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A Wall of Hate

EMINENT DOMAIN AND INTEREST-CONVERGENCE

Philip Lee[†]

INTRODUCTION

“On day one, we will begin working on an impenetrable, physical, tall, powerful, beautiful southern border wall.”¹—Donald Trump

Donald Trump is no stranger to eminent domain.² In the 1990s, Trump wanted land around Trump Plaza to build a limousine parking lot.³ Many of the private owners agreed to

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¹ Donald Trump, Campaign speech in Phoenix, AZ (Aug. 31, 2016) https://www.washingtonpost.com/video/politics/trump-says-he-will-build-impenetrable-physical-tall-powerful-beautiful-border/2016/08/31/34eaceacc-6fb6-11e6-993f-73c693a89820_video.html?utm_term=.b0c2b78beef1 [<https://perma.cc/D2CJ-ZZ52>]. For a full transcript of the speech, see Rishi Iyengar, *Real Donald Trump’s Speech on Immigration*, TIME (Sept. 1, 2016, 1:52 AM ET), <http://time.com/4475349/donald-trumps-speech-immigration-transcript/> [<https://perma.cc/CX3M-MGG8>].

² See, e.g., Jim Geraghty, *Donald Trump: “Eminent Domain is Wonderful,”* NAT’L REV., (Oct. 7, 2015, 7:50 PM), <http://www.nationalreview.com/article/425212/donald-trump-eminant-domain-wonderful-jim-geraghty> [<https://perma.cc/53NJ-VS5W>]; David Sherfinski, *Donald Trump: “I Think Eminent Domain is Wonderful,”* WASH. TIMES (Oct. 7, 2015), <http://www.washingtontimes.com/news/2015/oct/7/donald-trump-i-think-eminant-domain-wonderful/> [<https://perma.cc/H53Y-ZHPC>]. Although “eminent domain” is not mentioned in the Constitution, the Supreme Court has interpreted the Fifth Amendment as a provision that limits government eminent domain power. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 472 (2005) (referring to a city’s ability “to acquire . . . property [for a public use] from unwilling owners in exchange for just compensation” under the Takings Clause as “the power of eminent domain”).

³ David Boaz, *Donald Trump’s Eminent Domain Love Nearly Cost a Widow Her House*, GUARDIAN (Aug. 19, 2015), <https://www.theguardian.com/commentisfree/2015/aug/19/donald-trumps-eminant-domain-nearly-cost-widow-house> [<https://perma.cc/5Z6H-TV2N>].

sell, but one elderly widow and two brothers who owned a small business refused.⁴ Trump then got a government agency—the Casino Reinvestment Development Authority (CRDA)—to take the properties through eminent domain, offering them a quarter of what they had previously paid or been offered for their land.⁵

The property owners fought back and finally won.⁶ Although the CRDA named several justifications, from economic development to traffic alleviation and additional green space,⁷ the New Jersey Superior Court found there were not “sufficient assurances that the properties to be condemned will be used for the public purposes cited to justify their acquisition.”⁸ In reaching its result, the court noted that the legality of a government taking “may . . . turn upon an assessment of the consequences and effects of the proposed project.”⁹ The court refused to give significant deference to the government agency’s

⁴ *Id.*

⁵ *Id.* Boaz writes of the CRDA’s offers:

CRDA offered [Vera Coking, an elderly widow] \$250,000 for the property—one-fourth of what another hotel builder had offered her a decade earlier. When she turned that down, the agency went into court to claim her property under eminent domain so that Trump could pave it and put up a parking lot. Peter Banin and his brother owned another building on the block. A few months after they paid \$500,000 to purchase the building for a pawn shop, CRDA offered them \$174,000 and told them to leave the property. A Russian immigrant, Banin said: “I knew they could do this in Russia, but not here. I would understand if they needed it for an airport runway, but for a casino?”

Id.

⁶ *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. 1998). Note that the landowners in *Banin* were represented by Institute for Justice. *Atlantic City Condemnation—Vera Coking*, INST. FOR JUSTICE, <https://ij.org/case/casino-reinvestment-development-authority-v-coking/> [<https://perma.cc/8CQC-Y3KP>]. The Institute for Justice is the same non-profit libertarian public interest law firm that later represented the landowners in *Kelo v. City of New London*, 545 U.S. 469 (2005), which will be discussed later in the article. *See supra* section I.D.2.

⁷ *Banin*, 727 A.2d at 104–05. CRDA gave the following justifications related to the public benefit for its taking of private property:

- the development of additional hotel rooms in Atlantic City dedicated to housing conventioners using the new Convention Center
- redevelopment of a portion of the Corridor Area
- the construction of additional parking
- the alleviation of traffic congestion in the Corridor Area
- establishment of a park—green space—in Atlantic City
- creation of new permanent hospitality industry and short-term construction industry jobs
- promotion of the tourist and convention industries.

Id. at 104–05.

⁸ *Id.* at 108, 111.

⁹ *Id.* at 104 (citations omitted).

determination that the public purpose would be satisfied. Instead, it evaluated the government's claims on its own and found them lacking.

This heightened scrutiny is generally absent in federal court decisions interpreting the scope of public use for eminent domain power.¹⁰ This lack of federal fetter on eminent domain is troubling because of President Trump's promises to build a border wall between the United States and Mexico.¹¹ Trump instigated chants of "build a wall!" at his campaign rallies,¹² issued an executive order concerning the wall within his first days in office,¹³ and shut down the government over border wall funding.¹⁴ Construction of Trump's proposed border wall commenced in late September 2017.¹⁵ In November 2017, Trump requested additional resources to hire government attorneys to handle eminent domain cases in the coming year.¹⁶ After failing

¹⁰ See *infra* Part II. Note, however, that *Kelo* suggests that heightened scrutiny should be applied to pretextual takings where the stated reason is public use, but the actual reason is private benefit, yet the Court provides no standards on how to perform such analysis. 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."). In this article, I argue for heightened judicial scrutiny in all eminent domain challenges before a court, not just for pretextual takings.

¹¹ See Julie Hirschfeld Davis, David E. Sanger & Maggie Haberman, *Trump to Order Mexican Border Wall and Curtail Immigration*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/politics/wall-border-trump.html> [<https://perma.cc/Q8AJ-M3UW>] ("The border wall was a signature promise of Mr. Trump's campaign, during which he argued it is vital to gaining control over the illegal flow of immigrants into the United States.").

¹² See Kelly Wallace & Sandee LaMotte, *The Collateral Damage After Students' 'Build a Wall' Chant Goes Viral*, CNN (Dec. 28, 2016, 11:10 AM ET), <http://www.cnn.com/2016/12/28/health/build-a-wall-viral-video-collateral-damage-middle-school/index.html> [<https://perma.cc/QE75-JDMC>].

¹³ See Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

¹⁴ See Carl Hulse, *Trump Fences Himself in with Border Wall Spending Threat*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/us/politics/trump-wall-government-shutdown-congress.html> [<https://perma.cc/E4D5-FKQV>] (noting that Trump has left little room for negotiation with his threats to shut down the government if Congress does not approve funding for his border wall); Martin Pengelly and Jamiles Lartey, *Trump Claims Plan to End Longest Government Shutdown in History*, THE GUARDIAN (Jan. 12, 2019, 12:02 EST), <https://www.theguardian.com/us-news/2019/jan/12/donald-trump-government-shut-down-border-wall-democrats> [<https://perma.cc/F5Q6-6BE2>]; Jacob Pramuk, *Trump: I'm Building the Wall*, CNBC (Aug. 23, 2017, 2:00 PM ET), <https://www.cnbc.com/2017/08/22/trump-says-hes-willing-to-shut-down-the-government-to-get-his-border-wall.html> [<https://perma.cc/H6B3-GPEW>] (noting that Trump said at a rally in Arizona, "If we have to close down our government, we're building that wall.").

¹⁵ See Stephen Dinan, *Trump Border Wall Construction Begins*, WASH. TIMES (Sept. 26, 2017), <http://www.washingtontimes.com/news/2017/sep/26/trump-border-wall-construction-begins/> [<https://perma.cc/J8U3-P283>].

¹⁶ See Tal Kopan, *Trump Admin Taking Quiet Steps on Seizing Border Land, Report Says*, CNN (Nov. 13, 2017, 7:56 PM ET), <https://www.cnn.com/2017/11/13/politics/border-wall-eminent-domain/index.html> [<https://perma.cc/7SHU-C457>] (noting that a report produced by Democrats on the Senate Homeland Security and Government Affairs Committee on eminent domain and the border wall detailing the Trump administration's request for 2018, "which seeks

to secure federal funding for his border wall for over a year, Trump partially shut down the government in December 2018.¹⁷ Ending on January 25, 2019, this shutdown became the longest in U.S. history.¹⁸

Although about 650 miles of border fencing were already constructed in 1990,¹⁹ the proposed wall would be both much longer and much more massive. According to the executive order, “wall” is not just fencing, but “a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.”²⁰ The wall would also span the entire “‘Southern border’ . . . including all points of entry.”²¹ The southern border encompasses roughly two thousand miles.²² It stretches across the states of California, Arizona, New Mexico, and Texas.²³ Two-thirds of the land along this border is private, state-owned, or tribal land, while only about one-third is owned by the federal government.²⁴

an additional [twelve] [Justice Department] attorneys for \$2 million . . . to handle land acquisition cases”).

¹⁷ See Sheryl Gay Stolberg & Katie Rogers, *Government Shutdown to Continue for Days as Senate Adjourns Until Thursday*, N.Y. TIMES (Dec. 22, 2018), <https://www.nytimes.com/2018/12/22/us/politics/shutdown-trump-senate.html> [<https://perma.cc/YVH8-DY6L>].

¹⁸ See Mihir Zaveri, Guilbert Gates & Karen Zraick, *The Government Shutdown Was the Longest Ever. Here's the History*, N.Y. TIMES (Jan. 25, 2019) <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html> [<https://perma.cc/D5NM-VMAS>].

¹⁹ See Astrid Galvan & Brian Skoloff, *Donald Trump's Wall Plan Draws Mixed Reactions on the Border*, ASSOCIATED PRESS (Mar. 21, 2016), <https://apnews.com/08ea2fca2c7b4fe880d6110f3c00978f/mixed-reactions-trumps-border-wall-along-arizona-border> [<https://perma.cc/B248-TL26>] (“There are already about 650 miles of fencing, including the steel fence that divides the sister cities of Nogales in Arizona and Mexico and ranges from [eighteen] feet to [twenty-six] feet tall.”); Julia Jacobo & Serena Marshall, *Nearly 700 Miles of Fencing at the US-Mexico Border Already Exist*, ABC NEWS (Jan. 26, 2017, 6:38 AM ET), <http://abcnews.go.com/US/700-miles-fencing-us-mexico-border-exist/story?id=45045054> [<https://perma.cc/F5D3-HAT8>] (“The types of fencing includes [sic] wire mesh, chain link, post and rail, sheet piling, concrete barriers for vehicles and X-shaped steel beams for livestock.”).

²⁰ Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8,794 (Jan. 25, 2017); see also *Trump to Reporter: 'It's Not a Fence, It's a Wall; We're Gonna Start Building'*, FOX NEWS (Jan. 11, 2017, 12:36 PM), <http://insider.foxnews.com/2017/01/11/trump-reporter-its-not-fence-its-wall-and-were-not-going-wait> [<https://perma.cc/4DQ9-78WQ>] (“Trump pushed back on recent reports that U.S. taxpayers will have to foot the bill upfront, rather than Mexico. The president-elect first corrected the reporter, who referred to it as a ‘border fence.’ ‘It’s not a fence, it’s a wall. You just misreported it,’ he said.”).

²¹ Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8,794.

²² John Burnett, *Southern Border Wall: Campaign Slogan Meets Reality*, NPR (Jan. 23, 2017, 5:01 AM ET), <http://www.npr.org/2017/01/23/511165471/southern-border-wall-campaign-slogan-meets-reality> [<https://perma.cc/C68U-ABZ8>].

²³ Sarah Almukhter & Josh Williams, *Trump Wants a Border Wall. See What's in Place Already.*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/interactive/2018/02/05/us/border-wall.html> [<http://perma.cc/UT3R-QML5>].

²⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-399, SOUTHWEST BORDER: ISSUES RELATED TO PRIVATE PROPERTY DAMAGE 5 (2015), <http://www.gao.gov/assets/670/669936.pdf> [<https://perma.cc/9LAQ-25RK>] (“Additionally, the area along the southwest border is composed of federal, state, tribal, and private lands; federal and tribal lands

A major obstacle to building the wall besides the price,²⁵ which Mexico is not going to pay,²⁶ is the property rights of the private landowners and Native American tribes who occupy the land.²⁷ For those who refuse to sell their property to the federal government, under cases like *Kelo v. City of New London*, the government will be able to take it through the power of eminent domain with little check on its power.²⁸

This article is about the interest-convergence thesis, which posits that civil rights gains are made possible when the interests of racial minorities converge with the interests of the white majority.²⁹ Interest-convergence is a useful theoretical tool in analyzing the controversy surrounding the proposed border wall because it highlights overlapping interests between many different racial groups that otherwise may be missed. As such, this article argues that we are in a unique historical moment in which the interests of minority and majority racial groups have converged to push for heightened scrutiny in legal challenges to federal government takings of private land. In particular, racial minorities have an interest in increasing and maintaining their home ownership as a civil rights matter, while white people have an interest in limiting the power of government to take their homes from a property rights perspective.

This article proceeds in three parts. Part I provides an overview of Professor Derrick Bell's influential interest-convergence thesis. This Part also introduces the public use doctrine, in addition to a new idea of micro- and macro-level interest-convergence to explain what appears to be civil rights

make up 632 miles, or approximately 33 percent, of the nearly 2,000 total border miles. Private and state-owned lands constitute the remaining 67 percent of the border, most of which is located in Texas.”)

²⁵ See Peter Baker & Jennifer Steinhauer, *Wall 'Will Get Built,' Trump Says, as He Drops Funding Demand*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/us/politics/mexico-wall-spending-trump.html> [<https://perma.cc/L32D-F2QJ>] (“Mr. Trump initially estimated during the campaign that the wall would cost \$12 billion, but the figure has soared since then. A Department of Homeland Security internal report in February estimated that the wall could cost about \$21.6 billion. A new report issued by the Senate Democrats last week put the cost far higher, at nearly \$70 billion.”).

²⁶ Azam Ahmed, *Mexico's President Cancels Meeting with Trump Over Wall*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/world/mexicos-president-cancels-meeting-with-trump-over-wall.html> [<https://perma.cc/8GC2-5WZ6>]; Ayesha Rascoe, *In Blustery Call, Trump Pressured Mexico on Border Wall Payment*, REUTERS (Aug. 3, 2017, 9:59 AM), <https://www.reuters.com/article/us-usa-trump/in-blustery-call-trump-pressured-mexico-on-border-wall-payment-idUSKBN1AJ20F> [<https://perma.cc/N26E-WX8Q>].

²⁷ In addition, the state-owned land poses an issue. However, the many issues of federalism this invokes is beyond the scope of this article. I will focus, instead, on the potential takings from private parties and Native American tribes.

²⁸ *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

²⁹ See Derrick A. Bell, Jr., Comment, *Brown v. Board of Educ. and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

gains in the property realm when broader interests between majority and minority racial groups have not converged, but more individualized interests have. Part II applies a racial reinterpretation of the three cases—*Berman*, *Midkiff*, and *Kelo*—that created a broad, deferential interpretation of public use to show that minority and majority racial interests have converged on a macro-level around reforming federal eminent domain law. This Part highlights the racial dimension of important Supreme Court cases that, on first take, appear race-neutral. Finally, Part III suggests some possible ways forward by focusing on ways to challenge the federal government’s takings power with various forms of heightened judicial scrutiny. Part III argues that the time is ripe to pursue such alternatives because we are in a moment of macro-level interest-convergence.

I. THE INTEREST-CONVERGENCE THESIS AND PROPERTY THEORY

A. *The Interest-Convergence Thesis*

In a highly influential comment in the *Harvard Law Review* titled *Brown v. Board of Education and the Interest-Convergence Dilemma*, legal scholar Derrick Bell, Jr. was in search of a principle that would explain the civil rights victory in *Brown v. Board of Education*.³⁰ Bell’s piece was in response to an article by Professor Herbert Wechsler which argues that the proper role of the courts is to decide cases on a neutral principle that would be applicable to other cases.³¹ Wechsler then questions the constitutional legitimacy of *Brown* because, instead of neutral grounds, he argues that the case is really based on conflicting associational rights between African Americans and white people.³² Bell, in response, rejects both

³⁰ *Id.*

³¹ *Id.* at 520–21; see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (“To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?”).

