

Justice Thomas' *Kelo* Dissent, or, "History as a Grab Bag of Principles"¹

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In *Kelo v. City of New London*,² a bare majority of the Court held that economic development—creating jobs and increasing tax revenues—satisfies the Fifth Amendment's requirement that property be "taken for public use."³ *Kelo* ignited substantial political backlash,⁴ probably because the Court's decision permitted a city to use eminent domain to forcibly acquire homes from residents who had lived in them for decades.⁵ The Court rejected the plaintiffs' argument that taking their property for economic development is not a "public use," explaining that ever since the Court "began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'"⁶ Although Justice Stevens' majority opinion was the subject of much criticism,⁷ Justice Thomas' dissent was probably the most radical of the four opinions in *Kelo*.⁸ Thomas would have interpreted the Public Use Clause according to what he labels its "most natural

¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1060 (1992) (Blackmun, J., dissenting).

² 125 S. Ct. 2655 (2005).

³ U.S. CONST. amend. V.

⁴ See T.R. Reid, *Missouri Condemnation No Longer So Imminent; Supreme Court Ruling Ignites Political Backlash*, WASH. POST, Sept. 6, 2005, at A2 ("[A]ll over the country, . . . *Kelo* . . . has sparked a furious reaction, with politicians of both parties proposing new legislation that would sharply limit the kind of seizure the . . . decision validated."); see, e.g., Jeff Jacoby, Editorial, *Eminent Injustice in New London*, BOSTON GLOBE, June 26, 2005, at D11 ("These five justices, [said the son of one of the *Kelo* plaintiffs,] 'I hope someone looks at their property and says, "You know, we could put that land to better use—why don't we get the town to take it from them by eminent domain." Then maybe they would understand what they're putting my father through.'"); Benjamin Weyl, *Activist Tries a Grab for Jurist's Property*, L.A. TIMES, June 30, 2005, at A10 (describing an activist's apparently serious suggestion that the city of Weare, New Hampshire use eminent domain to acquire Justice Souter's vacation home in order to build a new hotel).

⁵ *Kelo*, 125 S. Ct. at 2668.

⁶ *Id.* at 2662.

⁷ In addition to the negative popular reaction, see *supra* note 4, some of the legal criticisms of *Kelo* are expressed by Justice O'Connor's dissent, *id.* at 2672–75, and by the opinion of the dissenting justices in the case when it was decided by the Supreme Court of Connecticut. *Kelo v. City of New London*, 843 A.2d 500, 588 (Conn. 2004) (Zarella, J., dissenting).

⁸ Justice Stevens wrote the opinion for the Court, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justice Kennedy also wrote a separate concurring opinion. The principle dissent was written by Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Scalia and Thomas. Justice Thomas wrote a separate dissent, which no other justice joined, that is the subject of this article.

reading,” namely, as a substantive limitation that “allows the government to take property only if the government owns, or the public has a legal right to use, the property.”⁹ In Thomas’ view, the majority opinion unjustifiably replaces the Public Use Clause with a “Public Purpose Clause” or a “‘Diverse and Always Evolving Needs of Society’ Clause.”¹⁰

In the first half of his opinion, Justice Thomas makes three interrelated arguments to support his position that his narrow reading of the Public Use Clause is consistent with its “original meaning.”¹¹ First, Thomas begins with a textual analysis of the words “for public use,” considering the definition of “use” in a founding-era dictionary and comparing the Public Use Clause to other clauses in the U.S. Constitution and in several other contemporary constitutions.¹² Second, the opinion examines the “Constitution’s common-law background,” which Thomas believes “reinforces” the conclusions of his textual analysis.¹³ Perhaps not surprisingly, Thomas almost exclusively relies on the writings of William Blackstone for this “common-law background.”¹⁴ Finally, Thomas surveys the early states’ eminent domain practices and explains how these practices support his understanding of the original meaning of the Public Use Clause.¹⁵

The second half of Thomas’ dissent advocates reconsidering the Court’s entire public use jurisprudence to conform with the conclusions of his textual and historical analysis.¹⁶ He begins with the earliest federal cases decided over a century ago that suggested that public use should be

⁹ *Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting).

¹⁰ *Id.* at 2677 (Thomas, J., dissenting) (quoting *id.* at 2662).

¹¹ *Id.* at 2679–80 (Thomas, J., dissenting).

¹² *Id.*

¹³ *Id.* at 2680 (Thomas, J., dissenting).

¹⁴ *Id.* at 2677, 2679, 2680 (citing Blackstone’s *Commentaries on the Laws of England*).

¹⁵ *Id.* at 2681–82. Because the federal government did not exercise its eminent domain authority until many decades after the founding, this early practice concerns the states’ eminent domain activity and the limits imposed by state equivalents to the Takings Clause. *Id.* at 2681. The first major case concerning an exercise of eminent domain by the federal government was not decided until 1872. DAVID A. SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 55 (1992).

¹⁶ *Kelo*, 125 S. Ct. at 2682–86 (Thomas, J., dissenting).

broadly construed and argues that imprecise dicta in those early cases evolved into the holdings of later key cases such as *Berman v. Parker*¹⁷ and *Hawaii Housing Authority v. Midkiff*.¹⁸ In both these cases, a unanimous Court held that the Public Use Clause is satisfied by a legislature's determination that taken property will be used for a public purpose,¹⁹ and the majority opinion in *Kelo* is based in large part on the reasoning of cases such as *Berman* and *Midkiff*.²⁰

This article analyzes the first half of Thomas' dissent because it provides the fundamental reasoning behind his view that the Public Use Clause should be interpreted as it was "originally understood," and his opinion of the significance of the facts in *Kelo*—and of the precedent on which it is based—essentially follow from that fundamental reasoning. This article does not take issue with the "original meaning" inquiry as a method of deciding constitutional cases or the propriety of overruling a century of Supreme Court precedent based on historical conclusions of questionable accuracy. Instead, it examines the support that Justice Thomas provides for the proposition that the Public Use Clause was originally understood as a substantive limitation that allowed a taking "only if the government or the public actually uses the taken property."²¹ This article argues that Justice Thomas' understanding of the Public Use Clause's original meaning is merely one possible meaning that the framers may have had in mind, and that at least as much historical and textual support exists to support the view that the framers intended the government

¹⁷ 348 U.S. 26, 36 (1954).

¹⁸ 467 U.S. 229 (1984).

¹⁹ *Id.* at 242; *Berman*, 348 U.S. at 36.

²⁰ *See Kelo*, 125 S. Ct. at 2663–66 (discussing *Berman*, 348 U.S. at 26, and *Midkiff*, 467 U.S. at 229, and concluding that there is "no principled way of distinguishing economic development from the other public purposes" recognized in those cases). Interestingly, although Justice O'Connor authored the opinion for the Court in *Midkiff*, she authored the principle dissent in *Kelo*.

²¹ *Kelo*, 125 S. Ct. at 2682 (Thomas, J., dissenting). Thomas alternates between requiring the public to "actually use the taken property," *id.* at 2682, 2684, and requiring that the public have "a legal right to use" the property, *id.* at 2679, 2686. In some of the early state cases that Thomas relies upon, the public actually used the taken property unaccompanied by a formal legal right, *id.* at 2681, while in other early cases he cites, there was merely a *legal* right to use the property but in actuality, the taking was used only by private parties, *id.* at 2683–84 (discussing *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906)). Accordingly, it would seem that Thomas would allow either legal or actual use to satisfy the Public Use Clause. *See infra* notes 138–141 and accompanying text.

to be able to take private property for public purposes such as economic development.²² The discussion below draws on the scholarship of William Novak,²³ Gregory Alexander,²⁴ David Schultz,²⁵ Morton Horwitz,²⁶ and others to demonstrate that many of the historical sources that Justice Thomas relies on—particularly John Lewis' 1888 treatise on eminent domain²⁷—in fact support the conclusion that the words “for public use” were originally understood to allow the government to take private property for a public purpose, if those words were meant as a substantive limitation at all.²⁸

I. THOMAS' TEXTUAL ARGUMENTS

Justice Thomas begins by analyzing the text of the Takings Clause itself to support his position that the “original meaning” of the Public Use Clause “allows the government to take property only if the government owns, or the public has a legal right to use, the property.”²⁹ The 1773 edition of Samuel Johnson's well-known *Dictionary of the English Language* “defined the noun ‘use’ as ‘the act of employing any thing to any purpose,’”³⁰ and an 1888 treatise on eminent domain noted that the word's Latin root, *utor*, means “to use, make use of, avail one's self of, employ, apply, enjoy, etc.”³¹ From these two sources, Thomas concludes that when property is taken pursuant to the Takings Clause, “the government or its citizens as a whole must actually

²² For a brief overview of the variety of influences on eminent domain theory and practice, see generally Harry N. Scheiber, *The Jurisprudence—and Mythology—of Eminent Domain in American Legal History*, in LIBERTY, PROPERTY, AND GOVERNMENT 217 (Ellen Paul Frankel & Howard Dickman eds., 1989).

²³ WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE* (1992).

²⁴ GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* (1996).

²⁵ SCHULTZ, *supra* note 15.

²⁶ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

²⁷ JOHN LEWIS, *LAW OF EMINENT DOMAIN* (Chicago, Callaghan & Co. 1888).

²⁸ The dispute among the justices in *Kelo* concerns two related issues. The first is about the correct meaning of the words “for public use,” and the second is the extent to which the Court should defer to legislative determinations of whether a particular taking satisfies that substantive standard. This paper focuses on the first issue because the choice of a substantive standard logically dictates an appropriate level of scrutiny—strict scrutiny hardly makes sense if almost any public purpose satisfies the Public Use Clause, and extreme deference would truly be an abdication of the Court's role if the standard it were trusting the legislature to apply were a difficult one to satisfy.

²⁹ *Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting).

³⁰ *Id.* (citing 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 2194 (London, 4th ed. 1773)).

³¹ *Id.* (citing LEWIS, *supra* note 27, at 224 n.4).

‘employ’ the taken property.”³² Thomas explains that, as applied to *Kelo*, it “strains language” to say the public is “‘employing’ the property” when “the government takes property and gives it to a private individual and the public has no right to use the property.”³³

Regardless of whether the public will in fact have “no right” to use the property at issue in *Kelo*,³⁴ there are several reasons why the language of the Public Use Clause does not compel the conclusion that the public must actually employ the taken property. First, Thomas’ analysis ignores a part of Johnson’s definition of the word “use,” focusing on the “act of employing” rather than on “to any purpose.” Taken as a whole, Johnson’s definition of “use” indicates that “public use” could mean that the public can “employ any thing”—here, the taken property—“to any purpose.”³⁵ Thus, the phrase “property taken for public use” could be understood as “the act by the public of employing the taken property to any purpose,” or perhaps even as “the act of employing the taken property to a public purpose.” Given that Thomas begins his opinion by criticizing the Court’s replacement of the Public Use Clause with a “Public Purpose Clause,”³⁶ it is odd that his textual analysis begins by defining “use” in terms of “purpose.”³⁷ Furthermore, Johnson lists nine definitions for the word “use,”³⁸ and Thomas does not explain why the drafters

³² *Id.* (Thomas, J., dissenting).

³³ *Id.* (Thomas, J., dissenting).

³⁴ See *infra* notes 129–140 and accompanying text.

³⁵ *Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting) (citing 2 JOHNSON, *supra* note 30, at 2194 (emphasis added)).

