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SYMPOSIUM - TAKING NEW YORK: OPPORTUNITIES, CHALLENGES, & DANGERS POSED BY THE USE OF EMINENT DOMAIN IN NEW YORK

Gallenthin v. Kaur: A Comparative Analysis of How the New Jersey and New York Courts Approach Judicial Review of the Exercise of Eminent Domain for Redevelopment

Ronald K. Chen*

*Rutgers School of Law - Newark

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Abstract

This Article explores two explanations for why New Jersey and New York take different approaches to judicial review of exercises of eminent domain. Part I examines the approach of both states and their differing procedures for review of administrative agency determinations. Part II discusses how each states' courts and legislatures define "blight." Part III examines how New York's approach leaves municipal officials and redevelopers free to use the more flexible concept of "underutilization" as a proxy for "blight."

KEYWORDS: eminent domain, property, constitution, Fifth Amendment, taking, New York, New Jersey, blight

GALLENTHIN V. *KAUR*: A COMPARATIVE ANALYSIS OF HOW THE NEW JERSEY AND NEW YORK COURTS APPROACH JUDICIAL REVIEW OF THE EXERCISE OF EMINENT DOMAIN FOR REDEVELOPMENT

Ronald K. Chen[*]

INTRODUCTION

The public controversy triggered by the United States Supreme Court's expansive decision in *Kelo v. City of New London*[1] put considerable political pressure on individual states to impose their own independent limits on the use of the power of eminent domain for purposes of redevelopment, in order to conform that power to commonly held notions regarding the inviolability of private property. *Kelo* held as a matter of federal constitutional doctrine that appropriating property for transfer to a private entity in order to encourage economic development or enhance tax revenues constituted a permissible "public use" under the Takings Clause of the Fifth Amendment.[2] But the Court emphasized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings

[*] Vice Dean, Clinical Professor of Law, and Judge Leonard I. Garth Scholar, Rutgers School of Law–Newark. A.B. Dartmouth; J.D. Rutgers–Newark. Admitted to the New Jersey and New York Bars. From 2006 to 2010, the author served as Public Advocate of New Jersey, and undertook, as major initiative of the Department of the Public Advocate, an examination of the use of eminent domain for redevelopment, and entered appearances in many New Jersey cases involving eminent domain and the definition of "blight," including *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007).

1. 545 U.S. 469 (2005).

2. U.S. CONST., amend. V.

power."[3] Observing that many states already impose "public use" requirements that are stricter than the federal baseline, the Court, in effect, invited the states to temper the breadth of its controversial decision with their own independent limitations. The pressure to identify independent state grounds for invalidating the use of eminent domain for redevelopment was therefore felt by both the legislative and judicial branches of state governments.

One such limitation that is grounded in the legal tradition of a number of states, including New York and New Jersey, is the principle that use of eminent domain for redevelopment should be restricted to areas that are considered "blighted." Elimination of blight through redevelopment projects has thus long been held by the courts to constitute a public benefit which satisfies the "public use" requirement of the Takings Clause.[4] Conversely, both before and after the *Kelo* decision, many states have required a showing of blight as a precondition to use of redevelopment powers, including eminent domain.[5] Especially after *Kelo*, several states have explored the concept of elimination of "blight" not only as a source of reaffirmation of a state's redevelopment authority, but at the same time as a potential limit on that same authority, which would protect areas deemed not to be blighted from condemnation for redevelopment.

New Jersey and New York have facially comparable constitutional and statutory provisions regarding use of condemnation to engage in redevelopment of blighted areas. Under the Blighted Areas Clause of the New Jersey Constitution: "The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment . . . ."[6] The New York Constitution states, albeit in somewhat different language, that "the legislature may provide . . . for the clearance, replanning, reconstruction and rehabili-

3. *Kelo*, 549 U.S. at 489. The Court further noted that, "[s]ome of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised." *Id.*

4. *See* Berman v. Parker, 348 U.S. 26, 36 (1954).

5. *See, e.g.*, Evans v. City of San Jose, 27 Cal. Rptr. 3d 675, 690 (Cal. Ct. App. 2005) ("A finding that a project area is blighted is the absolute prerequisite for redevelopment."); City of Norwood v. Horney, 853 N.E.2d 1115, 1142 (Ohio 2006) (absent blight, an economic or financial benefit alone is insufficient to satisfy the public use requirement under the Ohio Constitution); Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004) (merely "alleviating unemployment and revitalizing the economic base of the community" does not constitute "public use" under the Michigan Constitution).

6. N.J. CONST. art. VIII, §3, para. 1.

tation of substandard and unsanitary areas. . . ."[7] Pursuant to their respective constitutional provisions, both states have, either by statute[8] or by case law,[9] attempted to further elucidate the meaning of "blight."

In two relatively recent decisions, the courts of last resort of both states have laid out their vision for the proper role of the judiciary in defining "blight," and thus also determined its effectiveness in limiting at least some objectionable uses of eminent domain for purposes of redevelopment. But despite the similar focus on the concept of blight, the two courts announced two very different approaches to judicial review of such determinations. In *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*,[10] the New Jersey Supreme Court interpreted the New Jersey Constitution as imposing judicially enforceable limits on the legislative power to authorize condemnation for purposes of redevelopment, and thus strictly construed the New Jersey Local Redevelopment and Housing Law as not permitting designation of an undeveloped parcel of land as "in need of redevelopment," i.e., "blighted,"[11] merely because the local planning board found that the land was "stagnant or not fully productive." Such an expansive definition of blight, the court found, would be beyond the powers delegated to the legislature by the state constitution. Moreover, while facially respectful of administrative expertise, the court also required that an agency determination of blight be supported by "substantial evidence," such that the agency must satisfy a vigorous threshold evidentiary requirement, not merely supported by "the net opinion of an expert," before being entitled to deference.[12]

In contrast, in *Kaur v. New York State Urban Development Corp.*,[13] the New York Court of Appeals adopted a highly deferential approach to judicial review over the exercise of redevelopment power. In authorizing a controversial use of condemnation power to permit redevelopment and expansion by Columbia University in the Manhattanville section of West

7. N.Y. CONST. art. XVIII, §1.

8. For a description of New Jersey's statutory definitions of blight, see *infra* note 32. *See generally* N.J. STAT. ANN. §§ 40A:12A-1 to -73 (West 2011) (N.J. Local Redevelopment and Housing Law); New York State Urban Development Corporation Act, N.Y. UNCONSOL. LAW §§ 6251-6292 (McKinney 1968).

9. For New York case law attempting to describe the factors that may be considered in determining blight, see *infra* notes 126-129 and accompanying text.

10. 924 A.2d 447 (N.J. 2007).

11. Although the New Jersey Constitution uses the term "blighted area," in 1992 the New Jersey Legislature replaced the term in the local redevelopment law with the euphemism "area in need of redevelopment," while at the same time making clear that "[a]n area determined to be in need of redevelopment pursuant to this section shall be deemed to be a 'blighted area' for the purposes of Article VIII, Section III, paragraph 1 of the Constitution." N.J. STAT. ANN. § 40A:12A-6(c) (West 1992).

12. *Gallenthin*, 924 A.2d at 465.

13. 933 N.E.2d 721 (N.Y. 2010).

Harlem in Manhattan, the court characterized the determinations of "blight" and "public purpose" to be judgments largely committed to the legislature, and, in language hinting at separation of powers concerns, countenanced judicial intervention "only where there is *no room for reasonable difference of opinion* as to whether an area is blighted."[14] Under that standard, judicial review is so deferential that, as a practical matter, courts may be removed from any meaningful role in curtailing arguably overreaching use of eminent domain for redevelopment.

This Article will attempt to explore two credible explanations for the divergent results between the neighboring states. First, in Part II, it will explore the long tradition, ultimately grounded in the New Jersey Constitution, of meaningful judicial review of administrative agency determinations. Under the "action in lieu of prerogative writs" procedure created under Article VI, Section 5, Paragraph 4 of the state constitution, the New Jersey judiciary exercise the power by which the Crown, acting through its courts, historically exercised control over inferior courts and public authorities throughout the kingdom. While the analogous procedure under New York law, a CPLR Article 78 proceeding,[15] was likewise intended to emulate the traditional writs of certiorari, mandamus, and prohibition, and provide for judicial review over official or agency action, the scope of that review, as evidenced by the *Kaur* decision, is comparatively narrow.

In Part III, this Article discusses whether a second basis for the difference between *Gallenthin* and *Kaur* might lie in the diligence with which the respective courts and legislatures are willing to approach the task of defining "blight," such that it can be reduced to a judicially manageable standard. While the use of a poetic metaphor in legal terminology presents some undeniable interpretive challenges, the New Jersey courts appear to be more willing to explore the historical understanding and provenance of the term, stemming from the first urban renewal efforts in the late 1930s and 1940s, and the New Jersey Legislature has undertaken to define the conditions that establish blight in greater detail. In contrast, the relevant New York statutes are phrased at a level of generality that essentially begs the question of what constitutes blight.

Lastly, this Article concludes that the deferential attitude adopted by the New York courts toward legislative or agency determinations of blight runs the risk of leaving misuse of the malleable concept of "underutilization" without any meaningful remedy. The notion that an area can be deemed

14. *Id.* at 730 (emphasis in original) (quoting Goldstein v New York State Urban Dev. Corp., 921 N.E.2d 164, 172 (N.Y. 2009)).

15. N.Y. C.P.L.R. 7801 (McKinney 2011).

blighted because some prospective future use might become more economically productive would quickly degenerate into the rationale accepted by *Kelo*—but presumably rejected by those states that interpose their own requirement of blight—that stimulating general economic development can justify appropriating private property for redevelopment without a showing that the area to be condemned itself presents any danger to the public health, safety, and welfare. Under those circumstances there would appear to be little utility for maintaining the independent requirement of blight at all.

