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Planning as Public Use?

Nicole Stelle Garnett
Notre Dame Law School, ngarnett@nd.edu

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INTRODUCTION

There was nothing surprising about the holding in *Kelo v. City of New London*.[1] After all, in *Berman v. Parker*[2] and again in *Hawaii Housing Authority v. Midkiff*,[3] the Supreme Court made clear that federal judicial review of a decision to exercise the power of eminent domain should be extremely deferential. Nevertheless, *Kelo* has turned out to be full of surprises. First, there was the Court's bitter division. Justice O'Connor, who authored the unanimous *Midkiff* opinion, wrote a scathing dissent for herself and three colleagues. And, of course, there

* Visiting Professor of Law, University of Chicago Law School and John Cardinal O'Hara, C.S.C. Associate Professor of Law, Notre Dame Law School. I received valuable comments on previous drafts of this Article at the 2006 Conference on Litigating Regulatory Takings Claims, Boalt Hall School of Law, University of California, Berkeley, and from David Barron, Patricia Bellia, Alejandro Camacho, John Echeverria, Daniel Mandelker, and John Nagle. Eric Babbs provided excellent research assistance. Mistakes are my own.

1. 545 U.S. 469 (2005).
2. 348 U.S. 26 (1954).
3. 467 U.S. 229 (1984).

was the unexpected post-decisional hullabaloo, which resulted in a flurry of efforts to impose legislatively the very restrictions on eminent domain that the Supreme Court declined to impose constitutionally.[4] This Article, however, avoids this well-trodden ground and focuses instead on *Kelo*'s third surprise—the Court's implicit suggestion (made explicit by Justice Kennedy in concurrence) that public, participatory planning is a constitutional safe harbor and may separate impermissible "private" takings from presumptively valid public ones. The *Kelo* majority mentioned the words "plan" and "planning" forty times; Justice Kennedy's separate opinion brought the tally to nearly fifty. The Court's frequent reference to the City of New London's careful and extensive planning effort was surprising because it was unnecessary. *Kelo* reaffirmed that public use challenges are subject to rational basis review, a standard that simply requires the Court to satisfy itself that a taking advances some *conceivable* public purpose.

At a conference on litigating takings claims, it is appropriate to ask about the legal and practical significance of *Kelo*'s planning mandate. This question is an important one for two related reasons. First, property owners will likely challenge the sufficiency of pre-taking planning efforts in future public use litigation, arguing that a failure to plan is suggestive of impermissible private purposes. Second, *Kelo*'s emphasis on planning undoubtedly will influence government actors' pre-taking behavior. I have previously argued that legal scholars underappreciate the important role of nonjudicial government actors—the people that I call "Takers"—in the eminent domain process. Takers' behavior is important because very little eminent domain work takes place in courtrooms; most property owners sell their property "voluntarily" under Takers' threat of eminent domain. A more nuanced understanding of the factors influencing Takers' decisions about which projects to pursue and which properties to acquire is key to understanding eminent domain.[5] *Kelo*'s suggestion that planning immunizes economic-development takings from public use challenges is one of those factors. *Kelo* sends a signal to Takers that planning is good.

This Article briefly explores the constitutional and practical significance of *Kelo*'s planning mandate for future economic development projects. After briefly reviewing the Court's discussion of the planning that preceded the *Kelo* litigation in Part I, the Article examines the constitutional law of planning in Part II. Specifically, Part II examines how *Kelo*'s emphasis on planning departs from standard

4. *See, e.g.*, Castle Coalition, Legislative Center, http://www.castlecoalition.org/legislation/ (last visited Mar. 6, 2007) (describing state and federal legislative efforts).

5. *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006).

rational basis review of economic policies and asks what such a departure means for future public use litigants. Finally, in Part III, the Article explores three practical questions raised by the Court's decision to encourage the government to engage in careful, detailed planning before taking property in the name of "economic development." First, will public, participatory planning lend legitimacy to otherwise questionable "economic development" takings? Second, was the Court correct to assume that planning will prevent corrupt, pretextual takings, i.e., the taking of private property in the *name* of economic development but for the *true purpose* of benefiting a private individual? And third, will careful planning by the government lead to more successful projects?

I. PLANNING IN *KELO*

The facts of the *Kelo* decision are by now familiar. Trapped for decades in a seemingly hopeless economic spiral, the City of New London, Connecticut—with the support and encouragement of state officials[6]—undertook to redevelop the city's Fort Trumbull neighborhood. Project planning began in January 1998, when the city reactivated the long-defunct New London Development Corporation (NLDC), and the State of Connecticut authorized a $5.35 million bond issue to support the redevelopment of Fort Trumbull. One month later, the pharmaceutical giant Pfizer, Inc. announced plans to build a $300 million research facility on a site immediately adjacent to the Fort Trumbull neighborhood. The extent of Pfizer's influence over the project is a matter of significant dispute. The Court, following the city's lead, suggested that "local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation."[7] The petitioners, on the other hand, suggested that the Fort Trumbull project was essentially undertaken at Pfizer's behest.[8]

Beginning in April 1998, NLDC held a series of neighborhood meetings to educate residents about the redevelopment process. Soon thereafter, the Connecticut Department of Economic and Community Development determined that the Fort Trumbull project might have a significant environmental impact. This ruling triggered a full "Environmental Impact Evaluation," which required the examination of

6. *See* Brief of Respondent at 1, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2005 U.S. S. Ct. Briefs LEXIS 273 (noting that in 1990, the Connecticut Office of Planning and Management designated New London a "distressed municipality").

7. Kelo v. City of New London, 545 U.S. 469, 473 (2005).

8. *See* Brief of Petitioners at 4–5, *Kelo*, 545 U.S. 469 (No. 04-108), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/04-108/04-108.mer.pet.pdf (characterizing Pfizer as the "10,000 pound gorilla" and noting that the plan incorporated all of Pfizer's "conditions" were incorporated into the plan); *see also infra* notes 1188–124 and accompanying text.

the project's possible effects on air and water quality, traffic patterns, air pollution, flood prevention, historical buildings, etc., as well as the plan's consistency with local and state planning documents. The Environmental Impact Evaluation also required more neighborhood meetings, the solicitation and review of community opinion, and a forty-five day notice-and-comment period. After the State Office of Planning and Management approved the Environmental Impact Evaluation, NLDC formulated the specific development plan at issue in *Kelo*. The plan was finalized in August 1999, and formally adopted in January 2000.[9]

The development plan included a state park, a waterfront conference hotel, a "small urban village," recreational and commercial marinas, and approximately eighty new residences.[10] The plan required the assembly of 115 parcels of private property in the Fort Trumbull area, and the New London City Council authorized NLDC to acquire these properties by eminent domain if necessary.[11] Although most property owners sold voluntarily, seven individuals (who owned a total of fifteen parcels in the middle of the redevelopment area) refused.[12] After several months of unsuccessful negotiations, NLDC decided to acquire these properties by eminent domain.[13] Two months later, the owners of the targeted properties filed an action in state court, arguing that the takings ran afoul of the "public use" limitations of the Fifth Amendment and the Connecticut Constitution.[14] Nearly four years later, the U.S. Supreme Court granted the owners' petition for certiorari and agreed to review the Connecticut Supreme Court's determination that the takings were constitutional.[15]