³⁶ *Id.* at 2677 (Thomas, J., dissenting).

³⁷ In the eminent domain context, many early state judges do not seem to have distinguished between the words “use” and “purpose.” See, e.g., *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 23–24 (N.Y. 1837) (opinion of Edwards, Sen.) (using the terms “public purposes” and “public use” interchangeably); *Gardner v. Village of Newburgh*, 2 Johns Ch. 162 (N.Y. Ch. 1816) (opinion of Kent, Ch.) (“I am not to be understood as denying a competent power in the legislature to take private property for necessary or useful *public purposes* But . . . a fair compensation . . . is a necessary qualification . . . in taking private property for *public uses*.” (emphasis added)); *Den ex dem. Robinson v. Barfield*, 6 N.C. (2 Mur.) 390, 420 (1818) (opinion of Daniel, J.) (legislature can take property only for “public purposes”); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 264 (1828) (opinion of Carr, J.) (“The eminent domain . . . extends to the taking private property for public purposes.”).

³⁸ 2 JOHNSON, *supra* note 30, at 2194–95. The copy of the 1773 edition of Johnson’s *A Dictionary of the English Language* at Duke University’s rare book room has no page numbers and seems to have been printed without them. Therefore, the citations here rely on the page numbers that Thomas cites in his opinion.

of the Fifth Amendment must have necessarily intended the particular definition Thomas prefers—one of many meanings that the word had at during the late eighteenth century.³⁹

Second, putting aside the relevance of an 1888 treatise in determining the “original meaning” of an amendment drafted in 1791,⁴⁰ Thomas emphasizes the treatise’s definition of “use” as “employ” while ignoring broader terms such as “enjoy.”⁴¹ Is it so obviously wrong⁴² to say that the public does not “enjoy” property that, though owned by a private individual, is used to improve the local economy and create jobs? Even in 1888, the original meaning of the words “for public use” was far from obvious—Lewis begins his section on public use by quoting an 1876 Nevada Supreme Court decision: “No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words ‘public use’ . . . regulating the right of eminent domain.”⁴³

Third, it is questionable whether a textual analysis necessarily supports the conclusion that the Public Use Clause is a substantive limitation on the government’s eminent domain

³⁹ Johnson’s second, fourth, and fifth definitions, respectively, are “[q]ualities that make a thing proper for any purpose,” “[a]dvantage received,” and “[c]onvenience.” 2 JOHNSON, *supra* note 30, at 2194–95. Johnson apparently intended the order of definitions to have some significance, and he indicated that the definitions of each word should be ordered so as “to exhibit first its natural and primitive signification,” then “to give its consequential meaning,” and then its “metaphorical meaning.” SAMUEL JOHNSON, *THE PLAN OF A DICTIONARY OF THE ENGLISH LANGUAGE* (London, J. & P. Knapton et al., 1747). For a word such as “use” that has nine definitions, order alone does not indicate how significant or common each definition was at that time. Notably, Thomas does not mention “[a]dvantage received,” and he rejects the others by arguing that, when “read in context, the term ‘public use’ possesses the narrower meaning.” *Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting). But as is discussed below, this “context” is not as conclusive as Thomas claims. See *infra* notes 51–76 and accompanying text.

⁴⁰ See NOVAK, *supra* note 23, at 244–47 (noting that by the late nineteenth century, American legal thought had undergone a dramatic transformation, repudiating the “*salus populi*” principle that dominated the thinking of early nineteenth century jurists in favor of “a heightened regard for *individual* right and liberty”); see also ALEXANDER, *supra* note 24, at 322–23 (1997) (noting a decidedly non-originalist position taken by this particular 1888 treatise).

⁴¹ LEWIS, *supra* note 27, at 224 n.4.

⁴² Thomas contrasts his position with the majority’s holding in absolute terms, stating, for example, that the Court’s opinion goes “against all common sense,” *Kelo*, 125 S. Ct. at 2677 (Thomas, J., dissenting), that “[t]he Court adopted its modern reading blindly,” *id.* at 2682, and relied on “a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document,” *id.* at 2687.

⁴³ *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 400–01 (1876), *quoted by* LEWIS, *supra* note 27, at 217.

authority. In fact, Lewis himself seems to disagree with Thomas that the “most natural reading” of the Public Use Clause is as a limitation:

If the intent had been to make the words “public use” a limitation, the *natural form* of the expression would have been: “Private property shall not be taken *except* for public use, nor without just compensation.” It is certainly questionable whether anything more was intended by the provision . . . than as though it read, “Private property shall not be taken *under the power of eminent domain* without just compensation.”⁴⁴

There simply is not a single “most natural reading” of the Takings Clause, and Justice Thomas’ efforts to impose one by citing an eighteenth-century dictionary and a nineteenth-century treatise is both mistaken and misleading.⁴⁵ In fact, Thomas’ position on the meaning of “public use” is essentially identical to the position that Lewis believes is the “correct” view. But although Lewis favored the narrow meaning of “public use,” he readily conceded that as many cases had adopted “actual use by the public” as had upheld exercises of eminent domain for “public benefit or advantage.”⁴⁶ Furthermore, Lewis cautioned that “[i]f we look to our dictionaries, we find the same confusion as in the decisions,” noting that dictionaries define “use” to mean both “[t]he act employing any thing for any purpose” as well as “benefit, utility, advantage.”⁴⁷ While Lewis readily states that the position he takes is not compelled by the text, history, or precedent,⁴⁸

⁴⁴ *Id.* at *ii* (first emphasis added; quotations around “public use” replace commas and italics in the original).

⁴⁵ In fact, scholars have advanced plausible theories of the original meaning of the Public Use Clause that are at least as well-supported as, and entirely at odds with, Thomas’ view. See, e.g., Matthew P. Harrington, “*Public Use*” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1298–1300 (2002) (arguing that “the phrase, ‘public use’ as found in the Fifth Amendment was not meant to serve as a substantive limitation at all,” but merely served to distinguish takings that did not require compensation, such as taxation and forfeiture, from expropriations for which compensation was required); Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 16–18 (1980) (discussing the ambiguity in early state constitutions, perpetuated by the language of the Fifth Amendment, about whether the words “for public use” signified a substantive limitation on eminent domain).

⁴⁶ LEWIS, *supra* note 27, at 221–24.

⁴⁷ *Id.* at 223.

⁴⁸ *Id.* at 221–23. In the treatise’s preface, Lewis willingly explains that his position on the meaning of “public use” is merely one possibility, and modestly notes that “whether the conclusions reached by the author are correct must be left for the reader to judge.” *Id.* at *ii*.

Thomas excises such qualifications and presents Lewis' position as if it has always been the only plausible original understanding of Public Use Clause.⁴⁹

Although Thomas does note that these early sources also define “use” broadly,⁵⁰ he dismisses the possibility that the founders intended the Public Use Clause to be understood according to those broader meanings by explaining that when “read in context, the term ‘public use’ possesses the narrower meaning.”⁵¹ For “context,” Thomas compares the Takings Clause to other constitutional clauses in which the term “use” appears (or does not appear), as well as to the Takings Clauses in early state constitutions.⁵² The word “use” appears twice in the 1787 Constitution, and Thomas argues that in both instances it clearly has a narrow, literal meaning, and that therefore the word “use” in Takings Clause possesses that same literal meaning.⁵³

Article I, Section 8 grants Congress the power “[t]o raise and support armies, but no appropriation of money *to that use* shall be for a longer term than two years,”⁵⁴ and Article I, Section 10 states that “the net produce of all duties and imposts, laid by any state on imports or exports, shall be *for the use* of the Treasury of the United States.”⁵⁵ Contrary to Thomas' assertion, however, neither of these clauses shed much light on the meaning of “for public use” in the Takings Clause. The “use” referred to in Article I, Section 8 is clearly defined by the clause itself—i.e., the use of raising and supporting armies—so that the entire clause means “no appropriation of money to raise and support armies shall be for more than two years.”⁵⁶ The phrase “to that use” is not so much a substantive constitutional limitation as it is a prepositional placeholder that renders more concise that clause's grant of power combined with a limitation on

⁴⁹ See *supra* note 42.

⁵⁰ See *supra* note 39.

⁵¹ *Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting).

⁵² *Id.* at 2679–80.

⁵³ *Id.* at 2679.

⁵⁴ U.S. CONST. art. I, § 8, cl. 12 (emphasis added).

⁵⁵ U.S. CONST. art. I, § 10 cl. 2 (emphasis added).

⁵⁶ Constitutional Prohibition—Appropriations for Armies, 25 Op. Att'y Gen. 105, 106 (1904).

its exercise.⁵⁷ Thus, rather than mandating a “narrow” reading of the word “use,” Article I, Section 8 suggests that the phrase “for public use” was intended as a prepositional placeholder for the governmental power that must exist for the Takings Clause to have any meaning, namely, the power of eminent domain.⁵⁸ In other words, the original meaning of the Takings Clause might be “nor shall private property be taken under the power of eminent domain without just compensation.”⁵⁹ Thus, Article I, Section 8 potentially undermines a premise critical for Thomas’ position, namely, that the Public Use Clause is a substantive limitation on government action.⁶⁰

The word “use” in the provision of Article I, Section 10 that requires that any money collected by state import taxes “shall be for the use of the Treasury” could likewise imply that the Public Use Clause means the opposite of the view taken by Justice Thomas. If the framers actually had Article I, Section 10 in mind when they chose the word “use” for the Takings Clause, then logic suggests that they would have used a parallel formulation if their intent was to convey an identically narrow meaning.⁶¹ Specifically, just as import tax revenues “shall be for the use of the Treasury,” so too, the Takings Clause could have required that taken property “shall be for the use of the public.” This is as plausible as Justice Thomas’ conclusion that “use” in Article I, Section 10 mandates a literal reading of the Public Use Clause.

⁵⁷ *Cf. id.* at 106–07 (explaining that the substantive limitation in Article I, Section 8 concerns the meaning of the words “raise” and “support”).

⁵⁸ See Harrington, *supra* note 45, at 1299 (arguing that the Public Use Clause “was meant to be descriptive, rather than prescriptive”). The term “eminent domain” does not appear in the Constitution, yet the United States clearly possesses that power despite the lack of explicit constitutional authorization. *Cf. Harvey v. Thomas*, 10 Watts 63 (Pa. 1840) (noting that Pennsylvania’s right of eminent domain “would have existed in full force without” the constitutional clause that prohibits taking property for public use without just compensation), *cited by* LEWIS, *supra* note 27, at 22 n.4.

⁵⁹ This formulation paraphrases LEWIS, *supra* note 27, at *ii*; see also *supra* note 44 and accompanying text.

⁶⁰ Whether the Public Use Clause is in fact such a limitation is discussed above. See *supra* notes 44–45 and accompanying text.

⁶¹ See Harrington, *supra* note 45, at 1300–01 (arguing that if Congress had intended the Public Use Clause to be a narrow substantive limitation on eminent domain, “it might have gone about the business far more directly”).

