

## NOTES

### RAZE THE DEAD: URBAN BLIGHT, PRIVATE UNIVERSITIES, AND THE PATH TOWARDS REVITALIZATION

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# RAZE THE DEAD: URBAN BLIGHT, PRIVATE UNIVERSITIES, AND THE PATH TOWARDS REVITALIZATION

Josh Hoffman \*

After the expansion of eminent domain in *Kelo v. City of New London*, many theorists predicted that the doctrine would be invoked to primarily benefit wealthy private interests while disproportionately impacting lower income communities.<sup>1</sup> Although these fears were meritorious given the enormity of the *Kelo* decision, the debate over eminent domain has once again been relegated to a small community of legal theorists, as the current housing collapse has captivated the attention of the nation. The current economic recession has had a precipitous impact on urban development: the task of securing commercial lending is now tantamount to cleaning the Aegean stables and communities that had previously been afflicted with isolated pockets of blight have seen their conditions rapidly deteriorate with no viable plan for future improvement.<sup>2</sup> In an effort to plug steep municipal budgets, many cities have been forced to enact debilitating cuts to redevelopment agencies, deeming such expenditures to be discretionary.<sup>3</sup>

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<sup>1</sup> Wendell E. Pritchett, *Beyond Kelo: Thinking about Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 905 (2006).

<sup>2</sup> Kevin Post, *Area Businesses Get Creative To Acquire Loans During Credit Crunch*, PRESS OF ATLANTIC CITY, Feb. 19, 2011, [http://www.pressofatlanticcity.com/business/area-businesses-get-creative-to-acquire-loans-during-credit-crunch/article\\_780fa9ac-3c9a-11e0-be77-001cc4c03286.html](http://www.pressofatlanticcity.com/business/area-businesses-get-creative-to-acquire-loans-during-credit-crunch/article_780fa9ac-3c9a-11e0-be77-001cc4c03286.html).

<sup>3</sup> Zusha Elinson, *Cutting Redevelopment Funds Could Affect A Lot More Than Redevelopment*, N.Y. TIMES, Jan. 27, 2011, <http://www.nytimes.com/2011/01/28/us/28bcredevelopment.html> (discussing that redevelopment funds cover many of the City of Oakland's expenses, including officers' and city council members' salaries).

Although many critics would like to shelve eminent domain because of its sordid history and potential for misuse, I argue that the trouble with eminent domain has been its principal players and not its theoretical roots.<sup>4</sup> When used as a mechanism for private developers to inexpensively seize desirable real estate, eminent domain achieves a result that is antithetical to its original purpose: to serve the public good. The hijacking of eminent domain by a select few has enabled politically connected business people to line their pockets, potentially to the detriment of lower-income communities.<sup>5</sup> If we retool the definition of blight and allow private universities to play a greater role, we can harness eminent domain as a way to restrain the spread of blight and increase the quality of life in our nation's urban core. By moving away from an overly-inclusive definition of blight that currently allows states to "replac(e) any Motel 6 with a Ritz-Carlton," we can guarantee that only truly blighted properties will be susceptible to eminent domain and we can ameliorate the justifiably negative public perception of eminent domain.<sup>6</sup>

Private universities often serve as the bedrock of our urban neighborhoods; they provide jobs, culture, innovation, and an assortment of trickle-down economic benefits.<sup>7</sup> These non-profit institutions usually boast robust endowments and a keen ability to fundraise: two essential building blocks for urban development in a precarious lending environment.<sup>8</sup> The introduction of private universities and colleges to eminent domain will allow institutions that are not driven by profit margins to improve the peripheral areas surrounding their campuses in a sustainable manner. Although eminent domain has garnered negative attention in recent years, the current economic situation calls for its increased use to help prevent the continuing decay of our nation's urban communities. By focusing on institutions whose fates are inherently intertwined with those of their surrounding

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<sup>4</sup> *Springer Calls for Protections Against Eminent Domain Abuses*, KIRKLAND REP., Jan. 27, 2011, [http://www.pnwlocalnews.com/east\\_king/kir/news/114759159.html](http://www.pnwlocalnews.com/east_king/kir/news/114759159.html) (proposing a statewide ban on eminent domain for private economic development).

<sup>5</sup> Pritchett, *supra* note 1, at 915 ("Developers restricted by zoning regulations and directed by economics, are looking to build where the market is right.").

<sup>6</sup> *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).

<sup>7</sup> Linda Wilson Fouco, *More Than Classes: Colleges Bring Jobs, Cultural Events, Ready Volunteers to Suburbs*, PITTSBURGH POST-GAZETTE, South ed., Oct. 21, 2010, at S-1.

<sup>8</sup> Pritchett, *supra* note 1, at 931.

environs, we can equip responsible establishments with the necessary tools to effectuate sensible urban development in their own backyard.<sup>9</sup>

## I. THE EXPANSION OF BLIGHT

The debate over the definition of the term blight has been a major sticking point in the advancement of eminent domain. Each state seems to concoct a different definition, awarding varying degrees of power to local officials to make final determinations over the future of a parcel of property.<sup>10</sup> Several different indicators of blight can be found in state statutes and court opinions: faulty planning, dilapidated buildings, building code violations, impaired investments, and failure to properly utilize an area.<sup>11</sup> Ultimately, the fear of eminent domain resides in its subjective nature; as a society we take little comfort in the notion that blight is an “I know it when I see it” determination that cannot fit neatly into state statutes.<sup>12</sup> Instead of trying to define blight *per se*, we are often relegated to listing its accompanying attributes, such as unsanitary housing or irregular configurations.<sup>13</sup> “Not only do most states lack any quantifiable baseline, such as household income, property value, or percentage of vacant buildings for the determination of blight, but there is also little sense as to whether such a baseline should reflect national, state, or local standards.”<sup>14</sup> This inevitably leads to a guessing game: one individual may categorize a neighborhood as blighted, while another may see it as a sustainable low-income community.

