

# Fordham Urban Law Journal

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Volume 38

Number 4 Symposium - Taking New York:  
*Opportunities, Challenges, & Dangers Posed By the Use  
of Eminent Domain in New York*

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Article 7

2011

## Let There Be Blight: Blight Condemnations in New York After Goldstein and Kaur

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### Recommended Citation

Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After Goldstein and Kaur*, 38 Fordham Urb. L.J. 1193 (2011).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol38/iss4/7>

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# Let There Be Blight: Blight Condemnations in New York After Goldstein and Kaur

## **Cover Page Footnote**

For helpful suggestions and comments, the author would like to thank Amy Lavine, Norman Oder, and participants in the Fordham Urban Law Journal's symposium on eminent domain in New York. The author would also like to thank Eva Choi, Eric Facer, and Desiree Mowry for providing valuable research assistance.

**LET THERE BE BLIGHT: BLIGHT  
CONDEMNATIONS IN NEW YORK AFTER  
GOLDSTEIN AND KAUR**

*Ilya Somin*\*

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**INTRODUCTION**

The New York Court of Appeals' two recent blight condemnation decisions are the most widely publicized and controversial property rights rul-

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ings since the Supreme Court decided *Kelo v. City of New London*.<sup>1</sup> In *Kaur v. New York State Urban Development Corp.*,<sup>2</sup> and *Goldstein v. New York State Urban Development Corp.*,<sup>3</sup> the Court of Appeals set new lows in allowing extremely dubious “blight” condemnations. The court ruled that such condemnations are permissible under the state constitution’s Public Use Clause, which permits private property to be condemned only for a “public use.”<sup>4</sup> It also adopted an extremely narrow approach to interpreting what qualifies as an unconstitutional “pretextual taking.”<sup>5</sup>

This Article analyzes these aspects of *Kaur* and *Goldstein*, and argues that the New York Court of Appeals erred badly, by allowing highly abusive blight condemnations and defining pretextual takings so narrowly as to essentially read the concept out of existence.

Part I briefly describes the background of the two cases. *Goldstein* arose as a result of an effort by influential developer Bruce Ratner to acquire land in Brooklyn for his Atlantic Yards development project, which includes a stadium for the New Jersey Nets basketball franchise and mostly market rate and high-income housing that he plans to build.<sup>6</sup> *Kaur* resulted from Columbia University’s attempts to expand into the Manhattanville neighborhood of West Harlem.<sup>7</sup> When some of the landowners refused to sell, Ratner and the University successfully lobbied the government to declare the land they sought to be blighted and use eminent domain to transfer it to them.<sup>8</sup>

Part II addresses the issue of blight condemnation. *Goldstein* and *Kaur* both applied an extraordinarily broad definition of “blight” that included any area where there is “economic underdevelopment” or “stagnation.”<sup>9</sup> Almost any property can be described as underdeveloped relative to some other potential use of the land. In addition, the court ruled that even if the

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1. 545 U.S. 469 (2005). For my critique of *Kelo*, see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 227-44 (2007) [hereinafter Somin, *Grasping Hand*].

2. 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).

3. 921 N.E.2d 164 (N.Y. 2009).

4. N.Y. CONST. art. I, § 7, cl. (a).

5. See *Kelo*, 545 U.S. at 478 (noting that the government is not “allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit”); *id.* at 477 (explaining that “pretextual takings,” where the official rationale for the taking is a pretext “for the purpose of conferring a private benefit on a particular private party,” are unconstitutional).

6. See *Goldstein*, 921 N.E.2d at 166.

7. See *Kaur*, 933 N.E.2d at 724-25.

8. See *id.*; *Goldstein*, 921 N.E.2d at 166.

9. See *Goldstein*, 921 N.E.2d at 172 (quoting *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 331 (N.Y. 1975)).

property somehow falls outside this definition, state judges can only strike down a condemnation if “there is no room for reasonable difference of opinion as to whether an area is blighted.”<sup>10</sup> But with just about any area, there is at least *some* room for “reasonable” difference of opinion on the question of whether it is stagnant or underdeveloped.

In adopting an extremely broad definition of blight, the Court of Appeals was roughly in line with many other states that define blight expansively.<sup>11</sup> Even so, this definition is at odds with the text of the New York Constitution, which allows blight condemnations only in “substandard and insanitary areas [sic].”<sup>12</sup>

Moreover, the court broke dubious new ground in three other crucial respects. First, it chose to uphold the condemnations despite evidence suggesting that the studies the government relied on to prove the presence of “blight” were deliberately rigged to produce a predetermined result.<sup>13</sup> Second, it dismissed as unimportant the fact that the firm which conducted the studies had a serious conflict of interest in that it had previously been on the payroll of Ratner and Columbia—the private parties that stood to benefit from the blight condemnations.<sup>14</sup> Finally, the court refused to give any weight to extensive evidence indicating that Ratner and Columbia had themselves created or allowed most of the “blighted” conditions subsequently used to justify the condemnations to develop.<sup>15</sup> Both separately and in combination, these three elements of the court’s approach are extremely troubling. They open the door to serious abuses of the blight condemnation process on behalf of politically influential private interests.

Part III discusses *Goldstein* and *Kaur*’s treatment of the federal constitutional standard for “pretextual” takings. In *Kelo* and earlier decisions, federal courts made clear that “pretextual” takings remain unconstitutional despite the Supreme Court’s otherwise highly deferential posture on “public

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10. *Id.*

11. See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 307 (2004); Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42 [hereinafter Somin, *Blight Sweet Blight*]; see also Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2120-30 (2009) [hereinafter Somin, *Limits of Backlash*] (describing how highly permissive blight condemnation laws have persisted in many states even in the aftermath of recent reform efforts).

12. N.Y. CONST. art. XVIII, §§ 1, 9.

13. See *Goldstein*, 921 N.E.2d at 189-90 (Smith, J., dissenting).

14. See *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 726 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

15. See discussion *infra* Part II.C.

use” issues.<sup>16</sup> Unfortunately, the Supreme Court has been extremely unclear as to what constitutes a “pretextual taking.”<sup>17</sup> As a result, both state courts and lower federal courts have taken widely differing approaches to the issue.<sup>18</sup>

Nevertheless, *Kaur* and *Goldstein* are outliers in this area, deferring to the government more than any other court that has addressed the question since *Kelo*. In *Goldstein*, the property owners’ federal pretext claim had already been rejected by the Second Circuit.<sup>19</sup> I therefore analyze the federal decision in that case, as well as the state decision.

State and federal courts have identified four possible indications of a pretextual condemnation: the magnitude of the expected public benefits of the taking; the extent of the planning process that led to it; whether or not the taking has an identifiable private beneficiary whose identity was known in advance; and evidence of the intentions of the condemning authorities.<sup>20</sup> In *Kaur* and *Goldstein*, all four of these factors were present. Yet the New York Court of Appeals in *Kaur* dismissed the property owners’ pretextual takings claims out of hand. The Second Circuit did much the same in *Goldstein*. With one possible exception,<sup>21</sup> these were the most extreme pro-government pretext rulings of the post-*Kelo* era. They open the door to a wide range of pretextual condemnations.

Overall, *Goldstein* and *Kaur* probably rank among the most dubious blight condemnation decisions in American history. They make it easier than ever for well-connected interest groups to use blight condemnations to

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16. *Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005). For citations to pre-*Kelo* federal decisions striking down pretextual takings, see Ilya Somin, *Introduction: The Judicial Reaction to Kelo*, 4 ALBANY GOV’T L. REV. 1, 26 n.143 (2011) (symposium on eminent domain in the United States) [hereinafter Somin, *Judicial Reaction*].

