Fordham Law Review

Volume 76 | Issue 2 Article 19

2007

Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City

Nasim Farjad

Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City

Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law; B.S., 2003, University of Wisconsin-Madison. I would like to thank Professor James Kainen for his help in early stages of this Note and my family for their support throughout the Note-writing process.

CONDEMNATION FRIENDLY OR LAND USE WISE? A BROAD INTERPRETATION OF THE PUBLIC USE REQUIREMENT WORKS WELL FOR NEW YORK CITY

*Nasim Farjad**

A broadly interpreted definition of the public use and/or purpose requirement for condemnations has been a part of New York's legal landscape for decades. Although New York's use of eminent domain for economic development projects has been repeatedly criticized, the benefits from such condemnations, such as increased tax revenues, employment opportunities, and overall neighborhood revitalizations, outweigh any arguments put forth for prohibiting economic development takings from constituting a public use.

INTRODUCTION

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London,*[1] the debate about New York's eminent domain law has been rekindled. Specifically, the debate centers on New York's broad interpretation of the public use requirement of the Takings Clause of the Fifth Amendment to the U.S. Constitution.[2] Eminent domain "is a reserved right or inextinguishable attribute of sovereignty exercisable by the State, or its authorized agent, to effect a public good whenever public necessity requires."[3] Therefore, states have the sovereign power to take private property through eminent domain for public use, but are subject to the limitations expressed in the Takings Clause, to which they are party through the clause's incorporation into the Fourteenth Amendment's Due Process Clause.[4] The Takings Clause specifically prohibits "private property [to] be

* J.D. Candidate, 2008, Fordham University School of Law; B.S., 2003, University of Wisconsin–Madison. I would like to thank Professor James Kainen for his help in the early stages of this Note and my family for their support throughout the Note-writing process.

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

2. *See* U.S. Const. amend. V (providing that private property shall not "be taken for public use, without just compensation").

3. *In re* County of Nassau, 136 N.Y.S.2d 166, 169 (Sup. Ct. 1954) (examining the power of a referee who had determined the amount of just compensation, altered the acquisition maps, and created new map dimensions for a proposed condemnation).

4. Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897) (discussing the incorporation of the Takings Clause into the Fourteenth Amendment to make it applicable to state governments).

taken for public use, without just compensation."[5] Thus, states can only exercise eminent domain to take property if it is used for a public use and if the owner of the property is justly compensated.[6] In addition to the restrictions of the Takings Clause, condemning entities are subject to their state eminent domain laws and constitutions, which have further defined and restricted their respective eminent domain practices.[7] State constitutional and eminent domain procedural requirements, such as those in New York, often contain very similar public use or public purpose requirements as the U.S. Constitution.[8]

In *Kelo v. City of New London*, the Supreme Court broadly interpreted the public use requirement of the Takings Clause and held that a city's economic development plan, which included taking private property and transferring it to an unknown private developer to revitalize the local economy, constituted a public use.[9] However, the *Kelo* Court emphasized that nothing in its opinion precluded states from placing further restrictions on their respective takings powers.[10] By adopting such a deferential approach to state interpretations of the requirements of the Takings Clause, the Supreme Court set the stage for intense public outcry over its broad interpretation of public use to allow governments, municipalities, and agencies to condemn private property for economic development.[11]

Besides denouncing the Supreme Court's *Kelo* decision, many opponents of the broad interpretation of the public use requirement also pointed to New York's eminent domain law, which considers economic development takings a valid public use.[12] New York has repeatedly been singled out as having some of the most "condemnation friendly" courts.[13] It has also been criticized for having a legislature that has been reluctant to implement prohibitory measures to curb its broad interpretation of the public use requirement.[14] Therefore, this Note examines New York's eminent domain law and its important public use decisions. Additionally, it presents other states' legislative responses to the *Kelo* decision and analyzes the benefits and detriments of New York's eminent domain practices to determine whether New York needs to change its broad interpretation of the public use requirement so that economic development condemnations do not

5. U.S. Const. amend. V.
6. *Id.*
7. *See, e.g.*, N.Y. Em. Dom. Proc. Law §§ 101–707 (McKinney 2006).
8. *Compare id.*, *with* U.S. Const. amend. V.
9. *See* Kelo v. City of New London, 545 U.S. 469, 486–90 (2005).
10. *Id.* at 489.
11. *See infra* Part I.C.1 (discussing the general public reaction to the *Kelo* decision as exemplified in public opinion polls, newspaper articles, and legal journals).
12. *See infra* Part II.A.1.
13. *See, e.g.*, Nicole Gelinas, *Imminent Domain?*, City J., June 30, 2005, http://www.city-journal.org/html/eon_06_30_05ng.html; *see also infra* Part II.A (discussing reasons why New York's eminent domain law must change).
14. *See generally infra* Parts I.A.1, II.A.

constitute a public use, or maintain its current eminent domain law and practices.

Part I.A of this Note discusses the recent history of the public use requirement for eminent domain in New York by outlining and explaining its eminent domain law and important public use decisions. Part I.B focuses on three important Supreme Court cases—*Berman v. Parker*,[15] *Hawaii Housing Authority v. Midkiff*,[16] and *Kelo v. City of New London*[17]—which have resulted in the Court's broad interpretation of the public use requirement. Then, Part I.C describes the general reaction to the *Kelo* decision and outlines the two dominant state approaches to eminent domain law as a result of state legislation that is either pending or has become law since the *Kelo* decision. It divides the legislation passed and pending into two dominant approaches: prohibitory legislation, which prohibits or places a temporary ban on economic development takings as constituting a public use, and procedural reform legislation, which sets out to define more clearly certain eminent domain procedures and compensation schemes without necessarily prohibiting economic development takings.

Part II.A of this Note outlines the current debate in New York by analyzing arguments calling for a change in New York's eminent domain law either to prohibit the use of economic development takings under the public use requirement or to implement even more stringent procedural requirements to New York's eminent domain law. In doing so, Part II.A.1 presents arguments calling upon New York to adopt a more strict definition of public use—to only permit the use of eminent domain to condemn property that is "truly blighted"—which would then not allow for economic development takings. Additionally, Part II.A.2 and II.A.3 highlight the negative effects that general eminent domain practices have had on poor and ethnic communities and present arguments proposing to restrict condemning authorities' powers.

To counter, Part II.B presents the arguments for maintaining New York's current broad reading of the public use requirement and thus its current eminent domain law and practices. Part II.B.1 sets forth the proposition that restricting New York's current eminent domain practices will have negative effects on New York's, particularly New York City's, economic development. Additionally, Part II.B.2 discusses the benefits that economic development takings have provided by revitalizing important areas in the city. Then Part II.B.3 presents the argument that the procedural protections already in place provide ample protection for property owners. Lastly, Part II.B.4 provides a counterargument for the effects of eminent domain on poor and ethnic communities by discussing a theory that states that a narrow definition of the public use requirement tends to disadvantage such communities more so than New York's broad interpretation.

---

15. 348 U.S. 26 (1954).
16. 467 U.S. 229 (1984).
17. 545 U.S. 469 (2005).

Part III of this Note advocates for sustaining New York's current interpretation of the public use requirement and its approach to eminent domain. Part III.A argues that New York's eminent domain law and the New York judiciary's approach to eminent domain mirror the Supreme Court's trend of broadly interpreting the public use requirement. Then, Part III.B points to New York City's special position as one of the financial capitals of the world to highlight the need to maintain the city's highly prosperous economy.

Furthermore, Part III.C of this Note argues that the benefits that New York has seen in the forms of increased tax revenue, increased employment, and overall neighborhood revitalization outweigh any of the alleged negative effects of New York's eminent domain practices. In addition, it argues that the current public use interpretation and eminent domain practices, as outlined by the Eminent Domain Procedural Law and the State Environmental Quality Review Act, provide sufficient protection for citizens. Finally, Part III.D suggests that even if concern over some of New York's eminent domain procedural requirements, such as the amount of "just compensation" given to citizens who lose their property to eminent domain are valid, any proposed changes should only focus on specific procedural requirements, as opposed to implementing a prohibition on economic development condemnations.

I. INTERPRETATION OF PUBLIC USE IN THE PAST CENTURY

Part I.A of this Note outlines New York's eminent domain law. It also recounts the New York judiciary's development of a broad interpretation of the public use requirement to demonstrate the evolution of economic development takings ranging from those that were undertaken to remove slum conditions to those that sought to eliminate economic stagnation. Part I.B outlines the development of the Supreme Court's broad interpretation of the public use requirement. It summarizes the three important Supreme Court cases decided in the past century, with an in-depth account of the *Kelo v. City of New London* decision.[18] Lastly, Part I.C discusses the nationwide reaction to *Kelo*, including the prohibitory and procedural reform legislation that states have implemented in the wake of *Kelo*.

A. *New York Law Has Evolved to Interpret Public Use to Permit Economic Development Takings*

1. New York's Eminent Domain Law

New York's eminent domain law is codified in New York's Consolidated Laws and is titled Eminent Domain Procedure Law (EDPL).[19] Article I of

18. By upholding an economic development taking, *Kelo* sparked a nationwide debate over the validity of using a broad interpretation of the public use requirement.

