Rhode Island Policy Reporter

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Rights and Wrongs

SINCE THIS ARTICLE is a review of some legal matters, it will start with a legal device, a stipulation. Barring some political *deus ex machina*, quite soon Susette Kelo will lose her home of eight years and her neighbor, Wilhelmina Dery, will lose her home since birth in 1918. These homes, and a dozen or so others in the Fort Trumbull section of New London, will be bought by the city (or rather by the quasi-public New London Development Corporation) and bulldozed, to make way for the parking lot for a marina and for R&D space for Pfizer, the drug and chemical company. The stipulation is that this is a disaster, a travesty of modern urban planning, and an abuse of the power of eminent domain.

Now that the stipulation is in place, we can look at the issues. The reason this matter is in the news is because the US Supreme Court recently ruled against Kelo and Dery and their neighbors in their suit to have the taking of their homes overruled on constitutional grounds—

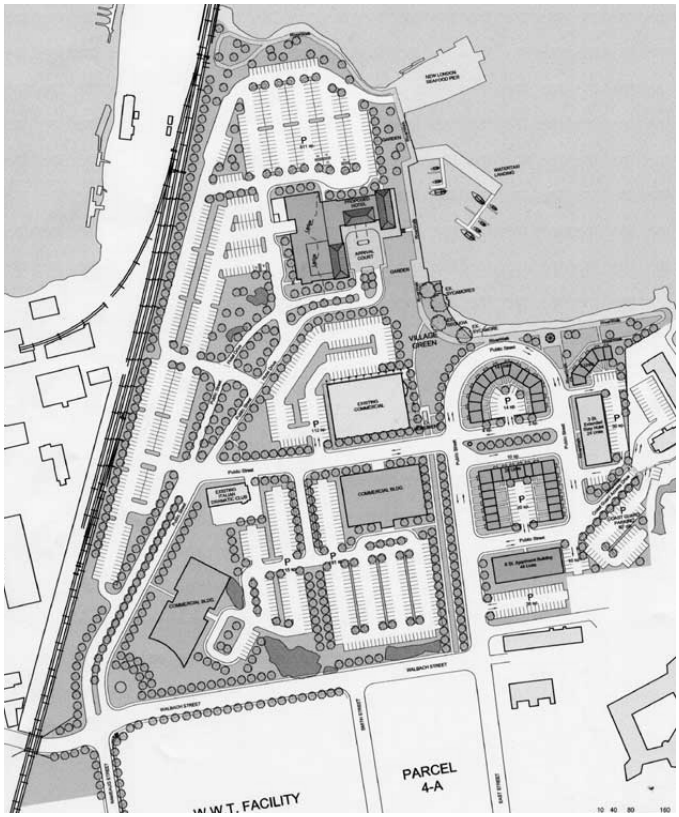

Figure 1: The site plan for the Fort Trumbull development in New London. The affected houses are in parcel 4-A, to the bottom, and parcel 3, roughly where the hotel-to-be and "village green" sit, on the water, directly above 4-A. Look how much is for parking, and also how much is lawn. Since the court case was filed, the New London Development Corp. found the developer in default, and construction of much of the project is on hold. Pfizer is off the picture, below, but will occupy some of the commercial buildings shown.

Kelo v. City of New London et al. The stipulation is necessary because the decision was a good one, and necessary, even though it won't preserve the Kelo and Dery homes. What's more, it's a decision that turns on crucial principles, and so needs protection and support from the public, even though the retiring Sandra Day O'Connor and the ailing William Rehnquist were in the minority.[1]

The suit held that the Fifth Amendment, which allows the taking of private property for public use (with "just compensation"), by omission forbids the taking of private property in order to give it to another private party, which is essentially what is being done in New London. The Court said, that's an interesting theory but there are plenty of decisions in the past that disagree.

