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Does the Endowment Effect Influence Outcomes in Takings Cases? An Exploratory Look at Some Important Cases and Suggestions for Additional Research

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Does the Endowment Effect Influence Outcomes in Takings Cases? Evidence from Some Important Cases and Implications for Planning Ethics and Practice

1. Introduction

Takings cases are governed by the Fifth Amendment to the U.S. Constitution, which states that private property shall not “be taken for public use, without just compensation.” Despite the apparent simplicity of the amendment, the issue remains controversial. For instance, the United States Supreme Court (USSC) has noted that it cannot establish a “set formula” for determining when a taking has occurred (*Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 1978). Controversies of interest to planners usually center on whether a regulation goes “too far” and what constitutes “public use.”¹

The literature on takings falls into two categories: legal and economic. Legal analyses include landmark pieces by Michelman (1967), who emphasizes fairness, and Epstein (1985), who takes a libertarian perspective. Economic analyses range from rational expectations theory (e.g., Blume and Rubinfeld 1984; Blume, Rubinfeld, and Shapiro 1984) to rule-based principles (e.g., Sax 1964; Miceli and Segerson 1994).² These approaches share the underlying assumptions that landowners, judges, and planners, are rational decision makers and that market efficiency is, or should be, a critical consideration in decisions.³ However, the assumption of perfect rationality has come under attack from a growing body of evidence in behavioral psychology. In response to the limitations of the rational model, this literature attempts to explain the law from a behavioral perspective (e.g., Jolls, Sunstein, and Thaler 1998; Jolls and Sunstein 2006). One component of this literature is the endowment effect.

The endowment effect—also known as the status-quo bias—is the tendency of people to hold on to property and rights that they have, implicitly placing more value on these properties

and rights than if they never possessed them (Thaler 1980). The endowment effect has been found to apply in many contexts, from a reluctance to trade possessions (Kahneman, Knetsch, and Thaler 1990; 1991) to a reluctance to change medical plans (Samuelson and Zeckhauser 1988). The effect is evident in numerous studies that show that people are willing to accept (WTA) more for property they own than they are willing to pay (WTP) for the same property if they had not owned it (see Horowitz and McConnell 2002 for a summary of some of these studies). The endowment effect suggests that allocations of property by independent parties are likely to favor those already holding endowments (Korobkin 2003), which include ownership, momentum toward ownership, or perceptions of ownership. Against this backdrop, I address my first question: Can the endowment effect provide insight into courts' decisions in takings cases?

I selected cases for review from a list of important takings cases maintained by the Community Rights Counsel (CRC), a nonprofit, public interest law firm based in Washington, DC. I do not review all the cases listed by the CRC, but instead concentrate on cases that are well known to planners, such as those involving regulations that affect development potential and condemnations for economic development. I exclude cases with complicated legal issues, such as compensation for temporary takings, except when they pertain to my arguments, and I do not claim that my conclusions extend to arcane cases.

I hypothesize that an examination of takings cases will reveal outcomes that are more likely to favor the holders of endowments. Consistent with this hypothesis, I find that in well-known takings cases that the party favored by endowments—whether governmental or private—is more likely to prevail in court, regardless of how the court arrives at its decision. My findings are consistent with previous findings on the importance of “first possession” and the well-known adage that “possession is nine-tenths of the law” (see, e.g., Bell and Parchomovsky 2005). As

noted by Kahneman (2011, 308)—one of the founders of the field of behavioral economics⁴ from which this article draws—this adage reflects the high moral status accorded to “possession” and it is actually reflected in many judicial opinions (Cohen and Knetsch 1992). The findings of this article should therefore not be viewed as surprising, as they build on other research.

A few general caveats are warranted. First, because the law and its interpretation are not fixed, it is difficult to provide a universal theory of takings decisions. And, as is clear from many decisions, cases can be decided by slim majorities in courts. For these reasons, I do not claim that the endowment effect will predict the outcome of every case. Second, although I review a wide range of cases that are familiar to planners, additional research is needed to examine the robustness of my findings across an even wider variety of cases and contexts. Finally, additional research is needed to examine the size of the endowment effect as it relates to land, how demographic characteristics might influence the presence or magnitude of the effect, and circumstances under which the effect might be more pronounced or under which it might fade. I expand on these points in Section 6.

Implications for planning ethics and practice

Governments use eminent domain takings or regulations to achieve some objective. Landowners can object in court to both types of government actions, whereupon governments must defend their actions. Because ownership—whether real, perceived, or by momentum—is important in establishing endowments that can be used to buttress arguments in court, and because governments can acquire endowments *before* court decisions are made, my findings lead to my second question: Can planners be ethical—in particular during an era that emphasizes deliberative processes—while pursuing strategic actions to acquire endowments in favor of their jurisdictions? To answer this question, I draw on literature that discusses the public interest in

planning (see, e.g., Alexander 2002), the need for planners to move beyond ideal deliberation (see, e.g., Watson 2006), and “situational ethics” (see, e.g., Campbell 2006). I conclude that planners can ethically pursue the public interest by strategically acquiring endowments so as to increase the chances of successfully defending their actions in court. This conclusion—based on current planning scholarship—is mostly normative; more research is needed to examine whether planners indeed behave as the ethics literature permits. I will also revisit this issue in Section 6.

The remainder of the article is as follows. Section 2 briefly reviews the USSC’s positions on takings. Section 3 reviews the endowment effect. Section 4 examines well-known takings cases to demonstrate that decisions appear to be consistent with the endowment effect. Section 5 examines whether planners can ethically pursue the public interest by strategically acquiring property in order to increase the chances of successfully defending their actions in court. Section 6 suggests avenues for additional research. Section 7 presents my conclusions.

2. A summary of controversies surrounding regulatory and eminent domain takings

The USSC has had a hard time dealing with takings. For many decades, regulatory takings cases were guided by Justice Oliver Holmes’ maxim in *Pennsylvania Coal v. Mahon* (260 U.S. 393, 1922): “if regulation goes too far it will be recognized as a taking.” What constituted “too far” has been debated, but generally, as long as affected property still held some economic benefit to the owner, the regulation was not considered a taking. This approach was supplemented by Justice Brennan’s three-part balancing test in *Penn Central*, which considered whether the regulations affected investment-backed expectations, involved invasion of property, and involved some historically recognized government activity.