19. *See generally* N.Y. Em. Dom. Proc. Law §§ 101–707 (McKinney 2006).

the EDPL outlines the principles behind eminent domain takings and states that eminent domain can be used for a "public use" or "public project."[20] It specifically defines the term "public project" as "any program or project for which acquisition of property may be required for a public use, benefit or purpose."[21] Additionally, in New York, condemning authorities must comply with both the U.S. and New York Constitutions, which make certain that no citizen is deprived of property without due process of the law.[22]

To ensure sufficient due process, New York's EDPL outlines the extensive procedural requirements that all condemning agencies must follow,[23] such as providing property owners with the opportunity to be heard in a public hearing.[24] Article II of the EDPL details, among other things, the specific requirements for providing public notice and the procedures that condemning authorities must abide by during a public hearing.[25] Recently, the EDPL was amended to require even greater notice of a public hearing and its determination to property owners.[26]

To further ensure due process, the EDPL requires the condemning authority to provide just compensation and provides a remedy for property owners unsatisfied with the amount of compensation they have received.[27] Additionally, under article V of the EDPL, a dissatisfied property owner has the option of appearing before a judicial forum to address the inadequacy of the compensation awarded.[28]

Although the EDPL is extensive, some still find New York's EDPL and eminent domain practices unsatisfactory.[29] While the EDPL has recently been amended to require greater procedural protections, such as greater notice to property owners,[30] it has not been amended to redefine the meaning of "public project" or "public use."[31] Furthermore, it has not been amended to specifically restrict the use of eminent domain for economic

---

20. *See id.* §§ 101, 103.

21. *Id.* § 103.

22. *See* U.S. Const. amend. V; N.Y. Const. art. I, § 6.

23. *See generally* N.Y. Em. Dom. Proc. Law §§ 101–707; *see, e.g.*, *In re* Atl. Ins. Co., 232 N.Y.S. 489, 493 (Sup. Ct. 1929).

24. *See* N.Y. Em. Dom. Proc. Law § 201.

25. *See id.* §§ 201–202.

26. *See id.* § 202. The Eminent Domain Procedure Law (EDPL) now requires notice to be served upon the owner or last owner or the attorney of the owner of the property as shown on assessment records. *Id.*

27. The EDPL states that "[t]he condemnor, at all stages prior to or subsequent to an acquisition by eminent domain of real property necessary for a proposed public project shall make every reasonable and expeditious effort to justly compensate persons for such real property by negotiation and agreement." *Id.* § 301.

28. *See id.* §§ 500–514.

29. *See generally infra* Part II.A.

30. *See* § 202.

31. *See generally id.* §§ 101, 103. The EDPL was first enacted in 1977 and became effective July 1, 1978. Comparing the text of these two sections of the EDPL to the original Act shows no "new section" additions to amend the "public use" or "public project" language. *Id.*

development takings.[32] This lack of revision in the EDPL's definitions of the public use and/or public purpose requirements has led to frustration, especially in the months after the Supreme Court's *Kelo* decision.[33]

Shortly after the *Kelo* decision, seventeen bills, which set out to provide more protection to New York property owners, were introduced in the New York state legislature.[34] Roughly a year later in May 2006, the State Senate Judiciary Committee cleared four bills proposing to define and restrict New York's eminent domain powers that were related to purely economic development takings.[35] Two of the bills, one proposed by Senator John DeFrancisco and Assemblywoman Joan Christensen and the other by Senator DeFrancisco alone[36] had set out to clarify New York's eminent domain powers and to amend the state constitution to bar the taking or transfer of private property to another private party for purposes of economic development.[37] Senator DeFrancisco's bill proposed reserving eminent domain powers for "classical uses,"[38] such as public infrastructure projects and other services provided by the government.[39] However, the New York legislature failed to enact any of the bills and did not change its eminent domain law. Thus, New York still does not restrict the public use or public project requirements from allowing takings for economic development purposes.

2. New York's Public Use Decisions

Although the national public, as a result of *Kelo*, is now quite familiar with Connecticut's broad interpretation of the public use requirement, Connecticut's judicially created laws are not unique in the Northeast.[40] In

32. *See* §§ 101–103.

33. *See generally infra* Part II.A.

34. *See* John Caher, *'Kelo'-Related Bills Pass Senate Judiciary Body*, N.Y.L.J., May 3, 2006, at 2 [hereinafter Caher, *'Kelo'-Related Bills*] (reporting that four bills passed the State Senate Judiciary Committee on May 2, 2006). The New York State Bar Association also reacted to the *Kelo* decision by requesting that the legislature create a commission to study eminent domain in New York to avoid a "backlash" to *Kelo*. *See* John Caher, *State Bar Backs Study to Moderate Post-'Kelo' Backlash*, N.Y.L.J., Apr. 7, 2006, at 1 [hereinafter Caher, *State Bar Backs Study*].

35. *See* Caher, *'Kelo'-Related Bills*, *supra* note 34.

36. *Id.*; *see also* Carol W. LaGrasse, *A Slew of Property Rights Bills Submitted to State Legislatures*, Prop. Rights Found. of Am., Inc., June 2006, http://prfamerica.org/SlewOfPropertyRightsBills.html.

37. *See* LaGrasse, *supra* note 36. The third bill, proposed by New York State Senator Carl Marcellino, set out to define "'economic development' in the context of eminent domain and require[d] homeowner impact assessment" while the fourth bill proposed defining "blight." *Id.*

38. *Id.*

39. *See* Caher, *'Kelo'-Related Bills*, *supra* note 34.

40. *See* Jacob E. Amir, *A Review of Takings Under* Kelo v. New London *in Light of General Constitutional Principles and Its Impact upon Zoning Laws Restricting Socially Unacceptable Enterprises*, 32 Westchester B.J. 13, 19 n.18 (2005).

fact, "Connecticut's [e]minent [d]omain [l]aws largely mirror New York's [eminent domain laws]."[41]

Applying the EDPL, New York courts have determined that some of the most common projects (e.g., projects that serve "classical uses") that cities, municipalities, and condemnation agencies engage in—such as the construction of streets and highways,[42] the expansion of railroads,[43] the creation or expansion of parks,[44] and the removal of slum conditions creating blight[45]—all fulfill the public use or public purpose requirements. Over the years, New York courts have grown to accept and uphold condemnations of areas that are deemed blighted in the broad sense of the word—areas that are economically stagnant and suffer from poor land use.[46] Thus, courts no longer insist that an area display slum conditions contributing to blight to meet the public use or purpose requirements. Therefore, it is no surprise that New York has a rich history of cases that demonstrate how the New York judiciary's interpretation of the public use requirement has evolved to uphold the less "classical" purpose of economic development.[47]

a. *A Narrow Definition: Condemnations Proposing to Remove Blight Created by Slum Conditions Constitute a Public Use*

Historically, urban renewal condemnations in New York were used to fulfill "classical purposes" such as the public purposes of removing "substandard [or] insanitary" conditions,[48] or "slum[]" conditions, which

41. *Id.*

42. *See, e.g.*, County of Jefferson v. Horbiger, 243 N.Y.S. 30 (App. Div. 1930); KJC Realty, Inc. v. State, 329 N.Y.S.2d 252 (Sup. Ct. 1972), *aff'd*, 295 N.E.2d 797 (1973).

43. *See, e.g.*, *In re* N.Y. Cent. R.R. Co., 66 N.Y. 407 (1876); Rensselaer & Saratoga R.R. Co. v. Davis, 43 N.Y. 137 (1870).

44. *See, e.g.*, People v. Adirondack Ry. Co., 54 N.E. 689 (N.Y. 1899), *aff'd*, 176 U.S. 335 (1900).

45. *See, e.g.*, N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 154 (N.Y. 1936).

46. Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 332 (N.Y. 1975) (discussing the removal of various conditions as constituting a public use). The *Yonkers* court stated,

> [T]he liberal rather than literal definition of a "blighted" area [is] now universally indorsed by case law. Many factors and interrelationships of factors may be significant . . . such . . . as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution. It can encompass areas in the process of deterioration or threatened with it as well as ones already rendered useless, prevention being an important purpose. It is "something more than deteriorated structures. It involves improper land use."

Id. (quoting John F. Cook, *The Battle Against Blight*, 43 Marq. L. Rev. 444, 445 (1960)).

47. *See generally infra* Part I.A.2.

48. *Yonkers*, 335 N.E.2d at 330 (discussing the evolving definition of blight to satisfy the public use requirement).

threatened the health, welfare, and safety of the public.[49] These takings satisfy the narrow definition of the public use requirement.[50]

The 1936 case of *New York City Housing Authority v. Muller* demonstrates New York's earlier and narrower definition of public use to include such uses as urban renewal to aid in "the health, safety, and general welfare of the public."[51] In *Muller*, the New York City Housing Authority sought to condemn two privately owned tenement houses, which were already surrounded by land the city had acquired, to clear the area of slum conditions and to build low income housing.[52] The owner resisted the condemnation on the grounds that clearing the area for lower income housing served a private purpose of providing housing for lower income tenants.[53] The New York Court of Appeals acknowledged that such a taking could be construed as serving a private purpose since the newly built property on the premises would be rented out to "a class designated as . . . 'low-income.'"[54] However, the *Muller* court pointed out that the purpose of the condemnation and the legislation upon which it relied was "not to benefit [a low income] class or any class; it [was] to protect and safeguard the entire public from the menace of the slums."[55] The court prefaced this decision by explaining that

> [s]lum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums.[56]

The court deemed the listed matters as those of state concern because it was the state's responsibility to ensure public welfare, health, and safety. To do so, the court held that the state could use eminent domain as provided by the New York Municipal Housing Authorities Law, which gave the city the "power to . . . plan and carry out projects for the clearing, replanning, and reconstruction of slum areas and the providing of housing accommodations for persons of low income."[57]

---

49. *Muller*, 1 N.E.2d at 155 (holding that slum clearance and building low-income housing constitute a public use).

50. *See id.* at 156. *See generally Yonkers*, 335 N.E.2d at 327.

51. *Muller*, 1 N.E.2d at 155.

52. *Id.* at 153.

53. *See id.* at 155.

54. *Id.*

55. *Id.* at 156.

56. *Id.* at 154.

