Arguing *Kelo*

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Kelo v. City of New London *was an immensely important case about the clash between the powers of government and the right to own private property. Yet the actual decision as much reflects the specific goals of the litigants and the tactical decisions of their appellate lawyers to attain those goals as it does the clash of the conflicting constitutional principles. Reflecting on the case twenty years later, I identify a few of the pivotal strategic decisions that influenced the Supreme Court's monumental ruling and the policy consequences that followed.*

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The speakers and authors in this Symposium were mostly subject-matter experts—that is, experts on the law and public policy concerning the twelve words of the Takings Clause of the Fifth Amendment. I, who argued *Kelo v. City of New London*[1] on behalf of the defendants, am an appellate lawyer—that is, one who generally wants to know just enough about the subject matter to argue the appeal properly. In turn, those I seek to persuade, the appellate judges and Justices, generally want to know just enough about the subject matter to decide the appeal properly. Prior to my engagement in *Kelo*, I had argued close to 175 appeals, but I had never argued an appeal involving the taking of property, much less an actual Takings Clause case.

Since I am not a subject-matter expert, I will not attempt to debate with the authors in this Journal who are discussing and critiquing aspects of the merits of the *Kelo* decision. The extent to which I opine on the merits of *Kelo* is covered in an article I previously co-authored.[2] There, I argued that *Kelo* properly follows the precedents and that critics should stop focusing on whether the recipient of the taking is a private party. Rather, they should press for a muscular interpretation of Justice Kennedy's fifth-vote concurrence that would give a more significant role to the courts in deciding whether the alleged public purpose of *all* takings is a real one. For example, the Supreme Court could apply a heightened rational-basis test, as it did in *City of Cleburn v. Cleburn Living Center, Inc*.[3]

Since I am an appellate lawyer, I will discuss here the ramifications, with examples from *Kelo* itself, of the tactical decisions made by the parties and their lawyers.

The legislative and executive processes are particularly suited to the role of the subject-matter experts because they can make whatever points they want to make in public statements and speeches, in legislative-committee presentations, and directly or through lobbyists to governors, to legislators or to their staff. The judicial process is much less suited to the role of the subject-matter experts. Litigation involves specific parties who may or may not be interested in public policy but just want to win their case. Take *Kelo*. Some of the Plaintiffs, including Ms. Kelo herself, actually won in the trial court.[4] It was fortunate for the plaintiffs' public-policy arguments that they all stood together on appeal. As far as the defendants were concerned, their goal was to proceed with the project, period.

In any event, the public-policy issues that the subject-matter experts are interested in, such as the precise issue in *Kelo* (namely, whether a private party promoting an economic-development plan can be the recipient of a taking) is always going to be decided in the context of a specific factual situation. The

1. 545 U.S. 469 (2005).

2. Wesley W. Horton & Brendon P. Levesque, Kelo *Is Not* Dred Scott, 48 CONN. L. REV. 1405, 1415-18 (2016); *see Kelo*, 545 U.S. at 490-93 (Kennedy, J., concurring).

3. 473 U.S. 432, 442-47 (1985).

4. Kelo v. City of New London, No. KNL-CV-01-0557299-S, 2002 WL 500238 (Conn. Super. Ct. 2002).

details of a case may have all sorts of flaws or unusual facts that the subject-matter experts would have preferred not to focus on. In *Kelo*, for example, the developer had not been chosen at the time of the taking, a situation that probably doesn't happen very often and therefore might have been ignored in any public-policy analysis outside the litigation process. But it existed in *Kelo*, and it blunted any argument that the defendants were favoring any particular developer. So, it was a factor that I made a big fuss about on appeal and that the concurring opinion by Justice Kennedy—the crucial fifth vote—found significant.[5]

Whether a particular case is the one that gets to the U.S. Supreme Court and then determines public policy depends on the happenstance of not only the facts but also how the case was handled procedurally in the lower court. In *Kelo*, the plaintiffs almost won in the Connecticut Supreme Court, losing only on a 4-3 vote.[6]