³² Wechsler, *supra* note 31, at 34. (“Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?”).

associational rights³³ and racial equality³⁴ as the principles that undergirded *Brown*. Bell explains an alternative thesis that would encompass a generally applicable principle: “Translated from judicial activity in racial cases both before and after *Brown*, this principle of ‘interest convergence’ provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”³⁵ In other words, civil rights gains will only be made when the interest of racial minorities overlaps with the interest of white people. Bell elaborates, “Racial remedies may . . . be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle- and upper-class whites.”³⁶ Bell then identifies three points of broad convergence between minority and majority interests in *Brown*. First, the decision was instrumental for white government officials and others in countering Communist propaganda aimed at third world countries that critiqued the racism of American society.³⁷ Second, *Brown* offered reassurance to the returning African American veterans of World War II, who had sacrificed so much fighting for the ideals of American democracy, that while their country had its racial problems, it was at least moving in the direction of equality.³⁸ Third, the decision was a boon to white Americans in the South who viewed racial segregation “as a barrier to further industrialization” and a more prosperous economy.³⁹ Based on these three aspects of overlapping minority and white interests, the civil rights victory in *Brown* was made possible. Interest-convergence is a useful tool that helps explain why civil rights progress has been

³³ Bell, *supra* note 29, at 522 (“To doubt that racial segregation is harmful to blacks, and to suggest that what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then.”).

³⁴ *Id.* at 523. (Bell argues “that the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites.”).

³⁵ *Id.*

³⁶ *Id.* A substantial body of research has arisen in recent years on the concept of subconscious bias in the law. *See, e.g.*, David L. Faigman, et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2007); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Annika L. Jones, Comment, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221 (2017); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97 (2010); L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359 (2012).

³⁷ Bell, *supra* note 29, at 524.

³⁸ *Id.*

³⁹ *Id.* at 525.

possible, even when the history of racial oppression in this country would suggest otherwise.

Interest-convergence, however, has been vigorously contested in the academy. One of the most powerful critiques is by legal scholar Justin Driver.⁴⁰ Driver argues that interest-convergence suffers a number of analytical weaknesses. First, the theory has an “overly broad conceptualization” of the uniformity of what constitutes a “black interest[.]” and a “white interest[.]”⁴¹ In response, Driver over-complicates Bell’s theory by questioning the epistemological foundations of racialized knowledge. Insofar as racial minorities have been mistreated in this society, however, the broad “black interest” would simply entail creating a society without this mistreatment.⁴² Second, Driver contends that the theory “incorrectly suggests that the racial status of [African Americans]” is characterized by continuity instead of change and takes issue with the theory’s lack of recognition of the agency of two groups of people who have played a significant role in civil rights gains—African American citizens and white judges.⁴³ In response, if interest-convergence is viewed partially as a historical methodology, then Driver’s attacks are flawed.⁴⁴ In other words, if Bell is describing how *Brown* happened, then his analysis is useful because its characterization of the continuity of racism and central role of white decision makers in maintaining the status quo is historically accurate. Thus, if Bell appears to be creating a dichotomy of African American interests versus white interests, assuming that racism is a fixture in American society, as well as downplaying the agency of individual actors in a racially oppressive system and looking for racial explanations of seemingly positive developments, then it is because this is how he explains the decision that ended Jim Crow. Finally, Driver criticizes the irrefutable nature of the theory—specifically, how it frames “egalitarian judicial decisions” as “necessary concessions to . . . maintain white [supremacy]” or simply “ignore[s] them altogether.”⁴⁵ In response, as Driver’s article demonstrates, no theory is irrefutable. If Bell ignored certain cases in his analysis,

⁴⁰ See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011).

⁴¹ *Id.* at 156.

⁴² See Lahny R. Silva, *Ringling the Bell: The Right Counsel and the Interest Convergence Dilemma*, 82 MO. L. REV. 133, 146–48 (2017) (applying interest-convergence to the right to counsel in criminal law).

⁴³ See Driver, *supra* note 40, at 156–57.

⁴⁴ See Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248, 252–58 (2012).

⁴⁵ See Driver, *supra* note 40, at 157.

scholars like Driver will surely highlight these gaps and continue to ask questions about its explanatory power.

Even taking Driver's critique seriously, interest-convergence maintains theoretical utility for explaining civil rights gains. Indeed, Bell's thesis has been applied to many different minority groups. For example, it has been used to analyze how Mexican Americans were able to successfully contest their legalized exclusion from juries,⁴⁶ how Japanese Americans were able to win reparations for the World War II internment camps,⁴⁷ how sexual minorities were able to secure marriage equality,⁴⁸ and how many other groups achieved civil rights gains.⁴⁹ Interest-convergence has also been applied to different areas of law.⁵⁰ In all of these analyses, the interest of minority groups in achieving equality and fair treatment overlapped with the interests of the majority group.

⁴⁶ See, e.g., Richard Delgado, *Rodrigo's Roundelay*, *Hernandez v. Texas and the Interest Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 63 (2006) (applying interest-convergence to Mexican Americans and the case that struck down their exclusion from juries).

⁴⁷ See Rhonda V. Magee, Note, *The Master's Tools from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 908–09 (1993) (applying interest-convergence to Japanese Americans and their fight for reparations for the World War II internment camps).

⁴⁸ See Neo Khuu, Comment, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184, 215–16 (2017).

⁴⁹ See Maria Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1377 (2005) (applying interest-convergence to undocumented minority students and their fight for educational access); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 330–31 (2009) (applying interest-convergence to people with disabilities and their fight for inclusion); Charles R. Venator-Santiago, *Cold War Civil Rights: The Puerto Rican Dimension*, 42 CAL. W. INT'L L.J. 423, 431 (2012) (applying interest-convergence to Puerto Ricans and their struggle for self-governance).

⁵⁰ See, e.g., Bryan L. Adamson, *The H'aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 185–99 (2006) (applying interest-convergence to school finance reform in education law); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 282–84 (1996) (applying interest-convergence to immigration law); Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 871–72 (1996) (book review applying interest-convergence to religious freedom law); Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 940 (2005) (applying interest-convergence to alternative dispute resolution in employment discrimination law); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 939 (2007) (applying interest-convergence to the cultural defense in criminal law); Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185, 209–10 (2012) (applying interest-convergence to advocate for single-issue coalitions in national security law); Silva, *supra* note 42, at 148 (applying interest-convergence to the right to counsel in criminal law); Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 286–87 (2004) (applying interest-convergence to recognition of tribal sovereignty in Indian Law).

Furthermore, this theory has applicability when looking at future events. Indeed, Bell suggests that the struggle for advancing racial equality is contingent on understanding and applying interest-convergence to future issues.⁵¹ Bell writes regarding the fate of *Brown*:

The change in racial circumstances since 1954 rivals or surpasses all that occurred during the period that preceded it. If the decision that was at least a catalyst for that change is to remain viable, those who rely on it must exhibit the dynamic awareness of all the legal and political considerations that influenced those who wrote it.⁵²

Therefore, according to Bell, understanding of the past can guide both the present and the future. This is particularly relevant with the election of a president who has stoked the flames of racial animosity.⁵³

B. *The Public Use Doctrine*

Eminent domain can be traced to Roman law⁵⁴ and has been codified in the Constitution.⁵⁵ While the Takings Clause,

⁵¹ Bell, *supra* note 29 at 528 (“Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized.”).

⁵² *Id.* at 533. Bell would later express deep pessimism that transformational societal change was possible. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, at ix (1992) (“[R]acism is an integral, permanent, and indestructible component of this society.”).

⁵³ See *infra* Section III.B.

⁵⁴ Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204 (1978) (tracing the origins of eminent domain).

⁵⁵ U.S. CONST., amend. V. One theory of eminent domain is that it is an inherent characteristic of sovereignty. See *United States v. Jones*, 109 U.S. 513, 518 (1883) (“The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and . . . requires no constitutional recognition.” (citation omitted)); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879) (“The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.”). Another theory of federal eminent domain power when exercised by the legislative branch is that it resides in the Necessary and Proper Clause. See *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681 (1896) (Upholding a historic preservation law under the Necessary and Proper Clause because it “comes within the rule laid down by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 421, in these words: ‘Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.’”). A related theory of federal eminent domain power holds that when it is exercised by the executive branch, it is constrained by the separation of powers. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The

which applies to the federal government, provides, “nor shall private property be taken for public use, without just compensation,”⁵⁶ courts have struggled to define the limits of “public use” over time.⁵⁷

In early cases, the Supreme Court fluctuated in defining the concept of “public use” in both narrow and broad ways—“narrow” meaning either use (or right to use) by the government or the public, and “broad” meaning public benefit or advantage.⁵⁸ Until 1954, the Supreme Court continued to vacillate as to how restrictively the concept of “public use” would be interpreted.⁵⁹

As will be discussed, the three modern Supreme Court cases that would define the contours of contemporary public use doctrine are *Berman v. Parker*,⁶⁰ *Hawaii Housing Authority v. Midkiff*,⁶¹ and *Kelo v. City of New London*.⁶² All three embraced a broad interpretation of what constitutes public use—and all three cases give government great deference in making public use determinations. This extreme deference to government decision making is problematic when racial animus permeates throughout the process.

first section of the first article says that ‘All legislative Powers herein granted shall be vested in a Congress of the United States . . .’”).

⁵⁶ U.S. CONST., amend. V.

⁵⁷ This article focuses on “public use” in the Takings Clause as applied to physical takings of real property and will not address the questions of what types of government regulations constitute takings or what is “just compensation” for eminent domain purposes. Furthermore, this article centers its analysis on eminent domain under the U.S. Constitution and not under the various states’ constitutions, except for comparison purposes later in the article.

⁵⁸ See Berger, *supra* note 54, at 208–09.

⁵⁹ *Compare* Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (holding that the State ordering a railway company to grant another private entity the right to build and operate an elevator on the railway company’s property in order to expand grain storage capacity was not a public use because it was a “taking by a State of the private property of one person . . . for the private use of another”) and *City of Cincinnati v. Vester*, 281 U.S. 439, 447–48 (1930) (holding that the city’s taking of more property than that was needed to widen a major street was inconsistent with public use and “the municipality is called upon to specify definitely the purpose of the appropriation”) and *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 79 (1937) (holding that the Texas Railroad Commission’s order to limit the total production of gas in order to prevent waste but which forced the plaintiff gas company to purchase additional gas from other companies was not a public use because it was a “glaring instance of the taking of one man’s property and giving it to another.”), *with* *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161–62 (1896) (holding that a state law that allowed for the creation of irrigation districts that facilitated the supply of water across the land was a public use even though the entire community did not have the subsequent right to use the water) and *Rindge Co. v. Los Angeles Cty.*, 262 U.S. 700, 706–07 (1923) (holding that the county’s taking of a private landowner’s ranch to construct public roads was a public use even though the roads connect with no other public roads at certain ends).

⁶⁰ *Berman v. Parker*, 348 U.S. 26 (1954).

⁶¹ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

⁶² *Kelo v. City of New London*, 545 U.S. 469 (2005).

C. *Racial Animus, Government Decision-Making, and Property Law*

Racial animus refers to prejudice or hostility against racial groups. A case that illustrates the danger of extreme deference to government decision making in the context of racial animus is *Korematsu v. United States*.⁶³ In *Korematsu*, Fred Korematsu, a Japanese American, challenged his criminal conviction for violating an exclusion order that prohibited people of Japanese ancestry from being in certain areas.⁶⁴ Specifically, Korematsu was convicted for being in San Leandro, CA, which was designated a "Military Area."⁶⁵ Justice Black, writing for the majority established that racial classifications should be "subject . . . to the most rigid scrutiny."⁶⁶ Despite this, the Court upheld the exclusion order noting the great deference given to government decision-makers in times of war.⁶⁷

Forty years after the Supreme Court's decision, Fred Korematsu brought a writ of *corum nobis* in a federal district court in California seeking to overturn his criminal conviction.⁶⁸ The district court considered two new sources of information in finding that Korematsu's criminal conviction suffered from errors of fact. One was that military necessity did not justify the internment of Japanese Americans; instead, the internment was caused by "race prejudice, war hysteria, and a failure of political

⁶³ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶⁴ *Id.* at 215–16.

⁶⁵ *Id.* at 215.

⁶⁶ *Id.* at 216.

⁶⁷ *Id.* at 223–24 ("Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified."). In his dissenting opinion, Justice Murphy characterized the majority's opinion as a "legalization of racism." *Id.* at 242 (Murphy, J., dissenting). Murphy wrote:

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

Id. at 233.

⁶⁸ *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984). "A writ of *coram nobis* is an appropriate remedy by which the court can correct errors in criminal convictions where other remedies are not available." *Id.* at 1411.

leadership.”⁶⁹ Another reason was consideration of documents that were “knowingly concealed from the courts” while the Supreme Court case was pending that showed contradictory evidence as to the military necessity of the internment.⁷⁰ In taking this new information into account and overturning Korematsu’s conviction, Judge Patel recognized the need for heightened scrutiny in the context of racial animus in order to protect the rights of citizens targeted based on fear and prejudice.⁷¹ Similarly, if Trump’s border wall proposal is motivated by a fear of dark-skinned people coming to America,⁷² then the government’s taking of private property should be analyzed with heightened scrutiny.

Another example of the dangers of giving too much deference to government decision-making comes from an eminent domain case before the Missouri Court of Appeals in 1959.⁷³ In *City of Creve Coeur v. Weinstein*, an African American couple, Howard and Katie Venable, obtained a building permit to start construction on a new house in the city of Creve Coeur, a suburb of St. Louis.⁷⁴ After the white residents of Creve Coeur learned that African Americans were trying to settle in the area, they formed a “Citizens Committee” and tried to purchase the property from the Venables in order to prevent them from residing in the all-white community.⁷⁵ When the couple refused to sell, the Citizens Committee convinced the city to take action against the Venables.⁷⁶ First, the city denied the couple a plumbing permit to thwart progress on the construction of their new home.⁷⁷ Next, the city condemned the property through its eminent domain power by claiming it was taking the property for use as a public park.⁷⁸ The Venables argued that they “ha[d] been denied the right to choose, free from racial discrimination,

⁶⁹ *Id.* at 1416–17 (citation omitted).

⁷⁰ *Id.* at 1417–19. For a fascinating account of how a scholar, while doing research for a book, later uncovered the intentionally concealed documents through a Freedom of Information Act request, see PETER IRONS, A PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION 362 (2006).

⁷¹ *Korematsu*, 584 F. Supp. at 1420.

⁷² This article argues that it is. See *infra* Section III.B.

⁷³ *Missouri ex rel. City of Creve Coeur v. Weinstein*, 329 S.W.2d 399 (Mo. Ct. App. 1959).

⁷⁴ *Id.* at 402.

⁷⁵ *Id.* at 403.

⁷⁶ *Id.* at 402.

⁷⁷ *Id.*

⁷⁸ *Id.* at 402–03.

the City of Creve Coeur in which to make their home.”⁷⁹ The Missouri Court of Appeals held for the city, noting:

[O]nce it is established that the use for which private property is appropriated is public, the judicial authority of the court is exhausted. This means that the courts have no authority to pass upon the motives of a legislative body in enacting a statute or an ordinance and are powerless to consider the question of what reasons actuated the legislative body in the passing of the statute or the ordinance, as the case may be.⁸⁰

Thus, under this lax standard of judicial review, the fact that racial animus infected the government’s decision making was irrelevant. So long as the government articulated a legitimate public use—in this case, the construction of a park that was open to the public—the condemnation would be upheld. In short, the Venables’ exclusion from the neighborhood based on their race was not even considered in determining the benefits that the “public” would enjoy by the taking. Analogously, if Trump’s border wall proposal is infected with racial animus, then it should be held to heightened judicial scrutiny to avoid a similar outcome to this earlier case.

D. *Applying Interest-Convergence Theory to Property Theory*

1. Property Law Examples of Micro-Level Interest-Convergence

Interest-convergence is not commonly applied to property law issues. This thesis, however, can be seen in earlier property cases on a micro-level. In certain property disputes, the interests of certain individual sellers and buyers of homes were aligned. For example, in *Buchanan v. Warley*, a white plaintiff was challenging a racial zoning law in Louisville, Kentucky that prohibited him from selling his home to an African American buyer.⁸¹ Although at odds with many of his white neighbors and the local government, the interest of the white seller was in selling his house to whomever he chose. Similarly, the interest of the African American buyer was in becoming a homeowner

⁷⁹ *Id.* at 402. They further claimed that the City “[h]astily chose a site for alleged park condemnation purposes and disregarded unsuitable topography, location, and cost of the area sought to be condemned” *Id.* at 403 (internal quotations omitted).

