Assembly, Public Use, and Reciprocity-of-Advantage Regulation

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In Kelo v. City of New London *(2005), the U.S. Supreme Court signaled that government-sponsored assemblies hardly ever create problems under the Public Use Clause in the Fifth Amendment to the U.S. Constitution. By a 5-4 majority, the Court held that a government takes property for public use when it condemns private property and transfers that property to another private party to produce local economic benefits. That holding was all but required by Court precedent, the majority argued; the eminent-domain power is the only way government can reassemble property.*

That argument relies on false dichotomies. In this Article, I argue that government-sponsored assemblies do not need to be takings for public use to be constitutional. In rights-based property theories, the power to sponsor private-to-private transfers and to assemble private property can be authorized instead under the police power, and specifically under the class of police regulations that secure average reciprocities of advantage.

*This Article teaches two lessons, one normative and one doctrinal. Normatively, reciprocity-of-advantage doctrine asks more reasonable questions than current doctrine does about whether state-sponsored assembly is justifiable. And doctrinally, this Article offers a roadmap for overhauling contemporary public-use doctrine. The U.S. Supreme Court treated assembly problems as reciprocity-of-advantage problems in the first assembly cases it considered after the Fourteenth Amendment was ratified—*Head v. Amoskeag Manufacturing Co. *and* Wurts v. Hoagland *(both 1885), and* Ohio Oil Co. v. Indiana *(1900). If* Head, Wurts, *and* Ohio Oil Co. *are convincing, then the Court's later assembly cases—from* Clark v. Nash *(1906), through* Berman v. Parker *(1954), to* Kelo*—should be limited or overruled.*

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Introduction

Kelo v. City of New London,[1] the subject of this Symposium, was the latest of the U.S. Supreme Court's forays into litigation over what I call here "state-sponsored private-to-private transfers." In a state-sponsored private-to-private transfer, a state or a state actor condemns one or more private parties' property and authorizes the transfer of that property to some other private party. In *Kelo*, the city of New London, Connecticut, and the city's Development Corporation (NLDC) authorized a massive redevelopment project around a new corporate headquarters to be built by the Pfizer pharmaceutical company. The city and the NLDC proposed to condemn the lots of Susette Kelo and other plaintiffs, to transfer title in those lots to a commercial development company on a long-term commercial lease, and to take those actions to build retail and office buildings near the new Pfizer headquarters.[2]

According to current doctrine, New London's proposal raised constitutional problems under the Fifth and Fourteenth Amendments to the U.S. Constitution. The Fifth Amendment was implicated because it forbids "private property [from]

1. 545 U.S. 469 (2005).
2. *See id.* at 474-76, 476 n.4.

be[ing] taken for public use, without just compensation,"[3] and the Fourteenth because it incorporates the Fifth Amendment's Eminent Domain Clause and applies that clause's limitations to states.[4] In *Kelo*, however, the Court upheld New London's proposal and rejected the constitutional challenge brought by Kelo and her fellow plaintiffs. Federal courts should review private-to-private transfers extremely deferentially, the Court concluded, and New London's proposal did not cross the constitutional line.[5]

Kelo has proven to be one of the most notorious decisions the Supreme Court has ever handed down. After the decision was released, it was opposed by 81% and 95% of respondents in two separate surveys,[6] and forty-seven states have since adopted legislation to prevent eminent-domain abuse.[7] And the result in *Kelo* was even more surprising since, shortly after the Constitution was ratified, authorities routinely warned that it would be "against all reason and justice" for "a law [to] take[] property from *A*. and give[] it to *B*."[8] *Kelo* came closer to ratifying such a transfer than any other case the Court has handed down. So how did the Court convince itself, and how did it try to convince readers, that the Fort Trumbull project was a constitutional taking for public use?

By a 5-4 vote, the Court said that it had no choice. "[O]ver a century of our case law interpreting [the Public Use] provision," Justice John Paul Stevens explained for the *Kelo* majority, "dictates [that] we may not grant petitioners the relief that they seek."[9] To explain why the Court's hands were tied, Stevens made two more specific arguments. Those arguments are studied and critiqued closely in this Article.

The first argument is a normative policy argument. Justice Stevens argued that New London, "a[s] [in] other exercises in urban planning and development," was "endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of their parts."[10] In this Article, that argument is called the "assembly argument." In an article on "land assembly districts" published just after *Kelo* was handed down, Michael Heller and Roderick Hills assumed that, "[f]rom an efficiency standpoint, we need eminent domain to consolidate overly fragmented

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

4. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); *see Kelo*, 545 U.S. at 472, 472 n.1; Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984). I question the incorporation approach, *see infra* note 150.

5. *See* Kelo, 545 U.S. at 480, 482.

6. *See* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 138-39 & tbl. 5.1 (2015). For further background, *see id.* at 135-64.

7. *See Eminent Domain*, INST. FOR JUST., https://ij.org/issues/private-property/eminent-domain [https://perma.cc/QNE3-A9U8].

8. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.); *see also Kelo*, 545 U.S. at 476-77, 478 n.5 (describing some variation on the "taking from *A* to *B*" hypothetical); Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311-12 (C.C.D. Pa. 1795) (same); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (Da Capo Press 1971) (1827) (same).

9. *Kelo*, 545 U.S. at 490.

10. *Id.* at 484.

land."[11] Today, Alexandra Klass assumes that there is a "need for eminent domain authority because of the difficulty of assembling numerous contiguous parcels, which can encourage landowners to 'hold out' for above-market value."[12]

Stevens also relied on a complementary legal argument, called in this Article "the public-use argument." According to the public-use argument, when a private litigant challenges a state-sponsored private-to-private transfer, the challenge presents an issue under the Public Use Clause. There are only two ways to interpret the phrase "public use." A "use-by-the-public" standard is relatively narrow; under it a taking is not for public use unless the public as a whole enjoys the use of the property post-condemnation via direct access or government management.[13] A "public-purpose" standard is relatively broad. Under *it*, a taking is for public use as long as it is conducted for a purpose that might rationally be believed to produce positive social benefits.[14] For Stevens and the other members of the *Kelo* majority, the public-purpose interpretation is far preferable. The "Court long ago rejected any literal requirement that condemned property be put into use for the general public," Stevens reminded readers, because in state courts the literal reading had proven to be "difficult to administer" and "impractical."[15]

The assembly and public-use arguments both present false dichotomies. Although private-to-private transfers are desirable in some situations, they are also problematic. The assembly and public-use arguments make it seem as if policymakers and judges have no choice but to let local governments sponsor private-to-private transfers. Over and over in *Kelo*, Justice Stevens argued that eminent-domain-limiting legal rules were "impractical," "inadequa[te]," and "rigid," because "[t]here is . . . no principled way of distinguishing economic development from . . . other public purposes" that have supported findings of public use and constitutionality.[16]

This Article introduces[17] a way out of the false dichotomy, one that has been ignored for at least seventy years. This strategy builds on a rights-based justification for property. In a recent book, I argued that property rights can be justified consistent with natural rights and mine-run principles of natural law.[18]

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11. Michael A. Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1465 (2008).

12. Alexandra B. Klass, *Eminent Domain Law as Climate Policy*, 2020 WIS. L. REV. 49, 78-79.

13. *See Kelo*, 545 U.S. at 477-79.

14. *See id.* at 480, 487-88 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).

15. *Id.* at 478-79.

16. *Id.* at 479-80, 483-84.

17. Maybe "re"-introduces is better. As shown in Part IV, *infra*, this Article explains and justifies a view that was assumed and applied earlier, in controlling Supreme Court precedents from the 1880s. And I set forth this view shortly before *Kelo* was decided. *See* Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 886-92.

18. This Article draws on and develops arguments I made in ERIC R. CLAEYS, NATURAL PROPERTY RIGHTS 274-96 (2025). In brief: "natural law" refers to principles of ethics and political morality in which the most fundamental objects of human practical action are to engage in courses of action that bring happiness or flourishing understood rationally, comprehensively, and consistent with

Of course, some readers will be skeptical that rights theories can ever justify private-to-private transfers. Shortly after *Kelo* was handed down, Joseph Sax assumed that "most of the uses that the Court has sustained over many decades" are "desirable and constitutional," and he warned readers that the only dissenters from that consensus are "the most doctrinaire property rights libertarian[s]."[19] When natural rights are justified consistent with principles of natural law, they do not have the features that Sax associates with property rights, libertarians, and doctrinaire ideologues.

In this Article, I am going to restate and apply a rights-based theory of property consistent with the theory I set forth in my book. I am going to call the theory—and systems of law consistent with that theory—"rights-based." "Rights-based" might mislead, I realize; the phrase encourages confusion with the theories Professor Sax singled out and criticized. But Sax was uncharitable to the extent that he was suggesting that all rights-based theories have the characteristics he suggested they have. And there's no short and punchy way to distinguish rights theories like the one I rely on here from the ones Sax criticized.[20] In the rest of this Article, then, when I refer to theories or legal systems as "rights-based," I ask readers to remember that I mean "grounded in rights structured consistent with mine-run principles of natural law."

In any case, in a rights-based theory (as meant in this Article), the legal rights of any one proprietor need to be structured as seems likely to serve the correlative interests of rights holders and of others. In narrow circumstances, states may legitimately sponsor private-to-private transfers. Presumptively, however, such transfers are problematic. That presumption expresses in practice the general sense behind the hostility toward takings from *A* to give to *B.* It also accords with what Sax expects from rights theories. Rights recognize and protect autonomy. Property rights free their holders to decide for themselves how best to use things for their own and others' self-preservation or betterment. In a system of natural law, however, autonomy is not valuable for its own sake. Autonomy is valuable only instrumentally, as a means for helping people produce goods ranging from preservation to rational flourishing. And in some extreme cases, it *is* clear that *B*'s uses will produce moral value to *B* and others far greater than the moral value *A* (or a collection of different *A*'s) will produce from their individual uses. In those cases the law may restructure—or reassemble—civil property rights to facilitate *B*'s uses.

