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Not in My Atlantic Yards: Examining Netroots' Role in Eminent Domain Reform

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NOTES

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INTRODUCTION

> *"WE OPPOSE the anti-democratic process that Forest City Ratner has used, and continues to use, to push its arena and skyscraper development plan on the people of Brooklyn without our input or consent."*
>
> —Develop Don't Destroy Brooklyn, online position statement[1]

Since the Supreme Court's decision in *Kelo v. City of New London*,[2] which expanded the state's power to condemn private property and transfer it to other private owners under the Fifth Amendment, there have been significant calls to curb the power of eminent domain through statutory reform.[3] Scholars and jurists in favor of eminent domain reform have asserted that legislation is needed to protect private property rights against the rising tide of state power,[4] with many arguing that such reform should incorporate a public approval process into land use decisions.[5] Those opposed to eminent-domain reform argue that empowering the public in land use decisions is an imperfect process that slows development.[6] This Note asserts that incorporating public approval into the eminent-domain process need not come at the cost of expediency. Rather, thanks to advances in technology, a public empowered by statutory

1. *See About DDDB*, DEVELOP DON'T DESTROY BROOKLYN, http://www.dddb.net/php/position.php (last visited Jan. 10, 2011).

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

3. *See* Ilya Somin, *Post-*Kelo *America: Assessing the Progress of Eminent Domain Reform*, REASON, (Apr. 20, 2007), *available at* http://reason.com/archives/2007/04/20/post-kelo-america (explaining that while reform was expected, and significant statutory enactments have occurred, more reform is needed).

4. *See id.* (referencing Judge Richard Posner and professor–author Ilya Somin's scholarship encouraging statutory reform in response to *Kelo*).

5. *See* David A. Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, 32 VT. L. REV. 129, 138 n.24 (2007).

6. *Id.* at 141 n.32.

reform can couple with grassroots Internet political activism—a concept popularly dubbed as "netroots"[7]—to create a new and more efficient approach to traditionally ineffective public forums.

This Note uses the Atlantic Yards project as a case study in post-*Kelo* use of eminent domain. Part I will outline the role of *Kelo* in reshaping the debate around eminent domain. Part II will examine the history and controversy surrounding Atlantic Yards and illustrate how, despite significant Internet-facilitated community activism, the absence of a legal mechanism prevented landowners from affecting any change in the outcome of Forest City Ratner's $4.9 billion commercial and residential development plan in Brooklyn, New York. Finally, Part III will look at traditional methods for public forums in land use and propose a new format to elicit and accommodate public participation in land use decisions. It will argue that advances in technology and the proliferation of the Internet have increased community connectivity, involvement, and transparency and can be used to streamline the public-hearing process. Statutory reform that incorporates these advances can appease both sides of the eminent domain reform debate and create a more efficient and democratic system of land use.

I. A BRIEF HISTORY OF *KELO* AND THE BATTLE OVER EMINENT DOMAIN REFORM

A. THE *KELO* DECISION

It was the start of a new millennium, and the city of New London, Connecticut, a sleepy colonial seaport of fewer than 24,000 people, was suffering.[8] Less than two centuries before, New London had prospered as the second-busiest whaling port in the United States.[9] Now its unemployment rate was nearly double that of greater Connecticut,[10] with twelve percent of its population living below the poverty line.[11] In 1997, attempting to spur economic development and revitalize the city, state and local officials reactivated the New London Development Corporation (NLDC), a private, nonprofit group that had been founded a few years earlier to help city officials with land use planning.[12] Just a month after the state pledged over $5 million in bonds for NLDC's planning and $10 million in bonds for land acquisition to develop New London, Pfizer announced plans to build a $300 million research facility in the city.[13] Pfizer

7. William Safire, *On Language: Netroots*, N.Y. TIMES, Nov. 19, 2006, at E26.

8. Kelo v. City of New London, 545 U.S. 469, 473 (2005).

9. Robert Owen Decker, *Connecticut Whaling*, CONNECTICUT'S HERITAGE GATEWAY, http://www.ctheritage.org/encyclopedia/topicalsurveys/whaling.htm (last visited Apr. 14, 2011).

10. *Kelo*, 545 U.S. at 473.

11. American FactFinder, U.S. CENSUS BUREAU, http://factfinder.census.gov/home/saff/main.html?_lang=en (enter "New London" and "Connecticut" in the "Get a Fact Sheet for your community" box; click "Go"; select "New London County, Connecticut"; click on the "2000" tab; browse to "Individuals below poverty line") (last visited July 23, 2011).

12. *Kelo*, 545 U.S. at 473.

13. *Id.*

planned construction next to Fort Trumbull, a particularly distressed area of the city that had formerly housed a naval facility.[14]

Energized over the new jobs and commerce Pfizer's presence could create, NLDC worked to create a development plan that would capitalize on the new facility.[15] The plan, which split the Fort Trumbull area into seven parcels, each with its own development designation, was approved by the city council in January 2000.[16] The city council also named NLDC as its development agent and authorized NLDC to purchase or acquire property through the use of eminent domain.[17] Though most of the real estate necessary for the development was acquired through negotiation, a group of seven homeowners in the area refused to sell, forcing NLDC to resort to eminent domain in order to carry out the project.[18]

The power of a state to seize private land under eminent domain arises from the Takings Clause of the Fifth Amendment to the U.S. Constitution,[19] which provides: "nor shall private property be taken for public use, without just compensation."[20] But precisely what constitutes a "public use"—justifying the exercise of eminent domain—is unclear. Though generally understood to encompass public-works projects like highways or public buildings,[21] in 1954 the U.S. Supreme Court expanded the concept of public use to include the removal of "blighting factors or causes of blight" for urban redevelopment.[22] Almost fifty years later, it seemed to many that New London's condemnation of unblighted homes to aid a private developer symbolized a growing trend of a more expansive definition of "public use" being used to justify eminent domain throughout the country.[23] Once reserved for clearing land for public projects such as schools and parks, or removing blighted areas such as slums, local governments were "increasingly finding it convenient" to use the power of eminent domain to make way for private economic development.[24]

For the homeowners in New London, the city's condemnation of their unblighted homes to aid a private developer flouted even the most generous definition of the "public use" requirement. Led by named petitioner Susette Kelo, they brought an action in New London Superior Court in December 2000

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14. *Id.*

15. *Id.* at 474.

16. *Id.* at 474–75. Before final approval by the city council, NLDC also received state-level approval and held "neighborhood meetings to educate the public" about the planned development. *Id.* at 473.

17. *Id.* at 475.

18. *Id.*

19. *See* Dana, *supra* note 5, at 129 n.1.

20. U.S. CONST. amend V.

21. Linda Greenhouse, *Justices Will Hear Property a Rights Case Contesting the Limits of Eminent Domain*, N.Y. TIMES, Sept. 19, 2004, at A21.

22. Berman v. Parker, 384 U.S. 26, 29 (1954) (citation omitted).

23. David Caillies, *Phoenix Rising: The Rebirth of Public Use, in* EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 49, 49–50 (Dwight H. Merriam & Mary Massaron Ross eds., 2006); Greenhouse, *supra* note 21.

24. *See* Greenhouse, *supra* note 21.

to halt the use of eminent domain on their properties.[25] Kelo and the other petitioners argued that without blight, New London's exercise of eminent domain was simply the use of state power to transfer property from one private owner to another. In its defense, the city argued for a broader interpretation of "public use"—one not limited to blighted properties—citing a legislative determination in state municipal statutes that condoned the taking of land for economic development.[26]

After an unsuccessful battle in the Connecticut courts, Kelo took her case to the U.S. Supreme Court.[27] In a 5–4 decision, the Court upheld the City of New London's use of eminent domain to promote economic redevelopment.[28] Justice Stevens, writing for the Court, concluded that "[p]romoting economic development is a traditional and long-accepted function of government."[29] In a strong dissent, Justice O'Connor warned that the decision would allow governments to replace "any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[30] In a separate concurrence, Justice Kennedy seemed to strike a balance between Stevens's sweeping definition of public use and O'Connor's foreboding words, broadly addressing potential future applications of the case to define public use.[31]

B. BACKLASH TO *KELO* AND THE DEBATE OVER EMINENT DOMAIN

Though conservatives and libertarians had traditionally fought against the expansive use of eminent domain, the Court's holding in *Kelo* was decried from all sides of the political spectrum with calls for statutory reform.[32] In Congress, Representative Maxine Waters, a California Democrat, formed an unlikely alliance with then-House Majority Leader Tom DeLay, a Texas Republican, to criticize the decision.[33] In the wake of public outcry over the decision, forty-three state legislatures enacted post-*Kelo* legislation to curb state use of eminent

25. Kelo v. City of New London, 545 U.S. 469, 475 (2005).

26. *See id.* at 476.

27. *Id.* at 476–77.

28. *See id.* at 490.

29. *Id.* at 484.

30. *Id.* at 503 (O'Connor, J., dissenting).

31. *See id.* at 491 (Kennedy, J., concurring). In his concurrence, Kennedy argued, "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 . . . . 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." *Id.*

32. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2108–09 (2009) (discussing H.R. Res. 340, 109th Cong., 151 CONG. REC. 5592–93 (2005) (enacted), which denounced the *Kelo* decision in a vote of 365–33 on June 29, 2005; condemnation of the decision by former President Bill Clinton, prominent Democratic leaders, and conservative action groups; and two national surveys in which 81 percent and 95 percent of respondents were opposed to the decision).

33. Charles Hurt, *Congress Assails Domain Ruling*, WASH. TIMES, July 1, 2005, at A1.

domain and introduce accountability and transparency into the process.[34]

The backlash to *Kelo* illustrates three central issues in the debate over the use of eminent domain. First, it showcases significant public concern over the increased use of eminent domain, and the consequent potential for corruption and abuse.[35] Second, it highlights the essential role of state legislatures in curbing the state's power of eminent domain, though some have argued that post-*Kelo* legislation fails to adequately protect private property from takings.[36] Finally, many advocates of eminent domain have argued that the backlash to *Kelo* is overblown,[37] and that eminent domain is a valid government power and an efficient urban development tool.[38] Though scholarship on each of these issues is extensive, this section will briefly summarize the key concerns in each debate.

1. Eminent Domain and the Potential for Abuse

"I believe that the result of this decision will be that working families and poor people will see their property turned over to corporate interests and wealthy developers," said then-Representative Bernard Sanders of Vermont in the days following *Kelo*.[39] Sanders's words echoed the concerns of Justice O'Connor and many others who saw the expansion of the government's ability to seize private property as a state power rife with the potential for corruption and abuse.

Abuses of the eminent domain power can take many forms. Perhaps chief among them is the increased capacity for covert backroom dealings between government officials and private developers.[40] Critics of eminent domain have argued that this is of particular concern where "vague and open-ended definitions of 'blight' permit local authorities to take almost any property, and thus open the door to any evasion of legislative restrictions on private economic development takings."[41] The state's threatened use of eminent domain to coerce

34. *See* Terry Pristin, *Columbia Setback Puts Eminent Domain in Spotlight*, N.Y. TIMES, Jan. 20, 2010, at B6; *see also Enacted Legislation Since* Kelo, CASTLE COALITION, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=510 (last visited Jan. 10, 2011).