⁸⁰ *Id.* at 406.

⁸¹ *Buchanan v. Warley*, 245 U.S. 60, 72–73 (1917). The zoning ordinance provided that it was unlawful for a “colored person” to move into a block that was occupied by a majority of white people and it was also unlawful for a white person to move into a block that was occupied by a majority of “colored people.” *Id.* at 70–71.

and subsequently being able to sell to whomever he chose. The Court described the alignment of interests by observing, “The right which the [zoning] ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.”⁸² In finding a violation of this right of disposition in the context of converging interests between a buyer and seller of different racial backgrounds, the Court struck down the racial zoning ordinance on Fourteenth Amendment grounds.⁸³

Furthermore, in *Shelley v. Kraemer*, the Shelleys were African American buyers of a home in St. Louis, Missouri who were challenging the racially restrictive covenants that were contained in the deed.⁸⁴ White neighbors were trying to invalidate the sale by enforcing the covenants against the Shelleys.⁸⁵ The Shelleys’ interest in this dispute was in becoming homeowners. In line with this interest, but at odds with her white neighbors who were trying to nullify the sale, the white seller of the home had an interest in being allowed to sell to whomever she chose.⁸⁶ The Court framed the rights at issue broadly enough to encompass the interests of both the buyer and seller:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.⁸⁷

⁸² *Id.* at 81.

⁸³ *Id.* at 82 (“We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.”).

⁸⁴ *Shelley v. Kraemer*, 334 U.S. 1, 4–5 (1948). The covenant provided that:

[N]o part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.

Id. at 4–5.

⁸⁵ *Id.* at 6.

⁸⁶ The case notes that the person on the warranty deed was listed as Josephine Fitzgerald. *Id.* at 5 n.1.

⁸⁷ *Id.* at 10.

In this moment of micro-level interest-convergence between the African American buyers and the white seller of the home,⁸⁸ the Court ultimately found for the Shelleys and struck down state court enforcement of racially restrictive covenants as a violation of equal protection.⁸⁹

A final example of micro-level interest-convergence in the property realm is in the race nuisance cases during the Jim Crow era. These cases involved white landowners attempting to use nuisance law to challenge the presence of African Americans in white neighborhoods.⁹⁰ Legal scholar Rachel Godsil analyzed such situations and found that in a slight majority (“thirteen of twenty-three”) of the cases she could find, “appellate courts rejected claims [by white landowners] that . . . land uses by [African Americans] constituted nuisances.”⁹¹ The interests of the individual white judges in these thirteen cases could have ranged from preserving property rights in general,⁹² to applying a formalistic application of nuisance law,⁹³ while the interest of the African Americans in these cases were simply in the use and enjoyment of their land. Based on these overlapping individual interests, a micro-level convergence occurred between these races and ultimately led to the civil rights of racial minorities being protected.

2. *Kelo v. City of New London* and Macro-Level Interest-Convergence

Interest-convergence can also be a tool of understanding the current historical moment in eminent domain law. This would be more of a macro-level convergence in which broad group interests have come together. In other words, unlike the micro-level convergence examples, macro-level convergence is profuse and monumental. It is neither localized to particular individuals nor at odds with many in the minority and majority groups in which these

⁸⁸ See RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 134 (Harvard Univ. Press, 2013) (noting in the context of racially restrictive covenants, there existed “a kind of wary cooperation between restricted white sellers or landlords and the minority renters or buyers who wanted to move into their forbidden properties. . . . [F]or at least a few fleeting moments, the interests of these groups were aligned—aligned against covenants.”).

⁸⁹ *Id.* at 20.

⁹⁰ See Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 514 (2006).

⁹¹ *Id.* at 520. Godsil found that no appellate court between 1877 and 1954 held the mere presence (as opposed to claims based on conduct) of African Americans or Mexicans to be a nuisance. *Id.* at 519.

⁹² See *id.* at 546–49.

⁹³ *Id.* at 533–36.

people belong. Just as the interests of the minority and majority converged at a macro-level in *Brown v. Board of Education*, they have converged in the same way in reforming eminent domain doctrine in the aftermath of *Kelo v. City of New London*.⁹⁴

After experiencing decades of economic decline, New London adopted “a development plan that . . . was ‘projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.’”⁹⁵ The city authorized the New London Development Corporation (NLDC), a private nonprofit entity, to submit and implement a development plan.⁹⁶ During the planning stage, “the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility” nearby.⁹⁷ In acquiring land for the project, the city authorized NLDC to purchase property from willing sellers and use the power of eminent domain to acquire the remaining property from unwilling owners in exchange for just compensation.⁹⁸

Kelo involved owners of condemned property who challenged the city’s exercise of eminent domain power.⁹⁹ The plaintiffs were landowners in the Fort Trumbull area of New London, Connecticut, who refused to sell their land to the city.¹⁰⁰ They claimed, among other things, that the city’s exercise of eminent domain was in violation of the Public Use Clause.¹⁰¹

The Supreme Court, in a 5-4 decision written by Justice Stevens, held for the city and ruled that the taking was constitutional. The Court majority noted that “our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”¹⁰² The majority rejected the landowners’ argument to scrutinize the means that the government chose by asking if a “reasonable certainty” that the expected public benefits would be achieved.¹⁰³ This exclusive focus on the rationality of the government ends or goals—with no inquiry into the means chosen to achieve the ends—was a form of extreme deference for government decision making. In 2009, just four years after *Kelo*

⁹⁴ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁹⁵ *Id.* at 472 (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004)).

⁹⁶ *Id.* at 473.

⁹⁷ *Id.* at 473.

⁹⁸ *Id.* at 475.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 483.

¹⁰³ *Id.* at 487–88.

was decided, Pfizer announced that it was leaving the area, taking 1,400 jobs with it.¹⁰⁴ Ten years after *Kelo*, the condemned lands remained vacant.¹⁰⁵

The many people who oppose *Kelo* have come from both sides of the political spectrum.¹⁰⁶ “In two national surveys conducted in . . . 2005, 81 percent and 95 percent of respondents were opposed to *Kelo*”—both results showing unified opposition across racial,

¹⁰⁴ See Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), <http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html> [<https://perma.cc/4KAS-GEXG>] (“Pfizer said it would pull 1,400 jobs out of New London within two years and move most of them a few miles away to a campus it owns near Groton, Conn., as a cost-cutting measure. It would leave behind the city’s biggest office complex and an adjacent swath of barren land that was cleared of dozens of homes to make room for a hotel, stores and condominiums that were never built.”).

¹⁰⁵ See *Fort Trumbull Neighborhood Remains Vacant a Decade After City Took Land*, DAY (June 22, 2015, 8:42 AM), <http://www.theday.com/article/20150619/NWS01/150629979> [<https://perma.cc/NDR4-UBS6>]. A new economic development project was proposed in 2015; however, the new plan did not need any of the land that was taken by eminent domain ten years earlier. See Ilya Somin, *New Economic Development May Be Coming to the Neighborhood Where Kelo v. City of New London Occurred—But Not the Condemned Property Itself*, WASH. POST: VOLOKH CONSPIRACY (Mar. 23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/23/new-economic-development-may-be-coming-to-the-neighborhood-where-kelo-v-city-of-new-london-occurred-but-not-the-condemned-property-itself/?utm_term=.fcafecf8edda [<https://perma.cc/B74Q-ALD6>] (noting that the Naval Undersea Warfare Center was owned by the city “long before the [*Kelo*] takings” and that “the condemned properties [in *Kelo*] were on Parcel 3 and Parcel 4A”—two parcels that would not be touched by the 2015 proposal); Collin A. Young, *New Residential Proposal for Fort Trumbull in New London*, DAY (Mar. 21, 2015, 1:01 PM), <http://www.theday.com/local/20150320/new-residential-proposal-for-fort-trumbull-in-new-london> [<https://perma.cc/2YGQ-JRCJ>] (noting that “[t]he development would be situated . . . on roughly [four] acres of land split among parcels 2A, 2B, and 2C and would have water views overlooking Coast Guard Station New London and Fort Trumbull State Park. The entire project is on land that was once the Naval Undersea Warfare Center site”).

¹⁰⁶ See ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 138 (2015). Joseph Singer explains this alignment from a distribution of ownership burdens perspective:

Liberals worry a great deal about . . . the unequal distribution of the burdens of ownership, as when polluting factories are located in areas dominated by poor people or disempowered racial groups. The liberal worry about the distribution of the burdens of property explains why many liberals sided with the Kelos to oppose the taking of their house for transfer to a big corporation. They saw themselves as seeking to limit the power of government to oppress the weak in favor of the powerful, to protect small owners from big owners. Of course, this worry about disparate impacts is also a conservative stance when it comes to regulatory takings. The conservative argument for compensation is that it is unfair for the burdens of public programs to be visited on those few property owners whose property is seized for the public good. This means that there is a crucially important convergence between liberals and conservatives.

Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 331 (2006).

gender, and political lines.¹⁰⁷ Similar results were demonstrated in a 2009 public opinion poll.¹⁰⁸

These aligned interests, especially across race, suggest a moment of possibility for collective resistance to extreme judicial deference to government decision making regarding eminent domain. Thus, we are in a unique historical moment in which the interests of both minority and majority racial groups have converged to push for heightened scrutiny in legal challenges to federal government exercises of eminent domain. Specifically, both minority and majority interests have come together to oppose Trump's plan to take private property for his proposed border wall. An exploration of the racial contexts of the major modern Supreme Court decisions on eminent domain demonstrate that racial minorities have an interest in increasing and maintaining their homeownership from a civil rights perspective, while white people have an interest in limiting the power of government to take their homes from a property rights perspective.

II. AN INTEREST-CONVERGENCE ANALYSIS OF THE BROAD, DEFERENTIAL INTERPRETATIONS OF "PUBLIC USE" IN EMINENT DOMAIN

The interest of people of color is the same now as when Professor Derrick Bell wrote his interest-convergence article in 1980.¹⁰⁹ That interest was and remains the achievement of racial equality in America.¹¹⁰ An expression of this interest is in the civil rights strategy of increasing homeownership among people of color in an attempt to reduce the racial wealth gap.¹¹¹ This is

¹⁰⁷ See SOMIN, *supra* note 106, at 138–39. (analyzing survey data from Zogby International, American Farm Bureau Federation Survey 27 and Saint Index 2005).

¹⁰⁸ *Id.* at 138–39 (“The 2009 survey [based on Stephen Ansolabahere and Nathaniel Persily, Field Report: Constitutional Attitudes Survey 61 (Knowledge Networks, July 2010)] results closely mimic those of the 2005 polls and show that public hostility to economic development takings was not simply the result of an immediate emotional reaction to the *Kelo* decision. As in the 2005 Saint Index poll, the 2009 survey shows over 80 percent opposition to economic development takings; once again, the overwhelming opposition cuts across racial, gender, ideological, and partisan lines.”).

¹⁰⁹ See Bell, *supra* note 29, at 523.

¹¹⁰ See *id.* (identifying a black interest “in achieving racial equality.”).

¹¹¹ See Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 883 (2013) (“Given that equity in a primary residence represents the largest asset most Americans of any race or ethnicity possess in their asset portfolios, lawyers should undertake efforts to increase homeownership within the African American and Latino communities, particularly given the current substantial racial homeownership gaps between these groups and white Americans.”); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 127–44 (2013) (arguing that progressive property theorists should focus more on issues of race-related acquisition and distribution, both historically and prospectively); Thomas M. Shapiro, *Race, Homeownership*,

not a new strategy.¹¹² Renowned American abolitionist Frederick Douglass noted in 1849 that “we hold civil government to be solemnly bound to protect the weak against the strong, the oppressed against the oppressor, the few against the many, and to secure the humblest subject in the full possession of his rights of person and of property.”¹¹³ This struggle continues today.¹¹⁴ As such, it is in racial minorities’ interest to oppose rules that make it too easy for government actors to take their houses through eminent domain.¹¹⁵ Here, an interest-convergence analysis is applicable because both racial minorities and the white majority have interests in stopping President Trump from obtaining private property to construct the proposed border wall.

Justice Stevens, writing for the *Kelo* majority,¹¹⁶ relied primarily on two Supreme Court cases to support its holding: *Berman v. Parker*¹¹⁷ and *Hawaii Housing Authority v. Midkiff*.¹¹⁸ Although these cases were framed by the Court in race-neutral ways, an interest-convergence analysis shows otherwise. Specifically, it demonstrates the racial interests embedded in

and Wealth, 20 WASH. U. J. L. & POL’Y 53, 65–74 (2006) (arguing that homeownership is the main policy strategy for closing the racial wealth gap).

¹¹² African American litigants have been suing for equal homeownership opportunities for decades, some even winning their cases before the Supreme Court. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968) (holding that a real estate company’s refusal to sell to an African American home buyer because of his race was a violation of 42 U.S.C. § 1982 because such racial barriers to owning property constituted “badges and incidents of slavery.”); *Shelley v. Kraemer*, 334 U.S. 1, 20–21, 23 (1948) (holding that court enforcement of racially restrictive covenants contained in private land deeds was a violation of equal protection).

¹¹³ Frederick Douglass, *Comments on Gerrit Smith’s Address*, NORTH STAR (Mar. 30, 1849), <https://rbscp.lib.rochester.edu/4383> [<https://perma.cc/4NV8-DUQW>].

¹¹⁴ For statistics on the racial homeownership gap in America, *see* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING (2017), http://www.JCHS.harvard.edu/sites/jchs.harvard.edu/files/harvard_jchs_state_of_the_nation_housing_2017.pdf [<https://perma.cc/5WX5-7XWL>]. The home ownership rate in the first quarter of 2017 was 71.9% for whites, 42.2% for blacks, 55.5% for Asians, and 46% for Hispanics. *Id.* at 4.

¹¹⁵ There is nothing inherently immoral or oppressive about eminent domain. Indeed, there may be certain situations where this power could be used to benefit oppressed peoples. For example, the government can take the land of a private corporation for the public use of creating low-income housing that is racially integrated, affordable, and near or easily accessible to good-paying jobs. Since eminent domain has been employed in so many oppressive ways, however, this article contends that heightened scrutiny should be used by the courts to limit the government’s power. In suggesting a new way forward, even in the example of eminent domain power protecting the civil rights of racial minorities, the government should be held to its burden of proof that the means are connected to the ends when legal challenges arise. If the government can meet its burden, then it is more likely that the government’s stated policy goals will be actualized. Further, the corporation in the hypothetical above would argue for heightened scrutiny. The specific level of proof in this situation required by the government is beyond the scope of this article.

¹¹⁶ *Kelo v. City of New London*, 545 U.S. 469, 480–82 (2005).

¹¹⁷ *Berman v. Parker*, 348 U.S. 26 (1954).

¹¹⁸ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

these cases and why racial minorities should oppose extreme judicial deference to government takings decisions.

A. Berman v. Parker

1. Background

In *Berman v. Parker*, private landowners sought to enjoin government condemnation of their property pursuant to the District of Columbia Redevelopment Act of 1945 (D.C. Act).¹¹⁹ Under the D.C. Act, “Congress made a ‘legislative determination’” that substandard housing and blighted areas¹²⁰ were “injurious to the public health, safety, morals, and welfare” in the District and it was within the government’s authority to eliminate all such conditions.¹²¹ To accomplish this, the D.C. Act created the National Capital Planning Commission, which authorized the development of “a comprehensive or general [land use] plan”;¹²² additionally, the Act also created the District of Columbia Redevelopment Land Agency, authorizing the use of eminent domain to acquire and assemble property to implement the

¹¹⁹ *Berman*, 348 U.S. at 28.

¹²⁰ The Act did not define “blighted areas,” leaving it up to the authorized government actors’ judgment to determine whether blight was present. Section 3(r) of the Act, however, provided some guidance:

‘Substandard housing conditions’ means the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.

Berman, 348 U.S. at 28 n.1 (quoting District of Columbia Redevelopment Act of 1945, ch. 736, § 3(r), 60 Stat. 790, 792). These elements are so broad, however, they can be made to apply to almost any residential area. For example, all buildings will experience some dilapidation, to some extent, over time. Wendell E. Pritchett contends:

Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. This “scientific” method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city. 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.

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).

¹²¹ *Berman*, 348 U.S. at 28.

