

## URBAN REVITALIZATION AND EMINENT DOMAIN: MISINTERPRETING JANE JACOBS

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INTRODUCTION .....	108
I. LAND USE REGULATION AND EMINENT DOMAIN IN THE COURTS.....	109
A. <i>A General Overview</i> .....	109
B. <i>Kelo v. City of New London</i> .....	111
C. <i>The New York Judicial Tradition of Deference</i> .....	113
D. <i>The Role of Accretion in the Common Law</i> .....	114
II. JANE JACOBS AND BOTTOM-UP REDEVELOPMENT .....	115
A. <i>The Death and Life of Great American Cities</i> .....	117
B. <i>Jacobs and the Information Problem</i> .....	120
1. <i>Catastrophic Change</i> .....	122
2. <i>On Planning Change</i> .....	123
C. <i>Jacobs’ Factors of Diversity</i> .....	124
D. <i>The Economics of Cities and “Jane Jacobs         Externalities”</i> .....	126
E. <i>A “Goldilocks Solution” for Urban Renewal?</i> .....	127
F. <i>Public and Private Redevelopment—Tax Increment         Financing</i> .....	130
G. <i>Constraining Abusive Condemnation</i> .....	134
H. <i>In Introduction: Poletown and Hathcock</i> .....	134
I. <i>The Kelo Decision</i> .....	136
J. <i>The Specter of Blight</i> .....	137
K. <i>Kelo Promises Protection from Abuse</i> .....	140
1. <i>Kelo Omits Affirmative Requirements</i> .....	142
2. <i>Reactions to Kelo</i> .....	144
III. PUBLIC USE IN NEW YORK AFTER <i>KELO</i> : <i>GOLDSTEIN</i> AND <i>KAUR</i> .....	144
A. <i>Goldstein and Atlantic Yards</i> .....	145
B. <i>Kaur and Columbia University</i> .....	147

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2011]     **URBAN REVITALIZATION AND EMINENT DOMAIN**           **107**

*C. Unfinished Business*.....150

        1. Obtaining Evidence to Make Fact-Bound  
           Determinations.....150

        2. Do the protections of *Kelo* apply to blight cases?....152

        3. A Coda.....153

“*The Jane Jacobs book is going to do a lot of harm . . . (b)ut we are going to have to live with it. So batten down the hatches.*”<sup>1</sup>

## INTRODUCTION

The year 2011 marks the fiftieth anniversary of the publication of Jane Jacobs’ *The Death and Life of Great American Cities*.<sup>2</sup> This is an auspicious time to review the impact of *Death and Life* on American land use regulation and eminent domain. It is also a good time to examine the impact of Jacobs’ work on courts in New York—where the ideas she proselytized seem taken into account in ways that are paradoxical at best and perverse at worst.

During the past century, states and localities have been increasingly proactive in determining uses of land. Top-down decision-making is more prevalent. Originally, the availability of allodial title, free from the lingering constraints of feudal tenure, was the lure attracting settlement in colonial America.<sup>3</sup> Likewise, the role of government in the new nation was both limited and largely designed to protect property,<sup>4</sup> although, to be sure, there was civic republican sentiment.<sup>5</sup>

In broad terms, governmental regulation of property in land began with enforcement of private property rights, through

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<sup>1</sup> Roger Montgomery, *Is There Still Life in The Death and Life?*, 64 J. AM. PLAN. ASS’N 269, 269 (1998) (“This was the reaction of the director of the American Society of Planning Officials, Dennis O’Harrow, in a first comment in the Society’s newsletter.”).

<sup>2</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

<sup>3</sup> See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 11–12 (2d ed. 1998).

<sup>4</sup> See, e.g., 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.”). For elaboration, see generally Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J. L. & PUB. POL’Y 77 (2002) (discussing the history of property rights and recent developments that threaten those rights).

<sup>5</sup> Civic republicanism stressed virtue and social cooperation, as distinct from the Lockean perspective stressing government as established to protect individual rights and private property. See John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1099, 1104, 1107 (2000); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 819–21 (1995).

common law private and public nuisance.<sup>6</sup> In the twentieth century, government's role turned from reactive to preemptive, as comprehensive zoning was perceived as anticipating and preventing nuisance. Most recently, government has become explicitly proactive, through massive redevelopment—often leveraged through “public-private partnership[s]”—and through fine-tuning regulations to achieve similar goals.<sup>7</sup>

On the other hand, much recent public involvement has favored mixed uses in a decided change from classic Euclidean zoning, with its rigid districts each embodying narrow use, height, bulk, and setback requirements. Much of this activity is articulated as furthering diverse and sustainable communities. These are goals that Jane Jacobs championed. Yet the very first sentence of *Death and Life* asserted her thesis: “This book is an attack on current city planning and rebuilding.”<sup>8</sup>

Jane Jacobs believed that the heterogeneity she sought could be brought about only by small-scale and incremental change. However, officials who want dramatic results, and developers whose stars are linked to those ambitions, assert that they can produce wholesale salutary change. Courts often have abrogated their responsibility to take a hard look at questionable practices.

This article explores the tension between the advantages of the organic development of cities and the increasing reliance, in New York and elsewhere, on mixed public-private arrangements to achieve them.

## I. LAND USE REGULATION AND EMINENT DOMAIN IN THE COURTS

### A. A General Overview

Courts have tended to treat government exercises of land use regulation and eminent domain powers with deference. As the Ninth Circuit put it, “[t]he Supreme Court has erected imposing barriers . . . to guard against the federal courts becoming the

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<sup>6</sup> See generally Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583, 584 (2008) (exploring the evolution of individual property rights and their effect on the environment and its interests).

<sup>7</sup> See, e.g., Audrey G. McFarlane, *Putting the “Public” Back into Public-Private Partnerships for Economic Development*, 30 W. NEW ENG. L. REV. 39, 45–46 (2007) (discussing governmental use of “public-private partnership[s]” for economic development).

<sup>8</sup> JACOBS, *supra* note 2, at 3.

Grand Mufti of local zoning boards.”<sup>9</sup>

Planning and zoning received the Supreme Court’s imprimatur in *Village of Euclid v. Ambler Realty Co.*,<sup>10</sup> where Justice George Sutherland upheld a comprehensive zoning scheme with little more than a nod to nuisance law,<sup>11</sup> and the admonition: “[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”<sup>12</sup> Sutherland was an adherent of economic substantive due process. His broad endorsement likely represented not an affirmative appreciation of the role of the State in furthering social welfare, but rather such an aversion to contagion in city tenements and fear of urban mobs as to require police power intervention.<sup>13</sup> His opinion also contained strong dicta on the need to protect single-family residential districts from multi-family intrusions, since “often the apartment house is a mere parasite.”<sup>14</sup>

Whether or not they were based on Social Darwinism, as sometimes portrayed,<sup>15</sup> his views on the supremacy of the single-family residential district appear to be shared by the liberal Justice William O. Douglas. In *Village of Belle Terre v. Boraas*,<sup>16</sup> Justice Douglas upheld a challenge to the constitutionality of an ordinance limiting one-family dwellings to traditional families, declaring: “A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.”<sup>17</sup> When the Court subsequently found a similar ordinance required the separation of two non-sibling grandchildren violative of the fundamental right of a family to remain together,<sup>18</sup> it did not question the assumptions of *Belle Terre*.

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<sup>9</sup> *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (internal citations omitted).

<sup>10</sup> 272 U.S. 365 (1926).

<sup>11</sup> *Id.* at 379, 387–88 (noting that nuisance is a helpful analogy, as with “a pig in the parlor instead of the barnyard”).

<sup>12</sup> *Id.* at 388.

<sup>13</sup> See JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 126–27, 166, 242–43 (Greenwood Press 1969) (1951).

<sup>14</sup> *Euclid*, 272 U.S. at 394.

<sup>15</sup> For a discussion, see Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 3–4 (1997).

<sup>16</sup> 416 U.S. 1 (1974).

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Moore v. E. Cleveland*, 431 U.S. 494, 499 (1977).

The apogee of the United States Supreme Court's enthusiasm for large-scale government intervention was *Berman v. Parker*,<sup>19</sup> where Justice Douglas rhapsodized about "public welfare" as "broad and inclusive," and representing values that are "spiritual" and "aesthetic."<sup>20</sup> "It is within the power of the legislature to determine that the community should be beautiful as well as healthy," he added, "spacious as well as clean, well-balanced as well as carefully patrolled."<sup>21</sup>

*B. Kelo v. City of New London*

It is instructive to observe the Court's very different tone in *Kelo v. City of New London*,<sup>22</sup> a decision criticized from the left as a "tepid defense of redevelopment."<sup>23</sup>

Justice John Paul Stevens stated in *Kelo* that past precedent established a broad reading of the Public Use Clause,<sup>24</sup> so that condemnation of sound residences for retransfer for private economic revitalization did not violate that provision.<sup>25</sup> While briefly mentioning that the Fort Trumbull project at issue would create other amenities, Justice Stevens consistently emphasized that New London was a distressed city and that the redevelopment would enhance its tax base and create jobs.<sup>26</sup> The key in *Kelo* was not planning at all, but rather federalism.<sup>27</sup>

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<sup>19</sup> 348 U.S. 26 (1954).

<sup>20</sup> *Id.* at 33.

<sup>21</sup> *Id.*

<sup>22</sup> 545 U.S. 469 (2005).

<sup>23</sup> Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 *ECOLOGY L.Q.* 1, 24 (2007). Another Supreme Court decision involving eminent domain, *Hawaii Housing Authority v. Midkiff*, had been criticized by Ralph Nader on similar grounds. See Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 *VILL. L. REV.* 207, 210–11 (2004) (noting the Court's failure to "emphasiz[e] the justification of the public use in question" (citation omitted)).

<sup>24</sup> *Kelo*, 545 U.S. at 483; U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The clause is made applicable to the states by the Fourteenth Amendment. See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897).

<sup>25</sup> *Kelo*, 545 U.S. at 483–84. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *MINN. L. REV.* 2100, 2102–03 (2009) (describing the *Kelo* backlash as "massive and unprecedented" and asserting that it "probably resulted in more new state legislation than any other Supreme Court decision in history").

<sup>26</sup> *Kelo*, 545 U.S. at 483–84.

<sup>27</sup> *Id.* at 482–83 ("Our earliest cases . . . embodied a strong theme of federalism . . . For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording

While the Court continued in *Kelo* to conflate “public purpose” and “public use,” it stopped short of affirming the implication of its earlier language in *Berman* that eminent domain was merely a device for achieving police power goals, with the Public Use Clause of no independent significance.<sup>28</sup> Likewise, Justice Stevens refrained from endorsing Justice O’Connor’s apparent conclusion in *Hawaii Housing Authority v. Midkiff*<sup>29</sup> that “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”<sup>30</sup> Progressives deplored Justice Stevens’ lack of support and searched for causes.<sup>31</sup> In her *Kelo* dissent, Justice O’Connor pronounced both earlier formulations “errant language . . . unnecessary to the specific holdings of those decisions.”<sup>32</sup>

Justice Stevens’ lack of enthusiasm for condemnation for retransfer for private redevelopment was made even clearer in subsequently published remarks that he delivered soon after *Kelo* was handed down, in which he cited the New London condemnation as an example of bad public policy.<sup>33</sup> He subsequently made the point more generally from the bench: “I think it appropriate to emphasize the distinction between constitutionality and wise policy.”<sup>34</sup>

Probably in anticipation of criticism from the right, *Kelo* articulated two ways by which the effects of its broad view of the Public Use Clause<sup>35</sup> could be constrained on the state level. The

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legislatures broad latitude in determining what public needs justify the use of the takings power.”).

<sup>28</sup> *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“Once 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. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.” (citation omitted)).

<sup>29</sup> 467 U.S. 229 (1984).

<sup>30</sup> *Id.* at 240.

<sup>31</sup> Mihaly, *supra* note 23, at 59 (“Justice Stevens finds refuge in precedence, but cannot articulate a defense of essential elements of economic redevelopment because he does not understand them. His personal ideology probably leaves him uncomfortable with the redevelopment’s longstanding and successful core concept of public intervention to cure land use market failure.”).

<sup>32</sup> *Kelo*, 545 U.S. at 501 (O’Connor, J., dissenting).

<sup>33</sup> See Justice John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 3–4 (2005) (“[M]y opinion of what the law authorized is entirely divorced from my judgment concerning the wisdom of the program.”)

