. 1117022) [hereinafter Magellan Pipeline Co. Final Judgment] (discussing the facts of a case where a pipeline company condemned the right to build a pipeline of any size as well as the right to "replace with the same or different size pipe"). However, a pipeline needs to necessarily have a size, which means that the condemnor must have taken more than it needed to complete the public project at hand. *Id.*

22. *See* United States v. 6.321 Acres of Land, 479 F.2d 404, 405 (1st Cir. 1973). In this case the United States Postal Service contracted with private parties to construct a postal office on privately held land and lease it to the Postal Office for thirty years. Once construction was completed, however, "in an abrupt change of policy, the Postal Service filed a 'Declaration of Taking'" to condemn the entire property. *Id.* But the Postal Office was not required to explain why it needed more than a lease under the deferential legal standards.

23. United States v. 58.16 Acres of Land, 478 F.2d 1055, 1057 (7th Cir. 1973). The Army Corps of Engineers responded to complaints of government intrusion of private property rights "by advising the [landowners] that the cost to protect their homestead exceeded its fair market value and therefore the [the Army Corps of Engineers] had elected to condemn the property." *Id.*

24. United States v. Meyer, 113 F.2d 387, 392 (7th Cir. 1940) (applying a "bad faith or abuse of discretion" standard of review to challenges of a government's necessity for a condemnation (citing Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923))).

for private property owners to effectively police the practice of hoardings at all.[25]

Hardly trivial, hoardings have outsized consequences. First, and perhaps most importantly, hoardings violate the necessity limitation on governmental exercises of the takings power.[26] And secondly, hoardings prevent the proper execution of the Just Compensation Clause.[27] Specifically, by taking more than they need, governmental entities can take advantage of a "catch-22" that exists in our law: condemnors can pay reduced just compensation awards premised on the argument that they are using less than the full rights that they are condemning, but those same condemnors are free to later intensify the rights they have taken at no additional expense.[28] And when landowners later assert additional rights to just compensation premised on an intensification of use by the condemnor, they are precluded from receiving any additional funds.[29]

In designing the structure of the Constitution, both Alexander Hamilton and James Madison identified the security of property as one of the first objects of government.[30] "Not just because property is . . . essential to our daily routines, but because [of the ways that] property

25. In fact, the seminal treatise on eminent domain suggests that landowners have very little ability to question the necessity of a government's taking at all. *See* 1A NICHOLS ON EMINENT DOMAIN, § 4.11, *supra* note 8 ("The overwhelming weight of authority makes clear that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review.").

26. 1A NICHOLS ON EMINENT DOMAIN § 4.11, *supra* note 8.

27. *See* Longoria, *supra* note 7, at 1403.

28. *See id.* at 1403 ("[Hence] [c]ondemnees . . . [are put] in an unwinnable position: '[c]laims of damage that are remote in time, uncertain, inaccurate, or unfounded in fact, will not be the basis of recovery,' but condemnors are free to later intensify easements that have previously been condemned at no additional expense." (fifth alteration in original) (footnote omitted) (quoting 4A SACKMAN, *supra* note 7, at § 14A.02)).

29. *See* Ioppolo v. Port of Seattle, No. C15-0358, 2015 WL 5315936, at *4 (W.D. Wash. Sept. 11, 2015) ("[T]he previous use of eminent domain and a paying of just compensation preclude later actions for inverse condemnation of the very same property." (quoting Ioppolo v. Port of Seattle, No. C15-0358, 2015 WL 13187674, at *8 (W.D. Wash. June 30, 2015))).

30. *See* Kelo v. City of New London, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting) ("These two limitations serve to protect 'the security of Property,' which Alexander Hamilton described to the Philadelphia Convention as one of the 'great obj[ects] of Gov[ernment].'" (alterations in original) (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 302 (Max Farrand ed. 1911)); *see also* THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). James Madison wrote:

> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

Id.

influences our 'community, economic opportunity, and identity,'"[31] and the intimate messages property communicates about someone's "importance, social position, and worth to others."[32] For this very reason, the Framers created the Fifth Amendment to ensure efficiency, fairness, and justice.[33] Because without it, they understood governmental entities could abuse the power to take and severely affect a person's economic or emotional well-being,[34] or worse yet, undermine their dignity or erase their history.[35]

Hoardings jeopardize these animating principles of the Fifth Amendment. But preventing the practice of hoardings is not so simple. Although hoardings are distinct from takings in that they are an example of unnecessary or excessive use of the condemnation power, hoardings are authorized by the same powers that authorize a government to take.[36]

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31. Longoria, *supra* note 7, at 1390 (footnote omitted) (quoting Emilio R. Longoria, *Biden Needs to Stop Building the Border Wall*, SAN ANTIONIO EXPRESS-NEWS (Oct. 20, 2021) [hereinafter Longoria, *Biden's Border Wall*], https://www.expressnews.com/opinion/commentary/article/CommentaryBiden-needs-to-stop-building-the-16549382.php#photo-21606988 [https://perma.cc/9WEY-VECF])); *see* Paul L. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1, 75 (2016) ("[T]he Colonists and new Americans certainly believed that property was essential to life, liberty, and the pursuit of happiness . . . .").

32. Miranda Oshige McGowan, *Property's Portrait of a Lady*, 85 MINN. L. REV. 1037, 1065 (2001).

33. Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 408 (2000) ("Takings doctrine is complex and multifaceted; some say chaotic. If there is some measure of coherence or consensus in this vast and diverse body of judicial opinions and scholarly commentary, it is that the purposes of just compensation are essentially two: efficiency and distributive justice."); Bell & Parchomovsky, *supra* note 16, at 553–54 ("Finally, fairness and efficiency, the concerns animating takings jurisprudence, mandate a givings jurisprudence as well." (footnote omitted)).

34. *See, e.g.*, HANNAH ARENDT, ON REVOLUTION, 244 (Penguin Books 2d ed. 2006) (1863). Political theorists have long suggested that "[t]he age-old remedy against" government corruption is "respect for private property" rights, "that is, the framing of a system of laws through which the rights of privacy were publicly guaranteed and the dividing line between public and private legally protected." *Id.*; *see also* Longoria, *The Case for the Rodeo*, *supra* note 8, at 127–28 (finding that takings claims can result in job loss, debt, depression, and a loss of dignity).

35. *See, e.g.*, Derek T. Muller, *"As Much upon Tradition as upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 482 (2006) (discussing the story of Marcus C. Strickland, Jr., a timber farmer in Ormond Beach Florida, whose 5,000 acre family timber farm was burned by the Florida Department of Agriculture). This caused Marcus a loss of roughly $2 million, as well as incinerating his family's income source, inheritance, and identity. *Id.*; *see also* Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. HAW. L. REV. 60, 60 (2022) (recounting the story of Schulmerich Bells, "the oldest manufacturer of orchestral quality musical handbells and handchimes in the United States," which was forced to shut down because of Pennsylvania's COVID-19 closure orders).

36. *See* 1A NICHOLS ON EMINENT DOMAIN § 3.01, *supra* note 8 ("Eminent domain authority is predicated on the superior right of the state over private property. It comes into being with the establishment of the government and continues as long as the government endures. Eminent domain authority does not require recognition by constitutional provision, but exists in absolute and unlimited form."). It follows then that if the State is endowed with a power to take, it also has some power to

Thus, it would be difficult to restrain one without mortally jeopardizing the other. And organized government could not practically function if it was prevented from meaningfully exercising its right to take private property.[37] Nor is it realistic or possible to prevent governmental entities from exercising their free will in making the decision to effectuate a hoarding, rather than a taking, in the administration of their duties.[38] What is the point of self-government after all if elected officials are not allowed to decide for themselves what should be taken on behalf of their constituency?[39]

This inability to remove the causes of hoardings directly forces us to confront a shortcoming of the design of republican government that our Framers realized long ago: "Enlightened statesmen will not always be at the helm" of the institutions making the decisions on whether to take property.[40] Governmental entities will likely always have the opportunity to elect to hoard, despite the fact that these same institutions are actually quite susceptible to influence from the "cabals of a few," as well as outright "confusion" about the true consequences of a government taking or the sponsors or motivations behind such an act.[41] Indeed, government

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determine what to take. *Id.* For an example of a municipal ordinance that allowed condemnors to take more than was necessary, see City of Cincinnati v. Vester, 281 U.S. 439, 441 (1930) ("A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made." (quoting OHIO CONST. art 18, § 10)).

37. *See* United States v. Carmack, 329 U.S. 230, 236 (1946) ("The power of eminent domain is essential to a sovereign government."); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Justice Holmes famously acknowledged that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.*; *see also* Tyson & Bro.—United Theatre Ticket Offs., Inc. v. Banton, 273 U.S. 418, 445–46 (1927) (Holmes, J., dissenting) (acknowledging that "the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work").

38. *See* THE FEDERALIST No. 10, *supra* note 30, at 78 (James Madison) ("There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. It could never be more truly said than of the first remedy, that it was worse than the disease.").

39. *Id.* at 82.

40. *Id.* at 80. James Madison wrote:

> It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

Id.

41. *Id.* ("[H]owever small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that,

officials regularly depend on self-interested parties to provide information necessary for government programming and sometimes even the exact wording of legislation that is filed.[42] There is no reason to believe that decisions about where and what to take are any less so influenced, and therefore, just as susceptible to improper influence or bias.[43]

The solution, therefore, is to put counter-systems in place, which ensure that even in the event that the causes of hoardings cannot be eradicated, the effects of those hoardings will be diffused.[44] One such solution is the payment of just compensation in installments as opposed to a single lump sum.[45] While just compensation is typically paid to

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however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude.").

42. David S. Levine, *Confidentiality Creep and Opportunistic Privacy*, 20 TUL. J. TECH. & INTELL. PROP. 11, 19 (2017) ("Due to a lack of expertise available to the government, especially with regard to new technologies, regulators may act based upon educated guessing, relying primarily on interested lobbyists for policy substance and legislative drafting."); *see also* Ailsa Chang, *When Lobbyists Literally Write the Bill*, NPR (Nov. 11, 2023, 2:03 PM), https://www.npr.org/sections/itsallpolitics/2013/11/11/243973620/when-lobbyists-literally-write-the-bill [https://perma.cc/N83V-DPJQ] ("It's taken for granted that lobbyists influence legislation. But perhaps less obvious is that they often write the actual bills—even word for word.").

43. Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1483 (1990) ("[V]irtually no one believes that the legislature (or executive branch) decides when to take property on the basis of a civic republican calculus. Instead, we believe that property is often taken because of pure majoritarian pressure (or even the pressure of politically powerful minorities)."); *see also* Letter from Alexander Hamilton to James A. Bayard (Apr. 1802), *in* THE MIND OF ALEXANDER HAMILTON 430–31 (Saul K. Padover ed. 1958) ("Nothing is more fallacious than to expect to produce any valuable or permanent results in political projects by relying merely on the reason of men. Men are rather reasoning than reasonable animals, for the most part governed by the impulse of passion."). For examples of the power of eminent domain being delegated to private companies with virtually no legislative or executive oversight, see Asbridge, *supra* note 8, at 362–63.

44. THE FEDERALIST NO. 10, *supra* note 30, at 79 (James Madison) (acknowledging that "the most common and durable source of factions has been the various and unequal distribution of property"). Madison notes that it is these same factions that ultimately decide whether to hoard or take. *Id.* at 79–80. But since the "the *causes* of faction" or unequal property distribution "cannot be removed," the only viable relief "to be sought" is "controlling its *effects*." *Id.* at 80.