I. JUDICIAL REVIEW OF AGENCY DETERMINATIONS

A. New Jersey's Approach

Judicial review of federal administrative agency decisions, as well as agency decisions in many states, is a legislatively created mechanism pursuant to the Administrative Procedures Act[16] (APA) or analogous state statutes, and thus is also largely subject to legislatively created limits.[17] In contrast, "[i]n New Jersey, judicial review of administrative agency determinations has the support of a special constitutional provision . . . which largely immunizes it from legislative curbs."[18] Thus, New Jersey "is conscious of itself as the jurisdiction in which judicial review has been most freely available with the least encumbrance of technical apparatus."[19] Indeed, occasional attempts by the New Jersey Legislature to curtail access to judicial review of agency action by imposing procedural barriers, such as a limitations period, have been firmly rebuffed.[20]

The actual text of the New Jersey Constitution that created this peculiar New Jersey guarantee of judicial review of agency action is at first inspection somewhat enigmatic: "Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court,

16. 5 U.S.C. §§ 701-706 (2011).

17. The federal APA permits judicial review of agency decisions unless: "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701. Nevertheless, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967).

18. *In re* Senior Appeals Examiners, 290 A.2d 129, 132 (N.J. 1972) (rejecting contention that the legislature precluded judicial review of the Civil Service Commission's decisions regarding state employee compensation plan).

19. *Id.* (quoting LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 535 (1965)).

20. *E.g.*, Fischer v. Bedminster Twp., 76 A.2d 673, 676 (N.J. 1950) (striking down as unconstitutional the legislature's attempt to impose statute of limitations on judicial review of a zoning ordinance enacted by municipal governing body).

on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary."[21] Although it "superseded" the traditional writ procedure and created the new action "in lieu" of prerogative writs,[22] decisional law has consistently interpreted this clause as leaving unchanged the substance of prerogative writ appeals, and thus actions in lieu of prerogative writs lie in those cases where a remedy was available under a traditional prerogative writ.[23] Proper interpretation of this provision requires an understanding of the legal history undergirding prerogative writs.

Prior to the 1947 New Jersey Constitution, the former New Jersey Supreme Court, a tribunal with both original and appellate jurisdiction which succeeded to the role of the English court of the King's Bench,[24] entertained petitions for the extraordinary writs traditionally recognized under English law: certiorari, habeas corpus, mandamus, prohibition, procedendo, and quo warranto. Developed at a time when there was no concept of separation of powers, prerogative writs were a means by which the Crown, acting through its courts, exercised supervision over public authorities throughout the kingdom.[25] Of these, the most useful device for judicial review was certiorari, whose historic function was "to supervise and review the proceedings of all inferior tribunals not proceeding according to the course of the common law, for the correction of jurisdictional excesses and errors of law revealed by the record."[26] Moreover, "[t]he power comprehends the supervision of statutory tribunals and governmental establishments, including municipal corporations."[27]

It was therefore clear at the outset that the action in lieu of prerogative writs created under the 1947 New Jersey Constitution intended to continue

21. N.J. CONST. art. VI, § 5, para. 4.

22. *In re* Application of Li Volsi, 428 A.2d 1268, 1277 (N.J. 1981).

23. *Id.*

24. *See* State v. Court of Common Pleas, 61 A.2d 503, 506 (N.J. 1948) (the prerogative writ of certiorari was within the appellate and extraordinary jurisdiction with which the Supreme Court, as the successor of the King's Bench, had been originally vested).

25. *See* 2 C.J. ANTINEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND THE OTHER COMMON LAW WRITS 689-90 (1987) (prerogative writ of certiorari available to correct constitutional violations, abuses of discretion, or lack of substantial evidence to sustain order); Robert J. Pushaw, Jr., *Justiciability and Separation Of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 496 n.153 (1996) ("The King's Bench, which assisted the Crown in exercising executive power, had discretion to grant prerogative writs against executive officials and lower courts (as opposed to Parliament or the king himself) who exceeded their legal authority or failed to perform their duties").

26. Fischer v. Bedminster Twp., 76 A.2d 673, 675 (N.J. 1950).

27. *Id.* at 676.

certiorari as a method of judicial review over administrative action.[28] Moreover, in interpreting the Prerogative Writs Clause, the New Jersey Supreme Court also emphasized that judicial review by an action in lieu of prerogative writ was immune from legislatively imposed limits or exceptions:

> By the clearest language, the Constitution commits to the Supreme Court the regulation of the new remedies provided in lieu of prerogative writs. Review, hearing and relief shall be had on such terms and in such manner as the Supreme Court alone may provide by rule. In the administration of these remedies, there is to be no division of authority. . . . No distinction is made between the substantive jurisdiction to afford the relief theretofore available through the prerogative writs and the mode and manner of the exercise of the power. The whole is within the exclusive jurisdiction of the Supreme Court. Neither the exercise of the power inherent in the old Supreme Court by means of the prerogative writs nor the regulation of the remedy is subject to legislative control.[29]

Pursuant to the authority granted by the state constitution, therefore, the New Jersey Supreme Court has enacted a court rule governing actions in lieu of prerogative writs,[30] its procedures are based on the Court's ultimate authority bestowed directly by the state constitution, and not through any delegated power from the legislature.

1. Gallenthin Realty v. Borough of Paulsboro

The action by Gallenthin Realty to review the action of the Borough of Paulsboro that designated a sixty acre parcel of undeveloped wetlands as

28. Monks v. New Jersey State Parole Bd., 277 A.2d 193, 198 (N.J. 1971) (citations omitted).

> Our judicial system has historically been vested with the comprehensive prerogative writ jurisdiction which it inherited from the King's Bench; that jurisdiction has been frequently exercised in the supervision of inferior governmental tribunals including administrative agencies. . . . When our 1947 Constitution was prepared, pains were taken to insure not only that the court's prerogative writ jurisdiction would remain intact, but also that the manner of its exercise would be greatly simplified. The implementing court rules now provide an easy mode of review designed to insure procedural fairness in the administrative process and to curb administrative abuses.

Id.

29. *Fischer*, 76 A.2d at 676.

30. "Review, hearing and relief heretofore available by prerogative writs and not available under R. 2:2-3 or R. 8:2 shall be afforded by an action in the Law Division, Civil Part, of the Superior Court." N.J. CT. R. 4:69-1. Under the procedure adopted by the New Jersey Supreme Court, actions to review administrative actions of statewide agencies, such as cabinet level departments, are brought directly in the Appellate Division of the Superior Court, while all other actions seeking review of local agency action, such as counties or municipalities, are brought in the Law Division.

blighted was therefore commenced as an action in lieu of prerogative writs.[31] Its litigation history in the Law Division and the Appellate Division of New Jersey Superior Court was somewhat unremarkable, leading to *pro forma* affirmances in unpublished opinions, which relied on the existence of consultant reports that rehearsed the statutory language of the New Jersey Local Redevelopment and Housing Law,[32] and then invoked the rule of deference to administrative expertise.[33] That deference was consistent with the empirical observation that in over forty years, the New Jersey Supreme Court had declined to second guess a legislative determination of blight.[34] As Chief Justice James Zazzali, the author of the *Gallenthin* opi-

31. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 453 (N.J. 2007).

32. N.J. STAT. ANN. § 40A:12A-5 describes a number of conditions that indicated a blighted area: (a) The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions; (b) abandoned commercial, manufacturing, or industrial buildings; (c) unimproved vacant land that has remained so for a period of ten years and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital; (d) areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community; (e) a growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety, and welfare; and (f) areas in excess of five contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone, tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated. N.J. STAT. ANN. § 40A:12A-5 (West 2009).

Rather than relying on the blight criterion set out in N.J. STAT. ANN. § 40A:12A-5(c) (unimproved vacant land), the Borough of Paulsboro Planning Board chose to rely on N.J. STAT. ANN. § 40A:12A-5(e), which permits designation of land demonstrating "a growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."

33. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, Nos. A-6941-03T1, A-0222-04T1, Type Op. at 17 (N.J. Super. App. Div. 2006) ("We conclude that there is substantial credible evidence in the record to support both the designation of plaintiffs' property as an area in need of redevelopment by application of *N.J.S.A.* 40A:12A-5e and the adoption of the redevelopment plan pursuant to *N.J.S.A.* 40A:12A-7, and we find nothing arbitrary, capricious, nor unreasonable in the action taken by the planning board and governing body.") (italics in original).

34. In *Wilson v. City of Long Branch*, 142 A.2d 837, 849 (N.J. 1958), the New Jersey Supreme Court had roundly rejected the argument that the legislature was not empowered to provide a definition of blight:

nion, himself noted in a law review article he co-authored with his former law clerk after he retired from the court, from the time of the adoption of the 1947 New Jersey Constitution until the *Gallenthin* decision, "[c]ourts repeatedly upheld redevelopment designations without questioning whether the ever-mutating statutory criteria fairly defined 'blight' within the meaning of the blighted areas clause."[35]

Based on prior experience, the case did not appear to be a likely candidate for the grant of discretionary review by the New Jersey Supreme Court. No doubt, however, the Court was aware of the recent public furor over the *Kelo* decision, and may have been examining incoming petitions for certification to identify a vehicle by which it could make its imprint on the ongoing debate on use of eminent domain. Moreover, the interpretation of the statutory definition of "blight" in New Jersey had expanded incrementally over the years so that, by the time of the *Gallenthin* decision, municipalities were often interpreting it to apply to any property that could be made more productive or was operated in a less than optimal manner.[36]

In particular, in 1992 the New Jersey Legislature made significant changes in the redevelopment statute,[37] in which it sought to expand the scope of redevelopment beyond the alleviation of blight.[38] For instance,

> Manifestly, the grant of power contemplated development and implementation by the Legislature. Definition of blight was the ordinary and expected incident of the exercise of that power and no reasonable argument can be made that the connotation ascribed to it overreaches the public purpose sought to be promoted by the Constitution.

35. James R. Zazzali & Jonathan L. Marshfield, *Providing Meaningful Judicial Review of Municipal Redevelopment Designations: Redevelopment in New Jersey Before and After* Gallenthin Realty Development, Inc. v. Borough Of Paulsboro, 40 RUTGERS L.J. 451, 479-80 (2009).

36. *See Gallenthin*, 924 A.2d at 460.

37. 1992 N.J. Laws c.79 (replacing Blighted Areas Act with Local Redevelopment and Housing Law).

38. The 1992 Local Redevelopment and Housing Law was based upon a report issued by the New Jersey County and Municipal Government Study Commission, chaired by then State Senator Jack Lynch. In its report, the Commission described what it deemed to be the outmoded concept of blight.