By 2004, that court had developed a strong body of state constitutional law showing a willingness to read a provision of the state constitution more broadly than the U.S. Supreme Court had read a similar provision of the U.S. Constitution. For example, the Search and Seizure Clause of Article I, Section 7 of the Connecticut Constitution has language similar to that in the Fourth Amendment.[7] But in construing Section 7, the Connecticut Supreme Court in *State v. Marsala*[8] rejected the U.S. Supreme Court's establishment of a good-faith exception to an illegal search warrant under the Fourth Amendment in *United States v. Leon*.[9] Likewise, Article I, Section 4 is similar to the First Amendment.[10] But in construing Section 4, the Connecticut Supreme Court in *State v. Linares*[11] rejected the U.S. Supreme Court's narrow definition of a public forum in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[12] I now turn to the takings clauses. Article I, Section 11 of the Connecticut Constitution states in full: "The property of no person shall be taken for public use, without just compensation therefor."[13] This language is very similar to the Takings Clause of the Fifth Amendment, which states: "Nor shall private property be taken for public use, without just compensation."[14]

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5. *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring).

6. Kelo v. City of New London, 843 A.2d 500, 507-11, 574 (Conn. 2004).

7. *See* CONN. CONST. art. I, § 7 ("The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."); *see also* U.S. CONST. amend. IV (containing the Search and Seizure Clause of the U.S. Constitution).

8. 579 A.2d 58, 58-59 (Conn. 1990).

9. 468 U.S. 897, 900, 905-08 (1984).

10. *See* CONN. CONST. art. I, § 4 ("Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."); *see also* U.S. CONST. amend. I (containing the provisions of the U.S. Constitution protecting freedom of speech and freedom of the press).

11. 655 A.2d 737, 739-43, 751-52 (Conn. 1995).

12. 460 U.S. 37, 45-47 (1983).

13. CONN. CONST. art. I, § 11.

14. U.S. CONST. amend. V.

But the Connecticut Supreme Court also had a rule, routinely overlooked by Connecticut practitioners, that, unless the state constitutional issue was briefed separately from the federal issue, the court would treat the state provision as meaning the same thing as the federal provision. This separate briefing normally follows what is called a *Geisler* analysis,[15] which has six prongs: text of the provision, decisions of Connecticut appellate courts, federal precedent, sister state decisions, history, and economic/sociological considerations. The text is obviously the most important prong. Other than that, the decisions vary on the importance of the other five prongs in deciding particular cases. In any event, unless all six prongs discourage an independent state constitutional analysis, it should be pursued. The plaintiffs cited several Connecticut cases that were relevant to an independent state constitutional claim, but they did not set them out in a separate analysis in their brief. The court's majority was confused as to whether the plaintiffs were making a separate state constitutional claim. Nevertheless, the court held the plaintiffs strictly to the procedural rule and assumed that the state constitutional provision had the same meaning as the Fifth Amendment.[16]

Had the plaintiffs divided their brief into separate analyses, or had the court eased up on applying the procedural rule, the dissent might have picked up one of the justices in the majority. An incident occurring at the annual dinner of the Connecticut Supreme Court Historical Society in 2011 is suggestive. The Society, of which I was then and still am the President, invited Jeff Benedict, the author of a book supporting Ms. Kelo's side of the case,[17] to be the speaker at the dinner. Both he and Ms. Kelo sat with me at the head table. In a private remark that I did not hear but was attributed to Richard Palmer,[18] one of the justices in the majority, Palmer ambiguously apologized to Ms. Kelo (whether for his vote, or more generally for her ordeal, was unclear), which suggests to me that his vote may have been a close call. It was around the time of *Kelo* that Justice Palmer was developing a strong voice on state constitutional rights, as would be seen most clearly in 2008 when he wrote the 4-3 majority opinion securing a right to marriage for same-sex couples under Article I, Section 20 of the state constitution.[19]

Had the dissent picked up one vote, the U.S. Supreme Court, and most of the public outside Connecticut, would never have heard of the *Kelo* case. While the plaintiffs' lawyers would have pocketed their win, they would have had to look elsewhere to find a test case for the U.S. Supreme Court.

