Articles:

Eminent Domain and Unfettered Discretion: Lessons from a History of U.S. Territorial Takings

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ABSTRACT

Eminent domain is a minimal constitutional protection for private property and one that is subject to far more discretion than previously recognized by scholars. This Article traces a novel legal history of land takings within the U.S. Territories, focusing on some of the most egregious and controversial incidents and problematic patterns originating within eminent domain law. Comparing this history to recent research that demonstrates how takings in the States have disproportionately impacted Black communities, this Article articulates three patterns of injustices in takings echoing between Black mainland communities and indigenous communities in the Territories: large-scale federally funded actions, local government takings that demonstrate bias and disproportionately impact minority communities, and delayed and inadequate compensation.

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Each of these patterns provides insight into how eminent domain law has failed to adequately protect private property. The result is a picture of how eminent domain law is doctrinally destined to fail at protecting property, particularly in communities with limited political power.

This Article proposes three specific and complementary routes to achieving more just property protections. Specifically, the Supreme Court should: (1) overturn Cherokee Nation v. Southern Kansas Railroad Co., a decision which justifies delayed compensation and is inconsistent with other doctrines for just compensation; (2) recognize the dangers of unfettered legislative discretion and, consistent with equal protection law, utilize a more intensive review in the context of takings in Black and indigenous communities; and (3), if an appropriate case were to present itself, articulate a standard for equal protection violations in the context of eminent domain.

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INTRODUCTION

Eminent domain is a minimal constitutional protection for property.[1] The government cannot take your property unless there is a public purpose for that property[2] and just compensation is paid.[3] A judicial affirmation of public purpose effectively ends any challenge to the taking, except for the point of appropriate compensation. In other words, the Fifth Amendment does little more than "exact[] . . . the price of the taking,"[4] with no requirement of payment before dispossession.[5] The Supreme Court has endorsed a policy of "deference to legislative judgments."[6] Even if the

1. There is an opportunity for judicial review in eminent domain, "but the Supreme Court has repeatedly 'made clear that it is "an extremely narrow" one.'" Goldstein v. Pataki, 516 F.3d 50, 57 (2d Cir. 2008) (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)). Courts cautiously note that "individuals whose properties are taken are entitled to some judicial process." Tioronda, LLC v. State, 386 F. Supp. 2d 342, 351 (S.D.N.Y. 2005).

2. This public/private line is fluid: "[q]uite simply, the government's pursuit of a public purpose will often benefit individual private parties." Kelo v. City of New London, 545 U.S. 469, 486 (2005). Only "[a] purely private taking" is forbidden. *See* Haw. Hous. Auth. V. Midkiff, 467 U.S. 229, 245 (1984).

3. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also* Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251–52 (1905) (interpreting the public purpose requirement and compensation requirement as two distinct barriers for a constitutional taking).

4. *See* Berman v. Parker, 348 U.S. 26, 36 (1954).

5. In *Cherokee Nation v. Southern Kansas Railway Co.*, the Supreme Court held that compensation need not be paid before dispossession; there need only be provisions made for payment. 135 U.S. 641, 659 (1890). This decision supported an extensive history of land takings for which compensation was delayed for decades. *See also* Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 737 (3d Cir. 2018) (holding that compensation "need not be paid contemporaneously").

6. *See Kelo*, 545 U.S. at 480 ("Without exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments

constitutional protections are limited, eminent domain law applies within the U.S. Territories, unlike many other constitutional norms.[7] Yet when compared to the States, where extensive scholarship illustrates the legal history of eminent domain, the legal history of eminent domain within the Territories remains rather murky. This lack of clarity persists despite an abundance of instances for study, including multiple pending disputes.[8]

This Article traces a novel legal history of takings within the U.S. Territories, focusing on some of the most egregious and controversial incidents and developing patterns of problems originating within eminent domain law. Comparing this history to recent research demonstrating that takings in the States have disproportionately impacted Black communities, this Article articulates three patterns of injustices in takings that echo between Black mainland communities and indigenous communities in the Territories. Each facet of these patterns provides insight into the failures of eminent domain law in adequately protecting private property. The result is a picture of how eminent domain law is doctrinally destined to fail at protecting property in communities with limited political power.

This Article argues three essential failures. First, legislative discretion invites racial bias in the context of deciding two key questions that underpin eminent domain actions: who belongs there and what use of the land is best. Second, courts allow municipalities and agencies to delay and defer payments on eminent domain claims for years—even decades—after confiscation. Finally, no other area of law (such as equal protection or due process) intervenes to provide adequate property protection. After examining these failures, this Article proposes three specific and complementary routes to achieving more just property protections in the context of eminent domain.

Part I provides a history of takings—takings that either intentionally target people based on race, class, and ethnicity or fail to provide fair compensation—across the five U.S. Territories, focusing on some of the most egregious and controversial incidents and developing patterns of problems that originate within eminent domain law.

Part II explains the unique risks of eminent domain for communities with limited political power, such as the U.S. Territories and predominantly minority communities within the States. First, Part II discusses the history of unjust takings in the States that have disproportionately impacted Black communities. Second, Part II explains the risks of governments having substantial discretion over eminent domain in minority communities. Parts I and II together form a critique of

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in this field."); *see also id.* at 472 (reaffirming the "longstanding policy of deference to legislative judgments in this field" (citing *Midkiff*, 467 U.S. at 241)).

7. *See infra* Part I.

8. *See infra* Part I.

how eminent domain law has failed to adequately protect property rights in a way that is consistent with the Fifth Amendment, particularly those property rights of the most vulnerable and disenfranchised communities. The final section of Part II summarizes the resonant patterns between mainland Black and indigenous experiences in the Territories with land takings.

Part III considers and rejects the idea that other areas of law, such as equal protection and due process, may intervene to provide adequate property protections.

Part IV then offers three specific and complementary routes to achieving more just property protections in the eminent domain context. Part IV argues that the Supreme Court should (1) overturn *Cherokee Nation v. Southern Kansas Railroad Co.*, which justifies delayed compensation; (2) recognize the dangers of unfettered legislative discretion—which is also effectively municipal discretion—and more robustly enforce, at a minimum, an enhanced rational basis test; and (3), if an appropriate case were to present itself, articulate a standard for an equal protection violation based on a development project inappropriately targeting a protected class.

I. A BRIEF HISTORY OF TAKINGS IN THE U.S. TERRITORIES

This Part begins with a discussion of the constitutional status of property protections in the Territories, examining the so-called Insular Cases to determine the applicability of the Fifth Amendment property protections. After affirming the applicability of constitutional norms, this Part combines strands of history from across the five U.S. Territories to generate a history of unjust takings across the Territories. These histories demonstrate similar patterns of injustices that will be used to illustrate specific problems with eminent domain law's ability to effectively protect property, particularly in minority communities[9] and, by extension, all other communities that lack political power.

9. American Samoa has a population of 46,366, and over 92% of this population is Pacific Islander. *See* CIA, THE WORLD FACTBOOK, EXPLORE ALL COUNTRIES – AMERICAN SAMOA (2022), https://bit.ly/346wXW5. Guam's population is 168,801, of which only 7% is white. Chamorro, the local indigenous group, makes up 37.3% of Guam's population, with Filipino constituting another 26.3%. *See* CIA, THE WORLD FACTBOOK, EXPLORE ALL COUNTRIES – GUAM (2022), https://bit.ly/35aCJGQ. The Northern Mariana Islands have a population of 51,659. The racial distribution of this population includes 50% Asian and 34.9% Native Hawaiian or other Pacific Islander. *See* CIA, THE WORLD FACTBOOK, EXPLORE ALL COUNTRIES – NORTHERN MARIANA ISLANDS (2022), https://bit.ly/3tSqycd. The U.S. Virgin Islands population is 105,870, which is 76% Black. *See* CIA, THE WORLD FACTBOOK, EXPLORE ALL COUNTRIES – VIRGIN ISLANDS (2022), https://bit.ly/3qUPopV. Puerto Rico has a population of 3,142,779, with a racial distribution of: 75.8% white or Hispanic, 12.4% Black/African American, and 8.5% other. *See* CIA, THE WORLD FACTBOOK, EXPLORE ALL COUNTRIES – PUERTO RICO (2022), https://bit.ly/3tUmgRo.

A. Application of Constitutional Property Doctrines Within the Territories

The U.S. Territories present a unique problem for constitutional questions because, as a direct product of the Insular Cases,[10] ordinary constitutional protections do not necessarily apply within the Territories.[11] The Insular Cases, decided between 1900 and 1922, considered whether constitutional protection, either generally or individually, applied to the U.S. Territories. The Supreme Court decided that the answer to this question "involves an inquiry into the situation of the Territory and its relations to the United States."[12] In other words, there is no single and straightforward answer to the question; the answer is a "flexible and pragmatic approach."[13] The flexibility is a logical consequence of the pragmatic: "the Constitution in the *Insular Cases* did not require Congress to implement all constitutional guarantees in its [T]erritories because of their wholly dissimilar traditions and institutions."[14]

However, this approach has "become controversial" because the Insular Cases' decisions may be viewed "as amounting to a license for further imperial expansion and having been based at least in part on racist ideology."[15] These critiques of the theoretical underpinnings of the Insular Cases are essentially impossible to dispute: the decisions explicitly

10. The "Insular Cases" is the common term used collectively for *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); and, sometimes, *Downes v. Bidwell*, 182 U.S. 244 (1901) and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). For the sake of simplicity, this Article adopts the broader reference to all four cases.

11. The relationship is unusual, or, in the recent words of the Tenth Circuit, simply a result of the "flexibility" that defines the "broader approach of the political and judicial branches applied to the [T]erritories." *See* Fitisemanu v. United States, 1 F.4th 862, 867 (10th Cir. 2021); *see generally* Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. L. REV. 147 (2006) (discussing the history of territorial governance, the history of the Insular Cases, and the development of the territorial incorporation doctrine); Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57 (2013) (analyzing the relationship between the U.S. and Puerto Rico, as created by the Supreme Court via the Insular Cases).

12. Downes v. Bidwell, 182 U.S. 244, 293 (1901).

13. Fitisemanu v. United States, 1 F.4th 862, 869 (10th Cir. 2021) (citing Balzac v. Porto Rico, 258 U.S. 298, 305 (1922)).

14. United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (internal quotation marks omitted).

15. *Fitisemanu*, 1 F.4th at 870; *see also* Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1688 (2017) (discussing the racist and expansionist reasoning of the Insular Cases, but arguing their ability to now protect local self-government within the Territories).

acknowledged both their focus on "empire"[16] and their rationale of making decisions based on "differences of race."[17]

Despite its unpleasant underpinnings, the Supreme Court has continued to apply the Insular Case framework, focusing on two features that may be particularly appealing to a member of the judiciary: flexibility and pragmatism. The heart of the question of whether a constitutional protection applies is "whether judicial enforcement of the provision would be 'impracticable and anomalous.'"[18] Focusing on "the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere,' the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed."[19] Moreover, the doctrine allowed the judiciary to revisit the question as necessary because "over time the ties between the United States and any of its unincorporated Territories [may] strengthen in ways that are of constitutional significance."[20] Such "practical considerations" have repeatedly been the central feature of the Supreme Court's approach to applying the Constitution in the Territories.[21] After considering decades of precedents, Justice Kennedy concluded that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[22] As the Tenth Circuit concluded, "the lodestar of the Insular framework has come to be the 'impracticable and anomalous' standard. Under this standard, 'the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it.'"[23] This flexibility is particularly logical given that political status and the right to self-government vary across different Territories.[24]

16. *Fitisemanu*, 1 F.4th at 870 (quoting *Downes*, 182 U.S. at 286). The Tenth Circuit noted that the Insular Cases explicitly recognized their own role in the colonial expansion of the U.S. *See id.*; *see generally* BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006) (explaining the role the Insular Cases played in the process of determining the physical bounds of the United States and the applicability of the U.S. Constitution in the Territories).

17. *Fitisemanu*, 1 F.4th at 870 (quoting *Downes*, 182 U.S. at 286).

18. Boumediene v. Bush, 553 U.S. 723, 759 (2008) (quoting Reid v. Covert, 354 U.S. 1, 74–75 (1957)).

19. *Id.* at 759 (quoting *Balzac*, 258 U.S. at 312).

20. *Id.* at 758.

21. *See id.* at 759 ("[W]hether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress has before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'" (quoting Reid, 354 U.S. at 74–75)).

22. *Id.* at 764.

23. Fitisemanu v. United States, 1 F.4th 862, 870 (10th Cir. 2021) (quoting Reid v. Covert, 354 U.S. 1, 75 (1956) (Harlan, J., concurring)).

24. *See, e.g.*, Northern Mariana Islands v. Atalig, 723 F.2d 682, 687 (9th Cir. 1984) (contrasting the Northern Marina Islands' right to self-governance against the political

The exception to flexible pragmatism comes from the "constitutional provisions that implicate fundamental personal rights," which "apply without regard to local context."[25] Essentially, "even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."[26]

The term 'fundamental' has a particular meaning in the context of territorial rights, which does not align with other usages of the term by the Supreme Court.[27] Additionally, across the circuits, definitions of fundamental do not neatly align.[28] The Ninth Circuit has defined fundamental in the negative: it is not sufficient that a right be considered fundamentally important in a colloquial sense or even that a right be "'necessary to [the] . . . American regime of ordered liberty.'"[29] Conversely, the D.C. Circuit states more generally that fundamental refers to "those rights so basic as to be integral to free and fair society."[30] These fundamental rights may be contrasted with "those artificial, procedural, or remedial rights that—justly revered though they may be—are nonetheless idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence."[31] For the purposes of this Article, such differences can be set aside. The key question is narrower: whether the Territories enjoy a constitutional protection against governmental confiscation[32] of land for public use without just compensation.

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status of Guam, which is "subject to the plenary power of Congress and has no inherent right to govern itself").

25. *Fitisemanu*, 1 F.4th at 878.

26. Dorr v. United States, 195 U.S. 138, 147 (1904) (quoting Downes v. Bidwell, 182 U.S. 244, 265 (1901)).

27. Particularly, the concept of fundamental rights within the Insular Cases' framework does not align with the *Duncan* analysis for the incorporation of rights in the Bill of Rights to apply to the States via the Fourteenth Amendment. *See Atalig*, 723 F.2d at 690 (discussing Duncan v. Louisiana, 391 U.S. 145 (1968)); *see also* King v. Morton, 520 F.2d 1140, 1146–47 (D.C. Cir. 1975) (distinguishing *Duncan* as applying within the States rather than the U.S. Territories).

28. For further discussion of the circuit differences, see Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 791 (1992).

29. Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1992) (quoting *Duncan*, 391 U.S. at 149–50 n.14).

30. Tuaua v. United States, 788 F.3d 300, 308 (D.C. Cir. 2015).

31. *Id.*

32. Confiscation is an appropriate limiting word because it retains this Article's central focus on the taking of land. The distinction is important because the Insular Cases recognize that tax rates on personal property may be different in the Territories when compared with the States. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 293 (1901) (holding that a tax on Puerto Rican produce, which exceeded mainland taxes, was acceptable even while couched as a foreign import duty). Moreover, other cases have supported territorial laws restricting property alienation due to the role of those laws in maintaining the initially

Examining the original Insular Cases, the answer to this key question seems to be yes. The constitutional protection of property against taking for public use without just compensation is a fundamental right that should apply across conditions in the different Territories. In *Hawaii v. Mankichi*, counsel proposed the question of whether a local law in Hawaii "confiscating private property for public use without compensation, [would] remain in force after an annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution.[33] The Court concluded that such a law would not stand.[34] Specifically, the Court explained, "[w]e would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation."[35] The reason that the Court rejected the application of the Constitution in *Mankichi*, however, was because "the two rights alleged to be violated in this case [were] not fundamental in their nature, but concern[ed] merely a method of procedure."[36] Notably, the procedures at issue were ones that the Court concluded, "sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property[,] and their well-being."[37] A subsequent Insular Case, *Dorr v. United States*, did not speak directly to property rights but quoted in full this portion of the *Mankichi* decision.[38] Similarly, in *Balzac v. Porto Rico*, the Supreme Court noted that, within the Territories, there were "guaranties of certain fundamental personal rights declared in the Constitution."[39] In explaining those rights, the Court specifically noted that "no person could be deprived of life, liberty[,] or property without due process of law."[40]

established compacts of governance. *See Wabol*, 958 F.2d at 1462 (concluding that restraints on land alienation in the Northern Mariana Islands were appropriate to protecting the culture, and that maintaining the culture was a key part of the original agreement to U.S. sovereignty, without which "the political union would not be possible"); Fitisemanu v. United States, 1 F.4th 862, 866–67 (10th Cir. 2021) (addressing the question of American citizenship for American Samoans, but reflecting that granting citizenship would have a detrimental effect on the local system of land ownership, which includes an alienation restriction).

33. Hawaii v. Mankichi, 190 U.S. 197, 217 (1903).

34. *See id*.

35. *Id*. at 217–18.

36. *Id*. at 218.

37. *Id.*

38. *See* Dorr v. United States, 195 U.S. 138, 144–45 (1904) (quoting *Mankichi*, 190 U.S. at 218.).

39. Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922).

40. *Id*. at 313.

B. Takings in Puerto Rico

The political document that first defined the U.S.-Puerto Rico relationship as we know it today was the Foraker Act of 1900. The Foraker Act was "a comprehensive measure designed to transform the economic, legal[,] and political foundations of Puerto Rico."[41] By 1901, however, the Hollander Bill created a colonial tax in Puerto Rico, which forced many small-scale and poor farmers to sell their lands.[42] In the words of historian Cesar J. Ayala, the Hollander Bill was a "classical mechanism" of colonization, effectively dispossessing rural populations to generate unlanded labor forces for work on plantations.[43] As a result, "the number of landless people in Puerto Rico continued to increase . . . to a degree that was exceptional in the Hispanic Caribbean at the time."[44]

This effort to extract land from the local population cleared a path for large sugar corporations to control massive plantations, on which the newly unlanded population worked. These corporations included American-owned sugar companies that "controlled 177,000 acres of the island's most fertile land – more than a quarter of the land suitable for continuous cultivation."[45] The remaining land became concentrated in the hands of large Puerto Rican companies known as *latifundia*.[46] During this period, the "sugar cane industry constituted nearly the entire economy of Puerto Rico and was the Islands' basic agricultural crop."[47] Ultimately, this consolidation led to unrest on the island as "[t]he disastrous economic downturn of the late 1920s intensified labor's resolve to extract a measure of economic justice from the sugar barons."[48]

From the 1940s to the 1960s, eminent domain played a significant role in reshaping the island politically and economically due to two different sovereign actors: the local government and the federal government. First, the local government began using eminent domain to respond to the extensive control created by the economic and land monopoly held by the sugar companies.[49] Prior to the change of Puerto Rico's government in 1940, there was increasing public resentment of the

41. Pedro A. Cabán, *Puerto Rico: State Formation in a Colonial Context*, 30 CARIBBEAN STUD. 170, 176 (2002).

42. *See* César J. Ayala, *The Decline of the Plantation Economy and the Puerto Rican Migration of the 1950s*, 7 LATINO STUD. J. 62, 66 (1996).

43. *See id.*

44. *Id.* at 67.

45. Keith S. Rosenn, *Puerto Rican Land Reform: The History of An Instructive Experiment*, 73 YALE L. J. 334, 337 (1963).

46. *See id.*

47. Stuart P. Kastner, *Constitutional Review of State Eminent Domain Legislation:* Hawaii Housing Authority v. Midkiff, 9 U. PUGET SOUND L. REV. 233, 238 (1985).

48. *See* Cabán, *supra* note 41, at 182.

49. *See* Matthew O. Edel, *Land Reform in Puerto Rico, 1940–1959: Part One*, 2 CARIBBEAN STUD. 26, 39 (1962).

power that sugar companies held over the lives of their workers, as well as a "widespread belief that" these companies "were exercising undue political influence."[50] Coupled with rising concerns over foreign companies controlling Puerto Rico, these factors led to the election of the Popular Democratic Party ("PPD") on the promise of land reform.[51]

In seeking to fulfill this promise, the new governing authority established new land laws and a government "Land Authority."[52] Most importantly, the Land Authority "could institute proceedings for the expropriation of land held above 500 acres."[53] Such an ability was an attempt to enforce a historic law that had been largely disregarded but still limited the possession of land in Puerto Rico to 500 acres.[54] The sugar companies fought against these enforcement measures. However, in *Puerto Rico v. Eastern Sugar Associates*, the Puerto Rican government ultimately prevailed on its authority to invoke eminent domain.[55]

With its eminent domain powers confirmed by the courts, the Land Authority proceeded to acquire the landholdings of corporate plantations over 500 acres and began to redistribute these lands to Puerto Ricans.[56] This redistribution took three forms, in that land was disposed of either: "(1) in small parcels to squatters and slum-dwellers for erection of homes, (2) in parcels of five to twenty-five acres to individuals for subsistence farming, [or] (3) in larger parcels to qualified persons for operating 'proportional-profit' farms."[57] By the mid-1950s, land reform fell by the wayside as the Puerto Rican government focused on increasing efforts to attract private industry. Puerto Rico's new government sought to shift away from a failing sugar industry, and "appropriations to the Land Authority . . . were cut off entirely."[58]

While the Land Authority sought to return land to local control, the federal government continued displacing the local populations to enable a military buildup.[59] During this time, the U.S. military sought to expand,

50. *Id.* at 29.

51. *See id.* at 30–31 ("In the spring of 1940, the United States Supreme Court upheld the 500 acre law, affirming the possibility of land reform in Puerto Rico, and opening the door for the PPD to triumph on the land issue.").

52. *See id.* at 37.

53. *Id.* at 39.

54. *See id.*

55. *See* Puerto Rico v. E. Sugar Assoc., 156 F.2d 316, 325 (1st Cir. 1946).

56. *See* Edel, *supra* note 49, at 44–45.

57. Case Comment, *Eminent Domain. For What Purposes Property May Be Taken. Condemnation of Corporate Land Holdings for Redistribution in Puerto Rican Agrarian Reform Program Upheld*, 59 HARV. L. REV. 1162, 1163 (1946).

58. Keith S. Rosenn, *Puerto Rican Land Reform: The History of An Instructive Experiment*, 73 YALE L. J. 334, 349 (1963).

59. *See* Cesar Ayala Casas & Jose Bolivar Fresneda, *The Cold War and Second Expropriations of the Navy in Vieques*, 28 CENTRO J. 10, 12–13 (2006).

particularly on the islands of Vieques and Culebra.[60] The expropriation of Vieques was conducted in two phases (1941 and 1948), resulting in two-thirds of the island falling under U.S. control and being used as a bombing range.[61] This expropriation drastically impacted the citizens of Vieques, not only displacing them but effectively creating a "service economy" dependent on "serving the troops."[62] This expropriation sparked protest both from the local population and the Puerto Rican government, who expressed that "the economy of Vieques was already in terrible shape and . . . further takeover of land by the Navy would be disastrous to the islanders."[63] In many ways, this prediction was accurate. The use of eminent domain on Vieques led the island "in a direction opposite to that of the rest of Puerto Rico, which underwent an economic and social transformation."[64]

Moreover, the process by which the federal government enforced its eminent domain claims was viewed as particularly cruel. Many evictions were "carried out literally overnight, with no compensation other than minute house plots elsewhere in Vieques."[65] This process was only possible because Vieques land, and consequently most of the actual payment for expropriation, went directly to two landowners of sugar *latifundas* who controlled the majority of the island.[66] These circumstances led to a situation where "large landowners received economic compensation, but workers were simply expelled from the land and their houses were demolished."[67]

Many viewed the methods and scale of expropriation utilized on the island as "part of a Navy plan to depopulate Vieques and turn the entire island into a bombing range and maneuver area."[68] This view is supported by evidence to some extent. The expropriated were "very much encouraged to emigrate[,]" and in the twenty years following the eminent domain claims, "the island lost [thirty] percent of its population."[69] Most egregiously, perhaps, was a proposal dubbed Plan Dracula, which sought to expel all living people from Vieques in addition to removing all bones and coffins from the island "so that former residents had no reason to

60. *See id.* at 13.
61. *See id.* at 12.
62. *See id.* at 11.
63. *Id.* at 15.
64. Juan A. Giusti-Cordero, *War Politics and War Games in Puerto Rico*, 88 NEW W. INDIAN GUIDE 53, 58 (2014).
65. *See id.*
66. *See* J. Ayala César, *From Sugar Plantations to Military Bases: the U.S. Navy's Expropriation in Vieques*, *Puerto Rico, 1940–45*, 13 CENTRO J. 23, 26 (2001).
67. *Id.* at 37.
68. Giusti-Cordero, *supra* note 64, at 59.
69. Marie Cruz Soto, *The Making of Viequenses: Militarized Colonialism and Reproductive Rights*, 19 MERIDIANS 360, 368–69 (2020).

return, not even to pray or place flowers on the graves of their dead."[70] Ultimately, this plan did not materialize.

Beginning in the 1970s and continuing into the early 2000s, the U.S. military faced severe public backlash against attempts for expansion through eminent domain. This public pressure ultimately forced the U.S. military to leave both Culebra and Vieques. In Culebra, this process began in the early 1970s when the territorial government, in support of local protests, held the position that the Navy "should terminate all training operations on Culebra . . . within a reasonable period."[71] This position immediately followed an attempt by the U.S. Navy in 1970 to "forcibly remove the entire population of Culebra."[72] In 1971, an agreement known as the Culebra agreement was signed in which the Navy agreed that they would seek an alternative island to conduct training operations on.[73] Subsequently, the Navy proceeded to backtrack on this agreement until 1974, when President Nixon ordered the Navy's withdrawal.[74]

Conversely, the demilitarization of Vieques began after a military accident which resulted in the death of a native citizen of Vieques, David Sanes-Rodriguez.[75] The outrage resulting from this event ultimately led to mass protests that spread beyond Vieques and "encourage[d] the largest public demonstration[] ever in Puerto Rico."[76]

Today, the legacy of military occupation and the associated acts of eminent domain continue. The Navy occupation of Vieques did not end with a complete transfer of land to the government of Puerto Rico. Instead, much of this land was shifted to the Department of the Interior for use as a nature conservancy.[77] While this is admirable, there are at least seventeen toxic sites within these areas—including five dumps in which "[n]o modern environmental safeguards, such as clay linings, were ever used . . . ."[78] After twenty years without the Navy's presence, eight of these seventeen sites "are still under review, and no significant action has been taken with regard to any of the nine others."[79] Even without the Navy

70. Frances Negron-Muntaner, *The Emptying Island: Puerto Rican Expulsion in Post-Maria Time*, HEMISPHERIC INST., https://bit.ly/3u2q5UR (last visited July 31, 2021).

71. *Id.*

72. Nathalie Schils, *Puerto Ricans Expel United States Navy from Culebra Island, 1970–1974*, GLOB. NONVIOLENT ACTION DATABASE (June 7, 2011), https://bit.ly/3KLrFk1.

73. *Id.*

74. *See id.*

75. *See* Javier Arbona, *Vieques, Puerto Rico: From Devastation to Conservation and Back Again*, 17 TRAD. DWELL. & SETTLE. REV. 33, 34 (2005) ("On April 19, 1999, an F-18 fighter jet dropped two 500-pound bombs several miles off target and killed Vieques-born David Sanes-Rodríguez[.]").

76. *See id.* at 35.

77. *See id.* at 36 ("On May 1, 2003, the day after the Navy left, the U.S. Department of the Interior inherited most of these lands.").

78. *Id.* at 40.

79. *Id.*

directly impacting the lives of the Viequenses, the very substrate of the island has been permanently affected by the federal government's eminent domain claims in the 1940s.

The modern views and usage of eminent domain reflect the historic trend of deciding whether development for Puerto Rico is best served through locally-led development or foreign investment. Hurricane Maria has only exacerbated the divide between these two schools of thought in many ways. For those favoring foreign investment, primarily championed by the government, eminent domain has been viewed as necessary to create attractive spaces for foreign investment. The Puerto Rican government has combined this view with policies driving such foreign investment. For example, in the early 2010s, Puerto Rico passed tax laws allowing Americans who spend half of the year on the island to pay zero tax on U.S. income.[80] The impact of these policies is most apparent in neighborhoods such as Vietnam, where poor and disadvantaged communities have been subject to eminent domain claims for the purposes of building tourism and luxury developments, such as a hotel and casino.[81] As Clarisa Moreno, a Vietnam resident, stated, "We have lived in our homes for generations, but they are going to be destroyed to make way for rich people coming to our island."[82]

Yet many Puerto Ricans, especially those in low-income, historically disadvantaged communities, have sought to fight against such eminent domain claims, sometimes through novel legal strategies. A significant example of this occurred in the community of Caño Martin Peńa.[83] Here, the community created a land trust which "gives more than 2,000 people collective legal rights over 200 acres of land on which their houses are built."[84] However, these legal rights were not easily achieved. In 2009, the Puerto Rican legislature sought to reverse the legal clause that permitted the establishment of the trust and prevailed in federal court.[85] It was only through mass protest that the 2009 act was repealed, and the land trust was permitted once again. Importantly, achieving such legal rights is essential in communities where land titles are largely not formally in place. The scale of this problem, which has legacies not only from the Hollander Act of 1901 but the PPD land redistribution in the 1940s, is massive, with a

80. *See* Rupert Neate, *Puerto Rico Woos US Investors with Huge Tax Break As Locals Fund Debt Crisis*, GUARDIAN (Feb. 14, 2016, 8:38 AM EST), https://bit.ly/33Ijkg8.

81. *See id.*

82. *Id.*

83. *See* Marlena Hartz, *Why Hurricane Maria Is No Match for This Mighty Community in Puerto Rico*, FORBES (Mar. 19, 2018, 8:33 AM EDT), https://bit.ly/3IvlApP.

84. *Id.*

85. *See id.* (explaining that "[i]n 2009, the Puerto Rico Legislature reversed the legal clause that established the Caño land trust," and a U.S. Court of Appeals "judge upheld the legislature's reversal").

supposed "585,000 – 715,000 (45 – 55 percent) of homes and commercial buildings in Puerto Rico hav[ing] been constructed without building permits . . . ."[86]

This indispensable fact has been instrumental in shaping the response to Hurricane Maria, as Federal Emergency Management Agency ("FEMA") guidelines that are incompatible with this reality have hampered recovery efforts. Access to loan funds via FEMA's Individuals and Households program requires proper title of the property to be established; as a result, many Puerto Ricans lack access to emergency federal funds.[87] The scale of this problem is massive, with "nearly half of all residents, according to studies, lack[ing] the clear titles to their properties that would allow them to take out housing reconstruction loans."[88] While there are efforts to ameliorate this situation, with proposals by Puerto Rico to implement a program to provide title documents to individuals, a continued fear remains amongst advocates that the risks of expropriation remain high for these informal communities.[89]

This continued fear has ultimately led both local and national activists to raise concerns about the threat of eminent domain in Puerto Rico. In 2018, following Hurricane Maria, the Institute for Justice released a report on Expropriation in Puerto Rico and offered a scathing analysis.[90] Of particular concern was Act No. 83, which "states that private property can be expropriated for 'any other useful purpose declared so by the Municipal Legislature.'"[91] This fear has been realized after "the damage and destruction left by Maria further worsened the situation, as many mayors and municipalities have used the need to recover and rebuild as a pretext for new economic development projects."[92]

86. Ivis Garcia, *The Lack of Proof of Ownership in Puerto Rico Is Crippling Repairs in the Aftermath of Hurricane Maria*, HUM. RTS. MAG., May 21, 2021, at 20, 21.

87. *See id*. ("FEMA's adherence to strict homeownership regulations precludes individuals living in these homes from gaining access to federal aid.").

88. Michael Kimmelman, *Rebuilding a Puerto Rico Barrio: 'Dead Is the Only Way They'll Ever Get Me to Leave*,*'* N.Y. TIMES (Jan. 20, 2019), https://nyti.ms/33V6ZWc.

89. *See* Nicole Acevado, *Housing Is Key to Puerto Rico's Recovery. Will 2019 See Promised Funding, Solutions?*, NBC NEWS (Feb. 4, 2019, 4:53 AM EST), https://nbcnews.to/3g8BScc ("Advocates have also raised concerns over expropriation risks that could disproportionately fuel displacement among residents of informal communities, even if property titles are granted to them.").

90. *See generally* INST. FOR JUST., EXPROPRIATION IN PUERTO RICO: POLICY BRIEF AND REPORT CARD (2018), https://bit.ly/3ujLPMe (examining the history of eminent domain in Puerto Rico in the post-*Kelo* era in which Puerto Rico continued to allow eminent domain as a development tool).

91. *Id*. at 5.

92. *Id.* at 6.

C. Takings in Guam

1. Guam and the U.S. Government

The history of land confiscation in Guam is a military story.[93] Historian Stephen Kinzer described that there was no other explanation that made any sense in terms of the American occupation: "Guam had only about 10,000 inhabitants in 1898, hardly enough to constitute a market for American goods. It offered little in the way of resources or investment opportunities. Its appeal was simple: location."[94]

Of course, location is a kind of appeal that never changes. At the point of initial colonization, Kinzer explained this appeal as such: "Guam lies between Hawaii and the Philippines, and is within [a] reasonable range of Shanghai, Hong Kong, and other ports on the East Asian mainland. Any nation seeking to project power into that region would find it a fine prize."[95] In modern geopolitics, Guam remains "a crucial geopolitical nexus in East Asia,"[96] primarily because it is the closest U.S. land to both China and North Korea.[97]

In pursuit of militarization, the U.S. military claimed land on the island to establish necessary ports, bases, and airfields.[98] The U.S. Military owns approximately 27% of land in Guam[99] and has controlled as much as 36%.[100] Much of this land has been acquired in a way that does not sit neatly with American public notions of a constitutional taking because just compensation did not regularly occur. A resolution of the Guam Legislature, summarizing the history of takings, found that such takings

93. *See generally* ROBERT F. ROGERS, DESTINY'S LANDFALL: A HISTORY OF GUAM 108–26 (1995) (setting out the history of conquest, occupation, and colonization of Guam). In terms of the U.S. occupation, the initial rule of Guam was entirely military based, with an officer holding the dual titles of commander of the naval station and governor of the island. *See* Stephen Kinzer, *Cruel Realities: The American Conquest of Guam*, 23 WORLD POL'Y J. 100, 102 (2006) ("President McKinley decreed that the entire island would be considered a naval station, ruled by an officer with absolute power.").