> The concept of a "blighted area" has changed considerably since the term was introduced in earlier redevelopment statutes. Over the past three decades, the focus of public action with respect to redevelopment has shifted from the elimination of "unsanitary," congested and unsafe slums, to the rehabilitation and conservation of declining neighborhoods, and to the enhancement and improvement of underutilized commercial and industrial areas. It is evident that the concept of a "blighted" area is no longer relevant and, in fact, carries an unnecesarily [sic] negative connotation. In some cases, this can represent a political constraint in municipalities that are considering the redevelopment of parts of their communities.

State of N.J. Cnty. & Mun. Gov't Study Comm'n, LOCAL REDEVELOPMENT IN NEW JERSEY: STRUCTURING A NEW PARTNERSHIP 58 (1987).

the language of the Local Redevelopment and Housing Law at issue in *Gallenthin* was expanded from "stagnant *and* unproductive condition of land" to "stagnant *or not fully productive* condition of land."[39] Thus the legislature effectively made the stagnancy requirement textually superfluous by providing that an area could meet the requirements of blight if the redevelopment was deemed useful for the enhancement and improvement of underutilized areas. Under this concept of "underutilization," as *Gallenthin* eventually observed, "any property that is operated in a less than optimal manner is arguably 'blighted.'"[40] But "[i]f such an all-encompassing definition of 'blight' were adopted," the Court noted, "most property in the State would be eligible for redevelopment."[41]

The circumstances therefore called for some curbing of government agency excesses, and the court responded forcefully, holding that under the New Jersey Constitution, the government may not designate private property for redevelopment unless it satisfied the constitutional definition of "blighted area," which the court defined as one marked by "deterioration or stagnation that has a decadent effect on surrounding property."[42] In so ruling, the court adopted a constitutional definition of blight that created a limit beyond which even the legislature could not tread, and thus necessarily rejected the notion, apparently presumed by the legislature in enacting the 1992 statute, that defining the limits of the redevelopment power was a purely legislative question beyond judicial review.

Especially when assessed in the context of the bulwark of judicial protection against administrative excess afforded by the New Jersey Constitution, the level of scrutiny used for analysis by the New Jersey Supreme Court in *Gallenthin*, and the apparent determination by the court to revitalize the role of the judiciary in scrutinizing an agency's use of redevelopment powers, should not have been completely unexpected. But the decision did catch by surprise many proponents of redevelopment, who had come to expect virtually unquestioning deference to administrative expertise in the complex and sometimes convoluted area of planning and redevelopment, which expectation was fostered by the fact that for decades prior to *Gallenthin* the court had never expressly rejected a local agency's blight designation.[43]

39. N.J. STAT. ANN. § 40A:12A-5(e) (West 2000) (emphasis added).

40. *Gallenthin*, 924 A.2d at 460.

41. *Id.*

42. *Id.*

43. *See* Zazzali & Marshfield, *supra* note 35, at 480-81 (*Wilson v. Long Branch*, 142 A.2d 837 (N.J. 1958), "set the tone for the next several decades of judicial review of redevelopment statutes--namely, judicial acquiescence to the legislature's presumed prerogative to define the contours and scope of redevelopment in New Jersey").

Gallenthin did not, however, revolutionize the mechanics of judicial review of administrative determinations. The widely accepted doctrine of deference to administrative expertise still prevails in New Jersey after *Gallenthin*, and thus the accepted axiom is usually that the decision of the municipal authorities that an area is blighted comes to the courts "invested with a presumption of validity."[44] But when reconciled with the constitutional mandate to the judiciary to provide meaningful review of administrative action, it is important to characterize accurately the source of this deference either as an aspect of self-imposed judicial restraint or as a result of the limitations inherited from prerogative writs practice at common law. Such deference, however, is not accurately described, at least in New Jersey, as a limitation imposed by the separation of powers doctrine, or by a lack of jurisdiction in the courts to engage in such review.

Some municipal proponents argued further that the Blighted Areas Clause concerns only a grant of authority to the legislature, and thus could not be the source of a private constitutional protection. Under this interpretation, the clause exclusively authorizes the legislature, not the judiciary, to define "blight," and, therefore, the judiciary must endorse without criticism the statutory definition of that concept. The court somewhat summarily dismissed those arguments as inconsistent with the role of "the Judiciary [as] the final arbiter of the institutional commissions articulated in the Constitution."[45]

> By adopting the Blighted Areas Clause, the People entrusted certain powers to the Legislature, and the courts are responsible for ensuring that the terms of that trust are honored and enforced. We find no merit to Paulsboro's assertion that the Blighted Areas Clause divests the Judiciary of that responsibility.[46]

While in other circumstances, citing *Marbury v. Madison* by name[47] might seem unnecessary or even trite, the *Gallenthin* court's emphasis that its role in defining "blight" flowed logically from the axiom that it is "emphatically the province and duty of the judicial department to say what the law is"[48] was an essential prerequisite to adopting and enforcing a constitutional limit to the scope of the term "blighted area." Until *Gallenthin*, it was not a completely foregone conclusion that the New Jersey Constitution

44. Levin v. Twp. Comm. of Bridgewater, 274 A.2d 1, 18 (N.J. 1971) ("To succeed, plaintiffs had the burden of overcoming that presumption and demonstrating that the blight determination was not supported by substantial evidence. If a reviewing court finds that the determination was grounded on substantial evidence, it must be affirmed.").

45. *Gallenthin*, 924 A.2d at 456.

46. *Id.*

47. *Id.*

48. 5 U.S. (1 Cranch) 137, 177 (1803).

provided the judiciary with the apparatus to impose restraints on a legislative definition of blight.[49] As the author of the *Gallenthin* opinion himself acknowledged, "it was not until *Gallenthin* that the blighted areas clause would be properly recognized as a meaningful limitation on the legislature's redevelopment authority."[50]

As further described in Part III of this Article,[51] the *Gallenthin* court then engaged in a comprehensive analysis of the historical understanding of the term "blight" in order to establish the outer constitutional limits of the legislature's redevelopment powers, and determined as a result of that analysis that "[a]t its core, 'blight' includes deterioration or stagnation that has a decadent effect on surrounding property."[52] Thus equipped with a constitutional arsenal, the court invoked the doctrine of constitutional avoidance[53] to narrow the statutory definition of "blight" contained in the Local Redevelopment and Housing Law.[54] It had become common practice for a municipality to designate a redevelopment area merely upon a finding that there was a "not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."[55] That formulation of the definition of an area in need of redevelopment came perilously close to an agency's subjective opinion, unfettered by any meaningful limits, that the land, in the judgment of a readily available "expert," was underutilized. The court, however, read the statutory provision as permitting a blight designation only if the land was found to be not merely "not fully productive," but also "stagnant,"[56] and furthermore only if the condition of stagnancy was actually caused by "the condition of

49. In *Forbes v. Board of Trustees of South Orange*, 712 A.2d 255, 260 (N.J. Super. Ct. App. Div. 1998), New Jersey's intermediate appellate court made a passing observation that the "Constitution permits the undertaking of public redevelopment only if the area so designated is blighted." Although *Forbes* then upheld the blight designation on the merits, it nevertheless at least "resurrected the notion that the blighted areas clause provided an outer limit on the legislature's redevelopment authority, which had been all but lost in the shadow of *Wilson*'s broad endorsement of the [Blighted Area's Act]." Zazzali & Marshfield, *supra* note 35, at 483.

50. Zazzali & Marshfield, *supra* note 35, at 483.

51. *See infra* notes 110-118 and accompanying text.

52. 924 A.2d at 460.

53. *Gallenthin*, 924 A.2d at 460-61.

54. The provision relied upon by the Borough of Paulsboro to declare the Gallenthin parcel as blighted provides that a municipality may designate an area if it finds a:

> [G]rowing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

N.J. STAT. ANN. § 40A:12A-5(e) (West 2009).

55. *Id.*

56. *Gallenthin*, 924 A.2d at 462.

the title, diverse ownership of the real property," or by some similar condition. What had been thought of as a grant of almost boundless discretion on the part of the beholder to discover blight under almost any set of circumstances was therefore interpreted so narrowly that it could arise in the relatively rare situation when a cloud on title or diversity of ownership could be shown not merely to have coexisted with the condition of blight, but actually to have caused it.[57]

The *Gallenthin* court then further insisted upon several procedural protections to bolster the vitality of judicial review. Most importantly, it insisted on credible, substantial evidence of blight, noting that,

> [i]n general, a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met. Because a redevelopment designation carries serious implications for property owners, the net opinion of an expert is simply too slender a reed on which to rest that determination.[58]

Those "serious implications" obviously contemplate a municipality taking the property by eminent domain and turning it over to another private party to redevelop. The *Gallenthin* decision protects property from a redevelopment designation unless it is in a blighted area, and demands that the municipality establish real proof of deterioration or stagnation so severe as to have a deleterious effect on surrounding property. In sum, the test of "substantial evidence" was given teeth.

Emboldened by the *Gallenthin* decision, lower New Jersey courts have recently overturned inadequate blight designations in a number of subsequent cases arising in various New Jersey municipalities.[59] For example, in

57. This requirement of causation would also logically lead a court to reject the notion that an area is blighted merely because it is divided into lots owned by different owners, even if this "diverse ownership of the real property" would make acquisition of a desired land parcel by a redeveloper difficult and more expensive, and even if sought for the purpose of making the land "potentially useful and valuable for contributing to and serving the public health, safety and welfare" under N.J. STAT. ANN. § 40A:12A-5(e). Since almost all land areas of significant size are comprised of individual lots with different owners, and thus would arguably be affected by "diverse ownership," this reasoning would result in the absurdity that almost all land is thereby blighted. Pursuant to *Gallenthin*, however, it is only when the condition of blight is caused by the diverse ownership or other similar condition, however, that § 40A:12A-5(e) properly applies.

58. 924 A.2d at 465.

