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## Note

### The Public Use of Reparations: How Land-Based Reparations Can Satisfy the Public Use Requirement of the Takings Clause

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#### INTRODUCTION

Emancipation, one of our nation's boldest and most morally profound acts, rested upon the hope that a dramatic reconception of property would take root. Almost four million African Americans gained the rights and remedies of personhood, no longer to be property.<sup>1</sup> This transformation also carried with it one of our nation's most enduring property problems. Freed African Americans had no land or wealth of their own. They had only their labor to trade,<sup>2</sup> often to the same plantation owners who enslaved them before.<sup>3</sup> The closest the nation came to meaningfully

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1. BUREAU OF THE CENSUS, POPULATION OF THE UNITED STATES IN 1860, at vii (1864), <https://www2.census.gov/library/publications/decennial/1860/population/1860a-02.pdf> [<https://perma.cc/W2WP-QQZS>]; see Paul Finkelbaum, *Slavery in the United States: Persons or Property?*, in *THE LEGAL UNDERSTANDING OF SLAVERY* 117 (Jean Allain ed., 2012).

2. Cf. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 11 (1985) (discussing the foundation that first possession serves in a natural rights theory of property and noting that those excluded from first possession trade their labor for property).

3. See generally JIM DOWNS, *SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION* (2012) (observing that the popular narrative around Emancipation often overlooks the struggles that freed African Americans faced immediately, such as starvation,

addressing the property needs of freed African Americans came when the Freedmen's Bureau, a short-lived federal agency, promised African American families "forty acres and a mule," but this was cut short when President Johnson granted amnesty to white Southerners and fully restored their property rights, virtually eliminating the reserve of land available for African Americans.<sup>4</sup>

The importance of home and property ownership for individual health and happiness is deeply engrained in American thought,<sup>5</sup> yet this value has not been seriously brought to bear upon Emancipation. In the wake of our nation's stunted response to the lack of African American property, it is not surprising that black Americans are more likely to be living in housing with concentrated poverty than white Americans.<sup>6</sup> Homeownership has long been viewed as an important factor for individual and inter-generational wealth accumulation.<sup>7</sup> Land<sup>8</sup> or housing-based reparations aimed at increasing homeownership among African Americans could address both the concrete reality of present-day

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which led them often back to work on plantations or to prisons—often old plantation cells themselves).

4. See CLAUDE F. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP 25–71, 181–89 (1978).

5. Compare THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("life, liberty, and the pursuit of happiness"), with JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 46 (C.B. Macpherson ed., Hackett Publ'g. Co. 1980) (1689) ("life, liberty, and estate").

6. KALWANT BHOPAL, WHITE PRIVILEGE 151–52 (2018).

7. See, e.g., CHRISTOPHER E. HERBERT ET AL., IS HOMEOWNERSHIP STILL AN EFFECTIVE MEANS OF BUILDING WEALTH FOR LOW-INCOME AND MINORITY HOUSEHOLDS? (WAS IT EVER?) (2013), <https://www.jchs.harvard.edu/sites/default/files/hbtl-06.pdf> [<https://perma.cc/CF95-XVAV>] ("[T]here continues to be strong support for the association between owning a home and accumulating wealth. This relationship held even during the tumultuous period from 1999 to 2009, under less than ideal conditions.").

8. This Note will refer to such reparations as "land-based reparations" instead of the more general "property-based reparations" because money is property and cash reparations are not the subject of this Note. The term "land," however, risks conjuring a misleading image of rural agricultural land. Though this Note does not undertake to provide a model reparations bill, such a bill would probably not involve agricultural land and would more likely involve homeownership or opportunities to purchase urban apartment units in markets with high barriers to access. Though this Note takes housing as its focus for reparations, "land-based reparations" was chosen over "housing-based reparations" in order to retain a clearer conceptual connection to land reform projects undertaken abroad and through history and to emphasize that these problems concern, at root, decisions about how people should live together in this nation, on this land.

inequality<sup>9</sup> and our nation's spiritual shortcomings borne of the lack of acknowledgment of the legacy of slavery after Reconstruction.

This Note advances the legal reparations conversation by showing how land-based reparations could be constitutionally possible. This Note supplies a framework for a reviewing court to analyze land or housing-based reparations legislation. Such legislation would involve transfer of property from current owners to beneficiaries of the reparations scheme. This would implicate the Fifth Amendment prohibition against taking property for public use without just compensation, known as the Takings Clause.<sup>10</sup> A "Taking" occurs when the government acquires private property or otherwise ousts the owner or substantially interferes with their use of the property.<sup>11</sup> In other words, Takings are uses of the government's eminent domain power. The Fifth Amendment poses an important limitation on the government's ability to effectuate Takings: the Taking must be for a "public use."<sup>12</sup>

This Note focuses on public use objections to land-based reparations schemes. The Supreme Court has construed the public use requirement leniently, tending to defer to the findings of the legislature pertaining to the problem to be solved.<sup>13</sup> More stringent conceptions of the public use requirement exist, however, such as a plain language reading of the word "public" and a more theoretical natural rights position such as that described by Richard Epstein. Epstein would pose the public use requirement of the Takings Clause as a challenge to demonstrate why the problem (in this case, the lack of African American intergenerational wealth) should be the province of government intervention

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9. Cf. Liz Krueger, *Krueger Unveils Right-of-First Refusal Legislation to Protect Tenants*, N.Y. ST. SENATOR LIZ KRUEGER (May 21, 2007), <https://www.nysenate.gov/newsroom/press-releases/liz-krueger/krueger-unveils-right-first-refusal-legislation-protect-tenants> [<https://perma.cc/CM95-5FP9>] (proposing that tenants who live in subsidized developments be given a right of first refusal when those developments are sold).

10. U.S. CONST. amend. V.

11. *Taking*, BLACK'S LAW DICTIONARY (11th ed. 2019).

12. U.S. CONST. amend. V.

13. See, e.g., *Kelo v. City of New London*, 843 A.2d 500, 527 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005) ("[T]he courts' role in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power[,] is extremely narrow." (quotation omitted)).

and not the free market.<sup>14</sup> The dissenting opinions in the Supreme Court's 5–4 decision in *Kelo v. City of New London* hint at how these positions may increase in dominance over Takings jurisprudence in the coming years. This Note shows that Congress is capable of presenting findings and drafting land-based reparations that would pass muster even under a Takings analysis more stringent than the current norm.

The validity of authorization for the eminent domain power in reparations will require showing why authorizing eminent domain offers greater benefits than the government's typical route of simply purchasing property on the free market for its land use projects. Of course, traditional sales without use of eminent domain remain a valid pathway for implementation, and Congress could author a bill that prioritizes traditional sales over actual use of the eminent domain power.<sup>15</sup> Nonetheless, whether or not it is ultimately used, *authorization* for use of the eminent domain power in reparations would serve to bring “willing sellers” to the negotiating table in response to the unique demand that the government's entrance into the market poses.<sup>16</sup> Urban markets with high barriers to entry may be particularly desirable targets for meaningful reparations, and authorization for eminent domain could give the government a foot in the door to negotiate for acquisition of urban rental units not currently offered for sale.<sup>17</sup> Many urban landscapes are also marked by a history of segregationist government policy, thus making a government remedy

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14. See EPSTEIN, *supra* note 2, at 177 (dismissing the case for the necessity of a rent-control statute as “weak, almost vanishing”).

15. *E.g.*, 43 U.S.C. § 1715(a) (2018) (authorizing the Secretaries of the Interior and of Agriculture to acquire land “by purchase, exchange, donation, or eminent domain” for addition to the National Forest System, but providing “the Secretary may exercise the power of eminent domain only if necessary to secure access to public lands, and then only if the lands so acquired are confined to as narrow a corridor as is necessary”).

16. See *United States v. 320.0 Acres of Land*, 605 F.2d 762, 782 (5th Cir. 1979) (“The Government has entered the ‘market’ as a ‘purchaser’ with a unique and pressing demand, and in so doing has distorted the market; absent the Government's activity as ‘purchaser’ or condemnor, there would be no market reflecting this unique demand.”).

17. *Cf.* Ilyce Glink & Samuel J. Tamkin, *How To Buy the Rental You're Living In*, WASH. POST (Jan. 13, 2016), <https://www.washingtonpost.com/news/where-we-live/wp/2016/01/13/how-to-buy-the-rental-youre-living-in> (last visited Mar. 11, 2020) (stipulating that “[t]he landlord is willing to sell” in an explanation of purchasing a property listed as a rental property).

appropriate.<sup>18</sup> While recognizing that there are good reasons not to resort to eminent domain proceedings unless necessary,<sup>19</sup> this Note argues that the balance should be pushed slightly more towards use of eminent domain than was represented in South Africa's program, for example.

Part I of this Note takes both a historical and normative look at past and present reparations schemes and explains the public use question posed by the Takings Clause through cases like *Kelo* and *Hawaii Housing Authority v. Midkiff*. Part I also examines a contemporary example of land-based reparations currently the subject of international intrigue: South Africa has recently accelerated its efforts to redistribute land to black South Africans stripped of their rights during apartheid. In South Africa, the government's pursuit of a "willing buyer, willing seller" policy instead of strong use of the eminent domain power has led to widespread frustration, culminating in Parliament-backed proposals to amend the constitution to eliminate the compensation requirement for land redistribution—a symptom of serious policy failure and unrest.

Part II describes how a potential reparations act would meet a Takings jurisprudence that may be shifting away from a pos-

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18. For example, during the Great Depression, the Home Owners' Loan Act of 1933 established an agency, the Home Owners' Loan Corporation (HOLC), which would offer loans and refinancing to home mortgagees in default. Home Owners' Loan Act of 1933, 12 U.S.C. § 1463 (1934) (repealed 1953). Agency officials created graded zones on city maps based explicitly on the degree of "infiltration of inharmonious racial groups" in the neighborhood and would refuse to lend in "red" zones. *Introduction to Mapping Inequality*, UNIV. OF RICH., <https://dsl.richmond.edu/panorama/redlining/#loc=3/41.238/-105.474&text=intro> [<https://perma.cc/EDH2-9ZC4>] (citation omitted). Where the effects of a place's history of expressly segregationist government policy are still being felt, the scope of the government's constitutional authority arguably grows significantly. Remedying the effects of the government's own past discriminatory policy has long been held to be within Congress's power under the Fifth and Fourteenth Amendments. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring) ("In my view there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification." (emphasis in original)).

19. Eminent domain often strikes resentment into the hearts of individuals and communities losing their property. Accusations of inefficiency and unfairness abound, weakening public trust in government. See, e.g., Jake Rossen, 7 *Maddening Examples of Eminent Domain*, MENTAL FLOSS (Apr. 28, 2015), <https://www.mentalfloss.com/article/63514/7-maddening-examples-eminent-domain> [<https://perma.cc/T5MP-ACSX>].

ture of deference to the legislature toward a more stringent judicial approach to the public use analysis. Part III argues that courts should retain their posture of deference to the legislature when considering a reparations act because legislatures, unlike courts, are uniquely positioned to evaluate non-economic, socio-political goods that reparations can bring about. Part III then argues that even under a non-deferential paradigm, the failure of the free market to solve the problem of intergenerational African American wealth can satisfy the public use requirement of the Takings Clause. Part III also looks to South Africa's example to offer arguments as to why the public might gain from Congressional authorization of eminent domain in a reparations bill, even if the government elects not to initiate eminent domain proceedings. Finally, Part III addresses slippery slope and tyranny of the majority objections to the recognition of reparations as a public use. Similar objections were raised by the petitioners and dissenting Justices in *Kelo* and would likely be raised again in this context.

#### I. CONCEPTUALIZING REPARATIONS WITHIN TAKINGS JURISPRUDENCE

Reparations exist in an ambiguous legal, moral, and political space between a traditional legal remedy between private parties and a democratic decision by the body politic about conducting the affairs of today.<sup>20</sup> Because human responses to injury and oppression vary in scale and circumstance as widely as the injuries themselves, reparations must be defined as a subset of potential remedies for the term to be useful. The definition of reparations matters not only for discourse, but for the political and social viability of reparations themselves: like most political action, reparations are born of demands made by organized social bodies and will succeed more often when the social group is clearly defined and can present a compelling account of how their injury has not been redressed by traditional remedies.<sup>21</sup>

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20. See generally David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043 (2010) (framing reparations in temporal terms: reparations happen when nations transition from an abusive past into a commitment "to democracy, human rights, and the rule of law").

21. See Rhoda E. Howard-Hassmann, *Getting to Reparations: Japanese Americans and African Americans*, 83 SOC. FORCES 823, 824–25 (2004) (utilizing social movements theory to illuminate difficulties of successfully framing a claim for reparations for slavery).

For example, the conceptual clarity in South Africa about who was injured, how they were injured, and how the present remedy relates to that injury has allowed land redistribution to proceed with governmental and popular support.

Section A explains basic normative concepts in reparations, focusing on Eric Posner and Adrian Vermeule's definition of reparations and their taxonomy of core reparations relationships. Section B describes the Takings Clause and Takings jurisprudence generally, and Section C explains the public use requirement, focusing on *Hawaii Housing Authority v. Midkiff*. Armed with these concepts, Section D examines South African land reform and the problems that have led to the proposed constitutional amendment to eliminate the compensation requirement for Takings. Section E examines reparations in the United States, including those paid to Japanese Americans and the history of efforts toward reparations for slavery.

#### A. DEFINING REPARATIONS AND THEIR CORE RELATIONSHIPS

One of the paradoxes of American life is that many Americans acknowledge that something very wrong happened in the formative years of this country, with pernicious effects lasting into the present, yet few Americans feel personally culpable enough that they are willing to voluntarily disgorge their assets.<sup>22</sup> White people feel a "moral taint" for slavery and its effects, a feeling of culpability despite not having individually enslaved anyone.<sup>23</sup> The question of whether mere membership in a group (e.g. white or African American) can confer moral status as wrongdoer or victim<sup>24</sup> takes on vital significance when considering one's moral obligations within a landscape of inequality:<sup>25</sup> if a group can bear status as a wrongdoer, members of that group may be rational to feel guilt if the group has acted wrongly. Reparations offer the opportunity to ease the collective sense of guilt

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22. See, e.g., REPARATIONS, <https://www.reparations.me> (last visited Mar. 11, 2020) (providing an online platform for white people to individually pay reparations directly to people of color, listing 79 "offering" and 104 "satisfied").

