

THE CONCEPTUAL CONUNDRUM AT THE CORE OF THE *KELO* DISSENT

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ABSTRACT

The “strict” public use requirement, articulated by Justice Thomas in his canonical Kelo dissent and adopted by a number of states in the wake of the decision, would bar any taking unless the condemned property would be owned, post-condemnation, by a governmental entity or a common carrier and “employed” directly by the public. Though purporting to establish a bright line rule, the test is highly indeterminate. Among other problems, it is impossible to determine what public “ownership” means, particularly when private parties may be bound (contractually or in fact) to use state-seized property in particular ways; equally impossible to determine when property is truly employed by the public, given that some members of the public will benefit from nominally “public” property and others will not, because they lack either the interest or capacity to use the property.

More bothersome than the test’s indeterminacy is that it is grounded in a profound misunderstanding of the functional nature of takings. Condemnations (alongside conventional monetary taxes and regulations) are simply ways of mustering resources the state controls (directly, by taxing-and-spending or condemning-and-using or indirectly, by regulating-and-directing). Constitutional takings law distinguishes compensable from non-compensable governmental actions to ensure that this power to garner resources is exercised so that no one is singled out to contribute an unfair share to government projects. “Public use” doctrine, on the other hand, at core regulates the

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functional “spending” power. It attempts to limit the ways in which the resources garnered through condemnation, a quasi-tax, are expended, regulating whether these resources are used on adequately public, rather than inappropriately parochial, projects.

For a host of compelling reasons, courts do not scrutinize conventional spending or regulatory programs to guarantee that they are adequately “public.” Supporters of the strict view of the public use requirement offer no persuasive functional reasons to hold condemnations to a higher standard of public use than traditional taxation or regulation. When resources are garnered through eminent domain, the conceptually muddied problem of unwarranted parochialism is not clearly resolved or even functionally addressed by a strict public use doctrine.

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INTRODUCTION

Few Supreme Court cases decided this millennium stirred as much passion as *Kelo v. City of New London*.¹ The Court's 5-4 decision, consistent with prevailing precedent at the time,² permitted the city of New London to use its eminent domain power to transfer homes from their owners to other private entities as part of an ultimately unsuccessful urban redevelopment plan. For our purposes, a simplified version of the conflict will do: Susette Kelo, a sympathetic homeowner in the path of the redevelopment plan, was forced out of her home in exchange for market value compensation³ so that Pfizer, a multinational private pharmaceutical company, could build a research facility on the land seized from her and her neighbors. Proponents of the redevelopment plan hoped that it would create jobs and bolster the tax revenue of a city in steep economic decline.⁴

The *case* may have gone the City's way, but those who levied a full-bore political attack in the decision's wake on using the eminent domain power in these sorts of economic redevelopment condemnation cases ultimately prevailed—both in the culture war and in the long-term political war. Justice Thomas and Justice O'Connor each wrote dissents at the Supreme Court level. But the Thomas dissent, which argued that that the eminent domain power could be exercised only when seized property would be used by the public (held by a state entity or a common carrier) after condemnation,⁵ triggered

1. 545 U.S. 469 (2005).

2. In the two leading twentieth century cases, *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court had held that property was taken “for public use” so long as the state entity had a public *purpose* in taking the property. See *Berman*, 348 U.S. at 28 (holding that property may be taken for public use based on identification of “blighted areas” under conditions “injurious to the public health, safety, morals, and welfare” of the District of Columbia); See *Haw. Hous. Auth.*, 467 U.S. 229, 233, 241–42 (1984) (permitting Hawaii's use of eminent domain to redistribute land in response to market factors that concentrated ownership).

3. *Kelo*, 545 U.S. at 475–76. Market value compensation almost surely did not fully indemnify her, in the sense that she was plainly *not* indifferent between condemnation with compensation and no condemnation.

4. *Id.* at 474–75. In the end, Kelo's land was *not* transferred to Pfizer or used for any other research and development office space for that matter; her property was simply never developed at all. See Alec Torres, *Nine Years after Kelo, the Seized Land is Empty*, NAT'L REV. (Feb. 5, 2014), <https://nationalreview.com/2014/02/nine-years-after-kelo-seized-land-empty-alec-torres/> (“After homeowners were forced off their property for the sake of ‘economic development,’ the city's original development deal fell apart, and the urban-renewal corporation that ordered the destruction has not found a developer to use the land.”).

5. See *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting) (“The most natural reading of the [Takings] Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose

both political mobilization against the majority decision and, ultimately, widespread legislative reform at the state level.

In terms of the partisan culture war, *Kelo* united the property rights-protective Right with nascent Occupy Wall Street anti-corporate Left populists. These groups rallied against centrist technocratic city planners, just as disdain for city planning had long united pro-market folks with communitarian Leftists who objected to planned cities on aesthetic, environmentalist, and egalitarian grounds.⁶ More significantly, *Kelo* sparked a wave of state judicial, constitutional, and legislative reforms, which attempted, in various ways, to reduce the use of eminent domain to transfer property to businesses⁷ who, it was alleged, would revitalize weak local economies only if the state assembled parcels for their use.

If Thomas's culture war triumph in *Kelo* foreshadowed the hollowing of the political Center in the face of attacks from both the populist Right and Left, that recognition alone justifies studying Thomas's dissent with an engaged and critical eye. But this article does not explore all of the symbolic and political meanings afoot. Instead, the goal of this article is to explain why the Thomas dissent, which rejects the majority's "public benefit" requirement and extols a "strict"

or necessity whatsoever.”).

6. See, e.g., JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 13 (1961) (“The pseudoscience of city planning and its companion, the art of city design, have not yet broken with the specious comfort of wishes, familiar superstitions, oversimplifications, and symbols, and have not yet embarked upon the adventure of probing the real world.”).

7. See Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 *ECOLOGICAL L.Q.* 703 (2011) (summarizing state-level anti-*Kelo* reforms and detailing notable examples). Some of the state reforms echoed the O'Connor dissent, which would permit condemnation where the condemnation itself met a broad public need, most particularly where the seized property was blighted, akin to a public nuisance. See *Kelo*, 545 U.S. at 497–98 (O'Connor, J., dissenting) (explaining that, separate from the “public ownership” and “use-by-the-public” categories of permissible takings, “in certain circumstances . . . takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use”). See, e.g., *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007) (adjudicating a claim under New Jersey law that allowed takings of “blighted areas”); IOWA CODE ANN. § 6A.22 (West 2018) (defining certain “acquisition[s] of property for redevelopment purposes and to eliminate slum or blighted conditions” as proper exercises of eminent domain). Other reforms enacted Justice Thomas's view by restricting eminent domain to cases in which the public would own or have access to the property after condemnation. See, e.g., TENN. CODE ANN. § 29-17-102(2) (West 2017) (defining “public use” to generally exclude private uses and the “indirect public benefits resulting from private economic development and private commercial enterprise”). Still others directly banned the use of the condemnation power to transfer property to a private owner for the purpose of economic development. See, e.g., ME. STAT. tit. 1, § 816 (2020) (generally prohibiting exercises of eminent domain to enhance tax revenue, promote commercial development, or transfer to individuals or for-profit businesses).

public use requirement, remains so unsatisfying as legal doctrine or as the basis of the public policy judgments embodied in post-*Kelo* state legislation.

This article will briefly review the Thomas dissent itself, but largely ignores the strengths and weaknesses of its specific arguments. Rather, this article observes and explores the implications of the opinion's deepest conceptual blind spot. What the dissent fails to recognize is that condemnations are, at core, exercises of the functional power to *tax*. They are merely one means through which the state can garner resources. And the *use* of condemned property, whether dubbed "public" or "private," like the use of money gathered through conventional taxation, is just one method of employing or spending these resources to meet the ends the state seeks to meet. Absent a good reason to differentiate the cases, we should police the use of condemned property in the same minimal way that we police the use of funds gathered through conventional taxation.

From the vantage point of functionalists (those who care far less about the ways in which we formally label legal actions than about how an action or rule affects social and economic life), takings law is about policing *taxation*. The taxing power is functionally the power to garner individual inhabitants' resources to meet state ends. Traditional exercises of the eminent domain power are just one method state entities use to gather resources used in public projects and should, like other exercise of the taxing power, be exercised so that the tax burden is borne equitably—no inhabitants should be singled out to contribute an unfair share of resources to government projects.

Take a simple case: When the state builds a road, it needs labor, concrete, and land. Taxpayers usually fund the cost of labor and purchase of concrete through taxes, and the relative impact on those who pay such taxes is regulated, if at all, outside the domain of takings law.⁸ On the other hand, taxpayers pay for the land only if the state either purchases it through voluntary exchange or if the state employs the eminent domain power (compelling a landowner to turn over her property) and has to compensate her for the value of the property taken. If, instead, land is seized without compensation, then some

8. See MARK KELMAN, *WHAT IS IN A NAME?* 125–26, 177–92 (2019) (discussing existing doctrinal limitations on Equal Protection clause-based constitutional restrictions on the maldistribution of tax burdens, and urging that the courts should be more aggressive in scrutinizing tax schemes under the Equal Protection clause to guard against unfair distribution of tax burdens).

landowners would bear a quasi-tax that similarly situated fellow inhabitants do not pay. This quasi-tax is imposed simply because the condemnees happened to own land in the path of proposed development; however, the Fifth Amendment's compensation requirement guards against the imposition of that unfair burden.⁹

But the state can also use *regulations* as a means of gathering resources for government projects: Governments may choose to pursue public goals by imposing a regulatory quasi-tax or by funding programs with tax dollars. For example, a local building code may require that buildings be constructed with costly fire-retardant materials or sprinklers. Such fire safety requirements garner resources initially from builders, although the costs are likely ultimately borne largely by buyers of housing services and commercial space. These safety expenditures decrease the risk of massive conflagration, just as taxes could fund more extensive public firefighting agencies to meet the same goal. Similarly, a regulation forbidding building in a flood plain forces an owner to sacrifice resources to diminish flood damage, just as a tax-and-spend based program to build a better levee would. A rent control program effectively transfers resources from landlords, forbidden to charge market rate rents to tenants, just as a housing voucher program would transfer resources from taxpayers to tenants. Judicial decisions requiring compensation in "regulatory takings" cases protect against the unfair distribution of regulatory compliance burdens.

From the vantage of those interested in function rather than form or label, "public use" doctrine regulates not the taxing power but the *spending* power. It attempts to limit the ways in which the resources garnered through these functional "quasi-taxes" are expended. It regulates whether these resources are utilized on an adequately public, rather than an inappropriately parochial, project. Even focusing narrowly on real property, the question of whether the state entity is making a public use of land does not depend on its manner of acquisition. The public use determination is independent of whether the state entity acquired the land through condemnation or a voluntary transaction.

Efforts to integrate these two policy concerns—guaranteeing fair distribution of tax burdens and limiting parochial uses of publicly

9. U.S. CONST. amend. V, cl. 4 ("[N]or shall private property be taken for public use, without just compensation.").

controlled resources—are far more difficult than Justice Thomas seems to recognize. Broadly speaking, this is the Thomas dissent's fatal flaw. Justice Thomas fails to adequately explain why a state's spending power must be tied to, and thus limited by, the source of the expended resources. Functionalists have no reason to care more about how resources acquired through condemnation than through direct taxation or regulatory quasi-taxes are used.¹⁰ Absent such an explanation, tying these issues together is wholly unreasonable.¹¹ Moreover, it is nearly impossible to determine whether *any* collective spending program is *truly* "public," should we conclude that we are constitutionally obliged to make that determination. Put simply, the benefits from collectively funded programs are never evenly distributed. This will be true even when the state uses resources (including condemned real property) to provide the quintessentially publicly owned goods Justice Thomas believes that the state is permitted to furnish using the property that it has taken.

Part I briefly addresses the textual and historical arguments that Justice Thomas relied on in his dissent. Then, it critically examines his functional, policy-based argument that a strict public use requirement is a significant bulwark that protects disempowered (often Black) homeowners from displacement at the behest of the politically powerful. Part II addresses the ambiguities and shortcomings in the dissent. For example, Justice Thomas fails to address the following: To what degree is a use adequately public when citizens vary in their ability to access and benefit from property nominally open to the public? What should we do when property seized by the state is then privatized, and how much public control over the private holder of the property is sufficient to meet the Thomas test? Does Justice Thomas

10. Source and use *can* be legitimately connected in some circumstances. For instance, it seems appropriate that those subject to benefits taxes (e.g. taxes levied on landowners to account for the costs of providing them with infrastructure) can insist that the benefits taxes are indeed used to pay for the infrastructure. The question I raise in this Article is whether there is any similar, plausible link between the tax form here (a taking of property) and the use (a particular sort of public use.) In Part III.B, I explore (and reject) some arguments that the type or level of the injury to a property owner whose property is condemned *does* depend on the use to which the property is put.

11. It also raises justiciability concerns: the problem is that condemnees in cases like *Kelo* are arguably not making a justiciable claim because the injury they experience from the Taking is in no way affected by the subsequent use of the property. See David L. Breau, Note, *A New Take on Public Use: Were Kelo and Lingle Nonjusticiable?*, 55 DUKE L.J. 835, 837 (2006) ("In *Kelo* and *Lingle*, the Court could plausibly have questioned the plaintiffs' standing to enjoin a violation of the Public Use Clause, because that violation would not exist but for the injury suffered by other citizens qua citizens, who were unable to seek judicial relief.").

intend that his public use test ought to function as a ban on state action in many regulatory takings cases where, to this point, we have simply required compensation to an affected owner when the value of her property is diminished by the regulation? Finally, Part III addresses, and rejects, four arguments that courts should scrutinize the use of condemned property more than they review the use of tax funds.

I. THE THOMAS DISSENT

The *Kelo* majority, consistent with prior Supreme Court case law, held that a transfer of the condemnee's property to a private entity was for a "public use" so long as it served a "public purpose," and more particularly for the specific redevelopment taking in *Kelo*, that the condemnation and transfer were part of a development plan calculated to further public interests.¹² The Thomas dissent urges instead that condemnations ought to be forbidden unless, after condemnation, the seized property is held by a state entity or a common carrier obliged to serve all members of the public. His dissent in *Kelo* relies on textual interpretation (i.e., how the words used in the constitutional text were understood by the text's readers at the time of constitutional ratification), an argument grounded in historical practice, and a policy argument.

A. Textual Argument

The textual argument is that the public use requirement in the Fifth Amendment¹³ should be read narrowly: Condemned property is not put to public *use* simply if it is used in a way that benefits the public, but rather that the "public" (defined as either the government or, more

12. See *Kelo v. City of New London*, 545 U.S. 469, 484–85 (2005) (concluding that the interest in developing the land at issue did not have "less of a public character" than the interests behind takings that the Court had upheld in previous cases).