A sharply divided Court affirmed the Connecticut Supreme Court's decision. Writing for a five-member majority, Justice Stevens rejected the owners' argument that the Fifth Amendment's public use limitation precluded the city from taking property from one private owner and transferring it to another to promote "economic development."[16] Justice Stevens emphasized the Court's longstanding tradition of deferring to political decisions to exercise eminent domain. He noted that in cases throughout the twentieth century, especially *Midkiff*[17] and *Berman*,[18] the Court had interpreted the term "public use" expansively to include takings that will advance any public purpose, and not simply those

9. *See* Brief of Respondent, *supra* note 6, at 5–6, 9.
10. *See Kelo*, 545 U.S. at 474.
11. *See id.* at 473–75.
12. *See* Brief of Respondent, *supra* note 6, at 7.
13. *See id.* at 9.
14. *See* Brief of Petitioners, *supra* note 8, at 7.
15. *See id.* at 9.
16. Kelo v. City of New London, 545 U.S. 469, 484 (2005).
17. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
18. Berman v. Parker, 438 U.S. 26 (1954).

enabling property to be acquired for public use or ownership. In keeping with *Berman* and *Midkiff*, however, Justice Stevens emphasized that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party."[19]

It was in drawing this line between permissible and impermissible takings that the planning process emerged as constitutionally significant. Throughout the *Kelo* majority opinion, Justice Stevens emphasized the exhaustive and participatory nature of New London's planning effort.[20] He suggested that the city's comprehensive planning efforts helped guarantee that the takings advanced public purposes.[21] Justice Stevens also suggested the converse—i.e., that takings benefiting private parties effected outside a comprehensive planning process would raise constitutional red flags. A "one-to-one transfer of property, executed outside the confines of an integrated development plan," he wrote, "would certainly raise a suspicion that a private purpose was afoot."[22]

In a short concurrence, Justice Kennedy went further than the majority, suggesting that the lack of comprehensive planning might render certain takings presumptively invalid.[23] While Kennedy refused to "conjecture" about when such a presumption might apply, he explained why he could comfortably conclude that *Kelo* was not such a case. First, "[t]his taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression, and the projected economic benefits of the project cannot be characterized as *de minimus*." Second, "the identities of most of the private beneficiaries were unknown at the time the city formulated its plans." Third, the "city complied with elaborate procedural requirements that facilitate . . . inquiry into the city's purposes."[24] Thus, Kennedy concluded that the takings at issue in *Kelo* clearly fell out of the universe of "suspicious" takings that justified a presumption of "impermissible private purpose."[25]

II. PLANNING IN TAKINGS LAW

Especially because he was the controlling fifth vote in the case, future public use litigants will undoubtedly ask courts to grapple with Justice Kennedy's musings about planning. Property owners are certain

19. *Kelo*, 545 U.S. at 477; *see also Midkiff*, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose and would thus be void.").

20. *See, e.g.*, *Kelo*, 545 U.S. at 483 ("The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community.").

21. *See id.* at 478.

22. *Id.* at 486–87.

23. *Id.* at 493 (Kennedy, J., concurring).

24. *Id.*

25. *Id.*

to challenge the sufficiency of pre-taking planning efforts, and Takers will seek refuge in the procedural complexities of economic development plans. This Part briefly explores the constitutional significance of *Kelo*'s planning mandate. The discussion focuses first on the role that planning has played in previous regulatory takings and public use cases. It then turns to the tension between a public use planning mandate and conventional rational basis review of economic policies. Finally, the Article draws upon several recent public use cases to explore the role that planning might play in post-*Kelo* public use litigation.

A. Planning as a Basis for Deference in Takings Cases

In one sense, the Court's frequent references to New London's planning effort were unremarkable. Indeed, in both regulatory takings and public use cases, the Court often has cited governmental planning efforts to bolster the case for judicial deference. In regulatory takings cases, for example, the presence or absence of planning is used to gauge whether a challenged regulation runs afoul of the oft-cited *Armstrong* principle—that the Fifth Amendment was designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[26] Consider the dueling majority and dissenting opinions in *Penn Central Transportation Co. v. City of New York*. While the dissent complained that the ordinance impermissibly singled out select property owners to bear the burden of historic preservation,[27] the majority argued that "New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city."[28] In subsequent decisions that applied the balancing test adopted in *Penn Central*, the Court has suggested that comprehensive planning provides evidence that the governmental interests advanced by a regulatory rule outweigh the burden imposed on individual property owners. In the

26. Armstrong v. United States, 364 U.S. 40, 49 (1960); *accord* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting *Armstrong*, 364 U.S. at 49); Pennell v. City of San Jose, 485 U.S. 1, 9 (1988); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987); Bowen v. Gilliard, 483 U.S. 587, 608 (1987); First Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 318–19 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978); *see also* William Michael Treanor, *The* Armstrong *Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997). *See generally* Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 747 (1993) (noting that the *Armstrong* principle has become part of the "ritual litany" employed in takings cases); Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 880 n.100 (1995) (observing that the statement in *Armstrong* "has taken on the quality of a canonical recitation").

27. *See Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting). On the "singling out" problem in takings law, see Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344 (1991).

28. *Penn Central*, 438 U.S. at 132.

recent *Tahoe-Sierra Preservation Council* decision, for example, the Court considered a regulatory takings challenge to a thirty-two month moratorium on all new development in the Lake Tahoe basin.[29] The Court rejected the property owners' suggestion that the Fifth Amendment's takings clause automatically required compensation for the losses resulting from the development ban. In reaching this conclusion, the Court discussed the importance of comprehensive planning at length and expressed concern that over-constitutionalizing the law of planning would be contrary to the public interest.[30]

Planning efforts also have played a role in previous public use cases. Importantly, in *Berman v. Parker*, the Court considered the constitutionality of a redevelopment plan predicated on the need to eliminate blighted residential conditions in southwest Washington, D.C.[31] The owner of a department store slated for demolition objected to his property's inclusion in the plan, arguing that the building was neither residential nor blighted. In rejecting this claim, the Court emphasized the comprehensive nature of the redevelopment plan conceived by the National Capital Planning Commission. Justice Douglas, writing for a unanimous court, observed that "[t]he experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area . . . the area must be planned as a whole. . . . If owner after owner were permitted to resist . . . integrated plans for redevelopment would suffer greatly."[32] Just as in *Kelo*, the *Berman* Court relied upon the community's comprehensive planning efforts to justify its deference to individual elements of the plan, including the broad use of eminent domain to effect private-to-private transfers of property.

B. Planning and Rational Basis Review

Kelo and *Berman* differ in one significant respect, however. In *Berman*, the Court never suggested that the failure to plan comprehensively might negate the case for judicial deference. On the contrary, in *Berman*, and again in *Midkiff*, the Court suggested that the eminent domain power and the police power are coterminous,[33] and that,

29. *See* Tahoe Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

30. *See id.* at 329–32 (refusing to apply categorical takings analysis adopted in *Lucas v. South Carolina Coastal Commission* to temporary moratoria); *see also id.* at 336–40 (stressing the importance of comprehensive land use planning devices, including moratoria).

31. Berman v. Parker, 348 U.S. 26, 30 (1954).

32. *Id.* at 34–35.