23. See generally Marina A. L. Oshana, *Moral Taint*, 37 METAPHILOSOPHY 353 (2006) (describing the characteristics associated with moral taint and examining the feeling of moral culpability under vicarious liability and collective responsibility theories).

24. See, e.g., Stephen Winter, *On the Possibilities of Group Injury*, 37 METAPHILOSOPHY 393 (2006).

25. See Lauren G. Robinson, *Rationales for Rural Land Redistribution in South Africa*, 23 BROOK. J. INT'L L. 465, 490 (1997).

or blame in a society where victims and perpetrators and their descendants are required to live alongside one another.<sup>26</sup>

There has been a lot written about such normative moral concepts regarding reparations, but there has been comparatively little legal scholarship about reparations.<sup>27</sup> In 2003, Eric Posner and Adrian Vermeule's *Reparations for Slavery and Other Historical Injustices* outlined core legal concepts for reparations schemes, but gave only cursory treatment of land-based reparations.<sup>28</sup> This Note takes up where Posner and Vermeule left off and uses their normative concepts to craft a framework for judicial review of land-based reparations legislation in the United States.

As a preliminary definition, Posner and Vermeule offer four characteristics of reparations. Reparations (1) provide a payment to a large group of claimants; (2) for wrongs that were permissible under prevailing law when committed; (3) in which current law bars a compulsory remedy for the past wrong (by virtue of sovereign immunity, statutes of limitations, etc.); and (4) are justified on backward-looking grounds of corrective justice, rather than forward-looking grounds such as the deterrence.<sup>29</sup> Contrary to (4), reparations have often been thought of as forward-looking, though not because of deterrence. Reparations can increase domestic prosperity by providing some citizens greater means to participate in the economy<sup>30</sup> or by fostering social

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26. See Gray, *supra* note 20; Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689, 1689–90 (2002) (“[R]eparations can avoid [a] divisive outcome if posited . . . as a means to ‘repair’ a country by creating a sense of mutual, interracial trust, respect, and shared destiny.”).

27. A substantial amount of the legal literature has focused on attempts at obtaining reparations through litigation. These attempts have almost universally failed. See, e.g., Yanessa L. Barnard, Note, *Better Late than Never: A Takings Clause Solution to Reparations*, 12 WASH. & LEE J.C.R. & SOC. JUST. 109, 111–12 (2005).

28. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 700–01 (2003).

29. *Id.* at 691.

30. See WORLD BANK GROUP, AN INCOMPLETE TRANSITION: OVERCOMING THE LEGACY OF EXCLUSION IN SOUTH AFRICA 97 (2018), <https://openknowledge.worldbank.org/bitstream/handle/10986/29793/WBG-South-Africa-Systematic-Country-Diagnostic-FINAL-for-board-SECPO-Edit-05032018.pdf> [<https://perma.cc/D8LG-AUWT>] (identifying that currently poor titling of property held by poor South Africans limits their use of property as collateral to access finance); Robinson, *supra* note 25, at 490.



bonds between demographics.<sup>31</sup> It is nonetheless helpful to include (4) in a preliminary definition to distinguish reparations from endeavors made purely to increase economic prosperity, such as those generally within Congress's power under the Commerce Clause.<sup>32</sup> There is an irreducible element of a backwards-looking corrective justice in reparations.

Reparations deal in judgments about groups in a way that traditional legal remedies do not. In a traditional legal action, the injured party and the wrongdoer must be clearly and discretely defined for a remedy to be awarded and enforced.<sup>33</sup> Posner and Vermeule observe that reparations involve a relaxation of the identification requirements of one or both parties.<sup>34</sup> Membership in a class, rather than a showing of individualized causation, becomes enough to make a viable claim for reparations benefits. Posner and Vermeule warn that although relaxing the individual identity requirements makes claiming reparations easier, it also makes reparations politically less compelling because the mechanism of injury becomes less clear.<sup>35</sup>

Any act of reparations requires an account of three sets of relationships, and the more detail and specificity that can be provided in these relationships, the better. Reparations schemes must articulate: (1) the relationship between the original wrongdoer and original victim; (2) the relationship between the original wrongdoer and the possible present payer of reparations; and (3) the relationship between the original victim and the possible present claimant or beneficiary.<sup>36</sup> There has been much written on the empirical problems inherent in relationship (3), such as identifying descendants of slaves and questioning whether their moral claims for reparations might diminish as the genes tying them to the original victims are diluted.<sup>37</sup> Such problems, while

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31. See Note, *supra* note 26, at 1689–90.

32. *E.g.*, Economic Stimulus Act of 2008, Pub. L. No. 110-185 § 101, 122 Stat. 613, 613 (providing a one-time income tax rebate for tax filers issued in mid-2008).

33. See, *e.g.*, *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (discussing and implementing an implied “ascertainability” requirement for class certification).

34. Posner & Vermeule, *supra* note 28, at 691.

35. *Id.* at 699.

36. *Id.* at 698.

37. See Note, *supra* note 26, at 1697–1700; see also Posner & Vermeule, *supra* note 28, at 718 (stating that reparations beneficiaries and payers share a mutual motivation to monitor the accuracy of benefits claims: beneficiaries know that payers do not want their payments being taken by free riders and

important for the political viability and practical implementation of reparations, are not the subject of this Note.

Cash-based reparations paid out of the general treasury can circumvent the need to articulate the relationship between the original wrongdoer and the payer in two ways. First, if the government itself authorized or perpetrated the wrongdoing, then making the government qua government pay is an easy pill to swallow.<sup>38</sup> Second, even where the government is not conceived of as the primary wrongdoer, the government qua taxpayer is an acceptable vehicle for reparations because the tax burden on any individual payer becomes so low as to be negligible and because taxpayers generally lack standing to sue over tax grievances.<sup>39</sup> Land-based reparations would be considerably more complex because some landowner would be required to give something up, subjecting the act to challenge under the Takings Clause.

#### B. THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

The Fifth Amendment ends with the Takings Clause, which states: “nor shall private property be taken for public use, without just compensation.”<sup>40</sup> In other words, when the government enacts legislation which requires that someone surrender property, the government is not only required to pay the owner for its value, but is also required to show that the property will be put to “public use.” The Takings Clause is an important statement of the government’s relationship to private property and individual rights, and scholars debate over its nature and scope.<sup>41</sup>

A cash-based reparations scheme where beneficiaries are paid out of the general treasury would not implicate the Takings Clause because no one, no payer of the reparations, would lose any property beyond the taxes paid into the general treasury, and the government’s ability to tax and spend for the general welfare is beyond question.<sup>42</sup> Nor would land-based reparations

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understand that monitoring recipients safeguards the political and moral authority of the reparations scheme).

38. See Robinson, *supra* note 25, at 467.

39. Posner & Vermeule, *supra* note 28, at 714.

40. U.S. CONST. amend. V.

41. See, e.g., Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1668–70 (1988) (questioning whether the “liberal triad” of property rights—exclusive use, control, and disposition—can be found “in” the Constitution, as Richard Epstein argues).

42. U.S. CONST. art. I, § 8.

where Congress has not authorized use of the eminent domain power, such as a purely grant-based model or a program of land acquisition through voluntary sales to the government. If Congress does authorize use of the eminent domain power, the constitutionality of the reparations legislation could be challenged by the landowner in an eminent domain proceeding.<sup>43</sup> The Takings Clause, as a restriction on government power, is facially more demanding of the legislature than the Taxing and Spending Clause, an affirmative grant of power.<sup>44</sup>

A challenge to government action under the Takings Clause invites three questions: first, whether there was a Taking at all;<sup>45</sup> second, whether the Taking was for a legitimate public use;<sup>46</sup> third, whether just compensation was paid.<sup>47</sup> The first and third can be briefly introduced, while the second is a subject of primary concern for this Note. On the first, in cases where someone loses possession of their land or property, it is clear that a Taking occurred.<sup>48</sup> This would be the result of an act of land-based reparations, where the beneficiaries would take control. Less clear, but of key importance in areas such as environmental regulation, are cases where the landowner argues that regulations, not eminent domain, have interfered with the owner's use and enjoyment of the property such that the regulation rises to the level of a Taking (called a "regulatory Taking"), even though

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43. See, e.g., *Whittaker v. Cty. of Lawrence*, 437 F. App'x 105, 108 (3d Cir. 2011).

44. In other words, the Takings Clause does not itself provide the federal government with the constitutional basis for an action. A federal use of the eminent domain power must fall within one of the enumerated powers of Congress, such as the Commerce Clause, and then additionally satisfy the requirements of the Takings Clause. Compare U.S. CONST. art. I, § 8 ("The Congress shall have the power . . ."), with U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

45. E.g., *United States v. Causby*, 328 U.S. 256, 265–66 (1946) (finding that frequent low-flying military airplanes over private residential property were "an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property" and holding that this intrusion constituted a Taking requiring compensation).

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

47. E.g., *United States v. Miller*, 317 U.S. 369, 370, 373 (1943).

48. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430, 441 (1982) (holding that the mandated installation of a cable box on private residential property constituted a Taking because it deprived the owner of use of that part of their property).

the owner's exclusive possession is not compromised.<sup>49</sup> On the third question, just compensation is typically measured by the market value of the property at the time of the Taking.<sup>50</sup> The following section discusses the second question: whether the Taking was for a public use.

### C. THE PUBLIC USE REQUIREMENT AND LEGISLATIVE DEFERENCE

The question of what constitutes a valid public use depends, at root, upon fundamental concepts about the state's role in providing for individuals.<sup>51</sup> While the magnitude of that question may mean that the public use requirement will never be precisely defined,<sup>52</sup> there are some generally agreed-upon endpoints. On one end, it is clear that where the property will be used by the public itself, as in a highway or other infrastructure, the public use requirement is satisfied.<sup>53</sup> The idea is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>54</sup> On the other end, a Taking meant merely to enrich a private party, or where the stated public use is found

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49. *Regulatory Taking*, BLACK'S LAW DICTIONARY (11th ed. 2019). The landmark case concerning regulatory Takings is *Lucas v. South Carolina Coastal Council*, which held that a Taking occurs when a regulation leaves the property owner without any available economic use of the property. 505 U.S. 1003, 1019 (1992); see also James W. Sanderson & Ann Mesmer, *A Review of Regulatory Takings After Lucas*, 70 DENV. U. L. REV. 497, 497 (1993) ("Many believe that the *Lucas* decision reflects the broader goals of the Reagan-Bush era. It shifts the analytical focus in environmental takings jurisprudence to a more owner-oriented analysis, in line with the general perception that the high court is weighted with 'pro-property' justices." (citations omitted)).

50. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2432 (2015).

51. See generally *Property and Ownership*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 6, 2004), <https://plato.stanford.edu/entries/property/#Bib> [<https://perma.cc/9ZQK-GCXA>] (describing three species of potential societal property arrangements—common property, collective property, and private property—and summarizing normative arguments for private property as an institution).

52. *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("An attempt to define its reach or trace its outer limits is fruitless . . .").

53. See, e.g., *U.S. ex rel. Tenn. Valley Auth. v. 1.72 Acres of Land in Tenn.*, 821 F.3d 742, 746 (6th Cir. 2016) (treating the condemnation of a strip of land by the Tennessee Valley Authority for the installation of power lines as a Taking).

54. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

to be a mere pretext for private enrichment, is prohibited by the public use requirement.<sup>55</sup> A land-based reparations scheme would place taken property into private hands,<sup>56</sup> so the constitutionality of this Taking under the public use requirement must be considered.

Not all legislation where taken property ends up in private hands is invalid under the Takings Clause. The Supreme Court has “repeatedly and consistently rejected” a definition of public use as restricted only to “use by the public.”<sup>57</sup> Writing for the majority in *Kelo v. City of New London*, Justice Stevens helpfully explains the poles of the public use requirement, which highlights the grey area in which this debate occurs:

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future “use by the public” is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.<sup>58</sup>

Between these poles lies the grey area of Takings jurisprudence. Where a piece of legislation places property into private hands, yet the private recipient owes no duty to the public, courts must puzzle over whether the Taking satisfies the public use requirement.

Though the question may seem initially vexing, jurisprudence on the public use requirement shows that courts have often deferred to the legislature’s findings on the issue, circumventing direct consideration of the question.<sup>59</sup> Because the legislature is more in touch with the needs of the public than the judiciary, the Supreme Court has stated that “the role of the judiciary in determining whether [legislative] power is being exercised for a public purpose is an extremely narrow one.”<sup>60</sup> In *Clark v. Nash*, the Supreme Court upheld the widening of an irrigation ditch as a valid public use although only one individual farmer benefited from it.<sup>61</sup> In *Berman v. Parker*, the Court upheld a Dis-

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55. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

56. *See id.*

57. *Id.* at 479–80.

58. *Id.* at 477.

59. *See Berman v. Parker*, 348 U.S. 26, 32 (1954).

60. *Id.*

61. *Clark v. Nash*, 198 U.S. 361, 363–65 (1905).

trict of Columbia plan to redevelop “blighted” urban areas by describing the public use requirement in terms of the general police power, which they described as “spiritual as well as physical, aesthetic as well as monetary.”<sup>62</sup>

Most pertinent to an inquiry about reparations and the government’s ability to provide housing for individuals, however, is the case of *Hawaii Housing Authority v. Midkiff*. *Midkiff* is interesting because the problem that the Hawaii legislature solved, though historically unique, bears some resemblance to the problem facing African American intergenerational wealth. Before the arrival of American settlers in Hawaii, the Polynesian people there managed land using a feudal tenure system in which one island high chief, the *ali‘i nui*, held ultimate control of all the island land and managed it through a system of hierarchical delegation.<sup>63</sup> After decades of interaction between Hawaiian leaders and American settlers, the land in Hawaii remained within the hands of the few.<sup>64</sup> The Hawaii legislature found that the State and Federal Governments owned 49% of the land and that 47% was held by only seventy-two private landowners.<sup>65</sup> The Hawaii state legislature found this injurious to the residential fee simple market and to public tranquility as a whole.<sup>66</sup>

The remedy which best accommodated lessors and lessees was the Land Reform Act of 1967.<sup>67</sup> Under the Act, tenants living on single-family residential lots within developmental tracts could ask the Hawaii Housing Authority to condemn the property.<sup>68</sup> When a minimum percentage of tenants in a development filed the appropriate application, the Housing Authority would hold a public hearing on whether condemnation of the land would “effectuate the public purposes of the Act.”<sup>69</sup> If condemnation was warranted, a purchase price was set either by condemnation trial or negotiation between the Housing Authority and

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62. *Berman*, 348 U.S. at 29, 33.

63. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 233. One of the landowners’ chief complaints was the federal tax liability they would incur by selling their land. Because transfers under the Act’s condemnation scheme were involuntary, the federal tax burden on the landowners was reduced. *Id.*

68. *Id.*

69. *Id.*

the lessor.<sup>70</sup> After condemnation and acquisition by the Housing Authority, the Housing Authority would sell the parcels to tenants.<sup>71</sup> Of note, funds to satisfy the condemnation awards were supplied entirely by the lessees.<sup>72</sup>

Citing *Berman v. Parker*, the Court first reiterated that the legislature's voice is "well-nigh conclusive" when it comes to declaring what is in the public interest.<sup>73</sup> The Court will not invalidate the legislature's judgment as to whether a public use is being effectuated unless the legislature's judgment is "palpably without reasonable foundation."<sup>74</sup> Applying these principles to the facts, the Court stated that the land oligopoly facing the people of Hawaii, which was "traceable to their monarchs," impeded the normal functioning of the residential land market, forcing thousands of residents to lease rather than purchase their homes.<sup>75</sup> The Court held that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers," and found that the Act was rationally related to its objective.<sup>76</sup> In other words, the deferential approach is rational basis review.<sup>77</sup>

#### D. CASE STUDY: LAND REFORM IN SOUTH AFRICA AND THE PROPOSED CONSTITUTIONAL AMENDMENT

South Africa is vigorously pursuing a solution to the lack of black landownership.<sup>78</sup> South Africa's constitution also contains a "Takings Clause," called the Property Clause, which contains more express language on the public use requirement than the Fifth Amendment of the U.S. Constitution provides.<sup>79</sup> The South

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70. *Id.* at 234.

71. *Id.* The Housing Authority could also sell the parcel to another party, provided public notice was given. *Id.*

72. *Id.*

73. *Id.* at 239.

74. *Id.* at 241 (citing *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896)).

75. *Id.* at 242.

76. *Id.* at 242–44 (noting that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause").

77. *Cf. Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (applying rational basis review and stating that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it").

78. *See S. AFR. CONST.*, 1996, Ch. 2 § 25.

79. *Id.*

African constitution also expressly recognizes land redistribution as a goal to be attained.<sup>80</sup> Despite the presence of these constitutional provisions for the past twenty-two years, public satisfaction with the rate and execution of land reform has been low enough to create demand for accelerated efforts. In 2016, President Jacob Zuma backed a proposed amendment to the constitution allowing redistribution of land without compensation, which has received continuing support from President Cyril Ramaphosa through fall 2019.<sup>81</sup>

In South Africa, the contours of the core reparations relationships are highly visible and subject to public debate.<sup>82</sup> The history of apartheid in South Africa allows for a strong showing in terms of Posner and Vermeule's three reparations relationships, fueling widespread political support for land reform.<sup>83</sup> The recognition of a property-based remedy as appropriate for what was, in part, a property-based injury,<sup>84</sup> garnered popular support for the endeavor.<sup>85</sup> The stark racial terms of the legislation which originally severed black South Africans from their land allows for a coherent narrative connecting the original victims to contemporary beneficiaries. The 1913 Natives Land Act prohibited black ownership of land outside a reserve area constituting

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80. *Id.* § 25(4).

81. See David Brennan, *South Africa Plows On with Land Seizure Reform, Drops Bill Offering Compensation*, NEWSWEEK (Aug. 28, 2018), <https://www.newsweek.com/south-africa-withdraws-land-seizure-bill-1093158> [<https://perma.cc/7UYM-K2JX>]; Matthew Savides, *'We Are a Great People,' Says Ramaphosa - But We Need To Address Land Issue Urgently*, TIMES LIVE (Dec. 16, 2019), <https://www.timeslive.co.za/politics/2019-12-16-we-are-a-great-people-says-ramaphosa-but-we-need-to-address-land-issue-urgently/> [<https://perma.cc/AK5K-EHJ9>].

82. See SAM MOYO, UNITED NATIONS RESEARCH INST. FOR SOC. DEV., *THE POLITICS OF LAND DISTRIBUTION AND RACE RELATIONS IN SOUTHERN AFRICA* 12 (Dec. 2004).

83. Posner & Vermeule, *supra* note 28, at 698.

84. See S. AFR. CONST., 1996, Ch. 2 § 25(3)(b) (including “the history of the acquisition and use of the property” among “all relevant circumstances” used to evaluate the “equitable balance between the public interest and the interests of those affected”).

85. Cf. Olivia Lannegren & Hiroshi Ito, *The End of the ANC Era: An Analysis of Corruption and Inequality in South Africa*, 10 J. POL. & L. 55, 57 (2017) (arguing that Mandela's party, the African National Congress, received in 2016 the lowest amount of votes it had ever received since Mandela assumed power in 1994 in part because inequality remains as bad or worse as it was in Mandela's time).



seven percent of South Africa and prohibited other land transactions, including sharecropping, between black and non-black persons outside the reserve.<sup>86</sup> The Population Registration Act of 1950 created racial categories and a subsequent series of statutes that regulates many areas of life including education, commerce, and residence for these categories.<sup>87</sup> Apartheid furthered segregation in the 1960s through 1980s.<sup>88</sup>

The ending of apartheid in 1994 and the presidency of Nelson Mandela held the promise that inequality would be reduced and black South Africans would gain more wealth.<sup>89</sup> Constitutional reforms that reflected those values soon followed. South Africa's 1996 constitution provides, like the United States, that in general property may only be expropriated for a public purpose and subject to payment consented to or approved by a court.<sup>90</sup> Unlike the United States, South Africa's constitution expressly provides that the amount of compensation takes into account "the history of the acquisition and use of the property," and that "the public interest includes the nation's commitment to land reform. . . . The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."<sup>91</sup>

The Restitution of Land Rights Act of 1994 established an agency, the Commission on Restitution of Land Rights, to allocate expropriated land back to black South Africans who qualified as claimants.<sup>92</sup> Under the Act, a South African was entitled to restitution if they were "persons or [part of] communities [who] were disposed under or for the purpose of furthering the objects of any racially based discriminatory law," or were the deceased estate or direct descendent of such a person.<sup>93</sup> After the

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86. Natives Land Act 27 of 1913 § 1(1)–(2) (S. Afr.) (repealed 1991); *see also* Robinson, *supra* note 25, at 472–73.

87. Population Registration Act 30 of 1950 § 5(1) (S. Afr.) (repealed 1991) ("Every person . . . shall be classified by the Director as a white person, a coloured person or a native.").

88. *See* Robinson, *supra* note 25, at 476 ("Apartheid represented a culmination of South Africa's segregationist policies as opposed to a break in its history.").

89. *See* Lannegren & Ito, *supra* note 85, at 57.

90. S. AFR. CONST., 1966, Ch. 2 § 25(1)–(2).

91. *Id.* § (3)–(5).

92. Restitution of Land Rights Act 22 of 1994 § 4 (S. Afr.).

93. *See id.* § 2.

Commission found such a showing satisfied, a notice was published and given to the owners of the parcel of land referred to in the claim, who were thereby enjoined from conveying the land or substantially altering it unless express permission from the Commission was obtained.<sup>94</sup> The Act also created a Land Claims Court which would receive claims approved by the Commission and which the Commission was unable to resolve through mediation.<sup>95</sup> The Land Claims Court could determine claimants' rights to restitution, to compensation, and to determine whether previously obtained consideration for the land was adequate.<sup>96</sup>

In 1997, the Department of Land Affairs drafted and distributed the White Paper on South African Land Policy.<sup>97</sup> This Paper outlined the Department's "willing seller, willing buyer" policy of land redistribution, phrased with explicit reference to the Property Clause and the tension between respecting existing landowners while moving forward with claims.<sup>98</sup> Under the willing seller, willing buyer policy, the Department stated that "[a] programme of forced land titling will not be undertaken."<sup>99</sup> The role of the Department was not to "become directly involved in land purchase for the land redistribution programme," but to "provide grants and services to assist the needy with the purchase of land."<sup>100</sup>

The willing buyer, willing seller policy failed to satisfy most South Africans.<sup>101</sup> In 2018, black South Africans still only owned four percent of land in South Africa.<sup>102</sup> Beneficiary claimants complained of "unhelpful, rude, and dismissive" officials contributing to "long delays, constantly changing qualification require-

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94. *Id.* § 11.

95. *Id.* §§ 14, 22.

96. *Id.* § 22.

97. DEP'T. OF LAND AFFAIRS, WHITE PAPER ON SOUTH AFRICAN LAND POLICY (1997).

98. *Id.* at 5, 39–40.

99. *Id.* at 16.

100. *Id.* at 9.

101. Constitutional Review Commission, Video: Free State Public Hearing, Part 1, at 38:30, YOUTUBE (2018), <https://www.youtube.com/watch?v=sKS0MKmAQGE>.

102. Witney Schneidman & Landry Signé, *South Africa: Land Redistribution in South Africa, Trump's Tweet, and U.S.-Africa Policy*, ALLAFRICA (Aug. 29, 2018), <https://allafrica.com/stories/201808290650.html> [<https://perma.cc/9URP-P2K4>].

ments and ‘strategic partners’ being imposed on them as a condition of getting land.”<sup>103</sup> Corruption is also a concern: in 2019 South Africa’s Special Investigative Unit uncovered a network of fraud wherein payments were made to beneficiaries and farms which did not meet the requisite criteria.<sup>104</sup>

Many claimants who have received land face serious challenges making productive use of it. A 2016 report commissioned by Parliament examined empirical studies that investigated the use and productivity of redistributed land and found in all provincial studies that less than 50% of land reform projects were growing food and marketing it effectively.<sup>105</sup> Lack of infrastructure and equipment, the reality that many claimants are inexperienced in working the land, and scarcity of capital to invest in these projects together result in stagnation and beneficiaries lose interest in the project.<sup>106</sup> Successful projects on claimed land are often either large group endeavors engaging in commercial farming or household-level projects where the applicants are already wealthy enough to invest in resources for the project.<sup>107</sup> The report cites, *inter alia*, lack of post-settlement support and poor political leadership as major factors in the failure of land reform and concludes that “South Africa’s land reform has combined the least effective aspects of both state and market-driven approaches.”<sup>108</sup>

The National Assembly, one of two chambers of the legislative branch (together called the Parliament) passed a motion in February 2018 that stated that the House “[r]ecognizes that the

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103. REPORT OF THE HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF FUNDAMENTAL CHANGE 203 (2017), [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf) [<https://perma.cc/ZN9V-5UFF>].

104. See Tom Head, *The Great Land Reform Heist: Report Accuses Government Officials of “Enormous” Fraud*, SOUTH AFRICAN (Jan. 24, 2019), <https://www.thesouthafrican.com/land-reform-corruption-fraud-report/> [<https://perma.cc/4K4F-3WVX>].

105. INST. FOR POVERTY, LAND & AGRARIAN STUDIES, UNIV. OF THE WESTERN CAPE, DIAGNOSTIC REPORT ON LAND REFORM IN SOUTH AFRICA 27 (2016), [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/Commissioned\\_Report\\_land/Diagnostic\\_Report\\_on\\_Land\\_Reform\\_in\\_South\\_Africa.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Diagnostic_Report_on_Land_Reform_in_South_Africa.pdf) [<https://perma.cc/W3FR-AB3H>] (finding in one study that “[o]nly 42% of projects were producing effectively and marketing their produce,” and in another study that “for 40%, at least some beneficiary activity . . . was discernible.”).

106. *Id.*

107. *Id.* at 28.

108. *Id.* at 79–80.

current policy instruments, including the willing buyer willing seller policy, and other provisions of section 25 of the Constitution may be hindering effective land reform” and instructed the Constitutional Review Committee to “review . . . section 25 of the Constitution . . . about the necessity of, and mechanisms for expropriating land without compensation” and propose “the necessary constitutional amendments[.]”<sup>109</sup> In December 2018 both chambers of Parliament resolved to adopt the report of the Constitutional Review Committee, signaling that the Parliament was receptive for a constitutional amendment bill to be brought.<sup>110</sup> On December 21, 2018, the South African Government Gazette published a draft expropriation bill for public comment,<sup>111</sup> and revisions continued through 2019 until the most recent draft, for which the comment period closed on January 31, 2020.<sup>112</sup> As expected, the draft bill states that “nil compensation” may be paid “where land is expropriated in the public interest, having regard to all relevant circumstances.”<sup>113</sup>

Recent land reform efforts and the possibility of expropriation without compensation draw international scrutiny. Some fear that investors will lose confidence in South Africa if a constitutional amendment undermines the security of property

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109. Motion as adopted with amendments by National Assembly. MINUTES OF REPORTS OF NATIONAL ASSEMBLY NO. 3, 5TH PARLIAMENT, AT 6 (S. Afr.), <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180320motion.pdf> [<https://perma.cc/68LF-MZ2U>].

110. *Parliament Approves Recommendation To Amend Section 25 of Constitution*, SOUTH AFR. (Dec. 5, 2018), <https://www.gov.za/speeches/ncop-approves-recommendation-amend-section-25-constitution-5-dec-2018-0000> [<https://perma.cc/6VY3-LU65>]. In spring 2019, legislators stated that there would be no vote or action on an amendment until the next Parliament was elected. Jan Gerber, *Land: Section 25 Amendment Won't Be Passed Before Elections, MPs Agree*, NEWS24 (Mar. 13, 2019), <https://www.news24.com/SouthAfrica/News/land-section-25-amendment-wont-be-passed-before-elections-mps-agree-20190313> [<https://perma.cc/NTX3-LZ4Y>].