13. U.S. CONST. amend. V ("Nor shall private property be taken for public use, without just compensation."). Some commentators have argued that the amendment was not intended to restrict the use of what was presumed to be a capacious sovereign power to take property, but merely to require compensation when the power was exercised. See Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings" Clause, 3 HASTINGS L.J. 1245, 1249 (2002) ("[T]he term 'public use' as used in the Fifth Amendment was meant to be descriptive, rather than proscriptive, and . . . [it] was not intended to operate as a substantive limitation on Congress's power to expropriate property."); Timothy J. Dowling, *How to Think about Kelo after the Shouting Stops*, 36 URB. LAW. 191, 194 (2006) ("Early constitutional commentators observed that the most striking feature of the public use language is the failure of the text to couch the reference as an affirmative restriction on eminent domain."). But see *Kelo*, 545 U.S. at 507 (Thomas, J., dissenting) (arguing that the public use language would be uninterpretable surplusage unless meant to limit governmental power).

ambiguously, “citizens as a whole”) must actually “employ” the taken property.¹⁴ Thus, the taking is permissible only if, post-condemnation, the government (or a private entity with common carrier obligations) owns the seized property.¹⁵ There is a good deal of academic debate over both the range of meanings the word “use” had during the Founding era and over Justice Thomas’s claim that the narrow meaning is most sensible in this context.¹⁶

B. Historical Practice Argument

The historical practice argument is partly based on the idea that the states’ early eminent domain practice “liquidates” the original text of the Fifth Amendment, permitting us to see more clearly how the ratifying public likely read the constitutional text, particularly when state constitutions employed the same language.¹⁷ In this regard, Justice Thomas claims that states used the eminent domain power almost exclusively for “quintessentially public goods” (like roads, canals, railroads and parks) or when granting land rights to common carriers (private entities that were legally bound to serve all members of the public).¹⁸ Leave aside, for now, one of the difficult conceptual questions

14. See *Kelo*, 545 U.S. at 508 (“When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is ‘employing’ the property, regardless of the incidental benefits that might accrue to the public from the private use.”).

15. See *id.* at 510 (“The Constitution’s text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.”).

16. See, e.g., Emily A. Johnson, *Reconciling Originalism and the History of the Public Use Clause*, 79 *FORDHAM L. REV.* 265, 286–87 (2010) (noting that originalists employ the eighteenth century definition of “use” to argue for both broad and strict interpretations of the Takings Clause); David L. Breaux, *Justice Thomas’ Kelo Dissent, or, “History as a Grab Bag of Principles,”* 38 *MCGEORGE L. REV.* 373, 376 (2007) (arguing that the language of the Takings Clause does not clearly provide that the public must use the property); Buckner F. Melton, Jr., *Eminent Domain, “Public Use,” and the Conundrum of Original Intent*, 36 *NAT. RESOURCES J.* 59, 85 (1996) (making an original “public meaning” argument that the Framers intended the words “public use” to mean “public benefit”); see also Dowling, *supra* note 13, at 194–95 (asserting that broad meanings of public use reflected common parlance and were prevalent in major legal commentaries on which the Framers relied).

As I note once again in Part III, below, I have little to add either to the general debate over the propriety of originalism as a guide to constitutional adjudication or to the particular debates in the public use context over either the meaning of the text or the contours of historical practice. This Article is focused on a functional, policy-driven interpretation of the public use requirement. For constitutional originalists, one should think of my audience as state legislators considering adopting the Thomas dissent as statutory law or constitutional amendment.

17. See William Baude, *Constitutional Liquidation*, 71 *STAN. L. REV.* 1, 62 (2019) (clarifying that although Founding Era practice is “not given privileged place by the theory of liquidation,” their decisions should get some extra consideration as elucidating ambiguous original meaning).

18. *Kelo*, 545 U.S. at 511–14 (Thomas, J., dissenting).

confronted later in the Article: In what sense is *any* road (or other “public” facility for that matter) truly a public facility in the sense that its benefits are distributed in anything resembling a *pro rata* fashion to members of the community? There is still considerable debate about whether the late nineteenth-century practices that most plainly violate Justice Thomas’s precepts¹⁹ should count as either evidence of the initial understanding of the constitutional language or give guidance to those who believe historical practice is relevant to understanding our constitutional traditions. Questions also remain about whether Justice Thomas has interpreted the earlier nineteenth century evidence properly.²⁰

C. “Policy” – *Protecting the Powerless from Displacement? Of property rights protection, public choice, and anti-subordination*

At the very end of his dissent, Justice Thomas adopts a more functionalist interpretive approach—focusing primarily on the *consequences* of alternative interpretations of “public use” under the Fifth Amendment.²¹ His functionalist argument is that a narrow view of the public use requirement is essential, lest powerful private parties expropriate the property (particularly, the homes) of the powerless. His account of power disparities appeals first to public choice theorists often associated with the political Right. Under the public choice theory, well-organized rent-seeking constituencies, seeking a highly

19. See, e.g., *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (permitting the condemnation of property to be used by a mining company to run an aerial ore-transporting bucket line over the condemnee’s property, but noting “the inadequacy of use by the general public as a universal test”); Johnson, *supra* note 16, at 319 (arguing that the *Kelo* majority best captures the appropriate historical understanding of “public use” when it remits decisions about limitations on the condemnation power to the states.); Jonathan Lahn, *The Uses of History in the Supreme Court’s Takings Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233, 1247–58 (2006) (challenging Thomas’s uses of history by summarizing evidence from Colonial government practice and Mill Acts, which permitted owners of private mills to destroy private property held by other private owners).

20. To the extent that early state practice is not just a guide to textual interpretation but an expositor of “American tradition,” it is hard to argue that the Court should be especially strict in protecting owners against condemnations. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* at 64–65 (1977) (noting that only a small handful of state constitutions addressed the takings issue at all at the time of the Framing, and that most states often seized property *without* any compensation well into the nineteenth century).

21. I strongly suspect that these policy arguments are *not* the arguments that mattered most to Justice Thomas himself. Instead, I believe that he relied most on the textualist arguments. Since *this* essay is more policy-focused, in significant part because it is concerned with state legislation that is consonant with the *Kelo* dissent’s ideals, I focus more on this aspect of the decision. Moreover, as I said, I have nothing interesting to add to the textual and historical debates that I noted in notes 16 and 19.

concentrated benefit, will exploit those less able to organize—typically because of vulnerability to free rider problems that diffuse citizens with similar interests face in organizing. But the argument's emphasis on protecting the vulnerable also appeals to anti-subordination theorists usually associated with the political Left. Working class and poor folk, and even more pointedly, people of color, will get trampled upon by the elite when they happen to own land the elite desires. Justice Thomas throws in a dash of anti-technocratic, anti-economic efficiency language that appeals to libertarians and Leftists alike: The specter of forced transfer of land from any low-valued to any higher-valued use (just to increase tax hauls) looms large.²²

D. Alternative mechanisms of displacement: public uses and private forces

Whatever one makes of the history of “urban renewal” or “economic development” planning,²³ the connection between narrowing the public use doctrine and protectiveness of the displaced is, at best, imperfect.²⁴ While excoriating the majority for perpetuating racial bias, Thomas notes that Black communities in St. Paul, Minnesota

22. See *Kelo*, 545 U.S. at 521–22 (Thomas, J., dissenting) (“[The losses from the broad public purpose test] will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. . . The deferential standard this Court has adopted for the Public Use Clause encourages ‘those citizens with disproportionate influence and power in the political process, including large corporations and development firms’ to victimize the weak Of all the families displaced by urban renewal from 1949 to 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of white had incomes low enough to qualify for public housing” (internal citations omitted)).

23. For a relatively negative view of urban renewal projects that nonetheless adverts to a number of more successful projects as well, see generally Amy Levine, *Urban Renewal and the Story of Berman v. Parker*, 42 THE URBAN LAWYER 423 (2010). Levine is plainly wary of the deference courts showed to these plans. *Id.* at 425 (“The governmental goals of blight removal and redevelopment were not inherently bad. . . . But the Supreme Court’s extreme deference allowed urban renewal projects to go forward across the country with an astonishing lack of attention to the welfare of the people that the programs were supposed to benefit.”). Far and away the most sophisticated view in the legal literature of the virtues of well-executed economic development plans—presented alongside a strongly justified claim that the sorts of development plans and condemnation schemes the dissenters in *Kelo* excoriate were far more common in the middle of the twentieth century than they were by the turn of the millennium when the case was decided—can be found in Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 59 ECOLOGY L.Q. 1 (2007). Mihaly points, for instance, to two quite beneficial redevelopment projects in San Francisco in which private owners received some condemned land (the Ferry Building project and the Gap Headquarters project) that could not have succeeded absent the use of eminent domain, given holdout problems. *Id.* at 28–32.

24. See, e.g., Julia D. Mahoney, *Kelo’s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 124 (2005) (“Thomas does not explain whether or how his favored interpretation would protect those imperiled by eminent domain.”).

and Baltimore, Maryland were wiped out by the use of eminent domain.²⁵ However, he fails to explain how that history is relevant to his dissent because these communities were destroyed not by economic development plans but by public works projects that, ironically, are plainly acceptable under the Thomas test. More generally, the interstate highway program, though creating manifestly “public uses” in Thomas’s sense, frequently displaced poor Black families and destroyed Black communities;²⁶ this racist legacy of the highway programs was often highlighted by Anthony Foxx, President Obama’s last Transportation Secretary.²⁷

Meanwhile, and of enormous moment, Thomas shows little concern for homeowner displacement and the destruction of neighborhoods that occur through the operation of unfettered market forces,²⁸ including gentrification.²⁹ Consider the poster child case for opponents

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

26. See Caitlin Dewey, *Advocates Rally to Tear Down Highways that Bulldozed Black Neighborhoods*, PEW STATELINE (July 28, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/28/advocates-rally-to-tear-down-highways-that-bulldozed-black-neighborhoods>; Scott Beyer, *How the US Government Destroyed Black Neighborhoods*, CATALYST (April 2, 2020), catalyst.independent.org/2020/04/02/how-the-u-s-government-destroyed-black-neighborhoods; Alena Samuels, *The Role of Highways in American Poverty*, THE ATLANTIC (March 18, 2016), <https://www.theatlantic.com/business/archive/2016/03/role-of-highways-in-american-poverty/474282/>.

27. See, e.g., Sarafina Wright, *Highways ruined Black communities, says Transportation chief*, THE LA. WEEKLY (Apr. 11, 2016), www.louisianaweekly.com/highways-ruined-black-communities-says-transportation-chief/ (“In place after place, highways cut the heart out of low-income and minority communities.”).

28. See Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751, 1760–61 (2015) (analyzing a survey of Milwaukee renters finding that one in eight had lost his or her home “involuntarily” within the past two years – through formal or informal eviction, property condemnation for non-payment of taxes or blight – and noting further that involuntarily-displaced renters often moved to worse neighborhoods, and that outcomes were worse for Black and Latinx renters than for white renters). In Mihaly’s account of successful private-public redevelopment plans in San Francisco, he notes that had the City simply allowed market forces to go unfettered, landlords in the Yerba Buena area adjacent to the downtown commercial district would simply have sold to office developers, displacing thousands of tenants, while the Yerba Buena mixed private-public redevelopment plan not only created lots of traditionally valued public facilities (e.g. parks, playgrounds, two museums) but also displaced fewer lower income tenants than would likely have been displaced through unconstrained market forces: 1400 of the 2500 units of new housing built in the project were reserved for low-income tenants. Mihaly, *supra* note 23, at 20.

29. See generally Miriam Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLANNING LIT. 31 (2018) (summarizing the debates over the meaning of gentrification and the meaning of displacement and looking at distinct empirical measures of the impact of “gentrification” on incumbents). The quick response by those unbothered by this aspect of Thomas’s opinion might be that gentrification occurs only through voluntary sale so that no one “loses” but, instead, merely voluntarily exchanges her home for the proffered offering price. But *renters* can lose long-occupied homes without compensation, and homeowners may not

of economic development takings that preceded the New London redevelopment plan litigated in *Kelo*: Detroit's condemnation of private homes and businesses in Poletown.³⁰ The land was condemned and refurbished at a total cost to the city of more than \$200 million and then sold for a mere \$8 million to General Motors, which built an auto plant on the assembled parcel.³¹ The land was not only condemned for GM's benefit, it was effectively *given* to GM, alongside tax abatements. Furthermore, the City did not bind GM by contract to provide any particular number of jobs or to ensure that jobs were held by particular classes of people. Other aspects of this condemnation are discussed below. But for now, the critical issue is the blind hypocrisy of those who claim to "protect" communities from eminent domain while ignoring the market and non-governmental forces that are at least as disruptive.

Those who decry the horrific impact of eminent domain typically idealize the Poletown community and emphasize the disruption that the takings caused while ignoring disruptions caused by other forces that had already occurred. Here's an entirely typical sentimental statement from the era: "The neighborhood selected for the new plant, however, was a rare commodity in an urban environment: a stable, integrated area that in many ways harkened back to the close-knit ethnic communities that characterized Detroit's past."³² True, many individuals living in Poletown's Central Industrial Park (CIP)

adequately account for the negative externalities they generate when they sell (nor are they able to capture positive externalities from preserving a historic neighborhood absent coordination). Moreover, while most homeowners whose property is condemned may well be *under*compensated, they do not simply suffer *un*compensated "losses."

30. See generally JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1990) (chronicling the "horror" of the destruction of the neighborhood as a central theme).

31. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 469 (Mich. 1981) (Ryan, J., dissenting).

32. David R.E. Aludjeh, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 ECOLOGY L.Q. 671, 673–74 (1988). Here are some other examples of the over-sentimentalized blindness to Poletown's pre-condemnation collapse: "Before GM, Poletown was a thriving neighborhood" and "a vibrant ethnic neighborhood . . ." Aaron Foley, *In retrospect, GM's Poletown plant was a petty terrible idea if we're being honest*, THE NEIGHBORHOODS, <https://theneighborhoods.org/story/retrospect-gms-poletown-plant-was-pretty-terrible-idea-if-were-being-honest> (last visited Jan. 25, 2021). "[Poletown's] residents were working class people who had jobs in nearby factories and quietly went about the business of pursuing the American dream. . . . Poletown was a living, breathing neighborhood that more than 3,000 people called home." Carla T. Main, *How Eminent Domain Ran Amok*, REAL CLEAR POLS. (Oct. 22, 2005), https://www.realclearpolitics.com/Commentary/com-10_21_05_CTM.html. Poletown is "one of many viable lower-class urban neighborhoods destroyed . . . by city governments' use of eminent domain." Derek Shearer, *Poletown: Community Destroyed*, MULTINATIONAL MONITOR (Feb. 1991), <https://www.multinationalmonitor.org/hyper/issues/1990/01/shearer.html>.

neighborhood targeted for redevelopment were profoundly upset to be displaced by the condemnations, and many people thought highly of the neighborhood. But far more people exited the neighborhood due to extra-governmental forces than were displaced by the condemnation and redevelopment plan: Between 1970 and 1980, the population in the CIP had declined by about two-thirds, from 15,188 to 5,885.³³ More than 9,000 people had already been “displaced”—compared to the 4,200 who lost their homes to make way for the GM plant.³⁴ And unlike the “victims” of eminent domain, many of those who left in the 1970s left without any compensation because the homes in the neighborhood often were not sellable. Indeed, a full one-third of the homes in this sentimentalized area were abandoned at the time of the GM-related condemnations.³⁵

Again, there is no doubt that many CIP residents were deeply upset to see their neighborhood razed. For example, the Poletown Neighborhood Council not only sued but also organized significant protests, and many (though by no means *all*) of the protesters were community residents. But the evidence on the whole strongly suggests that a majority of the residents were happy to get out of a dilapidated neighborhood,³⁶ and that most remaining residents had not left yet because they lacked the resources to do so without the condemnation awards. First, 90 percent of the homeowners in the CIP voluntarily accepted the City’s offers to purchase their homes (and get relocation bonuses and assistance).³⁷ Of course, those voluntary acceptances alone are not conclusive evidence of community residents’ preferences, given that their homes would ultimately be condemned if they did not sell prior to condemnation.³⁸ But of the 160 who refused, only ninety-five

33. U.S. GOV’T ACCOUNTABILITY OFF., GAO/RCED-90-48FS, INFORMATION ON RESIDENT AND BUSINESS RELOCATION FROM POLETOWN PROJECT 2, 10 (1989).