45. *See* Longoria, *supra* note 7, at 1385–86 ("Considering the range of reasonable alternatives available to ensure adequate compensation for landowners, it is especially frustrating that the current formulation of fair market value fails to achieve the Just Compensation Clause mandate."). One such reasonable alternative is valuation "on a production basis and compensate[ion] by a royalty, as opposed to a single lump sum purchase price." *Id.* (footnote omitted); *see also* Kelianne Chamberlain, Note, *Unjust Compensation: Allowing a Revenue-Based Approach to Pipeline Takings*, 14 WYO. L. REV. 77, 78–79 (2014) (advocating for "revenue-based payments—payments based on a percentage of the value of the material flowing through a pipeline—for pipeline easement" condemnations because this represents a more "'just' alternative approximation of a landowner's loss in a condemnation situation"); Marisa Fegan, Note, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 270 (2007) ("A higher standard for what constitutes and is included in 'just compensation' is both possible and desirable. Moreover, it is a more effective way to increase fairness and efficiency in eminent domain actions than public use reform.").

condemnees in a single lump sum,[46] lump sum payments are neither particularly efficient nor constitutionally required.[47] Indeed, the dominance of lump sum just compensation has exacerbated the effects of hoardings because it leaves private property owners helpless in the event governmental entities intensify the use of taken property years after the taking has been fully litigated and just compensation already paid.[48] Moreover, lump sum just compensation consistently leads to property being undervalued,[49] which incentivizes more condemnations[50] and can leave a net-negative social impact.[51] Utilizing installment methods of just compensation to ensure that just compensation is periodically reassessed and adjusted to match what has been taken could reduce, if not completely remedy, these concerns.[52]

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46. For an example of how just compensation is typically awarded in a single lump sum, as well as what is compensable in an eminent domain proceeding, see State v. CC Telge Rd., 605 S.W.3d 742, 745–51 (Tex. Ct. App. 2020).

47. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195 (1985) ("The Constitution speaks only of 'just' compensation, not of the form it must take.").

48. *See* Longoria, *supra* note 7, at 1403 ("Condemnees thus find themselves in an unwinnable position: '[c]laims of damage that are remote in time, uncertain, inaccurate, or unfounded in fact, will not be the basis of recovery,' but condemnors are free to later intensify easements that have previously been condemned at no additional expense." (alteration in original) (footnote omitted) (quoting 4A SACKMAN, *supra* note 7, at § 14A.02))).

49. *See id.* at 1384 (discussing the Just Compensation Clause). For many years now, the Just Compensation Clause requirement has been interpreted as a requirement to pay condemnees the fair market value of their land. *Id.* However, "an assessment of 'fair market value' as courts currently interpret it can be misleading as adequately compensatory for the risks inherent in certain kinds of condemnation projects." This is because takings can be "increased or expanded without initiating a new condemnation, and this can expose landowners to greater harm or devalue their property without any additional right to a new condemnation proceeding—even if one may be warranted." *Id.*

50. *See* Chamberlain, *supra* note 45, at 99 (discussing the advantages of non-lump sum just compensation payments). The author states:

> Revenue-based payments provide more efficient use of land. Some scholars have argued the only reason for the requirement of just compensation is to restrain excessive takings. That is, the "price" of taking land affects the demand for takings. A low price will lead to more takings, and a higher price will require potential condemnors to explore alternative avenues for their projects. Therefore, because current valuation undervalues the actual cost of the taking, takings are over-incentivized.

Id. (footnotes omitted) (citing THOMAS J. MICELI, THE ECONOMIC THEORY OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE 69 (2011)).

51. Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 714 (2008) ("The assumption is that government will only force the sale of property if the benefit is higher than the cost of compensating the owner. Thus, if the owner is fully compensated and the public is left better off, there will always be an overall social improvement resulting from a taking."). But it follows then that if just compensation is lower than its true value, a taking will lead to negative social improvement.

52. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 150 (1978) (Rehnquist, J., dissenting) ("Of all the terms used in the Taking Clause, 'just

In the event nothing is done to restrain the effects of hoardings, we have strong statistical evidence describing who will continue to shoulder this unconstitutional burden. Condemnations are statistically more likely among the poor, the old, the less-educated, renters, and those that identify as non-white.[53] Moreover, it is unlikely that these same groups are able to afford legal representation,[54] and even if they are able to do so, their representation is more likely to be substandard.[55] It is perhaps for this very reason then that eminent domain policies have been criticized as expressing the view that the interests and needs of poor households are relatively unimportant.[56]

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compensation' has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires 'a full and perfect equivalent for the property taken.'" (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893))).

53. Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of* Olech*'s Class of One*, 55 LOY. L. REV. 697, 707 (2009) ("Specifically, 58% of the homeowners living in areas targeted by eminent domain are minorities, as compared with only 45% minorities in surrounding communities."); *see also* Michael Karlis, *Hole to Nowhere: Why the Wheels Are Likely to Come Off of Elon Musk's San Antonio Tunnel Scheme*, SAN ANTONIO CURRENT (May 4, 2022, 8:30 AM), https://www.sacurrent.com/news/hole-to-nowhere-why-the-wheels-are-likely-to-come-off-of-elon-musks-san-antonio-tunnel-scheme-28801558 [https://perma.cc/YR7U-5J6W] (suggesting that the government has a tendency to acquire property for condemnation projects in places "where the land is cheaper, the people are poor and the facilities [are] not great").

54. Susannah Camic Tahk, *Distributive Precedent and the Pro Se Crisis*, 108 IOWA L. REV. 745, 755 (2023). The author found that:

> "[B]lack respondents . . . were less likely than white respondents to have sought, or considered seeking, legal help for their civil legal problems," a difference that was "primarily explained by racial differences in trust in institutions." While Greene, Sandefur, and the Myrick team call for more research on race and access to justice, so far all of their findings suggest that lack of legal representation is a problem more likely to affect Black Americans than white Americans.

Id. (alterations in original) (footnote omitted) (quoting Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1268 (2016)); *see also, e.g.*, City of San Antonio v. El Dorado Amusement Co., 195 S.W.3d 238, 249 (Tex. Ct. App. 2006) (explaining that the lack of counsel for eminent domain disputes is further exacerbated by the fact that attorney's fees are not typically recoverable in condemnation cases).

55. Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 HOW. L.J. 257, 257 (2001) ("Despite these public pronouncements and the supporting law, the handling of legal matters on behalf of the poor regularly falls short of what would constitute acceptable advocacy on behalf of clients who can afford to pay for counsel.").

56. Dana, *supra* note 3, at 365 (discussing the takings reforms inspired by *Kelo v. City of New London*). For instance, Dana argues that the post-*Kelo* eminent domain reforms "privilege the stability of middle-class households relative to the stability of poor households and, in so doing, expresses the view that the interests and needs of poor households are relatively unimportant." *Id.*; *cf.* Letter from Alexander Hamilton to Thomas Jefferson (June 19, 1786), *in* THE COMPLETE MADISON 338 (Saul K. Padover ed. 1953) ("I have no doubt but that the misery of the lower classes will be found to abate wherever the Government assumes a freer aspect, [and] the laws favor a subdivision of property.").

The Fifth Amendment was specifically enacted to guarantee fairness and justice when the government takes private property.[57] Indeed, Madison drafted this Amendment in response to the frequent uncompensated takings in colonial and revolutionary America so that there might be a safeguard for rights in general and for property rights in particular.[58] But hoardings jeopardize these original animating principles of the Fifth Amendment. When a government takes more than it needs, it violates implicit and explicit promises to preserve individual liberty.[59] And when it consistently does this, it erodes the trust that is necessary between government and the governed for the political process to continue.[60] In light of these stakes, and the certainty with which we can identify the past and future victims of hoardings, it is important to understand

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57. Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

58. Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420 (1994) ("The Federal Bill of Rights was essentially the work of James Madison. It was his draft, introduced in the House of Representatives on June 8, 1789, that was the basis for the amendments passed by the First Congress."); *see also* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694 (1985). The author stated:

> The principle that the state necessarily owes compensation when it takes private property was not generally accepted in either colonial or revolutionary America. Uncompensated takings were frequent and found justification first in appeals to the crown and later in republicanism, the ideology of the Revolution. . . . Madison believed it necessary to erect strong safeguards for rights in general and for property rights in particular. His just compensation clause—although intended to have relatively narrow legal consequences—was such a safeguard. Its ratification represented the translation of liberal ideology into constitutional principle.

Id. (footnote omitted).

59. National Gazette (Mar. 29, 1792), *in* THE COMPLETE MADISON, *supra* note 56, at 336 ("That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest."); *see also* Calder v. Bull, 3 U.S. 386, 388 (1798) (introductory quote); U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); U.S. CONST. amend. V.

60. Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO ST. L.J. 1253, 1278 (2012) (discussing how distrust leads to ineffective governance).

> The distrust created by corruption alters the fundamental relationship between the government and the governed. Trust is essential to secure the public's voluntary deference to the decisions of legal authorities. Trust increases the public's willingness to cooperate and consent to rules in the absence of government coercion. Individuals internalize norms when they perceive the government to be procedurally fair and worthy of trust. Corruption is antithetical to procedural justice, and in the absence of such justice, individuals will reject the legitimacy of government decisions. Where there is procedural justice, by contrast, individuals will accept government outcomes, even those that are not their preferred outcome. Thus, distrust increases the likelihood that government decisions will be openly defied or

the common governmental acquisition strategy of taking more than is necessary.[61]

To that end, this Article will proceed in three parts. First, it will describe the current status of the law around hoardings and explain how the status quo both allows and facilitates this practice. Second, it will provide examples of governmental hoardings and discuss how hoardings jeopardize the purpose and intent of the Fifth Amendment. And third, it will identify tentative solutions to remedy the effects of hoardings.[62]

I. THE LAW OF HOARDINGS

At bottom, hoardings are instances of unnecessary or excessive takings by governmental entities or their proxies that are tolerated under existing law.[63] Because all hoardings are takings, a meaningful discussion of the law of hoardings requires an investigation into the background principles of takings law, and specifically, the explicit and implicit limitations placed on the right to take.

A. *History of the Eminent Domain Power*

The right of eminent domain[64] has inured to sovereign governments since the days of the Romans.[65] And courts and scholars agree

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surreptitiously ignored. Distrust also increases the likelihood of hostility toward legal authorities.

Id. (footnotes omitted) (citing TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 74–75 (2002)).

61. *See* Letter from George Washington to Charles M. Thruston, (Aug. 10, 1794), *in* THE WASHINGTON PAPERS 400 (Saul K. Padover ed. 1955) ("If the laws are to be so trampled upon with impunity, and a minority (a small one too) is to dictate to the majority, there is an end put . . . to republican government; and nothing but anarchy and confusion is to be expected hereafter. Some other man or society may dislike another law, and oppose it with equal propriety, until all laws are prostrate, and every one (the strongest I presume) will carve for himself." (alteration in original)).

62. This Article is intended to start the discussion about hoardings. Therefore, like other pieces exploring the frontiers of takings law, it deliberately invites others to further research and investigate this area of the law. Accordingly, suggested solutions are not intended to be an exhaustive list, but rather, the beginning of a discussion intended to answer this question more fully.

63. *See* sources cited *supra* notes 18–23 and accompanying text.

64. There are a number of synonyms used to describe the right of eminent domain: takings, condemnation, appropriation, and expropriation. Each of these terms will be used interchangeably here and are all meant to describe generally "the state's prerogative to seize private property, dispossess its owner, and assume full legal right and title to it in the name of some ostensible public good." *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993).