Thomas' next argument is based on the absence of the word "use" in another clause. He points to the language of the General Welfare Clause, which states that "Congress shall have the power to . . . provide for the common defense and general welfare,"⁶² and suggests that the framers would have used "for the general welfare" in the Takings Clause if they intended its scope to be as broad.⁶³ However, Thomas' assumption that "public use" meant something substantially different than "general welfare" at the time of the founding may simply be untrue.⁶⁴ Rather, early Americans probably equated "public use" with "public benefit" and would not likely have drawn the sharp distinction that Thomas suggests.⁶⁵ Furthermore, even if the General Welfare Clause is broader than the Public Use Clause, the literal meaning of "public use" is not the only interpretive option. Despite the *Kelo* majority's deference to legislative determinations of what constitutes public use, the issue is still subject to substantive judicial review.⁶⁶ In contrast, the general welfare limitation on congressional power is generally considered to be effectively nonjusticiable.⁶⁷ Thus, even if Thomas is correct that the distinct language in these two clauses indicates distinct meanings, this does not necessitate the conclusion that the framers intended "for public use" to be read as "actual use by the public" rather than as "public benefit,

⁶² U.S. CONST. art. I, § 8, cl. 1.

⁶³ *Kelo*, 125 S. Ct. at 2679–80 (Thomas, J., dissenting).

⁶⁴ Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 74–75 (1996); Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339, 340–41 & nn.10–12 (1999).

⁶⁵ Melton, *supra* note 64, at 84–85.

⁶⁶ See *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting) (noting that "the question what is a public use is a judicial one" (quoting *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930))).

⁶⁷ *South Dakota v. Dole*, 483 U.S. 203, 208 n.2 (1987); see also Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 197 (2001) (describing the General Welfare Clause as "effectively nonjusticiable"); David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1200 (2004) ("*Dole's* requirement that spending programs serve the 'general welfare' is, by the Court's own admission, nonjusticiable."); Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 161 (2004) ("There is no justiciable limit on the expenditure of funds . . . for 'the general welfare.'"). But see David L. Breau, Note, *A New Take on Public Use: Were Kelo and Lingle Nonjusticiable?*, 55 DUKE L.J. (forthcoming Feb. 2006) (arguing that the *Berman-Midkiff-Kelo* line of cases has rendered the Public Use Clause effectively nonjusticiable).

utility, or advantage,” since the latter standard is still substantively distinct from the standard that governs judicial review in the General Welfare Clause context.

Thomas’ final argument from “context” compares the phrase “public use” in the federal Constitution with the phrase “public exigencies” in the Massachusetts Declaration of Rights⁶⁸ and the Northwest Ordinance, and the phrase “public necessity” in the Vermont Constitution of 1786, and suggests that the words “public use” in the federal constitution indicate a greater curtailment of eminent domain than existed under these other constitutional documents.⁶⁹ However, a closer examination of the Takings Clauses in these three documents reveals that the comparison is at best inconclusive and at worst disproves Thomas’ argument.

Both the Massachusetts Declaration of Rights, adopted in 1780, and the Vermont Constitution of 1786 actually speak of “public uses” in a manner that precisely parallels the language in the federal Takings Clause. The Massachusetts Declaration of Rights states that “whenever the public exigencies require, that the property of any individual should be appropriated *to public uses*, he shall receive a reasonable compensation therefor.”⁷⁰ The Vermont Constitution of 1786 states the general principle that “private property ought to be subservient to public uses, when necessity requires it” and then specifically provides that, despite this subservience, “whenever any particular man’s property is taken *for the use of the public*, the owner ought to receive an equivalent in money.”⁷¹ The Fifth Amendment reference to property “taken for public use” parallels the Massachusetts reference to property “appropriated for public

⁶⁸ Justice Thomas refers to this document as the Massachusetts Bill of Rights, but its full title is “A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.” In this paper, I use “Massachusetts Declaration of Rights” because it is consistent with the original title of that document. 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 337 (1971).

⁶⁹ *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting).

⁷⁰ MASS. CONST. art. X (1780), *reprinted in* 1 SCHWARTZ, *supra* note 68, at 341 (emphasis added).

⁷¹ VT. CONST. ch. 1, art. II (1786), *reprinted in* 6 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS* 3752 (1909) (emphasis added).

uses” and the Vermont reference to property “taken for the use of the public.” Thomas, however, bases his argument on a comparison between non-parallel clauses.

These state forerunners to the federal Takings Clause also seem to suggest that “public exigencies” or “necessity” must be a condition precedent to the exercise of eminent domain, *in addition to* requiring that taken property be for public use.⁷² Thus, it could be that the omission of the “public exigencies” and “necessity” requirements from the federal Takings Clause indicates that the federal Public Use Clause is less restrictive than the limitations in the Takings Clauses of colonial Massachusetts and Vermont.⁷³

The Northwest Ordinance was adopted by the Continental Congress in 1787 and “was framed mainly from the laws of Massachusetts.”⁷⁴ Its Takings Clause, which seems to be broader than the federal Takings Clause with respect to public use, provides that “should the public exigencies make it necessary for the common preservation to take any person’s property, or to demand his particular services, full compensation shall be made for the same.”⁷⁵ Similar to the Massachusetts Declaration of Rights, the Northwest Ordinance refers to “public exigencies,” apparently as a condition precedent for taking private property. Unlike both the federal Takings Clause and the Massachusetts Declaration of Rights, which refer to property taken for “public use” or “public uses,” the Northwest Ordinance does not specify what is to be done with property

⁷² Sales, *supra* note 64, at 367–68.

⁷³ *Id.* at 368, *cited by Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting). Thomas’ citation of Sales is misleading because Sales actually argues that the linguistic distinctions between these documents indicate that the public use limitation in the federal Constitution is *less* restrictive than the Massachusetts Declaration of Rights, the Vermont Constitution, and the Northwest Ordinance. Sales, *supra* note 64, at 368; *see also infra* text accompanying notes 136–137.

James Madison’s original draft of what would become the Takings Clause read “no person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation.” 2 SCHWARTZ, *supra* note 68, at 1027. If Thomas is correct that the House Committee responsible for reviewing Madison’s draft had these early state documents in mind, the deletion of any reference to “necessity” would suggest that the House intended to broaden the amendment relative to the Takings Clauses of Massachusetts and Vermont.

⁷⁴ 1 SCHWARTZ, *supra* note 68, at 386–87 (quoting an 1830 letter of Nathan Dane, who drafted the Northwest Ordinance that was adopted by the Continental Congress).

⁷⁵ Ordinance for the Government of the Territory of the United States North-west of the River Ohio, art. II (July 13, 1787), *reprinted in* 1 SCHWARTZ, *supra* note 68, at 400.

after it has been taken. In other words, the Northwest Ordinance simply does not contain a clause that parallels the federal Public Use Clause. Thus, although the addition of the words “for public use” to the Fifth Amendment suggests that the drafters intended some additional limitation on eminent domain, any conclusion from a comparison with the Northwest Ordinance about *the extent* of that additional limitation is little more than speculation.⁷⁶ And as explained above, a comparison with the other two pre-1791 Takings Clauses suggests that the federal public use limitation is less restrictive than the equivalent clauses in either of those documents.

II. “THE CONSTITUTION’S COMMON-LAW BACKGROUND”

Thomas surveys “the Constitution’s common-law background” to buttress the conclusions of his textual analysis that the Fifth Amendment requires the public to actually use taken property.⁷⁷ This “common-law background” is almost entirely drawn from Blackstone’s *Commentaries*, and for Thomas it is nearly axiomatic that the framers intended the Takings Clause to be the constitutional embodiment of “the law of the land [that] postpone[s] even public necessity to the sacred and inviolable rights of private property.”⁷⁸ Although the framers were undoubtedly influenced by theories about absolute property rights,⁷⁹ elevating such theories to constitutional status was not their sole motivation.⁸⁰ In fact, some scholars have gone so far as to call the “American liberal tradition” little more than a myth.⁸¹ While this probably

⁷⁶ The Northwest Ordinance requires some public exigency to exist before a taking of property but does not state that property, once taken, shall be put to public use. Conversely, the federal Takings Clause does not indicate that some public exigency must exist before property can be taken, but does say that such property is “taken for public use.” Although one requirement logically implies the other, a comparison of the precise phraseology used in these documents inconclusive.

⁷⁷ *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting).

⁷⁸ *Kelo*, 125 S. Ct. at 2677 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134–35 (1765)).

⁷⁹ SCHULTZ, *supra* note 15, at 19.

⁸⁰ *Id.* at 12–16.

⁸¹ See, e.g., NOVAK, *supra* note 23, at 2–3, 6–8 (1996); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM 7–8 (1956); Scheiber, *supra* note 22, at 218; cf. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 224 (1990) (discussing the “complex, paradoxical, and mythical dimensions of property’s importance in American constitutionalism”).

exaggerates its insignificance, there were other intellectual traditions that the framers inherited, and “a thinker of the time could even be attracted simultaneously to contradictory or even mutually exclusive concepts.”⁸²

One of the most influential of these concepts was civic republicanism—“the idea that private ‘interests’ could and should be subordinated to the common welfare of the polity.”⁸³ According to republican ideology, which stemmed from James Harrington’s 1656 treatise *Oceana*,⁸⁴ the objective of government was to protect “the political liberty of the collective people”—republicans were less concerned with protecting individual liberty against collective encroachment than with protecting “the public rights of the people against aristocratic privileges and power.”⁸⁵ Unlike Blackstone, Harrington advocated protecting individual liberty by redistributing property to ensure the survival of a republican form of government.⁸⁶ A citizen who owned private property was freed from the burden of providing for his own personal welfare and could instead pursue the civic virtue of pursuing the common welfare.⁸⁷ Although the influence of republican thought waned after the turn of the nineteenth century,⁸⁸ James Kent was still able to observe in 1826 that the “[p]rivate interest must be made subservient to the general interest of the community.”⁸⁹

⁸² SCHULTZ, *supra* note 15, at 12 (citation omitted).

⁸³ ALEXANDER, *supra* note 24, at 29.

⁸⁴ SCHULTZ, *supra* note 15, at 16–17.

⁸⁵ ALEXANDER, *supra* note 24, at 29.

⁸⁶ SCHULTZ, *supra* note 15, at 17.

⁸⁷ ALEXANDER, *supra* note 24, at 29.

⁸⁸ *Cf.* HORWITZ, *supra* note 26, at 64 (noting that as late as 1800, “there still existed a perhaps dominant body of opinion maintaining that individuals held their property at the sufferance of the state”).

⁸⁹ 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 265 (1826), *quoted by* NOVAK, *supra* note 23, at 9. Although Kent’s views on the role of private property were influenced by Federalists such as Alexander Hamilton and John Jay, his “formative years were spent in the revolutionary and constitutional periods when the political language of civic republicanism provided common vocabulary that crossed party lines.” ALEXANDER, *supra* note 24, at 134–35.

Many of the founders did not consider the public good to be in direct conflict with private interests but rather understood them to mutually reinforce one another.⁹⁰ Blackstone himself understood this interrelationship between the public good and private interests, noting that “the public good is in nothing more essentially interested, than in the protection of every individual’s private rights.”⁹¹ Furthermore, Blackstone may not have held the views that are now commonly attributed to him,⁹² and the language from the *Commentaries* quoted by Thomas is taken out of context.⁹³ For Blackstone, the “great . . . regard of the law for private property” meant that it would “not authorize the least violation of it” by the *Crown*.⁹⁴ But the *legislature’s* authority to take private property was clear—“the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce” to the public good.⁹⁵ The way the legislature could “compel the individual” was “by giving him full indemnification” such that “[t]he public is now considered as an individual, treating with an individual for an exchange.”⁹⁶ However, this

⁹⁰ ALEXANDER, *supra* note 24, at 26–30.

⁹¹ 1 BLACKSTONE, *supra* note 78, at 135.