34. *Id.* Rates of population decline in the CIP were even higher than they were in Poletown generally; the CIP lost 61% of its population in the decade, compared to 37% in the Poletown area more generally. *Id.*

35. *Id.* at 13.

36. *See id.* at 36 (“The two surveys of relocated residents indicated that a majority of those residents believed the move was beneficial. They liked their new homes and believed the city had treated them fairly.”).

37. *Id.* at 16.

38. *See* David A. Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, 32 VT. L. REV. 129, 135–36 (2007) (“In cases of land assembly in the shadow of a plausible threat that eminent domain will be employed by government officials to facilitate land assembly for development purposes, it is reasonable to assume that—indeed, developers confirm as much—land acquisition negotiations are affected and facilitated by that threat.”).

sued to stop the condemnation, and sixty-five simply sued to be compensated *more*.³⁹ Second, and far more significantly, the survey data strongly supports the conclusion that for the vast majority, leaving (and the opportunity to leave afforded by the condemnation and relocation assistance awards) was a boon, not a trauma. A full 85 percent of CIP residents over sixty years-old thought the condemnation-induced move had proven positive, as did 62 percent of those between eighteen and fifty-nine.⁴⁰ One of the obvious reasons for their satisfaction is that this purportedly joyous “rare” and “stable” throwback community was nothing of the sort. Indeed, more than 60 percent of respondents felt, at the time of the condemnations, that crime was a serious problem.⁴¹ Nearly the same percentage of people identified abandonment, dilapidated buildings, roaming dogs, and inadequate maintenance as serious problems plaguing Poletown.⁴² The ability to move to areas where fewer than 10 percent of respondents thought that crime was a serious problem was a welcome development.⁴³

Unfortunately, there is no study of the Fort Trumbull neighborhood of New London similar to the GAO Poletown study, so it is hard to say how residents of the felt about the condemnations at issue in *Kelo*. The Poletown data, though, should make legislators considering restrictions on eminent domain wary of claims that condemnation, rather than economic decline, is the most significant driver of displacement. Thus, policy makers should be vigilant and recognize when residents on the whole, rather than a sub-set of resisters, would welcome a condemnation award and a concomitant opportunity to exit a declining area.

II. AMBIGUITIES AND SHORTCOMINGS IN THE DISSENT

While Justice Thomas might well believe that his test establishes a fairly bright-line rule to distinguish permissible from impermissible uses of the condemnation power, his rule permitting the government to take property only when the public will employ or have access to the condemned property or when the government or common carrier “owns” the property after condemnation is far more ambiguous and

39. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 33, at 16.

40. *Id.* at 19.

41. *Id.* at 20.

42. *Id.* at 20–21.

43. *Id.* at 19–20.

indeterminate than he acknowledges. That is in part because it is unclear what it means to say that the “public” has access to property when access is incomplete (e.g., available only at a price that some would or could not pay) or the benefits of access unevenly distributed. It is unclear as well when the public can be said to “own” property if state actors “substantially control” nominally privately owned property. Finally, it is unclear what it might even mean for the public to own or have access to condemned property in most cases involving regulatory takings claims in which the owner retains some rights in relationship to her property (like landlords forbidden to charge market rents or landowners subject to what they see as hyper-restrictive zoning regulations), but its use or disposition is restricted in some way that substantially diminishes its value to the owner.

A. Incomplete public access and unevenly distributed public benefit

The *Kelo* majority spotted some of the facially obvious and significant ambiguities in the Thomas dissent—problems of application that have remained fundamentally insoluble. If condemned property must be put to public use, what does it mean, practically speaking, for the public to “make use” of the property? What proportion of the public need have access to the property? At what price?⁴⁴ (The “price” question must be a stand-in-for the question, “is something truly open to the public unless access is free?” since presumably *some* would-be users would be deterred from use by any positive price).⁴⁵

The common carrier cases raise both questions directly: Common carriers may be legally obliged to serve all members of the public who can pay to use their services, but many members of the public may have neither realistic access to the common carrier nor an ability (or willingness) to pay. The same is true of quintessentially public National Parks, which can and do charge entrance fees, and which are located in places far more accessible to some members of the public than to others.⁴⁶ Consider also the use of eminent domain to acquire land to

44. *Kelo v. City of New London*, 545 U.S. 469, 479 (2005).

45. *See id.* at 479 (“Not only was the ‘use by the public’ test difficult to answer (e.g., what proportion of the public need have access to the property? At what price?), but it proved to be impractical given the diverse and always evolving needs of society.” (cleaned up)).

46. *See, e.g., Entrance Fees and Where to Get Your Park Passes for Yosemite*, MY YOSEMITE PARK (Nov. 18, 2019), <https://www.myyosemitepark.com/park/entrance-fees> (indicating that Yosemite charges \$35 for a vehicle to enter). One could argue that the public generally benefits either from the existence value or option value of preserving National Park land, but even as to existence value or option value, willingness to pay would certainly be quite heterogeneous. Existence value, however, *is* a non-rivalrous, non-exclusive good.

build either publicly owned or privately owned sports stadiums. Justice O'Connor mentions stadiums in her *Kelo* dissent as plainly acceptable public projects, presumably not only because most are nominally publicly owned, but because, like any common carrier, they are "open to the public"—at least the portion of the public who are willing and able to pay a fee.⁴⁷ But, of course, fees to attend professional football games surely preclude many, if not most, members of the public from using the facility situated on the condemned property. Those unable to pay ticket prices are physically excluded even if (in the more diffuse sense contemplated by the "public benefit" test) they are happy to have a local team to root for or made better off because the team's presence generates economic activity.

These conventional common carrier cases pose a still-bigger conceptual problem that the majority ignores in its critique: Some people benefit a good deal from public projects, while others simply do not. This problem plainly applies to the standard public infrastructure cases (e.g., roads) that lack a critical defining feature of what economists would think of as pure public goods: People *can* be excluded from using or enjoying a road or public park so that these are not "non-exclusive" goods in the way a pure public good is. When a road is extended, the primary beneficiaries of the extension are landowners, residents, and business owners and customers in the area that will be served by the road—even if the road is formally open to the innumerable inhabitants of the jurisdiction who may never use it directly⁴⁸ and who benefit from its existence in precisely the same way that they could benefit from economic redevelopment projects.⁴⁹

47. See *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting) ("[T]he sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium.").

48. In response Justice Thomas asserts that there is public access so long as all *similarly situated members of the public* have access. See *id.* at 515 (Thomas, J., dissenting) ("Thus, the 'public' did have the right to use the irrigation ditch because all similarly situated members of the public—those who owned lands irrigated by the ditch—had a right to use it."). But this is a puzzling and unpersuasive assertion; all *similarly situated* members of the New London community—e.g., those who work at Pfizer—have access to Pfizer buildings and those who are differently situated (not owning land near the ditch, not doing business with Pfizer) do not. It is unlikely that Justice Thomas would find state laws permitting landlocked owners to condemn easements over a neighbor's property any more acceptable in situations in which multiple parties were landlocked and all of these similarly situated landlocked parties could avail themselves of the same easement.

49. The facts of *City of Omaha v. Tract No. 1*, 778 N.W.2d 122 (Neb. Ct. App. 2010), decided under a post-*Kelo* state reform statute, are instructive. The condemnees complained that the City could not take land to build a decelerator lane for traffic necessitated entirely by the construction of a store owned by a particular "well-known national retailer." And, of course, it is the retailer and that retailer's customers alone who directly benefit from the decelerator lane. And the private

But even the benefits from goods that economists would plainly define as non-exclusive, pure public goods (like the national defense, clean air, street lighting)⁵⁰ are likewise unevenly distributed. The nation's missile defense systems aid those who live in areas more vulnerable to missile attack more than those who do not. The value of cleaner air in any location depends on distinctions in health status and sensitivity to pollution. The value of clean air *projects* further depends on the baseline vulnerability of a particular region's air to degradation.

One might imagine arguing in the roads case that while most members of the public make no use of a particular road, the road system writ large is publicly used. Under Justice Thomas's narrow view of public use, the fact that a project is part of a system of projects likely to be reasonably beneficial to most members of the public is insufficient to justify the use of eminent domain.⁵¹ An argument

purpose – and doubtless the private impetus for the decelerator lane – are most transparent here because the lane is *added* to an existing road system. But, of course, *any* road system selectively benefits landowners adjacent to the roads (and the retailers who open up there, or the producers who ship products more cheaply because the road system exists). The Nebraska court nonetheless sustained the taking – finding that “as a matter of law . . . construction for traffic control and safety purposes does not constitute an ‘economic development purpose . . .’” *Id.* at 125.

50. These are public goods from the vantage of mainstream economists both in the sense that they are non-rivalrous (consumption of the good by one party does not diminish the capacity of others to consume it) and in the sense that full-bore exclusion of some members of the public from enjoying the good is impossible.

51. Justice Ryan, in his renowned dissent in the Poletown case, did seem to feel that developing infrastructure of use to the public—whether actually used by all members of the public or not—is legitimate even though plainly *justified* at bottom by its role in diffuse economic development. See *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 645 (Mich. 1981) (Ryan, J., dissenting). He describes privately owned infrastructure that serves as what he calls an “instrumentality of commerce” as an exception or qualification to the rule that the state cannot meet its economic development goals through transferring condemned property to private entities, *id.* at 670–71, but does not really satisfactorily explain why he thinks the exception is in any sense principled: His efforts, *id.* at 674–81, are all off-point. His first argument fundamentally echoes Professor Merrill's argument that the public use doctrine should focus on the public necessity of using condemnation (the means) rather than the ends to which condemned property is put and emphasizes that the condemnation power should only be used to overcome hold-out problems. See generally Thomas A. Merrill, *Economics of Public Use*, 72 CORNELL L. REV. 61 (1986). Justice Ryan's argument is that in the instrumentalities of commerce cases, collective action is indispensable. The argument is wholly ungrounded; hold-out problems are just as likely to be present in the *Kelo* situation as in the case where land is acquired for a privately owned canal or railroad. And the second argument – that there is greater ongoing accountability in cases in which the private owner creates an “instrumentality of commerce” – is wholly contingent; levels of regulation of railroads and canals could be strict or minimal, contractual arrangements with private corporations in economic development cases can also vary widely. And the final criteria – that the land is selected without regard to the wishes of a particular developer – seems not to distinguish the cases either: irrigation and road projects can be sought by particular interests, and one could describe GM (or the UAW, another strong supporter of the project) in Poletown as merely pointing out a fact about modern automobile production, not a fact about their particular

focused on systemic or distributed benefits is neither plainly germane nor even true. It is not germane because the relevant question for Justice Thomas in cases like *Kelo* is whether the use of the condemnee's land *in particular* is adequately public. The question is not whether the use of similar land for like projects would benefit enough people to count as "public use." If a distributed benefit is insufficient to render the project in *Kelo* "public," it ought to be insufficient to render the construction of particular roads adequately public just because the public at large would benefit if the state entity built a string of different roads. Worse still, arguments focused on the systemic benefits of infrastructure development are not even true in the sense that some people make far less use of infrastructure generally than others do.

If the point of the "public use" requirement is to prevent the use of property on unduly parochial projects, then Thomas's test will be useless. It is always the case that public projects help some citizens far more than they help others. Ownership by the state or a common carrier by no means guarantees that the benefits of a project are enjoyed evenly or enjoyed at all by many.

B. Privatization and questions of adequate government "control"

The Thomas dissent also fails to confront whether privatized facilities built on state-condemned land satisfy his public use or ownership test. Start with a simple case: It is clear that a state could use its eminent domain power to procure land for a prison or jail.⁵² But what would Thomas say we should do if the state seeks to seize land for a *privatized* prison, or if the state transfers control of a public facility to a private operator?⁵³ There are innumerable critiques of private

interests – that production occurs only in horizontal, large parcel plants. More generally, it might well be true that infrastructure development generally is of use to members of the public regardless of their specific uses, but it simply is not true that the extension of infrastructure facilitated by any particular condemnation plays anything like that role.

52. See, e.g., Diana Berliner, *Public Power, Private Gain*, INST. FOR JUST. 1, 1 (2003) ("To most people, the meaning of 'public use' is fairly obvious—things like highways, bridges, *prisons*, and courts." (emphasis added)).

53. It cannot be that those on the political Right most virulently in favor of narrowly construing "public use" would think it appropriate to stand in the way of privatization of public service delivery by barring a Taking simply because a private entity operated a facility traditionally owned and managed by the state. Conservative and libertarian commentators have strongly advocated privatization of previously state-owned or operated enterprises of various forms, arguing particularly that the world-wide privatization wave that began with privatization in the UK during the Conservative Thatcher regime in the 1980s has been an important source of economic progress. See generally Chris Edwards, *Margaret Thatcher's Privatization Legacy*, 37 CATO J. 89 (2017) (arguing that privatization of public service delivery under Margaret Thatcher's

prisons,⁵⁴ but it is unfathomable that the validity of condemnation would turn on whether the condemned property was used by the state itself to deliver a service or whether the land was used by a private entity that the state had entrusted with delivering that same service.⁵⁵ Thomas’s test demands that the public either “uses” or “owns” condemned property, but a private prison is not unambiguously used by the public in the sense that all members of the public have access to the prison land. Furthermore, trying to answer the question of whether the public “owns” the land only reveals what a hopeless task it is to determine when the state retains enough rights over property to dub the state an “owner.”⁵⁶

One could argue that so long as the state *leases* the condemned property to the privatized operator, it remains a formal owner because it retains a reversion interest in the property. But in many cases, the state’s reversion interest is close to economically worthless. (e.g., cases in which tenants have long-term leases or renewal options). State and local governments regularly enter into such long-term lease agreements with operators of sports stadiums. And private developers in economic redevelopment plans often lease the land the city has condemned.⁵⁷ In some cases (like Poletown), private developers buy fee interests in the condemned land, often at a subsidized price. In the Poletown example, would GM have cared whether it got a fee interest in the land seized by Detroit rather than a long-term or renewable lease to build its plant? If private entities are often indifferent between being dubbed tenants and being dubbed owners—they have fundamentally the same levels of control and the same economic interests whether they lease or own—then it would be preposterous to think that states satisfy Thomas’s public ownership requirement merely by leasing out the land to a private user. That the private user would be “no more” than a “mere” tenant should be of no determinative consequence.

conservative government spurred economic growth).

54. See generally, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L. J. 437 (2005).

55. See James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 865 (2004) (noting that a public use test of the form that Justice Thomas articulates creates unwise incentives to disdain privatization).

