Chicago-Kent Law Review

Volume 94 | Issue 1 Article 9

2-8-2019

# President Trump's Big Beautiful Wall: Discrimination, Eminent Domain, and the Public Use Requirement

Meghan K. Tierney
*Chicago-Kent College of Law*

# PRESIDENT TRUMP'S BIG, BEAUTIFUL WALL: DISCRIMINATION, EMINENT DOMAIN, AND THE PUBLIC USE REQUIREMENT

MEGHAN K. TIERNEY*

## INTRODUCTION

At a press conference held in Trump Tower New York City on June 16, 2015, Donald Trump announced his candidacy for President of the United States by promising the American people a "great, great wall on our southern border" to be paid for by the Mexican government.[1] Mr. Trump justified his campaign cornerstone by explaining that "[w]hen Mexico sends its people, they're not sending their best. . . . They're bringing drugs. They're bringing crime. They're rapists."[2] President Trump has a long and complicated history of being accused of, and fervently denying, various acts of racial discrimination.[3] Similarly, President Trump has insisted that his only motives behind the pursuit to completely separate the United States from Mexico are to curtail illegal immigration and curb drug cartel activity.[4]

On January 25, 2017, President Trump signed Executive Order No. 13,767, entitled "Border Security and Immigration Enforcement Improve-

* J.D. Candidate, Chicago-Kent College of Law Class of 2019. Executive Notes and Comments Editor, Chicago-Kent Law Review. I would like to thank Professor Sarah Harding for her invaluable guidance in helping me organize my thoughts and arguments throughout the note-writing process. I would additionally like to thank my family and friends who patiently listened to me talk (ad nauseam) about this topic for several months, and special thanks to those who read my drafts and provided feedback, counter-arguments, and criticism. Finally, thank you to my classmates (particularly the 2020 evening division class) for being the most fun and supportive group of people I have had the pleasure of meeting—you are all extraordinary.

1. Time Staff, *Here's Donald Trump's Presidential Announcement Speech*, TIME INC. (June 16, 2015), www.time.com/3923128/donald-trump-announcement-speech/ [https://perma.cc/AZK3-TY6T].

2. *Id.*

3. Lisa Desjardins, *How Trump Talks About Race*, PBS NEWSHOUR (Aug. 23, 2018, 12:39 PM), http://www.pbs.org/newshour/updates/every-moment-donald-trumps-long-complicated-history-race/ [https://perma.cc/LP8X-QQGN].

4. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 30, 2016, 3:27 AM), https://twitter.com/realdonaldtrump/status/770568584443539456 [https://perma.cc/6Y3P-EFLP] ("From day one I said that I was going to build a great wall on the SOUTHERN BORDER, and much more. Stop illegal immigration. Watch Wednesday!"); Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 27, 2016, 7:17 AM), https://twitter.com/realdonaldtrump/status/769539271678013440 [https://perma.cc/T9TU-69VD] ("Heroin overdoses are taking over our children and others in the MIDWEST. Coming in from our southern border. We need strong border & WALL!").

ments" (hereinafter "Order No. 13,767").[5] Among other directives, Order 13,767 instructs the Secretary of Homeland Security to "immediately plan, design, and construct a physical wall along the southern border . . . to most effectively achieve complete operational control of the southern border."[6] The Trump Administration awarded four contracts to construction companies to propose new border wall prototypes in August 2017,[7] and plans continue to move forward with piecemeal Congressional funding.[8]

To many, President Trump's fixation on building a wall between the United States and Mexico is grounded in a general dislike of Mexican citizens.[9] Consider, for a moment, a purely hypothetical situation where Chicago Mayor Rahm Emanuel formally declares that the city's southern neighborhood of Englewood is exceptionally dangerous and embroiled in chaos. Mayor Emanuel states that to protect the rest of the city from extreme gang violence, he plans to build a large fence around the Englewood area that will be protected by Chicago Police Department officers to ensure that guns and other weapons are unable to be carried outside of the neighborhood. He has made several statements in which he explicitly blames the African American and Latino populations for the ongoing violence and suggests that they be separated from the rest of the city. Mayor Emanuel has also let slip several derogatory statements about African Americans and Latinos during informal, public events. To build this fence and provide patrol stations for the police officers, Mayor Emanuel attempts to utilize the power of eminent domain to obtain the land surrounding Englewood and argues that the fence will have a positive impact on the city and will curtail the violence that has plagued Chicago for so long. In this exaggerated hypothetical, Mayor Emanuel's proposed fence has a discriminatory nature. In light of the evidence regarding the purpose of the fence, Mayor Emanuel would likely be hard-pressed to find a court that would allow the taking of private land under eminent domain. While the government does have a broad right to take private property for the greater public benefit,

5. Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 15, 2017).

6. *Id.*

7. Tara Goldshan, *The Trump Administration has Already Started Building the Border Wall*, VOX (Sept. 29, 2017, 9:30 AM), https://www.vox.com/policy-and-politics/2017/9/29/16298346/trump-administration-started-building-wall [https://perma.cc/J3EZ-R5VC].

8. Jennifer Scholtes & Sarah Ferris, *Trump waffles on forcing December fight over border wall funding*, POLITICO (Oct. 1, 2018, 2:04 PM), https://www.politico.com/story/2018/10/01/trump-border-wall-funding-854871 [https://perma.cc/MM5P-W9DA]. $1.6 billion has already been allocated for the project, with additional funding signed into law in late 2018. *Id.* It is unclear as to when the administration will solicit further funding from Congress. *Id.*

9. *See* Time Staff, *supra* note 1.

this note will argue that there can be no public benefit when the sole motivation behind a taking is racial discrimination.

Part I of this note will discuss the history of eminent domain and the Takings Clause of the Fifth Amendment, including a detailed analysis of the public use requirement. Part II will review how discriminatory intent is applied to other areas of land use law and regulation, specifically addressing exclusionary zoning and claims under the Equal Protection Clause. Finally, part III will argue that President Trump's border wall cannot be built on land condemned through eminent domain because there can be no valid public use if the motivation behind exercising eminent domain is largely based on invidious racial discrimination.