Exhibit A would be a case called *Hawaii Housing Authority v. Midkiff*, decided in 1984. During the 1980's, the US was heavily involved in a proxy war in El Salvador. Among the points of conflict was land reform, since an economic elite of fourteen (extended) families owned the vast bulk of the land, and operated the country like fourteen fiefs. Proposals to expropriate the land from the fourteen and redistribute it to the tenants who farmed it generated a lot of official tsk-tsking from Washington but during the same period, the state of Hawaii was engaged in exactly the same thing. As of the 1970's, over 72% of Oahu was owned by members of only 22 families and 18 families owned 40% of all the islands, with the state and federal governments owning 49% more. The large estates were mostly a remnant of Hawaii's past, when all land was kept at the pleasure of the ali'i nui, or island chief. The Hawaii legislature made it policy to break up the largest estates, and created a system of involuntary condemnation, to allow lessors to buy their homes from the landlords.

> The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs... Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers... We cannot disapprove of Hawaii's exercise of this power. (*HHA v. Midkiff*)

In fact, by 1779, Virginia and Pennsylvania both had land reform statutes with the purpose of redistributing what were essentially feudal estates. (Most owned by Tories, of course, but that's a different point.) Subsequent laws encouraged the formation of mills by using eminent domain to acquire land to be flooded by dams. The record

[1] Pointers to the Court opinions discussed here can be found on *whatcheer.net*. They make more interesting reading than you might think.

is pretty clear, the founders of our country, as well as all the Supreme Courts that have sat in judgment since then, didn't see anything wrong with this. Benjamin Franklin wrote this:[2]

> Private property…is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing, its contributors therefore to the public Exigencies are not to be considered a Benefit on the Public, entitling the Contributors to the Distinctions of Honor and Power, but as the Return of an Obligation previously received, or as payment for a just Debt.

Conservatives are fond of saying, "Freedom isn't free." Usually they're talking about the physical defense of our country during war, but the point also holds for town halls. Across America, in every town and county in the nation, there is a registry of deeds to record who owns what piece of land. This vast apparatus is not incidental to the existence of property rights, it is a fundamental part of the maintenance of those rights. The taxes we pay local governments are used to pay for the defense of our property, creating an obligation in return. This wasn't lost on the practical men of the 18th century, like Franklin.

What about takings? One would have to be blind not to see in the progress of the *Kelo* case the hand of those who would value the individual right to property over pretty much every social interest: health, environment, economy, whatever. For example, the lead attorneys for Ms. Kelo and her neighbors were provided free by the Institute for Justice, the "nation's only libertarian public interest law firm" according to their web site.[3] The IJ is an important cog in a machine that is currently grinding away at the government's ability to regulate land use. The machine includes around a dozen prominent nonprofit legal foundations who coordinate their work on these issues. The groups include the Institute for Justice, the Mountain States Legal Foundation, the Pacific Legal Foundation, the Defenders of Property Rights and several others. Most share board members with the prominent right-wing think tanks, like the Heritage Foundation, the Cato Institute and the Federalist Society. To most of these groups, zoning regulations, environmental regulation, and land-use planning that might restrict the kinds of uses for some piece of land, are all unacceptable infringements on a fundamental human right: to own land and do what you please with it. If regulation means that you can't do what you want with your land, then the government should pay you for it.[4]

The Kelo case was abetted by a network of property-rights legal foundations opposed to almost all regulation.

The Supreme Court considered a suit holding exactly that in 1992. In *Lucas v. South Carolina Coastal Council*, Justice Antonin Scalia, writing for the majority, held that the owner of a beach parcel that was occasionally awash, and which had been mostly below the high tide mark only a few years before its purchase was entitled to be compensated because of new regulations forbidding construction in the beach zone.[5] The property was bought in 1986, the regulations forbidding building went into effect in 1988, and—in response to the uproar from people like Mr. Lucas—exceptions were granted (by the SC legislature) that would have allowed Mr. Lucas to build in 1990. Nonetheless, the Supreme Court felt it had to make a statement about property rights in 1992. So they did, and now environmental regulation is more expensive than it used to be, since states have to bear in mind that building restrictions might require them to purchase development rights from property owners.

The pressure of suits financed by groups like the Institute for Justice has only grown over the past few years, and in 2001, the Supreme Court considered a suit claiming that not only must a property owner be paid for the "taking" of their land by regulation, but that they deserve to be paid for the most profitable possible use of that land. This suit, *Palazzolo v. Rhode Island* concerned a man who

[2]Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania (1789), in *The Writing of Benjamin Franklin* (Albert H. Smyth ed., 1970).