56. See Mihaly, *supra* note 23, at 39 (“The increasing sophistication of the public-private relationship renders the public-private ownership distinction even more uncertain.”).

57. See DAVID F. BEATTY ET. AL., *REDEVELOPMENT IN CALIFORNIA* 153 (2d. ed. 1995) (noting that ground leases are typically used in these plans to reduce upfront costs for developers and to enable redevelopment agencies to maintain a measure of control over a project after completion).

Perhaps a better way to ensure public use is for the state to lease or sell the property to a private party under terms that “adequately” direct the uses the lessee or fee owner can make of the property. Such contractual terms limit private discretion and instead require that private entities serve government ends. The concern addressed by specifying uses in contract is that we do not want to authorize a taking unless the state exercises “enough” control to be classified as an “owner.” In this regard, what makes the common carrier cases relatively easy for Justice Thomas is not so much that the public makes use of the property, but that the state regulates the common carrier. And, more obviously, privatized prisons operate under state supervision, and most sports stadium leases specify both permissible and impermissible uses that can be made of the stadium. If we believe what makes the public an “owner” of property in the relevant sense is that it determines how the property is used, then directly looking at the degree of control the state retains over how property is used might be the best way to implement Thomas’s vague “state ownership” test.

This control-focused approach is in some ways problematic, and to some degree is precisely what Justice Kennedy’s concurrence, and perhaps even the majority in *Kelo*, demands anyway. It is not clear why we should accept what otherwise seems like a substantively non-public project just because the state contracts with a private party to put such a project into place. Assume that one accepts the proposition that a municipal airport, which accommodates only private planes, or a marina used only by owners of expensive pleasure boats is truly a public project. Assume further that we would forbid the use of eminent domain to assemble a parcel to be handed over to a private marina operator or private airport owner. The idea that we rid the project of its fundamentally private character because the *state* specifies that a fundamentally private use will be made is unappealing. Or, to use examples closer to the heart of the *Kelo* dissenters, if Detroit had explicitly contracted with GM to employ a particular number of people or to attract satellite businesses, then Justice Thomas would probably remain unsatisfied. At the same time, it is unclear why the private prison (and even more clearly, the sports stadium) and the contractually limited GM cases are really so different.

Moreover, it is unclear when a state entity has imposed “enough” conditions in transferring property to a private party to be what Justices O’Connor or Thomas would deem an owner (assuming the sort of contractual direction we would typically see in privatized prison cases

suffices). Of course, to the degree that the state entity specifies more precisely how the land grantee must behave and can realistically enforce the contractual terms, there is a greater chance that the project will satisfy the public *purpose* requirement. As a matter of policy, Detroit almost certainly should have insisted on more punitive provisions—not only in the transfer of condemned land to GM at the bargain price of \$8 million, but also in the property tax abatement deals. Contractual penalties for non-performance of its public purpose would have either given stronger incentives for the company to meet certain employment goals or at least returned some of the subsidy to the City if the company had failed to do so. And as a matter of optimal redevelopment policy, state entities should always employ redevelopment plans that demand private developers meet community goals (e.g., by paying living wages, employing a certain number of people who live locally, revitalizing infrastructure in impoverished areas proximate to the redevelopment).⁵⁸

Detailed and enforceable obligations may be best practice, but it is unclear precisely how much detail there must be in a contract before *a court* can conclude that the state entity has failed to do “enough” to adequately protect its interests or to be “sure enough” (given inevitable economic uncertainties) that the project will meet the ends the state entity seeks to meet. Looking back with the benefit of nearly four decades of hindsight at the Poletown condemnation, we might readily conclude that GM *never* employed as many workers as it promised (peak employment was about 3,000 at the plant itself, and 1,500 at the time company announced in 2018 that the plant would close, though the company initially promised closer to 6,000 jobs).⁵⁹ Even so, it is not obvious that the deal was a bad one for the City. While it appeared that the plant would close in early 2020,⁶⁰ it now appears that it will stay open, employing more than two thousand workers to assemble new

58. See, e.g., Aaron Mondry, *Equitable development across America: How other cities won community benefits*, MODEL D (July 24, 2018), www.modeldmedia.com/features/equitable-development-usa-072318.aspx (detailing development plans in Oakland, Milwaukee, and Pittsburgh that contractually mandated, rather than merely anticipated, the realization of publicly important target goals).

59. Tom Gantert, *A Cautionary Tale About Job Promises and Corporate Subsidies*, MICH. CAP. CONFIDENTIAL (Dec. 18, 2019), <https://www.michigancongress.com/a-cautionary-tale-about-job-promises-and-corporate-subsidies>.

60. See Jamie L. LaReau, *GM: Detroit-Hamtramck plant to stay open 7 months longer than planned*, DETROIT FREE PRESS (Feb. 22, 2019), <https://www.freep.com/story/money/cars/general-motors/2019/02/22/gm-detroit-hamtramck-workers-impala-cadillac/2950160002/>.

generation electric and autonomous vehicles.⁶¹ Even if the Poletown plant had closed, it would nonetheless have provided thousands of jobs for more than thirty-five years, and there were doubtless local multiplier effects associated with these jobs. Whether other businesses would have either survived or opened that would have provided anywhere close to that number of jobs in the same rapidly depopulating area absent the condemnation is obviously a matter of speculation. If it is difficult to determine, even after the fact, whether a state entity received enough of the benefits that it formally or informally contracted to receive when granting control over parcels to a private entity, it is impossible to imagine how a court *at the time of a condemnation* could determine whether the state had retained “adequate” control over the use of the condemned property to be deemed its beneficial owner.⁶²

C. *Inapplicability of public use doctrine to regulatory takings cases*

The *Kelo* majority wholly ignores the most striking ambiguity in the Thomas dissent: How, if at all, does Justice Thomas believe his strict public use test applies to *regulatory takings*? Regulatory takings doctrine is implicated when the value of an owner’s property is significantly diminished by a regulation (e.g., by forbidding some or all development or capping rent payments) even though the injured party retains ownership of her property. Would the Thomas dissent bar the regulatory taking altogether (rather than simply demand that owners be compensated) in a wide swath of cases because the “property” that

61. See Jamie L. LaReau, *GM commits to \$2.2 billion investment and 2,200 jobs at Detroit-Hamtramck Assembly*, DETROIT FREE PRESS (Jan. 27, 2020), <https://www.freep.com/story/money/cars/general-motors/2020/01/27/gm-detroit-hamtramck-poletown-assembly-plant-jobs/4564108002/>.

62. Justice Kennedy, concurring in *Kelo* might already demand something like this “appropriate” level of control-based “ownership,” so that the economic development takings Justice Thomas opposes might in fact meet Justice Thomas’s own demands, properly understood. Justice Kennedy does seem to expect an indeterminate level of local government oversight of the development plan. See *Kelo v. City of New London*, 545 U.S. 469, 492 (2005) (highlighting the care with which the development plan was drawn). Alternatively, as the *Kelo* majority suggests, the state might demonstrate that the government has adequately protected its public aims because the most plausible outcome of the private-to-private transfer is that a public aim will be met, even absent explicit government oversight. See *id.* at 485 (“Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.”). Here the Court approvingly cites *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), upholding a program that permitted the EPA to force the transfer of trade secrets among pesticide manufacturers for just compensation, believing that Congress intended the transfer of trade secrets to remove a costly barrier to entry in an unduly non-competitive pesticide industry, though there were no explicit contractual limitations specifying what these second applicants had to do once they received the data.

is “taken” is not clearly owned or used by the public? Alternatively, would Justice Thomas’s logic dictate that the public use test is meant to apply only to conventional condemnations of real property rather than to regulation, leaving us with a dual-track public use doctrine? It would be difficult for any justice—and particularly one like Justice Thomas who believes strongly in bright-line rules—to justify a system in which one class of takings (exercises of the eminent domain power) are subject the Fifth Amendment’s “public use” requirement, while another class of takings (regulatory takings) are not.

Justice Thomas might argue that states have met his public use test in the regulatory takings cases in which the state has acquired a non-development servitude, thereby limiting the uses that can be made of the regulated party’s property. He might do so because he considers the servitude a form of property that the state now “owns” in some respect. Alternatively, he might believe that the public “uses” the portions of the owner’s land that cannot be developed because an owner might make use of her land by enjoying it in undeveloped form. Consider three examples in which the Court found a regulatory taking or the dissenters (whom Judge Thomas would likely have joined) would have found one. Take *Lucas v. S.C. Coastal Council*,⁶³ which prohibited development of ecologically-sensitive ocean-front property, or *Penn Central Transportation v. New York City*,⁶⁴ in which the parcel owner is forbidden to develop in the airspace above a historic landmark building, or *Village of Euclid v. Ambler Realty*,⁶⁵ which established restrictive zoning plans, and forbade commercial development in neighborhoods zoned as residential and multi-family dwellings in other zones. In each case, Thomas could conceivably argue that the public or the government itself now “owned” the relevant non-development servitude or that the public “used,” say, the space above Grand Central Terminal or the empty beach property as an undeveloped preserve.⁶⁶

63. 505 U.S. 1003, 1007–08 (1992).

64. 438 U.S. 104, 115–17 (1978).

65. 272 U.S. 365, 379–82 (1926). The property rights protective movement of the early 21st century sought not to end zoning, but merely to require compensation for exercises of the zoning power. *See, e.g.*, OR. REV. STAT. §195.305 (2020) (requiring compensation when any regulation “restricts the use of real property” unless the restriction abates a public nuisance, protects public health and safety, or “prohibit[s] the use of the property for selling pornography or performing nude dancing”). *See also* ARIZ. REV. STAT. ANN. §12-1134 (2020); TEX. GOV’T CODE §§2007.001-2007.045 (West 2019) (each substantially expanding the rights of owners to receive compensation when land use is restricted but not barring the restrictions.)

66. It is by no means clear how Justice Thomas would interpret the word “ownership” in the context of legal interests that were historically thought of as contractual rather than as property interests. Non-development servitudes—with the exception of a short list of Common Law

The fact that the public generally would not equally enjoy the benefits of the servitude would be no more (or less) bothersome than it is in the standard public ownership of infrastructure cases,⁶⁷ where some members of the public benefit far more from the infrastructure than do others. Still, in these non-development cases severely restricting the *physical use* of property, it is at least plausible to claim that that the public owns (and maybe even uses) the “unused space” that the regulations create.

There are other cases in which the state entity might “own” a (mere) restrictive equitable servitude, but in which it is impossible to think of the public as *using* undeveloped physical space. Think, for instance of the canonical *Mugler v. Kansas* case,⁶⁸ which addressed a regulation forbidding the production of alcoholic beverages. The brewing prohibition rendered nearly worthless a facility that had been constructed solely for the purpose of brewing beer.⁶⁹ Assume, contrary to fact, that the Court had found a compensable taking (as it might well have). Such a ruling would be grounded in the view that though the

permissible negative easements—were conventionally thought of as contract rights, not property rights. As a result, state interference with these rights, when privately held, was typically not found to be a taking of “property” until the latter half of the twentieth century. The traditional position in California, holding that the state owes no compensation when it makes a use that violates the terms of a covenant, was articulated in *Friesen v. City of Glendale*, 288 P. 1080 (1930) and not overturned until the decision in *California Edison Co. v. Bourgerie*, 507 P.2d 964 (1973). Older courts were often quite explicit that right-of-way easements were “property” interests in the sense that the state had to compensate a party who lost easement-based access as a result of the state’s project, but that covenants and equitable servitudes established contractual rights that governed the behavior of the parties to the contract but did not limit the sovereign’s power. *See, e.g., Smith v. Clifton Sanitation Dist.*, 300 P.2d 548, 550 (Colo. 1956). (“We think it is fundamental that where a company, corporation, or agency of the state is vested with the right of eminent domain and has acquired property through eminent domain proceedings and is using the property for public purposes, no claim for damages arises by virtue of such a covenant as in the instant case, in favor of the owners of other property on account of such use by the condemnor.”).

Thus, it is not at all clear that the public can “own” a non-development servitude or right that it could be said to gain from the regulatory taking in the more formalist senses that generally seem to matter to Justice Thomas, but one can leave that issue aside completely. For functionalists, the property right/contract right distinction is almost wholly uninteresting: in either case, from a functionalist vantage, someone has gained a legally-protected entitlement of value to her.

67. See discussion of the problem of unequal benefits, see *generally* Part IIA, *supra*. and particularly the text accompanying notes 48 to 51.

68. See 123 U.S. 623, 662 (1887) (holding that the prohibition regulation was fairly adapted to protecting the community against the evils of drinking and was therefore a legitimate exerciser of the police power rather than a compensable taking); see also *Powell v. Pennsylvania*, 127 U.S. 678, 687 (1888) (upholding a regulation limiting the production of margarine based on purported public health benefits).

69. See *Mugler*, 123 U.S. at 657 (“The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be materially diminished.”).

regulatory policy objectives were valid, the regulated parties were forced to bear a disproportionate share of the burdens of meeting the state's Prohibitionist goals. Despite the validity of the public health policy ambitions, there is nothing resembling public use of the regulated land—the private owner remains free to exclude others and to make most any use it wants of the land except alcohol manufacture. But this suggests the possibility that Justice Thomas would forbid the regulation barring the manufacture of alcohol rather than merely require the state to compensate those who bore atypically and unfairly concentrated losses from the regulation.

Moreover, the Court has decided many other regulatory takings cases in which the regulation at issue does not resemble the state acquiring a non-development servitude. In each of these cases, either the majority or the dissenters believe there has been a *compensable taking*. But even those justices who believe that the regulation requires compensation have not argued that the regulatory taking should be *barred* altogether. Outright prohibitions on these compensable regulatory takings are not contemplated even though there is neither anything resembling public use of the regulated property nor public ownership of an asset. If Justice Thomas is serious that takings should be barred when the public does not directly employ whatever the private party has given up, all of these regulatory takings should be forbidden, rather than permitted with compensation. Here are some of the obvious examples:

- A variety of rent control cases uphold uncompensated rent control, over dissents that Justice Thomas would likely support, even though the direct beneficiaries of the regulations are clearly the tenants themselves.⁷⁰ The general

70. See, e.g., *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (upholding wartime statute rent control legislation allowing tenants to not vacate once their leases expired); see also *Pennell v. City of San Jose*, 485 U.S. 1, 12 (1988) (“We have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare.”). Note that many early twentieth century judges with Thomas's narrow view of the “public use” requirement found that the condemnations should be *forbidden altogether*, without regard to compensation, when state entities first seized property to build public housing; public housing programs, like rent control most obviously benefit the occupants of the housing. See, e.g., *United States v. Certain Lands*, 9 F. Supp. 137, 142 (W.D. Ky. 1935) (rejecting public housing as a “public use” on the grounds that it would not house governmental activities and would not be available to the entire public on equal terms), *aff'd*, 78 F.2d 684 (6th Cir. 1935). But see, e.g., *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153, 155 (N.Y. 1936) (“Use of a proposed structure, facility or service by everybody and anybody is one of the abandoned universal tests of a public use.”). However, the dissenting judges in *Block* did *not* argue that the rent control statute was not for public use. See *Block*, 256 U.S. at 168 (McKenna, J., dissenting) (“Call [the rent control statute] what you will—an exertion of police

public does not enjoy the benefits of rent reduction in any direct way, nor do the ordinances facilitate the use of the leased premises by the public. Instead, the public benefits are diffuse, and the purposes of rent control schemes are some mix of redistribution, protection of the continuity interests of incumbent tenants, neighborhood preservation, and socioeconomic diversity promotion.⁷¹

- In a range of eviction-related regulatory takings cases, some of which found that the state must compensate those owners deprived of the prior right to evict,⁷² the direct beneficiaries are the tenants who cannot be evicted or the homeowners who cannot be foreclosed upon.⁷³ Members of the public generally gain no access rights to the units that the protected tenants (or delinquent mortgagors) can now directly enjoy.
- In the cases involving federal legislation that abrogated the right of Native owners to freely pass along highly fractionated property by descent or will,⁷⁴ the direct beneficiaries of the regulation were other owners of tenancy-in-common shares in the property. Post-regulation, these tenants-in-common would own a larger share of the once-highly-fractionated property. The public would not gain access to the property (which the fractionated owner lost her interest in) and would only benefit in the same indirect ways it arguably does in

or other power—nothing can absolve it from illegality.”). Later commentaries on rent control cases reflect the *Block* dissent. See, e.g., Richard A. Epstein, *Yee v. City of Escondido: The Supreme Court Strikes out Again*, 26 LOY. L. A. L. REV. 3, 8–9 (1992) (not challenging a rent control statute on grounds that it wasn't for public use but simply demanding that owners be compensated).

