

2011

Reclaiming the Promise of the Judicial Branch: Toward a More Meaningful Standard of Judicial Review as Applied to New York Eminent Domain Law

Paula Franzese
Seton Hall Law School

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Paula Franzese, *Reclaiming the Promise of the Judicial Branch: Toward a More Meaningful Standard of Judicial Review as Applied to New York Eminent Domain Law*, 38 Fordham Urb. L.J. 1091 (2011).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol38/iss4/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Reclaiming the Promise of the Judicial Branch: Toward a More Meaningful Standard of Judicial Review as Applied to New York Eminent Domain Law

Cover Page Footnote

The author thanks participants in the Fordham Urban Law Journal symposium on takings law for their helpful insights and comments, and Jennifer Bennett, Paolo Bruno, and Javier Diaz for their invaluable research assistance.

**RECLAIMING THE PROMISE OF THE JUDICIAL
BRANCH: TOWARD A MORE MEANINGFUL
STANDARD OF JUDICIAL REVIEW AS APPLIED
TO NEW YORK EMINENT DOMAIN LAW**

*Paula Franzese**

INTRODUCTION	1091
I. The New York Approach to Eminent Domain Law	1095
II. “Blight” as a Standardless Standard	1099
III. A Blind Deference and the Potential for Abuse: The New York Courts’ Reluctance to Second-Guess Agency Determinations	1102
IV. The Legislative Prerogative: Statutory Reform Efforts in a Post- <i>Kelo</i> Nation	1107
V. Putting Some Muscle Back Into Judicial Review: Reinvention in New York	1110
Conclusion	1116

INTRODUCTION

New York courts have long embraced a posture of considerable judicial restraint when passing upon the coordinating branches’ determinations of blight in eminent domain cases. Notwithstanding the U.S. Supreme Court’s controversial 2005 pronouncement in *Kelo v. City of New London*,¹ after which forty-three states heeded the majority’s invitation to refine their own laws to more strenuously protect private property rights,² New York’s government-permissive statutory scheme and solicitous judicial response remains unchanged. As recently as the last judicial term, the New York

* Peter W. Rodino Professor of Law, Seton Hall Law School. The author thanks participants in the *Fordham Urban Law Journal* symposium on takings law for their helpful insights and comments, and Jennifer Bennett, Paolo Bruno, and Javier Diaz for their invaluable research assistance.

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

2. Justice Stevens, the architect of the majority’s ruling in *Kelo*, later viewed favorably “the public outcry that greeted *Kelo*,” observing in a speech to a county bar association that the backlash itself “is some evidence that the political process is up to the task of addressing” eminent domain reform. Justice John Paul Stevens, *Judicial Predilections*, Address to the Clark County Bar Ass’n (Aug. 18, 2005), in 6 NEV. L.J. 1, 4 (2005).

Court of Appeals, in *Kaur v. New York State Urban Development Corp.*³ and *Goldstein v. Pataki*,⁴ concluded that the Empire State Development Corporation's (ESDC's) findings of blight must stand, unless patently irrational or baseless.⁵

In *Kaur*, the court afforded wholesale deference to the legislative body's characterization of relevant parts of West Harlem as "substantially unsafe, unsanitary, substandard, and deteriorated,"⁶ notwithstanding the fact that those characterizations rested in considerable part on the machinations of the very enterprise—Columbia University—that would stand to gain from the blight designation. The blight characterization inspired a host of vociferous objections.⁷ Nonetheless, the court deemed firm and immutable the premise that the judicial branch must not substitute its judgment for that of the legislatively designated agency.

Similarly, in *Goldstein*, the Atlantic Yards case, New York's highest court endorsed the condemnation of a residential community to make way for a "mixed-use development" that was proposed by private developer Forest City Ratner Companies (FCRC) for the benefit of that developer.⁸ The exercise of eminent domain would allow for the construction of a

3. 933 N.E.2d 721, 731 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

4. 488 F. Supp. 2d 254, 290 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008).

5. *See id.*; *see also* *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009).

6. *Kaur*, 933 N.E.2d at 726.

7. *See id.* at 727; *see also* Maggie Astor & Kim Kirschenbaum, *Court OKs Manhattanville Expansion*, COLUMBIA SPECTATOR, June 24, 2010, available at <http://www.columbiaspectator.com/2010/06/24/court-oks-expansion>; Kim Kirschenbaum, *Harlem Activists Seek Eminent Domain Law Reform*, COLUMBIA SPECTATOR, Oct. 18, 2010, available at <http://www.columbiaspectator.com/2010/10/18/harlem-activists-seek-eminent-domain-law-reform>; Kim Kirschenbaum, *Property Holdouts Look to Supreme Court*, COLUMBIA SPECTATOR, Sept. 22, 2010, available at <http://www.columbiaspectator.com/2010/09/22/property-holdouts-look-supreme-court>; *More on Last Week's Decision in Columbia Eminent Domain Case*, EMINENT DOMAIN LAW BLOG (June 29, 2010), <http://ownerscounsel.blogspot.com/2010/06/more-on-last-weeks-decision-in-columbia.html>; Damon W. Root, *Judicial Review of Eminent Domain in New York is Fundamentally Broken*, REASON.COM (June 25, 2010), <http://reason.com/blog/2010/06/25/judicial-review-of-eminent-dom>; Robert Thomas, *New York Still Has "Unfrozen Caveman Judges" Who Are "Frightened and Confused" by Eminent Domain Blight*, INVERSECONDEMNATION (June 24, 2010), <http://www.inversecondemnation.com/inversecondemnation/2010/06/new-york-still-has-unfrozen-caveman-judges-who-are-frightened-and-confused-by-blight.html>; Robert Thomas, *There Really Are No Limits To Eminent Domain In New York—Court Of Appeals Reverses The Columbia Case (Kaur)*, INVERSECONDEMNATION (June 24, 2010), <http://www.inversecondemnation.com/inversecondemnation/2010/06/there-really-are-no-limits-to-eminent-domain-in-new-york-court-of-appeals-reverses-the-columbia-case.html>; Jonathan S. Torbin, *New York's Eminent Domain "Blight" Grows*, COMMENTARY MAGAZINE (June 24, 2010), <http://www.commentarymagazine.com/blogs/tobin/319631>.

8. *Goldstein*, 921 N.E.2d at 166, 175.

sports arena to house the NBA Nets franchise.⁹ The court of appeals noted that affected private property owners 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” in earlier court precedent.¹⁰ Still, the court chose to defer wholesale to the agency’s determination of blight, concluding that once the legislative agency has made its findings, absent a showing of corruption or irrationality, “there is nothing for the courts to do about it.”¹¹

New York’s expansive approach to government’s eminent domain powers is manifested in the generous two-fold classification process that its statutory scheme allows. Under the New York State Urban Development Corporation Act (UDCA), a government agency may justify a taking of private property if the property is determined to have fallen prey to “blight,” or, in the alternative, if the land will be used in a manner that can support its classification as a “civic project.”¹² Blight designations are readily affirmed, as courts routinely defer to agency determinations. In the rare instance that the agency is unable to demonstrate blight, the civic purpose classification serves as a catch-all, effectively assuring that the exercise of eminent domain will go forward. *Kaur* makes plain the extent of the New York judiciary’s disinclination to enter the fray.¹³ There, the court afforded the agency’s blight designation wholesale deference while simultaneously declining to disturb its subsidiary determination that the taking for a private educational institution, Columbia University, qualified as a valid “civic project.”¹⁴

This Article asserts that the New York model must be recast to more effectively balance and vindicate the various equities that pit private property rights against concerns for the greater good. In considerable measure, reinvention depends on the capacity of the courts to emerge as more meaningful participants in the colloquy between and among the coordinating branches of government. The *Kaur* case in particular provides an object lesson on the potential for abuse when agency determinations of blight are

9. *Id.* at 166.