65. Hous. Auth. of N. Little Rock v. Amsler, 393 S.W.2d 268, 270 (Ark. 1965) ("[T]he power to take private property for public use has always been exercised since the days of the Romans." (citing 1 NICHOLS ON EMINENT DOMAIN § 1.12, *supra* note 8)); JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL S. SCHILL & LIOR J. STRAHILEVITZ, PROPERTY 998 (9th ed. 2018) ("The origins of eminent domain can be traced back to ancient Rome, where property could be taken for public projects (the evidence suggests that owners received compensation)."); PennEast

that the Federal and State governmental entities in the United States are endowed with the same power to take private property rights.[66] But the right to take was never intended to be unlimited.[67] In fact, a key reason behind the Constitution's ratification was to prevent the government from ever wielding such an unlimited power.[68] Which is why, shortly after the Constitution was signed by the delegates of the Constitutional Convention in 1787,[69] the first Congress ratified the Fifth Amendment

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Pipeline Co., v. New Jersey, 141 S. Ct. 2244, 2254–55 (2021) ("Governments have long taken property for public use without the owner's consent. Although the term 'eminent domain' appears to have been coined by Grotius, the history of the power may stretch back to biblical times." (citation omitted)).

66. United States v. Gettysburg Elec. Ry., 160 U.S. 668, 681 (1896). The Court writes:

> It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the [C]onstitution. The right to condemn at all is not so given. [The power to condemn] results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war, and to create and equip armies and navies. It has the great power of taxation, to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect.

Id.; *see also* U.S. CONST. art. 1, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

67. Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 524 (2009) ("The power of the government to take property by eminent domain is of ancient pedigree, as are limitations on that power."); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 (1992) ("[T]he notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."); *see also* Gardner v. Newburgh, 2 Johns. Ch. 162, 166–67 (N.Y. Ch. 1816) (Kent, Chancellor) ("Grotius, Puffendorf, and Bynkershoeck [agreed] when speaking of the *eminent domain* of the sovereign . . . that private property may be taken . . . ."). But even then, the power was limited to circumstances where a "public use" and "public necessity" existed. *Id.* at 166. There was also a "clear principle of natural equity, that the individual, whose property is thus sacrificed, must be indemnified." *Id.*

68. Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181, 195 (1999) (discussing the Framers' intent to protect property). The author states:

> [T]here is significant documentation that suggests the majority of the Framers thought the protection of property was a high priority. For many of the Framers, protection of property was the most important, or one of the most important purposes of the Constitution. For example, Alexander Hamilton declared during the Constitutional Convention that '[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property . . . .'"

Id. (second, third, and fourth alterations in original) (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 302 (Max Farrand ed., 1937)).

69. Jie Gao, *Comparison Between Chinese and American Lawyers: Educated and Admitted to Practice Differently in Different Legal Systems*, 29 PENN ST. INT'L L. REV. 129, 132 (2010) ("On September 17, 1787, the American Constitutional Convention signed the U.S. Constitution.").

in 1791[70] to explicitly limit the government's power to take private property: "[N]or shall private property be taken for public use, without just compensation."[71]

A stark departure from the early English and colonial practices of uncompensated condemnation,[72] the Fifth Amendment was a powerful pronouncement in favor of the protection of private property rights,[73] as well as an affirmation that public burdens should not be borne by private individuals.[74] But it was not perfect. Notably, the Fifth Amendment did not define any of its key terms. Neither the phrases "private property," "taken," "public use," nor "just compensation" are defined within the Constitution.[75] This imprecision has led to a number of debates over the

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70. *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (the bill of rights was ratified in 1791).

71. U.S. CONST. amend. V; *see* Nathan B. Hall, *I Don't Believe That Answers Our Question: The Story of* White v. Woodall *and How the Supreme Court's Silence Is Adversely Affecting the Fifth Amendment Privilege*, 69 OKLA. L. REV. 53, 73–74 (2016) (noting the Fifth Amendment was written in the negative to explicitly limit the government's power to "seize private property by requiring due process, just compensation, and public usage"); *see also* Schwartz, *supra* note 57, at 420. The author notes:

> The Federal Bill of Rights was essentially the work of James Madison. It was his draft, introduced in the House of Representatives on June 8, 1789, that was the basis for the amendments passed by the First Congress. As authored by Madison, the Takings Clause read: "No person shall . . . be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."

Id. (alteration in original) (quoting 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1027 (1971)); Murr v. Wisconsin, 582 U.S. 383, 394 (2017) ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."); DUKEMINIER, KRIER, ALEXANDER, SCHILL & STRAHILEVITZ, *supra* note 65, at 998 ("Various accounts attribute [the Fifth Amendment's creation] . . . to a shift from traditional republican ideology to a liberalism that carried with it distrust of legislatures and a concern for individual rights.").

72. *See* Treanor, *supra* note 58, at 694 ("The principle that the state necessarily owes compensation when it takes private property was not generally accepted in either colonial or revolutionary America.").

73. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992). The Fifth Amendment was created because the Framers realized that if the "protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property" had to be constitutionally constrained. *Id.* (citing Pa. Coal. Co. v. Mahon, 260 U.S. 393, 414–15 (1922)). Otherwise, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.* (alterations in original) (quoting *Mahon*, 260 U.S. at 415); Thompson, *supra* note 43, at 1483 ("The [F]ifth [A]mendment stemmed in part from fears that property would otherwise become the target of self-interested majorities (and not merely nonpropertied majorities) who would use the legislative power to enhance their private collective interests (rather than any altruistic view of the common good)." (footnote omitted)).

74. *See supra* note 56 for a discussion on the Fifth Amendment's guarantee regarding private property.

75. *See* Gold, *supra* note 68, at 192–95 (noting that the terms in the Takings Clause are not defined and that there is a lack of historical material on the Takings Clause's creation, which makes it difficult to study).

Fifth Amendment's true meaning in both scholarship[76] and our jurisprudence.[77] Most important of which, for the purposes of this Paper, is the lengthy debate over what is—and what is not—a taking.[78]

Despite the Takings Clause's age, our courts have not been able to provide a precise definition for when a taking occurs.[79] In fact, when given the opportunity to do so, the Court has moved in the opposite direction, preferring instead to address takings questions as they arise with an ad hoc approach.[80] As one can imagine, this has been a frequent source of frustration.[81] So much so, in fact, that the takings doctrine has been criticized by many as the "doctrine-in-most-desperate-need-of-

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76. *See, e.g.*, Somin, *supra* note 7, at 949 (the debate over how expansively the Public Use Clause should be interpreted); Longoria, *supra* note 7, at 1378 (the debate over how the Just Compensation Clause should be construed); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003) (long-living debate over what "property" is).

77. *See* Kelo v. City of New London, 545 U.S. 469 (2005) (the meaning of the Public Use Clause); United States v. 50 Acres of Land, 469 U.S. 24 (1984) (the proper ways to construe the Just Compensation Clause); *see, e.g.*, Milton v. United States, 36 F.4th 1154 (Fed. Cir. 2022) (what are cognizable property interests).

78. *See, e.g.*, Longoria, Lech*'s Mess*, *supra* note 8, at 297 (for a discussion of when uses of the police power effectuate takings); Gold, *supra* note 68, at 195 (for a discussion regarding whether the founders intended regulatory takings to be compensable).

79. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) ("We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area."); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (discussing the lack of a precise definition).

> [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Id. (third alteration in original) (citation omitted) (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

80. Murr v. Wisconsin, 582 U.S. 383, 393 (2017) ("In the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules. This area of the law has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.'" (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002))); *see also* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 615 (2014) ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124)).

81. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977) ("Indeed, in many conversations on the [Takings Clause], I have not encountered a

a-principle prize."[82] And the interpretation of the Takings Clause has regularly been described as uncertain,[83] in disarray,[84] and unrooted in preexisting law.[85]

B. *What Is a Taking?*

That said, limited rules have emerged over time in our takings jurisprudence, which have gradually helped us understand what it means for property to be taken.[86] Although these precedents are rooted in the Fifth Amendment's text, they are also often based on lessons learned from other portions of the Constitution,[87] collateral texts that existed at

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single lawyer, judge, or scholar who views existing case-law as anything but a chaos of confused argument which ought to be set right if one only knew how.").

82. Rubenfeld, *supra* note 63, at 1081 ("Throughout constitutional jurisprudence, only the right of privacy can compete seriously with takings law for the doctrine-in-most-desperate-need-of-a-principle prize.").

83. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting) ("Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence.").

84. *See, e.g.*, Andre LeDuc, *Twilight of the Idols: Philosophy and the Constitutional Law of Takings*, 10 ALA. C.R. & C.L. L. REV. 201, 202–03 (2019) ("Just about everybody agrees that the constitutional law of takings is (and has long been) in disarray.").

85. Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 681 (2005) (criticizing what may be the Court's most impactful regulatory taking's decision (Penn Central) as lacking "doctrinal clarity because of its outright refusal to formulate the elements of a regulatory taking cause of action, and because of its intellectual romp through the law of eminent domain that paid scant attention to preexisting legal doctrine"). It must also be pointed out, that although States have their own Takings Clauses, those state corollaries are often interpreted in lockstep with the Federal Constitution. *See, e.g.*, Hearts Bluff Game Ranch, Inc. v. Texas, 381 S.W.3d 468, 477 (Tex. 2012) ("We consider the federal and state takings claims together, as the analysis for both is complementary."); *see also* Est. of Sanchez v. County. of Bernalillo, 902 P.2d 550, 552 (N.M. 1995) (holding the same for New Mexico).

86. Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 223 (2021) ("The entire panoply of takings doctrine—not just regulatory takings, but related questions about the scope of eminent domain and the procedures that govern in takings cases—has long been decried as a muddle. In practice, though, some basic patterns have emerged in the jurisprudence." (footnote omitted)); *see also* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31–32 (2012) ("[W]e have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking. So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land." (first citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); and then citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992))).

87. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting) ("Nor does application of the Due Process Clause automatically trigger the Takings Clause, just because the word 'property' appears in both. That word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted."); Hignell-Stark v. City of New Orleans, 46 F.4th 317, 324 (5th Cir. 2022) ("Because property interests under the Due Process Clause and the Takings Clause are not the same, that test is not the same as the one for determining whether an interest qualifies as property for procedural due process. Instead, a property interest must be so deeply rooted in

the time of the Bill of Right's ratification,[88] as well as the Fifth Amendment's perceived purpose.[89]

For instance, for many years the Court provided governmental entities with immunity from regulatory takings claims[90] because the Fifth Amendment's plain language did not explicitly mention regulatory interferences with private property rights.[91] This meant that governmental entities could not have takings liability for intangible interferences with private property rights.[92] However, this idea was expressly overturned by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[93] Although the Fifth Amendment's plain language did not contain an explicit reference to regulatory takings, Justice Holmes read the Fifth Amendment's text to include regulatory takings claims.[94] Had he not, Justice Holmes remarked, the Fifth Amendment would lose all meaning because

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custom that 'just compensation' for appropriating necessarily includes money damages." (quoting U.S. CONST. amend. V)).

88. Gold, *supra* note 68, at 184 (looking to "the post-ratification commentary of James Madison, author of the Takings Clause, and the influential philosophies of William Blackstone, John Locke, and Hugo Grotius" as sources for the true scope of protection provided by the Fifth Amendment).

89. *See* Murr v. Wisconsin, 582 U.S. 383, 392–94 (2017) (recognizing the Fifth Amendment's "plain language" does not apply to "the imposition of regulatory burdens on private property," but acknowledging the importance of making such an application because private property rights would lose all meaning if the Fifth Amendment did not have this interpretation). That result would be at odds with the Fifth Amendment's clear purpose of protecting private property rights. *Id.*; *Lucas*, 505 U.S. at 1014 (recognizing "if the protection against physical appropriations of private property was to be meaningfully enforced," the Fifth Amendment's meaning had to be expanded to provide protections against regulations that interfere too much with private property rights).

90. Regulatory takings are inverse condemnation claims premised on the idea that the government "rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property" to such a degree that the regulation effects a taking. Cedar Point Nursery v. Hassid, 594 U.S. 139, 148 (2021).