35. *See, e.g.*, Somin, *supra* note 32.

36. *Id.*

37. *See* Timothy J. Dowling, *How To Think About* Kelo *After the Shouting Stops*, 38 URB. LAW. 191, 191–93 (2006) (calling the backlash "rife with misinformation" and "histrionic").

38. *See* ROBERT G. DREHER & JOHN D. ECHEVERRIA, *KELO'S* UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT 2–3, 22–26, 42–43 (2006), *available at* http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIReport_Kelo.pdf (arguing that eminent domain is a viable and efficient tool for bettering communities).

39. Hurt, *supra* note 33.

40. *See* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 170–71 (1978) (discussing how local government officials can extort bribes from developers during the land-use development process); *see also* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 69 (1995) (discussing the dangers of a land-use process removed from the eye of public scrutiny).

41. James W. Ely Jr., *Post-*Kelo *Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127, 135 (2009).

landowners to negotiate with developers is also a potential abuse.[42] Although the prevalence of these improprieties in eminent domain is an unsettled question,[43] land use experts who support *Kelo* have encouraged procedural reforms to increase government transparency and accountability as a solution to these potential abuses.[44] More fervent critics of *Kelo* have, in contrast, called for legislative reform banning eminent-domain decisions based on blight or economic development.[45]

2. The Failure of Legislative Reform

The legislative response to the post-*Kelo* backlash seemed to epitomize democracy in action. Some prominent members of the Judiciary even suggested that the popular and legislative reactions to *Kelo* meant that courts no longer needed to intervene to protect property rights.[46] But despite the plethora of reform attempts following the decision, only a small fraction of states that have reformed their eminent domain procedures have actually increased protection of individual property rights.[47] In a study conducted four years after *Kelo*, Ilya Somin examined the efficacy of eminent domain reform laws; he found that of the thirty-six state laws enacted in reaction to *Kelo*, twenty-two "provide[d] little or no protection for property owners against economic development takings."[48] Additionally, Somin found that despite the abundance of legislation, many of the states most susceptible to eminent domain abuses seemed least willing to adopt reforms.[49] At the federal level, the House of Representatives overwhelmingly passed a resolution condemning *Kelo*, yet Congress failed to give its barking over *Kelo* any bite and no substantive changes were made.[50]

In analyzing states' reforms, Somin found that many were ineffective because

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42. *See* Marc Hequet, *Life After* Kelo, RETAIL TRAFFIC, June 1, 2006, at 33, 35.

43. *Compare* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 2 (2003), *available at* http://www.castlecoalition.org/about/component/content/312 (reporting that from 1998 to 2002, over 10,000 properties claimed under eminent domain were given to private developers), *with* CASTLE COALITION, MYTHS AND REALITIES OF EMINENT DOMAIN ABUSE (2006), *available at* http://www.castlecoalition.org/pdf/publications/CC_Myths_Reality%20Final.pdf (rebutting many of the claims of eminent-domain abuse).

44. *See* Dreher & Echeverria, *supra* note 38, at 42–43.

45. *See infra* section I.B.2.

46. *See, e.g.*, *Confirmation Hearing on the Nomination of John G. Roberts Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 286 (2005) (then-Judge John Roberts stating that the legislation in response to *Kelo* demonstrated that "[Congress] and legislative bodies in the States are protectors of the people's rights as well" and that they could "protect them in situations where the Court has determined, as it did in 5–4 in *Kelo*, that [it is] not going to draw that line"); *see also* Somin, *supra* note 3 (citing Judge Richard Posner's prediction that "the political response to *Kelo* would be so strong that it could obviate the need for judicial protection of property rights").

47. *See* Somin, *supra* note 32, at 2104–05, 2120 (analyzing the effectiveness of state post-*Kelo* reform and finding that just fourteen states have passed legislation with "real teeth" and "meaningful new protection for property owners.").

48. *Id.* at 2120.

49. *Id.* at 2116–17.

50. *See* Ely, *supra* note 41, at 132; Somin, *supra* note 32, at 2149–50.

they included too many exceptions—or provided too many loopholes—to their supposedly severe limits on eminent domain.[51] Given the subjectivity of blight determinations,[52] Somin argued that the most effective measures of eminent domain reforms called for elimination or significant constraint on all condemnations based on blight or economic development.[53]

3. The Question of Efficiency and Expediency

A well-established justification for the use of eminent domain is its ability to facilitate efficient land use.[54] Under this rationale, major national and local land use organizations, as well as many scholars, support the decision in *Kelo*.[55] Beyond policy implications, public officials have also lauded the benefits of regulatory takings as a practical matter. In New York, for example, New York City Mayor Michael Bloomberg vigorously defended the power of eminent domain, calling it "crucial" to urban development,[56] and then-Governor George Pataki vetoed modest reforms to existing condemnation laws.[57] More generally, eminent domain can be said to promote efficiency through expediency by allowing the state—or an appointed development agency—to deal with "holdouts," and cut through the red tape often associated with land-use planning.[58] Proponents of eminent domain argue that legislation banning or significantly curbing its use, as well as procedural reforms calling for transparency and accountability, threaten the efficiency of these systems.[59]

II. NEW YORK STATE AND THE ATLANTIC YARDS PROJECT

The various elements of the debate over eminent domain after *Kelo* are openly displayed in New York state. New York did not alter its eminent domain process in the flood of post-*Kelo* reform, despite having an eminent domain process one of its own legislators called lacking in "accountability, transparency or meaningful public participation."[60] Nowhere has this criticism been more apt than in the context of the Atlantic Yards project in Brooklyn, New York.

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51. Somin, *supra* note 32, at 2120.

52. *See supra* section I.B.1.

53. Somin, *supra* note 32, at 2138.

54. *See* Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74–77 (1986) (describing the problem of "holdout" landowners who refuse to negotiate and single-handedly block urban development and eminent domain's solution to this problem).

55. *See generally* AMERICAN PLANNING ASSOCIATION, THE FOUR SUPREME COURT LAND-USE DECISIONS OF 2005: SEPARATING FACT FROM FICTION 1–94 (2005) [hereinafter LAND-USE DECISIONS OF 2005].

56. Diane Cardwell, *Bloomberg Says Power to Seize Private Land Is Vital to Cities*, N.Y. TIMES, May 3, 2006, *available at* http://www.nytimes.com/2006/05/03/nyregion/03domain.html.

57. Karrie Jacobs, *Demolition Man*, N.Y. MAG., Apr. 26, 2004, *available at* http://nymag.com/nymetro/news/trends/columns/cityside/n_10215/.

58. *See* Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 302–09 (2010).

59. *See generally* LAND-USE DECISIONS OF 2005, *supra* note 55.

60. Bill Perkins, Letter to the Editor, *Eminent Domain*, N.Y. TIMES, Dec. 20, 2009 (letter of State Senator and Chairman of the New York State Senate Corporations, Authorities and Commissions

A. THE ATLANTIC YARDS PROJECT

The Atlantic Yards Land Use Improvement and Civic Project—more commonly known as Atlantic Yards—was announced amidst much fanfare on December 10, 2003.[61] Devised by private developer Bruce Ratner, of the Forest City Ratner Corporation (FCRC), the $2.5 billion plan involved the building of a Frank Gehry-designed arena for the Nets basketball team, of which Ratner was a part owner,[62] as well as other commercial and residential space, on a twenty-two acre site near downtown Brooklyn.[63] About 40 percent of the site was located on below-grade railyard owned by the Metropolitan Transit Authority (MTA).[64] The remainder of the area included light manufacturing, retail, and residential uses and some vacant lots.[65] As news of the project spread, excitement abounded among New Yorkers from all walks of life.[66] Sports fans celebrated a new NBA team within the five boroughs, economists lauded the complex's creation of new jobs, and the cultural elite swooned at the idea of the Gehry-designed stadium, with one prominent architectural critic going so far as to claim that a "Garden of Eden grows in Brooklyn."[67]

The city's enthusiasm would not be enough to surmount the red tape and logistical problems the project generated. Before it could break ground, FCRC had to secure development rights, state and city permits, and approval of development plans.[68] Shortly after announcing the project, FCRC—through Ratner—began soliciting government involvement.[69] In February 2005, the City and State of New York signed a memorandum of understanding with Ratner, and FCRC partnered with the Empire State Development Corporation (ESDC), a quasi-public entity that had been given "significant redevelopment powers" by

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Committee, arguing the need for eminent-domain reform to bring accountability, transparency, and meaningful public participation to the process).

61. *See* Charles V. Bagli, *A Grand Plan in Brooklyn for the Nets' Arena Complex*, N.Y. TIMES, Dec. 11, 2003, at B1.

62. *See* Richard Sandomir & Charles V. Bagli, *Ratner's Path To Buy Nets Had Pitfalls and Promise*, N.Y. TIMES, Jan. 25, 2004, http://www.nytimes.com/2004/01/25/sports/pro-basketball-ratner-s-path-to-buy-nets-had-pitfalls-and-promise.html.

63. *See id.*; *see also* Lavine & Oder, *supra* note 58, at 287–88.

64. *See* Sy Gruza, *"Atlantic Yards" and the Future of Eminent Domain Litigation*, 242 N.Y. L.J. 4 (2009).

65. *See* Nicholas Confessore, *Blight, Like Beauty, Can Be in the Eye of the Beholder*, N.Y. TIMES, Jul. 25, 2006, http://www.nytimes.com/2006/07/25/nyregion/25blight.html; *see also* Lavine & Oder, *supra* note 58, at 287–88 n.3.

66. *See, e.g.*, Steve Cuozzo, *Progress Wins! Nets Plan Could Be Next of Many Triumphs*, N.Y. POST, Feb. 10, 2004, at 33; Richard Schwartz, Op-Ed, *The Plan's a Net Plus Homes, Offices, Jobs, NBA Team: It's a Winner for Brooklyn*, N.Y. DAILY NEWS, Feb. 10, 2004, at 35; Andrea Peyser, *Nets' Arena Will 'Work' Wonders*, N.Y. POST, Apr. 12, 2004, at 16.

67. Herbert Muschamp, *Courtside Seats to an Urban Garden*, N.Y. TIMES, Dec. 11, 2003, http://www.nytimes.com/2003/12/11/nyregion/courtside-seats-to-an-urban-garden.html.

68. *See* Lavine & Oder, *supra* note 58, at 291–331 (discussing the history of the Atlantic Yards project).

