

***Kelo* and the “Whaling City”: The Failure of the Supreme Court’s Opportunity to Articulate a Public Purpose of Sustainability**

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INTRODUCTION

“And here, the city, all port, gives on the ocean generously”¹

New London is a seaman’s town—a three-mile crescent of land bordering the Thames River and the Long Island Sound. The Old Stone Custom House from its sea-trading days still remains. By 1670, shipyards, merchant wharfs, and warehouses along with the town ferry and its landing lined its shores. Fort Trumbull, the historic center of development and home of the controversial development project in *Kelo*, protected shipping lanes during the Revolutionary War, and has continued to serve maritime functions throughout the past two centuries. In the 1800s, the town was the one of nation’s leading whaling ports. With the decline of whale oil, other marine-related activities continued including shipbuilding, marine trade, and fishing. Piers and ports continued Fort Trumbull’s maritime history into and through the twentieth century.² The recent home of extensive underwater research and the home of the U.S. Coast Guard, the lure of the sea continues. At the end of this century, the large, black nuclear submarines glided silently in New London’s waters and the clang of shipbuilding now echoes from Electric Boat yards on the other side of the river. The annual Yale-Harvard boat race on the Thames imitated its English cousin and added a touch of class to the scene. This is the setting for a recent Supreme Court case which appeared to set the homes and lives of a few long-time residents in this maritime city against the economic and political power of the well-intentioned seeking to rebuild a city down on its luck and fighting against modern economic forces indifferent to the charm of this seaside city.

By the end of the twentieth century, despite its raffish charm, New London was in economic decline.³ Perhaps its fate was sealed when, almost two centuries earlier, it lost its

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¹ William Meredith, *Waterways*, THE OPEN SEA AND OTHER POEMS 17 (1957). Meredith is a fine American poet residing near New London.

² For a readable history of New London, see ROBERT OWEN DECKER, THE WHALING CITY: A HISTORY OF NEW LONDON (1976). This history documents New London’s maritime trajectory and confirms its historical identity as a seafaring town.

³ This condition of New London is well documented in the City of New London’s Plan of Conservation

surrounding land and tax base to other towns, Ledyard, Groton, and Waterford—towns which have prospered in more recent years. Effectively by-passed by the thoroughway linking Boston, New York, and Washington, the spine of the Northeast Jean Gottman’s “Megalopolis” in the mid-twentieth century,⁴ New London was also by-passed by the commercial growth of surrounding suburbs—the sad tale of many of our nation’s urban places. And it was crippled by a paucity of taxable land, due to the Coast Guard Academy, Connecticut College, and lands owned by other non-profit and public entities, the combination of which erases half of New London’s land base from the tax roles.⁵ In recent years, New London has lost population, and gained minorities (some of whom worked in the area shipyards at the height of the shipbuilding period). In the past half century, New London struggled to reinvent itself through a variety of private and public programs. In the 1960s, major downtown renewal took place; in the 1970s, a new coastal management program was initiated,⁶ and a refurbished train station and new ferry landing were constructed. Some of this renewal was a mixed blessing since it failed to economically revitalize the city and left in its trail a substantial amount of subsidized housing which held a low-income elderly and minority population. Much of its coastal lands remained unrenewed, with historically useful but now-declined industries and substantial vacant and deteriorated housing still present.

Most relevant to the *Kelo* case is the arrival of Pfizer Company’s research facility in the 1990s. An extension or transplant from nearby Groton, the research facility was in some ways a foreign body in New London. Largely unrelated to New London’s maritime heritage and manned by a largely well-educated work force, the Pfizer facility was a bit like the “man from Hadleyberg” who appears to promise and indeed leaves a pile of gold in the town, in the form of the promised

and Development (1997) and is adverted to in the lower court opinions of *Kelo*. See *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at *341 (Conn. Super. Ct. Mar. 13, 2002); *Kelo v. City of New London*, 843 A.2d 500, 574 (2004). The city was designated “distressed” under state laws in 1990. *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005). This designation assumed some importance for those dissenting Supreme Court Justices who appear to believe that some form of specific “blight” must be found to establish a public purpose for eminent domain. This underlying assumption mistakenly limits public action for the city only to remediation of distress, rather than broader support of its sustainability.

⁴ Limited thoroughway frontage means that New London is the proud possessor of two early vintage shopping centers located in the shadows of mega-malls located in its neighboring Waterford. These mega-malls, along with nuclear power plants, make up the massive tax base for Waterford. The balance of tax base could change in the future if mass transport is reinvigorated to enliven New London’s rail line, and the nuclear power plants are decommissioned.

⁵ This limited tax base assumes importance in light of the serious problems confronting New London’s schools. These schools are trying to cope with an increasing black and hispanic population, now making up one-third of the city’s population and accounting for a high drop-out rate from its schools. CITY OF NEW LONDON, PLAN OF CONSERVATION AND DEVELOPMENT (1997).

⁶ This coastal management program is set forth in RAYMOND, PARISH, PINE & WEINER, INC., MUNICIPAL COASTAL MANAGEMENT PROGRAM: NEW LONDON, CONN. (1982). This program assumes some importance in the assessment of the *Kelo* case as discussed below.

arrival of well-educated citizens, new homes, jobs, and businesses. The elegant research facility looks out on the water, symbolic of the change of the nation’s economy and New London’s fate; a fate not of working with the sea, but rather regarding it as a pretty picture backdrop to unrelated work, tourism, or recreation.