33. *Id.* at 32 ("We deal, in other words, with what has traditionally been known as the police power."); *see also id.* at 33 ("Once the object is within the authority Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

therefore, "public use" challenges are subject to rational basis review. Rational basis review, as every first-year law student learns, generates predictable results—the government wins.[34] Moreover, standard rational basis review does not require that the government even articulate the justification for its policy. Instead, rational basis scrutiny requires the reviewing court to satisfy itself that the challenged policy advances some *conceivable* public purpose.[35] *Midkiff* makes clear that this traditional version of rational basis review applies in the public use context. Writing for a unanimous court, Justice O'Connor observed, "where the exercise of eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the Public Use Clause."[36] The Court, O'Connor emphasized, would not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[37] Her words echoed those of Justice Douglas in *Berman*. "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[38]

In other words, it is not immediately obvious why planning is relevant to rational basis review of an exercise of eminent domain. In regulatory takings cases, the relevance of planning is clear. When a property owner challenges a regulation as confiscatory, courts must weigh governmental interests against private ones (in the partial-takings context), or determine whether the government is asking owners to bear a disproportionate burden of providing public benefits (in the exactions context).[39] Both *Penn Central* balancing and *Nollan-Dolan* proportionality review require the court to consider the *actual* goals and interests advanced by a regulatory policy. Not only do planning documents represent concrete expressions of the governmental interests at stake, but the very fact that the government engages in planning may suggest seriousness of purpose. In contrast, because public use cases are

34. *See, e.g.*, David A. Dana, *Land Use Regulations in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1253–54 (1997) (describing the "bottom-line dynamics" of rational basis review in land use context: "Local governments won, aggrieved property owners lost.").

35. *See Midkiff*, 467 U.S. at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

36. *Id.*

37. *Id.* (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896).

38. Berman v. Parker, 348 U.S. 26, 32 (1954); *see also Midkiff*, 467 U.S. at 239 (quoting *Berman*, 348 U.S. at 32).

39. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 134 (1978) (articulating factors relevant for determining whether a regulatory taking has occurred, including "the economic impact of the regulation on the claimant" and "the character of the governmental action"); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring government to demonstrate "rough proportionality" in regulatory exactions, i.e., that they are "related both in nature and extent to the impact of the proposed development").

governed by rational basis review, the government's concrete commitments should be irrelevant. The relevant inquiry is whether the takings advance *conceivable* public purposes, not necessarily the goals of articulated, thorough planning efforts. As Richard Epstein has observed, the "expression 'conceivable public purpose' suggests that the court, in its search for a 'rational basis,' can supply a purpose that the legislature itself missed."[40] (And, indeed, the Court in *Kelo* refused to examine whether New London's plans would in fact advance the stated goal of economic development.[41])

That said, there are at least two reasons why the conceivability loophole of rationality review does not map easily onto a public use challenge. First, the government exercises the power of eminent domain to acquire property for real reasons, not speculative ones. Eminent domain laws universally require an *ex ante* statement of the "ends" justifying the condemnation. In most states, and for all takings by the federal government, eminent domain is a judicial proceeding.[42] After satisfying the necessary prerequisites,[43] the Taker files pleadings which, *inter alia*, describe the land to be taken, and, importantly, set forth the public use for which it is being taken.[44] The purpose used to justify the taking must be pleaded with particularity in many states.[45]

The fact that the government is legally bound to justify every exercise of eminent domain with an *ex ante* statement of purpose undercuts *Midkiff*'s insistence that a proper respect for the prerogatives of the political branches requires courts to speculate about conceivable justifications for an exercise of eminent domain. The Court has held that such speculation is inappropriate when the government has articulated the purpose of its policy, which it must do each time it exercises the power of eminent domain. For example, in *Allegheny Pittsburgh Coal*, the Court considered an equal protection challenge to a county's practice of reassessing property for tax purposes only when title changed hands.[46] The Court invalidated the assessment scheme because similarly situated

40. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 162 (1985).

41. *See* Kelo v. City of New London, 545 U.S. 469, 488 (2005) ("[W]e decline to second guess the City's considered judgments about the efficacy of its development plan.").

42. *See* 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN ¶ 24.05[1] (2006) (noting prevalence of judicial model in states); *see also* FED. R. CIV. P. 71A (2002) (setting forth procedure for condemnations in federal courts). In a few states, takings may be effected administratively, by the passage of an ordinance or resolution to take certain designated land and award compensation to the owners. *See* SACKMAN, *supra*, ¶ 24.04.

43. Such prerequisites include, for example, the requirement in most states that the condemnor attempt to purchase the property before instituting a condemnation. *See id.* ¶ 26A.02[1].

44. *See id.*

45. *See id.* ¶ 26A.02[1], nn.5 & 24.

46. *See* Allegheny Pittsburgh Coal v. County Comm'n, 488 U.S. 336 (1989).

property owners bore drastically different tax burdens.[47] However, a decade later in *Nordlinger v. Hahn*, the Court rejected an equal protection challenge to California's Proposition 13, which had a nearly identical effect.[48] In distinguishing the cases, the Court relied upon the fact that the county in *Allegheny Pittsburgh Coal* had asserted that its assessment scheme was "rationally related to its purpose of assessing properties *at true current value*," which, as a matter of logic, it could not be. The Court reasoned that when the government articulates a purpose for its action, it will be held to that purpose. "[T]he Equal Protection Clause does not demand . . . that a governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification . . . [but it] does require that a [stated] purpose may conceivably or may reasonably have been the purpose and policy."[49] The Court cited *Wheeling Steel Corp. v. Glander*[50] as authority for this proposition, observing that "after the Court in *Wheeling Steel* determined that the statutory scheme's stated purpose was not legitimate, the other purposes did not need to be considered because 'having themselves specifically declared their purpose, the . . . statutes left no room to conceive of any other purpose for their existence.'"[51]

Second, conceivability review fits uncomfortably with the Court's oft-repeated admonition that the exercise of eminent domain for a purely private purpose would run afoul of the Fifth Amendment's public use limitation.[52] Rational basis review does not require the government to provide any assurances that a given exercise of eminent domain is necessary, or even related, to any particular policy. So long as some conceivable purpose justifies the exercise of eminent domain, the means by which the government acquires land is essentially beyond scrutiny. The Court emphasized this point in the regulatory takings context only a few weeks before *Kelo* was decided. In *Lingle v. Chevron U.S.A. Inc.*, the Court abandoned the frequently mentioned, but rarely applied, dicta that a regulation that fails to "substantially advance legitimate state interests"

47. *Id.* at 341.

48. 505 U.S. 1 (1992).

49. *Id.* at 15 (internal quotations and citations omitted).

50. 337 U.S. 562 (1949).

51. *Nordlinger*, 505 U.S. at 16 n.7 (quoting Allied Stores of Ohio v. Bowers, 358 U.S. 522, 530 (1959)).

52. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party."); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) ("To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'") (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937)); *id.* at 245 ("A purely private taking could not withstand the scrutiny of the public use clause; it would serve no legitimate purpose of government and would thus be void.").

effects a regulatory taking.[53] Writing for a unanimous Court, Justice O'Connor emphasized that the *effectiveness* of a regulatory regime was irrelevant to the takings analysis.[54] The Court made a similar argument in *Kelo*, rejecting the property owners' suggestion that the public use limitation requires inquiry into whether a taking will in fact generate the public purposes used to justify it.[55] In other words, the Court has suggested that it will not consider whether eminent domain in fact advances the *stated* purpose for a taking while at the same time suggesting that some *unstated* purposes are illegitimate.