In a rights-based system, however, government-sponsored reassembly does not constitute an exercise of the eminent-domain power. When a private-to-private transfer is politically legitimate, a state should facilitate it via the police power, and specifically via a model of police regulation I'll call here

what morally outstanding people would regard as happiness or flourishing. *See id.* at 44-50. A "natural right" is a nonconventional entitlement for someone to engage in activities that (on one hand) produce happiness or flourishing, in a manner that (on the other hand) are consistent with and respectful of others' equal opportunities to engage in similar activities. *See id.* at 38-42, 50-53.

19. Joseph L. Sax, Kelo*: A Case Rightly Decided*, 28 U. HAW. L. REV. 365, 367 (2006).

20. A "classical natural law-based rights-based theory"? A "NLNR-based" theory?

"reciprocity-of-advantage regulation." At a high level of generality, the police power consists of the government's power to order the free exercise of rights. Or, in Randy Barnett's words, the police power is the power to regulate, where "regulate" means "make rights regular."[21] Police regulation is a broad field, and it contains several distinct models of government action. In one model, a government modifies civil property rights to help the rights holders exercise their rights effectively. In its regulatory-takings case law, the Supreme Court sometimes speaks of laws "securing an average reciprocity of advantage."[22] That phrase is anachronistic; it became popular about a century after the model of regulation I describe here became settled in U.S. law.[23] Nevertheless, the phrase is familiar now, and it expresses clearly the key expectation in the model of regulation studied here.

In the most extreme cases, reciprocity-of-advantage principles can justify the condemnation of private property and its redistribution to other private proprietors. Like all other rights-based justifications for government power, however, the principles that justify reciprocity-of-advantage regulation also limit it. In private-to-private transfers, there must be convincing proof that a high-value use of property is being stymied by a genuine bilateral monopoly and that condemnation and transfer are the only feasible solutions for the monopoly problems. If that necessity exists, a putative reciprocity-of-advantage regulation must also ensure that the condemnees receive a genuine advantage. That advantage can come without monetary compensation and instead by enhancing proprietors' uses of the resources being regulated.[24] Sometimes, however, compensation is necessary, and when it is it must be prorated in relation (on one hand) to the total value of the property being assembled and (on the other hand) the proprietors' equitable shares in that post-assembly value. That model of regulation supplies a reasonable middle position, one excluded by the argument framing of the *Kelo* Court's majority opinion and of scholarship like Sax's.[25]

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21. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101 (2001).

22. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 140 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

23. The earliest usage of which I am aware comes in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922), which upheld a party wall as a reciprocity-of-advantage regulation.

24. In these situations, reciprocity-of-advantage regulation is justified along the same lines Richard Epstein associates with "implicit in-kind compensation." *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195-215 (1985). Brian Lee assumes that reciprocity-of-advantage regulation is interchangeable with implicit in-kind compensation. *See* Brian Angelo Lee, *Average Reciprocity of Advantage*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 99, 100 (James E. Penner & Henry E. Smith eds., 2013). According to the theory presented in this Article, some regulations secure average reciprocities of advantage by implicit in-kind compensation without explicit compensation. But not the laws authorizing state-sponsored private-to-private transfers.

25. *See* Sax, *supra* note 19, at 367. *See generally* Thomas W. Merrill, *Six Myths About* Kelo, 20 PROB. & PROP. 19 (2006) (favoring broad readings of federal constitutional public-use limitations); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978) (same); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615 (1940) (same); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949) (same). *But see* SOMIN, *supra* note 6, at 35-111 (arguing for a narrow reading of federal constitutional public-use limitations).

I hope that this Article makes three contributions to property law and scholarship. First, at a minimum, I hope that this Article helps readers appreciate that private-to-private transfers might be addressed under the police power and not the eminent-domain power. If that ambition sounds modest, it is not. Today, most lawyers and legal scholars assume that private-to-private transfers are eminent-domain and public-use problems. Private-to-private transfers can be analyzed as eminent-domain problems, but they do not need to be.

Second, I hope that this Article stimulates thinking in contemporary normative property scholarship. State-sponsored private-to-private transfers raise profound issues about property—especially for those who (like me) ask whether property is a politically legitimate institution.[26] It's fair to test a theory of individual liberty by hypotheticals about war and drafts. May a government justly conscript citizens, force them to fight, and force them to risk their lives? If so, why, and does the theory mark off any principled limits on the kinds of wars the government may fight or how the conscripts are used? Private-to-private transfers test rights-based property theories similarly. Why should a government have authority to force some people to surrender their property for the benefit of others, and why might it be entitled to back its orders with government-sponsored violence? A reciprocity-of-advantage strategy can answer those questions. It identifies considerations to settle when forced transfers are just and unjust, and those considerations express in law and political morality concerns that seem relevant in common sense. Along the way, the strategy set forth here bolsters exclusion theories, by showing how better to protect the exclusive right of disposition.[27] In law-and-economics terms, this Article shows how to design assembly policy *if* one believes that the main dangers in assembly are public-choice pressures and the routine expropriation by retailers and commercial developers of owner subjective value,[28] and it calls into question economic analyses that focus primarily on welfare losses from owner free-riding or holdout.[29] The reciprocity-of-advantage strategy studied in this Article also addresses a concern voiced by Progressive property scholars—that the risk of land redistribution by eminent domain "is, as a structural matter," *not* "extended equally to all" and is instead "extended to a particular class of persons."[30]

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26. *See, e.g.*, ADAM MACLEOD, PROPERTY AND PRACTICAL REASON 1-4 (2015); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 12-16 (1988); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 6-18 (2000).

27. This Article supports exclusion, and specifically the exclusive right to disposition, more than Merrill and Smith do in THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTION TO U.S. LAW: PROPERTY 242-48 (2011).

28. *See, e.g.*, Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092-95 (1997).

29. *See, e.g.*, THOMAS J. MICELI, A THEORY OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE 24-35 (2011).

30. Laura S. Underkuffler, Kelo*'s Moral Failure*, 15 WM. & MARY BILL RTS. J. 377, 386 (2006). Note also that Progressive concerns, about unequal access to the political process, played important roles in the dissents of Justices O'Connor and Thomas in *Kelo v. City of New London*, 545 U.S. 469, 504-05, 521-22 (2005).

Finally, this Article raises in constitutional doctrine a possibility that needs to be explored far more carefully than it has been to date: it may be time for a thorough reassessment of U.S. Supreme Court public-use doctrine. Since around 1900, the Supreme Court has assumed that private-to-private transfer problems are public-use problems. As this Article will show, however, before the Fourteenth Amendment was ratified, at least some state courts treated private-to-private transfers as reciprocity-of-advantage problems. And ten to twenty years before the U.S. Supreme Court started calling such transfers public-use problems, it considered them instead to be reciprocity-of-advantage problems. Those state and Supreme Court cases might be better-reasoned than any case that came after—including *Kelo*. Since *Kelo*, every so often some private litigant has filed a petition for certiorari praying that the case be overruled or limited;[31] the Court denied such a petition a month after the conference at which this Article was presented.[32] Eventually, the Court will revisit *Kelo* and all of its case law on private-to-private transfers. When it does, it should rethink its case law. Assembly disputes should be analyzed in doctrine as reciprocity-of-advantage problems and not as eminent-domain problems.

I. Two Arguments for Deferential Public-Use Doctrine

The *Kelo* litigation arose after the New London city council tried to redevelop neighborhoods around an area in which Pfizer, Inc., an international pharmaceutical company, had committed to build a new headquarters. The city council forecast that redevelopment would produce new jobs and higher city tax revenues. In 2000, on the basis of those forecasts, the council approved a plan to redevelop ninety acres in the Fort Trumbull neighborhood, including the blocks where Susette Kelo and other New London residents lived. Then, in 2005, the city council authorized the NLDC to buy land in Fort Trumbull or acquire it via eminent domain. When litigation started, the NLDC was negotiating a ninety-nine-year lease to develop the targeted area with a New England commercial developer, for $1 rent per year.[33]

When Kelo and other Fort Trumbull residents refused to sell their lots or leave, the NLDC initiated proceedings to condemn those residents' lots. Kelo and her co-plaintiffs sued and prayed for an injunction that the proposed condemnation violated their Fifth Amendment rights. After the Connecticut Supreme Court issued an opinion upholding the Fort Trumbull plan in its entirety,[34] the U.S. Supreme Court granted certiorari.[35]

31. *See, e.g.*, Chicago v. Eychaner, 171 N.E. 31 (Ill. 2020), *cert. denied*, 141 S. Ct. 2422 (2021) (with Justices Thomas, Gorsuch, and Kavanaugh expressing interest in reconsidering *Kelo*); Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, 554 U.S. 930 (2008) (with Justice Alito wishing to grant certiorari).

32. *See* Bowers v. Oneida Cnty. Indus. Dev. Agency, 205 N.Y.S.3d 606 (App. Div. 2024), *leave to appeal denied*, 42 N.Y.3d 904 (2024), *cert. denied*, 145 S. Ct. 1428 (2025) (mem.).

33. *See Kelo*, 545 U.S. at 473-76, 476 n.4, 483.

34. Kelo v. City of New London, 843 A.2d 500 (Conn. 2004).

35. *See Kelo*, 545 U.S. at 477.