The pile of gold was in the form of a development plan. The announcement of the Pfizer arrival preceded this proposed development plan at issue in the *Kelo* case and even before the plan was well underway, the Pfizer arrival was accompanied by nearby clearance and the building of attractive townhouses. These initial efforts, as well as others, such as the refurbishing of the town’s Ocean Beach park, have succeeded in creating neighborhoods of gentrified and livable homes in this seaside city next to the Sound.⁷

But in New London, the past half-century effort to make the transition from an industrial age port city to a post-industrial ecologically sustainable and socially just urban place has not been completed. Even with the arrival of Pfizer, high unemployment, continued loss of population, and poverty remain. Thus, it was not unreasonable to launch a new effort at renewal which would reconfigure parts of the city’s lands, given the advent of Pfizer, the resurgence of Amtrak (with a second refurbishing of the station in downtown New London), the planned building of a new Coast Guard museum, the refurbishing of Fort Trumbull, and the partly completed pedestrian way along the coast. With a new comprehensive plan of development, a non-profit economic development corporation was formed and *The Fort Trumbull Municipal Development Plan* was adopted at the turn of the new millennium.⁸ This was the pot of gold that then divided the citizens of the town.

The Fort Trumbull Plan was more than an economic development plan. The plan sought to strengthen Pfizer’s presence in the city, with the proposed construction of a hotel and conference center as well as more housing to serve the needs of its employees. These “goodies” were part of the “understanding” that Pfizer brought with them to New London, and there is no doubt that the plan, in part, aimed to serve the needs of Pfizer, although those needs appeared to coincide with New London’s needs as well. Although the development plan clearly intended to complement the undertakings of Pfizer, it also sought to create other economic assets including a variety of offices, an extension of a pedestrian way along the Sound and parkland on the Thames River, a museum, eighty new residences and other retail sites, and marinas. The plan also proposed the environmental cleanup of more than a century of marine-industrial activities as well as the

⁷ Such gentrification was at the price of displacing a number of residents, including elderly residents to nearby suburbs. Justice Thomas, seeking once again to play the race card, mistakenly appears to analogize this displacement to the displacement of blacks in earlier renewal programs. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2687 (Thomas, J., dissenting).

⁸ NEW LONDON DEV. CORP., FORT TRUMBULL MUNICIPAL DEVELOPMENT PLAN (2000). The more general wisdom of economic development efforts in inner cities is explored in Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753 (1996-1997).

protection and restoration of important wetlands, improvements of the sewer system, and control of odor pollution from the waste-water treatment facility in the area. In short, the ninety-acre plan was, to all intents and purposes, a classic redevelopment plan seeking to take advantage of some on-going public projects, but adding and coordinating them with some new public and private initiatives. In one way or another, with the exception of the Pfizer facility itself (an admittedly large exception), the development plan represented a bold new effort to continue New London's maritime heritage with access to the sea, water-related recreation, and a historical reminder of what New London was all about.

This maritime heritage is a crucial element in New London's identity, based upon its history, its surroundings, and this continuous effort to perpetuate that heritage. Every city has its identity and those who live, work, and visit that city can share in that identity. Without exaggeration, one might say that the development plan expressed New London's collective memory and identity as a marine city continuing to seek sustainability in a changing economy. The sustainability as a maritime city means the presence of an economy that supports the way of life of its residents and protects the marine environment.

In this sense, the New London plan was one of a myriad of recent efforts at urban coastal development around the nation.⁹ These efforts have been designed to promote development, and to "clean up" polluted coastlines and provide coastal access to the citizenry. Marinas, parks, shopping quays, beach and wetland restoration, and coastal housing developments have been undertaken in many cities, both enhancing the cities' beauty, urban life, and their tax base, while reminding their residents of their city's heritage.

For the most part, the citizen complainants in the *Kelo* case did not contest the importance of the proposed development plan although they did view the plan as serving primarily the private purposes of Pfizer and private developers. Essentially, the complainants were contesting the vehicle of the plan—the New London Development Corporation. Such corporations emerged in the course of urban renewal in the 1960s and 1970s. They are authorized by state statutes, which, in turn, are part of a maze of both regulatory and grant-in-aid laws to facilitate urban development projects. They are linked to state economic development agencies which provide grants and contracts; they are designated by municipalities and guided by both state law and municipal laws and plans. These corporations were designed to attract private investment to the redevelopment projects and, in the case of some community development corporations, to facilitate participation of low-income persons and small businesses in low-income areas.

In the New London case, some of the board members of the New London Development

⁹ For accounts of such development efforts, see Joseph Petrillo, *Small City Waterfront Restoration*, 15 *COASTAL MANAGEMENT* 197 (1987); for an assessment, see Robert F. Goodwin, *Redeveloping Deteriorated Urban Waterfronts: The Effectiveness of U.S. Coastal Management Programs*, 27 *COASTAL MANAGEMENT* 239 (1999).