59. *See, e.g.*, Land Plus, L.L.C. v. Mayor of Hackensack, No. A-1276-07T3, 2008 WL 4648278 (N.J. Super. Ct. App. Div. Oct. 10, 2008); City of Long Branch v. Anzalone, No. A-0067-06T2, 2008 WL 3090052 (N.J. Super. Ct. App. Div. Aug. 7, 2008), *certif. denied*, 970 A.2d 1050 (N.J. 2009); Dutch Neck Land Co. v. City of Newark, No. A-5825-06T2, 2008 WL 2026506 (N.J. Super. Ct. App. Div. May 14, 2008); BMIA, L.L.C. v. Planning Bd. of Belmar, No. A-5974-05T5, 2008 WL 281687 (N.J. Super. Ct. App. Div. Feb. 4, 2008); LBK Assocs. v. Borough of Lodi, No. A-1829-05T2, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007); HJB Assocs., Inc. v. Council of Belmar, No. A-6510-05T5,

a case involving a bakery located in the Borough of Belmar,[60] the Borough's consultant had justified designation of the area as "in need of redevelopment" by finding that the bakery: "(1) had a faulty and obsolete layout; and (2) had an 'other condition' [residual] (contamination) [from a heating oil tank] that 'causes a stagnant economic condition of the properties in the study area [that] may tend to depress property values.'"[61] The Appellate Division reversed the finding of blight, observing:

> The statutory language of subsection 5(d) requires that the conditions listed in the first part of the sentence *be* "detrimental to the safety, health, morals or welfare of the community." Although the Schoor DePalma investigation report, on which the Borough relies, may have established Freedman's Bakery's: "obsolescence," "faulty arrangements or design," "excessive land coverage," "deleterious land use" or "obsolete layout," there is no proof whatsoever that these conditions are detrimental to the safety, health, morals or welfare of the community.[62]

The court therefore reinforced the requirement that not only must there be substantial evidence of underlying conditions such as "obsolescence," "faulty arrangements or design," "excessive land coverage," "deleterious land use," or "obsolete layout," but there must also be demonstrated a nexus between the existence of those conditions and the ultimate conclusion that the conditions are detrimental to the safety, health, morals, or welfare of the community. Relying on the principle that "[t]he New Jersey Constitution does not permit government redevelopment of private property solely because the property is not used in an optimal manner,"[63] the Appellate Division concluded that the bakery "is not a blighted area even if its design is not optimal for its commercial purpose."

In another matter that has attracted considerable public attention, the New Jersey Appellate Division struck down the blight designation of a residential beachfront neighborhood in Long Branch because it "did not find actual blight under any subsection" of the state's redevelopment law and specifically noted that "the record lacked substantial evidence that could have supported the New Jersey Constitution's standard for finding

2007 WL 2005173 (N.J. Super. Ct. App. Div. July 11, 2007); Mulberry St. Area Prop. Owners' Group v. City of Newark, No. ESXL-9916-04 (N.J. Super. Ct. Law Div. July 19, 2007); Evans v. Twp. of Maplewood, No. L-6910-06 (N.J. Super. Ct. Law Div. July 7, 2007).

60. HJB Assocs., Inc. v. Council of Belmar, No. A-6510-05T5, 2007 WL 2005173 (N.J. Super. Ct. App. Div. July 11, 2007) (per curiam).

61. *Id.* at *1.

62. *Id.* at *3 (citing Spruce Manor Enter. v. Borough of Bellmawr, 717 A.2d 1008 (N.J. Super. Ct. Law Div. 1998) (holding that failure to meet current design standards could not, by itself, serve as a basis for a designation that area was in need of redevelopment)).

63. *Id.* at *3 (quoting *Gallenthin*, 924 A.2d at 465 (citing N.J. CONST. art. VIII, § 3, para. 1)) (alterations in original).

blight."[64] Under what the lower court called *Gallenthin*'s "heightened standard," it found that "the record does not contain substantial evidence to support the City's findings,"[65] and that "the absence of substantial evidence of blight invalidates all of the City's findings under [the redevelopment statute] that appellants' properties were in need of redevelopment."[66] Moreover, the municipality could not credibly claim that the neighborhood was essential to its redevelopment plans, because its beachfront redevelopment program had proceeded successfully even as the parties litigated whether the municipality had properly designated the small area in question as blighted.[67]

In the *Borough of Lodi*, the municipal council sought to declare two trailer parks that provided essentially all of the market-rate affordable housing in the municipality as "in need of redevelopment," and thus a target for condemnation and redevelopment based on the general observation that the property was not properly utilized.[68] The trial court found that the proposed designation was unsupported by substantial evidence in the record before the Planning Board and, therefore, was arbitrary, capricious, and unreasonable.[69] The trial court further found that "[t]he evidence put forth by defendants in support of their designation for redevelopment can be summed up as vague criticism of the conditions at the complex based upon superficial observations."[70] The Appellate Division affirmed substantially for the same reasons given by the trial court, but made two additional comments of significance.[71] In response to the predictable plea from the municipality that its administrative decision is entitled to deference and a presumption of validity, the Appellate Division, interpreted *Gallenthin* as rejecting that presumption unless and until the municipality had established a prima facie evidentiary showing of substantial evidence to support its findings. "Once plaintiffs demonstrated the redevelopment designation was not supported by substantial evidence, that municipal action was no longer entitled to the deference normatively afforded."[72] Second, the court

64. City of Long Branch v. Anzalone, Nos. A-0067-06T2, A-0191-06T2, A-0192-06T2, A-0195-06T2, A-0196-06T2, A-0197-06T2, A-0198-06T2, A-0654-06T2, 2008 WL 3090052, at *15 (N.J. Super. Ct. App. Div. Aug. 7, 2008).

65. *Id.* at *1.

66. *Id.* at *21.

67. *Id.* at *15.

68. LBK Assocs. v. Borough of Lodi, No. BER-L-8766-03 (N.J. Super. Ct. Law Div. Oct. 6, 2005) (slip op.).

69. *Id.* at *21.

70. *Id.* at *16.

71. LBK Assocs. v. Borough of Lodi, No. A-1829-05T2, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007) (per curiam).

72. *Id.* at *1.

also denied the borough's request that the matter be remanded so that it be given another chance to fortify its evidentiary record.[73] Clearly, the prevailing sense after *Gallenthin* was that courts would no longer adopt the attitude of forgiveness and laxity to which some municipalities had become accustomed in defending their redevelopment plans.[74]

In addition to the *Gallenthin* court's willingness to delineate and enforce a substantive definition of "blight" that provides an outer boundary beyond which the legislature cannot tread, *Gallenthin*, and the lower court cases that have followed it, also demonstrate a renewed willingness to go beyond a cursory procedural review of the facial plausibility of a blight designation. As described above, there are at least three procedural requirements that a redevelopment agency must now satisfy before it finds itself governed by the more comfortable regime of administrative deference.

First, it must adduce evidence of blight under a fairly rigorous standard of "substantial evidence," failure of which results in loss of any administrative deference that might otherwise have been afforded to the agency determination. Under widely accepted principles of both federal and state administrative law, "substantial evidence" has been defined as "such evidence as a reasonable mind might accept as adequate to support the conclusion . . . or, to express it differently, whether the evidence furnished a reasonable basis for the agency's action."[75] Nevertheless, it has also been observed that in defining the level of deference afforded under the "substantial evidence" standard, some courts have "frequently stated the sub-

73. "The shortcomings in the determinations under review were too basic and too far at variance with current principles governing the redevelopment process to be amenable to repair through further hearings." *Id.*

74. Because this distinction between blighted and non-blighted areas typically limits only use of eminent domain for purposes of redevelopment, and would not limit use of the takings power for a traditional public use such as a road or other public infrastructure, an interesting doctrinal question will inevitably arise as to how the courts distinguish a taking that is for purposes of redevelopment from other takings that are not limited to blighted areas. The potential danger of pretextual takings that are ostensibly justified as undertaken for public use but that are then converted to private redevelopment projects will no doubt arise in those jurisdictions, such as New Jersey, where the limitations imposed by the doctrine of blight are given force.

75. Cooley's Anemia Blood & Res. Found. for Children, Inc. v. Legalized Games of Chance Control, 187 A.2d 731, 736 (N.J. Super. Ct. App. Div. 1963) (quoting Zacharide v. N.J. Real Estate Comm'n, 146 A.2d 491, 492-93 (N.J. Super. Ct. App. Div. 1958)) (alterations in original); *accord* Richardson v. Perales, 402 U.S. 389, 401 (1971) ("Substantial evidence means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). *See generally* E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 89 U. PA. L. REV. 1026, 1038 (1941); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 89 (1944).

stantial evidence standard in seemingly inconsistent and contradictory terms."[76] As Chief Justice Zazzali and Mr. Marshfield continued:

> Those varied enunciations of the substantial evidence standard did not provide property owners with a predictable basis for challenging redevelopment designations and provide too great an opportunity for abuse of property rights. Meaningful property right protections require a more reliable standard of review that does not undermine legitimate redevelopment projects, but forces municipalities to justify their designations with genuinely substantial evidence.[77]

In their view, *Gallenthin* provided that predictable basis. In effect, the courts seem to have determined an order of proof that requires substantial evidence first, deference later.

Moreover, "substantial evidence" does not consist of net opinions by an expert. Thus, boilerplate reports, of the type often commissioned in haste by municipalities before *Gallenthin*, which do not reveal the factual basis for the expert's conclusion and merely recite the text of the statutory criteria,[78] are at high risk of failure.

Finally, a redevelopment agency must not only show individual conditions that are substandard, but must also adduce evidence that links those substandard conditions to a detriment to the safety, health, morals, or welfare of the community. Failure to establish that causal nexus, which a redevelopment agency or its expert might easily overlook, is fatal to a blight determination, even if the underlying substandard conditions are established by substantial evidence.

These three evidentiary hurdles, as much as the heightened substantive definition of "blight" itself that *Gallenthin* imposed, have changed the legal landscape in New Jersey for legitimating use of eminent domain for redevelopment.

And while the New Jersey Supreme Court may not have stated as much explicitly, it is this author's contention that the boldness with which the New Jersey judiciary has reinforced these requirements to successful invocation of redevelopment powers is due at least in part to the peculiar constitutional history in New Jersey of judicial review of agency action. While active use of that power may have lain dormant with regard to blight desig-

76. Zazzali & Marshfield, *supra* note 35, at 485-86 (contrasting conventional definitions of "substantial evidence" with others that would permit judicial overruling of agency factual findings "only by proofs that there could have been no set of facts that would rationally support a conclusion that the enactment is in the public interest") (citations omitted).

77. *Id.* at 486.