⁹² See, e.g., NOVAK, *supra* note 23, at 32 (noting that nineteenth-century jurists conception of Blackstone was that “the individual and his interests preceded and trumped society and social interests”).

⁹³ “So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . If a new road . . . were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land.” *Kelo*, 125 S. Ct. at 2680 (quoting 1 BLACKSTONE, *supra* note 78, at 135).

⁹⁴ See 1 BLACKSTONE, *supra* note 78, at 135 (describing eminent domain as “an exertion of power, . . . which nothing but the legislature can perform”). John Locke, like Blackstone, was more concerned about arbitrary confiscations of private property by kings than by legislatures, and suggested that government by the people’s representatives would guard against such abuses. Locke explained that such arbitrary takings of property are not much to be feared in governments where the legislative consists . . . in assemblies which are variable, whose members, upon the dissolution of the assembly, are subjects under the common laws of their country, equally with the rest. But in governments, where the legislative is in one lasting assembly always in being, or in one man, as in absolute monarchies, there is danger still, that they will think themselves to have a distinct interest from the rest of the community; and so will be apt to increase their own riches and power, by taking what they think fit from the people.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 140 (1690); see also *id.* § 140 (noting that government can only take property “with his [the owner’s] own consent—i.e., the consent of the majority, giving it either by themselves or their representatives chosen by them”).

⁹⁵ 1 BLACKSTONE, *supra* note 78, at 135.

⁹⁶ *Id.*

analogy to private transactions does not suggest an “actual use” limitation as Thomas implies,⁹⁷ and Blackstone immediately clarifies his understanding of the legislature’s eminent domain authority. “All that the legislature does,” Blackstone writes, “is to oblige the owner to alienate his possessions for a reasonable price.”⁹⁸ If Blackstone can be read to suggest a public use limitation at all, it is more in tune with the *Kelo* majority than with Thomas’ dissent.

Blackstone’s discussion of the legislature’s power to take private property does not even mention “public use,” but instead refers to takings that are “extensively beneficial to the public” or for the “common good” or “the public good.”⁹⁹

Legislative eminent domain authority did not contradict Blackstone’s “absolute” private property rights because Blackstone, like the American republicans, believed that property rights were at least partly a creation of society.¹⁰⁰ “The original of private property is probably founded in nature, . . . but certainly the modifications under which we at present find it . . . are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty.”¹⁰¹ For Blackstone, and probably for the framers as well, “absolute” private property rights had an altogether different meaning than is commonly supposed.¹⁰²

⁹⁷ Compare *id.* at 135 (“But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange.”), with *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting) (“Only ‘by giving [the landowner] full indemnification’ could the government take property, and even then “[t]he public [was] now considered as an individual, treating with an individual for an exchange.” (alterations in original)).

⁹⁸ 1 BLACKSTONE, *supra* note 78, at 135.

⁹⁹ *Id.*

¹⁰⁰ ALEXANDER, *supra* note 24, at 27; SCHULTZ, *supra* note 15, at 19.

¹⁰¹ 1 BLACKSTONE, *supra* note 78, at 134.

¹⁰² See SCHULTZ, *supra* note 15, at 19 (noting that although Blackstone describes property rights as absolute, “this . . . is tempered by ‘the laws of the land’ and subject to legal restrictions (which are numerous)”).

Regardless of whether Blackstone actually viewed private property rights as so sacred that they could not be violated “even for the general good of the whole community,”¹⁰³ Thomas provides no indication of the extent that such ideas played a role in the drafting of the Takings Clause, and he completely ignores members of the founding generation that emphatically disagreed with any absolute conception of property rights.¹⁰⁴ For example, James Wilson, who was a delegate at the Constitutional Convention¹⁰⁵ and a Supreme Court Justice from 1789 until his death in 1798, believed that property rights were both social and relative, rather than individual and absolute, and criticized the Lockean “selfish philosophy” of absolute individual rights.¹⁰⁶ According to Wilson, individual rights would be better secured by preserving the common welfare of the entire polity to ensure the survival of a republican government,¹⁰⁷ and Wilson and other early American judges and legal thinkers¹⁰⁸ actively developed a theory of

¹⁰³ *Kelo*, 125 S. Ct. at 2680 (quoting 1 BLACKSTONE, *supra* note 78, at 135). *But see* NOVAK, *supra* note 23, at 264 n.62 (noting that “Blackstone often substantially qualified his bold generalizations on rights by the time he finished his more substantive, doctrinal discussions”); Harrington, *supra* note 45, at 1267–68 & nn.80–81 (noting that both Blackstone and Locke recognized that some takings occurred without compensation).

¹⁰⁴ Thomas is probably correct that Blackstone’s ideas influenced early state eminent domain practices, but that influence was largely manifested by the gradual adoption by the states of a compensation requirement. *See* HORWITZ, *supra* note 26, at 63–65. As late as 1820, a majority of the original colonies had not yet added compensation requirements to their state constitutions. *Id.* at 64. But as the nineteenth century progressed, the influence of “Blackstone’s strict views about the necessity of providing compensation” led states to gradually adopt constitutional and statutory provisions requiring compensation for takings of property. *Id.* at 63–65. For example, James Kent quoted extensively from Blackstone in his opinion in *Gardner v. Village of Newburgh*, 2 Johns Ch. 162 (N.Y. Ch. 1816), in order to emphasize the importance of compensation as a means of protecting individuals against arbitrary takings of private property.

¹⁰⁵ H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS* 45, 49 (2002).

¹⁰⁶ NOVAK, *supra* note 23, at 30–31, 36. Wilson analyzed the Constitution by beginning with its broad goals and only then proceeding to specific rules, in contrast with “modern attempts to construct a general politics of philosophy from particular, enumerated powers or the Bill of Rights.” *Id.* at 268 n.118.

¹⁰⁷ *Id.* at 34.

¹⁰⁸ Another early jurist who combined Blackstone’s ideas about the necessity of compensation with republican ideals about the supremacy of the common welfare was Justice William Patterson. In a 1795 Circuit Court opinion, Justice Patterson agreed with Blackstone that “[t]he preservation of property . . . is a primary object of the social compact.” *Vanhome’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795). But he unequivocally qualified that statement with the admonition that “[e]very person ought to contribute his proportion for public purposes and public exigencies” with the added qualification that “no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value.” *Id.* Justice Patterson’s opinion in *Vanhome’s Lessee* is discussed more fully in Part IV, *infra*.

public rights in accordance with the common-law principle of *salus populi suprema lex est*—the “the welfare of the people is the supreme law.”¹⁰⁹

The principle of *salus populi* formed the basis of what William Novak calls the “well-regulated society,” in which “the rights of individuals were *not* protected absolutely, according to . . . unchanging, natural laws of economic or individual behavior.”¹¹⁰ Similarly, Harry Scheiber has demonstrated that in antebellum America,

judges gave a good deal of sustained attention to producing a theory of “public rights” (trenching seriously on private claims to property), and the law was responsive to the imperatives of that theory in balancing off claims of the public good against constitutional mandates for the protection of private “vested” rights.¹¹¹

Thomas’ *Kelo* dissent does not mention Justice Wilson. Instead, to support his assertion that the Public Use Clause is an embodiment of absolute private property rights, Thomas cites Justice Chase’s *Calder v. Bull*¹¹² well-known dictum that “a law that takes property from *A*. and gives it to *B*.” is obviously invalid.¹¹³ But the prevalence of republican ideas among the founding generation¹¹⁴ undermines the assumption that *the* original meaning of the Takings Clause is solely represented by the Blackstonian views of Justice Chase¹¹⁵ rather than by the Harringtonian views of Justice Wilson.¹¹⁶

¹⁰⁹ NOVAK, *supra* note 23, at 9, 30–35, 41–42.

¹¹⁰ *Id.* at 35–36 (emphasis added).

¹¹¹ Scheiber, *supra* note 22, at 219.

¹¹² 3 U.S. (3 Dall.) 386 (1798).

¹¹³ *Calder*, 3 U.S. (3 Dall.) at 388, *cited by Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting). This dicta has been cited as a rhetorical flourish by all sides in the public use debate. Breau, *supra* note 67, at n.93. Less often noted is that Justice Chase went on to note that the legislature could authorize a taking of private property only “*for the benefit of the whole community, and on making full satisfaction.*” *Calder*, 3 U.S. (3 Dall.) at 392 (emphasis added); *see also infra* note 223.

¹¹⁴ ALEXANDER, *supra* note 24, at 26–36; *see supra* note 108; *see also supra* notes 83–89 and accompanying text.

¹¹⁵ As noted above, it is questionable whether Blackstone would actually with today’s Blackstonians. *See supra* notes 92–102 and accompanying text.

¹¹⁶ *See, e.g.*, SCHULTZ, *supra* note 15, at 25 (noting that although eminent domain was a well-recognized governmental power by 1787, “just compensation was not a widely accepted practice, despite the fact that Blackstone . . . [had] endorsed this concept”).

III. EARLY STATE PRACTICES

An examination of the eminent domain practices of the states during the first half-century after the founding can provide insight into how the eminent domain authority of the states was limited by the Takings Clauses in state constitutions.¹¹⁷ Because many state Takings Clauses contain language similar to the federal Takings Clause, such early practices can indicate how the founding generation viewed the federal Takings Clause as a limit on governmental authority.¹¹⁸ Thomas' survey of early state practices leads him to conclude that those practices conformed with his narrow conception of public use. But the historical record is less conclusive than Thomas' dissent suggests.

One well-known early exercise of eminent domain by the states was the passage of Mill Acts.¹¹⁹ Mills operated by harnessing the power generated by falling water, and dams were required in order to raise the water level. Such dams often permanently flooded neighbors' upstream lands,¹²⁰ and the Mill Acts allowed mill-owners to construct dams and prevented the owners of flooded land from obtaining injunctive or monetary relief for trespass or nuisance through the courts.¹²¹ During the eighteenth century, most mills were either grist mills or saw mills, but advances in technology during the nineteenth century enabled the construction of cotton mills,¹²² ironworks,¹²³ and other manufacturing operations that required mechanical power. The Mill Acts often, though not always, provided for statutory procedures to enable

¹¹⁷ *Kelo*, 125 S. Ct. at 2681 (Thomas, J., dissenting). See generally NOVAK, *supra* note 23 (providing examples of state regulation, confiscation, and destruction of private property in antebellum America to demonstrate the extent that the public welfare took precedence over private property rights).

¹¹⁸ *Kelo*, 125 S. Ct. at 2681 (Thomas, J., dissenting); HORWITZ, *supra* note 26, at 48; SCHULTZ, *supra* note 15, at 26.

¹¹⁹ SCHULTZ, *supra* note 15, at 26.

¹²⁰ *Id.*

¹²¹ HORWITZ, *supra* note 26, at 48.

¹²² *Id.* at 50.

¹²³ LEWIS, *supra* note 27, at 248.

upstream owners to obtain compensation, but mill owners could sometimes avoid liability by showing that the flooding resulted in a net benefit to the owner of flooded land.¹²⁴

Thomas argues in his *Kelo* dissent that these early Mill Acts enabled a taking of private property that was for actual use by the public because the earliest mills were “compelled to serve the public for a stipulated toll.”¹²⁵ Thomas also notes the objects of other early exercises of eminent domain that in his view support the “actual use” standard, such as “public roads, toll roads, ferries, canals, railroads, and public parks.”¹²⁶ Putting aside historical inaccuracies for a moment,¹²⁷ Thomas’ characterization of the Mill Acts could actually support the constitutionality of the takings challenged in *Kelo*, even under his “actual use” standard. Regardless of whether early mills were actually used by the public,¹²⁸ the flooded lands were certainly not. The taking of land by flooding certainly *benefited* the public by enabling the construction mills that the public could use, but contrary to Thomas’ implication, the public did not *actually use* the flooded land. Rather, the public used the mills, and the mills in turn could operate because upstream land had been flooded.