94. Kinzer, *supra* note 93, at 100.

95. *Id.*

96. Jessica Dweck, *Why Are We in Guam?*, SLATE (Mar. 23, 2010, 5:33 PM), https://bit.ly/3AGL9kW.

97. *See* Blaine Harden, *On Guam, Planned Marine Base Raises Anger, Infrastructure Concerns*, WASH. POST (Mar. 22, 2010), https://wapo.st/3g63crm.

98. *See id.*

99. *See id.*; *see also* Guam Res. No. 285-30 (COR), 30th Leg., 1st Sess. (2009) (enacted) ("[T]he Department of Defense currently possesses forty thousand (40,000) acres, constituting 27.21 percent of the island's land mass.").

100. *See* Guam Res. No. 285-30 (COR), 30th Leg., 1st Sess. (2009) (enacted) ("This left the Navy and Air Force in direct control of about forty-nine thousand six hundred (49,600) acres, *or* over thirty-six percent (36%) of the island.").

were overwhelmingly either uncompensated or inadequately compensated.[101]

U.S. military control of land in Guam began before World War II, when occupying U.S. forces controlled more than one-third of the island.[102] There has since been a long history of belated and minimal attempts at redress.[103] In terms of property, the attempt at post-hoc legality began in 1945 with the Guam Meritorious Claims Act.[104] The Act provided for the settlement of property claims through the Secretary of the Navy, who had the power to adjudicate and settle claims, and set the statute of limitations on claims at one year.[105] Additionally, the military's authority to grant claims was quite limited because claims over $5,000 had to be sent directly to Congress.[106]

The process provided for by the Guam Meritorious Claims Act did not proceed satisfactorily for a variety of reasons, including both the short statute of limitations and the referral of claims over $5,000 to Congress. By 1947, United States Navy Secretary James Forrestal appointed a civilian commission, the Hopkins Commission, to study this problem,

101. *See id.* (summarizing the history of takings in which just compensation was not given and explaining that in some cases when compensation was given, such compensation "was inadequate, due in part to a lack of proper land valuation . . . amounting to only pennies on the dollar for the actual value of the land").

102. *See id.*

103. Another act of takings by the U.S. government in Guam involved the government's cancellation of the reparations claims of residents of Guam from World War II. The 1951 peace treaty between Japan and the U.S. forgave Japan for any responsibility to pay reparations to residents of Guam for the atrocities that took place during the Japanese occupation (including forced labor, internment, rape, injury, and death). Residents of Guam later found that the "treaty effectively prevented Guam from suing Japan for damages." Anita Hofschneider, *Guam Residents Compensated for War Atrocities Decades Later*, ABC NEWS (Feb. 27, 2020), https://abcn.ws/3o6CZgz. Payments of $10,000–$25,000 were authorized in 2016. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1704, 130 Stat. 2000, 2644 (2016). The process for authorizing these payments had taken decades of work, including another fifteen years after hearings were held in the U.S. Senate in 2001. *See, e.g.*, *Guam War Claims Review Commission; And Guam Income Tax: Hearing on H.R. 308 and H.R. 309 Before the S. Comm. on Energy & Nat. Res.*, 107th Cong. 1 (2001). This was only a small part of what had been a decades-long fight to gain some compensation from the U.S. government.
Most of those reparations claims come from the Chamorro people, the indigenous population of Guam. But in a way, this compensation does not come from the U.S. at all. "The claims are to be funded with so-called Section 30 money, federal taxes that are already remitted to Guam and typically added to its general fund. The program is a compromise after decades of failed attempts to get more expansive compensation supported by both Congress and the people of Guam." Hofschneider, *supra* note 103.

104. *See* DON YOUNG, GUAM WAR CLAIMS REVIEW COMMISSION ACT, H.R. REP. NO. 106-815, at 2 (2000) ("On November 15, 1945, the Guam Meritorious Claims Act (Public Law 79-224) authorized the Secretary of the Navy to adjudicate and settle claims . . . for property damage occurring on Guam during the occupation of Japanese forces.").

105. *See id.*

106. *See id.* ("Certification of claims in excess of $5,000 or any claims for personal injury or death were to be forwarded to Congress.").

among others.[107] The Hopkins Commission Report described the claims process as proceeding "slowly" and advised "that immediate steps should be taken to hasten this process and to remove unsound and unfair distinctions in the allowance for claims."[108] The report concluded that the referral to Congress delayed claims,[109] meaning that desperate landowners "offered or agreed to reduce their claim to below $5,000 and accept the loss above that amount, in order to receive money for much-needed personal rehabilitation."[110] Eventually, in 1981, former landowners brought a class action suit against the U.S. regarding the post-World War II condemnations, which was ultimately settled.[111]

Meanwhile, as claims for uncompensated takings continued, the Navy Department expanded its land ownership in Guam and, from the perspective of the Guam Legislature, continued the trend of unconstitutional takings. "[C]ompensation was inadequate, due in part to a lack of proper valuation in the largely agrarian island, amounting to only pennies on the dollar for the actual value of the land."[112] Between 1947 and 1950, additional "large pieces of land were taken" for military facilities.[113] Finally, just before the Organic Act went into effect in 1950—making the local indigenous population American citizens—"without consultation with Guam officials *or* owners of [twenty-two] leased properties, the new civilian Governor, Carlton Skinner, signed a quitclaim deed . . . whereby the Government of Guam transferred all condemned property to the United States of America 'for its own use.'"[114] After this transfer, the U.S. military had "direct control of about forty-nine thousand six hundred (49,600) acres, or over thirty-six percent (36%) of the island."[115]

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107. *See id.*

108. *Id.*

109. Notably, the report concluded that the referral of claims to Congress was a needless safeguard. "The Report also stated that officials of the Naval Claims Commission testified to the basic honesty and fairness of the Guamanians in presenting their claims, that review in Washington of claims between $5,000 and $10,000 did not seem to serve any useful purpose, and that sufficient reliance and trust should be placed with the Naval authorities in Guam to safeguard the national interest." H.R. REP. NO. 106-815, at 2 (2000).

110. *Id.*

111. *See In re* Guam Land Cases, No. 88-15615, 1992 U.S. App. LEXIS 17739, at *1 (9th Cir. July 23, 1992) (discussing the history of the class action).

112. *See* Guam Res. No. 285-30 (COR), 30th Leg., 1st Sess., at 4 (2009) (enacted).

113. *See id.* at 5.

114. *See id.* at 5–6.

115. *See* Guam Res. No. 285-30 (COR), 30th Leg., 1st Sess., at 6 (2009) (enacted). In the 1990s, when the military was declaring some land as unneeded or "excess," rather than returning land to Guam or to the original owners of the land, the military transferred land to the U.S. Fish and Wildlife Service without advance notice. *Id.* at 6–7. Subsequent to the outcry over this incident, the military directly returned some small parcels to the original owners or their families. *See Guam Families Weep as Military Returns Land*, PAC. DAILY NEWS (May 21, 2003) (on file with author).

In the twenty-first century, Guam faces yet another military buildup and the associated threat to local land ownership[116]—primarily as a response to deepening concerns over U.S.-China relations.[117] As of 2006, the U.S. military announced plans for a substantial buildup in Guam and began preparing the necessary documents required of a federal agency for major federal action.[118]

In 2010, the Legislature of Guam passed a resolution opposing the further U.S. control of island lands.[119] The resolution concluded that, "it appears that the federal government has no appreciation for the history of [f]ederal land takings in Guam, *or* the importance of land to the people of Guam."[120] The resolution further explained, "the history of land takings and the importance of land in the local culture of a tiny island have resulted in a significant sensitivity to [f]ederal land takings on the part of the local people."[121]

A former resident of Guam, Koohan Paik, wrote about the changes happening as of 2010:

> I returned to Guam for a month-long visit with old friends this past November. I was stunned to find the forests of my childhood being replaced by tarmac at an alarming rate; the remaining wild beaches and valleys being surveyed as potential live-fire shooting ranges; and an enormous, magnificently rich coral reef slated for dredging in order to build a port for the Navy's largest aircraft carrier.[122]

Mr. Paik continued,

> I witnessed the rage and hurt, exploding suddenly--and so unexpectedly--from the Chamorro people and other island residents, who have had no say in the planning of cataclysmic changes that will

116. Notably, in the 1990s, with the closure of bases across the U.S., Guam residents hoped for the return of federal lands and created a mechanism for doing so equitably—the Guam Ancestral Lands Commission. *See* 21 GUAM CODE ANN. § 80103 (2020). A very small amount of land may be returned in the current climate of military buildup. *See* Anumita Kaur, *Navy Identifies 210 Acres of Excess Federal Land to Return to Govguam*, PAC. DAILY NEWS (Apr. 1, 2021), https://bit.ly/3obM4Vw.

117. *See* Mar-Vic Cagurangan & Alex Rhowuniong, *Operational Buildup: Guam Is at the Center of US Military's Indo-Pacific Strategy Amid Beijing's*, PAC. ISLAND TIMES (Aug. 8, 2020), https://bit.ly/35CXeMJ ("The U.S. military is accelerating its operational tempo in the Indo-Pacific region — with Guam as its showcase — to send a signal for deterrence amid China's growing aggression in its peripheries.").

118. *See* Tiara R. Na'puti & Michael Lujan Bevacqua, *Militarization and Resistance from Guåhan: Protecting and Defending Pågat*, 67 AMERICAN Q. 837, 845 (2015); *see also* Tinian Women Ass'n v. U.S. Dep't of the Navy, 976 F.3d 832, 835–36 (9th Cir. 2020) (explaining the timeline of preparations for troop relocation to Guam from 2007–2010).

119. *See* Guam Res. No. 285-30 (COR), 30th Leg., 1st Sess., at 3 (2009) (enacted).

120. *Id.*

121. *Id.*

122. Koohan Paik, *Living at the 'Tip of the Spear*,' NATION (Apr. 15, 2010), https://bit.ly/3ATGMTN.

> turn their homeland into an overcrowded waste dump for the creation of the hemisphere's pre-eminent military fortress. My friends told me it's all part of what's called the Guam Buildup.[123]

Such massive military enterprises also create collateral damage—the kind of damage that can impact both property values and residents' everyday lives. One of the primary concerns on the tiny island is that "the construction of a new Marine Corps base will overwhelm the island's already inadequate water and sewage systems, as well as its port, power grid, hospital, highways[,] and social services."[124] Even the Environmental Protection Agency (EPA) challenged the military regarding these plans, which could overwhelm the water and sewer systems of the island.[125] Potential water shortages in Guam would "fall disproportionately on a low income medically underserved population."[126] The Government Accountability Office agreed with the EPA, finding that the proposed military buildup would "substantially" burden infrastructure generally.[127] To understand the infrastructure burden another way, consider the population of the tiny island, which was trying to figure out whether it had "the carrying capacity to absorb a [fifty] percent population surge."[128]

By September 2017, Governor of Guam, Eddie Calvo, asked for military construction to stop, citing the unavailability of labor for Guam businesses.[129] Local businesses were forced to file suit due to a labor shortage, and Calvo concluded that he could "no longer . . . support the military buildup as a result."[130]

The issue of military buildup remains a live one. As of late 2020, the U.S. Navy planned to relocate approximately 5,000 troops to Guam.[131] The location of the tiny island continues to be the paramount motivation as Guam remains "the tip of the U.S. military's spear" and thus the "enemy's default target."[132] "The Indo-Pacific remains the most consequential region in the world[,] and it is the priority theater for the U.S. Department

123. *Id*.
124. *See* Harden, *supra* note 97.
125. *See id.*
126. *Id.*
127. *See id.*
128. Paik, *supra* note 122.
129. *See* John I. Borja, *Gov. Calvo to U.S.: Stop and Re-Evaluate Military Buildup*, PAC. DAILY NEWS (Sept. 29, 2017), https://bit.ly/3IRXbuD.
130. *Id.*
131. *See* Kevin Knodell, *Japan is Paying for New U.S. Military Facilities in Guam and the CNMI. Here's Why*, HONOLULU CIVIL BEAT (Nov. 1, 2020), https://bit.ly/3IPTWE7 (summarizing the Defense Policy Review Initiative, "an agreement that would relocate thousands of U.S. Marines from Japan and spread them to bases across the Pacific").
132. *See* Cagurangan & Rhowuniong, *supra* note 117; *see also* Mike Cohen, *Guam: Where The Next War Begins?*, PAC. ISLAND TIMES (Aug. 1, 2020), https://bit.ly/3g8RPz3 (arguing that if conflict between China and the U.S. is not resolved, it will lead to hostilities first known and felt by "Guam and the Commonwealth of the Northern Marianas Islands").

of Defense," according to General Charles Q. Brown Jr., commander of the Pacific Air Forces.[133]

In theory, and in response to local outrage against federal land control, the U.S. military has now adopted a "net negative strategy" for Guam. This strategy essentially means that "in line with their buildup plans, the military is required to make efficient use of land already owned by the Department of Defense."[134]

However, it is difficult to take the U.S. military's "net negative" commitment seriously in some ways. Such hesitancy is particularly true in light of the establishment and significant expansion of the Pacific Remote Islands Marine National Monument. By January 6, 2009, President George W. Bush established the Pacific Remote Islands Marine National Monument under the authority of the Antiquities Act of 1906,[135] which designated almost 87,000 square miles of islands and marine environments as preserved.[136] Accordingly, it is not surprising that the Guam legislature issued its scathing resolution on the U.S. government and land takings after the announcement of the National Monument. The resolution demanded that the U.S. government deal "in good faith with the official representatives of the people of Guam"[137] and "declar[ed] that condemnation *SHALL NOT* be a tool available to the federal government, either directly *or* through the use of intimidation."[138] Importantly, the legislature chose this moment to "recognize and memorialize the many years of injustice and mistreatment of the people of Guam, as reflected in the foregoing history of [f]ederal land takings."[139] One reason for the peak of outrage at this moment was the Monument's centralization of federal control. In short, the Monument "limits access to traditional fishing grounds, [and] removes original landowners[.]"[140] Theoretically, the Monument's presidential proclamation acknowledges that it is "subject to valid existing rights," but it also gives "[w]arning . . . to all unauthorized persons not to appropriate, excavate, injure, destroy, or remove any feature of this Monument Expansion and not to locate or settle upon any lands thereof."[141] In light of those warnings, it seems unclear whether the federal government would respect traditional fishing rights or other ownership claims.

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133. Cagurangan & Rhowuniong, *supra* note 117.

134. Mary Camacho Torres, *Advocate for Deliberate Land Strategies and Procedures*, GUAM DAILY POST (Feb. 18, 2016), https://bit.ly/3IPUFFl.

135. *See* Proclamation No. 8336, 3 C.F.R. § 100.8 (2010).

136. *See id.*

137. Guam Res. No. 285-30 (COR), 30th Leg., 1st Sess., at 8 (2009) (enacted).

138. *Id.* at 8–9.

139. *Id.* at 9.

140. Na'puti & Bevacqua, *supra* note 118, at 837.

141. Proclamation No. 9173, 3 C.F.R. § 100.115 (2015).

Moreover, in 2014, President Barack Obama expanded the Pacific Remote Islands Marine National Monument,[142] creating the largest marine reserve in the world.[143] The new bounds are approximately 495,000 square miles.[144]

Notably, both the establishment and expansion of the Monument took place precisely at the moment that the U.S. was pursuing a new military buildup in Guam. While the Monument might, on its face, appear to be entirely a conservation measure, a closer reading of the documents calls these motives into question. Although both presidential proclamations speak to the extraordinary marine ecosystems in the region, both also leave ample room for military activities. The proclamations note that "[t]he prohibitions required . . . shall not apply to activities and exercises of the Armed Forces[.]"[145] As a result of both the timing of the Monument's establishment and the significant room for military activities within the preserve, it is difficult to view the Monument as not being a part of the larger federal plan for military buildup within the region. The Monument simply has conservation bonuses that make it more publicly palatable.

With little recourse on the establishment of the Monument, the current emphasis in Guam is on asking Congress and the military to designate lands as "excess" and to return those lands either to the government of Guam or directly to the original owners and/or their families. In 2011, the Guam Economic Development Authority created a survey of lands, identifying "potentially releasable federal land."[146] In June 2017, the Navy released a report on "Net Negative" status within Guam, noting that the Navy specifically still owns more than 36,000 acres of land.[147] Under the 2019 National Defense Authorization Act, the Navy must continue to inventory its lands within Guam and label unused and unneeded land as "excess" land, which may be returned to the territorial government.[148] In June 2019, the Guam Economic Development Authority updated its survey, suggesting another contingent of land that might be designated as "excess."[149] However, this entire process depends on the Navy designating land as unnecessary while it is simultaneously

142. *See id.*

143. *See* U.S. FISH & WILDLIFE SERV., PACIFIC REMOTE ISLANDS MARINE NATIONAL MONUMENT—ABOUT THE MONUMENT (2019), https://bit.ly/3obOTpP.