<sup>34</sup> *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

<sup>35</sup> *Kelo*, 545 U.S. at 480 (“[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the

first was Stevens' jurisprudentially gratuitous but politically significant statement that "[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."<sup>36</sup> Numerous state laws enacted since have purported to restrict or prevent condemnation for economic revitalization.<sup>37</sup> However, Professor Ilya Somin suggested that the majority of these laws are apt to prove "ineffective," because of "widespread political ignorance that enables state and federal legislators to pass off primarily cosmetic laws as meaningful reforms."<sup>38</sup> Thus, he "challenge[d] the validity of claims that the political backlash to *Kelo* has provided the same level of protection for property owners as would a judicial ban on economic development takings."<sup>39</sup>

The second way States could constrain takings for private revitalization was through the monitoring of adherence to the Public Use Clause by their courts. Both Justice Stevens' *Kelo* opinion and the concurrence of Justice Kennedy, who supplied the majority's needed fifth vote, stated that the courts would not condone eminent domain abuse.<sup>40</sup> As will be discussed,<sup>41</sup> the problem is implementation.

### C. *The New York Judicial Tradition of Deference*

In New York, the Court of Appeals' adherence to deference is illustrated by a case that subsequently was reviewed by the United States Supreme Court. In 1977, in *Penn Central Transportation Co. v. City of New York*,<sup>42</sup> the Court of Appeals reasoned that the value of land is a product of society's wealth and therefore not attributable to the activities of its private owner.<sup>43</sup>

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broader and more natural interpretation of public use as 'public purpose.'" (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–164 (1896)).

<sup>36</sup> *Id.* at 489 (A statement that the Court does "not minimize the hardship that condemnations may entail" prefaced this comment).

<sup>37</sup> See, e.g., Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 803 (2008).

<sup>38</sup> Somin, *supra* note 25, at 2103–04.

<sup>39</sup> *Id.* at 2103.

<sup>40</sup> See *infra* Part III.K.

<sup>41</sup> See *infra* Part IV.

<sup>42</sup> 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

<sup>43</sup> *Id.* at 1275 ("It may be true that no property has economic value in the absence of the society around it, but how much more true it is of a railroad

Its analysis evoked the single tax theory of Henry George.<sup>44</sup> In conceptually stripping the value of a parcel from its private moorings, the New York high court eased the path for its more virtual obliteration of the distinct values inherent in private ownership and public use<sup>45</sup> in *Goldstein v. New York State Urban Development Corp.*,<sup>46</sup> and *Kaur v. New York State Urban Development Corp.*<sup>47</sup>

#### D. *The Role of Accretion in the Common Law*

Common law property jurisprudence illustrates the changing nature of rights over long periods of time through the process of accretion.<sup>48</sup> In a recent paper,<sup>49</sup> the noted land economist William Fischel suggests that “zoning’s historical development—evolution may be too fraught a term—should be regarded as being comparable to that of the common law and thus be taken more seriously by scholars than it normally is.”<sup>50</sup>

These views are in accord with those of Jane Jacobs, who observed: “Thinking about cities as processes rather than products highlights the role of contingency and path dependence

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terminal, set amid a metropolitan population, and entirely dependent on a heavy traffic of travelers to make it an economically feasible operation. Without people Grand Central would never have been a successful railroad terminal, and without the terminal, a major transportation center, the proposed building site would be much less desirable for an office building.”)

<sup>44</sup> HENRY GEORGE, *PROGRESS AND POVERTY THE REMEDY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH* 406 (1940) (asserting the efficiency of a single tax on the value of land, without improvements as a substitute for all other taxes). See Stewart E. Sterk, *The Jurisprudence of Takings: Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1732 (1988) (asserting that, in practice, taxes in the form of exactions on development would “inhibit planning . . . promote rent-seeking behavior, and . . . encourage administrative arbitrariness”).

<sup>45</sup> See *infra* Part IV.A–B.

<sup>46</sup> 921 N.E.2d 164 (N.Y. 2009).

<sup>47</sup> 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away v. N.Y. State Urban Dev. Corp., 2010 WL 3712673, at \*1 (U.S. Dec. 13, 2010) (No. 10-402).

<sup>48</sup> See *Hage v. United States*, 35 Fed. Cl. 147, 151 (1996) (“The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium. The legal task is very unlike legislative policy-making because judicial decision-making builds historically and logically upon past precedent in narrow cases and controversies rather than current general exigencies or sweeping political mandates.”).

<sup>49</sup> WILLIAM A. FISCHEL, *THE EVOLUTION OF ZONING SINCE THE 1980S: THE PERSISTENCE OF LOCALISM* 1 (2010), <http://ssrn.com/abstract=1686009>.

<sup>50</sup> *Id.* at 2.

in city growth and decline. And it does so without relying on technological determinism. It thus steers a middle path between predestination and agency.”<sup>51</sup>

Jacobs’ notion of the intrinsic fluidity of life in the streets was captured in a federal district court opinion in *Clear Channel Outdoor, Inc. v. City of New York*.<sup>52</sup> The plaintiffs sought to enjoin zoning restrictions limiting the location and illumination of billboards, on the theory that the restrictions were under-inclusive in not subjecting street advertising to the same rules as building-side and utility pole advertising.<sup>53</sup> The court declared:

The City’s vitality, activity, and diversity are manifested on its streets, and streets are the community’s natural gathering points. It is not fanciful to suggest that there is a real distinction between streets and buildings. Certainly it is permissible for the City to regulate, via its franchise rules, a wide variety of street furniture, including bus stop shelters and newsstands, so that they are uniform and contribute to a harmonizing scheme for city streets. The Street Furniture Franchise enables the City to tie together many of the disparate elements on the City’s street grid. That goal cannot be achieved by zoning because zoning is not applicable. The City’s actions with regard to streets in the public right of way cannot compromise or restrict its abilities to apply different rules via zoning for the simple reason that buildings are not streets and streets are not buildings. Different rules may be applied.<sup>54</sup>

Although not cited by the court, *Death and Life* specifically singled out “gigantic outdoor advertising” as one of the few uses which is “harmful in abundantly diversified city districts” unless its “location is controlled.”<sup>55</sup> Although such uses are profitable enough to seek space in “vital, diversified areas . . . they usually act as street desolators. Visually, they are disorganizing to streets, and are so dominating that it is hard—sometimes impossible—for any countering sense of order in either street use or street appearance to make much impression.”<sup>56</sup>

## II. JANE JACOBS AND BOTTOM-UP REDEVELOPMENT

Jane Jacobs was neither a technocrat nor a trained planner.

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<sup>51</sup> Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 318 (2010).

<sup>52</sup> 608 F. Supp. 2d 477 (S.D.N.Y. 2009), *aff’d*, 594 F.3d 94 (2d Cir. 2010).

<sup>53</sup> *Id.* at 510.

<sup>54</sup> *Id.* at 511 (citation omitted).

<sup>55</sup> JACOBS, *supra* note 2, at 234.

<sup>56</sup> *Id.*

She grew up in Scranton, Pennsylvania, with a decided independent streak.<sup>57</sup> She did not desire college, but instead, wanting to be a journalist, moved to Manhattan's Greenwich Village, then not a fashionable neighborhood.<sup>58</sup> She started as a stenographer and worked her way up to associate editor at *Architectural Forum*.<sup>59</sup> She was sent to examine an early high-rise urban renewal project in the Society Hill neighborhood of Philadelphia with its architect, Edmund Bacon.<sup>60</sup> They traveled through the predominantly African-American neighborhood in which the project was located.

"He took me along a crowded street, where there were a lot of recent arrivals in the Great Migration," Jacobs recalled in a speech she gave in 2004, nearly fifty years after the fact. "Obviously they were very poor people, but enjoying themselves and each other. Then we went one street over [where there were new high-rise projects]. Ed Bacon said, let me show you what we're doing. He wanted me to see the lovely vista. There was no human being on the street except for a little boy kicking a tire. I said, 'Where are the people?' He didn't answer. He only said, 'They don't appreciate these things. . . .'"

. . . At that moment, Jacobs realized that the high-rise projects that Bacon was so proud of had been designed with total disregard for the people who would actually inhabit them. "What a revelation this was to me! I had no credentials, him being the expert." So, Jacobs continued, "I set myself up as my own expert." She was able to trust her instincts, she said, because of her upbringing. "My parents never undermined my confidence."<sup>61</sup>

According to the urban historian Sam Bass Warner, Jr., Jacobs was "an iconoclast, a wise teacher, and a person who has been using her concern for cities as a device to discover a moral base for modern society."<sup>62</sup> Warner further elaborated:

I think the success of [*Death and Life*] rests upon Jacobs's method of study. She is not an academic, and therefore she does not think she must begin her work by a search of the literature in the hope of discovering some topic that might attract the attention of other academics. Instead, she looks about her, takes note of what the

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<sup>57</sup> ALICE SPARBERG ALEXIOU, *JANE JACOBS: URBAN VISIONARY* 9 (2006).

<sup>58</sup> *Id.* at 9, 15, 27.

<sup>59</sup> Douglas Martin, *Jane Jacobs, 89, Who Saw Future in Cities, Is Dead*, N.Y. TIMES, Apr. 26, 2006, at A1.

<sup>60</sup> ALEXIOU, *supra* note 57, at 39.

<sup>61</sup> *Id.* at 39–40.

<sup>62</sup> Sam Bass Warner, Jr., *Jane Jacobs's Moral Explorations*, 28 B.C. ENVTL. AFF. L. REV. 609, 609–10 (2001).

city presents to public view, and thereby finds her topics. Observation leads to the library, but the library is neither the beginning nor the end of her tasks.<sup>63</sup>

### A. *The Death and Life of Great American Cities*

*The underlying theme of Death and Life, just as Jacobs had envisioned in her original proposal, is that the city is a complex organism that makes itself up as it goes along—that is, by its very nature it is messy. A city, she states flatly, cannot be a work of art. In other words, she implies, you cannot just stick a civic center or a housing project in a neighborhood and expect it to put down roots and grow, just like that—any more than you can plant a date palm in a northern climate. Cities are delicate, teeming ecosystems. You cannot, Jacobs says, impose a grand plan on the city, as planners keep trying to do. The city will refuse to bend to their will . . .*<sup>64</sup>

As Professor Richard Schragger summarized, “*Death and Life* shows us how order arises out of the seeming disorder of urban life. It is a caution to those who would attempt to create a prepackaged and attractive urban landscape—a product—out of a process.”<sup>65</sup>

Its opening sentence, announcing that *The Death and Life of Great American Cities* is an attack on planning,<sup>66</sup> is often quoted, and reflects that a substantial portion of the book thoroughly details the failures of contemporary urban planning. However, although quoted less often, the second sentence has a more positive and didactic tenor: “It is also, and mostly, an attempt to introduce new principles of city planning and rebuilding, different and even opposite from those now taught . . .”<sup>67</sup>

The middle third of the twentieth century was a time of rapid expansion of planning in America. It is therefore unsurprising that Jane Jacobs’ excoriating critique of contemporary urban planning in *Death and Life* was swiftly met, in rapid succession, with derision, ambivalence, and finally co-optation.<sup>68</sup>

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<sup>63</sup> *Id.* at 610.

<sup>64</sup> ALEXIOU, *supra* note 57, at 75. For a description of how Jacobs’ view of economic development is similar to ecological development, see Spencer B. Beebe, *Integrative Solutions: Current Success and Future Trends*, 27 *ECOLOGY L.Q.* 1239, 1240 (2001).

<sup>65</sup> Schragger, *supra* note 51, at 318.

<sup>66</sup> JACOBS, *supra* note 2, at 3 (and accompanying text).

<sup>67</sup> *Id.*

<sup>68</sup> Christopher Klemek, *Placing Jane Jacobs within the Transatlantic Urban*

Notwithstanding that Jacobs was suspicious of the very enterprise of *city planning* as such,<sup>69</sup> the field was largely agreeable to her investigation and analysis of the microscopic as opposed to the macroscopic.<sup>70</sup> Not only were many of her insights beyond dispute—such as her description and prescription of “street eyes”<sup>71</sup>—but they found increasing receptivity as uneasiness grew in the 1950s and 1960s about the dissection of thriving neighborhoods by highways, massive developments, and a new awareness of the plight of urban ghettos.<sup>72</sup>

Planners, more than most, sensed these problems. Thus the urban planning establishment was willing to concede—in part—to many of Jacobs’ points,<sup>73</sup> albeit with a condescension that

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*Conversation*, 73 J. AM. PLAN. ASS’N 49, 50 (2007) (“In their harsh response to Jacobs, many in the newly professionalized planning establishment evinced their own nagging vulnerability, perhaps linked to a generational changing of the guard within the discipline, but also reflecting the growing resistance from citizens after more than a decade of urban renewal. . . . Beginning in the mid 1960s, disruptive forces coalesced around professional movements like advocacy planning, a cynical rhetoric of urban crisis, and, most decisively, a general shift away from New Deal/Great Society liberalism. Voices on both the right and the left championed local, small-scale, organic neighborhood development as preferable to top-down planning. Thus, by the time the federal department of Housing and Urban Development was created in 1965, its mandate had begun already to erode.”).