10. *Id.* at 171; *see also* N.Y.C. Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936) (developing the blight exception to the public use doctrine).

11. *Goldstein*, 921 N.E.2d at 172 (quoting *Kaskel v. Impellitteri*, 115 N.E.2d 659, 661 (N.Y. 1953)).

12. N.Y. UNCONSOL. LAW, Ch. 252, tit. 16, ch. 24, subch. 1, §§ 6251-6292 (McKinney 2010).

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

14. *Id.* at 733.

allowed to rest, unchecked, on the machinations of the enterprise that is advancing that designation in the first place.¹⁵

In the *Kaur* matter, Columbia University spent the better part of a decade quietly buying up considerable properties that would come to be within the scope of its proposed expansion, only to then allow those properties to fall into disrepair.¹⁶ As the New York Appellate Division noted angrily, “Manhattanville or West Harlem as a matter of record was not in a depressed economic condition when EDC and ESDC embarked on their Columbia-prepared-and-financed quest.”¹⁷ Specifically, after purchasing or acquiring control of the properties in the designated area—vacating seventeen buildings and more than half of the tenants—Columbia let water infiltration conditions deteriorate, building code violations persist, and garbage and debris remain in certain buildings.¹⁸ In turn, the decay of those premises was used to substantiate the designation of blight.¹⁹

The appellate division ruling in the *Kaur* case certainly appreciated the irony of such a result. In what the court perceived to be evidence of agency bias in favor of Columbia, the court observed that the ESDC delayed making an inquiry into the substandard conditions in Manhattanville until well after Columbia obtained control over the properties. The court found more evidence of agency heavy-handedness in the ESDC’s authorization of a special methodology, slanted in Columbia’s favor, for determining blight.²⁰ The court made plain its displeasure: “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”²¹ Still, on appeal, the court allowed the blight designation to stand.²²

15. *Id.*

16. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 11-15, 20 (N.Y. App. Div. 2009) (“It is important to note that the record before ESDC contains no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein.”), *rev’d*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

17. *Id.* at 19 (noting that the 2002 West Harlem Master Plan stated that “not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be realized through rezoning”).

18. *Id.* at 17.

19. *Id.*

20. *Id.* at 21-22. Columbia had hired an environmental and planning consulting firm, Allee, King, Rosen and Fleming, Inc. (AKRF) to assist in the planning. The methodology employed narrowed AKRF’s investigation to highlight blight designations in the report.

21. *Id.* at 22 (alteration in original).

22. *Id.* at 24.

If the public trust is to be upheld, a more meaningful standard of judicial review must be applied to New York's eminent domain process. Part I of this Article sets forth the relevant doctrinal and procedural predicates helpful to an assessment of such a possibility. It examines the mechanisms by which New York government agencies must abide when exercising the power of eminent domain. Further, it introduces the relevant provisions of New York's Eminent Domain Procedural Law (EDPL)²³ as well as the UDCA, and sets the framework for a comparative approach. Part II explores the devolution of the blight designation in New York into a standardless standard. Against this backdrop, Part III critically considers the New York courts' reluctance to second-guess state agency determinations of blight. It examines the potential for abuse that a posture of wholesale judicial deference creates. Part IV gleans lessons learned from other jurisdictions, as courts and legislatures have exercised their prerogative in response to *Kelo*'s invitation to impose public use requirements that are more stringent than the federal baseline. Finally, Part V sets forth a proposal for reinvention in New York, whereby a more meaningful standard of judicial review might be applied when courts evaluate the propriety of legislative and agency determinations of blight and civic purpose.

I. THE NEW YORK APPROACH TO EMINENT DOMAIN LAW

New York's eminent domain laws stand alone, representing a broad grant of takings authority to various enabling agencies. Despite the statutory requirement that a showing of "blight," or alternatively "civic purpose," be established by the given agency to justify the taking, those classifications themselves are broadly inclusive. Courts, in turn, hesitate to second-guess the agency determinations and abide, instead, by a posture of generous deference to government prerogative.

Certainly, as compared to other states' protocol in a post-*Kelo* world, New York's eminent domain law is anachronistic.²⁴ The mechanism in place in New York to permit the taking of private property for public use simply requires an easily satisfied showing of blight or civic purpose. The New York protocol significantly limits the capacity of affected landowners to push back against the government's takings powers, affording affected parties only thirty days to seek judicial review, or lose that right.²⁵

New York's government-solicitous approach to takings is peerless. While requiring that notice be published so that interested landowners

23. N.Y. EM. DOM. PROC. LAW §§ 101-709 (McKinney 1977).

24. See *infra* notes 112-39 and accompanying text.

25. N.Y. EM. DOM. PROC. LAW § 204 (McKinney 2010).

might have an opportunity to object at public proceedings, it was not until 2005 that the condemning agency was required to provide actual notice to those individuals directly affected by the project.²⁶ As noted, if affected parties fail to seek judicial review within the prescribed thirty-day window, they are essentially estopped from challenging the condemnation.²⁷ Moreover, as a predicate to seeking judicial review, interested parties must first attend the public hearing and voice their concerns.²⁸ The scope of judicial review is limited to the objections made at the hearing.²⁹

New York's swift and somewhat lopsided approach to justice in eminent domain matters may be a product of the specific needs of its fast-moving metropolis, which is rightly deemed a global center of commerce, education, and the arts.³⁰ As the issue was presented in *Kaur*, the undoubtedly public purpose of education is particularly vital for New York to maintain its status as an internationally-renowned and important center of higher education and academic research.³¹ Whatever the rationale, stated or subtextual, for the procedures adopted by New York, they are unmatched and most certainly skewed in favor of the governing agencies.

The EDPL is the state statutory body of law that governs the acquisition by eminent domain of real property within the state of New York. EDPL procedure requires the condemning entity to hold a public hearing prior to the acquisition, and to inform the public of the purpose for the project and the impact on the environment and residents of the locality.³² Notice of the public hearing must be given to residents at least ten days, but not more than thirty days, before the date of the hearing. Such notice must be published in at least five successive issues of both an official daily newspaper and a newspaper of general circulation.³³ Remarkably, until 2005 the condemning agency was not required to notify affected homeowners indivi-

26. See *Brody v. Vill. of Port Chester*, 509 F. Supp. 2d 269, 278 (S.D.N.Y. 2007).

27. N.Y. EM. DOM. PROC. LAW § 204 (McKinney 2004).

28. *Id.* § 202(c)(2).

29. *Id.*

30. See generally Nasim Farjad, Note, *Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City*, 76 FORDHAM L. REV. 1121, 1161 (2007); Bureau of Int'l Info. Programs, U.S. Dep't of State, *U.S. Cities Reflect Cultural Diversity, Artistic Ingenuity: Regional differences add character to U.S. Metropolitan Centers*, AMERICA.GOV (Dec. 13, 2007), <http://www.america.gov/st/peopleplace-english/2007/December/20071213194500GLnesnoM0.4935419.html>.