111. Draft Expropriations Bill 2019, GN 1409 of GG 42127 (21 Dec. 2018) (S. Afr.), [https://www.gov.za/sites/default/files/gcis\\_document/201812/42127gon1409s.pdf](https://www.gov.za/sites/default/files/gcis_document/201812/42127gon1409s.pdf) [<https://perma.cc/B9XB-6B2J>].

112. Jenna Ethridge & Jan Gerber, *South Africa: Expropriation Without Compensation - Have Your Say On the Draft Bill*, ALLAFRICA (Dec. 7, 2019), <https://allafrica.com/stories/201912091052.html> [<https://perma.cc/R4WZ-VTU6>].

113. Draft Expropriations Bill 2019, GN 1409 of GG 42127 (21 Dec. 2018) (S. Afr.), [https://www.gov.za/sites/default/files/gcis\\_document/201812/42127gon1409s.pdf](https://www.gov.za/sites/default/files/gcis_document/201812/42127gon1409s.pdf) [<https://perma.cc/B9XB-6B2J>].

rights at large.<sup>114</sup> Some critics draw parallels to land reform efforts in Zimbabwe, which were criticized for use of violence and for leaving the country with ineffectively run farms.<sup>115</sup> In August 2018, U.S. President Donald Trump tweeted that land reform in South Africa was exposing white farmers to violence there.<sup>116</sup> Although there has been some violence, it predates the recent land reform efforts, and its scale is often exaggerated.<sup>117</sup> The U.S. Department of State, furthermore, has distinguished South Africa from Zimbabwe, noting that in Zimbabwe the independent judiciary was destroyed in a way that has not occurred in South Africa.<sup>118</sup>

South Africa's land reform efforts illustrate on a grand scale the social and logistical problems that face land-based reparations attempts. It also serves as an example of how constitutions—both constitutional permission for government eminent domain power as well as constitutional limitations on that

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114. *South Africa's Banks Speak Out on Concerns Surrounding Land Reform*, BUSINESSTECH (Aug. 31, 2018), <https://businesstech.co.za/news/banking/268555/south-africas-banks-speak-out-on-concerns-surrounding-land-reform/> [https://perma.cc/JCP7-GU7C].

115. See, e.g., Tessa Clara Walther, *Land Reform: Will Zimbabwe's Economic Downfall Be Repeated in South Africa?*, DW (Dec. 30, 2017), <https://p.dw.com/p/2q6pl> [https://perma.cc/5CJS-Q5CF]; see also Robert Mugabe Admits Zimbabwe's Land Reform Flaws, BBC (Feb. 27, 2015), <https://www.bbc.com/news/world-africa-31663267> [https://perma.cc/2C4J-YTMA]. South African President Cyril Ramaphosa has denounced Zimbabwe's land reform methods as "anarchy" and declared that "there will be no smash and grab in South Africa." Joe Wallen, *Farmers in South Africa Claim They Are Being Targeted in 'Horrible' Attacks*, INDEPENDENT (Mar. 19, 2018), <https://www.independent.co.uk/news/world/africa/south-africa-white-farmers-plaasmoorde-cyril-ramaphosa-and-economic-freedom-fighters-gabriel-stols-a8262306.html> [https://perma.cc/GLY5-GMR6].

116. Donald Trump (@realDonaldTrump), TWITTER (Aug. 22, 2018), <https://twitter.com/realDonaldTrump/status/1032454567152246785> [https://perma.cc/BGE4-TPS]. But see Matt Peterson, *Trump Believes Fox News—And South Africa Pays the Price*, ATLANTIC (Aug. 23, 2018), <https://www.theatlantic.com/international/archive/2018/08/trump-rule-of-law-south-africa-farmers/568390/> [https://perma.cc/HS25-S8BD].

117. *Fact Check: Were 400 White South African Farmers Murdered Last Year?* ABC, <https://www.abc.net.au/news/2018-04-05/fact-check-were-400-white-south-african-farmers-murdered-year/9591724> [https://perma.cc/E3FX-9569].

118. *Department Press Release – August 23, 2018*, U.S. DEP'T OF STATE (Aug. 23, 2018), <https://www.state.gov/r/pa/prs/dpb/2018/08/285362.htm#SOUTHAFRICA> [https://perma.cc/PF9G-DTS8].

power—balance the interests of groups that have opposing visions for property and land use. More generally, South Africa exemplifies the interconnectedness of individual rights, state powers, and popular visions of social progress.<sup>119</sup> While South Africa's history and population differs greatly from that of the United States, there are lessons for courts to learn from South Africa's land reform efforts so far should Congress undertake any form of land-based reparations in the United States.

#### E. REPARATIONS FOR SLAVERY IN THE UNITED STATES

Starting from nothing, freed slaves in the United States exponentially increased their wealth and property holdings following Emancipation and the passage of the Thirteenth Amendment: in Georgia in 1880, whites owned thirty-six times more property than African Americans, which decreased to sixteen times by 1910.<sup>120</sup> Yet, just as much as these figures show progress, they also highlight the magnitude of the initial gap and its persistence into the present. Black Americans generally experience greater poverty than white Americans, and this inequality is heightened in areas in the South where there is a stronger historical connection to slavery.<sup>121</sup>

Reconstruction contained great debate over how best to meet the needs of freed African Americans, which required articulating how the federal government could act to meet the variety of these needs while remaining within the constitutional bounds.<sup>122</sup> The response was the Freedmen's Bureau and the promise of "forty acres and a mule" for freed African Americans.<sup>123</sup> Specifically, the agency had the authority to "set apart, for the use of loyal refugees and freedmen, such tracts of land within the insurrectionary states as shall have been abandoned,

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119. See Jan Gerber, *Land: Amending Section 25 a 'Great Moment in South African History' – Justice Albie Sachs*, NEWS24 (Mar. 2, 2019), <https://www.news24.com/SouthAfrica/News/land-amending-section-25-a-great-moment-in-south-african-history-justice-albie-sachs-20190302> [https://perma.cc/6GA3-LQHW].

120. Bruce Sacerdote, *Slavery and the Intergenerational Transmission of Human Capital*, 87 REV. ECON. & STAT. 217, 219 (2005).

121. Heather A. O'Connell, *The Impact of Slavery on Racial Inequality in Poverty in the Contemporary U.S. South*, 90 SOC. FORCES 713, 728 (2012).

122. See John M. Bickers, *The Power To Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. L. REV. 70, 74–76 (2006).

123. An Act To Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (1865).

or to which the United States shall have acquired title by confiscation or sale, or otherwise.”<sup>124</sup> However, President Johnson granted amnesty to white Southerners and fully restored their property rights, which virtually eliminated the reserve of land for African Americans, the end result being that no land was conveyed under this program.<sup>125</sup>

Several pushes for reparations for slavery have occurred since Reconstruction,<sup>126</sup> including several efforts to obtain remedies through litigation.<sup>127</sup> One such effort in the 1980s, which included introduction of a bill to establish a Commission to Study Reparation Proposals for African Americans,<sup>128</sup> carried momentum from two other movements. The first, a quasi-reparations scheme,<sup>129</sup> was a \$122 million payment to Native Americans whose lands had been illegally seized in 1877.<sup>130</sup> The second was the legislation passed to provide reparations to Japanese Americans interned during World War II.<sup>131</sup> The Civil

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124. *Id.*

125. See Bickers, *supra* note 122, at 96–97 (noting that Congressmembers argued that land in the South could not be treated in the manner typical of one nation victorious in war over another because the Confederacy was not a sovereign entity, but rather an illegal organization incapable of altering title to land within its domain, the end result being that white landowners assumed the same ownership they did before after Johnson’s grant of amnesty); see also OUBRE, *supra* note 4.

126. See generally *Reparations for Slavery Reading*, CONSTITUTIONAL RIGHTS FOUND., <http://www.crf-usa.org/brown-v-board-50th-anniversary/reparations-for-slavery-reading.html> (last visited Mar. 11, 2020) (discussing an 1894 bill to provide both a one-time and recurring payments, which died in committee, as well as public demands from student groups and black nationalist groups such as the Black Panther Party, which were inspired by these successful reparations acts).

127. See, e.g., *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995) (dismissing claims for slavery injuries under the Federal Tort Claims Act and the Civil Rights Act for lack of standing and because the government has not waived sovereign immunity).

128. Commission To Study Reparation Proposals for African Americans Act, H.R. 3745, 101st Cong. (1989).

129. Because the payment was premised on the illegality of the 1877 actions, it is different than a “true” reparations claim based on acts that were legal at the time of their commission.

130. See *Reparations for Slavery Reading*, *supra* note 126.

131. See generally Amy D. Coughenour, *Reparations for Past Mistakes: Atoning for the Internment of Japanese Americans during World War II*, 37 DTTP 32 (2009) (describing the several Acts under which the reparations scheme was passed and amended).

Liberties Act of 1988 provided \$20,000 to each Japanese American held at an internment camp or their descendants, stipulating that the Attorney General shall identify and locate all such individuals without application, though individuals could give notice to the Attorney General.<sup>132</sup> The reparations legislation survived an Equal Protection challenge from a German American plaintiff who had also been interned during the War.<sup>133</sup>

Had freed African Americans been given forty acres and a mule, their levels of wealth would be closer to whites, both immediately and intergenerationally.<sup>134</sup> The unique historical example of the Cherokee Nation, an autonomous tribal state during and after the Civil War, offers a rare opportunity for statistical comparison into what the long-term effects of land-based reparations might have been. Freed slaves in the Cherokee Nation gained citizenship status equal to that of native Cherokees.<sup>135</sup> In the Cherokee Nation, all citizens had a right to claim and improve unused land, so many freed slaves farming elected to improve their own plots instead of sharecropping.<sup>136</sup> These African American farmers and their descendants were thirty-five percent more likely to own a home in 1900 than their counterparts in other Southern states.<sup>137</sup>

The failures of Reconstruction carried the problem of African American wealth into the twentieth century. Discriminatory practices regarding land and housing, such as using predatory and scare tactics to coerce black homeowners in poor neighborhoods to sell low,<sup>138</sup> and racially restrictive covenants on properties and in neighborhoods that kept black people from owning

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132. 50 U.S.C. § 4215(1)–(2) (1989).

133. *Jacobs v. Barr*, 959 F.2d 313, 314 (D.C. Cir. 1992) (holding that reparations for Japanese Americans required strict scrutiny analysis but survived that analysis when German American plaintiff who was also interned during WWII sued); *see also* Note, *supra* note 26, 1694–96.

134. *See generally* George Sher, *Transgenerational Compensation*, 33 PHIL. & PUB. AFF. 181 (2005) (discussing the “counterfactual” problem to intergenerational injury: even though present day recipients of compensation may not have even existed but for the injury itself, they are still owed compensation for later wrongs connected to the original wrongs).

135. Melinda C. Miller, *Land and Racial Wealth Inequality*, 101 AM. ECON. REV. 371, 371–72 (2011).

136. *Id.* at 373–74 (reporting that the median black farmer in the Cherokee Nation owned twenty-eight more acres of land than the median black farmer in the South).

137. *Id.* at 374–75.

138. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (2014) <https://>



property, have been shown to have a strong geographical correlation with present day poverty and inequality of wealth and homeownership.<sup>139</sup> Americans have grown to care more about inequality in the last ten years.<sup>140</sup> Tracing the impacts of racial discrimination in finance and housing, Ta-Nehisi Coates' 2014 landmark piece *The Case for Reparations* rearticulated reparations to a contemporary audience at the height of the Black Lives Matter movement.<sup>141</sup> In 2017, Representative John Conyers introduced H.R. 40 (a reference to the forty acres and a mule originally promised), a bill which would establish a federal commission to study and propose reparations remedies for African Americans.<sup>142</sup>

The Democratic primary brought reparations into the public sphere in 2019, where some candidates supported reparations for African Americans while others supported broader, potentially race-neutral programs,<sup>143</sup> sparking renewed debate about

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[www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/](http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/) [<https://perma.cc/W32J-BCSR>].

139. See generally MAPPING PREJUDICE, <https://www.mappingprejudice.org> [<https://perma.cc/WK8Q-GVR5>] (documenting discriminatory housing practices).

140. See Peter W. Atwater, *Interest in Income Inequality: U.S. Case Study*, WORLD POLY (May 26, 2014), <https://worldpolicy.org/2014/05/26/interest-in-income-inequality-u-s-case-study/> [<https://perma.cc/VA98-6LEM>]; see also *Inequality*, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=2008-02-01%202014-02-15&geo=US&q=income%20inequality> (last visited Mar. 11, 2020).

141. Coates, *supra* note 138.

142. Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 115th Cong. (2017).

143. In February 2019, Senator Kamala Harris, while a candidate for the Democratic party nomination for the 2020 Presidential race, stated on a radio broadcast that she supported reparations for slavery. Astead W. Herndon, *2020 Democrats Embrace Race-Conscious Policies, Including Reparations*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/us/politics/2020-democrats-race-policy.html> [<https://perma.cc/W9V4-9HQC>]. Senator Elizabeth Warren, while a Democratic candidate, also stated her support for reparations and has proposed including Native Americans in the initiative, whereas Senator and candidate Bernie Sanders opposed reparations and instead voiced support for race-neutral legislation to uplift distressed communities. Igor Derysh, *Bernie Sanders Dismisses Kamala Harris' and Elizabeth Warren's Calls for Slavery Reparations*, SALON (Feb. 28, 2019), <https://www.salon.com/2019/02/28/bernie-sanders-dismisses-kamala-harris-and-elizabeth-warrens-calls-for-slavery-reparations/> [<https://perma.cc/3LNF-GD8Z>]; Annie Linskey, *Elizabeth Warren Opens Door to Reparations for Native Americans*, WASH. POST (Feb. 22, 2019), <https://www.washingtonpost.com/politics/elizabeth-warren-proposes-reparations-for-native-americans/2019/02/22/ed9529fc-3711-11e9-af5b>

the practicability and desirability of reparations.<sup>144</sup> A substantive reparations bill, brought via H.R. 40's Commission or otherwise, could make its way to the judiciary in the not-too-distant future.