144. *See* U.S. DEP'T OF COM., PACIFIC REMOTE ISLANDS MARINE NATIONAL MONUMENT (2020), https://bit.ly/3rcpoGv.

145. Proclamation No. 8336, 3 C.F.R. § 100.8 (2010); Proclamation No. 9173, 3 C.F.R. § 100.115 (2015).

146. GUAM ECON. DEV. AUTH., REPORT, POTENTIALLY RELEASABLE FEDERAL LANDS 2 (2019), https://bit.ly/32JysJC.

147. *See id.*

148. *See* Guam Omnibus Opportunities Act, 40 U.S.C. § 521 (2002) (authorizing the return of land to the Government of Guam).

149. *See* GUAM ECON. DEV. AUTH., *supra* note 146.

challenged with absorbing thousands of troops from other Asian-Pacific locations.

2. Fighting Indigenous Land Control

In addition to the general history of takings, the U.S. has also specifically impeded Guam's attempt to reposition land in the hands of members of the indigenous community in recent years. Guam established the Chamorro Land Trust, which holds public lands in trust for the benefit of the Chamorros, the local indigenous peoples, who may apply for long-term leases (both residential and agricultural).[150] The land trust is operated locally via a commission with five members appointed by the Governor of Guam and confirmed by the local legislature.[151] The trust was designed to benefit those who are "native Chamorro," which was defined as "any person who the Commission determines to be of at least one-fourth part of the blood of any person who inhabited the island prior to 1898."[152]

In September 2017, the United States filed a federal action alleging that the land trust violated Title VIII of the Civil Rights Act of 1968 because it discriminated against non-Chamorros.[153] This filing was rather ironic given that the land trust was directly responsive to the history of U.S. government actions concerning land and the indigenous people in Guam.[154]

The district court found that the facts were generally undisputed. "During and after World War II, the United States seized land on Guam, mostly from Guam's native inhabitants, the Chamorro people . . . [and] provided little or no compensation[.]"[155] Additionally, the issue was difficult to address as the U.S. ensured that "documentation underlying these seizures was sparse or nonexistent."[156] A portion of the seized land was returned to Guam in 1952, and the Chamorro Land Trust Act was

150. *See* Chamorro Land Trust Act, 21 GUAM CODE ANN., ch. 75 (2021).

151. *See* 21 GUAM CODE ANN. § 75102(a) (2021) (establishing the composition, chairman, and compensation for the Chamorro Land Trust).

152. Guam Pub. L. No. 12-226 (1975).

153. *See* United States v. Gov't of Guam, No. 17-00113, 2018 U.S. Dist. LEXIS 215308, at *2 (D. Guam Dec. 21, 2018) ("[T]he United States seeks to stop Guam from continuing what the United States describes as racial discrimination through the implementation of the Chamorro Land Trust Act.").

154. *See id.* (explaining that the U.S. government maintained that it was not clear that the commission's beneficiaries were the individuals whose land had been confiscated without compensation and whether the commission was actually benefiting those individuals).

155. *Id.* at *2–3.

156. *See id.* at *3.

designed to benefit the Chamorro people who had previously been deprived of their lands.[157]

Notably, the U.S. initially sought to obtain not only a change in policy but also money damages from the defendants (Guam and the Chamorro Land Trust).[158] The suit was settled at the end of May 2020, with Guam agreeing to change the relevant rules and regulations and promising not to "discriminate" based on "race or national origin" in future leases.[159] Subsequently, the U.S. sought to vacate the court's previous orders finding that it could not pursue money damages.[160] The ultimate settlement—a direct result of the federal government's actions—means that the Chamorro Land Trust can no longer specifically benefit the Chamorro people.[161]

3. Local Uncompensated Takings

Lacking a sense of federal constitutional standards, the local government of Guam emulated the federal disregard for land rights for decades. Thus, post-1945, there is a long history of takings of property by the local government of Guam without any compensation. The Guam Legislature has recently recognized this problematic history in a public law condemning the practice of taking without compensation:

> [S]ince 1945, it has also been the practice of the government to take private property without any compensation or compensatory exchange when that land has been needed for such purposes as public roads, access to property, or easements for public utilities, the construction of public schools, the construction of water wells, and similar projects benefitting the public at large. This practice must cease immediately because it is contrary to the principles of eminent domain, justice, and constitutional guarantees of property rights.[162]

This public law responded to an audit by the Inspector General, Department of the Interior that found approximately 73.3 million dollars

157. *See id.* ("[T]he language returning that land expressly recognized that Guam's inhabitants had had land taken from them and were entitled to consideration of their needs.").

158. *See id.* at *2 (holding that relief was limited to declaratory and injunctive remedies and refusing money damages as an available remedy).

159. *See* United States v. Gov't of Guam, Civil No. 17-cv-00113, Settlement Agreement, at 4 (2020), https://bit.ly/3sapA8C.

160. *See* United States v. Guam, No. 17-00113, 2020 U.S. Dist. LEXIS 126553, at *1–2 (D. Guam July 17, 2020) (denying the motion to vacate and retaining the holding that the U.S. cannot pursue money damages).

161. *See* Steve Limtiaco, *Land Trust Discrimination Settlement Hinges on Action by Guam Lawmakers*, PAC. DAILY NEWS (June 5, 2020), https://bit.ly/3ukBi34 (explaining the settlement agreement).

162. Guam Pub. L. 22-73 (1994).

"in excess costs to properly acquire title to the rights-of-way which have been taken by the various departments of government."[163] The public law recognizes the Audit Report's finding that "property owners were not compensated for 375,000 square meters of land taken over forty years ago, for 12,603 square meters taken since 1988, and for 28,705 square meters taken on a temporary basis."[164] Notably, these findings do not represent the total amount of uncompensated land because "[t]hese figures only represent land taken for various road projects and do not include land taken for easements not affected by the road construction."[165] The Guam public law noted that there was either "no compensation or grossly inadequate compensation . . . given, either in terms of money or by land exchanges."[166] Notably, the Governor of Guam vetoed the act, which later passed by an over-ride.[167] The bill was a response to what Senator Mary Camacho Torres described as takings "without the proper exercise of eminent domain or negotiated transfer."[168] Unfortunately, such errors compounded because landowners remained unaware that their rights were extinguished and often did not understand these rights until statutes of limitations expired.[169]

D. Takings in the Commonwealth of the Northern Mariana Islands

The Commonwealth of the Northern Mariana Islands ("CNMI") has historically had significant issues with unjust takings of land. These issues parallel the history in Guam, creating a striking pattern of federal and local confiscations.

1. The Northern Mariana Islands and the U.S. Military Takings

The relationship between the local government of CNMI and the federal government revolves around the usage of lands within the Territory for military purposes. The decision of what lands the military would occupy was central to the 1973 negotiations that culminated in the formation of the CNMI through a covenant.[170] During these negotiations,

163. *See id.*
164. *Id.*
165. *Id.*
166. *Id.* Additionally, in 2015 a suit alleged that the government of Guam "illegally collected real-property taxes from landowners whose property had been acquired for public use," which, if true, seems nothing more than adding insult to injury. *See* Shawn Raymundo, *Lawsuit Alleges Property Wrongly Taxed*, PAC. DAILY NEWS (June 15, 2015), https://bit.ly/33MsNmu.
167. *See* Guam Pub. L. 22-134 (1994).
168. Mary Camacho Torres, *Advocate for Deliberate Land Strategies and Procedures*, GUAM DAILY POST (Feb. 18, 2016), https://bit.ly/3fQmH7e.
169. *See id.*
170. *See* Arnold H. Liebowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L L. J. 19, 19 n.3 (1980).

mass tracts of land were leased to the federal government for use as military bases and target practice areas.[171] Other areas were set aside for future military developments.[172]

The Covenant Establishing the Commonwealth offered some protections for the Territory against aggressive expansion of the lands in the future, providing that the U.S. must seek to "acquire the minimum area and minimum interest necessary to achieve the purpose for which property is sought and attempt to acquire property by voluntary means before exercising eminent domain."[173] Nevertheless, this requirement has largely failed to be honored in good faith. Instead, this requirement has resulted in a system in which the territorial government has largely conceded that avoiding eminent domain claims from the federal government through proactively leasing the land to them is the most prudent and beneficial path for the Territory.[174]

Tensions escalated, however, with the Pacific-Asian buildup of the twenty-first century. In 2014, the U.S. Navy proposed to take complete control of the island of Pagan. Pagan is currently unoccupied following a volcanic eruption that forced its residents to relocate. Still, previous residents have expressed a desire to reclaim their land.[175] The U.S. Navy sees Pagan as "big enough and isolated enough to train amphibious forces at a necessary scale."[176]

The Pagan plan provoked significant public frustration within the islands. By 2015, residents had mobilized a legislative effort to pass a bill prohibiting the CNMI's Department for Public Lands from entering leases with the U.S. military.[177] This effort ultimately stalled after the Attorney General of CNMI, Edward Manibusan, made it clear that there was no legislative authority to prohibit certain land uses by the U.S. military and that the bill "[could] not prevent the U.S. from taking the land it desires through eminent domain, which could be a far worse outcome for the Commonwealth than if the land were leased."[178]

171. *See id.*

172. *See id.*

173. SPECIAL REPRESENTATIVES OF THE UNITED STATES AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, REPORT TO THE PRESIDENT ON 902 CONSULTATIONS 28 (Jan. 2017) [hereinafter SPECIAL REPRESENTATIVES].

174. *See* Joel D. Pinaroc, *AG: Military Can Still Acquire Lands Using Eminent Domain*, SAIPAN TRIBUNE (June 11, 2015), https://bit.ly/3giUHcM.

175. *See* Steve Limtiaco, *Here's Why Pagan Homestead Applicants Are Having Trouble Getting Permits to Live on Island*, PAC. DAILY NEWS (Aug. 11, 2019), https://bit.ly/3IQAPcU.

176. Grant Newsham, *Mariana Islands – US Military Strategy 'On Hold'*, ASIA PAC. BULL. (Mar. 26, 2018), https://bit.ly/3sGmwS5.

177. *See* Joel D. Pinaroc, *AG: Military Can Still Acquire Lands Using Eminent Domain*, SAIPAN TRIBUNE (June 11, 2015), https://bit.ly/3giUHcM.

178. *Id.*

Subsequently, residents sought 902 consultations, a process by which members of the CNMI government engage with representatives of the federal government to ameliorate disputes and generally reaffirm the territorial relationship.[179] This process concluded in 2017, focusing specifically on the U.S. military and Pagan. During these negotiations, CNMI explicitly clarified their view of the action that "such a proposal is not respectful of the scarcity and special importance of land in the Northern Mariana Islands."[180]

This issue is still developing as the U.S. military continues to envision a future on Pagan. Yet, the situation is iconic in that it demonstrates the land takings pattern in CNMI for the federal government: the threat of eminent domain manifests, and residents move towards appeasement, viewing eminent domain as a more dangerous proposition. But following a prolonged legal battle, a perception still exists both within the military and Territory that the plan will reach fruition in the future.[181] As of April 2019, Navy officials "requested that the Federal Aviation Administration restrict airspace over Tinian because '[t]he commercial airport on Tinian is within three nautical miles of the military lease area where the live-fire range complex will be sited and restricted airspace placed above it.'"[182] In 2020, members of the territorial legislature made clear that "the Department of Defense has not taken the CNMI Joint Military Training proposal off the table, although the CNMI government and the community have expressed their objection."[183] Despite these objections, there have been repeated assurances by the Governor of CNMI, Ralph Torres, that the United States Department of Defense (DOD) and the Territory have "never had a better relationship."[184]

In terms of the specifics of the military plans, the Ninth Circuit rejected the proposed usage of Pagan as the site of massive live-fire war

179. *See* SPECIAL REPRESENTATIVES, *supra* note 173, at i ("Beginning in October 2015, the late CNMI Governor Eloy Inos . . . requested U.S. President Barack Obama initiate the 902 Consultation process.").

180. *Id.* at 35.

181. *See* Rick Perez, *The Marine Corps*, SAIPAN TRIBUNE (May 17, 2021), https://bit.ly/3rvEQxX ("The Marines have long intended to maintain a fundamental enduring presence in our Marianas Islands chain, practicing supply chain logistical work, rotary and fixed-wing aircraft operations, and ground combat training operations across the tactical warfighting spectrum.").

182. Miguel D, *Opinion Regarding House Joint Resolution 21-08*, MARIANAS VARIETY (July 27, 2020), https://bit.ly/3L1c1ku.

183. *Rep. Tina Sablan Questions Proposed New Version of House Resolution on Military Training*, MARIANAS VARIETY (Oct. 25, 2020), https://bit.ly/3Hn1ygR.

184. Ferdie De La Torre, *Torres: CNMI Never Had a Better Relationship with DOD Than Today*, SAIPAN TRIBUNE (Nov. 3, 2020), https://bit.ly/3AQQsyg (referencing the proposed substitute version of House Joint Resolution 21-008, "pertaining to the administration's stance on expanded military activities in the CNMI[,]" to support an improving relationship between the CNMI and the U.S. Department of Defense).

games.[185] Despite this decision, the Navy maintains that the relocation of troops to Guam, and consequently CNMI, is a mandatory requirement under an international agreement with Japan.[186]

Notwithstanding the Governor's reassurances to the DOD, beginning in 2019, steps have been taken to complicate the process of military expansion through a repopulation program for Pagan.[187] Despite the potential for disrupting military plans, such repopulation is being framed as the culmination of a long-term goal of returning people to their ancestral homelands.[188] Regardless, this effort has proven relatively ineffective as legal complications with the homestead repopulation program have resulted in no permanent resettlement as of August 2019.[189] Still, these complications have not hampered the territorial government's ambitions, which include stated goals of building a mayor's office and repairing a runway on the island.[190]

2. Local Uncompensated and Unfairly Compensated Takings

Before the 1990s, the Marianas Public Land Corporation facilitated eminent domain through land exchanges.[191] This land exchange program ended in the early 1990s, in part due to corruption where "the CNMI government vastly underpriced the public lands and traded these lands in return for private lands worth approximately thirty-times less than the public lands."[192] Eminent domain actions still occurred in the 1990s, but payment was often not made. "[A] backlog of over eighty million dollars

185. *See 9th Circuit: No Need to Bomb NMI Islands*, SAIPAN TRIBUNE (Sept. 21, 2020), https://bit.ly/3L4kDXu ("The Ninth Circuit Court of Appeals . . . also pointed out that there is no need to bomb Tinian and Pagan in the name of national security.").

186. *See* Steve Limtiaco, *Those Opposed to Military Training on Tinian, Pagan, Lose Court Appeal*, PAC. DAILY NEWS (Oct. 8, 2020), https://bit.ly/3ufP6vJ ("The appeals court also noted that halting the Guam buildup, as requested, would impact an international agreement between the United States and Japan, which specifically requires the relocation of Marines to Guam.").

187. *See* Steve Limtiaco, *CNMI Will Resettle Island U.S. Military Wants for Training*, PAC. DAILY NEWS (Mar. 10, 2019), https://bit.ly/3L667yK ("[T]he CNMI government last week announced it will resettle the island, which was evacuated in 1981 because of an active volcano, by issuing as many as [eighty-eight] permits for agricultural homesteads.").

188. *See id.* (quoting Governor Ralph Torres, "[w]e look forward to the issuance date and seeing residents return to their ancestral lands").

189. *See* Limitaco, *supra* note 175.

190. *Id.*

191. *See* Blaine Rogers, *Raising the Bar: The Commonwealth of the Northern Mariana Islands, the Public Land Trust, and a Heightened Standard of Fiduciary Duty*, 7 ASIAN-PAC. L. & POL'Y J., June 2006, at 1, 18–20 (providing a brief history of the Marianas Public Land Corporation).

192. GREGG DE BIE, PRIVATE LANDS CONSERVATION IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 56 (Nat. Res. L. Ctr., Univ. Colo. Sch. L. 2004).

in unpaid settlements had strapped the CNMI government by 1999."[193] The result was a number of high-profile cases which ultimately led to a ballooning debt arising from eminent domain claims.

The most significant of these cases involved land taken without compensation by the territorial government in 1993 from Maria Mangabao for road improvement.[194] The Supreme Court of NMI entered judgment in the amount of 18.7 million dollars against the territorial government.[195] Subsequently, the local government filed multiple suits, arguing that the court had no authority to demand the government actually pay out these claims.[196] Ultimately the court determined that it did have the authority to compel payment, and the claims for this single taking were finally resolved in 2017.[197] In 2020, there were 184 pending monetary compensations in CNMI resulting from eminent domain claims for public purposes of varying reasons.[198]

E. Takings in American Samoa: A Unique Territory

Particularly when compared with the other U.S. Territories, American Samoa has a relatively limited and uncontroversial history regarding unjust takings. In American Samoa, most of the land remains in a communal system that is culturally based and controlled mainly via a system of nobility within the Territory's indigenous population.[199] Traditionally, aiga (extended families) "communally own virtually all Samoan land, [and] the matais [chiefs] have authority over which family members work what family land and where the nuclear families within the extended family will live."[200]

This system of ownership and control was affirmed in treaties and policies that date to the 1800s. Most importantly, these land protections

193. *Id.*

194. *See* NMI Judiciary, *NMI Supreme Court Hands Out Ruling in Eminent Domain Case*, SAIPAN TRIBUNE (June 29, 2012), https://bit.ly/348ekS4 (discussing Commonwealth v. Lot No. 353 New G, 9 N. Mar. I. 44 (2012) [hereinafter *Mangabao*]).