71. For qualified defenses of rent control, averting to these ends, see Ken Hanly, *The Ethics of Rent Control*, 10 J. BUS. ETHICS 189 (1991); Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986).

72. In some cases, no compensable taking was found. See *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (determining that the question presented before the Court regarded a compensated physical, not regulatory, taking); see also *Flynn v. City of Cambridge*, 418 N.E.2d 335, 339 (Mass. 1981) (holding that interference with just one property right does not, by itself, establish a taking). Yet in others, Courts overturned statutes barring eviction because they did not offer just compensation for the restriction of the eviction right but did not argue that anti-eviction statutes would be impermissible even if compensation were provided, despite the absence of clear “public use.” See *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989); see also *Cwynar v. City of San Francisco*, 109 Cal. Rptr. 2d 233, 251 (Cal. Ct. App. 2001).

73. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444–45 (1934) (statute precluding lenders from foreclosing was constitutional). This case raised issues outside the scope of this piece about whether the regulation impaired the mortgage contracts as well as Takings issues.

74. See *Babbitt v. Youpee*, 519 U.S. 234, 241, 244–45 (1997) (determining that a federal law limiting the descent of fractional land interests to other current owners constitutes a taking).

Kelo-style cases (i.e., the regulation promises more efficient allocation of property).

- In cases in which marketable title acts or legislatively-enacted time limits on the life of possibilities of reverter or rights of entry wipe out future interests in property,⁷⁵ it is obviously plausible to argue that those whose interests are wiped out should receive compensation.⁷⁶ But, once again, no one challenging these regulations – designed to facilitate efficient use of property by removing clouds on title and to dampen “dead hand” control concerns – argued that they were simply impermissible (even with compensation) because they directly benefitted only those holding property interests that had been burdened by these future interests prior to the enactment of the regulations and gave the public no ownership interests or access rights to any property.

It is highly unlikely that Justice Thomas would jettison the compensation requirement for regulatory takings, given legitimate concerns that individuals or small groups ought not be singled out to bear a disproportionate share of burdens that ought to be borne by the public as a whole.⁷⁷ Unless, though, he is willing to abandon his preferred version of the public use requirement for a sub-set of acts he would like to dub compensable takings, thereby violating his usual Formalist commitments, he would need to bar these regulatory acts altogether because *none* of them results in public ownership or employment of the seized property interests. But nothing in existing case law, or in anything Justice Thomas has written, suggests that

75. One can best think of such laws functionally as regulating disposition rights, even though they eliminate interests that could ripen into full-blown fees, with the concomitant powers to exclude and use as well as re-convey. But what such laws do, at core, is limit the capacity of the initial grantor of these disfavored rights to have undue control over the future use of the property *and* to dispose of the property in a fashion that, by clouding title, interferes with the ready alienability of property. Though an “estate” is nominally taken by the government, the functional impact of the statutes is not very different than the impact sought in Common Law rules against certain restraints on alienation which plainly define the permissible borders of free disposition.

76. *See, e.g.*, *Bd. of Educ. v. Miles*, 207 N.E.2d 181, 185 (N.Y. 1965) (holding that owners of unrecorded reversionary interests must be compensated because the state’s efforts simply to abolish them without compensation is an invalid use of the police power). *But see* *Black Mountain Energy Corp. v. Bell Cnty. Bd. of Educ.*, 467 F. Supp. 2d 715, 721 (E.D. Ky. 2006) (upholding a statute that, without compensation, eliminated a possibility of reverter because it gave owners five years to file a declaration to preserve it).

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

barring these regulations altogether is a serious option.

Justice Thomas's public use test focuses on the question of who has access to physical space. When land is condemned, one might try to ascertain who has access to that land after the taking. But it is difficult to fathom how the test can be applied to a *regulatory* regime that alters use and disposition rights rather than simpler access and exclusion rights.

Another core problem with applying the "public use" requirement to the regulatory takings context is that it is inconsistent with the Court's treatment of tax-and-spend plans. The Court has neither recognized that regulations impose implicit taxes or quasi-taxes (just like condemnations of land) nor that these regulations establish implicit spending programs—since the beneficiaries of the regulation have received benefits funded by those who bear the costs of regulatory compliance. It is effectively impossible to determine whether explicit tax-based spending plans are "adequately" broadly distributed to be understood as transparently "public." This is true not only because *no* spending plan distributes benefits evenly across a community,⁷⁸ but because redistribution is a legitimate government end.⁷⁹ These regulatory schemes may not be *explicit* tax-and-spend plans, but there is no reason to demand something mythically public when the tax-and-

78. Courts have wisely chosen to leave to legislatures the determination of whether spending projects are legitimate even when benefits are plainly quite unevenly distributed, sometimes realistically serving a nameable and finite group of beneficiaries: Consider, for instance, some typical infrastructure projects (airports built for the use of private planes, decelerator lanes that serve a single shopping center, sewage connection funded out of tax funds rather than user fees); housing projects that largely benefit occupants; projects to make public spaces more accessible to those who use wheelchairs to meet mobility needs that may sometimes be of modest or no benefit to those who do not.

But think, too, of a more complicated web of spending projects and regulations designed to curb climate change. It is important to recognize that both the spending projects (tax subsidies for electric cars or renewable electricity generation; public carbon capture facilities; mass transit) and regulations (forbidding the use of cheaper carbon-emitting sources; mandatory disclosure of the carbon footprint of a product) both garner resources from some inhabitants to meet an end whose benefits will inevitably be unevenly distributed (those in low-lying coastal areas or other more weather-vulnerable areas may gain a good deal more than some others, for instance.) The natural inclination is to believe that legislatures making fundamentally non-reviewable judgments about whether the projects generate adequate "public benefit" prevail whether they are meeting their ends through tax-and-spend or through regulation. If certain regulations unduly concentrate costs, though, so that they should be considered compensable takings, we might effectively limit the state to the use of tax-and-spend since the regulatory methods would be banned if Thomas's "public use" test were applied to the regulations.

79. Redistributive policies are designed to directly materially benefit some while materially harming others, even if one thinks the directly harmed parties receive an indirect benefit (e.g., increased social cohesion and conflict reduction) from the egalitarian shift.

spend programs become *implicit*. If housing vouchers and subsidies are “public” enough (though the immediate beneficiaries are plainly just a small sub-set of the population), so is rent control, although its direct beneficiaries are again the favored occupants of rent-controlled housing. And then condemnations are just taxes, too, with the seized land resources used or spent in a project of the government’s choosing.

Are there reasons to scrutinize tax-and-spend cases less critically than we scrutinize condemnations to ensure that the public is served by the government’s actions? When a city pursues a GM plant or a pharmaceutical research facility (or, to take the poster child case of this last decade, Amazon’s HQ2), should it matter in constitutional terms whether the resources it uses to woo the private developer come in the form of tax abatements, direct subsidies (e.g., selling land, however acquired, at below-market value), or indirect subsidies (e.g., construction of otherwise unnecessary infrastructure, like roads or utility connections or heliports for top Amazon executives), rather than condemned land? If we differentiate the use of taken property from the use of tax money, should we scrutinize regulatory takings like taxes or like real property condemnations?

The next section considers and rejects the most plausible reasons to differentiate the cases. It pays scant attention to the textual argument offered in the Thomas dissent itself, focusing instead on functionalist, policy-grounded arguments that might be used to justify the state legislation mirroring Thomas’s position.

III. DISTINGUISHING TAX-AND-SPEND FROM CONDEMN-AND-USE

We plainly *could* police how state entities employ condemned property differently than we limit how state entities can use tax or regulatory quasi-tax funds. The question of whether *courts* should do so might be answered by reference to constitutional text, given that there are colorable textual arguments, briefly addressed below, for making the distinction. State legislatures that restricted the condemnation power in the wake of *Kelo* should police the use of condemned property differently than they police the use of explicit taxation *only if* there are persuasive functional policy reasons to do so. The remainder of Section III examines possible policy reasons and finds them all wanting.

At core, the argument that courts must discipline the use of resources gained through condemnation far more than they oversee the use of tax funds is grounded in a textual hook: that the Framers

differentiated the spending power, which must merely be exercised for the “general Welfare,” from the condemnation power, which can only be exercised for “public use.”⁸⁰ In this view, constitutional limits on the spending power are facially less restrictive than the limits on the condemnation power.⁸¹ So, tax subsidies or government spending programs that are arguably “private” are constitutionally protected, while the condemnation power is more cabined. Again, I set aside both the normative debate about originalism’s merits and demerits, and the question of whether we can clearly divine in this particular context how the Framers’ references to “taxes” on the one hand and “takings” on the other were understood when the relevant texts were adopted. Thus, the remainder of the section instead addresses policy-oriented, functionalist arguments that presumably motivated state legislatures adopting Justice Thomas’s position and motivate some judges as well.⁸²

80. See *Kelo v. City of New London*, 545 U.S. 469, 509 (2005) (Thomas, J., dissenting) (“The Framers would have used some . . . broader term if they had meant the Public Use Clause to have a similarly sweeping scope.”). To support his proposition, Justice Thomas notes that some original state constitutions required takings be for “public use,” while others required “public necessity” or “public exigencies.” *Id.* at 509–10. Here, Justice Thomas relies on Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment’s “Public Use” Requirements*, 49 DUKE L.J. 339, 367–68 (1999). However, Thomas overlooks Sales’s argument that public projects appearing to benefit a select few were justified by the Civic Republican legal fiction that the entire public shared common aims.

81. Like Justice Thomas’s *Kelo* dissent, Justice Ryan’s in *Poletown* relied on state constitutional text and on history:

Well over a century ago, a clear line of demarcation was drawn between the powers of eminent domain and taxation, setting the jurisprudences of the [T]akings [C]lause and, if you will, the “taxing clause” on separate, independent courses. What is “public” for one is not necessarily “public” for the other.

Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 662 (1981) (Ryan, J., dissenting). However, the canonical cases that differentiated the two powers thought the taxing power *more* restrictive because those who are taxed get no compensation whatsoever. The canonical Michigan opinion articulating this idea is *Ryerson v. Brown*, 35 Mich. 333, 339 (Mich. 1877).

82. Skepticism about our capacity to apply what are considered original public meanings of texts to novel and unforeseen situations resonates in Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L. J. 555 (2006). Other powerful attacks on different forms of originalism include Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Mitchell Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 1–8, 37–68 (2009).

Even if the Framers *deliberately* distinguished the permissible aims of tax-funded public spending (promoting the “general Welfare”) from those of eminent domain (“public use”), it is extremely dubious that they made these distinctions adverting to situations that could not have been conceived of when the text was written. (For example, did they consider anything resembling property tax abatements negotiated with particular parties – plainly an exercise of the spending power if it must be classed an exercise of *either* the tax or eminent domain power – when they purportedly established that such abatements need only serve the “general Welfare”)? Did they think about whether entities like today’s charter schools (or privatized prisons or post office-

A. *Functionalist policy-driven arguments*

1. Concerns about under-compensation in the functionalist arguments

There are several functionalist arguments that might bolster the *Kelo* dissenters' claim that the power to spend tax money should be more capacious than the power to utilize condemned real property. The arguments for more closely scrutinizing condemnations take four basic forms:

1. **Ameliorating Under-Compensation:** A strict public use requirement is needed to ensure that those people whose property is condemned are actually appropriately compensated.⁸³
2. **Preventing Undue Influence by The Politically Powerful:** In another view, the strict public use requirement protects against a variety of political malfunctions: unduly influential interests will overwhelm the powerless and use eminent domain to expropriate their resources for private benefit. This concern is drastically reduced when the public must use or own the condemned property.⁸⁴
3. **Precluding Inefficient Transfers:** A strong public use test is needed to ensure that condemned property is actually more highly valued by the acquirers than it is valued by those who

substitutes like FedEx or UPS) should be considered public or private institutions? It is worth noting as well that Justice Thomas joined the majority in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612–14 (2013), holding (quite persuasively) that conditioning a development permit on the surrender of funds (to purchase conservation easements) constitutes a taking (just as the transfer of an easement on the regulated party's land would be) if – under the standards articulated in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) – what the permit seeker was asked to contribute in order to receive a permit grant was substantially disproportionate to what he would need to contribute to undo the adverse impact of development. If state entities, on the one hand, either *condemn land* (or lower its value unduly in the regulatory takings case) and, on an entirely separate hand, get money only through the exercise of the power to *collect taxes*, then the demand for money should have been treated as a tax, as the *Koontz* dissenters believed. *Koontz*, 570 U.S. at 623–29 (J. Kagan, dissenting). The *Koontz* holding acknowledges what Thomas refuses to see in *Kelo*: that the lines between taxes and condemnations (and, for that matter, regulations) are best thought of as either blurry or imaginary.

83. This argument is presented most forcefully in Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 987–90 and in Krier & Serkin, *supra* note 55, at 865–68.

84. See *supra* Part II.B (discussing Justice Thomas's functionalist argument). It is also mooted in Fennell, *supra* note 83, at 967–71, and a variant of this sort of argument is offered by Dana, *supra* note 38, at 152–54.

are subject to eminent domain.⁸⁵ There is inevitably a risk of inefficient transfers in the eminent domain context because those losing property are unwilling sellers subject to coercive or forced sales requirements.