78. *See, e.g.*, LBK Assocs. v. Borough of Lodi, No. BER-L-8766-03, at *16-17 (N.J. Super. Ct. Law Div. Oct. 6, 2005) (slip op.).

nations for several decades,[79] the progressive overreaching by redevelopment agencies and the New Jersey Legislature, starting with the 1992 expansion of the redevelopment powers in the Local Redevelopment and Housing Law[80] and culminating in the public indignation over the *Kelo* decision, prompted the New Jersey Supreme Court to recalibrate the balance between legislative discretion and the ultimate power of judicial review to cabin abuse of that discretion. There is therefore apparently a dynamic process at work, in which the courts readjust the potency of their prerogative writs powers as needed to suit the circumstances. Thus, while paying facial deference to administrative expertise, *Gallenthin* and its progeny have reaffirmed that, in New Jersey, ultimately the courts are in charge of ensuring that "the will of the People regarding the appropriate balance between municipal redevelopment and property owners' rights"[81] is fulfilled. The timing of the *Gallenthin* court's intervention in the redevelopment process may have been explainable by recent events triggered by *Kelo*, but the forcefulness of the court's intervention was bolstered by the long-standing constitutional basis for asserting its jurisdiction.

B. New York's Approach

New York's procedure for judicial review of administrative agency action, a CPLR Article 78 proceeding, facially has a shared heritage with New Jersey's action in lieu of prerogative writ. CPLR § 7801 is in fact similarly worded to Article VI, Section 5, Paragraph 4 of the New Jersey Constitution.

> Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article.[82]

Both New York and New Jersey, therefore, have borrowed from the historical English common law practice as the basis for providing judicial review over agency action. There are notable differences between them however. First is the obvious difference in the enacting authority. New Jersey has enshrined its judicial review process in its Constitution, whereas CPLR Article 78 is an ordinary statutory enactment. New Jersey also pro-

79. *See supra* notes 34-35 and accompanying text.

80. *See supra* notes 37-41 and accompanying text.

81. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 465 (N.J. 2007).

82. N.Y. C.P.L.R. 7801 (McKinney 2011). *Compare* N.J. CONST. art. VI, § 5, para. 4, quoted *supra* at text accompanying note 21.

vides that an action in lieu of prerogative writ shall be conducted "on terms and in the manner provided by rules of the Supreme Court, as of right."[83] In New York, however, it is the legislature, not the judiciary, that determines the contours and limits of the proceeding, and the legislature in fact has done so with some firmness, stressing that the scope of judicial review is limited to that explicitly set forth in the statute.[84] While an Article 78 proceeding does permit the familiar judicial inquiry into whether an administrative action is "arbitrary and capricious or an abuse of discretion," or is supported by "substantial evidence," the practical application of those concepts, as demonstrated in *Kaur*, is perceptibly narrower than under New Jersey law, in effect substituting the relatively demanding "substantial evidence" test with one that merely requires articulation of a rational basis.

In *Kaur v. New York State Urban Development Corp.*,[85] the Empire State Development Corporation (ESDC) sought to use the power of condemnation to purchase seventeen acres of privately owned property in connection with the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project located in the Manhattanville section of West Harlem. It is Columbia University's intention to build an expansion campus north of its present Morningside Heights campus that would consist of sixteen new "state-of-the-art buildings."[86]

In preparation for evidentiary hearings on whether the delineated area satisfied the condition of "blight," the ESDC either commissioned or had access to several studies of the proposed redevelopment area, conducted over several years. One 2004 study, commissioned by the New York Economic Development Corporation, documented and photographed the area of the Project site as well as the surrounding area, focusing on: (1) signs of deterioration; (2) substandard or unsanitary conditions; (3) adequacy of in-

83. N.J. CONST., art. VI, §5, para. 4.

84. N.Y. C.P.L.R. 7803 (McKinney 2011):

> The only questions that may be raised in a proceeding under this article are:
>
> 1. whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

85. 933 N.E.2d 721 (N.Y. 2010).

86. *Id.* at 724.

frastructure; and (4) indications of the impairment of sound growth in the surrounding community.[87] The first study determined that the conditions in the study area merited a designation of blight.[88] The ESDC also commissioned a second study in 2006 that reached the same conclusion.[89] When faced with suggestions that this second firm may have had a conflict of interest due to its prior contractual relationships with ESDC and Columbia University, ESDC commissioned a third blight study in 2008, conducted by a firm that was instructed to have no other business dealings with ESDC or Columbia. The third blight study examined variables including current land uses, structural conditions, health and safety issues, utilization rates, environmental contamination, building code violations, and crime statistics.[90] This study determined that since 1961, there was a dearth of new construction in the area, finding a "long-standing lack of investor interest in the neighborhood." It also enumerated the extensive building code violations in the area and the chronic problems that the buildings had with water infiltration.[91] In sum, the third study concluded that the neighborhood con-

87. Specifically, the study concluded that several of the buildings throughout West Harlem were dilapidated. The consultant also concluded that "numerous buildings evidenced poor exterior conditions and structural degradation. According to this study, two of the blocks with the highest number of deficient buildings and lots are within the Project site." *Id.* at 725.

88. *Id.*

89. The Court of Appeals described the second study, conducted by a firm known as AKRF, in some detail:

> It documented structural conditions, vacancy rates, site utilization, property ownership, and crime data. For each building on the Project site, it also documented the physical and structural conditions, health and safety concerns, building code violations, underutilization, and environmental hazards. AKRF said it selected these factors "because they are generally accepted indicators of disinvestment in a neighborhood. The widespread presence of one or more of these factors can also demonstrate the need for revitalization and redevelopment of an area." Based on these factors, on November 1, 2007, AKRF issued its Manhattanville Neighborhood Conditions Study. This study concluded that the Project site was "substantially unsafe, unsanitary, substandard, and deteriorated" or, in short, blighted.

Id.

90. *Id.*

91. *Id.* at 728. The third study also found that:

> [M]any of the buildings in the Project site had deteriorated facades and that several of the buildings had been sealed by the New York City Fire Department because of unsafe conditions. It also discovered widespread vermin on the streets and graffiti on the walls of the buildings and other structures. With respect to the four parcels owned by petitioner TIA, Earth Tech determined that these parcels, taken together, had more than three times the average number of building violations as the parcels acquired by Columbia over the previous several years.

Id.

ditions had created "a blighted and discouraging impact on the surrounding community."[92]

The record of blight in this case did have the advantage of quantity, and it is perhaps open to question whether ESDC may have prevailed in its blight determination under a conventional definition of "substantial evidence."[93] While the blight studies did appear to be based in part on the questionable concept of "underutilization," and sometimes referred to a lack of potential growth rather than the existence of deterioration as an indicator of blight, the empirical data concerning crime data, physical and structural conditions, health and safety concerns, building code violations, and environmental hazards, are at least colorable in establishing blight. Other participants in this symposium, however, have convincingly noted in greater detail the issues raised by the apparent conflict of interest by those who stood to benefit from an affirmative blight designation and the arguably pretextual nature of the blight designation,[94] and indeed the intermediate appellate court excoriated the record of blight as "sophistry" and "preposterous."[95] For purposes of this Article it is unnecessary to resolve this evidentiary issue and I leave to others the ultimate determination of whether the record was sufficient to establish "blight."[96]

But rather than merely applying a doctrinally unambitious rule of deference to the administrative fact-finding on the record before it, the *Kaur* majority applied a particularly pungent form of excessive deference to the agency's legal definition of blight that it had recently announced in *Goldstein v. New York State Urban Dev. Corp.*,[97] in which it approved the equally contentious Atlantic Yards redevelopment project in Brooklyn. Believing that determinations of "public purpose" were ordinarily the province of the legislature, and not the judiciary, the *Kaur* court found that judicial intervention in a blight determination was warranted "only where there

92. *Id.*

93. Although in his concurrence Judge Smith found the blight determination to be "strained and pretextual," *Kaur*, 933 N.E.2d at 737, he acquiesced based upon the comparable finding of blight upheld in *Goldstein v New York State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009).

94. *See* Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After* Goldstein *and* Kaur, 38 FORDHAM URB. L.J. 1193 (2011).

95. Kaur v New York State Urban Dev. Corp, 892 N.Y.S.2d 8, 16, 22 (N.Y. App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010).

96. When the author was Public Advocate of New Jersey, he frequently criticized the practice of "drive by blight studies" in which local officials or their hired consultants made only cursory inspection of the area under study before making a determination. Having established that principle, he does not wish to violate it himself by making a lay assessment of blight based on a necessarily incomplete understanding of the prevailing conditions in Manhattanville.

97. 921 N.E.2d 164 (N.Y. 2009).

is *no room for reasonable difference of opinion* as to whether an area is blighted."[98] Thus, "a court may only substitute its own judgment for that of the legislative body authorizing the project when such judgment is *irrational* or *baseless*."[99] Rather than attempting to give substantive guidance on the proper interpretation of "substandard and insanitary areas,"[100] i.e., the New York constitutional definition of "blight," the New York Court of Appeals appeared satisfied so long as the record indicated "long-standing lack of investment interest," which *Kaur* found provided sufficient record evidence to support a finding of blight such that "the issue is beyond our further review."[101]

In the opinion of this author, it was both unnecessary and imprudent for the New York courts to adopt such an extreme form of minimal, and somewhat superficial, scrutiny over blight determinations. By phrasing the test using words such as "irrational" or "baseless," or other terms that essentially require a court to find that an agency is either corrupt or has taken leave of its senses, the New York courts have come close to abdicating any meaningful role in blight determinations. If a state intends to impose an independent requirement that a taking authority establish blight in order to appropriate property for private redevelopment, then in order to have effect, that requirement must be externally enforceable in meaningful way. By removing any independent vitality to the requirement of blight, the New York courts are essentially returning to the state of affairs created by *Kelo*, in which the "public purpose" requirement is satisfied by such a broad spectrum of desirable outcomes, including general economic growth, that it is difficult to discern any judicially enforceable limitation on exercise of eminent domain.

The distinction between a blight determination under state law and the nominal requirement of "public purpose" established by *Kelo* for purposes of the Takings Clause was further eroded by other aspects of the *Kaur* case. Because the ESDC also sought to justify the redevelopment project not only as a "land use improvement project" leading to the removal of urban blight,[102] but also as a "civic project" under an unrelated provision of the Urban Development Act,[103] it also included in the record fulsome descriptions of the Columbia University project, and the economic activity that it

98. *Kaur*, 933 N.E.2d at 730 (emphasis in original) (quoting Goldstein v. New York State Urban Dev. Corp., 921 N.E.2d 164, 172 (N.Y. 2009)).