[3]The Institute for Justice board is made up, in roughly equal proportion, of bankers and investment professionals on the one hand, and representatives of other right-wing foundations like the Cato Institute, The Manhattan Institute, and the Reason Foundation. The co-founder of the Institute, and current "Counsel for Strategic Litigation" is Clint Bolick, who was an assistant at the Equal Employment Opportunity Commission when Clarence Thomas was its head, and went on to found the Landmark Legal Foundation, a reliable source of suits against the EPA and the National Education Association, among others.

[4]A useful field guide to the denizens of this terrain is called "The Takings Project: Using Federal Courts to Attack Community and Environmental Protections," prepared by the Community Rights Counsel (available at *www.communityrights.org*), a much younger foundation started to do combat on this ground.

[5]Lucas was the part owner of a larger beachfront housing development that included the lot in question. The development regularly required sandbag brigades—12 times between 1981 and 1983—to protect it from coastal flooding, and may have been part of the reason the legislature created the new coastal building regulations in the first place.

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wanted to fill an 11-acre salt marsh he owns on Rhode Island's southern coast and subdivide it into dozens of house lots and a beach club. Told that he wouldn't be allowed to do that, and despite the fact that his land is not valueless since it still includes some buildable lots, he demanded to be paid for the value of 74 house lots and the beach club. The Supreme Court ruled against Palazzolo on narrow grounds, but a bare majority of the Justices were sympathetic to his major claim, and he is now back in court, working his way back up the appeals ladder.

The *Palazzolo* suit, the *Lucas* suit, and a bunch of other similar cases in the 1990's[6] all represented significant steps forward for property rights advocates, and were all abetted in substantial ways by the same network of foundations. All these cases had the effect of expanding property rights against the ability of governments to regulate what is done with that property, and all were based on very little in the way of precedent.

In the *Lucas* case, Scalia had this to say:

> Prior to Justice Holmes' exposition in Pennsylvania Coal Co. v. Mahon, it was generally thought that the Takings Clause reached only a "direct appropriation" of property... or the functional equivalent of a "practical ouster of [the owner's] possession."

Which is to say, we thought the Fifth Amendment ("...nor shall private property be taken for public use without just compensation.") was only about actually dispossessing people of their property until about 1922, when we decided it included government regulation, too. Oliver Wendell Holmes, Jr. is a towering figure in the history of the Court, but one thing he is not is a model that Scalia ever aspired to emulate in public. Scalia vehemently disagrees with vast amounts of Holmes's legacy, from free speech rights to the importance of the "original intent" of the framers of the Constitution, so there is more than a little dark irony in seeing Scalia reach back to Holmes to find precedent for a property rights case.

The theory is that if the government regulates your land, they should pay you for whatever you can't do with it.

And reach back he did. There was apparently very little intervening precedent to find that built on the 1922 case in quite the right way, save a 1987 decision Scalia himself had written. He also cited in support another 1987 decision that rejected the very grounds on which the *Lucas* case was decided, and a 1980 decision on nearly the same issues, decided by a unanimous court the exact opposite way. So having disposed of the actual precedent, the *Lucas* opinion, and its companion decisions since, turn out to hinge on legal theories promoted by Richard Epstein, a law professor at the University of Chicago, and a crusading libertarian. With the help of Justices Scalia, Rehn-

[6]For example, *Nollan v. California Coastal Commission* (1992), *Dolan v. City of Tigard* (1994) and *Suitum v. Tahoe Regional Planning Agency* (1997).

The grab bag of history

Seeing Antonin Scalia quote Oliver Wendell Holmes approvingly is not the only historical funny business at the Supreme Court. Clarence Thomas's dissent in the *Kelo* case skips right over 200 years of judicial precedent to quote William Blackstone, who wrote "Commentaries on the Laws of England" in 1765. Blackstone asserted that the "sacred and inviolable rights of private property" trumped any and all public necessity. Blackstone was a huge influence on American law, but he stayed in England, and the quote presented is contradicted by the Fifth Amendment, so it's not quite clear why one should care.