91. *Lucas*, 505 U.S. at 1014 ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster [of the owner's] possession.'" (alteration in original) (first quoting Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870); and then quoting N. Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1879))). *But see* John M. Groen, *Takings, Original Meaning, and Applying Property Law Principles to Fix Penn Central*, 39 TOURO L. REV. (forthcoming 2024) (contradicting the popular assertion that the Takings Clause was "originally limited to direct appropriations or physical takings," and arguing that "many early 19th century cases found takings based on destruction of the right of beneficial use, cases that today we would call regulatory takings").

92. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.").

93. 260 U.S. 393 (1922). "The general rule at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

94. *See id.*

government's would become aware of this immunity from regulatory takings cases and their tendency would be "to extend the qualification more and more until at last private property disappears."[95]

So too in *Loretto v. Teleprompter Manhattan CATV Corp.*[96] did the Court acknowledge other implicit rules relating to when property has been taken. In that case, a state law allowed private cable companies to permanently occupy small areas of a landowner's roof to install cable equipment.[97] The Fifth Amendment's plain language was silent as to whether relatively minor invasions of private property were compensable takings. And in fact, Court precedent had suggested that governmental entities were immune from takings claims so long as they "substantially advance legitimate state interests."[98] Despite the Fifth Amendment's silence, however, the Court held that a permanent physical occupation of private property by a government entity or its proxy is always a taking, no matter how small the invasion.[99] The Court expressly disclaimed the idea that governmental entities could avoid takings liability because invasions were small or advanced state interests, even though that limitation does not explicitly exist in the Fifth Amendment's text.[100] To rule otherwise, the Court held, would subvert the purpose of the Takings Clause.[101] This rule was later reconfirmed in *Lingle v. Chevron U.S.A. Inc.*[102] and

95. *Id.* ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.").

96. 458 U.S. 419 (1982).

97. *Id.* at 422 ("On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof." (quoting Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 135 (NY. Ct. App. 1981))); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (describing the *Loretto* taking as "minute").

98. Agins v. Tiburon, 447 U.S. 255, 260 (1980); *see also Loretto*, 458 U.S. at 424 (finding a New York regulation had a legitimate police power purpose and then rejecting the takings claim because the regulation did "not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations").

99. *Loretto*, 458 U.S. at 434–35("[W]hen the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978))).

100. *Id.* at 426 ("But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

101. *Id.* ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.").

102. 544 U.S. 52 (2005).

expanded in *Cedar Point Nursery v. Hassid*[103] to include temporary physical invasions as well.[104]

The Court acknowledged additional implicit rules relating to when property has been taken again in *Lucas v. South Carolina Coastal Council*.[105] There, South Carolina enacted an environmental regulation that prevented a landowner from constructing any permanent structures on his land.[106] Although the Fifth Amendment's text was silent as to whether a regulatory building restriction was a taking, prior cases had upheld similar restrictions on construction without just compensation.[107] Additionally, South Carolina's Supreme Court had read an exception into the Fifth Amendment for takings liability when a government regulation "is designed 'to prevent serious public harm,' . . . regardless of the regulation's effect on the property's value."[108] Despite the Fifth Amendment's silence and the South Carolina Supreme Court's ruling, the Court read in a categorical rule to the Takings Clause finding a taking whenever a regulation "denies all economically beneficial or productive use of land."[109] Not doing so, the Court held, would jeopardize the Fifth Amendment's purpose of protecting private property rights.[110] "For what is the land," the Court quoted, "but the profits thereof?"[111]

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103. 594 U.S. 139 (2021).

104. *Lingle*, 544 U.S. at 532 ("This case requires us to decide whether the 'substantially advances' formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not."); *Cedar Point Nursery*, 594 U.S. at 153 ("There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364.").

105. 505 U.S. 1003 (1992).

106. *Id.* at 1007.

107. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (denying a takings claim against a zoning regulation that prohibited the landowner from constructing the most profitable uses on part of his property); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978) (denying a takings claim against a historic preservation ordinance that prevented a landowner from constructing an addition to its property).

108. *Lucas*, 505 U.S. at 1009–10 (quoting Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991)).

109. *Id.* at 1015 (explaining when a "regulation denies all economically beneficial or productive use of land," the "regulatory action [is] compensable without case-specific inquiry into the public interest advanced in support of the restraint").

110. *Id.* at 1018 ("On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.").

111. *Id.* at 1017 (quoting 1 EDWARD COKE, INSTITUTES ch. 1, § 1 (1st Am. ed. 1812)).

C. *Implicit Limitations on the Right to Take*

In this same way, the Court has also inferred limitations on the government's right to take based on other portions of the Constitution,[112] collateral texts that existed at the time of the Bill of Right's ratification,[113] as well as the Fifth Amendment's perceived purpose.[114]

In *Youngstown Sheet & Tube Co. v. Sawyer*,[115] for instance, we learned that the executive branch of government does not have the power to condemn private property unless that power has been granted by Congress or the Constitution.[116] There, President Truman issued an executive order in response to a national steelworkers union strike, which "directed the Secretary of Commerce to take possession of most of the steel mills [in America] and keep them running."[117] Although the Constitution's plain language did not explicitly grant or deny this power to the executive, President Truman claimed that the power to condemn private property was granted to the President "from the aggregate of his powers under the Constitution."[118] The Court resolutely denied this argument and affirmed that despite its silence, the Constitution did not grant the Chief Executive with the right to take private property in response to a labor dispute.[119] To hold otherwise, the Court noted, would be to ignore the historical basis for the Constitution's design of both separating and limiting governmental power.[120] It would also undermine the protection of private property rights, which our Constitution prioritizes.[121]

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112. *See, e.g.*, U.S. CONST. art. 1, § 8, cl. 18. Congress's power of eminent domain is impliedly limited by the Necessary and Proper Clause, which states that "[t]he Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This means that although Congress may pass laws that take property, those takings must be necessary.

113. *See* sources cited *supra* note 88.

114. *See* sources cited *supra* note 89.

115. 343 U.S. 579 (1952).

116. *See id.* at 584–85 (the executive cannot take property without authority from the Constitution or the legislature).

117. *Id.* at 583.

118. *Id.* at 587 ("The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that 'the executive Power shall be vested in a President . . .'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'" (alteration in original) (quoting U.S. CONST. art. II)).

119. *Id.*

120. *Id.* at 589 ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.").

121. *Id.* at 587 ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.").

Similarly, in *Pumpelly v. Green Bay Co.*,[122] we learned that governmental entities are not immune from the Takings Clause when they act pursuant to their police powers as opposed to their eminent domain powers.[123] There, the state of Wisconsin permanently flooded a private property owner's land after it constructed a dam on a nearby river.[124] Although the land's value was completely destroyed, the State argued that it did not owe just compensation to the landowner because the State constructed the dam pursuant to its police powers rather than its eminent domain power.[125] The Court ruled in favor of the landowner and affirmed the right to just compensation when private property is taken, regardless of the government's justification for taking the land.[126] This result was necessary despite the Fifth Amendment's silence on the subject, the Court stated, to prevent the perversion of the Fifth Amendment into an "authority for invasion of private right under the pretext of the public good."[127]

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.[128]

D. *The Judicial Treatment of Hoardings Claims*

But despite this historical context, the Court's hoardings jurisprudence—which can also be described as the Court's jurisprudence relating to unnecessary[129] or excessive takings—is surprisingly reverential towards

122. 80 U.S. (13 Wall.) 166 (1871).

123. *See id.* at 177.

124. *Id.* at 176.

125. *Id.* at 177.

126. *Id.* at 177–78.

127. *Id.* at 178.

128. *Id.* at 177–78. Despite the Court's ruling in *Pumpelly*, however, some circuits still find the arguments that were specifically dismissed in that case compelling and have denied takings claims because they held that those takings claims "fell within the scope of the police power and (2) actions taken pursuant to the police power do not constitute takings." Lech v. Jackson, 791 F. App'x 711, 719 (10th Cir. 2019).

129. Confusingly, there are two necessity doctrines housed within eminent domain law: (1) the "public necessity doctrine, which is the idea that public rights

government decisions about what, and how much, to take. This is particularly confusing, however, in light of the protections the Fifth Amendment provides for private property rights,[130] the implicit and explicit limitations that exist on exercises of the eminent domain power,[131] and the incentives—which the Court has previously acknowledged—that government entities have to abuse the right to take.[132]

For instance, the Court first addressed the topic of governmental hoardings in dicta in *Shoemaker v. United States*.[133] There, the Court wrote in passing that the necessity or extent to which a governmental entity

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trump private rights, without compensation, in emergencies," and (2) the "question of necessity" doctrine, which relates to the justifications for the government acquisition of a specific private property right as opposed to the acquisition of different or less private property rights. *See* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1190 (2019); *cf.* 1A NICHOLS ON EMINENT DOMAIN § 4.11, *supra* note 8 (relating to the expediency and justifications for a specific taking). This Paper will only use the phrase "necessity" to refer to the latter "question of necessity" doctrine.

130. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.").

131. As discussed above, Congress's eminent domain power is implied from the Necessary and Proper Clause. *See supra* note 65. Therefore, all exercises of the eminent domain power are impliedly bound to demonstrate that they are "necessary and proper for carrying into Execution" one of Congress's powers. *See* U.S. CONST. art. 1, § 8, cl. 18. That said, however, many state and federal legislatures have made this implied requirement explicit in their general statutes. *See, e.g.*, N.H. REV. STAT. ANN. § 371:1 (2024) ("Whenever it is necessary, in order to meet the reasonable requirements of service to the public, . . . such public utility may petition the public utilities commission for such rights and easements or for permission to take such lands or rights as may be needed for said purposes."); TEX. LOC. GOV'T CODE § 251.001 (2024) ("When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public use to acquire public or private property, whether located inside or outside the municipality . . . ."); MICH. COMP. LAWS § 213.56 (2024) ("Except as otherwise provided in this section, with respect to an acquisition by a private agency, the court at the hearing shall determine the public necessity of the acquisition of the particular parcel."); United States v. Carmack, 329 U.S. 230, 235–36 (1946) ("The Public Buildings Act, as an incident to an original $150,000,000 program, gave authority and direction to the Secretary of the Treasury (later substituting the Federal Works Administrator) 'to acquire, by purchase, condemnation, or otherwise, such sites . . . as he may deem necessary . . . .'" (alterations in original) (quoting 40 U.S.C. § 341 (2024))).

132. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) ("If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." (alterations in original) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))).

133. 147 U.S. 282, 300–21 (1893). There, plaintiff in error asserted sixteen arguments as a basis for overturning the appellate court and none had to do with the necessity or extent of taking. *Id.*; *see* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006) (explaining that dicta are expressions in a court's opinion that are not binding in subsequent cases as legal precedent and thus are "something to be treated lightly, or frankly, ignored").

takes private property is not a question that is reviewable by the judiciary, but rather a decision that is wholly within the legislature's discretion.[134] After *Shoemaker*, the Court restated this position towards the reviewability of claims challenging the necessity or extent of a taking several times.[135] This transformed *Shoemaker*'s dicta into binding precedent, which has been reaffirmed by every federal circuit court.[136]

Functionally, this has limited the judiciary's ability to review whether an exercise of the takings power is unnecessary or excessive over the last 130 years.[137] Indeed, the Court has regularly dismissed hoardings

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134. *See Shoemaker*, 147 U.S. at 298 ("[W]hile the courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted . . . .").