<sup>69</sup> See JACOBS, *supra* note 2, at 408 (“When human affairs reach, in truth and in fact, new levels of complication, the only thing that can be done is to devise means of maintaining things well at the new level”) (arguing that planners in large cities were simply incapable of manipulating the whole, but should instead focus on “diversity planning” within smaller, more comprehensible portions of their respective cities).

<sup>70</sup> See Morton Hoppenfeld, *The Death and Life of Great American Cities*, 28 J. AM. PLAN. ASS’N 136, 136 (1962) (book review) (“It is seldom that I find myself in such basic agreement on so many points of substance with a writer on the design of cities, but for that reason I wish the book were much better than it is. I wish her analysis were as sophisticated as her feelings are strong.”); see also A. Melemed, *Review: The Death and Life of Great American Cities*, 28 J. AM. PLAN. ASS’N 136, 139 (1962) (book review) (“Her attack on urban renewal is best where it points up the futility of the process and the havoc wrought upon the people who are dislocated by it.”).

<sup>71</sup> See Montgomery, *supra* note 1, at 271–72 (“Street eyes became the best known of Jacob’s ecological concepts” which “translated so neatly into planning practice and architectural and site design criteria that a field of specialized practice grew up almost immediately.”). Cf. JACOBS, *supra* note 2, at 35 (“there must be eyes upon the street”) (from her chapter on sidewalk safety, the closest Jacobs comes to using the term “street eyes”).

<sup>72</sup> See ALEXIOU, *supra* note 57, at 82–83.

<sup>73</sup> See Melemed, *supra* note 70, at 139 (“She has marked out a series of pitfalls and weaknesses which must be avoided in the future if we are to have cities worthy of the ideals of democracy.”).

discounted for Jacobs' lay credentials and the empirical limitations of her local laboratory.<sup>74</sup>

Jacobs' descriptions and explanations of the failures of contemporary urban planning too often were conflated, however, with the principles of effective planning she propounded. In many ways her descriptions and prescriptions are inextricably intertwined, which is unsurprising given the empirical and inferential manner in which she set about to analyze the issues.<sup>75</sup> But in their seizing upon many of her pithy observations, her principles of planning are often simply overlooked altogether by planners none too eager to be challenged by a lay commentator,<sup>76</sup> and by libertarians yearning for the destruction of the planning enterprise, not a reconstruction.<sup>77</sup>

*Death and Life* rightly is considered a seminal application of a novel, ecological process approach to her subject matter.<sup>78</sup> Her analogy with ecology was explicit when she stated that “[t]he cities of human beings are as natural, being a product of one form of nature, as are the colonies of prairie dogs or the beds of oysters.”<sup>79</sup> Consonant with this insight is her emphasis on process— “[t]his book has discussed cities, and their components almost entirely in the form of processes, because the subject matter dictates this.”<sup>80</sup> But as salient as her observations and revolutionary her perspective, *Death and Life* is about substantially more. “Furthermore,” she says, “once one thinks about city processes, it follows that one *must* think of catalysts of

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<sup>74</sup> See *id.* at 139 (“[I]f Mrs. Jacobs could be convinced of the desirability of planning of any kind, she could probably be won over to the idea that some urban problems are regional in scope and should be treated as such rather than accretively.”).

<sup>75</sup> JACOBS, *supra* note 2, at 440 (“In the case of understanding cities, I think the most important habits of thought are these: . . . 2. To work inductively, reasoning from particulars to the general, rather than the reverse.”); see David Kinkela, *The Ecological Landscapes of Jane Jacobs and Rachel Carson*, 61 AM. Q. 905, 909–10 (2009).

<sup>76</sup> However, she did hold a position as associate editor of *Architectural Forum*. Montgomery, *supra* note 1, at 270.

<sup>77</sup> See ANDY THORNLEY, URBAN PLANNING UNDER THATCHERISM: THE CHALLENGE OF THE MARKET 97–98 (1991) (“[A] careful reading of [Jacobs’] work does not seem fully to support the view that it can be simply regarded as a presentation of ‘the failure of central planning and the virtues of the decentralised and spontaneous market order’ . . . . Her position seems to be more complex.”).

<sup>78</sup> See, e.g., Kinkela, *supra* note 75, at 905.

<sup>79</sup> JACOBS, *supra* note 2, at 443–44.

<sup>80</sup> *Id.* at 440.

these processes, and this too is of the essence.”<sup>81</sup>

The rubric Jane Jacobs uses to analyze these catalysts she calls “diversity.”<sup>82</sup> This is not diversity for diversity’s sake. Rather the premise is that diversity brings desirable characteristics, for example resilience and adaptability.<sup>83</sup> Crucially, diversity in this sense is no more a prescription for dysfunctional cities than good health is a prescription for an illness. Diversity is a measure of well being and future prospects, to be promoted, for sure, but not a thing that can be created from whole cloth.<sup>84</sup> The second-half of *Death and Life* is largely devoted to describing what Jacobs believes catalyzes diversity, and, in turn, those processes that diminish diversity.

### *B. Jacobs and the Information Problem*

*There is a widespread belief among many city experts today that city problems already beyond the comprehension and control of planners and other administrators can be solved better if only the territories involved and problems entailed are made larger still and can therefore be attacked more “broadly.” This is escapism from intellectual helplessness. “A Region,” somebody has wryly said, “is an area safely larger than the last one to whose problems we found no solution.”*<sup>85</sup>

Jane Jacobs was not a student of Edmund Burke<sup>86</sup> or F.A. Hayek,<sup>87</sup> but shared with them an intuitive understanding of the importance, pervasiveness, and difficulty of leaders obtaining all of the information needed to make decisions. She also had a gift for discerning tacit knowledge, which is available not through formal learning, but only through observation and praxis.<sup>88</sup>

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<sup>81</sup> *Id.* at 440–41.

<sup>82</sup> *Id.* at 14.

<sup>83</sup> *See id.* at 14, 145.

<sup>84</sup> *Id.* at 151 (“[G]iven the development of these [generators of diversity], a city district should be able to realize its best potential, wherever that may lie.”).

<sup>85</sup> *Id.* at 410.

<sup>86</sup> *See* Amy L. Wax, *The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1069 (2005) (noting Burke’s view that almost all people are too fallible to operate in a complex society through logic and analysis, and that they operate “not primarily through reasoning, but through adherence to prescriptive roles, customs, and habits continuously adjusted to the messy demands of day-to-day living”).

<sup>87</sup> *See* Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

<sup>88</sup> *See* MICHAEL POLANYI, KNOWING AND BEING 138, 141–42 (Marjorie Grene

Jane Jacobs asserted in *Death and Life* that contemporary planners took upon themselves an impossible task—to manipulate a system with a complexity not only beyond their apprehension, but also beyond the comprehension of anyone.<sup>89</sup> It is difficult to conceive that any central body could accumulate the information necessary to make what Jacobs called a “close-grained” neighborhood or city work.<sup>90</sup> Her *Death and Life* was an encomium not to an engineered “diversity,” but rather to the richness of life and the interactions among neighbors and their institutions that derive from the fullness of life and the serendipity of human interaction.

A conventional solution to the information problem in urban governance and management is some form of “public private partnership.” In such a relationship, public officials set broad outlines or themes, and private institutions utilize market forces to achieve them. As the controlling metaphor developed by David Osborne and Ted Gaebler has it, the private sector rows and government steers.<sup>91</sup>

But those laboring at the oars have their own agendas, and are apt to seize upon any ambiguity in the directives they receive in order to advance their own goals. The detailed planning of ends requires knowledge of means, costs, and conflicting tugs on others. The difficulty government faces in formulating plans for and monitoring its “partners,” is essentially the same as in tasking its own workforce or the economy more generally.

An example of path dependence and organic growth is the development of Jacobs’ concept of “eyes on the street,” by which an increase in the number of informal observers of street activities creates an enhanced feeling of security that in turn leads to more informal observers.<sup>92</sup> This leads to Jacobs’ work being “often cited by proponents of order maintenance policing . . . despite her professed wariness of managed public spaces.”<sup>93</sup>

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ed., 1969).

<sup>89</sup> JACOBS, *supra* note 2, at 8, 13.

<sup>90</sup> *Id.* at 14.

<sup>91</sup> See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 33–35 (1992).

<sup>92</sup> See Montgomery, *supra* note 1, at 271 (discussing the origins of this term in *Death and Life*).

<sup>93</sup> Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 379 & n.25 (2001) (citing Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1171 (1996)).

Jacobs warns:

The first thing to understand is that the public peace—the sidewalk and street peace—of cities is not kept primarily by the police, [as] necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves.<sup>94</sup>

Although “architecture as crime control” has become a busy field,<sup>95</sup> *Death and Life* reminds us that we intuit its basic truth: “A well-used city street is apt to be a safe street. A deserted city street is apt to be unsafe.”<sup>96</sup> Although crime festers in rarely used parks, Professor Neal Katyal notes, “many city planners insist that building additional parks and open spaces is the solution to urban ills.”<sup>97</sup> While parks should be made more inviting and their open spaces more accessible to observation from the street, Katyal quotes Jacobs as asking: “More Open Space for what? For muggings?”<sup>98</sup>

### 1. Catastrophic Change

Concomitant with her cautious and incremental approach, Jacobs has urged prohibitions on massive change that might prove destructive to “bottom up” revitalization.<sup>99</sup> Thus, she argued that moribund old loft buildings in Toronto were good candidates for conversion to apartments and combination “living-and-working spaces.”<sup>100</sup> However, rezoning for residential use would trigger the imposition of prohibitive parking and other requirements.

Under the guidance of our very intelligent mayor at the time, these and almost all other regulatory controls were removed, except for fire and building safety codes. One rule was added: a ban against destruction of buildings, to prevent aesthetic and environmental waste . . . . You would be amazed at how rapidly those dying districts have come back to life and blossomed. The principle at work here has been the addition of what the previous mixture

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<sup>94</sup> JACOBS, *supra* note 2, at 31–32.

<sup>95</sup> See Neal Kumar Katyal, *Architecture As Crime Control*, 111 YALE L.J. 1039, 1097 (2002).

<sup>96</sup> JACOBS, *supra* note 2, at 34.

<sup>97</sup> Katyal, *supra* note 95, at 1097.

<sup>98</sup> *Id.* (quoting JACOBS, *supra* note 2, at 90).

<sup>99</sup> See JACOBS, *supra* note 2, at 143–44.

<sup>100</sup> Jane Jacobs, *Random Comments*, 28 B.C. ENVTL. AFF. L. REV. 537, 542 (2001).

## 2011] URBAN REVITALIZATION AND EMINENT DOMAIN 123

lacked. It still contains industries that hadn't left, and new working places have joined them, but now residents have moved in too. The same principle can work in languishing bedroom neighborhoods, where the missing ingredients are working places. In both cases, all existing regulations need rethinking.<sup>101</sup>

If Jane Jacobs found "order" in the flows of organic change, many more will find comfort in a false, superficial order. As Professor Nicole Stelle Garnett observed:

City officials schooled in this ideology, [that the appropriate way to order different land uses is to separate them from one another into single-use zones], may naturally tend to equate ordered land uses with the absence of disorder. They also may be wrong. As Jane Jacobs observed many years ago, "There is a quality even meaner than outright ugliness or disorder, and this meaner quality is the dishonest mask of pretended order, achieved by ignoring or suppressing the real order that is struggling to exist and to be served." In other words, as I have suggested elsewhere, when property is *over-* or *misregulated*, property regulations may impede efforts to restore a vibrant, healthy, and organic public order.<sup>102</sup>

## 2. On Planning Change

In engaging in urban planning, it is important to build in a proclivity for order, but not for sterility. Thus, Jane Jacobs found "strange and unpredictable uses and peculiar scenes" a commendable feature of city life, which led Wesley Skogan to observe that she was an "urban utopian" who 'claim[s] that a measure of disorder is actually *good* for us.'<sup>103</sup>

One trendy development in recent years has been the so-called "rise of the creative class," in which cities engage in redevelopment to lure the hip and cool.<sup>104</sup> While Professor Edward Glaeser asserted that the "best economic development strategy is to provide the amenities that will attract smart people

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<sup>101</sup> *Id.* at 537, 542. For a more general critique of problems resulting from parking and roadways in cities, see generally DONALD C. SHOUP, *THE HIGH COST OF FREE PARKING* (2005).