69. *See* Sandomir & Bagli, *supra* note 62.

the state.[70] An alter ego of the state Urban Development Corporation, ESDC was founded in 1968, during an era of liberal urban-renewal reform, and was granted broad powers to override zoning restrictions and declare blight in order to expedite the creation of public housing projects.[71] In the intervening four decades, however, ESDC's role shifted from the Robin Hood of public housing to the shepherd of megaprojects such as Times Square redevelopment—though its power remained the same.[72]

B. NETROOTS AND COMMUNITY OPPOSITION TO ATLANTIC YARDS

While many in greater New York City—and in the city's government[73]—enthusiastically supported the Atlantic Yards project, in Brooklyn things were less edenic. Just two months after FCRC announced the project, Develop Don't Destroy Brooklyn (DDDB), a nonprofit corporation, sprang into existence to lead "a broad-based community coalition" in opposition to Atlantic Yards.[74] "Real estate developer Bruce Ratner plans to build an arena and 17 high rises in residential Brooklyn. Thirteen acres of his 24-acre proposal are presently occupied by our homes and businesses, property which Mr. Ratner does not own," read the banner of DDDB's website, DDDB.net in April 2004.[75] Underneath the banner, DDDB.net summarized its perception of the debate neatly: "Successful Homes vs. Private Megaproject."[76] Though DDDB's *raison d'être* could be described as protectionism, many of its complaints focused less on the project itself and more on the land-use and development processes.[77] In a position statement published shortly after its founding, DDDB stated its two primary positions as:

> WE OPPOSE the anti-democratic process that Forest City Ratner has used, and continues to use, to push its arena and skyscraper development plan on the people of Brooklyn without our input or consent.
> WE SUPPORT community-based proposals and a fair, public, democratic, and transparent development process. We support proposals that allow our communities, the people who live, work and run small businesses in Brook-

70. EMPIRE STATE DEV. CORP. ET AL., BROOKLYN ARENA/MIXED USE DEVELOPMENT PROJECT (2005), *available at* http://www.dddb.net/documents/mou/MOU1.pdf [hereinafter MOU 2005]; Urban Development Corporation Act, N.Y. UNCONSOL. § 6254 (McKinney 2010); *see also* Lavine & Oder, *supra* note 58, at 287–88, 298.

71. *See* Norman Oder, *Dispatch—Atlantic Yards: This Generation's Penn Station?*, 20 PLACES 79, 81 (2008). For previous discussion on the significance of blight in the process of eminent domain, *see supra* text accompanying note 22.

72. *See* Oder, *supra* note 71, at 82.

73. *See* Sandomir & Bagli, *supra* note 62.

74. *See About DDDB*, DEVELOP DON'T DESTROY BROOKLYN, http://dddb.net/php/aboutdddb.php (last visited Jan. 10, 2011) [hereinafter *About DDDB*].

75. *See* DEVELOP DON'T DESTROY BROOKLYN (Apr. 10, 2004), http://web.archive.org/web/20040410172453/http://dddb.net/ (accessed by searching for DDDB.net in the Internet Archive index).

76. *Id.*

77. *See* Lavine & Oder, *supra* note 58, at 289–90.

> lyn, to shape our futures. This is best accomplished through the City's ULURP process.[78]

The group also opposed the use of "taxpayer subsidies for a private arena," and the use of eminent domain for a private development.[79]

Though some have dubbed DDDB a "grassroots" organization,[80] the coalition's significant use of the Internet to disseminate its message, fundraise, gather volunteers, circulate petitions, and raise community awareness means it is better understood as "netroots."[81] Popularized in 2002, the term netroots refers to the use of the Internet as an organizational tool to sign up "over the Internet to meet in person with other like-minded activists."[82] Early images of DDDB's website suggest it was designed to do exactly that. An April 2004 archive of the site displayed a message, posted in red, bolded text, for the time and location of a benefit concert called, "[NO] BLOOD ON THE [LIRR] TRACKS."[83] Though the webpage was mostly informational text and a graphic map of the proposed Atlantic Yards project site, a few links encouraged visitors' participation and involvement.[84] Just a few months later, in June 2004, the site displayed a new link to "Download Rally Fliers" and advertised a block party and rally, as well as an upcoming city council hearing.[85] By the end of the year, the site had been redesigned, with "Action Buttons" at the very top of the page asking visitors to "PLEASE DONATE," "Sign up for alerts," and "Pass it on."[86]

Though DDDB.net began as a rudimentary webpage posting meeting announcements, mission statements and community involvement solicitations, by early 2005 it had evolved into a sophisticated tool for disseminating information. An image of the website in February 2005 shows a page split into a two-column layout.[87] The left column, titled "Latest Developments," provided updates and news about the Atlantic Yards project, while a small text box highlighted the status of the proposal and opposition movement.[88] Outside of

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78. *See About DDDB: Position Statement*, DEVELOP DON'T DESTROY BROOKLYN, http://www.dddb.net/php/position.php (last visited Jan. 10, 2011).

79. *Id.*

80. *See* Oder, *supra* note 71, at 82.

81. *See* Safire, *supra* note 7.

82. *Id.* (quoting Jerome Armstrong, a political organizer for the Howard Dean presidential campaign, who is generally recognized as bringing the term into popular lexicon).

83. *See About DDDB*, *supra* note 74.

84. *Id.* Two buttons across the page allowed visitors to click and receive updates on DDDB and Atlantic Yards events or pass the page on to others. Two more prominent buttons invited visitors to "Donate" (with a credit card) or "Volunteer." *Id.*

85. *See* DEVELOP DON'T DESTROY BROOKLYN (June 7, 2004), http://web.archive.org/web/20040607100036/http://dddb.net/ (accessed by searching for DDDB.net in the Internet Archive index).

86. *See* DEVELOP DON'T DESTROY BROOKLYN (Dec. 16, 2004), http://web.archive.org/web/20041216045133/http://dddb.net/ (accessed by searching for DDDB.net in the Internet Archive index).

87. *See* DEVELOP DON'T DESTROY BROOKLYN (Feb. 3, 2005), http://web.archive.org/web/20050203225943/http://www.dddb.net/ (accessed by searching for DDDB.net in the Internet Archive index).

88. *Id.*

the local arena, the page also contained a news summary of *Kelo*, which had been recently accepted for review by the U.S. Supreme Court, asking visitors to "Ask the Bush Administration not to take sides in *Kelo v. New London*."[89] At the top of the column, two links asked visitors to "Send this letter to Speaker Silver" and "Send this letter to Speaker Silver and Majority Leader Bruno."[90] To the left, a numbered list guided the potential letter writer to the addresses and e-mail addresses of the legislators, with instructions for carbon copying the e-mail to DDDB organizers and a link to also send the completed letter to the *Times Union*, Albany's local paper.[91] Back on the site's main page, the right column contained links to the websites of Community Boards 2, 6, and 8, the local representative bodies for the areas surrounding the Atlantic Yards project.[92] Perhaps most significantly, the 2005 site contained a navigation bar under its "Action Buttons" directing visitors to main sources of information and providing a link to the DDDBlog.[93]

Develop Don't Destroy Brooklyn's online presence suggests a growing complexity and sophistication within the opposition movement. Though the numbers are not indicative of the amount of change DDDB was able to effect, between April 2004 and February 2005, DDDB.net increased its content from about 360 words of text and nine links to over 2,500 words and sixty links.[94] A greater number of links gives a visitor to a website increased access not just to information, but also to places to search for more information. In this case, it also reflected the increased visibility of the Atlantic Yards project and a growing number of online participants in the opposition movement. In addition to its own blog, by early 2006 DDDB.net had an extensive "blog roll"[95] that reflected the project's rising popularity as an issue in the mainstream media and local

89. *Id.*

90. *Id.* Clicking on the links led to a short pre-written letter of opposition to the Atlantic Yards project, addressed to the two legislators, with instructions at the top for the visitor: "You can copy and paste this text, to get started. But it's always best to use your own words and thoughts if time permits, and a shorter (even very short) letter is just fine." DEVELOP DON'T DESTROY BROOKLYN [hereinafter DEVELOP DON'T DESTROY BROOKLYN, Letter] (Feb. 3, 2005), http://web.archive.org/web/20050206005302/www.dddb.net/letters/silver/index.html (accessed by searching for DDDB.net in the Internet Archive index, following the "Feb. 3, 2005" hyperlink, then following the "Send this letter to Speaker Silver and Majority Leader Bruno" hyperlink).

91. *See* DEVELOP DON'T DESTROY BROOKLYN, Letter, *supra* note 90.

92. *See* DEVELOP DON'T DESTROY BROOKLYN (Feb. 3, 2005), *supra* note 87.

93. *Id.* (the navigation bar links read from left to right, top to bottom: "What's Wrong with Ratner's Proposal"; "Economic Studies"; "The UNITY Plan"; "Letter Library"; "Press Releases"; "'Safety Nets Plan'"; "Contact Politicians"; "Event Calendar"; "Required Reading"; "Related Websites").

94. *Compare* DEVELOP DON'T DESTROY BROOKLYN (Apr. 10, 2004), *supra* note 75, *with* DEVELOP DON'T DESTROY BROOKLYN (Feb. 3, 2005), *supra* note 87.

95. A blog, shorthand for weblog, is a text-based online publication with regular entries. A blog roll is a list of URL links to other blogs, and is designed to increase traffic between blogs. Most blogs are interactive between reader and writer, with readers leaving comments for and dialoguing with the blogger. *See* Rebecca Blood, *Weblogs: A History and Perspective*, REBECCA'S POCKET (Sept. 7, 2000), http://www.rebeccablood.net/essays/weblog_history.html.

blogs.[96] The most prolific of these bloggers was Norman Oder, who started covering the Atlantic Yards project in July 2005.[97] Oder's "watchdog blog," Atlantic Yards Report, has published over 4,000 posts since March 2006 offering "analysis, commentary, and reportage" on the Atlantic Yards project.[98] The Report's topics ranged from street reporting of rallies and court hearings to critiques of the media's reporting on Atlantic Yards and summaries of the project's history. The blog provides an almost encyclopedic account of the project's history and controversy.[99] While Oder's reporting attempted to paint a balanced account of the Atlantic Yards project, other blogs, such as noLandGrab.org, voiced opposition to the project.[100] "The website is built and maintained by a small group of citizens from Brooklyn," read the bottom of an image of noLandGrab.org in 2004. It further announced its independence, stating, "[w]e are not associated with any organization in particular, but serve as a portal for all people and organizations opposed to the proposed real estate deal in Prospect Heights, Brooklyn."[101] Unlike the Atlantic Yards Report, NoLandGrab.org did not emphasize original reporting, but rather seemed to strike a balance between compiling information through the blog and community activism. In addition to the blog, noLandGrab.org included links to volunteer, write legislators, attend hearings and rallies, and generally become involved in the opposition to the project.[102] Other anti-Atlantic Yards groups, such as Brooklyn Views, also established websites that combined blogging and community organizing.[103] Though some of the groups achieved more notoriety than others, all of these sites—DDDB.net, Atlantic Yards Report, noLandGrab.org, and Brooklyn Views—eventually linked to each other's pages on their own websites,

96. *See* DEVELOP DON'T DESTROY BROOKLYN (Apr. 2, 2006), http://web.archive.org/web/20060402192952/http://dddb.net.