Other cases such as *Nollan v. California Coastal Commission* (483 U.S. 825, 1987) and *Dolan v. City of Tigard* (512 U.S. 687, 1994) added further confusion to the case law on takings. *Nollan* established that there must be a “nexus” between permitting development and conditions placed on the developer. *Dolan* established that even if there is a nexus, the conditions must be “roughly proportional” to the developer’s plans. Among regulations that “go too far,” the “balancing test,” the “nexus,” and “rough proportionality,” there continues to be much controversy over what constitutes a regulatory taking, and scholars have struggled to ascertain whether there is an underlying rationale for decisions of the USSC.

Kelo v. City of New London (545 U.S. 469, 2005) touched on the central controversy of eminent domain takings: the meaning of “public use” in relation to whether it serves a “public purpose.” Until the 1950s, governments’ authority to take private property for public uses was taken for granted. However, in the 1950s, *Berman v. Parker* (348 U.S. 26, 1954) set the stage for taking land from one private party to give to another private party. By the time of *Kelo* in 2005, the USSC faced the question of whether economic renewal was a public purpose. The USSC decided that the city’s “determination that the area was sufficiently distressed to justify . . . economic rejuvenation is entitled to our deference.” In summary, current case law on eminent domain takings generally defers to governments’ assessments of what constitutes public use. Nonetheless, scholars have been unable to provide overall explanations for eminent domain takings decisions, and the USSC itself remains conflicted; the *Kelo* Court was split 5-4.

3. A primer on the endowment effect

Positive and normative interpretations of land use law assume perfectly rational decision makers. One of the underlying characteristics of a perfectly rational decision is that decreases in

utility that arise from a loss equal increases in utility that arise from a same-sized gain (see, e.g., Posner 2003, Section 1.1, 6-5). However, this assumption has faced increasing criticism because of widespread evidence that people treat losses and gains differently. In this model of decision making, the pain of a loss is greater than the pleasure of a same-sized gain (Kahneman and Tversky 1979). For instance, in a widely cited experiment, students who received free coffee mugs required more money to part with the mugs than students without mugs were willing to pay for them (Kahneman, Knetsch, and Thaler 1990). The first set of students treated the mugs as endowments that they acquired. Samuelson and Zeckhauser (1988) refer to the phenomenon where people are unwilling to trade existing allocations as the *status quo bias*. A related concept is “framing.” Language that emphasizes loss produces stronger reactions than language that emphasizes gain, because forcing people to accept a loss is considered more unfair than simply withholding a potential gain (Kahneman, Knetsch, and Thaler 1991).

Numerous studies have identified the endowment effect in a wide variety of situations for both tangible and intangible goods. Transactions involving tangible goods include exchanging lottery tickets for their nominal value (Knetsch and Sinden 1984), exchanging coffee mugs for chocolate bars (Knetsch 1989), and exchanging coffee mugs for cash (Kahneman, Knetsch, and Thaler 1990). With regard to intangible goods, individuals were willing to pay (WTP) less for a decrease in risk than they were willing to accept (WTA) for an equivalent increase in risk (Dubourg, Jones-Lee, and Loomies 1994). In another study, participants demanded more to give up a view than they were willing to pay to acquire it (Rowe, D'Arge, and Brookshire 1980). These differences between WTP and WTA have been widely observed in contingent valuation studies (see Horowitz and McConnell 2002 for many examples).

The endowment effect can be more pronounced when people believe they have worked hard or used their intelligence to obtain endowments (Rachlinski and Jourden 1998). In a variation of the coffee-mug test, Loewenstein and Issacharoff (1994) gave mugs to students who earned the highest scores on an exam. Half of the recipients were told that they received the mugs because of their performance on the exam, while the other half were told that they received the mugs randomly. Those who were told that the mugs rewarded their performance demanded more money for them than those who were told they were randomly awarded the mugs.

It seems likely that the endowment effect influences people's thoughts about land because land ownership involves a combination of tangible goods (land), intangible goods (rights and emotions), and the hard work often involved to obtain these goods. Indeed, while many studies have documented a WTA/WTP ratio of about 2, Horowitz and McConnell (2002) find that the average WTA/WTP measure for preserving land was 7. This high figure indicates the high value that people place on their land above and beyond its market value.

However, with a few exceptions (e.g., Fischel 1995a; Korobkin and Ulen 2000; Korobkin 2003), research has not examined how the endowment effect affects land disputes. For example, while Fischel (1995a) notes the WTP/WTA disparity, he restricts his discussions to why the law compensates landowners in eminent domain cases at market value rather than the WTA value.⁵

This lack of research is surprising when one considers that Justice Holmes—the godfather of regulatory takings jurisprudence—recognized the importance of endowments. In a case concerning adverse possession, Holmes (1897) summarizes the disproportionately high value of losses relative to gains:

It is the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it (477).

In Holmes's opinion, the adverse possessor had established ownership, otherwise known as an endowment, and now had more claim to the land than the owner of record.

Because the endowment effect is so prevalent, it is interesting to examine whether it plays a role in the takings decisions of U.S. courts, particularly the USSC. In particular, does the possession of endowments—real or perceived—by one party or another sway courts' decisions?

4. The endowment effect and courts' takings decisions

Regulatory takings and exactions

Land use regulations evolved to prevent nuisances (Prosser 1966). While there are other rationales for regulations, the nuisance rationale is widely applied on the basis that no one should be allowed to inflict harms on society (Fischel 1985, 155). On the other hand, regulations aimed at providing benefits sometimes do not survive the judicial process, on the basis that society should not benefit from restrictions imposed on a few (Fischel 1985, 155). Over time, a number of other tests have also been applied by the courts to examine regulations, including whether the regulation leads to physical occupation, whether it deprives owners of all economically viable uses of property, the *Penn Central* balancing test, and the “nexus” and “rough proportionality” tests (the last two refer to exactions; see Wright and Gitelman 2000 144-146).