57. *Id.* at 153; *see also* 1934 N.Y. Laws 14, §§ 60–78. The *Muller* court paraphrased the language of the Municipal Housing Authorities Law as follows:

Therefore, *Muller* was an example of the New York judiciary upholding the use of eminent domain for the construction of low income housing and for the removal of slums that created blighted areas—a narrow interpretation of the public use requirement. Yet *Muller* also stood for the right of a condemning authority to use eminent domain to indirectly promote economic development by ridding areas of conditions that created low tax returns and loss of business.[58] Thus, *Muller* established the early framework which allowed courts later to find that takings used for economic development did, in fact, serve a public use or purpose.

b. *An Evolving Definition: Takings That Propose to Eliminate Physical, Social, and Economic Blight Constitute a Public Use*

Approximately thirty years ago, New York's highest court acknowledged and specifically stated that in New York, the public use requirement for eminent domain takings was to be broadly interpreted.[59] The court in *Byrne ex rel. Pine Grove Beach Ass'n v. New York State Office of Parks, Recreation & Historic Preservation* dismissed the petitioner's claim, which stated that the New York State Office of Parks, Recreation & Historic Preservation's acquisition of real property in Oswego County to develop a safe boat refuge at Port Ontario did not constitute a valid public use.[60] The court held that public use "is broadly defined to encompass any use that contributes to the health, safety, general welfare, convenience or prosperity of the community."[61] Additionally, it held that a "'public use, benefit or purpose'" existed because the "construction of the proposed safe harbor [was] of vital necessity to the safety of boaters in the Port Ontario area and [because] . . . the influx of Federal funds for the project would have a

---

> [A] city may set up an authority with power to investigate and study living and housing conditions in the city, and to plan and carry out projects for the clearing, replanning, and reconstruction of slum areas and the providing of housing accommodations for persons of low income . . . . It is granted the power of eminent domain, to be exercised as provided, and it is exempted from the payment of certain taxes and fees. In enacting the statute, the Legislature, after thorough investigation, made certain findings of fact, upon the basis of which it determined and declared the necessity in the public interest of the provisions enacted and that the objects thereof were "public uses and purposes for which public money may be spent and private property acquired."

Muller, 1 N.E.2d at 153–54.

58. *See Muller*, 1 N.E.2d at 154.

59. *See* Byrne *ex rel.* Pine Grove Beach Ass'n v. N.Y. State Office of Parks, Recreation & Historic Pres., 476 N.Y.S.2d 42, 42 (App. Div. 1984).

60. *Id.*

61. *Id.* (citing N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936)). This interpretation of the public use requirement has been quoted by other New York courts to justify various condemnations. *See, e.g.*, Greenwich Assoc. v. Metro. Transp. Auth., 548 N.Y.S.2d 190, 193 (App. Div. 1989) (holding that the alleviation of traffic congestion around Grand Central Terminal and the protection of its architectural elements were encompassed by the broad definition of public use).

positive impact on the economy."[62] Thus, not only was the *Byrne* decision an example of the New York judiciary broadly defining public use to include any use that contributed to the health, safety, general welfare, and convenience of the public, but it was also an example of its acknowledgement of projects creating economic benefits as contributing to a taking's public use—a part of the purpose of the removal was to "have a positive impact on the economy."[63]

During that period in New York's history, the judiciary was not alone in broadly interpreting the public use or purpose requirement to allow for more than just the removal of slums creating blighted conditions. In addition to the judiciary's support for condemnations that eliminated blight in the broad sense of the word—both physical and economic deterioration[64]—the New York legislature also demonstrated its support for a broad interpretation of the public use requirement to allow for economic development condemnations as evidenced by the creation of the New York State Urban Development Corporation Act of 1968.[65] At the Act's inception, the legislature had determined that

> there exist[ed] in many municipalities within this state residential, nonresidential, commercial, industrial or vacant areas, and combinations thereof, which [were] slum or blighted, or which [were] becoming slum or blighted areas because of substandard, insanitary, deteriorated or deteriorating conditions . . . all of which hamper[ed] or impede[d] proper and economic development of such areas and which impair or arrest the sound growth of the area, community or municipality, and the state as a whole.[66]

The Act went on to outline New York's policy to promote a "vigorous and growing" economy, to decrease unemployment, and to reduce the level of public assistance to individuals and families.[67] To achieve these goals, the Act created the New York State Urban Development Corporation (UDC), a corporate governmental agency that has the authority to "retain existing industries and to attract new industries through the acquisition, construction, reconstruction and rehabilitation of industrial and manufacturing plants and commercial facilities, and to develop sites for new industrial and commercial buildings."[68] Furthermore, the UDC's

---

62. *Byrne*, 476 N.Y.S.2d at 43 (partially quoting N.Y. Em. Dom. Proc. Law § 207 (McKinney 2006)). The court was quoting the earlier version of the New York Eminent Domain Procedure Law, which has not been altered, and thus the citation provided in this footnote reflects the most recent publication of the law.

63. *Id.*

64. Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 332 (N.Y. 1975) (stating that the "liberal rather than literal definition of a 'blighted area' [is] now universally indorsed by case law").

65. *See* New York State Urban Development Corporation Act, N.Y. Unconsol. Law § 252(2) (McKinney 2006).

66. *Id.*

67. *Id.*

68. *Id.*

authorized takings were validated as serving public uses and public purposes, thus permitting the city to provide public money for such projects and most importantly permitting the UDC to acquire private property.[69]

It is with this Act in mind that the U.S. Court of Appeals for the Second Circuit affirmed the holding of the U.S. District Court for the Southern District of New York in *Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp.*, which upheld the condemnation of un-blighted buildings for the 42nd Street Redevelopment Project in Times Square.[70] The UDC's condemnation of the defendant's un-blighted building was part of a project to eliminate "physical, social and economic blight that [had] afflicted the Times Square Area . . . for . . . fifty years."[71] Although the controversial redevelopment project had resulted in a large amount of backlash and many lawsuits,[72] the Second Circuit ultimately did not find it problematic that the proposed condemned property was to be given to a private developer to build four new office towers in the area.[73] The Second Circuit affirmed the condemnations because they were part of a larger urban renewal project to rid the area of blight[74]—here, both slum conditions and, more broadly, conditions creating economic stagnation.[75]

Furthermore, the court stated that it did not matter that the "Rosenthal Building [was] structurally sound and fully utilized because 'community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.'"[76] Thus, the Second Circuit took no issue with giving condemned property to private developers so long as the property was part of an overall urban renewal project, which

---

69. *Id.*

70. *See generally* Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44 (2d Cir. 1985).

71. *Id.* at 45 (citing its earlier decision in *Natural Resources Defense Council, Inc. v. City of New York*, 672 F.2d 292, 294 (2d Cir. 1982), *cert. dismissed*, 450 U.S. 920 (1982), where it had discussed the "characteristics contributing to [the] blighted environment" in Times Square).

72. *See, e.g.*, *Natural Res. Def. Council*, 672 F.2d at 297 (upholding the sufficiency of the proceedings used to determine that the condemnation of private property in Times Square constituted a public use); *see also* Douglas Davis, *Strange Invaders*, Newsweek, Nov. 19, 1984, at 91 (discussing the controversy surrounding the 42nd Street Redevelopment Project); Alan Finder & Katherine Roberts, *The Rising Stake in Times Square*, N.Y. Times, Oct. 28, 1984, § 4, at 6E (discussing property owner resistance to the Times Square development projects).

73. *See Rosenthal*, 771 F.2d at 46 ("It makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end.").

74. *See id.*

75. It appears that the *Rosenthal* court no longer viewed blight as solely consisting of physical deterioration and substandard buildings created by slum conditions, but also viewed blight as consisting of conditions that created economic stagnation. The *Rosenthal* court seems to have been using a "liberal rather than literal definition of a 'blighted' area," which justifies the *Yonkers* court's observations that a more liberal definition of blight was "universally indorsed by case law" when determining that a taking's purpose was to rid an area of blight. Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 332 (N.Y. 1975).

76. *Rosenthal*, 771 F.2d at 46 (quoting Berman v. Parker, 348 U.S. 26, 35 (1954)).

rid an area of both slum conditions and economic stagnation. Additionally, the court acknowledged the difficulty in making individual blight assessments and the unreasonableness of requiring that all property in an area be blighted to justify condemnation.[77]

The resistance to the 42nd Street Development project did not end quickly. Almost two decades later, the New York appellate division dismissed another action regarding redevelopment in Times Square.[78] In *West 41st Street Realty L.L.C. v. New York State Urban Development Corp.*, six property owners challenged the UDC's proposed taking of their property in Times Square.[79] The owners asserted that the taking was unconstitutional because it was for the benefit of the New York Times—a private party.[80]

The UDC had first become involved in redeveloping Times Square in 1984 when it provided the city with a general project plan and received the New York City Board of Estimate's authorization "to develop the West 42nd Street area to overcome blight, physical and economic decay, and crime and frightening street life."[81] The court dismissed the property owners' claims, stating that "[v]irtually all of the anticipated outcomes of [the] project clearly serve[d] a public purpose by eliminating a pernicious blight which [had] impaired the economic development of a midtown Manhattan neighborhood."[82] The court went on to state that the fact "[t]hat a private business may obtain substantial benefits does not call into question the use of eminent domain and, under the circumstances, a statutory purpose of the UDC has been furthered."[83] Therefore, the court fully

---

77. *Id.*

78. *See generally* W. 41st St. Realty L.L.C. v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (App. Div. 2002).

79. *See id.* at 123.

80. *Id.*

81. *Id.* at 124. The court in *West 41st St. Realty*, just like the court in *Rosenthal*, seems to have also used a broad definition of blight to include both "physical and economic decay." *Id.* For a more detailed discussion of the evolving definition of blight, see *Yonkers Community Development Agency v. Morris*, 335 N.E.2d 327, 332 (N.Y. 1975).