195. *See* Ferdie De La Torre, *Court Command Sought for $18.7M Judgment*, SAIPAN TRIBUNE (Jan. 10, 2017), https://bit.ly/3gy38kB.

196. *See* Commonwealth v. Lot No. 218-5 R/W, 9 N. Mar. I. 533, 534 (2016) [hereinafter *Quitugua*].

197. *See id.* at 540.

198. *See* N. MAR. I. DEP'T PUB. LANDS, ANNUAL REPORT (2020), https://bit.ly/3HycQyU.

199. *See* Merrily Stover, *Individual Land Tenure in American Samoa*, 11 CONTEMP. PAC. 69, 74 (1999) ("Most of American Samoa's land is administered as communal land."); *see also* Ian Falefuafua Tapu, Comment, *Who Really is a Noble?: The Constitutionality of American Samoa's Matai System*, 24 UCLA ASIAN PAC. AM. L.J. 61, 79 (2020) (explaining that the *matai* system is both constitutionally and statutorily protected).

200. Tuaua v. United States, 788 F.3d 300, 309 (D.C. Cir. 2015) (quoting King v. Morton, 520 F.2d 1140, 1159 (D.C. Cir. 1975)).

were included within the founding documents of American Samoa as a U.S. Territory.[201] The first instrument of cession specifically provided:

> The Government of the United States of America shall respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District, but if the said Government shall require any land or any other thing for Government uses, the Government may take the same upon payment of a fair consideration for the land or other thing to those who may be deprived of their property on account of the desire of the Government.[202]

The second instrument of cession, for Manu'a, signed in 1904, similarly provided: "It is intended and claimed by [t]hese [p]resents that . . . the rights of the Chiefs in each village and of all people concerning their property according to their custom shall be recognized."[203] These provisions have continued to secure the local land rights systems, even against eminent domain.

Unlike in Guam, where the U.S. government challenged a program specifically meant to protect indigenous ownership, American Samoa has maintained its system despite legal challenges. A straightforward explanation for this is that, unlike residents of the other Territories, American Samoans are considered non-citizen U.S. nationals.[204] A recent case challenged this position, arguing that American Samoans have "been citizens from the start."[205] In this case, the district court held for the plaintiffs, but the Tenth Circuit reversed.[206] Part of the Tenth Circuit's reasoning was that American Samoa still maintains a system of indigenous

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201. *See* Stover, *supra* note 199, at 75 ("The current categories of land in American Samoa have their roots in treaty and policies of the nineteenth century."). The law ratifying the American Samoan cessions of land specifically stated, "[t]he existing laws of the United States relative to public lands shall not apply to such lands in the said islands of eastern Samoa; but the Congress of the United States shall enact special laws for their management and disposition[.]" 48 U.S.C. § 1661(b).

202. DEP'T STATE, OFF. HISTORIAN, INSTRUMENT OF CESSION SIGNED JULY 14, 1904 BY THE REPRESENTATIVES OF THE PEOPLE OF THE ISLANDS OF MANUA (1904), https://bit.ly/3L1CSwZ.

203. DEP'T STATE, OFF. HISTORIAN, INSTRUMENT OF CESSION SIGNED ON APRIL 17, 1900, BY THE REPRESENTATIVES OF THE PEOPLE OF TUTUILA (1900), https://bit.ly/32VT9SU.

204. *See* Fitisemanu v. United States, 1 F.4th 862, 865 (10th Cir. 2021) ("American Samoans are instead designated by statute 'nationals, but not citizens, of the United States.'" (quoting 8 U.S.C. § 1408)).

205. *Id.* at 864 ("Plaintiffs, three citizens of American Samoa, asked the district court in Utah to . . . declare that American Samoans have been citizens from the start."). The question before the court was, most simply put, "whether birth in American Samoa constitutes birth within the United States for purposes of the Fourteenth Amendment." *Id.* at 872. In answering this question, the Tenth Circuit noted that when tribal leaders ceded sovereignty, the relevant documents "were silent on whether American Samoans were, or ever would be, American citizens." *Id.* at 866.

206. *See id.* at 864–65.

nobility and land control that would be "threatened if birthright citizenship were imposed."[207] The court acknowledged that the current system is based on "communally owned lands"[208] and that there are currently "racial restrictions on land ownership requiring landowners to be at least 50% American Samoan."[209] The Tenth Circuit concluded that "the Insular Cases' framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution. This same flexibility permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course."[210]

Local customs and traditions matter in the context of land ownership and are the principal concerns with respect to citizenship. The D.C. Circuit Court of Appeals also considered the issue of citizenship in American Samoa in the 2015 case of *Tuaua v. United States*.[211] The court concluded that "[d]espite American Samoa's lengthy relationship with the United States, the American Samoan people have not formed a collective consensus in favor of United States citizenship."[212] The court recognized, "[i]n part this reluctance stems from unique kinship practices and social structures inherent to the traditional Samoan way of life, including those related to the Samoan system of communal land ownership."[213] The court noted that "[r]epresentatives of the American Samoan people have long expressed concern that the extension of United States citizenship to the [T]erritory could potentially undermine these aspects of the Samoan way of life."[214] In particular, granting "citizenship could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment, imperiling American Samoa's traditional, racially-based land alienation rules."[215]

As a result of American Samoa's unique system, the most controversial dispute over U.S. government takings only developed in recent years. This dispute arose from federal control of extensive portions of the seas surrounding American Samoa.[216] A 2002 rule ejected large

207. *Id.* at 866.

208. *Id.* (quoting LINE-NOUE MEMEA KRUSE, THE PACIFIC INSULAR CASE OF AMERICAN SAMOA 2 (2018) (internal quotations omitted)).

209. *Id.* at 866–67 (citing AM. SAMOA CODE ANN. § 37.0204(a)–(b)).

210. *Id.* at 870–71.

211. Tuaua v. United States, 788 F.3d 300, 301 (D.C. Cir. 2015).

212. *Id.* at 309.

213. *Id.*

214. *Id.* at 310.

215. *Id.*

216. *See* Terr. Of Am. Sam. v. Nat'l Marine Fisheries Serv., 822 Fed. Appx. 650, 651–652 (9th Cir. 2020) (challenging the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1891(d) and its "impact on fishing communities, the probable effects of increased large vessel longline fishing, and the availability of fish").

commercial fishing vessels from the area to "prevent the potential for gear conflicts and catch competition."[217] This 2002 rule was adopted because "[l]ocal fishermen and associated fishing communities depend[ed] on this fishery not only for food, income, and employment, but also for the preservation of their Samoan culture."[218]

In February 2016, the National Marine Fisheries Service proposed a new rule that would essentially revoke the 2002 protections of indigenous fishing rights in the waters surrounding American Samoa.[219] The proposed rule created outrage with fears that the fish population would be dramatically reduced, that there would be a destruction of coral reef ecosystem resources, and that the rule would be detrimental to recreational fishery and the growing sportfish tourism industry.[220] The most significant complaint, which would form the basis of the territorial government's legal challenge to this rule, was that the proposed rule ignored the Deeds of Cession, which had protected local property rights.[221]

Upon the new rule's finalization, the Territory of Samoa filed a civil complaint against the National Marine Fisheries Service.[222] The Government of American Samoa's position was that the Deeds of Cession "entrust[ed] control of their lands, including the vast bodies of water surrounding those lands, to the United States Government – in exchange for protection and rights guaranteed by the United States."[223] Under these Deeds of Cession, more than 28,000 square miles of property were ceded,

217. Nearshore Area Closures Around American Samoa by Vessels More than 50 Feet in Length, 67 Fed. Reg. 4,369 (Jan. 30, 2002).

218. *Id*.

219. *See* Pacific Island Pelagic Fisheries; Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area, 81 Fed. Reg. 5,619, 5,619 (Feb. 3, 2016) (to be codified at 50 C.F.R. pt. 665) ("To address the current fishery conditions, the Council recommended that NMFS allow federally permitted U.S. longline vessels 50 ft and longer to fish in portions of the LVPA [the American Samoa Large Vessel Prohibited Area].").

220. *See id.* at 5,621 ("Several commenters said that longline fishing has dramatically reduced fish populations around American Samoa and that this action would result in overfishing and deplete fish stocks.").

221. *See id.* at 5,623 ("[I]n the Deed of Cession . . . the United States promised to protect the lands, . . . and the waters surrounding the islands, and . . . all the science and environmental analysis should not supersede the rights of the people of these islands.").

222. The territorial government's argument was that the rule violated the Deeds of Cession of American Samoa, and consequently was in violation of the Magnussen-Stevens Fishery Conservation and Management Act ("MSA"). *See* Pl.'s Compl. At ¶ 6, Terr. of Am. Sam. v. Nat'l Marine Fisheries Serv., 822 Fed. Appx. 650 (9th Cir. 2020) (No. 16-00095). The MSA has several stated purposes including "to help conserve and manage fishery resources, and promote domestic commercial and recreational fishing." *Id.* at ¶ 2 (citing 16 U.S.C. § 1801). Important to the argument of the territorial government was that the MSA contains a protection stating that any plan, rule, or regulation must also be consistent with all other applicable laws. *See id.* at ¶ 46 (citing 16 U.S.C. §1853(a)(1)(C)).

223. *Id*. at ¶ 17.

including the Territory's surrounding waters.[224] The territorial government pointed to two paragraphs in the Deeds containing promises from the federal government to recognize and respect the property of the island's people.[225] In its petition, American Samoa asserted that the new rule "effectively eliminates alia [small boat] and cultural fishing practices."[226]

The Territorial Government of American Samoa initially prevailed in 2017.[227] The court concluded that the "American Samoans' right to use their 'property' to continue their customary fishing practices is reserved by implication in the Deeds of Cession."[228] On appeal, however, the Ninth Circuit reversed.[229] American Samoa subsequently petitioned for a writ of certiorari, placing a particular focus upon the historical reliance of the Deeds of Cession as the "predicate for its longstanding relationship with the U.S."[230] In this writ, American Samoa asserted that the Ninth Circuit decision was "out of line with [the Supreme Court's] recognition that the United States is obligated to keep its promises to its indigenous inhabitants."[231] Ultimately, on June 21, 2021, the Supreme Court denied the petition.[232] As a result of this denial, the 2016 rule was reinstated in July 2021.[233]

F. Takings in the U.S. Virgin Islands

The history of takings within the U.S. Virgin Islands focuses predominantly on the establishment of the Virgin Islands National Park. Public Law 925 established the park in 1956 on the Island of St. John.[234] Section 2(c) permitted the acceptance of donations of land to create the park, under which Laurance Rockefeller donated extensive land holdings for the project.[235] By the early 1960s, the citizens of St. John faced increasing threats of being forced off the island entirely as government officials sought to expand the National Park through eminent domain. This

224. *See id.* at ¶ 21.
225. *See id.* at ¶ 55.
226. *Id.*
227. *See* Terr. of Am. Sam. v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 LEXIS 39470, at *45 (D. Haw. 2017) ("[T]he Deeds of Cession require the United States to preserve American Samoan cultural fishing practices.").
228. *Id*. at *44.
229. *See Terr. of Am. Sam*., 822 Fed. Appx. at 652.
230. Writ. Of Cert. at 17, Terr. Of Am. Sam. v. Nat'l Marine Fisheries Serv., 822 Fed. Appx. 650 (9th Cir. 2020).
231. *Id.* at 20.
232. *See* Terr. Of Am. Sam., v. Nat'l Marine Fisheries Serv., 141 S. Ct. 2797 (2021).
233. *See* Pacific Island Fisheries; Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area; Court Order, 86 Fed. Reg. 36,239, 36,240 (July 9, 2021).
234. *See* Act of August 2, 1956, Pub. L. No. 84-925, 70 Stat. 940 (establishing Virgin Islands National Park).
235. *See* 87 CONG. REC. 19,732 (1962) (statement by Rep. John Saylor).

effort began in earnest in August 1961 when a bill to alter the boundaries of the Virgin Islands National Park was introduced to the Senate Committee on Interior and Insular Affairs.[236] Senate Bill 2429 would not ultimately pass until the following year, with a committee amendment that proved controversial.[237] The bill not only sought to further define expansion points for the park but also "authorized [the Secretary of the Interior] to acquire additional lands, waters, and interests by 'condemnation or exchange.'"[238]

The bill was not as uniformly well received in the House, primarily due to Representative James Rutherford of Texas, who ensured a House debate would occur on the bill.[239] Rutherford had traveled to the Virgin Islands and consulted with the citizens of St. John, who vehemently opposed the further use of eminent domain to expand the park.[240] Proponents portrayed this expansion through condemnation as "a very common provision in . . . national parks legislation."[241] Additionally, supporters argued that such expansion was a mere "round[ing] out" of the park, which had been authorized at its founding to be 9,500 acres but had only occupied 6,200 acres as of 1962.[242] Opponents viewed this bill as having been "rushed through under a cloud of secrecy,"[243] and alleged "that the Virgin Islands National Park is somehow or other a private preserve of Mr. Laurance Rockefeller, his friends[,] and associates."[244] Rockefeller represents a complicated figure in this dispute in that he expressed his opposition to the condemnation; however, press from the Virgin Islands "contended that it was he who originally sparked the bill, including the condemnation feature."[245]

Representative Jack Westland from Washington State, another prominent supporter of the Virgin Islanders, argued that the bill was not in keeping with self-determination for the citizens of St. John.[246] Westland saw eminent domain—as contrasted with voluntary sales—as incompatible with self-determination. In Westland's words, self-determination required that "whether these other acres are acquired or not is up to the judgment of the people who own the properties."[247]

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236. *See* 87 CONG. REC. 16,020 (1961).
237. *See* 87 CONG. REC. 12,244 (1962).
238. *Id.* at 12,245.
239. *See* 87 CONG. REC. 19,732 (1962) (statement by Rep. John Saylor).
240. *See id.*
241. 87 CONG. REC. 19,731 (1962) (statement of Rep. Wayne Aspinall).
242. *See id.*
243. *Id.*
244. 87 CONG. REC. 19,734 (1962) (statement of Rep. James Rutherford).
245. *Virgin Islanders Hail Park Defeat: Extra Land Was Sought for Facility on St. John*, N.Y. TIMES, Sept. 30, 1962, at 50.
246. *See* 87 CONG. REC. 19,735 (1962) (statement of Rep. Jack Westland).
247. *Id*.

Ultimately, the bill passed the House with an amendment proposed by Congressman Rutherford, which struck the controversial "or by condemnation or exchange" clause.[248] The Senate passed the bill with the House Amendments, although there was still some discomfort with the lack of the provision, and it was suggested that a future proposal should amend the bill to permit expropriation.[249] The bill's passage without a condemnation clause was cause for celebration for St. John property owners.[250]

G. Takings and Political Intervention

An obvious route to avoid land takings is seeking political intervention—petitioning a higher authority that can influence or cancel a planned project. However, such interventions are less likely to happen in the U.S. Territories. First, some populations are more likely to focus on day-to-day issues rather than political battles. For example, in Guam, "a third of the population receives food stamps[,] and about [twenty-five] percent lives below the U.S. poverty level."[251] Consequently, residents have limited persuasive power. As journalist Blaine Harden observed in the Washington Post, "as a [T]erritory, and without a vote in Congress, the island has negligible lobbying power and no legal means of halting the buildup."[252] In the words of Koohan Paik, who spent much of his childhood in Guam, "its people have no legal route to appeal any decisions made in Washington."[253] It is fair to say that Guam has no input in significant decisions concerning its future—such as a decision to move 8,000 marines there or to expand the Pacific military buildup.[254]

Such is the common plight of the Territories, which lack voting representation within Congress. As a result, judicial forums provide a limited mechanism for addressing irregularities or illegalities in the context of eminent domain.

II. EMINENT DOMAIN CARRIES UNIQUE RISKS FOR ABUSE AND THOSE RISKS ARE AMPLIFIED IN COMMUNITIES WITH LIMITED POLITICAL POWER SUCH AS THE U.S. TERRITORIES AND PREDOMINANTLY MINORITY COMMUNITIES

Part II explains the unique risks of eminent domain for communities with limited political power, including the U.S. Territories and

248. *See* 87 CONG. REC. 19,736 (1962).
249. *See* 87 CONG. REC. 20,499 (1962) (statement of Sen. Clinton Anderson).
250. *See Virgin Islanders Hail Park Defeat*, *supra* note 245.
251. *See* Harden, *supra* note 97.
252. *Id.*
253. Paik, *supra* note 122.
254. *See* Harden, *supra* note 97.

predominantly minority communities within the States. This Part first discusses the history of unjust takings in the States that have disproportionately impacted minority communities, and then explains the risks of governments having substantial discretion in the context of minority communities. Parts I and II together form a general critique of how eminent domain law has failed to adequately protect property rights in a way that is consistent with the Fifth Amendment, particularly of the most vulnerable and disenfranchised communities, and pave the way for Part III, which will address the specific doctrinal failures of eminent domain law and paths for correction.