97. *See* ATLANTIC YARDS REP., http://atlanticyardsreport.blogspot.com; *see also* Lavine & Oder, *supra* note 58, at 287 n.aa1.

98. *See* ATLANTIC YARDS REP., *supra* note 97.

99. *See, e.g.*, Norman Oder, *"Fun Day"? At FCR's "Brooklyn Day" Rally, Déjà Vu and Defensiveness*, ATLANTIC YARDS REP. (June 6, 2008, 7:05 AM), http://atlanticyardsreport.blogspot.com/2008/06/fun-day-at-fcrs-brooklyn-day-rally-dj.html; Norman Oder, *Eminent Domain Case Gets Day in Court; Public Use, Legislative Process at Issue*, ATLANTIC YARDS REP. (Nov. 22, 2006, 6:44 AM), http://atlanticyardsreport.blogspot.com/2006/11/eminent-domain-case-gets-day-in-court.html; Norman Oder, *Some Common (and Less-Common) Mistakes in Atlantic Yards Coverage*, ATLANTIC YARDS REP. (Jan. 12, 2009, 2:33 AM), http://atlanticyardsreport.blogspot.com/2009/01/some-common-and-less-common-mistakes-in.html; Norman Oder, *A Look Back at Atlantic Yards in 2009: Tumultuous Change, Success for Arena Backers, and Lingering Questions of Accountability*, ATLANTIC YARDS REP. (Jan. 4, 2010, 3:23 AM), http://atlanticyardsreport.blogspot.com/2010/01/look-back-at-atlantic-yards-in-2009.html.

100. *See* NOLANDGRAB.ORG (Feb. 17, 2004), http://web.archive.org/web/20040217033044/http://www.nolandgrab.org.

101. *Id.*

102. *Id.*

103. *See, e.g.*, BROOKLYN VIEWS (Apr. 11, 2006), http://web.archive.org/web/20060411164823/; BROOKLYN SPEAKS (Oct. 5, 2006), http://web.archive.org/web/20061005094907/http://www.brooklynspeaks.net/.

creating an interactive community on the web.[104]

The increase in Atlantic Yards-related content on the Web was reflected not only in an increase in content on DDDB.net, but also in its structure. The site transformed from a static page based on basic HTML to a more complex content management system, a change that suggests the need to better manage more information and a larger audience. By mid-2005, DDDB operated a website that could quickly and dynamically react to new changes, developments, rally supporters, disseminate messages, raise money, and increase the visibility of its cause. DDDB's prominence among the plethora of community opposition groups suggests its strategy was successful. Today, the coalition consists of twenty-one community organizations[105] and claims to represent fifty-one total community organizations formally aligned in opposition to the project.[106] Currently, DDDB has over 6,000 subscribers to its e-mail newsletter, 7,000 petition signers and 800 volunteers who keep the organization operating. Perhaps most significantly, the organization boasts a twenty-person volunteer legal team, in addition to its retained attorneys.[107]

C. ATLANTIC YARDS AS A CASE STUDY OF EMINENT DOMAIN

Like *Kelo*, the Atlantic Yards project received a great deal of media and public coverage and exposed the various sides of the debate over eminent domain and land use. Because of this relative level of transparency, Atlantic Yards serves as an excellent case study of the immediate effects of *Kelo* in a state that has not passed legislation subsequent to *Kelo*. This section will discuss Atlantic Yard's effect on, and interaction with, the three historic issues in the debate over eminent domain.[108]

1. Potential for Abuse and Corruption: A Lack of Transparency and Accountability

In Atlantic Yards, the Empire State Development Corporation, with its signifi-

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104. *See Required Reading: News Articles and Commentary*, DEVELOP DON'T DESTROY BROOKLYN, http://www.dddb.net/php/reading/news.php (last visited May 21, 2011); *Documents, Links, Articles*, ATLANTIC YARDS REP., http://www.atlanticyardsreport.blogspot.com (last visited May 21, 2011); NOLANDGRAB.ORG, (July 23, 2011) http://www.nolandgrab.org; BROOKLYN VIEWS, (May 21, 2011) http://www.brooklynviews.blogspot.com.

105. *See The Opposition*, DEVELOP DON'T DESTROY BROOKLYN, http://www.dddb.net/php/opposition.php (last visited Jan. 10, 2011) (stating that the Develop Don't Destroy Brooklyn Coalition is comprised of Atlantic Avenue Betterment Association (AABA); Boerum Hill For Organic Development; Brooklyn Bears Community Garden; Brooklyn Vision; Cambridge Place Action Coalition; Carroll Street Block Association (5th-6th Ave.); Develop Don't Destroy Brooklyn, Inc. (DDDB); East Pacific Block Association; Fans For Fair Play; Fort Greene Association (FGA); Friends and Residents of Greater Gowanus (FROGG); Kings County Greens; New York Preservation Alliance; North Brooklyn Greens; Park Slope Greens; Revel Arts; The Society for Clinton Hill; South Oxford Street Block Association; South Portland Block Association; Times Up!; and Warren St. Marks Community Garden).

106. *See id.*

107. *See About DDDB*, *supra* note 74.

108. *See supra* section I.B.

cant redevelopment powers,[109] quickly gave substance to many of the concerns of abuse and corruption in eminent-domain and land-use decisions that followed *Kelo*. Just seventeen months after partnering with the privately owned Forest City Ratner Corporation, in July 2006[110] ESDC declared the area under the footprint of the Atlantic Yards project blighted.[111] The determination raised eyebrows not only because of its post-hoc timing and questionable determination of blight, but also because the consulting firm selected in a no-bid process by ESDC to conduct the blight study had previously been under the employ of FCRC.[112] The firm, Allee, King, Rosen & Fleming (AKRF) relied on "vague criteria"[113] for its determination of blight, listing "overgrown weeds, crumbling sidewalks, trash and . . . barbed wire fencing" as indicative of blight.[114] Though ESDC did not have to accept AKRF's finding of blight, the group has never deviated from the suggestions of its consultants.[115]

Augmenting the feelings of backroom dealing, ESDC (with city approval) removed the entire Atlantic Yards project from the New York City Urban Land Use Review Procedure (ULURP), a public review process for land use that typically draws input from community groups, the planning commission, local government leaders, and the city council.[116] Simultaneously, ESDC overrode local zoning regulations, ignoring mass and density restrictions, set-back rules, and signage laws and condemning public roads.[117] ESDC's casual dismissal of local law and public input was epitomized by its failure to stage a public

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109. *See supra* section II.A.

110. DEVELOP DON'T DESTROY BROOKLYN, RESPONSE TO THE ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT BLIGHT STUDY CONTAINED WITHIN THE GENERAL PROJECT PLAN 3 (2006), http://www.dddb.net/documents/environmental/DEIS/testimony/DDDBBlightResponse.pdf.

111. *See* EMPIRE STATE DEV. CORP., ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT: BLIGHT STUDY, at i (2006) [hereinafter BLIGHT STUDY], *available at* http://esd.ny.gov/subsidiaries_projects/ayp/AtlanticYards/Blight_Study/Blight_Study_07_11_06.pdf; *see also* Lavine & Oder, *supra* note 58, at 298.

112. *See, e.g.*, Brief for Petitioners–Appellants at 64, Goldstein v. N.Y. State Urban Dev. Corp., No. 2008-07064 (N.Y. July 31, 2009), *available at* http://dddb.net/eminentdomain/papers/appeal/Appellant-Brief.pdf; Norman Oder, *Was AKRF's Work for Ratner a Hindrance to Hiring by ESDC? No, It Was a Justification*, ATLANTIC YARDS REP. (Aug. 15, 2008, 3:28 PM), http://atlanticyardsreport.blogspot.com/2008/08/was-akrfs-work-for-ratner-hindrance-to.html; *see also* Lavine & Oder, *supra* note 58, at 298, 312–14.

113. Lavine & Oder, *supra* note 58, at 298–99.

114. *See* BLIGHT STUDY, *supra* note 111, at B-4.

115. *See* N.Y. EM. DOM. PROC. § 204 (McKinney 2005) (stating that only the condemnor—not the consultant—is charged with assessing the findings and determining the potential public use of the project); Eliot Brown, *Who Has the Right to Say What's Blight? Bill Perkins v. ESDC Darling*, N.Y. OBSERVER, Jan. 6, 2010, http://www.observer.com/2010/real-estate/bill-perkins-no-fan-blight-consultant-akrf-esdc; *see also* Lavine & Oder, *supra* note 58, at 298–99.

116. MOU 2005, *supra* note 70, at 3; *see also* Lavine & Oder, *supra* note 58, at 306–08.

117. ATLANTIC YARDS LAND USE IMPROVEMENT AND CIVIC PROJECT MODIFIED GENERAL PROJECT PLAN 9–10, 16–17 (2006) [hereinafter 2006 PROJECT PLAN], *available at* http://www.scribd.com/doc/28363111/Atlantic-Yards-Modified-General-Project-Plan-12-06-Part-1; *see also* Lavine & Oder, *supra* note 58, at 306–08.

bidding process for the project.[118] Though ESDC was not legally required to request outside proposals, their absence further supported the claim that Atlantic Yards was a "private-public development," conceived by a private developer and facilitated by local and state governments eager to spur development.[119] Taken together, ESDC's actions with the Atlantic Yards project seemed a perfect showcase of post-*Kelo* eminent-domain and land-use concerns unmoored from any significant democratic process of public participation.[120]

Years before the Empire State Development Corporation made its finding of blight or announced it would bypass the public participation process, Develop Don't Destroy Brooklyn and other community groups had preemptively announced their opposition to the use of eminent domain for the benefit of a private developer.[121] So it was of little surprise when the ESDC accepted AKRF's finding of blight in July 2006 and bypassed the ULURP, that their actions immediately sparked controversy from community groups and journalists such as DDDB and Norman Oder about the transparency of the urban development process.[122] Though DDDB and Oder both worked passionately to bring attention to these issues, no mechanisms were in place to take into account public participation or hold ESDC accountable. Beyond the significant powers granted to them through the legislature and the courts,[123] members of ESDC are gubernatorial appointees and, as such, have limited electoral accountability.[124]

But while the work of DDDB and Oder might have had little actual effect on the fate of Atlantic Yards, it perhaps had indirect effects on how the state conducted its use of eminent domain. In December 2009, a New York appellate court shocked developers and public officials when it ruled that there was no public purpose or blight to justify ESDC's exercise of eminent domain over an area of gas stations and storage facilities set to be condemned to make way for

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118. *See* Lavine & Oder, *supra* note 58, at 300–02. While ESDC never staged a bidding process for the entire Atlantic Yards Project, the MTA did hold a post-hoc public bidding for the Vanderbilt Yards, after initially signing over the development rights to FCRC in February 2005. Only one other bidder made an offer for use of the yards and the MTA accepted FCRC's bid, lending an air of charade to the process. *See id.* at 302–04.