This distinction is admittedly too clever by half, but the point is that if the land taken under the Mill Acts is considered to have been actually used by the public, as Thomas suggests, then the taking in *Kelo* easily qualifies as a public use as well. Thomas’ reasoning suggests that when a merchant is authorized by the government to take private property in order to construct a facility that provides a service for a fee to the public, the public actually uses the taken

¹²⁴ HORWITZ, *supra* note 26, at 48; LEWIS, *supra* note 27, at 255–60; SCHULTZ, *supra* note 15, at 26–27.

¹²⁵ *Kelo*, 125 S. Ct. at 2681 (Thomas, J., dissenting) (quoting LEWIS, *supra* note 27, at 246).

¹²⁶ *Id.* (quoting LEWIS, *supra* note 27, at 246).

¹²⁷ For example, in one earliest cases concerning the constitutionality of a Mill Act, the public had no legal right to use the millworks at issue. *Boston & Roxbury Mill Corp. v. Newman*, 29 Mass. (12 Pick.) 467, 476–77 (1832); *see also infra* notes 156–159 and accompanying text.

¹²⁸ Thomas is not clear whether he would require actual use by the public or merely that the public have a legal right to use the taken property. *See supra* note 21.

property.¹²⁹ The property at issue in *Kelo* was to be used “to support the adjacent state park, by providing parking or retail services to visitors, or to support the nearby marina” and to build “at least 90,000 square feet of research and development office space.”¹³⁰ These uses easily satisfy Thomas’ test. Members of the public will actually use the parking facilities that are provided for visitors to the state park. Retail stores are also public uses by any definition—the 1888 treatise that Thomas relies on for much of the historical data in his dissent states that “[p]roperty taken for public buildings of all kinds, such as . . . markets . . . and the like, is taken for public use.”¹³¹ Thomas, however, omits “markets” from his list of public uses cited from this treatise.¹³²

Another particularly relevant omission from the list of public uses catalogued by Lewis in 1888 is what he calls “improving navigation,”¹³³ which includes taking land “on the banks of navigable streams for public landing places,”¹³⁴ or, in modern parlance, a marina. If the *Kelo* plaintiffs’ property is to provide parking or warehouse space for the nearby marina, that is a public use according to Thomas’ definition. Furthermore, even if members of the public do not directly use the taken property when they avail themselves of the marina’s services, Thomas’ public use test is satisfied as per his characterization of the Mill Acts.¹³⁵ To be sure, early mills could not operate without being able to flood upstream lands, whereas marina or park “support” may not be strictly necessary for those facilities to operate. But Thomas’ own textual analysis mitigates against a strict necessity requirement. That textual analysis includes a comparison of

¹²⁹ The mills charged a fee to anyone who wished to use their facilities. LEWIS, *supra* note 27, at 246 n.3.

¹³⁰ *Kelo*, 125 S. Ct. at 2659–60. The entire redevelopment plan used 90 acres of land divided into seven parcels, and the plaintiffs’ properties were situated on just two of these parcels, and the plan specified these uses for those parcels. *Id.* Owners of property on the other parcels had voluntarily sold their land to the city. *Id.* at 2660.

¹³¹ LEWIS, *supra* note 27, at 242 (footnotes omitted); see also NOVAK, *supra* note 23, at 95–105 (explaining the extent of governmental control over urban markets—i.e., “that place near the center of town where farmers, butchers, and householders exchanged necessary provisions”—during the eighteenth and nineteenth centuries).

¹³² *Kelo*, 125 S. Ct. at 2681 (Thomas, J., dissenting) (citing LEWIS, *supra* note 27, at 227–28, 234–41, 243); see also *supra* text accompanying note 126.

¹³³ LEWIS, *supra* note 27, at 244–45.

¹³⁴ *Id.*

¹³⁵ See *supra* notes 125–129 and accompanying text.

the federal Public Use Clause to equivalent restrictions in three other pre-1791 founding documents.¹³⁶ As is explained above, those three Takings Clauses require that a taking of property be because of some “public exigency” or “public necessity,” *in addition to* requiring that the taken property be for a public use.¹³⁷ Accordingly, Thomas should consider it significant that the federal Takings Clause lacks an equivalent requirement, and, to be consistent, should hold that using the property taken from the *Kelo* plaintiffs for park or marina support satisfies the federal public use requirement even if that property is not strictly necessary for the operation of those facilities.

Office space is also actually used by the public. Any member of the public that is willing and able to lease the space may presumably do so, just as any member of the public who was able to pay the price to use a mill could do so.¹³⁸ Admittedly, the “public” character of property taken for office space seems qualitatively different than that of property taken under the Mill Acts, if only because of the significant difference in the length of time of each individual’s use—the term of an office lease is measured in years while the use of a mill is probably takes hours or days. But such a normative distinction presumably would be irrelevant when considering the “original meaning” of the Public Use Clause. Rather, the taking is constitutional as long as the public “a legal right to use the property,”¹³⁹ which would seem to be the case here.¹⁴⁰ Regardless of whether the takings in *Kelo* satisfy an “actual use” standard, Thomas’ assertion that the early Mill Acts “compelled” mills to serve the public is historically inaccurate. In the eighteenth

¹³⁶ These documents are the Massachusetts Declaration of Rights of 1780, the Vermont Constitution of 1786, and the Northwest Ordinance of 1787. *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting).

¹³⁷ See *supra* notes 68–76 and accompanying text. The Northwest Ordinance actually does not contain a public use limitation at all. See *supra* notes 74–76 and accompanying text.

¹³⁸ See *supra* note 129 and accompanying text.

¹³⁹ *Kelo*, 125 S. Ct. at 2686 (Thomas, J., dissenting). However, whether Thomas requires “legal” use or “actual” use is not clear from his opinion. See *supra* note 21.

¹⁴⁰ See *infra* note 163.

century, most mills were for grinding grain and were “understood to be open to the public,”¹⁴¹ though whether they were “compelled” to serve the public is less certain.¹⁴² Furthermore, although the mills were used by the public, the flooded land was not, and if the correct legal standard is that the public has “a legal right to use the property,”¹⁴³ equating use of the mills to use of the flooded land seems to be an inappropriate extension.¹⁴⁴

Beginning in the early nineteenth century, the Mill Acts were extended to “saw, paper, and cotton mills, many of which served only the proprietor,”¹⁴⁵ and as early as 1814, the Supreme Court of Massachusetts found such a broad Mill Act constitutional.¹⁴⁶ Thomas, however, dismisses such “later extension[s]” as “not deeply probative” of whether early state practice was consistent with the original meaning of the Public Use Clause,¹⁴⁷ even though virtually no cases on the meaning of “public use” were decided before 1814. In fact, seven of the nine cases Thomas cites as examples of courts that “adhered to the natural meaning of ‘public use’” were decided after 1870,¹⁴⁸ by which time the republican ideas that were prevalent at the time of the founding were already being supplanted with “new political voices and new legal languages”¹⁴⁹ that emphasized the dichotomy and conflict between the public good and private interest.¹⁵⁰

¹⁴¹ HORWITZ, *supra* note 26, at 49.

¹⁴² *Kelo*, 125 S. Ct. at 2681 (Thomas, J., dissenting) (citing LEWIS, *supra* note 27, at 246 & n.3). The section in Lewis that Thomas cites provides a short description of early Mill Acts in fifteen states. Although all fifteen states regulated the prices charged by millers to some extent, Lewis mentions that just five of those states—Alabama, Delaware, Georgia, Kentucky, and North Carolina—actually required millers to grind for the public, and Alabama and Connecticut appear to have adopted these requirements after 1791. LEWIS, *supra* note 27, at 246 n.3.

¹⁴³ *Kelo*, 125 S. Ct. at 2686 (Thomas, J., dissenting).

¹⁴⁴ See *supra* notes 129–139 and accompanying text.

¹⁴⁵ HORWITZ, *supra* note 26, at 49.

¹⁴⁶ *Stowell v. Flagg*, 11 Mass. 364, 368 (1814), *discussed by* HORWITZ, *supra* note 26, at 49.

¹⁴⁷ *Kelo*, 125 S. Ct. at 2682 (Thomas, J., dissenting).

¹⁴⁸ *Id.* at 2682 n.2. These seven cases were decided in 1871, 1877, 1883, 1903, 1906, 1907, and 1908. *Id.*

¹⁴⁹ NOVAK, *supra* note 23, at 240.

¹⁵⁰ *Id.* at 239–48.

Of the remaining two cases Thomas cites, one is an 1859 Alabama decision that was limited to holding that “purely private” roads and mills were not public uses,¹⁵¹ but the case does not go so far as to hold that “public use” always requires actual use by the public.¹⁵² The second case—the earliest that Thomas cites as exemplary of early state practice—is *Harding v. Goodlett*,¹⁵³ an 1832 Tennessee case that, like the 1859 Alabama decision, turns more on the interpretation of the particular statute at issue than on the proper interpretation of Tennessee’s Public Use Clause.¹⁵⁴ Notably, Thomas makes no mention of two other 1832 cases that both directly addressed the meaning of public use.¹⁵⁵ In *Boston & Roxbury Mill Corp. v. Newman*,¹⁵⁶ the Massachusetts Supreme Judicial Court held that the construction of dams necessary for the operation of “grist-mills, iron manufactories, and other mills for other useful purposes” satisfied the Massachusetts Public Use Clause.¹⁵⁷ Even though the public had no legal right to use the manufacturing operations, the court was “at a loss to imagine any [private] undertaking . . . in which the public had a more certain and direct interest and benefit.”¹⁵⁸

Take the grist-mill established in this city, as an example. Is it of no benefit to have the corn ground near to the inhabitants, rather than at a distance? “But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the

¹⁵¹ *Sadler v. Langham*, 34 Ala. 311, 332–34 (1859), cited by *Kelo*, 125 S. Ct. at 2682 n.2 (Thomas, J., dissenting).

¹⁵² See LEWIS, *supra* note 27, at 229 & n.2 (characterizing *Sadler* as holding that “when [a] road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private and the law authorizing the condemnation of property therefor is void”); *id.* at 284 & n.2 (characterizing *Sadler* as holding that “in a state where the only kind of mills regarded as a public use are public grist-mills, a statute which authorized the condemnation of property for the erection of a ‘mill or other machinery’ was . . . void”).

¹⁵³ 11 Tenn. (3 Yerg.) 41 (1832), cited by *Kelo*, 125 S. Ct. at 2682 n.2 (Thomas, J., dissenting).

¹⁵⁴ *Harding*, 11 Tenn. at 52–54; see also LEWIS, *supra* note 27, at 250 & n.3 (noting that the decision in *Harding* was that “under an act which related solely to grist-mills, an application for a grist-mill, saw-mill and paper-mill could not be granted”). Nonetheless, it is interesting to note that the *Harding* court described the public use requirement in broad terms: “It is only for public uses the state is authorized to exercise [its eminent domain power] . . . because *the interests of the community require that for the good of the whole*, the private right must be yielded.” 11 Tenn. (3 Yerg.) at 52.