17. See Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 174-75, 185 (2009) (noting this lack of clarity); Somin, *Judicial Reaction*, *supra* note 16, at 24.

18. See Somin, *Judicial Reaction*, *supra* note 16, at 25-35 (describing different approaches to this issue adopted by various courts).

19. See *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008). The Second Circuit applied similarly extreme deference in an unpublished 2006 decision, *Didden v. Village of Port Chester*, 173 F. App’x 931 (2d Cir. 2006), which later became briefly famous because future Supreme Court Justice Sonia Sotomayor served on the panel as a Second Circuit Judge at the time. For discussions of *Didden*, see *Judge Sonia Sotomayor’s Record on Constitutional Property Rights: Testimony Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Ilya Somin, Assistant Professor of Law, George Mason University), available at [http://www.law.gmu.edu/assets/files/news/2009/Somin\\_TestimonySotomayor.pdf](http://www.law.gmu.edu/assets/files/news/2009/Somin_TestimonySotomayor.pdf); Somin, *Judicial Reaction*, *supra* note 16, at 31-34.

20. See Kelly, *supra* note 17, at 184-99; Somin, *Judicial Reaction*, *supra* note 16, at 24-25.

21. See *supra* note 19.

transfer property to themselves at the expense of those with less political influence.

## I. BACKGROUND TO THE TWO CASES

Both *Goldstein* and *Kaur* arose in large part as a result of efforts by private interest groups to acquire land for their own purposes. While that fact does not by itself prove that the resulting condemnations were unjustified or illegal, recognition of it is essential to any understanding of the two cases' history.

### A. The Background to *Goldstein*

In *Goldstein*, the court upheld a major condemnation as part of the Atlantic Yards development project. The Empire State Development Corporation (ESDC), a state agency, took a large area for the purpose of transferring it to Forest City Ratner (FCR), a firm owned by politically influential developer Bruce Ratner. Ratner sought to use the site primarily to build high-income housing and a new stadium for the New Jersey Nets basketball team, which he owned at the time.<sup>22</sup> First announced in 2003, the Atlantic Yards project was intended to include sixteen high-rise buildings, office and retail space, and a new stadium for the New Jersey Nets, of which Ratner was the majority owner until 2009.<sup>23</sup> The project area in question covered twenty-two acres and included a variety of buildings used for both residential and commercial purposes.<sup>24</sup> Far from being a slum of any kind, much of it was actually middle class housing located in a reasonably well-off neighborhood.<sup>25</sup>

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22. See *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 166 (N.Y. 2009) (noting that only about one-third of the over 5300 housing units to be constructed would be affordable for middle- or low-income residents). An intermediate appellate court had previously ruled that the construction of the basketball stadium was a permissible "public purpose." See *Develop Don't Destroy Brooklyn v. Urban Dev. Corp.*, 874 N.Y.S.2d 414, 424 (N.Y. App. Div. 2009).

23. Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 288-89 (2010).

24. *Id.* at 287-88.

25. For accounts of the area and its characteristics, see NEIL DEMAUSE & JOANNA CAGAN, *FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT* 280 (rev. ed. 2008) (noting that the area in question was "prime Brooklyn real estate" at the nexus of several "booming neighborhoods"); Lavine & Oder, *supra* note 24, at 291-94; Damon W. Root, *When Public Power is Used for Private Gain*, REASON.COM (Oct. 8, 2009), <http://reason.com/archives/2009/10/08/when-public-power-is-used-for> [hereinafter Root, *Public Power*].

Not until 2005, thirty-one months after the project was announced and seventeen months after it was endorsed by the city and state governments, did the ESDC—the government agency that approved the project and later sanctioned the use of eminent domain—conclude that the area in question was “blighted.”<sup>26</sup> The “blight” study commissioned by the ESDC was undertaken by Allen, King, Rosen, and Fleming (AKRF), a consulting firm with serious conflict of interest problems.<sup>27</sup>

FCR and city officials claimed that the Atlantic Yards project would produce some 2250 “affordable” housing units, as well as several thousand others.<sup>28</sup> However, most of “the units that are labeled affordable will in fact be at or above market rate for Brooklyn, and out of the price range for many existing residents.”<sup>29</sup> Moreover, FCR is not legally required to build more than three hundred of the “affordable” units for many years; in the meantime, hundreds of existing housing units in the area have been destroyed as a result of the project and its use of eminent domain.<sup>30</sup>

Similarly, claims that the project will produce massive increases in jobs and economic development are questionable in light of the fact that the project has absorbed hundreds of millions of dollars in public subsidies (even without counting the use of eminent domain as an implicit subsidy), and the FCR has no legal obligation to actually produce any of the promised jobs.<sup>31</sup> A 2009 New York City Independent Budget Office report found that the arena portion of the project would result in only a modest twenty-five million dollar net increase in tax revenue for the City and an actual loss of forty million dollars in revenue for the state over the next thirty years.<sup>32</sup> Moreover, the net increase for the City is wiped out once we take account of later revelations showing a previously unaccounted for thirty-one million dollars in infrastructure subsidies for the project.<sup>33</sup> Including this sum in the analysis would make the fiscal impact for both levels of government negative.

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26. *Id.* at 298.

27. *See* discussion *infra* Part II.B.

28. *See* Lavine & Oder, *supra* note 24, at 318-19.

29. *Id.* at 319.

30. *See id.* at 320-21.

31. *See id.* at 322-27.

32. N.Y.C. INDEP. BUDGET OFFICE, FISCAL BRIEF: THE PROPOSED ARENA AT ATLANTIC YARDS: AN ANALYSIS OF CITY FISCAL GAINS AND LOSSES 8 (2009), available at <http://www.ibo.nyc.ny.us/iboreports/AtlanticYards091009.pdf>. Unfortunately, the Independent Budget Office chose not to analyze the project as a whole, and instead analyzed only the arena portion of the project. *See id.* at 2.

33. *See* Lavine & Oder, *supra* note 24, at 324.



Because the Atlantic Yards takings encompassed a large area and threatened to forcibly displace many people and businesses, the project aroused widespread public opposition and a series of lawsuits that culminated in decisions by the Second Circuit Court of Appeals and New York's highest state court upholding the takings.<sup>34</sup>

### B. The Background to *Kaur*

The *Kaur* takings arose from an effort by Columbia University to acquire property for expansion in Harlem's Manhattanville neighborhood in New York City.<sup>35</sup> Beginning in 2001, Columbia sought, in conjunction with city agencies, to acquire some seventeen acres of property in Manhattanville in order to build new educational and research facilities for its campus.<sup>36</sup> By 2003, it owned some fifty-one percent of the land in the area.<sup>37</sup> In early 2004, Columbia began meeting with the ESDC to discuss condemnation of the remaining land.<sup>38</sup> As a result of these meetings, the ESDC hired Columbia's consultant, AKRF, to conduct a "blight" study that could justify the use of eminent domain to condemn those properties that remained outside Columbia's control.<sup>39</sup> In 2007, AKRF completed a study that, as expected, concluded that the area was "blighted."<sup>40</sup> Subsequently, the ESDC authorized the condemnation of certain property for Columbia's project.<sup>41</sup>

As with the Atlantic Yards project, the Columbia takings generated extensive media coverage and public resistance.<sup>42</sup>

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34. See *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009).

35. *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 724 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

36. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 11 (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).

37. *Id.* at 12.

38. See *id.*

39. See *id.*

40. See *id.* at 13; see also *infra* Part II.B.

41. *Kaur*, 892 N.Y.S.2d at 15.

42. See, e.g., Keith H. Hurokawa & Patricia Salkin, *Can Urban University Expansion and Sustainable Development Co-Exist?: A Case Study in Progress on Columbia University*, 37 *FORDHAM URB. L.J.* 637, 684-88 (2010) (describing the controversy over the use of eminent domain).