Writing for the Court majority, Justice Stevens held that the Fort Trumbull takings passed muster under a rational-basis standard.[36] Reviewing the Court's case law on private-to-private transfers, Stevens read them all to "eschew[] rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[37] Stevens took notice of New London's "economic development plan," and he and his colleagues in the majority deferred to the city's "belie[fs that the plan] will provide appreciable benefits to the community—including . . . new jobs and increased tax revenue."[38]

The majority opinion prompted two dissents.[39] One was authored by Justice Sandra Day O'Connor for herself and Justices Thomas, Scalia, and Rehnquist. O'Connor complained that the *Kelo* Court opinion went beyond any of its earlier precedents, that it "wash[ed] out any distinction between private and public use of property," and that it "thereby effectively . . . delete[d] the words 'for public use'" from the Eminent Domain Clause.[40] In a separate dissent, Justice Clarence Thomas argued for overruling all public-use cases concerning private-to-private transfers, from 1896 going forward, that had embraced the "public purpose" understanding of public use. Thomas argued that the Court should hold "that the government may take property only if it actually uses or gives the public a legal right to use the property."[41]

Justice Stevens dismissed both dissents, and to do so he relied on the two arguments studied in this Article. As Stevens presented the constitutional question, there were two basic interpretations of the Public Use Clause, the use-by-the-public and the public-purpose tests.[42] He concluded that the public-purpose test outperforms the use-by-the-public test. "Not only was the 'use by the public' test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?)," Stevens argued, "but it proved to be impractical given the diverse and always evolving needs of society."[43]

To prove that the public-purpose test was preferable, however, Justice Stevens relied on the assembly argument. Right after the quote above, Stevens added a footnote quoting at length from a Nevada case about the constitutionality of a state statute authorizing mining companies to have condemned aerial rights-of-way for systems shipping ore over aerial lines to refineries. The Nevada

36. *See id.* at 488-89.

37. *Id.* at 483.

38. *Id.*

39. Justice Kennedy wrote a concurrence stressing that he found decisive the presence of a comprehensive development plan, the fact that the condemnations were called for before any private commercial developer had been selected to redevelop the Fort Trumbull neighborhood, and the absence of any convincing proof of "impermissible favoritism." *See id.* at 490-93. Since Kennedy joined Stevens's opinion for the Court, however, he also supported all the claims Stevens made on behalf of the Court about public use and assembly.

40. *Id.* at 494 (O'Connor, J., dissenting).

41. *Id.* at 521 (Thomas, J., dissenting).

42. *See id.* at 479-80.

43. *Id.* at 479.

Supreme Court repudiated the "use-by-the-public" test because Nevada citizens were "directly interested in having the future developments [of mines] unobstructed by the obstinate action of . . . individuals."[44] In other words, the use-by-the-public test was inapposite because Nevada citizens were interested in the production of social wealth from minerals by assembly.

II. Assembly as a Reciprocity-of-Advantage Problem

As *Kelo* shows, all of the Justices now on the Court assume that state-sponsored private-to-private transfers present issues under only one constitutional clause—the Eminent Domain Clause, through the words "public use." But the Justices assume as much because, in disputes over condemnation, they follow an assumption expressed in the 1984 case *Hawaii Housing Authority v. Midkiff*, that a state's power of eminent domain is "coterminous with the scope of a sovereign's police power."[45] In a rights-based system of government, however, the police and eminent-domain powers are distinct. They complement one another, but they are still distinct. And when the police and eminent-domain powers are distinct, they ask different questions of private-to-private transfers.

A. The Eminent Domain and Police Powers in a Theory of Rights

When citizens are entitled to civil property rights, why may the government justly force some of them to surrender that property?[46] That question has several answers, and different answers apply in different practical contexts. In a rights-based legal system, the eminent-domain and police powers provide two reasonable answers, each for a different context.

In one answer, the government needs to assemble private property for collective uses. Highways and waterways facilitate travel. Military bases provide security. Common carriers provide water, electricity, energy, and other basic services. In each case, centralized management helps people exercise a natural right—respectively, to travel, to self-defense, and to property and its beneficial use. In each of those examples, however, ownership and management are collective.

The eminent-domain power gives the government the power to acquire private property in situations like the ones just described. A government may legitimately condemn private property when condemnation seems likely in practice to secure whatever rights collective management will secure.[47] For an

44. Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 410 (1876), *quoted in* Kelo, 545 U.S. at 479 n.8.

45. 467 U.S. 229, 240 (1984). More precisely, the Court said that, when federal courts inquire whether a government is condemning property for public use, the scope of *that* inquiry is coterminous with the judicial inquiry whether the policy justifying the condemnation is within the scope of the government's police powers.

46. *See, e.g.*, Armstrong v. United States, 364 U.S. 40, 49 (1960); Van Horne's Lessee v. Dorrance, 2 U.S. 304, 310 (C.C.D. Pa. 1795).

47. Upon payment of just compensation.

exercise of eminent domain to be legitimate, however, the uses must be genuinely collective. The "public-use" limitation expresses that constraint. That being so, government may condemn private property via eminent domain only when, post-condemnation, the property is used collectively in some literal sense of "collectively." In other words, some use covered by the "use-by-the-public" test.

In the other answer, assembly may serve the interests of the private parties who already own it. In those cases, should governments intervene? If a property theory's answer is "no," it opens itself up to Sax's charge of doctrinairism.[48] But a rights-based theory *can* answer, "Yes—in limited circumstances, and under the police power."

At a high level of generality, the police power is the power to order citizens' rights through general rules. In a rights-based system of law, the police power is the power to order how people exercise their rights, and to do so specifically in ways that allow people in civil society to enjoy the freedom they are entitled to by their natural rights. A canonical definition of the police power came in the 1851 Massachusetts case *Commonwealth v. Alger*, as "the power . . . to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances . . . as [legislators] shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."[49] That understanding expresses how rights and law relate to one another when rights are justified and structured consistent with principles of natural law. "Police" or regulatory power is just because it works *both* "for the good and welfare of the commonwealth" *and* for the good and welfare of "the subjects of the same."

But police regulation is a broad field of government action, and it covers a few distinct models of regulation. The most familiar model is the model of harm prevention.[50] Harm-prevention laws keep rights regular by keeping all citizens to their equal rights. But the harm-prevention model is not the only model of regulation.[51] Reciprocity-of-advantage regulation constitutes another viable model of regulation, and it justifies private-to-private transfers in some situations.

In a rights-based legal system, legal property rights serve interests that people have in beneficial use—in the productive use of resources for survival or thriving. In practice, civil property laws may not always serve those interests.

48. *See supra* note 19 and accompanying text. For example, SOMIN, *supra* note 6, does not consider reciprocity-of-advantage regulation as a serious possibility. He dismisses one case that studies assembly problems as reciprocity-of-advantage problems, *id.* at 266 n.86, telling readers that the case was refuted by EPSTEIN, *supra* note 24. But Epstein does not refute the case, for he does not consider the possibility that reciprocity-of-advantage regulation constitutes a distinct model of police regulation. *See infra* note 158.

49. 61 Mass. 53, 85 (1851).

50. *See* CLAEYS, *supra* note 18, at 251-53.

51. In this Article, I pass over a third model of regulation, in which regulations make rights regular by giving them determinate measures in practice. The law reviewed in *Alger* regulated in this sense; it marked off public waters and shores from private bayfront property, with boundaries far clearer than the boundaries provided by common law. *See, e.g.*, *Alger*, 61 Mass. at 88-95; CLAEYS, *supra* note 18, at 250-51.

For example, mineral rights are often classified in the realty associated with particular lots of land.[52] Boundary-driven property rights usually help landowners put their land to the uses they find gratifying, and the same rights supply rough but effective first cuts at access to subsurface minerals. But boundary-driven property rights can frustrate oil and gas production. When oil and natural gas are stored as liquids or gases, geothermal pressure helps push them to the surface, and boundary-driven rights encourage all mineral-rights holders to dissipate that pressure in races to capture oil and gas for themselves.[53] All of the rights holders have similar, correlative interests in recovering as much oil and gas as they can—and in particular, in recovering the increments of oil and gas that could be recovered if drilling exploited geothermal pressure to the greatest advantage. So a government may justly consolidate—in one private actor—all of the mineral rights in an oil or gas reservoir. Such a law (a "unitization" law) keeps rights regular, and it does so by coordinating how all rights holders use their mineral rights to their mutual advantage.

But the arguments that justify reciprocity-of-advantage regulations simultaneously limit them. Since natural property rights serve moral interests in use, reciprocity-of-advantage regulations must serve those use-interests more effectively than whatever laws they replace. In a dispute about oil and gas unitization, then, there must be a genuine dispute among rights holders (mineral-rights holders). It must seem reasonably likely that the rights holders cannot resolve the dispute among themselves by informal agreement or through contracting. It must also seem reasonably clear that the rights holders all have the same interest in the productive use of the resource (in seeing oil and gas extracted and sold). And, whatever coordination the government provides, the mineral-rights holders must come out better as a group than they would have if they had all drilled individually on their own lots.[54]

Some readers may wonder: Does the foregoing account of regulation differ in any meaningful way from the justifications for assembly applied in *Kelo* or the ones taken for granted in contemporary scholarship? Yes. Like the justifications accepted today, the account set forth here does let governments condemn and reorder property rights. But the account under study here starts with different presumptions. Again, in *Kelo* the Court quoted with approval a state-court opinion describing resistance to assembly as "the obstinate action of . . . individuals."[55] In a rights-based system, owners are not "obstinate" simply because they choose not to surrender their property for collective projects. People can pursue many different reasonable life projects with the same resources, and

52. *See* CLAEYS, *supra* note 18, at 174-91.