119. *Id.* at 287 n.2, 302–04 (describing "private–public" developments as those which originate from a private developer and are merely enabled by public entities, as opposed to "public–private developments," in which public institutions create a plan and then seek private interest).

120. *See id.* at 306–12. ESDC did have a few public hearings on the project in keeping with the State Environmental Quality Review Act (SEQRA), but these were reportedly "poorly managed . . . [with] time periods that were too short for lay members of the public . . . to thoroughly review" the project's thousand-page-long environmental impact statement. *Id.* at 310–12.

121. *See supra* section II.B.

122. *See* Lavine & Oder, *supra* note 58, at 298; Norman Oder, *Posts from July 2006*, ATLANTIC YARDS REP., http://atlanticyardsreport.blogspot.com/2006_07_01_archive.html (last visited July 24, 2011); *see also* DEVELOP DON'T DESTROY BROOKLYN, RESPONSE, *supra* note 110.

123. *See* Waybro Corp. v. Bd. of Estimate, 67 N.Y.2d 349, 354 (1986) (holding that ESDC, then the UDC, can override local laws if a project is significant to the state as a whole).

124. Urban Development Corporation Act, N.Y. UNCONSOL., LAW § 6254 (McKinney 2010).

an expansion of Columbia University's new campus.[125] The facts in *Kaur* bore strong resemblance to many of the facts in the Atlantic Yards litigation, especially surrounding ESDC's determination of blight. Like in Atlantic Yards, ESDC had hired the consulting firm AKRF to conduct a blight study, but this time AKRF was simultaneously employed by both the ESDC and Columbia University when it conducted its study—a relationship the court found to be a little too cozy, calling it a "Columbia sponsored finding of blight."[126] Drawing on Justice O'Connor's dissent in *Kelo*,[127] the State Court Appellate Division also suggested the long-standing agreements between Columbia and ESDC, long before condemnation surrounding the West Harlem project, made the finding of blight "mere sophistry."[128] Although the decision was overturned just a few months later by the Court of Appeals,[129] the strongly worded opinion of the lower appellate court drew significant attention to the issue of eminent-domain reform in New York State.[130]

The West Harlem project also demonstrated governmental recognition of the value of transparency—such as the public participation seen in ULURP—in land-use decisions. Perhaps taking a lesson from the contention surrounding Atlantic Yards, ESDC chose not to bypass the public approval step in developing the West Harlem site.[131] "What a difference the city's Uniform Land Use Review Procedure (ULURP) makes," wrote Oder in his coverage of the hearings, "at least in terms of public awareness."[132] Unlike ESDC's unilateral approval of the Atlantic Yards project, the ULURP process put the debate over the West Harlem project on the front page of the *New York Times* and into the fore of the public's mind.[133] "[E]ven if ULURP is a 'complete sham,'" wrote Oder in his review of the proceedings, "it is superior to the ESDC process, not just because it provides a greater opportunity for a democratic vote but because, as shown yesterday, it provides more of a platform for public scrutiny."[134] In contrast, in Atlantic Yards all the online and real-life collaborations, the well-organized petitions and rallies, the editorials and letter-writing campaigns—which appeared to be the epitome of a public engaged in the democratic

125. *See* Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 32 (N.Y. App. Div. 2009).

126. *Id.* at 20.

127. *Id.* at 26–27 ("As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. '[T]hat alone is a *just* government,' wrote James Madison, 'which *impartially* secures to every man whatever is his *own*.'" (quoting *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting))).

128. *Kaur*, 892 N.Y.S.2d at 16.

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

130. *See* Pristin, *supra* note 34.

131. *See* Norman Oder, *Columbia Vote (35–5–6) vs. AY Vote (4–0), Newspaper Coverage, and the Value Left in ULURP*, ATLANTIC YARDS REP. (Dec. 21, 2007, 6:02 AM), http://atlanticyardsreport.blogspot.com/2007/12/columbia-vote-35-5-6-vs-ay-vote-4-0.html.

132. *Id.*

133. *See* Charles V. Bagli, *City Panel Approves Columbia's Plan for Expansion in Harlem*, N.Y. TIMES, Nov. 27, 2007, at A1.

134. Oder, *supra* note 131.

process—were little more than shouting at the sky. Though New York recognized the value of ULURP in West Harlem, it is still not a required part of the urban development process and remains entirely at ESDC's discretion.[135] Without statutory or procedural reform mandating a public approval process, the failure of the massive direct public participation and democratic involvement seen in Atlantic Yards could easily happen again.

2. Litigation in Absence of Statutory Reform

As previously discussed, New York is one of the few states with no eminent-domain reform following *Kelo* and lacks a mandatory public approval process in land use decisions.[136] Though *Kelo* created an unfavorable precedent, in October 2006, DDDB co-founder Daniel Goldstein and other landowners and tenants in the Atlantic Yards area filed suit to stay the use of eminent domain.[137]

In their complaint, plaintiffs contended that the project was not a "public use," arguing that the use of eminent domain was for the sole benefit of a private developer, FCRC. Central to their argument was the project's genesis as a private interest creating the appearance of a "sweetheart deal" with no benefit to the public, the suspicious timing and circumstances surrounding the assessment of the blight determination, and the absence of a public participation process.[138] Additionally, plaintiffs argued that the project's alleged public use was "merely pretextual"—drawing their argument from Justice Kennedy's concurrence in *Kelo*, which hinted that a lack of open public biddings and beneficiary-blind commitments of public funds would undercut a state's legitimate claims of public use.[139] In response, ESDC and other defendants asserted their broad discretion to determine public use, and listed many public uses for the project, including economic development, creation of affordable housing and community space, and of course, the removal of blight.[140] Narrowly interpreting the words of Justice Kennedy in *Kelo*,[141] the district court dismissed the case, finding that the plaintiffs' factual allegations of pretext did not trump the "conceivable" public use standard in *Kelo*, and the Second Circuit affirmed the decision.[142] "[T]he redevelopment of a blighted area, even standing alone,

135. *See* N.Y. UNCONSOL. LAW § 6254 (McKinney 2010); Lavine & Oder, *supra* note 58, at 366–68.

136. See discussion in *supra* section I.B.2.

137. *See* Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007); *see also* Lavine & Oder, *supra* note 58, at 335.

138. Complaint at 28–30, Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) (No. CV-06-5827) (noting state and local governments' failure to secure a competitive bidding process and a lack of assurances that the land will be put to public use).

139. *Id.*; *see also* Oder, *supra* note 71, at 83 n.6.

140. *See Goldstein*, 488 F.Supp. at 258.

141. *See supra* text accompanying note 31. As Lavine and Oder note, it is likely the court applied the words of Justice Kennedy's concurrence in light of the heightened pleading standard established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and affirmed by *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). *See* Lavine & Oder, *supra* note 58, at 336 n.300. For a more detailed discussion on the role of pretext in the *Goldstein* case, see Lavine & Oder, *supra* note 58, at 337–40.

142. Lavine & Oder, *supra* note 58, at 336–37.

represents a 'classic example of a taking for public use,'" wrote Second Circuit Judge Katzmann, describing the court's deference to the standards of *Kelo*.[143]

After their suit failed in the lower federal courts and was denied certiorari to the U.S. Supreme Court, the *Goldstein* plaintiffs filed essentially the same complaint in state court, but this time under the fifth amendment of the New York constitution.[144] The Appellate Division, Second Judicial Department dismissed the suit, like the federal courts, in deference to ESDC's finding of blight and ignored the plaintiffs' claims of pretext.[145] Additionally, the second department extolled the public purposes the project would serve, including "creating an arena, publicly accessible open space, affordable housing, improvements to public transit, and new job opportunities."[146] When the New York State Court of Appeals affirmed the decision in November 2009,[147] it established that "public use" could include removal of even mild conditions of blight—an expansion of what counts as a "public purpose" under the New York constitution.[148]

Though Goldstein and DDDB filed one more suit to stay the condemnation of their property, the complaint was thrown out and the court of appeals decision in *Goldstein* marked the end of the road for DDDB's fight against eminent domain.[149] With no claims under the federal or state constitutions—and no post-*Kelo* statutory protections—DDDB and other community groups opposing Atlantic Yards turned to other avenues of complaint against the project. In April 2007, DDDB and twenty-five community groups filed claims under the State Environmental Quality Review Act (SEQRA), again alleging ESDC favoritism and lack of objectivity in regard to the project.[150] DDDB and a variety of community groups also pursued a panoply of other litigation, bringing procedural challenges against the MTA under the Public Authorities Accountability Act[151] and further action against ESDC based on the reapproval of a modified

143. Goldstein v. Pataki, 516 F.3d 50, 59 (2d Cir. 2008) (quoting Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp., 791 F.2d 44, 46 (2nd Cir. 2008).

144. Goldstein v. N.Y. State Urban Dev. Corp., 879 N.Y.S.2d 524 (N.Y. App. Div. 2009), *aff'd*, 921 N.E.2d 164 (N.Y. 2009).

145. *Id.* at 534–35.

146. *Id.* at 535.

147. Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 165 (N.Y. 2009).

148. *Id.* at 171; *see also* Lavine & Oder, *supra* note 58, at 343.

149. *See* Notice of Petition, *In re* N.Y. State Urban Dev. Corp., No. 32741/09 (N.Y. Sup. Ct. Dec. 23, 2009), *available at* http://dddb.net/eminentdomain/article4/ESDCArticle4Petition.pdf; *In re* N.Y. State Urban Dev. Corp., No. 32741/09 (N.Y. Sup. Ct. Mar. 1, 2010), *available at* http://www.scribd.com/doc/27686399/Gerges-Decision-on-Atlantic-Yards-condemnation-3-1-10; *see also* Lavine & Oder, *supra* note 58, at 348–49.

150. Motion for Injunction at 5, Develop Don't Destroy Brooklyn, Inc. v. Urban Dev. Corp, 874 N.Y.S.2d 414 (N.Y. App. Div. 2009) (No. 4206), *available at* http://www.dddb.net/FEIS/briefs/Brief_SupportingPIMotion.pdf. As Lavine and Oder note, SEQRA as a basis for challenge is rarely successful and is often used as a tactic for more leverage to negotiate with developers. Lavine & Oder, *supra* note 58, at 349 n.372.

151. Montgomery v. Metro. Transp. Auth., No. 114304, 2009 N.Y. Misc. LEXIS 3382, at *7 (N.Y. Sup. Ct. Dec. 15, 2009).

plan without a new environmental impact statement, as well as those groups' lack of authority to determine the schedule and timeline of the project.[152] Though this litigation was not without small successes,[153] the decisions were uniformly decided in favor of the public entities, rather than the public citizens.[154] In the end, even though DDDB and other community groups had come far in successfully organizing residents in Brooklyn in opposition to the project, absent additional statutory protection or even a cursory public participation process, the groups were essentially powerless against ESDC.