Corporation were linked to Pfizer, either by employment or family relationships. Moreover, the development corporation did have a clear agenda of facilitating development objectives that would make the Pfizer facility more successful. Thus, as indicated above, middle-income housing was planned to house some of the Pfizer research staff, the hotel was to serve Pfizer visitors as well as the public, and the renewal, including the cleaning up of odors and junkyards, would enhance the renovation of the Pfizer facility. Adding the match of Pfizer membership on the development agency to the combustible mix of advantages to Pfizer from the development plan was enough to start a fire. Ignored in the resulting community conflagration was the fact that many of these objectives of the plan corresponded to the city’s objectives of attracting the middle classes back to the city, cleaning up degraded sites, and promoting new tourist facilities. In any case, both the development corporation and its plan were approved by the municipal authorities.

To carry out the plan in New London, the development corporation not only had to acquire properties from willing sellers, but also had to take property from a very small group of unwilling residents through state-authorized eminent domain.¹⁰ The properties at issue were located in areas designed for a proposed marina and water-related commercial property. Some of the properties were acquired by their owners for investment; some for residential purposes. Some were occupied by relatively new residents; some by long-term residents.¹¹

Some of the residents sought to stop the taking of their homes by filing suit in Connecticut Superior Court, claiming that the eminent domain was not for a “public use.” The court enjoined the taking of some of the parcels, but not others that were found to be reasonably necessary to the project.¹² Upon appeal to the Connecticut Supreme Court, the court, despite a vigorous dissent, upheld all of the eminent domain takings in question, finding them all to be reasonably necessary to the project.¹³ The U.S. Supreme Court granted certiorari to determine whether the eminent domain in question was for a public use under the Fifth Amendment of the Constitution.

A majority of the Supreme Court upheld the eminent domain of the properties, finding it to be for a “public use.”¹⁴ The majority argued that the eminent domain clause of the Constitution, which required compensation for property taken for public use, had long since been broadened

¹⁰ Although some have suggested that private acquisition can adequately handle the problem of hold-outs, the methods suggested, such as secret acquisition of property, hardly promote the effort to establish a cohesive community.

¹¹ The number of long-time permanent residents was quite limited, despite rhetorical efforts on the part of opponents to the project to exaggerate both their number and motivation for ownership.

¹² *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at *341 (Conn. Super. Ct. Mar. 13, 2002). The parcels enjoined from taking appeared to the court to be less related to the overall development plan and its purposes.

¹³ *Kelo v. City of New London*, 843 A.2d 500, 574 (Conn. 2004).

¹⁴ *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

to include the taking of property for a public purpose. The Court determined that economic development was such a public purpose. The Court based its decision primarily upon two previous decisions, *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*.¹⁵ Both decisions upheld the exercise of the eminent domain power for public purposes.

One theme running throughout the majority decision in *Kelo* was the importance of careful planning to insure the government's pursuit of public purposes. In the words of the Court:

Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.¹⁶

In reaching this conclusion, the majority recognized the role of planning as the coordination of “a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts.”¹⁷ The majority properly rejected the dissents' effort to interpret the rationale of public use as simply serving a narrow private-nuisance standard in which eminent domain would only be justified to prevent specific harms to specific individuals.¹⁸ Such a narrow standard of public interest advanced by the minority ignores a more comprehensive concept of the public interest and the essential role of both law and planning to coordinate the use of both public and private mechanisms to rebuild our nation's cities. Unfortunately, the majority failed to document the array of planning provisions that were relevant to the *Kelo* situation. I shall discuss these below.

¹⁵ *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). The “hidden precedent” of the case was *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), in which the Michigan Supreme Court upheld the taking of an entire neighborhood to permit the expansion of an automobile plan. *Id.* at 459–60. (The case was later rejected by the Michigan Supreme Court, in *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004). The *Poletown* case is not analogous to *Kelo*, whose plan involved a variety of public purposes. For an excellent review of the history of “public use” in urban renewal, see Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003). My colleague, Marc Mihaly, in an accompanying article, properly characterizes the majority opinion as “tepid.” If one compares it with the fine majority opinion in *Berman*, which recognizes the broad purposes of urban renewal, the *Kelo* majority opinion is indeed weak.

¹⁶ 125 S. Ct. at 2665.

¹⁷ *Id.*

¹⁸ The dissenters ignore the common law public nuisance standard—a broader standard permitting the abatement of nuisances that violate common rights. More importantly, the land use laws of the twentieth century go far beyond the common law nuisance standards, seeking to affirmatively promote a community's common good through land use and environmental regulation.

I. THE HISTORY OF PLANNING IN AMERICA

Since the Court's ruling rests, in part, upon an appeal to the planning process which preceded the eminent domain, it is important to understand the controversial history of planning in America over the past half century.¹⁹ At the national level, this history extends back to the New Deal-planning efforts of the 1930s, the Second World War plans, the commitment to full employment planning after the war, the urban-renewal effort beginning in the 1950s, the social planning of the Great Society, Nixon's commitments to new town, population and land-use planning in the early 1970s, and the diversification of planning (transportation, health, energy, environmental, economic) of the past twenty years.

Especially important has been the rise of environmental planning in the past thirty years, which has embraced air and water quality management, forest, coastal zone, and ecological impacts in general. Environmental planning is essential to capturing the interdependent effects of ecosystems and tracing the impacts of intervention into those systems.²⁰ Although eminent domain implementation of such planning has not been as common as in other areas, it is an important tool in the implementation of some environmental laws.