## II. A BLIGHT UNTO THE WORLD: UPHOLDING UNCONSTRAINED BLIGHT CONDEMNATIONS.

The *Goldstein* and *Kaur* decisions both rely on an extremely broad definition of “blight,” while also overlooking considerable evidence of malfeasance in securing blight designations even under that definition.

Extremely broad definitions of blight are far from unusual in state law.<sup>43</sup> Many of the eminent domain reform laws enacted by state governments in the wake of *Kelo v. City of New London* are likely to be ineffective because, although they forbid “economic development” condemnations, they leave in place extraordinarily broad definitions of blight.<sup>44</sup> These blight laws allow almost any area to be designated as “blighted” and subsequently condemned.<sup>45</sup> For example, state courts have ruled that such unlikely areas as New York City’s Times Square and downtown Las Vegas are blighted, thereby justifying condemnations that transferred property to the *New York Times* and politically influential casino owners respectively.<sup>46</sup>

However, several post-*Kelo* state judicial decisions outside of New York have begun to crack down on broad definitions of blight, either invalidating them under their state constitutional “public use” clauses or at least limiting their application.<sup>47</sup> Decisions by the Ohio and New Jersey supreme courts and a Pennsylvania appellate court have all trended in that direction.<sup>48</sup> *Kaur* and *Goldstein* are therefore outliers relative to recent decisions in other states, since they not only endorse a virtually limitless definition of blight, but also make judicial review of blight designations in New York even more deferential than before.<sup>49</sup>

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43. See Somin, *Limits of Backlash*, *supra* note 11, at 2114-20.

44. See *id.*

45. See *id.*

46. See *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 7, 15 (Nev. 2003); *W. 41st St. Realty L.L.C. v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121, 123 (N.Y. App. Div. 2002).

47. See Somin, *Judicial Reaction*, *supra* note 16, at 12-15 (discussing the relevant cases).

48. See *Gallenthin Realty Dev. Co. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007) (ruling that open space cannot be designated as “blighted” and condemned); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1144-47 (Ohio 2006) (holding that the state constitution does not permit an area to be declared “blighted” merely because it is “deteriorating”); *In re Condemnation by the Redevelopment Auth. of Lawrence Cnty.*, 962 A.2d 1257, 1263 (Pa. Commw. Ct. 2008) (holding that a blighted property has an “an actual, objectively negative use of the property rather than merely a use relatively less profitable than another”). The Pennsylvania case was apparently litigated under the state’s broader pre-*Kelo* definition of blight, which has since been displaced by a narrower one enacted in its post-*Kelo* reform law. See Somin, *Limits of Backlash*, *supra* note 11, at 2141-42 (describing the new law).

49. See discussion *infra* Part II.A.

Even more strikingly, *Goldstein* and *Kaur* exceeded previous New York decisions and rulings in other states by endorsing blight designations obtained under highly dubious circumstances. In both cases the blight designation was based on a study conducted by a firm with a serious conflict of interest. Both cases also relied heavily on “blight” discovered on land that was already owned by the private entity that stood to benefit from the condemnation of other land in the area.

#### A. A Virtually Limitless Definition of Blight

Both *Goldstein* and *Kaur* relied on a definition of blight so broad as to be virtually limitless. Indeed, the *Goldstein* opinion itself notes that the Atlantic Yards area “do[es] not begin to approach in severity the dire circumstances of urban slum dwelling” that led to the enactment of the state constitution’s blight amendment in 1938.<sup>50</sup> To get around this problem, the court held that blight alleviation is “not limited to ‘slums’ as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public, sufficient to make their removal a cognizable public purpose.”<sup>51</sup> *Kaur*, in turn, applied the definition of “blight” adopted in *Goldstein*.<sup>52</sup>

Just about any area occasionally suffers from “economic underdevelopment” or “stagnation” and therefore could potentially be condemned under this rationale. Moreover, even under this expansive definition of blight, the decision allows courts to strike down a condemnation only if “there is no room for reasonable difference of opinion as to whether an area is blighted.”<sup>53</sup> With any neighborhood, there is nearly always “room for reasonable difference of opinion” as to whether the area is “underdeveloped” relative to some possible alternative uses of the land. Defining blight this broadly, and then deferring to the government’s determination of whether such “blight” actually exists, comes close to reading the public use restriction out of the state constitution.

It is unlikely that Article XVIII, Section 1 of the New York State Constitution—the amendment allowing condemnation of “substandard and insanitary areas [sic]”<sup>54</sup>—was originally understood to mean that virtually

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50. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 171 (N.Y. 2009).

51. *Id.* at 172 (quoting *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 331 (N.Y. 1975)).

52. *See Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 730-31 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

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

54. N.Y. CONST. art. XVIII, § 1.

any area could be declared blighted and condemned. The earliest New York Court of Appeals decision interpreting the amendment described it as applying to “slum areas.”<sup>55</sup> As that ruling pointed out, the amendment may have been intended to codify a 1936 New York Court of Appeals decision that upheld the use of eminent domain for the “clearing, replanning, and reconstruction of slum areas and the providing of housing accommodations for persons of low income.”<sup>56</sup>

This interpretation of Article XVIII is supported by the records of the Constitutional Convention of 1938, where proponents of the amendment repeatedly emphasized that it focused on “slum clearance.”<sup>57</sup> One key supporter defined the meaning of that key term as follows:

Slum clearance is the redemption of areas where the physical condition of the housing and the neighborhood is so squalid, so demoralized, so lacking in light, ventilation, fire protection and sanitation, so overcrowded with buildings and people that the existence of such areas endangers the health, safety and morals of those living there and impairs the welfare of the entire community wherein such areas exist.<sup>58</sup>

Article XVIII was one of many state statutory and constitutional blight laws enacted during this period for the purpose of alleviating “slum-like” conditions.<sup>59</sup> Efforts to expand the definition of blight to cover non-slum areas only emerged much later.

In fairness, *Goldstein*’s definition of “blight” was adopted from earlier decisions, such as the New York State Court of Appeals’ 1975 ruling in *Yonkers Community Development Agency v. Morris*,<sup>60</sup> which defined blight as including “underdevelopment and stagnation” as well as “slums.”<sup>61</sup>

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55. See *Murray v. LaGuardia*, 52 N.E.2d 884, 886 (N.Y. 1943).

56. *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153, 153 (N.Y. 1936).

57. See REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL FIFTH TO AUGUST TWENTY-SIXTH, 1938, at 1512-85 (1938) [hereinafter CONSTITUTIONAL CONVENTION]; see also Amy Lavine, *From Slum Clearance to Economic Development: A Retrospective of Redevelopment Policies in New York State*, 4 ALBANY GOV’T L. REV. 212 (2011) (describing origins of the 1938 amendment in efforts to facilitate slum clearance).

58. CONSTITUTIONAL CONVENTION, *supra* note 57, at 1531 (statement of Harold Riegelman). Riegelman was a leading advocate of liberal housing legislation and of Article XVIII. See generally Dorothy J. Gaiter, *Harold Riegelman, A Civic Leader*, N.Y. TIMES, Apr. 17, 1982, at 1.

59. See generally Wendell Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1 (2003) (arguing that eminent domain has often been used at the expense of individual property owners and to the benefit of purely private interests).

60. 335 N.E.2d 327 (N.Y. 1975).

61. *Id.* at 330. The *Goldstein* majority opinion relied heavily on *Yonkers*. See *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 171-72 (N.Y. 2009).