¹⁵⁵ The 1888 treatise that Thomas relies on for much of his historical information discusses the Tennessee case almost as an afterthought after first discussion of these two other 1832 cases. LEWIS, *supra* note 27, at 247–50.

¹⁵⁶ 29 Mass. (12 Pick.) 467 (1832).

¹⁵⁷ *Id.* at 476.

¹⁵⁸ *Id.*, quoted by LEWIS, *supra* note 27, at 248.

road for a toll.” If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Who ever heard of a refusal?¹⁵⁹

The other important 1832 public use case that goes unmentioned in Thomas’ dissent is *Scudder v. Trenton Delaware Falls Co.*¹⁶⁰ In *Scudder*, the New Jersey Court of Chancery upheld the application of a Mill Act to private manufacturing mills because it considered the public use limitation to be satisfied by the economic benefit that would result from the mills’ “stimulus to industry of every kind.”¹⁶¹

It is unsurprising that Thomas does not discuss *Boston & Roxbury Mill* or *Scudder*—these courts’ understanding of public use almost directly contradicts Thomas’ assertion in *Kelo* that a “promise of new jobs and increased tax revenue” was not consistent Public Use Clause’s original meaning.¹⁶² In 1832, the *Boston & Roxbury Mill* court emphatically approved job creation as a valid public use:

[I]n regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes? And are not the proprietors obliged to give employment? They cannot carry their works on without labor, and who that is disposed to industry and to that kind of employment, is prevented from its exercise? . . . [T]he interest or benefit arising from manufacturing establishments is distributed quite as much, and oftentimes more, among the laborers and operatives, than among the proprietors of the works.¹⁶³

¹⁵⁹ *Id.* at 477, quoted by LEWIS, *supra* note 27, at 248.

¹⁶⁰ 1 N.J. Eq. 694 (N.J. Ch. 1832). *Scudder* has been described as “the first significant public use challenge” to a state act authorizing the flooding of private property for industrial mills. Meidinger, *supra* note 45, at 23. Incidentally, the plaintiffs in *Scudder* sought relief in equity because New Jersey had no just compensation requirement until 1844. LEWIS, *supra* note 27, at 35–36.

¹⁶¹ *Scudder*, 1 N.J. Eq. at 729.

¹⁶² *Kelo*, 125 S. Ct. at 2677–78 (Thomas, J., dissenting).

¹⁶³ *Boston & Roxbury Mill Co.*, 29 Mass. (12 Pick.) at 477. In *Kelo*, the firms that will occupy the 90,000 square feet of research and development office space presumably “cannot carry their works on without labor,” *id.* at 477, which suggests that office space is a use that is consistent with the public use requirement under *Boston & Roxbury Mill*. Since Thomas provides no citation to an earlier case, *Boston & Roxbury Mill* is at least as good an indicator of the original meaning of the Public Use Clause as any of the cases he cites to support his understanding of the states’ early eminent domain practices.

Although neither court addressed increasing tax revenue as a valid public use, the *Scudder* court came close when it explicitly categorized “increase[ing] the value of property” as a legitimate public use.¹⁶⁴ Thomas simply misconstrues history when he asserts that early state practice generally conformed to the actual use standard. In fact, one scholar has noted that “the first . . . articulation of the narrow construction of public use” by a state court was not until 1837.¹⁶⁵ Before that, the few courts that discussed public use interpreted that clause broadly, and many courts were more than willing to allow takings for the purpose of economic development.¹⁶⁶

Thomas begins his dissent by accusing the *Kelo* majority of replacing the Public Use Clause with a “‘Diverse and Always Evolving Needs of Society’ Clause.”¹⁶⁷ But the original meaning of the Public Use Clause may be closer to that derisive characterization than one might gather from Thomas’ opinion. In 1832, a New Jersey court considered such “evolving needs of society” to be a part of the public use analysis:

The ever varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit, may depend somewhat on the situation and wants of the community for the time being.¹⁶⁸

Thomas suggests that these early cases were anomalies, in which “state legislatures tested the limits of their state-law eminent domain power,” and he criticizes the majority for citing such

¹⁶⁴ *Scudder*, 1 N.J. Eq. at 729.

¹⁶⁵ SCHULTZ, *supra* note 15, at 76 (discussing *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 2 (1837)).

¹⁶⁶ *Id.* at 75–76. For example, in the earliest federal public use decision that this author was able to locate, the Circuit Court for the District of Columbia considered a public use challenge to a statute that delegated eminent domain authority to the Baltimore & Ohio Railroad—a private corporation—to allow it to extend its lines into the District of Columbia. *Baltimore & O.R. Co. v. Van Ness*, 2 F. Cas. 574 (C.C.D.D.C. 1835). The court rejected the challenge because

this railroad, although it may be profitable to the stockholders, is also a great *public benefit*. It does not prevent the public from enjoying all the advantages which they enjoyed before, and gives them a cheaper, safer, and more expeditious mode of traveling than they would otherwise have. If it may not be called a common highway, yet it is really a *common good*. It is a great *public convenience*. . . . The condemnation of land, for such purposes, has been so general, and so extensive, for many years, that it may well be considered as established by the law of the land. . . . The condemnation of the land, therefore, is clearly for the . . . public use

Id. at 576 (emphasis added).

¹⁶⁷ *Kelo*, 125 S. Ct. at 2677 (Thomas, J., dissenting) (quoting *Kelo*, 125 S. Ct. at 2662).

¹⁶⁸ *Scudder*, 1 N.J. Eq. at 729 (emphasis added).

cases as “evidence of the broad ‘public purpose’ interpretation of the Public Use Clause.”¹⁶⁹ Thomas concedes, however, that the meaning of “public use” was a “hotly contested question in state courts” during the nineteenth century,¹⁷⁰ and while the majority relies on a century of federal Supreme Court precedent when it chooses to read the Public Use Clause broadly,¹⁷¹ Thomas falls back on his textual analysis, praising the early decisions that “adhered to the natural meaning of ‘public use.’”¹⁷² However, as is demonstrated above,¹⁷³ a textual analysis of the Public Use Clause is just as inconclusive as the early state decisions about the clause’s original meaning, all of which led John Lewis to observe in his 1888 treatise that “[i]f we look to our dictionaries, we find the same confusion as in the decisions.”¹⁷⁴

The original meaning that Justice Thomas attributes to the Public Use Clause is in fact just one of several plausible original understandings of the clause that finds support in history.¹⁷⁵ Running through Thomas’ *Kelo* dissent is the widely-held assumption that the founders’ primary goal in creating the constitution was to protect individuals’ absolute property rights against government interference.¹⁷⁶ But many founders subscribed to republican ideals, which emphasized the elevation of the public good over the private interest as critical to the survival of the republican form of government.¹⁷⁷ Readers of Thomas’ *Kelo* dissent ought to keep in mind Harry Scheiber’s advice about relying too heavily on historical analysis for guidance in modern takings jurisprudence:

If we want to measure contemporary jurisprudential “takings” doctrine against the values of the past or the historical record of law in action, we

¹⁶⁹ *Kelo*, 125 S. Ct. at 2682 (Thomas, J., dissenting).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 2662–64.

¹⁷² *Id.* at 2682 (Thomas, J., dissenting).

¹⁷³ *See supra* Part I.

¹⁷⁴ LEWIS, *supra* note 27, at 223.

¹⁷⁵ *See generally* Scheiber, *supra* note 22.

¹⁷⁶ *See supra* Part II.

¹⁷⁷ *See supra* notes 83–90, & 108 and accompanying text.

need to recognize that our law has been dualistic and has worked in a variety of ways—often bewilderingly so. Historically, American property law has expressed no single orthodoxy of either doctrine or economic preferences.¹⁷⁸

Because Thomas' search for the original meaning of the Public Use Clause discounts or ignores all but one of the prominent political beliefs held by the founders, his conclusions about the clause's original meaning are at best embarrassingly inaccurate¹⁷⁹ and at worst purposefully misleading.¹⁸⁰

IV. SEPARATING THE WHEAT FROM THE CHAFF

Originalism is a time-consuming endeavor. Sifting through primary and secondary sources to accurately ascertain a constitutional provision's original meaning takes many hours of research, and it may be unrealistic to expect the justices and their clerks to do this on the Court's schedule. To write this article, the author conducted about two months of research. Although the Court's caseload has diminished in recent years,¹⁸¹ the justices and their clerks may simply not have the time to devote several months to researching the history of a single constitutional provision. During the term that *Kelo* was decided, the Court decided 80 cases, and Justice Thomas personally authored 34 opinions, more than any other justice that term.¹⁸² The justices' law clerks are also quite busy—they deal with thousands of petitions for certiorari each term,

¹⁷⁸ Scheiber, *supra* note 22, at 232.

¹⁷⁹ *Cf. id.* at 217 (surmising that those who advocate minimal government intervention, such as Richard Epstein, “largely block history out of their analyses of property rights and takings” because “the historical facts regarding eminent domain in national and state constitutional law would prove seriously embarrassing”).

¹⁸⁰ *See id.* at 218 (noting that “little in the actual [historical] record . . . that will throw even a flimsy mantle of historical legitimacy over [the] views” of the those who argue that “the pervasive concern of the framers [was] to protect private rights”); *cf. ALEXANDER, supra* note 24, at 7 (criticizing Justice Scalia for “engaging in historical pretensions” in his opinion for the Court in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), in which Scalia “relied on the supposed existence of a singular American tradition concerning the protection of private property”).

¹⁸¹ *See* Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369 (2004) (discussing the gradual decline in the Supreme Court's caseload from 1926 to 2004). One reason the Court's diminishing caseload may not result in more time for the justices and their clerks is the dramatic increase in the number of amicus briefs filed in Supreme Court cases during the last several decades. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 751–56 (2000).

¹⁸² *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 420 tbl.I (2005).

draft bench memos on a daily basis, review emergency requests to stay state executions, and research and write drafts of opinions.¹⁸³ Such a schedule means that most historical research conducted by the justices or their clerks is probably limited to the information provided to the Court in briefs submitted by the litigants and amici.

Briefs submitted by amici are likely to be the primary of historical information presented to the Court because page limits and the need to cover many relevant issues prevent the litigants themselves from devoting much space to arguments about a clause's original meaning.¹⁸⁴

Amicus briefs, no less than the litigants' briefs, are meant to persuade rather than to inform,¹⁸⁵ and therefore they may lack the objectivity that might be found in a dispassionate historical treatise. When briefs present arguments based on non-legal fields of expertise, the justices and their clerks may have difficulty judging the validity of those arguments because they simply do not have the necessary expertise in the underlying field.¹⁸⁶ This concern has been raised regarding the Court's use of social science research and data from empirical studies,¹⁸⁷ but the

¹⁸³ Kevin J. Worthen, *Shirt-Tales: Clerking for Byron White*, 1994 B.Y.U. L. REV. 349, 354.

¹⁸⁴ See Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U.L. REV. 603, 606 (1984) ("Because of page limits, or considerations of tone and emphasis, parties are frequently forced to make some of the points they wish to make in rather abbreviated form. A supportive amicus can flesh out those points with additional discussion and citation of authority."); see also Kearney & Merrill, *supra* note 181, at 830 ("Amicus briefs matter insofar as they provide legally relevant information not supplied by the parties to the case—information that assists the Court in reaching the correct decision as defined by the complex norms of our legal culture.").