¹²² *Id.* at 29.

comprehensive plan.¹²³ To redevelop an area in Southwest D.C., the agency sought to seize the land of private landowners through the power of eminent domain.¹²⁴

The landowners argued, among other things, that the taking of their property was impermissible because it was not for a public use—it was simply taking their non-blighted commercial property and transferring it to another business.¹²⁵ The Court disagreed with the landowners and held for the government, noting that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”¹²⁶ The Court further observed that “[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.”¹²⁷

Berman adopted a very broad view of public use, which allows the government to take private property and transfer it to another private entity. In allowing for great deference to legislative decision making, the Court stated that public use can encompass values that “are spiritual as well as physical, aesthetic as well as monetary.”¹²⁸ In sum, “public use” was defined so broadly and the government was given so much deference that the notion of “public use” could be almost anything the government declared it to be.

2. Race and *Berman v. Parker*

An analysis of *Berman v. Parker* through an interest-convergence lens indicates why African Americans and other people of color have an interest in limiting the government’s takings power. Perhaps because the case was brought by white business owners in the area and not the predominantly African American residents of Southwest D.C.,¹²⁹ *Berman* had a racial dimension that was only mentioned in passing by the Court. Specifically, the Court acknowledged that the population of Area

¹²³ *Id.* The D.C. Act further declared such acquisition and assembly of real property as a public use. *Id.*

¹²⁴ According to the D.C. Act, “[p]reference is to be given to private enterprise over public agencies in executing the redevelopment plan.” *Id.* at 30 (quoting District of Columbia Redevelopment Act of 1945, ch. 736, § 7(g), 60 Stat. 796).

¹²⁵ The plaintiffs in *Berman* were owners of a department store located in Area B who argued that the government should not be allowed to take their property because their building was not suffering from blight—even though the surrounding area may have been. *Id.* at 31.

¹²⁶ *Id.* at 32.

¹²⁷ *Id.*

¹²⁸ *Id.* at 33 (citations omitted).

¹²⁹ Wendell Pritchett notes that “none of the briefs in the *Berman* case even mentioned the fact that the project would uproot thousands of poor blacks and would reshape Washington’s racial landscape.” Pritchett, *supra* note 120, at 44.

B was 5,012 people, of whom 97.5% were African American.¹³⁰ Thus, the overwhelming majority of the 5,012 people who lost their homes were members of a historically oppressed group.

Although race was barely mentioned by the Court, there was nothing race-neutral about the context of *Berman*. This case entailed a group of white decision makers negatively determining the fates of African American residents. It is important to note that the African Americans who were displaced by the urban renewal approved of in *Berman* did not move back to the area.¹³¹ Thus, the residents of Southwest D.C. were permanently displaced in the name of “public use.”

Indeed, the year *Berman* was decided—1954—was the same year that the Supreme Court struck down, for the first time, state-sponsored racial segregation as a violation of the Equal Protection Clause.¹³² Before 1954, Jim Crow laws¹³³—i.e., state and local laws that segregated people based on race according to white supremacist ideology—had been upheld by the Supreme Court for almost sixty years.¹³⁴ During the Jim Crow era, various public facilities were racially separated by law, but certainly not equal.¹³⁵

¹³⁰ *Berman*, 348 U.S. at 30.

¹³¹ HOWARD GILLETTE, JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 164 (1995) (“More than a third of the population displaced found alternative homes in public housing, much of it just outside the redevelopment area. Another 2,000 families moved into private rental units, and only 391 purchased private homes, all in other parts of the city.”). Many of the displaced African Americans that were victims of urban renewal in D.C. settled in neighborhoods located in Southeast D.C. See KILOLO KJAKAZI, DARRICK HAMILTON, RACHEL MARIE BROOKS ATKINS, WILLIAM A. DARITY JR., MARK PAUL & ANNE E. PRICE, THE COLOR OF WEALTH IN THE NATION’S CAPITAL: A JOINT PUBLICATION OF THE URBAN INSTITUTE, DUKE UNIVERSITY, THE NEW SCHOOL, AND THE INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT 13, 25 (2016), <http://www.urban.org/sites/default/files/publication/85341/2000986-2-the-color-of-wealth-in-the-nations-capital.pdf> [<https://perma.cc/9RMD-CCYR>].

¹³² *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

¹³³ Jim Crow took its name from a minstrel character. See W.T. Lhamon, Jr., *Turning Around Jim Crow*, in BURNT CORK: TRADITIONS AND LEGACIES OF BLACKFACE MINSTRELSY 18, 28 (Stephen Johnson ed., 2012) (discussing how by 1842, Jim Crow—a popular minstrel character—“had become an adjective for racial segregation”).

¹³⁴ See *Plessy v. Ferguson*, 163 U.S. 537, 540, 552 (1896) (upholding “Separate but Equal” laws in New Orleans); *Gong Lum v. Rice*, 275 U.S. 78, 85–87 (1927) (holding that racial segregation of a Chinese American student to a “school for colored children” was constitutional under *Plessy*).

¹³⁵ See, e.g., *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641 (1950) (“These restrictions . . . signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”); *Sweatt v. Painter*, 339 U.S. 629, 633–34 (1950) (“Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more

Brown, the seminal case, served as a death knell for Jim Crow.¹³⁶ This meant that *Berman* was decided in the same year that the Court removed its imprimatur from white supremacist laws that segregated people based on race and denied people of color equal resources in their separate spaces.

Racial segregation was certainly present in the District's housing at the time of *Berman*. In a 1948 report issued by a D.C.-based civil rights group known as the "National Committee on Segregation in the Nation's Capital," the group noted, "As a result of their segregation in slum areas, the housing available to [African Americans] is necessarily inferior to that of people who are free to live anywhere in the city."¹³⁷ The report further observed that the urban renewal of the 1940s was forcing African American people to move to make room for middle-class housing restricted to whites.¹³⁸ In sum, housing segregation in D.C. and the subsequent displacement of African Americans from their communities greatly diminished the opportunities for fair housing for members of this racial minority group.

The urban renewal that was approved by the Court in *Berman* was common across the country. Professor Ilya Somin writes, "By 1963, over 600,000 people had lost their homes as a result of urban renewal takings. The vast majority ended up living in worse conditions than they had experienced before their homes were condemned, and many suffered serious nonpecuniary losses as well."¹³⁹ Additionally, from 1949 to 1973, about two-thirds of the

important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.").

¹³⁶ *Brown*, 347 U.S. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

¹³⁷ NAT'L COMM. ON SEGREGATION IN THE NATION'S CAPITAL, SEGREGATION IN WASHINGTON, A REPORT 26 (1948); see also Wendell E. Pritchett, *A National Issue: Segregation in the District of Columbia and the Civil Rights Movement at Mid-Century*, 93 GEO. L.J. 1321, 1325-26, (describing the committee's origins and purpose. Pritchett notes that as part of the committee's work, "a group of more than a dozen researchers . . . examined several areas of race relations in the District. Among the topics they studied were: the housing, job, and health status of D.C.'s black population; segregation and discrimination within the federal government; the district government and the debates over 'home rule,' and the influence of business and real estate interests in the city.").

¹³⁸ NAT'L COMM. ON SEGREGATION IN THE NATION'S CAPITAL, *supra* note 137, at 41 (noting that of the 30,700 new units built during the 1940s, only 200, or less than 1%, were available to African Americans).

¹³⁹ SOMIN, *supra* note 106, at 87 (footnotes omitted). Jane Jacobs discussed some of the nonpecuniary losses that arise from urban development: "Whole communities are torn apart and sown to the winds, with a reaping of cynicism, resentment and despair that must be heard and seen to be believed." JANE JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 5 (1961). Frank Michelman also discussed

people displaced by urban renewal were nonwhite.¹⁴⁰ Historian Richard Rothstein in his book *Color of Law* explains how the cycle of racial segregation, starting with government slum clearance and continuing with African American's dispersal to other segregated areas, became self-perpetuating.¹⁴¹ The lax judicial scrutiny under *Berman* that allowed for such easy clearance facilitated this vicious cycle. Today, African Americans have an interest in strengthening judicial oversight over government takings in order to ensure fairer outcomes than what has happened in the past.

B. Hawaii Housing Authority v. Midkiff

1. Background

Thirty years after *Berman*, the Supreme Court was faced with another case involving the scope of public use.¹⁴² This was the second major case relied on by the *Kelo* majority.¹⁴³ *Hawaii Housing Authority v. Midkiff* involved trustees of landholding estates seeking relief declaring the Hawaii Land Reform Act of

nonpecuniary losses related to just compensation in his concept of “demoralization costs.” Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967) (“Demoralization costs’ are defined as the total of (1) the dollar value necessary to offset dis-utilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.”).

¹⁴⁰ SOMIN, *supra* note 106, at 88 (footnotes omitted).

¹⁴¹ RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 127 (2017). Rothstein further argues that government, at all levels, was “actively and aggressively” complicit in housing segregation in the following ways: (1) U.S. government’s decision to build racially separate public housing; (2) federal government’s urging of suburbs to adopt exclusionary zoning laws; (3) Federal Housing Administration’s redlining policies; (4) state courts’ enforcement of racially restrictive covenants even after *Shelley v. Kraemer* in 1948; (5) U.S. government’s grant of tax exempt status to racially discriminatory churches, universities, and hospitals; (6) police inaction and even encouragement of white mobs who threatened, intimidated, and attacked African Americans who moved to white neighborhoods; (7) state real estate commissions licensing of brokers who engaged in racially discriminatory practices; (8) local school boards’ placement of schools and drawing of attendance boundaries that ensured racial separation; (9) federal and state highway planners’ decision to build roads that made it easier for white suburbanites to commute to urban centers, while demolishing urban ghettos in the process; (10) U.S. government’s failure to protect African Americans’ labor market rights; (11) federal government’s decision to give tax breaks in racially coded ways—e.g., mortgage deduction for home owners, while no deduction for renters; (12) federal and state government’s failure to invest in adequate public transportation networks; and (13) federal government’s decision to direct low-income African Americans who receive housing assistance into racially segregated neighborhoods. *Id.* at 216–17.

¹⁴² See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁴³ *Kelo v. City of New London*, 545 U.S. 469, 481–82 (2005).

1967 (Hawaii Act) unconstitutional.¹⁴⁴ The Court explained that in the mid-1960s, the Hawaii legislature found that “while the State and Federal Governments owned almost 49% of the State’s land, another 47% was in the hands of only [seventy-two] private landowners.”¹⁴⁵ Throughout the state, most of the people living on privately owned lands were leasing from the landowners. “The legislature concluded that [this] concentrat[ion of] land ownership” in the hands of a few “was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.”¹⁴⁶

In response to the land oligopoly that was purportedly causing these issues, the legislature enacted the Hawaii Act, which established the Hawaii Housing Authority (HHA) and “created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees.”¹⁴⁷ Under the Hawaii Act, tenants living on certain residential lots were entitled to submit applications to the Hawaii Housing Authority (HHA) “to condemn the property on which they live[d]” that was located “within developmental tracts at least five acres in size.”¹⁴⁸ If a specified number of tenants in any tract filed such applications, the HHA was authorized “to hold . . . public hearing[s] to determine whether acquisition by the State of all or part of the tract [would] ‘effectuate the public purposes’ of the Act.”¹⁴⁹ If the HHA found that the public purposes would be served, the Authority could “designate some or all of the lots in [a landowner’s] tract for acquisition.”¹⁵⁰ If the landowners of the designated tracts refused to voluntarily sell their land to HHA, the agency could take the property and pay just compensation.¹⁵¹ The trustees of the landowning estates challenged this law as a violation of the public use provision in the Takings Clause.¹⁵²

The Court upheld the Hawaii Act as constitutional, noting that judicial review of the legislature’s judgment of what

¹⁴⁴ *Haw. Hous. Auth.*, 467 U.S., at 233–35.

¹⁴⁵ *Id.* at 232. Further, “[eighteen] landowners, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, [Twenty-two] landowners owned 72.5% of the fee simple titles.” *Id.*

¹⁴⁶ *Id.* But see Sumner J. La Croix & Louis A. Rose, *Public Use, Just Compensation and Land Reform in Hawaii*, 17 RES. L. & ECON. 47, 69 (1995) (arguing “that the concentration of land ownership was not responsible for high land prices in Hawaii. . . . rather, . . . the high prices were attributable largely to natural and governmental restrictions [such as zoning and permitting practices] on the supply of land for housing use.”).

¹⁴⁷ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. at 233.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (quoting Haw. Rev. Stat. § 516-22 (1977)).

¹⁵⁰ *Id.* at 233–34.

¹⁵¹ See *id.* at 234. HHA was then allowed to sell the land to the tenants, who would become fee simple owners instead of lessees. *Id.*

¹⁵² *Id.* at 234–35.

constitutes a public use is “extremely narrow.”¹⁵³ The Court articulated a constitutional test that amounts to the lowest level of judicial scrutiny—rational basis review.¹⁵⁴ The test involves two elements: (1) the legislature’s exercise of eminent domain power must have a legitimate purpose; and (2) a rational relationship must exist between the law enacted and this legitimate purpose.¹⁵⁵ Thus, under this test, great deference was afforded to the legislature’s judgment.¹⁵⁶

Here, utilizing rational basis review, the Court first found that the state had a legitimate purpose¹⁵⁷ in diluting the land market noting, “Regulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers.”¹⁵⁸ As for the second prong of rational basis review, the Court held that there was a rational relationship between the Hawaii Act and the legitimate purpose of fostering dilution of the land market.¹⁵⁹ The Court observed that the law was “a comprehensive and rational approach to identifying and correcting market failure.”¹⁶⁰ The Court further defined the scope of its review narrowly by stating:

Of course, this Act, like any other, may not be successful in achieving its intended goals. But “whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective.”¹⁶¹

Thus, the scope of the Court’s review was severely limited—no independent judicial inquiry would be made as to whether the means chosen were likely to advance the government’s ends. The only inquiry was whether the legislature could have rationally

¹⁵³ *Id.* at 240 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

¹⁵⁴ *Id.* at 242.

¹⁵⁵ *Id.* at 242–43.

¹⁵⁶ The Court observed, “Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority.” *Id.* at 244.

¹⁵⁷ The Court also refers to a legitimate purpose as a “conceivable public purpose.” *Id.* at 241 (“But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”).

¹⁵⁸ *Id.* at 242 (citations omitted). Justice O’Connor, writing for a unanimous Court, stated, “The ‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police powers.” *Id.* at 240. Later, Justice O’Connor retreated from her statement in *Midkiff*, by stating in her dissenting opinion in *Kelo*, “The case before us now demonstrates why, when deciding if a taking’s purpose is constitutional, the police power and ‘public use’ cannot always be equated.” *Kelo v. City of New London*, 545 U.S. 469, 501–02 (2005) (O’Connor, J., dissenting).

¹⁵⁹ *Midkiff*, 467 U.S. at 242.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (alterations in original) (citations omitted).

believed that the means would work. Under this lax standard, the Hawaii Act was found to be a permissible taking.

2. Race and *Hawaii Housing Authority v. Midkiff*

Like *Berman*, *Midkiff* also had a racial dimension that was not acknowledged by the Court. An interest-convergence analysis demonstrates that the history of how Hawaii became a state is one rife with racism and Western imperialism. Further, it shows how *Midkiff* was a decision that was consistent with this history.

Prior to annexation and statehood, Hawaii was a constitutional monarchy until 1893, when its last ruler, Queen Liliuokalani, was overthrown with the aid of the U.S. military and the land was annexed as a U.S. territory.¹⁶² With this annexation, white Americans eventually took control of Hawaii by establishing both economic and political dominance.¹⁶³ In writing about the white Americans who conspired to overthrow the kingdom, Queen Liliuokalani observed that they justified their actions by the belief that the indigenous people were not capable of self-governance.¹⁶⁴ Similarly, if President Trump is allowed to take tribal lands to build his border wall, a similar rationale of indigenous people's incompetence to govern themselves would permeate this government taking.

The belief that the native people were incompetent to manage their own lands had an analogue in earlier Supreme Court jurisprudence that dealt with the rights of Native American tribes. For example, in *Johnson v. M'Intosh*, the Supreme Court held that Native Americans only had a right of occupancy, but no right to sell their land.¹⁶⁵ In justifying its decision, Chief Justice Marshall, writing for a unanimous Court, described Native Americans "as a people over whom the superior

¹⁶² For an account of the overthrow in Queen Liliuokalani's own words, see LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 243-51 (1898); see also Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 862 (1975); JONATHAN K.K. OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002). After Queen Liliuokalani's overthrow, Hawaii eventually became a U.S. territory in 1898. See GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 289-91 (1968). Hawaii became the fiftieth state in 1959. *Id.* at 391. In 1993, Congress adopted a Joint Resolution (the Apology Resolution) that acknowledged that "the overthrow of the Kingdom of Hawaii on January 17, 1893 [occurred] with the [active] participation of agents and citizens of the United States" and further acknowledged that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy [the Kingdom of Hawaii] or through a plebiscite or referendum." Act of Nov. 23, 1993, Pub. L. No., 103-150, 107 Stat. 1510, 1512-13 (1993).