This history of planning in the United States in the twentieth century is found in the *Kelo* case, almost like layers of sediment at an archeological site. The *Kelo* case concerned comprehensive land-use planning by means of state enabling laws and local zoning plans, municipal economic development plans authorized by state economic-development legislation, and environmental plans, including environmental impact and coastal management plans authorized by federal and state statutes.

For the most part, however, the power of eminent domain is associated with land-use planning and redevelopment. This nation has undertaken an extensive effort at local and regional land-use planning beginning in the 1920s, and continuing to the present day. State statutes lay out the public purposes served by such planning and authorize eminent domain when necessary to carry out these purposes.

This effort at planning, at the national and state and local levels, has been controversial. The New Deal, the Great Society, and more recent New Town and proposed industrial-policy planning efforts produced political backlashes.²¹ Perhaps the greatest opposition came from those

¹⁹ For a brief, readable history of national planning up to the Nixon regime, see OTIS L. GRAHAM, *TOWARD A PLANNED SOCIETY: FROM ROOSEVELT TO NIXON* (1976).

²⁰ The importance of planning in environmental law is revealed in the history of environmental legal regimes as set forth in RICHARD O. BROOKS, ROSS A. VIRGINIA, & ROSS JONES, *LAW AND ECOLOGY* (2002).

²¹ For an account of New Deal planning, see MARION CLAWSON, *NEW DEAL PLANNING: THE NATIONAL RESOURCES PLANNING BOARD* (1981). For new towns, in addition to the author's *NEW TOWNS AND COMMUNAL VALUES* (1974), see IRVING L. ALLEN, *NEW TOWNS AND THE SUBURBAN DREAM: IDEOLOGY AND UTOPIA IN PLANNING AND DEVELOPMENT* (1977). For a discussion of industrial policy, see OTIS L. GRAHAM, *LOSING TIME: THE INDUSTRIAL POLICY DEBATE* (1992).

who saw the national planning efforts as the first step towards a socialist or communist society. It is interesting to speculate whether, as the communist threat recedes, fear of planning may also recede. However, land-use plans have been fought at the local level, in part because of their threat to a libertarian notion of untrammelled property rights.

Scholars have also been concerned about national and local planning. Some leading political theorists suggest that nations and communities do not have purposes, like corporations, and hence are not capable of being instrumentally planned.²² Different scholars and reformers have suggested different ideals for our cities—“the city beautiful,” the “communitarian city,” the “good city,” the “just city,” the “sustainable city,” and so forth.²³ There is also a diversity of views of the planning process corresponding to those ideals.²⁴ These disagreements of scholars are mirrored by disagreements among citizens; hence, a public pluralism makes agreement on planning efforts difficult. This disagreement has impaired the effectiveness of planning and there has been a myriad of scholarly criticisms of the effectiveness of planning.²⁵ Notably, Justice Stevens, the author of the majority opinion in the *Kelo* case, recently commented that he had more faith in the marketplace than in government planning.

Complicating matters in recent years has been the recognition of the important role the private sector can play in any public-planning efforts. Private planning has been important for many years, especially within large corporations.²⁶ The integral role of private investment has been an essential part of urban renewal. Here, a brief history of urban renewal is useful. When urban renewal began in the 1950s, its principal purpose was to remove selected blighted areas of inadequate housing. This effort was followed by efforts to revitalize the downtowns of our cities, which were competing with suburban economic centers. This effort required relocation, the building of subsidized housing, and significant social, employment, and educational services. To finance such services, in addition to federal and state funding, it proved necessary to refurbish the city’s tax base, which could only be accomplished by attracting economic investment to the city. Hence, economic development efforts were undertaken and these efforts required close working with economic interests. Ironically, at the same time, primarily through the work of Jane Jacobs, it was recognized that only with vibrant economic activity could the spirit of the city be retained and grow.²⁷

²² MICHAEL JOSEPH OAKESHOTT, *ON HUMAN CONDUCT* (1975).

²³ PETER GEOFFREY HALL, *CITIES OF TOMORROW* (1988).

²⁴ For a marvelous intellectual history of planning, see JOHN FRIEDMANN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* (1987).

²⁵ MARTIN MEYERSON & EDWARD C. BANFIELD, *POLITICS, PLANNING, AND THE PUBLIC INTEREST* (1955).

²⁶ JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (2nd ed., rev. 1971).

²⁷ JAMES Q. WILSON, *URBAN RENEWAL; THE RECORD AND THE CONTROVERSY* (1966); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* (1989).

As my colleague Marc Mihaly demonstrates in an accompanying article, partnerships between public and private have been an important part of past urban development and present urban-economic development projects. This important role of the private sector within the public-planning process was recognized as early as the 1950s when Robert Dahl and Charles Lindblom published their classic: *Politics, Economics, and Welfare*,²⁸ documenting the continuum between public and private. The newest joinder of public planning and the private sector is the establishment of publicly managed markets in environmental regulation and other fields. The close relationship between public and private opens the possibility of private corruption of public planning through rent-seeking efforts of the private sector.²⁹

All of these historical themes may be found within the circumstances surrounding the *Kelo* opinion and are reflected in the opinion: the plaintiff’s distrust of the effectiveness and fairness of the plan, the palpable pain of the Court at the plan’s impact upon property owners, the appeals to and attacks of urban-renewal planning, the underlying pluralism of New London with its conflicting interests, and the important role that the private sector plays within the plan. It is this “mare’s nest” of complicating historical cross currents into which the Supreme Court steps in the *Kelo* case.