The marked expansion of the term blight to encompass areas that are not just dilapidated, but simply underutilized, has led to a public backlash against eminent domain.<sup>15</sup> Many believe that this gradual encroachment on property rights is a furtive attempt by elected officials to increase municipal tax receipts with the hollow promises of new jobs and economic revitalization.<sup>16</sup> In one instance, a

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

<sup>10</sup> Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 305–08 (2004).

<sup>11</sup> *See, e.g., Sweetwater Valley Civic Ass’n v. Nat’l City*, 555 P.2d 1099, 1101 (Cal. 1976).

<sup>12</sup> *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>13</sup> *Sweetwater Valley Civic Ass’n*, 555 P.2d at 1102.

<sup>14</sup> Gordon, *supra* note 10, at 320–21.

<sup>15</sup> *See generally* Nadia E. Nedzel, *Eminent Domain: A Legal and Economic Critique*, 7 *U. MD. L.J. RACE, RELIGION, GENDER & CLASS* 140 (2007).

<sup>16</sup> *Id.*

public golf course was determined to be blighted in hopes of redeveloping the land for a shopping center.<sup>17</sup> Although a golf course may not have held the highest utility for that particular plot of land, a local government should not make value determinations regarding the best possible use of land and then enforce those decisions with eminent domain as its primary weapon of choice.<sup>18</sup> The Supreme Court of California held that “a determination of blight be made—not on the basis of potential alternative use of the proposed area—but on the basis of the area’s existing use.”<sup>19</sup> This is an important declaration and one that should be echoed in the high courts of all states. To prevent the needless seizure of private property, we should implore our elected officials to make determinations on the current state of property and not on the dim possibility of a future project that may never come to fruition.<sup>20</sup>

Whenever a governmental body seeks to acquire land, it generally declares that the acquisition of said property is necessary for at least one of three purposes: job creation, economic development, or increased tax revenues.<sup>21</sup> Although such proclamations are not always inaccurate, they often cloud the judgment of our elected officials and muddy the waters of legality.<sup>22</sup> It is very possible that “legislative bodies, greedy for additional tax dollars will use indefensible methods to either cause areas to be blighted and then grant eminent domain taking powers simply to raise their tax base.”<sup>23</sup> We should never permit the infringement upon private property rights as a pretense for hollow promises of job creation.

The hallmark of a blighted area is usually the existence of substandard housing conditions.<sup>24</sup> The District of Columbia offered up the following conditions in its eminent domain statute: lack of sanitary facilities, overcrowding, faulty

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<sup>17</sup> *Sweetwater Valley Civic Ass’n*, 555 P.2d at 1100.

<sup>18</sup> *Id.* at 1103–04.

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

<sup>20</sup> Gordon, *supra* note 10, at 321–22 (“Blighting, in other words, is driven not by objective urban conditions, but by the prospect of private investment”).

<sup>21</sup> Marc Scribner, *This Land Ain’t Your Land; This Land Is My Land*, COMPETITIVE ENTER. INST. ONPOINT, 4–6 (Mar. 3, 2010), <http://cei.org/sites/default/files/Marc%20Scribner%20-%20This%20Land%20Ain't%20your%20Land.pdf>.

<sup>22</sup> *In re Fisher*, 730 N.Y.S. 516, 516–17 (N.Y. App. Div. 2001).

<sup>23</sup> Nedzel, *supra* note 15, at 150 (citing Richard A. Epstein, Kelo: *An American Original*, 8 GREEN BAG 355, 359–60 (2005)).

<sup>24</sup> *Sweetwater Valley Civic Ass’n*, 555 P.2d at 1101 n.3.

interior arrangement, lack of ventilation/light, *et alia*.<sup>25</sup> This is typically how we view eminent domain in the twenty-first century; gone are the days of great railroads connecting a continent or the need to construct vast stretches of utility lines. As the era of infrastructural development has subsided, eminent domain is now advanced as a means to correct societal ills and cushion tax rolls. “Rather than furthering a public benefit by appropriating property to *create* something needed in a place where it did not exist before, the appropriations power was used to *destroy* a threat to the public’s general welfare and well-being: slums and blighted or deteriorated property.”<sup>26</sup> Although this may seem inapposite to the American conceptualization of property rights, I argue that eminent domain is still necessary and is justified as a “traditional application of the police power to municipal affairs.”<sup>27</sup>

Private redevelopment of a piece of land or neighborhood would often be virtually impossible without government assistance.<sup>28</sup> Although the free market is still the greatest means to develop and redevelop land, there are times when state action is needed to jumpstart a community or a particular project. High courts throughout the country have recognized this reality; in *Berman v. Parker*, the United States Supreme Court corroborated a congressional finding, holding that in certain circumstances “[redevelopment] cannot be attained by the ordinary operations of private enterprise alone without public participation.”<sup>29</sup> In *Sweetwater Valley v. National City*, the Supreme Court of California declared that “in many such instances the private assembly of the land in blighted areas for redevelopment is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of lack of the legal power and excessive costs.”<sup>30</sup> Although government action is often necessary to see a project to fruition it also creates a potential for abuse.