## I. THE FIFTH AMENDMENT TAKINGS CLAUSE, EMINENT DOMAIN, AND THE PUBLIC USE REQUIREMENT

### *A. History of Eminent Domain and the Fifth Amendment Takings Clause*

Eminent domain is the government's power to take private property for the public good upon payment of just compensation.[10] The government's power of eminent domain is granted by the Takings Clause of the Fifth Amendment, which states that "private property [shall not] be taken for public use, without just compensation."[11] Eminent domain claims necessitate a physical taking of land, defined as the government's physical and permanent occupation of a landowner's private property.[12] For the government to effectuate a taking under eminent domain, the sovereign must 1) prove that the land will be used for a general public purpose, and 2) pay the owner fair market value for the land.[13]

One of the earliest cases where the Supreme Court examined eminent domain was in 1875 when a landowner challenged the federal government's condemnation of his land to build a post office.[14] In its opinion, the Court declared that the government's power of eminent domain is "essential to its independent existence and perpetuity."[15] The transfer of land using eminent domain is effectuated by the government's filing of a

10. 26 AM. JUR. 2D *Eminent Domain* § 2, Westlaw (database updated August 2018).
11. U.S. CONST. amend. V.
12. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).
13. *See generally* D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280 (2010).
14. Kohl v. United States, 91 U.S. 367, 371 (1875).
15. *Id.* at 368.

condemnation proceeding under the relevant statute.[16] A condemnation proceeding services as a notice to the landowner that the government intends to take title of the property, which prompts the landowner to prove that they have a right to compensation for the land.[17]

The government's power of eminent domain has historically been quite broad due in large part to the decisions in *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*.[18] The scope of this power was challenged and upheld in 2005 by the landmark United States Supreme Court case *Kelo v. City of New London*.[19]

### *B. The Public Use Requirement*

#### 1. *Berman v. Parker*

Decided in 1954, *Berman v. Parker* was the first in modern history's trifecta of takings cases to equate the ideas of public use and public purpose.[20] The plaintiff, Samuel Berman, owned a department store in a poor, blighted community that was largely populated by African Americans.[21] The city of Washington D.C. sought to condemn and acquire plaintiff's land, which was admittedly in good condition, through eminent domain as part of the District of Columbia Redevelopment Act of 1945 ("D.C. Redevelopment Act").[22] The D.C. Redevelopment Act authorized the District of Columbia to condemn and acquire land as necessary to clear blighted areas that were "injurious to the public health, safety, morals, and welfare."[23] The Act explicitly declared that the land included in the redevelopment plan was a public use and created and tasked the District of Columbia Redevelopment Land Agency with acquiring all of the land necessary for the project.[24] The plaintiff asserted that his particular parcel of land was not blighted and argued that the proposed taking was unconstitutional under the Fifth Amendment, reasoning that the redevelopment project, which provid-

16. *See* 27 AM. JUR. 2D *Eminent Domain* § 366, Westlaw (database updated August 2018). Condemnation proceedings are largely administrative and do not address the issue of whether the government actually has the right to take the land. *See id.*

17. *See id.*

18. Daniel B. Kelly, *The 'Public Use' Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 18 (2006).

19. 545 U.S. 469 (2005).

20. 348 U.S. 26, 30 (1954).

21. *Id.* at 30–31.

22. *Id.* at 28, 34.

23. *Id.* at 29.

24. *Id.* (noting that the Act explicitly authorized the Agency to use eminent domain if necessary).

ed for various parcels to be sold to private developers, amounted to "a taking from one businessman for the benefit of another businessman."[25]

The District Court in *Berman* struggled to determine whether the taking of the plaintiff's land and subsequent sale to private parties was proper under eminent domain.[26] The District Court held that the land designated to be used for streets, parks, and other established public uses very clearly fell under the scope of eminent domain.[27] The issue in the eyes of the District Court was rather the constitutionality of re-selling various parcels to private persons as provided for in portions of the D.C. Redevelopment Act.[28] The court noted in its discussion that while the redevelopment of the area would likely be well-executed by private persons, "the courts have not come to call such pleasant accomplishments a public purpose which validates Government seizure of private property."[29] However, in light of the progression of the public use doctrine to include general public purpose, the court held that the seizure of the land in question was constitutional even if the land would be re-sold to a private party because the broad purpose of the taking was to eliminate blight.[30]

The plaintiff in *Berman* appealed to the Supreme Court and fervently argued that the sale of his condemned land to private parties was not constitutional as a valid public use.[31] While the Supreme Court did affirm the ruling of the District Court, it did not share the same concerns that the District Court voiced regarding sale to private parties.[32] In a unanimous decision, the Court held that the taking was constitutional and that public use broadly encompasses the idea of a general public purpose.[33]

25. *Id.* at 33–34.

26. Schneider v. District of Columbia, 117 F. Supp. 705, 724–25 (D.D.C. 1953), *modified sub nom*. Berman v. Parker, 348 U.S. 26 (1954). The District Court decision hinged on the language of the Act and held that "the Agency could condemn property *only for the reasonable necessities of slum clearance and prevention*, its concept of 'slum' being the existence of conditions 'injurious to the public health, safety, morals, and welfare.'" *Berman*, 348 U.S. at 31 (quoting *Schneider*, 117 F. Supp. at 724–25) (emphasis added).

27. *Schneider*, 117 F. Supp. at 711.

28. *Id.*

29. *Id.* at 724.

30. *Id.* at 724–25.

31. *Berman*, 348 U.S. at 31.

32. *Id.* at 35–36 (noting that "[i]f owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly").

33. *Id.* (reasoning that "[o]nce the question of the public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch").

### 2. *Hawaii Housing Authority v. Midkiff*

The Supreme Court produced another landmark takings case in 1984 when it decided *Hawaii Housing Authority v. Midkiff*.[34] A study conducted by the Hawaii Legislature revealed that only 22 landowners owned over 72% of the land on the island of Oahu, which was essentially an oligopoly that "skew[ed] the State's residential fee simple market, inflat[ed] land prices, and injur[ed] the public tranquility and welfare."[35] The Hawaii Legislature enacted the Land Reform Act of 1967 to facilitate the transfer of land from landowners to lessees existing on the land using eminent domain.[36]

In 1979, appellees filed suit and argued that the Land Reform Act was unconstitutional under the public use requirement of the takings clause since it transferred land to be used as private dwellings.[37] The District Court, after much debate, found that the Land Reform Act's purpose to redistribute land taken through eminent domain constituted a public use and was therefore constitutional.[38] The Court of Appeals reversed the District Court decision in 1983, reasoning that since there was no change in use of the property, there was no public use.[39] The Supreme Court opinion reversed yet again, noting that the Land Reform Act specifically identified that the condemnation of land was for a "public use and purpose," and therefore held that the use of eminent domain was constitutional under the scope of the state's police power to regulate the land ownership market.[40]

### 3. *Kelo v. City of New London*

*Kelo* is arguably the most famous eminent domain case in modern history. In 2005, the Supreme Court affirmed (in a 5-4 decision) that the public use requirement for takings is exceptionally broad and even property which is not blighted or in a blighted area can be taken under eminent domain.[41] The City of New London approved a development plan to revitalize

34. 467 U.S. 229 (1984).