II. EMINENT DOMAIN AS AN INSTRUMENT OF PLANNING AND THE “PUBLIC PURPOSE RATIONALE”

The *Kelo* majority opinion properly begins with the relevant text of our Constitution: “[N]or shall private property be taken for public use without just compensation.”³⁰ This provision appears to suggest three issues. First, the government cannot simply “take” private property. This text has been expanded by interpretation to apply to some “takings” of property values by regulation and this interpretation by courts and scholars has led to a myriad of cases and discussions.³¹

But these discussions of taking are unrelated to the second question: if property is taken for public use, compensation must be given. This text has been expanded by interpretation to include the eminent domain of property for a public purpose, not merely public use. By expanding the possibility of compensation for public use, it becomes difficult to draw the line between private

²⁸ ROBERT ALAN DAHL & CHARLES EDWARD LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE: PLANNING AND POLITICO-ECONOMIC SYSTEMS RESOLVED INTO BASIC SOCIAL PROCESSES* (1953).

²⁹ Perhaps a more significant work is the concern about “neo-corporatism”—the undue influence of corporations on public policy not only by means of public-private partnerships, but through a variety of “influences” of the private upon public decision-making.

³⁰ U.S. CONST. amend. V.

³¹ Some scholars and ideologues have sought to push their concerns about the taking of property by emphasizing the second separate phrase of the constitutional provision concerning compensation for public uses, and thus narrowing the interpretation of the clause.

and public uses. The *Kelo* case poses the second issue: whether the compensation is indeed for a public purpose.³² Since there are both public and private uses involved in the development project, determining how and when there is a public purpose is indeed difficult.

A third issue is the question of whether compensation by money is appropriate to the eminent domain of some properties. This is often referred to as the commodification issue.³³ This issue can arise under the “taking” provision in determining whether inverse condemnation or declaring the regulation null and void should be the remedy. The suitability of compensation can also arise under the second issue of eminent domain. Although not raised by the legal complaint in the *Kelo* case, the issue of the suitability of compensation in the case of elderly people occupying the home of a lifetime is certainly a key concern in the case. Since this issue is not dealt with in *Kelo*, I shall not address it here, except to suggest that the recognition of the non-market, non-commodity values of long-time residence may be better handled through non-legal channels.³⁴

The problem of the “public purpose” rationale, like its kissing cousin, the “public interest” standard, is that it is a very broad and vague standard. The vagueness of this standard was vigorously attacked by political scientist Theodore Lowi, who suggested that such a standard permits the undercutting of democracy by allowing wholesale delegation to administrative agencies.³⁵ The attack was elegantly capsulated in Charles Reich’s classic article, *The Law of the Planned Society*,³⁶ which argued that the “public interest” statute, which guided planning and administrative efforts, established a myth that such efforts were based upon an objective standard. Reich then argued that planning and administrative decisions in the public interest should be supplemented by required provisions for citizen participation in the planning process, as well as statutes that list a range of specific values affected by the proposed government action. Reich also recommended citizen-advisory bodies and judicial review of agency action. These and other arguments have been reiterated by Thomas Schoenbrod and Ross Sandler in recent books and articles and have been discussed by other scholars in different contexts.³⁷

³² Of course, the plaintiffs and one dissenter, Thomas, sought to limit eminent domain powers to securing public uses. Precedents have long since abandoned such a narrow reading. It is interesting to note that the broader public purpose doctrine was invoked at the turn of the twentieth century to draw a distinction between eminent domain to secure a public good and permissible “taking” without compensation to prevent a public harm. Some of the dissenters seek to take the latter standard, which applied to permissible takings, and apply it as a requirement in eminent domain.

³³ MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

³⁴ The method for handling it may be some form of “deep compromise” as outlined in HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 143–62 (2002).

³⁵ THEODORE J. LOWI, *THE END OF LIBERALISM* (1979).

³⁶ Charles A. Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227 (1966).

³⁷ Among these contexts is the regulation of communications, see Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 *FED. COMM. L.J.* 605 (1998). For other discussions, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

(To be sure, in *Kelo*, the issue is the constitutional “public purpose” standard, whereas in administrative law contexts, the “public interest” issues have focused upon “public interest” provisions within statutes;³⁸ however, for our purposes, the issues may be treated together since concerns about vagueness and objectivity appear to bedevil both constitutional and statutory standards.)

The *Kelo* case offers a fine test case of the adequacy of the “public purpose” rationale in constitutional review efforts. The majority found an adequate public purpose for the eminent domain adopting a deferential approach to what it perceived to be the deliberate, comprehensive, and procedurally satisfactory planning effort in New London. The minority sought to make the public-interest standard more specific by requiring the condemnation to be addressed to prevent specific harms.³⁹ Both were concerned with finding some objective basis for the determination of public purpose, one through appeals to planning and deliberation, one through appeals to a specific nuisance-harm standard.

