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Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration

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Steven J. Eagle

Abstract

Dirigisme is the "policy of state direction and control in economic and social matters. This Article examines dirigisme as it relates to state control of land use. It also analyzes the development of eminent domain law and the requirement that takings be for public use. The author argues that the New York Court of Appeals "subordinates constitutional protections for private property to centralized development," specifically examining the recent Goldstein and Kaur opinions. The Article also discusses the implications of condemnation for transfer for private redevelopment, including lack of transparency, secondary rent seeking, possibilities of corruption, and the inefficient use of resources.

KEYWORDS: eminent domain, Fifth Amendment, property, public use, dirigisme

PUBLIC USE IN THE DIRIGISTE TRADITION: PRIVATE AND PUBLIC BENEFIT IN AN ERA OF AGGLOMERATION

Steven J. Eagle[*]

ABSTRACT

This Article analyzes the development of eminent domain law, focusing on the U.S. Supreme Court and the New York Court of Appeals' approach to the requirement that takings be for "public use." It asserts that the Supreme Court's public use doctrine is conceptually incomplete. In applying that doctrine and its own precedents, the Court of Appeals acts in the State's tradition of dirigisme, and subordinates constitutional protections for private property to centralized development. Its recent *Goldstein* and *Kaur* opinions, uncritically supporting development for economic agglomeration, are the culmination of this approach.

The Article also discusses implications for public policy arising from condemnation for transfer for private redevelopment, as hastened by government efforts to stimulate agglomeration. These include a lack of transparency, secondary rent seeking, possibilities of corruption resulting from crony capitalism, and the inefficient use of public and private recourses.

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INTRODUCTION

This Article is about dirigisme, the "policy of state direction and control in economic and social matters,"[1] as it relates to state control of land use. It also is about the Public Use Clause, its evasive conceptualization by the U.S. Supreme Court, and the New York Court of Appeals' reflexive application of the Supreme Court's public use cases. As the French proverb would put it, the Court of Appeals' abrogation of its duty, together with an

1. 1 SHORTER OXFORD ENGLISH DICTIONARY 692 (6th ed. 2007).

underlying policy that takes us down the path of inefficient land use and crony capitalism, is worse than a crime—it is a blunder.

The U.S. Supreme Court's decision in *Kelo v. City of New London*[2] makes clear that the exercise of eminent domain no longer is constrained by traditional concepts of use by the public and the prevention of harm. The New York Court of Appeals had reached that conclusion over forty years earlier, by *Cannata v. City of New York*.[3] However, the majority in *Kelo* expressly assured that courts would confront abuses of eminent domain when and if they arise.

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[4] the Supreme Court implicitly assured that federal courts would review claims that state and local governments took private property in violation of the Fifth Amendment's Takings Clause, although those claims first would have to be "ripened" in state court.[5] Yet, as it turns out, the doctrine of collateral estoppel means that the very act of ripening a case for federal judicial review precludes its merits from being considered by the federal court.[6] As Professor Thomas Roberts observed, the landowners "understandable reaction" is that this "perpetrates a fraud or hoax."[7] "Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten."[8] Roberts was not troubled by this apparent bait-and-switch, being dismayed only by the fact that it "is surprising to those who are misled by the language of ripeness, which suggests that the state law suit is merely preparatory to a federal suit."[9]

The State of New York has a tradition of strong government in many areas, including land use regulation and takings.[10] The New York Court of Appeals has a tradition of deference to legislative and administrative ac-

2. 545 U.S. 469 (2005).

3. 182 N.E.2d 395, 397 (N.Y. 1962) (upholding condemnation of mostly vacant area subdivided as to "prevent effective economic development").

4. 473 U.S. 172 (1985).

5. *Id.* at 186.

6. San Remo Hotel, L.P. v. City and Cnty. of S.F., 545 U.S. 323 (2005).

7. Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 71 (1995).

8. *Id.* at 72.

9. *Id.* at 67. Roberts characterized the state compensation prong of *Williamson* "as a forum restricting rule, rather than a ripeness rule, provid[ing] more accuracy and safety." *Id.* at 39.

10. *See* Leah Moren Green, *The Erie Canal and the American Imagination: the Erie Canal's Effects on American Legal Development, 1817-1869*, 56 ALA. L. REV. 1167, 1170-71 (2005).

tions.[11] Recent decisions by the Court of Appeals in *Goldstein v. New York State Urban Development Corp.*,[12] and *Kaur v. New York State Urban Development Corp.*,[13] together with a U.S. Court of Appeals for the Second Circuit decision in the related *Goldstein v. Pataki* case,[14] forebode that the Supreme Court's assurances in *Kelo* that courts will confront eminent domain abuse will prove as evanescent as the *Williamson* tomato that turns from green to mushy red.

Ultimately, *Goldstein* and *Kaur* represent a continuation of the late Chief Judge Charles D. Breitel's declaration in *Penn Central Transportation Co. v. City of New York*[15] that the State commands "the accumulated indirect social and direct governmental investment" that provided most of its value to physical property.[16]

I. DIRIGISME AND NEW YORK

Dirigisme has long antecedents in New York law and policy, dating to the philosophical underpinnings of the State's constitution and law.[17] It is perhaps best associated with the economic policies of New York's Alexander Hamilton, who was convinced of the need and desirability of government involvement in the state and national economy.[18] Hamilton wanted a "government that would actively participate in the economy, regulating it and creating monopolies as it saw fit[, seeking] not to create an economy based on free enterprise, but one based on regulation and government intervention."[19] Despite Hamilton's untimely death, his economic philosophy survived and prospered, and was put to almost immediate use in the

11. *See generally* Yonkers Comm. Dev. Agency v. Morris, 335 N.E.2d 327 (N.Y. 1975); Denihan Enters. v. O'Dwyer, 99 N.E.2d 235 (N.Y. 1951); Kahlen v. State, 119 N.E. 883 (N.Y. 1918); Bloodgood v. Mohawk & Hudson R.R. Co., 18 Wend. 9 (N.Y. 1837); Oneonta Light & Power Co. v. Schwarzenbach, 150 N.Y.S. 76 (N.Y. App. Div. 1914), *aff'd*, 114 N.E. 1075 (N.Y. 1916).

12. 921 N.E.2d 164 (N.Y. 2009).

13. 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

14. 516 F.3d 50 (2d Cir. 2008).

15. 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

16. *Id.* at 1272-73 (emphasis added). *See infra* Part IV.A for further discussion.

17. DOUGLAS AMBROSE & ROBERT W.T. MARTIN, THE MANY FACES OF ALEXANDER HAMILTON: THE LIFE & LEGACY OF AMERICA'S MOST ELUSIVE FOUNDING FATHER 26, 169-70 (2006); EVAN CORNOG, THE BIRTH OF EMPIRE: DEWITT CLINTON AND THE AMERICAN EXPERIENCE 1769-1828, at 104, 112-13, 116-17 (1998).

18. STEPHEN F. KNOTT, ALEXANDER HAMILTON AND THE PERSISTENCE OF MYTH 43, 54 (2002).

19. Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 358 n.39 (1989).

State's support for the Erie Canal.[20] Hamilton's successors such as DeWitt Clinton saw great potential economic benefits in completing the massive infrastructure project, and when private attempts to finance and construct the Erie Canal failed, they were eager to step in and direct the development in the direction they saw fit.[21] A successor to Governor Clinton, William H. Seward, declared:

> [I]t is not only the right but the *bounden duty* of the legislature to adopt measures for overcoming physical obstructions to trade and commerce in this state, and for furnishing to each region, as far as reasonable, practicable facilities of access to the great commercial emporium of the Union, fortunately located within our own borders.[22]

In addition to sparking enthusiasm for major internal improvements, the Erie Canal significantly altered the development of New York law.

> Despite the previous century's insistence on natural rights, of which property ownership was one, American citizens began to realize that this interpretation of property rights would impede the country's ability to expand and prosper economically. To achieve this new economic development, it was necessary for private individuals to sacrifice their property for the canal.[23]

The requisition of private land by canal contractors produced a broader definition of "public use" as well.[24] In the area of education, another form of infrastructure or capital, the French tradition of dirigisme was actually imported from New York. The State early administered "Regents Examinations," a precursor to what much later became commonplace standardized testing.[25] Since 1784, the Regents have presided over the University of the State of New York, and "are responsible for the general supervision of *all* educational activities within the State."[26] It "is the nation's most

20. *See* Roy G. Finch, *The Story of the New York State Canals: Governor Dewitt Clinton's Dream*, NEW YORK STATE CANALS, *available at* http://www.canals.ny.gov/cculture/history/finch/index.html (last visited Apr. 11, 2011).

21. *See id.*

22. CHARLES Z. LINCOLN, 2 CONSTITUTIONAL HISTORY OF NEW YORK 97 (1905), *available at* http://nysl.nysed.gov/uhtbin/cgisirsi/T2UFEVhehH/NYSL/86450122/503/82982.

23. Green, *supra* note 10, at 1169 (citing CAROL SHERIFF, THE ARTIFICIAL RIVER 80-81 (Arthur Wang ed., 1996)).

24. Jerome v. Ross, 7 Johns. Ch. 315 (N.Y. Ch. 1823).

25. Regents examinations in selected high school subjects were authorized in 1876. *See* N.Y. State Educ. Dep't, *History of Regent's Examinations 1865-1987*, http://www.p12.nysed.gov/osa/hsgen/archive/rehistory.htm (last visited, Jan. 3, 2010). The exams were responsive to the perceived "danger of superficiality and misdirection in the range of secondary study." *Id.* (quoting Dr. John E. Bradley).

26. New York State Board of Regents, NYSED.GOV, http://www.regents.nysed.gov/ (last visited Jan. 3, 2011) (emphasis added).

comprehensive and unified educational system."[27] While it traces its antecedents to a 1784 statute establishing the Regents as a corporation empowered to govern Columbia College (now University) and subsequently established colleges, the provenance of the University of the State of New York is even more fascinating.

> This unique university was not a single institution of higher learning as at Paris or Oxford. Rather, it served largely as a way of governing schools, colleges and universities in a *centralized, secular system of state control.* In addition, it controlled admission to higher education through the regents examinations given to secondary school children. This type of university had been advocated unsuccessfully in France for over two hundred years.[28]

It is "no mere coincidence" that Napoleon's University of France (1808) took similar form.[29] "If France may claim to have given New York the ideal of a symmetrical state system of learning, New York may claim to have returned to France the practical form of such a system, in its all-inclusive university corporation."[30]

This Article is not about dirigisme in education, but rather about the conflict between the duty of New York courts to enforce the State's guarantees of private property rights[31] and its deference to centralized control of ownership and direction of land use. The New York and Federal constitutions both state: "Private property shall not be taken for public use without just compensation."[32] The courts of New York have generally interpreted this provision quite broadly in favor of the government, a trend continued since my last review a dozen years ago, in connection with the Court of Appeals' 1997 quartet of regulatory takings cases.[33]

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27. *Id.* The University:

> consists of all elementary, secondary, and postsecondary educational institutions, libraries, museums, public broadcasting, records and archives, professions, Vocational and Educational Services for Individuals with Disabilities, and such other institutions, organizations, and agencies as may be admitted to The University. The concept of The University of the State of New York is a broad term encompassing all the institutions, both public and private, offering education in the State.

Id.

28. Roland G. Paulston, *French Influence in American Institutions of Higher Learning, 1784-1825*, 8 HIST. EDUC. Q. 229, 236 (1968) (emphasis added).

29. *Id.* at 237-38.

30. *Id.*

31. N.Y. CONST. art. I, § 7 (McKinney 2010).

32. U.S. CONST. amend. V.; N.Y. CONST. art. I, § 7(a).

33. Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345 (1998) [hereinafter Eagle, *The 1997 Regulatory Takings Quartet*]; *see also infra* notes 100-10 and accompanying text (supplying a brief summary).

At the time of the American Revolution, the immemorial power of the sovereign to condemn private property for the health, safety, and welfare of the people devolved upon the State. "The right to take private property for public purposes does not depend upon any express provision in the charter of government, but is an inherent attribute of sovereignty existing in every independent state."[34] With the creation of entities like the Erie Canal Commission in 1817, New York State took an active role in promoting commerce and economic growth through their direction and instigation of the means of that growth.[35]

Though not all were Federalists,[36] the leading politicians of New York State shared Alexander Hamilton's belief in the end for strong government direction and support of industry. In his major economic work, *Report on Manufactures*,[37] Hamilton strongly argued against Adam Smith's perspective and the ability of free markets to effectively produce economic growth.[38] In *Manufactures*, Hamilton argued as an alternative to the unregulated free market that an integrated agricultural and industrial economy, in which the government promotes infrastructure development (canals and roads, at that time) aiding in the growth and prosperity of the populace, speeds technological growth and improves national security.[39] This economic perspective inspired adherents throughout the nation, but nowhere more than in Hamilton's home state, New York, where the role of government in improving the "public good" was fully enshrined even at the beginning of the nineteenth century.[40]

In New York State, a massive expansion of the breadth and use of eminent domain powers for projects such as the Erie Canal and subsequent infrastructure projects was justified based upon the potential public benefits such projects were expected to provide.[41] Specific changes such as an alteration in the judicial definition of the term public use (as applied from the Fifth Amendment) were introduced, with the term being "narrowly con-

34. Heyward v. New York, 7 N.Y. 314 (1852).

35. *See* GERARD KOEPPEL, BOND OF UNION: BUILDING THE ERIE CANAL AND AMERICAN EMPIRE 3 (2009).

36. Governor Dewitt Clinton, the driving force behind the Erie Canal, was a Democratic Republican.

37. Alexander Hamilton, *Report on Manufactures* (Dec. 5, 1791), *in* 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303 (Harold C. Syrett ed., 1966), *available at* http://www.constitution.org/ah/rpt_manufactures.pdf.

38. *See* AMBROSE & MARTIN, *supra* note 17, at 192.

39. *See generally* Hamilton, *supra* note 37.

40. KNOTT, *supra* note 18, at 43, 54, 56, 83, 108.

41. Green, *supra* note 10, at 1172-73 (citing Jerome v. Ross, 7 Johns. Ch. 315, 341-42 (N.Y. Ch. 1823)).

strued before the canal, [but] after the canal . . . construed broadly."[42] The preeminence of economic development interests was continued at the expense of individual property interests in the remedies available for a wrongful taking as well, as "even when construction companies took property without a state or court order for use in the canal's construction, they were required to pay damages rather than return the property."[43]

The phrase "Empire State" came into general usage as a nickname for New York upon the completion of the Erie Canal.[44] The completion of that waterway provided the first direct waterborne link between the Hudson River at Albany and the Port of New York, and the rich agricultural regions of western New York and the Great Lakes. This made the state the ideal conduit for trade between east and west, and thus the keystone of a North American "empire."[45] As time went on and the U.S. economy shifted from overwhelmingly agricultural to largely industrial, this transport corridor, augmented by the New York Central Railroad and, later, the New York State Thruway, fed economic development in upstate New York and the Midwest, carrying steel, coal, and the finished products of heavy industry. The change in economic focus did not, however, change New York State's means of promoting it, and the dirigiste philosophy that had supported the growth of trade in agriculture simply was adapted to industry.[46]

The prototypical twentieth century dirigiste administrator was New York's Robert Moses, the eternal proponent of government-directed infrastructure development.[47] Coming to prominence in the 1920s and 1930s, Moses believed adamantly in his vision of the form economic development in New York City and other parts of the state should take, and he used government taking power to shape the outcomes of that vision.[48] In place of the piecemeal development of small businesses and houses in neighborhoods like the South Bronx, Moses advocated for and imperiously achieved the creation of a centrally planned network of highways and bridges. This,

42. *Id.* at 1171 (citing Jerome v. Ross, 7 Johns Ch. 315 (N.Y. Ch. 1823)).

43. *Id.*

44. *See id.* at 1167.

45. *Id.* at 1169.

46. *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). In this staple of first-year property and torts classes, the Court of Appeals refused to grant the traditional remedy of injunction against a cement plant that emitted dust and noise to the detriment of neighbors. Instead, it awarded permanent damages on the grounds that the defendant's investment in the plant and the number of its employees made that use more valuable.

47. *See* Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2019 (2007).