<sup>102</sup> Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 *STAN. L. REV.* 1, 5 (2004) (quoting JACOBS, *supra* note 2, at 15).

<sup>103</sup> See *id.* at 41 n.199 (quoting JACOBS, *supra* note 2, at 238 and WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 7 (1990)).

<sup>104</sup> See RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* 287 (2002). For a doubtful view of this phenomenon, see Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 *IND. L. REV.* 1229, 1263 (2010).

and then get out of their way,”<sup>105</sup> Professor Richard Schragger retorted that:

The problem with this claim is that it is not at all clear whether these high human capital individuals are migrating to Boston and Las Vegas because of the amenities or whether the amenities are there because of the high human capital individuals. Indeed, the amenity story might have the causation exactly backwards.<sup>106</sup>

If “build it and they will come” is not necessarily the answer, designing a neighborhood out of sync with those who might be expected to work there is not either.

To plan for diversity, a city cannot simply add a few incentives for businesses to operate in a particular locale; rather, it must cultivate the type of residents who work in harmony with the character of a given city district. Such cultivation requires an understanding of the primary uses of city districts and aggressive matching of those uses with incentives for secondary uses. Generic plans for inner-city development, such as central business districts and civic centers, tend to ignore local conditions in lieu of wide-eyed hopes of generating massive changes to areas. In addition to large-scale planning, municipal housing decisions, from zoning to permits for new construction, could be redesigned to enhance diversity instead of eliminating it.<sup>107</sup>

### C. *Jacobs’ Factors of Diversity*

Jacobs proposes four indispensable catalyzing factors of diversity: (1) mixed primary uses; (2) small, well connected blocks; (3) mixture of buildings, particularly in age; and (4) appropriate density.<sup>108</sup> It is important to review these factors carefully because, as will be discussed later, Jacobs’ observations and themes must be interpreted and applied in light of these factors. Because diversity is a process, not a product, to realize diversity—in other words, a healthy and prosperous city—these loci are what Jacobs believes should be the principle concern of planning, rather than generalizing to their fruits.<sup>109</sup> Indeed,

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<sup>105</sup> Edward L. Glaeser, *The Death and Life of Cities*, in MAKING CITIES WORK: PROSPECTS AND POLICIES FOR URBAN AMERICA 22, 58 (Robert P. Inman ed., 2009).

<sup>106</sup> Schragger, *supra* note 51, at 328 (citing evidence that locales “like Silicon Valley, which had no preexisting amenities to offer before it became a technological center”).

<sup>107</sup> Katyal, *supra* note 95, at 1052 (footnotes omitted).

<sup>108</sup> JACOBS, *supra* note 2, at 150–51. Jacobs proposes appropriate diversity, because as she describes later, there can indeed be too much density. *See id.* at 276.

<sup>109</sup> *Id.* at 441 (arguing against a deductive approach to planning methodology).

Jacobs took issue with contemporary planners' classical reductionist approach; that is, generalizing, simplifying the issues, and then by deduction reaching absurd conclusions about what characteristics should be promoted.<sup>110</sup> In this way, Jacobs echoed the burgeoning postmodernist thought of her day.<sup>111</sup> Nonetheless, Jacobs does offer concrete, even generalized proposals for promoting diversity; specifically, policies and methods directed at her factors of diversity.

In *Death and Life*, Jacobs devotes almost as much space to the obstacles to achieving diversity as to those characteristics that promote it. It is in this realm—amelioration of obstacles—where Jacobs was a strong proponent of public policy as a mechanism for mitigating harms to city diversity. For example, she promotes zoning plans controlling scale,<sup>112</sup> and even some kinds of uses.<sup>113</sup> Presciently, she promoted the idea of subsidizing rents, which included the provisioning of credit to private developers to offset capital costs in constructing residences in useful areas.<sup>114</sup> She even promoted direct expenditures for the construction of complementary neighborhood facilities, and somewhat quixotically and questionably, indirect expenditures through pressing into public service benefactors “susceptible to public pressure.”<sup>115</sup>

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by stating that “[c]ity processes in real life are too complex to be routine, too particularized for application as abstractions”).

<sup>110</sup> *Id.* at 408.

<sup>111</sup> See Linda Hutcheon, *The Politics of Postmodernism: Parody and History*, 5 CULTURAL CRITIQUE 179, 192–93 (1986) (citing Jane Jacobs as an example of a critic of “modernism’s dogmatic reductionism,” specifically the failure of modernism’s imposition of pure, rigid forms to achieve desired outcomes); Bill Steigerwald, *City Views: Urban Studies Legend Jane Jacobs on Gentrification, the New Urbanism, and Her Legacy*, REASON, June 2001, available at <http://reason.com/archives/2001/06/01/city-views> (regarding Jacobs’ comments on the generational rise and fall of Victorian architecture as prelude to movement away from contemporary suburban architecture, but also noting that such rejection is characteristic of misplaced concerns); JACOBS, *supra* note 2, at 387 (highlighting a neighborhood’s pragmatism in repurposing a Victorian structure rather than destroying or replacing the structure, underscoring the difference in how locals approach the issue of form and function from how planners, using decontextualized formulas, would approach it).

<sup>112</sup> JACOBS, *supra* note 2, at 234–35 (“Such streets need [frontage] controls to defend them from the ruin that completely permissive diversity might indeed bring them.”).

<sup>113</sup> *Id.* at 234 (singling out parking lots, gas stations, and outdoor advertising).

<sup>114</sup> *Id.* at 292, 305.

<sup>115</sup> *Id.* at 167.

Jacobs enumerates four general ills.<sup>116</sup> First is the tendency for cities to self-destruct by undoing their own diversity.<sup>117</sup> What she describes as a tendency toward monotony is today more commonly referred to as a tendency toward monoculture.<sup>118</sup> Second, Jacobs describes the ill effects of massive features and how they interrupt the fabric of traffic and use that drive diversity.<sup>119</sup> Third she discusses the population instabilities, their origins, and how they can be mitigated without drastic interventions.<sup>120</sup> Finally, she discusses the role that money and policy—both public and private—have when not used judiciously or with moderation, upsetting the delicate process of diversification.<sup>121</sup>

*D. The Economics of Cities and “Jane Jacobs Externalities”*

While Jane Jacobs’ insights about the organic development of social communities have received the most attention, she was an important pioneer in describing the organization of economic life within cities and regions. Economists have begun to embrace Jacobs’ view of the role of cities in economic innovation. “Theorists argue that relatively concentrated geographic areas characterized by high levels of competition and a diversity of industries generate ideas and knowledge that increase human productivity.”<sup>122</sup> A leading regional economist, Edward Glaeser, has noted that “the role of cities as centers for the transmission of ideas . . . is associated most strongly with the work of Jane Jacobs,”<sup>123</sup> and that strong negative correlations between average firm size and employment growth across metropolitan areas portrayed “the positive role of small firms as support for the views of Jane Jacobs . . . that competition and diversity were good for producing new ideas.”<sup>124</sup>

Indeed, “much of the cross-border movement of persons, goods, and capital inside the United States is more accurately

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<sup>116</sup> See *id.* at 242.

<sup>117</sup> *Id.*

<sup>118</sup> See *id.* at 243.

<sup>119</sup> See *id.* at 242, 257, 265.

<sup>120</sup> *Id.* at 242, 287–90.

<sup>121</sup> *Id.* at 242, 317.

<sup>122</sup> Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1102 (2008).

<sup>123</sup> EDWARD L. GLAESER, *CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM* 14 (2008).

<sup>124</sup> *Id.* at 75.

characterized as intermunicipal rather than interstate.”<sup>125</sup>

Revitalization of the economies of distressed cities has been an important impetus for legislative action. As epitomized in *Kelo v. City of New London*,<sup>126</sup> courts have focused on the revitalization of cities primarily through the lens of the Takings and Public Use Clauses.<sup>127</sup> Yet cases adjudicating municipal import and export controls (including subsidies for locally based businesses)<sup>128</sup> might better be dealt with under the Interstate Commerce Clause.<sup>129</sup>

### E. A “Goldilocks Solution” for Urban Renewal?

Just as cities can have too much order as well as too little, Jacobs maintained that neighborhoods needed sufficient investment to thrive,<sup>130</sup> but not enough to be overwhelmed.<sup>131</sup> She referred to this as the difference between “gradual money” and “cataclysmic money.”<sup>132</sup>

Jacobs’ primary lament is that city building money, whether flowing from private lenders, the public fisc, or other sources, predominately is spent on cataclysmic change.<sup>133</sup> Cataclysmic money funds oversized projects that generate the types of monotony antithetical to her conception of diversity.<sup>134</sup> The end result is destruction of diversity in the localities where it is spent,

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<sup>125</sup> Schragger, *supra* note 122, at 1091.

<sup>126</sup> 545 U.S. 469 (2005).

<sup>127</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>128</sup> *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345–46, 353 (2006) (holding that taxpayers lacked standing to challenge a state franchise tax credit for expansion of automobile manufacturing). *See generally* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 *YALE L.J.* 965 (1998) (addressing the question of whether state business subsidies are constitutional).

<sup>129</sup> *See* Schragger, *supra* note 122, at 1097–98.

<sup>130</sup> JACOBS, *supra* note 2, at 294 (“Unslumming—much as it should be speeded up from the glacial pace at which it now proceeds—is a process of steady but gradual change. All city building that retains staying power after its novelty has gone, and that preserves the freedom of the streets and upholds citizens’ self-management, requires that its locality be able to adapt, keep up to date, keep interesting, keep convenient, and this in turn requires a myriad of gradual, constant, close-grained changes.”).

<sup>131</sup> *Id.* at 309 (“This city building money operates as it does not because of its own internal necessities and forces. It operates cataclysmically because we, as a society, have asked for just this. We thought it would be good for us, and we got it. Now we accept it as if it were ordained by God or the system.”).

<sup>132</sup> *Id.* at 292–94.

<sup>133</sup> *Id.* at 293.

<sup>134</sup> *See id.*

at best leaving unaffected the surrounding city save for its lost opportunity cost.<sup>135</sup> “All city building,” Jacobs reiterates, “requires a myriad of gradual, constant, close-grained changes.”<sup>136</sup>

*Death and Life* contains many examples of the misapplication of development capital, and the devastating projects which resulted. Jacobs illustrated the underlying hubris particularly well in one of her short stories. After she gave a talk at a design conference about the need for commercial diversity,<sup>137</sup> planners and others seized upon, of all things, the necessity for corner grocery stores.<sup>138</sup>

[S]oon I began to receive in the mail plans and drawings for projects and renewal areas in which, literally, room had been left here and there at great intervals for a corner grocery store. These schemes were accompanied by letters that said, “See, we have taken to heart what you said.” . . . This corner-grocery gimmick is a thin, patronizing conception of city diversity . . . . Lone little groceries, in fact, do badly in cities as a rule. They are typically a mark of stagnant and undiverse gray area . . . . [T]hese were schemes contemplating either great blankets of new construction, or new construction combined with extensive, prearranged rehabilitation. Any vigorous range of diversity was precluded in advance by the consistently high overhead.<sup>139</sup>

Jacobs suggested building small. Her method of subsidizing residential tenements and construction would include “great numbers of builders and owners, thousands of them.”<sup>140</sup> A focus on smaller construction would also help to infill lots, and gradually introduce new constructions so as to preserve the inheritance to later generations of aged buildings.<sup>141</sup> Furthermore, because of the significant negative externalities thrown off by large-scale development, the total cost to the city would be significantly less.<sup>142</sup>

However, as I have elaborated upon elsewhere,<sup>143</sup> there is a strong trend towards local officials moving the bar of regulation

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<sup>135</sup> *See id.*

<sup>136</sup> *Id.* at 294.

<sup>137</sup> *Id.* at 190.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 190–91.

<sup>140</sup> *Id.* at 332.

<sup>141</sup> *See id.* at 332–33.