The Court's concern that a government's stated justifications for seizing property may be pretextual—i.e., used to camouflage purely private transfers—is, however, in keeping with a long line of cases expressing concern that a legislature might use pretextual and valid justifications to accomplish invalid purposes. This concern was expressed as early as *McCulloch v. Maryland*, in which Justice Marshall observed that "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would be the painful duty of this tribunal... to say that such an act was not the law of the land."[56] Since then, the Court has suggested that it has a duty to investigate whether government actors are using pretextual justifications to exceed their constitutional authority in equal protection and commerce clause cases, as well as in cases interpreting the scope of Congress' Fourteenth Amendment enforcement powers.[57]

Justice Stevens' observation in *Kelo* that the City would not be "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit" is consistent with this tradition.[58] The need to distinguish constitutionally valid takings for public purposes from invalid takings for private purposes helps explain the significance that the Court placed on planning in *Kelo*. Just as planning informs decisions about the weight of the government's interest in regulatory takings cases, planning can instruct a reviewing court about the legitimacy of the government's motivations in public use cases. Both

53. 544 U.S. 528, 531 (2005) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

54. *See id.* at 543.

55. *See Kelo*, 545 U.S. at 488.

56. McCulloch v. Maryland, 17 U.S. 316, 423 (1819).

57. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 650–56 (1966) (applying *McCulloch*'s reasoning); City of Boerne v. Flores, 521 U.S. 507, 532 (1997) ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 414–18 (2d ed. 2002) (discussing review of facially neutral laws in dormant commerce clause cases).

58. Kelo v. City of New London, 545 U.S. 469, 478 (2005); *see also id.* at 491 (Kennedy, J., concurring) ("A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular party, with only incidental or pretextual public justifications.").

the majority opinion in *Kelo* and Justice Kennedy's concurrence suggest that planning almost always precludes a finding of pretext. Indeed, it is telling that immediately after explaining the illegitimacy of pretextual public takings, Justice Stevens exclaims, "The takings before us, however, would be executed pursuant to a 'carefully considered' development plan."[59] Whether planning actually serves to prevent the government from using the power of eminent domain to advance private purposes is a subject of further discussion below. As a matter of federal constitutional law, however, it is fairly clear that *Kelo* proceeds on the assumption that planning and pretext are usually incompatible.

C. The Significance of Planning in Future Public Use Litigation

Most post-*Kelo* public use litigation will take place in state courts, not federal ones. Not only did *Kelo* reemphasize that the role of federal courts in reviewing compensated takings is "extremely narrow,"[60] but, since the decision, many state legislatures are considering—or have enacted—laws restricting the power of eminent domain.[61] Several state courts have also entered the fray by interpreting state constitutional limits to prohibit the kind of takings at issue in *Kelo*.[62] Still, *Kelo* leaves open the possibility of future federal public use challenges by reemphasizing that the Fifth Amendment prohibits the use of eminent domain to advance a purely private purpose. Since it is reasonable to expect that few Takers will be so sloppy as to admit that the eminent domain power is being exercised for purely private purposes, both state and federal courts likely will face allegations that assertions of public purposes are pretextual. It is here that *Kelo* carves out a role for planning: government officials will view planning as a constitutional safe harbor and private litigants will consider a lack of planning a constitutional red flag. This Section briefly examines two practical ramifications of these assumptions. First, the failure to plan may lead to the invalidation of some takings, regardless of the potential public benefits that might be generated. Second, *Kelo*'s planning mandate may

59. *Id.* at 478 (majority opinion); *see also id.* at 493 (Kennedy, J., concurring) (arguing that a presumption of invalidity was inappropriate because "[t]his taking occurred in the context of a comprehensive development plan").

60. *Id.* at 500 (Kennedy, J., concurring) (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)); *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) (quoting *Berman*).

61. *See* Castle Coalition, *supra* note 4 (tracking eminent domain reform in state and federal legislatures).

62. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 770 (Mich. 2004) (invalidating economic development takings on state constitutional grounds); City of Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006) (holding that Ohio Constitution prohibits use of eminent domain solely to promote economic development).

limit the government's ability to resort to "quick-take" eminent domain procedures in some contexts.

1. *Planning and Pretext*

My first observation about how *Kelo*'s planning mandate may play out in subsequent cases is what might be called the Costco/NASCAR problem—that is, takings justified by the need for "economic development," but occurring outside of a comprehensive development plan, may become constitutionally suspect. In two now-notorious cases involving such takings, courts relied on the lack of pre-takings planning to reject as pretextual an "economic development" rationale. First, in *99 Cents Only Stores v. Lancaster Redevelopment Authority*, a district court rejected a local government's effort to condemn property leased by the plaintiff in order to accommodate the expansion demands of the discount retailer, Costco Wholesale Corporation.[63] Both stores were located in a shopping center known as the "Power Center." Although a recent comprehensive study had found that Costco should expand onto a vacant parcel of land, Costco demanded that the Authority condemn the space occupied by 99 Cents Only.[64] At this point, "fearful of Costco's relocation to another city," the Authority relented. The Authority agreed to acquire 99 Cents Only from its landlord through a "friendly eminent domain proceeding," in which the city would purchase the property for $3.8 million, relocate 99 Cents Only, and sell the property to Costco for one dollar.[65]

The district court found that the Authority's assertion that the condemnation was necessary to prevent the "reestablishment of blight" was "palpably without reasonable foundation" and thus, invalid even under *Midkiff*'s lax standards. The court reasoned that the asserted public purpose of future-blight prevention was pretextual:

> In this case, the evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. Indeed, Lancaster itself admits that the *only* reason it enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco.[66]

In rejecting the Authority's argument that acceding to that demand was in the public interest because the loss of an "anchor tenant" would doom the Power Center to failure,[67] the district court noted that the asserted

63. 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).
64. *Id.* at 1126–27.
65. *Id.* at 1126.
66. *Id.* at 1129 (emphasis added).
67. *Id.*

public use justifying the taking (blight prevention) emerged in litigation.[68] The need to placate Costco to prevent blight therefore did not result from the kind of "carefully considered" planning that the *Kelo* Court thought characterized New London's efforts. On the contrary, the only available plans—conceived by the Power Center's owner—suggested that Costco expansion could, and should, be accommodated without seizing 99 Cents Only.

In *Southwestern Illinois Development Authority v. National City Environmental* (*SWIDA*), the Illinois Supreme Court similarly rejected as pretextual an assertion that a challenged condemnation would promote economic development.[69] In 1998, Gateway International Motorsports Corporation sought to purchase its neighbor, National City Environmental, for parking needed to accommodate its expansion plans. National City refused to discuss the matter. Rather than attempt further negotiations, Gateway filed a "Quick-Take Application Packet" with the Southwestern Illinois Development Authority (SWIDA). The application asked SWIDA to condemn the land for Gateway in exchange for an application fee and a commission.[70] National City countered that this use of the eminent domain power was inconsistent with the takings clauses of the United States and Illinois Constitutions. The Illinois Supreme Court agreed. The court accepted that the stated justifications for the condemnation—the promotion of economic development and the minimization of traffic problems associated with the racetrack—were "public" ones. It reasoned, nevertheless, that the means by which SWIDA sought to advance that goal—to "advertise that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers"—exceeded the state and federal constitutional limits on the eminent domain power.[71]

In the months leading up to the litigation in the case, both SWIDA and the local county board held hearings and made specific findings that the additional parking would serve both an economic development and public safety function; again at the trial court level, SWIDA proffered expert testimony suggesting that inadequate parking at the Gateway facility posed serious public safety problems.[72] This evidence failed to convince the Illinois Supreme Court, in large part because of SWIDA's failure to plan. The court observed:

68. *Id.* at 1130.