53. *See, e.g.*, PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS AND MEYERS OIL AND GAS LAW (abr. 3d ed. 2007), §§ 104, 901, 970, at 1-11 to 1-13, 9-2, 9-11.

54. For two judicial opinions relying on similar concepts and expectations, see *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900); and *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir. 1929), *cert. denied sub nom.*, Ramsey v. City of Oxford, 280 U.S. 563 (1929).

55. Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 410 (1876), *quoted in* Kelo v. City of New London, 545 U.S. 469, 479 n.8 (2005); *see supra* text accompanying note 44.

rights express and respect their freedom to pursue their differing projects. And again, in *Kelo* the majority described New London as "endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts."[56] In a rights-based system, it is inappropriate to describe rights as "parts" and the claims of the community as a "whole" capable of subsuming those parts. In a rights-based system, the analog to Justice Stevens's "whole" is the common interests a group of rights holders have in exercising their rights in the same way. Governments have legitimate authority to regulate rights when it seems reasonably likely that most rights holders want to pursue the same interests with their rights and that government coordination will facilitate the exercise of the rights more effectively than individual action or private cooperation might.

B. The Eminent Domain and Police Powers in Early American Practice

Section A supplied an overview of a rights-based property theory. I want to switch course and illustrate that theory, with a few examples from nineteenth-century American treatises and cases.[57]

1. Kent's *Commentaries*

In his *Commentaries on American Law*, Chancellor James Kent regarded "the right of eminent domain [as an] inherent sovereign power [that] gives to the legislature the control of private property for public uses."[58] He also understood "public use" in the "use-by-the-public" sense. If a legislature "should take it for a purpose not of a public nature, as if the legislature should take the property of A. and gives it to B," he warned, it would be "unconstitutional," "void," and in violation of "natural equity" and "an acknowledged principle of universal law."[59]

But Kent assumed that this power of eminent domain stood separate from the police power. "[T]hough property be thus protected [by eminent domain limitations]," he warned, "it is still to be understood, that . . . [the state] may [make] general regulations" regarding property.[60]

56. *Kelo*, 545 U.S. at 483; *see supra* text accompanying note 10.

57. Readers may wonder what work the following examples perform in this Article. For the most part, I offer these examples to bolster this Article's first and second contributions. In the examples, intelligent lawyers and judges thought about assembly problems in rights-based terms, and the cases themselves supply concrete fact patterns. The materials studied in this Section provide some support for this Article's third contribution—but only weak support. The materials studied in this Section provide some evidence of what the Fourteenth Amendment might entail in relation to property and reciprocity-of-advantage regulation—but not comprehensive evidence.

58. 2 KENT, *supra* note 8, at 275.

59. *Id.* at 275-76.

60. *Id.* at 276.

2. *Vanderbilt v. Adams*

Although Kent distinguished the eminent-domain and police powers, he did not consider the possibility that the police power includes the power to make reciprocity-of-advantage regulations. Kent assumed that "general regulations" prohibited (only) "such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens."[61] But the harm-prevention model of regulation does not foreclose other models of regulation. And in the same time period in which Kent wrote his *Commentaries*, what we now know as the "reciprocity-of-advantage" model was starting to emerge.

Consider the 1827 New York Supreme Court case *Vanderbilt v. Adams*, published in the same year in which Kent was writing about property in his *Commentaries*.[62] Vanderbilt challenged the constitutionality of a harbor-traffic ordinance under which he was fined. The ordinance, he argued, interfered with his right to use a wharf he was renting. The court denied that the ordinance and fine effected, "in the legitimate sense of the term, a violation of any right," because the ordinance was an exercise of New York's power to make "a necessary police regulation."[63] Although Vanderbilt's free use of his wharf was subject to interference, in general the ordinance was a "regulation[] not lessening the value of the right" to use harbor-side property; it was instead a regulation "calculated for the benefit of all"[64]—a regulation securing an average reciprocity of advantage.

3. *Smith v. Smith*

Now, the ordinance challenged in *Vanderbilt* only limited one use of a wharf; it certainly did not authorize a private-to-private transfer. But other laws did—especially laws authorizing proprietors to consolidate riparian rights to build private mills. In the 1843 New York case *Smith v. Smith*,[65] a New York chancery court applied a cotenancy partition statute to authorize the reassembly of riparian rights. A father had passed onto two brothers cotenancy interests in mills on the same river. The brothers fell out arguing how their mills should be used, one sued the other for a partition by sale, and an assistant chancellor ordered such a partition. The chancellor overruled the order of partition by sale. He found several different strategies for partition in kind feasible. One was to split the land and mills, another was to give one brother control over the main mill and make him let the other brother take turns using power from that mill,

61. *See id.*

62. 7 Cow. 349 (N.Y. Sup. Ct. 1827). In *Vanderbilt,* the court considered not only (state) eminent-domain limitations but also (federal) Contracts Clause limitations, *see* U.S. CONST. art. I, § 10, cl. 3, not relevant here. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1587-88 (2003).

63. *Vanderbilt*, 7 Cow. at 351.

64. *Id.*

65. 10 Paige Ch. 470 (N.Y. Ch. 1843).

and a third was to assign one of the brothers all of the mills and make that brother pay the other owelty.[66] In any of these strategies, in the chancellor's view, the relevant partition statutes authorized "regulations for the use of the water power which is not capable of actual partition without a destruction of its value."[67]

In his discussion, the chancellor assumed that just partition strategies secured reciprocities of advantage. He did not use the words "reciprocity" or "advantage," to be sure. But he did expect a just partition to "mak[e] an actual and equitable partition of the water power in controversy, so as to be mutually beneficial to each" and "perfectly equal; so far as human judgment is capable of producing equality in such a case."[68] And terms like "equitable" and "mutually beneficial" express in substance the expectations associated with a reciprocity of advantage. The power to partition could justify what might seem serious interferences with property rights—like ousting one of the brothers and forcing him to receive money payments. Even in that scenario, however, partitions would still be just if shown to be necessary, and if the payments made to the ousted cotenant made the partition "equitable," "beneficial," and "mutually" so, to the ousted cotenant.

4. *Bates v. Weymouth Iron Co.*

Smith applied the partition statute at issue as a police regulation. In *Bates v. Weymouth Iron Co.*, an 1851 Massachusetts case,[69] the Massachusetts Supreme Judicial Court *refused* to apply a statute as a police regulation, in concern that the statute would not constitute an exercise of the police power if it were applied on the facts of the case. The Weymouth Iron Company ran a grist mill, forge, and factory from mills drawing power from a dam along a river by its property. The dam reservoir did not supply enough power for all the company's various operations. To generate more water power,[70] the iron company also dammed and built a reservoir behind a brook. When the iron company dammed the brook, the new dam flooded Bates's land.[71] Bates sued the iron company for trespass, and the company argued that state mill acts abrogated Bates's common-law rights and limited Bates to a finding of damages by a jury.[72] In substance, the company was making an assembly argument. The mill acts authorized the reassembly of water rights for mill power, it argued, and the authority the statute created for assembly preempted common-law actions by other riparians.

The Massachusetts court rejected the assembly argument and decreed that a judgment be entered for Bates.[73] The court's opinion was written by Chief

66. *See id.* at 477-78.
67. *Id.* at 478.
68. *Id.* at 476-78.
69. 62 Mass. (8 Cush.) 548 (1851).
70. Primarily, the company caught water used in the mill and saved it for reuse for waterpower.
71. *See Bates*, 62 Mass. at 549-51.
72. *See id.* at 549.
73. *See id.* at 556.

Justice Lemuel Shaw—not only a figure as towering as Chancellor Kent, but also the author of *Alger* (which was decided in the same year).[74] In *Bates*, Shaw relied on three related legal arguments: ordinary statutory interpretation, the canon against reading statutes in derogation of common law, and the canon against reading statutes to avoid possible constitutional problems. The state mill acts entitled riparians to build dams for power mills and to flood the land of upstream riparians, on condition that they pay "equitable assessment[s] of which [are] provided for by the acts."[75] As written, the acts did not do violence to the common law or the Massachusetts Constitution—in Shaw's words, they did not establish in civil law "a right to take and use the land of the proprietor above, against his will."[76] The mill acts were lawful because they constituted "a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it."[77] But "the grant of power made by the mill acts . . . being in derogation of common right, [was] not to be extended by construction beyond the just and fair meaning of the [acts'] terms."[78]

The iron company went beyond "the reason and principle" of the statute and its regulatory purpose in two respects. The company flooded a riparian on the river it was using for its mill with water from a different water course, and it did so not to build new waterpower but to reuse old power.[79] On that basis, Bates's common-law action was not preempted, and he was entitled to prevail. In other words, the mill acts secured reciprocities of advantage as written. But the iron company was producing mill power in ways not clearly authorized by the acts, and it was threatening to deny Bates a reciprocity of advantage by flooding his land. That threat strengthened the conclusion that the acts should not be read to authorize the iron company's flooding.

5. *Coster v. Tide Water Company*

Bates appealed to the concept of reciprocity-of-advantage regulation only in a supporting role, in a case that focused for the most part on statutory interpretation. But two courts did rely on the same concept directly in constitutional challenges, and those courts declared invalid a government-sponsored assembly project. Both of these opinions were issued in New Jersey, in litigation over a law authorizing a state corporation to drain swamps. The project in dispute was held unconstitutional by the state court of chancery in *Coster v. Tide Water Company*,[80] and the chancellor's injunction was then

74. *See supra* note 49; Claeys, *supra* note 62, at 1599-1604.
75. *Bates*, 62 Mass. at 553.
76. *Id.*
77. *Id.*
78. *Id.* at 555.
79. *See id.* at 554-55.
80. *Coster I*, 18 N.J. Eq. 54 (Ch. 1866).

sustained by the state's court of errors and appeals.[81] And both of those decisions were handed down in 1866, just before the Fourteenth Amendment was ratified.

