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

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.”

The literature on takings—whether legalistic (e.g., Michelman 1967; Epstein 1985) or economics-based (e.g., Blume and Rubinfeld 1984)—shares the underlying assumptions that landowners, judges, and planners are rational decision makers and that market efficiency is, or should be, a critical consideration in courts’ decisions. However, the assumption of perfect rationality has come under attack due to a growing body of evidence in behavioral psychology. In response to 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 to hold on to property and rights that one already has, implicitly valuing them more than if one 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). Numerous studies show
that people are willing to accept more for property they own than they are willing to pay for the same property if they had never owned it (see Horowitz and McConnell 2002 for a summary of some of these studies). The effect suggests that allocations of property by third 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 explore whether the endowment effect provides insight into courts’ decisions in takings cases.

I selected cases for review from a list of significant cases maintained by the Community Rights Counsel (CRC), a nonprofit, public interest law firm. I do not review all the cases listed by the CRC but instead concentrate on those that shape contemporary planners’ understanding of takings jurisprudence, such as whether regulations go “too far” (e.g., *Penn Coal* and *Keystone*), exactions (*Nollan* and *Dolan*), and eminent domain for redevelopment (e.g., *Berman* and *Kelo*).

My analyses suggest that the party—whether private or government—favored by endowments is more likely to prevail in court, regardless of how the court arrives at its decision. These findings are consistent with previous findings on the importance of “first possession” and the 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 economics from which this article draws—this adage reflects the high moral status accorded to “possession,” and it is 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.

This article is exploratory. I intend in this article only to point out that courts’ decisions in takings cases appear to side with the party that has the best claim to endowments. My larger objective is to lay the groundwork for future research that examines more cases, hypotheses that emerge from my analyses, and other characteristics of the endowment effect as it relates to land.
Section 5 expands on these points. I also note that because the law and its interpretation are not fixed, it is difficult to provide a universal theory of takings decisions. Furthermore, court cases can be decided by slim majorities. Thus I do not claim that the endowment effect will predict the outcome of every case, only that it can provide useful guidance on how courts are likely to rule.

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 discusses hypotheses that arise from this article and suggests avenues for additional research. Section 6 presents my conclusions.

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

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 constitutes “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 regulation affected investment-backed expectations, their economic impact on the property owner, and the character of the government’s actions. The USSC later held that regulations amount to a categorical taking if they deprive the landowner of all or almost all economically viable uses of the land, as in *Lucas v. South Carolina Coastal Council* (505 U.S. 1003, 1992). Despite these “tests,” the USSC continues to have a hard time dealing with regulatory takings.
Cases involving exactions, such as *Nollan v. California Coastal Commission* (483 U.S. 825, 1987) and *Dolan v. City of Tigard* (512 U.S. 687, 1994), led to other “tests” and added confusion to the case law. *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. Nonetheless, there continues to be much controversy over how to treat exactions (Wright and Gitelman 2000, 145).

*Kelo v. City of New London* (545 U.S. 469, 2005) touched on the central controversy of eminent domain: the meaning of “public use” and its relation to “public purpose.” Until the 1950s, governments’ authority to take property for public use was accepted. However, *Berman v. Parker* (348 U.S. 26, 1954) set the stage for taking land from one private party to give to another. By the time of *Kelo* (2005), the USSC faced the question of whether redevelopment was a public purpose. The USSC decided that the city’s decision “that the area was sufficiently distressed to justify…economic rejuvenation is entitled to our deference.” Current case law on eminent domain generally defers to governments’ assessments of what constitutes public use. Still, scholars have been unable to provide overall explanations for eminent domain decisions by the USSC, which 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. In a perfectly rational decision, 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: the pain of a loss is greater than the pleasure of a same-sized gain.
For instance, 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 had 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,” where language that emphasizes losses produces stronger reactions than language that emphasizes gains, because forcing people to accept losses is considered more unfair than simply withholding potential gains (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 will influence 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 is 7. This 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 1995; Korobkin and Ulen 2000; Korobkin 2003), research has not examined how the endowment effect affects land disputes. For example, while Fischel (1995) 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.