¹⁶³ See Levy, *supra* note 162, at 861.

¹⁶⁴ LILIUOKALANI, *supra* note 162, at 178.

¹⁶⁵ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587-88 (1823).

genius of Europe might claim an ascendancy.”¹⁶⁶ He noted the consequences of recognizing full ownership rights in their land by writing that the Native American tribes were “fierce savages” who were leaving the land fallow.¹⁶⁷ Professor Robert Williams describes the case as “one of the most thoroughly racist, nonegalitarian, undemocratic, and stereotype-infused decisions ever issued by the Supreme Court.”¹⁶⁸ The Court’s decision was permeated with the idea that Native Americans were too primitive to make sensible governance decisions. Likewise, the indigenous Hawaiian people were stripped of their land based on a similar racist sentiment that they were not capable of self-governance.¹⁶⁹ Queen Liliuokalani was subsequently arrested, tried for misprision of treason, and imprisoned.¹⁷⁰ Today, indigenous Hawaiians and Native Americans have an interest in pushing for heightened scrutiny when the government attempts to take their lands.

Connecting this history of racism and imperialism in Hawaii to the *Midkiff* case, Queen Liliuokalani’s foster sister, Bernice Pauahi, established a testamentary trust in 1883 providing schools for poor or orphaned Native Hawaiians upon her death.¹⁷¹ The trustees of the Bishop Estate were the

¹⁶⁶ *Id.* at 573.

¹⁶⁷ *Id.* at 590.

¹⁶⁸ ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 56 (2005). Chief Justice Marshall also expressed his views about Native Americans in two other landmark cases. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832) (“After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.”); *Cherokee Nation v. Georgia*, 30 U.S. (5. Pet.) 1, 15 (1831) (referring to Native Americans as “[a] people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms”).

¹⁶⁹ See LILIUOKALANI, *supra* note 162, at 178. It is important to note that the Native Hawaiians were not passive recipients of American colonialism. Instead, they actively resisted. See generally *e.g.*, NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* (2004) (tracing indigenous Hawaiian resistance to colonization in the 1890s).

¹⁷⁰ See LILIUOKALANI, *supra* note 162, at 267–94; see also HELENA G. ALLEN, *THE BETRAYAL OF LILIUOKALANI: LAST QUEEN OF HAWAII 1838–1917*, at 321–50 (1982).

¹⁷¹ *Pauahi’s Will*, KAMEHAMEHA SCHOOLS, [http://www.ksbe.edu/about_us/about_pauahi/](http://www.ksbe.edu/about_us/about_pauahi/will/) [https://perma.cc/6A3J-Z7TL]. The Kamehameha Schools website notes, “When she passed away, Pauahi’s estate comprised some 375,500 acres of land assessed at about \$474,000. Today, it includes nearly 365,800 acres of Hawai’i land and combined with other assets is valued at \$11.0 billion as of June 30, 2014.” *About Pauahi*, KAMEHAMEHA SCHOOLS, http://www.ksbe.edu/about_us/about_pauahi/ [https://perma.cc/T3TY-PTLK] This preference for Native Hawaiian applicants was upheld by the Ninth Circuit in the face of a discrimination claim under 42 U.S.C. § 1981. See *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 849 (9th Cir. 2006) (en banc).

landowners in *Midkiff* challenging the Hawaii Act.¹⁷² In their brief to the Supreme Court, they argued:

Trustees' land presently serves an indisputable public use. In stark contrast, [the Hawaii Act] empowers private lessees, at their election, to compel appropriation of Trustees' land for purely personal purposes. Ironically, at a time in American history when the rights and special needs of the aboriginal population are finally receiving recognition, this statute strikes at the jugular of a unique non-profit trust dedicated to providing quality education for an underprivileged native group.¹⁷³

Despite these arguments, the trustees lost. This outcome was just another instance of Hawaiian lands being taken from the descendants of indigenous Hawaiian people and given to others.¹⁷⁴ In short, Native Hawaiians and other indigenous peoples have an interest in restricting the government's power of eminent domain to prevent such land dispossession to continue in the future.

These examples illustrate that unfair property dispossession by the government is a civil rights issue. Indeed, this issue has affected many racial minority groups throughout American history. For example, Mexicans who were living within the new boundaries of America drawn after the Mexican-American War, even though guaranteed by the Treaty of Guadalupe Hidalgo that their property rights "shall be inviolably respected,"¹⁷⁵ were robbed of their property through a formalistic land claim procedure that was stacked against them.¹⁷⁶ Japanese Americans were dispossessed of their property when they were forced to leave their homes and personal effects behind and hastily shuttled to internment camps during World War II.¹⁷⁷ Asians in America, who were not eligible to apply for

¹⁷² Brief for Appellees at 3, *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (No. 83-141).

¹⁷³ *Id.* at 4–5 (footnotes omitted).

¹⁷⁴ See Alfred L. Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 85 OR. L. REV. 771, 800 (2007) ("The legislature's action is subject to the criticism that it was providing additional rights to non-Native Hawaiians at the expense of trusts that own land and rent it out for the benefit of Native Hawaiians: that it was, in essence, effecting yet another transfer from the Native Hawaiians to others.").

¹⁷⁵ Treaty of Peace, Friendship, Limits and Settlement, U.S.-Mex., art. VIII, ¶ 3, Feb. 2, 1848, 9 Stat. 922, 929 (commonly known as the Treaty of Guadalupe Hidalgo).

¹⁷⁶ See Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 209 (1996); Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife,"* 4 MICH. J. RACE & L. 39, 129–33 (1998); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1669 (2000).

¹⁷⁷ Richard Reeves writes:

Often, the designated evacuees had just a day to put their affairs in order, to sell or rent their houses and farms and cars—usually at a fraction of their real value. Worse than that, thousands of families would lose their homes or farms to

citizenship until 1952 because of the whiteness requirement in federal naturalization law, were not allowed to own real property due to alien land laws.¹⁷⁸ Every one of these groups should have an interest in curbing unfettered government authority to construct rules that exclude them from their property rights. This overly broad power is evidenced in contemporary takings law and could be employed in Trump's efforts to construct a massive border wall.

Moreover, property dispossession takes on a special dimension when dealing with Native American tribes because it implicates issues of tribal sovereignty not present with other minority groups.¹⁷⁹ For example, if a border wall is built, the federal government will have to condemn Tohono O'odham land—which is deemed sacred by tribal members.¹⁸⁰ Such unilateral action would undermine this tribe's ability to govern itself. The Tohono O'odham people, which now number thirty-four thousand enrolled members, have possessed their land

foreclosures by banks because their bank accounts were frozen by government order. Many lost their land and work of a lifetime to plain and open thievery by local officials and residents because California's escheat laws allowed the state and banks to take over "abandoned properties." The furniture of the evacuees and, in fact, almost everything they owned was packed into churches, warehouses, and abandoned buildings, easy targets for thieves and vandals.

RICHARD REEVES, *INFAMY: THE SHOCKING STORY OF THE JAPANESE AMERICAN INTERNMENT IN WORLD WAR II* 75 (2015); *see also* ONLY WHAT WE COULD CARRY: THE JAPANESE AMERICAN INTERMENT EXPERIENCE 3 (Lawson Fusao Inada, ed., 2000).

¹⁷⁸ *See* IAN F. HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 129 (1996); Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 59–63 (1998); Gabriel J. Chin, *Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497, 499–505 (2001); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 991–94 (2010).

¹⁷⁹ A series of three cases penned by Chief Justice John Marshall, known as the "Marshall trilogy," delineates the legal and political standing of Native American tribes. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that Georgia could not impose its own laws on Cherokee tribal lands); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that the Supreme Court did not have original jurisdiction under Article III of the Constitution to hear a suit brought by the Cherokee Nation, which was not a sovereign nation, but a "domestic dependent nation" similar to "that of a ward to his guardian."); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 584–85 (1823) (holding that Native American tribes had a right of occupancy on their land but they can sell it only to the U.S. government).

¹⁸⁰ Laurel Morales, *Border Wall Would Cut Across Land Sacred to Native Tribe*, NPR (Feb. 23, 2017), <http://www.npr.org/2017/02/23/516477313/border-wall-would-cut-across-land-sacred-to-native-tribe> [<https://perma.cc/M8VN-UJCE>]; *see also* Fernanda Santos, *Border Wall Would Cleave Tribe, and Its Connection to Ancestral Land*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/us/border-wall-tribe.html> [<https://perma.cc/D2M4-7QNN>] ("After the Mexican-American War and then the Gadsden Purchase in 1854 delineated the border for good, most of the tribe's land was left in present-day Arizona, where it still controls 2.8 million acres . . . while a smaller piece became part of what is now the Mexican state of Sonora.").

since 1854.¹⁸¹ The Tohono O’odham Nation is currently 2.8 million acres—approximately “the size of Connecticut”—and runs sixty-two miles along the U.S.-Mexico border in Arizona.¹⁸²

“Because of tribal rights,” the federal government condemning Native American land to build a wall “would most likely require an act of Congress.”¹⁸³ The Tohono O’odham Nation, however, opposes such a course of action. In February 2017, the Nation produced a video titled *There is No O’odham Word for Wall* explaining their objections.¹⁸⁴ In the official press release that accompanied the video, the Nation’s Chairman Edward D. Manuel states:

[T]he Tohono O’odham Nation can not and will not support a fortified border wall. The Nation remains committed to working together to protect the border using proven and successful techniques. We invite the President and his Administration to visit the Nation, see these challenges firsthand, and begin a productive dialogue for moving forward.¹⁸⁵

American citizens who are against broad eminent domain powers should see the parallels in the federal government taking Native American lands, through the enactment of federal law, and should be aligned with the Tohono O’odham people in their fight for sovereignty.¹⁸⁶ Indeed, since the interests of racial minorities and white landowners have come together on this issue, the time is ripe for collective action that unifies these groups.

¹⁸¹ Santos, *supra* note 180.

¹⁸² *Id.*

¹⁸³ *Id.*; see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”). *United States v. Kagama*, 118 U.S. 375, 382 (1886) (“[A]fter an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure,—to govern them by acts of congress.”).

¹⁸⁴ Tohono O’odham Nation, *There is No O’odham Word for Wall*, YOUTUBE (Feb. 18, 2017), <https://www.youtube.com/watch?v=RQu-YEmKCN8> [<https://perma.cc/8Y8T-5MF3>].

¹⁸⁵ Press Release, Tohono O’odham Nation Office of the Chairman and Vice Chairman, Tohono O’odham Nation Releases Video on Its Opposition to Proposed Border Wall (Feb. 21, 2017), <http://www.tonation-nsn.gov/wp-content/uploads/2017/02/Press-Release-Tohono-Oodham-Nation-Releases-Video-on-its-Opposition-to-Proposed-Border-Wall.pdf> [<https://perma.cc/FW8R-U3NQ>].

¹⁸⁶ In a different context, the interests of environmentalist groups and Native American tribes have recently converged in response to President Trump’s decision to drastically reduce the size of two national monuments in Utah—Bears Ears National Monument and the Grand Staircase-Escalante National Monument. See *Trump Shrinks National Monuments Angering Environmentalists*, BBC NEWS (Dec. 5, 2017), <http://www.bbc.com/news/world-us-canada-42226752> [<https://perma.cc/SR7K-PZAV>]. Both groups are preparing legal challenges to Trump’s actions. *Id.*

C. *Race and Kelo v. City of New London*

The interest of white landowners, like many or all of the plaintiffs in *Kelo v. City of New London*, is in the protection of their property rights from government overreach.¹⁸⁷ This interest is evident in Trump's efforts to take the homes of people who live along the U.S.-Mexico border. While this interest converges with the interests of racial minorities in achieving racial equality, *Kelo* implicates race in a different way than *Berman* and *Midkiff*. While *Berman* was situated in a slum clearance project in D.C. that primarily affected African Americans residing in the targeted area, and *Midkiff* arose from a land redistribution law in Hawaii that took land away from a trust that benefitted Native Hawaiians, *Kelo* involved white landowners in Connecticut whose property was being taken by the government for economic redevelopment purposes.¹⁸⁸ Although eminent domain cases before *Kelo* greatly expanded takings power, public criticism was limited because the majority did not sympathize with the landowners in either *Berman* or *Midkiff*.¹⁸⁹

In contrast, public reaction to *Kelo* was characterized by almost ubiquitous outrage.¹⁹⁰ Most states have subsequently enacted post-*Kelo* restrictions on eminent domain.¹⁹¹ Eminent domain was now generally seen by the public as a serious threat to all Americans' private property rights.¹⁹² However, there was nothing new with *Kelo*. Such expansive uses of eminent domain

¹⁸⁷ *Kelo v. City of New London*, 545 U.S. 469, 475 (2005).

¹⁸⁸ See discussion *infra* Sections II.A.1, II.B.1.

¹⁸⁹ Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 56–57 (2005). (“Although the *Midkiff* decision received scrutiny in the academic and legal community for arguably breaking new ground in public use jurisprudence, there was no serious public outcry. Perhaps there was a lack of sympathy from mainstream Americans for the wealthy landowners of Hawaii. Likewise, in the blight cases, perhaps the average middle-class American failed to identify with the mostly low-income communities of color that had been displaced.” (footnotes omitted)).

¹⁹⁰ SOMIN, *supra* note 106, at 137 (“*Kelo* was greeted by immediate and widespread outrage.”). *But see* Conor Friedersdorf, *Why Trusting Donald Trump on Judges Is Folly*, ATLANTIC (Aug. 8, 2016), <https://www.theatlantic.com/politics/archive/2016/08/why-trusting-donald-trump-on-judges-is-folly/494645/> [<https://perma.cc/8ARW-NH7L>] (“That same year, the court’s decision was praised by a billionaire real-estate developer [Donald Trump] with a personal interest in eminent domain. (He once tried to have the government force a woman from her home against her will so he could build a limousine parking lot.) He told Fox News of the ruling, ‘I happen to agree with it 100 percent.’”).

¹⁹¹ SOMIN, *supra* note 106, at 142 (“A total of forty-five states have enacted post-*Kelo* eminent domain reform laws.”); *see also* Marc Mihaly & Turner Smith, *Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703, 707–08 (2011).

¹⁹² SOMIN, *supra* note 106, at 113 (“While [the] result was consistent with preexisting doctrine, it nonetheless made explicit a threat to ordinary middle- and working-class homeowners that in the earlier cases seemed merely latent.”).

have historically been used to dispossess Native American tribes of their land.¹⁹³ Furthermore, as previously mentioned, eminent domain has been used to dispossess African Americans of their land.¹⁹⁴ In the National Association for the Advancement of Colored People's (NAACP) amicus brief submitted in *Kelo*, the prominent civil rights organization emphasized how eminent domain power has historically dispossessed racial minorities. The NAACP asserted, "The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that 'urban renewal' was often referred to as 'Negro removal.'"¹⁹⁵ The NAACP further contended, "Even absent illicit motives, eminent domain power has affected and will disproportionately affect racial and ethnic minorities, the elderly and the economically disadvantaged. Well-cared-for properties owned by minority and elderly residents have repeatedly been taken so that private enterprises could construct superstores, casinos, hotels and office parks."¹⁹⁶ In sum, the government has continuously dispossessed racial minorities of their land through the use of eminent domain and the interests of these minority groups and those of the majority are now converging.

In his dissenting opinion in *Kelo*, in a rare moment of alliance, Justice Thomas agreed with the NAACP's arguments. Thomas wrote that such a broad interpretation of public use "guarantees that these losses will fall disproportionately on poor communities."¹⁹⁷ Thomas recognized a racial dimension to the inequity of such a broad interpretation of public use. He noted that public works projects in St. Paul, Minnesota and Baltimore, Maryland in the 1950s and '60s decimated predominantly minority communities, and that the *Kelo* holding will only "exacerbate these

¹⁹³ Leeds, *supra* note 189, at 52 ("For centuries, American Indians have seen their lands taken by federal and state governments without consent, and at times, without compensation. Some Indian land takings have fallen squarely within the exercise of eminent domain powers, but takings have routinely occurred under other theories that provide no legal remedy. In both situations, the underlying rationale for the taking was the belief that Indians were not using the land as efficiently as another owner would. In short, the 'public good' necessitated the taking of land from the Indians, so the land could be redistributed to others who would make better use of the land." (footnotes omitted)).