99. *Id.* at 731 (emphasis added).

100. N.Y. CONST., art. XVIII, §1.

101. *Kaur*, 933 N.E.2d at 733.

102. *See* N.Y. UNCONSOL. LAW § 6253(6)(c) (McKinney 2009) (permitting use of eminent domain as a land use improvement project when land is deemed to be blighted).

103. *Id.* § 6253(6)(d).

would generate.[104] This evidence of the virtues of the Columbia project may have understandably misled some to believe that ESDC was attempting to justify the project based on the argument that the existing property was "underutilized," or, in terms specifically rejected by the New Jersey Supreme Court, was not being used in an "optimal manner."[105] Indeed, the lavishness of the praise for the project apparently raised the suspicions of the New York Appellate Division in *Kaur*, which concluded in somewhat harsh terms that:

> the blight designation in the instant case is mere sophistry. It was utilized by ESDC years after the scheme was hatched to justify the employment of eminent domain but this project has always primarily concerned a massive capital project for Columbia. Indeed, it is nothing more than economic redevelopment wearing a different face.[106]

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104. *Kaur*, 933 N.E.2d at 729:

> ESDC noted that the Project would create 14,000 jobs during the construction of the new campus as well as 6,000 permanent jobs following the Project's completion. ESDC found that the Project would generate substantial revenue, estimating that "tax revenue derived from construction expenditures and total personal income during this period" at $122 million for the State and $87 million for New York City.
>
> Moreover, ESDC indicated that another purpose of the Project was the creation of much needed public space. Specifically, it found that the Project site would create "approximately 94,000 square feet of accessible open space and maintained as such in perpetuity that will be punctuated by trees, open vistas, paths, landscaping and street furniture and an additional well-lit 28,000 square feet of space of widened sidewalks that will invite east-west pedestrian traffic."
>
> In addition to the open space created, ESDC highlighted that the Project made provision for infrastructure improvements—most notably to the 125th Street subway station—as well as substantial financial commitment by Columbia to the maintenance of West Harlem Piers Park. ESDC further acknowledged that Columbia would open its facilities—including its libraries and computer centers—to students attending a new public school that Columbia is supplying the land to rent-free for 49 years. Columbia would also open its new swimming facilities to the public.

105. *See* Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 465 (N.J. 2007).

106. Kaur v New York State Urban Dev. Corp., 892 N.Y.S.2d 8, 16 (N.Y. App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010).

The Appellate Division also examined critically the various blight studies that had been prepared, and had little positive to say:

> This search for distinct "blight conditions" led to the preposterous summary of building and sidewalk defects compiled by AKRF, which was then accepted as a valid methodology and amplified by Earth Tech. Even a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood. Virtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor.

Id. at 22.

The intermediate appellate court then took aim at what appears to be its core concern, i.e., that the Columbia project was merely an attempt to convert the "blight" inquiry into an "underutilization" inquiry, a debate that, if properly framed, is impossible to fail. Citing *Gallenthin*, the New York Appellate Division condemned what it characterized as the "folly" of underutilization:

> The time has come to categorically reject eminent domain takings solely based on underutilization. This concept put forward by the respondent transforms the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal.[107]

Finding that "the true beneficiary of the scheme to redevelop Manhattanville is not the community that is supposedly blighted, but rather Columbia University, a private elite education institution,"[108] the New York Appellate Division found that even under *Kelo*, the taking was unconstitutional.

The New York Court of Appeals eventually reversed the appellate division's judgment under the gauzy cloak of the virtually abject deference that it had devised in *Goldstein*, and therefore it did not directly address the doctrinal concerns over underutilization. But the suspicions of the intermediate court are at least understandable. Asserting the relevance of such alluring potential uses in the context of a blight determination inevitably leads to accusations that the real justification for exercising the powers of redevelopment is not to eradicate present conditions of blight, but rather to encourage future conditions of growth. While *Kelo* accepts that justification as a "public purpose" under the Federal Constitution, it does not follow that states that impose the additional requirement of "blight" should also do so. The rule of excessive deference adopted by the New York Court of Appeals, however, makes it impossible to draw a judicially manageable distinction between "blight" and "long-standing lack of investment interest,"[109] which is itself merely a somewhat more pungently worded definition of "underutilization." The failure to make the distinction between "blight" and "underutilization" has effectively removed any independent state law grounds for challenging eminent domain for purposes of redevelopment in New York.

107. *Id.* at 23.
108. *Id.*
109. *Kaur*, 933 N.E.2d at 733.

II. THE ELUSIVE DEFINITION OF "BLIGHT"

As this Article has attempted to demonstrate, one critical distinction between the approach of the New Jersey Supreme Court in *Gallenthin* and the New York Court of Appeals in *Kaur* is one court's willingness, and the other's reluctance, to establish a substantive definition of "blight" that limits subsequent attempts by redevelopment agencies, and ultimately even by legislatures, to expand. The New Jersey Supreme Court began with the proposition, which the court assumed did not require any explanation, that "[t]his appeal . . . requires us to ascertain the meaning of the term 'blighted' as used in the New Jersey Constitution."[110] The court ultimately concluded that "[a]lthough the meaning of 'blight' has evolved, the term retains its essential characteristic: deterioration or stagnation that negatively affects surrounding properties."[111]

Gallenthin arrived at its substantive definition of "blight" through a historical understanding analysis of how the term was used and understood near the time that the 1947 New Jersey Constitution was adopted. The term "blighted area" had accumulated a technical meaning among urban planners in the years preceding the 1947 Constitutional Convention.[112] The earliest use of the term "blight" for real estate purposes was by University of Chicago sociologists in the 1920s,[113] who applied the term to describe changes to an area that, although not necessarily meeting the definition of a "slum," constituted properties in a state of decline.[114] The court itself cited Mabel Walker, an early influential urban planner who wrote in the decade before the 1947 Constitutional Convention during the advent of the first widespread attempts at urban renewal, who defined "blight" as "an area in

110. *Gallenthin*, 924 A.2d at 455.

111. *Id.* at 459.

112. *See generally* Colin Gordon, *Developing Sustainable Urban Communities: Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305 (2004).

113. Other scholars and planners soon echoed the Chicago sociologists' definition of "blight." *See, e.g.*, PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, 3 SLUMS, LARGE SCALE HOUSING AND DECENTRALIZATION 41 (John M. Gries & James Ford eds., 1932) ("A blighted area is an area where, due either to the lack of a vitalizing factor or to the presence of a devitalizing factor, the life of the area has been sapped."); Edith Elmer Wood, SLUMS AND BLIGHTED AREAS IN THE UNITED STATES 3 (1935) ("A blighted residential area is one on the down grade, which has not reached the slum stage."); C. Louis Knight, *Blighted Areas and Their Affects Upon Land Utilization*, *in* THE ANNALS OF THE AMERICAN ACADEMY 134 (1930).

114. *See* HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO 364 (1933); Ernest W. Burgess, *The Growth of the City: An Introduction to a Research Project*, *in* THE CITY (Robert E. Park et al. eds., 1925); *see also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 13-22 (2003) (describing the historical development of the concept of "blight").

which deteriorating forces have obviously reduced economic and social values to such a degree that widespread rehabilitation is necessary to forestall the development of an actual slum condition."[115] *Gallenthin* also referred to the proceedings of the 1947 Constitutional Convention itself, in which the meaning of blight was discussed.[116] While the court admitted that the definition of "blight" had "evolved"[117] and was "elusive,"[118] it was not so indefinable that it was incapable of a judicially manageable and enforceable standard.

Gallenthin was also quite comfortable in declaring what "blight" was not:

> Paulsboro interprets subsection 5(e) to permit redevelopment of any property that is "stagnant or not fully productive" yet potentially valuable for "contributing to and serving" the general welfare. Under that approach,

115. Mabel L. Walker, URBAN BLIGHT AND SLUMS 5 (1938); *see also id.* at 6 ("Old buildings are neglected and new ones are not erected and the whole section becomes stale and unprofitable. In other words, blight is a condition where it is not profitable to make or maintain improvements."); *id.* at 7 ("Instead of being improved in an appropriate manner, buildings are allowed to rot and let out to the most economically helpless of the city's inhabitants."); *id.* at 17 ("[A]ll the visible manifestations of blight appear. Structures become shabby and obsolete. The entire district takes on a down-at-the-heel appearance. The exodus of the more prosperous groups is accelerated. Rents fall. Poorer classes move in. The poverty of the tenants contributes further to the general air of shabbiness. The realty owner becomes less and less inclined or able to make repairs. . . . At length the worst sections become slums with high disease and high crime rates.").

116. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 457-58 (N.J. 2007) (quoting 1 PROCEEDINGS OF THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 742-44). Delegate Jane Barus made the following observations about the concept of blight:

> Certain sections of [the older cities in the State] have fallen in value, and have [become] what [are] known as "blighted" or "depressed" areas. This has happened, sometimes, because the population has shifted from one part of the town to another, or one section has become overcrowded. Sometimes it has happened because the district has turned to business instead of residential, or partly to business; and sometimes simply because the buildings themselves, although they were originally good and may have been fine homes, have become so outdated and obsolescent that they are no longer desirable, and hence, no longer profitable.
>
> These depressed areas go steadily downhill. The original occupants move away, the rents fall, landlords lose income and they make up for it by taking in more families per house. It's impossible to keep the properties in good condition, the houses deteriorate more and more, and what was once a good section of the town is on the way to becoming a slum.
>
> Naturally, this slump in value is not confined to the original area affected. It spreads to neighboring blocks. No one person . . . can counteract this spread, because no one can afford to sink money into a blighted area . . . because the improvement is so small that it cannot turn the tide of deterioration.

Id.

117. *Id.* at 459.

118. *Id.* at 460.