82. *W. 41st St. Realty*, 744 N.Y.S.2d at 126.

83. *Id.* A proposed Urban Development Corporation (UDC) project requires the UDC to "find that: (1) the proposed project site is substandard or unsanitary and impairs sound growth and development; (2) there is a plan for clearance, replanning, reconstruction and rehabilitation of that area; and, (3) the plan affords maximum participation by private enterprise." *Id.* at 124 (citing New York State Urban Development Corporation Act, N.Y. Unconsol. Law § 6260(c) (McKinney 2000)). The court was citing the earlier version of the New York State Urban Development Corporation Act, which has not been altered, and thus, the citation provided in this footnote reflects a more recent publication of the law.

It is important to note that other New York courts have also acknowledged the controversy surrounding condemnations in which private entities benefit and have held that "[e]minent domain cannot be used as a mere pretext for conferring benefits upon purely private entities and persons." 49 WB, L.L.C. v. Vill. of Haverstraw, 839 N.Y.S.2d 127, 137 (App. Div. 2007) (citing Kelo v. City of New London, 545 U.S. 469, 478 (2005), and Woodfield Equities v. Inc. Vill. of Patchogue, 813 N.Y.S.2d 184, 185 (App. Div. 2006)). Yet, just as the *West 41st St. Realty* court held, most other New York courts have also held that "the fact that an intended public use confers incidental benefit to private persons or

acknowledged the necessity of reducing slum conditions and economic stagnation as supporting a public use. Furthermore, it did not let the fact that a private entity might also benefit stand in the way of moving forward with a condemnation.

All three cases discussed, *Byrne*, *Rosenthal*, and *West 41st Street Realty*, exemplify the New York judiciary's willingness in the past to uphold takings that served a narrow interpretation of the public use requirement—takings whose purpose was to rid an area of slum conditions creating blight—while also acknowledging that such removal of areas blighted from economic stagnation served a public purpose. Therefore, the decisions in *Byrne*, *Rosenthal*, and *West 41st Street Realty* demonstrate how New York's interpretation of the public use requirement was evolving to encompass more than just the removal of slum conditions and physical blight. The removal of economic stagnation and solving the problems associated with improper land use were also deemed to satisfy a public use or purpose.

c. *A Broad Definition of Public Use: Retaining or Increasing a City's Economic Vitality Constitutes a Public Use*

As New York courts developed an understanding of the complexities of urban conditions,[84] they to began to determine that areas eligible for urban renewal condemnations were "not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation [were] also threats to the public sufficient to make their removal cognizable as a public purpose."[85] Therefore, the New York judiciary no longer uses a narrow interpretation of the public use or public purpose requirements, which had earlier constituted only the removal of slum conditions creating blight.[86] New York courts now interpret the public use requirement broadly to include projects that solely propose to address economic development, which constitutes the removal of substandard conditions in the urban renewal context.[87]

In 1985, *Northeast Parent & Child Society v. Schenectady Industrial Development Agency* held that projects that increased tax revenue fulfilled the public use or purpose requirement for eminent domain takings in New

---

entities will not invalidate the condemnation of private property." *49 WB, L.L.C.*, 839 N.Y.S.2d at 137; *see also Kelo*, 545 U.S. at 478; *Yonkers*, 335 N.E.2d at 331; Vitucci v. N.Y. City Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (App. Div. 2001); Ne. Parent & Child Soc'y, Inc. v. Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503, 504–05 (App. Div. 1985).

84. *See generally Yonkers*, 335 N.E.2d at 330.

85. *Id.* at 330, 332 (stating that the broad definition of blight "is something more than deteriorated structures" and "involves improper land use") (quoting Cook, *supra* note 46, at 445); *see also Kelo*, 545 U.S. at 481.

86. *Yonkers*, 335 N.E.2d at 332; *see also* N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 154 (N.Y. 1936).

87. *See Yonkers*, 335 N.E.2d at 331; *Vitucci*, 735 N.Y.S.2d at 560. *See generally In re* Fisher, 730 N.Y.S.2d 516 (App. Div. 2001); *Ne. Parent*, 494 N.Y.S.2d at 504.

York.[88] In *Northeast Parent*, an agency had set out to condemn a school that the Northeast Parent & Child Society had purchased earlier, with the intent to rent the property to Oxygen Enrichment Company, Ltd., a company that the Industrial Development Agency (IDA) wanted to retain in the community.[89] The IDA's plan was "to increase Schenectady's tax base and diversify its economy."[90] The court held that the IDA's taking of the property was within its eminent domain powers and that the incidental benefit to the Oxygen Enrichment Company was not enough to invalidate the taking's proposed public purpose—an increase in the city's tax base—which was in accordance with the IDA's "statutory responsibility to promote [Schenectady's] economic welfare."[91] Thus, the *Northeast Parent* court established that takings that generated or increased tax revenue were a valid public use or purpose under New York's EDPL.[92]

Similarly, in the 2001 case of *Vitucci v. New York City School Construction Authority*, a New York appellate division court held that a condemnation that was for the purpose of carrying out an urban renewal project, constituted a valid public use.[93] The condemned Brooklyn, New York, property was originally destined to be used as a site to build a school.[94] However, the plan was not realized, so the New York City Development Corporation and the City of New York decided to use the property for an urban renewal project, which would allow for the expansion of a food production business whose premises surrounded the property.[95] Dismissing the petitioner's claims, the court held that such urban renewal constituted a public use and that "it [was] permissible for a municipality to condemn property to aid commercial development that may be beneficial to the area, notwithstanding that it may also be to the benefit of a private commercial entity."[96] Therefore, the *Vitucci* court demonstrated the New York judiciary's willingness to broadly interpret the public use or purpose requirement to permit economic development projects that propose to retain an economically beneficial private entity for the purpose of increasing economic vitality.

It is no surprise that in the same year as the *Vitucci* decision, a New York court dismissed *In re Fisher*, where rent-stabilized tenants of 45 Wall Street claimed that the UDC's proposed condemnation of their building for a new site for the New York Stock Exchange did not constitute a valid public

88. *See Ne. Parent*, 494 N.Y.S.2d at 504.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *See* Vitucci v. N.Y. City Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (App. Div. 2001).
94. *Id.* at 561.
95. *Id.*
96. *Id.* at 562. The court further held that, "[i]f a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain." *Id.*

use.[97] The court reasoned that the proposed New York Stock Exchange project, by creating the conditions necessary to retain the New York Stock Exchange in lower Manhattan, "[would] result in substantial public benefits, among them increased tax revenues, economic development and job opportunities as well as the preservation and enhancement of New York's prestigious position as a worldwide financial center."[98] Therefore, just like the *Northeast Parent* and *Vitucci* courts, the *In re Fisher* court broadly interpreted the public use requirement and did not shy away from finding that a taking that attempted to retain an entity solely for economic development purposes constituted a public use.

As the cases above demonstrate, New York courts have evolved to broadly interpret the public use and/or purpose requirement by upholding condemnations ranging from those that proposed the removal of slums that had created blight[99] to takings that only proposed to alleviate economic stagnation and poor land use, or to promote economic development,[100] which constituted removing substandard conditions in the urban renewal context (the removal of areas blighted due to either physical or economic deterioration).[101] In almost every case, the proposed takings were deemed to serve a public use or public purpose.[102] However, as the next section discusses, not all proposed condemnations in New York are deemed a public use.

d. *Limitations: Not All Proposed Takings Constitute a Public Use*

Although New York courts are known as "condemnation friendly,"[103] contrary to popular belief, they do prevent some condemnations—those that do not fall under their definition of a public use or purpose. For instance, in *Matwijczuk v. Commissioner of Transportation*, the Supreme Court for Albany County served as a buffer between the State of New York and a local property owner.[104] To help carry out the construction of Interstate Route 508 in Duanesburg, New York, the transportation commissioner apportioned a right of way through a property owner's land, leaving landlocked the property owner's remaining lands, which housed a

97. *See In re* Fisher, 730 N.Y.S.2d 516, 516 (App. Div. 2001). Although the court held for the UDC, the actual condemnation and New York Stock Exchange move has not occurred.

98. *Id.* at 517.

99. *See generally* Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44 (2d Cir. 1985); N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936); W. 41st St. Realty L.L.C. v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (App. Div. 2002).

100. *See generally* Ne. Parent & Child Soc'y, Inc. v. Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503 (App. Div. 1985); *Vitucci*, 735 N.Y.S.2d 560; *In re Fisher*, 730 N.Y.S.2d at 516.

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

102. *See infra* Part I.A.2.a.–c.

103. *See infra* Part II.A.

104. *See generally* Matwijczuk v. Comm'r of Transp., 423 N.Y.S.2d 574 (Sup. Ct. 1979).

residential dwelling.[105] The commissioner also obtained a temporary easement to demolish the residential dwelling and stated that since it was landlocked it "would have become a derelict structure, a fire hazard, and an attractive nuisance in which individuals and in particular children, might have some time in the future [to] become seriously injured or killed."[106]

However, the court protected the property owner and held that the temporary easement to demolish the residential dwelling should be annulled because it was "arbitrary, capricious and beyond the statutory authority of respondent."[107] It determined that condemning the dwelling would neither improve safety conditions on the highway, nor avoid the creation of a hazard due to its distance from the highway, and that the property owner could find other means of accessing his land.[108] By determining that the commissioner's findings were only speculation and therefore did not create a public purpose, the *Matwijczuk* court exemplified New York courts' willingness to prohibit unnecessary condemnations. Thus, *Matwijczuk* revealed that although the New York judiciary broadly interprets the public use and public purpose requirements, it neither disregards the protections of the Fifth Amendment's Takings Clause nor those of New York's EDPL.