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

32. N.Y. EM. DOM. PROC. LAW § 201 (McKinney 1982).

33. *Id.* However, if only weekly publications are available, it must be published in at least two successive issues.

dually.³⁴ Finally, in 2005, the EDPL was amended to require that the record billing owner be given notice by certified mail within the same statutorily prescribed time frame.³⁵

The notice afforded affected owners must “clearly state that those property owners who may subsequently wish to challenge condemnation of their property via judicial review may do so only on the basis of issues, facts, and objections raised at such hearing.”³⁶ Hence, well in advance of the project’s launch date, the landowner must attend the public hearing, determine any present or future objections that he or she may wish to raise, and raise such objections. At the hearing, the proponent of the project must outline its purpose, proposed location, any alternative locations, and any other information that it deems pertinent.³⁷ Thereafter, any person in attendance is to be given a “reasonable opportunity” to present an oral or written statement regarding the project.³⁸ While that provision provides objecting residents an opportunity to be heard, the condemning agency is not obliged to address their complaints, or even to take them into consideration when rendering its determinations.

The Institute for Justice found that, at the requisite public hearings, officials are neither required to answer questions from property owners nor to provide them with relevant supporting documents or the opportunity to directly challenge the government’s evidence.³⁹ It has been posited that private interest groups as well as local governments routinely inflate the “public good” that the given project will advance mindful that, once the property is condemned, there is no concomitant governmental obligation to produce evidence of the alleged economic gains that were used to justify the condemnation in the first place.⁴⁰ Further, the statutorily prescribed “reasonable opportunity” to be heard is an ambiguous term that has not been defined by the legislature or the courts, leaving considerable room for circumvention.

The EDPL requires that, within ninety days of the public meeting, the agency must complete its determinations and findings concerning the pro-

34. See *Brody v. Vill. of Port Chester*, 509 F. Supp. 2d 269, 269 (S.D.N.Y. 2007).

35. N.Y. EM. DOM. PROC. LAW § 202 (McKinney 2004).

36. *Id.* § 202(c)(2).

37. N.Y. EM. DOM. PROC. LAW § 203 (McKinney 1982).

38. *Id.*

39. *Empire State Eminent Domain: Robin Hood in Reverse*, INST. OF JUSTICE (Jan. 2010), http://www.ij.org/index.php?option=com_content&task=view&id=3045&Itemid=165 (referencing Dick Carpenter & John K. Ross, *Robin Hood in Reverse*, CITY JOURNAL, Jan. 15, 2010, available at <http://www.city-journal.org/2010/eon0115dcjr.html>).

40. *Id.*

posed public project.⁴¹ It is obliged to publish a brief synopsis, in at least two successive issues of a generally circulated newspaper, to indicate the public use, benefit, or purpose to be served by the project, the environmental effects, and the reasons for the selection of the particular location.⁴² The agency is also required, upon written request, to provide a written copy of its determination and findings.⁴³ Once officials approve the statement of “Determination and Findings,” property owners have thirty days to sue to contest the findings.⁴⁴

Significantly, New York is one of only a few states to require property owners to file a lawsuit before officials move to condemn.⁴⁵ If property owners miss the thirty day window, they permanently lose the right to object to the blight finding and to challenge an eventual condemnation.⁴⁶ As noted, until 2005 officials were not obliged to inform property owners that their property was targeted for redevelopment—thus the thirty day window would expire before property owners even knew they had to act.⁴⁷

When property owners do attempt to defend their property, judicial review is limited to the transcript of the public hearing. The court can either confirm or reject the determinations, and may review whether: (1) the proceeding was in conformity with state and federal constitutions; (2) the proposed acquisition was within the condemning agency’s statutory jurisdiction or authority; (3) the determinations were made in accordance with statutory requirements; and (4) a public use, benefit, or purpose will be served by the proposed acquisition.⁴⁸ Subsequent to the publication of its determinations and findings, the condemning agency has the right to amend the proposed project when further study of field conditions so warrants. The procedural protocol allows for amendment without requiring additional publication.⁴⁹

As a procedural matter (and setting aside for present purposes the wide swath of discretion afforded the condemning agency with respect to the substantive determination of blight), the EDPL is not particularly solicitous of private property rights. From affording affected landowners only thirty days to seek judicial review (or lose the right), to limiting judicial review to those objections raised at public hearing, to creating a parade of exemp-

41. N.Y. EM. DOM. PROC. LAW § 204 (McKinney 2004).

42. *Id.* § 204(A).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. N.Y. EM. DOM. PROC. LAW § 207 (amended 1991).

49. N.Y. EM. DOM. PROC. LAW § 205 (amended 1977).

tions regarding agency compliance with the procedural protocol, the procedural regime is less than generous to the targets of agency action. The procedural safeguards are waived if the agency, for example, obtains a license permit or certificate of public convenience from a state, federal, or local government agency, obtains a certificate of environmental compatibility and public need pursuant to the public service law, or undergoes or purports to undergo prior to acquisition one or more public hearings.⁵⁰

In conjunction with the EDPL, takings of private property for public use are effectuated in accordance with the UDCA. The UDCA creates a corporate governmental agency, known as the New York State Urban Development Corporation (“UDC”), which is granted the authority to “acquire, construct, reconstruct, rehabilitate or improve such industrial, manufacturing, commercial, educational, recreational and cultural facilities . . . and to carry out the clearance, replanning, reconstruction and rehabilitation of such substandard and insanitary areas.”⁵¹ The UDCA permits the UDC to exercise eminent domain for land use projects and civic projects.

Under the UDCA, a land use project is defined as “[a] plan or undertaking for the clearance, replanning, reconstruction, and rehabilitation . . . of a substandard and insanitary area, and for recreational or other facilities incidental or appurtenant thereto, pursuant to and in accordance with article eighteen of the constitution and this act.”⁵² The UDC must find that the area in which the land improvement project is to be located is “substandard or insanitary” or is in danger of becoming such, and “tends to impair or arrest the sound growth and development of the municipality.”⁵³ “Substandard or insanitary” is interchangeable with “a slum, blighted, deteriorated or deteriorating area or an area which has a blighting influence on the surrounding area.”⁵⁴ No further guidance on the meaning of the term “blight” is offered by the UDCA itself.

II. “BLIGHT” AS A STANDARDLESS STANDARD

After conducting research on New York’s eminent domain protocol, the Institute for Justice published findings that chronicle the ease with which blight designations are made. The blight designation can be affixed to any neighborhood “in need of redevelopment.”⁵⁵ That designation, in turn, can rest on such dubious grounds as “outmoded design,” the “lack of suitable

50. N.Y. EM. DOM. PROC. LAW § 206 (amended 1978).

51. N.Y. UNCONSOL. LAW § 6252 (McKinney 2011).

52. N.Y. UNCONSOL. LAW § 6253(6)(c) (McKinney 2009).

53. N.Y. UNCONSOL. LAW § 6260(c)(1) (McKinney 2011).

54. N.Y. UNCONSOL. LAW § 6253(12) (McKinney 2009).

55. Carpenter & Ross, *supra* note 39.

off-street parking,” or the danger that the area might become “substandard or insanitary.”⁵⁶ Municipalities have enough latitude to wield the blight stamp so that “virtually any property fits the bill,” and courts in turn rarely scrutinize those blight designations.⁵⁷