35. *Id.* at 232.

36. *Id.* at 233.

37. *Id.* at 235.

38. Midkiff v. Tom, 483 F. Supp. 62, 69 (D. Haw. 1979).

39. Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983) ("When we strip away the statutory realizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit."), *rev'd sub nom.* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

40. *Midkiff*, 467 U.S. at 241.

41. Timothy B. Lee, *Can A City Give Your Home to a Private Developer? In 2005, the Supreme Court Said Yes*, VOX (June 23, 2015, 3:20 PM), https://www.vox.com/2015/6/23/8833847/kelo-

the community upon the arrival of a new corporate headquarters for pharmaceutical giant Pfizer.[42] The New London Development Corporation's ("NLDC") redevelopment plan included building restaurants, shopping centers, recreational centers, and a riverwalk.[43] Upon NLDC's initiation of condemnation proceedings of several parcels of land, Susette Kelo and eight other plaintiffs filed suit for a restraining order to prohibit the taking of their land for use in the redevelopment project.[44] The homes targeted by the NLDC's redevelopment plan were condemned solely due to their location, as there were no allegations that the homes were in poor condition.[45] Plaintiffs argued that the taking was in violation of the public use requirement and specifically asked that the Court "adopt a new bright-line rule that economic development does not qualify as a public use."[46]

The Court heavily relied on its holdings in *Berman* and *Midkiff* when it determined that the NLDC's use of eminent domain to acquire the land at issue satisfied the public use requirement.[47] The majority specifically noted that "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."[48] The Court also emphasized its reasoning in *Midkiff* that it is not the judiciary's duty to analyze the legislature's purpose for exercising eminent domain, so long as it is legitimate and rational.[49]

### *a. Justice Kennedy's Concurring Opinion*

Justice Kennedy submitted a concurring opinion discussing the importance of judicial review in situations where pure private benefit is the motivating factor behind an eminent domain claim but found no such issue to be present in the facts of *Kelo*.[50] Justice Kennedy compared the analysis to that of an Equal Protection claim:

property-supreme-court [https://perma.cc/BGJ4-9KGU] (describing the situation of the neighborhood before the taking, stating that "Kelo's neighborhood wasn't blighted").

42. Kelo v. City of New London, 545 U.S. 469, 474–75 (2005).

43. *Id.* at 474.

44. *Id.*

45. *Id.* at 475.

46. *Id.* at 484.

47. *Id.* at 483 (noting that the NLDC's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference").

48. *Id.*

49. *Id.* at 488 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984)).

50. *Id.* at 492 (Kennedy, J., concurring) (concluding that the case at hand "survives the meaningful rational-basis review that in my view is required under the Public Use Clause").

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.[51]

The concurrence further points out that there may be situations in which the proposed public use is so suspicious or prone to abuse that the courts should "presume an impermissible private purpose."[52] The proposed private benefit analysis, while it is simply dicta, does support the idea that "incidental or pretextual public justifications" should be carefully analyzed when reviewing a takings claim.

### *b. Justice Thomas's Dissenting Opinion*

Justice Thomas authored a scathing dissent in *Kelo* where he argued that the majority holding was flawed and based on errors made in *Berman* and *Midkiff* which treated the power of eminent domain as identical to the State's police power.[53] Justice Thomas further stated that since "the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to the legislatures as to what satisfies it."[54] Justice Thomas's dissent in *Kelo* goes even further, as he strenuously argued that "there is no justification . . . for affording almost insurmountable deference to legislative conclusions that a use serves a 'public use.'"[55] He continued to posit that the judiciary would not defer to the legislature's determination of, for example, the "circumstances that establish . . . when a search of a home would be reasonable."[56]

This dissent also explored the chilling consequences of allowing the legislature to act without any oversight or check from the judiciary and pointed out several instances of the disparate impact this deference had on minority populations. For example, the displacement of elderly, low-income Polish immigrants was upheld as a constitutional taking in the Michigan Supreme Court under *Poletown Neighborhood Council v. De-*

51. *Id.* at 491.
52. *Id.* at 493.
53. *Id.* at 519 (Thomas, J., dissenting).
54. *Id.* at 518.
55. *Id.* at 517.
56. *Id.* at 518.

*troit*.[57] Additionally, the overwhelming majority of those forcibly removed from their homes in *Berman* for "slum-clearance" were African American in what was known as "Negro removal."[58] This trend of minority displacement in the name of economic development has become ordinary and commonplace in our society and still occurs throughout the United States, affecting various minority groups and those living in poverty.[59]

The holdings in *Berman*, *Midkiff*, and *Kelo* show that the public use requirement of the Takings Clause is extremely broad and rarely substantively reviewed by the courts. However, with these examples in mind, it is crucial to remember the importance of judicial review when addressing a suspicious public use that may have a disparate impact on a particular class of people.

## II. DISCRIMINATORY INTENT AND THE PUBLIC USE REQUIREMENT

This note focuses its argument on the idea that the public use requirement cannot be validly fulfilled if the motivation behind a taking is discriminatory. While there have been no direct cases involving the use of eminent domain for a solely discriminatory purpose, cases in other areas make it clear that such a purpose would run afoul of the public use requirement for failure to serve even a basic legitimate government interest.[60] There are two areas of law that provide support for the idea that discrimination cannot be a public use. First, there is a long precedent set by federal courts that exclusionary or discriminatory zoning is unconstitutional.[61] Second, and more generally, there is a strong body of case law which recognizes that any bare desire to harm under the Equal Protection Clause cannot satisfy a legitimate government purpose.[62] In addition to the analysis of what types of government activity may constitute a public use, it is also necessary to analyze the threshold of discrimination as interpreted by the Equal Protection Clause.

57. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 460, 470 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

58. *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

59. *Id.*

60. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

61. *See generally* S. Burlington Cty. NAACP v. Mount Laurel Twp. (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975).

62. *See generally* United States v. Windsor, 570 U.S. 744 (2013).

### *A. Exclusionary Zoning as A Means for Discrimination*

Zoning laws were upheld as constitutional in 1926 and have been implemented widely throughout the United States.[63] While zoning is intended to contribute to the public safety and welfare, it is not uncommon for local governments to enact zoning laws that prohibit certain kinds of persons from inhabiting their neighborhoods.[64] These laws, better known as exclusionary zoning laws, are facially neutral ordinances that have a discriminatory effect on a particular class of people.[65] The cases discussed below regarding the township of Mt. Laurel are important cases that shed some light on the issue of exclusionary zoning.