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<sup>25</sup> *Berman v. Parker*, 348 U.S. 26, 28 n.1 (1954).

<sup>26</sup> *City of Norwood v. Horney*, 853 N.E.2d 1115, 1134 (Ohio 2006).

<sup>27</sup> *Berman*, 348 U.S. at 32.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.* at 29; *see also id.* at 35 (“If owner after owner were permitted to resist these redevelopment programs on the grounds that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.”).

<sup>30</sup> *Sweetwater Valley Civic Ass’n v. Nat’l City*, 555 P.2d 1099, 1022 n.4 (Cal. 1976) (quoting Cal. Health & Safety Code § 33036 (West 1963)).

In *Gallenthin Realty Development v. Borough of Paulsboro*, a sixty-three acre parcel of vacant wetlands was classified as “not fully productive” and subject to taking.<sup>31</sup> The Borough of Paulsboro thought the land would be better suited “as a nature center for tidal river appreciation or passive recreation use.”<sup>32</sup> Undoubtedly this was a noble cause, but these sorts of capricious classifications contribute to eminent domain’s paltry reputation. Eminent domain should not be used for nonessential development and the court in *Gallenthin* found this categorization of blight to stretch far beyond the limits imposed by the state legislature.<sup>33</sup> This balance warrants the use of eminent domain primarily when private action is rendered ineffective in the face of insurmountable difficulties associated with redevelopment. Thus, eminent domain’s societal benefit is not derived from finding the best possible use for a parcel of property, but in assuring that there is a government safety net when private options do not readily exist.

The lack of a private solution approach is supported by United States Supreme Court precedent. In *Hawaii Housing Authority v. Midkiff*, the Court confronted a land oligopoly that threatened the stability of the economic class, due to an abnormally dense concentration of land ownership.<sup>34</sup> On the island of Oahu, 22 landowners amassed over 72% of the fee simple titles.<sup>35</sup> The Supreme Court found the “perceived evil of concentrated property ownership”<sup>36</sup> to be against the best interests of the public. In doing so, the Supreme Court held that action to maintain tranquility or equality is within the bounds of a state’s police power and may be necessary when private action is not a viable option.<sup>37</sup>

The Supreme Court applied the “rationally-related” standard of review in *Midkiff*; a relatively low threshold for a legislature to reach.<sup>38</sup> By handcuffing itself to such a diminished level of review, the Court failed to avail itself of a useful

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<sup>31</sup> *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 451 (N.J. 2007).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 464–65 (“Although community redevelopment is an important municipal power, that authority is not unfettered. Our constitution restricts government redevelopment to ‘blighted areas’ . . . That limitation reflects the will of the People regarding the appropriate balance between municipal redevelopment and property owners’ rights.”) (internal citation omitted).

<sup>34</sup> *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

<sup>35</sup> *Id.* at 232.

<sup>36</sup> *Id.* at 245.

<sup>37</sup> *See id.* at 242; *see also* *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>38</sup> *Midkiff*, 467 U.S. at 240–41.

means to curtail governmental abuses of power. Arguably, a higher standard of review would restrain misguided public officials and provide a level of security to a general public unaware of the intricacies of eminent domain. In both *Berman* and *Midkiff*, the Court indicated that it has a role in reviewing the eminent domain decisions of a legislature; but as a police power, the Court must afford great deference to the states.<sup>39</sup> Although the Court's use of judicial restraint is usually embraced, a higher level of scrutiny should be employed to ensure that state legislatures do not have *carte blanche* to enact takings whenever they please. Therefore, when the City of Long Beach declares vacant oceanfront land condemnable under the guise of urban renewal, a court should be able to fully review the decision and not simply resign itself to an arbitrary or capricious determination.<sup>40</sup>

Irrespective of the courts role in policing eminent domain, the first line of defense against misuse needs to reside in the statutory definition of blight. This would help prevent a golf course from ever finding itself amidst the ranks of dilapidated houses and abandoned row homes on the municipal chopping block for redevelopment.<sup>41</sup> In *Gallenthin*, the Supreme Court of New Jersey offered a scathing admonishment of blight's ever-expanding definition, "if such an all-encompassing definition of 'blight' were adopted, most property in the State would be eligible for redevelopment."<sup>42</sup> The Supreme Court of New Jersey then proposed a refined definition of blight that is more aligned with our societal connotations of the term, "deterioration or stagnation that negatively affects surrounding properties."<sup>43</sup> The high courts of all fifty states should heed this call and discontinue the rubber-stamping of statutes that give blight an overly expansive definition. If not, eminent domain will continue to rest upon a shaky legal foundation and the future of the doctrine will be just as convoluted as the past.

State legislatures should revisit their eminent domain statutes to ensure they do not define blight in overly broad terms nor grant local officials with extra-constitutional powers. Instead, these statutes must reflect our society's true understanding of blight. The state most certainly possesses the right of eminent domain, but it should be wielded like a scalpel and not a hammer. Eminent domain

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<sup>39</sup> *Id.*; *Berman*, 348 U.S. at 32.