Even when the subject-matter experts focus on the legal issues, there is a wide difference between their focus and that of the appellate lawyers. In construing the language of the last twelve words in the Fifth Amendment, the

15. *See* State v. Geisler, 610 A.2d 1225, 1232 (Conn. 1992).

16. Kelo v. City of New London, 843 A.2d 500, 521-22 & n.29 (Conn. 2004).

17. JEFF BENEDICT, LITTLE PINK HOUSE (2009).

18. *See* Jeff Benedict, *Apology Adds an Epilogue to* Kelo *Case*, HARTFORD COURANT, Sep. 18, 2011.

19. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411-12 (Conn. 2008).

subject-matter experts would examine and discuss the text, especially as to the meaning of the words in 1791; the history of takings in England and in colonial and nineteenth-century America; and relevant decisions from the U.S. Supreme Court, all other state and federal courts, and perhaps even English courts.

Yet, presumably because they thought it was the best appellate strategy, the plaintiffs in *Kelo* limited their argument to distinguishing *Berman v. Parker*,[20] a 1954 case about cleaning up blight but with broader pro-government language. Thus, they did not directly address *Berman* to see if it was wrongly decided, an argument that might have weakened their attempt to distinguish *Berman*. Because of the plaintiffs' decision, my partner Daniel Krisch, who wrote the brief, and I saw no reason to spend significant time on the history of takings or judicial precedents before 1954.

Even when given the opportunity at oral argument by Justice Souter to attack *Berman*, the plaintiffs' counsel, Scott G. Bullock, made little if any effort to do so. Bullock had just in effect agreed with Justice Scalia that "public use" means more than "public purpose." Justice Souter responded, "If that is your answer then I suppose the slum clearance cases were wrongly decided."[21] Bullock then responded to Justice Souter by saying that some of the amici had argued so, and he followed up by stating simply, "And of course, this Court is free to do so."[22]

Given Bullock's decision not to attack *Berman* or at least not to do so vigorously, I mentioned the pre-*Berman* cases only once, to emphasize to the Justices that the existing law holds that "public use" and "public purpose" are the same thing.[23] Indeed, with the exception of Justice Thomas's solo dissent, the majority opinion and the principal dissent by Justice O'Connor largely followed the tactical choices of the parties and accepted that *Berman* was the law.[24]

One peculiar aspect of the parties' lack of engagement with the pre-*Berman* cases is that the majority opinion in *Kelo* miscited some of them—starting with *Fallbrook Irrigation District v. Bradley*[25]—as Fifth Amendment cases when they actually were only Fourteenth Amendment Due Process Clause cases. Justice Stevens, the author of the majority opinion, later admitted the mistake in a law-review article but said it would not have affected the result.[26]

Another peculiar aspect of the parties' lack of engagement on the pre-*Berman* cases is that, in my preparations for oral argument, I did not have to

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20. 348 U.S. 26, 28, 33-34 (1954).

21. Transcript of Oral Argument at 11, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

22. *Id.*

23. *Id.* at 52.

24. *Kelo*, 545 U.S. at 480-86 (majority opinion); *id.* at 498-505 (O'Connor, J., dissenting); *id.* at 514-21 (Thomas, J., dissenting).

25. 164 U.S. 112 (1896).