#### 1. *Mt. Laurel I*

In 1975, the Southern Burlington County NAACP brought suit against the Mt. Laurel Township of New Jersey, alleging that the zoning ordinances enacted by the township sought to exclude the minority African American and Hispanic residents from obtaining low to moderate income housing within Mt. Laurel borders.[66] The ordinances at issue provided minimum lot sizes, minimum dwelling sizes, and restrictions on the number of bedrooms and occupants that could reside in apartment buildings.[67] While the New Jersey Supreme Court did not find a blatant discriminatory intent, it upheld the trial court's holding that "through its zoning ordinances [Mt. Laurel] has exhibited economic discrimination in that the poor have been deprived of adequate housing."[68] Specifically, the court recognized the need for adequate housing for residents of all income levels and held that the restrictive ordinances were "outside the intended scope of the zoning power."[69] The court further declared that the state must consider and appropriately address land use regulations that have a substantial impact on those outside of their specific community.[70] This holding produced what is now known as the

63. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (holding that zoning laws "must find their justification in some aspect of the police power, asserted for the public welfare").

64. Alice M. Burr, *The Problem of Sunnyvale, Texas, and Exclusionary Zoning Practices*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 203, 204 (2002).

65. *Id.*

66. *Mount Laurel I*, 336 A.2d at 717.

67. *Id.* at 719, 721.

68. *Id.* at 723 (quoting S. Burlington Cty. NAACP v. Mount Laurel Twp., 290 A.2d 465, 473 (N.J. Super. Ct. Law Div. 1972)).

69. *Id.* at 730.

70. *Id.* at 726 (holding that "when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served").

Mount Laurel Doctrine, which ordered that the township provide realistic opportunities for low and moderate income housing.[71]

### 2. *Mt. Laurel II*

Eight years after the holding in *Mt. Laurel I*, the New Jersey Supreme Court re-heard the case, as the town was still operating with "a blatantly exclusionary ordinance."[72] The court emphasized the constitutional authority behind its holding in *Mt. Laurel I* that "[m]unicipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional."[73] In a lengthy and detailed opinion that addressed five other cases that struggled to appropriately apply the Mt. Laurel Doctrine, the court clarified the Doctrine by setting forth specific criteria that a municipality must meet, including removing excessive restrictions, using affirmative measures, and providing zoning for mobile homes as well as "least cost" housing.[74] The *Mt. Laurel II* decision spurred the passage of New Jersey's Fair Housing Act in 1985.[75] While many throughout the state regarded the decision as a controversial display of judicial activism, the New Jersey Supreme Court viewed the decision as the push the legislature needed to pass a law that was capable of keeping the judiciary out of zoning disputes.[76]

The decisions in *Mt. Laurel I* and *Mt. Laurel II* cement the notion that even a facially neutral ordinance can function in an unconstitutional and discriminatory fashion. Additionally, these cases highlight the importance of judicial analysis of legislation that has a potentially discriminatory impact.

## *B. The Equal Protection Clause and Discriminatory Intent*

A concrete understanding of how discrimination is analyzed in the courts is necessary to determine whether the actions being taken by the government in respect to President Trump's border wall are discriminatory in nature and therefore run afoul of the public use requirement. One of the

71. *Id.* at 730.

72. S. Burlington Cty. NAACP v. Mount Laurel Twp. (*Mount Laurel II*), 456 A.2d 390, 410 (N.J. 1983).

73. *Id.* at 415.

74. *Id.* at 441.

75. *Judicial Duty in New Jersey*, N.Y. TIMES (Feb. 24, 1986), www.nytimes.com/1986/02/24/opinion/judicial-duty-in-new-jersey.html [https://perma.cc/6U9G-MMSD].

76. *Id.* (commenting that "this kind of response, one that would permit us to withdraw from this field, is what this court has always wanted and sought").

most robust laws prohibiting discrimination in the United States is the Equal Protection Clause. In the aftermath of its ratification in 1868, it appeared to many that equal protection of the law required that every law be applied to every citizen in the same manner and therefore did not permit for the type of special legislation that allows, for example, police officers to drive over the speed limit while responding to an emergency.[77] In a series of decisions in the early 1900s, the Supreme Court held that the Equal Protection Clause does allow for the passage of legislation directed to distinct groups, classes, and geographical areas.[78] These decisions also illuminated the essence of the Equal Protection Clause, which is simply that all similarly situated persons are guaranteed equal treatment under the law.[79]

Equal Protection Clause jurisprudence has set forth several levels of scrutiny depending on the classification at issue, each inquiring into different standards or thresholds of discrimination. The sections below will discuss the strict scrutiny standard, which requires the identification of a suspect class or an invidious discriminatory purpose, as well as the rational basis review standard, which turns on the finding of a legitimate government interest in legislation. Both of these thresholds for discrimination provide a unique lens through which we can analyze the motivation behind the use of eminent domain to obtain land for President Trump's border wall.

### 1. Strict Scrutiny: Suspect Classifications and Invidious Purpose

The strict scrutiny standard is invoked by courts when reviewing legislation that has a facial classification based on suspect class (e.g., race, religion, national origin).[80] Courts may also choose to analyze legislation under strict scrutiny if the law involves a fundamental right (such as the constitutionally enumerated right to be free from government seizure of land) and creates a disparate impact on a particular class when applied.[81] President Trump's proposed border wall and the Executive Orders issued to effectuate the building of the wall are arguably an example of disparate impact on the Latin American community.

77. Joseph Tussman & Jacob tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343 (1949) ("[W]ith its apparent requirement of equality, the United States Supreme Court found it necessary to reaffirm the right of state legislatures to pass 'special' legislation.").

78. *Id.* at 343 ("Special burdens are often necessary for general benefits . . . not to impose unequal or unnecessary restrictions upon any one, but to promote . . . the general good." (quoting Barbier v. Connolly, 113 U.S. 27, 31 (1885))).

79. *Id.* at 344.

80. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

81. *Id.*

There is an important distinction between a law that inadvertently causes a racially disparate impact and a law that is intended to have a racially disparate impact (the latter being quite rare and difficult to prove). The concept of disparate impact was the crux of *Washington v. Davis*, a case in which a group of black applicants to the District of Columbia police academy asserted that the written aptitude test administered during recruitment, which measured verbal ability, vocabulary, reading, and comprehension, was unfairly prejudicial and racially discriminatory.[82] The petitioners sued the police department under the Equal Protection Clause and alleged that the aptitude test skewed culturally toward white applicants, and the test was irrelevant to the skills necessary for a police officer, and therefore had a disproportionate impact on black applicants.[83] The District of Columbia police academy argued, and the Court agreed, that it was vital for police officers to possess the ability to clearly communicate, and therefore the results of the test were "reasonably and directly related to the requirements of the police recruit training program."[84] The Court further held that even if the aptitude test did have a disparate impact on black applicants, it did not violate the Equal Protection Clause, reasoning that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[85] However, the Court prudently noted that when a law is neutral on its face and still leads to disparate treatment against a protected class, courts must be vigilant in determining whether the facially neutral law was passed or applied with an invidious purpose.

The Supreme Court further reinforced the importance of the invidious purpose test in *McCleskey v. Kemp*, holding that discrimination alleged under the Equal Protection Clause must be purposeful to succeed under strict scrutiny.[86] The plaintiff, Warren McCleskey, was convicted of murder and sentenced to death under Georgia's capital punishment statute.[87] McCleskey claimed that Georgia's capital punishment statute violated the Equal Protection Clause in light of an academic study that indicated a higher incidence of black defendants who were sentenced to the death penalty.[88]

82. Washington v. Davis, 426 U.S. 229, 232–35 (1976).

83. *Id.* at 234–35.

84. *Id.* at 235.

85. *Id.* at 240.

86. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) ("[A] defendant who alleged an equal protection violation has the burden of proving the 'existence of purposeful discrimination.'" (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967))).

87. *Id.* at 284–85.

88. *Id.* at 286–87 (explaining that McCleskey's proffered "Baldus study" was a statistical analysis of over 2,000 murder cases in Georgia which analyzed how often and to whom the death penalty was

The Court analyzed McCleskey's equal protection claim as applied to his individual conviction and the capital punishment statute in general. The Court held that to violate the Equal Protection Clause, McCleskey was burdened to prove that his individual capital punishment sentence was an exercise in intentional discrimination against him based on his race.[89] The Court further held that the passage of Georgia's capital punishment statute must have been purposefully enacted by the legislature in furtherance of a clear discriminatory agenda.[90]

Applying the holdings of *Davis* and *McCleskey* in a land use context, the Supreme Court heard *Village of Arlington Heights v. Metropolitan Housing Development Corp.* in 1977, a case which alleged racial discrimination when the Village denied a rezoning request that would allow racially integrated low-income housing to be built.[91] Specifically, the Metropolitan Housing Development Corporation ("MHDC") and several minority community members brought suit claiming that the zoning decision violated the Equal Protection Clause and the Fair Housing Act.[92] The district court found no violation of the Equal Protection Clause, followed by an appellate court reversal which stated that although the Village did not exhibit a discriminatory intent, the ultimate effect of the zoning decision was discriminatory and therefore did violate the Equal Protection Clause.[93] The Supreme Court ultimately held that there was no Equal Protection Clause violation, citing to its holding in *Washington v. Davis* that "[d]isproportionate impact is not . . . the sole touchstone of an invidious racial discrimination."[94] However, the opinion is instructive as to the factors of what does constitute an invidious discriminatory purpose: (1) disproportionate impact, (2) the historical background of the challenged decision, (3) the specific antecedent events, (4) departures from normal procedures, and (5) contemporary statements of the decisionmakers.[95]

*Davis*, *McCleskey*, and *Village of Arlington Heights* provide important guidance in how the Equal Protection Clause is analyzed generally, as well as in the context of land use regulations. Discriminatory intent is an abso-

applied, and that the data was subject to "an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds").

89. *Id.* at 292–93 (holding that "[McCleskey] offers no evidence specific to his own case that would support an inference that racial considerations play a part in his sentence").

90. *Id.* at 298 (holding that "there was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose").

91. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 252 (1977).

92. *Id.* at 252.

93. *Id.*

94. *Id.* at 265 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

95. *Id.* at 266–68.

lute violation of the Equal Protection Clause—which is evaluated under strict scrutiny—but is often difficult to prove.[96] Legislators are generally vigilant in ensuring that there are no public or private statements that could be construed against them in an Equal Protection argument. Thus, under rational basis review, the Equal Protection Clause also provides that legislation must be related to a legitimate government interest that does not seek to harm a particular group of citizens.[97]

### 2. Rational Basis Review: Legitimate Government Interest and Bare Desire to Harm

Let us assume for a moment—as some would argue—that President Trump's proposed border wall has no discriminatory intent. At the very least, Order 13,767 and any legislation regarding the construction of Trump's border wall would be analyzed under rational basis review.[98] Under rational basis review, courts must be able to identify a legitimate government interest for passage of the legislation—a threshold that the government is almost always able to meet.[99] However, recent decisions under the Equal Protection Clause have engaged rational basis review and have emphasized that there can exist no bare desire to harm a particular group within the legitimate government interest prong.[100]

#### *a. Legitimate Government Interest*

In *City of Cleburne v. Cleburne Living Center Inc.*, the Plaintiffs brought suit against the City of Cleburne for its refusal to grant a special use permit (required under ordinance only for the operation of homes classified as a "hospital for the feebleminded") that would allow for the operation of a group home for the mentally ill, claiming that the ordinance requiring said permit was discriminatory.[101] In its analysis, the Supreme Court declined to recognize mental illness as a quasi-suspect classification and instead relied on a rational basis analysis of the government's interest in denying the permit for the home.[102] To begin its analysis, the Court noted that "legislation is presumed to be valid . . . [if] the statute is rationally

96. *See* McCleskey v. Kemp, 481 U.S. 279, 293 (1987).

97. *See generally* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

98. *See generally* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 85 KY. L.J. 591 (2000).

99. *Id.*

100. *Id.* at 616.

101. 473 U.S. 432, 436–37 (1985).