<sup>40</sup> *Haberman v. City of Long Beach*, 762 N.Y.S.2d 425, 427 (N.Y. App. Div. 2003).

<sup>41</sup> *See Sweetwater Valley Civic Ass'n v. Nat'l City*, 555 P.2d 1099 (Cal. 1976).

<sup>42</sup> *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007).

<sup>43</sup> *Id.* at 459.



must rest gracefully on the scales of justice—always counterbalanced with the rights of individual property owners. The failure to rein in the ever-expanding definition of blight will impede eminent domain from its highest possible use: the redevelopment of neighborhoods that stand no chance of survival if left only to the whims of the free market.

## II. THE DANGER OF BLIGHT

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.<sup>44</sup>

Although the statutory definition of blight has gradually expanded throughout the past century, true blight is an extremely dangerous force that requires constant attention.<sup>45</sup> In many cities, once-thriving neighborhoods have given way to vacant row homes and abandoned storefronts.<sup>46</sup> Blight often has a domino effect on a community as its presence can wreak havoc on the value of neighboring real estate and the existence of a mere handful of abandoned properties can quickly cause a whole neighborhood to deteriorate precipitously.<sup>47</sup>

The buildings are eyesores that raise the risk of fires and structural collapses, encourage criminal activity, reduce the attractiveness of neighborhoods to potential buyers and lower property values. They're also the greatest source of urban blight, sucking the life out of communities and making every other social and economic reconstruction task there more difficult.<sup>48</sup>

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<sup>44</sup> *Berman*, 348 U.S. at 32–33.

<sup>45</sup> Gordon, *supra* note 10, at 308–14 (presenting a detailed history on the evolving definition of blight).

<sup>46</sup> Editorial, *Neighborhood Eyesores*, BALTIMORE SUN, Oct. 25, 2010, [http://articles.baltimoresun.com/2010-10-25/news/bs-ed-vacant-houses-20101025\\_1\\_neighborhood-eyesores-vacant-lots-dilapidated-structures](http://articles.baltimoresun.com/2010-10-25/news/bs-ed-vacant-houses-20101025_1_neighborhood-eyesores-vacant-lots-dilapidated-structures).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

Blight has long been an issue for our nation's cities but the recent financial downturn has exacerbated the problem.<sup>49</sup> The foreclosure epidemic has created a Sisyphean struggle as cities attempt to combat the expanse of blight with dwindling resources.<sup>50</sup> This economic decline has chilled urban real estate markets as prospective developers and home buyers are naturally reticent to invest in an unstable area. "Such conditions of blight tend to further obsolescence, deterioration, and disuse because of the lack of incentive to the individual landowner and his inability to improve, modernize, or rehabilitate his property while the condition of the neighboring properties remains unchanged."<sup>51</sup>

Blight also promotes an extremely negative psychological perception of community. Many criminologists believe that the presence of blight can lead to increases in crime and violence in a community.<sup>52</sup> In the seminal article *Broken Windows*, James Wilson and George Kelling describe how a healthy community can quickly fall into disarray.<sup>53</sup>

We suggest that "untended" behavior also leads to the breakdown of community controls. A stable neighborhood of families who care for their homes, mind each other's children, and confidently frown on unwanted intruders can change, in a few years or even a few months, to an inhospitable and frightening jungle. A piece of property is abandoned, weeds grow up, a window is smashed. Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out, unattached adults move in. Teenagers gather in front of the corner store. The merchant asks them to move; they refuse. Fights occur. Litter accumulates. People start drinking in front of the grocery; in time, an inebriate slumps to the sidewalk and is allowed to sleep it off. Pedestrians are approached by panhandlers.

At this point it is not inevitable that serious crime will flourish or violent attacks on strangers will occur. But many residents will think that crime, especially violent crime, is on the rise, and they will modify their behavior

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<sup>49</sup> Scott Johnson, *Oakland Council Members, Activists Blast Banks for Blight*, OAKLAND TRIB., Feb. 20, 2011, [http://www.insidebayarea.com/ci\\_17427273?IADID=Search-www.insidebayarea.com-www.insidebayarea.com](http://www.insidebayarea.com/ci_17427273?IADID=Search-www.insidebayarea.com-www.insidebayarea.com).

<sup>50</sup> Chana Joffe-Walt, *A Shrinking City Knocks Down Neighborhoods*, NAT'L PUB. RADIO (Mar. 15, 2011, 12:01 AM), <http://www.npr.org/blogs/money/2011/03/15/134432054/a-shrinking-city-knocks-down-neighborhoods>.

<sup>51</sup> *Sweetwater Valley Civic Ass'n v. Nat'l City*, 555 P.2d 1099, 1101 n.4 (Cal. 1976).

<sup>52</sup> See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

<sup>53</sup> See *id.*

accordingly. They will use the streets less often, and when on the streets will stay apart from their fellows, moving with averted eyes, silent lips, and hurried steps. “Don’t get involved.” For some residents, this growing atomization will matter little, because the neighborhood is not their “home” but “the place where they live.” Their interests are elsewhere; they are cosmopolitans. But it will matter greatly to other people, whose lives derive meaning and satisfaction from local attachments rather than worldly involvement; for them, the neighborhood will cease to exist except for a few reliable friends whom they arrange to meet. Such an area is vulnerable to criminal invasion.<sup>54</sup>

The recent economic downturn has added to the vulnerability of our urban neighborhoods and has accelerated the decay process. This dire situation calls for a paradigm shift; if private developers are unable to secure financial backing for new projects, private universities could help shoulder the burden by removing blighted properties surrounding their campuses. The removal of these troubled properties would encourage private development and help attract prospective homebuyers to the community.