48. ROBERT A. CARO, THE POWER BROKER 4-9 (1974) (magisterial biography of Moses).

in his view, enhanced overall economic development and the "public good."[49]

The "public private hybrid" development model was chiefly Moses' invention.[50] He used the Tri-Borough Bridge Authority, which had ill-defined powers, to help direct massive amounts of government money into the projects which he supported, essentially turning him into the man with control of the money to finance infrastructure improvements, which no other person or authority in the state had.[51] Moses' displacement of many people and businesses and his brusque personal style resulted in vehement protests and eventually caused the city government to turn against him.[52]

Despite Moses' fall, the mindset in favor of large-scale development through eminent domain takings, against the wishes of property owners and masterminded by quasi-public organizations, remained undisturbed. A classic case illustrating this mindset is the ill-fated World Trade Center Project, which had its genesis in concerns after the Second World War about New York City retaining its financial leadership in a world of globalized commerce.[53] The movers behind the project were New York Governor Nelson A. Rockefeller and his brother, Chase Manhattan Bank Chairman David Rockefeller. The Port of New York Authority was brought in because it possessed bonding power, "mean[ing] that Rockefeller did not have to carry the enormous cost of the project on his state budget."[54] Also, the Port Authority had the power of eminent domain, which was exercised against a neighborhood of small shop owners, and which was upheld by the Court of Appeals in the highly publicized case of *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*.[55] Dirigisme in New York remains alive and well today, as demonstrated by the Atlantic Yards Project[56] and similar

49. *Id.* at 850.

50. Nasim Farjad, *Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City*, 76 FORDHAM L. REV. 1121, 1155 (2007) (quoting Eleanor Randolph, Editorial, *Robert Moses, Builder, Left Behind His Power Tool*, N.Y. TIMES, Feb. 14, 2007, at A26).

51. CARO, *supra* note 48, at 386-92, 617-18.

52. *See generally* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961). Jacobs herself had been radicalized by Moses' plan to run a highway through Washington Square Park. *Id.*

53. *See* Mary L. Clark, *Lessons From the World Trade Center for Open Space Planning Generally and Boston's Big Dig Specifically*, 32 B.C. ENVTL. AFF. L. REV. 301, 301-02 (2005).

54. PAUL GOLDBERGER, UP FROM ZERO: POLITICS, ARCHITECTURE, AND THE REBUILDING OF NEW YORK 22 (2004).

55. 190 N.E.2d 402 (N.Y. 1963).

56. *See generally* Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008).

ventures throughout the State, sponsored by its redevelopment agency, the Empire State Development Corporation.[57]

Illustrative of this tendency toward centralism in land use and development is the State Environmental Quality Review Act (SEQRA),[58] which requires review of "virtually all discretionary acts taken by State agencies and local governments in New York."[59] SEQRA encompasses not only actions undertaken by government agencies or involving government funding, but also those private projects that require agency approvals.[60] The Act has been interpreted as to require detailed review of the economic impact that a commercial enterprise may have on neighborhood character.[61]

Thus, the Court of Appeals has held that the "potential acceleration of the displacement of local residents and businesses is a secondary long-term effect on population patterns, community goals, and neighborhood character such that [SEQRA] requires these impacts on the environment to be considered in an environmental analysis."[62] In cases where there is a governmental "larger plan" for development, the cumulative impact of all other pending proposals must be taken into account in the review of any particular development application.[63]

In recent years, upstate New York has fallen on hard economic times,[64] and manufacturing in New York City has declined, with corresponding heavy reliance on the financial and service sectors.[65] The relative decline of New York State is illustrated by census data: the 1960 census resulted in New York having forty-one representatives in Congress, while Florida had

57. For list and summary, see *Major Development Projects*, EMPIRE STATE DEV., http://www.empire.state.ny.us/Subsidiaries_Projects.html (last visited Apr. 18, 2011).

58. N.Y. ENVTL. CONSERV. LAW art. 8 (McKinney 2010).

59. John F. Shea, *Environmental Law and Regulation in New York*, 9 FORDHAM ENVTL. L. REV. 223, 226 (1997).

60. *Id.*

61. *See, e.g.*, Soc'y of the Plastics Indus. v. Cnty. of Suffolk, 573 N.E.2d 1034 (N.Y. 1991).

62. Chinese Staff & Workers Ass'n v. City of New York, 502 N.E.2d 176, 180-81 (N.Y. 1986).

63. Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven, 606 N.E.2d 1373, 1378 (N.Y. 1992) (quoting Save the Pine Bush, Inc. v. City of Albany, 512 N.E.2d 526, 531 (N.Y. 1987)).

64. *State & County QuickFacts: Buffalo (City), New York*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/36/3611000.html (last visited Apr. 18, 2011) (showing the decline in population and a median household income almost half that of New York State as a whole).

65. *May 2009 State Occupational Employment and Wage Estimates: New York*, U.S. DEP'T OF LABOR: BUREAU OF LABOR STATISTICS (last modified Apr. 6, 2010), http://www.bls.gov/oes/current/oes_ny.htm (showing the great majority of New York State workers are no longer employed in industry).

twelve representatives.[66] As a result of the 2010 census, both states have twenty-seven representatives. California supplanted New York as the most populous state in the 1970 census, with Texas also surpassing New York's population in 1994.[67] Florida is expected to supplant New York in 2015 as the nation's third most populous state.[68] The dirigiste system seems to be in danger not due to any successful attempts to tame it or do away with it, but simply due to a shift in the economic needs of the state and a failure to adjust accordingly.

The declining relative importance of manufacturing in American cities, together with tremendous growth in the importance of information,[69] suggest a change in focus for the State's dirigiste inclination. While eminent domain was the lynchpin of the Atlantic Yards project,[70] it also was employed to obtain the site for the new headquarters building of an important information purveyor, the *New York Times*.[71] Given the interlocking of economic actors and interests, it is perhaps not a coincidence that *The New York Times* has been an avid booster of the controversial use of condemnation for Atlantic Yards and Columbia University.[72]

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66. KAREN MILLS, U.S. CENSUS BUREAU, C2KBR/01-7, CONGRESSIONAL APPORTIONMENT, CENSUS 2000 BRIEF 2 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-7.pdf.

67. *The 2011 Statistical Abstract: The National Data Book*, U.S. CENSUS BUREAU, http://www.census.gov/compendia/statab/cats/population.html (last visited Apr. 18, 2011).

68. PAUL R. CAMPBELL, POPULATION DIV., U.S. CENSUS BUREAU, PPL-47, POPULATION PROJECTIONS FOR STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2025 (1996), *available at* http://www.census.gov/population/www/projections/ppl47.html.

69. *See supra* note 65 and accompanying text.

70. *See infra* Part II.C.

71. *See* Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 369 (2010).

72. *See id.* (noting that The New York Times Company partnered on its midtown headquarters building with Forest City Ratner, the developer of Atlantic Yards). *The New York Times* coverage, in turn, was not critical of the Atlantic Yards Project. *Id.* *The New York Times* also editorialized that the Court of Appeals' decision upholding the use of eminent domain for Atlantic Yards in *Goldstein* was the "right decision," and that the Appellate Division's opinion in *Kaur*, finding the Manhattanville Project advocated by Columbia University to be pretextual was "misguided[]" and "weakly reasoned." *See* Editorial, *Eminent Domain in New York*, N.Y. TIMES, Dec. 14, 2009, at A30. Most recently, a *New York Times* architectural review has lavished praise on the new Columbia science building that will serve as the gateway to the campus extension that was the subject of *Kaur* as "superb architecture" and a means of "reinforcing the university's public mission." Nicolai Ouroussoff, *A Building Forms a Bridge Between a University's Past and Future*, N.Y. TIMES, Feb. 8, 2011, at C2.

> It is also, not incidentally, a work of healing. Seen in the context of Columbia's often tense relationship with its Harlem neighbors, including recent battles over its plans to build a new 17-acre campus in West Harlem, the building is a gleaming

The mindset that first flowered in the governance structure for Columbia College soon after Independence may have reached its culmination in the partnership between the State and what is now Columbia University. In 2010, the New York Court of Appeals endorsed, without effective qualification, that the State's imprimatur permits it to appropriate parcels belonging to its neighbors and then re-convey them to Columbia.[73]

In a statement released shortly after his recent swearing-in as governor, Andrew M. Cuomo pledged to serve the people of New York "and make it the Empire State once again."[74] That promise hints that the State's interventions in the economy will continue and perhaps grow. If so, reconciling the State's role in urban revitalization with transparency, the prevention of crony capitalism, and private property rights will become more important than ever. It is incumbent upon the New York Court of Appeals to make its review of litigation arising from this process more conceptually sound and practically astute.

II. TAKINGS AND PUBLIC USE LAW

A. Takings Law

The right of the State to take private property for public use is an attribute of sovereignty that does not depend on any constitutional provision.[75] The U.S. Constitution says, "nor shall private property be taken for public use, without just compensation."[76] The U.S. Supreme Court described the Takings Clause as a "tacit recognition of a pre-existing power to take private property for public use, rather than a grant of a new power."[77] The corresponding New York provision is in substance exactly the same: "Private property shall not be taken for public use without just compensation."[78]

> physical expression of the university's desire to bridge the divide between the insular world of the campus and the community beyond its walls.

Id.

73. Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

74. Danny Hakim, *Cuomo is Sworn In as New York's Governor*, N.Y. TIMES, Dec. 31, 2010, at A13.

75. Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); Heyward v. New York, 7 N.Y. 314, 325 (1852); *see also* Fifth Ave. Coach Lines, Inc. v. City of New York, 183 N.E.2d 684 (N.Y. 1962) (noting that the power of eminent domain antedates the state and federal Constitutions, survived their adoption, and is subject only to restrictions that takings shall be for authorized public use and that just compensation be paid to owners).

76. U.S. CONST. amend. V.

77. United States v. Carmack, 329 U.S. 230, 241-42 (1946).

78. N.Y. CONST. § 7(a).

The exigencies of government do not permit uncompensated takings, even if government has great need. Justice Holmes warned in the seminal case of *Pennsylvania Coal Co. v. Mahon* that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[79] Likewise, the New York Court of Appeals warned that "no matter how pressing a problem may be, private property may not be so interfered with as to amount to taking without compensation even for public purpose or to advance general welfare."[80] Other cases reinforced this admonition.[81] Within these constraints, however, the New York Court of Appeals has stated that the power of eminent domain is legislative, and it is the legislature that determines the necessity for and time and manner of its exercise.[82]

In 1835, the Supreme Court of Judicature of New York, the State's highest court of law at that time, held in the case of *In re Albany Street*[83] that a statute authorizing the condemnation of an entire lot was invalid when only part of the land was required for the establishment of a street and the landowner did not consent.

> If this provision . . . is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power which, with all respect, the legislature did not possess. The Constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of another. It is in violation of natural right, and if it is not in violation of the letter of the Constitution, it is of its spirit, and cannot be supported.[84]

In another possible reflection of John Locke's famous declaration "their lives, liberties, and estates, which I call by the general name property,"[85] the Supreme Court of Judicature declared in 1843, in *Taylor v. Porter & Ford*:[86]

79. 260 U.S. 393, 416 (1922).

80. Salamar Builders Corp. v. Tuttle, 275 N.E.2d 585, 588 (N.Y. 1971).

81. *See, e.g.*, In re Cheesebrough, 78 N.Y. 232 (1879) (holding that, despite the State's interest in the health of its citizens, a permanent sewer could not be installed on private land without payment of just compensation).

82. Soc'y of N.Y. Hosp. v. Johnson, 154 N.E.2d 550, 555 (N.Y. 1958).

83. 11 Wend. 149, 149 (N.Y. Sup. Ct. 1834).

84. *Id.* at 151.

85. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 155 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

86. 4 Hill 140 (N.Y. Sup. Ct. 1843).

> It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of *A* and transfer it to *B*, they can take *A* himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be "due process of law."[87]

During the nineteenth century, the U.S. Supreme Court at first required compensation only where the state divested the landowner of title,[88] but subsequently extended the concept to instances where governmental actions worked a permanent appropriation.[89] However, it drew the line at cases where the regulation was an application of the police power, designed to prevent harm.[90] Likewise, New York courts have recognized that reasonable land use restrictions imposed under the police power do not constitute takings merely because the land's value is substantially reduced.[91]

In 1922, in *Pennsylvania Coal Co. v. Mahon*,[92] the U.S. Supreme Court held for the first time that regulation of property use, as well as physical appropriation, could require just compensation under the Takings Clause, if the regulation went "too far."[93] *Pennsylvania Coal* remains "the foundation" of regulatory takings law,[94] and its' "too far" language has been adopted in New York.[95]

The most general test employed by the Supreme Court in determining whether a regulatory taking has occurred is contained in *Penn Central Transportation Co. v. City of New York*.[96] That case, decided in 1978, provided for an ad hoc, multi-factor balancing test. *Penn Central* remains the

87. *Id.* at 147.

88. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999).

89. Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) (land above government dam permanently inundated).

90. *See, e.g.*, Mulger v. Kansas, 123 U.S. 623 (1887) (loss of value in brewery building after prohibition imposed).

91. Putnam Cnty. Nat'l Bank v. City of New York, 829 N.Y.S.2d 661 (N.Y. App. Div. 2007).

92. 260 U.S. 393 (1922). *See generally* STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7(b)(1) (4th ed. 2009) [hereinafter EAGLE, REGULATORY TAKINGS].

93. *Pennsylvania Coal*, 260 U.S. at 415.

94. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting) (the case was decided by a 5-4 vote).

95. Rochester Tel. Corp. v. Vill. of Fairport, 446 N.Y.S.2d 823, 825 (N.Y. App. Div. 1982) ("If the regulation goes too far, the municipality's action will be treated as a public taking for which compensation is required.").

96. 438 U.S. 104 (1978).

"polestar" of the Court's takings jurisprudence.[97] Not subjected to *Penn Central* balancing are "categorical" takings, in which land is deprived of all economic use,[98] or instances of permanent physical occupation, however slight.[99] The Court reiterated and summarized these rules in 2005, in *Lingle v. Chevron U.S.A. Inc*.[100]

In New York, the principal Court of Appeals' application of *Penn Central* has been a quartet of cases decided in 1997: *Basile v. Town of Southampton*,[101] *Kim v. City of New York*,[102] *Gazza v. New York State Department of Environmental Conservation*,[103] and *Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry*.[104] "Viewed as a whole, this 'takings quartet' makes it significantly easier for the State of New York and its subdivisions to resist the takings claims of private landowners."[105]

In *Anello*, the Court of Appeals held that the challenge to a permit denial occasioned by a "steep slope" ordinance "must fail," since the "restriction thus encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her."[106] In *Gazza*, a development variance required by a wetlands ordinance antecedent to the plaintiff's purchase was denied.[107] The Court of Appeals declared that "[t]he relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title."[108] Alternatively, petitioner's "reasonable expectations" at the time of his purchase "were not affected when the property remained restricted" and that "the alleged diminution of value and limitation of property uses caused by the environmental regulations would fall well within constitutional boundaries."[109]

In *Basile*, tidal lands were subject both to wetlands regulations and to a covenant whereby plaintiff's predecessor in title recited that the parcel "may consist of wetlands and may not be suitable for erection of a dwel-

97. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (O'Connor, J., concurring).
98. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).
99. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).
100. 544 U.S. 528, 536-40 (2005).
101. 678 N.E.2d 489 (N.Y. 1997).
102. 681 N.E.2d 312 (N.Y. 1997).
103. 679 N.E.2d 1035 (N.Y. 1997).
104. 678 N.E.2d 870 (N.Y. 1997).
105. Eagle, *The 1997 Regulatory Takings Quartet*, *supra* note 33, at 346.
106. *Anello*, 678 N.E.2d at 871 (stating that a "steep slope" ordinance prevented petitioner from building a one-family dwelling on a parcel in order to promote the orderly development of land with excessively steep slope areas).
107. *Gazza*, 679 N.E.2d at 1040.
108. *Id.*
109. *Id.* at 1043.

ling," and no building shall be erected "unless and until" the parcel is "approved as a building lot" by the Town.[110] The Court of Appeals noted that "'[t]he wetlands regulations at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered' by virtue of the covenants."[111] Finally, in *Kim*, owners of a gas station claimed a physical taking by dint of city construction of a high earthen wall filling some of their parcel and blocking access to some of the rest. The court decided that they were put on notice of a change in the adjoining avenue's grade by a map filed in the county engineer's office a decade before, and that the city's actions saved them the cost of a similar structure to provide the avenue with the required lateral support.[112]

More recently, in *Consumers Union of U.S., Inc. v. State*,[113] the Court of Appeals summarized its regulatory takings jurisprudence, borrowing heavily from the U.S. Supreme Court's summary in *Lingle v. Chevron U.S.A. Inc.*[114] "Governmental regulation of private property," it said, "effects a taking if it is 'so onerous that its effect is tantamount to a direct appropriation or ouster.'"[115] "To determine whether a regulation is proper or goes 'too far,' a court must consider the factors identified in *Penn Central*. The primary, but not exclusive *Penn Central* inquiry turns on 'the extent to which the regulation has interfered with distinct investment-backed expectations.'"[116]

B. Public Use

In *Kelo v. City of New London*,[117] the U.S. Supreme Court upheld, as consistent with the Public Use Clause,[118] the condemnation of sound residences for retransfer for private urban revitalization. In explaining the Court's holding, Justice Stevens' majority opinion was careful to adumbrate that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."[119] "A purely private taking could not withstand the scrutiny of the public use requirement; it would