102. *Id.* at 442.

related to a legitimate state interest."[103] The Court reviewed various factors in the city's permit decision, including the fact that other multiple-resident homes such as fraternity houses or nursing homes did not require a special permit, as well as the disapproval of property owners near the proposed facility.[104] Based on the lack of other special permits required by the City, the Court ultimately found no legitimate state interests in the city's decision to require, and subsequently deny, the special use permit for Featherston home, and the ordinance was found to be invalid.[105]

### *b. Bare Desire to Harm*

The Supreme Court addressed the importance of recognizing potential discrimination in a government's claimed interest in *U.S. Department of Agriculture v. Moreno*, a case that alleged that the federal government's denial of food stamps to a household of non-related individuals violated the Equal Protection Clause.[106] The Plaintiffs specifically argued that the provision of the food stamp law that prohibited households with unrelated persons was an irrational classification and therefore discriminatory.[107] In its analysis, the Supreme Court noted that legislative classifications will be considered constitutional if they are in furtherance of a legitimate governmental issue.[108] Review of the legislative history of the food stamp act revealed that Congress enacted the related household rule to prevent "hippie communes" from participating in the program.[109] In its opinion authored by Justice Brennan, the Court held that "[f]or if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[110]

Building on the bare desire to harm concept in *Moreno*, the Supreme Court heard Equal Protection Clause arguments regarding the Defense of Marriage Act ("DOMA") in *United States v. Windsor* in 2013.[111] The federal government passed DOMA in 1996, at the same time that many states

103. *Id.* at 440. *See also* Romer v. Evans, 517 U.S. 620, 631 (1996) (holding that "we will uphold the legislative classification so long as it bears a rational relation to some legitimate end").

104. *Cleburne*, 473 U.S. at 448.

105. *Id.* (holding that "[b]ecause in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case").

106. 413 U.S. 528, 532–33 (1973).

107. *Id.* at 533.

108. *Id.*

109. *Id.* at 534.

110. *Id.*

111. 570 U.S. 744 (2013).

were legalizing same-sex marriage.[112] DOMA had numerous provisions that affected over 1,000 federal laws, but the particular provision at issue in *Windsor* was directed to the definitions of the words "marriage" and "spouse," which were both meant to include only male-female relationships.[113] When Edith Windsor sought to qualify for the federal estate tax exemption upon her wife's death, the Internal Revenue Service denied her exemption and Windsor was forced to pay a $363,053 estate tax to the federal government.[114] In her appeal to the Supreme Court, Windsor argued that the federal government's passage of DOMA violated the Fifth Amendment's guarantee of equal protection of the laws.[115] Quoting the holding of *Moreno*, the Court held that DOMA was indeed a clear violation of the Equal Protection Clause because there was evidence that the legislature passed the law with the bare desire to harm those engaged in same-sex marriages.[116] *Windsor* and subsequent challenges to DOMA and similar laws have succeeded in cementing the Supreme Court's rejection of legislation that is enacted with a bare desire to harm minority groups.

While not directed at land use regulations or takings law, the exclusionary zoning and Equal Protection Clause cases play an important role in determining how motive should be analyzed in terms of government action. The Equal Protection Clause, specifically the lack of a legitimate government interest or the government's bare desire to harm a particular group, are useful tools with which to analyze President Trump's statements and opinions about the border wall and whether they are discriminatory in nature and therefore outside the realm of the public use requirement.

## III. TRUMP'S PROPOSED BORDER WALL IS DISCRIMINATORY AND THEREFORE NOT A PUBLIC USE

### *A. Federal Courts Can and Should Review the Legislature's Determination of Public Use When Necessary*

In eminent domain cases, the courts are not bound to accept a legislature's proffered public use with blind faith.[117] While the decisions in *Berman*, *Midkiff*, and *Kelo* do grant an extraordinary amount of deference to

112. *Id.* at 752.
113. *Id.*
114. *Id.* at 753.
115. *Id.*
116. *Id.* at 769–70.
117. S. Burlington Cty. NAACP v. Mt. Laurel Twp. (*Mount Laurel II*), 456 A.2d 390, 466 (N.J. 1983) (stating that "the genius of our system of laws is that it is only a presumption, for both may be set aside upon proper proof that the presumption was unwarranted").

the legislature's determination of what is in the public good, the courts do still have the ability to review legislative determinations of public use. The fact that federal courts are highly deferential to the legislature does not mean that they have no power at all. The Supreme Court decided *Cincinnati v. Vester* in 1930, holding that "it is well established that . . . the question [of] what is a public use is a judicial one."[118] In *Vester*, the city attempted to take the complainant's land in proceedings for excess condemnation to facilitate the widening of a city thoroughfare.[119] The City vaguely argued that the taking was justified as a public use because the land would be used "in furtherance of the said widening of Fifth Street" and was "necessary for the complete enjoyment and preservation of said public use," even though the land at issue was not to be used for the street itself or any abutments to the street.[120] The Court declined to recognize the use of the land as a public use since the explanation given by the City was so vague, and the land could have been used for any variety of purposes, some of which could fall squarely outside of the public use.[121] While the street widening issue in *Vester* would have no difficulty meeting the public use requirement today under current takings law, the important message to take away from *Vester* is that the courts, when necessary, can investigate public use claims as they see fit.[122]

Many courts decline to engage in an inquiry as to the legitimacy of public use once a public use is declared by the legislature.[123] However, the Court's conclusion in *Vester* regarding judicial authority to review is still good law.[124] In her dissent of the *Kelo* decision, Justice O'Connor wrote that "[a]n external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on governmental power is to retain any meaning."[125] The *Midkiff* opinion also discussed the notion that "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use

118. 281 U.S. 439, 446 (1930).

119. *Id.* at 441.

120. *Id.* at 443 (the plaintiff argued that "no part of this property is taken for the 25-foot strip or abuts on the widened street").

121. *Id.* at 448 (holding that "private property could not be taken for some independent and undisclosed public use").

122. *Id.* at 446.

123. *See generally* Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENVTL. AFF. L. REV. 243 (2012).

124. Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting).

125. *Id.*

'unless the use be palpably without reasonable foundation.'"[126] Under both strict scrutiny and rational basis review, I believe that President Trump's proposed border wall does not comport with the spirit of the public use requirement and is suspect enough to warrant review. Although it is rarely exercised, the judicial power to evaluate public use claims could be just the tool the courts need to seriously interrupt the construction of President Trump's proposed border wall. Similar to President George Bush's border wall project, the construction of President Trump's proposed wall rests quite heavily on the administration's ability to acquire the necessary land through eminent domain.[127] It is more than likely that at least some of the attempted acquisitions will end up in federal court, as many condemnation cases did during the Bush Administration's fence building project in 2006.[128] These condemnation cases are exactly where the courts should step in, as discussed in *Vester* and *Kelo*, to analyze President Trump's statements and attitudes in order ensure that the construction of this wall has a legitimate government interest able to satisfy the public use requirement.

### *B. Discriminatory Intent Cannot Satisfy the Public Use Requirement*

#### 1. Strict Scrutiny: Suspect Classification and Discriminatory Intent Behind Building the Wall

President Trump has made his intentions loud and clear with respect to the proposed Mexican border wall—the U.S. government will build a wall across the entirety of the southern border, and Mexico will pay for it.[129]

126. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

127. Tracy Jan, *Trump's 'Big, Beautiful Wall' Will Require Him to Take Big Swaths of Other People's Land*, WASH. POST (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=.707a1d747534 [http://perma.cc/ALF7-FRBR].