3. Inefficiency and Expediency

On March 11, 2010, over six years after the project was officially announced, Atlantic Yards broke ground.[155] At its launch, Atlantic Yards had an anticipated date of completion around 2006, but between the litigation and the decline in the economy, the timetable had moved steadily outward, and Ratner now projected it opening in 2018.[156] A month later, in April 2010, Goldstein, who had been the face of the eminent-domain litigation and Develop Don't Destroy Brooklyn, settled with FCRC, selling his apartment for $3 million.[157] For some, Goldstein was the quintessential money-seeking holdout that often justified the use of eminent domain: "Low- and moderate-income people had to wait years for housing while he obstructed the Atlantic Yards project," Bertha Lewis, a housing advocate who supported the project told the *New York Times*.[158] Others saw Goldstein as a hero of the people: "Dan Goldstein did more than anyone else to try and prevent what will be looked upon in decades to come as one of the most brazen land grabs in recent history," wrote a commenter at the *New York Times*'s City Room blog.[159]

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152. *See* Memorandum of Law of Respondent Empire State Dev. Corp. in Opposition to Article 78 Petition at 41, Prospect Heights Neighborhood v. Empire State Dev. Corp., No. 116323/09 (N.Y. Sup. Ct. Dec. 11, 2009) *available at* http://www.scribd.com/doc/28429914; *see also* Mark Fass, *Environmental Suit Is Revived Against Atlantic Yards Project*, N.Y. L.J., Nov. 10, 2010, at 1.

153. *See* Lavine & Oder, *supra* note 58, at 54–55 (discussing Appellate Division, First Department Justice James Catterson's minority opinion acknowledging the validity of some of the claims of the petitioners); *see also id.* at 361 (discussing State Supreme Court Justice Marcy Friedman's declaration, while rejecting the petitioner's suit, that "the plan lacked the candor that the public was entitled to expect . . .").

154. *See id.* at 349–361 (outlining the litigation and results of DDDB's litigation).

155. Kareem Fahim, *Ground Broken on Atlantic Yards Project*, N.Y. TIMES CITY ROOM BLOG (Mar. 11, 2010, 4:46 PM), http://cityroom.blogs.nytimes.com/2010/03/11/ground-broken-on-atlantic-yards-project/.

156. Norman Oder, *In Daily News Ratner Asserts AY by 2018*, ATLANTIC YARDS REP. (May 4, 2008, 6:04 AM), http://atlanticyardsreport.blogspot.com/2008/05/in-daily-news-ratner-asserts-ay-by-2018.html.

157. Charles V. Bagli, *$3 Million Deal Ends a Holdout in Brooklyn*, N.Y. TIMES (Apr. 21, 2010), http://www.nytimes.com/2010/04/22/nyregion/22yards.html; Norman Oder, *DDDB's Goldstein Settles for $3M*, ATLANTIC YARDS REP. (April 21, 2010, 5:45 AM), http://atlanticyardsreport.blogspot.com/2010/04/ddbs-goldstein-settles-for-3m-or-less.html.

158. *See* Bagli, *supra* note 157.

159. Dr. Brian, Comment to *Daniel Goldstein, Last Atlantic Yards Holdout, Leaves for $3 Million*, N.Y. TIMES CITY ROOM BLOG (Apr. 21, 2010, 4:06 PM), http://cityroom.blogs.nytimes.com/2010/04/21/daniel-goldstein-last-atlantic-yards-holdout-leaves-for-3-million/?apage=1#comments.

Just as Goldstein's role was difficult to characterize, so was the city's "efficient" use of eminent domain. Though eminent domain undoubtedly forced Goldstein, who had "vow[ed] never to be dislodged" from his Brooklyn home,[160] to finally settle, his litigation cost the project critical years and pushed it into the recession, potentially jeopardizing funding.[161] Perhaps most significantly, as litigation dragged on, delay over the project reportedly cost Ratner upwards of $6.7 million a month in losses.[162] Though those costs were initially covered by FCRC, the expense of the litigation and delays could also end up coming out of the public's pocket, with New York City giving $131 million in subsidies to Ratner as the project moves forward.[163]

ESDC's decision to circumvent a public participation process in their land-use decisions in the name of efficiency and expediency had the opposite effect. Though bypassing ULURP was well within the powers of ESDC, it generated significant antagonism from citizen groups and contributed to the rise in net-roots activism and journalism on the Atlantic Yards project.[164] The public reaction was not lost on the courts[165] or the condemnors. "The way [the Institute for Justice, Daniel Goldstein, and DDDB] were able to rally the troops was impressive," said Lisa Bova-Hiatt, a deputy chief at the New York City Law Department who worked on the Atlantic Yards litigation.[166] "When we were in federal court the turn-out was enormous. Even after oral argument ended . . . the courtroom was packed, more than I'd ever seen before in the previous years with eminent domain."[167] Rather than fast-tracking development, the lack of public hearings increased public resistance and created additional litigation.[168] The end result was a highly visible controversy that called attention to the need for reform in state land-use development policy.[169]

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160. *See* Bagli, *supra* note 157.

161. *See* Amy Westfeldt, *Economy, Uncertain Financing Plague Brooklyn Arena*, USA TODAY (Oct. 14, 2008), http://www.usatoday.com/sports/basketball/2008-10-14-3222935191_x.htm?csp=34.

162. *See* Norman Oder, *ESDC/FCR Say Eviction Delay Past May 17 Would "Cripple" AY But Claims of Continued Losses and Jeopardized Benefits Seem Overblown*, ATLANTIC YARDS REP. (Apr. 20, 2010, 7:16 AM), http://atlanticyardsreport.blogspot.com/2010/04/esdcfcr-say-eviction-delay-past-may-17.html.

163. *See* Norman Oder, *Did the City Give FRC $31M More For Area Land? Despite Previous Reports, the Answer is Yes*, ATLANTIC YARDS REP. (Jan. 27, 2010, 5:21 AM), http://atlanticyardsreport.blogspot.com/2010/01/did-city-give-forest-city-ratner-31.html.

164. *See supra* section II.B.

165. *See supra* section II.C.2.

166. Telephone Interview with Lisa Bova-Hiatt, Deputy Chief, Tax & Bankr. Litig. Div., N.Y.C. Law Dep't (Nov. 23, 2010).

167. *Id.*

168. *See, e.g.*, Verified Petition and Complaint at 2, Develop Don't Destroy Brooklyn v. Urban Dev. Corp., 874 N.Y.S. 2d 414 (N.Y. App. Div. 2009) (No. 4206), *available at* http://dddb.net/FEIS/PetitionComplaint.pdf; Petition at 2, Goldstein v. N.Y. Urban Dev. Corp., No. 2008-7064 (N.Y. App. Div. Aug. 1, 2008) *available at* http://dddb.net.eminentdomain/papers/EDpetition080801.pdf.

169. *See* Pristin, *supra* note 34.

III. INCORPORATING THE LESSONS FROM ATLANTIC YARDS INTO EMINENT DOMAIN REFORM

Atlantic Yards demonstrated a significant array of problems within the urban renewal process, but most notable among them were issues of transparency and accountability.[170] The absence of a mandated public participation process or any statewide eminent-domain reform led to increased concerns over corruption and abuse in urban redevelopment and calls for reform. More public hearings or outright bans on eminent domain, however, are traditionally opposed by urban redevelopment advocates, who argue they reduce expediency and efficiency in land-use development.[171]

Some reform has taken shape following Atlantic Yards, but none adequately addresses this trio of issues within eminent domain and land use. In Albany, New York State Senator Bill Perkins introduced legislation to reform the state's eminent domain process, in part by creating a new, independent public authority with local representation to advise projects.[172] A locally staffed public authority might resolve some of the issues in New York's eminent domain process, but it fails to fully address the need for a mechanism to empower full, meaningful public participation. The West Harlem project, for example, demonstrated a successful use of public participation through ULURP, but the process is still not statutorily required, and its presence in land development remains entirely at the discretion of ESDC.[173] Beyond changes to the public participation process in land use, requests for a moratorium on eminent domain were also made to then-Governor David Paterson, though none were implemented.[174]

Each of these initiatives addresses some, but not all, of the concerns raised after *Kelo* as seen in Atlantic Yards: Perkins's statutory reform fails to take into account the need for full public participation and transparency; the voluntary use of ULURP in West Harlem lacks the teeth of judicial precedent or a

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170. *See* Lavine & Oder, *supra* note 58, at 371–73 (listing the "myriad" of issues raised by the Atlantic Yards project).

171. *See supra* section I.B.3.

172. Kim Kirschenbaum, *As Manhattanville Hearing Approaches, Perkins Pushes for Eminent Domain Law Reforms*, COLUMBIA SPECTATOR (May 31, 2010), http://www.columbiaspectator.com/2010/05/31/manhattanville-hearing-approaches-perkins-pushes-eminent-domain-law-reforms; *see* Lavine & Oder, *supra* note 58, at 366 & n.460.

173. *See* Norman Oder, *Will "absurd" Process Make Atlantic Yards This Generation's Penn Station?*, ATLANTIC YARDS REP. (Dec. 3, 2007, 6:31 AM), http://atlanticyardsreport.blogspot.com/2007/12/will-absurd-process-make-atlantic-yards.html (discussing the problems with ULURP); Norman Oder, *After Doctoroff Admits AY Should've Gone Through ULURP Will Bloomy, Burden Follow*, ATLANTIC YARDS REP. (Dec. 12, 2007, 7:32 AM), http://atlanticyardsreport.blogspot.com/2007/12/after-doctoroff-admits-ay-shouldve-gone.html (public officials discussing how projects built without a public review process lack consensus and result in inferior plans).

174. Letter from Bill Perkins, 30th District Senator, to David Patterson, Governor of N.Y. (Dec. 8, 2009), *available at* http://www.nysenate.gov/report/letter-governor-paterson-eminent-domain; Kim Kirschenbaum, *Local Activists Protest Eminent Domain Appeal*, COLUMBIA SPECTATOR, Jan. 29, 2010, *available at* http://www.columbiaspectator.com/2010/01/29/local-activists-protest-eminent-domain-appeal.

legislative mandate; and a moratorium on eminent domain ignores concerns over holdouts and inefficient land use. All of these concerns, however, are valid and none need be ignored in creating reform to eminent domain and land use following *Kelo*. From the lessons of netroots activism in Atlantic Yards emerges a proposal for a new solution to these historical issues. An online public participation process, modeled on the notice and comment seen in e-rulemaking and e-governance, could address calls for increased transparency and accountability without sacrificing expediency and efficiency. In proposing this new process, this Part will first look briefly at the value of public participation in land-use decisions. Next, it will examine how e-governance can implement this kind of mass public participation in land-use review, using examples of e-rulemaking and online policy making in both federal and state administrative law and land use. Finally, it will argue that this solution creates a more democratic, efficient, and expedient development process than solutions currently in place and will address potential concerns for implementation.