But neither the majority nor the minority of the Supreme Court sought to carefully review the statutes that were in operation and that governed eminent domain in this case. These statutes set forth a variety of more specific objectives and corresponding processes requiring the community’s officials to determine if these objectives were properly pursued. Let us briefly identify these statutes, of which all were passed since the 1960s and all address the problems of the public-interest standard (albeit, for the most part, at a state level), about which Lowi and Reich were concerned.

As indicated above, the statutes relevant in *Kelo* are: (1) the federal and state coastal management acts;⁴⁰ (2) the state and local land-use planning acts;⁴¹ (3) the state and local economic-development acts;⁴² and (4) the state environmental impact law.⁴³ Each of these statutes contains a set of carefully articulated purposes, requirements for public approval of plans and their implementation, opportunities for citizen participation, limits upon private interests within the planning process, and opportunities for judicial review.⁴⁴ In addition, there are specific limits to

³⁸ At the time of the concern over the “public interest” standard in the 1950s, philosophers became interested in the issue. For an excellent discussion, see WAYNE ALBERT RISSER LEYS & CHARNER MARQUIS PERRY, *PHILOSOPHY AND THE PUBLIC INTEREST* (1959).

³⁹ It is interesting to note that the Supreme Court dissenters could take refuge in the liberal, pragmatic writing of John Dewey in his *THE PUBLIC AND ITS PROBLEMS* (1927), in which he argues that there is no pre-existing form of the public, but only the organized response to the indirect, important, and continuous harmful consequences of “private groups.”

⁴⁰ 16 U.S.C. § 1451 (2005); CONN. GEN. STAT. ANN. § 22a-90 (West 2005).

⁴¹ See Title 8 of Connecticut’s General Laws for Connecticut’s statutes on Zoning, Planning, Housing, Economic and Community Development and Human Resources.

⁴² CONN. GEN. STAT. ANN. §§ 8-31a to 8-438.

⁴³ *Id.* §§ 22a-16 to 27g.

⁴⁴ The lower Connecticut court in the *Kelo* case reviewed these processes in considerable detail. See *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789 (Conn. Super. Ct. Mar. 13, 2002).

possible private enrichment set forth within state non-profit laws and the federal tax laws and their regulations.⁴⁵

All of these laws are designed to insure, among other things, that the private interests within the plan are controlled and coordinated by public purposes. Thus, their proper application in the *Kelo* case would presumably stop the abuse of the public interest by private interests. But, of course, courts may need to determine if such abuse is present. Such an inquiry requires a careful examination of the relations among the statutes, as well as the application of the statutes to the case at hand. Such a determination requires the judicial review of the purposes of the statute; this review requires a purposive review.

III. UNDERSTANDING JUDICIAL REVIEW OF PUBLIC PURPOSES

The courts' review of whether eminent domain is justified by public purposes is part of a more general "purposive review" by the courts in many different kinds of cases.⁴⁶ Courts in such review often seek to specify public purposes through constitutional or legislative interpretation. When fundamental liberties or suspect classifications are threatened, the court seeks to determine whether there are "compelling state purposes." When administrative actions are challenged as "vague" or as "delegating" legislative powers, the adequacy of the statement of legislative purpose to guide administrative action or private parties may be at issue. When the question arises as to whether a specific activity should be conducted by the federal or the state government, the court may explore the purpose of the statute at issue to determine whether it is properly federal or state. When a taking issue is posed by a regulation, the court may look to and weigh the purpose of the regulation against the degree of taking. And when the activity involves eminent domain, the court must explore whether such eminent domain serves a public purpose. Determining "compellingness," specificity, federal level appropriateness, proper rationale for regulation, and private involvement requires the court to review and perhaps specify the government purpose.

These "purposive" reviews have been difficult for the courts since they threaten to require a counter-majoritarian court to adopt the position of second guessing the legislature. Thus, the courts have vacillated in their decisions that seek to handle all of these issues, i.e. the issues of defining "compelling state purposes," the "public interest," the articulation of federal or state activities, and the weight of a purpose for justifying regulation without compensation. Courts have

⁴⁵ A review of the tax laws bearing upon economic development and its implications for controlling private interests is set forth in chapter eight of WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* (2001).

⁴⁶ For a discussion of "purposive review," see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997).

failed to recognize that their task is to specify, through interpretive definition, the public purposes at issue.

The *Kelo* case offers simply one more example of the problem of judicial review of government purposes. In *Kelo*, the court can only review the extent to which eminent domain seeks to promote public purposes by carefully reviewing whether the eminent domain is properly contained with the plans and these plans are authorized by legislative purpose. Put another way, the condemnation by the economic-development agency must be in accordance with the planning process and must further the legislative purposes that authorize it. It is not the plan (i.e., that an administrative action) that establishes the basis of public interest, but the legislative findings, purposes, and objectives that authorize the plan.

This task of judicial review is complicated by two considerations. First, there are often multiple statutes involved. In the *Kelo* case, there are at least four such statutes. Consequently, the court must determine the relation among the statutes’ purposes before determining whether the action in question promotes the appropriate mix of purposes. This, however, is a normal part of a court’s job, especially when faced with cases involving multiple statutes. Second, the inquiry into the compatibility of the action and plan in question to the purposes of the statutes may not be reduced to a means-ends inquiry.⁴⁷ Rather, the court may be faced with the need to carefully articulate the public-interest purpose and explore how the statutory objectives and activity under that statute “fits” with that purpose. Thus, in the *Kelo* case, the court must examine how the eminent domain fits with the specific purposes of economic development, as well as the relation of economic-development purposes to the environmental and land-planning purposes of the respective statutes, where relevant.