To fully appreciate New York's constantly evolving and currently broad definition of the public use requirement, it is necessary to look to the U.S. Supreme Court's interpretation of the public use requirement.

B. *The Big Three*

During the past century, the Supreme Court has decided three important eminent domain cases that have altered the interpretation of the public use requirement under the Takings Clause of the Fifth Amendment.[109] These three cases have demonstrated the Supreme Court's increasingly broad interpretation of the public use requirement and its deference to state eminent domain powers.

1. *Berman v. Parker*

In the 1954 case of *Berman v. Parker*, the owners of a department store, located in an area where the National Capital Planning Commission had proposed a project for development, questioned the constitutionality of the District of Columbia Redevelopment Land Agency's condemnation of their property.[110] Both the agency's condemnation powers and the Planning Commission's authority to generate redevelopment projects were created by

105. *Id.* at 575.
106. *Id.* (internal quotation marks omitted).
107. *Id.* at 575–76.
108. *Id.* at 576.
109. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).
110. *See Berman*, 348 U.S. at 31.

the District of Columbia Redevelopment Act of 1945.[111] In the Act, the legislature had determined that

> owing to technological and sociological changes, obsolete lay-out, and other factors, conditions . . . with respect to substandard housing and blighted areas . . . are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants . . . by eliminating all such injurious conditions by employing all means necessary.[112]

The Act proposed that if the majority of an area's housing is beyond repair, the area ought to be condemned and devoted to public purposes such as streets, schools, and other public facilities.[113] Owners of one of the parcels of land, which the agency proposed to condemn, protested because their property, which housed a department store, was not residential property, nor was it "slum housing."[114] The owners further expressed concern over the plan that would give their property to a private developer for redevelopment purposes,[115] such as for the construction of low-cost housing, which the legislature intended to use as a replacement for the "substandard housing" in the area.[116]

The Court acknowledged the owners' argument that property condemned in order to "merely . . . develop a better balanced, more attractive community" could potentially be cause for concern.[117] However, the Supreme Court deferred to the legislature and upheld the redevelopment plan even though a part of the condemned area was to be leased or sold to private parties for redevelopment purposes because the overall purpose of the plan was to rid the area of blight.[118] The Court chose not to dwell on the "means chosen"—selecting a private enterprise to carry out the slum clearance—to accomplish the redevelopment plan.[119] Instead, it focused on the legislature's determination that a public purpose was established.[120]

---

111. *See id.* at 28–29.

112. *Id.* at 28 (internal quotation marks omitted).

113. *See id.* at 28–30.

114. *Id.* at 31.

115. *See id.*; *see also* Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 Fordham L. Rev. 1837, 1843 (2005) (stating that *Berman* upheld the use of eminent domain to transfer property from one private owner to another).

116. *See Berman*, 348 U.S. at 28.

117. *Id.* at 31.

118. *See id.*; *see also* Gallagher, *supra* note 115, at 1843 (stating that in *Berman*, the "Supreme Court . . . allowed the use of eminent domain to transfer property from one private party to another for the purpose of blight clearance"); Glen H. Sturtevant, Jr., Note, *Economic Development as Public Use: Why Justice Ryan's* Poletown *Dissent Provides a Better Way to Decide* Kelo *and Future Public Use Cases*, 15 Fed. Cir. B.J. 201, 201–02 (2005) (writing that *Berman* has been one of the U.S. Supreme Court's "most prominent public use cases in the past 50 years" and that it demonstrates the Court's deference to governmental decisions to use eminent domain).

119. *See Berman*, 348 U.S. at 33.

120. *Id*; *see also* Richard O. Brooks, Kelo *and the "Whaling City": The Failure of the Supreme Court's Opportunity to Articulate a Public Purpose of Sustainability, in* The

The Court agreed with Congress's determination that "if [the area] were not to revert again to a blighted or slum area . . . the area must be planned as a whole" and held that such a determination was well within congressional power.[121] Additionally, it accepted the determination that slum clearance, which required the removal of blighted, and sometimes un-blighted properties in the area, constituted a public use.[122] The Court further dismissed the owner's protests over the un-blighted property by recognizing that if owners were permitted to resist development programs "on the ground that . . . particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly."[123] Thus, the Supreme Court upheld the Act by interpreting it to allow the agency to "condemn property only for the reasonable necessities of slum clearance and prevention, its concept of 'slum' being the existence of conditions 'injurious to the public health, safety, morals and welfare.'"[124]

2. *Hawaii Housing Authority v. Midkiff*

Thirty years after *Berman*, the Supreme Court reaffirmed its deferential approach to legislative judgments[125] by upholding a Hawaii statute that proposed that fee title was to be taken from lessors and transferred to lessees to eliminate the "social and economic evils of a land oligopoly."[126] Polynesian immigrants from the western Pacific had originally settled the Hawaiian Islands. The settlers developed a system where one island high chief on each island controlled the land and assigned it for development and farming under a feudal system.[127] Thus, the islands lacked private land ownership.[128] By the mid-1960s, the Hawaii legislature discovered that seventy-two private landowners owned forty-seven percent of Hawaii's land and concluded that this scheme "was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."[129] To alleviate these problems, the legislature created the Land Reform Act of 1967, which allowed tenants living on lands constituting at least five acres to ask the agency to condemn

---

Supreme Court and Takings: Four Essays, at 5 (2006), *available at* http://www.vjel.org/books/pdf/PUBS10003.pdf (stating that *Berman* upheld the use of eminent domain for a public purpose).

121. *Berman*, 348 U.S. at 34, 36; *see also* Sturtevant, Jr., *supra* note 118.

122. *Berman*, 348 U.S. at 35.

123. *Id.* (quoting Schneider v. D.C. Redevelopment Land Agency, 117 F. Supp. 705, 724–25 (D.C. Cir. 1953)).

124. *Id.* at 31.

125. *See* Sturtevant, Jr., *supra* note 118, at 202 (writing that "the *Midkiff* Court stated that . . . governmental determinations of public use only warrant highly deferential rational basis scrutiny. Under this standard of review, the Court upholds the government's use of eminent domain, provided it is 'rationally related to a conceivable public purpose.'" (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984))).

126. *See Haw. Hous. Auth.*, 467 U.S. at 241–42.

127. *Id.* at 232.

128. *Id.*

129. *Id.*

the parcels and hold a public hearing to determine if such takings would effectuate a public purpose.[130] If a "public purpose" was determined, the agency was allowed to take the property and sell the land titles to tenants who had applied for fee simple ownership.[131]

The appellants questioned the constitutionality of the taking because they did not believe such takings constituted a public use, since the land was to be sold to private parties. The Court dismissed the argument and found it irrelevant that the State first transferred condemned property to private individuals because it held that "it is only the taking's [public] purpose, and not its mechanics" that are important for determining public use.[132] Furthermore, it held that the "[r]edistribution of fees simple to correct deficiencies in the market . . . attributable to land oligopoly is a rational exercise of the eminent domain power," and thus fulfilled the public use requirement of the Takings Clause of the Fifth Amendment.[133] Thus, the Court demonstrated its willingness to uphold condemnations that sought to alleviate the perils of land oligopoly and at the same time its preference for giving more weight to a takings purpose as opposed to its mechanics.

3. *Kelo v. City of New London*

The most recent and most controversial Supreme Court case regarding the public use requirement is *Kelo v. City of New London*.[134] In *Kelo*, the Supreme Court was faced with a new question: whether a city's proposed taking, which was solely for economic reasons, qualified as a public use within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[135] Due to decades of economic decline in the city of New London, a Connecticut state agency "designate[d] the City a 'distressed municipality.'"[136]

State and local officials decided to revitalize the city, most notably, the Fort Trumbull area, so they reactivated the New London Development Corporation (NLDC), a nonprofit entity established earlier to assist the city in planning economic development.[137] Soon, Pfizer Inc., a pharmaceutical company, announced it would build a $300 million research facility on a

130. *Id.* at 233.
131. *Id.* at 233–34.
132. *Id.* at 244; *see also* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934, 982 (2003) ("By requiring the government to link the means and ends of an exercise of eminent domain, courts would place important structural limitations on the power of eminent domain while respecting the prerogative of the political branches to determine what policy ends are in the public interest."). Garnett argued that the "the [*Midkiff*] Court equated 'public use' and 'public interest,' and . . . held that the government has virtually unfettered discretion to exercise its power of eminent domain to advance any conceivable public purpose." *Id.* at 940.
133. *Midkiff*, 467 U.S. at 243.
134. 545 U.S. 469 (2005).
135. *Id.* at 472.
136. *Id.* at 473.
137. *Id.*

site adjacent to Fort Trumbull, thereby bringing hope to planners that Pfizer would bring new jobs to the area and aid in the area's revitalization.[138] Seven parcels of land were designated for various revitalization projects including a "small urban village," roughly eighty new residences that were to be organized into an urban neighborhood, research and development office space, parking spaces for the state park, a renovated marina, and land for office and retail space.[139] The city council approved the plan in January 2000 and designated the NLDC, which hoped the plan would aid in new commerce, create new jobs, and generate tax revenue, as the development agent.[140]

The nine petitioners, which owned a total of fifteen properties on land that was to be taken for the development plan, brought an action claiming that the taking violated the public use restriction of the Fifth Amendment.[141] At the same time, the NLDC announced that it would lease some of the parcels to private developers that had promised to develop land according to the terms of the economic development plan.[142] The Connecticut Superior Court deemed the plan "a valid public use under both the Federal and State Constitutions."[143]

The Supreme Court granted certiorari and the majority determined that the plan was indeed a part of a project that served a "public purpose," thus fulfilling the public use requirement of the Takings Clause.[144] Although the five-Justice majority was satisfied, the four dissenting Justices were distraught over the potential effects of the decision. For example, in her dissent, Justice Sandra Day O'Connor argued that the Court's broad interpretation of a public use was in effect abolishing the limitations to the government's power and erasing the distinction between private and public use.[145] Justice O'Connor pointed out that the proposed taking did not qualify under any of the three well-recognized public use takings: takings that transfer private property to public ownership (e.g., for roads and hospitals), takings that transfer private property to common carriers (e.g., railroads or a public utility), and takings that transfer private property to private constituencies under certain circumstances (e.g., the takings in *Berman* and *Midkiff*).[146]

---

138. *Id.*
139. *Id.* at 474.
140. *Id.* at 474–75.
141. *Id.* at 475.
142. *Id.* at 476 n.4.
143. *Id.* at 476.
144. *Id.* at 484; *see also* David Schultz, *Economic Development and Eminent Domain After* Kelo: *Property Rights and "Public Use" Under State Constitutions*, 11 Alb. L. Envtl. Outlook J. 41, 43, 73–84 (2006) (stating that the *Kelo* Court upheld the use of eminent domain for economic development purposes and discussing the patterns of state court decisions after the *Kelo* decision).
145. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).
146. *Id.* at 497–98.