The endowment effect provides an explanation for many court decisions on regulations and exactions. In general, regulations or exactions that take away endowments—whether from private parties or governments—are not likely to withstand judicial review. Likewise, regulations or exactions that seek to provide gains to governments at the expense of landowners or to landowners at the expense of governments will also probably not survive a judicial process: From a behavioral perspective, foregone gains count less than losses to governments or

landowners (Cohen and Knetsch 1992). By extension, if landowners cement their rights through plans or activities, regulations or exactions that take those rights away are less likely to prevail. And if governments cement their rights through plans or activities, courts are more likely to favor their regulations or exactions.

The unequal weighting of losses and gains has implications for the framing of regulations. For instance, regulations framed in terms of preventing the loss of existing endowments will receive more deference from the courts than regulations framed in terms of providing gains. The following two subsections discuss some of these scenarios.

Endowments and land use regulations: I begin with *Keystone Bituminous Coal Association v. DeBenedictis* (480 U.S. 470, 1987) because it contains the most expansive enunciation of the heavier weight given to losses versus gains. The majority on the USSC noted that the disputed Subsidence Act (1966) was designed to prevent public harm from underground mining and was therefore not a taking even if gains to mining companies were destroyed.

Lucas v. South Carolina Coastal Council (505 U.S. 1003, 1992) sheds further light on the endowment effect and the importance of framing regulations. Lucas built subdivisions on an island off South Carolina since the 1970s. In 1986, he purchased two lots for his own use and commissioned plans for homes. The laws in place permitted this use. Changes in the law in 1987 prevented building on Lucas' lots. The fact that Lucas had already prepared plans was sufficient to establish that he had strong endowments before the new law was passed. In endorsing the power of the endowment, Justice Scalia noted in his decision that Lucas had plans and that the plans were precisely what he and other developers had been doing for almost two decades.

It is interesting to observe how interpretations of the 1987 law influenced decisions in lower courts. The law was viewed favorably when it was interpreted as preventing the loss of

public endowments. For instance, relying on *Mugler v. Kansas* (123 U.S. 623, 1887), a majority of the Supreme Court of South Carolina (SCSC) determined that there was no taking because the law intended to prevent “public harm” (404 S.E. 2d, S. Carolina 899, 1991). But two dissenting judges read the law as intending to create gains by promoting tourism and visual amenities. Not surprisingly, these judges found a taking. In the majority view, potential public losses weighed heavily. In the minority view, potential public gains could not justify losses to Lucas.

Although Justice Scalia questioned the losses/gains (also referred to as harms/benefits) distinction, he preserved it with regard to “background principles” of nuisance and property. Indeed, post *Lucas*, lower courts continue to give heavy weight to losses caused by nuisances. Blumm and Ritchie (2005) cite numerous cases: For example, the Colorado Supreme Court found no taking in *Colorado Department of Health v. The Mill* (8887 P.2d Colorado, 993, 1994) by ruling in favor of use restrictions placed on contaminated land, and the Court of Federal Claims ruled in *Hendler v. United States* (175 F.3d 1374) that the installation of wells by the federal government to monitor groundwater contamination was not a taking. Blumm and Ritchie (2005) provide other examples of nuisances that have evolved to more than those typically allowed by common law (see also Kendall, Dowling, and Schwartz 2000). In the end *Lucas* has had unintended effects as courts invoke both traditional and increasingly expansive interpretations of nuisances—as an antecedent inquiry even before the substance of a takings argument is heard—to support government actions (Blumm and Ritchie 2005; Ruhl 2007).^{6,7}

Justice Scalia himself recognized that new circumstances or knowledge “may make what was previously permissible no longer so,” leaving the possibility that environmental concerns may warrant restrictions on land use. The evolution of circumstances is worth noting. Wright and Gitelman (2000) note the “impact of the environmental movement” (105) and the “significant

trend” (106) in courts to uphold environmental statutes. For example, while in the 1960s courts struck down flood control ordinances (*Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 1963 and *Dooley v. Town Plan and Zoning Commission of Fairfield*, 154 Conn. 470, 1967), within a decade courts began to uphold wetlands regulations. Indeed, by 1991 in *Gardner v. New Jersey Pinelands Commission* (125 N.J. 193, 1991), the New Jersey Supreme Court observed that the robustness of *Parsippany-Troy Hills* “has declined with the emerging priority accorded to the ecological integrity of the environment.” Thus, the trend toward more recognition of environmental concerns as posing harms suggests that were *Lucas* adjudicated today, and the legislation unambiguously written as intending to prevent harms, the USSC might be more sympathetic to the legislation. The lesson of *Lucas* therefore is about the tug-of-war between private parties that create endowments (e.g., building plans) and governments that seek to wrest those endowments away with their own plans, aided by courts that permit increasingly expansive interpretations of allowable government actions.

Unlike the ambiguously worded legislation at contest in *Lucas*, the ordinance adopted by Los Angeles County in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (482 U.S. 304, 1987) explicitly aimed to preserve public health and safety rather than provide benefits to some party. For technical reasons, this case was remanded from the USSC to the California Court of Appeals. The lower court upheld the ordinance’s validity. For the legislation to be overturned, one or perhaps two conditions would be needed: First, the ordinance would have had to be worded in terms of providing benefits. Second—as in *Lucas* and as discussed in other cases later—it would have helped the plaintiff if First English Church had detailed or approved plans to rebuild on the property before the ordinance was passed.

Similarly, the intent of the Tahoe Regional Planning Agency (TRPA) in *Tahoe-Sierra Preservation Council, Inc. v. TRPA* (535 U. S. 302, 2002) was to avoid environmental losses by imposing a development moratorium. As Justice Stevens noted in his ruling, quoting the District Court's decision, "unless [development] is stopped, the lake will lose its clarity." Perhaps ironically, the moratorium was designed to give the TRPA time to complete a comprehensive plan: Not only was the moratorium well-worded to prevent losses, but the TRPA increased its endowments by completing a plan before the case was decided.

Pennsylvania Coal is best known for the doctrine that when a regulation goes too far, it is a taking. However, setting aside that doctrine, we see that the status quo strongly favored Pennsylvania Coal Co. for two reasons. First, the Kohler Act, which prohibited mining that could cause subsidence, was passed in 1921. However, in a 1878 deed, Pennsylvania Coal Co. had granted Mahon surface rights to the parcel but retained mining rights. Mahon had accepted the risks of underground mining by the coal company and waived the right to compensation for resulting damage. Second, as Fischel (1995b, Ch 1) discusses in detail, local social norms allowed Pennsylvania Coal Co. to continue extracting coal after the Kohler Act.