### III. THE PUBLIC GOOD

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.<sup>55</sup>

The question of what precisely constitutes “the public good” is hotly contested. The nebulous nature of this term has helped contribute to the public’s negative perception of eminent domain. Although the United States Supreme Court has permitted property transfers directly from private individuals to private corporations in the name of “the public good,” many legal theorists and members of the general public perceive takings of this nature to be *per se* unconstitutional.<sup>56</sup> A sharply divided United States Supreme Court validated the aforementioned big three as worthy objectives of “the public good”: job creation, economic development, and increased tax revenues.<sup>57</sup> Several Supreme Court justices, most

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<sup>54</sup> *Id.* at 31–32.

<sup>55</sup> U.S. CONST. amend. V.

<sup>56</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005). But see Editorial, *Eminent Latitude*, WASH. POST, June 24, 2005, at A30.

<sup>57</sup> *Kelo*, 545 U.S. at 472.

notably Antonin Scalia and Clarence Thomas, believe that these “remote public benefits” are not enough to justify the use of eminent domain.<sup>58</sup>

The battle over the definition of “the public good” finally came to a head in 2005 with the now infamous Supreme Court case of *Kelo v. New London*.<sup>59</sup> In *Kelo*, a working class neighborhood was to be condemned and then handed over to Pfizer, in the name of economic development, with the hope that the company would develop a corporate site.<sup>60</sup> The *Kelo* case quickly became water-cooler talk and fodder for politicians who lamented the expansion of eminent domain and feared that the delicate balance between property rights and “the public good” had been irretrievably lost.<sup>61</sup>

In a rush to score political points with a frustrated voting bloc, over two dozen states quickly pushed through legislation banning economic development as a rationale for the public good requirement.<sup>62</sup> This rush to legislation was ill-conceived, as eliminating the economic development rationale was simply hacking at the branches and not attacking the root of eminent domain’s problem.<sup>63</sup> The true genesis of the problem was the over-inclusive definition of blight that was large enough to capture New London in its net: a low-income community that was by no means blighted.<sup>64</sup> Unfortunately, the *Kelo* decision resulted in the demonization of economic development; it was portrayed as risky social experimentation that threatened individual property rights. This portrayal is simply not the case; economic development is needed more than ever, and without eminent domain, truly blighted communities will continue to founder for years to come.

In *Kelo*, private property was immediately deeded over to another private group, the Pfizer Corporation.<sup>65</sup> Although it is within the legal confines of eminent domain to directly deed land to another private individual so long as that party utilizes that land for “the public good,” the swap in *Kelo* left many with a bad taste

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<sup>58</sup> Nedzel, *supra* note 15, at 148 (citing *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting)).

<sup>59</sup> *Kelo*, 545 U.S. at 469.

<sup>60</sup> *Id.*

<sup>61</sup> Nedzel, *supra* note 15, at 150.

<sup>62</sup> *Id.*

<sup>63</sup> See HENRY DAVID THOREAU, WALDEN 73 (Jeffrey S. Cramer ed., 2004) (“There are a thousand hacking at the branches of evil to one who is striking at the root.”).

<sup>64</sup> Editorial, *supra* note 56.

<sup>65</sup> *Kelo*, 545 U.S. at 469.

in their mouths, as it appeared to most observers that the taking was not effectuated with the true interests of New London or its long-time residents in mind.<sup>66</sup>

#### IV. THE PRIVATE UNIVERSITY

The answer for how to effectively utilize eminent domain in the twenty-first century may be to engage private colleges and universities in the process. To mitigate fears of transferring private land directly to another private citizen, a legislature could utilize non-profit private universities as a proxy to help develop blighted neighborhoods. Private universities have stepped into the foray of eminent domain in the past, but they have not always been greeted receptively by courts. In *University of Southern California v. Robbins*, USC sought to use eminent domain to acquire property that bordered its new library.<sup>67</sup> The goal was to increase access to the library and to beautify the surrounding locale.<sup>68</sup> The California Court of Appeals wrestled with the notion of the public good but ultimately held that “the higher education of youth in its largest implications is recognized as a most important public use, vitally essential to our governmental health and purposes.”<sup>69</sup> This holding was a crucial building block for private universities in the field of eminent domain, as the California Court of Appeals did not differentiate between public and private universities when it declared higher education to be a vital public use.<sup>70</sup>

The court also dismissed the farfetched argument that USC might amend its articles of incorporation in a way that would prevent the public from enjoying the benefits of the land.<sup>71</sup> The decision found these fears not supported by the weight of the evidence, especially considering USC’s esteemed reputation and history.<sup>72</sup> The court also reiterated the United States Supreme Court decision in *Fallbrook Irrigation District v. Bradley*, of significance because it suggests that private universities may benefit from eminent domain actions despite the fact they are not mandated to admit a predetermined percentage of state residents, and it is entirely

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<sup>66</sup> Editorial, *supra* note 56.