110. Basile v. Town of Southampton, 678 N.E.2d 489, 490 (N.Y. 1997).
111. *Id.* at 491 (internal citation omitted).
112. Kim v. City of New York, 681 N.E.2d 312, 313-15 (N.Y. 1997).
113. 840 N.E.2d 68 (N.Y. 2005).
114. 544 U.S. 528, 536-40 (2005).
115. 840 N.E.2d at 84 (quoting *Lingle*, 544 U.S. at 537).
116. *Id.* at 84-85 (citing *Lingle*, 544 U.S. at 539).
117. 545 U.S. 469 (2005).
118. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
119. *Kelo*, 545 U.S. at 477.

serve no legitimate purpose of government and would thus be void."[120] The Public Use Clause has its genesis in substantive due process, which permeates the Court's early discussion in *Calder v. Bull*:

> [A] law that takes property from *A* and gives it to *B*: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.[121]

Similarly, the New York Supreme Court stated, "[t]he people cannot, as long as the Constitutions of the state of New York and of the United States remain in their present form, take private property for use of other than the people, even if they pay just compensation."[122]

In *Taylor v. Porter & Ford*,[123] although the plaintiff succeeded in preventing a road from crossing his property without permission, the judge opined that "the legislature is not supreme," and could not "transfer the property of *A* to *B*."[124]

> I shall not be understood as saying that a trial and judgment are necessary in exercising the right of eminent domain. When private property is taken for public use, the only restriction is, that just compensation shall be made to the owner. *But when one man wants the property of another, I mean to say that the legislature cannot aid him in making the acquisition.*[125]

Other than "law and reason," two factors militate against condemnation of property from private party *A* solely for the benefit of private party *B*. The first is injury to *A*, who loses the subjective value he or she places on ownership above fair market value. Since it is impractical to pay condemnees their asserted subjective value of their land, the Supreme Court has decided that payment of fair market value is the measure of "just compensation."[126] The sentimental value of a family long residing in a house and the goodwill and customization of premises used by business are familiar examples of uncompensated losses, since "market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property."[127] That subjective value

120. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).
121. 3 U.S. (3 Dall.) 386, 388 (1798).
122. N.Y.C. Hous. Auth. v. Muller, 279 N.Y.S. 299, 300 (N.Y. Sup. Ct. 1935).
123. 4 Hill 140 (N.Y. Sup. Ct. 1843).
124. *Id.* at 144.
125. *Id.* at 147 (emphasis added).
126. *See, e.g.*, United States v. Reynolds, 397 U.S. 14, 16 (1970).
127. Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

represents a real loss to owners, however, as does the uncompensated costs in time and money expended in searching for substitute premises and moving. For these reasons, "[c]ompensation in the constitutional sense is therefore not full compensation."[128] A separate reason for disallowing condemnations producing purely private benefit is the inevitable corruption and undermining of the fabric of a democratic society that would result.[129]

At least as early as 1837, New York's highest court ruled that private parties could derive incidental benefit from the exercise of eminent domain,[130] a point made explicitly in its 1878 case of *In re Ryers*.[131] New York has long given great discretion to legislative decisions. In 1835, in *Varick v. Smith*,[132] the Chancery Court of New York noted the primacy of the legislature in deciding what constituted a public purpose. In connection with the disposition of waters from a dam constructed to facilitate a state canal, it stated "the legislature is the sole judge as to the expediency of making police regulations, interfering with the natural rights of the citizens of the state; and as to the expediency of exercising the right of eminent domain, for any public purposes."[133] A 1914 Court of Appeals case held that it is not objectionable that a grant of the right of eminent domain originated in and was designed to subserve private interests, so long as the use is public.[134]

Adopting a broad construction of the term "public use," the New York Court of Appeals held, in *Denihan Industries v. O'Dwyer*,[135] that "an incidental private benefit, such as a reasonable proportion of commercial space, is not enough to invalidate a project which has for its primary object a public purpose."[136]

In defining permissible "public use," the Supreme Court's *Kelo* opinion stated the two conflicting views of the subject. The narrow view defined "public use" as "use by the public," which meant use by the general public,

128. *Id.*

129. *See* Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77, 78-79 (2002) (noting the relationship between property and liberty).

130. Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9 (1837) (upholding delegation of eminent domain power to railroads with incidental benefit to them).

131. 72 N.Y. 1, 7-8 (1878).

132. 5 Paige Ch. 137 (N.Y. Ch. 1835).

133. *Id.* at 137.

134. Oneonta Light & Power Co. v. Schwarzenbach, 150 N.Y.S. 76, 81 (N.Y. App. Div. 1914), *aff'd*, 114 N.E. 1075 (N.Y. 1916).

135. 99 N.E.2d 235 (N.Y. 1951).

136. *Id.* at 238.

government agencies, and common carriers that were heavily regulated and obligated to serve the public.[137]

> [W]hile many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society.[138]

Instead, Justice Stevens stated, "when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'"[139]

Justice Stevens recognized that the broad "public purpose" test he propounded was susceptible to abuse. Situations where a "private purpose was afoot" could be "confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use."[140]

In the Court of Appeals' recent decisions in *Goldstein v. New York State Urban Development Corp.*,[141] and *Kaur v. New York State Urban Development Corp.*,[142] the possibility of abuse indeed has arisen. That problem is exacerbated by the U.S. Supreme Court's hazy jurisprudence of "pretextuality," and by daunting procedural impediments to ascertaining whether that condition exists.

C. Maximum Deference in Goldstein and Kaur

The principal New York public use case decided since the U.S. Supreme Court's *Kelo* decision[143] was *Goldstein v. New York State Urban Development Corp.*[144] There, the Court of Appeals upheld the condemnation of private parcels to facilitate construction of Atlantic Yards, a 22-acre mixed-use development in downtown Brooklyn proposed by private developer Bruce Ratner.[145] According to the court's summary:

137. Kelo v. City of New London, 545 U.S. 469, 479 (2005).

138. *Id.*

139. *Id.* at 480.

140. *Id.* at 487 (internal citations omitted).

141. 921 N.E.2d 164 (N.Y. 2009).

142. 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

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

144. 921 N.E.2d 164 (N.Y. 2009).

145. *See* Lavine & Oder, *supra* note 71, at 288 (providing detailed account of the politics, social dynamics, and economics of the Atlantic Yards project).

> The project is to involve, in its first phase, construction of a sports arena to house the NBA Nets franchise, as well as various infrastructure improvements—most notably reconfiguration and modernization of the Vanderbilt Yards rail facilities and access upgrades to the subway transportation hub already present at the site. The project will also involve construction of a platform spanning the rail yards and connecting portions of the neighborhood now separated by the rail cut. Atop this platform are to be situated, in a second phase of construction, numerous high rise buildings and some eight acres of open, publicly accessible landscaped space. The 16 towers planned for the project will serve both commercial and residential purposes. They are slated to contain between 5,325 and 6,430 dwelling units, more than a third of which are to be affordable either for low and/or middle income families.[146]

The project was challenged on the grounds that the Atlantic Yards project was intended to facilitate private economic gain, albeit with possible incidental public benefit.[147] The Court of Appeals acknowledged that the alleged blight in the project area "did not begin to approach in severity the dire circumstances of urban slum dwelling" present in *New York City Housing Authority v. Muller*,[148] the 1936 case in which it first recognized blight as grounds for condemnation.[149] Nevertheless, it stated that subsequent cases upheld blight condemnations where "a substantial part of the area" was "'substandard and insanitary' by modern tests."[150]

> "Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose."[151]

The court stressed that "lending precise content" to general terms such as "blight" "has not been, and may not be, primarily a judicial exercise," and that the Legislature had left the "actual specification" of public uses

146. *Goldstein*, 921 N.E.2d at 166.

147. *Id.* at 170.

148. 1 N.E.2d 153 (N.Y. 1936).

> Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums.

Id. at 154.

149. *Goldstein*, 921 N.E.2d at 171.

150. *Id.* (quoting Kaskel v. Impellitteri, 115 N.E.2d 659 (N.Y. 1953)).

151. *Id.* at 172 (quoting Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327 (N.Y. 1975)).

"largely . . . to quasi-legislative administrative agencies."[152] "It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies . . . ."[153]

Judge Smith's dissenting opinion challenged both the "self-serving" determination by the State redevelopment agency that petitioners lived in a "blighted" neighborhood and the majority's deference to that finding.[154] The legal implications of the majority opinion and dissent in *Goldstein* are analyzed elsewhere in the Article.[155]

Soon after *Goldstein* was decided, the Appellate Division held, in *Kaur v. New York State Urban Development Corp.*,[156] that condemnation by the Empire State Development Corporation for the purpose of extending the Columbia University campus in West Harlem did violate the public use requirement. While *Goldstein* primarily discussed the extent to which urban disamenities constituted "blight" under New York law, the Appellate Division in *Kaur* described the blight designation as "mere sophistry"[157] and approached the case primarily in the context of pretext.

The Court of Appeals reversed, holding that ESDC's "findings of blight and determination that the condemnation of petitioners' property qualified as a 'land use improvement project' were rationally based and entitled to deference."[158] The court noted that in *Goldstein* it had "reaffirmed the long-standing doctrine that the role of the Judiciary is limited in reviewing findings of blight in eminent domain proceedings."[159] It restated the "objective data utilized by ESDC," and that, given the Court of Appeals precedent, the Appellate Division's de novo review of the record was "improper."[160]

It concluded that, "[o]n the 'record upon which the ESDC determination was based and by which we are bound' it cannot be said that ESDC's finding of blight was irrational or baseless."[161]

152. *Id.*

153. *Id.*

154. *Id.* at 186 (Smith, J., dissenting).

155. *See infra* Part III.C.

156. 892 N.Y.S.2d 8 (N.Y. App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

157. *Id.* at 10.

158. 933 N.E.2d 721, 724 (N.Y. 2010).

159. *Id.* at 730.

160. *Id.* at 731.

161. *Id.* (quoting Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 166 (N.Y. 2009)) (citing Levine v. New York State Liquor Auth., 245 N.E.2d 804 (N.Y. 1969)).

The Appellate Division also had held that the alternative basis upon which the Manhattanville Project could be upheld, that it was a "civic project," could not be met because the expansion was of a private university.[162] The Court of Appeals rejected this distinction as lacking statutory support,[163] adding that "the advancement of higher education is the quintessential example of a 'civic purpose.'"[164]

III. VITIATION OF PUBLIC USE IN THEORY AND PRACTICE

At its outset, this Article postulated that the combination of *Kelo* and *Kaur* is worse than a crime; it is a blunder. The present section explores the "crime" itself and why the U.S. Supreme Court's reasoning in *Kelo v. City of New London*,[165] as brought to fruition in *Kaur v. New York State Urban Development Corp.*,[166] effectively reads the Public Use Clause out of the United States and New York State Constitutions.[167] The subsequent section discusses why this development constitutes a blunder from a public policy perspective.[168]

A. *Kelo* Demonstrates the Need for a Limiting Principle

In *Kelo*,[169] the Supreme Court found that the condemnation of a sound moderate- and middle-income residential neighborhood for retransfer for private urban revitalization, did not violate the Fifth Amendment's Public Use Clause. The Court specifically rejected the "narrow" interpretation of public use, which limits eminent domain to instances of intended use by the general public, a government agency, or a highly regulated common carrier obligated to serve the public.[170] Instead, it adopted a "broad" view that equates "public use" with "public purpose."[171]

The problem with the broad view is that "public purpose" is an indeterminate term. Justice O'Connor, who wrote the principal opinion for the

162. Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 20 (N.Y. App. Div. 2009).

163. Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 733-34 (N.Y. 2010).

164. *Id.* at 734.

165. 545 U.S. 469 (2005).

166. 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

167. U.S. CONST. amend. V. ("[N]or shall private property be taken for public use, without just compensation."); N.Y. CONST. § 7(a) ("Private property shall not be taken for public use without just compensation.").

168. *See infra* Part IV.

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

170. *Id.* at 479.

171. *Id.* at 479-80. *See also supra* notes 137-39 and accompanying text.

four dissenters,[172] earlier had stated in *Hawaii Housing Authority v. Midkiff*[173] that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."[174] In *Kelo*, she drew back from the sweeping implications of that formulation and from Justice Douglas' similar earlier proclamation in *Berman v. Parker* that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[175] Justice O'Connor distinguished those cases, noting that the "extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society."[176] She explained that the government responded to a blighted neighborhood that was injurious to health in *Berman*, and to a dramatic concentration of land ownership in *Midkiff*.[177] "Because each taking directly achieved a public benefit, it did not matter that the property was turned over to private use."[178] In *Kelo*, however, the city never claimed that the petitioners' "well-maintained homes are the source of any social harm."[179]

B. The Unsatisfactory Adoption of Pretextuality

The Supreme Court's *Kelo* analysis began by juxtaposing two "polar propositions."[180] While the State "may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation," it "may transfer property from one private party to another if future 'use by the public' is the purpose of the taking."[181]

As a corollary to this proposition, the State cannot "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[182] Justice Kennedy's concurring opinion in *Kelo* added that "[a] court applying rational basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a

172. *Id.* at 494-505 (O'Connor, J., dissenting) (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas).
173. 467 U.S. 229 (1984).
174. *Id.* at 240.
175. Berman v. Parker, 348 U.S. 26, 33 (1954).
176. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).
177. *Id.* at 498-99.
178. *Id.* at 500.
179. *Id.*
180. *Id.* at 477.
181. *Id.*
182. *Id.* at 478.

particular private party, with only incidental or pretextual public benefits."[183]

Kelo is the first case in which the Supreme Court has endorsed the "notion of a 'pretext' claim."[184] Why did the Court adopt a standard based on intent, and is that standard workable?

1. Why Should Motive Matter?

"Pretextuality" refers to the proffer of an ostensible motive for conduct in order to hide the speaker's actual motive. There are many areas in which motive is important. The criminal law, which focuses on punishment, naturally is concerned with moral culpability. "The late Justice Oliver Wendell Holmes once pointed out the distinction between criminal and non-criminal intent: 'Even a dog distinguishes between being stumbled over and being kicked.'"[185] On the other hand, injury to property is the purview of the law of tort, where rectification and indemnification is the focus and not punishment of the party causing the harm. This point was well articulated in Justice O'Connor's dissent in *Kelo*:

> Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same from the constitutional perspective—private property is forcibly relinquished to new private ownership.[186]

Justice O'Connor was correct, but the anomaly she describes was one she was complicit in establishing. It was she who declared, "[o]ur polestar . . . remains the principles set forth in *Penn Central*," the case wherein the Court substituted its ad hoc, multifactor test for regulations[187] based heavily on expectations.[188] Justice Stevens quoted her concurring opinion and its "polestar" formulation as persuasive to the Court that even the complete

183. *Id.* at 491 (Kennedy, J., concurring).

184. Goldstein v. Pataki, 516 F.3d 50, 61 (2d Cir. 2008).

185. United States v. Smith, 29 F.3d 270, 273 n.1 (7th Cir. 1994) (quoting Morisette v. United States, 342 U.S. 246, 252 n.9 (1952)).

186. *Kelo*, 545 U.S. 469, 502-03 (O'Connor, J., dissenting).

187. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

188. *See, e.g.*, Steven J. Eagle, *The Rise and Rise of "Investment Backed Expectations,"* 32 URB. LAW. 437, 439 (2000).

deprivation of all economic use for a substantial period of time should be judged under the flexible *Penn Central* formulation instead of under the *Lucas* standard.[189] At its heart, *Penn Central* is not a takings test; it is a due process test.[190] Due process concerns proportionality (ends-means analysis) and fairness.[191]

In *Armstrong v. United States*,[192] the U.S. Supreme Court stated that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[193] *Penn Central* quoted this language and immediately added that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[194] Subsequently, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[195] the Court referred to this dictum as the "*Armstrong* principle."[196]

> When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.[197]

Tahoe-Sierra thus stated that the subtlety of analysis required to discern whether regulations are so severe that fairness requires just compensation makes categorical rules unsuitable and directs us back to the ad hoc, multi-factor analysis of *Penn Central.* There, the Court found that "factors that have particular significance" are the "economic impact of the regulation on

189. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336-38 (2002).

190. *See* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1016-21 (2000); *see also* John D. Echeverria, *The Takings Issue and the Due Process Clause*, 17 VT. L. REV. 695, 696 (1993) ("[I]n the course of developing the Takings Clause as a substantive constraint on property regulation, the Court, in ad hoc fashion, has incorporated into its takings analysis standards the Court formerly utilized exclusively in its review of regulatory activities under the Due Process Clause.").