While Pennsylvania Coal Co. established that it had amassed endowments in its favor, Penn Central Transportation Co. could not do so in *Penn Central*. Although there is evidence of a 1950s sketch for redevelopment, it never progressed past an initial draft. Plans to redevelop Grand Central Station were not prepared until 1968, three years after passage of the 1965 New York City Landmarks Law seeking to protect historic structures. Like First English Church and Tahoe-Sierra Preservation Council, Inc., Penn Central Transportation Co. had failed to establish endowments or cement them with plans.

Similarly, in *Agins v. City of Tiburon* (447 U.S. 255, 1980) and *San Diego Gas and Electric v. City of San Diego* (450 U. S. 621, 1981), both cities prevailed because the plaintiffs did not cement endowments, whereas the cities acquired endowments through new regulations. In *Agins*, the City of Tiburon failed to acquire Agins' property by other means, but wished to comply with a state law requiring communities to provide open space. Thus it rezoned the land containing Agins' property to lower densities, in effect creating open space. Although Agins had bought his property before the rezoning, he never formulated firm plans to develop the land. On the contrary, the City "moved first" by rezoning the land. Not surprisingly, courts ruled in favor of Tiburon. (See Ellickson and Tarlock 1981 for more details.)

In *San Diego Gas and Electric*, the company planned to build a nuclear power plant. But as various courts noted, the plaintiff abandoned plans to build the plant after discovering an offshore fault that made the project risky. In the meantime, the land was rezoned and identified as potential open space as part of San Diego's open space plan. The City failed to raise a bond required for the purchase of the land, and the company sued for compensation, mandamus, and declaratory relief (Kmiec 1981-1982). However, two events hurt the company in court: It was forced to give up endowments due to natural circumstances, while the City acquired the same endowments by virtue of having prepared a plan.

Endowments and exactions: *Nollan* is a classic case in which a condition was designed to provide benefits rather than prevent harms. The USSC did not uphold the condition. In *Nollan*, the plaintiff wanted to replace a small bungalow with a larger house. The authorities agreed to grant permission if Nollan allowed people the right to walk across the property to access the adjacent beach. From a behavioral perspective, the condition was designed to provide a benefit to the public; it was not intended to prevent a loss. This flaw reduced the likelihood that the courts

would uphold the condition. From Nollan’s perspective, it was helpful that he already possessed an endowment, which stemmed from leasing the property for many years. Indeed, Nollan appeared to understand the power of endowments—perceived or real—and he cemented his endowment by buying the property as the case made its way through the courts.

A hypothetical scenario sheds additional light on the power of endowments. Suppose beach-goers had a long history of traversing Nollan’s property to get to the beach. Now, suppose Nollan wished to build a house that would block their path. In this case, a condition that he must modify his plans and continue to provide access in exchange for a building permit would in all likelihood be upheld by the courts because the beach-goers had established a firm endowment in their favor. (This situation is similar to adverse possession, as discussed later.)

In *Dolan*, the USSC found that there was a nexus between the City of Tigard’s regulations and conditions placed on Dolan for expanding her business. Specifically, the City required a land dedication along a creek that partially traversed Dolan’s land in exchange for approving an expansion of the footprint of her business. The condition aimed to prevent losses due to flood damage and traffic congestion that would result from the expansion. Tigard also had a well-articulated plan to support its conditions on Dolan. The USSC overturned the conditions *only* because they were too onerous and lacked “rough proportionality” to the petitioner’s plans.

Tigard may have had a better chance if it had pursued condemnation, backed up by its plan for the area. Writing for the majority, Justice Rehnquist noted that “had the city simply required petitioner to dedicate a strip of land . . . a taking would have occurred.” Tigard would have had to compensate Dolan, but the court was likely to view Tigard’s actions as routine use of its eminent domain power, supported by endowments acquired through its plans and the objective of preventing losses due to flooding and traffic congestion.

Summary of regulatory takings and exactions: First, regulations have a greater chance of success if they are framed in terms of preventing losses rather than providing gains; as the endowment effect predicts, courts are more sympathetic to losses. Notwithstanding *Lucas*, lower courts continue to employ the losses/gains distinction and even since *Lucas* have taken an increasingly expansive view of permissible government actions based on this criterion. Second, development plans are critical for establishing endowments and consequently swaying courts' decisions. Third, like private parties, governments can also employ plans as a way to acquire endowments and signal investment expectations. In fact, this may explain why courts place less emphasis on private land as an endowment and more emphasis on plans. If private land were the most important form of endowment, governments would have little chance of regulating it. Using plans as endowments levels the playing field: What matters are the development plans of private parties versus the regulatory plans of governments.

Eminent domain takings

Endowments and economic revitalization: Two controversial cases bookend the importance of establishing endowments to justify eminent domain takings: *Berman v. Parker* and *Kelo v. City of New London*. While both cases were ostensibly about the meaning of “public use,” the facts show that winning governments had established critical endowments when the cases were heard. In both instances, governments established endowments through a two-step process: first, preparing redevelopment plans and second, beginning to implement them.

In *Berman*, planners established endowments by preparing redevelopment plans for portions of Washington, DC, that they wished to revitalize. By virtue of its legislative powers over the District, Congress passed legislation that permitted the planning agency to adopt and execute a “comprehensive or general plan” including a “land use plan” (District of Columbia

Redevelopment Act of 1945). In his decision, Justice Douglas noted the comprehensiveness of the plan. By the time the case reached the courts, not only had the plan been completed but much of it had been implemented, firmly cementing endowments in the hands of the city.

In *Kelo*, the plaintiffs were at a disadvantage because the City had acquired considerable endowments by the time the case reached the USSC. Detailed plans were prepared for a research park, conference center, hotel, marinas, museum, and office and retail space. With City Council's consent, the planning agency applied for and obtained permits from state agencies (Caves and Cullingworth 2009, 87-90). The plaintiffs found themselves trying to wrest endowments from New London. As Justice Stevens notes the majority decision (citing *Berman*):

Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption ... it is appropriate for us ... to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.