Thus, in *Kelo*, the court first had to explore and specify the meaning of the economic-development statute at issue.⁴⁸ In a remarkably thorough and extensive lower-court opinion, the judge sought to define by interpretation the economic objectives of the law governing the project at issue. The court carefully parsed the economic-development purposes of the relevant statutes, determining that the statute is not reserved to blighted areas, but rather has a broader purpose of economically rejuvenating distressed cities. That purpose includes the acquisition of larger land areas to facilitate development purposes, acquire private lands (including residential lands to do so),

⁴⁷ The recognition that the court’s analysis may require something other than simply means-ends reasoning is set forth in HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY* (2002), and the possibility of “thinking about ends” is set forth in HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* (1994). The kind of reasoning involves the achievement of coherence in the definition of purposes. The determination of whether eminent domain is a proper means to the ends of redevelopment or environmental objectives requires the prior definition of what those redevelopment and environmental goals are.

⁴⁸ The handling of several statutes is not uncommon in complex federal court cases and in undertaking interpretations in accordance with the legislative interpretative principle of *in pari materia*.

and enter into arrangements with other private parties to develop the lands in question, even if the incidental purposes of which may be to benefit some private parties. This analysis of the purposes of the statute was partly based upon the language of the statute, partly upon precedent. The court went on to examine the project at issue, finding its purpose indeed to be the economic development of the city and, by exploring both the motivation of the agreement at issue and the consequences of the agreement, found the private benefits to be incidental. This latter finding depended upon the court's examination of the specific context and objectives of the development plan itself.

IV. THE PUBLIC PURPOSES AND SUSTAINABILITY

The statutes in the background of the *Kelo* case included not only land-use and economic-development statutes, but also environmental statutes. The project, insofar as it was a development project, could threaten environmental damage. At the same time, the project could promote environmental purposes by conducting environmental cleanups and reducing odors, as well as increasing the public access to the coast and coastal recreation opportunities. These possible benefits and harms are governed by the state and federal coastal management legislation and the environmental impact legislation. The state and federal coastal management act mandate a municipal coastal management plan, which was adopted. Local officials deemed the development to conform with that plan. Similarly, the environmental impacts were assessed and found to be satisfactory in an extensive environmental impact statement. These actions constituted a judgment that the development in question was environmentally sustainable.

Although the *Kelo* Court did not address the relationship of these environmental statutes to the project in question, they were reviewed in prior litigation challenging the procedure of environmental assessment.⁴⁹ This litigation did not require that there be court-review at the time of the plaintiff's petition. As a consequence, the Court was not required to determine whether the plan in question substantively complied with the coastal management act or the broad values of the state's environmental impact statutes. Presumably, when and if such review takes place, the Court will be required to explore the relationship between the purposes of the development and environmental statutes. At such a time, the Court may, in effect, be articulating the standards of sustainability for this urban-development project.

⁴⁹ Fort Trumbull Conservancy, L.L.C. v. Planning & Zoning Comm'n of the City of New London, 832 A.2d 611 (Conn. 2003). For a follow-up discussion, see Jane Kimball Warren, *Is Your Client's Proposed Development Safe from Environmental Attack?* Apr. 15, 2005, <http://www.msi-network.com/com/content/cmsdoc179.asp>.

V. SUPREME COURT REVIEW AND DEFERENCE

The U.S. Supreme Court expressed deference in this case, and offered several rationales for that deference. Since the issue was one of economic regulation, a minimal scope of review was indicated. In addition, the Court explicitly deferred to the state legislature and the careful municipal-planning process. If the matter had been one of a federal administrative agency, one might expect deference to that agency. Finally, the Court might have deferred to the careful analysis and findings of the state courts.

Underlying such deference are several principles: the principle of lesser protection accorded to economic and social regulation of property interests, the principle of federalism accorded to land-use activities which have been viewed as “traditionally” state activities, the principle of administrative expertise (a kind of *Chevron* deference), and the principle of respect of lower court mixed fact/law determinations. However, despite the abundance of reasons to accord deference, a blank check cannot be granted by the Supreme Court to the administrative agencies, the city, or the lower courts. The U.S. Supreme Court, in according such deference, should articulate the grounds and limits of its deference. It should extend this deference only after insuring that the administrative agency and the lower court review of that agency determined that the eminent domain will indeed serve broader public purposes.

The principle of limited judicial review of government action serving social and economic purposes is well established in constitutional law, but it may deserve a full and fair reexamination in the case of eminent domain of personal residential property. However, that issue is beyond the scope of this paper.⁵⁰ A second principle of deference, deference to administrative expertise, may be questioned in cases where the agency for various reasons is suspected of not having the relevant expertise or of abusing the expertise.⁵¹

The third principle of deference, the principle of federalism, may have special force in *Kelo*. The case is clearly a land use related case,⁵² ordinarily considered the province of state and local governments. Hence, it may be appropriate to accord special deference to the state and local officials who approved the plan resulting in eminent domain. The Supreme Court has recently reasserted the state and local characteristic of local zoning-like decisions and hence, such federalist deference might apply here.⁵³

⁵⁰ Although it occurs to me that the dissenters, in adopting a nuisance-based standard for eminent domain, may be indirectly seeking to strengthen the claims of private property in eminent domain cases.