¹⁹⁴ See *supra* Section II.A.

¹⁹⁵ Brief for National Association for the Advancement of Colored People, et al., as Amici Curiae Supporting Respondents at 7, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108) (citations omitted).

¹⁹⁶ *Id.* at 9.

¹⁹⁷ *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (internal citations omitted).

effects.”¹⁹⁸ Because of these unfair results, Thomas urged for a narrow interpretation of the Public Use Clause.¹⁹⁹

Kelo and its aftermath show us that white landowners have an interest in preventing such arbitrary takings. From a property rights perspective, this interest is fundamental to the Constitution’s conception of individual liberty.²⁰⁰ This interest is now evident in the plight of the many white landowners who are facing forced dispossession of their homes to make room for the construction of a border wall.²⁰¹

Finally, in addition to racial interests converging, other types of convergence are occurring. For example, on August 12, 2017, hundreds of people from forty groups including property rights organizations, environmentalists, and immigrants’ rights advocates marched together in south Texas to protest the construction of the border wall.²⁰² They were hoping to draw national attention to the multi-faceted harms that will be caused by the wall.²⁰³ This was one of the first major protests against the border wall uniting different groups; it is likely many more will follow.

Now that various interests—especially racial minority and majority interests—are coming together to challenge government eminent domain power, Part III will explore some

¹⁹⁸ *Id.* at 522.

¹⁹⁹ *Id.* at 508.

²⁰⁰ See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed., 2008).

²⁰¹ See Scott Bronstein, Collette Richards, Curt Devine & Drew Griffin, *President Trump v. American Landowners on the Border*, CNN (Apr. 3, 2017), <http://www.cnn.com/2017/04/03/us/eminent-domain-border-private-land-cases/index.html> [<https://perma.cc/G5S9-A8RG>]; Lauren Etter & Justin Sink, *The Wall Needs the Consent of Many*, BLOOMBERG (Feb. 2, 2017), <https://www.bloomberg.com/news/articles/2017-02-02/the-wall-needs-the-consent-of-many> [<https://perma.cc/FT9D-H5SA>]; Tracy Jan, *Trump’s ‘Big, Beautiful Wall’ Will Require Him to Take Big Swaths of Other People’s Land*, WASH. POST: WONKBLOG (Mar. 21, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/21/trumps-big-beautiful-wall-will-require-him-to-take-big-swaths-of-other-peoples-land/?utm_term=.7385d350cb2a [<https://perma.cc/3YJ2-QBML>]. Although these articles do not explicitly mention race, it is statistically likely that many of the landowners affected by Trump’s border wall will be white. See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV, *supra* note 114, at 4.

²⁰² Nomaan Merchant, *Advocates Stage First Big Texas Protest Against Border Wall*, WASH. TIMES (Aug. 12, 2017), <https://www.washingtontimes.com/news/2017/aug/12/advocates-stage-first-big-texas-protest-against-bo/> [<http://perma.cc/4ZMW-AB78>]; see also Michael Hardy, *In South Texas, Threat of Border Wall Unites Naturalists and Politicians*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/in-south-texas-threat-of-border-wall-unites-naturalists-and-politicians.html> [<https://perma.cc/Q6H6-ZRJD>].

²⁰³ One example of the multi-faceted harms of the construction of the border wall, in addition to the diminishment of property rights and civil rights, would be the environmental damage that the construction of a massive wall would create. See Erika Bolsted, *Trump’s Wall Could Cause Serious Environmental Damage*, SCI. AM. (Jan. 26, 2017), <https://www.scientificamerican.com/article/trumps-wall-could-cause-serious-environmental-damage/> [<https://perma.cc/MLT6-9FH6>].

possible ways forward, using the current president's plan to take property for a border wall as an illustrating example.

III. POSSIBLE WAYS FORWARD

This Part explores some possible ways to resist President Trump's proposal to take peoples' lands for the construction of a border wall. It will analyze different ways to either narrow the definition of "public use" or achieve heightened scrutiny in eminent domain cases.²⁰⁴ The specific strategies to implement these possibilities are many and include things like attempted legal reform through the courts, legislatures, and executive agencies, as well as pushing for a constitutional amendment, pursuing grassroots activism, and producing scholarship and other forms of public expression that seek to raise awareness of the issue.²⁰⁵

²⁰⁴ One potential critique of a call for heightened scrutiny is that it is an invocation of a return to the *Lochner* era, where the Supreme Court, under a Substantive Due Process analysis, applied heightened scrutiny to a state law prohibiting bakery employees from working more than ten hours per day or sixty hours per week. See *Lochner v. New York*, 198 U.S. 45, 57 (1905) ("The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate . . ."). In applying heightened scrutiny, the Court concluded that the law was not "a fair, reasonable and appropriate exercise" of the state's police power. *Id.* at 56–57. *Lochner* has been much derided as an example of judicial overreach. See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 536–37 (2015) (summarizing criticism). A full response to this critique is beyond the scope of this article. However, a brief point is worth mentioning. Even during the *Lochner* era, the Supreme Court upheld certain state regulations that it deemed vital to prevent certain harms—i.e., they were valid exercises to state power. James Ely writes:

It bears emphasizing that the outcome in *Lochner* did not bar all legislative reform. . . . The Supreme Court, for instance, was receptive to laws dealing with obvious health and safety risks, even when such regulations imposed heavy costs on property owners or businesses. The justices upheld the regulation of safety in mines and worker's compensation that provided for a financial award to employees injured by industrial accidents. Moreover, the Supreme Court sustained state laws that required the payment of wages in money rather than script, brushing aside a liberty of contract argument. The Court also took a deferential view with respect to state supervision of public morals. . . . Nor did the Supreme Court see any constitutional infirmity with laws to prevent fraudulent business practices.

ELY, *supra* note 200, at 108–09. In the same way, applying heightened scrutiny in takings cases does not necessarily give courts unfettered power over the other branches of government. Indeed, such scrutiny serves as a check against executive and legislative overreach in the eminent domain context.

²⁰⁵ The main point of this article is to argue that we have reached a moment of interest-convergence to collectively push for a change in eminent domain law. Detailed analysis of the strategies to accomplish this goal are beyond the scope of this article.

A. *A Narrow Interpretation of the Public Use Doctrine*

One possible way forward to limit federal eminent domain power is to push for a narrow interpretation of public use. Justice Thomas articulates a narrow definition in his *Kelo* dissent by writing, “The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.”²⁰⁶ This narrow interpretation could curb economic development takings, such as the one at issue in *Kelo*, but it would not provide any restriction on the federal government’s proposal to take private property to build a border wall.²⁰⁷ Under a narrow interpretation of public use, so long as the federal government owned and used the land taken, it would be a permissible exercise of eminent domain. If Trump takes property through eminent domain and keeps it in federal hands to build a border wall, then even a narrow reading of public use would not provide any protection to the landowners. This is because a narrow interpretation would not prevent poor government decision making.

A primary reason to restrict the government’s eminent domain power is to provide a fetter against ineffective government plans that would lead to the unnecessary dispossession of property. Rather than arguing that government lacks any power to condemn land, this article asserts that the government should be put to its proof to take this drastic action because people’s property rights are at stake. It is likely that many people would vigorously object if their homes were taken with little evidence that the taking would accomplish the government’s stated purpose.

There is ample evidence that a border wall would not be effective in decreasing the number of unauthorized immigrants from Mexico in this country. For example, researchers Ana Gonzalez-Barrera and Jen Manuel Krogstad found, in a study for the Pew Research Center, that “[t]he number of Mexican immigrants living in [this country] illegally has declined by more than [one] million since 2007.”²⁰⁸ In fiscal year 2016, “more non-

²⁰⁶ *Kelo v. City of New London*, 545 U.S. 469, 508 (2005) (Thomas, J., dissenting).

²⁰⁷ Ilya Somin proposes to ban economic development and blight takings altogether, but notes that while it will improve the situation, it “will not eliminate all eminent domain abuse.” See SOMIN, *supra* note 106, at 204–05.

²⁰⁸ Ana Gonzalez-Barrera & Jens Manuel Krogstad, *What We Know About Illegal Immigration from Mexico*, PEW RES. CTR. (Mar. 2, 2017), <http://www.pewresearch.org/fact-tank/2017/03/02/what-we-know-about-illegal-immigration-from-mexico/> [https://perma.cc/W8MR-G4HY]. “In 2014, 5.8 million unauthorized immigrants from Mexico lived in the

Mexicans than Mexicans were apprehended at U.S. borders,” with 192,969 Mexicans apprehended, which represents “a sharp drop from a peak of 1.6 million apprehensions” sixteen years earlier.²⁰⁹ The authors note, “The decline in apprehensions reflects the decrease in the number of unauthorized Mexican immigrants coming to the U.S.”²¹⁰ These numbers suggest that a border wall will not be effective in reducing a population of people coming to the United States whose numbers have been declining on their own. Further, “unauthorized immigrants are more likely to be long-term residents of the U.S. As of 2014, 78% had lived in [this country] for ten years or more, while only 7% had been in the [U.S.] for less than five years.”²¹¹ If the vast majority of undocumented immigrants are long-term residents of this country, then a border wall will do little to decrease the number.

In an article in the *American Journal of Sociology*, scholars Douglas Massey, Karen Pren, and Jorge Durand argue that more forceful immigration enforcement policy starting in 1986 has served to increase, not decrease, the number of unauthorized immigrants from Mexico.²¹² Massey, Duran, and Pren explain:

The principal substantive finding of our analysis is that border enforcement was not an efficacious strategy for controlling Mexican immigration to the United States, to say the least. Indeed, it backfired by cutting off a long-standing tradition of migratory circulation and promoting the large-scale settlement of undocumented migrants who otherwise would have continued moving back and forth across the border.²¹³

In addition, to the extent that the wall is supposed to deter crime at the border,²¹⁴ policy experts have expressed doubts that a physical wall would reduce drug trafficking,²¹⁵ human

U.S., down from a peak of 6.9 million [seven years earlier].” *Id.* (emphasis added). However, “Mexicans still make up about half of the nation’s 11.1 million unauthorized immigrants.” *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Douglas S. Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM. J. SOC. 1557, 1557–58, 1590 (2016).

²¹³ *Id.* at 1590; see also David Bier, *A Wall Is an Impractical, Expensive, and Ineffective Border Plan*, CATO INST. (Nov. 28, 2016, 2:31 PM), <https://www.cato.org/blog/border-wall-impractical-expensive-ineffective-plan> [<https://perma.cc/55YG-X4TY>] (arguing that a border wall will not be effective in reducing illegal immigration or drug trafficking).

²¹⁴ Donald J. Trump (@realDonaldTrump), TWITTER, (June 22, 2017, 3:15 PM), https://twitter.com/realDonaldTrump/status/878013639613186049?ref_src=twsrc^tfw&ref_url=http%3A%2F%2Fwww.latimes.com%2Fpolitics%2FFla-pol-updates-everything-president-we-will-build-the-1498170467-htlmstory.html [<https://perma.cc/69LM-GL45>] (“Mexico was just ranked the second deadliest country in the world, after only Syria. Drug trade is largely the cause. We will BUILD THE WALL!”).

²¹⁵ See Ron Nixon, *As Trump Calls for Wall on Mexican Border, Smugglers Dig Tunnels*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/us/us-mexico-border-wall-tunnels.html> [<https://perma.cc/N7KZ-G9NP>]; Ron Nixon, *Homeland*

trafficking,²¹⁶ or terrorism.²¹⁷ Finally, although the president has repeatedly promised a large physical wall to keep people out, both lawmakers and other federal officials have consistently questioned the efficacy and cost of such an undertaking.²¹⁸ Nonetheless, if a narrow interpretation of the public use doctrine were adopted, none of the evidence of the proposed border wall's ineffectiveness would matter. Courts would simply defer to the fact that the taken land would be in government hands.

B. *Racial Animus and the Trump Presidency*

Given the strong evidence against building a wall, what can explain Trump's relentless pursuit of an incredibly costly measure that will not be effective in achieving the president's policy goals? One plausible reason is that Trump's proposal is based on racial animus.²¹⁹ In other words, Trump's purported goal of curbing illegal immigration is just a pretext for racial animus against people of Mexican descent. Evidence for such animus abounds in Trump's own words. For example, Trump stated at a speech announcing his bid for president:

When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that

Security Secretary Says Border Wall Alone Will Not Work, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/homeland-security-john-kelly-border-wall.html> [https://perma.cc/5F3X-239P]; Roberto Saviano, *Why a Mexican Border Wall Won't Stop the Drug Cartels*, NEWSWEEK (Mar. 6, 2017, 8:00 AM), <http://www.newsweek.com/2017/03/17/why-mexican-border-wall-wont-stop-drug-cartels-564112.html> [https://perma.cc/4EBD-QATG].

²¹⁶ See Kalhan Rosenblatt, *Will Trump's Border Wall Prevent Human Trafficking? Experts Aren't Sure*, NBC NEWS (Apr. 26, 2017, 4:29 PM EDT), <http://www.nbcnews.com/news/us-news/will-trump-s-border-wall-prevent-human-trafficking-experts-aren-n751466> [https://perma.cc/6ZUT-CHNT].

²¹⁷ See Eric Schmitt & Linda Qiu, *Fact Check: The Trump Administration's Argument for a Border Wall*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/27/us/politics/fact-check-trump-border-wall-mexico.html> [https://perma.cc/ADM3-MQ23].

²¹⁸ Scott Bronstein, Curt Devine & Drew Griffin, *Trump Wants a Wall. Border Experts Want a Fence*, CNN (Feb. 16, 2017, 6:49 PM ET), <http://www.cnn.com/2017/02/16/politics/trump-border-wall/index.html> [https://perma.cc/XZ7M-VU4P] (quoting Border Patrol officials that state that a fence would be more sensible than a wall); Adam Hartung, *Why President Trump's Border Wall Is an Example of Bad Leadership*, FORBES (Jan. 28, 2017, 8:20 PM), <https://www.forbes.com/sites/adamhartung/2017/01/28/why-president-trumps-border-wall-is-an-example-of-bad-leadership/> [https://perma.cc/XEG9-6QEJ] ("Interestingly, the state with the longest Mexican border is Texas—and of its 38 congressional members (36 in Congress, 2 in the Senate and 25 Republican) not one (not one) supports building the wall.").

²¹⁹ Here, racial animus can take two forms: either Trump's own personal animus or, conversely, the animus of Trump's supporters that he caters to by continually promising that a wall will be built and that Mexico will pay for it. For my analysis, it makes no difference—I will treat them as one and the same. If either or both types of animus lead to the unfair taking of private property and the government trampling on other rights, then it must be checked.

have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.²²⁰

Furthermore, during his presidential campaign, two men urinated on a sleeping Latino man and then assaulted him with a metal pole.²²¹ At the police station, one of the men stated, "Donald Trump was right; all these illegals need to be deported."²²² When asked about the incident, instead of denouncing the attackers, Trump said, "I will say that people who are following me are very passionate. They love this country and they want this country to be great again. They are passionate."²²³ These comments demonstrate the racial animus of both Trump and his base.

Moreover, then-candidate Trump refused to answer questions about immigration from Jorge Ramos, a Mexican American reporter at the Spanish-language news channel Univision and told Ramos to "Go back to Univision" before Trump's bodyguard forcibly removed Ramos from the room.²²⁴ In addition, then-candidate Trump made public statements against the fitness of a Mexican American judge, who was born in Indiana, to hear a pending case in which Trump was a defendant based on the judge's racial background.²²⁵ Specifically, Judge Gonzalo P. Curiel was presiding over a fraud class action case brought "by former students of Trump University" when Trump asserted that the judge had a conflict of interest because the judge's family was of Mexican heritage and the judge would, therefore, be biased against

²²⁰ *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> [<https://perma.cc/TDK2-6XPL>].

²²¹ Adrian Walker, *Passionate Trump Fans Behind Homeless Man's Beating?*, BOS. GLOBE (Aug. 21, 2015), <https://www.bostonglobe.com/metro/2015/08/20/after-two-brothers-allegedly-beat-homeless-man-one-them-admiringly-quote-donald-trump-deporting-illegals/> I4NXR3Dr7litLi2NB4f9TN/story.html [<https://perma.cc/F6TS-YKJU>].