Coster presented a constitutional challenge to an application of a New Jersey statute establishing the Tide Water Company. The law authorized the company to drain tide water marshes along Newark Bay, construct the works necessary to drain those marshes, and raise money for its works by assessing the properties drained.[82] The same law that created the company also established a state commission to review, approve, and enter into contracts for drainage works that the company proposed. The Tide Water Company proposed to drain the land of Coster and several other owners with property along the bay. For its compensation, the company asked the state commission to give it a ground rent, a property right to receive from the fee owners, in the future and in perpetuity, "profit out of the management and improvement" of the drained lands.[83]

That proposal presented an assembly scheme, though an unusual one. The social gains consisted of the advantages that owners would enjoy after their lots were drained. To produce those advantages, the proposal would have condemned an easement on every one of the lots to be drained, and it would have assembled all those easements for the Tide Water Company. Post-drainage, the company would keep in every lot the easement and a second property right, the ground rent, and every lot in the drained area would be held in a fee encumbered by the easement and the ground rent.

Coster and his co-plaintiffs sued for an injunction directing the state commissioners not to make or enter into the contract the company sought.[84] To the chancellor, the plaintiffs' complaint presented a constitutional case; it implicated a New Jersey constitutional property-rights guarantee, the state constitution's eminent-domain clause, and its declaration about the scope and limits of the legislative power.[85] The chancellor considered the possibility that the draining scheme was an exercise of the eminent-domain power, but his analysis came out in the negative because the scheme was not for public use. "The public use required, need not be the use or benefit of the whole public or state," he conceded, "but the use and benefit must be in common, not to particular individuals or estates."[86] The proposal was not for common use because the Tide Water Company stood to enjoy the private use of the ground rents.[87]

By itself, however, that conclusion about eminent domain was not sufficient to support the injunction. The chancellor recognized that "another branch of legislative power," for "*police* laws," "may be appealed to, as authorizing the

81. Tide Water Co. v. Coster, 18 N.J. Eq. 518, 518-19 (1866).

82. *Coster I*, 18 N.J. Eq. at 55-56.

83. *Id.* at 61-62.

84. *Id.* at 58-59.

85. *See id.* at 63-64. The chancellor also relied on Kent's discussions of the eminent-domain and police powers and their differences. *See id.* at 64.

86. *Id.* at 68.

87. *See id.*

taking of the lands required for the works to drain [the relevant] meadow."[88] The chancellor was referring to "the power of the government to prescribe public regulations for the better and more economical management of property . . . which . . . can be better managed and improved by some joint operation."[89] The chancellor meant what I am calling reciprocity-of-advantage regulation, as he made clear by citing party-wall, irrigation, and drainage laws. But that model of police regulation was "to be exercised for the benefit of the parties affected," he warned, "not for that of strangers,"[90] and such regulations needed "to make an improvement common to all concerned, at the common expense of all."[91] The chancellor concluded that the proposal did not satisfy that expectation. The Tide Water Company was an outsider to the lands to be drained, none of the owners of those lands had asked for drainage, and the permanent ground rent the company was set to receive seemed far out of proportion to the value that Coster and the other plaintiffs stood to receive from having their lands drained.[92]

The state court of errors and appeals sustained the chancellor's injunction on the same ground. That court thought that other New Jersey laws authorizing a group of swampland owners to drain their own lands were distinguishable. In the view of the court of errors and appeals, those laws were "regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burthen of the expense incurred in their improvement," and they were "rules of police of the same character as provisions concerning party walls and partition fences."[93] The proposal challenged in *Coster* did not regulate as those laws did. It let an outside company force drainage, and the drainage did not improve the drained lots as much as the ground rents encumbered them.

C. Elements for Reciprocity-of-Advantage Cases

1. The Two Elements

Because the courts that considered *Coster* found the challenged New Jersey law unconstitutional, they considered all of the justifications that might have upheld the law. As relevant here, an assembly project might legitimately exercise the eminent-domain power *or* the police power. The main inquiry about the eminent-domain power is relatively easy to address. If a state-approved project extinguishes or modifies some property right in civil law, the project must satisfy the "use-by-the-public test."

88. *Id.* at 68, 71.
89. *Id.* at 68.
90. *Id.* at 69.
91. *Id.* at 70.
92. *See id.* at 69-72.
93. Tide Water Co. v. Coster, 18 N.J. Eq. 518, 531 (1866).

What about the power to regulate for an average reciprocity of advantage?[94] I doubt that the reciprocity-of-advantage model can be restated with a set of specific, necessary, and sufficient requirements. The model applies to all sorts of coordination problems. Proprietors can get very different "advantages" from regulation. And one cannot say whether a proposed regulation secures a reciprocity of advantage without knowing how existing regulations burden and benefit the parties they regulate. Even so, the model supplies the guidance that can realistically be expected from a general standard. In broad terms, for a law to secure an average reciprocity of advantage, two elements need to be satisfied. In practice, there must be a genuine need for the government to coordinate how private proprietors will use their property. Separately, it must seem reasonably certain that the regulated parties will enjoy a reciprocity of advantage.

2. Necessity

The necessity element is easiest to satisfy when the regulation at issue restrains only a few uses and the parties have made clear that they want to put their possessions to the same use. Consider a group of dock and wharf owners who (as in *Vanderbilt*) are all docking boats on the same river and in the same harbor. Or two relatives (in *Smith*) who have accepted cotenancy interests and are both using riparian lots to run mills.

The necessity element is harder to satisfy when the parties have not precommitted to some common uses—like the holders of mineral rights before there has been any energy production, or the owners of land in a swamp before anyone has tried to start draining the property. In cases like these, the showing of necessity should be more convincing. There still might be a genuine need for coordination in such cases, and public officials might confirm as much in a few different ways.

One proxy for "necessity" is whether any of the affected parties whose rights might be coordinated have asked for that coordination. In *Smith*, both of the brothers had voluntarily accepted rights in the cotenancy their father had created; both could be presumed to know and accept the legal rules cotenancy law makes available to cotenants who want partitions. Unitization statutes seem less threatening when they require mineral-rights holders to petition for unitization;[95] the swamp-drainage project in *Coster* seemed more threatening because none of the affected lot owners had petitioned for drainage.[96]

But a conscientious public official might also ask whether, by objective measures, it seems really clear that the resource in question can be put only to the uses promoted by coordination. That inquiry applies with unitization. Mineral-rights holders can produce much of the oil and gas from a conventional

94. I thank David Schleicher for convincing me to address the issues discussed in this Section.

95. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 102.011 (West 2025). Not all unitization statutes limit the right to petition for unitization to rights holders. *See* MARTIN & KRAMER, *supra* note 53, § 913.2, at 9-14.

96. *See supra* note 92 and accompanying text.

reservoir without unitization. If they do not cooperate, however, it will not be cost-effective for them to recover some increment that could be recovered through centralized drilling. That challenge creates a genuine need to unitize mineral rights. It is reasonable to expect that all of the rights holders want oil and gas produced, because all of the productive uses of the oil and gas are above ground.

The "necessity" element should be hardest to satisfy when none of the foregoing conditions apply. Even in those conditions, it still might be just to condemn land for assembly. In those cases, however, the necessity element should be applied extremely strictly. When different proprietors are putting resources to different uses, and when they have not cooperated in any common venture, respect for their property rights respects their autonomy and the incommensurable differences between their life projects. If the projects of a few make it impossible for others to exercise their own rights, the law may cease to provide that respect and instead condemn the rights of the few. But the "impossibility" should be understood relatively literally and strictly. "Impossibility" should require something like the difficulties several parties face when each party's use jeopardizes most of the uses by other parties, and if the parties did not end up in that deadlock by prior agreement or conduct.

3. Reciprocity of Advantage

Like the necessity element, the reciprocity-of-advantage element is also context-dependent. Even so, the various applications of the reciprocity-of-advantage element hang together as long as one keeps track of the baseline for measuring the "advantage" in particular cases. A reciprocity-of-advantage regulation does not need to supply explicit compensation if it helps proprietors put the resources regulated to better uses, like the harbor regulation in *Vanderbilt*. Some of the partition strategies in *Smith* might have secured advantages to the brother opposing partition; he might have received sufficient advantage from taking turns using water power from the primary mill.[97]

But some readers might wonder whether proprietors ever need to get money payments in projects that secure reciprocities of advantage. The question is reasonable; it's often said that proprietors have no right to compensation when governments are (merely) regulating their property rights.[98] Although that saying applies fairly to harm-prevention regulation,[99] it does not apply to reciprocity-of-advantage regulation, and it would be a mistake to apply it in that setting. In unitization disputes, the advantage for mineral-rights holders accrues when they

97. *See supra* note 66 and accompanying text.

98. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

99. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 661-68 (1887) (upholding as a police regulation a law prohibiting the sale or manufacture of intoxicating liquor, without any compensation to businesses who made or sold liquor before the law took effect). The same saying also applies to (justly-written) regulations supplying determinacy to the activity regulated. *See supra* note 51.

get paid royalties for their fair shares of the oil and gas produced through unitization. In *Smith*, the chancellor was open to the possibility that one brother might acquire all of the relevant realty and mills, and that the other would be paid in owelty. In that scenario, however, since the ousted brother had an interest in the cotenancy analogous to the interest a partner has in a partnership, it would not be enough to pay him off the fair market value of his cotenancy rights. In that scenario the ousted brother would be entitled to an "equitable partition of the water," and if he had to be paid owelty he would be entitled "to . . . a compensation in money, as an equivalent for such a special privilege in the use of the waters" he was forced to surrender in an equitable assessment of the partition.[100]

* * *

In short, in a rights-based property system, eminent domain is not the most fitting institutional framework for evaluating a state-sponsored private-to-private transfer. If such a transfer respects property rights, it does so because it regulates a conflict between private property rights to secure an average reciprocity of advantage. Reasonable minds can disagree whether this strategy is the best strategy a legal system might use. But neither *Kelo* nor a lot of contemporary academic commentary consider that strategy at all. That strategy is overlooked thanks to the false dichotomies at work in *Kelo*.

III. The Assembly Argument Reconsidered

The assembly argument uses a false dichotomy to make interventionist policies seem more convincing than they are.[101] Assembly projects promise to produce significant social benefits—valuable projects or businesses, new communities, new aesthetic benefits, or new wealth. Governments can try to produce those benefits in rights-based legal systems. But rights-based legal systems focus on the downsides of social legislation far more than other normative theories do. The assembly argument makes it easy to deny that there are any downsides. If the only choices are a utilitarian cost-benefit framework and doctrinaire property-rights libertarianism, an interventionist-utilitarian approach seems inevitable.

When eminent domain is used in private-to-private transfers, it is often justified on interventionist-utilitarian grounds. Consider how Supreme Court Justice William Douglas spoke of assembly policy in the 1954 case *Berman v.*

100. Smith v. Smith, 10 Paige Ch. 470, 477 (N.Y. Ch. 1843); *see supra* note 68 and accompanying text.

101. I use "interventionist" in this sense: a theory of government is interventionist if, when a policy promotes community benefits and simultaneously threatens individual rights, the theory "justif[ies] intervention in the market and in property rights when the benefits outweigh the burdens of intervention" from the standpoint of "the interests of society as a whole." GEORGE FLETCHER, BASIC CONCEPTS IN LEGAL THOUGHT 162 (1996). Fletcher associates this tendency, correctly, with mine-run utilitarianism and the Kaldor-Hicks standard of efficiency as used specifically by Richard Posner in his law-and-economics analysis.

Parker.[102] *Berman* (unanimously) upheld from statutory and constitutional challenges a project to redevelop a neighborhood in southwest Washington, D.C. The case now stands for the principle that governments do not run afoul of constitutional public-use limitations when they condemn and redevelop properties found to be "blighted."[103] But *Berman* also supports broad power to assemble property, and it was far more candid about why broad power is desirable than *Kelo* was. For Douglas and his colleagues, governments have (in law) and are entitled (normatively) to enact what he called "social legislation."[104] Douglas assumed that the "purposes" served by social legislation were "neither abstractly nor historically capable of definition," and that the "concept of the public welfare" legislatures may promote "is broad and inclusive."[105]

Douglas also assumed that the public welfare took priority over individual rights. That assumption came out in two separate ways in his Court opinion. Douglas took at face value justifications for the redevelopment project whereby the allegedly "blighted" D.C. neighborhood "suffocated[] the spirit by reducing the people who live[d] there to the status of cattle" and "ma[de] living an almost insufferable burden."[106] Douglas also construed the Eminent Domain Clause not to limit significantly legislative programs supporting assembly. The public-use requirement might seem to rule out social legislation as envisioned by Douglas. In Douglas's view, however, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive," and "nothing in the Fifth Amendment . . . [stood] in the way" of Congress and the redevelopment of the targeted neighborhood.[107] Since the phrase "public use" *is* a "specific constitutional limitation," however, Douglas's opinion is best read as telling readers to disregard the Public Use Clause as a meaningful limit on private-to-private transfers.[108]

In a rights-based system, however, rights *do* seriously limit the so-called blight-based redevelopment projects Douglas supported. A government may justly condemn private property to enlarge the resources available to the entire public or to enlarge the resources the government has to perform services for the entire public. When that is the "social" rationale for condemnation, however, the condemned property needs to be used by the public in a relatively literal sense.

In a rights-based system, a government may also sponsor a private-to-private transfer, to reassemble underutilized property rights. In such a system, however, the necessity element forces the government to prove that the resources in dispute are underused. In utilitarian terms, people can put similar resources to

102. 348 U.S. 26 (1954).

103. *Id.* at 34.

104. *Id.* at 32. To appreciate what "social legislation" meant in the relevant intellectual and historical context, see John Dewey, *Liberalism and Social Action*, *in* 11 JOHN DEWEY: THE LATER WORKS, 1925-53, at 1, 20-28 (Jo Ann Boydston ed., 1992).

105. *Berman*, 348 U.S. at 32-33.

106. *Id.* at 32.

107. *Id.* at 32-33.

108. *See, e.g.*, BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 (1977).

extremely different uses, the utilities people associate with those uses are incommensurable, and governments are usually poor judges of how individual people prioritize different utilities. The necessity element forces an independent government actor to ask whether it seems clear that the parties' preferences are not incommensurable. Or, if the preferences are incommensurable, whether a few parties are exercising their rights in ways that make it literally or nearly-literally impossible for many others to exercise theirs. And those requirements help explain why reciprocity-of-advantage standards might advance the goals in other normative property theories.[109] For Progressive property theorists, a strict showing of necessity protects the incommensurable preferences of condemnees. For law-and-economics theorists, the same showing prevents unnecessary expropriation of owner subjective value. And for exclusion theorists, that showing stops public authorities from degrading rights of exclusion and ownership to the point that they no longer coordinate private bargaining for access to resources.

Even when it is necessary to reassemble property rights, the advantage element requires that condemnees share equitably in the gains from assembly. In utilitarian terms, to make sure that an assembly project really has collective social value, the state must ensure that the beneficiaries share some of that value with the condemnees as if they were partners with equitable stakes in it. In Progressive framing, that constraint provides further protection for condemnees, and most of all for the condemnees with the least political influence. In the framings of exclusion and economic analyses, the constraint provides further checks against public-choice pressures.

Berman repays even closer study because the concerns just expressed were considered in the case—specifically, in the opinion in *Schneider v. District of Columbia*, the three-judge district-court opinion modified and in substance reversed by *Berman*.[110] The district-court opinion did not follow Part II in every respect. By the 1950s, the public-use framework was entrenched in assembly law, and Judge E. Barrett Prettyman (the author of the three-judge opinion) and his colleagues decided the case before them on statutory and public-use grounds.[111] But even within that framework, Prettyman asked several of the important substantive questions.

Doctrinally, Judge Prettyman argued that public-use limitations required an inquiry into necessity similar[112] to the inquiry studied above in Section II.C.2.

109. *See supra* notes 27-30 and accompanying text.

110. 117 F. Supp. 705 (D.D.C. 1953), *modified*, Berman v. Parker, 348 U.S. 26 (1954).

111. The district court construed the redevelopment-enabling statute narrowly in concern that D.C. would violate the Public Use Clause if it had broader statutory authority. *See id.* at 720-25.

112. "Similar" is not the same as "identical." If Judge Prettyman had followed the framework set forth in Part II, *Schneider* and *Berman* should not have focused on public-use issues; they should have focused on harm-prevention police-power issues. In a rights-based system, assuming that there was "blight" in the targeted neighborhood, the means of reassembly would have needed to be necessary to the end of preventing the blight under the harm-prevention model of police regulation. It was at least conceivable that the redevelopment project was regulating property rights to prevent the harms associated with blight. But a government does not legitimately "regulate" "harm" by targeting properties that offend

For the areas that were not blighted but were adjacent to blight, Prettyman concluded that they could not be condemned because the government had no valid grounds for condemnation.[113] For the areas that were in fact blighted, he insisted "that title to real estate cannot be seized by the Government merely because a slum presently exists upon the land."[114] He required proof that "the seizure of the fee title" be shown to be "necessary" and "reasonably incidental to the clearance of a slum," and he found the government's proof unconvincing.[115]

In reviewing the legality of the D.C. government's assembly proposal, Judge Prettyman also made clear that the standards he was applying protected individual rights. Prettyman rejected the utilitarian views the Court later endorsed in *Berman*: "[t]hat the Government may do whatever it deems to be good for the good of the people is not a principle of our system of government."[116] And his doctrinal analysis (above) carried into effect a rights-based vision. D.C. authorities' real complaint about the targeted neighborhood, Prettyman believed, was that it "fail[ed] to meet what are called modern standards."[117] That complaint threatened, in his view, the rights of the neighborhood's residents to use their lots as they found satisfying:

> Let us suppose that [the neighborhood] is backward, stagnant, not properly laid out, economically Eighteenth Century . . . . Suppose its owners and occupants like it that way. Suppose they are old-fashioned, prefer single-family dwellings, like small flower gardens, believe that a plot of ground is the place to rear children, prefer fresh to conditioned air, sun to fluorescent light. In many circles all such views are considered 'backward and stagnant'. Are those who hold them 'therefore blighted'? Can they not, nevertheless, own property? Choice of antiques is a right of property. Or suppose these people own these homes and can afford none more modern. The poor are entitled to own what they can afford. The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.[118]

Contemporary lawyers and policymakers can have reasonable debates about redeveloping residential neighborhoods in towns or cities. Redevelopment can change and improve a municipality's common life, and it can bring significant economic or other benefits. But to those arguments there are reasonable counterarguments, and Judge Prettyman identified the main ones. The

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some people's aesthetic preferences. A government might legitimately target "blight" if it means pollution or other consequences from land use that bother neighbors where they live. But a government could not condemn and transfer property as a response to such blight without—as Prettyman expected—showing that the pollution or other annoyance could not be prevented by any remedy short of condemnation and transfer. *See* CLAEYS, *supra* note 18, at 288-91; Claeys, *supra* note 17, at 915-19.