In *Goldstein v. New York State Urban Development Corp.*,⁵⁸ the Atlantic Yards case, New York’s highest court approved the seizure of what dissenting Judge Robert Smith called a “normal and pleasant residential community.”⁵⁹ In that case, the ESDC sought to use its eminent domain power to undertake a “mixed-use development” that was proposed by private developer FCRC, for the benefit of that developer.⁶⁰ The project sought to condemn private property in order to make way for the construction of a sports arena to house the NBA Nets franchise.⁶¹ Petitioners, affected private property owners, alleged that the land at issue was not in fact blighted. The New York Court of Appeals responded that “[t]hey are 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* court in 1936.”⁶²

Yet, in *Goldstein*, instead of reviewing the record to assess the propriety of the blight designation, the court chose to defer wholesale to the agency’s determination. It concluded that “[i]t is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies”⁶³ Further, the court determined that once the legislative agency has made its findings, absent a showing of corruption or irrationality, “there is nothing for the courts to do about it.”⁶⁴

Similarly, the concurrence in *Kaur* took considerable issue with the blight classification, but felt compelled to vote with the majority because of the weight of precedent.⁶⁵ The court’s endorsement of the findings of blight, despite the evidence that the private entity receiving the benefits of

56. *Id.*

57. *Id.*

58. 921 N.E.2d 164 (N.Y. 2009).

59. *Id.* at 190 (Smith, J., dissenting).

60. *Id.* at 166.

61. *Id.*

62. *Id.* at 171; *see also* N.Y.C. Hous. Auth. v. *Muller*, 1 N.E.2d 153 (N.Y. 1936) (developing the blight exception to the public use doctrine).

63. *Goldstein*, 921 N.E.2d at 172.

64. *Id.*

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

that classification, Columbia University, wielded a heavy hand in influencing the determination of blight, makes plainer the extent of the New York judiciary's wholesale deference to agency determinations of blight.⁶⁶ Prior to the ESDC's conclusion that the area in question was "blighted," West Harlem was not in a depressed economic condition.⁶⁷ To the contrary, "the 2002 West Harlem Master Plan stated that not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be realized through rezoning."⁶⁸ Factors that led to the area's designation as blighted included the presence of unpainted block walls, loose awning supports, and sidewalk and building defects.⁶⁹ Significantly, the ESDC study substantiating the characterization of blight failed to include vital considerations such as an analysis of real estate values, rental demand, rezoning applications, and prior proposals for development of the waterfront area.⁷⁰

Goldstein and *Kaur* demonstrate just how expansively the blight designation has been construed and applied in New York. The hollowness of the blight classification renders vulnerable any area where economic development could be increased. Certainly, "[a] sufficiently expansive definition of blight is essentially equivalent to authorizing economic development takings."⁷¹

To solidify a government's capability to essentially effectuate takings at will, the New York statutory scheme authorizes condemnations not only to remediate "blight," however broadly conceived, but also to advance "civic projects."⁷² A "civic project" is defined as "[a] project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes."⁷³ As a result, the "civic project" classification serves as a catch-all and back-up plan, in the unlikely event that government is unsuccessful at deeming an area "blighted." In *Kaur*,

66. Ilya Somin, *New York High Court Upholds Columbia University Takings*, THE VOLOKH CONSPIRACY (June 24, 2010), <http://volokh.com/category/2010/06/24/new-york-high-court-upholds-columbia-university-takings/>.

67. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 19 (N.Y. App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

68. *Id.*

69. *See id.* at 22.

70. *Id.*

71. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 266 (2007) (alteration in original).

72. N.Y. URBAN DEVELOPMENT CORPORATION ACT 174/68 § 3(6)(d) (2006) (alteration in original).

73. *Id.*

the New York Court of Appeals went so far as to approve the ESDC's alternative classification of Columbia's plans for expansion as a "civic project."⁷⁴ Its willingness to defer to the agency's determinations is made even plainer when it notes that, "[o]f course, ESDC is statutorily empowered to exercise eminent domain in furtherance of a civic project regardless of whether a project site suffers from blight."⁷⁵

III. A BLIND DEFERENCE AND THE POTENTIAL FOR ABUSE: THE NEW YORK COURTS' RELUCTANCE TO SECOND-GUESS AGENCY DETERMINATIONS

On the one hand, the U.S. Supreme Court has noted emphatically that "[t]he role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one."⁷⁶ In *Berman v. Parker*, the Supreme Court found that "[C]ongress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for [the Court] to reappraise them."⁷⁷ Certainly, courts are not in a position to "oversee the choice of the boundary line nor to sit in review on the size of a particular project area."⁷⁸ Rather, once the matter of public purpose has been resolved, "the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rest in the discretion of the legislative branch."⁷⁹ Likewise, in *Hawaii Housing Authority v. Midkiff*,⁸⁰ the Supreme Court determined that the "public use" requirement is coterminous with the scope of a sovereign's police power.⁸¹ The Court made clear that it would not substitute its judgment for the legislature's judgment as to what constitutes a public use unless the use in question is "palpably without reasonable foundation."⁸²

In *Kelo v. City of New London*,⁸³ the Court found itself confronted with the question of "whether the City's development plan serves a 'public pur-

74. *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 733 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

75. *Id.*

76. *Berman v. Parker*, 348 U.S. 26, 32 (1954) (alteration in original).

77. *Id.* at 33 (alteration in original).

78. *Id.* at 36.

79. *Id.* at 35-36 (alteration in original).

80. 467 U.S. 229 (1984).

81. *Id.* at 240.

82. *Id.* at 241 (alteration in original).

83. 545 U.S. 469 (2005).

pose.”⁸⁴ The Court acknowledged that, without exception, precedent defined the public purpose construct broadly, reflecting a longstanding policy of deference to legislative judgments in the field.⁸⁵ Justice Stevens, writing for the majority, noted that “our earliest cases in particular embodied a strong theme of federalism, emphasizing the ‘great respect’ that we owe to state legislatures and state courts in discerning local public needs.”⁸⁶ For more than a century, the jurisprudence governing public use “widely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”⁸⁷ Those policies form the bedrock for much of the Supreme Court’s approach to determinations of blight.

On the other hand, the Court has made plain that even a rational basis standard of review must have teeth. In his concurrence in *Kelo*, Justice Kennedy stated that “[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.”⁸⁸ Meaningful rational basis review requires that courts conduct an extensive inquiry into primary and incidental benefit.⁸⁹ Even more significantly, the traditional presumption of validity may not apply to a more narrowly drawn category of takings. “There may be private transfers in which the risk of undetected, impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”⁹⁰

Thus, *Kelo* itself suggests a basis for considered judicial review when the condemnation is motivated by private economic interests.⁹¹ Certainly, Justice Kennedy’s concurrence in that case placed particular emphasis on review of the motivations to attend the underlying planning process that ultimately called for the exercise of the takings power.⁹² He acknowledged that an acute inference of impermissible preferential treatment could well warrant the presumption that the private transfer itself is invalid.⁹³

84. *Id.* at 480 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

85. *Id.*

86. *Id.* at 482.

87. *Id.* at 483.

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

89. *See id.*

90. *Id.* at 493.

91. *See* Charles E. Cohen, *The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate*, 46 DUQ. L. REV. 375, 412-13 (2008).

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

93. *Id.* at 493.