Thomas also finds support for his position in Samuel Johnson's dictionary of 1773, and in John Lewis's "Treatise on the Law of Eminent Domain" of 1888. A lot has happened since these gentlemen wrote their books. And when Lewis wrote his, he was already "rowing against the tide" according to one historian.[a] These quotes sound impressive, but do they have any other function?

Quotations provide their interest from the authority of their source, the poetry or humor of their language, or their pithiness. A beautiful turn of phrase is worth quoting, and so is an unlikely or prominent source of an opinion. But do opinions acquire value simply by aging? In a rapidly changing world, one might be excused for thinking the reverse to be true. Why exactly should I care that Blackstone thought private property "sacred?" Thomas's *Kelo* decision is filled with quotes that add essentially nothing to the argument, like padding in some high school student's term paper.

But looking through some of the property rights decisions which now have the rule of law, it's hard to avoid the feeling that the same thing is done with decisions as with quotes. They've been selected out of context, with subsequent modifications to precedent ignored. In his dissent in *Lucas*, Harry Blackmun agreed:

> [T]he Court seems to treat history as a grab bag of principles, to be adopted where they support the Court's theory and ignored where they do not...What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.

The important thing about quotes and references is not simply that they exist, but that they mean something. But perhaps that principle, too, is just a relic of an earlier age.

[a]"Can the 'Despotic Power' Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain" James W. Ely Jr., in *Probate and Property*, November 2003, ABA Publications

quist, Thomas, Kennedy and O'Connor, with invaluable assistance from the various property rights legal foundations, these theories are now the law of the land, more or less. In other words, this is one of the results of appointing an articulate, young, committed partisan to the Supreme Court: a body of bad law that will take a generation or two to undo, if it can ever be undone at all.

So now we leap back to the present, and what do we find in Thomas's dissent in the *Kelo* case, but a complaint that there is a body of law to deal with the definition of "just compensation," but no corresponding precedent for "public use." Thomas complains that the Court is therefore shirking its responsibility. This may seem like sound reasoning, but the fact remains that the "just compensation" body of law he refers to is bad law, with meager precedent, promoted by ideologues, and acceded to by people who didn't really see what was going on until it was too late. It's a blight on our legal system and an impediment to regulation that promotes the health and safety of real people, but Thomas's solution is presumably to create a comparable body of bad law on the other point.

There is no bad law about eminent domain to match the bad law about "takings." What a shame.

So is owning real property a fundamental human right? The Institute for Justice and its friends would certainly have us believe so. But the thing about rights is that they often conflict. "The right to swing my fist ends where the other man's nose begins."[7] It's not too hard to think of circumstances where your right to liberty and happiness might conflict with your child's right to a healthy childhood. Didn't we even fight a civil war over conflicting rights? After all, Thomas Jefferson's right to his property conflicted with Sally Hemings's right to life, liberty and the pursuit of her happiness.

So when rights conflict, what do we do then? Where does the right to property rank? The UN's Universal Declaration of Human Rights (ratified in 1948) includes this:

> (1) Everyone has the right to own property alone as well as in association with others.
> (2) No one shall be arbitrarily deprived of his property.

But this is article 17, right behind a right to marry. Now the number of the article in the Declaration isn't meant to be a ranking, but still, there are 30 articles in the document, and this is all the mention of property there is. When the right to property conflicts with one of these others, what do we do? According to the Institute for Justice, Antonin Scalia, the Pacific Legal Foundation, Clarence Thomas and their friends, property rules.

Definitions A substantial part of the dissents in the *Kelo* case have to do with the fact that the words "public use" aren't really that much help as a guide. The New London Development Corporation believes that public use involves building amenities for an R&D facility for Pfizer. Is this a public use? One can hope for more guidance from the court than they have given. But is this really possible? The Courts have shied away from difficult definitions in the past—most notably about what, exactly, constitutes pornography—on the theory that any definition must be defective and that a bad definition can cause more mischief than no definition. The Court specifically did not rule out the possibility that they might overturn some proposal as not being a public use, and they cited approvingly some cases where lower courts did exactly that.