Nevertheless, these earlier cases, like *Goldstein* itself, seem to be at variance with the text and original meaning of Article XVIII. Indeed, the *Yonkers* court itself acknowledged that “urban renewal began as an effort to remove ‘substandard and insanitary’ conditions which threatened the health and welfare of the public, in other words ‘slums.’”<sup>62</sup>

Moreover, no previous Court of Appeals decision had combined a very broad definition of blight with the conclusion that, even under this definition, property owners may not successfully challenge a blight designation unless there could be “no reasonable difference of opinion” as to whether the area is blighted.<sup>63</sup> Indeed, as Judge Robert Smith pointed out in his dissent, *Yonkers* noted that “courts are required to be more than rubber stamps in the determination of the existence of substandard conditions,” and actually found that the government had *failed* to sufficiently prove that one of the areas it sought to condemn was “substandard.”<sup>64</sup>

### B. Endorsing Highly Biased Blight Determination Studies

*Goldstein* and *Kaur* went beyond merely adopting an extremely broad definition of blight. They also overlooked extensive evidence indicating that the blight studies commissioned by the Empire State Development Corporation were heavily biased and deliberately rigged to reach a predetermined conclusion.

As Judge Smith recognized in his dissenting opinion in *Goldstein*, the original rationale for the condemnation was “economic development—job creation and the bringing of a professional basketball team to Brooklyn.”<sup>65</sup> Apparently, “nothing was said about ‘blight’ by the sponsors of the project until 2005,” when the ESDC realized that a blight determination might be needed for legal reasons.<sup>66</sup> Moreover, the decision to condemn the property had already been made, and AKRF, the firm conducting the blight study, knew what outcome the condemning authorities sought. As Judge Smith suggested, “[i]n light of the special status accorded to blight in the New

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62. *Id.* (quoting N.Y. CONST. art. XVIII, § 1).

63. *Goldstein*, 921 N.E.2d at 172. A 1953 case cited by the *Goldstein* majority did rule that a blight determination should be upheld if it were not made “corruptly or irrationally or baselessly.” *Kaskel v. Impellitteri*, 115 N.E.2d 659, 661 (N.Y. 1953). Still, as Judge Smith pointed out in his dissent, this case did not involve the use of blight designations to condemn property, but rather a challenge by a taxpayer to the use of tax revenue for purchase of such property. See *Goldstein*, 921 N.E.2d at 188 (Smith, J., dissenting). The *Kaskel* court noted that the legal standard it adopted applies only to “a taxpayer’s action under section 51 of the General Municipal Law.” *Kaskel*, 115 N.E.2d at 661.

64. *Goldstein*, 921 N.E.2d at 188 (Smith, J., dissenting) (quoting *Yonkers*, 335 N.E.2d at 333).

65. *Id.* at 189.

66. *Id.*

York law of eminent domain, the inference that it was a pretext, not the true motive for this development, seems compelling.”<sup>67</sup>

AKRF also had a major conflict of interest. The firm was originally hired and paid by Ratner himself,<sup>68</sup> though its official relationship with Ratner’s firm had technically ended by the time it conducted the blight study (at which time, however, Ratner was still paying its bills).<sup>69</sup> Despite its awareness of AKRF’s relationship with Ratner, the ESDC awarded it a multi-million dollar no-bid contract to conduct the blight study.<sup>70</sup> As a lower court judge noted in another case generated by the Atlantic Yards project, the ESDC uses AKRF as its “perennial environmental consultant.”<sup>71</sup> ESDC officials have noted that AKRF “always produces studies that are in accord with the agency’s plans.”<sup>72</sup> At a hearing conducted by New York State Senator Bill Perkins in January 2010, ESDC representatives admitted that AKRF had always concluded that a property was blighted whenever asked to do a blight study by the agency.<sup>73</sup> Even worse, AKRF’s contract with the ESDC specifically required the firm to conduct a “blight study *in support* of the proposed project,”<sup>74</sup> which strongly suggests that the firm was instructed to conclude that the area was blighted, since the project could not go forward without such a finding.

AKRF therefore had very strong incentives to produce a study that facilitated the goals of both Ratner and the ESDC. Perhaps for that reason, the firm strained to find evidence of blight in its report, counting minor flaws

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67. *Id.*

68. See Lavine & Oder, *supra* note 24, at 312.

69. See *id.* at 312-13.

70. See *id.* at 313.

71. *Develop Don’t Destroy Brooklyn v. Urban Dev. Corp.*, 874 N.Y.S.2d 414, 426 (N.Y. App. Div. 2009) (Catterson, J., concurring).

72. Lavine & Oder, *supra* note 24, at 313-14.

73. See Eliot Brown, *Who Has the Right to Say What’s Blight? Bill Perkins vs. ESDC Darling*, N.Y. OBSERVER (Jan. 6, 2010), <http://www.observer.com/2010/real-estate/bill-perkins-no-fan-blight-consultant-akrf-esdc>; see also Norman Oder, *At Hearing, ESDC Representatives Defend Use Of Consultant AKRF; Perkins Slams “Egregious Conflict Of Interest” Given Simultaneous Work For Developers*, ATLANTIC YARDS REPORT (Jan. 7, 2010, 8:35 AM), <http://atlanticyardsreport.blogspot.com/2010/01/at-hearing-esdc-representatives-defend.html> (discussing these hearings).

74. Reply Appendix for Petitioners-Plaintiffs-Appellants Atlantic Yards Arena and Development Project—Contract Scope for an Environmental Impact Statement at 28, *Develop Don’t Destroy Brooklyn v. Urban Dev. Corp.*, 874 N.Y.S.2d 414, 424 (N.Y. App. Div. 2009) (No. 104597/07), available at <http://dddb.net/FEIS/appeal/080822ReplyAppendix.pdf> (emphasis added). For a discussion of this aspect of the contract, see Norman Oder, *Was AKRF Really Hired To Do A Study Of Neighborhood Conditions? It Was Hired To “Prepare A Blight Study In Support Of The Proposed Project,”* ATLANTIC YARDS REPORT (Jan. 12, 2010, 2:54 AM), <http://atlanticyardsreport.blogspot.com/2010/01/was-akrf-really-hired-to-do-study-of.html>.

such as “weeds,” “graffiti,” “cracked sidewalks,” and “underutilization.”<sup>75</sup> The AKRF study ignored the obvious point that the city government itself was responsible for maintaining the sidewalks and keeping them free of weeds.<sup>76</sup> In one instance, a “mural protesting the use of eminent domain” was classified as evidence of blight.<sup>77</sup>

*Kaur* similarly featured a probably rigged blight study conducted by AKRF. An earlier Appellate Division ruling forcing the ESDC to disclose relevant documents in the Columbia litigation had rebuked the agency for hiring AKRF to conduct the blight study due to the fact that the firm had a conflict of interest and had essentially acted as Columbia’s “agent.”<sup>78</sup> AKRF, the court ruled, had been “serving two masters” simultaneously.<sup>79</sup> Because of this background, the taking in *Kaur* had been invalidated in a close three-to-two plurality decision by New York’s intermediate appellate court, the Appellate Division.<sup>80</sup> When Columbia presented the agency with a plan to use eminent domain to acquire the remaining property and use it for its “sole benefit,” a blight study was commissioned from AKRF, which was simultaneously employed by Columbia on the development project’s general plan.<sup>81</sup>

AKRF was instructed by the ESDC to use a methodology “biased in Columbia’s favor,” that allowed blight to be proven by the presence of minor defects such as “unpainted block walls or loose awning supports.”<sup>82</sup> But as the Appellate Division concluded, “[v]irtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor.”<sup>83</sup>

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75. Lavine & Oder, *supra* note 24, at 298-99; Root, *Public Power*, *supra* note 25.