<sup>142</sup> *See id.* at 190 (existing large scale development does not adequately internalize costs).

<sup>143</sup> *See* Steven J. Eagle, Kelo, *Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 63 (2009).

from eliminating land uses that are objectionable, or even that are compatible, in favor of uses that attempt to optimize a parcel's contribution to the local tax base, or otherwise to attract residents that demand few expensive services and attract others similarly situated.

Adding to this pressure for municipal industrial policies is that urban revitalization provides sizeable pecuniary benefits for its advocates. As Professor Thomas Merrill described in a path-breaking article,<sup>144</sup> eminent domain is intended to *prevent* rent seeking,<sup>145</sup> say, by the owner of arid land in a pass-through which a transcontinental railroad must run.<sup>146</sup> Unfortunately, it gives rise to two types of rent seeking in the urban revitalization context. The first is the profit that the condemnor will make from the condemnation.<sup>147</sup> Second, revitalization projects are lucrative for those private developers and others who construct or operate them.<sup>148</sup> These individuals lobby for both the creation of such projects and their own role within them. Merrill noted that “[c]ases involving delegation of eminent domain to one or a few private parties, or involving condemnation followed by retransfer of the property to one or a few private parties, present the primary situations where such secondary rent seeking is likely to occur.”<sup>149</sup>

There is yet another variant on this theme. A private redeveloper who is granted the right to select parcels to condemn within a designated redevelopment district may exact a fee from individual owners in exchange for a promise *not* to select their parcels.<sup>150</sup> The Second Circuit panel hearing the case, which

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<sup>144</sup> Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

<sup>145</sup> “Rent seeking” refers to the quest for economic rents, which are payments for goods that have a fixed supply. Examples include undeveloped land, or a legislative preference. Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967), reprinted in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 39 (James M. Buchanan et al. eds., 1980). The specific term “rent seeking” was coined by Anne Krueger. Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974), reprinted in *id.*

<sup>146</sup> Merrill, *supra* note 144, at 74–77.

<sup>147</sup> *Id.* at 85 (explaining that the land's value after condemnation is almost always higher than before, and that takings law now allocates 100% of this surplus to the condemnor).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 87–88.

<sup>150</sup> See *Didden v. Vill. of Port Chester*, 322 F. Supp. 2d 385, 390 (S.D.N.Y. 2004), *aff'd*, 173 F. App'x 931, 932–33 (2d Cir. 2006).

included now-Justice Sonia Sotomayor, treated it in summary fashion as a routine application of *Kelo*.<sup>151</sup> Left without serious attention was that a designated redeveloper could exact money from each of several landowners spared from condemnation, as well as obtaining assembly and construction profits from the parcel finally selected. This type of predatory rent seeking could work great mischief.

*F. Public and Private Redevelopment—Tax Increment Financing*

In recent decades, an assortment of devices have been created or refined to team up investor capital and expertise with the needs of cities. The pressures for these come from increased municipal aggressiveness in fine-tuning land uses and in borrowing, the creation of new vehicles for investor participation, and in some cases, political prudence in substituting private capital and involvement for condemnation.<sup>152</sup>

Government efforts to alleviate post-World War II downtown decline and decay started with the provision of public infrastructure, such as wider streets, alternative routes for traffic, and public parking.<sup>153</sup> When that proved insufficient, governments engaged in reducing the burdens of taxation and regulation on downtown redevelopers through, for instance, tax abatements or special zoning status permitting more intense development in exchange for developer-provided amenities such as public plazas.<sup>154</sup> Perhaps a more accurate or useful description of this process is that cities confer upon investors “regulatory property,” the value of which resides in their subsequent ability to develop land with an intensity forbidden to others.<sup>155</sup>

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<sup>151</sup> *Didden*, 173 F. App’x at 933 (“[E]ven if Appellants’ claims were not time-barred, to the extent that they assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district . . . *Kelo* . . . obliges us to conclude that they have articulated no basis upon which relief can be granted.” (citations omitted)).

<sup>152</sup> See John R. Nolon & Jessica Bacher, *Zoning and Land Use Planning*, 37 REAL EST. L.J. 234, 245 (2008) (citing *Kelo v. City of New London*, 545 U.S. 469 (2005)). “The adverse political and public reaction to [the U.S. Supreme Court’s decision in] *Kelo*, however, has limited the use of condemnation and heightened interest in less severe methods of assembling land for urban redevelopment.” *Id.*

<sup>153</sup> David M. Lawrence, *Constitutional Limitations on Governmental Participation in Downtown Development Projects*, 35 VAND. L. REV. 277, 277 (1982).

<sup>154</sup> *Id.* at 277–78.

<sup>155</sup> Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights*:

## 2011] URBAN REVITALIZATION AND EMINENT DOMAIN 131

When the provision of infrastructure and rewards for development proved insufficient, local officials developed a third approach, “promoting *specific* development projects.”<sup>156</sup>

These ventures require active cooperation between the public and private sectors, with each sector responsible for specific components of the entire project. For example, a single project might include a large parking facility with a convention center, a hotel, and one or more retail or office structures located in the air space above the facility. In such a project, the city might acquire the land and construct the parking garage and convention center, and the private developer might lease the air space from the city and construct the other buildings. The city would build the parking facility as a part of this particular project, rather than as part of a program to improve the general downtown infrastructure.<sup>157</sup>

A private developer might have constructed the project as a whole, if it had the money to do so.<sup>158</sup> Likewise, a city could develop such projects, but as *Death and Life* noted, “[t]he expense of bearing the whole cost would make public subsidy costs for redevelopment and for housing projects too heavy.”<sup>159</sup> Thus, although direct subsidies are common,<sup>160</sup> municipalities use other devices as well. These devices include tax abatements and the creation of special districts, including business improvement districts.<sup>161</sup> Unlike other devices, however, tax increment financing (TIF) brings new money to an area without the political and legal problems inherent in increased general taxation.<sup>162</sup>

TIF is the most widely used local program for development financing in the country. It “has been implemented in virtually

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*Choice Among Alternative Solutions to Tragedies of the Commons*, 28 *ECOLOGY L.Q.* 123, 124 (2001) (coining term “regulatory property”). An example is the ownership of New York City taxicab medallions, made of stamped-tin, but now worth hundreds of thousands of dollars. *Id.* at 144 n.52.

<sup>156</sup> Lawrence, *supra* note 153, at 278.

<sup>157</sup> *Id.*

<sup>158</sup> The cost would include expenditures for acquiring the individual parcels needed to assemble the super parcel upon which the large-scale revitalization project would be built. The argument that “holdouts” preclude such private ventures is a principal argument for government involvement through eminent domain. See Merrill, *supra* note 144, at 80.

<sup>159</sup> JACOBS, *supra* note 2, at 312.

<sup>160</sup> See Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 *CORNELL L. REV.* 789, 790 (1996) (noting that such subsidies are widespread).

<sup>161</sup> Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 *U. CHI. L. REV.* 65, 73 (2010).

<sup>162</sup> *Id.*

every kind of community . . . [and] [t]ypically, it is ‘the first tool that local governments pull out of their economic development toolbox.’<sup>163</sup>

Under TIF, the difference between the real estate tax revenues generated by a parcel before the construction of a project not otherwise feasible, and the tax revenues after the project is completed, are dedicated to servicing the bonds financing the project.<sup>164</sup> Thus until these obligations are paid, “tax increases that would have been shared by the city with other taxing entities—school districts, counties, and special districts—are siphoned into repayment of redevelopment agency obligations.”<sup>165</sup>

As Professor Richard Briffault recently explained, two important reasons for TIFs’ popularity are its exemplification of the “fiscalization of local development policy,” thus engendering an increase in the local tax base without encountering the political and legal limits on increased taxation, and that TIF “plays off the fragmentation of local government” and ensuing competition.<sup>166</sup>

Historically, as noted by Professor George Lefcoe, urban renewal officials quested for “‘the blight that’s right’—places just bad enough to clear but good enough to attract developers.”<sup>167</sup> Challenges to the blight determinations that undergird TIF-based projects have proven infeasible.<sup>168</sup> However, TIFs have become a more general financing tool.

As TIF proliferated, it also evolved, shifting from what was initially an urban renewal program targeted at depressed central city areas to a more general public investment and infrastructure financing scheme. The redirection, or expansion, of TIF is best captured through the change in the language used to describe TIF activity from redevelopment—that is, the revitalization of a once vibrant but now economically depressed or physically deteriorated area—to simply development, or increase in economic activity in an area that might have been vacant, farmland, undeveloped, or

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<sup>163</sup> *Id.* at 65 (quoting James Krohe, Jr., *At the Tipping Point: Has Tax Increment Financing Become Too Much of a Good Thing?*, PLAN., Mar. 2007, at 20–21.).

<sup>164</sup> See Alyson Tomme, *Tax Increment Financing: Public Use or Private Abuse?*, 90 MINN. L. REV. 213, 216 (2005).

<sup>165</sup> George Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 996 (2001).

<sup>166</sup> Briffault, *supra* note 161, at 66–67.

<sup>167</sup> Lefcoe, *supra* note 165, at 995 (quoting BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 23 (1990)).

<sup>168</sup> See *infra* notes 221–22 and accompanying text.

simply lightly developed.<sup>169</sup>

Furthermore:

Many TIF plans are intended to aid a specific firm, but others reflect efforts to attract large numbers of investors to an area. The TIF district may be created in response to a developer's proposal, or may be initiated by the city more speculatively, without a specific development in mind.<sup>170</sup>

Professor Briffault cites a study "reporting that nearly 40 percent of TIFs are created without specific development projects in mind," thus implying that specific projects, largely investor-driven, fuel the majority of demands for TIF.<sup>171</sup> A logical correlative of the competition for development among localities and the expansion of TIF financing is condemnation on demand by the highest bidder, an abuse epitomized by *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*,<sup>172</sup> where "SWIDA advertised that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers."<sup>173</sup>

The existence of public-private partnerships does not alleviate the need for moral judgments that should accompany purely public development.<sup>174</sup> For instance, public-private partnerships can be a vehicle for circumventing voter disapproval of projects.<sup>175</sup> They also have given rise to considerable distrust that such partnerships serve the interests of business elites, and circumvent limits on taxation and requirements for accountability in public projects.<sup>176</sup> Increasingly, such projects

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<sup>169</sup> Briffault, *supra* note 161, at 71.

<sup>170</sup> *Id.* at 68.

<sup>171</sup> *Id.* at 68 n.11 (citing J. Drew Klacik, *Tax Increment Financing in Indiana*, in *TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT* 179, 183–84 (Craig L. Johnson & Joyce Y. Man eds., 2001)).

<sup>172</sup> 768 N.E.2d 1 (Ill. 2002).

<sup>173</sup> *Id.* at 10.

<sup>174</sup> Robin Paul Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 *VAND. L. REV.* 67, 70–71 (1987); Robin Paul Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 *OHIO ST. L.J.* 163, 176 (1986).

<sup>175</sup> See, e.g., Nick Beermann, *Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefitting Corporate Welfare?*, 23 *SEATTLE U. L. REV.* 175, 176 (1999) (relating the creation of a public facilities district implementing a sales tax increase in King County, Washington, for construction of a Seattle Mariners baseball stadium, using an enabling statute passed by the state legislature only weeks after King County voters rejected the imposition of the same tax for the same purpose).

<sup>176</sup> See McFarlane, *supra* note 7, at 42–43.

are the result of purely private initiative, with investors “sometimes even proposing projects that communities didn’t ask for.”<sup>177</sup>

### G. *Constraining Abusive Condemnation*

Jane Jacobs’ distrust of top-down ordering came to full flower in her denunciation of “arrogant” and “promiscuous” eminent domain:

Mr. [Jay] Wickersham [a previous speaker] did not come down too hard on promiscuous use of the powers of eminent domain when he called it arrogant and observed that these powers are typically given poor oversight in the courts. I would add that it invites corruption, and is an intellectually lazy way of bringing about large changes, carrying along in its train cruelty and waste. . . . Boston affords a famous example: destruction of the former West End community which became a notorious example of the evils of promiscuous eminent domain. . . . Of course it isn’t just in Boston that eminent domain powers ran wild. Nor is it only in Boston that they remain a temptation for promoters with big schemes, big egos, little intelligent ingenuity, and less conscience.<sup>178</sup>

### H. *In Introduction: Poletown and Hathcock*

In the well-known Michigan case, the condemnation of an entire ethnic neighborhood for construction of a Cadillac assembly plant was upheld in *Poletown Neighborhood Council v. City of Detroit*.<sup>179</sup> However, the Michigan Supreme Court emphatically repudiated its *Poletown* rationale 23 years later, in *County of Wayne v. Hathcock*.<sup>180</sup> The court declared that a “public use” is a use that “will in some manner advance the public interest. *But incidentally every lawful business does this.*”<sup>181</sup>

According to a social historian, the Poletown neighborhood of Detroit was a vibrant industrial area in the early and middle twentieth century, but its social fabric was wrought by new

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<sup>177</sup> Ianthe Jeanne Dugan, *Private Investors Push Public Projects*, WALL ST. J., Oct. 15, 2010, at C1.