¹⁸⁵ Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 99–100 (1993).

¹⁸⁶ *Id.*

¹⁸⁷ See, e.g., Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J.L. & MED. 335, 337–45 (1987) (describing problems with the Court's interpretation of empirical studies that were presented as evidence in two capital murder cases); Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279, 288–93 (1995) (criticizing Justice Kennedy's opinion for the Court in *Lee v. Weisman*, 505 U.S. 577 (1992), because "Justice Kennedy cited only three isolated, marginally analogous studies from which he drew conclusions that were unwarranted and went far beyond those to which the authors of the studies themselves came."); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 L. & CONTEMP. PROBS., Autumn 1978, at 57, 70 (noting that the social science data the Court relied on in *Brown v. Board of Education*, 347 U.S. 483 (1954), "was methodologically unsound"); see also, e.g., Rustad & Koenig, *supra* note 185, at 128 (analyzing the empirical studies cited by amicus briefs submitted in three major Supreme Court punitive damages cases and finding "a systematic misuse of empirical research" by these amicus briefs, "a phenomenon [the authors] call[ed] 'junk social science'").

same problem exists when the justices rely on the necessarily advocacy-oriented historical accounts presented to the Court in amicus briefs. Scholars have expressed concern about “advocacy disguised as social science in amicus curiae briefs” and about the Court’s difficulty in evaluating the arguments presented in such briefs.¹⁸⁸ In *Kelo*, an amicus brief submitted by the Claremont Institute¹⁸⁹ in support of the petitioners was the only brief that solely addressed the question of “[w]hether the original meaning of . . . the Public Use Clause requires the public actually to use the property it takes,”¹⁹⁰ whereas the litigants’ briefs’ discussion of the Clause’s original meaning was far more limited.¹⁹¹ This amicus brief was certainly aimed at persuading the Court to adopt a particular position,¹⁹² and as is discussed below, Thomas appears to taken many of the arguments in his dissent directly from the Claremont Institute’s brief without applying enough scrutiny to its misleading version of history.¹⁹³

The justices and their clerks are trained as lawyers. Properly evaluating historically-based arguments such as those in the Claremont Brief requires them to become expert historians, something they may simply not have the time to do between the first Monday in October and the last Monday in June. Comparing the Claremont Brief to Thomas’ *Kelo* dissent illustrates the importance of subjecting the arguments in such a brief to critical analysis and careful scrutiny. The Claremont Brief, like Thomas’ dissent, begins by discussing the definition of “use” in

¹⁸⁸ Rustad & Koenig, *supra* note 185, at 99–100, 119–22.

¹⁸⁹ The Claremont Institute’s self-described mission is “to restore the principles of the American Founding to their rightful, preeminent authority in our national life.” The Claremont Institute, <http://www.claremont.org> (last visited July 21, 2006).

¹⁹⁰ Brief of Amicus Curiae The Claremont Institute et al. in Support of Petitioners at *i*, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) [hereinafter “Claremont Brief”]. The Claremont Brief essentially summarizes the arguments made in a 2004 article written by one of the authors. See generally Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877.

¹⁹¹ Brief of the Respondents at 28–32, *Kelo*, 125 S. Ct. 2655 (No. 04-108); Reply Brief of Petitioner’s at 2–3, *Kelo*, 125 S. Ct. 2655 (No. 04-108).

¹⁹² See Claremont Brief, *supra* note 190, at 5 (“The Court should strive to do what Justice Thomas did for Commerce Clause doctrine in his concurring opinion in *United States v. Lopez*: Construe its public use ‘jurisprudence in a manner that both makes sense of [its] more recent case law and is more faithful to the original meaning of that Clause.’ 514 U.S. 549, 584 (1995).”).

¹⁹³ See *infra* notes 194–233 and accompanying text.

Samuel Johnson's *A Dictionary of the English Language*.¹⁹⁴ As was discussed above, Johnson's definition is far less conclusive than either the Claremont Institute or Thomas indicate.¹⁹⁵ The Claremont Institute argues that Johnson's other definitions for "use" such as "convenience" and "help" were "merely . . . secondary meaning[s], not the most common meaning of the word."¹⁹⁶ The Institute provides no authority for this proposition, and Johnson's *Dictionary* does not indicate the how common or uncommon of any of the nine definitions of the word "use" actually were during the late eighteenth century.¹⁹⁷ Thomas' focus on this argument indicates that he may simply have accepted the accuracy of this textual analysis without conducting any meaningful independent research into the issue.

Thomas also does not seem to have scrutinized the Claremont Institute's selective quotations of Blackstone's *Commentaries*. Both Thomas and the Claremont Institute completely omit Blackstone's distinction between the legislature's authority to take private property in exchange for compensation and the arbitrary confiscations by the Crown that Blackstone and others sought to eradicate.¹⁹⁸ Rather, both emphasize that Blackstone describes the eminent domain transaction as one in which "*the public is now considered as an individual, treating with an individual for an exchange,*"¹⁹⁹ apparently to imply that the public must use the taken property in the same way that an individual purchaser would. But both omit Blackstone's very next sentence, in which he explains that this transaction is quite different from a land sale between private parties: "All that the legislature does *is to oblige the owner to alienate his possessions* for

¹⁹⁴ Claremont Brief, *supra* note 190, at 6 (citing 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed. 1786)). Justice Thomas cited Johnson's fourth edition, which was published in 1773. *See supra* note 30.

¹⁹⁵ *See supra* notes 30–39 and accompanying text.

¹⁹⁶ Claremont Brief, *supra* note 190, at 6.

¹⁹⁷ To be sure, the definition that Thomas and the Brief's authors prefer is the first definition listed, but there is no indication that the second, fourth, or fifth definitions were not as common or nearly so. *See supra* note 39 and accompanying text.

¹⁹⁸ *See supra* notes 90–102 and accompanying text.

¹⁹⁹ Claremont Brief, *supra* note 190, at 12 (quoting 1 BLACKSTONE, *supra* note 78, at 135 (Claremont Brief's emphasis)); *see also Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting) (quoting the same passage).

a reasonable price.”²⁰⁰ A close reading of Blackstone, then, casts doubt on the Claremont Institute’s contention that “Blackstone’s understanding of eminent domain left no room for the broad reading of ‘public usefulness.’”²⁰¹ Thomas’ complete adoption of the Claremont Institute’s arguments to that effect suggest that he did not independently analyze the actual text of Blackstone’s *Commentaries*.

These examples demonstrate that historical research depends on first-hand examination of primary sources, an endeavor in which the justices and their clerks, often recent law-school graduates,²⁰² have had little training or experience. The Claremont Institute does, however, devote several pages of its brief to discussing a primary source of a type quite familiar to the justices and their law clerks—a court opinion. Specifically, the Claremont Institute points to Supreme Court Justice William Patterson’s 1795 circuit court opinion in *Vanhorne’s Lessee v. Dorrance*²⁰³ and notes that “the Institute is not aware of any primary source that explains how 1790s-era Americans understood public use limitations better than [that] opinion.”²⁰⁴ The Claremont Brief compares Patterson’s statement that “it is . . . difficult to form a case, in which the necessity can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen”²⁰⁵ with the Connecticut law at issue in

²⁰⁰ 1 BLACKSTONE, *supra* note 78, at 135 (emphasis added). Neither Thomas nor the Claremont Institute would likely be comforted by Blackstone’s reassurance that “oblig[ing] the owner to alienate his possessions” is “[a]ll that the legislature does.”

²⁰¹ Claremont Brief, *supra* note 190, at 12; *see also supra* notes 90–102 and accompanying text.

²⁰² Three of Thomas’ four clerks for the October 2004 term graduated law school in 2003 (the fourth graduated in 2002), and all of their post-law school work experience consisted only of clerking for federal judges. List of Law Clerks of the Supreme Court of the United States, http://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States (last visited Aug. 4, 2006).

²⁰³ 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795); Claremont Brief, *supra* note 190, at 14–16. *Vanhorne’s Lessee* is one of several that Thomas cites to support the proposition that “the Public Use Clause . . . embodied the Framers’ understanding that property is a natural, fundamental right, prohibiting the government from ‘tak[ing] property from A. and giv[ing] it to B.’” *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting) (citing *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 311; other citations omitted).

²⁰⁴ Claremont Brief, *supra* note 190, at 14.

²⁰⁵ *Id.* at 15 (quoting *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 311).

Kelo that, according to the Claremont Brief, “presumes that city officials may and should redistribute land in whatever way is most advantageous for their cities.”²⁰⁶ This “stark contrast” leads to the Brief to conclude with Patterson’s words that “it is infinitely wiser and safer to risk some possible mischiefs than to vest in the legislature so unnecessary, dangerous, and enormous a power.”²⁰⁷ The clear implication is that taking property from one citizen and giving it to another was the “dangerous . . . power” that Patterson did not want to vest in the legislature, and that such a taking was not considered a public use in 1795.

Although Thomas does not discuss *Vanhorne’s Lessee*, he cites it as supporting the proposition that “the Public Use Clause . . . prohibit[s] the government from ‘tak[ing] property from *A*. and giv[ing] it to *B*.’”²⁰⁸ It seems likely, however, that Thomas’ citation to the case was based on the Claremont Institute’s analysis rather than on his or his clerks’ own review of Patterson’s opinion because, had they done so, they undoubtedly would have realized that the case in fact supports the nearly opposite proposition—that the legislature unquestionably has full authority to take property from one person and give it to another, as long as certain procedures are followed.²⁰⁹ The “unnecessary, dangerous, and enormous . . . power” that to which Patterson referred was *not* the power to take property from one citizen and vest it in another. Rather, in the next sentence after the one quoted in the Claremont Brief, Patterson explains the power that

²⁰⁶ *Id.* at 16.

²⁰⁷ Claremont Brief, *supra* note 190, at 16 (quoting *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 312).

²⁰⁸ *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting) (alterations in original). The internal quotation is actually taken from *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), although as is noted above, *Calder* says little about the scope of public use. *See supra* note 113.

²⁰⁹ *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 312. Patterson explains that “untoward must be the state of things, that would induce the legislature, supposing they had the power, to divest one individual of his landed estate merely for the purpose of vesting it in another, even upon full indemnification, *unless that indemnification be ascertained in the manner which I shall mention hereafter.*” *Id.* (emphasis added). Patterson then goes on to explain the procedure that would make such a taking permissible. *See infra* note 220 and accompanying text.

concerns him: that “the Legislature judged of the necessity of the case, *and also* of the nature and value of the equivalent.”²¹⁰

For Patterson, the potential for abuse lay in the legislature’s combined power to decide *both* that an appropriation of private property was necessary *and* to determine the amount of compensation that the landowner would receive: “Such a case of necessity, *and judging too* of the compensation, can never occur in any nation.”²¹¹ Although Patterson could have limited this “dangerous . . . power” by placing a substantive limit on the legislature’s authority to determine the necessity of the taking, he did not. Instead, Patterson eliminated the legislature’s authority to determine the amount and form of compensation.²¹²

Patterson writes in the typically convoluted style of eighteenth century jurists, but his analysis proceeds in logical steps. Patterson first observes that “the preservation of property . . . is a primary object of the social compact” and draws the conclusion that “[t]he legislature, therefore, has no authority to . . . divest[] one citizen of his freehold and vest[] it in another *without a just compensation*.”²¹³ Next, Patterson goes a step further and inquire whether the legislature can “make an act divesting one citizen of his freehold and vesting it in another, even with compensation.” Patterson’s answer to this question illuminates his understanding of the social compact, of the common welfare, and of the importance that the republican form of government has for safeguarding that welfare:

That the legislature, on certain emergencies, had authority to exercise this high power, has been urged from the nature of the social compact The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case, *it cannot be lodged any*

²¹⁰ *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 312.