Therefore, *Berman* and *Kelo* should not be viewed only as debates over the meaning of public use. Rather, these cases demonstrate how governments can prevail in courts by preparing plans so as to establish endowments and then cementing those endowments by beginning to implement the plans.

My interpretation of *Kelo* complements that of Nadler and Diamond (2008), who argue—correctly I believe—that the controversy surrounding *Kelo* resulted because the public could relate to the plaintiffs' strong emotional attachment to their properties. However, the USSC was faced with the facts as presented. While the public correctly recognized endowments possessed by the plaintiffs, the public was unaware of the endowments acquired by the government. The USSC was required to weigh *Kelo*'s endowments against the government's collection of endowments: plans, actual implementation activities, and momentum toward redevelopment.

Chronologically between *Berman* and *Kelo*, *Poletown Neighborhood Council v. City of Detroit* (304 N.W.2d Mich. 455, 1981) also emphasizes the importance of endowments. In the middle of an economic recession and in response to incentives from the City of Detroit, General Motors (GM) notified the city of its willingness to build a new plant in Poletown. GM presented the plan to the City in July 1980. Within four months, plans for the project were approved and various permits were granted by city, state, and federal officials (Jones, Bachelor, and Wilson 1986). The magnitude of the endowments and the speed with which they were acquired were perhaps even greater than in *Berman* and *Kelo*. By the time citizens reacted, the combination of GM's and government's endowments were already stacked against them.

The Michigan Supreme Court's decision in *County of Wayne v. Hathcock* (684 N.W.2d Mich. 765, 2004) poses some challenges to my arguments. In *Hathcock*, the Court overturned *Poletown*. However, *Hathcock* is instructive because it highlights the likely outcome when governments fail to amass endowments. In *Hathcock*, the County had acquired about 1,300 acres of land for an office park. This might appear to be a substantial acquisition of endowments, but unlike the governments in *Berman*, in which there was a "comprehensive plan", *Kelo*, in which there were already detailed redevelopment plans, and *Poletown*, in which permits and approvals were already secured, Wayne County did not establish the critical endowment of a detailed plan, obtain permits and approvals, or secure investors.

Endowments and possession: Adverse possession generally occurs in two ways: The owner of record may not realize he owns the land because of ambiguous boundaries or he may not know that an adverse possessor occupies his land (e.g., he lives far away). In the former case, the owner of record should feel little loss if title for the land is awarded to the adverse possessor (Cohen and Knetsch 1992; Stake 2001; Korobkin 2003). The latter case is more complicated

because the owner—believing that he still owns the land—may feel he has as much of an endowment as the adverse possessor. In this case, the length of time the squatter occupied the land and the economic value of the occupation will probably be of critical importance.

Hawaii Housing Authority v. Midkiff (467 U.S. 229, 1984) highlights how the actual possession of land increases the chances of gaining title to it. *Midkiff* arose when the Hawaiian legislature passed the Land Reform Act of 1967; large land holdings were condemned and the titles sold to lessees. Landowners objected, and the case found its way to the USSC. Although *Midkiff* is not about adverse possession, the lessons of adverse possession noted above shed light on this case: Occupation is important. Moreover, the occupiers were not squatters. They were living legally on the land and owned structures built on the land, thus giving them an even stronger endowment than squatters. While I acknowledge that legal arguments in court centered on the meaning of “public uses” and the oligopolistic power of landowners, and I do not extend my arguments to suggest that landlords risk losing land through routine leasing transactions, it is clear that occupation helped the lessees. To further demonstrate this point, it is important to note that the legislation did not permit sales to non-occupiers except under limited circumstances.

Summary of eminent domain cases: First, preparing plans is critical to governments’ successful defense of eminent domain takings. The plan is important not because it demonstrates good planning, public involvement, or some public-purpose criterion (contrary to the assertions of the head of the American Planning Association, Farmer 2005). Rather, preparing the plan is the government’s first step toward establishing endowments. Second, approvals help to cement endowments. Third, governments can gradually increase endowments and strengthen their case against holdouts by acquiring the property of willing sellers, as *Berman* and *Kelo* show. Fourth, physically occupying land also creates an endowment.

5. Can planners strategically acquire endowments so as to justify condemnation?

The previous discussions show that governments can prepare plans and create “facts on the ground” so as to establish and cement endowments. This increases governments’ chances of successfully defending cases brought against them. On the other hand, it is in the interest of private parties to have their own plans and to prevent governments from preparing plans because plans themselves represent a significant shift in endowments in favor of governments. Indeed, it is in the interest of private parties to prevent planning processes—from the very beginning—that might lead to new regulations or condemnation. If Kelo et al. had created enough roadblocks during the participatory planning process, the final plan for redeveloping New London’s waterfront might never have been formulated.

When governments are the ones attempting to acquire endowments, it raises ethical questions for planners. What are the ethical implications of planners acquiring endowments so as to justify new regulations or condemnations in court? This question is particularly relevant during a planning era that emphasizes deliberative processes. In addressing these issues, I draw on *Kelo*, which in many respects represents a “typical” situation, to illustrate the challenges that eminent domain takings pose for ethical planning practice, with particular regard to truth telling.

New London was a severely blighted community. A redevelopment plan was prepared through extensive public discussion and participation. Given the response of Kelo et al., let us assume—as is likely the case in similar situations—that many residents objected to the plan. Armed with the knowledge that acquiring endowments by preparing a plan and acquiring land will make it difficult for Kelo et al. to win in court, how should planners respond?

In cases such as *Kelo*, both the consensus-building and implementation stages pose quandaries for planners. During the consensus-building phase, there are challenges to principles

of communicative rationality, which require planners to speak truthfully. In this phase, could a planner say to a community that includes potential holdouts, “Do not worry about holdouts going to court: If we prepare a plan and I strategically acquire land, it will be difficult for them to win.” Clearly, such a statement—while truthful—would doom any consensus-building attempts, and planners wishing to pursue condemnation to promote redevelopment would be wise not to reveal this strategy.⁸ During the implementation phase, could a planner rapidly purchase the properties of willing sellers so as to acquire critical endowments before holdouts get to court?