113. *See Schneider*, 117 F. Supp. at 724-25.
114. *Id.* at 717.
115. *Id.*
116. *Id.* at 716.
117. *Id.* at 719.
118. *Id.*

benefits that follow from urban redevelopment are communal, and often in practice they are not commensurable with the satisfactions that local residents get from the lots targeted for clearance and condemnation. And especially in the context of municipal redevelopment, it is far easier for developers to leave alone and build around a few local residents who prefer to stay than it is for a mill builder to build a mill without every affected upstream riparian right. Justice O'Connor picked this concern up in *Kelo*. As O'Connor noted, New London and the NLDC had spared a well-connected social club, the Italian Dramatic Club, from the plan to redevelop Fort Trumbull even though it was not consistent with the course of anticipated redevelopment.[119] But it is easy to brush those responses aside—if the only two choices are broad local power to redevelop and property-rights libertarian doctrinairism.[120]

IV. The Public-Use Argument Reconsidered

The public-use argument presents a false dichotomy not in normative debate but in constitutional doctrine. If lawyers or judges are not satisfied with the public-purpose and use-by-the-public tests, they could rely on doctrines associated with reciprocity-of-advantage regulation. Indeed, the U.S. Supreme Court has relied on those doctrines in three or four cases. Around 1900, however, the Court started reviewing private-to-private transfers exclusively as constitutional public-use issues. And at least as early as *Berman*, the Court made clear that it wasn't interested anymore in alternatives to public-use doctrine. Justice Stevens took advantage of that framing of the doctrinal choices in *Kelo*; he made it seem as if the only two choices the Court had were the two interpretations of the Public Use Clause.[121]

A. Assembly as a Reciprocity-of-Advantage Issue in the U.S. Supreme Court

In four cases after the ratification of the Fourteenth Amendment, the U.S. Supreme Court relied on the concepts and the approach studied in Part II. And with one small complication, all of these cases preceded the cases in which the Court started conceiving of private-to-private transfer challenges as public-use eminent-domain cases.

The first and most important case was the 1885 mill-act case *Head v. Amoskeag Manufacturing Co.*[122] New Hampshire mill acts authorized riparians to flood their own and neighbors' land to build dams and dam-powered mills.

119. *See* Kelo v. City of New London, 545 U.S. 469, 495 (2005) (O'Connor, J., dissenting).

120. Critics of rights-based theories sometimes argue that rights-based theories are extreme because they bar any limits on rights no matter what the consequences. *See generally* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002). That argument presents another false dichotomy. *See* CLAEYS, *supra* note 18, at 66-68. John Rawls said, rightly, that any theory of justice that did not "take consequences into account in judging rightness . . . . would simply be irrational, crazy." JOHN RAWLS, A THEORY OF JUSTICE 30 (1971).

121. *See supra* notes 13-15 and accompanying text.

122. 113 U.S. 9 (1885).

The acts gave the mill builder and the neighbors rights to petition local courts, and they required courts to refer such petitions to committees of disinterested persons. If a review committee and court both concluded that it was necessary to flood riparian land to build a dam, and that the dam would be beneficial to the public, the court would then authorize the dam building and order the dam-and-mill builder to pay 150% damages to the neighbors.[123] The Amoskeag Manufacturing Company built a dam and mill, the local committee and court made the requisite findings under the state mill acts, and Head argued that the laws unconstitutionally took his property for private use.[124]

But the U.S. Supreme Court avoided deciding Head's case as a public-use challenge. By the mid-1870s, American state courts had split on whether mill acts unconstitutionally took private property for private use,[125] and Justice Horace Gray (writing for a unanimous Court) decided not to "express an opinion upon [that question] when not required for the determination of the rights of the parties before it."[126] Gray

> prefer[red] to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed with a due regard to the interests of all and to the public good is within the power of the legislature.[127]

In other words, the law was a valid regulation securing a reciprocity of advantage, as Gray confirmed by citing and following *Smith v. Smith* and other cases and statutes on the partition of cotenancies; *Bates* and other Massachusetts cases that described mill acts as police regulations; and *Coster* and other cases treating swamp-drainage laws "as reasonable regulations for the general advantage of those who are treated . . . as owners of a common property."[128]

And when Justice Gray explained why the New Hampshire Mill Act was a police regulation, he appealed to the framework studied in Section II.C above:

> When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.[129]

Gray required a private-to-private transfer to be "necessary to secure the beneficial enjoyment" of the rights being regulated.[130] For a mill act, "use of the

123. *See id.* at 10-12.
124. *See id.* at 15-16.
125. *See id.* at 17-20.
126. *Id.* at 21.
127. *Id.*
128. *See id.* at 21-25.
129. *Id.* at 21.
130. *Id.*

power, inherent in the fall of the stream and the force of the current . . . cannot be used without damming up the water, and thereby causing it to flow back."[131] And Gray also required such a transfer "to secure . . . beneficial enjoyment," i.e., an average reciprocity of advantage. Here Gray took note that the challenged mill acts provided to ousted riparians 150% of their ordinary damages. Those damages provided "equitable compensation"; they compensated ousted riparians generously enough to treat them as stakeholders in the mill's construction.[132]

The Court relied on the reciprocity-of-advantage model again in the same year. In *Wurts v. Hoagland*, the Court upheld the constitutionality of assessments made pursuant to a New Jersey swamp-drainage scheme.[133] The challenged law authorized a state geology survey board, on the petition of five owners in a swampy area, to order drainage if the board found that drainage was "for the interest of the public and of the landowners to be affected."[134] Citing *Head* and *Coster*, Justice Gray (writing again for a unanimous Court) upheld the law, "without reference to the power of . . . eminent domain,"[135] as a "'rule[] of police'"[136] or "as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands . . . in the improvement of which all have a common interest . . . may be reclaimed and made useful to all."[137] The challenged law was necessary because, "by reason of the peculiar [and swampy] natural condition of the whole tract," the swampland "c[ould] not be improved or enjoyed by any of the [lot owners] without the concurrence of all."[138] And it secured an average reciprocity of advantage because drainage made the drained land "useful to all."[139]

In *Ohio Oil Co. v. Indiana*,[140] the Court upheld an Indiana statute prohibiting waste in the extraction of oil and natural gas—again as a reciprocity-of-advantage regulation. If one took the position that mineral-rights holders had no "property interest in the common fund" of a reservoir before any of them captured any oil or gas, "then the statute does not provide for the taking of private property."[141] But if one held that mineral-rights holders did have inchoate property interests in oil and gas in a reservoir, "then . . . there must arise the legislative power to protect the right of property from destruction."[142] And that latter legislative power consisted of a "power of the State to regulate and control

131. *Id.* at 23-24.
132. *Id.* at 23, 26.
133. 114 U.S. 606 (1885).
134. *See id.* at 607.
135. *Id.* at 614.
136. *Id.* at 612 (quoting Tide Water Co. v. Coster, 18 N.J. Eq. 518, 531 (1866)).
137. *Id.* at 614. *See also id.* at 611-12 (quoting *Coster I*, 18 N.J. Eq. 54, 68-71 (Ch. 1866), as authority showing that reciprocity-of-advantage regulation was constitutional under the Fourteenth Amendment).
138. *Id.* at 614.
139. *Id.*
140. 177 U.S. 190 (1900).
141. *Id.* at 210.
142. *Id.* at 210-11.

[oil and natural gas's] use and waste in the interest of all those within the gas field."[143]

In between *Wurts* and *Ohio Oil* the Court also decided the 1896 case *Fallbrook Irrigation District v. Bradley*.[144] Justice Rufus Peckham's opinion for the Court is confused, but in one passage Peckham relied on the concept of an average reciprocity of advantage. The California law under challenge authorized the creation of irrigation districts, the construction of irrigation canals on private land, and the levying of assessments on lots getting irrigated. Peckham's opinion for the (unanimous) Court upheld the law, but it relied on three distinct rationales to do so. In some passages, the Court upheld the challenged act on the ground on which Justice Stevens and the Court majority relied in *Kelo*; in those passages "the property [irrigation districts] took was to be taken for a public purpose."[145] Other passages gave Justice Thomas grounds for reading *Fallbrook Irrigation District* narrowly in *Kelo*.[146] In those passages, Peckham argued that irrigation districts needed to supply landowners with water subject to common-carrier duties—consistent with the use-by-the-public standard in public-use doctrine.[147]

In a third set of passages, however, Peckham purported to follow *Head* and *Wurts*[148] and he upheld the irrigation law as an exercise of the police power. In an arid jurisdiction, he argued, laws compelling participation in an irrigation district are "reasonable regulations for the general advantage of those who are treated . . . as owners of a common property," if and when "the improvement" from water "cannot be accomplished without the concurrence of all or nearly all of the [affected] owners."[149]

B. The Textual Basis for Treating Assembly Cases as Reciprocity-of-Advantage Cases

Head, *Wurts*, *Ohio Oil Co.*, and one of the three lines of argument in *Fallbrook Irrigation District* all approach private-to-private transfers differently from *Berman*, *Midkiff*, and *Kelo*. Let me explain the differences, using the constitutional categories the Court relies on now.[150]

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143. *Id.* at 207 (citing Townsend v. State, 47 N.E. 19 (Ind. 1897)).

144. 164 U.S. 112 (1896).

145. *Id.* at 161; *see* Kelo v. City of New London, 545 U.S. 469, 480 (2005).

146. *See Kelo*, 545 U.S. at 515-16 (Thomas, J., dissenting).