The New York judiciary's insistence on wholesale deference to legislative and agency determinations of blight, particularly in *Kaur*, misses this call. If *Kaur* does not provide an object lesson on impermissible favoritism, what does? Columbia was both the architect and beneficiary of the blight designation. The court repeatedly recognized that "the record before ESDC contains no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of the property therein."⁹⁴ After Columbia began acquiring the property in question, the ESDC made no further attempts to independently ascertain that the conditions in the area were blighted until March 2006, four years after the West Harlem study found that while the area could be revitalized through rezoning, it was not blighted.⁹⁵ ESDC's inexplicable delay in assessing the property until long after Columbia had established control over it, as well as Columbia's intentional dereliction, raise a credible, if not acute inference that the blight designation was manipulated to impermissibly favor a private actor.⁹⁶ Examples of this behavior include permitting water infiltration conditions to go unaddressed and letting building code and local ordinance violations pile up.⁹⁷

If rational basis review is to have meaning, the New York judiciary must reclaim its role as a meaningful check on the coordinating branches. Somehow, in New York, deference has devolved into wholesale surrender of the judicial role. Certainly, history in New York shows that judicial restraint is not meant to be judicial abdication.

While the New York courts have long recognized that the extensive authority to make initial blight determinations is vested in agencies and municipalities, even limited judicial review has traditionally been construed to require more than a perfunctory review of the record below.⁹⁸ Certainly, the governing statute vests duly designated municipal officials with discretion in the designation and selection of substandard areas,⁹⁹ and courts may review those findings only upon a limited basis.¹⁰⁰ That review, however, has meant more than a mere rubber stamp.

94. See *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 16 (N.Y. App. Div. 2009), *rev'd*, 933 N.E. 721 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

95. *Id.* at 16-17.

96. *Id.* at 21.

97. *Id.*

98. See generally *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327 (N.Y. 1975); *Ziegler v. Chapin*, 27 N.E. 471 (N.Y. 1891); *Kaskel v. Impellitteri*, 115 N.E.2d 659 (N.Y. 1953).

99. *Yonkers*, 335 N.E.2d at 332-33 (finding that the record showed a substantial factual basis to find the area involved substandard).

100. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009).

For example, in 1953, the plaintiff in *Kaskel* disputed the conclusion of various qualified public bodies and officers that the area in question, in Manhattan, was, in fact, substandard and insanitary.¹⁰¹ The court carefully reviewed the record and found that there was ample evidence to justify the determination of the city planning commission that a substantial part of the area in question was substandard and insanitary.¹⁰² Nothing in the record could sustain a finding of corruption, irrationality, or baselessness.¹⁰³

Later, in *Talcott v. Buffalo*,¹⁰⁴ the court noted that a posture of judicial deference with respect to matters within the discretion of local officers and municipal bodies facilitates aims of efficiency and recognizes the wisdom of the political process:

Whatever evils may exist in the government of cities, that are due to mistakes, errors of judgment, or the lack of intelligent appreciation of official duty, must necessarily be temporary, compared with the mischief and inconvenience which judicial supervision, in all cases, would ultimately produce. Local officers are elected or appointed for such brief periods that frequent opportunity is afforded to the public and the taxpayers interested in their official acts to change them and substitute others in their place.¹⁰⁵

The capacity, however, to “vote out” those in charge is not available under the present statutory scheme for takings in New York. Members of the governing agency are neither popularly elected nor readily susceptible to the checks that transparency and accountability would otherwise provide.¹⁰⁶ Particularly here, courts must reemerge as meaningful checks on “the lack of intelligent appreciation of official duty.”¹⁰⁷

New York’s own jurisprudence concedes this role for the courts. In *Yonkers*, the court held that:

[C]ourts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination

101. *Kaskel*, 115 N.E.2d at 661.

102. *See id.* at 662.

103. *See id.*

104. 26 N.E. 263, 264-65 (N.Y. 1890).

105. *Id.* at 265.

106. *See generally* Paula A. Franzese & Daniel J. O’Hern, *Restoring the Public Trust: An Agenda for Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 RUTGERS L. REV. 1175, 1178 (2005) (exalting the aims of transparency and accountability as cornerstones of good government).

107. *Talcott*, 26 N.E. at 265.

of public purpose must be made by the courts themselves and they must have a basis on which to do so.¹⁰⁸

Yet, in *Goldstein*, New York's highest court reasoned that "[t]he Constitution accords government broad power to take and clear substandard and insanitary areas for redevelopment. In doing so, it commensurately deprives the Judiciary of grounds to interfere with the exercise."¹⁰⁹ In that case, the ESDC sought to obtain, through the use of eminent domain, certain privately owned property in downtown Brooklyn for inclusion in a land use improvement project known as Atlantic Yards. The project was to be accomplished by a private developer. Certain landowners objected to the taking as a violation of the state constitution, which requires the use of eminent domain only for a public purpose. The Court of Appeals determined that eradicating blight from an area is a sufficient public purpose to comply with the constitutional requirement.¹¹⁰

The *Goldstein* court noted the potential for abuse that an expansive conceptualization of blight can wield, but opted to leave that concern to the legislature.

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 . . . should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and business. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.¹¹¹

For courts to yield the floor wholesale because statutory reform is within the purview of the popularly elected branches begs the question. In both *Goldstein* and *Kaur*, New York's highest court missed the opportunity to exercise appropriately its own authority, certainly within the province of the judiciary, to review the records below to determine whether they could support the blight designation in the first place. Even a posture of judicial deference to the coordinating branches of government accommodates, rightly so, room for courts to serve as a check on the potential for abuse. Otherwise, the constitutional guarantees are eviscerated. A comparative assessment of the experiences of other jurisdictions, together with an examination of New York's own earlier precedent, makes plain that courts must have a voice in the evolving colloquy on blight.

108. *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 333 (N.Y. 1975).

109. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 173 (N.Y. 2009).

110. *Id.* at 170-71.

111. *Id.* at 172.

IV. THE LEGISLATIVE PREROGATIVE: STATUTORY REFORM EFFORTS IN A POST-KELO NATION

Kelo inspired a veritable national backlash, as states accepted Justice Stevens' invitation in that case to "impose 'public use' requirements that are stricter than the federal baseline."¹¹² Those more stringent safeguards against government abuse have come largely as a consequence of legislative reform. Most states have modified or crafted eminent domain statutes that narrow and more carefully prescribe the appropriate grounds for exercise of the takings power.¹¹³ Others have used state constitutional law to derive meaningful limitations on the use of eminent domain for economic development.¹¹⁴ Still others have passed constitutional amendments rendering takings for economic revitalization impermissible.¹¹⁵

As further evidence of the public's post-*Kelo* engagement with the issue of eminent domain, in the November 2006 elections voters in ten states approved ballot measures that restricted government takings powers.¹¹⁶ Post-*Kelo* legislation banned takings for economic redevelopment, barred post-condemnation transfers to private parties, or both.¹¹⁷ Recognizing states' capacity to more stridently narrow the reach of governmental takings, then-Judge Roberts opined during his Supreme Court confirmation hearings that "legislative bodies in the states [possess the power to] protect [citizens of those states] . . . where the Court has determined, as it did 5-4 in *Kelo*, that [it is] not going to draw that line."¹¹⁸

The Florida legislature enacted one of the more, if not the most, stringent set of post-*Kelo* restrictions on government authority to exercise its powers of eminent domain.¹¹⁹ On its face, the Florida Constitution contains a broad rendering of the takings power, sanctioning condemnations for "pub-

112. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

113. See ALA. CODE § 24-2-2 (2000); FLA. STAT. ANN. § 73.013(1) (West 2006); KY. REV. STAT. ANN. § 416.540 (West 2005); MO. ANN. STAT. § 523.271(1) (West 2002); 35 PA. CONS. STAT. ANN. § 1702 (West 1997).