The lack of research is surprising when one considers that Justice Holmes—the godfather of takings jurisprudence—recognized the importance of endowments. In a case concerning adverse possession, Holmes (1897) summarizes the 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 pervasive, 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 reasons for regulations, the nuisance rationale is widely used 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, as discussed in Section 2.

The endowment effect provides an explanation for many court decisions. In general, regulations or exactions that take away endowments—whether from private parties or governments—are unlikely to withstand judicial review even if they provide gains to other parties. From a behavioral perspective, foregone gains count less than the loss of endowments to landowners or governments (Cohen and Knetsch 1992). By extension, if owners cement their rights through plans or activities, regulations or exactions that attempt to 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 regulations or exactions that prevent a loss of these rights.

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 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 an 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 mining and was thus not a taking even if gains to mining companies were destroyed. (I will revisit Keystone later.)

*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 had 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 two 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 (harms/benefits) distinction in *Lucas*, he preserved it with regard to “background principles” of nuisance and property. Indeed, despite Justice Scalia’s admonitions, lower courts continue to give heavy weight to losses caused by nuisances. Blumm and Ritchie (2005) cite several cases: For example, the Colorado Supreme Court found no taking in *Colorado Department of Health v. The Mill* (8887 P.2d Colorado, 993,
1994) when it ruled in favor of restrictions placed on contaminated land, and the Court of Federal Claims ruled in *Hendler v. United States* (175 F.3d 1374) that the federal government’s installation of wells 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). Over time, *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. Wright and Gitelman (2000) note the “impact of the environmental movement” (105) and the “significant trend” (106) over time for 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 Planning 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 long-term 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.,
plans) and governments that use legislation to tilt the weight of endowments in their favor, aided by changing norms that seek to prevent the loss of environmental endowments and 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 prevent public harms 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 they had 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 also 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.

*Penn 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 there were three important factors in Pennsylvania Coal Co.’s favor. First, the Kohler Act, which prohibited mining that could cause subsidence, was passed in 1921. However, in an 1878 deed, Pennsylvania Coal Co. had granted
Mahon surface rights to the parcel but retained mining rights. Mahon had specifically accepted the risks of underground mining by the coal company and waived the right to compensation for resulting damage. Second, as Fischel (1995, Ch 1) discusses in detail, local social norms allowed Pennsylvania Coal Co. to continue extracting coal even after the Kohler Act. These first two factors show that the status quo strongly favored Pennsylvania Coal Co.

The third factor is best discussed by juxtaposing *Penn Coal* with *Keystone* (discussed earlier). Indeed, the plaintiffs in *Keystone* based their arguments—unsuccessfully—on *Penn Coal*. However, Justice Stevens, writing for the majority in *Keystone*, found that similarities with *Penn Coal* were “far less significant than the differences.” While he presented many reasons for upholding the legislation in *Keystone*, one stands out: In comparing *Keystone* to *Penn Coal*, he noted that the legislation in *Keystone* was intended to serve “legitimate public interests in health, the environment, and the fiscal integrity of the area by minimizing damage [losses] to surface areas. None of the indicia of a statute enacted solely for the benefit [gains] of private parties identified in Pennsylvania Coal are present here.” Justice Stevens was making a distinction between losses that the legislation in *Keystone* intended to prevent and gains that the legislation in *Penn Coal* intended to provide. From the perspective of the endowment effect, losses are given more weight than gains; it is therefore not surprising that the wording of the legislation in *Keystone* contributed to it being upheld. Nor is it surprising that the legislation in *Penn Coal* was overturned: Legislation that intends to provide benefits will likely not survive judicial review.

While Pennsylvania Coal Co. established that it had amassed endowments in its favor (and that the legislation it successfully challenged was intended to provide benefits), Penn Central Transportation Co. could not demonstrate the acquisition of endowments 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 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 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 his 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. Not surprisingly, the USSC did not uphold the condition. From Nollan’s perspective, it was also helpful that he already possessed an endowment, which stemmed from occupying the property as a lessee 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 situation, 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 the importance of occupation, 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.