The majority disagreed and instead sought to explain its rationale by outlining the Court's progression over the centuries from endorsing a strictly literal interpretation that the condemned property be used for the general public (the "use by the public test"), which it had deemed too difficult to administer, to the broader and more practical test of a property serving a "public purpose."[147] The Court explained that there was "no principled way of distinguishing economic development from the other public purposes that [the Court had] recognized."[148] It stated,

> It would be incongruous to hold that the City's interest in the economic benefits to be derived . . . [as having] . . . less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.[149]

It also reinforced its deference to the individual state legislatures[150] because, "[v]iewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances."[151]

---

147. *See id.* at 479–80 (majority opinion). The Court stated, "Not only was the 'use by the public' test difficult to administer (*e.g.*, what proportion of the public need have access to the property? At what price?), but it proved to be impractical given the diverse and always evolving needs of society." *Id.* at 479. The Court then provided an example of when it had rejected the "use by the public test" by explaining that in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906), the Court had upheld a mining company's use of an aerial bucket line to transport ore over property that it did not own. *See Kelo*, 545 U.S. at 480. The Court also pointed to various state court decisions that used a broader interpretation of public use to allow takings that did not literally and directly constitute "use by the public":

> From upholding the Mill Acts (which authorized manufacturers dependent on power-producing dams to flood upstream lands in exchange for just compensation), to approving takings necessary for the economic development of the West through mining and irrigation, many state courts either circumvented the "use by the public" test when necessary or abandoned it completely.

Id. at 479 n.8 (citing Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. Rev. 615, 619–24 (1940)).

148. *Kelo*, 545 U.S. at 484. The Court went on to discuss other takings that it had found to constitute a public use, such as those that facilitated agriculture and mining, and takings that promoted a "'well-balanced' community through redevelopment." *Id.* (citing Berman v. Parker, 348 U.S. 26, 33 (1954)).

149. *Id.* at 485. For a similar argument, see Sturtevant, Jr., *supra* note 118, at 204 n.25 (arguing that "'[w]ithout eminent domain, it would be virtually impossible to fathom an alternative means of establishing such a complex network of transportation as exists in this country. Clearly, among other contributing factors, our roads, freeways, highways, interstates, and certainly railroads have, in large part, allowed for the prodigious economic status the United States enjoys today.'" (quoting Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49 (1999))).

150. *Kelo*, 545 U.S. at 480 ("Without exception, our cases have defined [the public purpose] concept broadly, reflecting our longstanding policy of deference to the legislative judgments in this field.").

151. *Id.* at 482; *see also* Avi Salzman, *Homeowners Shown the Door*, N.Y. Times, July 3, 2005, § 14 (Conn.), at 1 ("The way courts have interpreted eminent domain laws has evolved over the last two centuries. Cities and states have taken private property through eminent

Thus, the narrowly split Court held that general economic development constituted a public use for federal constitutional analysis and left it to the states to restrict their own eminent domain practices if needed.[152]

C. *The Storm After* Kelo*: A Slew of States Change Their Eminent Domain Laws*

1. General Public Reaction

Although the Supreme Court's holding in *Kelo* confirmed the view already held by some jurisdictions,[153] it still generated much controversy in the form of media frenzy and intense public outcry.[154] Some applauded the *Kelo* decision,[155] but the majority of Americans were unhappy with the decision as reflected in major newspapers, which ran countless stories on the decision and the aftermath it created in states across the nation.[156] In

---

domain laws since early in the nation's history, often to build roads or other pieces of public infrastructure.").

152. *Kelo*, 545 U.S. at 489–90. It should be noted that New York City, by filing an amicus brief arguing that there can be increases in tax revenue and employment if a city is allowed to determine what public use is, was among the group of amicus curiae that aided New London in its Supreme Court battle. *See* Brief for the City of New York as Amicus Curiae Supporting Respondents at 1, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108) [hereinafter Brief for the City of New York] (stating that economic development takings can create jobs as exemplified by the Metrotech development project in Brooklyn, New York, which created thousands of jobs in Brooklyn); *see also* Paul Moses, *'Times' to Commoners: Go Elsewhere*, Vill. Voice, Aug. 23, 2005, at 27 (arguing that the eminent domain friendly borough of Manhattan and Mayor Michael Bloomberg supported the building of the new New York Times headquarters in Times Square).

153. At the time of the *Kelo* decision, New York was one of six states to broadly interpret the public use requirement to allow for economic development takings. In addition to New York and Connecticut, four other states—Kansas, Maryland, Minnesota, and North Dakota—also broadly interpreted public use to allow for economic development takings. *See* Elsa Brenner, *Homes Taken, Lives Rebuilt*, N.Y. Times, July 31, 2005, § 14 (Westchester), at 1 (discussing the good and bad effects of eminent domain in villages in New York).

154. *See* Laura Mansnerus, *Battle to Revise Eminent Domain Law Escalates in Trenton*, N.Y. Times, June 16, 2006, at B5 (discussing the "media-generated hysteria" surrounding eminent domain in New Jersey after the *Kelo* decision); *see also* Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court:* Kelo v. City of New London, *in* The Supreme Court and Takings: Four Essays, *supra* note 120, at 41, 41 ("Though with less animus than the organized political right, Americans of most political persuasions found the [*Kelo*] majority decision wrong-headed and oppressive.").

155. *See* Editorial, *Eminent Latitude*, Wash. Post, June 24, 2005, at A30; Charles Hurt, *Congress Assails Domain Ruling*, Wash. Times, July 1, 2005, at A1 (stating that District of Columbia Mayor Anthony Williams also hailed the ruling, calling it a "victory"); Editorial, *The Limits of Property Rights*, N.Y. Times, June 24, 2005, at A22 (calling the ruling "a welcome vindication of cities' ability to act in the public interest" and "a setback to the 'property rights' movement, which is trying to block government from imposing reasonable zoning and environmental regulations").

156. *See* Blaine Harden & Juliet Eilperin, *Court Ruling Fuels Dispute in West over Eminent Domain: Initiatives Challenge Land-Use Regulations*, Wash. Post, Oct. 2, 2006, at A3 (discussing the outcry over the *Kelo* decision by stating that "[l]ibertarians and land developers have found populist fodder in a contentious Supreme Court decision from last year that favors eminent domain over private property"); William Yardley, *Anger Drives*

addition, major news organizations and opinion poll web sites conducted public opinion polls, which showed that the majority of Americans opposed the *Kelo* Court's decision to uphold takings used for economic development.[157]

Moreover, the *Kelo* decision angered citizens across party lines and political viewpoints, from liberals to libertarians, Democrats to Republicans.[158] For instance, a group of citizens started a campaign to use eminent domain to seize the home of Justice David H. Souter.[159] Furthermore, just two months after the decision, *The New York Times* reported that the author of the *Kelo* decision, Justice John Paul Stevens, attempted to soothe the public[160] by stating that the decision was "unwise" and that had he been a legislator, he would have opposed it.[161] With so much controversy and public outcry over the *Kelo* decision, some states have changed their eminent domain laws to respond to public opinion.[162] In accordance with the *Kelo* Court's deference to state legislatures,[163] states have responded by implementing various eminent domain legislation.[164]

2. The Two Dominant Types of Post-*Kelo* State Eminent Domain Legislation

In the few months left in 2005 after the Supreme Court decided *Kelo v. City of New London*, thirteen states, whose legislatures were in session,

---

Property Rights Measures, N.Y. Times, Oct. 8, 2006, § 1, at 34 (stating that "the backlash against the [*Kelo*] ruling has made property rights one of the most closely watched ballot issues nationwide").

157. Castle Coalition, The Polls Are In: Americans Overwhelmingly Oppose Use of Eminent Domain for Private Gain, http://www.castlecoalition.org/resources/kelo_polls.html (last visited Sept. 21, 2007) (citing a variety of polls such as the CNN poll, Wall Street Journal/NBC News Poll, MSNBC poll, and the Christian Science Monitor Poll); *see also* Bernard W. Bell, *Legislatively Revising* Kelo v. City of New London: *Eminent Domain, Federalism, and Congressional Powers*, 32 J. Legis. 165, 166 (2006).

158. Adam Liptak, *Case Won on Appeal (To Public)*, N.Y. Times, July 30, 2006, § 4, at 3.

159. *Id.*

160. Ian Urbina, *Ohio Supreme Court Rejects Taking of Homes for Project*, N.Y. Times, July 27, 2006, at A18 (discussing the public backlash to the *Kelo* decision and an Ohio Supreme Court ruling against economic development takings).