There are possibilities for contemporary reparations involving property or homeownership which could creatively solve both the intergenerational wealth problem and the social problems regarding race relations. African Americans rent homes rather than own them at higher rates than whites, and black homeowners have been leaving their homes for the rental market at higher rates than whites.<sup>145</sup> As the percentage of people who rent rather than own their homes has increased generally,<sup>146</sup> a broader renters' rights movement has found natural allies in organizations that advocate for communities of color and has identified solutions such as community land trusts and co-ops.<sup>147</sup> A plan resembling that in *Midkiff* could be used to transfer owner-

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-b51b7ff322e9\_story.html?utm\_term=.88a89b1c8921 [https://perma.cc/JP5V-RH56].

144. Compare Megan McArdle, *Kamala Harris and Elizabeth Warren Are Wrong. We Shouldn't Pay Reparations for Slavery*, WASH. POST (Feb. 26, 2019), [https://www.washingtonpost.com/opinions/kamala-harris-and-elizabeth-warren-are-wrong-we-shouldnt-pay-reparations-for-slavery/2019/02/26/8cbf9c66-39fa-11e9-a06c-3ec8ed509d15\\_story.html?utm\\_term=.0da3eba391f6](https://www.washingtonpost.com/opinions/kamala-harris-and-elizabeth-warren-are-wrong-we-shouldnt-pay-reparations-for-slavery/2019/02/26/8cbf9c66-39fa-11e9-a06c-3ec8ed509d15_story.html?utm_term=.0da3eba391f6) [https://perma.cc/RJ48-FGBR] (opposing reparations because reparations benefits would trivialize the injustice of slavery and would operate as a "psychological quitclaim" severing the government from its sense of responsibility for its disadvantaged groups), with Bill Fogarty, *The True Range of Opportunities for Reparations*, WASH. POST (Mar. 3, 2019), [https://www.washingtonpost.com/opinions/the-true-range-of-opportunities-for-reparations/2019/03/03/fec269d0-3ba1-11e9-b10b-f05a22e75865\\_story.html?utm\\_term=.72e3ab2b1a31](https://www.washingtonpost.com/opinions/the-true-range-of-opportunities-for-reparations/2019/03/03/fec269d0-3ba1-11e9-b10b-f05a22e75865_story.html?utm_term=.72e3ab2b1a31) [https://perma.cc/FT8F-AZSM] (stating that contemporary critics of reparations "dodg[e] the issue of reparations" by failing to consider the full range of options available, including "easy" ones such as getting rid of Confederate monuments).

145. See Gregory Sharp & Matthew Hall, *Emerging Forms of Racial Inequality in Homeownership Exit, 1968–2009*, 61 SOC. PROBS. 427, 435 (2014).

146. Anthony Cilluffo et al., *More U.S. Households Are Renting Than at Any Point in 50 Years*, PEW RESEARCH CTR. (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years> (last visited Mar. 11, 2020).

147. See, e.g., CAL. RENTER POWER, <https://carenterpower.org/about/> [https://perma.cc/J8UT-NUX8] ("Our collective work for housing justice is grounded in the principles of racial, economic, and gender justice. We believe an injury to one is an injury to all. We believe housing is a human right. We believe to make that a reality we must build the power of tenants and low-income people to shape their communities.").

ship of property that beneficiaries are already living in, for example. Reparations beneficiaries could go to the government for help negotiating the purchase of certain properties, where the government's authorization to use eminent domain would help a beneficiary penetrate the market, even if eminent domain is not ultimately used. Other options for land-based reparations may be option contracts or rights of first refusal for property already being sold.<sup>148</sup> Land-based reparations, and the subsequent Takings Clause analysis they would provoke, could well be part of the reparations conversation in the coming decade.

## II. ANTICIPATING THE JUDICIAL RECEPTION OF A LAND-BASED REPARATIONS BILL

If a reparations bill is passed by Congress in any form, it will undoubtedly be the product of intense public debate and of much private reckoning with our individual relationships to institutions created within a history that includes slavery.<sup>149</sup> A property or land-based reparations bill would elicit even more powerful response than cash-based reparations or government-funded education and public works programs<sup>150</sup> designed as reparations remedies. The recent events in South Africa, including the proposed amendment to eliminate the just compensation requirement, underscore the need to take land reform demands se-

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148. *Cf.* Krueger, *supra* note 9 (proposing that tenants who live in subsidized developments be given a right of first refusal when those developments are sold).

149. *See* Coates, *supra* note 138 ("Perhaps after a serious discussion and debate—the kind that HR 40 proposes—we may find that the country can never fully repay African Americans. But we stand to discover much about ourselves in such a discussion—and that is perhaps what scares us. The idea of reparations is frightening not simply because we might lack the ability to pay. The idea of reparations threatens something much deeper—America's heritage, history, and standing in the world."). *But cf.* David Frum, *The Impossibility of Reparations*, ATLANTIC (June 3, 2014), <https://www.theatlantic.com/business/archive/2014/06/the-impossibility-of-reparations/372041/> [<https://perma.cc/K9MF-5HWP>] (cataloging questions which a potential reparations remedy would face and arguing that the debate that would accompany a serious reparations proposal would likely further embitter divisions between African Americans, other immigrant groups, and progressive whites, threatening their already tenuous political coalition).

150. *See, e.g.,* Coates, *supra* note 138 ("Charles Ogletree, the Harvard Law School professor, argues for something broader: a program of job training and public works that takes racial justice as its mission but includes the poor of all races.").

riously. The judiciary in the United States should prepare to receive a land-based reparations bill and to evaluate a Takings Clause challenge fairly and effectively.

As described in Part I, the predominant theme of Takings jurisprudence is that reviewing courts usually defer to the legislature's findings on the public use of a project, only invalidating legislation where the project bears no rational relation to any public interest. More rigorous standards exist, however, and a land-based reparations bill passed in the near future may be required to meet those standards. Section A describes the reception of a land-based reparations bill under the deferential, rational basis standard. Section B examines evidence of more stringent approaches to Takings, namely textualist and natural rights theories. Section C describes the natural rights theory of property in detail, using Richard Epstein's book *Takings* to illustrate how this theory would impose stronger limitations on the government's ability to interfere with private market activity.

#### A. A LAND-BASED REPARATIONS BILL WOULD LIKELY BE UPHOLD UNDER THE DEFERENTIAL STANDARD.

Courts have deferred to the findings of the legislature in Takings cases largely due to reasoning that because the elected legislature better understands and represents the interests of the public than the judiciary, courts should defer to legislative findings and opinions on whether the measure constitutes a legitimate public use.<sup>151</sup> Public use, in this paradigm, is a dynamic, not static, concept: what may be an illegitimate use of government eminent domain powers for private enrichment in one set of circumstances may provide public utility in another.<sup>152</sup> Although cases can be found where the legislature's appropriations

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151. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239, 244 (1984) (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)); *Berman*, 348 U.S. at 33 (1954) ("Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.").

152. See Jonathan Lahn, Note, *The Uses of History in the Supreme Court's Takings Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233, 1237 (2006) (quoting Justice Sutherland's description of the increasing complexities of modern life which is used as justification for the state's imposition of zoning restrictions in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

of property were not rationally related to a possible public purpose,<sup>153</sup> in most cases the legislature's projects meet this low threshold.<sup>154</sup>

In this paradigm, a land-based reparations bill would likely turn out similarly to the affirmation of the Hawaii Land Reform Act in *Hawaii Housing Authority v. Midkiff*. The plaintiffs in a challenge to a land-based reparations Act would be landowners and would be the payers of the reparations in the sense that they are required to sell a parcel to a reparations beneficiary (though they receive just compensation). Plaintiffs would allege that the measure does not serve a legitimate public use, especially since their Taken property would end up being used purely by private individuals. Yet Justice O'Connor's opinion for the unanimous Court in *Midkiff* contains ample language in support of the legislature's authority and primary role in responding to the particularities of the problems facing their constituents. Justice O'Connor describes the Land Reform Act as an "attempt[] [by the people of Hawaii], much as the settlers of the original [thirteen] Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs," and states that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."<sup>155</sup>

If Congress were to pass a bill granting land-based reparations for slavery, it would almost certainly contain a description of slavery's legacy as a land oligopoly traceable to "monarchs" of a kind: the plantation owners and the auctioneers, the state legislatures that kept slavery legal, and the federal policies which foreclosed the one real attempt at allocating freed African Americans a productive measure of property and means.<sup>156</sup> The vacuum of wealth and land for freed African Americans would play

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153. See *Midkiff*, 467 U.S. at 241 (finding that the government could not compel a private railroad company to construct a grain elevator purely and explicitly for use by a private party (citing *Mo. Pacific R. Co. v. Nebraska*, 164 U.S. 403, 416 (1896))).

154. *Id.* ("[W]here 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.").

155. *Id.* at 241–42.

156. See, e.g., Commission To Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 115th Cong. § 2(a) (2017) ("following the abolition of slavery the United States Government, at the Federal, State, and local level, continued to perpetuate, condone and often profit from practices that con-

a similar role in the public use Takings analysis as the feudal practices of the Polynesian people in Hawaii played in explaining the land oligopoly in *Midkiff*. Provided that Congress did an adequate job articulating and explaining reparations in terms of public benefit, a reviewing court would likely hold that Congress's aims are within the scope of its powers<sup>157</sup> and that the reparations scheme is reasonably related to those aims, and the court would hold that the reparations are for public use, citing *Midkiff* and the principle of deference to the legislature's findings on what constitute the evils of our time.

B. A STRICTER TEXTUALIST AND/OR NATURAL RIGHTS STANDARD MAY BE APPLIED.

The deferential approach is not without critics on the Supreme Court. *Kelo v. City of New London* was a 5–4 decision and the dissents contain several lines of reasoning opposing the deferential approach.<sup>158</sup> In *Kelo*, the City of New London approved a development plan which entailed using the city's eminent domain power to condemn residential properties and give much of the property to Pfizer Inc.<sup>159</sup> Susette Kelo, one of the local homeowners to be ousted by the plan, argued that the city's plan did not satisfy the public use requirement of the Takings Clause.<sup>160</sup> The Supreme Court of Connecticut, applying the deferential, rational basis standard, held that "economic development" is a valid public use, notwithstanding that the development would occur at the hands of a private party.<sup>161</sup> The narrow Supreme Court majority, citing *Midkiff*, upheld the decision, rejecting pe-

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tinued to brutalize and disadvantage African-Americans, including share cropping, convict leasing, Jim Crow, redlining, unequal education, and disproportionate treatment at the hands of the criminal justice system . . .").

157. This Note focuses on reparations and the Takings Clause, which is a limitation on government power, and does not endeavor to catalog the affirmative powers of Congress which could underpin potential reparations bills. As a perfunctory matter, reparations bills could likely be justified under the Spending Clause, the Commerce Clause, and potentially the Thirteenth Amendment itself. As mentioned above, cash-based reparations schemes have already survived strict scrutiny constitutional challenges. *See, e.g., Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992).

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

159. *Id.* at 472–73.

160. *Id.* at 475.

161. *Kelo v. City of New London*, 843 A.2d 500, 528 (Conn. 2004), *aff'd*, 545 U.S. 469.

itioner's request to adopt a bright-line rule that economic development does not constitute a public use and noting that "the government's pursuit of a public purpose will often benefit individual private parties."<sup>162</sup> Justice Kennedy wrote separately, joining the majority but cautioning that "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one" and suggested that a presumption of invalidity under the public use clause be applied when the risk of impermissible favoritism is "acute."<sup>163</sup> Justices O'Connor, Rehnquist, Scalia, and Thomas joined in the dissent, and Thomas also wrote separately.

A slippery slope theme pervades the dissents and the petitioner's briefs.<sup>164</sup> Two strains of thought underly the slippery slope theme: a narrow textualist reading of the Fifth Amendment itself<sup>165</sup> and an appeal to American first principles of individual property rights.<sup>166</sup> The first view is reminiscent of the "public use means use by the public" argument: though this argument has been rejected by the Supreme Court,<sup>167</sup> versions of it have survived in state courts. In *County of Wayne v. Hathcock*, for example, the Michigan Supreme Court rejected a county's economic development plan under the Michigan state constitution's "Takings Clause," stating that the transfer of property to private entities is limited to situations where the private recipient bears some special relationship or duty to the public.<sup>168</sup>

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162. *Kelo*, 545 U.S. at 484–85.

163. *Id.* at 491–93 (Kennedy, J., concurring).

164. *See, e.g.*, Brief for Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2811059 (stating in a section heading that "a ruling affirming the Connecticut Supreme Court will open the floodgates").

165. *See, e.g.*, *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting) (quoting *Calder v. Bull*, 3 U.S. 386 (1798)).

166. *See, e.g., id.* at 501 ("[I]f predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.").

167. *See supra* Part I.D.

168. *Cty. of Wayne v. Hathcock*, 684 N.W.2d 765, 781–83 (Mich. 2004) (describing three situations where transfer of condemned property to private entities would be permissible: (1) "public necessity of the extreme sort otherwise impracticable," such as the construction of highways; (2) the private entity remains accountable to the public; and (3) the selection of land to be condemned is itself based on public concern).

On the second argument, Jonathan Lahn observed that Scalia's opinion for the majority in *Lucas*, along with the dissents of Justices O'Connor, Thomas, Scalia, and Roberts in *Kelo*, appeal to static, transcendent "first principles" of American constitutional law.<sup>169</sup> In *Lucas*, Justice Scalia describes the South Carolina Coastal Council's argument as "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."<sup>170</sup> In *Kelo*, the dissenting Justices begin by quoting a 1798 opinion stating that "[a] law that takes property from A and gives it to B . . . is against all reason and justice."<sup>171</sup> Justice Thomas goes further and cites "[e]arly American eminent domain practice" as a source of understanding what content the public use requirement should carry today.<sup>172</sup> He cites "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic" to illustrate the need for more stringent limitations on governmental use of eminent domain.<sup>173</sup> He also posits that "it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights."<sup>174</sup>

With Justices Gorsuch and Kavanaugh confirmed, the deferential majority coalition in *Kelo* has likely waned into a minority position. Justice Kennedy, the Court's swing vote on many 5–4 decisions including *Kelo*, was replaced by Justice Kavanaugh. The Court's attitude towards the legislature and the relationship between government and private property will likely resemble Justice Thomas's dissent in *Kelo*. Because of this, the Court will require a strong showing from Congress as to why

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169. Lahn, *supra* note 152, at 1235 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

170. *Lucas*, 505 U.S. at 1028 (referring to common law principles of nuisance and property).