Here in Rhode Island there is a highway extension being built right now to connect the Quonset Point industrial park to Route 4. It is a short road, and will serve no residences. In order to build this road, eminent domain has been exercised several times. In other words, several businesses and homes have been bought and destroyed in order to serve businesses that do not yet exist and may never exist, along with a few that actually do exist. Is this road a public or a private use? Everyone thinks of roads as public, but this one is really only to service an industrial park. In a way it's not much better than taking Susette Kelo's house to be a marina parking lot near Pfizer, even if the title to the actual land will be the state's. In a world of confused categories like this, what test could a court come up with to classify uses into a "public" category and a "private" one?

In the *Kelo* decision, the majority satisfied itself that the public use envisioned was documented and broad, with a large number of potential beneficiaries, and considered its work on that point done. There are those who would have them be more specific, but let those people propose a test to tell a private from a public use. It may be harder than it looks. Would such a test forbid the land reform of the Hawaii decision? Would it permit the Quonset Point road? How would it be formulated? Would using eminent domain be acceptable to build a school? What if it's a charter school? A reservoir? What if the reservoir is to serve a particular housing development? What if it's affordable housing?

*How would **you** formulate a test for "public use?" Be specific.*

[7] Attributed to... Justice Oliver Wendell Holmes, Jr.

The stipulation But this isn't the last word on the New London debacle. It may well be that, in a legal and constitutional sense, the NLDC is perfectly justified in what it proposes. But what is going down in New London is just another chapter in disastrous land use planning. The city councillors who allow this to happen may be lucky enough to avoid seeing this project turn out badly, but the odds aren't with them.

In the 1960's vast swaths of urban America were laid waste by "urban renewal." Fueled by federal highway money, thousands of blocks in hundreds of cities were razed to make way for highways and new developments. Decades later, it's not too hard to see much of this as a grave mistake. In Providence, for example, I-95 sliced through a busy neighborhood, creating a canyon that cut downtown off from the Federal Hill and Broad Street neighborhoods, and creating such anomalies as the congregation-free churches downtown. The neighborhood destroyed was said to be blighted, but was destroying it the best option? The soulless brick developments that replaced it win no beauty prizes. For that matter, they're not so much safer, either.

The Fort Trumbull planners are not notable for their lack of imagination. Sadly.

The end of huge new highway construction didn't mean the end of this folly. Many square blocks of Boston's "blighted" West End were destroyed to make way for the Copley Plaza hotel and Copley Place mall. Some call it blight, while others call it cheap housing, and after the hotel was built, the hotel workers' union was successful in forcing the hotel to participate in a scheme to increase the supply of now-scarce affordable housing in the area.

In the end, what is the problem with the Fort Trumbull plan? It's not that the rules permit it, since the same rules permit other practices we need. Rather, it seems that the people to whom we trust our future are too readily snookered by architectural renderings of tidy lawns and happy little stick figures strolling around them. They are too ready to tear buildings down and begin afresh, when a smarter—though more difficult—course might be very different.

The planners of the New London debacle apparently subscribe to the unholy trinity of modern American commercial life:

$$\text{cleaner} + \text{safer} + \text{more parking} = \text{better}$$

David Burnett, an executive at Pfizer, and husband of then NLDC president Claire Gaudiani[8], said "Pfizer wants a nice place to operate. We don't want to be surrounded by tenements." And indeed the development appears to be a modern executive's wet dream, with a marina, a health club, a fancy hotel, a water taxi dock, a "village green" and so on. Of course, the hotel and marina developer is currently in default, so realizing this vision may be a while yet. But there's no shortage of parking (see page 1).

But it doesn't have to be this way. The city of Providence has achieved some national prominence just because a few people were once persuaded *not* to tear down the blighted neighborhoods of Benefit Street. Now there are guided tours of the houses in that area, and pictures of the street grace our tourist literature. Many

*Providence is famous now because some people once decided **not** to tear stuff down.*

Hope is not a plan

One of the largely unnoticed events of this past budget season happened late in the game, when the administration and AFSCME reached an agreement on a new contract. This was a great relief to many, but it also had the effect of adding $43 million to the employee expenses in the budget. It seemed odd that the Governor, who spends so much time exhorting the towns to get tough with their teacher unions, would underestimate the cost of the new contract by so much. But as usual, the real story is even odder, and according to the budget office, the Governor hadn't budgeted for *any* settlement. Had the union agreed to his original proposal, it still would have added $30 million to his officially proposed budget.