**Summary of regulatory takings and exactions:** First, regulations have a greater chance of success if they are framed in terms of preventing losses. Notwithstanding Lucas, lower courts
continue to employ the losses/gains distinction as an antecedent inquiry to takings claims and—
together with the evolution of long-term norms in the direction of avoiding environmental
losses—have taken an increasingly expansive view of permissible government actions based on
this criterion. Second, development plans are critical for establishing endowments and swaying
courts’ decisions. Third, like private parties, governments can use plans to acquire endowments.
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 only form of endowments, 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**

**Endowments and economic revitalization:** Two controversial cases bookend the
importance of establishing endowments to justify eminent domain: *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 the city’s endowments.
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 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 in 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 them by starting 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, it was generally unaware of the endowments acquired by the government. Although the USSC considered many legal arguments—unlike the public—the USSC was in a position 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 the 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 critical endowments, such as a detailed plan, permits and approvals, or investors.

**Endowments and occupation:** Hawaii Housing Authority v. Midkiff (467 U.S. 229, 1984) highlights how the actual occupation 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, which ruled in favor of the lessees. The underlying lesson of Midkiff is that occupation is important. Moreover, the occupiers were not squatters. They were living legally on the land and owned structures built on the land, which gave them an even stronger endowment than squatters. To further understand the role of occupation in Midkiff, it is useful to consider what might have been the outcome had the land not been leased: It is unlikely that courts would
have countenanced the forced sale of land to the general public. In fact, the legislation did not permit sales to non-occupiers except under limited circumstances. I acknowledge that legal arguments in court centered on the meaning of “public uses” and the oligopolistic power of landowners, and I do not suggest that landlords risk losing land though routine leasing transactions. Still, it is clear that occupation helped the lessees.

**Summary of eminent domain cases:** First, preparing plans is critical to governments’ successful defense of the use of eminent domain. 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. Avenues for further research

This article is an exploratory piece on how endowments appear to influence courts’ decisions in takings cases. Drawing on the emerging field of behavioral psychology and law, it suggests a number of testable hypotheses and areas for future research. Some of the following recommendations for research draw on a special issue of the *Tulane Law Review* (2009) titled “A psychological perspective on property law.” I also suggest additional research on the implications of my findings for planning ethics and practice.

1. I examined a range of cases from regulatory takings and exactions to eminent domain, but further qualitative research is needed to corroborate my arguments. While I have examined
mostly “classic” cases known to planners, I hypothesize that my findings will broadly extend to other cases and that the endowment effect will continue to play a major role in deciding cases, regardless of the “tests” that courts employ.

2. It would be worthwhile to perform a statistical analysis of randomly selected land use regulations to see whether those that survive judicial review are more likely to emphasize losses than gains. It will be challenging to code a sufficient sample, but such research would provide a valuable complement to this study. Again, I hypothesize that regulations worded to emphasize losses will be more likely to survive judicial review, even post *Lucas*.

3. Studies could be conducted on citizens to ascertain the strength of the endowment effect and its implications for takings. Horowitz and McConnell (2002) provide multiple examples of how such studies can be replicated. Given the strength of the endowment effect in other cases concerning land, I hypothesize that the effect will be strong and that citizens are likely to think that compensation should be much higher than market value, with allowances made to account for the length of time residents lived in their homes.8, 9

4. Researchers could also investigate how much governments pay landowners before takings cases get to court. While Chang (2010) provides a recent study, his research was performed in New York City, which may not be representative of the U.S. Comparing awards to market value would shed light on how much governments already pay heed to the endowment effect.

5. Researchers could investigate whether it is optimal for jurisdictions to pay landowners amounts above market value when eminent domain is used. Higher payments must be balanced against the economic benefits of the project, but would higher payments save the expenses of litigation when landowners resist the use of eminent domain?
6. Other studies could simulate the facts of past takings cases to ascertain how citizens would decide them. Such studies could compare the legal concept of property as a bundle of rights with the public’s view of property as a discrete asset (Nash 2009). Exploring how perceptions of property vary by gender, race, and age may also help planners predict when the public might find takings objectionable.