To address these issues, I turn to a discussion of the public interest because it appears to be the only avenue that allows planners to behave strategically while still employing elements of deliberation. There are layers of issues to be resolved: Is there a public interest justification for condemnation? Who determines what is in the public interest? Can planners employ strategic behavior in pursuing the public interest while remaining faithful to the values of deliberation?

Is there a public interest justification for condemnation? In tracing how planners have interpreted the public interest, Alexander (2002) and Campbell and Marshall (2002) conclude that the concept of the public interest is still alive among planners (Campbell and Marshall in particular draw on Howe 1992; Howe 1994; see also Moroni 2004). Moreover, while scholars of communicative rationality stress the multiplicity of interests (Forester 1989; Healey 1996), Campbell and Fainstein (2003, 13) conclude that these scholars are actually “renewing” a focus on the public interest, but in ways that differ from previous technocratic or advocacy approaches. Campbell and Fainstein conclude that throughout the evolution of planning theory, “the central task of planners” has always been “serving the public interest”; it remains the “leitmotiv” that holds planning theory together (Campbell and Fainstein 2003, 13).

Further, even as some academics question its existence, professional planners clearly feel otherwise; the AICP Code of Ethics and Professional Conduct (American Institute of Certified Planners 2005, 2009) is filled with references to the public interest. And, while I have primarily relied on planning scholarship to argue the existence of a public interest, the case law on takings itself highlights its centrality through direct reference. Cases as diverse as *Lucas*, *First English*, *Tahoe-Sierra*, *Penn Central*, *Kelo*, and *Berman* explicitly discuss the public interest.

Having established the centrality of the public interest in planning, we are still left to resolve whether it has been or can be used as the basis for takings. From a planning perspective, the traditional understanding of the public interest as the “collective interest of the community” (Klosterman 1985, 15) remains powerful (see also Altshuler 1965; Mazza 1990). The cases examined earlier highlight these collective interests: From *Penn Coal* to *Poletown*, *Lucas*, *Kelo*, and *Agins*, the actions in question addressed community interests. In *Poletown* and *Kelo*, the community’s need for economic development drove the decisions to condemn private lands. In *Lucas* and *Agins*, environmental interests prompted the regulations. For planners, community interests have been and will likely continue to be the motivation guiding takings. (Scholars such as Brooks (2002) believe that personal ethics should also help determine the public interest, but I believe that the role of ethics is best left for the following sub-section.)

Who determines what is in the public interest? While previous generations of officials reserved this role for themselves, in a pure form of communicative planning, the public interest should emerge through deliberation that is deontological “through and through” (Campbell and Marshall 2002, 180). However, Campbell and Marshall (2002), Alexander (2002), Pløger (2004), and Watson (2006) argue that dialogical forms of deliberation cannot be relied on to articulate

the public interest when there are strong divisions of interests, as in the case of eminent domain takings. These arguments are echoed by Huxley (2000) and Flyvbjerg (1998).

Campbell and Marshall (2002) conclude that communicative rationality is incapable of defining the public interest and that planning—and by extension planners—are critical in articulating it. Although not discussing the role of planners in defining the public interest, Watson (2006) advocates alternatives to deliberation, arguing that alternatives can lead to better outcomes. And even well-known advocates of communicative rationality acknowledge that things have to start somewhere. For example, Innes and Booher (2010, 92) note that planners can be “leaders and sponsors” by identifying problems and/or taking the initiative to find solutions.⁹

Fortunately, the planning literature, including the literature on communicative planning, provides guidance for current-day planners on how to articulate the public interest. At the heart of this guidance is the elevation of the public interest to the level of planners’ ethics (e.g., Brooks 2002, Chs. 5 and 9; Ploger 2004). To be sure, scholars who blend communicative rationality with ethics in carving a role for planners to determine the public interest build on the work of other planning ethicists who precede the rise of deliberative practice, such as Bolan (1983) and Howe and Kaufman (1979);¹⁰ this highlights the fact that planners’ ethics have been critical in determining the public interest for a long time.

Such ethics operate within specific contexts. Planners must—and are encouraged to—make ethical choices about what is better for the community. Campbell and Marshall (1999, 476) argue that when planners make choices, the reality of “the socio-economic and institutional contexts” within which they find themselves should take precedence over a procedural emphasis on deliberation. Further, drawing on O’Neill (2000) and Young (1990), Campbell (2006) discusses how ethical judgment allows planners to move from universal ethical principles to

situated contexts. One of Campbell's examples involves what do to with a piece of greenspace: preserve it for environmental protection or use it to provide affordable housing? These planning problems are "situated" and "must be handled by some form of institution probably under the aegis of the state" (Campbell and Marshall 2006, 246).

Planners face similar conditions when contemplating actions that might lead to takings. From *Berman* to *Kelo* and *Lucas*, planners made choices that translated ethical principles to situated contexts. Of course, planners could sometimes get it wrong, in that supposedly universal principles, like those accepted at the time of *Berman*, are now considered inappropriate. Nonetheless, there is ample historical evidence to show that planners have adapted general ethical values to suit certain situations (see, e.g., Howe 1992; 1994 for examples). In particular, the implied ethical principle behind takings, at least in the post-*Berman* era, has been to promote economic revitalization and environmental goals at the expense of property owners.

Planners' leeway in shaping the public interest does not mean that they should not use deliberative processes, nor does it mean that planners are the only arbiters of the public interest. As Campbell and Marshall (2002) point out, planners' interpretation of the public interest can and should be vetted by a participatory process. But, as Young (2000) notes, such processes should be guided by a desire to achieve good outcomes. The point at which public processes should give way to the public interest will depend on planners' personally defined values (Brooks 2002, 76-77), as discussed in many examples provided by Howe (1992;1994). Ultimately, electoral politics and the vicissitudes of electoral democracy will determine whether planners—as agents of elected officials—used their judgment appropriately (Brooks 2002, Chapter 12) and got it right (Campbell and Marshall 2002).¹¹

Finally, should planners act strategically during a participatory plan-making process and during implementation of the plan? This issue is of utmost importance, but I deal with it only briefly because I rely on the arguments above that situated ethical judgment permits planners to act strategically. In particular, during a deliberative process it is this ethical judgment that permits planners to depart from ideal deliberation by withholding the fact that they have a strategy to counter landowners like Kelo et al. And this ethical judgment further permits planners to get facts on the ground by rapidly buying the properties of willing sellers. Indeed, this may well have been the two-part strategy employed by planners in New London. As Campbell and Marshall (2002) and Watson (2006) might argue, substantive concerns about economic revitalization trump the need for ideal deliberation.