128. Special Report, USA Today, *The Wall—An In-Depth Examination of Donald Trump's Border Wall*, USA TODAY, https://www.usatoday.com/border-wall/ [http://perma.cc/9XBC-SAWZ] (last visited Sep. 21, 2018).

129. *Trump's Statements About Mexico, Border Wall*, VOA NEWS (Jan. 26, 2017, 5:45 PM), https://www. voanews.com/a/ trump-statements-mexico-border-wall/3694548.html [http://perma.cc/HJU6-E2GZ].


This construction disparately affects those on the Southern border of the country, specifically landowners whose land will be condemned by the Trump administration.[130] However, Trump's border wall will likely have far-reaching consequences beyond the condemnation of private land at the border. While the expansion of the border is predicated on facially neutral reasoning (e.g., immigration and drug concerns), it is worth recalling that facially neutral legislation can easily have a disparate impact on minority groups, as evidenced by the large amount of case law regarding exclusionary zoning. Further, it is well-settled that legislation which creates a disparate impact upon a minority group based on race or national origin is a suspect classification subject to strict scrutiny.[131] One could argue that the increased discrimination in housing, service in public establishments, policing, etcetera, against those of Hispanic and Latin American descent during Trump's presidency should be considered a disparate impact (one which will only be exacerbated by a wall meant to physically exclude and alienate

130. Jan, *supra* note 127.
131. Fallon, Jr., *supra* note 80, at 1275–79.

Latin Americans).[132] Assuming, *arguendo*, that this type of discrimination does cause a disparate impact on Latin Americans, the next step in a strict scrutiny analysis is to delve into the likely discriminatory motive as demonstrated by various statements President Trump has made throughout his campaign and tenure as President.

Prior to his candidacy, Mr. Trump took to Twitter in 2013, opining that "[s]adly, the overwhelming amount of violent crime in our major cities is committed by blacks and hispanics—a tough subject—must be discussed."[133] He went on in 2015 to suggest that "the Mexican government forces many bad people into our country. . . . And they are drug dealers, and they are criminals of all kinds."[134] During a 2016 campaign event, then-candidate Trump tried to rally his supporters into believing that Mexico is a hostile nation, pointing to the sky while saying "[t]hat could be a Mexican plane up there—they're getting ready to attack."[135] During the last presidential debate, in what has become a quite famous quote, then-candidate Trump promised that "one of my first acts will be to get all of the drug lords . . . we're going to get them out; we're going to secure the border. We have some bad hombres here, and we're going to get them out."[136]

President Trump's thoughts and statements about Mexico and Mexican immigrants in the United States are clear and arguably in furtherance of a discriminatory agenda.[137]

132. *See* Ellen Wulfhorst, *Discrimination Against Latinos in United States has Risen, Study Says*, REUTERS (Dec. 7, 2016, 5:27 AM), https://www.reuters.com/article/us-usa-migrants-discrimination/discrimination-against-latinos-in-united-states-has-risen-study-says-idUSKBN13W1A3 [http://perma.cc/CQ2C-82NS].

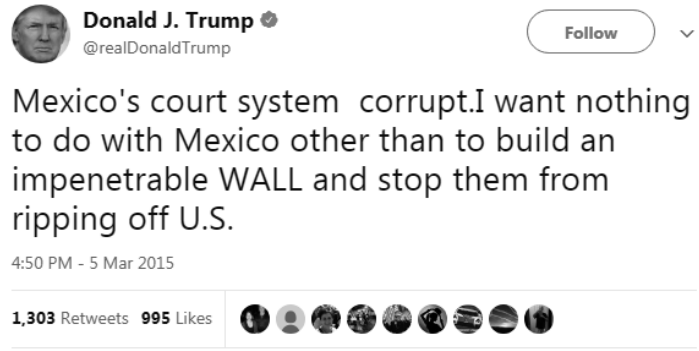
133. Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2013, 3:05 AM), https://twitter.com/ realDonaldTrump/status/342190428675796992 [http://perma.cc/D3BR-5NY6].

134. All in with Chris Hayes, (NBC television broadcast Jul. 8, 2015) (transcript available at http://www.nbcnews.com/id/57600791/ns/msnbc-all_in_with_chris_hayes/t/all-chris-hayes-wednesday-july-th/#.VeOnUNNViko) [http://perma.cc/3XCL-D75F].

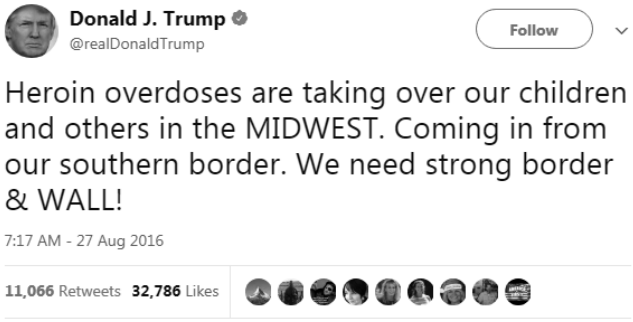
135. Rebecca Savransky, *Trump Points to Plane, Says it Could be Mexico 'Ready to Attack*,*'* THE HILL (Jun. 30, 2016, 4:15 PM), http://thehill.com/blogs/ballot-box/presidential-races/286179-trump-points-out-mexican-plane-theyre-getting-ready-to [http://perma.cc/6VFC-Y2N2].

136. Justin Worland, *The Internet Couldn't Believe Donald Trump's 'Bad Hombres' Comment at the Final Presidential Debate*, FORTUNE (Oct. 19, 2016), http://fortune.com/2016/10/19/presidential-debate-donald-trump-bad-hombres/ [https://perma.cc/Z4Y2-5FEH].