Color us confused. We thought Rhode Island elected a hard-headed business guy to run the state. Is this how things ran at Cookson? What would he have done if the settlement hadn't happened until July? Isn't this the kind of thing military planners scorn when they say, "Hope is not a plan."

So our plan for acquiring new subscribers is to hope that you enjoy reading here about policy issues you don't hear about anywhere else. And then we hope you'll subscribe. Or if you already do, tell three friends that they should subscribe, too. There are still tattoos left for new subscribers, so tell them that, too. $35/11 issues, address on page 2, or pay online: *whatcheer.net*. –TS

[8] In addition to this conflict, a Pfizer vice president, George Milne, Jr., sat on the NLDC board. Milne told the Wall Street Journal in 2002 that he recused himself from the relevant decisions, but he did acknowledge lobbying colleagues on the proposal. As far as I can tell, these conflicts of interest played no part of the case that made it to the Supreme Court, perhaps because the Institute for Justice's top priority is in setting new property law precedent, not keeping Susette Kelo in her house.

old New England cities are filled with old industrial space going to waste, and New London isn't any different. Old mill space is in high demand in some places, but in New London the city planners and the Pfizer executives apparently like to encourage driving, and they like lawns, and they like nice hotels, so that's what they want to see. But remember, almost nothing about the jobs promised by Pfizer depend on there being a health club and marina next door.

Like the Rhode Island Economic Development Corporation executives who steer new industry to suburban industrial parks instead of to cities, the New London development authority has relied on a false idol of progress: the one that holds tidy suburban development to be superior to real neighborhoods, where real people live. Look around some depressed part of town, what do you see? Do you see blight or do you see cheap housing? Do you see chaos, or opportunity? Sometimes there isn't much difference. It seems easier to knock down neighborhoods and build something tidier in its place, but humility is in order. The evidence of the past 50 years seems to be that some of that ease is an illusion. It's easy to tear down, and it's easy to build, but things often don't work out in quite the way we hope. We've replaced dangerous neighborhoods with project housing in many cities only to see the projects become even more dangerous. We've knocked down poor neighborhoods only to create housing shortages in others, and we've built business parks in others, only to watch them languish.

Do you see blight, or do you see cheap housing? Chaos or opportunity? What you bring matters as much as what you see.

There is no denying that it's harder to fit new space into old buildings, and it's also hard to fit new uses into old neighborhoods. But two results seem worth it. For one, this kind of shoehorning can result in the kind of fascinating space that makes cities fun to live in. The second good result is that it can let elderly ladies live out their days in the neighborhoods where they grew up, which is no small thing.

As is so often the case, the fault doesn't lie with the system but the people we've elected to administer it. The Fort Trumbull situation is a travesty of urban planning, as wrongheaded as all that 1960's urban renewal, but it's a political travesty, a misapplication of the system, not a perversion of it. Like so many others, the illness is in the people we've entrusted to run our system, and seeking for a solution by modifying the system is, at best, a waste of time, and at worst, truly dangerous to other important goals of government, like preserving drinking water, encouraging public transit, limiting air pollution, promoting public health, and keeping housing affordable. We don't currently do a good job on many of these counts, but if we are ever to succeed in these struggles, we will need the tools questioned by the *Kelo* plaintiffs.

So go ahead and agitate for laws against taking private property for mall development. We need them. Work to unseat town councillors and Governors in love with the unholy planning trinity, but don't remove the legal justification for regulation of the market in land. Health and safety regulation, environmental regulation, land use planning are all important. If all farms are to be sold into housing, what will we eat? If we can't discourage development around wells and reservoirs, what will we drink? If all neighborhoods are to be gentrified, where will the people who can't afford them live? Some say the free market will provide, but the evidence is pretty thin. It would be good not to discard the possibility of providing guidance to the market, and that's exactly what is at issue in the "takings" and eminent domain jurisprudence of the *Kelo* case. ■