> any property that is operated in a less than optimal manner is arguably "blighted." If such an all-encompassing definition of "blight" were adopted, most property in the State would be eligible for redevelopment. We need not examine every shade of gray coloring a concept as elusive as "blight" to conclude that the term's meaning cannot extend as far as Paulsboro contends. At its core, "blight" includes deterioration or stagnation that has a decadent effect on surrounding property. We therefore conclude that Paulsboro's interpretation of N.J.S.A. 40A:12A-5(e), which would equate "blighted areas" to areas that are not operated in an optimal manner, cannot be reconciled with the New Jersey Constitution.[119]

In contrast, *Kaur* expressly rejected suggestions to adopt a comprehensive functional definition of blight. Rather, it warned that "blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition."[120] In *Goldstein v. New York State Urban Development Corp.*,[121] which upheld the blight designation of the controversial Atlantic Yards project in Brooklyn, the Court of Appeals rejected the same type of historical understanding analysis that the New Jersey Supreme Court found persuasive in defining blight in *Gallenthin*.[122] While the court conceded that the appellants were "doubtless correct that the conditions cited in support of the blight finding at issue do not begin to approach in severity the dire circumstances of urban slum dwelling described by the *Muller*[123] court in 1936, and which prompted the adoption of Article XVIII at the State Constitutional Convention two years later,"[124] it found that the courts "have never required that a finding of blight by a legislatively designated public benefit corporation be based upon conditions replicating those to which the Court and the Constitutional Convention responded in the midst of the Great Depression."[125]

Other attempts by the New York court to describe "blight" have usually resulted in a non-exclusive list of examples of relevant factors, rather than a formulaic test that might have an unintended limiting effect. In *Yonkers Community Development Agency v. Morris*,[126] for instance, the court, after referring to the "liberal rather than literal definition of a 'blighted' area now universally indorsed by case law,"[127] found that "[m]any factors and

119. *Id.* at 460.

120. Kaur v. New York State Urban Dev. Corp., 933 N.E.2d 721, 732 (N.Y. 2010).

121. 921 N.E.2d 164 (N.Y. 2009).

122. *See supra* notes 112-116 and accompanying text.

123. N.Y.C. Hous. Auth. V. Muller, 1 N.E.2d 153 (N.Y. 1936). *Muller* was the seminal decision in New York upholding the use of eminent domain to relieve conditions of blight.

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

125. *Id.*

126. 335 N.E.2d 327 (N.Y. 1975).

127. *Id.* at 332.

interrelationships of factors may be significant."[128] *Yonkers* was an unusual case in that it ultimately failed to uphold an agency determination of blight. But it did not do so by reasoning that the agency finding was inconsistent with any accepted definition of blight. Rather, the court found that the agency had failed procedurally to articulate the basis for its discretion with sufficient clarity.[129] Even this mild rebuke had no operative effect, since the property in question had already been taken and cleared, and the owners in effect had waived their rights.[130] It is unclear whether imposing a duty to articulate the basis of the exercise of discretion is of much utility when there is no substantive standard by which to assess the validity of any articulation that may result.

In effect, the New York courts have never provided a useful definition of "blight," but have almost invariably added to an ever growing list of what blight may be, while never creating a correlative list of what blight is not. *Goldstein* candidly admitted that "the evolution of the concept of public use . . . has sapped the concept of much of its limiting power,"[131] but concluded that any move to reverse the steady expansion of the scope of the term must come from the political branches of government.

> It may be that the bar has now been set too low—that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any

128. *Id.* The court continued:

> These may include such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution. It can encompass areas in the process of deterioration or threatened with it as well as ones already rendered useless, prevention being an important purpose. It is "something more than deteriorated structures. It involves improper land use. Therefore its causes, originating many years ago, include not only outmoded and deteriorated structures, but unwise planning and zoning, poor regulatory code provisions, and inadequate provisions for the flow of traffic."

Id. (citation omitted).

129. The court in *Yonkers* noted that:

> [E]ven where the law expressly defines the removal or prevention of "blight" as a public purpose and leaves to the agencies wide discretion in deciding what constitutes blight, facts supporting such a determination should be spelled out. It may be that plaintiff here would have no difficulty in doing so in its papers or by way of proof. It did not do so.

Id. at 332 n.16.

130. *Id.* at 334.

131. Goldstein v. New York State Urban Dev. Corp., 921 N.E.2d 164, 173 (N.Y. 2009).

> such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.[132]

Thus, despite the shared historical and cultural heritage that undergirds the New Jersey and New York constitutional provisions that authorize use of eminent domain in order to alleviate blight, the interpretations of those provisions by the respective judiciaries on either side of the Hudson have taken dramatically divergent paths. New York treats the designation of blight as tantamount to a political question beyond the competence of the courts to determine, while New Jersey believes that its constitutional provision "operates as both a grant and limit on the State's redevelopment authority,"[133] and that the courts are empowered if necessary to enforce that limit.

It is perhaps pointless to attempt to reconcile these two approaches from a doctrinal perspective in order to predict when courts will adopt a judicially enforceable mechanism to control eminent domain for redevelopment, and when they will not. Obviously, one can make the empirical observation that, at least in this instance, the similarities in demographics and anthropology between the two highly developed and densely populated neighboring states of New York and New Jersey were insufficient to bring about a common doctrinal theory. This has not been so in all cases, as demonstrated by the decision of the New York Court of Appeals in the equally controversial issue of the propriety of judicial review over the adequacy of public financing of education,[134] in which New York was willing to learn from, and to a great extent follow, the "experience of our neighbor"[135] in the long line of series of *Abbot v. Burke* cases.[136] As a matter of compari-

132. *Id.* at 172.

133. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 456 (N.J. 2007).

134. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003).

135. *Id.* at 349 (noting the New Jersey Supreme Court's "landmark decision" in the *Abbott v. Burke* series of decisions).

136. *See generally* Abbott v. Burke (*Abbott I*), 495 A.2d 376 (N.J. 1985); Abbott v. Burke (*Abbott II*), 575 A.2d 359 (N.J. 1990); Abbott v. Burke (*Abbott III*), 643 A.2d 575 (N.J. 1994); Abbott v. Burke (*Abbott IV*), 693 A.2d 417 (N.J. 1997); Abbott v. Burke (*Abbott V*), 710 A.2d 450 (N.J. 1998); Abbott v. Burke (*Abbott VI*), 748 A.2d 82 (N.J. 2000); Abbott v. Burke (*Abbott VII*), 751 A.2d 1032 (N.J. 2001); Abbott v. Burke (*Abbott VIII*), 790 A.2d 842 (N.J. 2002); Abbott v. Burke (*Abbott IX*), 798 A.2d 602 (N.J. 2002); Abbott v. Burke (*Abbott X*), 832 A.2d 891 (N.J. 2003); Abbott v. Burke (*Abbott XI*), 832 A.2d 906 (N.J. 2003); Abbott v. Burke (*Abbott XII*), 852 A.2d 185 (N.J. 2004); Abbott v. Burke (*Abbott XIII*), 862 A.2d 538 (N.J. 2004); Abbott v. Burke (*Abbott XIV*), 889 A.2d 1063 (N.J. 2005); Abbott v. Burke (*Abbott XV*), 901 A.2d 299 (N.J. 2006); Abbott v. Burke (*Abbott XVI*), 953 A.2d 1198 (N.J. 2006); Abbott v. Burke (*Abbott XVII*), 935 A.2d 1152 (N.J. 2007); Abbott v. Burke (*Abbott XVIII*), 956 A.2d 923 (N.J. 2008); Abbott v. Burke (*Abbott XIX*), 960 A.2d

son, however, the amount of judicial intervention and conflict with the legislative branch required to enforce a substantive definition of blight would seem to pale in comparison to the judicial intrusion that has been required in New Jersey to enforce the constitutional norm of a thorough and efficient education,[137] which has spawned more than twenty separate decisions by the New Jersey Supreme Court over the course of more than thirty years.[138] Nevertheless the New York Court of Appeals followed New Jersey's lead undaunted by that experience, predicting that it could "learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation,"[139] and presumably also avoid unseemly clashes with the legislature. The case could be made with equal if not greater force that the lessons that could have been learned from the New Jersey Supreme Court's decision in *Gallenthin* would have been of similar pedagogical value to New York.

III. WHITHER "UNDERUTILIZATION" AND "BLIGHT?"

It is the general purpose of this Article to explain, rather than pass judgment on, the contrasting approaches taken by New York and New Jersey concerning judicial review of blight determinations. The advantages and disadvantages of each are fairly self-evident. But New York's approach does trigger one observation. Because as a practical matter the judiciary will not intervene to impose any enforceable limit on the concept of "blight," municipal officials and redevelopers promoting a project are effectively free to use the malleable concept of "underutilization" as a proxy for blight, safe in the knowledge that they will not be second-guessed by judges in subsequent litigation.

360 (N.J. 2008); Abbott v. Burke (*Abbott XX*), 971 A.2d 989 (N.J. 2009); Abbott v. Burke (*Abbott XXI*), No. M-1293-09, 2011 WL 1990554 (N.J. May 24, 2011).

137. N.J. CONST. art. VIII, § IV, para. 1 states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." In comparison, the New York Constitution provides: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, § 1. The respective constitutional texts are comparable, albeit not identical, as are the respective constitutional provisions providing for remediation of blight. *See supra* notes 7-15 and accompanying text (quoting New Jersey and New York constitutional provisions regarding blight). It would be difficult, therefore, to explain the two states' divergent approaches in defining blight, contrasted to providing for public education, based on textual distinctions alone.

138. Although it does not bear the *Abbott v. Burke* caption, the first case in which the New Jersey Supreme Court intervened in the area of public school funding was *Robinson v Cahill*, 306 A.2d 65 (N.J. 1973), and it is typically included in the recitation of the *Abbott* line of cases.

139. *Campaign for Fiscal Equity*, 801 N.E.2d at 349.

It was of course the controversial notion that land could be appropriated to improve general economic conditions—i.e., not because the property presented some condition harmful to public health, safety, and welfare, but merely because a redeveloper believed that it could make more economically productive use of the property—that was at the heart of the public outcry in *Kelo*. While New Jersey thereafter accepted the *Kelo* Court's invitation to impose a higher standard than that required under the Fifth Amendment and clearly rejected underutilization as a justification for the use of redevelopment powers, there are those who suggest that the *Gallenthin* decision has discouraged needed redevelopment projects by making the process of property acquisition more difficult and costly.

Conversely, by committing the determination of blight exclusively to the discretion of the two political branches of government, New York's method removes much of the transaction costs associated with extended efforts to prove blight, but also calls upon the populace simply to trust that local politicians, and the private redevelopers with whom public officials work, will always use redevelopment powers, including eminent domain, solely in the public interest and not motivated by their private financial interests.