171. *Kelo*, 545 U.S. at 494 (2005) (O'Connor, Thomas, Scalia, & Rehnquist, JJ., dissenting) (citing *Calder v. Bull*, 3 U.S. 386 (1789)).

172. *Id.* at 511 (Thomas, J., dissenting).

173. *Id.* at 518.

174. *Id.* at 517–18 (describing the public use question as a "quintessentially legal question" inappropriate for the legislature); *see also* Raphael Janove, *Yielding to the Confiscation of Public and Private Property: Judicial Deference Under the Copyright and Takings Clauses*, 39 VT. L. REV. 89, 102–04 (2014) (describing four levels of deference between the Justices in *Kelo*, labelling Justice Thomas's position as: "[n]o deference or at the very least . . . [only] if the public 'actually uses' the land").



the land-based reparations constitute a valid public use. The Court may shift towards a more textualist reading of the public use requirement and it may shift towards a view couched in American first principles. The following Section articulates the content of the American first principles line of argument: a natural rights theory of property.

C. A NATURAL RIGHTS THEORY OF PROPERTY AND THE MARKET FAILURE TEST.

Property-based reparations are more complicated than cash reparations because somebody must give up their land. Although many think of property chiefly as policy, as a social arrangement or institution,<sup>175</sup> deep currents of American thought resist the notion that property fundamentally depends on the state.<sup>176</sup> In his book *Takings*, Richard Epstein articulates a classical liberal framework for Takings Clause analysis, which he introduces by examining a Lockean natural rights theory of property.<sup>177</sup> Epstein's work is widely cited, including in the main text of Supreme Court opinions in Takings cases, including *Lucas*,<sup>178</sup> and this Note uses Epstein as a voice for the Lockean classical liberal theory of property which may motivate a Court less inclined to defer to the legislature's notions of public use.<sup>179</sup> The political philosophy of John Locke has been described as "the weapon of choice for contemporary opponents of social welfare rights,"<sup>180</sup> the idea being that a welfare state exceeds the bounds of what the state was authorized to do under Locke's framework. Regardless of whether one views Locke as friend or foe, the degree of his

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175. See, e.g., ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD 1 (2012).

176. See EPSTEIN, *supra* note 2, at 10; cf. 2018 Platform, LIBERTARIAN PARTY, <https://www.lp.org/platform/> [<https://perma.cc/K83M-4H9Z>] ("[W]e oppose all government interference with private property, such as confiscation, nationalization, and eminent domain.")

177. See EPSTEIN, *supra* note 2, at 10–12.

178. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

179. Classical liberalism is "conservative" in contemporary terms. See NATHAN SCHLUETER & NIKOLAI WENZEL, SELFISH LIBERTARIANS AND SOCIALIST CONSERVATIVES?: THE FOUNDATIONS OF THE LIBERTARIAN-CONSERVATIVE DEBATE 14 (2017) (arguing that "conservatism rests on recognition of the mutual interdependence of liberty, tradition, and reason," then describing the American founding, which uniquely achieved the "equilibrium" of these elements, as motivated by principles of classical liberalism or "natural law liberalism").

180. Peter P. Cvek, *John Locke, Social Welfare and the U.S. Constitution*, 27 ZBORNIK RADOVA 99, 101 (1990).

influence on the structure and purpose of the Constitution is beyond doubt.<sup>181</sup>

Epstein begins *Takings* with a description, taken from the natural rights tradition, of inequality of individual property rights as a “natural” state of affairs.<sup>182</sup> Some have always had more and some have always had less.<sup>183</sup> However, in the absence of a functioning state authority, everyone must waste a lot of resources defending against usurpations. Both rich and poor agree, the reasoning goes, that they would be absolutely better off if they surrendered some of their natural rights to a state. In a well-functioning state, each citizen-beneficiary is given a share of the surplus utility from the state proportional to the resources they contributed.<sup>184</sup> Due to this proportionality of returns principle, the state undertakes only to increase absolute wealth, not the relative wealth of some citizens.<sup>185</sup>

Under the Lockean natural rights view, meaningful property rights exist prior to the formation of the state.<sup>186</sup> These “natural” property rights are based on the common law principle of first possession.<sup>187</sup> Contrary to the Hobbesian view that the individual surrenders *all* of their prior rights to the state as a requisite for state formation, the Lockean view holds that the individual only surrenders the rights necessary for the state to guarantee basic peace and predictability in private affairs.<sup>188</sup> The state must rigorously justify intrusions into one individual’s

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181. See EPSTEIN, *supra* note 2, at 162 (“I believe the public use limitation is an integral part of the eminent domain clause. The best way to approach the problem is as a matter of political theory, to show how the public use language fits in with the Lockean conception of the state.”).

182. *Id.* at 3–4.

183. However, the euphemistic character of the term “natural rights” comes into view here: inequality is deemed “natural” without mention of the specific acts which resulted in that inequality, however inhumane or unnatural they may have been, such as American slavery.

184. *Id.* at 5.

185. See *id.* at 163 (“This pro rata distribution had, it must be stressed, an important allocative function because it does not skew the incentives of private parties in the choice between public and private control over human affairs. For example, if each person received an equal portion of the general gain, there would be an incentive for persons with smaller shares to force matters into the public area, where they would be relative gainers.”).

186. *Id.* at 10.

187. *Id.*

188. *Id.* at 4 (describing the role of the state not to equalize the relative distributions of wealth and natural rights, but merely to increase each party’s gross prosperity).

private sphere in terms of the individual rights of another person being protected.<sup>189</sup>

On this view, the state does not have inherent authority to solve social problems, such as inequality, absent a showing that another individual's rights have been violated—the mere existence of inequality, accompanied by a resolution from the legislature declaring that inequality is bad, is not enough to justify government intrusion on the current, “natural” holding of property. Some ills are left to the free market to solve. For Epstein, this limitation is expressed in the Constitution as the Takings Clause, specifically the public use requirement.<sup>190</sup>

What is capable of satisfying the public use requirement in a natural rights paradigm? To answer that question, it is helpful to return to the benefits sought by state formation in the first place. The state was granted some measure of police power to protect individuals from incursions by others. Because the state must possess and manage property itself in order to bring about its benefits, some property must be transferred from private hands to public.<sup>191</sup> If this transfer is left entirely to voluntary exchanges in the free market, the state would never achieve its ends because it would never acquire the necessary property and resources. The solution is to grant the state the power to compel transactions when necessary. According to Epstein, “[t]here are transaction costs, holdout, and free-rider problems that are almost insuperable when the conduct of a large number of individuals must be organized.” To this problem, the proper response is to force exchanges upon payment for public use.<sup>192</sup>

In other words, Takings are justified as a valid public use if they are necessary to solve a problem that voluntary free associations are demonstrably incapable of solving. A classically liberal “Epsteinian” take on the public use question can be articulated as the following test: the state, specifically the legislature, must demonstrate why the free market is incapable of effectively

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189. *Id.* at 181 (expressing dissatisfaction at the legislature's findings in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) because they did not demonstrate the existence of a market-obstructing “oligopoly” as the standard an antitrust expert would accept).

190. *Id.* at 12.

191. *Id.* at 4.

192. *Id.* at 5.

achieving the ends sought by the appropriation.<sup>193</sup> This Note refers to this test as the “market failure test.” This failure can be articulated in terms of transaction costs, monopolies, holdouts, and the like. Whatever the logic behind the particular failure, for Epstein the demand remains rigorous.<sup>194</sup>

In more practical terms, a reparations bill would be required to present findings not only about why reparations would benefit the public, but would also be required to articulate why authorization of the eminent domain power is necessary.<sup>195</sup> Reparations proponents would be required to show why the government’s typical practice of simply purchasing land would not suffice for this project.

Part II has described the deferential approach to Takings, under which a property-based reparations bill would meet with little challenge. Part II also looked to natural rights philosophy to explain the more stringent market failure test, and Part II examined evidence of the possibility that Takings jurisprudence might move towards such a test.

### III. EVALUATING THE PUBLIC USE OF REPARATIONS

Protests about race relations<sup>196</sup> and about the state’s role in governing property<sup>197</sup> continue to fill our streets, more than a

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193. See also Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82 (1986) (“The basic model posits that eminent domain is designed to increase social wealth by facilitating certain transactions that otherwise would not take place, or that would take place only at an inefficiently high cost.”).

194. Cf. EPSTEIN, *supra* note 2, at 124–25 (arguing for the striking of a statute regulating strip-mining because it deprives landowners of one of the natural rights of using their property and that “simple alteration of privately owned lands does not come within a light year of invasion on another’s property”).

195. See Merrill, *supra* note 193, at 81 (“If private developers and the like can get by without eminent domain, the critics ask, then why cannot the government?”).

196. BLACK LIVES MATTER, <https://blacklivesmatter.com/about/herstory/> [<https://perma.cc/M6G2-JSQ8>] (protesting, *inter alia*, the killing of African Americans by police officers).

197. E.g., OCCUPY WALL ST., <http://occupywallst.org/about/> [<https://perma.cc/E2W2-8T9A>] (highlighting wealth inequality broadly); STAND WITH STANDING ROCK, <https://standwithstandingrock.net/history/> [<https://perma.cc/KS7P-RZH3>] (resisting the construction of the Dakota Access Pipeline through Native American sacred grounds without their consent—a project which used the eminent domain power in Iowa); *The Wall*, USA TODAY, <https://www.usatoday.com/border-wall/> [<https://perma.cc/56WG-EXPV>] (describing the debates

century and a half after Emancipation. Reparations could serve as a turning point in race relations which would provide public benefits to everyone. The utility for the beneficiaries is clear, as African Americans would enjoy greater wealth and homeownership, which would increase their access to capital, allowing the development of richer social institutions to serve their needs.<sup>198</sup> White people would benefit by being able to let some of their guilt go.<sup>199</sup> Everyone would benefit from the increased social stability that would come with greater racial integration. In a future that may hold increased social unrest and public calls for land reform, a well-executed reparations bill could diffuse tensions and prevent more drastic actions, such as amending the Takings Clause to eliminate the just compensation requirement, a measure being debated in South Africa now.<sup>200</sup>

Reparations will not solve all social problems. Indeed, there are some compelling reasons to refrain from implementing reparations, both social and technical. It might be socially difficult to pay reparations to one minority group without addressing similar grievances from other minority groups, and differential treatment might exacerbate social discord to the detriment of their intended aims.<sup>201</sup> The familiar technical problems of determining claimants and providing a claims mechanism remain.<sup>202</sup> It is Congress's job to parse these problems and prioritize them against the social ills of post-slavery America.

If a reparations bill does become law, it will undoubtedly be a result of intense national soul-searching and complex value judgments that attempt to resolve disparate narratives in our history. Section A argues that courts, including the Supreme Court, should give deference to Congress on the public use issue when faced with a property-based reparations bill. Section B argues that even under a more stringent natural rights conception of the Takings Clause, a reparations bill could satisfy the market

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around the wall on the Mexican border proposed by President Donald Trump; a project which would require use of the eminent domain power).

198. See Miller, *supra* note 135 and accompanying text.

199. See *supra* notes 22–26 and accompanying text.

200. See *supra* notes 109–14 and accompanying text.

201. See Frum, *supra* note 149 (replying to Ta-Nehisi Coates's, *The Case for Reparations*, arguing that were reparations to be pursued, the project would almost certainly be faced with claims for expansion to other historically oppressed groups, as well as greater calls for distinctions of deserving recipients within groups, which would create a near-insurmountable bureaucratic burden and would demoralize a generation of civil rights workers and activists).

202. See Note, *supra* note 26, at 1697–700.

failure test and be upheld as a valid public use. Drawing once more upon South Africa's example, Section C explains why authorization for the eminent domain power in a reparations bill would offer benefits beyond a purely grant-based model, even if voluntary transactions are prioritized as they likely would be. Section D addresses slippery slope and tyranny of the majority objections to the recognition of reparations as a public use.

A. COURTS SHOULD RETAIN THE DEFERENTIAL STANDARD BECAUSE THE LEGISLATURE IS ESPECIALLY WELL-SUITED TO EVALUATE THE PUBLIC USE OF REPARATIONS.

In the face of increasing references to first principles of the American Constitution and natural rights theories of property, the normative reasons for deference to the legislature on the public use issue must be reasserted and reevaluated. Two core notions justify judicial deference to the legislature: first, an "institutional competence" argument which holds that the legislature is a better fact-finder and appraiser of values than the judiciary;<sup>203</sup> second, a "democratic" or separation of powers argument which holds that the legislature is more accountable to the public for its actions than the unelected judiciary.<sup>204</sup> Both arguments support continued deferential review for evaluation of an act of reparations. Whether or not judicial deference should be given in all Takings Cases, it should be given in evaluating a reparations scheme because the legislature is especially well-suited to ascertain and weigh the noneconomic, sociopolitical ills of its constituents.

In the Takings jurisprudence on deference to the legislature, the Supreme Court usually undertakes to give a short normative justification for its deference.<sup>205</sup> When making an institutional competence argument, the Court posits that the legislature is more aware of something than the judiciary is capable of being, the content of the thing varying based on the facts of the case. For example, in *Kelo* the Court defers to the economic judgment

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203. Dru Stevenson, *Judicial Deference to Legislatures in Constitutional Analysis*, 90 N.C. L. REV. 2083, 2122 (2012).

204. Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENVTL. AFF. L. REV. 243, 274 (2012).

205. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 483–84 (2005) (giving deference because of the "thorough deliberation" that the city of New London undertook in crafting their economic plan).

of the lawmakers in the city of New London.<sup>206</sup> In other cases, that deference is cast less in economic terms and more in terms of sociopolitical, even aesthetic values. In *Berman v. Parker*, the Court memorably described the concept of public welfare as “spiritual as well as physical, aesthetic as well as monetary.”<sup>207</sup> The urban renewal plan upheld in that case was based not only upon economic development, but because “[m]iserable and disreputable housing conditions . . . suffocate the spirit by reducing the people who live there to the status of cattle.”<sup>208</sup> The Court, rather than undertake an independent assessment of the truth of this claim, deferred to the judgment of those who govern the District of Columbia.<sup>209</sup>

The lawmakers in New London, who presumably walked and drove through the town with regularity and perhaps experienced economic distress firsthand, relied on their familiarity with local nuance when deciding that the town would be served by allowing Pfizer to build a campus where Mrs. Kelo’s house stood.<sup>210</sup> These lawmakers would be subject to political consequences if the project failed or the constituents were displeased with the use of the eminent domain power.<sup>211</sup> A judicial nullification of this legislative act based on its own opinions about the propriety of the project would be improper, the reasoning goes, because the judiciary is a much worse fact-finder and does not understand the “long established methods and habits of the people” as well as the legislature, nor are judges subject to the same political accountability.<sup>212</sup>

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206. *See id.* at 483 (“Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.”).

207. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

208. *Id.* at 32.

209. *Id.* at 33.

210. *See Kelo*, 545 U.S. at 473, 483.

211. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2102–03 (2009) (cataloging political responses to the *Kelo* decision, including state legislation forbidding economic development takings, and quoting Judge Richard Posner stating that this political response is evidence of the soundness of the *Kelo* decision (quoting Richard A. Posner, *The Supreme Court, 2004 Term Forward—A Political Court*, 119 HARV. L. REV. 31, 98 (2005))).

212. *Kelo*, 545 U.S. at 482–83 (quoting *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 606–07 (1908)).

In *Midkiff*, the case that most closely resembles a potential land-based reparations act, the problem of land oligopoly and the findings made by the Hawaii state legislature were described primarily in the economic terms of the fee simple market, but the Court also described the legislature as a decisionmaker which takes into account the competing interests of citizens with vastly different standings in the social landscape: landlords and tenants, lessors and lessees.<sup>213</sup> The Court acknowledged how the legislature's solution took into account both the undeniable need for land redistribution and the legitimate worries of the land-owners, such as their federal tax burden.<sup>214</sup>

Outside the Takings context, there are ample cases where courts have deferred to entities based on institutional competence. In *Bell v. Wolfish*, the Supreme Court deferred to the management decisions of federal prison administrators regarding punishments, sleeping arrangements, and restrictions on inmate access to published materials.<sup>215</sup> In *Chevron*, the Supreme Court deferred to the decision of the Environmental Protection Agency regarding how to implement a "technical and complex" environmental regulatory scheme.<sup>216</sup> The theme here is that entities which are in close contact with their subject matter<sup>217</sup> and engage in judgments weighing values against one another<sup>218</sup> are entitled to judicial deference.

It is the legislature's unique ability to serve as the arbiter of these complex moral tradeoffs that would justify judicial deference in a reparations case on institutional competence grounds. If legislatures are better than courts at making economic judgments about public use because of their unique closeness to the people, legislatures are even more in-tune with the social, ethnic,

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213. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984).

214. *Id.* at 233.

215. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (stating that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security" (citations omitted)).

216. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

217. See Oren Eisner, Note, *Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411, 434 (2001).

218. Stevenson, *supra* note 203.



and spiritual issues important to their constituents.<sup>219</sup> A reparations bill passed into law would represent a complex, highly deliberated judgment that Congress undertook in dialogue with the nation. The judiciary has not undertaken to put its finger on the pulse of race relations in America, and that is not its institutional charge.<sup>220</sup> In evaluating a reparations act and deciding whether to defer to the judgment of the legislature or undertake a more rigorous review of the merits of the act, courts should pause and remember the weight of our country's history, the moral trials that every American has faced in navigating the deep division between black and white, and the fact that the legislature, not the judiciary, has participated in that conversation.

B. EVEN IF COURTS DO NOT RETAIN THE DEFERENTIAL STANDARD, THE SLOW PACE OF AFRICAN AMERICAN WEALTH GROWTH CAN CONSTITUTE A MARKET FAILURE, SATISFYING THE NATURAL RIGHTS STANDARD

As the Takings jurisprudence makes more frequent references to the first principles taken from substantive property theories, courts may ask more questions about why a particular eminent domain measure should be the province of government intervention and not of private voluntary transactions in the free market.<sup>221</sup> This market failure requirement can be met in situations where structural factors make those transactions impossible or especially unlikely to occur voluntarily, such as when monopolies and holdouts are involved.

The intergenerational effects of slavery can satisfy the market failure test. In the first instance, being enslaved meant being artificially severed from all market activity due to the tortious actions of the master.<sup>222</sup> Slavery can be described as one of our nation's biggest structural barriers to free market participation: black people could not trade their labor for any meaningful gains while enslaved.<sup>223</sup> After Emancipation, one of our nation's most

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219. See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

220. Cf. Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2145–46 (2003) (discussing whether the judiciary or legislature is the institution best suited to address sex discrimination).

221. See *supra* note 169 and accompanying text.

222. Cf. EPSTEIN, *supra* note 2, at 11 (describing foundational principles of labor, including that “each individual owns his own labor”).

223. Cf. CHARLES BALL, *LIFE OF A NEGRO SLAVE* (ABR.) 8 (1923 ed.), <https://books.google.com/books?id=WfNcAAAAcAAJ&pg=PA8#v=onepage&>

enduring property problems came into being: the monopoly of landownership by whites and the absolute vacuum of African American wealth.<sup>224</sup> Despite being finally able to trade labor for money and property, it was difficult for freed African Americans to obtain land, especially after the plantation owners had all their holdings fully restored by President Johnson.<sup>225</sup> Generations later, African Americans own homes at a rate far below whites, and social stability is tenuous.<sup>226</sup>

Independent from all concerns about private discrimination in free market transactions, it is clear that the sudden emancipation of an entire demographic of people without any personal property, coupled with a scarcity of land, poses a serious structural problem for the free and natural distribution of property in the marketplace.<sup>227</sup> This situation can be described as a monopoly problem (e.g., one group has a monopoly on the fee simple market), which can be described more fundamentally as a type of holdout problem because the monopolizing party has little incentive to further divide market shares by allowing another group to participate in the market.<sup>228</sup> However Congress may describe the precise contours of these problems, it is clear that they are the same type of structural problems that someone applying a market failure analysis would deem a permissible use of the eminent domain power.<sup>229</sup>

The structural barriers to market participation facing freed African Americans could constitute a market failure by themselves, but those problems alone are not the whole story. Add in widespread private discrimination and violence against black people, along with state and local laws aimed at preventing black homeownership,<sup>230</sup> and the failure of free, voluntary transactions to provide for African Americans after Emancipation is apparent beyond doubt. The structural problems were most apparent in the very beginning of Emancipation, as such federal

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q&f=false (noting that slaves were permitted to work for wages at other plantations only on Sundays).

224. See *supra* note 125 and accompanying text.

225. See *id.*

226. See O'Connell, *supra* note 121.

227. See Alan W. Evans, *On Monopoly Rent*, 67 LAND ECON. 1, 2-4 (1991).

228. See Brian A. Facey & Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey*, 70 ANTITRUST L.J. 513, 520 (2002).

229. See *supra* note 189 and accompanying text.

230. See generally MAPPING PREJUDICE, *supra* note 139 (cataloging discriminatory housing practices geographically).

efforts as the Freedmen's Bureau recognized, but private discrimination has fueled those problems throughout the generations. Entrenched private discrimination should be recognized as a structural problem worthy of government intervention through eminent domain power under a market failure analysis.<sup>231</sup>

The land oligopoly in *Midkiff* formally resembles the dearth of African American wealth: one population (in *Midkiff*, the Polynesian people, and white Europeans in mainland America) populates and covers the land, improving the soil and claiming it for themselves, then a minority group arrives (the American colonists in *Midkiff* and the slaves, involuntarily, in the mainland) and is forced to bargain against the monopoly that has taken hold. The Court said that “[t]he land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State’s residential land market” and even used the words “market failure” when describing the Land Reform Act as a rational response to the problem.<sup>232</sup> Although there is a superficial irony to citing *Midkiff* to support reparations (Hawaii was a truly rare American historical oddity where indigenous people of color actually held an important market monopoly), courts should recognize the formal similarity between *Midkiff* and reparations for slavery and be prepared to hold, upon a proper showing from Congress, that the failure of the free market to provide for adequate African American intergenerational wealth is a failure worthy of government intervention for Takings Clause purposes.

Richard Epstein, this Note’s voice for use of the market failure test, critiqued *Midkiff* in his book *Takings*. If a reparations proponent cites *Midkiff*, it would be worthwhile to evaluate his critique. The basis of Epstein’s critique was that a market failure had not been demonstrated. He wrote, “No antitrust expert thinks ‘oligopoly’ because there are ‘only’ seventy or twenty-two or eighteen landowners in a given market. Why then allow the legislature to so find?”<sup>233</sup> This is facially unconvincing without

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231. Cf. *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964) (holding that Congress could regulate racial discrimination in the private sector under the Commerce Clause where that discrimination impeded interstate commerce).

232. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984).

233. EPSTEIN, *supra* note 2, at 181.

reference to the size of the theoretical markets being evaluated.<sup>234</sup> Nor does Epstein explain why the notion of oligopoly as it is used in the antitrust field, which concerns the legality of private action, should be the standard for the public use question under the Takings Clause, which concerns the legality of legislative action. He goes on to invoke other vague premises, stating, for example, that the problem of land inequality here “does [not] depend upon the overall structure of the market.”<sup>235</sup> Finally, he blames “the extensive network of state land use regulations” for the problem of land shortages and high prices.<sup>236</sup>

In the sense that discriminatory housing codes can be blamed for the shortage of land available to African Americans, Epstein may be right about state land use regulations. In general, however, courts evaluating a reparations act should take care to avoid reasoning in an overly general way about market failures, as Epstein does. In considering “the overall structure of the market,” courts should remember the monumental imbalance of property that faced African Americans as they entered the market for the first time.<sup>237</sup> Courts should remember that our nation recognized this problem once, in the creation of the Freedmen’s Bureau and the promise of forty acres and a mule, yet resources were eliminated for this project before it could bear fruit.<sup>238</sup>

Courts should also make their evaluations with an eye towards South Africa, where the demand for land reform has gotten so great that it is quite possible, if not likely, that their Property Clause will be amended to eliminate the just compensation requirement. The next section examines how the balance between voluntary transactions and eminent domain was struck in South Africa and offers insights for reparations proponents in

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234. For example, envision a situation where one individual lives on each parcel and each parcel is equivalent. Each individual can be an owner or a renter of their parcel. If there are twenty-two parcels and twenty-two owners, then there is certainly no land oligopoly. But, if there are ten million parcels and only twenty-two owners, there may well be a land oligopoly. The Hawaii legislature made findings on the number of parcels and owners in Hawaii and in its various islands and subdivisions. *Midkiff*, 467 U.S. at 232 (“[T]he Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State’s land, another 47% was in the hands of only 72 private landowners.”).

235. EPSTEIN, *supra* note 2, at 181.

236. *Id.*

237. *Id.*

238. *See supra* note 5 and accompanying text.

legislatures to consider in striking that balance more productively, which reviewing courts should also note when evaluating the public use question.

C. LESSONS FROM SOUTH AFRICA: MARKET FAILURE IS A REAL CONCERN AND AUTHORIZATION FOR USE OF THE EMINENT DOMAIN POWER COULD MAKE REPARATIONS WORK BETTER

South Africa's land reform efforts have stagnated through a generation, leaving many South Africans unsatisfied and feeling like Mandela's party failed to deliver on fundamentals of its post-apartheid vision.<sup>239</sup> There are many reasons for this, but amidst it all, there is consensus in government that the willing buyer, willing seller policy has not worked.<sup>240</sup> The free market has failed to incentivize land transfers and failed to provide the infrastructure necessary for beneficiaries to make productive use of their claimed land. This situation is a paradigmatic market failure worthy of government intervention.

In South Africa, the constitutional basis for government intervention using the eminent domain power is undisputed in this arena.<sup>241</sup> Yet, the government pursued the willing buyer, willing seller policy.<sup>242</sup> The willing buyer, willing seller policy is symptomatic of a deep hesitance from the government about use of the eminent domain power for land reform. On the individual level, motivations for this hesitance likely diverge greatly and may range from legitimate concern for the rights and well-being of white landowners to outright self-interest, fraud, and obstructionism.<sup>243</sup> Whatever the reason, the result has been disappointing at best: land ownership inequality remains stark, claimants are frustrated with the administration's hesitance and slow pace, and those who have received land have not been supported in utilizing it.<sup>244</sup> To the extent that the willing buyer, willing

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239. See Lannegren & Ito, *supra* note 85, at 57.

240. REPORT OF THE HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF FUNDAMENTAL CHANGE 203 (2017), [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf) [<https://perma.cc/ZN9V-5UFF>]; see also *supra* notes 78–80 and accompanying text.

241. S. AFR. CONST., 1996, Ch. 2 § 25(4)–(9).

242. See *supra* notes 97–100 and accompanying text.

243. See, e.g., Milton Nkosi, *Is South Africa's Land Reform an Election Gim-mick?*, BBC News (Aug. 11, 2018), <https://www.bbc.com/news/world-africa-45099915> [<https://perma.cc/BWJ9-DSZV>].

244. See *supra* notes 105–09 and accompanying text.

seller policy was motivated by a desire to protect private property rights in the abstract, it backfired completely: there is real work being done to amend the Property Clause of the South Africa Constitution to eliminate the compensation requirement.<sup>245</sup> According to some, even talk of this amendment has destabilized investments in the South African economy.<sup>246</sup>

Should Congress undertake land-based reparations in the United States, both Congress and the judiciary should avoid repeating the mistakes inherent in South Africa's willing buyer, willing seller policy. Of course, Congress would likely elect to pursue voluntary sales of land before resorting to eminent domain, as is typically practiced in government land use projects.<sup>247</sup> This would be conceptually consistent with reparations and desirable since it avoids the resentment generated by eminent domain.<sup>248</sup> Acknowledging this, there are nevertheless important reasons why Congress may elect to authorize use of the eminent domain power for reparations, even if eminent domain proceedings would rarely be initiated.