76. Lavine & Oder, *supra* note 24, at 299.

77. *Id.*

78. See *Tuck-It-Away Assocs. L.P. v. Empire State Dev. Corp.*, 861 N.Y.S.2d 51, 59-60 (N.Y. App. Div. 2008).

79. *Id.* at 59.

80. See *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8 (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).

81. *Id.* at 16.

82. *Id.* at 17. Later, another firm was hired to conduct an independent blight study, but it was required to use the same flawed methodology. See *id.* at 18. For more details on the biases and flaws in the blight study, see Damon W. Root, *Holding Justice Kennedy to His Word: Why the Supreme Court Must Put a Stop to Columbia University’s Eminent Domain Abuse*, REASON.COM (Sept. 29, 2010), <http://reason.com/archives/2010/09/29/holding-justice-kennedy-to-his>; see also Damon W. Root, *College Cheats: Columbia Blighted Own Hood*, N.Y. POST, Feb. 16, 2009, [http://www.nypost.com/p/news/opinion/opedcolumnists/item\\_oZsTv770SurIHl5f5BJlQO;jsessionid=DD25B89035A1B3D03970A76560585183](http://www.nypost.com/p/news/opinion/opedcolumnists/item_oZsTv770SurIHl5f5BJlQO;jsessionid=DD25B89035A1B3D03970A76560585183) [hereinafter Root, *College Cheats*].

83. *Kaur*, 892 N.Y.S.2d at 17.

The Appellate Division therefore ruled that the area could not be considered blighted; it also ruled that the blight findings were an unconstitutional “pretextual” taking, since the biased blight study showed that the blight rationale was a mere pretext for a scheme to benefit Columbia.<sup>84</sup>

The New York Court of Appeals unanimously reversed the Appellate Division, relying primarily on the extremely broad definition of blight upheld in *Goldstein* just a few months earlier.<sup>85</sup> The court refused to consider most of the evidence showing that the AKRF study deliberately used biased methodology, claiming only that AKRF’s objectivity was not compromised merely “because Columbia had previously engaged AKRF” to produce its development plan for the area.<sup>86</sup> The court also noted that AKRF’s findings were confirmed by a study conducted by a different firm, Earth Tech,<sup>87</sup> but did not consider the relevance of the fact that that firm was also required to use the same biased methodology as AKRF.<sup>88</sup> The court further noted that a third firm, Urbitran, had conducted a study finding blight in the area prior to AKRF’s study, thereby calling into question the Appellate Division’s finding that there was no evidence of blight prior to the acquisition of most of the area by Columbia.<sup>89</sup> But, the New York Court of Appeals did not dispute the Appellate Division’s finding that the ESDC chose not to rely on the Urbitran study in making its decision to condemn the property, and had in fact commissioned the AKRF study because ESDC staff doubted the adequacy of the Urbitran findings.<sup>90</sup>

### C. Blight Designations Based on the Blight Created by the Very Parties that Stood to Gain from Condemnation

In both *Goldstein* and *Kaur*, the New York Court of Appeals refused to consider extensive evidence suggesting that much of the “blight” used to justify condemnation of the areas in question was in fact created by the very parties that stood to benefit from the takings.

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84. *Id.* at 18, 20.

85. *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). Judge Smith, the sole dissenter in *Goldstein*, concurred in *Kaur* only because of the force of the earlier precedent. *See id.* at 737 (Smith, J., concurring).

86. *Id.* at 731-32.

87. *See id.* at 727.

88. *See Kaur*, 892 N.Y.S.2d at 22.

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

90. *See Kaur*, 892 N.Y.S.2d at 12-13. The New York Court of Appeals incorrectly stated that the Appellate Division had “ignored” the Urbitran study. *See Kaur*, 933 N.E.2d at 733.



In *Goldstein*, by the time the AKRF blight study was conducted in 2005, Forest City Ratner already owned a substantial proportion of the property in the area (acquired in part through the threat of eminent domain), and had allowed some of it to deteriorate.<sup>91</sup> As Damon Root explains, “Ratner had already acquired many of the properties he wanted (thanks to eminent domain) and left them empty, thus *creating* much of the unsightly neglect he now cites in support of his project.”<sup>92</sup> Other areas may have fallen into disrepair in part because “Ratner’s plan to acquire the properties and demolish the buildings had been public knowledge for years when the blight study was conducted,” and owners therefore had no reason to invest in their property’s upkeep.<sup>93</sup>

In *Kaur*, as in *Goldstein*, there was little evidence of actual blight prior to the acquisition of much of the property in the area by the expected beneficiaries of eminent domain. Indeed, the Appellate Division concluded that there was “no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein.”<sup>94</sup> The Empire State Development Corporation only ordered a blight study after Columbia had already acquired most of the property in the area and therefore “gained control over the very properties that would form the basis for a subsequent blight study.”<sup>95</sup>

Most of the alleged blight that was found by AKRF was located on property owned by Columbia itself, and was possibly allowed to develop in order to justify a blight finding.<sup>96</sup> In 2002, not long after Columbia began to acquire land in the area, a study conducted by Ernst & Young for the New York City Economic Development Corporation found that fifty-four of the sixty-seven properties in the project area were in “good,” “very good,” or “fair” condition.<sup>97</sup> By contrast, the AKRF study, which was conducted just a few years later in 2007 when Columbia already owned most of the area, found that forty-eight of the sixty-seven properties were “substandard.”<sup>98</sup> If AKRF’s conclusions are correct, the implication is that many

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91. *Kaur*, 892 N.Y.S.2d at 12.

92. Root, *Public Power*, *supra* note 25.

93. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 190 (N.Y. 2009) (Smith, J., dissenting).

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

95. *Id.* at 21.

96. See Root, *College Cheats*, *supra* note 82 (noting that Columbia already owned seventy-six percent of the land in the area at the time of the study and that “the university refused to perform basic and necessary repairs, thereby pushing tenants out of Columbia-owned buildings and manufacturing the ugly conditions that later advanced the school’s real-estate interests”).

97. *Kaur*, 892 N.Y.S.2d at 12.

98. *Id.* at 13.

of the properties deteriorated during the years when Columbia was acquiring land in the area, and much of the alleged “blight” was on land already owned by Columbia.

#### D. Implications

Both *Goldstein* and *Kaur* upheld takings under an extremely broad definition of blight. More unusually, both decisions refused to give more than perfunctory consideration to the strong evidence that the new private owners of the condemned property had rigged blight studies in their favor and were themselves responsible for a substantial proportion of the alleged blight those studies found.

In *Goldstein*, Ratner and the ESDC disputed some of these claims.<sup>99</sup> The key point, however, is that the majority refused to even consider the relevance of a possible conflict of interest, and concluded that the takings were permissible even if the allegations against the developer and the condemning authority were correct, so long as there was room for “reasonable difference of opinion” over the presence or absence of blight.<sup>100</sup> As the majority explained:

It may be that the bar has now been set too low—that what will now pass as “blight,” as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.<sup>101</sup>

The upshot of the court’s rulings is that developers and other politically influential interest groups are free to lobby for blight designations obtained on the basis of studies conducted by firms facing an obvious conflict of interest and acting under biased instructions. Further, the results of such studies are to be assessed under a nearly limitless definition of blight that includes any area which might be “underdeveloped” or “stagnant.”<sup>102</sup> Even under that definition, courts can only invalidate the resulting condemnations if there can be “no reasonable difference of opinion” as to whether an area is blighted.<sup>103</sup> Taken together, *Goldstein* and *Kaur* make it virtually

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99. See Revised Brief for Respondent at 25-34, *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009) (No. 2009-0178), 2009 WL 3810844.

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

101. *Id.* at 172.