69. 768 N.E.2d 1 (Ill. 2002). The opinion reversed an earlier decision upholding the condemnation. No. 87809, 2001 Ill. LEXIS 478 (Ill. Apr. 19, 2001), *vacated and reh'g granted*, 748 N.E.2d 194 (Ill. 2001).

70. *See SWIDA*, 768 N.E.2d at 4.

71. *Id.* at 10.

72. *Id.* at 4–6.

> SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack. . . . Clearly, the foundation of this taking is rooted not in the economic and planning process with which SWIDA has been charged. Rather, this action was undertaken solely in response to Gateway's expansions goals . . . . It appears SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan.[73]

Because *Kelo*'s reliance on planning suggests the impermissibility of *not planning*, future litigants undoubtedly will ask courts to draw similar inferences from a lack of planning. For this reason, *National City Environmental* should sound a cautionary note for government officials eager to accommodate the demands of private interests promising "economic development" in exchange for compulsory land acquisition services.

In a recent case, the Rhode Island Supreme Court drew such an inference. In *Rhode Island Economic Development Corporation v. Parking Company*,[74] the court held that the acquisition of an airport parking facility ran afoul of the Fifth Amendment's public use limitation after finding that the asserted "economic development" rationale was pretextual. The facts of the case were unusual and convoluted. In exchange for the construction of a multi-million dollar parking facility adjacent to the Providence airport, the Rhode Island Department of Transportation granted a private company the exclusive right to operate all airport parking concessions for twenty years. The parties also entered into an option contract, granting the airport authority the right to buy out the contract in accordance with a sliding scale of stipulated purchase prices. During the late 1990s, the parties agreed to expand the facilities devoted to valet parking at the airport.

Unfortunately, demand for this high-end service fell precipitously following the terrorist attacks on September 11, 2001. In an effort to increase parking revenues, the airport authority then sought to convince the owner of the parking facility to move or close the valet parking service. When the parking company refused, the airport authority sought to acquire a "temporary easement" in the facility by eminent domain. This easement would have enabled the airport authority to operate the parking facility and would have effectively negated the original twenty-year agreement between the parties.[75] The Rhode Island Supreme Court held that the taking was unconstitutional, finding that assertions that acquiring an easement would "enable [the airport authority] to promote a growing economy, [and] encourage the expansion of... commercial

73. *Id.* at 10.
74. 892 A.2d 87 (R.I. 2006).
75. *Id.* at 91–95.

industry" were conclusively unsupported.[76] The court ruled that the taking was "arbitrary" and in "bad faith," observing that "such hasty maneuvering bears little resemblance to the comprehensive and thorough economic development plan that was undertaken and upheld . . . in [*Kelo*]."[77]

Read together, these three cases suggest that some takings that generate significant public benefits may be unconstitutional if a court can reasonably infer that the public economic benefits were not the actual reason the property was taken. The possibility of this inference is particularly likely when the primary beneficiary is a private party demanding property. Consider, as a final example, a never-litigated case in the community where I live. AM General, L.L.C., has manufactured High Mobility Multi-Purpose Wheeled Vehicles (or "Humvees") for the U.S. military at a plant in unincorporated St. Joseph County, Indiana since 1986. In 1992, AM General began to use this plant to manufacture ultra-luxury sport utility vehicles (known as the "Hummer" or "H1") for civilian use.[78] In December 1998, General Motors (GM) approached AM General about purchasing the "Hummer" trademark, a move which would enable GM to manufacture a more affordable Hummer sport utility vehicle. The two automakers agreed that GM would acquire exclusive rights to the Hummer trademark and that AM General would manufacture the smaller, more affordable, "H2" for GM. This agreement was conditioned upon AM General acquiring the property for a new 630,000-square-foot manufacturing facility very quickly.[79]

AM General and GM decided to build the new plant directly adjacent to the existing Humvee facility.[80] To complete the project, AM General needed to acquire fifty-two separate lots in a low-density, blue-collar, residential neighborhood. During the negotiations with GM, AM General secured assurances that St. Joseph County would acquire the land needed by eminent domain if necessary to complete the project on time.[81] After the deal was finalized, the County began to take steps to pave the way for condemnations, including declaring the parcels in question "blighted."[82] These initial legal moves upset residents,[83] and

76. *Id.* at 106.

77. *Id.*

78. *See* AM General: Corporate History, http://www.amgeneral.com/corporate_history.php (last visited Mar. 6, 2007).

79. Interview with Craig MacNab, Dir. of Pub. Relations, AM General, in South Bend, Ind. (July 8, 2005) [hereinafter *McNab Interview*]; *see also* Anita Munson, *Concrete Poured for Plant*, SOUTH BEND TRIB., Aug. 16, 2000, at B8.

80. *McNab Interview*, *supra* note 799; *see also* Munson, *supra* note 79.

81. Interview with Patrick McMahon, Exec. Dir., ProjectFuture, in South Bend, Ind. (July 29, 2005) [hereinafter *McMahon Interview*].

82. *Id.*

lawyers for objecting property owners threatened to challenge the County's acquisitions on public use grounds.[84] At this point, the County agreed to allow more time for private negotiations. Over the following few months, the County purchased all of the properties voluntarily, but under the threat of eminent domain. The County now leases the property back to AM General.[85]

In the post-*Kelo* world, would the County's threatened resort to eminent domain withstand public use scrutiny? The answer is less clear than angry post-*Kelo* rhetoric might suggest. Certainly, the stated justification for the takings—economic development[86]—is now established as a constitutionally valid purpose. And, the County had good reason to believe that the plant would promote economic development. The H2 facility was projected to create 1,500 new manufacturing jobs—a prize in any Rust Belt community.[87] Yet, the project would also raise many of Justice Kennedy's red flags—the private beneficiaries (AM General and GM) were clearly identifiable; the project arose at the request of (or behest of) AM General, who in turn was responding to a demanding timetable imposed by GM. While St. Joseph County has a general policy of promoting industrial development whenever possible, this particular project took place outside of the normal planning process.[88] It is too soon to tell how *Kelo*'s planning mandate will play out in such cases, but undoubtedly future litigants will force courts to define the role of planning in economic development efforts that rely on the use—or threat—of eminent domain.[89]

2. *Planning and Quick-Take*

Second, some property owners may turn *Kelo*-inspired planning efforts against Takers, using planning as a basis for challenging their decision to use "quick-take" eminent domain powers. State and federal

83. *See* Deanna McCool, *2 Owners Find AM General Deal Fair*, SOUTH BEND TRIB., Mar. 29, 2000, at D1 (noting that "17 homeowners . . . file[d] a remonstrance opposing a blight designation for the area").

84. *See* Rick Thackery, *Proposed Hummer Plant Raises Eminent Domain Questions*, IND. LAW., Mar. 29, 2000, at 6.

85. *See id.*

86. Before condemning the properties, the County also would have had to declare them "blighted," which undoubtedly would strengthen the constitutional case. *McMahon Interview*, *supra* note 81.

87. *See* Jack Colwell, *Homeowners Near Plant Get More Time; Company Says Project Will Proceed*, SOUTH BEND TRIB., Feb. 23, 2000, at A1.

88. *See* Kelo v. City of New London, 545 U.S. 469, 491–92 (2005) (Kennedy, J., concurring) (discussing factors that may raise suspicion of pretext). On economic development in St. Joseph County, Indiana, see Project Future, http://www.projectfuture.org/ (last visited Mar. 6, 2007).