A. PUBLIC PARTICIPATION IN LAND USE

The rise of ESDC's extensive powers and its bypass of the ULURP process in Atlantic Yards illustrates much of the debate over the role of public participation in the land use development process. As discussed above in Part I, eminent domain has been expansively interpreted and applied, and deal-making between private developers and local governments has become more commonplace.[175] Emphasizing expediency and the need to cut through red tape, local and state officials "often treat public participation as if it obstructs or provides only marginal benefits to the decision process, rather than embracing it as an essential element of decision making."[176] The result is a "shrouded" process that either pays inadequate lip service to public participation or ignores it altogether.[177] ESDC's failure to use ULURP in Atlantic Yards, and its subsequent successful use in West Harlem, bear out the premise that a public participation process provides a valuable check on the back-room dealings and favoritism in local land use decisions, and in combination with media coverage, effectively disseminates information about the proposed project.[178]

A leading suggestion for reform of the public participation in land use is a collaborative model proposed by Alejandro Camacho that "cultivates negotiation processes" and "fosters agreement[s]" in local land use decisions.[179] Drawing on developments from administrative land use planning and alternative dispute resolution, Camacho's collaborative model calls for (1) broad and

175. *See* Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One*, 24 STAN. ENVTL. L.J. 3, 4 (2005).

176. *Id.* at 38.

177. *Id.* at 5.

178. *See supra* section II.C; *see also* Camacho, *supra* note 175, at 69.

179. *See* Camacho, *supra* note 175, at 69.

meaningful public participation; (2) a sustained problem solving orientation; (3) an active, meditative land-use planning profession; (4) an adaptable, comprehensive plan and agreement; and (5) creative accountability.[180] Though the collaborative model has implementation challenges, such as ensuring public participation and when to require consensus, its approach is a significant step away from the back room deals and unpredictable land use processes currently possible.[181]

B. E-DEMOCRACY, E-GOVERNANCE, E-RULEMAKING AND NETROOTS

As discussed in section II.B, Atlantic Yards' juxtaposition with the rise of household Internet use[182] and post-*Kelo* public awareness[183] of eminent domain resulted in prolific netroots involvement. Combined with Camacho's collaborative model, which emphasizes problem solving and broad, meaningful public participation, the story of Atlantic Yards suggests a new kind of model of public participation in land use decisions, one based on a concept similar to netroots action called "e-democracy."[184] Though the concept of e-democracy is simple, it is not particularly specific. As applied to land use processes, simply enabling citizen participation through the Internet is wonderful in theory, but perhaps no more effective or democratically legitimate than current models of participation if not properly organized or recognized.[185] Instead, applying the more specialized concept of e-governance—the use of computer networks to allow for expanded public involvement in policy deliberations—suggests a more specific model for online participation through an e-rulemaking-like process.[186] Because e-rulemaking is a well-defined and commonly used process, it provides an effective guideline for specializing and customizing the process to land-use negotiations.[187]

A corollary of e-governance, e-rulemaking is a government agency's use of public participation via online technology to increase efficiency, compliance, public participation, and "enhance the legitimacy" in the formation of rules and

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180. *See* Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two*, 24 STAN. ENVTL. L.J. 269, 269, 271 (2005).

181. *Id.* at 306–07.

182. Surveys conducted by the International Telecommunication Union, the leading United Nations agency for information and communication technology issues, estimate that between 2003 and 2010 Internet use in America rose from 59.2% of the population to 77.3%. *See Internet Usage and Population Growth*, INTERNET WORLD STATS, http://www.internetworldstats.com/am/us.htm (last visited July 24, 2011).

183. *See supra* section I.B.

184. E-democracy is short for electronic democracy, which proposes greater and more active citizen participation enabled by the Internet and mobile communications. *See* Steven Clift, *E-Democracy Resource Links*, PUBLICUS.NET (Mar. 23, 2006), http://www.publicus.net/articles/edemresources.html.

185. *See* Arthur Isak Applbaum, *Failure in the Cybermarketplace of Ideas*, *in* GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE 17, 30–31 (ELAINE CIULLA KAMARCK & JOSEPH S. NYE, JR. EDS., 2002).

186. *See* Barbara D. Brandon & Robert H. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1422–24 (2002).

187. *See id.* at 1422 n.1.

decisions.[188] The basic procedural framework of e-rulemaking is simple and based on three distinct steps: notice, comment, and rule.[189] An agency simply publishes a "[g]eneral notice of proposed rule making . . . in the Federal Register[;] . . . give[s] interested persons an opportunity to participate in the rule making through submission of written data, views or arguments[;] . . .[and] [a]fter consideration . . . incorporate[s] in the rules adopted a concise general statement of their basis and purpose."[190] Beyond e-rulemaking, e-governance can also take a more general discussion-based approach on broad policy-making through the use of online dockets and online forums.[191]

E-rulemaking and e-governance are perhaps best known on the federal level. In the 1990s, federal administrative agencies began to implement e-rulemaking and e-governance systems online.[192] In 2002, the Bush Administration spearheaded the creation of an "online rulemaking management" system, which ultimately focused on the creation of a "single government-wide system" for e-rulemaking: the Federal Docket Management System (FDMS).[193] While this federal e-rulemaking initiative has been described as a "complex, multi-tiered governance structure,"[194] the core concept provides a viable method of application outside the federal context. According to Professor Cary Coglianese, an expert on administrative law who has written extensively on e-rulemaking:

> The basic contours of e-rulemaking—namely soliciting public comment via the Internet—could clearly be applied at the state level as well. Arguably the use at the state [and] local level is even more valuable, as state [and] local administrative processes have tended to be more opaque than the federal processes.[195]

Four brief examples, two at the federal level and two at the state and local level, effectively illustrate the broad potential of e-governance in harnessing public participation in policy making. At the federal level, these can be seen in the use of more traditional e-rulemaking formatting of notice and comment for online public participation in drafting the National Forest Services policy, as well as the use of electronic docket rooms for developing general statements of policy in federal regulatory agencies like the Environmental Protection Agency

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188. *See E-Rulemaking.org*, UNIV. OF PA. LAW SCH., http://www.law.upenn.edu/academics/institutes/regulation/erulemaking/ (last visited July 24, 2011).

189. *See* CARY COGLIANESE, HARVARD UNIVERSITY, E-RULEMAKING: INFORMATION TECHNOLOGY AND REGULATORY POLICY 5–6 (2004).

190. Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(3)(C) (2000).

191. *See* Brandon & Carlitz, *supra* note 186, at 1462.

192. COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 3 (2008), *available at* http://ceri.law.cornell.edu/documents/report-web-version.pdf.

193. *Id.*

194. *Id.*

195. E-mail from Cary Coglianese, Professor, Univ. of Pa. Law Sch., to author (Apr. 7, 2011) (on file with author).

(EPA).[196] At the state and local levels, Virginia's use of a virtual town hall and New York City's solicitation of public comments on the World Trade Center memorial via the Internet illustrate how e-governance can also be applied on a smaller scale.

1. Federal Use of E-Rulemaking and E-Governance

In 1999, President Clinton asked the Forest Service to "develop and propose for public comment" a set of regulations to protect roadless areas in national forests.[197] In drafting the environmental issue statement and proposed rule, the Forest Service conducted "extensive outreach" efforts, drawing 517,000 written responses and 16,000 attendees at public meetings.[198] By the close of the comment period, the Forest Service received over 1,000,000 form letters and postcards, 60,000 original letters, and significantly, 90,000 electronic mail messages.[199] The website dedicated to the creation of this regulation also received over 14 million hits.[200] Just two years after Clinton's initial request, the proposal was adopted.[201] Scholars in e-governance and e-rulemaking have pointed to the Forest Service's successful use of e-rulemaking as an example of the possibilities of using online notice-and-comment rulemaking to engage broad sectors of the public and influence federal regulation.[202] The Roadless Area Conservation e-rulemaking process also demonstrated the successful use of online public participation in a land use context. Though there are undoubtedly differences between federal rulemaking and local or state land use decisions,[203] the Forest Service's use of e-rulemaking to create regulations surrounding land use provides a salient illustration that can conceivably be scaled to the state or local level.

Beyond rulemaking, various administrative agencies, such as the EPA, have also used online participation in their policy-making. When the EPA decided to change its Public Participation Policy in 1999, it turned to online discussion forums after traditional public meetings and outreach proved too costly.[204] In summer 2001, the EPA held a National Dialogue on Public Involvement in EPA Decisions, which complemented a more traditional notice-and-comment process.[205] Both experts and the general public were invited to participate in the

196. *See* Brandon & Carlitz *supra* note 186, at 1422, 1436–47.

197. U.S. FOREST SERV., ROADLESS AREA CONSERVATION RULEMAKING FACTS, http://fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5137368.pdf (last visited May 21, 2011).

198. *See* Brandon & Carlitz, *supra* note 186, at 1422 n.1 (citing Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3248 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 324)).

199. Special Areas; Roadless Area Conservation, *supra* note 198.

200. *See* U.S. FOREST SERV., *supra* note 197.

201. *See* Special Areas; Roadless Area Conservation, *supra* note 198.

202. *See, e.g.*, Brandon & Carlitz, *supra* note 186, at 1422.

203. *See infra* section III.C.

204. *See* Brandon & Carlitz, *supra* note 186, at 1463.

205. *See* THOMAS C. BEIERLE, RESOURCES FOR THE FUTURE, DEMOCRACY ON-LINE: AN EVALUATION OF THE NATIONAL DIALOGUE ON PUBLIC INVOLVEMENT IN EPA DECISIONS 8 (2002), http://www.rff.org/rff/Documents/RFF-RPT-demonline.pdf.

online forums on various topic threads, and over two weeks, 320 people posted messages on the forum and many more read compilations of the day's discussions sent out through a listserv.[206] In assessing the success of the program, Resources for the Future, a nonprofit, independent research organization specializing in environmental policy-making, found the online dialogue to be "a clear improvement over the notice-and-comment process that it complemented . . . [which] clearly reached a much larger and more geographically diverse group than could ever have participated in person."[207] The exercise illustrated that e-governance and more online forums could be used to create a national discussion on not only specific regulations, but also broad policy matters.[208] Like the Forest Service, the EPA's National Dialogue also illustrated the effectiveness of online participation in environmental and land-use contexts.

2. State and Local Use of E-Rulemaking and E-Governance

In 2000, the state of Virginia launched the Virginia Regulatory Town Hall, an online public participation forum for state regulation.[209] At its founding, the site provided "detailed information throughout each phase of the regulatory development process in Virginia" and included an automated e-mailing notification system that could be modified to let registered users know about meetings and proposed regulations in their areas of interest.[210] In the ensuing decade, the site has enhanced both its functionality and its usability. Beyond a simple notification process, it now includes online public comment forums, public petitions, and a keyword-searchable site.[211] Notably, in 2007 the Virginia Legislature amended the Virginia Administrative Process Act to specifically provide for a thirty-day period for online public comment on almost all regulations.[212] Since its inception, the site has won numerous awards as a "pioneer in electronic rule making"[213] and is an ongoing example of effective e-rulemaking and public participation at the state level.