4. *Assuaging Those Asked to Make Sacrifices*: The level of justification required to impose a loss on someone depends on the degree to which the party is singled out to bear the loss or the degree to which the loss is an especially profound or deep one. In this view, the “public use” requirement might be seen as a proxy for a public project with the high level of justification required to assuage those whose property is taken, who are presumed to have borne losses that are both atypical and large.⁸⁶

These functionalist arguments play out differently depending on assumptions about the adequacy of compensation for condemnations of homes, condemnations of businesses, and compensation for regulatory takings. To illustrate with the simplest example: Suppose we believe that condemnees are fully compensated and that we are obliged to provide especially strong justification for the most serious deprivations. If that is the case, then there is *less* reason to apply a public use test to condemnations than to taxes because fully compensated condemnees (by definition) have lost nothing at all. Those condemnees are, in theory, in the same position as they were prior to condemnation. Taxpayers, however, have lost *something* in the sense that they would prefer not to pay the tax because they would enjoy the benefits of

85. This argument is most explicit in Thomas S. Ulen, *The Public Use of Private Property: A Dual-Constraint Theory of Efficient Governmental Takings*, in *TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE* 163, 174 (Nicholas Mercuro ed., 1992). It is mirrored to some degree in Thomas J. Miceli, *Free riders, holdouts, and public use: a tale of two externalities*, 148 *PUB. CHOICE* 105, 115 (2009), though Miceli explicitly rejects the idea that Thomas's test meets these goals. *Id.*

86. This argument is made most explicitly in Micah Elezar, “*Public Use*” and the Justification of Takings, 7 *J. CONST. L.* 249, 254–56, 265–66 (2004), but is also an important aspect of Justice Ryan's *Poletown* dissent:

As a general proposition then, in the realm of aid to private corporations, “public purpose” (taxation) has been construed less restrictively than “public use” (eminent domain). The distinction is fully justified. The character of governmental interference with the individual in the case of taxation is wholly different from the case of eminent domain. The degree of compelled deprivation of property is manifestly less intrusive in the former case: it is one thing to disagree with the purposes for which one's tax money is spent; it is quite another to be compelled to give up one's land and be required, as in this case, to leave what may well be a lifelong home and community. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 666 (1981) (Ryan, J., dissenting).

public spending projects even if they did not contribute tax revenue.

But it is certainly *plausible* that owners of real property would be under-compensated if they received merely the fair market value of the condemned property.⁸⁷ Homeowners will often be under-compensated in part because the subjective value that they place on the property is higher than its “fair market” value. They will not receive the consumer surplus. The fact that they often value it more than its market value is itself a product of diverse factors: For instance, potential buyers who determine the fair market value will lack the personal, emotional attachments to the home that the condemnee may have;⁸⁸ the condemnee may have made site-specific improvements suited to her own tastes or benefit from the location in a way that would-be buyers may not value.⁸⁹

Condemnees may be under-compensated not only because they subjectively value the seized parcel more than the market does, but also because condemnation at fair market value strips them of the opportunity to bargain for some of the economic surplus gained by the post-condemnation developer (the increased value of the land after state-coordinated redevelopment). If we imagine that the seller and buyer of property are in a bilateral monopoly relationship, a buyer with the condemnation power gets all of the development surplus. Many will think it unfair to divide the development surplus so that the innocent party gets nothing while the more culpable one gets all the gains.

87. See Fennell, *supra* note 83, at 962–66 (summarizing the under-compensation problem and identifying three items of value left uncompensated by eminent domain: the transferor’s subjective premium, their chance at surplus, and their autonomy).

88. Many commentators only emphasize this one aspect of the under-compensation problem, *See, e.g.*, Ulen, *supra* note 85, at 167–68. Justice Ryan also emphasizes such personal attachments in his *Poletown* dissent. *See Poletown*, 410 Mich. at 682 (Ryan, J., dissenting) (“Eminent domain . . . can entail . . . intangible losses, such as severance or personal attachments to one’s domicile and neighborhood . . .”).

89. Statutory provisions may provide compensation for moving costs or the search costs in locating new housing (although not for the search costs that follow relocation, like finding new service providers). *See, e.g.*, the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4622 (2018) (mandating moving costs be paid when real property is condemned by the federal government); CAL. GOV. CODE § 7262 (Deering 2020) (person displaced by eminent domain is entitled to payment for such actual moving and related expenses as the public entity determines to be reasonable and necessary). But such provisions are not constitutionally mandated. *See United States v. Petty Motor Co.*, 327 U.S. 372, 378–79 (1946). Absent such statutory provisions – provisions that were in place, for instance, for the condemnees in the *Poletown* case – homeowners will not receive compensation for moving or search costs, further ensuring that they will not be fully indemnified when their property is seized.

Finally, those whose property is condemned face an uncompensated loss of autonomy.⁹⁰ They have no real choice in the matter: They do not get to meaningfully decide to part from their home. Condemnees do not get the opportunity to hold out for a better deal or just to stay put. Moreover, the loss of autonomy is fundamentally a loss not truly commensurable with compensation.⁹¹

Business-owner condemnees may lose goodwill and other aspects of going-concern value absent legislative schemes that compensate for such losses.⁹² But the legislative schemes will still struggle to account for sentimental losses. It is, though, considerably less plausible that sentimental losses would be at all widespread among owners of businesses, and uncommon for seized businesses to possess site-specific goodwill.

Under-compensation is plausible in a small sub-set of regulatory takings. An affected landowner might value a prohibited use of land more than a buyer would pay at fair market value. Some owners would not have forfeited the opportunity to proceed with the barred development in exchange for the difference between the pre-regulation and post-regulation property value. As a result, paying them the post-regulation decreased market value (the measure of compensation in regulatory takings cases)⁹³ does not account for the owner's subjective

90. Arguably, taxpayers forfeit autonomous control over whether to transfer resources too. Whether the purported autonomy losses in a condemnation are worthy of greater attention than those incurred through taxes is a hard question.

91. The libertarian case for property rules protecting against forced transfer at fair market value is set out clearly in Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 *YALE L.J.* 2091 (1997). The view is accepted by many who would not generally characterize themselves as libertarians. See, e.g., Fennell, *supra* note 83, at 966–67.

92. For the canonical discussion of the traditional limits on judicial and statutory efforts to compensate for the loss of going concern value (the gap between the value of a concern as an ongoing business and its liquidation value) and goodwill (the value inhering in the tendency of existing customers to continue to purchase from the particular business) and a guide to some of the reform efforts that began in the late twentieth century, see generally Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 *B.C. L. REV.* 283 (1991). For further discussions of going concern value and its calculation, see generally, Merle F. Dimbath, *The Theory and Practical Determination of Going Concern Value*, 7 *J. FORENSIC ECON.* 171 (1994) (discussing calculation of business value).

93. See generally Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 *N.W. U. L. REV.* 677 (2005) (discussing issues in implementing a market value compensation rule in regulatory takings cases); See also Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 *N.Y.U. ENVTL. L. J.* 110, 121–24 (2002) (arguing that the “decline in market value” compensation model draws on the model typically used in partial takings cases, in which condemnees receive compensation for both the adverse consequences of the taking and for the property itself, and thereby comes closer to providing full-bore indemnification for regulatory takings).

loss. This is true for the same reason that a plaintiff in a particular nuisance or trespass suit might not have been willing to tolerate an incursion if compensated for lost market value⁹⁴ or why some future interest holders (in what are dubbed ameliorative waste cases)⁹⁵ or tenants in common (resisting partition by sale rather than physical division of property)⁹⁶ might prefer to make the use of the property they most desired, even if they would receive fair market value compensation if they were forced to make a non-preferred use or tolerate an unwanted use by another. Still, businesses with regulatory takings claims (due to use restrictions or, even more surely, price ceilings) would typically be fully compensated by accounting for straightforward lost income and lost property value.

At any rate, none of the functional arguments for a strict public use requirement make much sense on their own terms. More importantly the functional arguments do not adequately distinguish the legitimate concerns of condemnees from the concerns of ordinary taxpayers.

2. Does a strict public use requirement correct for under-compensation?

The argument that we need a strict public use requirement to correct for under-compensation naturally starts with the premise that property owners are indeed often under-compensated—that condemnees would not voluntarily sell the condemned property for its fair market value.⁹⁷ This assumption is reasonable, even though there are significant reasons to believe the under-compensation problem is

94. See, e.g., *Glavin v. Eckman*, 881 N.E.2d 820, 824 (Mass. App. Ct. 2008) (“[T]he wrongful cutting [of a tree] may represent a significant loss to the property owner . . . even where the value of the timber cut is negligible, or the diminution in value of the property . . . is minimal or nonexistent.”).

95. See, e.g., *Brokaw v. Fairchild*, 237 N.Y.S. 6, 14–15 (N.Y. Sup. Ct. 1929) (permitting remaindermen to block conversion of a residence into an economically more valuable apartment). Note the persuasive argument that plaintiffs who succeeded in ameliorative waste cases won because in a world with weak surveying techniques, changes made to land (however value-increasing) indeed threatened their ability to derive economic value from their remainder because they risked losing title to some portion of the land. Only rarely did plaintiffs prevail by focusing on their subjective valuation. This argument is made particularly persuasively in Jill M. Fraley, *A New History of Waste Law: How a Misunderstood Doctrine Shaped Ideas About the Transformation of Law*, 100 MARQ. L. REV. 861, 881–83 (2017).

96. See, e.g., *Ark Land Co. v. Harper*, 599 S.E.2d 754, 761–62 (W. Va. 2004) (ruling that tenants in common may request partition in kind when they have emotional ties to a property, even if it would not maximize property value).

97. See Fennell, *supra* note 83, at 958–59 (explaining the existence of an “uncompensated increment”—a gap between fair market value and the reservation price of the condemnee); see also Krier & Serkin, *supra* note 55, at 866.

often overstated: The combination of formal super-compensation laws and informal practices designed to overcome opposition to public projects means that, in most cases, more adequate compensation is offered.⁹⁸

The role that a strict public use requirement might play in correcting for under-compensation is seemingly straightforward. When property is taken, a parcel owner receives explicit monetary compensation, which, by hypothesis here, is inadequate. But, depending on how the property is used, she may also receive implicit in-kind compensation—her “share” of the value of the project. If the project is not a “public” one, and she has no access to the project, she will receive nothing by way of implicit in-kind compensation. But if she has access to whatever public project emerges, then she gets *some* value from the use of the condemned property (e.g., she gets some value from using the road or park situated on her condemned property). The sum of explicit and implicit compensation may then be adequate.⁹⁹

But this implicit compensation theory does not support Justice Thomas’s strict public use requirement—nor does it bolster the case for scrutinizing public spending more deferentially than we scrutinize the use of property seized in eminent domain proceedings. Three observations support this conclusion.

First, requiring any sort of public use of seized property cannot possibly solve the problem of under-compensation if that problem is as dire as many suggest. Even assuming a public project that delivers pro

98. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 104–05 (2006) (arguing that under compensation is an overstated problem because takers are often incentivized and even legally obligated to negotiate with owners and provide relocation assistance). Consistent with Garnett’s views, when the Poletown condemnees older than 60 were surveyed, a full 92 percent thought that the monetary compensation they had received was fair. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 33. It is worth noting as well that at least in relationship to homeowners, one of the most commonplace arguments that condemnation under-compensates—that it does not account for the impact of being uprooted—seems, at least on its face, to be overstated because 11 percent of Americans (and about 5 percent of homeowners) move each year on average, for a number of reasons. U.S. Census Bureau, *Geographical Mobility: 2015-2016* tbl. 1. (Nov. 2016), <https://www.census.gov/content/census/en/data/tables/2016/demo/geographic-mobility/cps-2016.html>.

99. If the main reason to retain a strong public use requirement is to alleviate under-compensation, having no clear answer on whether Thomas’s version of strict public use is meant to apply to regulatory takings would be unimportant—assuming that under-compensation is less prevalent in regulatory takings. But if a “strong” public use requirement is helpful only in *categories* of cases where under-compensation is most often an issue, it might make sense to dispense with the requirement when businesses, rather than homes, are taken. However, the *Kelo* dissents suggest no such distinction would be drawn. See *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O’Connor, J., dissenting); *id.* at 505 (Thomas, J., dissenting).

rata benefits to every member of the public, these *pro rata* benefits cannot possibly balance out the losses borne by the property owner forced to vacate her home. Assume, as do typical state laws offering super-compensation for seized homes, that homeowners are under-compensated by 25 percent if they receive only fair market value of their homes.¹⁰⁰ For a home sold at roughly the American median price (about \$330,000),¹⁰¹ a reasonable estimate of the “uncompensated increment” (the gap between fair market value and reservation price) is \$82,500. It is simply inconceivable that the *pro rata* share of the gains from any particular public project would be anywhere close to \$82,500.

Second, there is no particular relationship between imposing the strict public use test (as opposed to the looser public benefit test) and guaranteeing that the condemnee has received adequate implicit in-kind compensation (the value of the public project to the condemnee). Any particular condemnee in Poletown might well gain more personally from the GM plant’s economic stimulus than he would gain from any particular conventional public works project. He might be helped a great deal if the economic development project permitted him to keep his job but not use the road or park or have been willing to offer anything to expand military or prison capacity.

Third, if we assume it is problematic that a particular property owner receives no implicit in-kind compensation from a particular sort of “non-public project,” then it is also certainly problematic that taxpayer dollars are expropriated to help finance such projects. Of course, the amount of tax money that any one taxpayer devotes to a wholly private subsidy is relatively trivial: Each taxpayer’s bill may rise only marginally to account for property tax abatements (like those Detroit gave to GM) or to fund the infrastructure constructed for a private user. Likewise, though, we only trivially correct whatever real under-compensation problem there is if we insist on “public uses.”¹⁰²

100. See, e.g., MICH. CONST. art. X, § 2 (amended 2006) (providing, “If private property consisting of an individual’s principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property’s fair market value, in addition to any other reimbursement allowed by law.”); see also Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 634–35, 645–49 (2013) (discussing state eminent domain provisions and critiquing academic pieces that support super compensation requirements).

101. See Federal Reserve Bank of St. Louis, *Median Sales Price of Houses Sold for the United States*, <https://fred.stlouisfed.org/series/MSPUS> (2020) (citing U.S. Census Bureau & U.S. Dep’t of Housing and Urban Development).

102. There are a host of ways to deal explicitly with under-compensation rather than relying on implicit in-kind compensation to do the work. There are problems I will not rehearse with each

But if it is worth worrying about the condemnee's lost opportunity to enjoy trivial pro rata gains from a truly public project, then we *should* worry about the small losses that a taxpayer funding non-public projects suffers.

3. Does a strict public use test restrain the capacity of powerful private actors to appropriate resources and reduce incentives to engage in rent seeking?

Justice Thomas argues that the strict public use requirement is a necessary check on powerful parties who wish to condemn land for their own private gain. Once again, the argument is both theoretically implausible and inconsistent with past experience. Imagine a greedy corporation desiring some mix of (condemnation-acquired) land, tax abatements, and explicit subsidies. If we are worried about the company getting its way due to limited organized opposition, one would presume that the company would prioritize seeking tax abatements and subsidies over seeking land through eminent domain. If, then, we are worried about undue influence at all, courts should worry *more* about undue influence over abatements and subsidies than condemnations.

Assume, first, that at least some non-trivial portion of property owners would be under-compensated if their land is condemned for the benefit of Greedy Corp. Assume, on the other hand, that when tax money is expended, no particular citizen loses much; the losses are small for each individual and diffused across the population. On the other hand, Greedy Corp. receives the sorts of concentrated benefits that make the company a highly engaged, readily organized political player. Mainstream public choice theory asserts that Greedy Corp. will be less successful if it is trying to concentrate harms on a few rather than spread them among many. Each individual facing losses would face massive free rider problems in organizing opposition.¹⁰³ The free rider effects are enormously powerful even if a tax subsidy is large

of the proposed mechanisms—e.g., simply giving a bonus above fair market value; making property owners pre-declare the subjective value of their homes by having them pay property taxes on subjective value; dividing the development surplus more fairly by granting condemnees various sorts of equity interests in economic development projects. For some discussions of mechanisms and problems, see Fennell, *supra* note 83, at 992–1002; Krier & Serkin, *supra* note 55, at 868–73; and Ulen, *supra* note 85, at 180–83.