²¹¹ *Id.* (emphasis added).

²¹² *Id.* at 312–13.

²¹³ *Id.* at 310 (emphasis added).

where with so much safety as with the Legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity.²¹⁴

The context for the key passage quoted by the Claremont Institute mentioned above²¹⁵ is now clearer. Patterson had difficulty imagining that the common good would ever necessitate transferring property from one citizen to another: “it is . . . difficult to form a case in which the necessity of a State can be of such a nature as to authorize or excuse the seizing of landed property belonging to one citizen and giving it to another citizen.”²¹⁶ He nevertheless believed that if such a situation arose, it would be the legislature’s “sole and exclusive” authority to determine that the taking was necessary.²¹⁷ This, then, led to his concern that the legislature would be both the judge of that necessity *as well as* the judge of the amount of compensation to be paid.²¹⁸ Contrary to the Claremont Institute’s implication, however, Patterson’s solution was not to narrow the meaning of public use or to increase judicial oversight of the legislature’s determination of necessity. Rather, Patterson explained that “the legislature can take the real estate of *A.* and give it to *B.* on making compensation, the principle and reasoning upon it go no further than to show that *the legislature are the sole and exclusive judges of the necessity of the case*, in which this despotic power should be called into action.”²¹⁹ “But,” Patterson declared, “here the legislature must stop. . . . [t]hey cannot constitutionally determine upon the amount of compensation, or value of the land.”²²⁰

²¹⁴ *Id.* at 310–11 (emphasis added).

²¹⁵ See *supra* note 205 and accompanying text.

²¹⁶ *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 311.

²¹⁷ *Id.* at 312.

²¹⁸ *Id.*

²¹⁹ *Id.* (emphasis added).

²²⁰ *Id.* Patterson explained that the legislature “cannot constitutionally determine . . . the amount of the compensation, or value of the land,” because “[p]ublic exigencies do not require . . . that the legislature should, of themselves, without the participation of the proprietor, or intervention of a jury, assess the value of the thing, or ascertain the amount of the compensation to be paid for it.” *Id.* at 312–13. Patterson’s opinion in *Vanhorne’s Lessee* goes on to describe three ways that the amount of compensation could be determined: (1) “by the parties—

Although Patterson's language is difficult to parse, a careful reading of the opinion by a Supreme Court clerk would undoubtedly have uncovered the fact that *Vanhorne's Lessee* does not at all support a narrow understanding of public use as implied by the Claremont Brief. Thomas' citation of *Vanhorne's Lessee* to support such a narrow understanding suggests that perhaps a careful reading was not done. One other aspect of *Vanhorne's Lessee* that might have led Thomas and his clerks to question the Claremont Institute's textual arguments concerns the constitutional provision at issue in the case—the Takings Clause in the Pennsylvania Constitution of 1790.²²¹ Although this Takings Clause refers to property “taken or applied to public use,” Justice Patterson never once mentions the words “public use.” Instead, he discusses the legislature's authority to take property “for public purposes” and “for the good of the community”²²² and primarily focuses on the legislature's sole authority to determine that “the *public exigencies, or necessities* of the State,” require a particular taking of private property.²²³ Patterson's language undermines the argument raised by the Claremont Institute and echoed by Thomas in his *Kelo* dissent that Americans in Justice Patterson's generation understood the words “public use” as having a distinct and more narrow meaning than the words “public

that is, by stipulation between the legislature and the proprietor of the land,” (2) “by commissioners mutually elected by the parties,” or (3) “by the intervention of a jury.” *Id.* at 313.

²²¹ “[N]or shall any man's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made.” PA. CONST. art. IX, § 10 (1790).

²²² *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 310.

²²³ *Id.* at 312 (emphasis added). *Vanhorne's Lessee* is one of many early federal and state court decisions that describe “public use” in similar terms. *E.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (U.S. 1798) (“for the benefit of the whole community”); *Baltimore & O.R. Co. v. Van Ness*, 2 F. Cas. 574, 576 (C.C.D.D.C. 1835) (“public benefit” and “public convenience”); *Boston & Roxbury Mill Corp. v. Newman*, 29 Mass. (12 Pick.) 467, 476 (1832) (“public . . . interest and benefit”); *State v. Town of Hampton*, 2 N.H. 22, 25 (1819) (“public purposes”); *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694 (N.J. Ch. 1832) (“public importance and utility” and “public use or benefit”); *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 16 (N.Y. 1837) (“benefit which is to result to the public”); *id.* at 24 (opinion of Edwards, Sen.) (“public purposes”); *id.* at 47 (opinion of Maison, Sen.) (“public interest and convenience”); *Beekman v. Saratoga & S.R.R.*, 3 Paige Ch. 45 (N.Y. Ch. 1831) (“public interest” or “benefit to the public”); *Gardner v. Village of Newburgh*, 2 Johns Ch. 162 (N.Y. Ch. 1816) (“public purposes”); *Den ex dem. Robinson v. Barfield*, 6 N.C. (2 Mur.) 390, 420 (1818) (opinion of Daniel, J.) (“public purposes”); *Buckingham v. Smith*, 10 Ohio 288, 297 (1840) (“public use, or . . . public welfare”); *Lindsay v. Commissioners*, 2 Bay 38 (S.C. 1796) (opinion of Waties, J.) (“public utility”); *Harding v. Goodlett*, 11 Tenn. (3 Yerg.) 41, 52 (1832) (“interests of the community” and “good of the whole”); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 264 (1828) (“public purposes”).

exigencies” or “public necessity” that appeared in pre-1791 documents such as the Massachusetts Declaration of Rights of 1780, the Vermont Constitution of 1786, and the Northwest Ordinance of 1787.²²⁴

Although the Claremont Brief was the only submission to the Court in *Kelo* that focused solely on the Public Use Clause’s original meaning, some of the other briefs argued that a broad conception of public use was common during the late eighteenth and early nineteenth centuries, and these briefs pointed to academic research that would have provided enough information to uncover much of the historical evidence presented in this article. The Brief of the Respondents cites extensive articles by John F. Hart²²⁵ and Errol P. Meidinger²²⁶ to demonstrate that early states often “redirected private property towards some other private use thought to be more advantageous for the common good.”²²⁷ The Respondents explain that the framers expressed little concern about defining the scope of public use because they “may well have assumed that representative government would adequately protect against abuses of eminent domain.”²²⁸ Several other amicus briefs relied extensively on Mathew P. Harrington’s work²²⁹ to support the proposition that “American legislatures repeatedly used their power of expropriation to effect all manner of social and economic engineering, frequently transferring property from one private entity to another where it was thought that the transfer would effect some greater economic purpose.”²³⁰ These amicus briefs also discussed the extent that civic republican ideas influenced

²²⁴ *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting); Claremont Brief, *supra* note 190, at 13–14; *see also supra* notes 68–76 and accompanying text.

²²⁵ John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

²²⁶ Meidinger, *supra* note 45.

²²⁷ Brief of the Respondents, *supra* note 191, at 30–32 (citing Hart, *supra* note 225, at 1282–83).

²²⁸ *Id.* at 29 (quoting Meidinger, *supra* note 45, at 17–18).

²²⁹ Harrington, *supra* note 45.

²³⁰ Brief of Brooklyn United for Innovative Local Development (BUILD) et al. as Amici Curiae in Support of Respondents at 12–14, *Kelo*, 125 S. Ct. 2655 (No. 04-108) (quoting Harrington, *supra* note 45, at 1247); *see* Brief of the National League of Cities et al. as Amici Curiae in Support of Respondents at 6, *Kelo*, 125 S. Ct. 2655 (No. 04-

the founders and explained that if “public use” was meant to be a substantive limitation on eminent domain, the Fifth Amendment would have been more explicit about the matter because “[s]uch a limit would have been a monumental alteration in the nature of representative government as understood by the members of the founding generation.”²³¹ One amicus brief even mentions the doubts expressed by John Lewis—the author of the 1888 treatise that Thomas extensively relies on in his *Kelo* dissent—about whether the Public Use Clause was ever intended to be a substantive limitation at all.²³² Although none of these briefs devote as much space as does the Claremont Brief to the Public Use Clause’s original meaning, they pointed the Court towards an extensive body of research about the understanding of “public use” during the early American period that directly contradicts the account presented by the Claremont Institute.

Of course, most cases require the justices to choose between contradictory and often well-supported arguments, and the problem with Thomas’ dissent is not that he found the Claremont Institute’s arguments more persuasive than those presented by other amici. Rather, Thomas’ failure to acknowledge any of the primary and secondary sources that cast considerable

108) [hereinafter “Nat’l League of Cities Brief”] (citing Harrington, *supra* note 45, at 1299–1301, for the proposition that “[t]here is no evidence the Framers were concerned about the purposes for which eminent domain is employed”); Brief for the Massachusetts Chapter of the National Ass’n of Industrial and Office Properties as Amicus Curiae in Support of Respondents at 5–8 & nn.10, 17–18, 22, *Kelo*, 125 S. Ct. 2655 (No. 04-108) [hereinafter “Massachusetts Brief”] (quoting extensively from Harrington, *supra* note 45); *see also* Brief of the American Planning Ass’n et al. as Amici Curiae in Support of Respondents at 6, *Kelo*, 125 S. Ct. 2655 (No. 04-108) [hereinafter “APA Brief”] (“During the colonial and early national periods, the understanding about the permissible scope of eminent domain appears to have been . . . that the power could be used for any purpose consistent with public benefit or advantage.” (citing Meidinger, *supra* note 45, at 25)).

²³¹ Massachusetts Brief, *supra* note 230, at 8 n.22 (quoting Harrington, *supra* note 45, at 1300–01); *see also* APA Brief, *supra* note 230, at 7 n.18 (“[T]he compensation clause was protective of minority rights, and thus satisfied federalist fears that a landless majority might gain control of the national legislature and impose confiscating regulations on property” (quoting Harrington, *supra* note 45, at 1297)).

²³² National League of Cities Brief, *supra* note 230, at 6 (citing LEWIS, *supra* note 27, at *ii*, for the proposition that “the language of the Takings Clause does not impose any limitation other than the payment of just compensation”). The citation refers to Lewis’ preface in which he notes that “[i]t is certainly questionable whether anything more was intended by the provision . . . than as though it read, ‘Private property shall not be taken *under the power of eminent domain* without just compensation.’” LEWIS, *supra* note 27, at *ii*; *see also supra* notes 44–49 and accompanying text.

doubt on the traditional property-rights view of the Public Use Clause²³³ suggests that Thomas and his clerks may not have conducted the sort of in-depth historical research required for an accurate analysis of the Public Use Clause's original meaning. Originalism as a judicial decisionmaking methodology depends on accurate historical research. Such research takes time, especially for non-experts, a group that includes the justices and their clerks. The omissions, mischaracterizations, and inaccuracies in an opinion authored by the Court's most ardent supporter of originalism suggest that perhaps originalist methodologies cannot be reliably implemented under the constraints of Supreme Court litigation.

²³³ See *supra* notes 33, 42–49 and accompanying text.