102. See *id.* at 171-72.

103. See *id.* at 172.

impossible to challenge blight condemnations in New York on public use constitutional grounds. As Justice Catterson of New York's Appellate Division recently explained, "[u]nfortunately for the rights of the citizens . . . the recent rulings of the Court of Appeals . . . have made plain that there is no longer any judicial oversight of eminent domain proceedings."<sup>104</sup>

This judicial abdication imperils both the rights of property owners and effective neighborhood development. Unconstrained blight takings are easily manipulated by powerful interest groups in order to seize property they covet from the poor and politically weak.<sup>105</sup> Because governments lack effective tools for measuring the value of existing land uses, and new owners of condemned "blighted" property rarely have any binding obligation to produce the economic benefits that supposedly justify the use of eminent domain, such takings also routinely end up destroying more economic value than they create.<sup>106</sup>

To be sure, these dangers exist even with respect to condemnations in genuinely blighted areas. It is possible that blight condemnations of all types should be banned.<sup>107</sup> But, the problem is greatly exacerbated if, as in New York, virtually any area can be declared blighted and taken.

Some scholars worry that narrowing the definition of blight without banning blight takings altogether might end up harming racial minorities and the poor by singling out their communities as the only ones subject to blight takings.<sup>108</sup> In my view, however, such concerns are outweighed by the very real benefits that restricting blight condemnations have for racial minorities and the poor. These groups are disproportionately victimized by blight condemnations in areas that are not "blighted" in the lay sense of the term.<sup>109</sup> Limiting blight condemnations to "substandard and insanitary areas [sic]," as required by the New York Constitution,<sup>110</sup> is a highly imperfect policy. But, it would be a significant improvement over the status quo.

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104. *Uptown Holdings, L.L.C. v. City of New York*, 908 N.Y.S.2d 657, 661 (N.Y. App. Div. 2010) (Catterson, J., concurring).

105. *See Somin, Grasping Hand*, *supra* note 1, at 264-67.

106. *See id.* at 190-203 (discussing such problems with both broad blight takings and related "economic development" condemnations).

107. *See id.* at 269-71. *See generally* Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833 (2007) (asserting that alternatives to blight condemnation may be more constitutional).

108. *See, e.g.,* David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365 (2007) (making this argument).

109. *See* Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931 (2007) (discussing this issue in detail).

110. *See* N.Y. CONST. art. XVIII, §§ 1, 9.

### III. EVISCERATING PRETEXTUAL TAKINGS STANDARDS

In *Kelo v. City of New London* and previous decisions, the Supreme Court ruled that, under the Fifth Amendment, virtually any potential public benefit qualifies as a “public use,” justifying the use of eminent domain.<sup>111</sup> The one area where *Kelo* leaves room for significant judicial scrutiny of public use issues is that of “pretextual takings,” where the official rationale for the taking is a pretext “for the purpose of conferring a private benefit on a particular private party.”<sup>112</sup> Unfortunately, *Kelo* says very little about the question of how to determine whether or not a taking that transfers property to a private party is in fact pretextual.<sup>113</sup> As the federal district court decision in *Goldstein* notes, “[a]lthough *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term ‘mere pretext.’”<sup>114</sup> To add to the confusion, the *Kelo* majority indicated that one possible indication of a pretextual taking is the presence of a “one-to-one transfer of property, executed outside the confines of an integrated development plan.”<sup>115</sup> But, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, the federal district court case cited by Justice Stevens as an example of a pure “one-to-one transfer,”<sup>116</sup> actually struck down a taking that the government justified as necessary to implement a previously established redevelopment plan.<sup>117</sup> Justice Kennedy’s concurring opinion in *Kelo* also suggested that a taking may be invalidated if it showed “impermissible favoritism” to a private party.<sup>118</sup> But, like the majority opinion, which Kennedy joined, he was extremely unclear as to

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111. See *Kelo v. City of New London*, 545 U.S. 469, 484-85 (2005); see also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (concluding that a public use is any objective “rationally related to a conceivable public purpose”); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (ruling that the legislature has “well-nigh conclusive” discretion in determining what counts as a public use); Somin, *Grasping Hand*, *supra* note 1, at 224-25 (discussing *Midkiff* and *Berman* in greater detail).

112. *Kelo*, 545 U.S. at 477; see also *id.* at 478 (noting that the government is not “allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit”).

113. See Kelly, *supra* note 17, at 174 (noting that the Court “failed to provide much guidance” on this issue).

114. *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007), *aff’d*, 516 F.3d 50 (2d Cir. 2008).

115. *Kelo*, 545 U.S. at 487.

116. See *id.* at 487 n.17.

117. See *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1125-26 (C.D. Cal. 2001) (noting that the case involves condemnation powers established pursuant to the “Amargosa Redevelopment Plan”).

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

how to determine what counts as a taking “intended to favor a particular private party.”<sup>119</sup>

In his thorough analysis of *Kelo*’s pretext standard, Professor Daniel Kelly identifies four criteria that courts use to determine whether a private-to-private taking is pretextual:

- 1. The magnitude of the public benefit created by the condemnation. If the benefits are large, it seems less likely that they are merely pretextual.
- 2. The extensiveness of the planning process that led to the taking.
- 3. Whether or not the identity of the private beneficiary of the taking was known in advance. If the new owner’s identity was unknown to officials at the time they decided to use eminent domain, it is hard to conclude that government undertook the condemnation in order to advance the new owner’s interests.
- 4. The intentions of the condemning authorities. Under this approach, courts would investigate the motives of government decision-makers to determine what the true purpose of a condemnation was.<sup>120</sup>

In the aftermath of *Kelo*, various state and federal courts disagreed widely as to the relative importance of these four factors.<sup>121</sup> The striking fact about *Goldstein* and *Kaur* is that they rejected pretextual takings claims despite strong evidence suggesting that *all four* factors were present. If none of the four factors is enough to prove pretext, the New York Court of Appeals’ approach comes close to reading the concept out of existence. At the very least, if the court’s majority believed that none of the four is an appropriate indication of pretext, it should have explained what, if anything, would be.<sup>122</sup>

In *Goldstein*, the majority probably ignored *Kelo*’s pretext standard and the lower court cases interpreting it<sup>123</sup> because the property owners’ federal

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119. *Id.* For analyses discussing the lack of clarity in Justice Kennedy’s opinion, see Somin, *Grasping Hand*, *supra* note 1, at 229-31; Kelly, *supra* note 17.

120. Kelly, *supra* note 17, at 184-99. Kelly finds fault with each of these tests, and proposes an alternative approach of his own. *See id.* at 215-20.

121. *See* Somin, *Judicial Reaction*, *supra* note 16, at 25-35 (discussing these cases).

122. In a 2007 lower court decision, the Appellate Division invalidated a taking as pretextual in a case where the government’s motive was suspect. *See* 49 WB, L.L.C. v. Vill. of Haverstraw, 839 N.Y.S.2d 127, 141 (N.Y. App. Div. 2007) (holding that a condemnation was pretextual because “the Village’s true purpose for condemnation was to assist its waterfront developer in meeting the developer’s private scattered-site affordable housing obligation and to reduce costs to the developer”). It is not clear, however, whether this approach remains viable in New York after the Court of Appeals’ decisions in *Goldstein* and *Kaur*.

123. *See, e.g.*, 49 WB, 839 N.Y.S.2d 127.

constitutional claims had already been rejected in federal court.<sup>124</sup> I discuss this federal case in detail below.<sup>125</sup> Nonetheless, the property owners explicitly argued that the blight alleviation rationale for the takings was pretextual under the New York State Constitution,<sup>126</sup> and the Court of Appeals should have at least considered the relevance of recent pretext precedents from other jurisdictions.