147. *See Fallbrook Irrigation Dist.*, 164 U.S. at 162.

148. *See id.* (citing *Head*, *Wurts*, and Hagar v. Reclamation Dist., 111 U.S. 701 (1884), a case rejecting Contracts Clause and due-process / excessive-tax challenges to a swamp-drainage law).

149. *Id.* at 163.

150. Again, the Court now assumes that the U.S. Constitution imposes eminent-domain limitations on the states by incorporation of the Fifth Amendment via the Fourteenth Amendment. *See supra* notes 3-4 and accompanying text. The cases studied in Section IV.A assumed that those limitations applied on states via Fourteenth Amendment substantive due process. *See* Ohio Oil Co. v. Indiana, 177 U.S. 190, 200 (1900); *Fallbrook Irrigation Dist.*, 164 U.S. at 156; Wurts v. Hoagland, 114 U.S. 606, 610 (1885); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 16, 26 (1885). Justice Thomas and I suspect that federal eminent-domain limitations apply to states because property rights are privileges and immunities under the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."); *see* Murr v. Wisconsin,

States have all the powers that sovereign nations have except those denied them by the federal Constitution.[151] When states and state actors are considering authorizing private-to-private transfers, then, they may regulate or take property for those transfers except to the extent that the Fourteenth and Fifth Amendments limit their exercises of those powers. And, as of 1868, when the Fourteenth Amendment was ratified, in state constitutional doctrine there were three relevant but differing lines of case law. Some state cases assumed that private-to-private transfers presented questions about the meaning of the phrase "public use," and that the phrase "public use" meant "public purpose."[152] Other cases agreed that the question was a public-use question—but concluded that "public use" meant "use by the public."[153] And at least in the *Coster* litigation, some state courts agreed that "public use" meant "use by the public," but they regarded private-to-private transfers as raising questions about a state's authority to secure an average reciprocity of advantage by police regulation.

In *Head*, Justice Gray assumed that the relevant interpretive questions fell in what is sometimes called the "construction zone."[154] He preferred to avoid committing the Court to one of the two rivaling interpretations of the Public Use Clause. He found persuasive, and sufficient to dispose of Head's challenge, the rule of law whereby states may sponsor private-to-private transfers if they secure reciprocities of advantage.

And read as *Head* and the other cases did, the text of the Eminent Domain Clause applies in two separate ways to state-sponsored private-to-private transfers. The Clause states, "[N]or shall private property be taken for public use, without just compensation."[155] That language expressly limits the exercise of a state's eminent-domain power. And as late as *Wurts* and *Head*, the Court was leaving open the possibility that "public use" might be read as Justice Thomas reads it—as limiting eminent domain to takings for use by the public.

But the Eminent Domain Clause also limits states' exercises of the police power—indirectly, since "[i]t is a constitution we are expounding."[156] When a state law stays within the police power, it does not run afoul of the Eminent Domain Clause. "Private property" does not prevent reasonable and well-supported reciprocity-of-advantage regulation. In the language of modern regulatory takings cases, proprietors' "private property" is limited by

582 U.S. 383, 419 (2017) (Thomas, J., dissenting); Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 196 (2004).

151. *See* U.S. CONST. art. VI, cl. 2; *id.* amend. X.

152. *See, e.g.*, Olmstead v. Camp, 33 Conn. 532, 550 (1866).

153. *See, e.g.*, Nesbitt v. Trumbo, 39 Ill. 110, 115 (1866).

154. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469-73 (2013).

155. U.S. CONST. amend. V.

156. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("[S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.").

background limitations inhering in their title under state law.[157] One of those limitations is a liability to modification, consistent with legitimate reciprocity-of-advantage regulations as understood in antebellum cases like *Vanderbilt*, *Smith*, *Bates*, and the *Coster* cases. Nor does the verb "taken" prevent legitimate reciprocity-of-advantage regulation. A putative regulation counts as an inverse condemnation and a "taking" if it does not pass muster as a police regulation. As *Head* explained, however, "independently of [constitutional limitations prohibiting the] taking [of] private property for public use, in the strict constitutional sense," a law does not run afoul of those limitations if it is not an exercise of the eminent-domain power and instead constitutes a "just and reasonable exercise of the power of the legislature, having regard to the public good . . . as well as to the rights of the . . . proprietors, to regulate the use of [property] which without some such regulation could not be beneficially used."[158]

C. What Next?

It is strange how the Court ended up with *Berman*, *Midkiff*, and *Kelo* after starting with *Head*, *Wurts*, *Fallbrook Irrigation District*, and *Ohio Oil Co.* But that is a topic for another article. *Head* and the other three cases studied in Section IV.A are more than sufficient to question all of the cases that came later. If courts really want legal doctrines that consider both the downsides and the upsides of assembly, those doctrines exist. It was misleading for Justice Stevens (and the Court majority) to train all their fire on the use-by-the-public standard and to conclude that that standard is "difficult to administer" and "impractical" for private-to-private transfers.[159] *Head* and the other earlier cases applied a standard that seems practical and more feasible to administer to such transfers. If the Court really wants an alternative to *Kelo*'s rational-basis deference, it exists, and it supplied a *ratio decidendi* in *Head* and two other cases.

So what next? The answer to that question depends on one's views about constitutional interpretation. For functionalists, the strategy introduced in this Article is at least worth considering. Some functionalists may choose to stand by *Kelo*'s deferential strategy; others might find attractive the non-deferential strategy applied in *Coster*, *Head*, and the cases following *Head*. Either way, functionalist assessments of assembly law and policy are closer than they seem

157. *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 160 (2021); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028-29 (1992).

158. *See* Head v. Amoskeag Mfg. Co., 113 U.S. 9, 26 (1885). Epstein argues that the relevant issues are public-use issues. On one hand, he argues that the "public" in private-to-private transfers consists of the community of proprietors whose rights are restructured, and on the other hand he criticizes *Head* for relying on an incoherent account of police regulation. *See* EPSTEIN, *supra* note 24, at 171-72. But Epstein's account of "public use" would expand the term's meaning unnecessarily. And he doesn't understand or account for reciprocity-of-advantage regulation because he assumes (without studying the antebellum judicial record) that police regulation covers only harm-prevention regulation. *See id.* at 107-45.

159. Kelo v. City of New London, 545 U.S. 469, 479 (2005); *see supra* notes 13-16, 34-45 and accompanying text.

in *Kelo* and current scholarship. There are not two but three viable strategies for reviewing state-sponsored private-to-private transfers, and the third one hasn't yet been considered.

For formalists, this Article raises questions that will need further study. As this Article has shown, there is not an inevitable progression from *Fallbrook Irrigation District*, *Clark v. Nash*[160] and *Strickley v. Highland Boy Gold Mining Co.*[161] through *Berman* and *Midkiff* to *Kelo*. The Supreme Court could have avoided considering private-to-private transfers as public-use cases if it had wanted to, and *Head*, *Wurts*, and *Ohio Oil Co.* provide valid precedents, not overruled or repudiated, for questioning those six cases.[162] Many other questions could be asked here, and I hope to return to those questions in later scholarship. At a minimum, though, this Article suggests that Justice Thomas's call in *Kelo* for a root-and-branch reconsideration of public-use law[163] is not as outlandish as it may have seemed at the time.

Maybe the six cases just mentioned were reasonable applications of the Fourteenth Amendment to state-sponsored private-to-private transfers. Given *Head*, *Wurts*, and *Ohio Oil Co.*, though, maybe those cases sent the Court's case law on a bad path. Since *Fallbrook Irrigation District* has three alternate rationales, it could be recast fairly easily. *Clark* and *Strickley* are more than 120 years old now, but the Supreme Court has overruled older cases than that.[164] *Berman v. Parker* may seem unassailable now. But *Wickard v. Filburn*[165] is more than a decade older than *Berman*, *Wickard* seemed unassailable as late as 1993, and it was limited by *United States v. Lopez* in 1995.[166] And *Midkiff* was decided within a month of *Chevron v. National Resources Defense Council*,[167] which was just overruled in 2024.[168]

160. 198 U.S. 361 (1905) (upholding a statute authorizing private owners of arid land to acquire neighbors' property for irrigation ditches).

161. 200 U.S. 527 (1906) (upholding as a taking for public use a law condemning aerial easements for an aerial ore bucket line between a mine and a town center).

162. This Article does not call into question public-use cases in which the condemned property is used by the general public after the condemnation. *See, e.g.*, Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 407 (1992) (concerning use by a common-carrier train company); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 988-92 (1984) (concerning intellectual property made accessible to the public by operation of a regulatory scheme); Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (concerning use by the government in a government-owned and -run facility); Rindge Co. v. L.A. Cnty., 262 U.S. 700, 706 (1923) (concerning public highways); United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 669 (1896) (concerning use of land at Gettysburg by the government as a national memorial open to the public); Shoemaker v. United States, 147 U.S. 282, 284 (1893) (concerning public parks).

163. *See Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).

164. *See, e.g.*, Collins v. Youngblood, 497 U.S. 37 (1990) (overruling *Thompson v. Utah*, 170 U.S. 343 (1898), *Kring v. Missouri*, 107 U.S. 221 (1883), and their interpretations of the Ex Post Facto Clause, U.S. CONST. art. I, § 10, cl. 1).

165. 317 U.S. 111 (1942).

166. *See* United States v. Lopez, 514 U.S. 549 (1995).

167. 467 U.S. 837 (1984).

168. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

The Court's public-use cases on private-to-private transfers are not sacrosanct. And they deserve reconsideration more serious than they got in *Kelo*. After all, they have been supported for decades by two false dichotomies.