135. *See* United States v. Gettysburg Elec. Ry., 160 U.S. 668, 685 (1896) ("The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative, and not a judicial, question." (citing *Shoemaker*, 147 U.S. at 282, 298)); *see also* Sears v. City of Akron, 246 U.S. 242, 251 (1918) ("It is well settled that while the question whether the purpose of a taking is a public one is judicial, the necessity and the proper extent of a taking is a legislative question. The legislature may refer such issues, if controverted, to the court for decision." (citations omitted)); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 65 (1913) (holding the same); Joslin Mfg. Co. v. Providence, 262 U.S. 668, 678 (1923) (holding the same); Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923) (holding the same); United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 551–52 (1946) (holding the same), *rev'd on other grounds*, 327 U.S. 546 (1946).

136. *See* United States v. 6.321 Acres of Land, 479 F.2d 404, 407 (1st Cir. 1973); *see also* Brody v. Village of Port Chester, 434 F.3d 121, 133 (2d Cir. 2005); Whittaker v. County of Lawrence, 674 F. Supp. 2d 668, 695–96 (W.D. Pa. 2009); *Welch*, 150 F.2d at 616; Atl. C. L. R. Co. v. Sebring, 12 F.2d 679, 681 (5th Cir. 1926) (binding on the Eleventh Circuit as well); United States *ex rel.* Tenn. Valley Auth. v. Two Tracts of Land, 456 F.2d 264, 267 (6th Cir. 1972); United States v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975); United States v. Mischke, 285 F.2d 628, 631 (8th Cir. 1961); United States v. 14.02 Acres, 547 F.3d 943, 952 (9th Cir. 2008); Wilson v. United States, 350 F.2d 901, 906 (10th Cir. 1965) (holding the same); Berman v. Parker, 348 U.S. 26, 35–36 (1954) ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." (citing *Shoemaker*, 147 U.S. at 282, 298)).

137. Since *Shoemaker*, that is. It is also worth mentioning, however, that both state legislatures and the federal legislature often do mandate "necessity" findings before government entities can take private property. *See, e.g.*, *supra* note 124. However, these additional statutory necessity requirements do not alter the general outcome for hoardings challenges that has been laid out by the Supreme Court. *See, e.g.*, City of Novi v. Robert Adell Child.'s Funded Tr., 701 N.W.2d 144, 151–52 (Mich. 2005). The court held:

> Defendants also have challenged the proposed taking on the basis of public necessity. It is required pursuant to MCL 213.56 that there be a public necessity for the taking to be permitted. Specifically, there must be a necessity for the taking "of all or part of the property for the purposes stated in the complaint . . . ." Yet, pursuant to the statute, the determination of necessity is left not to the courts but to the public agency, which in this case is the city. The only justiciable challenge following the agency's

claims when they have been asserted,[138] and that trend has continued regardless of how the hoardings claims have been fashioned.[139] When hoardings claims have been asserted, courts prefer to review more traditional questions relating to the eminent domain power instead, such as whether Congress has validly authorized the right to take[140] or whether just compensation has been paid.[141] However, these alternative grounds for review rarely provide relief for claimants.[142]

Although the Court's historical justifications for this deferential rule are scant, the judicial treatment of hoardings claims has largely been based on separation of powers concerns.[143] Furthermore, some believe that courts are ill-equipped to determine whether a government taking is necessary because that determination often depends on technical or financial information that courts do not possess.[144] And even if courts

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determination is one based on "fraud, error of law, or abuse of discretion." None of these bases is shown to exist here.

Id. (alteration in original) (first quoting MICH. COMP. LAWS § 213.56(1) (2024); and then quoting COMP. §213.56(2)).

138. *See* sources cited *supra* note 135.

139. 1A NICHOLS ON EMINENT DOMAIN § 4.11, *supra* note 8. Hoardings claims can be fashioned in a number of ways from "[w]hether there is any necessity for the taking," to "[w]hether there is any need for resorting to eminent domain in effecting such acquisition," to "[w]hether the time is a fitting one," to "[w]hether there is a need for the property to the extent sought to be acquired," or "[w]hether there is a need for the particular tract sought to be acquired (and, correlatively, whether another tract would not better serve the purposes of the condemnor)." *Id.* However, courts have dismissed each of these iterations of hoardings claims.

140. *See Gettysburg Elec. Ry.*, 160 U.S. at 683–84 ("The mere fact that Congress limited the amount to be appropriated for the purposes indicated does not render the law providing for the taking of the land invalid." (citing *Shoemaker*, 147 U.S. at 282–302)).

141. *See id.*

142. *See, e.g.*, *id.*

143. *See* Lavine, *supra* note 8, at 374 ("The kind of property to be taken is not a question for the judiciary, but is a question for the legislative body in the first instance, and when the power to determine this is delegated by the legislature to the administrative agency, it is then a question to be determined by the latter."); *see also* 1A NICHOLS ON EMINENT DOMAIN § 4.11, *supra* note 8 ("Just as it is exclusively within the power of the legislature, except so far as it is limited by the provisions of the constitution, to decide what police regulations shall be enacted, what taxes shall be levied and what the duties of the various public officers shall be, so it is within the exclusive jurisdiction of the same body to determine what public improvements shall be constructed, where they shall be located, and whether the power of eminent domain shall be employed to acquire the necessary site."); Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923) ("That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . . Neither is it any longer open to question in this Court that the legislature may confer upon a municipality the authority to determine such necessity for itself. . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." (alterations in original) (quoting Joslin Mfg. Co. v. City of Providence, 262 U.S. 668 (1923))).

144. *See* Lavine, *supra* note 8, at 376 ("Even if the courts did possess the power to determine questions of necessity, these judicial bodies are not equipped to do so. The determination as to whether a dam should be built, its location, extent, the kind of property to be acquired, and the nature of the estate to be acquired, involve

were allowed to review the necessity or extent of a governmental takings, it is argued there is an additional concern that the judicial process is not an appropriate mechanism by which to retrieve the constituent feedback that is required to make meaningful assessments of governmental necessity.[145]

Despite this deferential framework, however, the Court has preserved a narrow right to obliquely challenge the necessity or excessiveness of a taking.[146] Specifically, the Court has consistently maintained that although the necessity or extent of a taking is a legislative question beyond judicial review, the question of whether a government taking is reasonably necessary to advance the purpose used to justify it is a judicial question within the Court's jurisdiction.[147] Thus, courts may still pass judgment

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questions of public finance, economics, engineering, hydraulics, geology, practical real estate decisions, and conflicting interests of federal, state, municipal and private entities, other than legal rights.").

145. *See id.* ("Also the court procedure is not the suitable means by which the elements that must go into making a non-legal decision of this nature may be presented to the individual who must make the ultimate decision.").

146. United States v. 58.16 Acres of Land, 478 F.2d 1055, 1058 (7th Cir. 1973) ("The determination of whether the taking of private property is for a public use may appropriately and materially be aided by exploring the good faith and rationality of the governmental body in exercising its power of eminent domain.").

147. Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 966 (2003) ("Of course, a court evaluating a pub[l]ic use challenge must still connect the dots to determine whether a given exercise of eminent domain is reasonably necessary to advance the purpose used to justify it."); *see, e.g.*, United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896) ("It is stated in the second volume of Judge Dillon's work on Municipal Corporations (4th ed. § 600), that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one."); City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930) ("It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."); *see also* United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946) ("[W]hatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject '[i]ts decision is entitled to deference until it is shown to involve an impossibility.'" (quoting Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925))), *rev'd on other grounds*, 327 U.S. 546 (1946); United States v. Carmack, 329 U.S. 230, 243 (1946) (accepting that if in affirming a taking achieved a public use "officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned," their decision to take could be overturned); Lavine, *supra* note 8, at 380–81 (1955) ("In distinction to the determination of necessity, which is a decision to be made by the administrative agencies unless arbitrary, capricious or in bad faith, the question as to whether a taking is for public use is a matter for the courts ultimately to determine. However, it is for Congress or the appropriate state legislature to decide what type of taking of property constitutes the taking for a public use, and such a decision is entitled to deference

on whether a given exercise of eminent domain is so arbitrary or capricious that it could not reasonably satisfy the Public Use requirement.[148] That said, however, this method for challenging the necessity or extent of a governmental hoardings is often easily defeated, and therefore has not been particularly effective historically.[149] For that very reason, scholars have suggested that this challenge provides little practical protection for affected landowners.[150]

II. THE CAUSES AND EFFECTS OF HOARDINGS

Perhaps unsurprisingly, this deferential hoardings jurisprudence has facilitated and popularized the practice of unnecessary or excessive governmental takings. Nevertheless, hoardings remain difficult to identify because they require some sort of public disclosure concomitant with a taking, which demonstrates that the governmental entity is taking more than it needs to complete a public project.[151] This kind of disclosure rarely exists because governmental entities have strong incentives to avoid the public blowback from disclosing that they are unnecessarily or

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unless the courts cannot hold that the property to be acquired is for a public use." (footnote omitted)); Kelo v. City of New London, 545 U.S. 469, 488 (2005) (Unless the legislature's purpose is illegitimate or its means are irrational, "our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984))).

148. *See* S. Pac. Land Co. v. United States, 367 F.2d 161, 162 (9th Cir. 1966) ("But the Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith. And various courts of appeal, including this one, have said that an exception to judicial non-reviewability exists in such circumstances." (first citing *Carmack*, 329 U.S. at 320; and then citing Simmonds v. United States, 199 F.2d 305, 306–07 (9th Cir. 1952))); *58.16 Acres of Land*, 478 U.S. at 1059 (holding "questions of bad faith, arbitrariness, and capriciousness, all bearing upon the determination of public use" are reviewable by courts); *see also Kelo*, 545 U.S. at 488 (acknowledging that questions of necessity and extent can be reviewed when determining if the Public Use Clause has been satisfied if the legislature's purpose is not legitimate and its means are irrational).

149. The Court has only overturned one governmental attempt to hoard. *See Vester*, 281 U.S. at 449 (overturning Cincinnati's attempt to take more land than it needed because it did not prove that doing so would satisfy the public use requirement).

150. *See* Lavine, *supra* note 8, at 376 ("[I]t is difficult to find an administrative determination as to necessity that is viewed by the courts as being arbitrary or capricious.").

151. Ordinary condemnees often lack the technical expertise to determine whether a government taking is unnecessary or excessive, thus discovering hoardings is often incumbent on public statements clarifying that a taking is unnecessary or excessive. For an example of how public disclosure helped landowners identify a hoarding, see Berman v. Parker, 348 U.S. 26, 35 (1954). However, the Court ultimately denied this hoardings challenge "on the ground that [the] particular property was not being used against the public interest," and the Court wants to avoid overseeing "the choice of the boundary line [and sitting] in review [of] the size of a particular project area." *Id.*

excessively taking private property, such as increased public oversight, reduction in budgets, or reduced agency discretion.[152] But despite these constraints, a number of examples of hoardings exist.[153]

A. *Hoardings Examples*

In Fort Bend and Harris Counties in Texas, for instance, the West Harris County Regional Water Authority (the Water Authority) has been delegated the power of eminent domain to improve and construct water pipelines that traverse the surrounding area.[154] To that end, the Water Authority has begun condemning property in Harris County to build a water pipeline that is nine feet in diameter.[155] However, the Water Authority admits that it only plans on using the rights it condemns to build a water pipeline that is no bigger than eight feet in diameter.[156] Despite this discrepancy, the Water Authority has been allowed to take

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152. Peter P. Swire, *A Theory of Disclosure for Security and Competitive Reasons: Open Source, Proprietary Software, and Government Systems*, 42 HOUS. L. REV. 1333, 1377–78 (2006). The author states:

> [C]onsider the incentives of a government agency when there is a known problem, such as a vulnerability, in a project where the agency is supposed to be in charge. The disadvantages of disclosure are evident—disclosure will expose problems in the agency's area of responsibility. There could well be hostile public hearings as well as possible reductions in budget and agency discretion. The advantages of disclosure may be only indirect. If the embarrassing details will come out later, it may make sense to disclose the problem earlier, spun in a way that favors the agency. In many instances, these indirect benefits of disclosure are small. The incentive of government agencies in many situations, when they know about a vulnerability or mistake, is to deny, deny, deny.