Much less defensibly, the Court of Appeals also completely ignored *Kelo* and related pretext cases in *Kaur*, despite the fact that the lower court decision striking down the Columbia takings relied heavily on *Kelo*'s pretext analysis.<sup>127</sup> Unlike in *Goldstein*, no federal court had already ruled on the property owners' Fifth Amendment pretext claims, and the owners continued to press those arguments in the Court of Appeals.<sup>128</sup> Thus, it is difficult to understand why the *Kaur* court failed to even cite *Kelo*,<sup>129</sup> much less discuss the relevant federal precedents interpreting pretextual takings.

### A. The Magnitude of Expected Public Benefits

The Court of Appeals for the District of Columbia<sup>130</sup> and some lower federal courts emphasize the magnitude of expected public benefits as an indicator of pretext. According to the D.C. Court of Appeals, "[i]f the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed."<sup>131</sup> Under this approach, courts "focus primarily on the benefits

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124. See *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008).

125. See *infra* Part III.A.

126. See Brief for Petitioners-Appellants at 13-15, *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009) (No. 2009-0178), 2009 WL 3810843.

127. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 10-16 (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).

128. See Brief for Petitioners-Respondents at 2, 9, 129-39, *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010), available at <http://www.scribd.com/doc/32282922/Petitioners-Respondents-brief> (pagination in hyperlink).

129. See generally *Kaur*, 892 N.Y.S.2d 8.

130. This is the highest court of the District of Columbia, equivalent to a state supreme court. It should not be confused with the United States Court of Appeals for the D.C. Circuit, a federal intermediate appellate court.

131. *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173-74 (D.C. 2007). In *MHC Financing Partnership v. City of San Rafael*, No. C00-3785VRW, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006), the Northern District of California also interpreted *Kelo* as requiring "'careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer . . . [with] only incidental benefit to the City.'" *Id.* at \*14 (quoting *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring)). A pre-*Kelo* Seventh Circuit case also emphasized the importance of the distribution of the benefits of a taking. See *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 465-66 (7th Cir. 2002) (hold-

the public hopes to realize from the proposed taking” and compare them to those expected to be realized by the new private owner.<sup>132</sup> This theory builds on Justice Kennedy’s concurring opinion in *Kelo*, which suggested that a taking might be invalidated if it has “only incidental or pretextual public benefits.”<sup>133</sup>

In *Goldstein v. Pataki*,<sup>134</sup> the federal case addressing the pretextual takings claims of the Atlantic Yards property owners, the Second Circuit rejected the argument that the takings should be invalidated because most of the benefits would flow to Ratner, or because any benefits to the community might be “dwarf[ed]” by the project’s costs.<sup>135</sup> So long as a taking is “rationally related to a classic public use,” the court ruled that the distribution of benefits was irrelevant.<sup>136</sup>

Much evidence suggests that the benefits of the *Kaur* takings were similarly skewed. The takings were conducted in accordance with Columbia’s preexisting plans for expansion.<sup>137</sup> As the Appellate Division recognized, Columbia would be able to use the condemned property for its “sole benefit.”<sup>138</sup>

The conclusion that the takings will primarily benefit Columbia is reinforced by evidence suggesting that the area in question was already doing well economically and did not need a massive redevelopment project in order to produce further growth.<sup>139</sup> The Appellate Division pointed out that, “[t]he 2002 West Harlem Master Plan [covering the area that was eventually transferred to Columbia] 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.”<sup>140</sup> The New York Court of Appeals failed to consider the relevance of any of these points to a pretext analysis.

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ing that the true purpose of the takings was “to confer a private benefit” on business interests because “any speculative public benefit would be incidental at best”).

132. See *Franco*, 930 A.2d at 173.

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

134. 516 F.3d 50 (2d Cir. 2008).

135. See *id.* at 58.

136. See *id.* at 62.

137. See *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 21-22 (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).

138. *Id.* at 21.

139. See *id.* at 19.

140. *Id.*

## B. Pretextual Motive

The Pennsylvania and Hawaii supreme courts interpret *Kelo*'s pretextual taking inquiry as focusing primarily on the actual intentions of condemning authorities and the plausibility of the condemning authority's asserted goals. In *Middletown Township v. Lands of Stone*,<sup>141</sup> the Pennsylvania Supreme Court interpreted *Kelo* as requiring the court to examine "the real or fundamental purpose behind a taking," emphasizing that "the true purpose must primarily benefit the public."<sup>142</sup> The Hawaii Supreme Court adopted a similar standard,<sup>143</sup> as did several pre-*Kelo* federal court decisions.<sup>144</sup>

In *Goldstein v. Pataki*, the Second Circuit simply refused to consider any evidence of improper motive, ruling that whenever a taking is "rationally related to a classic public use," it is impermissible to "give close scrutiny to the mechanics of a taking . . . as a means to gauge the purity of the motives of various government officials who approved it."<sup>145</sup> The court also made clear that its definition of "classic public use" is extremely broad, noting that private-to-private blight takings and "the creation of affordable housing" qualify.<sup>146</sup>

The Second Circuit's refusal to consider evidence of motive was extremely unfortunate in light of the highly suspicious circumstances surrounding the taking. As discussed above,<sup>147</sup> the ESDC decided to conduct a blight study only after it and Ratner already intended to use eminent domain against the property owners.<sup>148</sup> It also relied on a firm with a serious

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141. 939 A.2d 331 (Pa. 2007).

142. *Id.* at 337; *see also In re O'Reilly*, 5 A.3d 246, 250 (Pa. 2010) (quoting *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007)).

143. *See Cnty. of Hawaii v. C & J Coupe Family P'ship*, 198 P.3d 615, 647-49 (Haw. 2008) (holding that *Kelo* requires courts to look for "the actual purpose" of a taking to determine whether the official rationale was "a mere pretext").

144. *See, e.g., Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price"); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target corporation); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual.").

145. *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008).

146. *Id.* at 58.

147. *See supra* Part II.B.

148. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 189 (N.Y. 2010) (Smith, J., dissenting).



conflict of interest to conduct the study.<sup>149</sup> All of this is at the very least relevant evidence of pretextual intent.<sup>150</sup>

In *Kaur*, as in *Goldstein*, there was extensive evidence of pretextual motive inherent in the blight designation process. The fact that the ESDC relied on AKRF, despite its conflict of interest, and instructed the firm to use a highly biased methodology is surely relevant.<sup>151</sup>

In addition, the Appellate Division found further evidence of improper motive in the ESDC's behavior with regard to its treatment of the property owners' Freedom of Information Law requests.<sup>152</sup> The ESDC improperly withheld key documents from the owners in order to prevent them from using them in administrative hearings assessing the validity of the planned takings.<sup>153</sup> As the Appellate Division explained,

[i]t is beyond dispute that, as the cutoff date to enter documents into the record approached, the respondent and other agencies engaged in a last-ditch effort to thwart the petitioners' attempt to obtain documents, including those which were ordered by the courts of this State to be released and turned over. . . .<sup>154</sup>

The ESDC thus deprived the owners of vital information needed to challenge the project at the only time such evidence could be used. The failure to release these documents indicates the extent to which the ESDC was willing to take any action in order to push the project through, and provides at least some additional evidence of pretextual motive.<sup>155</sup> The New York Court of Appeals' ruling simply ignored that evidence.

### C. The Extent of the Pre-Condemnation Planning Process

The Maryland, Pennsylvania, and Rhode Island Supreme Courts have relied on the absence of extensive advance public planning to indicate a pretextual taking.<sup>156</sup> This theory builds on *Kelo*'s emphasis on the presence of

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149. *Id.* at 167.

150. *See supra* Part II.B.

151. *See supra* Part II.B.

152. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 27-28 (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).

153. *Id.* at 27-28.

154. *Id.*

155. *Id.* (plurality); *id.* at 30-32 (Richter, J., concurring).

156. *See Mayor of Balt. v. Valsamaki*, 916 A.2d 324, 352-53 (Md. 2007) (noting the absence of a clear plan for the use of the condemned property, and contrasting this absence with the facts of *Kelo*); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 104 (R.I. 2006) (emphasizing that "[t]he City of New London's exhaustive prepa-

an “integrated development plan” behind the takings upheld in that case.<sup>157</sup> It is difficult to say exactly how much advance planning is needed under this approach to ward off pretext claims.

In *Goldstein v. Pataki*, the Second Circuit rejected the idea that any significant scrutiny was required because of the “acknowledged fact that Ratner was the impetus behind the Project, i.e., that he, not a state agency, first conceived of developing Atlantic Yards . . . and that it was his plan for the Project that the ESDC eventually adopted without significant modification.”<sup>158</sup> If a planning process completely dominated by a private beneficiary does not qualify as pretextual, it is difficult to see what sort of process would.

In *Kaur* as well, the relevant plan was developed by Columbia University—the very private interest that stood to benefit from the condemnations.<sup>159</sup> The blight alleviation plan was produced after the condemning authority had already decided to condemn the property and transfer it to Columbia.<sup>160</sup> The Appellate Division found that “[t]he record discloses that every document constituting the plan was drafted by the preselected private beneficiary’s [Columbia’s] attorneys and consultants and architects.”<sup>161</sup> As the Appellate Division concluded, “[t]he contrast between ESDC’s scheme for the redevelopment of Manhattanville and New London’s plan for Fort Trumbull could not be more dramatic.”<sup>162</sup> Although the New London plan was far from free of special interest influence,<sup>163</sup> at least it was not developed in advance by the very private party that would eventually take over the condemned property.

#### D. The Presence of a Known Private Beneficiary of the Taking

Both the majority and concurring opinions in *Kelo* note that there is a greater risk of a pretextual taking when the taking’s private beneficiary is

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ratory efforts that preceded the takings in *Kelo* stand in stark contrast to [the condemning authority’s] approach in the case before us”).

157. See *Kelo v. City of New London*, 545 U.S. 469, 487-88 (2005); cf. Nicole S. Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443, 444 (2007) (arguing that planning is the main focus of *Kelo*’s pretext analysis).

158. *Goldstein v. Pataki*, 516 F.3d 50, 55-56 (2d Cir. 2008).

159. See *Kaur*, 892 N.Y.S.2d at 19-21.

160. See *supra* Part II.B.

161. *Kaur*, 892 N.Y.S.2d at 20.

162. *Id.* at 19.

163. See Somin, *Grasping Hand*, *supra* note 1, at 236-38 (describing evidence of extensive influence by the Pfizer Corporation, which stood to benefit from the takings indirectly).

known in advance.<sup>164</sup> The Third Circuit Court of Appeals relied heavily on this factor in a 2008 decision. In *Carole Media L.L.C. v. New Jersey Transit Corp.*,<sup>165</sup> the court upheld a taking of a firm's license to post advertisements on public billboards owned by the New Jersey Transit Corporation.<sup>166</sup> Although there was evidence that the new policy was adopted in part because it was likely to favor the interests of a rival firm, All Vision,<sup>167</sup> the court upheld the condemnations in large part because there was "no allegation that NJ Transit, at the time it terminated Carole Media's existing licenses, knew the identity of the successful bidder for the long-term licenses at those locations."<sup>168</sup>

No one disputes that Ratner was the private beneficiary of the takings upheld in *Goldstein*, and that his identity as such was well-known in advance of the decision to condemn.<sup>169</sup> Yet neither the Second Circuit nor the New York Court of Appeals gave any weight to this fact.<sup>170</sup>

Similarly, there is no doubt that Columbia was the expected beneficiary of the *Kaur* condemnations, and that the ESDC was well aware of this reality.<sup>171</sup> Nevertheless, in *Kaur* too, the New York Court of Appeals did not attach any weight to the presence of a known private beneficiary.<sup>172</sup>

### E. Implications

In sum, both the New York Court of Appeals in *Kaur* and the Second Circuit in *Goldstein* refused to give weight to any of the four factors identified in *Kelo* and various lower court decisions as possible indicators of pretextual takings. Nor did either ruling suggest any alternative test. The Second Circuit did note that its decision "preserve[es] the possibility that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached

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164. See *Kelo v. City of New London*, 545 U.S. 469, 478 n.6 (2005) (noting that it is "difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown"); *id.* at 491 (Kennedy, J., concurring).

165. 550 F.3d 302 (3d Cir. 2008).

166. *Id.* at 312.

167. *Id.* at 310-11.

168. *Id.* at 311. As a result of this ignorance, the court ruled that "this case cannot be the textbook private taking involving a naked transfer of property from private party A to B solely for B's private use." *Id.*

169. See *Goldstein v. Pataki*, 516 F.3d 50, 53-54 (2d Cir. 2008).

170. See *id.*; *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 165-66 (N.Y. 2009).

171. See *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 725-26 (N.Y. 2010), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

172. See *id.* at 724.

that a closer *objective* scrutiny of the justification being offered is required.”<sup>173</sup> But it is difficult to see what those circumstances might be if neither subjective intent, nor the distribution of the projects costs and benefits, nor the presence of an identifiable private beneficiary who played a key role in initiating the taking, is enough to trigger such “objective scrutiny.”

### CONCLUSION

The New York Court of Appeals’ treatment of “blight” takings in *Goldstein* and *Kaur* breaks new and dangerous ground in endorsing abusive condemnations. It both defines blight more expansively than ever before and allows blight designations to be obtained by extremely dubious means. These include the use of consulting firms with severe conflicts of interest and reliance on evidence of blight that may have been produced by the very same private interest groups that stand to benefit from the condemnation that the blight finding is intended to justify.

The New York Court of Appeals and the Second Circuit have also virtually ignored the federal Supreme Court’s mandate that “pretextual” takings remain unconstitutional even under the Court’s otherwise highly permissive public use jurisprudence.<sup>174</sup>

As a result of these two rulings, there are virtually no remaining constitutional limits on blight condemnations in New York state, including America’s largest city.

To be sure, abusive blight condemnations still readily occur even under less permissive legal regimes. Had the New York Court of Appeals adopted a broad definition of blight but refused to countenance the use of biased consulting firms or evidence of blight generated by the beneficiaries of takings, government agencies would probably still be able to get a blight designation for most, if not quite all, the areas potentially coveted by influential interest groups.

Even so, the court’s endorsement of blight designations produced by biased firms and based on conditions that interested parties helped create, creates genuine harm. It makes it difficult to constrain blight condemnations even if the definition of blight were to be narrowed. A biased firm could potentially manufacture evidence of more narrowly defined blight. And an ambitious developer could allow such blight to develop on his land in the hopes of using it to lobby for the use of eminent domain to acquire nearby land that he or she covets. Effective eminent domain reform re-

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173. *Goldstein*, 516 F.3d at 63.

174. *See Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005).

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quires both narrowing the definition of “blight” and the reimposition of constraints on corrupt blight designation practices.<sup>175</sup>

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175. On the former point, see Somin, *Grasping Hand*, *supra* note 1, at 266-71. It is arguable that the use of eminent domain may do more harm than good, even in genuinely blighted areas. *See id.* at 269-71; *see also* Eagle, *supra* note 107 (arguing that “‘blight condemnation’ is dubious at best” and that abatement, foreclosure, and private revitalization are “more in accord with Constitutional requirements and more likely to produce transparent and efficacious results”).