<sup>178</sup> Jacobs, *supra* note 100, at 541; see Jay Wickersham, *Jane Jacobs’s Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547 (2001).

<sup>179</sup> 304 N.W.2d 455, 457–59 (Mich. 1981), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

<sup>180</sup> 684 N.W.2d 765, 788 (Mich. 2004).

<sup>181</sup> *Id.* at 786 (emphasis added).

freeways and a medical center, by deindustrialization, and the movement of older families to the suburbs.<sup>182</sup> “We . . . can no more blame G.M. for taking Poletown than we can blame the giant white shark for mauling the fleshy legs of the hapless swimmer.”<sup>183</sup> On the other hand, Professor William Fischel has concluded that, far from being the villain in the *Poletown* saga, General Motors would have preferred to build a greenfield plant elsewhere, and was importuned to select the Poletown site at the behest of then-Mayor Coleman Young, since it was the only practical way for the city to obtain a very large federal grant.<sup>184</sup>

Regardless of the causal sequence, the demolition of the Poletown neighborhood resulted in much pain. In her book contrasting conversations and negotiations with demands for respect of one’s constitutional “rights,” Professor Mary Ann Glendon discussed these consequences.

In order to induce General Motors Corporation to build a new Cadillac assembly plant that was projected to bring 6,000 jobs to the area, the City of Detroit agreed to use its power of eminent domain to acquire a site that GM wanted. . . . The land in question was an entire ethnic neighborhood known as “Poletown,” complete with 1,400 homes, schools, 16 churches, 144 local business [sic], and a neighborhood organization that begged the Michigan Supreme Court to save the community from the wrecker’s ball and the bulldozer. . . . The neighborhood residents—with the combined power of City Hall, General Motors, the United Auto Workers, the banks, and the news media arrayed against them—naively thought that the courts would protect their property rights. No amount of compensation, they pointed out, could repair the destruction of roots, relationships, solidarity, sense of place, and shared memory that was at stake.<sup>185</sup>

The justifications and methods by which legislatures and administrators reshape land use and neighborhood character has changed greatly over the years. For instance, no longer do federal

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<sup>182</sup> See John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 58–59 (1984) (“A succession of public policy choices in the 1950’s and 1960’s, however, repeatedly attacked the physical integrity of the area and, more than anything else, marked Poletown as the eventual likely target for the wrecker’s ball.”).

<sup>183</sup> *Id.* at 69–70.

<sup>184</sup> William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 940–43 (2004).

<sup>185</sup> MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 29–30 (1991).

agencies predicate housing finance upon the existence of racial segregation,<sup>186</sup> nor do state and local legislatures make the rigid distinction between residential and commercial districts.<sup>187</sup> Nevertheless, the top-down approach is still strong.

### I. *The Kelo Decision*

In *Kelo v. City of New London*,<sup>188</sup> the U.S. Supreme Court held that the condemnation of sound residential property for retransfer for private urban revitalization did not violate the Fifth Amendment's limitation of eminent domain to instances where the appropriated property would be put to "public use." As noted earlier,<sup>189</sup> the rationale of the 5-4 majority was that, "[w]ithout exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."<sup>190</sup> The Court further stated that, "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."<sup>191</sup> For the majority, *Kelo* seemed an easy case:

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As

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<sup>186</sup> FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT § 937 (1958); see John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 LAW & SOC. INQUIRY 399, 405 (2007) ("Areas surrounding a location are investigated to determine whether incompatible racial and social groups are present, for the purpose of making a prediction regarding the probability of the location being invaded by such groups. If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values.").

<sup>187</sup> See JESSE DUKEMINIER, JAMES E. KRIER, ET AL., PROPERTY 954–68 (7th ed. 2010) (describing methods of achieving flexibility in zoning).

<sup>188</sup> 545 U.S. 469 (2005).

<sup>189</sup> See *supra* notes 22–26 and accompanying text.

<sup>190</sup> *Kelo*, 545 U.S. at 480.

<sup>191</sup> *Id.* at 483.

with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.<sup>192</sup>

Justice Thomas dissented because he read the Court's precedents as involving greater public oversight and actual public use.<sup>193</sup> The principal dissent, by Justice O'Connor declared:

To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.<sup>194</sup>

To further demonstrate the uncabined nature of the majority's "public use" interpretation, Justice O'Connor included what has become a rhetorical home run:<sup>195</sup> "The specter of condemnation hangs over all property. Nothing," she declared, "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."<sup>196</sup>

### *J. The Specter of Blight*

If the movement for condemnation and for revitalization was pulled by the allure of upscale living, more jobs, and an enhanced tax base—it was pushed by fear.

To secure political and judicial approval for their efforts, renewal advocates created a new language of urban decline: a discourse of

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<sup>192</sup> *Id.* at 483–84 (citing *Berman v. Parker* where the Court held that condemnation for economic vitalization in the context of slum removal in the District of Columbia was a valid public use).

<sup>193</sup> *Id.* at 511–14 (Thomas, J., dissenting).

<sup>194</sup> *Id.* at 494 (O'Connor, J., dissenting).

<sup>195</sup> As of Jan. 17, 2011, a Westlaw search indicates that the phrase has been quoted in at least 122 secondary legal sources and 286 news sources.

<sup>196</sup> *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting).

blight. Blight, renewal proponents argued, was a disease that threatened to turn healthy areas into slums. A vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.<sup>197</sup>

“Blight” was effective as a legal as well as rhetorical strategy, since, “[b]y tying the legitimacy of redevelopment to slum clearance or blight removal, courts extended only slightly the power local governments had long possessed to demolish dangerously dilapidated housing.”<sup>198</sup>

Statutes often defined “blight” to include not only the presence of physical danger or disease, but also long laundry lists of factors that “embraced not only economic deterioration in tax revenue terms but also all the adverse physical conditions of property that individually or in combination impeded its reasonable productivity and resulted in its negative impact upon the general welfare and economic well-being of the community.”<sup>199</sup> Thus, aggressive public officials or astute investors easily could satisfy the requirement of “blight” in redevelopment statutes.

However, even severe “blight” logically does not justify condemnation. Private and public nuisance suits provide relief under the common law. Alternatively, should the owner neglect a government demand to abate the nuisance, the locality could abate and charge the cost as a betterment assessment. Should the owner not pay the assessment lien, the parcel could be auctioned at a tax sale.<sup>200</sup> This recourse to foreclosure, rather than condemnation, opens the process of redevelopment to public participation and might result in abatement that is more in scale with the neighborhood than more grandiose efforts employed by the locality’s chosen redeveloper.<sup>201</sup>

However, the blight metaphor evokes more than danger from faulty wiring or rotten beams.

The role of blight terminology in restricting racial mobility has also been under-appreciated by legal scholars. Blight was a facially neutral term infused with racial and ethnic prejudice. While it

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<sup>197</sup> Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 3 (2003).

<sup>198</sup> Lefcoe, *supra* note 165, at 993 (footnote omitted).

<sup>199</sup> *Concerned Citizens of Princeton, Inc. v. Mayor of Princeton*, 851 A.2d 685, 701–02 (N.J. Super. Ct. App. Div. 2004) (quoting *Forbes v. Bd. of Trs. of Twp. of S. Orange Vill.*, 712 A.2d 255, 258–59 (N.J. Super. Ct. App. Div. 1998)).

<sup>200</sup> For elaboration, see Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 853–54 (2007).

<sup>201</sup> *See id.* at 851.

## 2011] URBAN REVITALIZATION AND EMINENT DOMAIN 139

purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. This “scientific” method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.<sup>202</sup>

Jane Jacobs was particularly dubious that slums would fester for long in dynamic cities. She concluded, “it requires institutional effort, a lot of effort, to make ghettos. They don’t simply materialize on their own. Once made, they aren’t difficult to maintain. It’s the making that takes manipulative effort, like redlining and blockbusting.”<sup>203</sup> As Justice Clarence Thomas noted in his dissent in *Kelo*, “[u]rban renewal projects have long been associated with the displacement of blacks; [i]n cities across the country, urban renewal came to be known as ‘Negro removal.’”<sup>204</sup> Their mutual concerns led both the NAACP and Jane Jacobs to file amicus briefs for the *Kelo* petitioners.<sup>205</sup>

Furthermore, once a finding of “blight” is made, it is practically almost impossible for it to be challenged successfully. In a recent paper,<sup>206</sup> Professor George Lefcoe explained why:

State laws invariably delegate the task of making blight findings to the same local government sponsoring the TIF funded redevelopment project. Some officials use their best efforts to comply while others hire permissive consultants and rely on their findings uncritically . . . . In any event, few blight determinations are ever challenged in court. Blight litigation is complicated and expensive. The attorneys most capable of filing such challenges are jeopardizing their future dealings with the city officials they sue and with officials in other cities who get wind of their whistle-

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<sup>202</sup> Pritchett, *supra* note 197, at 6.

<sup>203</sup> Jacobs, *supra* note 100, at 545.

<sup>204</sup> *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (quoting Pritchett, *supra* note 197, at 47).

<sup>205</sup> Brief for National Ass’n for the Advancement of Colored People, et al. as Amici Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811057; Brief for Jane Jacobs as Amica Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2803191.

<sup>206</sup> George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing* (Univ. of S. Cal., Ctr. in Law, Econs. & Org., Working Paper No. C10-14, 2010) available at <http://ssrn.com/abstract=1680598>.

blower-like behavior. Challengers usually lose when contending that a particular renewal area wasn't blighted; standards of judicial review strongly favor upholding local government decisions.<sup>207</sup>

### *K. Kelo Promises Protection from Abuse*

In *Death and Life*, Jacobs stated that “[t]he power of eminent domain, long familiar and useful as a means of acquiring property needed for public use, is extended, under redevelopment law, to acquisition of property intended for private use and private profit.”<sup>208</sup> While the majority in *Kelo* had no problem equating the incidental benefit to the public derived from lawful private use to a public use, it took pains to reconcile this position with its emphatic restatement of the “perfectly clear” proposition 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.”<sup>209</sup>

Justice Stevens attempted to refute the argument that, in the absence of a bright-line definition of public use:

[N]othing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.<sup>210</sup>

In his concurring opinion, Justice Kennedy, who supplied the majority's fifth vote, was more direct. After restating the deferential rational-basis review, the Court accorded economic and social legislation generally,<sup>211</sup> he added: “The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only *incidental* or

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<sup>207</sup> *Id.* at 16 (footnotes omitted).

<sup>208</sup> JACOBS, *supra* note 2, at 311.

<sup>209</sup> *Kelo*, 545 U.S. at 477.

<sup>210</sup> *Id.* at 486–87.

<sup>211</sup> *Id.* at 490 (Kennedy, J., concurring) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)).

## 2011] URBAN REVITALIZATION AND EMINENT DOMAIN 141

*pretextual* public benefits, are forbidden by the Public Use Clause.”<sup>212</sup> Kennedy added specificity to how a court was to proceed:

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. . . . 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. Here, the trial court conducted a careful and extensive inquiry into “whether, in fact, the development plan is of primary benefit to . . . the developer . . . and private businesses which may eventually locate in the plan area [e.g., Pfizer], and in that regard, only of incidental benefit to the city.” The trial court considered testimony from government officials and corporate officers; documentary evidence of communications between these parties, respondents’ awareness of New London’s depressed economic condition and evidence corroborating the validity of this concern, the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known, evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented.<sup>213</sup>

The factors noted by Justice Kennedy should constitute a roadmap for adjudicating landowners’ assertions of pretextuality when they arise. However, even this is second best. A state court taking the Public Use Clause seriously should face the incoherent doctrinal framework that the *Kelo* majority thrust upon it.<sup>214</sup>

The essential difficulty in evaluating economic development takings is that private benefit and incidental public benefit are,

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<sup>212</sup> *Id.* (emphasis added).