I acknowledge that this behavior borders on unethical because it involves withholding information¹² and singling out citizens such as Kelo et al. But the planning literature implicitly endorses such behavior. In discussing the politics of planning, Brooks (2002 Ch 12) notes the importance of negotiation and utilizing power relationships in the context of planners' personal values and visions for the community. To be sure, I do not take such behavior lightly: It involves lying by omission which can be interpreted as a misuse of power. But in the absence of other "moral philosophical sources to inform our thinking" (Watson 2006, 46), I see no other avenue if planners wish to pursue the public interest and avoid having their actions overturned by courts.¹³

(Parallel arguments can be made about regulations. For instance, suppose planners learn through the grapevine of discussions to develop environmentally sensitive land that is not protected by appropriate regulations. The ethical question is whether planners should "work behind the scenes" to establish ownership by engaging in a race with private developers to see who prepares a plan first or influence other legislative outcomes to prevent development.)

6. Avenues for further research

This article suggests areas of research on how courts view endowments and takings, planners' strategies for prevailing in courts, planners' perceptions about the ethics of these strategies, and citizens' perception about endowments and takings. As part of the emerging field of behavioral psychology and law, there is a growing literature on the intersections of property and psychology that can provide guidance for future investigations. In making recommendations for research, I draw on a special issue of the *Tulane Law Review* (2009) titled "A psychological perspective on property law." The following is a discussion of possible avenues for research:

1. While I examined cases across a spectrum of scenarios ranging from regulatory takings and exactions to eminent domain takings, future research is needed to corroborate my arguments by examining additional cases. In particular, I have examined mostly "classic" cases known to planners. I hypothesize that my findings will broadly extend to other cases.
2. Empirical research can examine whether planners actively acquire endowments to strengthen their positions in courts. Because most takings cases are settled outside of court, not many planners are likely to have faced the threat of judicial proceedings, and so obtaining adequate samples for research may be difficult. Nonetheless, surveys could inquire about whether planners engage in acquiring endowments as an "insurance policy" in the unlikely event that landowners go to court, and what planners feel about the ethical implications of such actions.

I note that my discussions in Section 5 on implications for planning ethics were not a positivist discussion of how planners behave. Rather, I was exploring how planners can be ethical in an era of deliberative planning. I have no evidence about how planners actually behave when faced with the possibility that a landowner may go to court. For this reason, I am unable to formulate hypotheses about the results of such surveys.

3. Studies could be conducted on citizens to ascertain the strength of the endowment effect and its implications for takings. Studies cited earlier (Horowitz and McConnell 2002) provide multiple examples of how such studies can be replicated. As Blumenthal (2009) notes, variations of such research could examine what citizens think is appropriate compensation for eminent domain takings. For example, should sentimental attachment be considered, perhaps measured by the length of time someone lived in his home, or should compensation include some standard premium above fair market value? Indeed, in response to *Kelo*, as of 2009, four states (Michigan, Indiana, Kansas, and Missouri) have increased compensation for takings to at least 125 percent of market value (Chang 2010). This suggests some recognition of the endowment effect, but whether this goes far enough is still an empirical question.¹⁴
4. There is also a lack of research on how much is actually paid to landowners before takings cases get to court. While Chang (2010) provides a recent study, his research was performed in New York City only, which may not be representative of all the U.S. Evidence of awards compared to existing market value would shed light on how much governments already pay heed to the endowment effect.
5. Researchers may also investigate if it is optimal for jurisdictions to pay landowners amounts above market value in eminent domain takings. Higher payments must, of course, be balanced against the economic benefits of the project, so that the costs of condemnation do not exceed those benefits. But would higher payments to landowners save the expenses of litigation when landowners resist eminent domain takings, such as in *Kelo*?
6. Other studies can simulate the facts of known takings cases to ascertain how citizens would decide these cases.¹⁵ Such studies provide an opportunity to compare the legal concept of property as a bundle of rights with the layperson's view of property as a discrete asset (Nash

2009), and may shed light on why citizens find certain takings objectionable. Exploring how perceptions of property vary by gender, race, and age may also help planners understand when the public might object to a taking. For instance, in areas with older populations, are planners likely to encounter more opposition to certain regulations or condemnations? Does the length of time a person owns property influence his/her valuation of it?

7. Related to Point 6 are a growing number of studies about how people come to conclusions about ownership based on possession. For example, Friedman and Neary (2009) discovered that ownership is often assigned to people who have “first possession,” even if possession is only insinuated rather than supported by substantive evidence. Studies can explore how the public assigns ownership based on perceptions of who possesses the property.
8. In addition to studies that examine the psychological premium that should be paid to landowners in takings cases, other studies could examine whether landowners overestimate the negative emotional impacts of losing property or whether the endowment effect fades rapidly with time (Blumenthal 2009). In particular, what non-pecuniary actions can planners take to ameliorate the pain of losing one’s home?

7. Conclusions

This article introduced the concept of the endowment effect, an empirical observation rooted in behavioral psychology that people value losses more than they value gains. Because takings involve the loss of property, it is interesting to examine whether the endowment effect might be reflected in judicial decisions involving controversial takings cases. My research leads me to conclude that the endowment effect helps explain controversial takings decisions. I acknowledge that the arguments presented in this article may not always hold. Takings cases are

too complicated to assert that a single theory will always predict how the courts will rule. Nonetheless, the endowment effect appears to have considerable predictive power.

The following four salient findings about endowments and takings resulted from this research: 1) Notwithstanding *Lucas*, regulations that are written to emphasize losses to society rather than gains are more likely to survive judicial review; 2) Endowments can include comprehensive plans, development plans, investments, permits, and laws; 3) both governments and private parties can acquire endowments such as plans, investments, and permits in attempts to sway courts in their favor; and 4) occupying land creates a strong endowment. My findings should not be viewed as surprising as they build on an emerging body of research.