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

115. See Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny,"* 59 ALA. L. REV. 561, 591 (2008) (noting that Louisiana and South Carolina have resorted to constitutional amendment to reform takings law).

116. *Id.* at 601; see also Nat'l Conf. of State Legislatures, *Property Rights Issues on the 2006 Ballot*, NCSL (Nov. 12, 2006), <http://www.ncsl.org/default.aspx?tabid=17595> (noting that Louisiana's measure received fifty-five percent of the vote while South Carolina's measure received eighty-six percent of the vote).

117. See ALA. CODE § 24-2-2; FLA. STAT. ANN. § 73.013(1); KY. REV. STAT. ANN. § 416.540; MO. ANN. STAT. § 523.271(1); 35 PA. CONS. STAT. ANN. § 1702.

118. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 286 (2005).

119. Lopez, *supra* note 115, at 591-92.

lic purpose.”¹²⁰ However, despite claims that they would “hinder the revitalization of inner cities,” Florida’s legislative amendments now bar governmental agencies from using the takings power to convey property “to a natural person or private entity.”¹²¹ Not satisfied with that barrier, Florida went one step further, legislatively prohibiting the exercise of eminent domain “for the purpose of abating or eliminating a public nuisance” or “for the purpose of preventing or eliminating slum or blight conditions.”¹²²

Missouri modified its eminent domain statutes so that “[n]o condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.”¹²³ “Economic development” purposes include measures intended to increase the “tax base, tax revenues, employment, and general economic health.”¹²⁴ Similarly, Kentucky decided to completely strike the word “purpose” from its eminent domain statutes.¹²⁵ Thus, takings are now limited to those for “public use.”¹²⁶ In turn, the Kentucky legislature determined that “no provision in the law of the Commonwealth shall be construed to authorize the condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly.”¹²⁷ Still, neither Missouri nor Kentucky prohibits exercise of the takings power to eliminate “blighted areas or substandard and unsanitary areas.”¹²⁸

Both Pennsylvania and Alabama have “redefined . . . ‘blight’ for condemnation purposes . . . to reduce the number of properties eligible for acquisition.”¹²⁹ “Pennsylvania . . . modified the definition of blight as set forth in its Urban Redevelopment Law, which was enacted in 1945.”¹³⁰

The . . . statute defined ‘blight’ by reference to seven factors: (1) unsafe, unsanitary, inadequate or over-crowded conditions of the houses in the particular area; (2) inadequate planning in the area; (3) excessive land coverage by the buildings in the area; (4) lack of adequate light and air and open space; (5) the defective design and arrangement of the buildings

120. FLA. CONST. art. X, § 6(a) (1968) (declaring that “no private property shall be taken except for a public purpose and with full compensation”).

121. Lopez, *supra* note 115, at 591-92.

122. *See id.* at 592.

123. MO. ANN. STAT. § 523.271(1) (West 2002).

124. *Id.* § 523.271(2).

125. KY. REV. STAT. ANN. § 416.540 (West 2005).

126. *Id.* Kentucky redefined “condemn” as taking private property for a “public use” (formerly “purpose”) pursuant to eminent domain, and redefined eminent domain as the “right of the Commonwealth to take for a public use” (formerly “purpose”).

127. KY. REV. STAT. ANN. § 416.675(3) (West 2005).

128. MO. ANN. STAT. § 523.271(2) (West 2002); *see also* Lopez, *supra* note 115, at 593.

129. Lopez, *supra* note 115, at 593.

130. *Id.*; *see also* 35 PA. CONS. STAT. ANN. § 1702 (West 1997).

in the area; (6) faulty street layout; or (7) land uses in the area which are economically or socially undesirable.¹³¹

In response to *Kelo*, Pennsylvania's statute now restricts the blight designation to any one of a series of factors aimed at curtailing unbridled discretion in the hands of state and local government.¹³² The list of circumstances capable of sustaining the blight designation include those locations that constitute a "public nuisance at common law," an "attractive nuisance to children," buildings that are "vermin infested," lots or parcels that are "a haven for rodents," or properties classified as "abandoned."¹³³

Alabama resorted to a similar approach when redefining blight in the aftermath of *Kelo*.¹³⁴ The statute now defines "blighted property" as portions of the community with "buildings, or improvements, which, because of dilapidation, deterioration or unsanitary or unsafe conditions, vacancy or abandonment, neglect or lack of maintenance, inadequate provision of ventilation, light, air, sanitation, vermin infestation, or lack of necessary facilities and equipment, are unfit for human habitation or occupancy."¹³⁵ By contrast, takings of less than blighted areas for purposes of urban renewal are not permitted without owner consent.¹³⁶

Even those reform efforts, however, are not without their detractors. Legislative attempts at redefining blight have been criticized as vague and less than adequate for purposes of protecting against governmental overreaching.¹³⁷ Given the definitional vagaries that permeate much of the post-*Kelo* legislation, critics contend that reform efforts tend to do little more than "preserve the status quo."¹³⁸ Some maintain that legislatures for the most part opted for measures that barred the specific exercises of eminent domain that incited the anti-*Kelo* outcry without remediating the real

131. Lopez, *supra* note 115, at 593; *see also* 35 PA. CONS. STAT. ANN. §1702(a).

132. *See* Property Rights Protection Act, 26 PA. CONS. STAT. § 205(b)(1)-(12) (2006).

133. *Id.*

134. ALA. CODE § 24-2-2 (2010).

135. *Id.* § 24-2-2(c)(1).

136. *Id.* § 24-2-2(b).

137. *See* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 725 (stating that "[d]efinitions of 'blight' are generally vague enough to allow condemnation of almost any property"); So-min, *supra* note 71 (commenting that "[a] sufficiently expansive definition of blight is essentially equivalent to authorizing economic development takings").

138. Lopez, *supra* note 115, at 594 (citing David Barron, *Eminent Domain is Dead! (Long Live Eminent Domain!)*, BOS. GLOBE, Apr. 16, 2006, at D1 (characterizing post-*Kelo* reforms as having "more bark than bite")); *see also* Terry Pristin, *Voters Back Limits on Eminent Domain*, N.Y. TIMES, Nov. 15, 2006, at C6 (reporting that "[e]minent domain specialists on both sides . . . say many of the statutes enacted by state legislatures have few teeth").

potential for government misuse of the blight designation.¹³⁹ These legislative deficiencies suggest that, even in the presence of statutory reform efforts, courts have a role to play in protecting against such abuse.

V. PUTTING SOME MUSCLE BACK INTO JUDICIAL REVIEW: REINVENTION IN NEW YORK

While judicial deference can and has served salutary ends when it comes to legislative agency determinations of blight, a posture of judicial restraint must not be reduced to one of blind deference. Wholesale judicial rubber stamping of the coordinating branches' prerogatives is ill-advised for a host of reasons. There must be a more meaningful role for the courts when called upon to adjudicate those matters that transcend the interests of the litigants themselves. Such cases, often implicating a mix of individual and societal interests, may well render inescapable judicial balancing of public policy considerations. This recognition is particularly compelling in takings cases, where the interests at stake implicate both the individual and the collective interests of the community.