7. A growing number of studies examine 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. Further studies can explore how the public assigns ownership based on perceptions of who possesses property rights.

8. In addition to investigating the psychological premium that should be paid to landowners in takings cases, researchers could examine whether landowners overestimate the negative emotional impacts of losing property and 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?

9. A potentially rich vein of research could examine how landowners and occupiers think about adverse possession. In adverse possession cases, 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, Korobkin 2003). In the former case, following Cohen and Knetsch (1992), Stake (2001), and Korobkin (2003), I hypothesize that the owner of record should feel little loss if title for the land is awarded to the adverse possessor. The latter situation 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 situation, I
hypothesize that the length of time the squatter occupied the land and the economic value of the occupation will be of critical importance.

10. The previous discussions show that planners 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. However, when governments attempt to acquire endowments, it raises ethical questions for planners. Should planners strategically acquire endowments so as to sway perceptions of ownership and bolster governments’ arguments in courts? What are the ethical implications of such actions by planners?

Economic development that requires using eminent domain highlights these challenges. During consultations, could a planner—who under current ethical guidelines is required to speak truthfully—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.” Such a statement—while truthful—would doom any consensus-building attempts. While implementing the plan, could a planner rapidly purchase the properties of willing sellers so as to acquire critical endowments before holdouts get to court?

Ethical challenges also arise in the case of regulations. Suppose planners learn of discussions to develop environmentally sensitive land that is not protected by appropriate regulations. Should they seek to establish ownership by discreetly preparing a plan for the land before the private developer does?

A literature on “situational ethics” (e.g., Campbell 2006) appears to grant planners leeway to depart from ideal deliberation in pursuit of planning objectives. We need empirical studies (e.g., along the lines of Howe 1994) of how planners view these ethical conundrums as well as scholarship that provides guidance to planners faced with these situations.
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 is reflected in judicial decisions in controversial takings cases. My research suggests that the endowment effect does help 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.

This research yields five salient findings: 1) Despite *Lucas*, regulations that emphasize losses rather than gains are more likely to survive judicial review. 2) Endowments can include comprehensive plans, development plans, investments, permits, etc. 3) Both governments and private parties can acquire endowments in attempts to sway courts in their favor. 4) Occupying land creates a strong endowment. 5) Implementing plans helps to cement endowments.

Further research is needed to see if my findings about the endowment effect hold across a wider set of land use cases. I also suggest research to highlight the presence of the endowment effect among citizens, to investigate how the effect might vary in different circumstances, and to help planners understand the public’s discomfort with takings. Further, because planners can strategically acquire endowments to increase the chances of their actions surviving judicial review, scholarship is needed to provide ethical guidance to planners.
References


23


Notes

1 Eminent domain 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 the use of eminent domain 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 (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 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).

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

4 Investment-backed expectations usually turn on whether the landowner had actual “expectations,” and whether the expectations were reasonable. Economic impact on the property owner is interpreted by most courts to mean the value of the remaining economic use. The character of government action refers to whether the government’s actions involved an invasion of private property or whether the actions promoted the public good through adjustments of benefits and burdens. See also Echeverria (2000).

5 Fischel (1995) 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. Knetich 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 other 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 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 Such research needs to be carefully worded. For example, it is important to point out to interviewees that compensation for eminent domain will come from taxes. Further, it is unlikely that citizens will say no to more money, so citizens need to be placed at arms length to the eminent domain transaction being considered. Thus, questions should not be worded: “How much do you think the government should pay you to take your property?”

9 Indeed, in response to Kelo, as of 2009, four states (Michigan, Indiana, Kansas, and Missouri) increased compensation for takings to at least 125 percent of market value (Chang 2010). However, increases in compensation post Kelo should not be interpreted to mean that states have made it more difficult for governments to use eminent domain 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.

10 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 portrayed in the media, as in Kelo, Lucas, and Poletown.