Like the EPA's more informal use of online public participation to shape policy reform, governments can also use open, online public forums at the local level. As the City of New York turned toward rebuilding on the World Trade Center site following the events of September 11, 2001, public input was of the utmost importance. The Lower Manhattan Development Corporation (LMDC), a joint state–city corporation created in the wake of the attacks, was charged

206. *Id.* at 8–9.

207. *Id.* at 8–10.

208. *See* Brandon & Carlitz, *supra* note 186, at 1465.

209. *See* Michael Asimow, *News from the States*, ADMIN. & REG. L. NEWS, Summer 2000, at 22.

210. *Id.*

211. *Site Index*, VA. REGULATORY TOWN HALL, http://townhall.virginia.gov/siteindex.cfm (last visited Apr. 12, 2011).

212. VA. CODE ANN. § 2.2-4007.01 (2007).

213. *Town Hall Awards*, VA. REGULATORY TOWN HALL, http://townhall.virginia.gov/L/Awards.cfm (last visited Apr. 12, 2011).

with revitalizing downtown Manhattan and creating a permanent memorial.[214] In December 2002, after soliciting design proposals from around the world for ideas for the World Trade Center site, nine designs were presented to the public for comment.[215] In addition to traditional outreach activities such as hearings and video presentations, LDMC also posted the designs online and encouraged public participation through its website.[216] During the comment period between December 18, 2002 and February 2, 2003, LDMC received over 4,000 comments through its website and e-mail, and over 13,000 comments total on the memorial design.[217] Beyond feedback on the design proposals for the memorial, LMDC also used online public participation in finalizing its recommendations on the purpose, centerpiece, and supporting exhibits of the World Trade Center memorial.[218] During the one-month public comment period, the draft recommendations were available for download online accompanied by an online comment form.[219] Of the 400 responses received by LMDC, 67 percent were received through the online comment form.[220] These comments were read and discussed in their entirety by the Memorial Center Advisory Committee, which recommended changes to the final recommendations as a result of the public response.[221] Through use of online comment, LMDC and New York City have been able to harness public input and create a transparent and democratic redevelopment program. Beyond demonstrating a scaled model of e-governance, LMDC's use of online public participation also demonstrates how effective online forums can be within a land use process.

C. A NEW SOLUTION TO THE PROBLEMS OF EMINENT DOMAIN

As applied to land use, an e-rulemaking process could involve either a more formal notice-and-comment approach, as seen in the Forest Service and Virginia examples, or a broader online planning dialogue, as seen in the EPA and World Trade Center memorial examples. Rather than the presentation of a proposed rule or policy, however, e-governance in land use decisions would instead

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214. LOWER MANHATTAN DEV. CORP., THE PLAN FOR LOWER MANHATTAN, http://www.renewnyc.org/ThePlan/general_project_plan.asp (last visited Apr. 12, 2011).

215. Press Release, Lower Manhattan Dev. Corp., The Lower Manhattan Development Corporation and Port Authority of New York & New Jersey Announce Selection of Studio Daniel Libeskind: Memory Foundations as Design Concept for World Trade Center Site (Feb. 27, 2003), http://www.renewnyc.com/displaynews.aspx?newsid=41c07ff1-9b1a-41a2-866b-8aa8148b6736.

216. *Id.*

217. LOWER MANHATTAN DEV. CORP., & PORT AUTH. OF N.Y. & N.J., THE PUBLIC DIALOGUE: INNOVATIVE DESIGN STUDY (2003), *available at* http://www.renewnyc.com/content/pdfs/public_dialogue_innovative_design.pdf.

218. John C. Whitehead & Kevin M. Rouge, LOWER MANHATTAN DEV. CORP., PUB. DIALOGUE REPORT ON THE MEM. CTR. ADVISORY COMM. DRAFT RECOMMENDATIONS FOR THE MEM. CTR. 2 (2004), *available at* http://www.renewnyc.com/content/pdfs/Public_Comment_Report.pdf.

219. *Id.*

220. *Id.*

221. *Memorial Center Advisory Committee Recommendations*, LOWER MANHATTAN DEV. CORP., http://www.renewnyc.com/memorial/memorial_center_draft_rec.asp (last visited Apr. 12, 2011).

involve the online presentation of a development plan for comment from community groups, architects, urban planners, neighbors, and civic leaders.

1. Creating a More Efficient System of Public Participation

Lisa Bova-Hiatt in a recent interview said:

> If a public authority like the Empire State Development Corporation or the Metropolitan Transit Authority had to go through local uniform land use procedures every time they proposed a project, especially where the project might involve approval from more than one municipality or jurisdiction, these projects would never come to fruition.[222]

Bova-Hiatt's concerns over the expediency and efficiency of public participation in land-use decisions are representative of many urban development proponents.[223] As shown, however, an online public participation process could eliminate many of the hazards of current land use review processes, which often involve large, poorly-run, and hard-to-organize public meetings.[224] As seen in the EPA's National Dialogue and Lower Manhattan Development Corporation's public discourse, e-governance is also a low-cost alternative to traditional public forums. It can also be an efficient and accessible organization of public input: regardless of whether interested parties can actively participate in notice and comment, they can always follow the proceedings surrounding them through compilations and e-mails. Finally, including the public in the land use planning process has the added benefits of possibly forestalling an increase in litigation and expediting development. By making the public part of a partnership of planning, developers and city officials decrease the natural resistance to new land use projects.[225] Online forums and an e-rulemaking structure for land use decisions have the potential to revolutionize civic participation, transforming

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222. *See* Telephone Interview, *supra* note 166.

223. *See supra* section I.B.3.

224. In Atlantic Yards, the public hearings relating to SEQRA were poorly managed, chaotic, and too short for proper review of the complicated documents presented for discussion. *See, e.g.*, Norman Oder, *ESDC Hears the Critics on Scale, Scope, and More; BUILD is Subdued; Will Affordable Housing Move East Offsite?*, TIMES RATNER REP. (Oct. 19, 2005, 8:11 AM), http://timesratnerreport.blogspot.com/2005/10/esdc-hears-critics-on-scale-scope-and.html; Norman Oder, *Environmental Impact? Challenges Abound to State's "Comically Limited" Process*, TIMES RATNER REP. (Dec. 15, 2005, 8:50 AM), http://timesratnerreport.blogspot.com/2005/12/environmental-impact-challenges-abound.html; Norman Oder, *Muncipal* [sic] *Art Society: Consider Alternatives, Including No Arena and/or Less Density*, TIMES RATNER REP. (Jan. 31, 2006, 10:50 AM), http://timesratnerreport.blogspot.com/2006/01/muncipal-art-society-consider.html; Norman Oder, *AY Supporters Out in Force at Epic Hearing, but Opponents Go the Distance*, ATLANTIC YARDS REP. (Aug. 24, 2006, 6:29 AM), http://atlanticyardsreport.blogspot.com/2006/08/ay-supporters-out-in-force-at-epic.html; Norman Oder, *AY Forum on Election Day Brief and Low-key, though Criticism of Scale Won't Disappear*, ATLANTIC YARDS REP. (Sept. 13, 2006, 6:48 AM), http://atlanticyardsreport.blogspot.com/2006/09/ay-forum-on-election-day-brief-and-low.html.

225. *See* E. Thirteenth St. Cmty. Ass'n v. N.Y. State Urban Dev. Corp., 84 N.Y.2d 287, 296 (N.Y. 1994) (discussing the legislative history of the Eminent Domain Procedure Law and recognizing debate over the involvement of a public participation process in public projects).

time-consuming, unwieldy public meetings into streamlined and organized public-participation processes.

In Atlantic Yards, an efficient, inclusive online public participation process is easy to imagine. In the use of eminent domain, ESDC could have easily posted notice online and held public hearings in online forums or provided virtual mediation between the condemnees and the condemnors.[226] Rather than rushed, poorly managed in-person public hearings, a searchable environmental impact statement could have been posted online for a period of public comment along with an online comment form. Perhaps most notably, the entire ULURP process could have been moved to an online community participation program, with neighborhood community boards, borough presidents, local politicians, and the general public all having a chance to weigh in on the land-use project and voice their concerns. Though the voluntary incorporation of public participation into what was often characterized as a private land use project might seem unlikely, such outreach and transparency might ultimately have been in the best interests of condemnors and developers.

2. Addresses Public Participation Issues

From the very beginning, the movement against the Atlantic Yards project seemed fueled not by protectionism, but by the lack of a democratic land-use process. "WE OPPOSE [sic] the anti-democratic process that Forest City Ratner has used, and continues to use, to push its arena and skyscraper development plan on the people of Brooklyn without our input or consent," stated Develop Don't Destroy Brooklyn in its online position paper against the Atlantic Yards project.[227] DDDB spoke for many civic groups in seeking transparency and accountability in the urban development project taking place in their neighborhood. As demonstrated, an online review process could create an online dialogue and allow individuals to participate in land use planning. As seen in the Forest Service's e-rulemaking, online comments can draw huge amounts of public participation and community involvement. It is unlikely that such a process would be at a loss for public participation. As the rise of netroots activism in Atlantic Yards demonstrates, there is a ready interest for an outlet for community involvement in land use decision making. Additionally, the use of an online participation process would create a transparent public record and a means of holding all parties—from land use officials to citizens, and from developers to the government—accountable, and prevent the use of eminent domain for private gain. Finally, a public record would provide a valuable historical learning tool that could help municipalities and governments learn from various solutions to land use problems.

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226. *See, e.g.*, GA. CODE. ANN. §22-1-10 (Supp. 2011) (reforming eminent domain laws to mandate better notice requirements and evening public hearings); IND. CODE § 32-24-1-3 (2011) (reforming eminent domain laws allowing condemnee to demand paid-for mediation with condemnor).

227. *About DDDB: Position Statement*, *supra* note 78.

3. Hurdles to Effective Statutory Reform

Unfortunately, on a large scale, instituting such a process to introduce public participation in the eminent domain process would require legislative action and so far such reform has had little success.[228] But, as mentioned above,[229] voluntary implementation of such reform is not outside the reach or best interests of local governments and state agencies—some of which have expressed an open mind to reform. In a *New York Times* article published shortly after the Appellate Division's ruling in *Kaur*, Lisa Bova-Hiatt said the city would not oppose "thoughtful change" in the eminent domain laws.[230] Whether the city's open-minded attitude remains now that *Kaur* has been reversed remains to be seen.

CONCLUSION

The organic rise in netroots public participation in Atlantic Yards points to the potential for a long-term, practical solution to problems with the land use process and eminent domain. Drawing on the lessons learned in Atlantic Yards, e-rulemaking and e-governance can create a system of land-use development that addresses many of the concerns raised by the public after *Kelo*, such as accountability and transparency, while still creating an efficient and expedient land use development process. Through statutory reform or changes in local government policies, such a system can be quickly and easily implemented, eliminating many of the current problems with public participation and making land use decisions more efficient and democratic.

228. *See* Pristin, *supra* note 34.
229. *See* section III.C.
230. *Id.*