26. John Paul Stevens, Kelo*, Popularity and Substantive Due Process*, 63 ALA. L. REV. 941, 946 (2011).

worry about being grilled on that subject by Justice Thomas. It was common knowledge that he was less enamored of *stare decisis* than the other Justices when it came to constitutional questions, but it was also well-known in 2004 that he hardly ever spoke at oral argument, unlike today.[27] I was glad about this because I did not particularly want to discuss the pre-*Berman* cases, especially since the earliest of the modern cases, *Fallbrook*,[28] was authored by Justice Rufus Peckham, of *Lochner v. New York*[29] fame. However, Justice Thomas's silence at oral argument did not affect his blistering attack on the pre-*Berman* cases in his solo dissent.[30]

Another tactical choice made by the plaintiffs in their brief was to emphasize their complete-win argument—namely, that private economic-development takings are always a violation of the Takings Clause. In the 4-3 decision of the Connecticut Supreme Court, even the three dissenting justices agreed that the Fifth Amendment permitted such takings.[31] The disagreement was over whether there should be a stricter constitutional test for such takings. The dissenters discussed their test at length and explained in detail why the economic plan proposed would not meet any such test.[32] The dissenters certainly teed up that issue if the plaintiffs had wanted to focus on it in the U.S. Supreme Court.

The plaintiffs did brief the Connecticut dissenters' issue in the U.S. Supreme Court, but it was clearly subordinate to their main argument, that private economic-development takings are never proper. The defendants' brief likewise subordinated the dissenters' issue.[33] At the oral argument, Bullock did not even mention this issue in his opening argument until page seventeen of the oral-argument transcript,[34] and he did not mention it at all in his rebuttal.[35] I mentioned the issue in my oral argument only when I was asked about it, and my response was that there was no reason to have one test for *Berman* and a different test for *Kelo*.[36] Once again, the majority and dissenting opinions largely followed the tactical decisions of the parties and spent little time on the issue.[37]

27. Nicholas Goldberg, *What Does it Mean that Famously Silent Justice Clarence Thomas Is Suddenly Garrulous?*, L.A. TIMES (May 27, 2021, 3:10 AM PT), https://www.latimes.com/opinion/story/2021-05-27/clarence-thomas-speaking-oral-arguments [https://perma.cc/6N47-U7J4].

28. 164 U.S. 112 (1896).

29. 198 U.S. 45 (1905).

30. Kelo v. City of New London, 545 U.S. 469, 514-18, 523 (2005) (Thomas, J., dissenting).

31. Kelo v. City of New London, 843 A.2d 500, 592-93 (Conn. 2004) (Zarella, J., dissenting).

32. *Id.* at 581-600 (Zarella, J., dissenting).

33. Brief of Respondents at 22-23, 45-46, *Kelo*, 545 U.S. 469 (No. 04-108).

34. Transcript of Oral Argument, *supra* note 21, at 17.

35. *See id.* at 55-57.

36. *Id.* at 27.

37. *Kelo*, 545 U.S. at 487-88 (majority opinion) (including one paragraph on the plaintiffs' proposed test). Justice O'Connor's dissent did not mention the test at all.

Timing matters. Most experts did not think the plaintiffs' petition for certiorari would be granted.[38] I did not think so either. I had consulted with the defendants when the case was before the Connecticut Supreme Court. Once that court reached a decision and the plaintiffs filed their petition, I was retained at a small fee to oppose it. I threw in handling the appeal if certiorari was granted because it obviously wasn't going to happen.

There did not seem to be much going on legally to interest the U.S. Supreme Court, which hadn't considered the issue since 1984, when it decided *Hawaii Housing Authority v. Midkiff*,[39] a case permitting the breaking up of a land oligopoly in Hawaii and that quoted the broadly permissive language of *Berman.* There was no conflict among the federal circuits, and it was unlikely that there would be because *Berman* had such broadly permissive language.