A. Eminent Domain and Impacts on Black Communities

1. Early Twentieth Century Takings

During the twentieth century, minority homes and businesses were often targeted to create resources used primarily or entirely by white community members. The media has recently documented the story of Manhattan Beach, California.[255] A Black family, the Bruces, bought land on Manhattan Beach in 1912, creating a beach and oceanfront resort catering to Black families.[256] Over time, the community became home to multiple Black landowners and businesses.[257] In 1924, the city condemned the Bruces' property to create a public park, ignoring this well-developed minority community.[258] Although the city paid compensation, it effectively removed Black families from the beach area and caused the owners to lose "their property and business"[259] and move to Los Angeles.[260]

Similarly, the burdens of federal takings for military purposes also frequently fell on minority communities who were offered unequal compensation. For example, "[i]n 1942, Harris Neck, a thriving community of Black landowners who hunted, farmed[,] and gathered

255. *See* Jacey Fortin, *This Black Family Ran a Thriving Beach Resort 100 Years Ago. They Want Their Land Back.*, N.Y. TIMES (Mar. 11, 2021), https://nyti.ms/3Hq6vFH (detailing the story of Willa and Charles Bruce, who were "among the first Black people to settle in Manhattan Beach, Calif[ornia]"). Currently, Los Angeles County is working out a plan to return the property to the Bruce family. *See L.A. County Leaders Mover Forward with Returning Bruce's Beach to Black Family*, KTLA NEWS (July 14, 2021), https://bit.ly/3L5ND1d ("Los Angeles County leaders are moving forward with a plan to return prime beachfront property to descendants of a Black couple who built a resort for African Americans but were stripped of the land by local city officials a century ago.").

256. *See* Fortin, *supra* note 255.

257. *See id.*

258. *See id.*

259. *See id.*

260. The county still owns the land. *See id.*

oysters, was taken by the federal government to build an airstrip." [261] "When federal officials were looking for a site for an Air Force base, the county's white political leaders led them past thousands of uninhabited acres to Harris Neck."[262] The government condemned Harris Neck and ordered the residing families to leave.[263] "Black[] [residents] received an average of $26.90 per acre for the land, while white[] [residents] received $37.31, according to a 1985 federal report."[264] Despite the government's promises that residents could return after World War II, the Harris Neck National Wildlife Refuge was established in 1962, and the land remains the property of the Fish and Wildlife Service.[265]

In a virtually identical circumstance, "[t]he Espy family in Vero Beach, Fl[orida], lost its heritage in 1942, when the U.S. government seized its land through eminent domain to build an airfield."[266] The Espys' property "which included a [thirty]-acre fruit grove, two houses[,] and [forty] house lots, [was valued] at $8,000."[267] Unhappy with this valuation of their land, the Espys sought a jury trial, where they were awarded $13,000, which was still only one-sixth of the price of similar, neighboring farms owned by non-Black families.[268]

2. Urban Renewal & Post-WWII Transportation Takings

Additionally, during the mid-twentieth century, municipalities frequently used eminent domain to remove Blacks and other minority communities from their property, using urban renewal as the supporting theory.[269] From 1949 to 1973, the federal government endorsed and

261. Shaila Dewan, *Black Landowners Fight to Reclaim Georgia Home*, N.Y. TIMES (June 30, 2010), https://nyti.ms/3J4Zevp.

262. *Id.*

263. *See id*.

264. *Id.*

265. *See id*.

266. *See* Todd Lewan & Dolores Barclay, '*When They Steal Your Land, They Steal Your Future*,*'* L.A. TIMES (Dec. 2, 2001, 12:00 AM), https://lat.ms/34sOAjg.

267. *Id.*

268. *See id.*

269. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003) ("By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation."). For studies documenting the disproportionate impact of blight and urban renewal takings on minorities, see Martin Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal, 1949-1962*, 64–65 (1965); *see also* MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT 71–100 (2004); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH J. L. REFORM 689, 740–41 (1994) ("Numerous past experiences indicate that the [redevelopment] process has been driven by racial animosity as well as by bias against the poor.").

financed an "urban renewal" program, which resulted in the takings of 2,500 communities in 993 cities across the U.S.[270] Furthermore, scholars have argued that the concept of blight "was invented specifically for purposes of redoing aging downtown areas, and meant, quite simply, that buildings had lost their sparkle and their profit margin."[271] However, urban renewal was not the only federal program that financially supported large-scale takings. The federal highway program similarly helped cities clear large areas of land and slice through other neighborhoods.[272] In doing so, highway planners "routed some highways directly, and sometimes purposefully, through Black and brown communities."[273]

In other words, the burden of the federal remaking of cities fell unevenly. "More often than not . . . the part of the city the businessmen thought was blighted was the part where [B]lack people lived."[274] In fact, according to Professor Ilya Somin, "the vast majority of those uprooted from their homes have been . . . African-Americans."[275] Indeed, according to multiple reports, the urban renewal program was often called "the Negro removal program."[276] Moreover, many figures from this era understate the impact of takings on Black-Americans because condemnations (particularly due to blight) were performed by state and local government and therefore are not included in federal records.[277]

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270. *See* FULLILOVE, *supra* note 269, at 4.

271. *Id*. at 58. Additionally, the invented concept of blight contributed to negative perceptions of Black neighborhoods, which were "vilified as places of shame and dysfunction." *See id.* at 121. For more discussion of the blight label and stereotypes, see Pritchett, *supra* note 269, at 7–8.

272. *See* FULLILOVE, *supra* note 269, at 64.

273. Noel King, *A Brief History of How Racism Shaped Interstate Highways*, NPR (Apr. 7, 2021, 5:02 AM), https://n.pr/3GpBbFZ; *see also* Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125 (2021) (exploring "the ways transportation policy and infrastructure development have fed inequality and helped make many Black communities inhospitable for health, success, and economic opportunity"); David Leonhardt, *Fixing What Highways Destroyed*, N.Y. TIMES (May 28, 2021), https://nyti.ms/32UYRnS (discussing the history of highway-related takings in Black communities during the 1950s and 1960s).

274. FULLILOVE, *supra* note 269, at 20.

275. *The Civil Rights Implications of Eminent Domain Abuse: Testimony Before the U.S. Comm'n on Civil Rights* (2011) (testimony of Ilya Somin, Assoc. Professor of Law, George Mason Univ.).

276. *See* Brief for Nat'l Ass'n for the Advancement of Colored People et al. as Amici Curiae Supporting Petitioners at 7, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 73 USWL 4552 (evaluating the efforts of the federal government to reduce poverty in inner cities from 1965 through the early 1970s); *see also* FULLILOVE, *supra* note 269, at 61.

277. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 269–71 (2007) (noting that "some 3.6 million people" were relocated by means of federally sponsored urban renewal condemnations, but that "this figure does not include blight condemnations undertaken by state and local governments on their own initiative").

Urban redevelopment did not just take homes; it took entire Black communities and Black business districts.[278] Many examples of Black communities destroyed by urban renewal exist, including the Tremé neighborhood of New Orleans;[279] the Hill in Pittsburgh;[280] Northwest in Roanoke, Virginia;[281] and Elmwood in Philadelphia.[282] Such community-wide takings hold a special significance due to their emotional impact on the people dispersed, who not only lose a home, but often employment and an entire community support network.[283] In the words of Mindy Fullilove, who has studied this problem for decades, the consequences of such takings included "social, economic, cultural, political, and emotional losses."[284]

Aside from these losses, urban renewal also contributed to a growing housing crisis. Cities took homes and generally replaced them with "businesses, educational and cultural institutions, and residences for middle-and upper-income people."[285] By some counts, urban renewal programs replaced only about two percent of the housing they destroyed.[286] According to research compiled by the U.S. Advisory Commission on Intergovernmental Relations in 1965, from 1949–1964, the use of eminent domain to promote urban renewal led to the demolition of 177,000 families' and 66,000 individuals' housing.[287]

According to Professor Somin, "in most cases, those displaced by blight condemnations ended up worse off than they were before, and were not fully compensated for their losses."[288] Black families did not receive

278. *See* FULLILOVE, *supra* note 269, at 20.

279. *See* Alyssa M. Hasbrouck, Note, *Rethinking "Just" Compensation: Dignity Restoration as a Basis for Supplementing Existing Takings Remedies with Government-Supported Community Building Initiatives*, 104 CORNELL L. REV. 1047, 1070 (2019) ("During the heyday of urban renewal, 'much of the neighborhood was destroyed with Federal Urban Renewal funds . . . . The destruction leveled eight blocks of historic Creole cottages and music halls, as well as other community structures, and tore out the streets where the music flowed.'" (quoting Frances Frank Marcus, *New Orleans Disputes Future of Park on Site of Treme, Where Jazz Dug In*, N.Y. TIMES (Mar. 23, 1983), https://nyti.ms/3KB0qZ5)).

280. *See* FULLILOVE, *supra* note 269, at 60–61.

281. *See id.* at ch. 4.

282. *See id.* at ch. 5.

283. *See id.* at 11–14.

284. *Id.* at 20.

285. *Id.* at 58–59.

286. *See id.* at 59.

287. *See* Alvin Mushkatel, & Khalil Nakhleh, *Eminent Domain: Land-use Planning and the Powerless in the United States and Israel*, 26 SOC. PROBS. 147, 149 (1978) (focusing on the effects of urban renewal on the poor and minorities in the United States); *see also* Marc A. Weiss, *The Origins and Legacy of Urban Renewal*, *in* FEDERAL HOUSING POLICIES & PROGRAMS: PAST AND PRESENT 253, 253–54 (J. Paul Mitchell ed., 1985) ("As of June 30, 1967, approximately 400,000 residential units had been demolished in urban renewal areas.").

288. *The Civil Rights Implications of Eminent Domain Abuse*, *supra* note 275, at 44.

fair compensation for their homes until years later, when lawsuits were filed across the country seeking fair payment.[289] Despite urban renewal's decline in the 1970s, Black families continued to be disproportionately affected by eminent domain in the United States. For example, in 1974, a Department of Housing and Urban Development report showed that over forty-eight percent of those forced to relocate were Black.[290] A similar report in 1975 showed that "over [forty-seven] percent of all families and individuals reported relocated were Black."[291]

More recently, according to research conducted after 2005, eminent domain continues to affect marginalized communities disproportionately. Census data shows that fifty-eight percent of project areas in which eminent domain has been threatened or used for private development are inhabited by minority residents, and twenty-five percent of these residents live at or below the poverty line.[292] As a current example, the Byhalia Pipeline's projected route will take property in "multiple majority-Black neighborhoods in south-west Memphis."[293]

3. A Year at a Glance: Takings in 2004

Stories of individual takings that primarily impact minority communities continue into the twenty-first century. Consider these examples from a single year: 2004. "In San Diego, California, a new baseball stadium for the San Diego Padres stands as the anchor of a boom in downtown development, which has come at the cost of the removal of a number of low-income citizens and small businesses, many of them Latino, through eminent domain."[294]

The same year, the city of North Miami, Florida planned a development around "improving" its minority community. [295] The city planned to use eminent domain to help give a "face lift" to the working-

289. *See* FULLILOVE, *supra* note 269, at 79.

290. *See* Mushkatel & Nakhleh, *supra* note 287, at 150.

291. *Id.*

292. *See* DICK M. CARPENTER & JOHN K. ROSS, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 6 (Inst. Just. ed., 2007) (showing average poverty levels for project areas and surrounding communities).

293. Leanna First-Arai, *Pipeline Tells Black Memphis Landowners: Sell Us the Rights to Your Land or Get Sued*, GUARDIAN (Apr. 22, 2021, 5:00 PM), https://bit.ly/3FSHlhm.

294. Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcemen*t, 83 DENV. UNIV. L. REV. 1, 22 (2005); *see also* Daniel B. Wood, *San Diego Reinvents Itself - and Gentrifies*, CHRISTIAN SCI. MONITOR (Feb. 26, 2004), https://bit.ly/3IsspZf (E**rror! Hyperlink reference not valid.**examining the question, "[w]hen money pours in and property values rise, do poorer, more ethnically diverse neighborhoods get shoved aside?").

295. *See* David Ovalle, *City is Banking its Future on Massive Redevelopment*, MIAMI HERALD (Jan. 5, 2004), https://bit.ly/3fTiBLv.

class town, which holds a large Haitian population.[296] A city attorney said that the project, which would involve the demolition of low-cost apartments and the construction of "upscale" condos, was "social engineering" that would greatly improve the city's tax base.[297]

In Riviera Beach, Florida, in 2004, the town planned an enormous redevelopment project that would remove more than 2,000 houses, many of them low-cost and owned by African Americans, to allow private development of high-rise condos, large homes, and shops.[298]

In Long Branch, New Jersey, in 2004, the town used "eminent domain to condemn the residences of about 300 people, many of them [B]lack, for redevelopment projects."[299] In Camden, New Jersey, the town planned

> to demolish hundreds of old houses in various locations to make way for shopping complexes and condominium and townhouse developments. Remarkably, for a city whose population has fallen dramatically over the past fifty years, the government claims that one reason for the use of eminent domain is to decrease 'density' in the area.[300]

Opponents suspected this was a pretext and argued that "the poor people in the community, most of whom are African American or Latino, don't have the clout that the developers have."[301]

The above examples from a single year—2004—demonstrate the overall pattern of land takings more often falling on Black and minority communities.

B. Eminent Domain and Indigenous Lands in the States

Although a well-documented history exists of the process of colonization—the history of confiscating Native American lands through settlement and violent conquest—the judicial mechanism of eminent domain is distinct from colonization and empowered another mechanism of dispossession for Native Americans.

Some Native American lands have been subject to eminent domain actions because the government agreed to Native ownership of the lands

296. *See id.*

297. *See id.*

298. *See* Dennis Cauchon, *Pushing the Limits of 'Public Use*,*'* USA TODAY, Apr. 1, 2004, at 03A, 2004 WLNR 6257751.

299. Boudreaux, *supra* note 294, at 21.

300. *Id*. at 22; *see also* Erik Schwartz, *Progress or Discrimination?*, COURIER-POST, Aug. 5, 2004, at B1, 2004 WLNR 23323720.

301. Boudreaux, *supra* note 294, at 22*; see also* Schwartz, *supra* note 300, at B1.

in a treaty and later took the lands.[302] In *United States v. Sioux Nation of Indians*, the Sioux sought compensation for land in the Black Hills designated as theirs under a treaty with the federal government and subsequently taken without compensation.[303] As the Supreme Court explained the history, the initial taking was planned in 1874 by the Army, who intended to take more than 1,000 troops and other staff and establish a military outpost on a portion of the land.[304] The expedition confirmed the existence of substantial natural resources in the region, including timber and gold fields.[305] Subsequently, in the words of the Court, the federal government chose to "abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory."[306] At first, the Sioux lacked a procedural mechanism to bring suit but ultimately were able to file a petition for compensation in 1923. That claim was then dismissed in 1942[307] because the claim was "a moral claim not protected by the Just Compensation Clause."[308] The claim was relitigated, with the Supreme Court ruling in 1980 that the government "effected a taking of tribal property," and "[t]hat taking implied an obligation on the part of the [g]overnment to make just compensation . . . [which] must now, at last, be paid."[309]

Around the same time as the federal government crossed into Sioux land in the Black Hills to establish a military outpost, an act of Congress granted land that had already been reserved for the Klamath and Modoc Tribes to the State of Oregon for the construction of a "military road."[310] A report from the Secretary of the Interior found:

> The Indians have complained bitterly and have made, and continue to make, claim for compensation for the lands taken from them. I believe that their claim is just and that they should have reasonable compensation, and I do not believe it fair that they should be compelled

302. *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371, 374–77 (1980) ("[T]he Sioux Nation has claimed that the United States unlawfully abrogated the Fort Laramie Treaty of April 29, 1868, . . . of which the United States pledged that the Great Sioux Reservation . . . would be 'set apart for the absolute and undisturbed use and occupation of the Indians herein named.'").

303. *See id*. at 383.

304. *See id.* at 376.

305. *See id*. at 377.

306. *Id.* at 378.

307. *See* Sioux Tribe v. United States, 97 Ct. Cl. 613, 689 (1942) ("The plaintiff tribe is not entitled, as a matter of law, to recover from the United States, and the petition must therefore be dismissed.").

308. *Sioux Nation of Indians*, 448 U.S. at 384.

309. *Id.* at 424.

310. *See* Klamath & Moadoc Tribes & Yahooskin Band of Snake Indians v. United States, 85 Ct. Cl. 451, 454–55 (1937) ("By an act approved July 2, 1864, Congress granted to the State of Oregon, to aid in the construction of a military road.").