Certainly, a government's redevelopment authority cannot be unfettered. Courts have a role to play in assuring that the appropriate balance is struck between the means and ends of redevelopment and the rights of property owners. The national experience reveals that courts are capable of discharging this role fairly. For example, the Ohio Supreme Court, refusing to rubber stamp government designations of land as "deteriorating," deemed that classification a "standardless standard."¹⁴⁰ In the court's estimation, Ohio's statutory scheme does not afford fair notice to property owners and invites "ad hoc and selective enforcement."¹⁴¹

While applying a rational basis standard of review, the Ohio courts recognize that even limited judicial scrutiny "remains a critical constitutional component."¹⁴² Significantly, the court emphasized that the judiciary's "independence is critical, particularly when the authority for the taking is delegated to another or the contemplated public use is dependent on a private entity."¹⁴³ Particularly in those instances in which the state takes pri-

139. See John E. Kramer & Lisa Knepper, *One Year After Kelo Argument National Property Rights Revolt Still Going Strong: 43 State Legislatures Work Toward Eminent Domain Reform*, INST. FOR JUSTICE (Feb. 21, 2006), http://www.ij.org/index.php?option=com_content&task=view&id=933&Itemid=165.

140. *City of Norwood v. Horney*, 853 N.E.2d 1115, 1145 (Ohio 2006).

141. *Id.*

142. *Id.* at 1138.

143. *Id.* at 1139.

vate property and transfers it to another private person or entity, “judicial review of the taking is paramount.”¹⁴⁴

Perhaps most relevant to reform of the New York model is the experience just across the Hudson River, in New Jersey. Recently, in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, the New Jersey Supreme Court determined that, as a matter of state constitutional law, government designations of blight must rest upon “substantial evidence.”¹⁴⁵ Moreover, the court interpreted the New Jersey Local Redevelopment and Housing Law to bar the designation of blight when, in the estimation of the local planning board, the parcel in question is deemed merely “stagnant or not fully productive.”¹⁴⁶

While affording the New Jersey statutory scheme the presumption of constitutionality and considerable deference, and “recogniz[ing] that government redevelopment is a valuable tool for municipalities faced with economic deterioration in their communities[,]”¹⁴⁷ the court in *Gallenthin* did not hesitate to scrutinize the record to gauge the integrity of the municipality’s blight designation. Judicial deference must mean more, the court tacitly observed, than judicial endorsement of a record that contains essentially “a bland recitation of applicable statutory criteria and a declaration that those criteria are met.”¹⁴⁸ Rather, “municipal redevelopment designations are entitled to deference provided that they are supported by substantial evidence on the record.”¹⁴⁹ In *Gallethin*, the court held that the substantial evidence standard was not met, mindful that the municipality’s decision was supported “by only the net opinion of an expert.”¹⁵⁰

The New Jersey Supreme Court derived its authority to impose a meaningful check on government’s exercise of its redevelopment powers from the state’s constitution. The relevant constitutional provisions restrict redevelopment to “blighted areas.”¹⁵¹ Intended to strike a “balance between municipal redevelopment and property owners’ rights,” the blight showing mandated by the constitution could not be sustained, the court determined “solely because the property is not used in an optimal manner.”¹⁵²

Significantly, New Jersey’s constitutional provisions on blight are quite similar to those contained in the New York Constitution. New Jersey’s

144. *Id.*

145. 924 A.2d 447, 465 (N.J. 2007).

146. *Id.* at 458-65.

147. *Id.* at 460.

148. *Id.* at 465.

149. *Id.*

150. *Id.*

151. N.J. CONST. art. VIII, § 3, para. 1 (1947).

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

blighted areas clause decrees that “[t]he 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.”¹⁵³ Correspondingly, New York’s relevant constitutional provision indicates that “the legislature may provide . . . for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas.”¹⁵⁴ Yet, notwithstanding the comparable enabling grants, the New Jersey courts have put some steel into the blight conceptualization, while the recent pronouncements of the New York judiciary, in *Goldstein* and *Kaur*, reveal a considerable disinclination to do the same.

In *Gallenthin*, the New Jersey court noted that blight “presumes deterioration or stagnation that negatively affects surrounding areas.”¹⁵⁵ By contrast, property cannot constitutionally be deemed “in need of redevelopment” simply because it is “not fully productive.”¹⁵⁶ The court saw fit to review the record below, and found that it could not support the redevelopment designation by substantial evidence.¹⁵⁷ The government’s reliance on the conclusions of one expert—that the area in question was unimproved, partially vacant, and not optimally utilized—was deemed inadequate.¹⁵⁸

The government’s capacity to issue a designation of blight on the basis of underutilization is fiercely problematic. The court in *Kaur* endeavored to explain that “[t]he theoretical justification for using the degree of utilization of development rights as an indicator of blight is the inference that it reflects owners’ inability to make profitable use of full development rights due to lack of demand.”¹⁵⁹ This rather self-serving rationalization renders any property, which the government finds less than optimally operated, susceptible to the takings power. The *Kaur* court acknowledged that “[i]f such an all-encompassing definition of ‘blight’ were adopted, most property in the State would be eligible for redevelopment.”¹⁶⁰

The potential, in Justice Kennedy’s lexicon, for “impermissible favoritism of private parties”¹⁶¹ is particularly acute when a government agency is

153. N.J. CONST. art. VIII, § 3, para. 1 (1947).

154. N.Y. CONST. art. XVIII, § 1 (amended 1965).

155. *Gallenthin*, 924 A.2d at 457.

156. *Id.* at 449.

157. *See id.* at 449-54, 464-65.

158. *See id.* at 464.

159. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 22 (App. Div. 2009), *rev’d*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

160. *Id.* at 23 (quoting *Gallenthin*, 924 A.2d at 460).

161. *Kelo v. City of New London*, 545 U.S. 469, 493 (Kennedy, J. concurring).

allowed to decide property ownership based on its own opinion of who or what would put the land to a more productive or attractive use. Moreover, “the bundle of sticks” that those of us who teach property law use as a metaphor to describe the cadre of rights and duties that ownership contemplates, including the owner’s prerogative to use, or not use, to the exclusion of others, would fall away if government were to become arbiter and referee of productivity.

Mindful of the *Gallenthin* court’s concerns with respect to the adequacy of the record, the record in *Kaur* reveals that no comprehensive development plan was ever created. Moreover, the situs of government’s reach, West Harlem, “was not in a depressed economic condition” at the time that the EDC and ESDC embarked on their mission to find blight.¹⁶² Most significantly, the private party to reap the benefits of the blight designation, Columbia University, was the “progenitor of its own benefit.”¹⁶³ Columbia University spent years quietly buying up considerable properties that would come within the scope of its proposed expansion, only to then allow those properties to fall into disrepair.¹⁶⁴ Later, the state of those premises’ decay was used by the ESDC to substantiate its designation of blight.¹⁶⁵

Further, the court in *Kaur* viewed with some skepticism the characterization of Columbia University’s expansion project as a “civic project.”¹⁶⁶ Columbia is the sole beneficiary of the project. At best, “the public benefit is incrementally incidental to the private benefits” conferred.¹⁶⁷ Surely, a judicial vetting of the propriety of government’s exercise of its takings powers to transfer private property to another private entity “who will use it in a way that the legislature deems more beneficial to the public”¹⁶⁸ was warranted.

In *Kelo*, Justice O’Connor’s dissent sets forth precisely this basic precept in the following way:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.* given to an owner who will use it in a

162. *Kaur*, 892 N.Y.S.2d at 19 (noting that “[t]he 2002 West Harlem Master Plan stated that not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be realized through rezoning”).

163. *Id.* at 20.