<sup>67</sup> *Univ. of S. Cal. v. Robbins*, 37 P.2d 163, 164 (Cal. Ct. App. 1934).

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

<sup>69</sup> *Id.* at 165.

<sup>70</sup> *See id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

possible that the majority of faculty members and students could be non-residents.<sup>73</sup>

Universities have often been pivotal in shaping their respective cities in the 20th century, notably in Philadelphia, Chicago, and New York.<sup>74</sup> University neighborhoods, like most urban communities, were not immune from decline and many administrators feared that deteriorating neighborhoods surrounding a campus would disparately impact the school's ability to attract top students.<sup>75</sup> Several prestigious universities enlisted urban renewal programs as means to raze blighted properties in an effort to buttress the boundaries of their campuses.<sup>76</sup> Although this strategy was successful in stabilizing the peripheries of campuses, the consequence was the displacement of minority residents who were viewed as a threat to the preservation of the university community.<sup>77</sup>

Although universities have had a dubious history with eminent domain, we should not let past acts of subterfuge taint future development. Private universities are often the cornerstone of a city neighborhood and provide countless benefits to their surrounding communities.<sup>78</sup> Although residents who are unaffiliated with a university may view the student population as parasitic, universities often form a symbiotic relationship with their surrounding neighborhoods by helping to sustain numerous local businesses.<sup>79</sup> Furthermore, colleges and universities provide far more than “remote benefits” to a community; they “offer a veritable smorgasbord of events and activities that are open to the public at rates that range from free to discount, including theater performances, concerts, speakers and other cultural events.”<sup>80</sup> Many colleges even require students to do community service, or allow their students to earn credits by helping in the local community.<sup>81</sup> “Institutions of higher learning have a big impact—financially, culturally and socially—on the

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<sup>73</sup> *See id.* at 165–67 (“It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use.”).

<sup>74</sup> Pritchett, *supra* note 1, at 929.

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

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 930.

<sup>78</sup> *Id.* at 931.

<sup>79</sup> *Id.* at 930.

<sup>80</sup> Fouco, *supra* note 7.

<sup>81</sup> *Id.*

communities where they are located.”<sup>82</sup> Ultimately, our nation’s private colleges and universities contribute greatly to the desirability of their surrounding communities.

Although past attempts at neighborhood reconstruction were marked by a lack of community involvement, several universities have started to elicit input from concerned citizens before embarking on development projects.<sup>83</sup> This coordination has helped to ensure that urban renewal is achieved with the voices of the community in mind.<sup>84</sup> Even though initial development was short-sighted and completely university-centric, schools are becoming increasingly cognizant of the communities around them and have focused on long-term stability for the neighborhood as a whole, not just short-term gains for the university.<sup>85</sup> It has been said that “universities have deep, almost unbreakable ties to their communities”<sup>86</sup> as many schools will look to their neighborhood as a way to mold and shape their own identity; fully aware that when a student chooses a university, the aesthetic value and livability of the neighborhood often weighs as heavily as the institution’s academic reputation.

To strengthen this integral relationship between neighborhoods and universities, and to combat urban blight in the process, the doctrine of eminent domain should be expanded to include our nation’s private colleges and universities. The combination of robust endowments, aesthetic aspirations, and a perpetually replenishing student population make universities prime candidates to help rejuvenate our nation’s urban neighborhoods. Although “town and gown” conflicts will always arise, universities possess a key ingredient that no developer can claim: a longstanding bond to a community that won’t expire at the end of a leasehold term.

While politically connected real estate developers often unilaterally reap the benefits of eminent domain, communities are usually left out in the dark and play no role in the decision-making process. The illusion of urban renewal that is sold to communities can be even more deflating than the reality of stagnation where negative cycles of “build and tear down projects” offer little in the way of jobs or increased opportunities for members of the local community. However, if we

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

<sup>83</sup> Pritchett, *supra* note 1, at 931.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 931–32.

<sup>86</sup> *Id.* at 932.

allowed private universities to take the reins with eminent domain, sustainable urban development could be achievable. If private universities could acquire blighted land, forgotten neighborhoods could be restored, and the general public could rest assured that, because the universities are not-for-profit educational institutions, public property would not be deeded over to profit-seekers in search of cheap real estate.

In light of the current economic downturn, university development of blighted land is a more viable option than reliance on private developers. Navigating the murky waters of lending institutions and relying upon private firms to fund large projects has becoming increasingly complicated and lends itself to corruption and cronyism. The sluggish economy has made it exceedingly difficult for developers to raise enough capital to finance new projects; while university endowments, though weakened by the current market, remain economically secure with more than fifty colleges and universities boasting endowments of over one billion dollars.<sup>87</sup>

## V. COLUMBIA UNIVERSITY'S EXPANSION: A CAUTIONARY TALE

In 2001, Columbia University, one of our nation's most prestigious private institutions, decided that it wanted to develop a new campus in the Manhattanville area of West Harlem.<sup>88</sup> Columbia sought to build upwards of 6.8 million gross square feet by constructing 16 new buildings and modifying several existing properties as part of the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project (the Project).<sup>89</sup> The endeavor was estimated to cost \$6.28 billion, with Columbia supplying one hundred percent of the funds; thus, no municipal entity was asked to contribute or subsidize the development of the new campus.<sup>90</sup>

To begin such a massive endeavor, Columbia enlisted help from the New York City Economic Development Corporation (NYEDC), which crafted a plan for redevelopment.<sup>91</sup> In total, there were 67 lots that Columbia sought to acquire for

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<sup>87</sup> Eric Gorski, *College Endowments Rebound After Bleak Period*, ASSOCIATED PRESS, Jan. 27, 2011, available at 1/27/11 AP DataStream 05:01:49 (Westlaw).