161. *Id.* (internal quotation marks omitted).

162. *See infra* Part I.C.2.

163. *See* Kelo v. City of New London, 545 U.S. 469, 489 (2005) (stating that the opinion did not "preclude[] any State from placing further restrictions on its exercise of the takings power").

164. Mihaly, *supra* note 154, at 41 ("The universality of [the] response [to *Kelo*] hardly escaped the notice of legislators. In the months since the opinion, members of Congress, state legislators, and even councilpersons in charter cities have introduced measures containing palliatives or correctives to the perceived abuse."); *see* Terry Pristin, *Voters Back Limits on Eminent Domain*, N.Y. Times, Nov. 15, 2006, at C6 (stating that "34 states ha[d] adopted laws or passed ballot measures" in response to the *Kelo* decision); *see also infra* Part I.C.2.

considered eminent domain legislation in response to the Court's ruling.[165] Of these thirteen states, four enacted eminent domain legislation.[166] The trend continued in 2006, where the number of states that considered legislation in response to the Court's decision increased. All forty-four state legislatures that were in session during the 2006 legislative session considered eminent domain legislation, and twenty-eight of those states passed bills to alter their eminent domain practices.[167] During that time, the types of legislation passed and under consideration ranged from legislation "[p]rohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity" to legislation "[e]stablishing legislative study committees or stakeholder task forces to study [their state's eminent domain procedures] and report back to [the] legislature with findings."[168] Recently, during the 2007 session,[169] six additional states passed legislation in response to the *Kelo* decision.[170] In regard to economic development takings, the legislation passed and under consideration since *Kelo* can be divided into two dominant approaches: prohibitory legislation and procedural reform legislation.

a. *Prohibitory Legislation: Halting Economic Development Takings*

In the two years after the *Kelo* decision, states passed three different types of prohibitory legislation. One group of states enacted laws that prohibited the use of eminent domain for takings whose primary purpose was to promote or maintain the economic development of an area.[171] Another group of states tackled economic development takings less directly by redefining the meaning of "public use," and/or the meaning of "blight," with the intention of restricting the use of eminent domain to more classical purposes, such as to rid an area of "slum conditions" and conditions "detrimental to the public health and safety."[172] The last group of states passed legislation that sought to place a moratorium on economic development takings to give the states enough time to study their eminent

165. *See* Nat'l Conf. of State Legislatures, Eminent Domain: 2005 State Legislation, http://www.ncsl.org/programs/natres/post-keloleg.htm (last visited Sept. 21, 2007) [hereinafter Eminent Domain 2005].

166. *See id.*

167. *See* Nat'l Conf. of State Legislatures, Eminent Domain: 2006 State Legislation, http://www.ncsl.org/programs/natres/emindomainleg06.htm (last visited Sept. 21, 2007) [hereinafter Eminent Domain 2006].

168. *Id.*

169. Information on eminent domain legislation passed in 2007 is current as of publication.

170. *See* Nat'l Conf. of State Legislatures, Eminent Domain: 2007 State Legislation, http://www.ncsl.org/programs/natres/emindomainleg07.htm (last visited Sept. 21, 2007) [hereinafter Eminent Domain 2007]. The six states that passed eminent domain legislation in 2007 were Montana, New Mexico, North Dakota, Utah, Virginia, and Wyoming. *Id.*

171. *See infra* notes 173–75 and accompanying text.

172. *See infra* notes 176–83 and accompanying text.

domain practices.[173] These three types of legislation shared one common goal—they all sought to halt economic development takings either temporarily or permanently.

The first category of states that passed legislation prohibiting the use of eminent domain for economic development purposes includes, among others, Alabama, Montana, Nebraska, North Dakota, and Virginia.[174] Some states, such as Alabama, passed legislation very quickly, while others, like Montana, waited for up to two years before passing such restrictive measures. Only two months after the Supreme Court's *Kelo* decision, the Alabama legislature responded by enacting a bill that prohibited the use of eminent domain for "private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person . . . or other business entity."[175] Two years later, in the 2007 legislative session, Montana passed Senate Bill 363, which limited the use of eminent domain to blighted areas and did not allow for its use if the primary purpose of the condemnation was to increase tax revenue.[176]

Although some state legislatures specifically set out to prohibit the use of economic development takings, others dealt with their state's eminent domain practices by focusing on their respective interpretations of the public use requirement. Iowa is one such state.[177] Notwithstanding the objection of Iowa's governor, the Iowa legislature enacted House File 2351, which, among other things, further defined public use for eminent domain purposes.[178] It amended section 3 of section 6A.21 of the Iowa Code to include a new section 6A.22, which defined public use as "the possession, occupation and enjoyment of the property by the general public or a public utility; where private use is only incidental to a public use; or to redevelop blighted areas where at least 75 percent of the properties in the area are blighted."[179] Thus, section 6A.22 restricted eminent domain to blighted properties and areas displaying "slum or blighted conditions."[180] It also clarified blighted properties and areas displaying slum conditions as those that were unsanitary and had conditions that were "conducive to ill health,

---

173. *See infra* notes 184–89 and accompanying text.

174. *See generally* S.B. 363, 60th Leg., Gen. Sess. (Mont. 2007); L.B. 924, 99th Leg., Gen. Sess. (Neb. 2006); S.B. 2214, 60th Leg., Reg. Sess. (N.D. 2007); S.B. 781, 2007 Gen. Assem., Reconvened Sess. (Va. 2007). For a complete list of states prohibiting the use of eminent domain for economic development takings, see Eminent Domain 2005, *supra* note 165; Eminent Domain 2006, *supra* note 167; and Eminent Domain 2007, *supra* note 170.

175. *See* Ala. Code § 11-47-170(b) (Supp. 2006).

176. *See* S.B. 363, 60th Leg., Gen. Sess. (Mont. 2007); *see also* Eminent Domain 2007, *supra* note 170.

177. *See* Eminent Domain 2006, *supra* note 167.

178. *Id.*; *see also* H.F. 2351, 81st Gen. Assem., Reg. Sess. (Iowa 2006) (providing revised definitions labeled as "Additional Limitations on Exercise of [Eminent Domain] Power"). Both the House and Senate overrode the Iowa governor's veto in July 2006. *See* H.J. 1781, 81st Gen. Assem., Extraordinary Sess. (Iowa 2006); S.J. 1110 81st Gen. Assem., Extraordinary Sess. (Iowa 2006).

179. Eminent Domain 2006, *supra* note 167; *see also* H.F. 2351 § 6A.22.

180. H.F. 2351 § 6A.22(2)(a)(5).

transmission of disease, infant mortality, juvenile delinquency, or crime, or detrimental to the public health and safety."[181] Finally, it went on to exclude specifically economic development activities, even those "resulting in increased tax revenues, increased employment opportunities . . . [or] privately owned or privately funded commercial or industrial development."[182]

Iowa was not alone in enacting laws to define its public use requirement. In the 2007 legislative session, Virginia defined its public use requirement by stating that "property may only be taken where the public interest dominates any private gain and the primary purpose is not for an increase in tax base, tax revenue or employment."[183] Montana, Nebraska, and Wyoming also addressed the public use requirement. Like Iowa, they focused on and narrowed the definition of blight, and enacted legislation to define what constituted a public use—the removal of blighted properties—and restricted the use of eminent domain to those areas only.[184]

Although many states decided to eliminate any language in their laws that could lead to the use of eminent domain for economic development purposes, other states decided to halt economic development takings temporarily.[185] For instance, during the 2005 legislative session, the Ohio Senate enacted Senate Bill 167, which placed a moratorium on economic development takings in the state.[186] Section 2.(A) of Senate Bill 167 stated that,

---

181. *Id.*

182. *Id.* § 6A.22(2)(b).

183. Eminent Domain 2007, *supra* note 170. Virginia enacted Senate Bill 781 to amend the Virginia Code by adding section 1-237.1 to define public use by stating that it was the acquisition of property where

> (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners.

S.B. 781, 2007 Gen. Assem., Reconvened Sess. (Va. 2007). For a complete list of states that have enacted similar legislation, see Eminent Domain 2005, *supra* note 165; Eminent Domain 2006, *supra* note 167; and Eminent Domain 2007, *supra* note 170.

184. *See* S.B. 363, 60th Leg., Gen. Sess. (Mont. 2007); *see also* L.B. 924, 99th Leg., Gen. Sess. (Neb. 2006); H.B. 124, 59th Leg., Gen Sess. (Wyo. 2007). For the entire list of states that have enacted similar legislation, see Eminent Domain 2005, *supra* note 165; Eminent Domain 2006, *supra* note 167; and Eminent Domain 2007, *supra* note 170.

185. For a list of states that decided to study the effects of eminent domain before enacting eminent domain legislation, see Eminent Domain 2005, *supra* note 165; Eminent Domain 2006, *supra* note 167; and Eminent Domain 2007, *supra* note 170.

186. *See* S.B. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2005).