In addition, a Catch-22 procedural rule made it almost impossible to get into the federal courts: before going to federal court you had to exhaust your state remedies, but when you did you almost always got a state-court decision on the Fifth Amendment issue that then was res judicata, preventing review by the federal courts (except of course by the U.S. Supreme Court).[40]

So, the Connecticut Supreme Court decided the appeal on March 9, 2004, and the plaintiffs filed their petition on July 19, 2004. And, what do you know, on July 30, 2004, the Michigan Supreme Court came down with a high-visibility decision[41] overruling its 1981 decision under the Michigan Constitution that had permitted a taking for a huge private economic plan prepared by General Motors.[42] While the decision had nothing directly to do with the Fifth Amendment of the U.S. Constitution, the validity of private economic-development plans was suddenly a big issue. And then it was our turn on August 18, 2004, to file an opposition to the petition and still claim that this case was of no interest to the U.S. Supreme Court. Of course, one month later the plaintiffs' petition was granted, and we now know from Justice Stevens' papers that seven of the nine Justices, including Justice Stevens himself, voted to hear the case.[43] As I said, timing matters.

Once the petition was granted, both sides rushed to the Solicitor General's Office. Why? While the taking did not involve the federal government, the government obviously would be affected by any ruling on the Takings Clause. And it was well-known that having the United States on your side dramatically improves your chances of success. In the end, the George W. Bush administration

38. Ilya Somin, *What I Learned from Justice Stevens' Papers on* Kelo v. City of New London, REASON (May 5, 2023), https://reason.com/volokh/2023/05/05/what-i-learned-from-justice-stevens-papers-on-kelo-v-city-of-new-london [https://perma.cc/D79T-5JLP].

39. 467 U.S. 229, 231-32, 240-43 (1984).

40. Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985). This case was overruled long after *Kelo* in *Knick v. Township of Scott*, 588 U.S. 180, 184-86 (2019).

41. County of Wayne v. Hathcock, 684 N.W.2d 765, 784-87 (Mich. 2004).

42. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 459-60 (Mich. 1981).

43. *See* Somin, *supra* note 38.

decided to sit it out, although the renowned advocate Edwin S. Kneedler of the Solicitor General's office, who retired this year, always took my calls.

At the same time we were contacting the Solicitor General's office, a large number of public- and private-interest groups on both sides started calling our office to request our consent to file an amicus curiae brief. We quickly learned that any objection would tag us as neophytes since it would certainly be futile, so we had none. More important was what to do, if anything, about coordinating the work of the favorable amici. It would be useful for each of them to focus on different aspects of the issue. It was also important to avoid, if possible, having anyone supporting us by taking extreme positions or writing intemperately. But our office had research to do for our brief and so had little time to devote to the amici. In the end, an amici coordinator not related to our office took charge of reviewing the amici briefs. Our office stayed clear of those briefs until it was time for us to select attorneys for some of the amici to participate in mooting me.

Appellate lawyers count votes. Going into *Kelo*, I counted four votes our way—Justices Stevens, Souter, Ginsberg, and Breyer; three votes the plaintiffs' way—Chief Justice Rehnquist and Justices Scalia and Thomas; and two votes in play—Justices O'Connor and Kennedy. I recall the plaintiffs' counsel saying that they reached the same conclusion. So, I needed one vote and they needed two. I decided that the facts, not legal theory, would be more likely to convince one of them. Justice O'Connor was my first choice for a fifth vote because she had authored the unanimous decision in *Midkiff*.

I had lots of excellent facts besides the absence at the taking of a known developer: New London was poor; it was geographically tiny at less than six square miles; there was a huge holdout problem because the ninety-six-acre site contained around 115 separate properties; the public was kept notified during the deliberative process; the state supported the project; the project wasn't displacing minorities; and the possible favoritism issues involving Pfizer Corporation and a small ethnic club had made no headway even with the three dissenters on the Connecticut Supreme Court.[44] Most importantly, the developer to be chosen would be required to follow the detailed plans approved by the city. So, I pushed the facts.