<sup>88</sup> *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 11 (N.Y. App. Div. 2009), *rev'd*, 907 N.Y.S.2d 122 (N.Y. 2010).

<sup>89</sup> *Id.* at 11–12.

<sup>90</sup> *Id.* at 12.

<sup>91</sup> *Id.*



the Project, and by October 2003, Columbia had gained control of fifty-one percent of the lots.<sup>92</sup> In 2004, Columbia and several groups began working on environmental impact statements.<sup>93</sup> The NYEDC then released a study in which they declared the area to be blighted.<sup>94</sup> After several other impact statements and studies were conducted, a public hearing was held by the City Council in December of 2007, and shortly thereafter the decision was made to rezone 35 acres of West Harlem; an area that included the Project site.<sup>95</sup>

In December of 2008, the Empire State Development Corporation (ESDC) authorized the acquisition of the property for the Project.<sup>96</sup> This prompted several local businesses to file suit challenging the determination of the ESDC.<sup>97</sup> When the New York Supreme Court rendered its decision, it found the blight designation to be “mere sophistry,” and expressed concern at the manner in which Columbia, almost unilaterally, embarked upon a crusade to have the land designated as blighted.<sup>98</sup>

Rather than the identity of the ultimate private beneficiary being unknown at the time that the redevelopment scheme was initially contemplated, the ultimate 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. . . .<sup>99</sup>

The New York Supreme Court also found that the proposed expansion project did not satisfy the public use requirement.<sup>100</sup> Therefore, the court found the public

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 13.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 15.

<sup>98</sup> *Id.* at 16.

<sup>99</sup> *Id.* at 20.

<sup>100</sup> *Id.* at 23 (“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.”).

benefits to be “incrementally incidental to the private benefits of the Project”<sup>101</sup> and cited both *University of Southern California v. Robbins* and *Board of Education v. Pace College* in holding that not enough precedent existed to consider a private institution’s expansion a public benefit.<sup>102</sup>

The New York Supreme Court’s decision was subsequently overturned by the New York Court of Appeals which found the blight determination to be rationally based and, consequently, it held that the determination should have been awarded greater deference.<sup>103</sup> The New York Court of Appeals found the lower court’s *de novo* review to be improper and strongly disagreed with the assertion that the Project would produce only illusory public benefits.<sup>104</sup>

The plurality at the Appellate Division held that the expansion of a private university does not qualify as a “civic purpose.” This conclusion does not have statutory support. Indeed, there is nothing in the statutory language limiting a proposed educational project to public educational institutions. In fact, the UDC Act encourages participation in projects by private entities . . . Columbia University, though private, operates as a nonprofit educational corporation. Thus, the concern that a private enterprise will be profiting through eminent domain is not present. Rather, the purpose of the Project is unquestionably to promote education and academic research while providing public benefits to the local community. Indeed, the advancement of higher education is the quintessential example of a “civic purpose.”<sup>105</sup>

The New York Court of Appeals proceeded to enumerate other public benefits that would positively impact the community, including a two-acre gateless public park; an open-air market; infrastructural upgrades; a stimulation in job growth;<sup>106</sup> and countless cultural and educational benefits.<sup>107</sup> This was a profound

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<sup>101</sup> *Id.* at 24.

<sup>102</sup> *Id.* at 24–25 (arguing that the decision in *Board of Education v. Pace College* is contrary to the respondent’s argument).

<sup>103</sup> *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 733 (N.Y. 2010), *cert. denied sub nom*, *Tuck-It Away, Inc. v. N.Y. State Urban Dev. Corp.*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 822 (2010).

<sup>104</sup> *Id.* at 731.

<sup>105</sup> *Id.* at 733–34.

<sup>106</sup> The court’s findings indicated an estimated 14,000 construction jobs and 6,000 permanent employees would result from the plan. *Id.*

<sup>107</sup> *Id.* at 734–35.

statement by the court as it unequivocally affirmed the role of private universities in the field of eminent domain and laid a solid foundation for other schools to employ this powerful tool in the future.

The United States Supreme Court's decision to deny *certiorari* for the landowners<sup>108</sup> leaves the door open for private universities to utilize eminent domain. As a result, we will undoubtedly see schools dip their toes in the water to test the legal climate. Once a critical mass is reached, the United States Supreme Court may be unable to avoid the matter, especially if the circuit courts disagree as to a private university's ability to provide public benefits. Invariably, future legal battles will be waged as courts attempt to refine and retool the role of private universities within eminent domain; however, for the time being New York State has extended an open invitation to private universities with plans for expansion.

Although Columbia University's Project was ultimately successful, its actions should serve as a cautionary tale for other private colleges and universities. If a private university plays the role of aggressive developer, they may encounter hostility from both courts of justice and the court of public opinion. Columbia, through a series of forceful and calculated maneuvers, was able to accomplish its goal of expansion with the Project. But in the process, it suffered a publicity nightmare and fanned the flames of public frustration with eminent domain.<sup>109</sup> The public did not believe the Project to be in the best interests of the community and instead perceived Columbia as a self-interested institution looking to expand cheaply at the expense of a low-income neighborhood that was merely underutilized.