> to wait for a long term of years and finally employ attorneys to prosecute their claim.[311]

The Secretary of the Interior suggested compensation of $108,750, and Congress approved this amount.[312] In 1937, the Court of Claims determined that the tract's value was $2.9 million[313] and awarded reasonable compensation—fifty years after the taking.[314]

Tribes have also sued regarding natural resources removed after the establishment of the Native American lands. For example, the Navajo sought compensation for a portion of oil and gas deposits that the U.S. government had acquired.[315] Additionally, after the U.S. purchased Alaska, the Tlingit and Haida tribes sought compensation for their lands and resources, which would be opened to settlement by the U.S.[316] The Court of Claims agreed that a taking had occurred and compensation was due but failed to award any damages, leaving the issue open for future negotiation.[317]

Tribes have similarly suffered improper and delayed consideration for lands that were taken. For instance, in 1966, the federal government took land from the Coast Indian Community in California and conveyed it to the County of Del Norte to create an access road for timbering, compensating only $2,500.[318] A decade later, the Court of Claims agreed with the plaintiffs' alleged proper valuation of the land of $57,000.[319]

Overall, there are strong commonalities between the experiences of Black and indigenous citizens within the States. Most importantly, both groups have been under-compensated for their lands and natural resources and have had to expend money on lawsuits to obtain proper compensation.

311. *Id. at 456.*
312. *See id.* at 458.
313. *See id.* at 457–58.
314. *See id.* at 460–66 (calculating the amount due to plaintiffs).
315. *See* Navajo Tribe of Indians v. United States, 364 F.2d 320, 322 (Ct. Cl. 1966) (arising out of a "series of transactions beginning in 1942, [in which] the United States acquired certain oil and gas rights with respect to the Rattlesnake field, an area within the Navajo Indian Reservation").
316. *See* Tlingit & Haida Indians v. United States, 177 F. Supp. 452, 453 (Ct. Cl. 1959) (noting that the court was authorized to hear "claims, legal or equitable for lands or other tribal or community property rights taken from the Tlingit and Haida Indians by the United States without compensation").
317. *See id.* at 467 ("[I]t seems clear that the United States both failed and refused to protect the interests of these Indians in their lands and other property in southeastern Alaska . . . and that the United States is liable . . . to compensate the Indians for the losses so sustained.").
318. *See* Coast Indian Cmty. v. United States, 550 F.2d 639, 641 (Ct. Cl. 1977).
319. *See id.*

C. The Patterns of Injustice in Eminent Domain

Stories of eminent domain from minority communities within the States mirror those from the U.S. Territories in multiple ways. Specifically, there are three key patterns of injustices in eminent domain that affect minority communities in both the States and the Territories.

First, eminent domain actions in both the States and Territories have involved large-scale federally financed actions, such as military expansion, highway construction, and urban renewal.[320] Such projects provide federal financing for what ultimately become local endeavors, allowing military authorities or cities and counties to decide what land is taken and how much is taken, with limited federal oversight. There are no protection mechanisms that might eliminate bias in this process. Meanwhile, federal programming and funding supports and encourages extensive use of eminent domain, often at the hands of appointed—rather than elected—officials.

Second, local governments have also dispossessed minority communities in both the States and Territories in unjust ways that demonstrate bias.[321] The federal government is not alone as a problematic actor. Territorial governments, states, counties, cities, and towns have similarly behaved in ways that demonstrate bias.

Finally, minority communities in both the States and Territories have been compensated inadequately and with significant delay.[322] Landowners have been forced to file suit to obtain proper compensation, following procedures that do not provide for an attorney's fees and waiting years or decades for appropriate compensation.

Each facet of these patterns of unjust takings provides insight into the failures of eminent domain law, particularly in the context of communities with less political power. The remainder of this Article draws on these patterns of injustice to critique eminent domain law and develop a discrete set of recommendations to address the problem.

III. THE LIMITED INDIRECT OPTIONS FOR EMINENT DOMAIN CHALLENGES

If eminent domain law is not adequately protecting Americans, then the question becomes whether other areas of law step in to fill that gap and respond to concerns such as the treatment of Black and indigenous peoples. This Part examines the alternative claims that a plaintiff may consider when contesting an eminent domain action and evaluates the effectiveness of these alternatives in preventing a land taking.

320. *See supra* Sections I.B.–II.B.
321. *See supra* Sections II.A–B.
322. *See supra* Sections II.A–B.

A. Eminent Domain and Abuse of Discretion

Compare the lenient legislative deference standard with review of an agency action, where the court questions whether there was an abuse of discretion. Why do these, admittedly minimal, protections on power not exist in the context of eminent domain? The reason is simple: the eminent domain power is an attribute of state sovereignty,[323] even when exercised via a municipality.[324] The lenient approach to review is a reflection of the "wide birth afforded to states and municipalities in the exercise of that particular sovereign power."[325] This is a departure from the normal Supreme Court position that an agency "action may not be upheld on grounds other than those relied on by the agency."[326] In the context of eminent domain, and as a concession to state sovereignty, the Supreme Court enforces a far more lenient rule, upholding takings if they are "rationally related to a conceivable public purpose."[327] As a result, attempting to challenge the necessity of a taking is essentially a futile gesture because, for the past century, the Supreme Court has consistently approached the question of land takings as one that is "purely political, does not require a hearing, and is not the subject of judicial inquiry."[328] This extensive scope of discretion, in terms of the necessity and context, means that abuse of discretion considerations focus specifically on the two

323. *See* Georgia v. Chattanooga, 264 U.S. 472, 480 (1924) ("The power of eminent domain is an attribute of sovereignty, and inheres in every independent State."). Additionally, when the eminent domain power is conferred by the state on a local body such as a municipality, the court recognizes the same "wide birth afforded . . . in the exercise of that particular sovereign power." Hsiung v. Honolulu, 378 F. Supp. 2d 1258, 1265 (D. Haw. 2005). In short, "the necessity and expediency of the taking of property for public use 'are legislative questions, no matter who may be charged with their decision.'" N. Laramie Land Co. v. Hoffman, 268 U.S. 276, 284 (1925) (quoting Joslin Mfg. Co. v. Providence, 262 U.S. 668, 677 (1923)).

324. *See Joslin Mfg.*, 262 U.S. at 678 (holding that delegation of the eminent domain power and its related process of finding a public purpose were not "any longer open to question in this court"). The eminent domain power may be delegated, but "may be resumed at will." *Chattanooga*, 264 U.S. at 480 (citing Pa. Hosp. v. Philadelphia, 245 U.S. 20 (1917) (holding that the eminent domain power of the state is so crucial to sovereignty that it cannot be abridged, even by an agreement made by the state)). This is because a "sovereign can never be contractually bound to surrender 'an essential attribute of its sovereignty.'" *Hsiung*, 378 F. Supp. 2d at 1266. The eminent domain power is one of those essential attributes of sovereignty. *See* W. River Bridge Co. v. Dix, 47 U.S. 507, 522 (1848) (describing eminent domain as "an essential and indispensable attribute of sovereignty").

325. *Hsiung*, 378 F. Supp. 2d at 1265.

326. Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 420 (1992) (citing SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)).

327. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

328. *Joslin Mfg.*, 262 U.S. at 678.

constitutional limits of eminent domain: public purpose and just compensation.[329]

Concerning public purpose, such abuse of discretion review appears to be administered with an extremely light touch. For example, a recent Mississippi Supreme Court case involved a claim that the City of Clinton "did not exhaust all other options before resorting to eminent domain."[330] The court simply responded that such an argument "fail[ed] to consider [the state's] jurisprudence" because the applicable standard of review is "evidence indicative of fraud or abuse of discretion."[331] Similarly, abuse of discretion is used to review lower court decisions on whether the government used blight or urban renewal, which is generally accepted as a public purpose,[332] as a pretext for a taking.[333]

Regarding just compensation, state courts generally establish rules and procedures for determining property values, including what types of market value evidence to consider or exclude, such as which properties count for comparable sales.[334] In doing so, these courts utilize an abuse of discretion standard.[335] Federal cases challenging market value follow the

329. For example, when setting up "special courts of eminent domain," Mississippi adopted abuse of discretion as the standard of review for decisions of the court. *See* Wiggins v. Clinton Miss., 298 So. 3d 962, 964 (Miss. 2020) (reviewing on appeal, for abuse of discretion, the issues of whether the city lacked the legal authority to make the taking and whether there was a public use or public necessity for the taking).

330. *Wiggins*, 298 So. 3d at 965.

331. *Id.*

332. *See* Berman v. Parker, 348 U.S. 26, 35 (1954) (rejecting a claim that the District of Columbia Redevelopment Act violated the Fifth Amendment and holding that, via the police powers, the jurisdiction was authorized to act in furtherance of public health and safety via eminent domain)*; see also* Paulk v. Hous. Auth. of Tupelo, 195 So. 2d 488 (Miss. 1967) (accepting that urban renewal is a public purpose in Mississippi).

333. *See* Kelo v. City of New London, 545 U.S. 469, 478 (2005) ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."); *see also Wiggins*, 298 So. 3d at 964 (considering whether urban renewal was a "sham" created by a city for an otherwise retaliatory taking).

334. *See* Atkinson v. Seminole Pipeline Co., NO. 03-96-00245-CV, 1998 Tex. App. LEXIS 2364, at *12–13 (Tex. App. Apr. 24, 1998) (considering whether the trial court erred in excluding certain comparable property sales).

335. *See* State *ex rel.* State Highway Comm'n. v. Wetterau Foods, Inc., 632 S.W.2d 88, 90 (Mo. Ct. App. 1982) ("Admission of evidence of comparable sales rests in the broad discretion of the trial court and will not be disturbed unless the discretion is clearly abused." (citations omitted)); *see also* Stine v. Commonwealth Dep't of Transp., 364 A.2d 745, 748 (Pa. Commw. Ct. 1976) (applying the abuse of discretion standard in the eminent domain context "especially when the lower court has viewed the premises"); City of Enid v. Moyers, 165 P.2d 818, 820 (Okla. 1945) ("While the range of inquiry as to such value rests largely in the discretion of the trial court, and the action of the trial court in admitting or excluding evidence as to value will not be disturbed unless there has been an abuse of such discretion." (citing State v. Winters, 156 P.2d 798 (Okla. 1945))).

same pattern, using an abuse of discretion standard specifically tied to the question of evidence.[336]

In sum, the abuse of discretion concept focuses on the two core constitutional limits of public purpose and just compensation. In those contexts, abuse of discretion acts primarily as an evidentiary standard. Abuse of discretion does not provide an additional or independent standard for making a collateral attack on an eminent domain action.

B. Equal Protection

Although equal protection arguments have not been particularly successful in the context of eminent domain challenges, courts seem somewhat open to considering a well-developed equal protection case. In *Whittaker v. County of Lawrence*,[337] the plaintiffs alleged both substantive due process and equal protection violations, arguing that they experienced "'intentional and arbitrary discrimination' without a rational basis" as a class of one.[338] The Third Circuit dismissed both claims, finding no proof of an illegitimate government interest or arbitrary singling out of the landowner's property that would substantiate an equal protection claim.[339]

Conversely, the plaintiffs in *New West, L.P. v. City of Joliet*[340] found more success through equal protection. In this case, the claim arose from a city's attempt to condemn an apartment complex that it considered "rundown."[341] The partnership of tenants alleged that the city violated (1) the Equal Protection Clause by litigating and lobbying the Department of Housing and Urban Development (HUD) not to renew the complex's federal subsidy; and (2) the Fair Housing Act by "discouraging current and prospective minority tenants from living in" the apartment complex.[342] The Seventh Circuit remanded the allegations for further discussion.[343]

C. Due Process

Although cases styled as due process challenges to eminent domain proceedings attempt to separate due process from violating the public purpose requirement, courts have engaged in a longstanding pattern of

336. *See, e.g.*, United States v. 33.90 Acres of Land, 709 F.2d 1012, 1013 (5th Cir. 1983) (applying the abuse of discretion standard to evaluate an exclusion of evidence regarding comparable sales of properties to set the market value of the condemned land).

337. Whittaker v. County of Lawrence, 437 F. App'x 105, 108–09 (3d Cir. 2011).

338. *Id.* at 109 (citing Willowbrook v. Olech, 528 U.S. 562, 564 (2000)).

339. *See id.* at 109–10.

340. New W., L.P. v. City of Joliet, 491 F.3d 717 (7th Cir. 2007).

341. *See id.* at 719 ("Joliet thinks that Evergreen Terrace, built in 1965, is so run-down that it is a public nuisance.").

342. *Id.* at 719, 721.

343. *See id.* at 722.

treating the two as effectively one question.[344] Even though this may add an independent count to the complaint, the analysis is not substantively different than simply challenging whether there was a public purpose, so long as the court analyzes the claim using the legislative deference standard from eminent domain.

For instance, in *City of Cincinnati v. Vester*,[345] the city proposed a street widening project requiring condemnation of additional land unrelated to the improvement. The landowners alleged a due process violation because the city's plan to "us[e] or dispos[e] of its excess" through sale was not a public use.[346] The Sixth Circuit agreed that this excess condemnation did not amount to a public use and held that there was a due process violation because "property may [not] be taken for the purpose of selling it at a profit and paying for the improvement."[347]

In *Port of Umatilla v. Richmond*,[348] a landowner claimed that the port commission was "attempting to condemn and acquire [an acreage far in excess than can be used] for the purpose of selling and leasing such real property to private investors."[349] The Supreme Court of Oregon stated that the Due Process Clause protects landowners from takings under the "pretense of eminent domain" rather than a proper public use.[350]

To the degree that substantive due process offers a distinct claim from a failure to state a public purpose, the standard for proving a violation is extraordinarily high.[351] In *Whittaker v. County of Lawrence*,[352] plaintiffs challenged an eminent domain action, arguing a violation of due process because their land was taken "despite no indication of blight," where Pennsylvania's Urban Redevelopment Law required a finding of blight for a permissible taking.[353] The Third Circuit affirmed that "[i]n reviewing the

344. *See, e.g.*, Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159 (1896) (considering "the question as to what is due process of law, and, as incident thereto, what is a public use").

345. Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd*, 281 U.S. 439 (1930).

346. *See id.* at 243.

347. *Id.* at 245.

348. Port of Umatilla v. Richmond, 321 P.2d 338 (Or. 1958).

349. *Id.* at 340.

350. *See id.* at 353; *see also* State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 966 P.2d 1252, 1258–59 (Wash. 1998) ("Fraud or constructive fraud would occur if the public use was merely a pretext to effectuate a private use on the condemned lands."); Barr v. New Brunswick, 67 F. 402, 403 (C.C.D.N.J. 1895) (questioning whether the taking is for public use and not an "arbitrary exercise of the power of the government").

351. *But see* King Cnty. v. Theilman, 369 P.2d 503, 505 (Wash. 1962) (finding that the taking was not a necessity, "when by changing the route slightly and putting in a cut and a turn on the [Highland Development Company] property you can get an equally satisfactory road with an equally satisfactory grade").

352. Whittaker v. County of Lawrence, 437 F. App'x 105 (3d Cir. 2011).

353. *See id.* at 108.

conduct of executive officials, only conduct that 'shocks the conscience' rises to the level of a substantive due process violation."[354]

D. National Environmental Policy Act

The National Environmental Policy Act ("NEPA")[355] applies specifically to "major federal actions" and therefore applies only to the eminent domain actions of the federal government. NEPA does not apply to the myriad of municipal level eminent domain actions. Nevertheless, NEPA remains important due to the history of eminent domain as a part of military buildup and expansion.[356]

NEPA requires federal agencies to assess the environmental impacts of their planned projects, creating an "Environmental Impact Statement" ("EIS").[357] As a part of evaluating these impacts, the agency must "prepare 'a detailed statement' discussing, inter alia, 'alternatives to the proposed action.'"[358] As its focus is primarily procedural,[359] it is critical to recognize that NEPA is not truly a mechanism that would be likely to be effective as a collateral attack on an eminent domain action. With that said, the "linchpin" of assessing environmental impacts is considering alternative actions,[360] potentially including alternative sites for a project,[361] and

354. *Id.* (citing Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).

355. 42 U.S.C. § 4332.

356. *See supra* Part II.

357. *See* Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1285 (1st Cir. 1996) ("The primary mechanism for implementing NEPA is the Environmental Impact Statement (EIS).").

358. Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980) (citing 42 U.S.C. § 4332(2)(C)); *see also* Roosevelt Campobello Int'l Park Com. v. U.S. EPA, 684 F.2d 1041, 1047 (1st Cir. 1982) ("EPA's duty under NEPA is to study all alternatives that 'appear reasonable and appropriate for study at the time' of drafting the EIS, as well as 'significant alternatives' suggested by other agencies or the public during the comment period." (quoting Seacoast Anti-Pollution League v. NRC, 598 F.2d 1221, 1228–33 (1st Cir. 1979))).

359. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."); *see also* Brodsky v. U.S. Nuclear Regul. Comm'n, 704 F.3d 113, 118 (2d Cir. 2013) ("NEPA is, at its core, 'a procedural statute that mandates a process rather than a particular result.'" (quoting Stewart Park & Reserve Coal., Inc. v. Slater, 352 F.3d 545, 557 (2d Cir. 2003))); *see also* Cellular Phone Taskforce v. FCC, 205 F.3d 82, 95 (2d Cir. 2000) (finding that "as long as all the significant potential environmental impacts are considered in a combination of general and site-specific assessments at the time the facilities are constructed, the requirements of NEPA and the CEQ have been satisfied" (citing Env't Coal. of Ojai v. Brown, 72 F.3d 1411, 1418 (9th Cir. 1995))).