The authorization for use of eminent domain may bring some landowners to the negotiating table who would not be otherwise interested in selling.<sup>249</sup> This would save government resources and expedite the timetable, allowing the program to be implemented more fully. Some decisive use of the eminent domain power early on in South Africa would have likely been a more effective way to transfer land and focus government resources on actually helping benefits claimants set up productive lives there.

Furthermore, eminent domain would allow a reparations program to penetrate markets which would be difficult to penetrate if the government simply engaged in voluntary purchasing.<sup>250</sup> A land-based reparations bill should be designed to meet

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245. See *supra* notes 109–14 and accompanying text.

246. See *supra* note 114 and accompanying text.

247. See generally CAROL H. VINCENT ET AL., CONG. RESEARCH SERV., RL34273, FEDERAL LAND OWNERSHIP: ACQUISITION AND DISPOSAL AUTHORITIES 4–7 (2019), <https://fas.org/sgp/crs/misc/RL34273.pdf> [<https://perma.cc/9GYZ-USC7>] (describing land acquisition procedures used by the National Park Service, Forest Service, Fish and Wildlife Service, and the Bureau of Land Management).

248. Carol L. Zeiner, *A Therapeutic Jurisprudence Analysis of the Use of Eminent Domain To Create A Leasehold*, 33 UTAH ENVTL. L. REV. 197, 229 (2013).

249. See *supra* notes 16–17 and accompanying text.

250. See *id.*

the contemporary needs of beneficiaries, meaning that the subject of the bill could be, for example, urban rental apartments which the bill would allow claimants to purchase as condominiums. These units are generally not posted for sale on the market, so a declaration of the government's authority to use eminent domain could bring these landowners to the table.<sup>251</sup> Insofar as modern urban landscapes still bear the effects of expressly discriminatory government policy, authorization for use of the eminent domain power to disrupt these patterns would be even more appropriate.<sup>252</sup> Forcing the United States back into an entirely willing buyer, willing seller approach by curtailing the government's use of the eminent domain power could turn well thought out reparations into an administratively arduous and socially unfulfilling project like South Africa's. A court reviewing a Takings Clause challenge to land-based reparations legislation should pay special attention to Congress's findings on the failures of the free market to accomplish its ends.<sup>253</sup>

Beyond the use of the eminent domain power itself, there are several other lessons to be gleaned from South Africa when considering land-based reparations in the United States. Posner and Vermeule describe reparations as fundamentally backwards-looking,<sup>254</sup> but the example of South Africa highlights the importance of forward thinking for reparations to be meaningful. Of course, there cannot be reparations without an original injury, so there must be some amount of backwards-looking in reparations.<sup>255</sup> But forward thinking, e.g. consideration of the property needs of African Americans in their present economic and geographic orientations, should not damage the conceptual integrity of reparations.<sup>256</sup> Indeed, the original injury would be better healed when more thought is put into effects.

More concretely, reparations should not focus too much on a strict identity relationship between past and present victims/beneficiaries and wrongdoers/payers and should instead focus on beneficiaries' real needs in the present.<sup>257</sup> South Africa chose to focus on redistributing rural farmland because that was

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251. See *supra* note 17 and accompanying text.

252. See *supra* note 18 and accompanying text.

253. *E.g.*, *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

254. Posner & Vermeule, *supra* note 28, at 691.

255. See *supra* note 29 and accompanying text.

256. See *supra* notes 30–31 and accompanying text.

257. *Cf.* Posner & Vermeule, *supra* note 28, at 698.

the land that was taken from them or their recent ancestors.<sup>258</sup> This identity relationship (i.e. the fact that the land they are getting is the same land that was taken from them) is superficially satisfying, but seems to result in beneficiaries receiving something that is not useful or meaningful to them.<sup>259</sup> In terms of Posner and Vermeule's taxonomy of reparations relationships,<sup>260</sup> it could be said that South Africa's government described the relationship between the original victim and the possible beneficiaries too literally: the goal was to put beneficiaries back in the position that the original victims were in before the injury.

There are better ways to conceive of this relationship. Reparations beneficiaries will always carry their past with them, but they look toward the future. Reparations work better when they consider what would help beneficiaries flourish in the present. Should Congress undertake land-based reparations, Congress should avoid basing its remedies on the past and should consider the contemporary forces of urbanization, urban segregation, and differential job availability that shape the lives of descendants of slaves. Productive land transfers to reparations recipients would, at least for the coming decade, more likely involve transfer of urban residential property on an individual claimant or group claim basis than land to be worked itself.

The legislation in *Midkiff* was well-designed because it ensured that claimants would receive land that was immediately useful: they were already living there.<sup>261</sup> Land-based reparations could employ that same mechanism. It could even go farther and grant beneficiaries the right to purchase land that would make them even more productive than their current situation allows. Beneficiaries could, for example, be granted a right to purchase housing in competitive markets where there are broader job options and higher income potentials.<sup>262</sup> This immediate grant of capital in the form of homeownership is both backward-looking

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258. See Robinson, *supra* note 25, at 472–73, 484–85.

259. See *supra* note 105 and accompanying text.

260. See *supra* note 29 and accompanying text.

261. Haw. Hous. Auth. v. *Midkiff*, 467 U.S. 229, 232–33 (1984). *Midkiff* could also serve as a model for legislation for its economy: because the claimants purchased their lots back from the state, the state did not need to fund purchases out of its own pockets. *Id.*

262. See, e.g., Matthew Speakman, *Hottest Markets for 2019 Driven by Job Opportunities*, ZILLOW (Jan. 15, 2019), <https://www.zillow.com/research/hottest-markets-jobs-22696> [<https://perma.cc/6S4H-L7FJ>] (describing job opportunities as a major determining factor in whether a market is “hot,” i.e. desirable, which raises the rent).



because it is designed to remedy the initial vacuum of African American wealth that existed after slavery ended and forward-looking because it promotes participation in economic activities that the beneficiary actually desires to and is qualified to participate in.

Use of the eminent domain power in land-based reparations would promote ends such as these better than a grant program reflecting a willing buyer, willing seller approach would. The free market has failed to naturally rectify the inequalities facing African Americans.<sup>263</sup> Discrimination in housing still exists, and even if it is not present, unequal access to capital stemming generations prevents African Americans from entering competitive markets through voluntary private transactions.<sup>264</sup> A land-based reparations scheme that employed strategic use of the eminent domain power would have greater social impact and avoid the bureaucratic nightmare that a protracted willing buyer, willing seller grant program could very plausibly entail in light of South Africa's recent history.

D. A HOLDING AFFIRMING A LAND-BASED REPARATIONS BILL  
COULD BE NARROW AND AVOID SLIPPERY SLOPE OR TYRANNY OF  
THE MAJORITY CONCERNS

When *Kelo* was argued, petitioners and their amici portrayed economic development Takings as a “floodgate” leading to municipalities condemning any property they desired if it would be used more productively, i.e. generate more tax revenue.<sup>265</sup> Were economic development ratified as a valid public use, there would be little to stop “10,000 pound gorilla[s]”<sup>266</sup> like Pfizer from courting governments into using their eminent domain power. Yet, the Court upheld it. In the reparations context, critics may argue that were reparations-style backwards-looking corrective justice recognized as a valid public use, that there would be little to stop a majority coalition from continuing to distribute property to demographics they have taken under their wing.<sup>267</sup> They

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263. See, e.g., *supra* note 120 and accompanying text.

264. See *supra* notes 138–40 and accompanying text.

265. Brief for Petitioners, *supra* note 164, at \*48–49. See also Brief of Reason Found. as Amicus Curiae Supporting Petitioners at 5, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2787140, at \*11.

266. Brief for Petitioners, *supra* note 164, at \*4–5.

267. See, e.g., Kevin D. Williamson, *The Case Against Reparations*, NAT'L REV. (May 24, 2014), <https://www.nationalreview.com/2014/05/case-against-reparations-kevin-d-williamson> [<https://perma.cc/JD4E-CUYX>] (“Once [the

may point to South Africa's ousting of white farmers from agricultural land and the potential for violent backlash as the inevitable result of recognizing the public use of reparations.<sup>268</sup>

There are two related concerns here: slippery slope and tyranny of the majority. Slippery slope arguments take one valid thing and extrapolate it to an unacceptable conclusion<sup>269</sup>—here, one valid act of reparations for slavery would lead to a plethora of future reparations redistributions, which, in the eyes of reparations opponents, would be simply too much. The tyranny of the majority argument concerns the efficacy of controls placed upon a democratic majority to ensure they do not exploit the minority.<sup>270</sup> If the judiciary recuses itself from meaningful review of reparations legislation, the argument would go, there would be nothing to stop a majority coalition from going too far. Both concerns are misguided.

Reparations Takings would constitute a much narrower set than economic development Takings. Unlike economic development, which continues throughout time and involves a theoretically infinite number of entities which could benefit from eminent domain, reparations concern only a small number of groups, a number which would quickly run out if reparations were pursued in earnest. In other words, because there are only a few

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fact that some black people are better off than some white people] is acknowledged, then the case for reparations is only moral primitivism: My interests are inextricably linked to my own kin group and directly rivalrous with yours, i.e., the very racism that this program is in theory intended to redress.”).

268. See Bethania Palma, *Is a 'Large-Scale Killing' of White Farmers Underway in South Africa?*, SNOPEs (Aug. 24, 2018), <https://www.snopes.com/fact-check/white-farmers-south-africa/> [<https://perma.cc/R3SH-ENEL>] (citing the Trump tweet, *supra* note 116).

269. See *Fallacies*, STAN. ENCYCLOPEDIA OF PHILOSOPHY § 1.15 (May 29, 2015), <https://plato.stanford.edu/entries/fallacies/> [<https://perma.cc/JZ89-GMRG>] (“The fallacy of the slippery slope generally takes the form that from a given starting point one can by a series of incremental inferences arrive at an undesirable conclusion, and because of this unwanted result, the initial starting point should be rejected. The kinds of inferences involved in the step-by-step argument can be causal . . . The weakness in this argument, the reason why it is a fallacy, lies in the second and third causal claims. The series of small steps that lead from an acceptable starting point to an unacceptable conclusion may also depend on vague terms rather than causal relations.” (emphasis omitted)).

270. See Edwin J. Feulner, *Preventing “the Tyranny of the Majority,”* HERITAGE FOUND. (Mar. 7, 2018), <https://www.heritage.org/conservatism/commentary/preventing-the-tyranny-the-majority> [<https://perma.cc/3274-88P8>] (describing bicameralism and small “r” republicanism as the Founding Fathers’ preempting of the tyranny of the majority).

demographics which could claim an injury redressable by reparations,<sup>271</sup> opportunities for reparations Takings would quickly run out—perhaps even after one piece of legislation. The Supreme Court upheld economic development as a potentially valid public use,<sup>272</sup> so the Court should uphold a rationale which is considerably narrower and more constrained than economic development.

It is possible that one piece of reparations legislation is unsatisfactory to its beneficiaries and the beneficiaries continue to demand further reparations for the same injury, constituting a slippery slope. In the first instance, this is an argument to be made to Congress itself in designing the reparations, not an argument against upholding reparations in court. There is nothing illegitimate about being unsatisfied with one legislative attempt and calling for another. A more serious worry would be whether repeated calls for reparations are a mere pretext for using the state for private enrichment. Here, Justice Kennedy's concurrence in *Kelo* is illuminating: Justice Kennedy points out that courts can use conventional trial methodology to sort out whether the stated goals of legislation are legitimate or merely pretextual.<sup>273</sup> The dissenting Justices objected that only legislation drafted by a "stupid staffer" would fail that test,<sup>274</sup> but that objection puts the cart before the horse. Courts can and should be rigorous in trial; the law should not assume a lack of judicial rigor before the fact. In any event, that objection was directed towards economic development Takings, which, as discussed above, are a much broader and more amorphous set than reparations Takings.

Finally, the basic reality that reparations are so extraordinary and uncommon assuages these concerns. The political success of a piece of reparations legislation will depend in large part upon the specificity of its articulation and upon the authenticity

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271. Assuming that Americans do not commit further atrocities warranting future reparations.

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

273. *Kelo v. City of New London*, 545 U.S. 469, 491–92 (2005) (Kennedy, J., concurring) (observing that the trial court considered testimony from government officials and corporate officers, documentary evidence and communications, the commitment of public funds by the State before the beneficiaries were known, *inter alia*, when the trial court upheld the development plan).

274. *Id.* at 502 (O'Connor, J., dissenting) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992)).

of the politicians carrying it forward. Any hints of using reparations merely to punish innocent white people or to enrich black people far beyond what is called for will seriously damage its political viability.<sup>275</sup> Furthermore, unlike in South Africa, historically oppressed people remain a minority. It is highly unlikely that upholding a reparations bill dealing with property or homeownership would lead to a tyrannical outcome.

### CONCLUSION

Reparations must certainly be backwards-looking, but they are also forward-looking in the sense that they can “creat[e] a sense of mutual, interracial trust, respect, and shared destiny.”<sup>276</sup> In deciding whether to defer to the legislature’s judgment, courts should remember the unique ability of legislatures to envision futures in their own communities. If it comes to pass that courts employ the market failure test to evaluate reparations, courts should remember the initial monopoly and the subsequent history of artificial barriers to effective market participation by African Americans.

The core concern of this Note is to prepare the judiciary to properly receive and evaluate an act of reparations. If that day comes, it will come after years of national self-reflection and reconciliation with our neighbors. Let us meet that day with humility and grace as the judiciary decides the fate of what might be our nation’s most serious effort to address our painful history.

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275. See generally Howard-Hassman, *supra* note 21 (cataloging the effectiveness of various narratives used to frame reparations and other civil rights claims).

276. Note, *supra* note 26.