Id.

153. This Article has not performed a comprehensive review of all instances of government hoardings. However, it will provide choice examples of governmental hoardings to illustrate how this phenomenon occurs in practice. That said, the hope is that others will take on this baton and further investigate this government takings strategy. Many more hoardings have surely occurred.

154. *See* H.R. 1842, 2001 Leg., 77th Sess. (Tex. 2001) ("The authority is created under and is essential to accomplish the purposes of Section 59, Article XVI, Texas Constitution, including without limitation the acquisition and provision of surface water and groundwater for residential, commercial, industrial, agricultural and other uses . . . and other public purposes stated in this Act."); *see also* City of Austin v. Whittington, 384 S.W.3d 766, 781 (Tex. 2012) (although Texas takings law differs from federal takings law in some ways, Texas is still bound by the Fifth Amendment and the analysis for hoardings claims in both jurisdictions is complementary).

155. *See, e.g.*, Guhn Inv. Grp. Final Judgment, *supra* note 18, at 1 (stating the Water Authority is condemning "one (1) underground water line not to exceed one hundred eight inches (108") in internal pipe diameter and which shall transport water").

156. *See The Surface Water Supply Project*, W. HARRIS CNTY. REG'L WATER AUTH. & THE N. FORT BEND WATER AUTH. SURFACE WATER SUPPLY PROJECT (June 17, 2023), https://surfacewatersupplyproject.com [https://perma.cc/8RWY-V85Z] (However, the condemning authority is only building a water pipeline that "will vary in diameter from 96 inches to 42 inches, depending on the pipeline segment").

more private property rights than it needs to complete its water pipeline project.[157]

So too in *Magellan Pipeline Co. v. M. E. Florence Investment Co.*[158] did a pipeline company take more than it needs.[159] There, Magellan Pipeline Company and V-Tex Logistics, LLC (collectively, the Pipeline Company) condemned a permanent easement to "construct, operate, [or] maintain" a pipeline of any size, as well as the right to freely upgrade the size of the pipe at any time in the future.[160] In reality, however, all pipelines must have a size. And in fact, the Pipeline Company eventually installed a pipeline of some size in the tract it condemned.[161] Therefore, as a practical matter, the Pipeline Company took more than it needed to complete its public project.[162] Yet, this hoarding was still ultimately allowed by the Court.[163]

In *United States v. 58.16 Acres of Land*,[164] the Army Corps of Engineers (the Corps) attempted to take more than it needed as well. There, the Corps filed a declaration of taking to condemn the fee simple absolute to a 58.16 acre tract that abutted a dam for flood control purposes.[165] Although the Corps could have taken smaller portions of the affected property to achieve its public objectives, the Corps stated that "the cost to protect [the landowners'] homestead" from the dam "exceeded its fair market value and therefore the Corps had elected to condemn the [entire] property" instead of just part of it.[166] Ultimately, the Seventh Circuit stayed the Corps possession of the excess property pending a final judgment in the case, but importantly, it allowed the case to proceed and noted its "narrow function" with respect to "the extent of judicial review over the right of eminent domain."[167]

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157. *See, e.g.*, Guhn Inv. Grp. Final Judgment, *supra* note 18, at 4 (order granting the excess easement rights to the condemnor).

158. Final Judgment, Magellan Pipeline Co. v. M. E. Florence Inv. (Harris Cnty. Civ. Ct. Mar. 7, 2020) (No. 1117022).

159. *Id.* at 3.

160. *Id.* Specifically, the Pipeline Company is "vested with the . . . rights . . . to survey, construct, operate, maintain, inspect, patrol (by surface or air), protect, repair, modify, convert, replace with the same or different size . . . a pipeline for the transportation of oil, oil products (including without limitation gasoline, diesel, and jet fuel), liquified minerals, and other mineral solutions . . . ." *Id.*

161. *See, e.g.*, *Public GIS Viewer*, TEX. R.R. COMM'N, https://gis.rrc.texas.gov/GISViewer/ [https://perma.cc/L69V-TYJK] (last visited May 25, 2024) (providing a public map by the Texas Railroad Commission, which indicates where pipelines have been installed in the State of Texas).

162. *See supra* note 161.

163. Magellan Pipeline Co. Final Judgment, *supra* note 21, at 2–8.

164. 478 F.2d 1055 (7th Cir. 1973).

165. *Id.* at 1057.

166. *Id.*

167. *Id.* at 1058, 1061.

B. *Why Governments Hoard*

It is difficult to discern why condemnors take more than they need in pursuing a public project because they rarely provide justifications for hoarding.[168] However, logic, economics, and political philosophy provide some insight as to why condemnors decide to hoard.

First, although governmental entities can act altruistically, "it would be naive to suppose that the self interest motives of ordinary human action are transformed merely by [working for a governmental entity]."[169] Therefore, governmental actors are presumed to have the same motivations to "maximize their power, size, and prestige" as other market actors.[170] Within this context, it becomes clear how hoarding could be seen by governmental actors as an effective tool to achieve these goals. For instance, by taking more than they need, governmental actors can literally stockpile valuable private property rights, which increases their autonomy to pursue future projects, as well as increases the size of their property holdings and wealth.[171] This in turn is likely to positively affect the governmental entities' output and prestige.[172]

Second, hoardings can provide an economic advantage to governmental actors because it endows them with valuable private property rights while cutting costs. This phenomenon occurs in a few ways. In some takings, for instance, a governmental actor can save money by hoarding because the cost to remediate property damaged by a public project exceeds its fair market value.[173] In other takings, hoarding can save governmental entities money because it allows them to capture the benefits of enhanced property values adjacent to the taking that would have gone to private individuals.[174] In both of these circumstances, the hoarder is double benefited by a condemnation action—first, by receiving

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168. *See, e.g.*, *id.* at 1057. This is one of the rare circumstances where the government admitted to hoarding merely to cut costs.

169. Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 47 (1982).

170. Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2044 (2000).

171. Swire, *supra* note 152, at 1377 & n.135 ("Arguing that bureaus seek to provide the broadest possible range of services in order to garner the most power possible." (citing WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 111–12 (1971))).

172. *See, e.g.*, Aranson, Gellhorn & Robinson, *supra* note 169, at 48 (stating that by owning assets without "standards," governmental agencies can pursue "budget-maximizing techniques, as well as policies consistent with other objectives"); Swire, *supra* note 152, at 1377 ("A prominent strand of public choice theory posits that agencies will seek to maximize 'turf.' That is, agencies will have goals such as expanding their budget, maximizing their flexibility vis-a-vis other institutions, avoiding embarrassment, and so on." (footnote omitted)).

173. *58.16 Acres of Land*, 478 F.2d at 1057.

174. City of Cincinnati v. Vester, 281 U.S. 439, 443–44 (1930). Here, the City of Cincinnati argued that hoarding was necessary, in part, to recoup the "expense[s]" from the public project because the privately owned land that would have bordered the City's public project would have increased in values. *Id.*

the condemned land, and second, by the peripheral economic benefits the condemnation provides.

Third, hoardings allow governmental entities to disguise the impact of larger deprivations of private property rights. By taking more than it plans to use, for example, a governmental entity can claim that its taking will have a reduced impact on an affected property from what is publicly advertised.[175] However, the condemnor can later intensify the use of the taken property at no additional cost.[176] And often, when the condemnor decides to intensify its use, the property is more valuable.[177] In effect, this allows the condemnor to attain private property rights at a fraction of their true value.[178]

Lastly, governments hoard to substantiate their existence. The power to take is often delegated to administrative agencies with narrow

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175. *See* sources cited *supra* notes 155–157, 159–160 and accompanying text (discussing two Texas hoardings cases). In *West Harris County v. Guhn*, the Water Authority argued that its interference with private property rights was necessarily less intrusive than the condemnation petition imagined because the Water Authority wanted to build a smaller pipeline than the condemnation petition allowed. A similar argument could be made for the Pipeline Company in *Magellan*.

176. *See also, e.g.*, Weaver v. Nat. Gas Pipeline Co., 188 N.E.2d 18, 19 (Ill. 1963) (exemplifying a case where a court denied takings compensation for damages caused by the intensification of a property that had already been taken because the original takings gave the condemnor the right to intensify its use of the property).

177. Generally, real estate increases in value over time, which means that taking private property rights now is usually always cheaper than taking them in the future. Natalie Campisi, *How Buying a House Can Hedge Against Inflation*, FORBES, https://www.forbes.com/advisor/mortgages/homebuying-can-hedge-against-inflation/ [https://perma.cc/435G-VWJX] (Sept. 27, 2021, 10:04 AM) ("Tangible assets like real estate get more valuable over time . . . ."). In the cases litigating the government's takings liability for Hurricane Harvey, for example, we learned that The Corps could have purchased land for a condemnation project in Houston's western suburbs for "prices between five to ten dollars per acre." *See In re* Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs, 146 Fed. Cl. 219, 231–32 (2019) (finding The Corps could have purchased land for a condemnation project in Houston's western suburbs for "prices between five to ten dollars per acre"). Damages caused by the government to that land is now estimated around $1.67 billion. Jim Sams, *Ruling Exposes Gov't to More Than $1B in Damages Because of Harvey Flooding*, CLAIMS J. (Nov. 4, 2022), https://www.claimsjournal.com/news/southcentral/2022/11/04/313609.htm [https://perma.cc/3FD7-2P6C].

178. *See* Longoria, *supra* note 7, at 1402. The author stated:

> This unjust phenomenon occurs because the courts and appraisal industry currently define fair market value through a necessarily limited inquiry only concerned with creating an "opinion of value" at a set period in time referred to as the "date of value," also referred to as the "date of taking." Yet, it is common for damages to occur in condemnation cases long after just compensation has been litigated because of the broad manner in which condemnors take easements. Thus, the fair market value formulation precludes condemnees from asserting relevant evidence of damages that are legally possible but unlikely.

Id. (footnotes omitted) (APPRAISAL FOUND., UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE 41 (2020–21 ed.)); *see also* Shelley Ross Saxer & David L. Callies, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in* Kelo, *in* EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 137 (Dwight Merriam & Mary Massaron Ross, eds., ABA 2006) (for a deeper exploration of these issues).

objectives.[179] These agencies are closely monitored for productivity and efficiency.[180] Thus, agencies have strong "incentive[s] to overstate the dangers of the activities that [they] regulate[] or propose[] to regulate" in order to both increase their budget and the number of powers delegated to them.[181] Ironically, this means that governmental agencies can, and often do, have more money and power than they need to complete a public project.[182] In turn, governments hoard as a consequence of their overabundance of resources and power. If they do not, those same governmental institutions risk losing their budget and power as a consequence of "spend it or lose it" policies, which force agencies to lose control over their excess budget at the end of each year.[183]

C. *The Effects of Hoardings*

The full effects of hoardings are difficult to discern because this takings strategy has not been studied comprehensively.[184] However, from what little is known, hoardings present a meaningful affront to the security of private property right because they expose affected landowners to a range of practical harms, as well as force them to experience serious constitutional deprivations of liberty and freedom.

With respect to the practical harms, by taking more than they need, hoardings necessarily expose private property owners to more instances of uncompensated governmental interference with their private property rights.[185] That is because the governmental entity can return to the condemnation site to intensify its use of the property to the fullest extent

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179. *See* Lavine, *supra* note 8, at 371 ("The determination as to whether property should be taken for a certain project usually is entrusted by the legislature to various administrative agencies or officials." (citing Mitchell v. Harmony, 54 U.S. (13 How.) 115, 14 L.Ed. 75 (1851))); *see, e.g.*, Plaintiff's Second Amended Statement and Petition for Condemnation at 2–3, W. Harris Cnty. Reg'l Water Auth. v. Guhn Inv. Grp. (No. 1142782) (for an example of a specific agency that has been delegated the power of eminent domain).