<sup>213</sup> *Id.* at 491–92 (citations omitted).

<sup>214</sup> *Id.* at 504 (O’Connor, J., dissenting) (chiding the majority for its “abdication of our responsibility” by suggesting that landowners turn to their states to provide more stringent standards for public use).

by definition, merged and mutually reinforcing. As Justice O'Connor observed in her dissent in *Kelo*, "any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs."<sup>215</sup>

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.<sup>216</sup>

Some state courts have relied upon the pretextuality provision of *Kelo*. These include *Franco v. National Capital Revitalization Corp.*,<sup>217</sup> and *County of Hawai'i v. C&J Coupe Family Ltd. Partnership*,<sup>218</sup> where the asserted pretextuality involved one of the most classic governmental activities, the construction of a road.

### 1. *Kelo* Omits Affirmative Requirements

*Kelo v. City of New London*<sup>219</sup> contains considerable rhetoric about why the Public Use Clause was not violated, but little that pins down how that clause *would* be violated. Most clearly, "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."<sup>220</sup> The operative word is "sole." One could hardly imagine a transfer expressed in these terms. Indeed, the fitting out of any new grand private residence results in the employment of laborers and domestics, and the expansion of any legitimate business advances the welfare of its customers.<sup>221</sup>

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<sup>215</sup> *Id.* at 502.

<sup>216</sup> *Id.* at 502–03.

<sup>217</sup> 930 A.2d 160, 171–72 (D.C. 2007) (remanding for consideration of *Kelo* pretextuality, where both economic revitalization and other police power purposes were invoked by the agency).

<sup>218</sup> 198 P.3d 615, 646–47 (Haw. 2008).

<sup>219</sup> *Kelo*, 545 U.S. 469.

<sup>220</sup> *Id.* at 477.

<sup>221</sup> See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004)

Justice Kennedy's concurring opinion attempted to supply some content to this null set by adding 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."<sup>222</sup> Yet, it is not evident that, apart from possible criminal law liability for bribery, perjury, and the like, "intent" should matter at all. An honest public official agreeing to a condemnation for retransfer plan does not provide much help for his or her community if the city's return is mediocre, even if the private counterpart's return is worse. Likewise, the official has enhanced the city's welfare if it receives a handsome return, even if the counterpart's return is better.

The Public Use Clause basis of Justice Stevens' declaration that the transfer through condemnation from one private party to another, for the purpose of raising property values and taxes, is impermissible and will be confronted if it arises.<sup>223</sup>

The case Justice Stevens cites for that proposition is more ambiguous. In *99 Cents Only Stores v. Lancaster Redevelopment Agency*,<sup>224</sup> the city accepted a trumped-up blight study that purported to justify condemnation of a competitor's store for the purpose of transferring it to Costco. While the immediate condemnation was "pretextual," Lancaster's intent was not to benefit Costco, but rather to produce ten times the tax revenue even while laying the groundwork for revitalization by pleasing Costco, its principal revitalization partner.<sup>225</sup> Raising tax revenue to fund infrastructure, schools, and other public functions seems like a public purpose. Stevens' suggestion that problems with Lancaster's actions pertained to public use, rather than to arbitrary or capricious conduct relating to the Due Process Clause, are not supported.<sup>226</sup>

Similarly, Justice Kennedy's list of factors militating in favor of a finding of pretextual taking seem more like prophylactic rules against arbitrary or discriminatory conduct than explanations of

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(noting that a "public use" is a use that "will in some manner advance the public interest. *But incidentally every lawful business does this.*" (emphasis added)).

<sup>222</sup> *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring).

<sup>223</sup> *Id.* at 487 (majority opinion).

<sup>224</sup> *Id.* at 487 n.17 (citing *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *dismissed by* 60 F. App'x 123 (9th Cir. 2003)).

<sup>225</sup> See Eagle, *supra* note 143, at 104–05.

<sup>226</sup> See *id.* at 105.

why there is a lack of public benefit.<sup>227</sup> Temptations to misfeasance or malfeasance by public officials might have the incidental detriment of making revitalization less efficacious. But that rationale sounds in substantive due process review within the Takings Clause, a concept the Court rejected, as Justice Stevens noted elsewhere in *Kelo*, and in *Lingle v. Chevron U.S.A., Inc.*<sup>228</sup>

## 2. Reactions to *Kelo*

The Supreme Court's decision in *Kelo* was coincident with an already-gathering trend towards more stringent policing of the Public Use Clause and state equivalents.<sup>229</sup> Shortly before *Kelo* was decided, the Supreme Court of Michigan "repudiated" its notorious *Poletown* doctrine<sup>230</sup> in *County of Wayne v. Hathcock*. Shortly thereafter, the Ohio Supreme Court disclaimed the broad latitude that *Kelo* permitted in *City of Norwood v. Horney*.<sup>231</sup> Other state courts have followed suit.<sup>232</sup> Even more dramatic has been the legislative reaction to *Kelo*. Legislation to forbid or limit condemnation for retransfer for private economic revitalization has been considered in almost every state and has been enacted in many.<sup>233</sup>

## III. PUBLIC USE IN NEW YORK AFTER *KELO*: *GOLDSTEIN* AND *KAUR*

*"[T]he recent rulings of the [New York State] Court of Appeals [in Goldstein v. New York State Urban Development Corp. and Kaur v. New York State Urban Development Corp.] have made plain that there is no longer any judicial oversight of eminent domain*

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<sup>227</sup> See *supra* text accompanying notes 212–14.

<sup>228</sup> *Kelo*, 545 U.S. at 488 (noting that the Court rejected the "substantially advances" formula). See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005).

<sup>229</sup> U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

<sup>230</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

<sup>231</sup> 853 N.E.2d 1115, 1152 (Ohio 2006).

<sup>232</sup> See *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006); *Benson v. State*, 710 N.W.2d 131 (S.D. 2006) (acknowledging the court's narrow interpretation of the state's public use clause).

<sup>233</sup> See *Somin, supra* note 25, at 2120 (gathering and classifying legislative actions).

*proceedings.*<sup>234</sup>

*Kelo* stated that the Public Use Clause should be interpreted in broad, but not unlimited, fashion.<sup>235</sup> However, *Kelo* did not specify a theoretical basis for delineating its extent, or the tests that state courts and lower federal courts must apply in implementing it. The holding of the New York Court of Appeals in *Goldstein* and *Kaur* mostly avoided these difficult issues through an apparent policy of studied deference.

In *Goldstein*, contentions of condemnation abuse involved the immense scale of the project and the notoriety of the developer.<sup>236</sup> In *Kaur*, the project's scope was more modest, but a powerful and prestigious neighbor coveted the land.<sup>237</sup>

#### A. *Goldstein and Atlantic Yards*

In *Goldstein*, the Court of Appeals reviewed the condemnation of an area in Brooklyn, known as Atlantic Yards, for the purpose of constructing an NBA sports arena, transportation facilities, landscaped open space, shops, and some 6,000 housing units (one-third affordable by low or middle-income families).<sup>238</sup> The United States Court of Appeals for the Second Circuit upheld the dismissal of the plaintiffs' federal public use claims and remanded for a determination of state claims.<sup>239</sup>

The facts indicate that a part of the Atlantic Yards area clearly was blighted. The project footprint in which the plaintiffs were landowners had not been so determined. However, the court's opinion stated that a study conducted by the condemnors found "sufficient indicia of actual or impending blight to warrant their condemnation for clearance and redevelopment," and that "the proposed land use improvement project will, by removing blight and creating in its place the above-described mixed-use

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<sup>234</sup> *Uptown Holdings, LLC v. City of New York*, 908 N.Y.S.2d 657, 661 (App. Div. 2010) (Catterson, J., concurring) (citations omitted).

<sup>235</sup> *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (postulating that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party").

<sup>236</sup> *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 165–66 (N.Y. 2009).

<sup>237</sup> *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 724–25 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at \*1 (U.S. Dec. 13, 2010) (No. 10-402).

<sup>238</sup> *Goldstein*, 921 N.E.2d at 165–66.

<sup>239</sup> *Id.* at 167 (citing *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008)).

development, serve a ‘public use, benefit or purpose’ . . . .”<sup>240</sup>

In response to the dissent’s conclusion that the facts indicated the plaintiffs’ area to be a “normal and pleasant residential community,”<sup>241</sup> the court stated that matter “must necessarily be one of opinion or judgment.”<sup>242</sup> Most important, the court essentially disclaimed responsibility for establishing standards.

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 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. Properly involved in redrawing the range of the sovereign prerogative would not be a simple return to the days when private property rights were viewed as virtually inviolable, even when they stood in the way of meeting compelling public needs, but a reweighing of public as against private interests and a reassessment of the need for and public utility of what may now be outmoded approaches to the revivification of the urban landscape. These are not tasks courts are suited to perform. They are appropriately situated in the policy-making branches of government.<sup>243</sup>

The court allowed that there was “a hypothetical case in which we might intervene to prevent an urban redevelopment condemnation on public use grounds,” one in which “the physical conditions of an area might be such that it would be irrational and baseless to call it” blighted.<sup>244</sup>

The dissent noted that the state constitution provided: “Private property shall not be taken for public use without just compensation.”<sup>245</sup> The dissent further elaborated on the concept of “public use.”

The words “public use” embody an important protection for property owners. They prevent the State from invoking its eminent domain power as a means of transferring property from one private owner to another who has found more favor with state

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<sup>240</sup> *Id.* at 166.

<sup>241</sup> *Id.* at 190 (Smith, J., dissenting).

<sup>242</sup> *Id.* at 173 (majority opinion) (quoting *Kaskel v. Impellitteri*, 115 N.E.2d 659, 661 (1953)).

<sup>243</sup> *Id.* at 172–73.

<sup>244</sup> *Id.* at 173 (quoting *Kaskel*, 115 N.E.2d at 662).

<sup>245</sup> *Id.* at 186 (Smith, J., dissenting) (quoting N.Y. CONST. art. I, § 7(a)).

officials, or who promises to use the land in a way more to the State's liking. They do not require that all takings result in public ownership of the property, but they do ordinarily require that, if the land is transferred to private hands, it be used after the taking in a way that benefits the public directly. A recognized exception permits the transfer of "blighted" land to private developers without so strict a limitation on its subsequent use, but that exception is applicable only in cases in which the use of the land by its original owner creates a danger to public health and safety.<sup>246</sup>

Just as Justice O'Connor's dissent in *Kelo* chastised the majority for its "abdication of our responsibility" in "our refusal to enforce properly the Federal Constitution,"<sup>247</sup> Judge Smith similarly chastened the majority in *Goldstein*. One important difference, however, is that Justice Stevens' *Kelo* opinion was built largely on federalism and comity, matters not germane to a state court interpreting the state constitution.

Given the imperfection of any neighborhood, and the multitude of effects intrinsic in any large condemnation, the possibility that any government assertion could be "irrational and baseless" is hypothetical, indeed.

### B. *Kaur and Columbia University*

While Jane Jacobs did not live to comment on *Kaur*, she brought a somewhat similar lawsuit in 1967.<sup>248</sup> New York University was expanding its Washington Square campus, and wanted to construct what the court termed "a much-needed library, in accordance with plans and specifications formulated by a world-famous architect."<sup>249</sup> Jacobs sought to enjoin New York City from relinquishing its rights on a strip of land to be used for the library, on the grounds that it should be devoted instead to part of a greenway. Summary judgment was granted to the defendants.<sup>250</sup>

In *Kaur v. New York State Urban Development Corp.*,<sup>251</sup> the Appellate Division evaluated whether the acquisition of some

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<sup>246</sup> *Id.*

<sup>247</sup> *Kelo v. City of New London*, 545 U.S. 469, 504 (2005) (O'Connor, J., dissenting).

<sup>248</sup> See *Jacobs v. City of New York*, 281 N.Y.S.2d 867 (Sup. Ct. 1966), *aff'd*, 282 N.Y.S.2d 633 (App. Div. 1967).

<sup>249</sup> *Id.* at 869.

<sup>250</sup> *Id.* at 873.