103. Moreover, if the losses are small, the private costs of opposing the plan might exceed the private gains one would reap if the plan were defeated.

enough to impose significant losses on each taxpayer.¹⁰⁴ This point is hardly a novel one.¹⁰⁵

If, instead, condemnees are truly adequately compensated, to the point where they are indifferent between the status quo (keeping their property) and condemnation with compensation, they have absolutely no motive to organize to oppose an eminent domain plan.¹⁰⁶ So, Greedy Corp. would enjoy relatively free reign. Nevertheless, taxpayers may still oppose the project in precisely the same way they would oppose explicit subsidies. If a state's goal is to impose strict public use requirements to mitigate political influence asymmetries, then there is no reason to defer to spending-side subsidization but to strictly police the use of condemnation. The political battle is seemingly similar in each case, although condemnation plans often draw more attention and blowback than tax abatements, both because condemnation plans produce attention-grabbing "identifiable victim effects"¹⁰⁷ and because no funds must be explicitly appropriated to grant Greedy Corp. an abatement (contrary to takings, which require budgeted expenditures).

104. For instance, if Amazon accepted New York City's offer of approximately \$3 billion in subsidies, the per capita loss for each New Yorker would have been more than \$400. See Jon Campbell, *Amazon HQ2: \$3 billion in state, city tax breaks draws company to New York*, DEMOCRAT & CHRONICLE (Nov. 13, 2018, 10:27 AM), <https://www.democratandchronicle.com/story/news/politics/albany/2018/11/13/new-york-amazon-incentives-billion/1986979002/>.

105. See Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 394–95 (1996) (noting the explicit relation between free rider effects and tax incentives). See also Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 109, 1138–40, 1146 (2008) (sketching the conventional public choice perspective in relationship to local decision making more generally). What Schragger adds, so perceptively, to the usual discussion of the maldistribution of political power is that when it comes to the choice of mechanisms a municipality can use to aid a private corporation – say, the choice between tax abatements worth \$X million and assistance through eminent domain in assembling a parcel for \$X million less than it otherwise could be assembled by the company on its own, overcoming holdouts – there is lots to be said for the use of eminent domain. Tax incentives tend to be a zero-sum game (the city that wins simply hurts another city) while (at least on occasions when hold outs might otherwise block a project and the company substitutes an inferior site) eminent domain actually can increase overall productivity. *Id.* at 1137–38 (noting that cities choosing tax incentives over eminent domain tends to be a zero sum game in which the city that attracts a company hurts another city, and its tax incentives are often not offset by local economic benefits).

106. See Glynn Lunney, *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1946–59 (1992) (discussing the motivation and organization of collective response to legislatively-initiated eminent domain takings); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L. REV. L. & ECON. 125, 131–32 (1992) (noting that an under-appreciated virtue of full compensation is that it precludes concentrated opponents of a justified taking from blocking an action that generates diffuse benefits).

107. Karen E. Jenni & George Loewenstein, *Explaining the "Identifiable Victim Effect,"* 14 J. RISK & UNCERTAINTY 235 (1997) (describing a behavioral phenomenon causing people to spend more money to save the life of an identified victim than an anonymous one).

Not only will condemnees more effectively mobilize than will diffuse taxpayers, condemnees plainly have legal standing to challenge a condemnation, not only on constitutional grounds (the condemned property will not be publicly used) but for a host of narrower procedural reasons. On the other hand, taxpayers, generally, do not have standing to challenge tax abatements.¹⁰⁸

It is difficult to show empirically that condemnation plans invigorate more organized and effective opposition than spending-side tax abatements, subsidies, and targeted infrastructure spending plans. But in condemnations, the problem of asymmetrical attention by winners and losers is far less common—instead, both sides of the dispute are often equally engaged. The Poletown controversy is an obvious case. The takings received far more political heat than the massive spending-side giveaways to GM did; it was Poletown residents and allies, not Detroit taxpayers writ large, who organized to resist the subsidy-heavy plan. Similarly, though there were certainly political pressures to limit the extent of cities' giveaways for Amazon in the HQ2 competition, there is no evidence of more generalized outrage like that generated by the *Kelo* condemnations. Of course, there are Right libertarians and Left populists who categorically object to corporate subsidies,¹⁰⁹ and many economists have argued that the subsidies are ineffective even for particular localities¹¹⁰ and do even less to promote overall productivity.¹¹¹ But we are not seeing law review symposia on HQ2 the way we saw them on *Poletown* and *Kelo*, much less commercial films heavily promoted by the property rights-

108. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006). There may, though, be some situations in which competing businesses can make dormant Commerce Clause attacks on tax deals that unduly favor locals. For a comparison between standing claims that can be made by individual taxpayers and disfavored businesses, see Enrich, *supra* note 106, at 409–18.

109. See, e.g., Derek Thompson, *Amazon's HQ2 Spectacle Isn't Just Shameful – It Should Be Illegal*, THE ATLANTIC (Nov. 12, 2018), <https://www.theatlantic.com/idea/archive/2018/11/amazons-hq2-spectacle-should-be-illegal/575539/> (arguing that a mix of federal bans and changes in tax laws would have the desirable effect of eliminating local government subsidies for businesses designed to alter location decisions).

110. See Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. AM. PLAN. ASSOC. 27, 34–35 (2004) (stating that nine in ten businesses given incentives would have made the same location decision without the incentive); see, e.g., Richard Florida, *Handing Out Tax Breaks to Business Is Worse Than Useless*, CITYLAB (Mar. 7, 2017), <https://www.citylab.com/life/2017/03/business-tax-incentives-waste/518754/> (summarizing studies that draw negative conclusions about the impact of incentives on local economies).

111. See generally Daniel J. Wilson, *Beggar Thy Neighbor? The In-State, Out-of-State, and Aggregate Effects of R&D Tax Credits*, 91 REV. ECON. & STATS. 431 (2009) (noting that tax subsidies do not achieve a desirable aggregate effect).

protective Institute for Justice that litigated the *Kelo* case.¹¹² Most of the New York City opponents of Amazon’s Long Island City project wanted to renegotiate, rather than cancel, the City’s \$3 billion plan to attract Amazon.¹¹³ Had the company needed to use the condemnation power to acquire land for its new headquarters, there would almost certainly have been many more staunch opponents. Moreover, the apparent paucity of condemnations of residential property—not just for economic development purposes but for conventional infrastructure takings as well¹¹⁴—may reflect the relative political efficacy of condemnees compared to burdened taxpayers.

4. Is the risk of inefficient transfer reduced if the transferee makes a “public use”?

Professor Ulen’s argument that strict public use doctrine reduces the risk of inefficient transfer¹¹⁵ does not make much sense in its own terms. More importantly, the argument does not map onto Justice Thomas’s particular public use test (or, for that matter, any other administrable public use test). His argument is straightforward: If the government is constrained in its exercise of the takings power only by the requirement that it pay fair market value compensation, the transfer from initial owner to the state may be inefficient (moving the property from a higher to a lower valued use) because the initial owner values the property more than fair market value, and fair market value is all that the government has demonstrated a willingness to pay.¹¹⁶ Moreover, the vulnerability of private property to expropriation at a

112. Some of the distinction doubtless comes from discrepancies in the simplicity of the cases. In Poletown it was easy to understand the eminent domain process well enough to understand who benefitted and who lost. Issues involving tax and regulatory subsidies are more complex. The subsidies offered Amazon by New York City were insanely complex. It is not the case that New York City planned to just cut the company a \$3 billion check it could use to defray expenses, the city offered a variety of zoning concessions, designations of the headquarters as eligible to receive favorable federal tax Enterprise Zone treatment, eligibility for a tax abatement program dependent on new job creation. For a fuller description of the complex array of sweeteners that Amazon was apparently offered, see Emily Holloway, *What Comes Next? Building on the Momentum of the Amazon Fiasco*, ADVOCATE (Apr. 7, 2019), <https://gcadvocate.com/2019/04/07/what-comes-next-building-on-the-momentum-of-the-amazon-fiasco/>.

113. *Id.* (urging for New York City to ask Amazon for more favorable terms in exchange for the subsidies rather than give no subsidies at all).

114. See MIHALY, *supra* note 23, at 10–12 (stating that condemnations for redevelopment purposes are rare). *But see* U.S. GOV’T ACCOUNTABILITY OFF., *Eminent Domain: Information about Its Uses and Effect on Property Owner and Communities Is Limited* (Nov. 2006) (summarizing issues with the data used in studies of eminent domain that preclude us from understanding much about actual eminent domain practices).

115. See Ulen, *supra* note 85, at 167.

116. *Id.* at 167–68.

price lower than the owner's reservation price may cause secondary inefficiencies. Owners may waste resources lobbying the government to forego taking their property. They also might under-invest in developing sentimental attachments to their property or make fewer non-transferable investments that buyers would not value.¹¹⁷ But there would be efficiency *losses* if we forego the condemnation power completely. We need the eminent domain power to permit the provision of large-scale, complex public goods—goods that require the simultaneous purchase by the buyer of many parcels for the purpose of providing a public good.¹¹⁸

Proponents of this argument focus on the same sort of means-oriented public use test long associated with Professor Merrill. Instead of focusing on how the seized property is used, we should inquire whether it is necessary for the government to use eminent domain as a means to overcome holdout problems.¹¹⁹ Professor Ulen argues that the ends and means are inextricably linked. He asserts that the only situation in which there is an efficiency reason to overcome holdout problems is one in which the government needs to assemble a parcel to provide a “large, complex public good,” because these public goods projects alone are the sort that the government provides more efficiently than private market actors do.¹²⁰ Absent the sort of market failure we observe only in the provision of public goods, “the most efficient method for determining relative valuation of . . . property is voluntary exchange.”¹²¹

117. *Id.* at 170.

118. *Id.* at 171–72.

119. *See* Merrill, *supra* note 51.

120. Ulen, *supra* note 85, at 174–76.

121. *Id.* at 187–88. There is another, if less significant, puzzling and troubling feature of Ulen's argument: market failures may preclude the efficient transfer of property to a private user whose use has no public goods aspects at all. Consider, for instance, the problem of strategic behavior leading to a bargaining breakdown when there are bilateral monopolies (and hold-outs always create a localized bilateral monopoly problem). In many circumstances, property would not be efficiently transferred absent government edict even when there is no public aspect to the forced transfer at all. Relative hardship doctrine in trespass law (limiting the plaintiff to damages rather than injunction) implicitly forces a sale in a bilateral monopoly situation to prevent some mix of unjust distributive outcomes (the victim might get “too much” if he could charge the trespasser the high cost of removing a trivially invasive structure that damaged him little) *and* inefficiency (if in an effort to extract more of the surplus that inheres in continuing the trespass, the rights holder refused to sell the right to continue the trivial trespass. For an overview of relative hardship doctrine, *see Restatement of Property* §563 (1944). *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 529–39, 542–73 (2009) (discussing the merits and ubiquity of permitting private use condemnations to overcome market failures).

The claim that private purchasers will offer bids for property that equal the total social demand for the condemned land unless the land is to be used for a “large, complex public good” is wholly unwarranted. It is true that if the condemned land will be used to provide the most traditional forms of public goods (a non-rivalrous good from which exclusion is not possible), it is likely that neither a private party hoping to sell the good at a profit nor a coalition of potential users would bid as much for the land as it is actually worth to them because many “potential buyers” of the public good will be free riders, hoping that others would purchase the goods or services (whose benefits they would enjoy whether they paid for the good or not). Essentially, *free riding is what causes public goods to be under-provided in private markets*.¹²² But while free riding, and concomitant under-valuation by potential private bidders, is an obvious problem when the land would be used for a conventional public good, it is also a problem whenever the land will be used in a fashion that generates positive externalities, diffuse benefits not fully capturable by those who own the land.¹²³

To clarify the point, take a case that does not directly involve condemnations or land use at all. Assume that more privileged citizens are made worse off by the presence of poverty in their community, and that they place a value on its elimination. Certain privileged citizens may not contribute funds to alleviate poverty, recognizing that they cannot be excluded from enjoying the benefits of poverty reduction that would be produced by the contributions of others. But every public

122. We could also take a more political theoretical, rather than economic, view of “public goods”—focused less on the failure of markets to capture existing private demand for an end-state and more on the idea that certain goods or end-states are the ones that collective decision-makers, acting not merely to reflect the self-interest of constituents but trying to ascertain the community’s higher order commitments, should pursue. In this view, for instance, redistribution is a “public good” not so much because individual constituents will not “pay for it,” unless others are forced to pay for it as well (the free rider account), as because a certain level of social equality is what the community comes to aspire to as the outcome of a certain form of collective moral discourse. Similarly, one could argue that a legislature seeks species preservation *because* it is a public good in an economist’s sense *or* because it is a public commitment regardless of the present self-interested tastes that inhabitants of the community now manifest for the preservation.

123. Here is the standard illustration of such externalities. It derives from James Meade, *External Economies and Diseconomies in a Competitive Situation*, 62 *ECON. J.* 54 (1952). Assume X is a beekeeper who wants to use Parcel P for his honey-producing business and Y wants to use it to grow crops that require the use of a toxic pesticide. Y will bid too much for the land unless he has to account for the negative externality he imposes on his neighbors by using the pesticide, but X will bid too little because he can only readily capture the income he gets from selling honey, not the benefits (the positive externality) that he provides nearby farmers by keeping bees that help pollinate their plants. It may well be factually inaccurate that beekeepers cannot readily charge farmers for “pollination services” but the conceptual point remains trenchant.

use in the broad “public purpose” sense shares that very same free rider problem: Many (if not all) of the people of Detroit would have benefitted from the spillover effects of economic development of the Poletown neighborhood, whether they personally paid for it or not. Though Detroit residents may be physically excluded from the GM plant (to track Justice Thomas’s version of Ulen’s public goods test), they cannot be excluded from reaping some of the concomitant benefits of development. Those benefits would accrue to Detroit residents whether or not they buy the goods or services that the putative private buyer (GM) produces using the land as an input.¹²⁴

Most of the traditional public goods of the sort Thomas protects (*e.g.*, roads and canals, much less schools or parks) are not truly public goods. These goods are under-provided in markets not because a private entrepreneur could not physically exclude non-users and charge direct users (tolls for those who actually use roads and canals, tuition for students, entrance fees at parks). Instead, they would be under-provided predominantly because there are diffuse public benefits associated with the production of the goods: economic development spillovers in the case of canals and roads; the benefits to third parties that the student does not fully capture when she is educated; the option value, existence value and eco-system preservation benefits of maintaining natural land. It is the presence of these diffuse public benefits that rightly leads us to recognize that, because of free rider problems, relying solely on private provision and private bid valuation will cause the supply of these goods to be inefficiently low.¹²⁵ Neither Thomas’s public use test nor some other requirement that the government take property only when it is doing so to create a traditional public good would permit many takings that combat free-rider inefficiencies.¹²⁶

124. Those who would benefit indirectly from the preservation of the neighborhood also would not manifest these preferences in a market; free rider problems would beset efforts to aggregate bids either for GM’s use *or* the initial inhabitants’ ongoing use were we to use markets (or auctions) to allocate the land so that it was put to its highest valued use.