360. *See* Monroe Cty. Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697–98 (2d Cir. 1972) ("The requirement for a thorough study and a detailed description of alternatives . . . is the linchpin of the entire impact statement.").

361. *See Roosevelt*, 684 F.2d at 1047 (noting that the agency should study alternative sites if there is "tangible evidence that an alternative site might offer 'a substantial measure of superiority.'" (quoting *Seacoast*, 598 F.2d at 1228–33)).

always including the option of taking no action,[362] a choice that would remove the need for eminent domain. Additionally, although its requirements are officially procedural, the EIS may also be viewed as "an action-forcing procedure, designed to ensure that [the broad national commitment to protecting and promoting environmental quality] is infused into the ongoing programs and actions of the Federal Government."[363]

Plaintiffs have utilized NEPA as a part of challenges to eminent domain actions within the U.S. mainland and Territories. For example, in *Allegheny Defense Project v. Federal Energy Regulatory Commission*,[364] an environmental group and homeowners challenged condemnations for a pipeline project, relying on NEPA and the Due Process Clause.[365] Additionally, landowners in *United States v. 178.15 Acres of Land*[366] alleged that the government "lacked the power to exercise . . . eminent domain over their lands because of its failure to file an [EIS] in accordance with . . . [NEPA] . . . prior to the taking."[367] The Fourth Circuit simply found that it "perceive[d] no merit in any of these contentions" and upheld the taking.[368]

A NEPA challenge also forms a significant part of the story of Guam and CNMI's fight against land takings by the U.S. military. In 2009, the DOD released its Draft Environmental Impact Statement ("DEIS") related to the planned military buildup on Guam. The DEIS detailed the significant implications for both property and infrastructure, such as a roughly forty-one percent increase in population in just a few years, extensive building projects, and potential damage to fishing in the area due to extensive dredging.[369] The implications for land takings were extraordinary in terms of the U.S. military's intentions: "hundreds of acres of jungle may be bulldozed to create housing for [U.S.] Marines, more than one thousand acres of new land may be leased to build five new firing ranges, and new training facilities may be built on Pagan and Tinian [in the nearby CNMI]."[370] The scale of the project was extraordinary, with it

362. *See* 40 C.F.R. § 1502.14(d) ("Include the alternative of no action . . . ."); *see also* Pac. Coast Fed'n. of Fishermen's Ass'ns v. U.S. Dept. of Int., 929 F. Supp. 2d 1039, 1048 (E.D. Cal. 2013) ("Among the alternatives required to be discussed in every EA or EIS is the 'no action' alternative.").

363. Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1285 (1st Cir. 1996).

364. Allegheny Def. Project v. Fed. Energy Regul. Comm'n, 964 F.3d 1 (D.C. Cir. 2020).

365. *See id.* at 9.

366. United States v. 178.15 Acres of Land, 543 F.2d 1391 (4th Cir. 1976).

367. *Id.* at 1391.

368. *Id.*

369. *See* Na'puti & Bevacqua, *supra* note 118, at 845.

370. *Id.*

being "the largest single project ever proposed by the DOD, totaling an estimated $15 billion."[371]

Moreover, the project proposed acquiring 950 acres at Pâgat Village, a noted local historical site on the Guam National Register of Historic Places.[372] The DEIS took essentially no notice of the cultural and social implications of the takings, being "written as if Guam's people, land[,] and culture counted for nothing."[373] Assistant Secretary of the Navy for Energy, Installations and Environment, Jackalyne Pfannenstiel, quite astonishingly argued that "preservation of the Pagat village site, as a very special cultural place for Guam, is consistent with the training range."[374]

The DEIS provoked what has been called "the most blistering responses ever to come from the Environmental Protection Agency."[375] Moreover, many of the EPA's concerns flowed directly from the plan for extensive eminent domain: "Hundreds of acres of jungle and wetlands habitat will be covered with concrete and tract developments in order to house tens of thousands of newcomers."[376]

By 2010, the National Trust for Historic Preservation, among other organizations, filed suit against the DOD.[377] Madeleine Bordallo, a non-voting delegate for Guam, suspected that the needed land could never be purchased, stating, "I frankly remain very skeptical that the preferred alternative will be achieved. And I'm adamantly opposed to the use of eminent domain to acquire these lands, if local landowners are not willing to sell or lease."[378]

In 2013, the DOD issued a supplemental EIS, which provoked a subsequent NEPA challenge alleging that the Navy

> failed to mention its plans to convent CNMI land into military training ranges when it released the 2010 Environmental Impact Statement, or EIS, for the relocation of around 5,000 Marines from Okinawa to Guam. Instead, it waited five years to announce a separate program, the Commonwealth Joint Military Training, or CJMT program, which

371. *Id.* The scale of this project is particularly notable when you consider the scale of the tiny island. Sen. Mary Camacho Torres wrote about this problem, citing a public law adopted by Guam, which states: "the size of the Territory presents rigorous constraints on potential activities and limits options for development. In a small island environment such as that which exists in Guam, even isolated activities imply certain potential impacts. Resources are scarce and particularly fragile. Environmental, visual, social and economic impacts can be felt immediately throughout the entire island." Torres, *supra* note 168.

372. *See id*.

373. Paik, *supra* note 122.

374. Pat Host, *Guam Delegate Skeptical of Navy's Preferred Site for Marines' Relocation*, INSIDE PENTAGON, July 29, 2010, at 14.

375. Paik*, supra* note 122.

376. *Id.*

377. *See* Host, *supra* note 374, at 14.

378. *Id.*

> advocates for the use of the northern two-thirds of Tinian and the entire island of Pagan as military training ranges, primarily by the relocated marines.[379]

The suit alleged that this separation of projections was an "illegal segmentation" of the EIS and "a failure to be transparent."[380]

The Federal District Court ultimately granted summary judgment for the Navy.[381] Regarding the challenges to the EIS, the District Court concluded that it was reasonable for the Navy to examine the two plans—the relocation of troops from Okinawa to Guam and the construction of training facilities in the Commonwealth of the Northern Mariana Islands—separately because these plans did not relate to "connected actions."[382] Additionally, the court found that it was acceptable for the Navy not to address the cumulative impacts of these plans until a subsequent EIS.[383]

The Ninth Circuit subsequently reviewed and concluded that the actions were "not connected for the purposes of an environmental impact statement."[384] The court found that "the two actions have overlapping goals" but denied their connected status because they also had "independent utility."[385] The court based its reasoning on the idea that "while it may be more convenient for the Marines to have these training facilities closer, there is no evidence showing they *must* be."[386] Additionally, the Ninth Circuit also determined that the plaintiffs lacked standing to challenge the troop relocation because changing the relocation plans would involve altering a U.S. treaty with Japan.[387]

In sum, NEPA can be a useful tool in the eminent domain context. However, NEPA also lacks force because it indirectly approaches the problem and focuses on procedure rather than substance. A better or more

379. Sophia Perez, *Governor Remains Opposed to Military's Plans*, GUAM DAILY POST (Aug. 29, 2018), https://bit.ly/3AExdIj.

380. *Id.*

381. Tinian Women Ass'n v. U.S. Dep't of the Navy, No. 16-cv-00022, 2018 U.S. Dist. LEXIS 143988, at *4 (D. N. Mar. I. Aug. 22, 2018).

382. *See id.* at *43 ("[T]he Court concludes that the Relocation EIS serves the independent purpose of fulfilling international obligations to Japan, and the CJMT EIS serves the independent purpose of evaluating the training facilities required.").

383. *See id.* at *55–56 ("[W]hile there may be cumulative impacts from the actions resulting from the relocation of Marines and the CJMT proposal, there is no NEPA violation because Defendants have committed to assessing these impacts in the CJMT EIS.").

384. Tinian Women Ass'n v. U.S. Dep't of the Navy, 976 F.3d 832, 834 (9th Cir. 2020).

385. *Id.* at 838.

386. *Id.* (emphasis in original).

387. *See id.* at 840 ("TWA's second claim is not redressable by the judicial branch and must be dismissed for lack of standing.").

thorough environmental assessment might or might not actually impact the existence or scope of an eminent domain project.

IV. CONCLUSIONS AND RECOMMENDATIONS TO ENSURE CONSTITUTIONAL PROTECTION OF PROPERTY CONSISTENT WITH THE FIFTH AMENDMENT

This final Part reflects on the historical patterns of unjust takings in the U.S. Territories. The first Section engages the history of race and property law, focusing narrowly on the continuing implications for eminent domain. Then, three additional Sections set forth three specific problems with eminent domain law as it stands, particularly as a tool to protect indigenous peoples of the Territories. Each Section then articulates a discrete method of making practical changes to existing Supreme Court precedent in ways that are consistent with other doctrines and precedents.

A. Eminent Domain and the Problem of Political Power in the U.S. Mainland and the Territories

Given the demographics of the communities most likely to be directly impacted by eminent domain, it is crucial to recognize that eminent domain often occurs in contexts where a government entity wants to either (1) control access or designate who belongs in an area, or (2) determine the best use of a property. Due to the history of race, property, and law in the U.S, both contexts offer unique challenges when the subject lands are populated by predominantly minority residents.

With respect to access or designating who belongs in an area, ample evidence demonstrates that white people regularly attempt to exclude Black people from shared spaces. Professors Taja-Nia Y. Henderson & Jamila Jefferson-Jones recently wrote about "white Americans calling the police when they perceived that Black people were occupying spaces [like public parks] where they ought not to be."[388] Henderson and Jefferson-Jones concluded that the "casting of Blackness as a property harm" was "a deep-seated phenomenon that has been pervasive throughout U.S. history."[389] Their scholarship details a history of utilizing "the language of land use, particularly that of nuisance and trespass," as a mechanism to "exclude Blacks from various shared spaces."[390]

388. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 865 (2020).

389. *Id.* at 870; *see also* Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1649 (2019) ("For Black people in White spaces, whose bodies carry the weight of cultural myths about danger and criminality and who may at any time be viewed as suspicious, threatening, or out of place by their neighbors, self-defense laws are a reminder that the law condones, and even encourages, fear-based violence against them.").

390. Henderson & Jefferson-Jones, *supra* note 388, at 871.

The U.S. has a history of racial exclusion in property, from segregation to restrictive covenants,[391] and segregated spaces have both shaped and continue to dominate the American landscape.[392] Unsurprisingly, "[t]he story of [B]lack resistance is also profoundly spatial. For example, [B]lacks vigorously contested the denial of civil rights to travel freely and enter public spaces through sit-ins, marches, and other actions that operated on a spatial plane."[393] In essence, the question of who belongs has long been racialized and has played out not only socially but also spatially in property.

It is against this canvas that we paint the story of eminent domain law. Eminent domain projects can effectively decide who belongs in an area—particularly in the context of urban development.

B. Overturn Cherokee Nation v. Southern Kansas Railway Co.

The pattern of acknowledging that compensation is due but failing to provide that compensation for years or decades after a taking is at the core of the history of unjust takings in the U.S. Territories.[394] The Supreme Court's decision in *Cherokee Nation v. Southern Kansas Railway Co.*[395] is a key mechanism that makes this possible because the Court only required "provision for compensation" rather than actually requiring "just compensation." The Supreme Court minimized the requirements of the Fifth Amendment, finding that "[t]he Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken."[396] Instead, the Court found that the Constitution only demanded "reasonable, certain[,] and adequate provision for obtaining compensation before . . . occupancy is disturbed."[397]

391. *See generally* Douglas S. Massey & Nancy A. Denton, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (discussing the history of racial segregation in the United States and arguing that this segregation had significant economic consequences).

392. *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1913 (1994) ("[C]ontemporary society, through the mechanism of law, creates and perpetuates racially identified spaces without doing so explicitly."); *see also* Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1366 (1997) (examining racial hierarchy and segregation, particularly in public institutions).

393. Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 407 n.32 (2010).

394. *See supra* Part II.

395. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1890).

396. *Id.*

397. *Id.*

Five years later, the Supreme Court's decision in *Sweet v. Rechel*[398] supported *Cherokee Nation* by emphasizing the "provision for reasonable compensation" rather than direct, immediate, or contemporaneous payment.[399] Recently, the Third Circuit relied substantially on *Cherokee Nation* to find that the "established law" does not require payment in advance of dispossession.[400] The Third Circuit added, "In addition, compensation need not be paid contemporaneously with the taking; instead, the Fifth Amendment requires only that a provision for payment must be available."[401]

Cherokee Nation's holding does not meet the standard of the Fifth Amendment. Our constitutional guarantee is for just compensation, not a promise to make just compensation in the future. Indeed, *Cherokee Nation* stands in stark contrast to the well-litigated standard for just compensation: a true market value of the property, often based meticulously on comparisons to sales that are similar both in their timing and in the location of the property. Our well-established idea of just compensation is based on a normal market transaction. Such a normal market transaction is one where the payment proceeds possession.

Finally, a provision for compensation is not compensation. Rather, such provision is effectively a promise to make payment. A promise is not always certain. The frequency of municipal bankruptcies alone should convince us that such promises are not very likely to be kept. Moreover, the history of land takings in the Territories demonstrates the likelihood of the government's delayed and diminished payments to less powerful, minority populations. The straightforward solution is to overturn *Cherokee Nation*, which, as the law stands, effectively prevents an immediate suit for payment. Overturning *Cherokee Nation* would be a substantial step forward in protecting our constitutional property rights generally, and such a change would particularly benefit minority communities. The history detailed in this article demonstrates that a provision for compensation is not an effective protection of the right to just compensation. The existence of a procedural mechanism, no matter how cumbersome or late, provides poor protection for a right so clear in

398. Sweet v. Rechel, 159 U.S. 380 (1895)

399. *Id.* at 399 ("When, however, the legislature provides for the actual taking and appropriation of private property for public uses, authority to enact such a regulation rests upon its right of eminent domain,—a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner.").

400. *See* Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 737 (3d Cir. 2018) ("[D]ue process does not require that condemnation of land to be in advance of its occupation by the condemning authority.").

401. *Id.*

the text of the Constitution. The appropriate standard is the standard articulated in the Constitution: just compensation.

C. Replace Legislative Discretion with Intermediate Scrutiny Where Plaintiff-Landowners Are Members of a Protected Class

Minority communities—specifically Black communities in the States and indigenous communities in the Territories—are more likely to be subjects of an eminent domain action.[402] The history of race and property within the U.S. is riddled with bias and exclusion. Moreover, two frequently racialized questions underpin eminent domain: who belongs in the space and what is the best use of the space. In this context, a standard of legislative discretion, which translates to municipal discretion given the number of local takings, is highly likely to overlook racially-biased decision-making.

In light of the history of bias in property law—and particularly eminent domain law—as well as the existence of a far higher level of scrutiny in an ordinary equal protection case based on race, courts should embrace a standard of intermediate scrutiny. Such a standard recognizes the systemic likelihood of bias in the eminent domain context. Moreover, an intermediate scrutiny standard balances the recognition of sovereignty and the need for some government leeway in practically accomplishing infrastructure projects.

D. Articulate a Standard for Equal Protection Challenges Based on Race and Eminent Domain

Equal protection has not been a fruitful ground for challenges to eminent domain actions, mainly because such challenges have been limited in number and viewed essentially as outside of eminent domain's basic public use and just compensation framework. However, given the evidence of how eminent domain actions have disproportionately impacted Black and indigenous communities, courts should be as open to equal protection as an independent ground for challenging an eminent domain action as they would be to an equal protection challenge in another context. When a state or city government acts in a prejudiced manner regarding the processing and payment of takings claims or the selection of property for taking, such claims should be considered under the equal protection framework rather than being relegated solely to the eminent domain context—where a lack of protective standards fosters unequal treatment. Therefore, the Supreme Court should articulate a standard for

402. *See* Brief for Nat'l Ass'n for the Advancement of Colored People et al. as Amici Curiae Supporting Petitioners at 7, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 73 USWL 4552.

an equal protection violation in this context when the next case presents itself.

V. CONCLUSION

The legal history of unjust land takings within the U.S. Territories is a neglected topic that is useful for developing patterns of problems originating within eminent domain law. These patterns demonstrate that eminent domain law fails to protect private property adequately.

Unfettered legislative discretion invites racial bias in the context of deciding two key questions that underpin eminent domain actions: who belongs there and what use of the land is best. Additionally, courts unreasonably tolerate delays in payments on eminent domain claims—a trend wholly inconsistent with the otherwise transactional emphasis on just compensation. Finally, no other area of law, such as equal protection or due process, intervenes to provide adequate property protection.

This Article endorses three specific and complementary routes to achieving more just property protections in the context of eminent domain. First, the Supreme Court should overturn *Cherokee Nation v. Southern Kansas Railroad Co.*, which justifies delayed compensation and is inconsistent with other precedents that emphasize ordinary land transactional approaches to just compensation. Second, in keeping with equal protection laws, the Court should recognize the dangers of unfettered legislative discretion and adopt a more intensive review in the context of takings of Black and indigenous land. Finally, in keeping with equal protection rulings in other contexts, the Court should articulate a standard for an equal protection violation in the context of eminent domain.