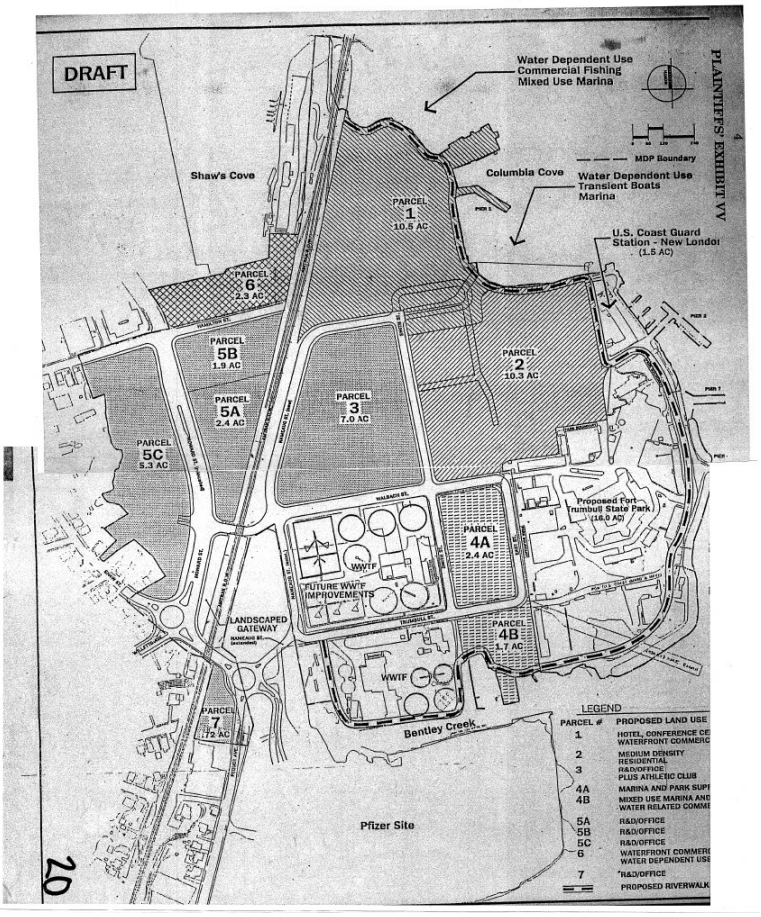
The question I had was that, given the certainty that the Justices would be aggressively questioning me on the law, how would I make sure they remained focused on the facts? So, I did what I often do when I do not have the faintest idea what to do: I stared at the ceiling. And it came to me: Hold up the Plan!

I called the clerk's office in Washington. Can I blow up the plan, in Figure 1 below, and hold it up to the Justices while I explain it to them in my oral argument? I was told that the last time something like that was done at oral argument was in the 1970s, when a lawyer held up a dead snail darter and Chief Justice Burger told him to get that fish out of the courtroom. However, the clerk

44. *See* Kelo v. City of New London, 843 A.2d 500, 595-99 (Conn. 2004).

told me that if I blew up nine copies and sent them to the Court, I could take my chances.

Figure 1



In order to talk about the facts, however, I had to be careful not to have my time gobbled up by Justice Scalia, who was sure to grill me at length on any opening I might have given him. I was mooted four times by subject-matter experts and experienced appellate lawyers in preparation for the oral argument. One of the moots was held at the Georgetown University Law Center moot courtroom, and I answered "no" when asked whether taking a Motel 6 for a Ritz Carlton would be proper. Immediately I got bogged down on where the line was between a proper and an improper taking. I could see Justice Scalia having a lot of fun at my expense on this point. Since my argument was going to be that wherever the line was for such takings, we were not near it, and since I could not answer his question by saying it does not matter in this case, my only option was

to say "yes" to the Motel 6 question. That would sound extreme, but at least it would stop any further questions along that line so I could focus on the facts.

And that is what happened, although the Motel 6 question—precisely that question—came from Justice O'Connor.