The high value placed on deliberation raises questions about whether planners can ethically behave strategically to acquire endowments so that their actions can survive judicial review. Many planning theorists have articulated the continuing importance of the public interest and the role of planners in achieving it. Situational ethics, which guides the day-to-day decisions of planners, permits planners to use their judgment to depart from ideal deliberation in pursuit of the public interest. Planners may, for example, use their ethical judgment to create endowments by buying the properties of willing sellers while some landowners holdout in an eminent domain case, engaging in a race to prepare plans for environmentally sensitive land before private developers can do so, or otherwise seeking to influence legislative processes.

There is a need for further research to see if my findings about the endowment effect hold across a wider set of land use cases. I also suggest research intended to highlight the presence of the endowment effect among citizens, understand how this effect might vary in different circumstances, help planners understand the public's discomfort with takings, and shed light on planners' perceptions of their own ethics.

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Notes

¹ Eminent domain taking is the taking of land for public use, for which just compensation must be paid. Regulatory takings result when regulations that are a valid exercise of police power amount to an eminent domain taking because the regulations are excessive (Roberts 2002). One other form of regulations—exactions, which are conditions imposed on developers in exchange for permission to build—may also be found to be a taking if they “go too far” (Wright and Gitelman 2000, 131). While the United States Supreme Court (USSC) has formulated different rules for exactions, the literature frequently considers exactions to be a subset of regulations (see, e.g., Wright and Gitelman 2000, Ch V; Juergensmeyer and Nicholas 2002), and I take that approach in this article.

² Other literature includes Fischel (1995b), who explains case law through evolving political and economic trends, and Tribe (2000, Chs 11 and 15), who explains the *Lochner* era through the lens of laissez-faire economics.

³ Legal analyses are often translated into economic terms, and some consider the protection of property and economic efficiency as two sides of the same coin (see Jacobs 2010 for a review of these arguments).

⁴ This research is part of a larger field of study on how psychology affects choice and decision-making. See, for example, Hogarth (1987), Plous (1993), and Rabin (1998) for reviews.

⁵ Fischel (1995a) reasons that paying the WTA price would impose higher taxes on everyone; paying market value reduces the public’s burden while offering a reasonable price. Knetsch and Borcharding (1979) make similar points.

⁶ Further, regulations that lead to a total wipeout of benefits are very rare. The most well-known case that highlights the difficulty in applying the *Lucas* rule is *Palazzolo v. Rhode Island* (533 U.S. 606, 2001), where even a 94 percent reduction in property value from \$3.5 million to \$200,000 was insufficient to invoke the rule.

⁷ There are reasons to question Justice Scalia’s analysis of the losses/gains distinction. First, in equating losses with gains, he cites *Claridge v. New Hampshire Wetlands Board* (125 A.2d N.H. 292, 1984) and *Bartlett v. Zoning Commission of the Town of Old Lyme* (161 Conn. A. 2d 910, 1971). Both cases involved laws intended to prevent the filling of wetlands: In the former, because of potential harms to the public and in the latter because of the benefits of wetlands. Thus, Justice Scalia argued that the law could be written either way. However, he failed to note the different outcomes of the two cases. In the first, courts ruled that there was no taking; this is not surprising from a behavioral perspective because of the high value placed on the avoidance of harms (losses). In the second, courts found that there was a taking; again, this is not surprising given the lower value placed on the provision of benefits (gains). Second, while Justice Scalia cited Sax (1964) to suggest that *Lucas* was a case of “independently desirable uses”, he overlooked numerous other literature that maintains the losses/gains distinction, for example, Sax (1971), Dunham (1958; 1962), and Bosselman et al. (1973). Finally, Justice Scalia failed to take his own equivalence of losses and gains to its logical conclusion. In noting that South Carolina must identify background nuisances that would negatively affect neighbors, Justice Scalia could well have said that the state should identify benefits that would accrue to neighbors if *Lucas* were not permitted to build. Fisher III (1993) takes a similar perspective, arguing that legislators could easily make their regulations “*Lucas* proof” by emphasizing economic benefits.

⁸ Deliberative practice would permit the community to decide what percentage of participant approval constitutes “consensus” (Innes and Booher 2010, 94). However, an astute Kelo et al. would make certain that the specified percentage requires the agreement of potential holdouts. Further, while deliberation allows negotiation (Innes and Booher 2010, 28), there is a limit to how much this can be done. Suppose planners raised their bid on property owned by holdouts. Given the intensity with which holdouts oppose condemnation, it is clear that the bid would have to be large, so that the economic rationales for the takings may no longer be valid.

⁹ To be sure, Innes and Booher (2010) would place limits on the subsequent role of planners and defer to citizens to craft solutions. However, there are issues of importance, such as global climate change, for which planners will have to take a leading role in finding solutions without waiting for solutions to emerge from a deliberative process.

¹⁰ More recent examples of scholars who discuss planning ethics but only indirectly link it to communicative rationality include Baum (1998) and Bollens (2002).

¹¹ Others, both inside and outside of government, also seek to articulate the public interest. However, this is an article about planners and so I do not address the role of others in determining the public interest.

¹² To be sure, communicative rationalists endorse the strategic use of information (e.g., Forester 1989, 41-43). However, Forester is concerned about equalizing power differentials between unequal non-government parties; he does not appear to address the strategic use of information by governments against private parties.

¹³ I am not comfortable with this conclusion, but absent other strategies that can withstand the scrutiny of courts while pursuing the public interest, other options appear limited.

¹⁴ Increases in compensation post *Kelo* should not be interpreted to mean that states have made it more difficult for governments to use eminent domain takings for economic development purposes. As Jacobs and Bassett (2011) and Somin (2009) note, although 43 states have passed *Kelo* reform laws as of 2010, these laws are mostly cosmetic.

¹⁵ I make no claim that research on citizens will confirm my argument that courts tend to side with parties that have greater claims to endowments. There are always likely to be differences between how the courts and the public perceive endowments, because courts see all endowments during legal arguments, whereas the public sees endowments only as they are expressed in the media, as in *Kelo*, *Lucas*, and *Poletown*.