²²² *Id.*

²²³ *Id.*

²²⁴ Phillip Rucker, *First, Trump Booted Univision Anchor Jorge Ramos Out of His News Conference. Then Things Got Interesting*, WASH. POST (Aug. 25, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/08/25/first-trump-booted-univision-anchor-jorge-ramos-out-of-his-news-conference-then-things-got-interesting/> [<https://perma.cc/X7A3-7DTB>]. Also, then-candidate Trump responded to a question about immigration at a presidential debate by stating, "We have some bad hombres here, and we're going to get them out." Katie Zezima, *Trump on Immigration: There Are 'Bad Hombres' in the United States*, WASH. POST (Oct. 19, 2016), (internal quotation marks omitted) <https://www.washingtonpost.com/news/post-politics/wp/2016/10/19/trump-on-immigration-there-are-bad-hombres-in-the-united-states/> [<https://perma.cc/4P3L-7X9H>].

²²⁵ Alan Rappeport, *That Judge Attacked by Donald Trump? He's Faced a Lot Worse*, N.Y. TIMES (June 3, 2016), (internal quotation marks omitted) <https://www.nytimes.com/2016/06/04/us/politics/donald-trump-university-judge-gonzalo-curiel.html> [<https://perma.cc/KSP6-NMSV>].

Trump because of his plans to build a border wall.²²⁶ Trump repeated this sentiment in a televised interview on CNN.²²⁷ He later claimed that his comments were somehow “misconstrued.”²²⁸

Trump’s statements evidencing racial animus have continued into his presidency. In a discussion of how to prosecute immigrants living in sanctuary cities, President Trump stated:

You wouldn’t believe how bad these people are. These aren’t people. These are animals. And we’re taking them out of the country at a level and at a rate that’s never happened before. And because of the weak laws, they come in fast, we get them, we release them, we get them again, we bring them out. It’s crazy.²²⁹

Finally, on August 25, 2017, President Trump pardoned Joe Arpaio, the former Sheriff of Maricopa County, Arizona who was to be sentenced to criminal contempt of court for failing to comply with a federal judge’s order to stop racially profiling Latinos.²³⁰ After the pardon, Trump tweeted that Arpaio was an “American patriot . . . [who] kept Arizona safe!”²³¹ These examples illustrate exactly why heightened scrutiny is necessary to root out Trump’s racially discriminatory decision making.

In a different context that highlights the value of heightened scrutiny over federal government action in the context of racial animus, a federal district court in New York has

²²⁶ *Id.*

²²⁷ *Donald Trump Rails Against Judge’s ‘Mexican Heritage,’* CNN (June 3, 2016), <http://www.cnn.com/videos/politics/2016/06/03/donald-trump-judge-mexican-trump-university-case-lead-sot.cnn> [<https://perma.cc/3WFJ-CK8B>].

²²⁸ Alan Rappeport, *Donald Trump Says His Remarks on Judge Were ‘Misconstrued,’* N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/us/politics/trump-university-judge.html> [<https://perma.cc/AK76-37EB>].

²²⁹ President Donald Trump, Remarks at a California Sanctuary State Roundtable (May 16, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/> [<https://perma.cc/H8X2-RTTH>]. Trump’s Press Secretary, Sarah Sanders, later explained, “The President was very clearly referring to MS-13 gang members who enter the country illegally and whose deportations are hamstrung by our laws.” Sarah Sanders, White House Press Sect., Press Briefing (May 17, 2018), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-acting-secretary-veterans-affairs-robert-wilkie-05172018/> [<https://perma.cc/WC2M-GX8S>]; cf. Linda Qiu, *The Context Behind Trump’s ‘Animals’ Comment*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/us/politics/fact-check-trump-animals-immigration-ms13-sanctuary-cities.html> [<https://perma.cc/22VU-Z2M5>] (arguing that the Press Secretary’s explanation of the President’s “animals” comment do not make sense in the context of state sanctuary laws that would not protect the examples of violent criminals that the press secretary cites in her explanation).

²³⁰ Julie Hirschfield Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html> [<https://perma.cc/3HDZ-WZBG>].

²³¹ Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 25, 2017, 7:00 PM), https://twitter.com/realDonaldTrump/status/901263061511794688?tfw_site=nytimes&ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F08%2F25%2Fus%2Fpolitics%2Fjoe-arpaio-trump-pardon-sheriff-arizona.html [<https://perma.cc/LW7P-PUTE>].

allowed a case to proceed to challenge Trump's decision to end the Deferred Action for Childhood Arrivals program.²³² A number of federal circuit courts, under a heightened scrutiny standard, have also enjoined Trump's travel bans as a violation of the Establishment Clause because they found anti-Muslim animus infused in the government's actions.²³³

Given these examples of Trump's racial animosity, this article argues that the courts should stop applying such a deferential standard to the government's actions and instead apply heightened scrutiny to provide a judicial limitation on the federal government's eminent domain power. Trump should not

²³² See *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 278 (E.D.N.Y. 2018) ("At the very least, one might reasonably infer that a [presidential] candidate who makes overtly bigoted statements on the campaign trail might be more likely to engage in similarly bigoted action once in office."); see also Alan Feuer, *Citing Trump's 'Racial Slurs,' Judge Says Suit to Preserve DACA Can Continue*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/nyregion/daca-lawsuit-trump-brooklyn.html> [<https://perma.cc/WX5N-P5FV>]. Federal courts in San Francisco, New York, and D.C. have blocked Trump's attempt to end DACA and the Supreme Court is unlikely to hear Trump's appeal. See Pete Williams, *Supreme Court Unlikely to Hear Trump DACA Appeal*, NBC NEWS, (Jan. 18, 2019), <https://www.nbcnews.com/politics/supreme-court/supreme-court-unlikely-hear-trump-daca-appeal-n960321> [<https://perma.cc/9ZQ2-XAX3>].

²³³ See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572, 590 (4th Cir.) (sustaining the district court's nationwide injunction by applying "meaningful judicial review" of a travel ban that the Fourth Circuit characterized as "that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination.") *vacated as moot*, 138 S. Ct. 353 (2017) (mem.); *Hawaii v. Trump*, 859 F.3d 741, 769 (9th Cir. 2017) (affirming in part the district court's preliminary injunction against the President's travel ban in which the district court found, "A review of the historical background here makes plain why the Government wishes to focus on the Executive Order's text, rather than its context. The record before this Court is unique. It includes significant and un rebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor." *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1136 (D. Haw. 2017)), *vacated as moot*, 138 S. Ct. 377 (2017) (mem.). These cases were later consolidated and the Supreme Court granted cert. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2085 (2017) (As part of this opinion, the Supreme Court modified the preliminary injunctions issued by the Fourth and Ninth Circuits by narrowing their scope.). *Id.* The Trump administration subsequently changed its travel ban (for a third time) and the Supreme Court allowed this iteration to go into effect while legal challenges were pending. See Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html> [<https://perma.cc/YRX9-TDJZ>]. In a subsequent 5-4 decision, the Supreme Court upheld the President's authority to issue the travel ban and rejected the Establishment Clause challenge. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Justice Sotomayor, in a strong dissenting opinion, observed, "Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications." *Id.* at 2438 (Sotomayor, J., dissenting). Recently, a prominent Trump supporter cited Japanese American internment in a televised interview "as a 'precedent' for an immigrant registry." See Jonah Engel Bromwich, *Trump Camp's Talk of Registry and Japanese Internment Raises Muslim Fears*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/18/us/politics/japanese-internment-muslim-registry.html> [<https://perma.cc/WBY8-FQUY>]. This is another example of how excessive judicial deference to the federal government's claims of national security can be dangerous.

be allowed to make decisions based on racial animus and hide under the cloak of public use—especially when his border wall would not do much to achieve his purported ends.

C. *Heightened Judicial Scrutiny in Eminent Domain Cases*

A possible way forward, which is more effective than narrowing the definition of “public use,” is to apply heightened judicial scrutiny to the government’s decision to condemn land. This Part explores two possibilities for achieving heightened scrutiny in eminent domain cases—means-ends analysis and strict scrutiny.

1. Means-Ends Analysis in Eminent Domain Cases

First, federal courts could apply a form of heightened scrutiny by using means-ends analysis, which entails analyzing the government action that is taken to achieve a public policy goal (the means), and the policy goal put forth by the government (the ends).

Professor Thomas Merrill argues that judicial review in eminent domain cases should focus on the means that the government chooses, rather than the ends.²³⁴ Merrill begins by focusing on a distinction “drawn by Guido Calabresi and Douglas Melamed between property rules, which allow an owner to protect a right or entitlement from an unconsented taking by securing injunctive relief, and liability rules, which afford protection only through an ex post award of damages.”²³⁵ In critiquing “the extreme deference to legislative eminent domain decisions,” Merrill notes that courts have relied exclusively on liability rules to “protect all private property rights.”²³⁶ He argues that the fundamental source of this extreme deference and subsequent overreliance on liability rules is a focus on ends rather than on means. Merrill argues that deference to ends may be proper,²³⁷ but urges a more searching inquiry on means.²³⁸

²³⁴ See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 65 (1986).

²³⁵ See *id.* at 64 (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972)).

²³⁶ *Id.*

²³⁷ *Id.* at 66–67 (“The ends question asks what the government plans to do once the property is obtained. This inquiry, in turn, requires a clear conception of the legitimate functions or purposes of the state. . . . The answers to such questions demand an exercise in high political theory that most courts today are unwilling (or unable) to undertake.”).

²³⁸ *Id.* at 67 (“The means question, by contrast, is narrower. It asks where and how the government should get property, not what it may do with it. . . . The means

This heightened scrutiny of means has a parallel in some state courts. For example, in *County of Wayne v. Hathcock*, the Michigan Supreme Court set forth a heightened standard for judicial scrutiny in eminent domain cases that asks whether the taking was necessary to achieve the ends that the government was pursuing.²³⁹ In *Hathcock*, landowners challenged Wayne County's exercise of eminent domain for purposes of clearing land for the Pinnacle Project—which entailed “constructing a large business and technology park with a conference center, hotel accommodations, and a recreational facility.”²⁴⁰ *Hathcock* overruled an infamous case, *Poletown Neighborhood Council v. City of Detroit*, which involved the condemnation of property for the construction of a General Motors plant in Detroit, Michigan.²⁴¹ Citing to the broad discretion given to government in its eminent domain decisions, the majority in *Poletown* held for the state, noting, “The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.”²⁴² This is essentially an ends analysis, in which the government is afforded great deference to act in the public interest.²⁴³

Poletown, serving as a state-level precursor to *Kelo*, was met with widespread outrage.²⁴⁴ Perhaps reflecting conflicting societal views on the outcome, also like *Kelo*, the decision itself was not unanimous. The majority opinion in *Poletown* was met with two vigorous dissents.²⁴⁵ In his dissent, Justice Ryan criticized “the always disastrous philosophy that the end justifies the means.”²⁴⁶ Ryan's opinion thus suggested that

approach, of course, is also ‘political’ in that it concerns state actions that will advance or retard conflicting interests. Nevertheless, the means approach demands a more narrowly focused and judicially manageable inquiry than the ends approach.”)

²³⁹ *Cty. of Wayne v. Hathcock*, 684 N.W.2d 765, 776 (Mich. 2004).

²⁴⁰ *Id.* at 770. The Pinnacle Project was expected to “create thirty thousand jobs and add \$350 million in tax revenue.” *Id.* at 771.

²⁴¹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 468, 470 (Mich. 1981) (Ryan, J., dissenting).

²⁴² *Id.* at 459.

²⁴³ See *supra* notes 234–238 and accompanying text.

²⁴⁴ Ilya Somin & Jonathan H. Adler, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 624–25 (2006) (“Like *Poletown* before it, *Kelo* was met with public outrage, despite the fact that it arguably made few changes to existing federal Takings Clause jurisprudence.”).

²⁴⁵ *Poletown Neighborhood Council*, 304 N.W.2d at 460–464 (Fitzgerald, J., dissenting); *id.* at 464–84 (Ryan, J., dissenting).

²⁴⁶ *Id.* at 465. Justice Ryan further criticized the substantial influence of General Motors in the government's exercise of eminent domain powers. *Id.* at 470 (“The evidence then is that what General Motors wanted, General Motors got. The corporation conceived the project, determined the cost, allocated the financial burdens, selected the

means along with ends should be evaluated by courts. Ryan then articulated three factors that would allow for the transfer of condemned properties to private parties: “1) *public* necessity of the extreme sort; 2) continuing accountability to the *public*; and 3) selection of land according to facts of independent *public* significance.”²⁴⁷ All three factors were types of means analysis.

Justice Ryan noted that the majority decision failed to recognize, let alone apply, any of these means-focused factors.²⁴⁸ He warned that the now greatly expanded concept of “public benefit” has no limits.²⁴⁹ Ryan’s analysis would later become the basis of *Poletown*’s reversal.²⁵⁰

Twenty-three years after *Poletown*, the Michigan Supreme Court was faced with the same issue.²⁵¹ In *County of Wayne v. Hathcock*, Wayne County was attempting to take private land to clear the way for a business center.²⁵² The county put forth the following purposes or ends for the condemnations:

- (1) the creation of jobs for its citizens, (2) the stimulation of private investment and redevelopment in the county to insure a healthy and growing tax base so that the county can fund and deliver critical public services, (3) stemming the tide of disinvestment and population loss, and (4) supporting development opportunities which would otherwise remain unrealized.²⁵³

While conceding that these goals were within the scope of the county’s powers, the court held that the exercise of eminent domain was not legally permissible because they failed under

site, established the mode of financing, imposed specific deadlines for clearance of the property and taking title, and even demanded [twelve] years of tax concessions.”)

²⁴⁷ *Id.* at 478. Ryan described public necessity of the extreme sort as “the exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of the land that can be assembled only by the coordination central government alone is capable of achieving.” *Id.* Next, he defines continuing public accountability as “the retention of some measure of government control over the operation of the enterprise after it has passed into private hands.” *Id.* at 479. Finally, Ryan explains choosing the land based on facts of independent significance as the “determination of the specific land to be condemned is made without reference to the private interests of the corporation. The determination is based instead upon criteria related to the public interest.” *Id.* at 480.

²⁴⁸ *Id.* at 480 (“The three elements discussed above are not recognized by the majority, which instead has tied the concept of public use to the existence of a public benefit. Yet, the principles inhering in the precedent demonstrate that, although public benefit is a necessary condition, it is itself an insufficient condition for the existence of a public use.”).

²⁴⁹ *Id.* at 480. (“From now on ‘the protean concept of public benefit’ will be the sole criterion by which we are to adjudge the constitutionality of employing eminent domain for private corporations. The concept of public benefit is indeed protean. It is also nebulous. The state taking clause has now been placed on a spectrum that admits of no principles and therefore no limits.”).

²⁵⁰ See *Cty. of Wayne v. Hathcock*, 684 N.W.2d 765, 781, 785–87 (Mich. 2004).

²⁵¹ *Id.* at 769.

²⁵² *Id.* at 770.

²⁵³ *Id.* at 775–76.

the three means-based factors that Justice Ryan analyzed in his *Poletown* dissent.²⁵⁴ *Poletown* was, therefore, overruled and state law subsequently required courts to scrutinize the means of taking private property that the government chose when exercising its eminent domain power.²⁵⁵

Applying the *Hathcock* means-ends analysis to the president's plan to take private property for the construction of a border wall, a court would give deference to the government's stated goals of preventing illegal border crossing and deterring crime in general. The federal government, however, would have to demonstrate that the means chosen furthered these stated goals in a meaningful way. In other words, deference would not be given to the government's means. A court would have to analyze the government's evidence to determine how the border wall would further the president's ends. In this historic moment of interest-convergence, both minority and non-minority voices should be pushing back against the taking of private property for a massive construction project that will not accomplish the president's stated policy objectives. They should do this in recognition that unfettered government eminent domain authority is detrimental from both a civil rights standpoint and a property rights perspective.

Furthermore, in another context analyzed under takings law, means-ends analysis has been utilized by the Supreme Court when considering the constitutionality of exactions, or certain conditions placed on government permission for private parties to build on and develop property. The Court, therefore, in at least certain types of takings cases has applied a form of heightened scrutiny.

In *Nollan v. California Coastal Commission*, the Nollans were private landowners who "own[ed] a beachfront lot in Ventura County, California."²⁵⁶ In order to raze the existing structure and build a new house on their land, a state statute "required [the Nollans] to obtain a coastal development permit from the California Coastal Commission."²⁵⁷ The commission granted the development permit on the condition that the Nollans allow the public a right-of-way easement across a portion of their property in order to access the beaches.²⁵⁸ The Nollans challenged this condition in court as an uncompensated taking in violation of the Takings Clause of the Fifth

²⁵⁴ *Id.* at 781–83.

²⁵⁵ *Id.* at 787.

²⁵⁶ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987).