89. *See, e.g.*, W. Seafood Co. v. United States, 202 F. App'x 670 (5th Cir. 2006) (rejecting property owner's claim that asserted public purpose was pretextual because the extensive pre-takings planning paralleled New London's efforts in *Kelo*).

quick-take statutes permit the government to obtain title and possession to property prior to a final judgment in an eminent domain action.[90] Quick-take procedures are usually justified by something akin to the Fourth Amendment doctrine of "exigent circumstances"—that the delay attendant to a full condemnation proceeding would jeopardize many public projects. For example, the leading eminent domain treatise states that quick-take statutes were enacted after "urgent public transportation, communication, and urban renewal projects illustrated the many inadequacies in the traditional [eminent domain] procedures."[91] The Supreme Court approved of quick-take in principle as early as 1890, when, in *Cherokee Nation v. Southern Kansas Railway Co.*, the Court upheld a federal statute that authorized the defendant to enter into tribal lands for the purpose of constructing a railroad.[92] The Court rejected the Cherokee Nation's argument that the law violated the Takings Clause because it did not require the railroad to provide compensation before occupying the land and beginning construction.[93] The Court has reaffirmed this holding on several subsequent occasions.[94]

These cases do not necessarily imply, however, that quick-take procedures are constitutional in all of their applications. The Supreme Court has expressed a strong preference for as-applied constitutional challenges,[95] which, in the eminent domain context, might require a showing that the resort to quick-take powers was necessary to the success of a particular project. Yet extensive pre-taking planning arguably undercuts the "exigency" justification for seizing property prior to adjudicating takings claims. Planning takes time—the very thing that Takers exercising quick-take powers argue they cannot afford to spare. Some litigants, therefore, may attempt to use Taker's efforts to comply with *Kelo*'s planning mandate to challenge the resort to quick-take

90. *See* Declarations of Taking Act, 40 U.S.C. §§ 3114–3115 (2006); SACKMAN, *supra* note 42, ¶ 24.10. The standard quick-take procedure requires the condemner to file a "declaration of taking" as well as deposit of the appraised fair market value of the property with the court. *See* SACKMAN, *supra* note 42, ¶ 24.10.

91. SACKMAN, *supra* note 42, ¶ 24.10[2].

92. 135 U.S. 641 (1890).

93. *Id.* at 658–59 ("The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation be actually paid in advance of the occupancy of the land to be taken.").

94. *See, e.g.*, Bragg v. Weaver, 251 U.S. 57, 58–59 (1919); Sweet v. Rechel, 159 U.S. 380, 400–03 (1894).

95. *See, e.g.*, United States v. Salerno, 481 U.S. 739 (1987). The *Selamo* Court held:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

Id. at 745.

authority. Limiting quick-take eminent domain powers to truly "exigent" situations also would be consistent with the procedural due process principle that "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking."[96]

III. WHY PLAN? NONCONSTITUTIONAL DIMENSIONS OF *KELO*'S PLANNING MANDATE

Kelo's reliance on planning has practical as well as constitutional significance. Indeed, the legal significance of the Court's discussion of planning is far more difficult to predict than Takers' practical response to it. Since *Kelo* encourages planning, more planning will occur. This final Part of the Article therefore briefly considers three arguments that a constitutional rule encouraging pre-takings planning may produce better takings policy. First, it is possible that participatory planning processes may minimize the non-instrumental, dignitary harms generated by the use of eminent domain to achieve private-to-private transfers of property. Second, planning may reduce the likelihood that Takers will use the "economic development" rationale to disguise the use of eminent domain for purely private purposes. And, third, planning may increase the likelihood that economic development projects will succeed.

A. Planning and Legitimacy

In my previous work, I argued that economic development takings may generate high, non-instrumental dignitary losses—uncompensated harms that result from the nature of the government's action, rather than the property's subjective or economic value to an owner.[97] I based this conclusion on a number of related factors. First, every exercise of eminent domain "singles out" individual property owners to bear the cost of advancing broader societal goals.[98] Knowing that the government could

96. Zinermon v. Burch, 494 U.S. 113, 132 (1990); *accord* Parratt v. Taylor, 451 U.S. 527, 541 (1981) (rejecting demand for pre-deprivation hearing because it is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place). Furthermore, in a situation analogous to the taking of property by eminent domain, the Supreme Court invalidated on due process grounds state laws permitting the replevin of personal property prior to a pre-confiscation hearing, Fuentes v. Shevin, 407 U.S. 67 (1972), although lower courts have rejected efforts to extend this rule to invalidate quick-take eminent domain procedures. *See* Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312 (4th Cir. 1983); Vazza v. Campbell, 520 F.2d 848 (1st Cir. 1975); Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex.), *aff'd*, 419 U.S. 1042 (1974).

97. *See* Garnett, *supra* note 5.

98. *See, e.g.*, James G. Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1305–06 (1985) (arguing that eminent domain results in high demoralization costs because it pits individuals against the state); *see also* Levmore, *supra* note 27, at 1344 (articulating "singling out" as basis for compensation); Glynn S. Lunney, Jr., *A*

have taken someone else's property may lead owners to feel that the government has treated them unfairly vis-à-vis others whose property was not taken. Economic development takings may also generate what might be called "expressive" harms.[99] Owners may be insulted by the taking, viewing it as tantamount to a government declaration that their property would be put to a more socially beneficial use by someone else. Indeed, some owners sound as if they were motivated to file public use claims in part because they are so offended by the message sent by the taking.[100] The insult is amplified by the fact that, as Jim Krier and Christopher Serkin have observed, many economic development condemnations leave owners in a particularly unenviable position. Not only have they been singled out to bear the brunt of generating public benefits, but their very displacement also makes it likely that they will not enjoy the benefit of the prosperity promised by the economic development project.[101] Finally, the private beneficiaries frequently receive a windfall from the transaction. In the economic development context, eminent domain almost always generates assembly gains that raise the value of the property. Because the fair market value determination is made before the condemnation, however, the original owner does not share in any increase of that value.[102] The allocation of the "condemnation bonus" entirely to the private beneficiaries of takings may demoralize property owners. Abraham Bell and Gideon Parchamovsky have observed that "[w]hile people can view windfalls that befall another with sanguinity, when the windfall arrives as a result of a strategic and deliberate decision

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Critical Reexamination of the Takings Jurisprudence, 90 MICH. L. REV. 1892 (1992) (greater scrutiny needed when concentrated groups impose costs on individuals); Merrill, *supra* note 26, at 880 (arguing that "fair share" justification for regulatory takings reflects principle that the Takings Clause prohibits "spot" redistribution).

99. On expressivism, *see, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1528 (2000) ("A person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her.").

100. *See* Eleanor Charles, *Eminent Domain Challenged in New London Project*, N.Y. TIMES, Apr. 1, 2001, at 9 (describing residents' reactions to New London, Connecticut eminent domain and commercial development); Sylvian Metz, *Family Awarded for Nissan Land Battle*, CLARION-LEDGER (Jackson, Miss.), Mar. 31, 2003, at 1B (describing residents' reactions to Canton, Mississippi eminent domain and commercial development).