<sup>251</sup> 892 N.Y.S.2d 8 (App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at \*1 (U.S. Dec. 13, 2010) (No. 10-402).

seventeen acres in the Manhattanville area of West Harlem by purchase and condemnation served a public use.<sup>252</sup> The land was intended for a new campus of Columbia University, which privately would pay the entire \$6.28 billion cost of the project.<sup>253</sup>

Columbia owned only two parcels in the area in 2000, began work on its plan in 2001, and by October 2003, owned fifty-one percent of the land, with thirty-three percent still owned privately.<sup>254</sup> It began working with the Empire State Development Corporation (ESDC) and other related agencies in 2004.<sup>255</sup> Columbia paid ESDC to contract for several blight studies. Those studies, and a subsequent study undertaken after the court found a conflict of interest,<sup>256</sup> found increased blight and a “long-standing lack of investor interest in the neighborhood.”<sup>257</sup> The Appellate Division, First Department found that “ESDC’s determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent.”<sup>258</sup>

The First Department methodically went through the factors delineated in Justice Kennedy’s concurrence in *Kelo*, and concluded that “[t]he contrast between ESDC’s scheme for the redevelopment of Manhattanville and New London’s plan for Fort Trumbull could not be more dramatic.”<sup>259</sup> In particular, it noted that neither Manhattanville nor West Harlem were depressed areas, that the project was not considered as part of a comprehensive review of the area, that the lack of public participation was underscored by Columbia paying all of the costs, and that rezoning of the area was undertaken “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.”<sup>260</sup> Likewise:

[T]he record makes plain that rather than the identity of the ultimate private beneficiary being unknown at the time that the redevelopment scheme was initially contemplated, the ultimate

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<sup>252</sup> *Id.* at 11–12.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 12.

<sup>255</sup> *Id.*

<sup>256</sup> *Tuck-It-Away Assoc., L.P. v. Empire State Dev. Corp.*, 861 N.Y.S.2d 51, 60 (App. Div. 2008).

<sup>257</sup> *Kaur*, 892 N.Y.S.2d at 14.

<sup>258</sup> *Id.* at 15–16.

<sup>259</sup> *Id.* at 19.

<sup>260</sup> *Id.*

## 2011] URBAN REVITALIZATION AND EMINENT DOMAIN 149

private beneficiary of the scheme for the private annexation of Manhattanville was the progenitor of its own benefit. The record discloses that every document constituting the plan was drafted by the preselected private beneficiary's attorneys and consultants and architects . . . . Even the blight study on which ESDC originally proposed to base its findings was prepared by Columbia's consultant. . . .<sup>261</sup>

. . . In this case, the record overwhelmingly establishes that the true beneficiary of the scheme to redevelop Manhattanville is not the community that is supposedly blighted, but rather Columbia University, a private elite education institution. These remarkably astonishing conflicts with *Kelo* on virtually every level cannot be ignored, and render the taking in this case unconstitutional.<sup>262</sup>

The Appellate Division also determined that "a private university does not constitute facilities for a 'civic project.'"<sup>263</sup>

The New York Court of Appeals reversed.<sup>264</sup> It concluded, pursuant to *Goldstein*, that the 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."<sup>265</sup> The court "also conclude[d] that the alternative finding of 'civic purpose,' likewise, had a rational basis."<sup>266</sup>

Additionally, the court stated: "[G]iven our precedent, the de novo review of the record undertaken by the plurality of the Appellate Division was improper. On 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."<sup>267</sup>

Turning to the alternative basis for eminent domain that the redevelopment would be a "civic project," the New York Court of Appeals stated "there is nothing in the statutory language limiting a proposed educational project to public educational institutions."<sup>268</sup> It further added that, in an earlier case involving Atlantic Yards, the Appellate Division rejected the argument that

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<sup>261</sup> *Id.* at 20.

<sup>262</sup> *Id.* at 23.

<sup>263</sup> *Id.*

<sup>264</sup> *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 730 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at \*1 (U.S. Dec. 13, 2010) (No. 10-402).

<sup>265</sup> *Id.* at 724

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 731 (citations omitted).

<sup>268</sup> *Id.* at 733.

the project was not a “civic project” because of the inclusion of the Nets professional basketball franchise.<sup>269</sup>

A petition for certiorari has been filed by *Kaur* plaintiffs, under the style *Tuck-It-Away, Inc. v. New York State Urban Development Corp.*<sup>270</sup>

### C. Unfinished Business

*Goldstein v. New York State Urban Development Corp.*,<sup>271</sup> its federal counterpart *Goldstein v. Pataki*,<sup>272</sup> and *Kaur v. New York State Urban Development Corp.*<sup>273</sup> together leave many important issues unresolved.

#### 1. Obtaining Evidence to Make Fact-Bound Determinations

Given the deference normally accorded legislative and administrative land use determinations, meaningful judicial review requires access to facts upon which determinations can be made as to whether legislative powers or administrative discretion have been abused.

In *Kaur*, the Appellate Division did not independently ascertain the existence of evidentiary facts, but instead evaluated, and found wanting, the conclusions that the ESDC drew from those facts.<sup>274</sup> When the Court of Appeals held that the

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<sup>269</sup> *Id.* at 734 (citing *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, 874 N.Y.S.2d 414, 424 (App. Div. 2009)) (declaring “a sports arena, even one privately operated for profit, may serve a public purpose”).

<sup>270</sup> Petition for Writ of Certiorari at \*1, *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 2010 WL 3722066 (U.S. Sept. 21, 2010) (No. 10-402), *cert. denied*, 2010 WL 3712673 (U.S. Dec. 13, 2010) (No. 10-402). The questions presented were:

1. Whether it was error for the Court of Appeals of New York to disregard the principles enunciated in *Kelo v. City of New London*, 545 U.S. 469 (2005) in sanctioning the use of eminent domain for the benefit of a private developer, when the circumstances presented by the instant case exemplify the very bad faith, pretext, and favoritism that this Court warned could result if *Kelo*'s safeguards were ignored?

2. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States imposes any minimum procedural standards, in accordance with the requirement of fundamental fairness, to preserve a property owner's meaningful opportunity to be heard within the context of an eminent domain taking? *Id.*

<sup>271</sup> 921 N.E.2d 164 (N.Y. 2009).

<sup>272</sup> 516 F.3d 50 (2d Cir. 2008).

<sup>273</sup> *Kaur*, 933 N.E.2d at 721.

<sup>274</sup> *See id.* at 733.

Appellate Division was bound by the agency's findings of blight and determined that the condemnation of petitioners' property qualified as a 'land use improvement project' so long as they were not irrational or baseless, it in effect treated the agency as a part of the judicial system.<sup>275</sup>

Another arena for fact-finding might be the federal courts. In *Goldstein v. Pataki*, the Second Circuit cut to the heart of the landowners' claims about Atlantic Yards, stating:

Each of the claims relies on slightly different allegations. The heart of the complaint, however, and the centerpiece of the instant appeal, is its far-reaching allegation that the Project, from its very inception, has not been driven by legitimate concern for the public benefit on the part of the relevant government officials. Appellants contend that a "substantial" motivation of the various state and local government officials who approved or acquiesced in the approval of the Project has been to benefit Bruce Ratner, the man whose company first proposed it and who serves as the Project's primary developer. Ratner is also the principal owner of the New Jersey Nets. In short, the plaintiffs argue that all of the "public uses" the defendants have advanced for the Project are pretexts for a private taking that violates the Fifth Amendment.<sup>276</sup>

Such allegations almost invariably implicate not explicit declarations of conspiracy, but rather "wink-and-nod" collusion and widely spread snippets of evidence. These are not generally apparent from reams of studies and hearings. Compounding the problem, as noted earlier, states "delegate the task of making blight findings" to redevelopment agencies, and some agency officials "hire permissive consultants" and rely uncritically on their findings.<sup>277</sup>

Facts supporting allegations of pretext must be ferreted out through piecing together contradictions in statements and often with the guidance of sympathetic insiders. The process involves intensive discovery. As noted by the Second Circuit, the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly* makes this process much more difficult.<sup>278</sup> *Twombly* disavowed the often-utilized formula 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

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<sup>275</sup> *Id.* at 730–32.

<sup>276</sup> *Goldstein*, 516 F.3d at 54.

<sup>277</sup> *See supra* notes 206–07 and accompanying text.

<sup>278</sup> *Goldstein*, 516 F.3d at 56 (discussing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

would entitle him to relief.”<sup>279</sup> It substituted the requirement that “[f]actual allegations must be enough to raise a right to relief above the speculative level.”<sup>280</sup>

## 2. Do the protections of *Kelo* apply to blight cases?

One proffered explanation of the New York Court of Appeals’ failure to mention *Kelo* in its *Kaur* decision is its possible unarticulated view that *Kaur* involved blight, and that the protections against pretextuality did not apply in blight cases.<sup>281</sup> The U.S. Court of Appeals for the Second Circuit upheld the district court’s dismissal of the residents’ complaint that the Atlantic Yards project violated the Public Use Clause in *Goldstein v. Pataki*.<sup>282</sup> The court held that the project was “justified in reference to several classic public uses,” including the provision of open space, additional affordable housing, and “construction of a publicly owned (albeit generously leased) stadium,” in the “long-blighted” area.<sup>283</sup> It added:

Primarily underlying this claim is a passing reference to “pretext” in the *Kelo* majority opinion in a single sentence. (“Nor would the City be allowed to take property under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit.”). Fortunately, the Supreme Court’s guidance in *Kelo* need not be interpreted in a vacuum. *Kelo* posed a novel question of law precisely because the City of New London had “not [been] confronted with the need to remove blight.” The Supreme Court granted certiorari on the limited question of “whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.” Accordingly, the issue of pretext must be understood in light of both the holding of the case, which, in permitting a taking solely on the basis of an economic development rationale, reaffirmed the “longstanding policy of deference to legislative judgments in this field,” as well as the decision’s self-identification with a tradition of public use jurisprudence that “[f]or more than a century . . . has

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<sup>279</sup> *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

<sup>280</sup> *Twombly*, 550 U.S. at 555.

<sup>281</sup> Petition for Writ of Certiorari, *supra* note 270, at \*16 n.20 (quoting from oral argument at the Court of Appeals in *Kaur*, where Chief Judge Lipmann asked the State’s counsel about “differentiat[ing the case] from economic development in the sense of *Kelo*? ESDC’s counsel responded that, because *Kelo* primarily concerned economic development and not blight, it was inapplicable here because of ESDC had found blight.” (citations omitted)).

<sup>282</sup> *Goldstein*, 516 F.3d at 52–53.

<sup>283</sup> *Id.* at 63–64.

wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”<sup>284</sup>

The Second Circuit opinion points to the difficulty—and perhaps the futility—of trying to separate the strands of causation and result in a complex revitalization project. On one hand, as suggested by the court, “blight” might be an objective causal factor obviating “intent” in bringing about mixed public and private benefit.<sup>285</sup> On the other hand, “blight” often has been an after-the-fact label justifying condemnation for (more upscale) private revitalization.<sup>286</sup>

### 3. A Coda

*Kaur v. New York State Urban Development Corp.*,<sup>287</sup> and, especially, *Goldstein v. New York State Urban Development Corp.*,<sup>288</sup> present intricate weaves of public and private benefit, such that it is almost impossible to argue that no public benefit exists. In its opinions in these cases, the Court of Appeals seems to agree with the notion that “the structure of public-private economic redevelopment renders almost quaint the very concept of distinct, clearly separable ‘public’ gain and ‘private’ gain.”<sup>289</sup>

Professor Richard Epstein has noted the proclivity of judges to reduce the difficult issues that have been the subject of this article to a unitary standard: “All questions involving land use regulation need to be governed by the same test. Let the rational basis test form any part of the analysis, and the legislative act will routinely pass muster except in rare cases of overt personal misconduct.”<sup>290</sup>

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<sup>284</sup> *Id.* at 61 (citations omitted).

<sup>285</sup> *See id.* at 58–59.

<sup>286</sup> *See* Pritchett, *supra* note 197, at 21 (“Many blighted areas supported viable businesses and provided affordable housing to working-class persons. The problem with a blighted area, however, was that it was not profitable enough—it did not produce enough tax revenues for the city, and it did not create profit opportunities for those who most coveted the land.”).

<sup>287</sup> 933 N.E.2d 721, 730–31 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away v. N.Y. State Urban Dev. Corp., 2010 WL 3712673, at \*1 (U.S. Dec. 13, 2010) (No. 10-402).

<sup>288</sup> 921 N.E.2d 164, 170–72 (N.Y. 2009).

<sup>289</sup> Mihaly, *supra* note 23, at 53.

<sup>290</sup> Richard A. Epstein, *Public Use in a Post-Kelo World*, 17 SUP. CT. ECON. REV. 151, 153 (2009).