> JUSTICE O'CONNOR: For example, Motel 6 and the city thinks, well, if we had a Ritz-Carlton, we would have higher taxes. Now, is that okay?
>
> MR. HORTON: Yes, Your Honor. That would be okay. I—because otherwise you're in the position of drawing the line.[45]

To my answer, Justice Scalia did follow up, but all he asked was whether I accepted the proposition that "you can take from A and give to B if B pays significantly more taxes," to which I answered, "I do, Your Honor."[46] Thereafter, Justice Scalia said very little until after I had explained my chart. That was my goal, and I then awaited the opportunity to produce my chart. When the opportunity soon arose, there was nary a word about line drawing during my explanation of the chart.

Justice O'Connor, who was presiding, looked down on the chart with great interest. My ploy obviously did not convince her, but who knows? Perhaps it helped to convince Justice Kennedy, whose fifth-vote opinion was very fact-specific. At the very least, all the Justices knew my focus was on the facts.

I will quote the whole colloquy, even though lengthy quoting is something I never have done before in a brief or law-review article and could not imagine ever doing until now. I do so here for this reason: As you read it, envision all of the Justices, including Justice Scalia, sitting there quietly while I explained the chart as if I were presenting at a zoning-commission meeting. I spoke for forty-two lines of transcript, during which the only questions, which were from Justice O'Connor, concerned the chart. By contrast, in his principal argument, Bullock was never allowed to speak for more than thirteen lines before he was interrupted. (He had better luck in rebuttal, by which point the Justices were done with questions.)

So, with that introduction, here are my complete remarks—all forty-two lines of them—about the chart:

> JUSTICE O'CONNOR: So what are these parcels of the people now before us going to be used for?
>
> MR. HORTON: Yes, Your Honor. First of all, it's a long-range plan. If I could have, if I could have the chart, please, if I may show you Your Honor. [Krisch hands me the chart]. The—we are out on a peninsula here, and here is Pfizer down here, which at the time of the taking was almost completed. They moved in a month afterwards. Up here is an old state—old fort from the 19th century that the state

45. Transcript of Oral Argument, *supra* note 21, at 30.
46. *Id.* at 31.

> agreed to turn into a state park as part of an overall plan. The overall plan is this whole thing. Now, parcel one is going to be a hotel, is planned for a hotel. Parcel two was planned—
>
> JUSTICE O'CONNOR: Let's talk about the litigants.
>
> MR. HORTON: Yes.
>
> JUSTICE O'CONNOR: Before us today.
>
> MR. HORTON: Yes. That's right. They are in parcel 3 and they are in parcel 4-A. Now, the—it's to be developed in phases. The first phase is one and two. The next phase is then three and four, A, and there is also a marina—
>
> JUSTICE O'CONNOR: What's planned for 3 and 4-A?
>
> MR. HORTON: What's planned for 3 is that it's going to be office space. And the expectation is there is going to be a demand for class A office space, which is the best quality office space in this area by 2010. And the expectation is that it will attract the sorts of offices that will feed on the Pfizer. They spent $300 million on a site here. In addition, I may point out, this is the Amtrak line going along here. The only way you can get to parcels 1 and 2 is to go right by parcel 3 or go right by parcel 4-A. This is a waste water treatment facility. Parcel 4-A is for park support or marina support. Now, it isn't more definitive, but obviously, one possible use is for parking here because you've got a waste water treatment facility here. You've got the park here. You've got the marina here and you've got the other parcels here. It's not like we are talking, as in *Berman*, you're talking about something that's in the parcel. And in *Berman*, they said it's not for the court to decide where the boundary lines ought to be. It seems to me that's another point, Justice O'Connor. It's not like parcel 3—[Interruption by Justice Breyer].[47]

My colloquy with Justice O'Connor, my hopeful fifth vote, elicited the following comments that evening from Slate reporter Dahlia Lithwick:

> I've witnessed some weird moments at oral arguments over the years, but I'm thinking absolutely nothing could compare with the sight I beheld today: In the midst of argument in *Kelo v. New London*—a critically important case about the government's right to condemn private land and give it to private developers—the lawyer for the city of New London, Connecticut, pulls out an actual prop. In response to a query from Sandra Day O'Connor as to whether there's a concrete development plan for what would replace the handful of homes being condemned, Wesley W. Horton hauls out a big poster board with the whole proposed community laid out. Condos here, marina here, yank out this crappy little Victorian house and the health club will go there, he enthuses.