101. James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 867–69.

102. *See* Olson v. United States, 292 U.S. 246, 256 (1934) ("[V]alue to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking."); EPSTEIN, *supra* note 40, at 163–64 (questioning division on fairness grounds); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 85 (1986) (noting that "eminent domain almost always generates a surplus" which is awarded solely to the condemnor); *cf.* United States v. Miller, 317 U.S. 369, 377 (1943) ("The owners ought not to gain by speculating on probable increase in value due to the Government's activities.").

of the government, the reaction may turn to resentment and frustration."[103]

One potential benefit of pre-takings planning is that the participation in the planning process by those targeted property owners might help minimize these dignitary harms and lend legitimacy to otherwise suspect takings policy. For example, the literature on regulatory negotiations generally suggests that participatory rulemaking generates a "legitimacy benefit." Empirical studies of regulatory negotiations have found that participants are more satisfied with both the process and the results of collaborative rulemaking than the traditional administrative rulemaking process.[104] And, in the land use planning context, the new urbanists similarly rely on lengthy, participatory community negotiation sessions—called "charettes"—to build consensus among the diverse interests affected by planning efforts.[105] More broadly, the idea that public participation lends legitimacy to governance efforts finds support in the civic republican tradition,[106] as well as the literature on the dignitary value of due process, which proceeds upon the assumption that "the right to be heard" prior to an adverse government action is itself intrinsically valuable.[107]

The extension of the "participation yields legitimacy" argument to the eminent domain context, however, is problematic for at least two related reasons. First, as Saul Levmore has observed, "A central theme of takings law is that protection is offered against the possibility that

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103. Abraham Bell & Gideon Parchamovsky, *Givings*, 111 YALE L. J. 547, 579 (2002).

104. *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L. J. 60, 62, 67, 80, 109–10 (2000) (discussing comprehensive study of EPA's negotiated rulemaking process, which found that negotiations reduce conflict and increase participant satisfaction and commitment to results). *But see* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (providing empirical account that regulatory negotiations neither reduces rulemaking time nor post-rulemaking litigation); *cf.* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000) (disputing Coglianese's methodology and findings). *See generally* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 89 (1995) (arguing for reforms "enhancing public involvement in the regulatory process, largely in order to build trust").

105. *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 162 (1999).

106. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988) (discussing literature).

107. *See, e.g.*, William J. Brennan, *Reason, Passion and the "Progress of the Law,"* 10 CARDOZO L. REV. 3, 19–20 (1988) (arguing that post-termination hearing may not adequately protect dignitary interests); Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153 (identifying, among purposes of hearing requirement, "dignity values," including "concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate," and "participation values," such as "an appreciation of litigation as one of the modes in which persons exert influence or have their wills 'counted'"). *See generally* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 222–53 (1985).

majorities may mistreat minorities."[108] While *Kelo* reemphasizes that the Takings Clause protects against majoritarian abuses primarily through the compensation guarantee, the claim that participation legitimizes majoritarian decisions to single out property owners to bear public burdens is not entirely congruous with the idea of the Takings Clause as a minoritarian right. The second difficulty with assuming that planning can legitimize takings policy is captured in Carol Rose's colorful observation that "[t]here is just something about land that makes you think that when you own it, it is really, really yours."[109] The loss of the autonomy guaranteed by private property may be a primary cause of the "dignitary harms" that attend an exercise of eminent domain. Individuals whose property is taken by eminent domain may feel unsettled and vulnerable when they learn that the government plans to take their property. Eminent domain obviously eviscerates the physical autonomy guaranteed by the boundaries of private property.[110] A compulsory taking deprives an owner of her "most essential right" to exclude others—including, especially, the government—from her property.[111] Expanding the scope of the takings power may increase all property owners' feelings of vulnerability. As Justice O'Connor noted in *Kelo*, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[112]

B. Avoiding Pretext

A second potential real-world benefit of *Kelo*'s planning mandate is suggested by Justice Kennedy's concurrence—that planning will protect against the real possibility that Takers will respond to illegitimate overtures of developers seeking private benefit. The risk of private rent seeking in situations like the one facing New London prior to *Kelo* is certainly substantial. It is no secret that local government officials with

108. Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 309 (1990).

109. Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1143 (1996) (reviewing WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)).

110. *See, e.g.*, Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 345 (1996) (describing the "independence argument" for property).

111. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) ("[T]he landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights characterized as property.'") (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna*, 444 U.S. at 176); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (quoting *Loretto*, 458 U.S. at 433).

112. 545 U.S. 469, 503. (O'Connor, J., dissenting); *see also* William A. Fischel, *The Political Economy of Public Use in* Poletown: *How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 949 ("Expansion of eminent domain's scope raises the anxiety that even more uses will soon be found, and no one's property will be safe.").

their "economic back to the wall"[113] have demonstrated a seemingly limitless willingness to promote development through a dizzying array of subsidies, including the sale (or sometimes the gift) of property seized by eminent domain.[114] Both practical experience and economic theory demonstrate why the government's ability to bypass the market, and therefore avoid holdouts and other land assembly problems, makes eminent domain an attractive "incentive" to offer to private companies. The potential beneficiaries have a substantial incentive to engage in rent seeking to secure the benefit of this bypass (not to mention to capture all or part of the "condemnation bonus" discussed above).[115]

Will comprehensive planning temper local officials' desire to respond to private entities promising to promote economic development in exchange for free land?[116] The evidence is mixed. On the one hand, the planning process may give property owners (and especially homeowners) an opportunity to organize so as to protect their interests. As Daniel Farber has observed, homeowners targeted by eminent domain do have some advantages that increase the likelihood of political success:

> They form a small group (relative to the electorate at least) and often have high stakes (since they are about to have large amounts of property seized by the state). They also have the advantage of sharing a geographical connection, and that proximity makes it easier to form

113. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

114. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 382–89 (describing common incentives); Clayton P. Gillette, *The Law and Economics of Federalism: Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 479 (1997) (describing common incentives); Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 809–10 & n.73 (1991) (discussing enterprise zones, tax abatements and exemptions, subsidized loans and industrial revenue bonds). Government incentives for development are hardly a new phenomenon, *see* OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH (rev. ed. 1969) (describing early state development policies), but the diversity of the subsidy methods and the amount of money offered appear to have crested during the past two decades, *see* KENNETH THOMAS, COMPETING FOR CAPITAL: EUROPE AND NORTH AMERICA IN A GLOBAL ERA 159 (2000) (estimating that total subsidies from state and local governments now exceed $50 billion annually); Enrich, *supra*, at 386–87.

115. *See, e.g.*, EPSTEIN, *supra* note 40, at 161–81; Merrill, *supra* note 102, at 85–87.

116. *See* ROBERT G. DREHER & JOHN D. ECHEVERRIA, *KELO'S* UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT 20–21, 24–25 (2006) (suggesting that careful planning will forestall capture by the would-be recipients of property seized by eminent domain); AM. PLANNING ASS'N, POLICY GUIDE ON PUBLIC REDEVELOPMENT 13 (2004) (arguing that "an open and inclusive public participation process will prevent the frequent accusations of secret government maneuverings and developer favoritism that often plague redevelopment programs"); John D. Echeverria, *The Triumph of Justice Stevens and the Principle of Generality*, 7 VT. J. ENVTL. L. 22 (2005–2006), *available at* http://www.vjel.org/articles/pdf/ sorryforthepdf5.pdf (arguing that the "generality" of New London's development plan safeguards against "faction" and "singling out").