191. *See, e.g.*, Lassiter v. Dep't of Social Servs. of Durham Cnty., 452 U.S. 18, 24 (1981) (due process "expresses the requirement of 'fundamental fairness'").

192. 364 U.S. 40 (1960).

193. *Id.* at 49.

194. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

195. 535 U.S. 302 (1902).

196. *Id.* at 321.

197. *Id.* at 322 n.17.

the claimant," whether it interferes with "distinct investment-backed expectations," and the "character of the governmental action."[198]

There are distinct advantages in the alternative of examining objective intent. In *Goldstein v. Pataki*,[199] for instance, the Second Circuit quoted an observation in a dissenting opinion by Justice Scalia that "discerning the subjective motivation of [a legislative body] is, to be honest, almost always an impossible task. . . . To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist."[200] On the other hand, the opinion added that Justice Scalia prefaced his remark by noting that "it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed)."[201]

Perhaps the Supreme Court predicates its public use jurisprudence on intent for the same reason that it predicates its regulatory takings jurisprudence on intent. Examinations of subjective motivation permit the Court to circumvent the direct questions that it must face under the Fifth Amendment's Takings Clause. Did the plaintiff own property? Did the government take the property? Was just compensation paid? The Court could establish bright line rules for deciding these questions, relying, for example, upon proposed objective standards such as the "independent economic viability" standard for any "horizontally definable parcel,"[202] or any set of property rights selected by the owner, so long as it is recognized as a "commercial unit" in a recognized market.[203]

The Court in *Penn Central* did not define the "character of the regulation" test, but merely illustrated it by observing that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[204] However, four years later, the Court held in *Loretto v. Teleprompter Manhattan CATV Corp*. that a permanent physical invasion constitutes a categorical taking without regard to the *Penn Central* balanc-

198. *Penn Cent.*, 438 U.S. at 124.

199. 516 F.3d 50 (2d Cir. 2008).

200. *Id.* at 63 (quoting Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting)) (alteration in original).

201. *Id.*

202. *See* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1538 (1994) ("[A]ny horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation.").

203. *See* EAGLE, REGULATORY TAKINGS, *supra* note 92, § 7-7(e)(5), at 934 (noting that the term is adopted from U.C.C. § 2-608(1)).

204. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

ing test.[205] Thus, the "character of the regulation" test was deprived of its only clear content. It would seem, however, that unfairness is an aspect of its meaning.

In *American Pelagic Fishing Co., L.P. v. United States*,[206] newly enacted statutes precluded one large, advanced, and specialized fishing ship from plying its trade, as if that one entry in a large fishing fleet "had been identified by name in the text of the acts."[207] The U.S. Court of Federal Claims stressed that the new law's severity, essential retroactivity, and specific targeting justified a finding that there was a regulatory taking under the "character of the regulation" test.[208] The Federal Circuit reversed on other grounds,[209] and the point has not been definitively decided. It might be that, as Professor Mark Fenster put it:

> Ultimately, the character factor serves as a judicial escape hatch. . . . A properly functionalist judge should assess the conflicting human values at stake in the litigation, appraise the social importance of existing precedent, consider all of the relevant evidence that would bring light to the conflict, and reject the use of abstract legal concepts that would direct the decision away from the particular dispute and the prevalent norms of social and commercial behavior in the relevant field. . . . To the extent that the character factor allows a judge to make this consideration explicit, it will enable her to more candidly decide the issue.[210]

The Court chose to submit functional takings of property rights not involving physical appropriation to the *Penn Central* test, in which the owner's subjective "expectations" predominates,[211] except when those turn out to be objectively unreasonable.[212] Its justification for separate bodies of physical takings and regulatory takings law rests largely on its observation that the former "usually represent a greater affront to individual property rights."[213] It is hard to discern from that truism a valid Constitutional dis-

205. 458 U.S. 419, 426-27 (1982).

206. 49 Fed. Cl. 36 (2001).

207. *Id.* at 51.

208. *Id.* at 46.

209. 379 F.3d 1363 (Fed. Cir. 2004) (holding fishing permits are not property).

210. Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 575-76 (2009).

211. *See, e.g.*, Consumers Union of U.S., Inc. v. State, 840 N.E.2d 68, 85 (N.Y. 2005) (noting that the "primary, but not exclusive *Penn Central* inquiry turns on 'the extent to which the regulation has interfered with distinct investment-backed expectations.'" (internal citation omitted)).

212. *See* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). Then-Justice Rehnquist gave no explanation for his opinion's change in terminology from *Penn Central*'s "distinct investment-backed expectations."

213. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002).

tinction. Parenthetically, when it came to "just compensation," the Court has rejected any attempt to measure subjective value and adopted a fair market value standard instead.[214]

Similarly, "pretextuality" makes sense only as a fairness equivalent sounding in substantive due process. It seems paradoxical that the Supreme Court has eschewed using substantive due process in property rights deprivations cases,[215] while at the same time using light and ineffectual variants of substantive due process as tests for uncompensated takings and takings not for public use.

2. The Assumptions Underlying Pretext are Counterfactual

In *99 Cents Only Stores v. Lancaster Redevelopment Agency*,[216] a U.S. district court found that the justification given for the condemnation, the fabricated explanation that 99 Cents' parcel was "blighted," clearly was not the actual reason for the city's act. But, as I elaborate elsewhere,[217] there was no showing that the city condemned 99 Cents' parcel to enhance private welfare at the expense of public benefit. The parcel was condemned at the behest of 99 Cents' competitor Costco, to which it was to be transferred. As the trial court noted, the city viewed Costco as a lynchpin of its economic development plans, and was "fearful of Costo's relocation to another city."[218] As Lancaster's city attorney later told the *Wall Street Journal*, Costco provided ten times the sales tax revenues to the city that 99 Cents did: "You tell me which was more important."[219]

Just as cultivated inscrutability might mask virtue as well as vice, pretextuality might mask an agent's desire to achieve public benefit. It might be argued, correctly, that 99 Cents Only Stores would have been the "victim" of Costco's apparent scheme to use extortion against the city to oust its competitor. 99 Cents Only Stores might have had a meritorious tort claim against Costco for interference with relational interests.[220]

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214. United States v. Carmack, 329 U.S. 230, 241-42 (1945).

215. *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005). *See generally* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899 [hereinafter Eagle, *Property Tests*].

216. 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *dismissed as moot*, 60 F. App'x 123 (9th Cir. 2003).

217. Steven J. Eagle, Kelo, *Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 104-05 (2009).

218. *99 Cents*, 237 F. Supp. 2d at 1126.

219. Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, at B1 (quoting David McEwan).

220. *See generally* Leon Green, *Relational Interests*, 29 U. ILL. L. REV. 1 (1935).

Thus, although pretextuality might have been an element in the city abetting Costco's wrongful scheme, it would not indicate that the city had an underlying wrongful purpose. One could argue that pretextuality in *Kelo* was shorthand for "pretextuality for bad purpose." Akin to the Catholic theological concept of "double effect,"[221] the premise would be that the government action in cases like *99 Cents Only Stores* should be regarded as privileged because of the legitimacy of its dominant purpose.

The broader point, however, is that courts rightly should be concerned when private actors have the opportunity to leverage eminent domain to the disadvantage of competitors and other possible victims of what might rise to legalized extortion. In *99 Cents Only Stores*, an exaction could be had from only the landowner whose property was taken.[222] In *Didden v. Village of Port Chester*, however, the redeveloper to whom eminent domain powers had been delegated could exact money from many landowners in exchange for condemning other parcels in the redevelopment district. [223]

3. The Manichean Distinction Between Public and Private Benefit

Justice Stevens began his analysis in *Kelo* by stating that government may not condemn land belonging to *A* for the "sole purpose" of benefitting *B*,[224] and that a "purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[225] Justice Kennedy's concurring opinion declares that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause."[226]

Official acts that public officials perform to benefit themselves, their family, and those who bribe them are punishable by criminal law.[227] State actions executing the scheme are arbitrary and capricious and hence run afoul of the Due Process Clauses of the Fifth and Fourteenth Amend-

221. *See, e.g.*, Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 130 (1972) (describing the "double effect" as a doctrine which distinguishes between bringing something about deliberately and bringing something about as a side effect of a deliberate act).

222. *99 Cents*, 237 F. Supp. 2d at 1123.

223. 173 F. App'x 931, 933 (2d Cir. 2006).

224. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

225. *Id.* (quoting Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).

226. *Kelo*, 545 U.S. at 469, 490 (Kennedy, J., concurring).

227. *See generally* JOHN T. NOONAN, JR., BRIBES (1984) (relating history of crime of bribery).

ments.[228] However, every public official knows that private firms enter into the redevelopment process precisely because of the possibility of their private gain, and that post-contractual attempts to thwart such gain would give the city the reputation of an unreliable redevelopment partner. In that sense, a government entity embarking on condemnation for retransfer for private redevelopment objectively must desire private gain.

Justice Stevens' opinion in *Kelo* suggests the Manichean distinction that gains could be purely public *or* private. Justice Kennedy's concurrence suggests that, while there could be both private and public gains, one would be incidental to the other. Stevens' assertion seems wrong in theory. Kennedy's, alas, seems incapable of application.

Citing the eminent Michigan jurist Thomas Cooley, the state's supreme court rejected economic revitalization takings in *County of Wayne v. Hathcock*.[229] That case overruled the court's *Poletown* doctrine, which countenanced the condemnation of an entire ethnic neighborhood for an auto assembly plant.[230]

> Every business, every productive unit in society, does, as Justice Cooley noted, contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.[231]

Justice Kennedy's formulation that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual

228. *See, e.g.*, Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 584 (1972) (noting that "the protection of the individual against arbitrary action is the very essence of due process") (ellipses, punctuation, and internal citations omitted).

229. 684 N.W.2d 765 (Mich. 2004).

230. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

231. *Hathcock*, 684 N.W.2d at 786. Perhaps this paragraph was the inspiration for Justice O'Connor's much more widely quoted lines:

> For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

Kelo, 545 U.S. at 503 (O'Connor, J., dissenting).

public benefits,"[232] does not make clear whether the proscribed intent would have to encompass incidental public benefits. Either way, "intent" regarding the future is as ephemeral as *Penn Central*'s "expectations" about the future.

Justice Thomas noted that New London's project, which stated a "vague promise of new jobs and increased tax revenue," also was "suspiciously agreeable to the Pfizer Corporation."[233] But the Fort Trumbull redevelopment undoubtedly contemplated future consequences of its decisions as well as present ones.

The immediate function of the Fort Trumbull redevelopment was to build the infrastructure that would be synergetic with Pfizer's adjoining research center, so that the company would benefit from the restaurants, shops, hotels, and upscale housing that would provide amenities and lodging for its key personnel and visitors. The redevelopment tenants, in turn, would benefit from the patronage of Pfizer and its employees and invitees.[234]

The second purpose of the redevelopment was to serve as a catalyst for the creation of jobs and needed economic activity in New London and Connecticut, partly through encouraging *other* corporations to relocate. For decisionmaking executives of these companies, the minutiae of Fort Trumbull negotiations and ensuing contract provisions were hardly relevant. They would be greatly interested in the basic economic terms the city and state would offer them, to be sure. Beyond that, however, the bottom line question would be posed to their Pfizer counterparts at business roundtable and trade meetings: "Was New London agreeable to meeting your needs?" Not only was complying with the informally expressed needs of Pfizer officials not inimical to the best interest of the city, it affirmatively furthered the economic development of the city.[235]

Justice O'Connor's explanation that "private benefit and incidental public benefit are, by definition, merged and mutually reinforcing," and that "any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs" is exactly on point.[236]

232. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).
233. *Id.* at 506 (Thomas, J., dissenting).
234. *Kelo*, 545 U.S. at 473.
235. *Id.*
236. *Id.* at 502 (O'Connor, J., dissenting).

4. Practical Objections to Pretextuality

Calder v. Bull described the pure government transfer of property from *A* to *B* as "against all reason and justice."[237] But where the benefits are "merged and mutually reinforcing," the principle that government should not arbitrarily favor one citizen to the detriment of another has to do with an evaluation of ends and means.

Calder presents a zero-sum game. *B* now has the property and *A* does not. While this sequence of events does not, ex post, affect third parties, it is clear, ex ante, that society would be a net loser. Property owners like *A* would expend time and money attempting to thwart or buy off officials who might facilitate grabs of their property. Correspondingly, predators like *B* would devote their talents and cash to bringing about such untoward results. As is the case with outright theft, the costs are in both effectuating and preventing redevelopment transfers, and also, as Professor Frank Michelman described, in the demoralization of rightful owners that would discourage productive investment.[238]

However, "pretextual" takings involve not actions, but rather variance between articulated motives and actual motives. Unlike *Calder* transfers, pretextual transfers may or may not involve losses to society. They might well provide benefit to the city engaging in them. Besides, demoralization costs are present in any exercise of eminent domain.

Assume that Smith is mayor of a small city, and Jones is a developer who has contributed to Smith's reelection campaigns. Jones proposes that the city undertake a redevelopment project that will require condemnation and will benefit the city in the amount of $20*X*. Assume that the benefit to Jones will be $10*X*. On its face, there is no evidence to suggest that Jones would have offered a sweeter deal or that the city could have obtained more than $20*X* from anyone else. Now, assume instead that, other facts remaining the same, Jones derived $30*X* in benefit, which is more than the city did. Further assume that, in the latter case, fear of charges of "pretextuali-

237. 3 U.S. (3 Dall.) 386, 388 (1798).

238. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

> "Demoralization costs" are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.

Id. at 1214 (internal footnote omitted).

ty" led the city to accept a redevelopment project from Clark instead. Clark would derive $8*X* in value, and the city would derive $15*X*.

Why should the city have to derive $5*X* less in value by dealing with Clark, simply to avoid Jones obtaining a greater return than the city? This analysis suggests that the real problem with pretextuality is not that government is acting for bad motives, but rather that it is acting for opaque motives. Perhaps its actions are for the best, and perhaps they are not. We just do not know, and that does not seem fair. As a prophylactic measure, we might want to ban government officials from taking part in non-transparent transactions.[239]

It might be, as in the case of offenses deemed "hate crimes," that society decides to enhance the punishment accorded a wrongful act based on its motive. The fear of victimization by a criminal motivated by racism, xenophobia, or a similar motive imposes psychological and deterrence costs upon potential victims in excess of those imposed upon other potential victims of similar crimes. Likewise, uncompensated losses arising from pretextual condemnation might engender a heightened sense of injury in the condemnee, who would ascribe his injury to predation rather than to the random chance of government necessity. In the case of "pretextual" condemnation, where such an enhanced level of injury might justify as an appropriate preventative, Justice Kennedy suggested a higher level of judicial scrutiny in appropriate types of situations.[240]

C. Vitiating the Public Use Clause—*Goldstein* and *Kaur*

In *Marbury v. Madison*,[241] the U.S. Supreme Court declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[242] The Court more recently stated that ''the question [of] what is a public use is a judicial one.''[243] To the extent the New York Court of Appeals unduly defers to the political branches of government, it not only makes it almost impossible for a landowner to win on public use grounds, it also deprives the Public Use Clause of any independent significance.

239. This was a reason offered by Professor Thomas Merrill as to why cities assemble parcels through eminent domain rather than adopt "private developers' 'guile.'" *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82 (1986); *see also infra* notes 395-96 and accompanying text for further discussion.

240. *See infra* note 285 and accompanying text.

241. 5 U.S. (1 Cranch) 137 (1803).

242. *Id.* at 177.

243. Cincinnati v. Vester, 281 U.S. 439, 446 (1930).

1. The Court of Appeals Regards "Public Use" as Redundant

The lesson of *Goldstein* and *Kaur* is that the New York Court of Appeals will enforce the Public Use Clause only where it is unnecessary. Through its vague and open ended definitions of crucial concepts such as "blight" and "civic purpose," the court's jurisprudence implicitly is founded on the notion that a governmental entity or its chosen redeveloper's exercise of eminent domain will be held not to be for public use only under circumstances in which it would lose on independent grounds. In other words, where other aspects of the taking comport with constitutional and statutory requirements, public use always would be found. Conversely, where a taking is set aside on public use grounds, it could be set aside for another reason. The result is that the Public Use Clause *never* is outcome determinative.

2. An Open-Ended View of "Blight"

The alluring notion of "blight,"[244] in its most expansive form, permeates both *Goldstein* and *Kaur*. In *Goldstein*, Chief Judge Lipmann noted that the "removal of urban blight" is sanctioned in the court's 1936 decision in *New York City Housing Authority v. Muller*, [245] and in the State Constitution, for the alleviation of "substandard and insanitary areas."[246] He added, though, that by 1975, in *Yonkers Community Development Agency v. Morris*,[247] urban renewal had progressed from the alleviation of "slums" to dealing with other "threats to the public sufficient to make their removal cognizable as a public purpose," including "economic underdevelopment and stagnation."[248]

In his dissenting opinion in *Goldstein*, Judge Smith reviewed the court's caselaw, including *Muller* and *Morris*, and concluded that while these cases undoubtedly expanded the old understanding of public use, they did not establish the general proposition that property may be condemned and turned over to a private developer every time a state agency thinks that doing so would improve the neighborhood.[249] The majority provided a half-hearted defense:

> It may be that the bar has now been set too low—that what will now pass as ''blight,'' as that expression has come to be understood and used by

244. *See infra* Part IV.B.

245. Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 171 (N.Y. 2009) (citing N.Y.C. Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936)).

246. *Id.* (citing N.Y. CONST. art. XVIII § 1).

247. 335 N.E.2d 327 (N.Y. 1975).

248. *Id.* at 330.

249. *Goldstein*, 921 N.E.2d at 187 (Smith, J., dissenting).

> political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.[250]

This admission is remarkable, first, for its passive construction, referring to the possibility that the standard was "set too low" and how the lack of constraint "has come to be defined." More importantly, it seemed to treat the "sovereign power of eminent domain" as the prerogative of the Legislature, as if the sovereign people had not in their constitution provided for the judicial department as well as the legislative department.[251] The Court of Appeals' perspective on blight seems to be a function of the Georgist view of property ownership and the State's claims first enunciated by Chief Judge Breitel.[252]

3. Pretext in Goldstein *and* Kaur

The Court of Appeals' opinion in *Goldstein v. New York Urban Development Corp.* did not mention the issue of pretext at all,[253] but it was raised in Judge Smith's dissent:

> According to the petition in this case, when the project was originally announced in 2003 the public benefit claimed for it was economic development—job creation and the bringing of a professional basketball team to Brooklyn. Petitioners allege that nothing was said about "blight" by the sponsors of the project until 2005; ESDC has not identified any earlier use of the term. In 2005, ESDC retained a consultant to conduct a "blight study." *In light of the special status accorded to blight in the New York law of eminent domain, the inference that it was a pretext, not the true motive for this development, seems compelling.*[254]

The majority emphasized that the court was limited in its review to the record developed by the ESDC,"[255] a principle well established in New York law.[256] Given that the controlling record was made by the agency

250. *Id.* at 172.

251. *See supra* notes 241-43 and accompanying text.

252. *See infra* Parts IV.A.1-A.2 for further discussion.

253. 921 N.E.2d 164 (N.Y. 2009).

254. *Id.* at 189 (Smith, J., dissenting) (emphasis added).

255. *Id.* at 166 (citing In re Levine v. New York State Liquor Auth., 245 N.E.2d 804 (N.Y. 1969)).

256. In re Trump-Equitable Fifth Ave. Co. v. Gliedman, 443 N.E.2d 940, 942 (N.Y. 1982) ("A fundamental principle of administrative law long accepted by this court limits judicial review of an administrative determination solely to the grounds invoked by the

fostering urban renewal, however, and Judge Smith's characterization that the agency's determination was "self-serving,"[257] it is important that it be considered in that light.

Judge Smith noted that only the northern part of the Atlantic Yards project area could be described as "blighted," and that the southern part, where the plaintiffs lived, appeared to be "a normal and pleasant residential community."[258] "Choosing their words carefully, the consultants concluded that the area of the proposed Atlantic Yards development, taken as a whole, was 'characterized by blighted conditions.'"[259] He concluded: "It is clear to me from the record that the elimination of blight, in the sense of substandard and unsanitary conditions that present a danger to public safety, was never the bona fide purpose of the development at issue in this case."[260]

For its part, the majority stated facts in the record supporting this determination and noted that when administrative bodies "'have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts.'"[261]

As noted earlier,[262] in the aftermath of the New York Court of Appeals decision in *Goldstein*,[263] the Appellate Division held in *Kaur v. New York State Urban Development Corp*. that condemnation by the Empire State Development Corporation for the purpose of extending the Columbia University campus in West Harlem violated the public use requirement.[264] The Appellate Division described the blight designation in *Kaur* as "mere sophistry."[265] It stated that the designation "was utilized by ESDC years after the scheme (i.e., the Manhattanville Project) was hatched to justify the employment of eminent domain, but this project has always primarily concerned a massive capital project for Columbia. Indeed, it is nothing more

agency, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis.").

257. *Goldstein*, 921 N.E.2d at 186 (Smith, J., dissenting).

258. *Id.* at 189-90 (Smith, J., dissenting).

259. *Id.* at 190 (internal citation omitted).

260. *Id.* at 189.

261. *Id.* at 172 (quoting Kaskel v. Impellitteri, 115 N.Y.2d 659, 661 (1953)). Judge Smith pointed out that *Kaskel* was a taxpayer's suit, brought under a section of municipal law requiring corruption, fraud, or a total lack of agency power in order to succeed. *Id.* at 188 (Smith, J., dissenting).

262. *See supra* Part II.C.

263. *Goldstein*, 921 N.E.2d 164.

264. 892 N.Y.S.2d 8, 9 (N.Y. App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

265. *Id.* at 10.

than economic redevelopment wearing a different face."[266] The court noted that, in his concurring opinion in *Kelo*, Justice Kennedy "placed particular emphasis on the importance of the underlying planning process . . . and laid out in detail the elements of the New London plan that ensured against impermissible favoritism."[267]

The Appellate Division stated that the "contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic."[268] It enumerated elements by which the Manhattanville plan diverged from New London's, including Master Plan findings that Manhattanville was experiencing a "renaissance of economic development" prior to the proposed project, that "Columbia underwrote *all* of the costs of studying and planning for what would become a sovereign-sponsored campaign of Columbia's expansion," and that the redevelopment agency's commitment to rezoning Manhattanville was "not for the goal of general economic development or to remediate an area that was 'blighted' before Columbia acquired over 50% of the property, but rather solely for the expansion of Columbia itself."[269]

The Court of Appeals reversed on the grounds that ESDC's "findings of blight and determination that the condemnation of petitioners' property qualified as a 'land use improvement project' were rationally based and entitled to deference."[270]

D. Meaningful Scrutiny and Procedural Roadblocks

Promises in *Kelo* that instances of public use condemnation abuse "can be confronted if and when they arise,"[271] and that "[a] court applying rational basis review . . . should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits,"[272] are effective only if implemented. As Justice Kennedy noted in his concurrence, "meaningful rational basis review" requires that courts "conduct[] a careful and extensive inquiry" into primary and incidental benefits.[273] Unfortunately, there is significant tension be-

266. *Id.*

267. *Id.* at 12-13 (citing Kelo v. City of New London, 545 U.S. 469, 491-93 (2005) (Kennedy, J., concurring)).

268. *Id.* at 13.

269. *Id.* at 13-14.

270. Kaur v. New York State Urban Dev. Corp., 933 N.E.2d 721, 724 (N.Y. 2010).

271. *Kelo*, 545 U.S. at 487.

272. *Id.* at 491 (Kennedy, J., concurring).

273. *Id.* at 491-92.

tween that goal and the insulation of legislative decisionmaking from overly intrusive judicial review.

1. Public Use and "Meaningful" Judicial Scrutiny

While Justice Kennedy joined the majority opinion as the necessary fifth vote in *Kelo v. City of New London*,[274] his concurring opinion urged the adoption of "the meaningful rational basis review that in [his] view is required under the Public Use Clause."[275] He cited favorably to *City of Cleburne v. Cleburne Living Center, Inc.*,[276] a case in which group homes for the retarded were given less favorable zoning treatment than other multifamily housing, such as hotels and fraternity houses. While purporting to use rational basis review, the Court actually examined the proffered bases for the distinction, instead of asserting that the city must have had a plausible basis.[277] The case is a leading example of "covert[] heightened scrutiny."[278]

Justice Kennedy accepted the premise that eminent domain should be upheld if "'rationally related to a conceivable public purpose.'"[279] However, he suggested that this takings standard was parallel to, and not an application of, similar standards developed by the Court in other contexts.[280]

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.[281]

The "clear showing" of favoritism and disproportional private benefit standard, as Justice Kennedy employed it, seems far less burdensome than a judicial refusal to find substantive due process applicable to deprivations

274. 545 U.S. 469 (2005).

275. *Id.* at 492 (Kennedy, J., concurring).

276. *Id.* at 491; *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

277. *Cleburne*, 545 U.S. at 446-47, 450.

278. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1612 (2d ed. 1988); Eagle, *Property Tests*, *supra* note 215, at 951-54 (discussing the *Cleburne* line of cases).

279. *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984)).

280. *Id.* ("This deferential standard of review *echoes* the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses.") (emphasis added).

281. *Id.* at 491 (Kennedy, J., concurring).

of property at all,[282] or application of a "shocks the conscience" standard.[283]

In order to give the condemnee a chance to make this "clear showing," a "court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose."[284] Where there is a "plausible accusation," then, the first object of judicial inquiry is *not* to decide if the taking has some legitimate public purpose, but rather to see if the record indicates pretext or disproportional benefit.

"The record," for these purposes, should be defined in connection with Justice Kennedy's next point.

> My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. *There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.*[285]

The category of takings comprised of transactions where the transferee (i) initiated the condemnation or was hand-selected by officials ordering the taking; (ii) would benefit substantially from the taking; and (iii) benefited from a complex and perhaps opaque administrative process, presents precisely the possibility of "undetected impermissible favoritism" with which Justice Kennedy was concerned.[286]

In such a situation, it is not unlikely that officials and their selected redeveloper work together to shape an administrative record that appears unblemished on its face. A court reviewing this record would find ample references to legitimate public purposes and no substantial evidence of favoritism, disproportionality, or pretext. But, under these circumstances, that court would not be taking the condemnee's accusation seriously. That, in essence, marks the flaws in the New York Court of Appeals review of

282. *See* Greenbriar Vill., L.L.C. v. City of Mountain Brook, 345 F.3d 1258, 1262 (11th Cir. 2003).

283. *See* Mongeau. v. City of Marlborough, 492 F.3d 14, 15 (1st Cir. 2007); United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392 (3d Cir. 2003).

284. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

285. *Id.* at 493 (emphasis added).

286. *Id.*

Goldstein and *Kaur*. In this regard, as in other aspects of the *Kelo* case, Justice O'Connor's reservations seem prescient:

> The Court protests that it does not sanction the bare transfer from *A* to *B* for *B*'s benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee–without detailing how courts are to conduct that complicated inquiry. For his part, Justice Kennedy suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take–without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. Whatever the details of Justice Kennedy's as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staff[er]" failing it.[287]

If the "*Armstrong* principle" of fairness[288] is the leitmotif of the Takings Clause, it entails that individuals should not be singled out to bear burdens, and that the burdens imposed upon them should not be disproportional to either the burdens imposed on others similarly situated or the burdens that their actions impose on the community.

Scholars and judges have long considered concepts of fairness and proportionality in connection with takings liability. A classic article by Professor Robert Ellickson discussed the tendency of government to impose development exactions on landowners lacking political power.[289] Similarly, Professor Saul Levmore observed that takings claims are more compelling when the condemnee was singled out as a target of opportunity.[290]

Meaningful rational basis review, the "more stringent" standard that Justice Kennedy advocated for questionable categories of public use takings,[291] requires that rational basis inquiry be conducted with regard to actually proffered justifications for government acts and not conjectural or plausible ones. This was the standard used in the *Cleburne* case, to which

287. *Id.* at 502 (O'Connor, J., dissenting) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025-26 & n.12 (1992)) (additional citations omitted).

288. Armstrong v. United States, 364 U.S. 40 (1960). *See also supra* notes 192-96 and accompanying text.

289. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 439 (1977) ("Development charges . . . are widely used by small suburbs because they cream off the surplus of a particular group of landowners who have little political power.").

290. Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306-07 (1990) (contrasting small, isolated property owners in special need of constitutional protection from large, institutional owners, that easily could become involved in the political process).

291. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

Justice Kennedy referred, and in similar cases in which there was a possibility of abuse.[292]

A reminder that "public use" is contextual and not a permanent imprimatur of approval is contained in a case arising from a troubled New York revitalization project, the Destiny USA Mall.[293] In *Kaufmann's Carousel, Inc. v. City of Syracuse Industrial Development Agency*,[294] a retail store claimed that easements it owned could not be condemned as part of reconfiguring rights in the project; those easements had been acquired as the result of an earlier condemnation for retransfer.[295] Although Kaufmann's claimed that the earlier condemnation in its favor certified its use as being a "public use" that could not subsequently be disturbed, it was unable to convince the court.[296]

In the Supreme Court's recent opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[297] one of the issues before the Court was whether judicial actions could constitute regulatory takings. The Court did not decide the "judicial takings" issue. However, in a part of Justice Scalia's opinion for the Court joined by only Chief Justice Roberts and Justices Thomas and Alito, Scalia declared that "the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter . . . But the particular state actor is irrelevant."[298] In *Dolan v. City of Tigard*,[299] the Court held that exactions of property required for development approvals had to be based on "individualized determination" and "rough proportionality" to the burden of the locality that they imposed.[300] But these requirements applied only to administrative determinations, not to legislative exactions.[301] To the extent that subsequent cases adopt Scalia's view in *Stop the Beach* that what is

292. *See, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982) (distribution of Alaska natural-recourse income according to duration of residency is irrational); Plyler v. Doe, 457 U.S. 202 (1982) (denial of public school to children of illegal immigrants is irrational); *see also* Eagle, *Property Tests*, *supra* note 215, at 952-54.

293. *See, e.g.*, Rick Moriarty, *Syracuse to Decide Deadline for Destiny USA Mall Addition*, THE POST-STANDARD, Dec. 19, 2010, *available at* http://www.syracuse.com/news/index.ssf/2010/12/syracuse_to_decade_deadline_fo.html.

294. 750 N.Y.S.2d 212, 221 (N.Y. App. Div. 2002).

295. *Id.* at 214.

296. *Id.* at 221.

297. 130 S. Ct. 2592 (2010).

298. *Id.* at 2602.

299. 512 U.S. 374 (1994).

300. *Id.* at 391.

301. *See* Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1116 (1995) (Thomas, J., dissenting from denial of certiorari) (asserting that there is no relevant difference between administrative and legislative exactions).

important is that the State act, and not the State actor, the distinction drawn by *Dolan* becomes eroded.

2. *Pretext Defenses and Discovery*

In *Franco v. National Capital Revitalization Corp.* (*Franco I*),[302] the District of Columbia's redevelopment agency condemned Franco's store in the Skyland Shopping Center in the southeast quadrant of the District. The center contained about thirty stores, and a draft bill introduced in the Council of the District of Columbia called for its condemnation as "necessary and desirable for the public use."[303] The bill "did not explain why the properties were 'necessary' or to what 'public use' they would be devoted."[304] There were no public hearings before the bill was passed, but the enacted version contained a set of findings of crime and blight, including underutilization, neglect, poor maintenance, and absentee ownership facilitating the accumulation of trash.[305] "The Council also found that '[t]he assemblage of the properties comprising the Skyland Shopping Center and the construction of a new shopping center on the site . . . will further many important public purposes,'" including alleviation of the factors noted above.[306]

The District of Columbia Court of Appeals exercised jurisdiction because the trial court had granted the redevelopment agency immediate possession, and had exercised pendant appellate jurisdiction because the issues in the dispute were "inextricably intertwined."[307]

Proceeding to the merits, the court first noted that *Kelo* reiterated the Supreme Court's "'longstanding policy of deference to legislative judgments in this field.'"[308] However,

> *Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said. The government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual. It may be difficult to make this showing, and the Supreme Court's decision may

302. 930 A.2d 160 (D.C. 2007).
303. *Id.* at 163.
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 165.
308. *Id.* at 168 (quoting Kelo v. City of New London, 545 U.S. 469, 480 (2005)).