This public relations failure is precisely the problem that has prevented most private colleges and universities from utilizing eminent domain. A publicity nightmare could upset a school's financial backers and may alarm potential applicants. Nevertheless, private universities need not be dismayed by the fiasco that ensued from the Project, and can instead learn from Columbia's missteps. If a private university is interested in employing eminent domain as part of an effort to expand its borders or revitalize a surrounding neighborhood, it should proceed through the proper legislative channels from the inception. The university should

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<sup>108</sup> *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 822 (2010).

<sup>109</sup> *Dozens Rally Against Columbia Expansion*, THE REAL DEAL (Mar. 9, 2011, 1:43 PM), <http://therealdeal.com/newyork/articles/dozens-rally-against-lack-of-jobs-created-by-columbia-university-expansion-plan>.

also ensure that the organizations which author the environmental impact statements and the neighborhood analyses are free from university influence.<sup>110</sup>

Columbia acquired a number of properties and then labored to have the neighborhood deemed blighted as a way to acquire the remaining non-Columbia owned parcels.<sup>111</sup> Columbia appeared to consider it a foregone conclusion that once they held enough spots on the checkerboard, the whole of the neighborhood would be secured for the Project. That brand of conceit did not resonate well with the public and Columbia's bruised reputation may deter other private universities from utilizing eminent domain.<sup>112</sup> The lesson other universities should heed from the Project is that as long as you do not portray yourself as an overzealous developer, you will not be perceived as such.

Instead of following the Columbia University approach, institutions should look to Howard University and the University of Minnesota as models for sensible urban development. When Howard wanted to revitalize the LeDroit Park neighborhood in Washington D.C., it teamed up with local groups to ensure that the whole community played a role in the revitalization process.<sup>113</sup> The University of Minnesota includes representatives from the community as well and requires each project to undergo a Neighborhood Impact Assessment; part of this requirement includes making the plan available to the public and allowing for alternative plans to be discussed.<sup>114</sup>

Universities may also sit on the sidelines due to fear of costly litigation. Because the role of the private university within the field of eminent domain still resides in a legal haze, each attempt at development will inevitably lead to legal action from the affected landowners. Even if the university is ultimately successful, the prospect of being embroiled in seemingly endless litigation is a deterrent because negative headlines and round after round of legal battles may damage the institution's reputation.

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<sup>110</sup> *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 21 (N.Y. App. Div. 2009), *rev'd*, 907 N.Y.S.2d 122 (N.Y. 2010).

<sup>111</sup> *Id.* at 11–12.

<sup>112</sup> *Kaur*, 907 N.Y.S.2d at 132.

<sup>113</sup> Pritchett, *supra* note 1, at 931.

<sup>114</sup> *Id.* at 932.

## VI. NEGATIVES TO PRIVATE UNIVERSITIES EMPLOYING EMINENT DOMAIN

There can be little doubt that blight removal and economic development condemnation disproportionately impact already marginalized groups, including tenants, the elderly, persons of low-income, and racial and ethnic minorities. Condemnees who belong to “discrete and insular minorities,” as well as other disadvantaged groups, are not only marginalized in the political processes surrounding redevelopment projects, they are also confronted with especially severe impacts from displacement.<sup>115</sup>

Eminent domain has a long and sordid history of displacing minorities and working-class families, it has been used in racially offensive ways, and its unintended consequences have often been far worse than the societal ills it had sought to rectify.<sup>116</sup> Those who are fearful of expanding its use are not without justification; if we want to extend eminent domain to include private colleges and universities, we must be extremely careful to limit its scope and to ensure that its application benefits the entire community.

Unfortunately, there will be universities who attempt to utilize eminent domain in a self-interested fashion. These institutions will do so as a means to subsidize their own expansion, uninterested in the potential ramifications of their actions. Although it may be hard to identify these objectionable actors, they must be admonished swiftly. Hopefully, between an internal administrative system of checks and balances, a dedicated board of visitors, and an informed student body, these misdeeds will be few and far between. We must not burn down the haystack in fear of the solitary needle and thus we should not let those who seek to use eminent domain in a self-interested manner inhibit those who wish to improve their neighborhoods.

Ultimately, private universities will not employ eminent domain solely to combat blight; universities are not charity developers, nor should they try to conduct themselves as such. Even if the sole intent of a university is to beautify a few properties adjacent to campus, this seemingly insignificant deed could have a

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<sup>115</sup> Brief of Amicus Curiae State Sen. Bill Perkins at 7, *Tuck-It-Away v. N.Y. State Urban Dev. Corp.*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 822 (2010) (No. 10-402), 2010 WL 4255035.

<sup>116</sup> Dick M. Carpenter II & John K. Ross, *Victimizing The Vulnerable: The Demographics of Eminent Domain Abuse*, INST. FOR JUST. (June 2007), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/Victimizing\\_the\\_Vulnerable.pdf](http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf).

ripple effect in the community. Still, the doctrine of eminent domain should not be invoked liberally. It should be practiced in moderation, as a means to initiate development when private funds are unavailable and when a university's expansion could translate into viable economic gains for a struggling neighborhood.