164. *Id.* (“It is important to note that the record before ESDC contains no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein.”).

165. *Id.* at 21.

166. *See id.* at 23-24.

167. *Id.* at 24.

168. *Kelo v. City of New London*, 545 U.S. 469, 494 (O’Connor, J., dissenting).

way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.¹⁶⁹

Certainly, both the state and federal jurisprudence is rife with emphasis on judicial deference. In *Berman*¹⁷⁰ and *Midkiff*,¹⁷¹ the Supreme Court made plain the significance of deferring to legislative findings about public purpose. The Court recognized that the judiciary is “ill equipped to evaluate the efficacy of proposed legislative initiatives” and ultimately rejected as unworkable the concept that courts ought to decide what constitutes a governmental function. Similarly, Justice O’Connor’s dissenting opinion in *Kelo* concedes the inability of courts to evaluate whether eminent domain is a necessary means to pursue the legislature’s ends.¹⁷² However, Justice O’Connor hastened to add that:

[F]or all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void”¹⁷³ To protect that principle, those decisions reserved a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use . . . though the Court in *Berman* made clear that it is “an extremely narrow” one.¹⁷⁴

Reinvention in New York will depend on the capacity of the courts to reclaim their place as meaningful actors in a tripartite system of checks and balances. While the province of the judiciary in passing on the propriety of government takings is narrow, New York’s own precedent makes plain that “courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing.”¹⁷⁵ The statutory template specifically allows for judicial review as to whether “the proceedings were in conformity with the federal and state constitutions” and whether “a public use, benefit, or purpose will be served by the proposed

169. *Id.*

170. *Berman v. Parker*, 348 U.S. 26 (1954).

171. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

172. *See Kelo*, 545 U.S. at 499 (O’Connor, J., dissenting).

173. *Id.* at 500 (quoting *Midkiff*, 467 U.S. at 245).

174. *Id.* at 240 (quoting *Berman*, 348 U.S. at 32).

175. *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 333 (N.Y. 1975).

2011] *THE PROMISE OF THE JUDICIAL BRANCH* 1115

acquisition.”¹⁷⁶ Indeed, there is nothing in New York’s enabling grant or statutory scheme to deny courts the opportunity to assess “whether the agency’s conclusion is supported by substantial evidence in the record that was before the agency at the time of its decision.”¹⁷⁷

The judiciary’s insistence that the blight designation be supported by substantial evidence in no way usurps the appropriate province of the competing branches of government. The court is not superimposing its judgments onto the legislative scheme, mindful that the governing agency is presumptively best suited to grappling with the complex economic, social, political and moral issues involved.¹⁷⁸ Nor should the court “impede the ability of governments to solve holdout and other market failure problems, as well as to regulate industries through the reassignment of property rights.”¹⁷⁹ Indeed, New York’s use of eminent domain for economic development projects has increased tax revenues, employment opportunities, and overall neighborhood vitality in a number of vicinages.¹⁸⁰

The court, however, does enforce the constitution. To render consideration of the constitutionality of the exercise of the takings power to the political branches is an abdication of that function.¹⁸¹ Particularly in the arena of economic redevelopment, where untoward influences and “germs of corruption”¹⁸² can infect the playing field, courts must assure that the interests of all property owners are sufficiently safeguarded.¹⁸³ The responsibility of the judiciary becomes especially vital in New York because the agency making the blight classifications is immune to public vote or outcry.¹⁸⁴

That New York courts must emerge as relevant actors on the stage of takings law is made plainer still in view of the less than strident procedural safeguards in place to protect landowners and the absence in the statutory text of any meaningful definition of “blight” and “civic purpose.” Mindful

176. N.Y. EM. DOM. PROC. LAW § 207 (McKinney 2010).

177. See *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 437 (N.Y. 1986).

178. See Julia D. Mahoney, *Kelo’s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 125-26.

179. See *id.* at 106.

180. See Farjad, *supra* note 30, at 1121.

181. See generally James W. Ely, Jr., *Can the “Despotic Power” Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17 ABA PROB. & PROP. 31, 36 (2003) (“Generalized statements as to the necessity for a taking, sometimes veering toward mere speculation, should not be regarded as adequate.”); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 891 (1987) (deeming problematic the hollowness of the public use requirement).

182. Thomas Jefferson, *Notes on the State of Virginia*, reprinted in THOMAS JEFFERSON WRITINGS 1781-82, 245 (Merrill D. Peterson ed., 1984) (“In every government on earth [there] is some trace of human weakness, some germ of corruption and degeneracy . . .”).

183. See Mahoney, *supra* note 178, at 126.

184. See *supra* notes 106-07 and accompanying text.

that the New York legislature has granted a separate entity the authority to exercise condemnation proceedings, courts must ensure that the grant of authority is construed strictly. Doubts over the propriety of the taking should be resolved in favor of the targeted property owners.¹⁸⁵

Courts should require that the blight designation be supported by substantial evidence. At a minimum, the judiciary must engage in more than perfunctory review of the record below. Certainly, as articulated in the archives of New York's own precedent, "even 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 determinations should be spelled out."¹⁸⁶

CONCLUSION

While New York state court precedent has long compelled judicial deference to agency blight determinations, deference must be construed to require more than blind endorsement. This assertion is particularly apt as applied to the New York model, which affords its enabling agencies broad grants of authority to accomplish takings. Against the backdrop of New York's uniquely permissive eminent domain laws, courts must be more than wholesale abiders of the agency's will.

When blight designations are allowed to stand unchecked, no matter the machinations that may have distorted that very characterization, individual liberties are compromised and the public trust betrayed. The most recent New York Court of Appeals cases on point, *Goldstein* and *Kaur*, demonstrate the ease with which government agencies can justify their actions, no matter how susceptible the record is to real inferences of manipulation and heavy-handedness. Particularly then, courts must not yield the floor wholesale to the wisdom of the political process.

The procedural safeguards advanced by the New York protocol are anemic at best. In the presence of a largely toothless statutory and regulatory scheme, the public trust depends on a more involved judiciary. A standard of review that requires that blight determinations be supported by substantial evidence can protect against infection of the takings process by privatized actors inescapably motivated by self-interest.

The record amassed in *Kaur* makes plain that blight findings are susceptible to distortion at the hands of those private interests who have most to gain from the blight designation. Against this landscape, even the most modestly applied standard of review obliges courts to do more than defer

185. *City of Norwood v. Horney*, 853 N.E.2d 1115, 1138 (Ohio 2006).

186. *See Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 332 (N.Y. 1975).

2011] *THE PROMISE OF THE JUDICIAL BRANCH* 1117

wholesale to the coordinating branches prerogatives. Government must be put to its proofs, and the build-up to the blight designation must be examined to weed out instances of abuse and manipulation. Courts must demand more than broad descriptions of property as unsanitary or deteriorated. Legislative agencies must be made to justify their determinations with evidence to show that the blighted conditions truly permeate and are not self-inflicted.

The heart of our system of checks and balances depends upon a tripartite model. It is not, by contrast, two and a half branches, or two and a third branches. To vindicate its role as a full and functional agent, the judiciary must be rendered more than a rubber stamp, particularly in those matters, such as takings, that implicate a mix of individual and collective interests. A meaningful model of judicial review must be allowed to accommodate the independence, certainly, but also the interdependence of the coordinating branches. Courts must be willing to engage those branches in an exchange that demands a better modicum of accountability. Until then, the public trust remains vulnerable.