These circumstances lead this author to make two suggestions: one somewhat cosmetic and the other very practical. First, if a state such as New York chooses to decline the Supreme Court's invitation to adopt a higher standard of "public use" than that announced in *Kelo*, then it should do so explicitly, and thereby accept the ensuing political consequences. Maintaining the façade of limiting the use of eminent domain to blighted areas when no such limitation actually exists would appear to be procedurally inefficient and also misleading to the public. Government transparency would be enhanced if such a state abandoned any pretense of limiting redevelopment to "blighted areas," and candidly admitted that it has empowered itself to take private property under whatever circumstances it believes serves the public interest.

Second, the enormous amounts of money involved in redevelopment projects, and the intimacy of the relationship between redevelopers and local public officials, demand that strict ethics and conflict of interest rules are in place, including restrictions on so-called "pay to play," especially if there is no meaningful judicial review available. It is beyond the scope of this Article to propose the details of such legislation,[140] but public confi-

140. For some examples of recent legislation in New Jersey designed to address the so-called "play-to-play" problem, specifically with regard to redevelopers contributing to the campaigns of local elected officials, see, for example, S. 607, 214th Leg., Reg. Sess. (N.J. 2010) (pre-filed for introduction to 2010 session by Asw. Handlin and Sens. Goodwin & Baroni) (prohibiting anyone who has made a campaign contribution to relevant public officials within one year from purchasing or otherwise acquiring title or right to redevelop

dence in the integrity of the redevelopment process, while always an important goal, is made even more necessary when the power of eminent domain is, for all practical purposes, delegated to a private redeveloper by a local official or agency.

Finally, this author does not want to leave the incorrect impression that he believes that imposing a strict and judicially enforceable definition of "blight" is the sole cure to address the public concerns triggered by *Kelo*. It is at most one imperfect tool that is useful when redevelopment agencies seek to expand the historical breadth of the redevelopment power to include areas that did not meet the traditional definition of blight but which were, in the agency's opinion, capable of being put to more economically productive use, and thus "underutilized." It was the image of homes belonging to middle class residents being taken, whether in New London, Connecticut or Long Branch, New Jersey, that so jarred the public's somewhat complacent assumption that only those who lived in distressed areas were at such peril, that triggered the political pressure to limit such use. A strict construction of blight, however, does nothing to alleviate concerns of disproportionate impact on economically disadvantaged, and typically minority residents,

property under the "Eminent Domain Act or the Local Redevelopment and Housing Law"); S. 2323, 213th Leg., Reg. Sess. (N.J. 2008) (introduced Nov. 13, 2008 by Asw. Handlin and Sen. Baroni) (redeveloper ineligible to enter into a redevelopment agreement if, after the public issuance of a request for proposal, redeveloper has solicited or made any campaign contribution to specified political campaign committees including those of a candidate for a State legislative, county or municipal elective public office in which any property subject to the redevelopment agreement is located); 213th Leg., Reg. Sess. (N.J. 2008) (pre-filed for introduction to 2008 session by Asws. Huttle and Greenstein) (prohibiting redevelopment agreement with any redeveloper who has made a contribution exceeding $300 to the candidate committee of a holder of a public office having ultimate responsibility for awarding the redevelopment agreement).

None of these legislative attempts to control the "pay-to-play" phenomenon have proceeded past the early stages of consideration. On September 24, 2008, former Governor Jon S. Corzine, as part of a larger package of legislative proposals designed to promote ethics reform, signed Executive Order 118, which forbade a State redevelopment entity (e.g., a principal department of state government) from awarding a redevelopment agreement to any redeveloper who had made a contribution to (i) a candidate committee or election fund of any candidate for or holder of the public office of Governor or Lieutenant Governor; (ii) a State, county, or municipal political party committee or a legislative leadership committee; or (iii) a candidate committee or election fund of any candidate for or holder of a State legislative, county, or municipal elective public office in a State legislative district, county, or municipality in which any property subject to the redevelopment agreement is situated. N.J. Exec. Order No. 118 (2008), *available at* http://www.state.nj.us/infobank/circular/eojsc118.htm. Most redevelopment agreements in New Jersey, however, are undertaken at the municipal level by a local redevelopment entity, and thus were unaffected by Executive Order 118. *See* N.J. DEP'T OF THE TREASURY, STATE TREASURER'S LIST OF STATE REDEVELOPMENT ENTITIES PURSUANT TO EXECUTIVE ORDER NO. 118 (2008) (excluding local entities from coverage by Executive Order 118), *available at* http://www.state.nj.us/treasury/purchase/pdf/EO118treasurerlist.pdf.

who live in areas that meet any definition of blight, and indeed concentrates the effects of displacement disproportionately upon those communities.[141] As Professor (now Chancellor) Wendell Pritchett wrote powerfully:

> The rhetoric of blight enabled urban elites to craft and implement these broad powers of condemnation. In the decade following *Berman*, urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods, and helped entrench racial segregation in the inner city. Racial motivations were often submerged under the labels of "slum clearance" or "neighborhood revitalization," but a primary goal of postwar urban renewal was to channel minority settlement into certain areas and to uproot minority communities in other areas. In cities across the country, urban renewal came to be known as "Negro removal."[142]

Advocates for social justice through legal reform, however, are rarely given doctrinally or politically pristine tools with which to achieve that reform.[143] While when read in isolation, the concept of "blight" has ob-

141. *See* Amanda W. Goodin, *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, 82 N.Y.U. L. REV. 177, 199-200 (2007) ("Some commentators have argued that 'justifying eminent domain on a finding of blight invariably targets low-income communities. . . .' This seems to be a particularly accurate prediction regarding restrictive definitions of blight, because the factors that constitute blight are more likely to be found in low income areas—for example, the less-valuable buildings in low-income neighborhoods are far more likely to be 'dilapidated, unsanitary, unsafe, vermin-infested or lacking in the facilities and equipment required by statute or an applicable municipal code' than buildings in upper-and middle-income neighborhoods.") (citations omitted).

142. Pritchett, *supra* note 114, at 47.

143. For a graphic example of a case in which *Gallenthin*'s restrictive definition of blight did not preclude redevelopment and the subsequent displacement of an entire economically disadvantaged community, see *Citizens in Action v. Mt. Holly*, No. A-1099-05T3, 2007 WL 1930457, *1 (N.J. Super. Ct. App. Div. July 5, 2007) (per curiam) (upholding blight designation). As retired Chief Justice Zazzali himself noted, *Mt. Holly* is an example of "redevelopment . . . [that] did not offend the blighted areas clause" even after the *Gallenthin* decision. *See* Zazzali & Marshfield, *supra* note 35, at 494.

While serving as New Jersey Public Advocate, the author also issued a report on the Mt. Holly Gardens redevelopment project. N.J. DEP'T OF THE PUB. ADV., EVICTED FROM THE AMERICAN DREAM: THE REDEVELOPMENT OF MOUNT HOLLY GARDENS (2008), *available at* http://www.state.nj.us/publicadvocate/public/pdf/gardens_report.pdf. While regretfully conceding that the designation of the Mt. Holly Gardens area might comply with state law, that report also observed:

> The first duty of any local government is to its existing residents. The law should not permit a municipality to proceed on the assumption that some of its residents, regardless of their economic status, will simply disappear for the convenience of those who remain or who arrive to replace those who have left. It is our hope that statutory reform will reconcile the laws governing compensation and relocation with the overriding principle that the costs of redeveloping a community should not be borne by those who can least afford it.

Id. at 3. Residents of Mt. Holly Gardens also brought suit in federal court claiming, *inter alia*, violation of the federal Fair Housing Act, 42 U.S.C. § 3601 et seq.; the Civil Rights Act of 1866, 42 U.S.C. § 1982; and the Equal Protection Clauses of the U.S. and New Jer-

vious and disturbing connotations,[144] when read together with appropriate general principles limiting the arbitrary use of police power in a way that disproportionately affects low income communities, its invocation in appropriate circumstances becomes at least palatable. For instance, in its landmark *Mount Laurel* decision, the New Jersey Supreme Court held that the state constitution required that a municipality provide a reasonable opportunity for low and moderate cost housing, "in order to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries."[145] While the *Mount Laurel* decision dealt specifically with use of the zoning power, its application of state equal protection principles clearly extended to all use of the police power:

> It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Art. I, par. 1 of our Constitution, the requirements of which may be more demanding than those of the federal Constitution.[146]

The powers of redevelopment, and the power of eminent domain in particular, are clearly among the police powers of the state that are covered within the obligation to be exercised fairly with regard to low income residents.

Redevelopment can be a powerful tool to revitalize local communities and neighborhoods. It has special relevance in areas such as New Jersey and the New York City metropolitan area, where the relative scarcity of undeveloped land focuses attention on previously developed areas whose vitality may have diminished with the forces and passage of time. Like all governmental powers, however, the redevelopment power is susceptible to misuse. Eminent domain is one of the most awesome powers that Americans have entrusted to their government. When this power is invoked, citizens lose their home and their business. More importantly, they can also lose their place in their community, and their sense of comfort, stability,

sey Constitutions. On January 3, 2011, the United States District Court for the District of New Jersey dismissed all plaintiff's claims. *See* Mt. Holly Citizens in Action, Inc. v. Twp. of Mt. Holly, 2011 WL 9405 (D.N.J. Jan 3, 2011). The case is now pending in the Third Circuit, which has taken the unusual step of staying eminent domain actions pending appeal. *See* Mt. Holly Citizens in Action, Inc. v. Mt. Holly, No. 11-1159 (3d Cir. order dated Mar. 16, 2011) (granting stay and injunctive relief pending appeal).

144. As Professor Pritchett put it bluntly: "The role of blight terminology in restricting racial mobility has also been under-appreciated by legal scholars. Blight was a facially neutral term infused with racial and ethnic prejudice." Pritchett, *supra* note 114, at 6.

145. S. Burlington Cnty. NAACP v. Mount Laurel, 336 A.2d 713, 728 (N.J. 1975).

146. *Id.* at 725. Thus the *Mount Laurel* court continued that "[i]t is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in *all* local land use regulation." *Id.* at 727 (emphasis added).

and security. The greater the power entrusted to government officials, the more safeguards that should exist to ensure that it is used with care and discretion.