> raise many more questions than it answers, but a pretext defense is not necessarily "foreclosed by *Kelo*."[309]

The court observed that "Justice Kennedy focused hypothetically on the insubstantial quality of touted public benefits, stating "that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause."[310]

Franco I noted that it could not "indulge baseless, conclusory allegations that the legislature acted improperly,"[311] but that it "could not summarily deny without a hearing a property owner's detailed objections."[312] It held that "in this case the defense may not be rejected as a matter of pleading," vacated the order granting the agency immediate possession, and remanded.[313] On remand, the trial court granted broad discovery on Franco's takings claim, but deprived him of his substantive pretext defense by applying collateral estoppel based on another Skyway Shopping Center condemnation case.[314] The appellate court held, in *Franco II*, that collateral estoppel was inapplicable.[315]

Franco II[316] also rejected the District's motion to dismiss the pretext claim, treating it as a claim for summary judgment, since it involved matters outside the pleadings.[317] It observed that "[e]ssentially, Franco was seeking the same opportunity to complete discovery related to his pretext claim" that he had enjoyed in his condemnation case "on virtually the same question, i.e., his pretext defense," and remanded.[318]

3. The Role of Twombly *and* Iqbal

Pretextuality is more difficult to plead as a result of the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*,[319] and *Ashcroft v. Iq-*

309. *Id.* at 169.
310. *Id.* at 173.
311. *Id.* at 171.
312. *Id.* (citing United States v. 58.16 Acres of Land, More or Less, 478 F.2d 1055, 1057, 1059 (7th Cir. 1973)).
313. *Id.* at 175-76.
314. Franco v. Nat'l Capital Revitalization Corp. (*Franco II*), 3 A.3d 300, 303 (D.C. 2010).
315. *Id.* at 305. In a related procedural issue, *Franco II* held that the landowner was not collaterally estopped from asserting his pretext defense because a similar defense had not prevailed in a separate lawsuit filed by another condemnee in the same revitalization project in which Franco had not participated. *Id.*
316. *Id.* at 300.
317. *Id.* at 307.
318. *Id.* at 308.
319. 550 U.S. 544 (2007).

bal.[320] In 1957, in *Conley v. Gibson*,[321] the Supreme Court enunciated "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[322] As explained in *Iqbal*, the Court adopted a stricter standard in *Twombly*, requiring that:

> To survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[323]

Franco I stated that the *Twombly* standard had been met.[324] However, *Twombly* played a substantial, if not fully specified, role in *Goldstein v. Pataki*.[325] The U.S. Court of Appeals for the Second Circuit declined to explore the parameters of the case, since the appellants accepted its applicability and "[a]s all parties acknowledge, at a bare minimum, the operative standard requires the plaintiff [to] provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'"[326] The Second Circuit concluded that, "[i]n view of what they have effectively conceded in prosecuting this lawsuit, the appellants cannot meet this standard."[327]

Goldstein v. Pataki considered whether the plaintiffs' Atlantic Yards claim sufficiently alleged that the taking of his property by eminent domain violated the Public Use Clause of the Fifth Amendment. The court stated that they had effectively acknowledged the project's public benefits, but contended that these "serv[ed] as a 'pretext' that masks its actual raison d'être: enriching the private individual who proposed it and stood to profit

320. 129 S. Ct. 1937 (2009).

321. 355 U.S. 41 (1957).

322. *Id.* at 45-46.

323. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citations omitted) (quoting *Twombly*, 550 U.S. at 556-70).

324. *Franco I*, 930 A.2d at 170 (noting that "Franco made many specific factual allegations to support this claim").

325. 516 F.3d 50 (2d Cir. 2008).

326. *Id.* at 56 (quoting ATSI Commc'ns v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 545)).

327. *Id.* at 56-57.

most from its completion."[328] It noted as the essence of the plaintiffs' argument:

> Defendants' decision to take Plaintiffs' properties serves only one purpose: it allows Ratner to build a Project of unprecedented size, and thus reap a profit that Defendants, tellingly, have attempted to conceal at every turn. This is not merely favoritism of a particular developer. . . . Here, the ''favored'' developer is driving and dictating the process, with government officials at all levels obediently falling into line.[329]

These claims, the Second Circuit continued, related to the fact that Bruce Ratner was the impetus behind the Project, that his proffered civic improvements were post hoc justifications, and that the Empire State Development Corporation's review was a "sham" in which the outcome was long "predetermined."[330] The court explained that the gravamen of the plaintiffs' contentions is that benefits objectively related to public use "should nevertheless be rejected as 'pretextual,' not because they are false, but because they are not the real reason for the Project's approval."[331]

The court stated that pre-*Kelo* instances in which federal courts addressed pretextuality "contested whether *any* public use would be served by the taking."[332]

> In contrast, the particular kind of ''pretext'' claim the plaintiffs in this case advance bears an especially dubious jurisprudential pedigree: The plaintiffs have effectively acknowledged the Project's rational relationship to numerous well-established public uses, but contend that it is constitutionally impermissible nonetheless because one or more of the government officials who approved it was actually—and improperly—motivated by a desire to confer a private benefit on Mr. Ratner. . . . [Plaintiffs] seek depositions of pertinent government officials, along with their emails, confidential communications, and other pre-decisional documents. They also dispute various plausible assumptions underlying the Project's budget.
>
> Allowing such a claim to go forward, founded only on mere suspicion, would add an unprecedented level of intrusion into the process. . . .
>
> Accordingly, we must reject the notion that, in a single sentence, the *Kelo* majority sought *sub silentio* to overrule *Berman*, *Midkiff*, and over a

328. *Id.* at 52-53.
329. *Id.* at 55.
330. *Id.* at 56.
331. *Id.* at 58-59.
332. *Id.* at 62 & n.9 (citing Aaron v. Target Corp., 269 F. Supp. 2d 1162, 1175 (E.D. Mo. 2003); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002); 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1130 (C.D. Cal. 2001)).

> century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various government officials who approved it.[333]

The Supreme Court of Hawaii in *County of Hawaii v. C & J Coupe Family Partnership* took another approach.[334] The court asserted that the presence of even a "classic" public use would not obviate the possibility that the "actual purpose" was to confer private benefit, and thus the court permitted a pretextuality defense.[335] On the other hand, it agreed with the Second Circuit in *Goldstein v. Pataki*[336] that the appellants there were seeking "an unprecedented level of intrusion into the process."[337] It then noted that the *C & J Coupe* plaintiff did not seek such intrusive review, but rather "as contemplated by *Goldstein*, questions 'the basic legitimacy of the outcome' and seeks a 'closer objective scrutiny of the justification being offered.'"[338]

Other cases have also indicated that the lower courts have yet to come to grips with the tension between the heightened scrutiny implied in Justice Stevens'[339] and Kennedy's[340] *Kelo* opinions and the deferential rational basis approach the Court otherwise uses in land use and takings cases.[341] These include *Carole Media L.L.C. v. New Jersey Transit Co.*,[342] where the Third Circuit disregarded evidence inconsistent with the *Midkiff* "rationally related to a conceivable public purpose" standard,[343] and *Rhode Island Economic Development Corp. v. Parking Co.*,[344] where the court upheld a claim of pretextuality in a case where the State Department of Transportation would gain from termination of its contractual obligation.[345] None of the cases considered in this discussion contained any clear indication of whether the court was applying a rational basis or heightened scrutiny standard, or clear guidance on how trial courts were to proceed on remand or in future cases.

333. *Id.* at 62 (citations omitted).
334. 198 P.3d 615 (Haw. 2008).
335. *Id.* at 648.
336. 516 F.3d 50 (2d Cir. 2008).
337. *C & J Coupe Family P'ship*, 198 P.3d at 649 (quoting *Goldstein*, 516 F.3d at 63-64).
338. *Id.* (quoting *Goldstein*, 516 F.3d at 63-64).
339. Kelo v. City of New London, 545 U.S. 469 (2005).
340. *Id.* at 490 (Kennedy, J., concurring).
341. *Id.* at 480 (noting the Court's "longstanding policy of deference").
342. 550 F.3d 302 (3d Cir. 2008).
343. *Id.* at 309 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984)).
344. 892 A.2d 87 (R.I. 2006).
345. *Id.* at 106-08.

"Neither the courts ruling against pretext claims, nor the courts ruling in favor of such claims, have any consistent, thorough, and rigorous doctrine governing their adjudication and the scrutiny to be applied."[346] The Supreme Court's failure to grant certiorari in *Kaur v. New York State Urban Development Corp.*[347] represents a lost opportunity to provide such clarity.

In the end, the result of analyses such as that of the Second Circuit would preclude almost all public use pretextuality claims from receiving meaningful scrutiny. Plaintiffs would be required to submit pleadings showing with specificity evidence of *no* public use, or else a "smoking gun" demonstrating pretextual motivation. Any large revitalization project, however, would produce at least some public benefit. Even in the case of a small project, it would not be clear that pretextual explanation equates to invidious pretextual intent.[348] A "smoking gun" would make fine evidence, but developers and officials collaborating on a project of substantial scope likely would be sufficiently seasoned and discrete to make this possibility highly unlikely.[349] The outcome would vindicate Justice O'Connor's sense of cynicism, or resignation, that "[w]hatever the details of Justice Kennedy's as-yet-undisclosed test, it is difficult to envision anyone but the 'stupid staff[er]' failing it."[350]

IV. *GOLDSTEIN*, *KAUR*, AND PUBLIC POLICY PROBLEMS

The previous section of this Article described how, in its application of *Kelo v. City of New London*[351] in *Goldstein v. New York State Urban Development Corp.*,[352] and *Kaur v. New York State Urban Development Corp.*,[353] the New York Court of Appeals abrogated its duty to meaningfully examine possible instances of eminent domain not for public use. This Part concludes that this turn in law also is a blunder in public policy. The very opacity inherent in public-private partnerships and redeveloper selection that contributes to making eminent domain legally objectionable in this context also makes it bad public policy.

346. Brief for Pacific Legal Foundation as Amicus Curiae Supporting Petitioners, Tuck-It-Away v. N.Y. State Urban Dev. Corp. at 21, 131 S. Ct. 822 (2010) (No. 10-402).

347. 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

348. *See supra* notes 217-21 and accompanying text for discussion.

349. *See infra* notes 416-17 and accompanying text for discussion.

350. Kelo v. City of New London, 545 U.S. 469, 502 (O'Connor, J., dissenting) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025-26 & n.12 (1992)).

351. 545 U.S. 469 (2005).

352. 921 N.E.2d 164 (N.Y. 2009).

353. 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

A. *Penn Central*, Henry George, and Agglomeration Economics

1. Penn Central *in the Court of Appeals: A Georgist Turn*

The New York Court of Appeals judgment in *Penn Central Transportation Co. v. City of New York*, favoring the New York City Landmarks Preservation Commission, and against the construction of an office building on top of Grand Central Terminal, was affirmed by the U.S. Supreme Court.[354] The Supreme Court's *Penn Central* opinion has been subject to much criticism, largely because its ad hoc multifactor analysis gives little real guidance to lawyers and judges.[355]

Although the U.S. Supreme Court indeed has been reticent in accepting or deciding cases that would allow it to refine its takings and public use doctrine,[356] it did criticize Chief Judge Breitel's New York Court of Appeals' *Penn Central* opinion. In *Lucas v. South Carolina Coastal Council*,[357] it took the New York court to task for its "extreme—and, we think, unsupportable—view of the relevant calculus" pertaining to the denominator of the takings fraction.[358] The Court of Appeals, *Lucas* continued, had impermissibly "examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings clai-

354. 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

355. *See, e.g.*, Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679 (2005).

> *Penn Central* lacks doctrinal clarity because of its outright refusal to formulate the elements of a regulatory taking cause of action, and because of its intellectual romp through the law of eminent domain that paid scant attention to preexisting legal doctrine. Its aftermath has become an economic paradise for specialized lawyers, a burden on the judiciary, as well as an indirect impediment to would-be home builders, and an economic disaster for would-be home buyers and for society at large.

Id. at 681.

356. *See, e.g.*, Knutson v. City of Fargo, 600 F.3d 992 (8th Cir.), *cert. denied*, 131 S. Ct. 357 (2010) (denying review after four justices urged, in *San Remo Hotel, L.P. v. City and Cnty. of S.F.*, 545 U.S. 323 (2005), that the Court review requirement for state litigation to ripen takings claim against municipalities); Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir. 2003) (incongruity of allowing only regulatory takings defendant to remove case to federal court, where Eighth Circuit strongly hinted Supreme Court should grant review); PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991) (uncontroverted claims of government destruction of development applicant's submissions, case dismissed after oral argument).

357. 505 U.S. 1003 (1992).

358. *Id.* at 1016 n.7 (discussing *Penn Cent.*, 366 N.E.2d at 1276-77, *aff'd*, 438 U.S. 104 (1978)).

mant's other holdings in the vicinity."[359] But that is only the tip of the iceberg.

Chief Judge Breitel, writing for the Court of Appeals, noted the principle, "rooted in the due process clause of the Constitution," that the State "may not, by regulation, deprive a property owner of all reasonable return on his property."[360] He continued, however, by questioning

> the extent to which government, when regulating private property, must assure what is described as a reasonable return on that ingredient of property value created not so much by the efforts of the property owner, but instead by *the accumulated indirect social and direct governmental investment* in the physical property, its functions, and its surroundings.[361]

In his discussion of what gives property value, Chief Judge Breitel continued:

> So many of these attributes are not the result of private effort or investment but of opportunities for the utilization or exploitation which an organized society offers to any private enterprise, especially to a public utility, favored by government and the public. These, too, constitute a background of massive social and governmental investment in the organized community without which the private enterprise could neither exist nor prosper . . . . It is that privately created and privately managed ingredient which is the property on which the reasonable return is to be based. All else is society's contribution by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due.[362]

Phrases such as "indirect social and direct governmental investment" are breathtaking in their arrogation of all of the value inhering in a parcel not demonstrably attributable to activities of its owner to the State. Under this reasoning, as Professor William Fischel noted, government was "entitled to appropriate to itself all of the advantages of civilization."[363] It is somewhat remarkable to see, at this late date, the chief judge of New York adopting such a Hobbesian view of the relationship of the individual and the State.

Whereas John Locke asserted that individuals enter into a social contract whereby they institute government to protect their rights,[364] Thomas Hobbes saw anarchy as such a threat to human flourishing, and life itself,

359. *Id.*

360. *Penn Central*, 366 N.E.2d at 1272.

361. *Id.* at 1272-73 (emphasis added).

362. *Id.* at 1273.

363. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 50 (1995).

364. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION §§ 124-26 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

that he was willing to grant absolute power to the sovereign.[365] "By the late eighteenth century, 'Lockean' ideas on government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition."[366] Even critics of the Lockean view have concluded that property rights were the "great focus" of the Framers,[367] and Hobbes' views correspondingly were disfavored.[368] In a recent regulatory takings case, Justice Kennedy made a cryptic but unmistakable reference to our constitutional tradition of accepting Locke and rejecting Hobbes. In rejecting the assertion that the State could eliminate Takings Clause rights of new owners through the simple expedient of promulgating contrary regulations prior to their purchase, he declared: "The State may not put so potent a Hobbesian stick into the Lockean bundle."[369]

The Hobbesian turn of Chief Judge Breitel was abetted by vagueness and a lack of analysis. He stated "the massive and indistinguishable public, governmental, and private contributions to a landmark like the Grand Central Terminal are inseparably joint."[370] This led Professor Gideon Kanner to ask: "Just how one would go about distinguishing the indistinguishable, and separating the inseparable, the court never took the trouble to explain."[371]

2. Penn Central *as Precursor to Agglomeration*

Chief Judge Breitel's insight about societal value in *Penn Central* was not altogether wrong. More accurately, it reflects that, *mutatis mutandis*, every owner of property derives value from the activity of his or her neighbors and contributes to the value of their respective parcels in return. A given property owner, therefore is not deriving a windfall, but rather is en-

365. THOMAS HOBBES, LEVIATHAN 70 (Richard Flathman & David Johnston eds., W. W. Norton & Company, Inc. 1997) (1651).

366. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 87 (1997).

367. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 92 (1990) ("The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty.").

368. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27-29, 55-59 (1967).

369. Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

370. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

371. Kanner, *supra* note 355, at 686.

meshed in a relationship that Justice Holmes described as "reciprocity of advantage."[372]

New York City's Midtown business district is vibrant because people gather there, which might be attributed to suburban railroad commuters desiring to work near Grand Central Terminal and a myriad of other reasons, comprising "indirect social investment." As Professor Robert Lucas put it: "What can people be paying Manhattan or downtown Chicago rents *for*, if not for being near other people?"[373] While there is no clear owner of the value generated by such a vibrant web of associations, it seems clear that those contributing to that wealth would have a strong aversion to its appropriation by outsiders. Professor James Buchanan illustrated this principle in pointing out that wealthy and distinguished individuals had a marked preference for joining those private clubs that were owned by the members, rather than by proprietors, since proprietors could sooner or later charge each member for enjoying the value of association generated by all of the other members.[374]

This kind of arrogation of relationships generating value is not limited to private social club owners or the New York Court of Appeals. In *Brown v. Legal Foundation of Washington*,[375] for instance, the U.S. Supreme Court countenanced the commandeering of the principal of law clients' trust funds into Interest on Lawyers Trust Accounts (IOLTA) accounts, with the interest generated by those accounts directed for use by legal services programs.[376] *Brown*'s justification, that their lawyers were not entitled to the money and that the program was limited to funds where it was not practical to create separate bank accounts for the individual clients, means that the State is the residual claimant of all value not nailed down in law, even when those with plausible interests in it work together and undoubtedly would prefer that the earnings stay within their partnership.[377]

372. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

373. Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 39 (1988).

374. James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965).

375. 538 U.S. 216 (2003).