125. *See generally* Miceli, *supra* note 85 (emphasizing that the economically relevant feature of public goods, in thinking about the propriety of a taking, is simply that there are free rider problems that lead private bidders to offer too little to produce the good). Consistent with the analysis in this piece, Miceli also clearly recognizes that free rider problems create the need for collective provision whether we are considering budgeted spending or the use of condemned property. *Id.* at 106, 112–13.

126. Furthermore, Justice Thomas’s test not only forbids takings in which private demand for a good understates the true efficiency gains from transfer but permits transfers which may well be inefficient because the condemnee could not actually be fully compensated by those who value the condemnee’s property. It is absolutely plausible in any given case that property condemned

5. Does “public use” provide the sort of strong justification we need to make the imposition of burdens on the condemnee morally acceptable?

There are three dubious premises that undergird the conclusion that we need a strong public use requirement to police the disposition of condemned real property, but not the use of funds garnered through taxation in order to ensure that those who face the most serious losses have been subject to a burden that is justifiable to ask them to bear. The argument’s first problematic premise is that those from whom property is taken bear losses that are both especially momentous and atypical, as compared to the losses borne by taxpayers. The second predicate assumption is that those who are singled out to bear large losses should be asked to make the atypical momentous sacrifice they have made only if there is a very good reason for them to do so, while those who bear smaller or more typical losses should be satisfied if there is merely a marginal justification for the loss. The third and most troubling premise assumes that the fact that the property will be put to “public use” is an especially strong justification for forcing an individual to bear the loss. These arguments are not commonplace, but they have been made by some academic commentators¹²⁷ and more implicitly by others,¹²⁸ including judges.¹²⁹

First, the idea that those from whom property is taken suffer enormous losses compared to the losses borne by taxpayers is, at best, true only in certain factual circumstances. In the many cases in which property owners are adequately compensated, whether because the owner values the property at its fair market value or because the state deliberately compensates property owners at levels sufficiently greater than market value,¹³⁰ it is *taxpayers*, not those who face condemnation, who face the largest loss. Taxpayers simply fork over the money they owe (and, except in the case of benefits taxes or user fees) receive whatever government services they value whether or not they pay taxes—paying taxes is thus a pure loss. Condemnees, on the other hand, lose nothing if fully indemnified. And even in condemnation cases

for ownership or direct use by the public is valued more highly by the condemnee.

127. See Elezar, *supra* note 86, at 254–56, 265–66.

128. See, e.g., Ulen, *supra* note 85, at 189.

129. See, e.g., *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 666 (Mich. 1981) (Ryan, J., dissenting).

130. It is worth noting once more that 92 percent of homeowners sixty or older surveyed after the *Poletown* taking thought they had received fair compensation. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 33, at 23.

where there is some uncompensated increment, it is unclear that the uncompensated increment is more burdensome than taxes. If we assume that jurisdictions that give a 25 percent premium for homes estimate the uncompensated increment accurately and that the median price of an American home is \$330,000,¹³¹ folks who get compensated at fair market value typically lose a bit more than \$80,000 once in their lives; on the other hand, an average earner pays more than double that in federal income taxes alone over the course of their life.¹³²

It might still be argued that condemnations are more troubling because undercompensated property owners suffer a unique loss that those not subject to eminent domain do not, while taxpayers suffer widely shared losses. It is not obvious that we need to justify asking someone to make a relatively unique sacrifice of a particular size more than we need to justify more widespread sacrifices of equal size, but for the moment, a narrower point is more relevant. It may be difficult to *identify* people who pay a disproportionate amount in taxes, and we have even less capacity to identify those who benefit little from public spending despite paying similar taxes.¹³³ But that does not mean that there are no people whose taxpaying burdens are not just atypically high, but atypically high in quite significant ways.

Moreover, the argument that we can impose burdens with “weak” justification on a taxpayer, assuming we conclude that many around the taxpayer have been asked to make the same sacrifice, is administratively confusing and conceptually unsatisfying. At the administrative level, it is unclear how widespread a loss must be for us

131. Federal Reserve Bank of St. Louis, *supra* note 102.

132. See Richard Barrington, *How Much Will You Pay in Taxes Over Your Lifetime?*, FORBES (Mar. 17, 2011), <https://www.forbes.com/sites/moneybuilder/2011/03/17/how-much-do-you-pay-in-taxes-over-your-lifetime/#4d35baaa/> (stating that the average earner pays an estimated \$188,520 in federal taxes over her lifetime).

133. Sometimes identifying people who pay too much or receive too little relative to others who pay the same amount is not *that* tricky. For instance, people who realize capital gains pay taxes that those who devise or bequeath appreciated assets at death never do even though those who realize gains before death are either identically or more poorly situated (cash poor) than those who pass the appreciated assets to devisees and legatees. (We may be talking millions of dollars in “excess” taxes for those who realize gains). And childless people who pay school taxes may indeed share the diffuse public benefits of universal education, but they do not enjoy the (derivative) private benefits that parents get when, for example, their children’s earning capacity is increased by schooling. Looking at property taxes in the very high tax suburb of New York that I grew up in, someone owning a home whose market value is around \$1 million would pay annual school taxes of approximately \$6,600 per year. If we assume a childless couple is paying school taxes for somewhere in the vicinity of the 15 years that a two-child couple is receiving private benefits from the schools, then the childless couple is paying nearly \$100,000 more in (net) taxes than the couple with children.

to ignore it: Are we to ignore the Poletown residents' complaints because *thousands* were displaced, rather than a single homeowner (or three or five or fifty)?

At the conceptual level, the argument that we require greater justification to injure a few than to injure many entails a rejection of methodological individualism—an approach that Justice Thomas would likely find troubling. Certainly, those who emphasize the separateness of persons that justifies individual rights frameworks do not think that an individual whose rights are infringed should be reassured to learn that others have borne the same injury; libertarians would never be reassured to learn that they are merely one of many whose rights were trampled. For a methodological individualist, each displaced resident of Poletown and each taxpayer whose money went to fund a troublingly private development project deserves the same sort of explanation. The fact that there are more similarly situated parties in one scenario than the other is entirely beside the point.

Counter to the arguments just presented, one might still conclude that those subjected to eminent domain experience losses that are both larger and less widely shared than the losses faced by taxpayers spending large sums to fund projects that do not selfishly benefit them. One could further reject these arguments *and* believe that those facing large or atypical losses should face them only when there are especially strong justifications for facing them. Even then, the conclusion that we need the public use requirement to guarantee that those bearing atypical and large losses do so only when the losses are “justified” is extraordinarily weak. There is nearly no relationship between any “public use” requirement (especially Justice Thomas’s) and “strong justification.”

For individualists, it is tautologically true that the gains that counterbalance the losses that the taxpayer or condemnee experiences *must* be enjoyed by individuals because only individuals have interests or can experience gains. We are justified to impose suffering to create Thomas’s sort of public use goods only because individuals are benefitted by the creation of these goods; for individualists, what else could the justification be? But even for those who believe we can *distinguish* public gains from aggregated private gains, there will surely be “private gains” to others that justify losses and suffering as much as these putative “public gains.”

Assume, *arguendo*, that the Poletown homeowners made an atypically large sacrifice and that this is unfair unless they have been

given an especially powerful reason to do so. The idea that their sacrifice would be *more* justified if it had gone to build a park or a highway, rather than to serve “private” ends (like keeping on some autoworkers in the Poletown plant who would otherwise have to leave the Detroit area or change vocations), is unfathomable. Likewise, a taxpayer who bore disproportionate burdens need not be reassured to learn that his tax dollars funded a traditional public good whose provision he opposed (“defense” spending, or highways that facilitated white flight to the suburbs) rather than redistributive efforts he favored that would target particular private parties (like health care for otherwise uncovered sick children, or public education that equalizes opportunity). “Public uses” may not serve the interests of those who sacrificed to facilitate them; “private” uses may. There is no systematic reason to believe that our material sacrifices will feel more justified when they fund one type of legislatively directed project than another.

CONCLUSION

Of course, it can be a bad thing that public programs may serve parochial interests, though what is really a bad thing is that they may serve the *wrong* parochial interests. The word “wrong” is important to emphasize, though. It is by no means a bad thing, for instance, that certain programs (e.g., Medicaid) primarily serve the immediate interests of materially disadvantaged members of the community, even if we think programs that serve these groups could be thought of as parochial in some ways.

Wrong-headed parochial projects may entail taxing and expending *money* or they may entail different forms of garnering resources (“taxing” via condemnation, particularly when there is an “uncompensated increment” such that condemnees are under-compensated; “taxing” via regulation that impels regulated parties to expend resources to meet collectively established aims) and distinct forms of spending (using the resources gained through condemnation on the program the government directs them to be used in; funneling resources to a regulatory program’s beneficiaries).

Alas, there is nothing much for courts to do about unwarranted parochialism in the straightforward tax-and-spend cases, and the things that Thomas proposes to do about it in the condemn-and-use cases are senseless. There is nothing much to do about parochialism for a host of conceptual and practical reasons. Conceptually, the distinction between parochial projects designed to aid individuals and those with a public

purpose is completely obtuse from the vantage of methodological individualists, those who believe that only individuals truly have interests. For methodological individualists, gains to “the public” are just the sum of gains to individuals. And asking courts to determine when too few people benefit from a public project – much less the wrong few – is hopeless. There are plainly conventional public works projects whose benefits are narrowly focused. The extreme case is the public airport serving only private airplane owners, but parks and highways are often moderate cases. At the same time, there are some projects that directly benefit a narrow constituency that may seem unproblematic in part because there is widespread collective support for granting those benefits and in part because the benefits of the end-state would be under-provided in a private market. In this regard, consider again typical redistributive programs that directly benefit only the “needy” sub-set of the population. But when are any of these projects on the wrong side of the “unacceptably parochial” line?

Supporters of a narrow view of the public use requirement have offered no persuasive functional reasons to believe that it is more sensible for courts to try to remedy the problems of unwarranted parochialism when resources are garnered through eminent domain rather than taxation. Tax-and-spend programs to attract Amazon, whether in the form of property tax abatements or highly targeted, company-specific infrastructure development, were just as substantively parochial as programs that would have assembled parcels for the company. But because such facially “parochial” programs might well benefit less parochial economic development interests over time, courts wisely refuse to invalidate them. And supporters of the narrow view of public use have given no reason whatsoever—functional or textual or formalist—to believe that courts should scrutinize the use of resources subject to takings law protection that are gathered by condemnation of real property more than they should scrutinize the use of resources subject to *regulatory* takings law protection. Nor have they provided a policy-based rationale for why property takings should be scrutinized more closely than tax-and-spend programs.

Justice Thomas is right that it might be possible to come up with a judicially enforceable test for undue parochialism in the context of eminent domain even if doing so for spending programs would be more difficult. He proposes that the garnered resources must be owned by the state or a common carrier and open to use by the general public. But the test is considerably less administrable than its proponents

would have us believe. Set aside for a moment the glaring problem that it is hard to apply to most regulatory takings, leaving us with two distinct and inconsistent tests to determine when a taking is simply impermissible rather than merely giving rise to a compensation requirement. What is more is that it is impossible to determine what “public ownership” means when private users may be bound by explicit state-based directions to use property in a particular way. This problem only intensifies as governments move to privatize service delivery and to enter into public-private joint ventures. It is equally impossible to determine when property is truly open to the public in relevant ways. Realistically, some members of the public will have little or no interest in accessing “public” property or may not have the capacity to access it—particularly when public facilities are not free.

But what is far more bothersome than the test’s blurriness is that it is conceptually senseless. Justice Thomas’s form of “public use” is a very poor proxy for uses that are acceptably non-parochial. The test plainly permits programs that actually serve narrow interests. In fact, because a decent case can be made that *all* public programs serve some sub-set of the population’s needs better than they do others’, the failure of the test to shut down government entirely is puzzling. Furthermore, the test also forbids uses where eminent domain seems appropriate under any sensible functional approach. The government may sensibly undertake projects when private demand in the market is suppressed by free rider problems (whether public provision is appropriate because the project is designed to produce conventional public goods like defense or merely to produce goods generating substantial positive externalities, as is the case in the economic development sphere). And it makes use of the condemnation power as a means to realize these projects, rather than market purchase, because it faces hold-out problems in assembling parcels (whether for public roads, large military bases or large factories).

Many, but by no means all, of the economic development takings of the sort that excited such rage after *Kelo* were indeed likely parochial in the bad sense. The same is true of similar tax abatement and infrastructure development deals, untouched by the narrow public use test for condemnations alone. But much of the fuss we saw, historically, over the poster child private use condemnations in *Kelo* and *Poletown* was ideological in the pejorative sense. Most of the bad outcomes of eminent domain (under-compensation of a non-trivial proportion of parcel owners who lose property, particularly residential property, and

destruction of communities) occur regardless of how condemned land is used. The construction of the constitutionally unproblematic highway system not only caused the same sorts of damage to property owners that the *Kelo* hysterics decry, but the gains and losses from these ostensibly public programs were hardly uniform.¹³⁴ And the overwrought solicitude for the displaced would feel a bit more moving and sincere if those, like Justice Thomas, who wept over the use of condemnation, paid any heed to the far more massive dislocations that routinely occur because of market forces. The GM-UAW-Detroit troika may have directly displaced 4,000 residents of Poletown,¹³⁵ but the ongoing mix of market forces and imperfect governance caused far more serious depopulation in the previous decade.

At its core, the *Kelo* dissent is devoid of reason. It is unsound constitutional law. But more importantly, it is singularly unhelpful in guiding the policy decisions that state legislatures must make today about the permissibility of condemnations. A more solid foundation is needed to guide narrow issues that arise in the context of eminent domain or the broader questions that arise when we rightly worry about the unjust distribution of public benefits.

The problem of unduly parochial government programs will not be remedied by endowing courts with greater power to strike down legislatively authorized uses of either the funds raised through taxation or the land acquired through condemnation. It is by no means obvious that we can adequately constrain inappropriate parochialism through the range of mechanisms designed to counter asymmetric influence in the political process—campaign finance reform, increasing transparency of legislative action, restraining lobbyists and making their efforts more public, vigorously prosecuting those who offer and those who receive more explicit bribes to influence public decision making. But we should be looking to reform of the political process rather than judicial enforcement of constitutional or statutory bans on inadequately public programs to ameliorate, if not completely fix, the problem that too many programs benefit a small sub-set of the populace. Conceptually and functionally, Justice Thomas’s public use test is unilluminating. Its

134. Spoiler alert: Facilitating white flight suburbanization through the construction of the interstate highway system was hardly an unambiguously non-parochial public project!

135. It would also be helpful to recall that the condemnation probably should not be seen as “displacing” most of them but rather as having given many of the supposedly “displaced” the financial wherewithal to exit a broken community that they wanted to get out of.

infirmities demand that state legislatures abandon such a rigid and ineffective standard.