²⁵⁷ *Id.* at 828.

²⁵⁸ *Id.*

Amendment.²⁵⁹ The Supreme Court held for the Nollans and found that a taking had occurred by applying a means-ends analysis.²⁶⁰ While accepting the state’s purported ends (or policy goal) “that the public interest [would] be served by a continuous strip of publicly accessible beach along the coast,”²⁶¹ the Court observed that the exaction would be impermissible if the “essential nexus” between the means and ends was missing—i.e., when the means “utterly fails to further the end[s].”²⁶² The Court noted, “When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater [which would be a proper exercise of police power], but granted dispensations to those willing to contribute \$100 to the state treasury [which would be impermissible].”²⁶³ In other words, the Court was looking for a strong connection between the means and the ends to justify the government taking of property.

The Court found that the essential nexus in this case was not satisfied because the ends of physical public access to the beach would not be satisfied by a means (i.e., a land use condition) that would allow only for visual access and the prevention of a psychological barrier to physical access.²⁶⁴ In other words, the connection between ends and means was too attenuated for the takings conclusion to be avoided.

Seven years later, in *Dolan v. City of Tigard*, the Court elaborated on the questions the Court must ask to determine if an exaction constitutes a government taking.²⁶⁵ In *Dolan*, “Florence Dolan own[ed] a plumbing and electric supply store” in Tigard, Oregon.²⁶⁶ She sought to raze her existing 9,700-square foot store and construct another building almost double the size of the original.²⁶⁷ The city granted Dolan’s request subject to two conditions: (1) she dedicate a portion of her property “for improvement of a storm drainage system” along a

²⁵⁹ *Id.* at 829.

²⁶⁰ *Id.* at 841–42 (“California is free to advance its ‘comprehensive program,’ if it wishes, by using its power of eminent domain for this ‘public purpose,’; but if it wants an easement across the Nollans’ property, it must pay for it.” (citing U.S. CONST. amend V)).

²⁶¹ *Id.* at 841.

²⁶² *Id.* at 837.

²⁶³ *Id.*

²⁶⁴ *Id.* at 838. In his dissenting opinion, Justice Brennan disagreed with the majority’s characterization that the benefit of the public easement was restricted to visual and psychological access, and cites to instances in which the commission requested the easement because it wanted to increase physical access to the beaches. *Id.* at 850–51 (Brennan, J., dissenting).

²⁶⁵ *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

²⁶⁶ *Id.* at 379.

²⁶⁷ *See id.*

flooding area near her property; and (2) “she dedicate [a fifteen]-foot strip of land . . . as a pedestrian/bicycle pathway.”²⁶⁸ Dolan challenged these conditions as an uncompensated taking of her property under the Fifth Amendment.²⁶⁹

The Court expounded upon the essential nexus test of *Nollan*, setting forth a two-part inquiry. The Court “must first determine whether the ‘essential nexus’ exists between the ‘legitimate state interest’ and the permit condition exacted by the city.”²⁷⁰ Under the first inquiry, the Court found that an essential nexus existed between the legitimate interests of the prevention of flooding and the reduction of traffic congestion and the imposed permit conditions.²⁷¹ The Court then described the second part of the analysis in which the Court is “to determine whether the degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of petitioner’s proposed development.”²⁷² The Court further explained that “rough proportionality” was the required degree of connection between ends and means for Fifth Amendment purposes.²⁷³ Under the second inquiry, the Court found that the permit conditions were not “roughly proportional” to the impact of the proposed development.²⁷⁴ Therefore, the exactions amounted to uncompensated taking in violation of the Fifth Amendment.

Professor Nicole Garnett argues that the heightened scrutiny from *Nollan* and *Dolan* should also be applied when a challenge arises to a government’s eminent domain power.²⁷⁵ Garnett contends that the heightened scrutiny required in exactions cases is an attempt “to ensure that the property owner would bear no more than his or her ‘fair share’ of the burden of regulation.”²⁷⁶ She argues that this “singling out” of landowners in exactions cases applies equally, if not more, to landowners in

²⁶⁸ *Id.* at 380.

²⁶⁹ *Id.* at 382.

²⁷⁰ *Id.* at 386 (citation omitted).

²⁷¹ *Id.* at 387–88.

²⁷² *Id.* at 388 (citations omitted).

²⁷³ *Id.* at 391. The Court eschewed the term “reasonable relationship” because it “seems confusingly similar to the term ‘rational basis’ which described the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.” *Id.* The Court elaborated, “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.*

²⁷⁴ *Id.* at 395–96.

²⁷⁵ Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 963 (2003).

²⁷⁶ *Id.* at 943.

eminent domain cases.²⁷⁷ Garnett draws on *Nollan* and *Dolan* and articulates a “reasonable necessity” test, as applied to eminent domain cases:

Can the government link the means by which and purpose for which it seeks to acquire land? That is, can the government demonstrate that a given exercise of eminent domain was “reasonably necessary” to advance, or “related in nature and extent” to, the public purpose for which the condemnation power was invoked?²⁷⁸

Applying Garnett’s proposed test to the federal government’s taking of private property to build a border wall, a court would ask if the taking was “reasonably necessary” or “related in nature and extent” to the President’s stated purpose of stopping illegal border crossing or deterring crime. Again, deference will be given to the stated ends, but none will be afforded to the means the government has chosen to accomplish them. In this moment of interest-convergence, people from all racial backgrounds should contest the idea that the border wall is reasonably necessary for the President’s stated objectives. Indeed, allowing government extreme deference in choosing this means puts everyone’s property rights in jeopardy.

Therefore, heightened judicial scrutiny based on either *Hathcock* or *Nollan* and *Dolan* would move away from the extreme deference given to government discretion in *Berman*, *Midkiff*, and *Kelo* and put the government to its proof that its means were reasonably necessary or in some way connected to the stated ends.

2. Strict Scrutiny in Eminent Domain Cases

a. Triggering Strict Scrutiny

Another way forward is to apply strict scrutiny analysis in eminent domain cases. Strict scrutiny can be triggered when the

²⁷⁷ *Id.* at 950 (“In fact, some individuals forced to involuntarily part with their property in an eminent-domain proceeding may be *worse off* than those who face an aggressive regulatory authority that has ‘singled them out’ for a development exaction.”).

²⁷⁸ *Id.* at 964. Garnett further explains:

First, at the broadest level, a court might review whether the larger *project* for which the property is being condemned is reasonably necessary to advance the government’s policy goals. . . . Alternatively, a reasonable necessity test might require courts to ask a means-ends question familiar from other areas of constitutional law—that is, whether the government’s actions are “overinclusive” (or, at least theoretically, “underinclusive”). . . . Finally, aside from scrutiny of the *amount* of land acquired, means-ends scrutiny in a public-use case might entail an evaluation of whether the government could have acquired the land in question through other, noncoercive, means.

Id. at 966–67 (footnotes omitted).

government impinges on fundamental rights.²⁷⁹ The fundamental right at issue in challenges to government eminent domain power is the individual right to own property.²⁸⁰ In addition to the Takings Clause, Professor Michael Lang argues that this right can be implied from several provisions of the Constitution, including the Third Amendment's stringent restrictions on quartering troops in people's homes, the Fourth Amendment's protection of houses and effects against unreasonable searches and seizures, and the Fifth and Fourteenth Amendments' protection against deprivations of property without due process of law.²⁸¹ Taken together, these constitutional provisions would create a fundamental right to own property in the same way the Supreme Court has used a number of constitutional protections to imply the fundamental right of privacy.²⁸²

An alternative way to trigger strict scrutiny is for a court to frame the issue based on the personal and unique nature of what a home means to people. Legal scholar Margaret Radin, in theorizing a personhood perspective in property law, makes a

²⁷⁹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.” (citations omitted)). *Carolene Products* upheld an economic regulation by applying rational basis review, but noted that heightened scrutiny may be proper in other situations—namely when fundamental rights are infringed or when “prejudice against discrete and insular minorities” is present. *Id.* at 153 n.4. It is interesting to note that this case created a dichotomy between economic rights, which are subject to rational basis review, and individual liberty rights, which are subject to heightened scrutiny. A number of scholars have critiqued this as a false dichotomy and have argued that the infringement of economic (i.e., property) rights should receive the same heightened scrutiny as individual liberty rights. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 211 (1985); ELY, *supra* note 200, at 140–41.

²⁸⁰ See Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 609 (1997) (Arguing that “the recognition of fundamental property rights should be analytically similar to the recognition of fundamental liberty interests.”); Michael A. Lang, Note, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 IND. L. REV. 449, 461 (2006) (“Although the Federal Constitution was established to protect individual rights to life and liberty, it was also created to protect private property rights.” (footnote omitted)). Some states have interpreted their own constitutions as recognizing property as a fundamental right and, therefore, providing heightened scrutiny analysis in challenges to eminent domain power. See, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115, 1129, 1138 (Ohio 2006) (applying heightened scrutiny after recognizing that property is a “fundamental right” under the Ohio Constitution.); *Bd. of Cty. Comm’rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 650–51 (Okla. 2006) (applying heightened scrutiny after recognizing an “individual fundamental interest of private property ownership” under the Oklahoma Constitution).

²⁸¹ Lang, *supra* note 280, at 461–62.

²⁸² See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (“In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right [to privacy] in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.” (citations omitted)).

distinction between “personal” property, as defined as “some object . . . so bound up with me that I would cease to be ‘myself’ if it were taken” and fungible property, meaning property not “specially related to persons.”²⁸³ Radin gives a home as an example of “personal” property and argues that, as such, strict scrutiny should apply to a government taking of a home.²⁸⁴ Similarly, the idea that homes are special sources of security, liberty, and privacy can support the application of strict scrutiny.²⁸⁵ Legal scholar Benjamin Barros argues that given these unique characteristics, eminent domain law does not sufficiently protect people’s personal interest in their home.²⁸⁶ Barros, therefore, urges “higher levels of judicial scrutiny and additional process protections to better ensure that homes taken by use of eminent domain are in fact required for public use.”²⁸⁷

Thus, in government takings of people’s homes based either on property as a fundamental right or the unique and personal nature of a home, strict scrutiny would be the proper standard of review. This heightened judicial review should serve as a shield for both racial minorities and white landowners whose interests have converged to stop the taking of their homes by the federal government.

b. Applying Strict Scrutiny

When strict scrutiny is applied, a government regulation may be “justified only by a ‘compelling state interest,’ and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”²⁸⁸ One major difference between strict scrutiny and means-ends analysis is

²⁸³ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1005 (1982). Radin gives the following “personal” property example:

If my kidney may be called my property, it is not property subject to condemnation for the general public welfare. Hence, in the context of a legal system, one might expect to find the characteristic use of standards of review and burdens of proof designed to shift risk of error away from protected interests in personal property. For instance, if there were reason to suspect that some object were close to the personal end of the continuum, there might be a prima facie case against taking it. That prima facie case might be rebutted if the government could show that the object is not personal, or perhaps that the object is not “too” personal compared with the importance to the government of acquiring that particular object for social purposes.

Id. (footnotes omitted).

²⁸⁴ *Id.* at 1005–06.

²⁸⁵ D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 259–75 (2006).

²⁸⁶ *Id.* at 295.

²⁸⁷ *Id.*

²⁸⁸ *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citations omitted).

that strict scrutiny eschews the traditional judicial deference given to the states in determining ends and applies the highest review to both ends and means. In other words, the government is put to its proof that both its ends are compelling, and its means selected to achieve those ends are narrowly tailored.²⁸⁹ As for the president's stated objectives of preventing illegal immigration and deterring crime, these will most likely be deemed compelling government interests. The narrow tailoring prong of strict scrutiny, however, will pose the most significant hurdle for the government to overcome. Indeed, the narrow tailoring test is a much more searching inquiry into the government's means than the other means-ends tests presented in this article.²⁹⁰

If strict scrutiny applied to eminent domain cases, legal scholar Michael Lang proposes a sensible three-prong test specific to such cases.²⁹¹ First, the government must show that the use of eminent domain "is the only practicable method" of achieving the government objective.²⁹² The "only practicable method" test is similar to the "least restrictive means" test under strict scrutiny review in equal protection cases.²⁹³ Second, the government must show that "an asserted public use has a reasonable chance of accruing in a reasonable amount of time."²⁹⁴ This prong is a further inquiry into the means that the government chooses to meet its ends in that it asks about the anticipated time frame of the public benefit being realized. It "is designed to deter a condemning authority from asserting a pretextual public use."²⁹⁵ Third, the government must demonstrate that if a private transferee takes the land, then that "transferee . . . will not receive gratuitously the surplus value that represents the difference between the pre-condemnation and post-condemnation values."²⁹⁶ In the case of the federal government taking land for a border wall, this prong

²⁸⁹ The Court has noted, "The term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986).

²⁹⁰ See *supra* Section III.C.1.

²⁹¹ Lang, *supra* note 280, at 472. Note that Lang is addressing condemnations that take property from one private party and give it to another private party. I broaden the language of the test to apply other exercises of eminent domain.

²⁹² *Id.*

²⁹³ See, e.g., *Wygant*, 476 U.S. at 280 n.6 (1986) (narrow tailoring requires "consideration of whether lawful alternative and less restrictive means could have been used").

²⁹⁴ Lang, *supra* note 280, at 475 (footnote omitted).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 477.

will not be relevant unless the government subsequently conveys the land on which the wall sits to a private entity.²⁹⁷

In applying the most relevant elements of Lang's strict scrutiny test to the president's use of eminent domain to seize land for a border wall, the government faces significant challenges. First, the government would need to show that its proposed border wall is the "only practicable method" of stopping illegal border crossings or deter crime.²⁹⁸ Much evidence exists to the contrary.²⁹⁹ Second, the government would have to demonstrate that the government's objectives would be met over a reasonable amount of time. Again, this seems unlikely to be satisfied.³⁰⁰ Like the converging interests in *Brown v. Board of Education*, the interests of the majority and minority have converged in limiting eminent domain power after *Kelo*. The border wall is the next major battle ground in this fight. The application of strict scrutiny is one possible way forward.

In sum, any of these forms of heightened scrutiny—either means-ends analysis or strict scrutiny—would be better than the extreme deference articulated in *Berman*, *Midkiff*, and *Kelo*, because they would provide a check on unfettered government decision-making regarding the taking of private property.³⁰¹ Much is at stake. If Trump succeeds in building the border wall that he has repeatedly promised his supporters, then potentially thousands of people from all racial groups will lose their land for an ill-conceived government plan infused with racial animus that will do little to benefit the public. As it now stands, federal law may be on Trump's side because eminent domain doctrine has been judicially constructed over the past decades in a way that makes it far too easy for the federal government to take what it wants as long as it identifies a legitimate public benefit before the taking. It does not have to be this way. Even incremental steps in the proper direction—toward heightened scrutiny in takings cases—can have significant policy and legal effects over time.

²⁹⁷ In an age of increasing privatization of government functions, the private ownership and management of the border wall is not beyond the realm of possibilities. See, e.g., THE SENTENCING PROJECT, PRIVATE PRISONS IN THE UNITED STATES (2018), <http://www.sentencingproject.org/publications/private-prisons-united-states/> [https://perma.cc/9DGL-QYYS] ("Private prisons in the United States incarcerated 128,063 people in 2016, representing 8.5% of the total state and federal prison population.").

²⁹⁸ Lang, *supra* note 280, at 472.

²⁹⁹ See *supra* notes 208–218 and accompanying text.

³⁰⁰ See *supra* notes 208–218 and accompanying text.

³⁰¹ The benefits and limitations of each approach are beyond the scope of this article. The main argument is that a point of interest-convergence has arrived and a number of possibilities of reforming the law exist that are better than the status quo.

CONCLUSION

President Donald Trump is seeking to take privately owned and tribal properties, including people's homes and businesses, to build a continuous physical wall along the two thousand mile border between the United States and Mexico.³⁰² He even partially shut down the government for the longest period in history in order to pressure Congress to fund his wall.³⁰³ Substantial evidence suggests that this massive government condemnation scheme will not effectuate Trump's primary purpose—the stopping of illegal immigration from Mexico. We are at a unique point in history where the interests of both the minority and majority have converged on a common goal: to restrict government power to take private property unless it can be put to its proof that such taking is justified. The best way forward involves applying heightened judicial scrutiny in which the government must justify that its means are connected to its stated ends. The only way to reform the law in this way is to embrace this moment of interest-convergence—i.e., acknowledge an alignment of interests between groups whose interests have historically diverged and move forward together.

³⁰² See *supra* notes 20, 24 and accompanying text.

³⁰³ See *supra* notes 17–18 and accompanying text.