376. *Id.* at 237-38.

377. For elaboration, see Steven J. Eagle, *Regulatory Takings, Public Use, and Just Compensation After* Brown, 33 ENVTL L. REP. 10807, 10812 (2003) (noting that "neither a host nor her guest might be able to prove which is the rightful owner of coins found under the sofa cushion, each would have a better claim to the money than a visiting government inspector of upholstered furniture").

3. Agglomeration and Public Policy

In the decades since *Penn Central*, land and housing economists have come to analyze the synergies that come from the propinquity of people who could learn from or do business with each other as "agglomeration effects." The sub-discipline studying why people decide to locate in cities is referred to as "the New Economic Geography" or "agglomeration economics."[378] A major problem with the dirigiste approach to land use that marks grand projects such as CityCenter (Las Vegas), and Atlantic Yards (Brooklyn), is that it fails to take into account why people and businesses move to, within, and from cities.

The traditional Tieboutian model assumes that individuals chose from competing suburbs or cities to find the mix of amenities provided by government and taxes imposed by government that suits them best.[379] While Chief Judge Breitel was willing to credit "indirect social and direct governmental investment" to the State without examining it further,[380] "agglomeration economics"[381] "starts with the basic claim that individuals and businesses make their location decisions on the basis of where other individuals and businesses decide to locate."[382] In other words, Breitel focused on gathering *places*, and agglomeration economics focuses on gathering *people*.

Countering the attraction to the center resulting from agglomeration is the repulsion from the center that results from effects of high density, such as crowding of roads, higher rents, and lack of green space. These reductions in amenities are collectively referred to as "congestion."[383] Somewhat akin is the increase in social bads, such as organized crime, that have increasing returns to scale. As Professor David Schleicher suggests, these might better be termed "negative agglomerations."[384]

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378. *See generally* David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507. Schleicher cites foundational work, including Edward L. Glaeser, *Are Cities Dying?*, 12 J. ECON. PERSP. 139 (1998) [hereinafter Glaeser, *Are Cities Dying?*]; Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. POL. ECON. 1002 (1986); Lucas, *supra* note 373.

379. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

380. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1272-73 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

381. Among other important contributions are EDWARD L. GLAESER, CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM (2008); MASAHISA FUJITA, PAUL KRUGMAN, AND ANTHONY J. VENABLES, THE SPATIAL ECONOMY: CITIES, REGIONS, AND INTERNATIONAL TRADE (1999); and Schleicher, *supra* note 378.

382. Schleicher, *supra* note 378, at 1509-10.

383. *See* Glaeser, *Are Cities Dying?*, *supra* note 378, at 150.

384. Schleicher, *supra* note 378, at 1529.

It is worth noting that the New York Court of Appeals' approval of a "civic project" basis for upholding the expansion of the Columbia University campus into Manhattanville in *Kaur* was based largely on its agglomerative effect.[385] Of course, although Columbia might deem its purposes loftier, the agglomerative effect of its activities differs little from those of, say, Manhattan's garment district.[386] Notably, however, regulations designed to protect urban manufacturing areas have proved disadvantageous.[387]

B. Urban "Blight" as a Metaphor for Contagious Illness

The word "blight" has greatly encouraged and justified condemnation for revitalization. As described in Professor Wendell Pritchett's path breaking article, "blight" is equated to a "public menace."[388] "By elevating blight into a disease that would destroy the city, renewal advocates broadened the application of the Public Use Clause and at the same time brought about a re-conceptualization of property rights."[389] The U.S. Supreme Court accepted this model whole, stating in *Berman v. Parker*[390] that "[t]he experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, *as though possessed of a congenital disease*, the area must be planned as a whole."[391] Thus, in *Berman*, *Hawaii Housing Authority v. Midkiff*,[392] and *Kelo v. City of New London*,[393] the Court has espoused that the remedy for blight is condemnation and government-directed redevelopment.

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385. Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 734 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

> The indisputably public purpose of education is particularly vital for New York City and the State to maintain their respective statuses as global centers of higher education and academic research. To that end, the Project plan includes the construction of facilities dedicated to research and the expansion of laboratories, libraries and student housing.

Id.

386. *See* Lucas, *supra* note 373, at 38 ("New York City's garment district, financial district, diamond district, advertising district and many more are as much intellectual centers as is Columbia or New York University. The specific ideas exchanged in these centers differ, of course, from those exchanged in academic circles, but the process is much the same.").

387. Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010).

388. 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).

389. *Id.* at 3.

390. 348 U.S. 26 (1954).

391. *Id.* at 34 (emphasis added).

392. 467 U.S. 229 (1984).

393. 545 U.S. 469 (2005).

But, as I have elaborated upon elsewhere, abatement is the direct and proper remedy for blight, not condemnation.[394] If the present owners, lenders, or parties with a potential interest are unwilling or unable to abate a nuisance, government may do so, impress a betterment lien upon the land, and foreclose the lien if and when unpaid.[395] Encouraging local private initiative and transparency, both important in a well-functioning republic, augur strongly for this approach because the foreclosure process is both public and modest in scale, as opposed to larger redevelopment projects whose developers are opaquely selected.

C. Underutilization

Much of the underpinning of the concept of "underutilization" of property as blight is based upon Professor Michael Heller's thesis of the anticommons.[396] But, this is the tail wagging the dog. The numerous shards of property noted by Heller that prevented the utilization of storefronts in Moscow were not endogenous to a natural evolution of private property rights, but rather were fragments resulting from the sudden implosion of the Soviet Union.[397] The real story is that for three-quarters of a century Russia was governed by a regime that concomitantly repressed both individual property and individual liberty. Overly centralized control of resources deprives individuals of their incentives and ability to apply their local and tacit knowledge to coordinate resource use.[398] Furthermore, as Heller hints at, rent control and kindred regulations imposed in the name of (contested) non-utilitarian values also may lead to underutilization.[399]

Because of concern about ostensible blight, the courts have countenanced the use of eminent domain to acquire small parcels, with the resulting superparcel having a higher aggregate market value. It might, or might not, have a higher aggregate social value, since condemnation results in the destruction of large (albeit almost immeasurable) amounts of subjective value, as well as the imposition of high out of pocket costs.[400]

394. Steven J. Eagle, *Does Blight Justify Condemnation?*, 39 URB. LAW. 833 (2007).

395. *Id.* at 838.

396. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624-25 (1998).

397. *See* Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229, 1250-51 (2010) [hereinafter Eagle, *Really New Property*].

398. *See generally* Steven J. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345 (2006) (claiming that the United States evangelizes the free market, transparency, and subsidiarity in countries including those in the former Soviet Union, but is reluctant to adhere to these principles itself).

399. *See* Heller, *supra* note 396, at 671 n.228.

400. *See supra* notes 126-29 and accompanying text.

As Professor Jonathan Barnett notes, however, market actors whose roles vary from one transaction to another have strong incentives to "resist and correct overpropertization."[401] In the urban renewal situation, however, actors do not switch roles. Members of minority groups, persons of moderate income, and owners of small businesses are the condemnees. Well-connected redevelopers are post-condemnation transferees, and they proxy for the upscale businesses and residents that subsequently occupy their developments. All of these groups have every reason to militate for more redevelopment.

In New York, the Court of Appeals decisions in *Goldstein* and *Kaur* seem apiece with Chief Judge Breitel's Georgist views in *Penn Central*.[402] Breitel saw much of the value of property resulting not from efforts of the landowner, but rather from "a background of massive social and governmental investment in the organized community without which the private enterprise could neither exist nor prosper."[403] Therefore, the government, and not the landowner, is entitled to this value upon the exercise of eminent domain.

A corollary of this view is that an owner who does not utilize his land productively is depriving society (i.e., the State) of some value that belongs to it. A more sophisticated form of this argument is that the errant owner is depriving his neighbors (and society) of a duty owed under some sort of reciprocity of advantage theory.[404] One also might analogize the obligation to the right to provide lateral support to a neighbor's land or to create conditions that prevent neighbors from enjoying the enhanced value that would inure to them if those whose lands were contiguous were more industrious. The State, being the representative of society, can require good uses of land as well as prohibit bad. There is no such "affirmative police power," however.

The Court of Appeals' view also is reminiscent of that of A. C. Pigou, who recognized that it was necessary for society to rectify social harms that emanated from some parcels or activities, to the detriment of others.[405] Ronald Coase subsequently explained that negative externalities are typically not unilateral, but that activities impinge upon one another not because one is good and the other bad, but because both activities are legiti-

401. Jonathan M. Barnett, *Property as Process: How Innovation Markets Select Innovation Regimes*, 119 YALE L.J. 384, 390 (2009).

402. *See supra* Part IV.A.

403. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1273 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

404. *See supra* note 372 and accompanying text.

405. *See* ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE 160-68 (1920).

mate, but mutually incompatible.[406] While the court's implicit assumption seems to be that owners targeted for redevelopment who refuse to sell do so because they are "holdouts," the alternative possibility is that "underutilization" in the eyes of redevelopment agencies represents good utilization from the perspective of the owners. In some highly publicized cases of eminent domain, the owners' views might be a better economic choice as well.[407]

D. The Information Problem and Information Paradox

1. Government Disclosure is Cheap and Private Information is Expensive

A major problem with eminent domain for private economic redevelopment is asymmetry of information. In his classic article *The Economics of Public Use*,[408] Professor Thomas Merrill notes the broadest objection to the use of eminent domain for parcel assembly, that private developers regularly assemble sites for shopping centers and commercial office developments without eminent domain.[409] Merrill's response is that this might work well for smaller parcels not strictly site-dependent, and, where anticipated, large gains could buy off rent seekers.[410] More fundamentally, however, while conceding that straw transactions, options, and similar devices may work well for private developers, Merrill asserted that their utility for government assembly is limited. "The necessary ingredient of these techniques is secrecy, and governments, at least in an open society like the United States, are not very good at keeping secrets."[411] Even if it could keep information private, the possibilities of government purchasing agents buying off holdouts in secret deals and possibly tipping off potential sellers creates a "specter of corruption" that might make it prudent for eminent domain to be used instead of private developers' "guile."[412]

406. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

407. The saga of Susette Kelo is instructive in this regard. *See supra* Part III.A.

408. Merrill, *supra* note 239.

409. *Id.* at 81; *see, e.g.*, Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

> [T]he landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.

Id. at 783-84.

410. Merrill, *supra* note 239.

411. *Id.*

412. *Id.*

Another way to look at the fact that government typically must devise its plans for acquisitions in public view is that obtaining such disclosed information is cheap. Sellers and competing buyers need merely read the local newspapers or attend city council meetings to find out government's land acquisition plans.

But how does government decide whether and where to institute large urban revitalization projects in the first place? Here it is vital that it ferret out the information that would lead it to the best decision. But, as Professor Kenneth Arrow noted, information "is an economic good, in the sense that it is costly and valuable."[413] It is difficult to sell information, however, since the very process of informing a potential buyer of the reasons why it is valuable serves to convey the information for free. Also, "there is no general way of defining units for information," and information is difficult to evaluate.[414] Yet, information about development opportunities can be quite lucrative, since one characteristic of information is an "extreme form of increasing returns."[415] The same bit of information that might be the key to a small project with modest profits might serve the same function for a large project with substantial profits.

From the city's perspective, it is difficult to evaluate the consequences of accepting a redevelopment proposal. Furthermore, a little-known developer might not have good judgment or prove a reliable partner. Judgment and reliability, in this context, include avoiding potential embarrassment for local officials, and, perhaps, providing reciprocal value for contracts awarded. Sponsorship by a well-regarded team player provides the necessary reputational bonding. That is why newcomers may be told, "[w]e don't want nobody that nobody sent."[416] Redevelopers that somebody sent would likely have to justify that patronage in ways that are both circuitous and difficult to substantiate.[417] That one hand washes the other is the truism of crony capitalism.

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413. Kenneth J. Arrow, *The Economics of Information: An Exposition*, 23 EMPIRICA 119-28 (1996).

414. *Id.* at 120.

415. *Id.*

416. Interview by Harry Kreisler, Conversations with History, Inst. of Int'l Studs., U.C. Berkley, with Abner Jay Mikva, former Congressman (Apr. 12, 1999), *available at* http://globetrotter.berkeley.edu/people/Mikva/mikva-con2.html. Mikva, later a member of Congress, a United States Court of Appeals judge, and counsel to President William J. Clinton, related that a "quintessential Chicago Ward committeeman" turned him away with the those words when he arrived, unsponsored, to volunteer for Adlai Stevenson and Paul Douglas. *Id.*

417. An aphorism attributed to Senator Earl Long states: "Don't write anything you can phone. Don't phone anything you can talk. Don't talk anything you can whisper. Don't whisper anything you can smile. Don't smile anything you can nod. Don't nod anything

2. *Crony Capitalism and Urban Revitalization*

Government coordination of economic activity means that some actors are encouraged in certain undertakings. These are of value, in turn, because they are forbidden to others. The beneficiaries of such largess have acquired "regulatory property,"[418] which has been placed in a limited number of hands and is susceptible to removal or dilution by the State. According to Professor John Coffee, however, the presence of dispersed ownership is important for the autonomy of both government and providers of capital.

> This is the dark side of concentrated ownership; put simply, the separation of cash-flow rights from voting rights can serve as a means by which those controlling the public sector can extend their control over the private sector. At a minimum, the prospect of crony capitalism—that is, closely interlocked political and economic leaderships, each reciprocally assisting the other—ensures that concentrated owners will need to become deeply involved in government in order to protect their positions from existing rivals, new entrants, and political sycophants.[419]

As Professor Coffee adds, "[o]nce concentrated ownership degenerates into a 'crony capitalism' that unites political and economic power, the role of law is likely to become minimal."[420] Professor Timothy Canova described "crony capitalism" as the "tendency of ostensible public-sector regulatory authorities reaching out to help their 'friends' in the private sector."[421]

Much of the concern about crony capitalism results from concern about the causes and effects of bailouts of firms by government in time of economic turmoil. For instance, the *Financial Times* outlined that the rescue in the late 1990s of Long-Term Capital Management by the Federal Reserve took place in the context of a web of former colleagueship and per-

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you can wink." *Earl Long Quotes*, BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/e/earllong212427.html (last visited Apr. 18, 2011).

418. *See* Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 129 (2001) (coining term and explicating concept).

419. John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 72 (2001).

420. *Id.* at 81.

421. Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT'L L. REV. 1571, 1583 (1999) (reporting on American crony capitalism, conflicts of interest, and lack of transparency).

sonal friendship between top officials at the Fed and the beneficiaries of its largess.[422]

The creation of massive urban redevelopment projects located on sites taken involuntarily from their previous owners and retransferred to powerful and sometimes politically well-connected new proprietors is fertile grounds for crony capitalism abuse. Such accusations played an important role in opposition to New York's Atlantic Yards project. As suggested earlier, one might conclude that the relationship between a leading bank and New York State government regarding the World Trade Center, instantiated in the brothers Rockefeller, was not wholly arms-length.[423] The same might be said for the provenance of *New York Times* coverage of Bruce Ratner and Atlantic Yards.[424]

Another example is the recent account describing the allocation of funds from Chicago's Tax Increment Financing (TIF) program, which is financed and administered outside the city's annual budget. "About $500 million has gone into the TIF program in each of the last four years, and most financing decisions are made behind closed doors by top city officials and aldermen."[425]

E. Government, Property, and Coordination

Condemnation for economic revitalization is, at its heart, a tool designed to bring economic resources to bear in repairing communities.[426] The conceit is that the "visible hand" of government, within the context of the regulatory state, can best coordinate activities.[427] It is true, as Professors Robert Ahdieh,[428] Michael Heller,[429] and others argue, that "[t]he operative challenge is to coordinate property-rights holders around an efficient equili-

422. *See* John Plender, *Western Crony Capitalism*, FIN. TIMES, Oct. 3, 1998, at 10 (criticizing incestuous relationships between government and regulatory officials and investment bankers).

423. *See supra* notes 53-55.

424. *See supra* note 72 and accompanying text.

425. Mick Dumke, *Candidates Question the Ways Tax Increment Financing Is Used*, N.Y. TIMES, Jan. 20, 2011, at A21.

426. Steven J. Eagle, Kelo, *Directed Growth and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 64 (2009) [hereinafter Eagle, *Directed Growth*].

427. *See* Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 584 (2010).

428. *Id.* at 593-98.