47. Transcript of Oral Argument, *supra* note 21, at 35-37.

> My heart begins to pound. I want in on this deal. And O'Connor looks like she does, too.
>
> With the exception of a yellow pad, I have never seen a visual aid of any sort used at oral argument. Advocates really should use them more . . . .[48]

My opportunity to expatiate on the facts did ultimately end up causing me a time problem. Oral arguments in the Rehnquist Court were almost always limited to precisely thirty minutes per side. While Chief Justice Rehnquist was sick, and Justice Stevens had missed his flight from Florida due to weather, I could not assume that Justice O'Connor, who was presiding for the first time, would be less strict. I thought I had enough time left for concluding remarks, but I was wrong:

> MR. HORTON: And so it seems to me the four words I think that this Court should consider—and I'm not going to tell you the four words since my red light is on. Thank you, Your Honor.
>
> JUSTICE O'CONNOR: Mr. Bullock, you have three and a half minutes.
>
> REBUTTAL ARGUMENT BY SCOTT G. BULLOCK ON BEHALF OF THE PETITIONERES
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> JUSTICE KENNEDY: Mr. Bullock, do you know those four words?
>
> MR. BULLOCK: I wish I did. I could respond to it if I—if I actually did.[49]

The four words, as the Press found out after the oral argument, were "precedent," "democracy," "compensation," and "federalism." Brendon Levesque and I have discussed the significance of those words at length in our 2016 article.[50] But since my focus at the oral argument was on the facts, it probably was just as well that I ended my argument with a mystery.

But my tactical decision in answering the Motel 6 question did have negative long-term policy implications. I was simply looking for a fifth vote, but my opponents, and especially the plaintiffs' lawyers, later publicized my Motel 6 answer to an angry public as if that were what the case was really about. I must say, I had no idea when I was arguing the appeal what a political storm I was about to enter. Before the argument, the case had attracted attention, but the Connecticut Supreme Court's decision had not produced any great public outrage, even in Connecticut. Indeed, Attorney General Richard Blumenthal, whose position in Connecticut is elective, had attempted unsuccessfully to participate in oral argument on my side even though the state was not a party.

48. Dahlia Lithwick, *Condemn-Nation: This Land Was Your Land, But Now It's My Land*, SLATE (Feb. 22, 2005), https://slate.com/news-and-politics/2005/02/condemn-nation.html [https://perma.cc/E3JZ-3JXM].

49. Transcript of Oral Argument, *supra* note 21, at 55.

50. Horton & Levesque, *supra* note 2, at 1414-25.

But I seem to have found a way to bring everyone together: Democrats hate *Kelo*; Republicans hate *Kelo*; Independents hate *Kelo*.

Ms. Kelo herself was a focus of the *Kelo* backlash. She owned a cute little pink house, and she looked and acted in a way that the public in general could relate to—an ordinary person in the best sense of the word.

This leads to a final point about public policy made in the context of litigation. Choose your lead plaintiff carefully—because it can make a big difference. You want someone who is angry but not too angry, someone who speaks well but not too well, and someone who listens to her lawyers. I can't comment on the last point, but I can say from my vantage point that Ms. Kelo was the ideal lead plaintiff.

Krisch and I did our job. Berliner and Bullock did theirs. We all did our jobs while representing real parties in a real dispute with other real parties. The briefs mattered. The oral argument mattered. Both depended on our tactical decisions and the goals of our clients. The reality is that public policy in *Kelo* was determined in the happenstance of specific facts and the parties' tactical decisions and goals. It is the clash of interests more than the clash of ideas that determines public policy in the American judicial system.