⁵¹ These exceptions to *Chevron* deference are found in cases that apply exceptions to the deference principles after the *Chevron* case. The dissenters in the *Kelo* case did not take this route, nor shall I.

⁵² Categorizing a case, such as the *Kelo* case, in one way or another is an arguable matter. Thus, it might be viewed as “an environmental case” or, to the extent that federal-economic development funds are involved, “an economic development case”; both characterizations make it more difficult to label it a traditional state concern.

A fourth and final approach to offering modern deference in *Kelo* is to offer deference to state courts after review of their decisions to determine whether they carefully addressed the issue of whether the eminent domain in question complied with the statutory provisions and purposes authorizing eminent domain. If the lower courts carried out such a careful review, then their decision may be accepted. If they did not, the Court might remand to the state courts to insure that they carefully review the record to determine whether the eminent domain did serve the public purposes.

In fact, the lower state court *did* carefully review the proposed plan and eminent domain in light of at least some of the objectives of some of the statutes—specifically the eminent domain statute, the laws enabling the municipal development project, and their statutory objectives.⁵⁴ As indicated above, the court explored the purposes of the principal statute, the legislative history, the structure of the statute, past precedents dealing with similar statutes, and scholarly commentaries, as well as the requirements of conformity of the economic development statutes with other statutes. The implementation of plans under the municipal development statutes were found to have conformed to the municipal conservation and development plans of the municipality.⁵⁵ The plans and eminent domain actions were reviewed by appropriate offices to determine their linkage to statutory purposes. This lower court analysis permitted the Supreme Court to defer to its review.⁵⁶

CONCLUSION

For environmentalists, the Supreme Court's failure to carefully review the use of eminent domain to serve the publicly adopted statutory purposes might seem to be a blessing. On the one hand, such deference, as in *Kelo*, may give a free hand to coastal municipalities and others to undertake urban coastal-development projects that enhance coastal access and clean up a degraded

⁵³ It is worth noting that the Justices urging such deference in other cases were not the Justices suggesting deference in the *Kelo* case.

⁵⁴ *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at *20 (Conn. Super. Ct. Mar. 13, 2002) (discussing Conn. Gen. Stat. Ann. § 8-186). This focus appeared to be justified in light of the central issue of the case raised by plaintiff that economic development was not a public use.

⁵⁵ The court, however, did not explore whether the plan did indeed advance the specific purposes of the planning-enabling act, nor the purposes of the environmental statutes in question. One other dimension of determining the applicability of these statutes and plans is their “fit” to the marine history of New London. This fit is discussed in much legal and non-legal literature. See, e.g., John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1 (1996-1997).

⁵⁶ An amicus brief authored by some land use law professors mistakenly argued for intermediate review, without understanding the proper rationale of the Court's deference in *Kelo*. See Brief Amicus Curiae of Professors David L. Callies et al. in Support of Petitioners, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108). I have set forth that rationale.

environment. Similarly, as a result of this case, environmentally beneficial non-coastal projects may be given a green light without significant Supreme Court review. But, of course, development projects, whether coastal or not, are not all environmentally beneficial and deference then would have different implications for environmental protection. Perhaps it would be better if the Supreme Court at least carefully reviewed the lower courts' decisions to determine that they had properly reconciled development and environmental statutes and had properly applied the conclusion.

A more important consequence of the Supreme Court's deference is the Court's failure to clearly indicate the need for purposive review in the lower courts. This purposive review should embrace the important environmental purposes involved in economic-development projects. If not corrected by the Supreme Court through remanding to the lower courts upon their failure for full review, the lower courts will not be required to perform an important task. That task is the careful interpretation of the relationship between environmental and development-oriented laws, or within multi-purpose environmental laws (such as the Coastal Zone Management Act). This failure is the failure to articulate the shared legal meaning of sustainability which lies at the heart of reconciling economic development and environmental laws.

Thus, the task of the Supreme Court, from this point of view, is to insure that the ends of law are deliberated through full interpretation of the statutory public purposes and their applicability. In *Kelo*, the Supreme Court deferentially permitted the lower state court to review carefully the public purposes of the laws enabling economic-development projects, although the Supreme Court failed to clearly set forth the basis of its deference. And, perhaps because the issue was not clearly raised in the lower courts, the Supreme Court failed to remand to require the lower courts to explore the relation between the project and the environmental legislative purposes, which were also applicable in the case. In failing this latter task, the Court failed to promote a public articulation of the public ends of sustainability as defined in its environmental impact and coastal management legislation. In this latter sense, in the case of New London, the courts may have failed to insure that New London's plans continue to retain its sea-tide identity.

"But wherever I strike the waterfront, on my walks . . .
It boils with the salt tide and its headwaters.
It is at full with early water, changing the banks
And here, the city, all port, gives on the ocean generously."⁵⁷

⁵⁷ William Meredith, *Waterways*, THE OPEN SEA AND OTHER POEMS 17 (1957).