137. Donald J. Trump (@realDonaldTrump), TWITTER (May 5, 2016, 11:57 AM) https://twitter.com/realdonaldtrump/status/728297587418247168 [https://perma.cc/UVJ3-95YP]. While Trump has occasionally tweeted missives like, "I love Hispanics!," these are few and far between, usually prompted by some backlash over previous statements or policy proposals. The "I love Hispanics!" tweet was posted on Cinco de Mayo amid heated debate over his proposed border wall. *Id.*








These rare glimpses into the psyche of one of the country's most powerful lawmakers (as President Trump has the ability to sign Executive Orders into law without congressional oversight) can provide federal courts

with the evidence that they need to evaluate these Orders under strict scrutiny. These statements are racially tinged, politically insensitive, and in the case of at least the 2013 Twitter statement, wholly untrue.[138] The Supreme Court in *McCleskey* held that legislation in furtherance of a clear discriminatory agenda is an absolute violation of the Equal Protection Clause.[139] Further, as discussed in *Arlington Heights*, evaluating contemporary statements of the decisionmaker can shed invaluable light on intent.[140] These statements appear to confirm that President Trump's personal dislike of a particular class, namely, those of Latin American heritage is at least part of the motivation for his border wall. As such, a court could properly evaluate any legislation or Executive Order pertaining to the border wall under strict scrutiny.

### 2. Rational Basis Review: The Government has No Legitimate Interest if the Underlying Motive is Discriminatory

As discussed above, President Trump's statements regarding the Mexican and Latin American populations should prompt the courts to apply a standard of strict scrutiny in determining whether there is animus in the expansion of the fence along our southern border. However, should the courts decide that strict scrutiny is unwarranted, the exercise of eminent domain to construct the border wall still fails under rational basis review. While discussing the judicial branch's general deference to the legislature in rational basis review of legitimate government interests, Justice White stated in *Cleburne*:

> The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.[141]

Since President Trump's intentions are plausibly discriminatory based on the evidence discussed thus far it is arguable that there is no legitimate government interest in continuing the construction of the border wall past what was done through the Secure Fence Act of 2006. The Secure Fence

138. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, 2016 CRIME IN THE UNITED STATES (2016), https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-21 [https://perma.cc/6SJN-RSHS]. Hispanic or Latino persons only account for 18.4 percent of all arrests throughout the country. *Id.*

139. 481 U.S. 279, 298 (1987).

140. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

141. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

Act enabled the Department of Homeland Security to build fencing along the Southern border and increased the use of cameras, satellites, and drones to protect the border.[142] President Bush signed the Secure Fence Act into effect in 2006, stating that "[t]his bill will help protect the American people. This bill will make our borders more secure. It is an important step toward immigration reform."[143] While President Trump is relying on the Secure Fence Act to expand the border wall, the key difference between Bush's wall and Trump's wall is in the underlying motive. President Trump's dislike of the Latin American and Mexican populations is relatively clear based on his public statements, while President Bush's statements regarding the Secure Fence Act reflect a legitimate government interest solely in securing the southern border to curtail illegal immigration.[144] Since President Trump's motivations are arguably more sinister and the expansion of the border wall is unlikely to curtail illegal immigration,[145] the courts should decline to allow the government's taking of private land under eminent domain for the border wall for failure to further any legitimate government interest.

### *C. Eminent Domain Should Not be Exercised To Expand the Border Wall*

The history and case law summarized thus far, when combined, supports the argument that eminent domain should not be exercised where there is a reasonably clear discriminatory motive and no legitimate government interest. The Equal Protection Clause is an invaluable resource that protects American citizens from discrimination and hateful legislation. The early Supreme Court decisions interpreting the scope of the Equal Protection Clause, as well as more recent decisions such as those in *Moreno* and *Windsor*, all strongly support the notion that the government is strictly prohibited from passing legislation that is motived by the bare desire to harm a particular group.[146] It is often difficult to ascertain whether there are im-

142. *Fact Sheet: The Secure Fence Act of 2006*, THE WHITE HOUSE (Oct. 26, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html [https://perma.cc/AAF7-G5CS].

143. *Id.*

144. *Id.* President Bush's intention of working toward immigration reform is exactly the type of public use that the courts generally do not review, as they grant broad deference to the legislature.

145. The World Staff & Agence France-Presse, *Trump just signed an executive order to start building a wall at the border*, PRI: THE WORLD (Jan. 25, 2017, 7:00 PM), https://www.pri.org/stories/2017-01-25/trump-just-signed-executive-order-start-building-wall-border [https://perma.cc/886B-HDAS]. Congress members on both sides of the aisle "have voiced doubts about whether a wall would actually stem illegal immigration." *Id.*

146. *See generally* United States v. Windsor, 570 U.S. 744, 769–70 (2013).

proper motives behind the passage of legislation. Indeed, as Justice Roberts noted in his dissent in *Windsor*, charging the legislature with such an accusation "should require the most extraordinary evidence."[147] In what is surely a rare instance in history, the motivations behind President Trump's desire to build his great wall appear to be alarmingly clear and are quite disconcerting. If the courts do determine that the border wall is based in a desire to discriminate against Latin Americans, a strict scrutiny analysis would clearly find that government action in furtherance of the border wall (i.e., the exercise of eminent domain) would be unconstitutional. Alternatively, should courts feel that strict scrutiny is not the appropriate standard of review, it still follows that discriminatory motive and a bare desire to harm does not satisfy the public use requirement, just as it certainly would not satisfy the legitimate government interest requirement of rational basis review.

## CONCLUSION

Eminent domain is an invaluable tool at the government's disposal that helps to foster projects which improve communities and keep our neighborhoods free from blight. Throughout the history of eminent domain jurisprudence the Supreme Court has held that the public use requirement of the Fifth Amendment Takings Clause is exceptionally broad, and in most circumstances, this author has no issue with the exercise of takings through eminent domain. However, it is imperative that we do not let the federal government take land for uses that are demonstrably sinister – even when an otherwise valid justification is put forth. President Trump has been fairly straightforward and honest about his disdain for the Latin American population in his campaign statements and Twitter communiqués. Although it is true that he has not said that he plans to build this wall *because* of this disdain, it would be foolhardy for the American public and the federal courts to interpret his statements in any other way. President Trump's proposed border wall will require the taking of thousands of acres of land through the use of eminent domain, which requires that the government prove a legitimate public use. As discussed in earlier sections of this note, careful analysis of President Trump's attitudes toward Latin Americans and Mexicans arguably indicates a bare desire to harm these groups by keeping them out of the United States and disenfranchising immigrants who are already present in the country.

147. *Id.* at 795–96 (Roberts, C.J., dissenting).

There is no precedent for the argument set forth in this note—that the presence of discriminatory intent invalidates an otherwise legitimate public use which would permit the government's taking of privately owned property. Nevertheless, the federal courts do have the authority, however infrequently-exercised, to analyze public use claims with regard to governmental takings. It is essential that the law evolves with the problems presented to it in times of social change and political turmoil, and that evolution is sorely needed here to prevent the taking of thousands of acres of privately owned land for a purely discriminatory purpose.