> into a group and to identify them in the first place. As neighbors, they are likely to have community ties that make organization easier.[117]

On the other hand, the "developer influence model" of public choice theory posits that developers—including the would-be beneficiaries of economic development takings—frequently are a dominating force shaping the outcome of the planning process, rather than the passive followers of the rules that emerge from it.[118] And, even those scholars (especially William Fischel) who make the case that homeowners usually exert more influence than developers in local planning processes[119] agree that the "influence model best fits central cities, and the majoritarian model, elite suburbs."[120]

In other words, developers are most likely to exert influence over the planning processes in the very communities most likely to engage in comprehensive redevelopment efforts like New London's Fort Trumbull project—center cities struggling to redevelop struggling urban cores.[121] And, it is worth remembering that, despite the Court's insistence in *Kelo* that Pfizer was not the moving force behind (or primary beneficiary of) the Fort Trumbull project, Pfizer was the "10,000 pound gorilla" in discussions about what uses to incorporate into the development plan.[122] As Susette Kelo's lawyers emphasized in their brief before the Court:

> [T]he development plan contains all of Pfizer's "requirements" that it set forth in agreeing to build its global research facility in New London: a luxury hotel for its clients, upscale housing for its employees, and office space for its contractors . . . as well as the overall "redevelopment" of the Fort Trumbull neighborhood adjacent to Pfizer, in addition to other upgrades to the area that it demanded: renovation of the state park and sewage treatment plant upgrades.[123]

Indeed, the extent of the interactions between New London and Pfizer strongly suggests that planning did not eliminate private influence over

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117. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992).

118. *See, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 408–10 (1977) (describing model).

119. *See generally* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 72–97 (2001); NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 60–70 (2001) (describing "two force model of politics" in the land use planning context, which is characterized by both "fear of the few" and "fear of the many").

120. Ellickson, *supra* note 118, at 409; *see also* FISCHEL, *supra* note 119, at 90–94.

121. *See* BERNARD J. FRIEDAN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES, ch. 7 (1989) (describing modern day redevelopment efforts as a "dealmaking" process).

122. Brief of Petitioners, *supra* note 8, at 4–5 (quoting Respondent's expert).

123. *Id.* at 5.

the Fort Trumbull redevelopment effort. It remains to be seen to what extent planning can or will temper such influence in future cases.[124]

C. *Planning and Development Success*

One final question is whether *Kelo*'s planning mandate promotes sound development policy. If planning works, in other words, *Kelo* may increase the likelihood that economic development efforts will succeed by encouraging planning. As above, the evidence on this point is mixed, and worthy of more in-depth consideration than possible in this short article. Many redevelopment experts champion planning as essential to project success, as one would expect, because most redevelopment experts are themselves planners.[125] In addition to the potential legitimacy benefit outlined above, participatory planning also is said to serve an information-generating function that helps government decision makers to be better informed about the consequences of their actions.[126] That said, planning for urban redevelopment efforts like the one at issue in *Kelo* has a rather checkered record. For example, the imposition of rigid, federally mandated planning requirements—which required redevelopment agencies to conceive of a plan and acquire the land needed for it before soliciting private developers' participation—likely contributed to the failure of many redevelopment efforts during the Urban Renewal period from the 1950s through the early 1970s.[127]

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124. *See* Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy, Bad Judgment*, 38 URB. LAW. 201, 203 (2006) (arguing that "all the condemning municipality needs to do now is proffer self-manufactured plans for the proposed taking"); Douglas W. Kmiec, *The Human Nature of Freedom and Identity—We Hold More than Random Thoughts*, 29 HARV. J.L. & PUB. POL'Y 33, 45–46 (2005) (characterizing New London's development as "capture" by Pfizer and criticizing Court's reliance on "planning and town meetings" to prevent oppression by factional interests).

125. *See, e.g.*, AM. PLANNING ASS'N, *supra* note 1166; DOWNTOWNS: REVITALIZING THE CENTERS OF SMALL URBAN COMMUNITIES (Michael A. Burayidi ed., 2001).

126. *See, e.g.*, Freeman & Langbein, *supra* note 1044, at 88 (finding that regulatory negotiations generally improved quality of information available); *see also* Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, Installment 2, 24 STAN. ENVTL. L.J. 269, 309 (2005) (arguing that participatory planning has the "potential to generate land use agreements that are more legitimate and higher-quality—namely, fairer, better planned and more efficient.").

127. *See* Lyman Brownfield, *The Disposition Problem in Urban Renewal*, 25 LAW & CONTEMP. PROBS. 732 (1960). On the failure of urban renewal, see generally Schill, *supra* note 1144, at 808–09 ("The number of jobs created and amount of private sector investment generated by the program were below the hopes and expectations of its proponents. Furthermore, the human toll caused by displacement and the destabilization of nearby residential communities casts doubt on the efficacy of subsidized site assembly . . . ."); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 G.W. L. REV. 934, 954–55 (2003) (discussing literature on urban renewal).

A number of factors distinguish modern economic development efforts from Urban Renewal–era efforts, ranging from project scale to the type of planning involved (i.e., expert-driven versus participatory).[128] And, conventional wisdom also holds that local governments have gotten better at redevelopment.[129] Those touting urban "success stories" must, however, also contend with dismal failures.[130] In some cases, even floating a redevelopment proposal may cause residents and businesses to rationally anticipate future displacement by deferring maintenance and/or relocating before a mass exodus depresses property values.[131] Ultimately, the government may end up holding a large amount of land that has been rendered uninhabitable, and therefore "unrenewable," precisely because the government threatened to take the land to renew it. And, because many relocated businesses fail, renewal efforts can have the perverse effect of permanently removing businesses from downtown—a particularly troubling prospect because the businesses "renewed" out of business may be long-term stakeholders that stuck it out through economically difficult times.[132]

CONCLUSION

Kelo's third surprise—the majority's emphasis on the extensive, participatory planning—has largely been overshadowed by the post-decisional uproar in the popular press and the legislative chambers. While only time will tell how *Kelo*'s planning mandate will influence future

128. *See* Peter Hall, *The Turbulent Eighth Decade: Challenges to American City Planning*, 55 J. AM. PLANNING ASS'N 275 (1989).

129. *See generally* FRIEDAN & SAGALYN, *supra* note 1211, at 171–239 (discussing the debate over the "downtown mall" phenomenon). *Cf.* Kirk Johnson, *A Plan Without a Master: Rebuilding by Committee? Robert Moses Would Cringe*, N.Y. TIMES, Apr. 14, 2002, at 35 (discussing negatives of the "democratization" of urban planning in context of "Ground Zero" redevelopment).

130. *See generally* John P. Elwood, *Rethinking Government Participation in Urban Renewal: Neighborhood Revitalization in New Haven*, 12 YALE L. & POL'Y REV. 138 (1994) (describing the history of failed redevelopment efforts).

131. *Id.* at 177–78; *see also, e.g.*, City of Buffalo v. George Irish Paper Co., 299 N.Y.S.2d 8, 14 (N.Y. App. Div. 1969), *aff'd*, 26 N.Y.2d 869 (1970) (holding that "cloud of condemnation" resulting from a redevelopment proposal effected a *de facto* taking of property; plaintiff's tenants refused to renew leases after learning of the plans). This problem is pervasive enough that courts have developed the doctrine of "condemnation blight" to deal with it. *See* 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN ¶ 12B.17[6] (2006) (defining condemnation blight as the "debilitating effect upon value of a threatened, imminent or potential condemnation").

132. *See, e.g.*, Elwood, *supra* note 130, at 179 (discussing business failure); Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CINN. L. REV. 333, 371 (1984):

> Perhaps the major moral issue is the basic question of whether it is morally acceptable for society to allow a poor person to be forced from his home in order to bring new investment and new people into a particular neighborhood. We have been doing that for at least forty years, but the question does not go away.

litigation and future projects, this Article represents a brief initial effort to sort through the implications—practical and legal—of the Court's decision to encourage pre-takings planning efforts.