180. *See, e.g.*, Aranson, Gellhorn & Robinson, *supra* note 169, at 50 (agency output is closely monitored, sometimes for welfare improvement).

181. *Id.* at 48.

182. *See id.* (the natural consequence of overstating need is that agencies will have more than they need); *see also* Leonard Yoo, *Closing the Black Fiscal Hole: Alternatives to the "Spend It or Lose It" Policy for Agency Discretionary Spending*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 339, 340 (2017) ("Under the 'spend it or lose it' policy, federal agencies have an incentive to (collectively) burn through every last cent of the $1.027 trillion discretionary funding during the year because the agencies lose control over their budget at the end of each year; as its name suggests, under this policy if agencies don't spend their budget, they lose control over any remaining funds.").

183. Yoo, *supra* note 182, at 340.

184. Ideally, this will change in the near future, and we will have solid information about the breadth and variations of the hoardings practice.

185. *See* sources cited *supra* notes 154–155, 158–160 and accompanying text (discussing that by taking less than they need, the City and the Water Authority reserve the right to return to the lands they condemned to build more intense public projects like a nine foot water pipeline or a public street).

of the rights that were taken.[186] This phenomenon does not exist with takings where the government only takes what it needs because in those circumstances, the condemnor would need to initiate new condemnation proceedings for just compensation in order to intensify a property's use.[187]

Notably, however, the same is not true for hoardings. When a condemnor hoards, it can freely intensify its use of property to the fullest extent of the rights that were previously taken.[188] And when it does so, the condemnor can seriously devalue the remainder property.[189] For example, the condemnor can physically damage homes during construction,[190] destroy crops,[191] interfere with access to the remaining property,[192] materially affect the remainder property's internal circulation,[193] adversely impact the flow of traffic around the remining property,[194] materially alter a property's view,[195] or transform a property into a nonconforming use.[196] But these additional interferences with private property rights may not be compensated.[197]

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186. *Id.*

187. Knick v. Township of Scott, 139 S. Ct. 2162, 2168 (2019) (explaining a "property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time"). Thus, a condemnor would need to pay just compensation if they interfered with new private property rights that were not already taken. *Id.*

188. Buchanan v. Warley, 245 U.S. 60, 75 (1917) ("That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded.").

189. *See* sources cited *infra* notes 190–196 and accompanying text.

190. See *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 228 (5th Cir. 2022), for an example of where mere construction caused $10.5 million worth of damage to neighboring homes.

191. See *Weaver v. Nat. Gas Pipeline Co.*, 188 N.E.2d 18, 19 (Ill. 1963), for an example where intensification of a previously taken easement caused damage to crops maintained by the owner of the remainder property.

192. See *State v. Harrell Ranch, Ltd.*, 268 S.W.3d 247, 251–52 (Tex. Ct. App. 2008), for an example of construction from a taking materially impairing access for a remainder property.

193. See *State v. Speedway Grapevine I, Ltd.*, 536 S.W.3d 858, 867–68 (Tex. Ct. App. 2017), for an example of internal circulation at a remainder property being affected by construction from a taking.

194. Dep't of Transp. v. Gefen, 636 So. 2d 1345, 1346 (Fla. 1994) (identifying reduction in flow of traffic as something that may affect the commercial value of property although it was held to be non-compensable).

195. State *ex rel.* Dep't of Highways v. Allison, 372 P.2d 850, 851–52 (Okla. 1962) (acknowledging construction can alter a property's view or its ability to be viewed and that one's view is a compensable property right).

196. See *Speedway Grapevine I, Ltd.*, 536 S.W.3d at 867, for an example of a taking making a property nonconforming with applicable land use regulations.

197. See *Weaver v. Nat. Gas Pipeline Co.*, 188 N.E.2d 18, 19 (Ill. 1963), for an example of a case where a court denied takings compensation for damages caused by the intensification of a property that had already been taken because the original takings gave the condemnor the right to intensify its use of the property.

Hoardings also require private property owners to experience serious constitutional deprivations of liberty and freedom. In designing the Constitution, for example, both Madison and Hamilton agreed that the security of property was one of the first objects of government.[198] This was because "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom."[199] For this very reason, the Bill of Rights provided explicit protections for private property rights,[200] as well as "spheres of our lives and existence, outside the home, where the State should not be a dominant presence."[201] Otherwise, they feared, the enormous powers entrusted to the government were "too open to abuse."[202]

These protective strategies make sense in light of the importance private property rights play in the range of opportunities available to us and the way we enjoy our lives. Indeed, the property we accumulate, inherit, and use often communicates intimate messages about our importance, social position, and worth to others.[203] It also often "influences our 'community, economic opportunity, and identity.'"[204] But by taking more than they need, condemnors meaningfully deprive private property owners of these important aspects of their identity and livelihood.[205] They also prevent these same owners from shaping and planning their own destinies, which in turn deprives them of the liberty the Constitution

198. *See* Larkin, *supra* note 31, at 37 n.201, 41–42.

199. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).

200. *See* U.S. CONST. amend. II (protecting property rights to arms); U.S. CONST. amend. III (protecting property rights in the home from government intrusion); U.S. CONST. amend. IV (protecting property from unreasonable search and seizure); U.S. CONST. amend. V (protecting property from being taken); U.S. CONST. amend. X (reserving property rights not specifically delegated to the States and the People).

201. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

202. W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 545 (1848) (Woodbury, J., concurring) ("But the doctrine, that this right of eminent domain exists for every kind of public use, or for such a use when merely convenient, though not necessary, does not seem to me by any means clearly maintainable. It is too broad, too open to abuse.").

203. McGowan, *supra* note 32, at 1065–66.

204. Longoria, *supra* note 7, at 1390 (quoting Longoria, *Biden's Border Wall*, *supra* note 31); *see also* Larkin, *supra* note 31, at 75 ("[T]he Colonists and new Americans certainly believed that property was essential to life, liberty, and the pursuit of happiness . . . .").

205. Buchanan v. Warley, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." (first citing Holden v. Hardy, 169 U.S. 366, 391 (1898); and then citing 1 BLACKSTONE'S COMMENTARIES 127 (Thomas M. Cooley ed., 1753))).

guarantees.[206] "As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'"[207]

III. POTENTIAL SOLUTIONS FOR THE HOARDINGS PROBLEM

The harmful effects of hoardings are particularly frustrating in light of the range of reasonable alternatives that exist for condemnors, as well as the relative ease with which courts could change the existing, but deferential, law around hoardings.

A. *How Condemnors Could Change*

For instance, condemnors could merely take what they need. If a condemnor can use the eminent domain power to construct a public project, it stands to reason that they will likely be able to use the eminent domain power to expand or modify that same project.[208] What stops condemnors from merely exercising the right of eminent domain as needed, as opposed to hoarding more rights than may ever be used?[209]

The response seems to be twofold. The first is that condemnors may be unable to respond to public exigencies as they arise if they are required to initiate new condemnation proceedings every time they need to achieve a public objective.[210] However, this concern seems overblown because the Court has long held that condemnors can "take property up front and force the owner to seek recovery for any loss of value" later.[211] Additionally, most states and the Federal government have instituted quick take measures which allow the title of condemned property to be vested in the condemning entity before the case has reached final judgment.[212] Therefore, it is unlikely that condemnors would be meaningfully inhibited from achieving their public objectives if they

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206. *See* Cedar Point Nursery v. Hassid, 41 S. Ct. 2063, 2071 (2021); *see also supra* note 17.

207. *Id.* (alteration in original) (quoting Adams, *Discourses on Davila*, *supra* note 15, at 188).

208. *See, e.g.*, Rindge Co. v. Los Angeles County, 262 U.S. 700, 703 (1923) (upholding the use of the eminent domain power to expand a highway that had already been constructed).

209. *See* PUBLIC GIS VIEWER, *supra* note 161 (showing where the Pipeline company takes the right to build a pipeline of unlimited size, even though that could never be practically necessary).

210. *See, e.g.*, NEV. REV. STAT. ANN. § 37.055 (2023) ("All proceedings in all courts brought under this chapter to exercise the right of eminent domain take precedence over all other causes and actions not involving the public interest, to the end that all such proceedings must be quickly heard and determined.").

211. PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2255 (2021) (citing 1 NICHOLS ON EMINENT DOMAIN § 1.22, *supra* note 8).

212. *See, e.g.*, 40 U.S.C. § 3114 (2024). The statute states:

> In any proceeding in any court of the United States outside of the District of Columbia brought by and in the name of the United States and under the authority of the Federal Government to acquire land, . . . the petitioner may file, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the

could not depend on excess private property reserves to achieve public objectives.

The second is that it would be too costly to condemn private property rights as needed because the condemnation process is expensive[213] and because private property rights tend to appreciate over time.[214] But these concerns miss the mark. While public entities should closely monitor the public fisc, this should never come at the expense of individual constitutional rights.[215] Indeed, it would almost always be cheaper for the government to ignore the Bill of Rights.[216] But as Oliver Wendell Holmes, Jr. famously explained, "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[217]

B. *How Hoardings Law Could Change*

Courts could also increase judicial scrutiny over decisions to hoard in a manner that is historically consistent with the interpretation of the Fifth Amendment and the separation of powers doctrine.

From its inception, the government's eminent domain power has been explicitly and implicitly limited.[218] Historically, these limitations

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land described in the petition, declaring that the land is taken for the use of the Government. . . .

On filing the declaration of taking . . . title to the estate or interest specified in the declaration vests in the Government . . . .

Id.; *see also* 735 ILL. COMP. STAT. ANN. 30/20-5-5 (2024) (for a similar statute from Illinois).

213. *See, e.g.*, Patricia J. Winmill, Acquisition of Rights-of-Way by Condemnation, *in* ROCKY MT. MIN. L. INST. 9-1 (1998) ("Factual and legal complexities can make a condemnation action unpredictable, expensive and time consuming." (emphasis omitted)); *see also* 7 NICHOLS ON EMINENT DOMAIN § G6.01, *supra* note 8 ("Acquisition through condemnation is also more expensive for the condemning authority. In general, the condemning authority should expect to pay more for the property if a jury sets the price after a just compensation trial."); D. Zachary Hudson, Note, *Eminent Domain Due Process*, 119 YALE L.J. 1280, 1287 (2010) ("Regardless of whether the ultimate resolution of a conflict between a property owner and a takings authority is 'the product of negotiation or litigation, the entire condemnation process [is] often arduous, expensive and time consuming.'" (alteration in original) (quoting 6A NICHOLS ON EMINENT DOMAIN § 24.10 (3d ed. 2006))).

214. *See supra* note 178 and accompanying text.

215. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

216. It would be cheaper for the government, for instance, if they could quarter soldiers in private homes without permission, freely seize property without a warrant, take land without just compensation, or impose excessive fines. However, certain constitutional amendments prevent the government from acting in such a way. *See* U.S. CONST. amend. III; U.S. CONST. amend. IV; U.S. CONST. amend. V; U.S. CONST. amend. VI.

217. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

218. For an example of some of these implicit and explicit limitations, see sources cited *supra* notes 67, 95, 101, 120, 128 and accompanying text.

did not diminish or disappear merely because their recognition would interfere with legislative programming.[219] In fact, the exact opposite was true. Courts have consistently acknowledged limitations on the use of the eminent domain power by the legislative and executive branch, precisely because the Constitution compels judicial intervention when government actions inappropriately take private property without just compensation.[220]

For these very reasons, the Court's jurisprudence on hoardings claims is particularly confusing. In the name of honoring the separation of powers,[221] the Court has refused to review claims relating to unnecessary or excessive takings,[222] thereby ignoring its protective responsibilities under the very same separation of powers doctrine.[223] This has produced both economic and constitutional harms.[224] And perhaps more importantly, it has inappropriately shaped people's identities and taken away their livelihoods.[225]

That said, solutions exist within existing takings jurisprudence that could substantially diminish a condemnor's ability to hoard. For example, while courts may not have the means or processes to decide how

219. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828, 841 (1987) (preventing the state of California from taking private property rights despite legislative approval of the plan); Dolan v. City of Tigard, 512 U.S. 374, 390, 396 (1994) (preventing a local government from taking private property rights because they had not proven the taking was roughly proportional to the government interest); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 441 (1982) (requiring NY legislature to pay just compensation despite the belief that it was not needed for a de minimis invasion with private property rights); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014, 1030–31 (1992) (interfering with the South Carolina state legislature's attempt to take private property without just compensation); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (for an example of the court interfering with an attempted taking because it violated the separation of powers doctrine).

220. *See supra* note 219.

221. *See supra* note 143.

222. *See* sources cited *supra* note 136; *see also* Lynda J. Oswald, *Recent Developments in Land Use, Planning and Zoning Law: Can a Condemnee Regain Its Property if the Condemnor Abandons the Public Use?*, 39 URB. LAW. 671 (2007) (for an interesting example of how California voters rejected attempts to increase judicial scrutiny over the necessity of a taking).

223. Patchak v. Zinke, 138 S. Ct. 897, 904–05 (2018) (explaining that under the separation of powers doctrine, the judiciary is responsible for "interpreting and applying [laws] in cases properly brought before the courts" (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923))). The Court continued by stating: "The separation of powers, among other things, prevents Congress from exercising the judicial power. One way that Congress can cross the line from legislative power to judicial power is by 'usurp[ing] a court's power to interpret and apply the law to the [circumstances] before it." *Id.* at 905 (alterations in original) (citation omitted) (quoting Bank Markazi v. Peterson, 136 S.Ct. 1310, 1323 (2016)).

224. *See* sources cited *supra* notes 185–197, 198–202 and accompanying text (describing first the economic harms and then the constitutional harms experienced by hoardings).

225. See Muller, *supra* note 35, for the stories of Marcus C. Strickland, Jr. and Schulmerich Bells, who both argue that more was taken from them than was necessary.

much a condemnor should take,[226] they do have the competency to determine if a taking is not reasonably necessary to advancing the public purpose used to justify it.[227] In fact, courts perform versions of this inquiry all the time.[228] Therefore, an easy jurisprudential fix could be to require condemnors to prove that every taking is reasonably necessary for the public use it is allegedly advancing.[229] Similarly, courts could also extend the "essential nexus" test from exactions jurisprudence to hoardings claims.[230] This would require condemnors to prove that an essential nexus exists between what the government takes and the government interest it is allegedly advancing.[231] Either of these jurisprudential fixes would return the Court to its proper role under the separation of powers doctrine[232] and align hoardings jurisprudence with other Fifth Amendment case law. [233]

C. *Focusing on the Effects of Hoardings*

But each of these proposed solutions identifies a weakness in our system of self-governance. Namely, that "[e]nlightened statesmen will not always be at the helm" of the institutions deciding to take property.[234] Therefore, pleas for self-restraint or greater judicial intervention

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226. *See supra* note 145 and accompanying text.

227. Garnett, *supra* note 147, at 966 ("Courts, however, must regularly evaluate the 'reasonableness' of government action. (Consider, for example, the 'reasonable suspicion' and 'probable cause' determinations required in the Fourth Amendment context.) And, determining the 'reasonable necessity' of an exercise of eminent domain certainly is no more difficult than comparing an exaction to the impact of a proposed development.").

228. *Id.*

229. *Id.* ("For example, it is possible that courts might come to ask the government to make several different types of 'necessity' showings. First, at the broadest level, a court might review whether the larger *project* for which property is being condemned is reasonably necessary to advance the government's policy goals. For example, a court might ask whether a redevelopment project to be enabled by eminent domain is reasonably necessary to stem the tide of suburban sprawl, to renew a lifeless downtown, or to advance whatever goal the government uses to justify the exercise of eminent domain.").

230. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (to determine whether an exaction is Constitutional, a court must review whether an "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city); *see also* Jessica L. Asbridge, *Fines, Forfeitures, and Federalism*, 111 VA. L. REV. (forthcoming 2025) (discussing the usefulness of using the Court's test for exactions for other constitutional inquiries).

231. *See Nollan*, 483 U.S. at 837.

232. *See* Patchak, 138 S. Ct. at 904–05 (discussing the judiciary's role under the separation of powers doctrine).

233. This Article does not make a decision as to which jurisprudential response would be most effective or favorable. It merely proposes more protective alternatives to demonstrate that courts can expand the ability for judiciaries to review the necessity or extent of a taking in a way that is consistent with the Court's takings jurisprudence.

234. *See* THE FEDERALIST NO. 10, *supra* note 30, at 80 (James Madison) ("It is in vain to say that enlightened statesmen will be able to adjust these clashing interests,

will only go so far.[235] Especially when you consider that those most likely to be condemned[236] are also the least likely to afford legal representation to assist them in asserting their rights.[237] As James Madison suggested long ago, the solution then may be to focus on the effects of hoardings as opposed to their causes.[238]

One such solution is the payment of just compensation in installments rather than a single lump sum.[239] Although condemnors typically pay just compensation to condemnees in a single lump sum, lump sum just compensation is not required by the Fifth Amendment's text.[240] Nor is it particularly efficient.[241] However, lump sum just compensation has become exceedingly popular because of the ease with which it can be

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and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole."). And even if enlightened statesmen do manage to be put in power, they are likely to be self-interested.

235. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 36 (1954) (affirming a local government's attempt to take non-blighted property as a part of a comprehensive plan to restructure a neighborhood, despite the landowner's opposition); Kelo v. City of New London, 545 U.S. 469, 488–89 (2005) (issuing a similar holding where the Court affirmed a government plan to take non-blighted property).

236. *See* sources cited *supra* note 53 and accompanying text (discussing that the poor are more likely to be condemned).

237. Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1040–41 . The author finds:

> Yet, study after study has documented the wide gap between legal needs and the availability of an attorney, especially for the poor. A 1994 ABA study found that lower-income households averaged approximately one civil legal need each year, yet only about one in four were able to address the need through the civil justice system. A number of recent state legal needs studies similarly found that fewer than twenty percent of the legal problems experienced by low-income people are addressed with the assistance of an attorney. According to one study, nine out of ten low-income households that get no attorney assistance end up receiving no help at all; among the ten percent that try to get other help, most turn to community organizations that cannot provide legal assistance.

Id. (footnotes omitted) (citing TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING FOR THE WASH. STATE SUPREME COURT, THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY 49 (2003)).

238. *See* THE FEDERALIST NO. 10, *supra* note 30, at 79 (James Madison) (acknowledging that "the most common and durable source of factions has been the various and unequal distribution of property"). He then finds that it is these same factions that ultimately decide whether to hoard or take. *Id.* But since the "the *causes* of faction" or unequal property distribution "cannot be removed," the only viable relief "to be sought in the means of controlling its *effects*." *Id.* at 80.

239. For the concept of installment just compensation, see sources cited *supra* note 45 and accompanying text.

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

241. *See* sources cited *supra* notes 45, 48–51 and accompanying text (describing the inefficiencies with lump sum just compensation).

calculated[242] and the relatively minor administrative burden it places on condemnors.[243]

That said, condemnors abide by the Fifth Amendment's just compensation requirements so long as they provide a "full and exact equivalent" for the property taken "to the owner."[244] This could be done in installments, to be reassessed as property use intensifies, rather than a single lump sum. Although this would not solve the issues that arise with all hoardings, such as when fee simple is taken for cost savings, it could completely resolve the hoardings, which allow condemnors to intensify a property's use after a taking.

CONCLUSION

In promoting the ratification of the Constitution, our Framers identified that: "It is a misfortune, inseparable from human affairs, that public measures are rarely investigated with that spirit of moderation which is essential to a just estimate of their real tendency to advance or obstruct the public good."[245] The law surrounding hoardings is a perfect example of this phenomenon. By refusing to review the extent or necessity of a condemnor's taking, courts have allowed condemnors to take whatever they want—even if it is not necessary.[246] This has exposed private property owners to a range of practical harms, as well as violated implicit and explicit promises in the Constitution.[247] And perhaps more importantly, it has eroded the trust that is necessary between government and the governed for the political process to continue.[248] In light of these concerns, judicial intervention is not just advisable, but necessary. The hoardings experiment has been lab tested for the last 130 years, and our "lessons of

242. *See* Longoria, *supra* note 7, at 1395 (just compensation is often equated to market value, which is "'an objective concept,' and [is] more easily expressed in dollars and cents" (quoting Morasch v. Hood, 222 P.3d 1125, 1131 (Or. Ct. App. 2009))). This has made it a popular expression of the Just Compensation Clause's mandate "among state and federal courts." *Id.*

243. Because lump sum just compensation does not require condemnors to constantly reassess the sufficiency of the payments it has made to condemnees, it is necessarily easier to carry out.

244. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

245. THE FEDERALIST NO. 37, *supra* note 30, at 224–25 (James Madison).

246. *See* sources cited *supra* notes 135–138 and accompanying text.

247. *See* sources cited *supra* notes 186, 199 and accompanying text.

248 *See* Alford, *supra* note 60, at 1278. The author writes:

> The distrust created by corruption alters the fundamental relationship between the government and the governed. Trust is essential to secure the public's voluntary deference to the decisions of legal authorities. Trust increases the public's willingness to cooperate and consent to rules in the absence of government coercion. Individuals internalize norms when they perceive the government to be procedurally fair and worthy of trust. Corruption is antithetical to procedural justice, and in the absence of such justice, individuals will reject the legitimacy of government decisions. Where there is procedural justice, by contrast, individuals will accept government outcomes, even those that are not their preferred outcome. Thus, distrust increases the likelihood that government decisions will be openly defied or

experience" now confirm that a new methodology is needed.[249] For just as there is no right without a remedy, private property becomes meaningless if the constitutional mechanisms in place to ensure its protection are not meaningfully enforced. And to make matters worse, we know that the poor, the old, the less-educated, renters, and those that identify as non-white are the most likely to shoulder this unconstitutional burden.[250]

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surreptitiously ignored. Distrust also increases the likelihood of hostility toward legal authorities.

Id. (footnotes omitted) (citing TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 7–8 (2002)).

249. Jerold H. Israel, Gideon v. Wainwright*: The Art of Overruling*, 1963 SUP. CT. REV. 211, 221 (1963) ("Closely related to the change-in-circumstances rationale is the argument that a prior precedent may be rejected when it has failed to pass the 'test of experience.' The Court has frequently acknowledged that 'the process of trial and error, so fruitful in the physical sciences is appropriate also in the judicial function.'" (first quoting Barden v. N. Pac. R. Co., 154 U.S. 288, 322 (1894); and then quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 408 (1932) (Brandeis, J., dissenting))).

250. Blackman, *supra* note 53, at 701 ("Specifically, 58% of the homeowners living in areas targeted by eminent domain are minorities, as compared with only 45% minorities in surrounding communities."); *see also* Karlis, *supra* note 53 (Often, "[w]hen you look at government strategy when acquiring property for [condemnation] projects, unfortunately, there's a lot of empirical evidence that these projects tend to go through places where the land is cheaper, the people are poor and the facilities [are] not great.").