429. *See* Heller, *supra* note 396, at 626 (asserting that over-specified property rights in land preclude effective utilization of property); *see generally* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008) (extending *Anticommons* principles to air transport congestion, patent locks precluding pharmaceutical advances, etc.).

brium of consumption and use."[430] However, that does not mean that the State is the best agent to make the change. One cannot displace market-based coordination, which certainly has warts in practice, with an idealized form of government-coordinated economy.[431] In particular, the fact that real property sometimes is used in what some would deem suboptimal ways does not prove or even imply that State-driven redevelopment would do better.[432] One illustration of the failure of control to anticipate the full consequences of its well-intended decisions is the attempt to preserve blue-collar jobs in New York City by prohibiting the conversion of underutilized loft buildings so as to provide much-needing housing.[433]

F. Agglomerate Proliferation

As was noted earlier, agglomeration provides increasing returns to scale of productive economic and enjoyable cultural and social interactions.[434] But, as is the case with critical densities of fissionable nuclear material, the ensuing chain reactions set off by agglomeration are not always socially beneficial. The bad effects include *negative agglomeration*,[435] *congestion*,[436] and what I will call *agglomerate proliferation*. While it is conventional to use the term "congestion" as a catchall for all undesired effects of agglomeration, I break out proliferation for reasons similar to Professor Schleicher's use of negative agglomeration. "Congestion" is an apt metaphor for the disutility resulting from the conflict between things resulting from an agglomeration that are, in themselves, desirable. Highway congestion resulting from the crowding of highways by workers on their way to new jobs within a growing agglomerate metropolitan area is the archetype. Negative agglomeration is not a conflict among goods, and agglomeration proliferation is not a conflict within an agglomerating area.

"Agglomerate proliferation," as I use the term, refers not to the growth of agglomerates, but to their proliferation (or, more precisely, to the proliferation of aspiring agglomerates). Local officials, spurred by their own dreams, or dreams supplied by erstwhile redevelopers or sport franchise

430. Ahdieh, *supra* note 427, at 594-95.

431. *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1-2 (1969) (discussing and naming the "nirvana fallacy"). The fallacy first was described in R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960), noting comparisons between "a state of laissez faire and some kind of ideal world."

432. For elaboration, see Eagle, *Directed Growth*, *supra* note 426.

433. *See* Hills & Schleicher, *supra* note 387, at 251.

434. *See supra* note 373 and accompanying text.

435. *See supra* notes 383-84 and accompanying text.

436. *See supra* notes 383 and accompanying text.

owners, decide that their towns need to become hubs of economic activity. "Need" and "desire" are not synonyms, and neither equates to "destiny."

Owners, or developer's investors, provide equity financing for projects that are independently economically justifiable. Often such projects consist of multiple structures and uses. These may be owned and financed separately and bound together by covenants. The regional shopping center is the classic example. The principal economic advantage of the shopping center over the traditional main street is that the most desirable merchants are able to internalize the positive externalities they generate. On Main Street, storefront owners can free ride on esteemed retailers who bring droves of shoppers to the block. In the mall, the sought-after merchant would insist on internalizing its positive externality by paying a far lower rent per square foot than merchants who live off the traffic they generate.[437] This observation, writ large, is the basis for claims that localities should subsidize businesses fostering agglomeration.[438]

Where there is no reasonable assurance that the proposed new development would pay its own way, even after considering ownership structures and covenants that would provide synergies with complementary land uses, bringing in government is the logical resort. The proffered explanation involves the creation of public goods, which are both nonrival and nonexcludable. This means that if government contributes to the new development, complementary businesses or competitors would settle in town and more skilled workers, vendors, lawyers, and accountants familiar with the industry, and others would flock in. If the city down the freeway could prosper through agglomeration, why not ours?

During the first part of the nineteenth century, the severe depression that started in 1837 was due largely to a massive growth in public and private debt. "The 'orgy of canal and railroad building and of bank organization' was spurred by New York's success with the Erie Canal in 1817.[439] States sought to replicate the New York success story and borrowed money to fund these internal improvements."[440] Similarly, towns would compete in subsidization of railroads, in hopes of obtaining service and becoming re-

437. *See, e.g.*, Marcus Gerbich, *Shopping Center Rentals: An Empirical Analysis of the Retail Tenant Mix*, 15 J. REAL EST. RES. 283, 284-86 (1998).

438. *See infra* notes 443-48 and accompanying text.

439. Susan P. Fino, *Perspectives: Federal Jurisprudence, State Autonomy: De Tocqueville or Disney? The Rehnquist Court's Idea of Federalism*, 66 ALB. L. REV. 765, 769 (2003) (quoting Reginald C. McGrane, *Some Aspects of American State Debts in the Forties*, 38 AM. HIST. REV. 673, 673 (1933)).

440. *Id.*

gional distribution hubs.[441] "Although these policies could create local agglomerative benefits if only one local government engaged in them, they did not produce net national economic gain, as they created inefficient subsidy competition, political manipulation of the railroad industry, and overinvestment."[442]

Just as prestigious anchor department stores in shopping malls provide positive externalities in the form of customer traffic to smaller merchants, Professors Teresa Garcia-Milà and Therese McGuire postulated that desirable firms will supply new jobs and attract synergetic enterprises.[443] "Tax breaks are a means of internalizing the positive externality of agglomeration economics."[444] In theory, such tax preferences can create wealth for the city granting them and society as a whole, if the city could better capture the positive externalities than other cities.[445] The principal illustration in the Garcia-Milà and McGuire article was the recent move of the Boeing Company's headquarters from Seattle to Chicago. Some five hundred workers, mostly from Seattle, would move into an existing building in Chicago. Chicago provided Boeing $50 million in subsidies.

In commenting upon the Garcia-Milà and McGuire thesis, Todd Sinai noted that "[t]he authors label the externality 'benefits from agglomeration,' but it really could be anything productivity-enhancing: from greater civic pride to honest-to-goodness knowledge spillovers."[446] He added "Boeing may have been a 'loss leader' for Chicago, not intended to make existing firms more productive, but to act as a magnet for additional firms."[447]

Cities motivated to become "centers of excellence" in one activity or another, compete for increases in scale that would lead them to become the next Detroit or Silicon Valley or Wall Street. However, firms planning to locate facilities play the subsidy offer of one city against another (as did railroads) or threaten to leave (as do sports teams). Under these circums-

441. Schleicher, *supra* note 378, at 1514 (citing Stanley L. Engerman, *Some Economic Issues Relating to Railroad Subsidies and the Evaluation of Land Grants*, 32 J. ECON. HIST. 463 (1972)).

442. *Id.*

443. *See generally* Teresa Garcia-Milà & Therese J. McGuire, *Tax Incentives and the City*, *in* BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 95 (William G. Gale & Janet Rothenberg Peck eds., 2002) [hereinafter Milà & McGuire, *Tax Incentives*].

444. *Id.* at 114.

445. *See* Hills & Schleicher, *supra* note 387, at 263 n.47.

446. Todd Sinai, *Comment* on Teresa Garcia-Milà & Therese J. McGuire, *Tax Incentives and the City*, *in* BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 124, 125 (William G. Gale & Janet Rothenberg Peck eds., 2002).

447. *Id.* at 129.

tances, it is easy to dissipate whatever gains might result from agglomeration.

Professor Edward Glaeser enumerated reasons for tax incentives for firms to locate in a city. These were (1) bids by localities to obtain consumer or producer surplus for existing residents; (2) agglomeration economics; (3) up-front compensation for future tax exploitation; (4) tax discrimination against those rooted in a community and in favor of those freer to leave; and (5) "corruption and influence."[448]

Thus, while agglomeration economics is the account that captures the imagination, it is difficult to discern whether it is another name for the largely obscure mixture of motives and relationships that have marked public-private urban land redevelopment.

G. Redevelopment Does Not Embody Superior Knowledge

Professor Richard Schragger notes that the New Economic Geography literature indicates "the reason some places do well economically and others do poorly may have more to do with luck or path dependency than with particular legal institutions."[449]

> Historical accident, path dependence, spatial persistence—these features of economic geography suggest that uneven economic development is not an aberration but rather a salient feature of economic life. It also suggests that chance and very small perturbations in an existing equilibrium can make a big difference to outcomes. Economic growth does not start from a clean slate whereby each political jurisdiction can act to ensure its own prosperity. Geography is not incidental to economy; it is a key feature of economy.[450]

Despite the facts that well-conceived development can obtain private financing and that poorly-conceived projects do not deserve public financing, government officials try over and over to find middle ground where public investment would benefit the locality. The usual lure is economic development and the positive externalities that the project will generate and rain upon the city or metropolitan area as a whole.

Common objects of such financing are athletic stadiums, which have a long history of public support,[451] and not coincidentally, played an impor-

448. Edward Glaeser, *Comment* on Teresa Garcia-Milà & Therese J. McGuire, *Tax Incentives and the City*, *in* BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 114, 116-20 (William G. Gale & Janet Rothenberg Peck eds., 2002).

449. Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1837 (2010).

450. *Id.* at 1893.

451. *See* Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams' Demands for Free Public Stadiums*, 6 RUTGERS J.L. & PUB. POL'Y 35, 38-48 (2008).

tant role in the Atlantic Yards project that was litigated in *Goldstein v. New York State Urban Development Corp.*[452] As Professor Kenneth Shropshire noted, the statement most often encountered when sports teams want a new home is: "We should build a new facility because the economic impact will be tremendous."[453] However, it is almost impossible to determine whether a new stadium will have any positive multiplier effect at all. Beyond the construction phase, which often is a significant factor in mobilizing political support for an urban redevelopment project,[454] most payroll of the sports franchise consists of high-dollar player contracts and low-paid, sporadic employment of custodial and food vendors' staff. Even more important, most consumer expenditures for tickets, parking, and food substitute for alternative local uses of the family entertainment budget.[455]

> One overarching theme of the book *Sports, Jobs and Taxes*, edited by economists Roger Noll and Andrew Zimbalist, is that no economist has conducted an independent study showing a positive economic impact on a city from arena or stadium construction, at least not in the past 30 years. There is a big difference, they encourage us lay people to understand, between economic *activity* and economic *impact*. . . . [E]ven the gross economic activity of a franchise is relatively modest.[456]

Other studies have shown similar results.[457] According to Professor Zimbalist, "most of the money that gets spent [on sports facilities] is [simp-

452. 921 N.E.2d 164 (N.Y. 2009). Although not mentioned in the New York Court of Appeals' *Goldstein* opinion, "[Bruce] Ratner is also the principal owner of the New Jersey Nets." *Goldstein v. Pataki*, 516 F.3d 50, 54 (2d Cir. 2008).

453. Kenneth L. Shropshire, *Sports Facility Construction in the Coming Millennium: The Lawyer's Role*, 16 ENT. & SPORTS LAW 1, 27 (1998) [hereinafter Shropshire, *Sports Facility Construction*].

454. *See, e.g.*, Lavine & Oder, *supra* note 71, at 369 (noting that "the grassroots support for Atlantic Yards came mostly from groups that received funding from the developer or expected jobs, like construction unions").

455. *See, e.g.*, Andrew P. Morriss et al., *Green Jobs Myths*, 16 MO. ENVTL. L. & POL'Y REV. 326, 390 n.233 (2009).

456. Shropshire, *Sports Facility Construction*, *supra* note 453.

457. *See* SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (Roger G. Noll & Andrew Zimbalist eds. 1997); Dean V. Bairn, *Sports Stadiums as "Wise Investments": An Evaluation*, *in* HEARTLAND INST. POL'Y STUDY NO. 32 (1990), *available at* http:// www.heartland.org/archives/studies/sports/baim2.htm (discussing the practicality of public investment in stadiums). *Cf.*, Allen R. Sanderson, *In Defense of New Sports Stadiums, Ballparks, and Arenas*, 10 MARQ. SPORTS L.J. 173, 184 (Spring 2000) (arguing that public spending on stadia is reasonable unless disproportionate with expenditures on highway, airport, and other infrastructure construction).

ly] recirculated money within the town. It does not generate new value added."[458]

Despite the lack of economic benefit from publicly subsidized sports facilities, they are defended as ways of providing the social value and solidarity that comes from rooting for the home team and giving the host city a national and world identity.[459]

Beyond stadiums, many well-known eminent domain projects simply have not worked out,[460] and numerous major projects have run into trouble. In Las Vegas, although the Nevada Supreme Court upheld condemnation for urban revitalization for the massive "CityCenter Las Vegas" project,[461] the market does not share the developers' enthusiasm.[462] Perhaps more important, an industry research analyst for a leading international commercial real estate brokerage firm noted, "[s]ome of CityCenter's revenue will be revenue that Las Vegas didn't have before, but we project that 70% to 90% will be at the expense of existing properties."[463] The notion that cities can be brought back to affluence and life by in-migration by suburban empty nesters and members of the young, bright, and hip "creative class," an idea associated with Professor Richard Florida,[464] seems to have been overblown.[465]

Probably the most visible urban revitalization project in the country has been the Fort Trumbull redevelopment in New London, Connecticut. Pfizer has left New London, the Fort Trumbull redevelopers were unable to obtain funding, and infrastructure for any development such as roads has yet to be built.[466] A July 2010 account in the *Hartford Courant* began: "The empty expanse that was once the working-class Fort Trumbull neighbor-

458. *Stadium Financing and Franchise Relocation Act of 1999: Hearing on S. 952 Before the S. Comm. on the Judiciary*, 106th Cong. 37 (1999) (statement of Professor Andrew Zimbalist).

459. *See* Edelman, *supra* note 451, at 50-53.

460. *See generally* Gideon Kanner, *Eminent Domain Projects That Didn't Quite Work Out*, SR004 ALI-ABA 291 (2009).

461. *See* City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 11 (Nev. 2003) (adopting expansive views of "blight" and "public use").

462. *See, e.g.*, Alexandra Berzon, *Contract Dispute Could Hamper City Center's Finances*, WALL ST. J., May 19, 2010, at B2 ("Contractor claims against City Center . . . could jeopardize the project's loan contracts and condo sales, the project said in a recent court filing.").

463. Denise Kalette, *Developers Bet a Fortune on Vegas*, NAT'L REAL EST. INV., Jan. 1, 2010 (quoting Jacob Oberman, Dir. of Gaming Res., CB Richard Ellis, Las Vegas, Nev.).

464. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE (2002).

465. *See* Eagle, *Really New Property*, *supra* note 397, at 1261-63.

466. Elaine Stoll, *Fort Trumbull Developer Asks for More Time, Misses Deadline*, THE [NEW LONDON] DAY, Nov. 27, 2010, at QQ.

hood in New London is an ever-present reminder of the painful eminent domain battle that took dozens of homes—and the redevelopment that didn't follow."[467] The account noted the possibility of new townhouse construction, but added that they "wouldn't be built where the properties were taken and demolished."[468] Earlier in 2010, *The [New London] Day* noted that the transfer of the underlying Fort Trumbull project land, which was mandated by state law, never had been accomplished and that officials were equivocating on when that might be done.[469] Susette Kelo's travails might have been for naught.

Apart from specific redevelopment projects, it might be that the entire apparatus of government-directed subsidization and condemnation for sports stadiums, convention centers, shopping centers, and the like is a chimera.

Professor Edward Glaeser's research, including data from the 2010 Census, indicates that the basis for sustained regional growth is the personal satisfaction of residents and potential migrants.[470] Census data indicate that population is not moving to high-income areas, or to areas with high amenity values. Instead, Glaeser states, they are moving to areas where housing is cheap because building is abundant.[471]

CONCLUSION

Dissenting in *Goldstein*, New York Court of Appeals Judge Smith declared:

> The whole point of the public use limitation is to prevent takings even when a state agency deems them desirable. To let the agency itself determine when the public use requirement is satisfied is to make the agency a judge in its own cause. I think that it is we who should perform the role of judges . . . .[472]

467. Kenneth R. Gosselin, *A Townhouse Plan and an Electric Boat Purchase Could Undo Some Ill Will In New London's Fort Trumbull Area*, HARTFORD COURANT, July 5, 2010, at QQ.

468. *Id.*

469. David Collins, *New London Should Take Title to Fort Trumbull*, THE [NEW LONDON] DAY, Feb. 7, 2010, at QQ.

470. *See* Edward L. Glaeser, *What Democrats Might Learn From the Census*, N.Y. TIMES ECONOMIX BLOG (Jan. 11, 2011, 6:00 AM), http://economix.blogs.nytimes.com/2011/01/11/what-democrats-might-learn-from-the-census/ (noting higher wages, quality of life, and "affordable housing, which typically comes from abundant supply" as the principal factors).

471. *See id.*

472. Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 190 (N.Y. 2009) (Smith, J., dissenting).

Condemnation for transfer for private redevelopment may or may not make sense as a political matter. As a matter of public policy, its justifications are doubtful.[473] In a speech weeks after handing down the Supreme Court's opinion in *Kelo*, Justice Stevens acknowledged his personal view that the "allocation of economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials."[474] As a matter of law, however, his promise in *Kelo* that cases of alleged takings not for public use "can be confronted if and when they arise"[475] has not come to pass, certainly not in New York.

473. *See supra* Part IV.A.
474. John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 4 (2005).
475. Kelo v. City of New London, 545 U.S. 469, 487 (2005).