> [n]otwithstanding any provision of the Revised Code to the contrary, until December 31, 2006, no public body shall use eminent domain to take, without the consent of the owner, private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person.[187]

The bill went on to state that if any public body used eminent domain to conduct a taking for economic development purposes, the Ohio Public Works Commission, Department of Development, and General Assembly would not distribute to the public body any funding necessary to carry out the project.[188]

Ohio not only placed a moratorium on eminent domain for economic development, but it also established a Legislative Task Force to Study Eminent Domain and Its Use and Application in the State.[189] Ohio Senate Bill 167 determined that the task force was to consist of members that fell across the spectrum on eminent domain issues, such as members of the Ohio House of Representatives, members of the Ohio State Senate, a member of the home-building industry in the state, a statewide advocate of the issues raised in *Kelo*, a member representing the agricultural industry in Ohio, a member representing the real estate industry in Ohio, and an attorney knowledgeable on eminent domain who represented property owners in the state of Ohio.[190]

The three types of prohibitory legislation enacted in the past two years demonstrate the backlash that resulted from the Supreme Court's *Kelo* decision. Prohibitory legislation, along with the second category of legislation passed—procedural reform legislation—demonstrate that states were quick to draw upon the Supreme Court's deferential approach to state legislatures[191] and change their laws in accordance with their own interpretations of the public use or purpose requirement.

b. *Procedural Reform Legislation: Economic Development Takings Are Valid So Long as Certain Procedural Protections Are in Place*

In contrast to the prohibitory legislation that states approved in the past two years, states that passed procedural reform legislation sought to change

---

187. *Id.*

188. *See id.*

189. *See id.* § (3)(A). The New York State Senate took similar action by passing legislation that created a commission to study the effects of eminent domain. *See* Press Release, John A. DeFrancisco, New York State Senator, Senate Passes Measure Cosponsored By Sen. DeFrancisco to Study Eminent Domain (June 22, 2006), *available at* http://senatordefrancisco.org/press_archive_story.asp?id=14315 ("In the wake of the decision in the *Kelo v. City of New London* case we need to make sure that the rights of individual property owners in Central New York and elsewhere remain protected . . . . We need to study this issue and take action to ensure that the use of eminent domain is not abused and used *only* for public purposes." (internal quotation marks omitted)).

190. *See* Ohio S.B. 167 § (3)(A).

191. *See Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

the procedures condemning authorities used when employing their eminent domain powers. For instance, in 2006, the Utah legislature enacted Senate Bill 117, which modified the procedural provisions of its eminent domain law.[192] Besides broadening the definition of public use to include such things as takings that proposed to construct bicycle paths, the amended law now requires a condemning agency to provide written notice to the property owner so that the owner can appear and be heard at the meetings where the governing body of the area is to vote on the taking.[193] Utah is one of many states that enacted this type of bill to implement procedural changes in its eminent domain procedure law.[194]

Laws requiring notice and hearing before a governing body were not the only kinds of procedural reform legislation passed. Legislation dealing with another important aspect of eminent domain—just compensation—was also put into effect.[195] In the 2006 legislative session, the Kansas legislature passed amendments to its Eminent Domain Procedure Act, reiterating the meaning of public use by stating that takings were acceptable for public use projects, such as those requiring the transfer of property to the Kansas Department of Transportation and to public utility companies (e.g., gas gathering services).[196] Although the amendment further defined the meaning of public use, it only sought procedural reform as opposed to prohibitory reform. Thus, it did not go as far as other state bills that banned the use of eminent domain for private economic development.[197] Instead, the amendment allowed for economic development takings as follows:

> Any city which has adopted a redevelopment project plan in accordance with the provisions of this act may purchase or otherwise acquire real property in connection with such project plan. Upon a 2/3 vote of the members of the governing body thereof a city may acquire by condemnation any interest in real property . . . which it deems necessary for or in connection with any project plan of an area located within the redevelopment district . . . .[198]

Although the amended statute did not specifically prohibit economic development takings, it did give such condemnations special consideration and thus created detailed procedural requirements for economic development takings. It provided that if the legislature decided to allow for an economic development taking in the future, it was to consider "requiring

192. *See* S.B. 117, 56th Leg., Gen. Sess. (Utah 2006) (citing amendments to the eminent domain statute, Utah Code Ann. § 78-34-4 (2007)). Note that, although the bill cited an earlier edition of the code, this Note cites the most recent edition.

193. *See id.* (citing the amended eminent domain statute, Utah Code Ann. § 78-34-4(2)(e) (2007)).

194. *See generally* Eminent Domain 2006, *supra* note 167.

195. *See* Eminent Domain 2005, *supra* note 165 (listing Kansas and Michigan as two of the states requiring a more rigid compensation scheme); *see also* Eminent Domain 2006, *supra* note 167.

196. S.B. 323, 81st Leg., Gen. Sess. (Kan. 2006).

197. *See supra* Part I.C.2.a.

198. S.B. 323 § (3)(a).

compensation of at least 200% of fair market value to property owners."[199] Thus, states like Kansas and Utah crafted legislation to more specifically address their eminent domain procedures and in doing so joined New York in applying stringent eminent domain procedural requirements.[200]

The extensive legislation proposed and approved in the past two years illustrate the division between states, such as New York, which broadly interpret the public use requirement to allow for economic development takings,[201] and states that prefer a narrow or classical interpretation of the public use requirement and prohibit takings that propose to maintain or increase economic development in an area.[202]

This Note next explores the arguments advocating that New York follow the nationwide trend of restricting eminent domain by implementing prohibitory or more stringent procedural eminent domain legislation. This Note then discusses the arguments in favor of maintaining New York's broad interpretation of the public use requirement.

II. DOES NEW YORK NEED TO CHANGE ITS EMINENT DOMAIN LAW?

Part II of this Note discusses the two sides to the debate over New York's eminent domain law. Part II.A outlines the argument advanced by opponents of New York's current interpretation of the public use requirement and details their propositions for restricting and reforming New York's eminent domain law by implementing changes to New York's EDPL. It also examines the various arguments that suggest that the current broad interpretation of the public use requirement has hurt the state's poor and ethnic minorities. Then, it discusses the problems that have arisen from providing condemning authorities with unchecked powers.

Part II.B of this Note outlines the arguments advanced by proponents of New York's current interpretation of public use. It sets forth the problems of restricting economic development takings in New York. Additionally, it discusses how economic development takings have helped increase revitalization efforts in New York City. Finally, it provides a counterargument to the theory that New York's current broad interpretation of the public use requirement has hurt the state's poor and ethnic minority communities.

A. *New York's Eminent Domain Law Must Change*

Within days of the Supreme Court's ruling in *Kelo*, New Yorkers, ranging from homeowners to senators, joined other state citizens in voicing

199. *Id.* 323 § (2)(f).

200. *See generally* N.Y. Em. Dom. Proc. Law §§ 101–707 (McKinney 2006); *see also supra* notes 19–28 and accompanying text.

201. *See supra* Part I.A.2.

202. *See supra* Part I.C.2.a.

their concerns over New York's eminent domain practices.[203] Some focused their attention on urging the legislature to change New York's laws out of fear that the Supreme Court's deference to states would result in New York courts interpreting the public use and public benefit requirements even more broadly than before.[204] Those that had hoped that the Supreme Court decision would curb the already "condemnation friendly" New York courts, which they viewed as "uphold[ing] practically every condemnation," quickly realized that a change in state law was the only means left to address the state's eminent domain problems.[205]

1. New York Must Redefine What Constitutes a Public Use or Public Project: It Should Require That an Area Be "Truly Blighted"

Some proponents of changing New York's eminent domain laws, such as New York State Senator James Alesi, have called for the "[l]egislature [to] at least more sharply define the definition of a blighted area."[206] Such concern most likely stems from a liberal definition of what constitutes blight.[207] The New York judiciary no longer requires that a project propose to remove slum conditions that create blight; it upholds condemnations that propose to remove property in areas blighted due to economic stagnation.[208]

Furthermore, often in New York, a condemning entity couples the determination of an area as blighted with a development project's intended economic benefits to justify a public use.[209] Other times, the agency determines that an area is blighted in a broad sense and thus substandard in an urban renewal context—e.g., it has fallen victim to economic stagnation

---

203. *See* Richard H. Escobales, Jr., Editorial, *The Transition in the Court*, N.Y. Times, Sept. 7, 2005, at A24 (writing about a New York citizen who "worr[ies] . . . about judges who transmogrify the meaning of basic constitutional protections . . . to expand government power, as in Kelo v. New London"); Robert Steinback, *Not at Home with Eminent Domain Threat*, Times Union, June 25, 2006, at E6 ("An individual's home should be his castle, not some condominium developer's next meal."); Op-Ed., *The Eminent Domain Fight-Back*, N.Y. Sun, Oct. 5, 2005, at 6 (writing about eminent domain "abuses" in New York and stating that "[l]egislators owe it to their constituents to curb these abuses before they go any further"); *see also* Brenner, *supra* note 153 (writing about the effects of New York's eminent domain practices on the village of Port Chester and stating that "[t]he term 'eminent domain,' which has been in the forefront of the collective consciousness in Port Chester for the last decade, has become more familiar on the national stage" since the *Kelo* decision); Press Release, John DeFrancisco, *supra* note 189; Gelinas, *supra* note 13.

204. *See* Elizabeth Benjamin, *Property Rights at Stake*, Times Union, Oct. 19, 2005, at A1 (reporting on New York state senators' calls for a change in New York's eminent domain laws); *see also* Gelinas, *supra* note 13.

205. Gelinas, *supra* note 13 (internal quotation marks omitted) (quoting Dana Berliner, a senior attorney at the Institute for Justice, a public interest law firm that advocates for restricting New York's eminent domain laws).

206. Benjamin, *supra* note 204 (quoting New York State Senator James Alesi).

207. *See, e.g.*, Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 771 F.2d 44 (2d Cir. 1985); Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 332 (N.Y. 1975).

208. *See supra* Part I.A.2.c.

209. *See generally* W. 41st St. Realty L.L.C. v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (App. Div. 2002); *see also Rosenthal*, 771 F.2d at 46; *supra* text accompanying notes 81–83.

or bad land use.[210] Concerns stem from a noted trend in which economic development projects are approved when developers convince agencies and courts that an area that is not "truly" blighted is nonetheless blighted.[211] This often means that the area is just economically blighted or substandard in an urban renewal context as opposed to an area blighted due to slum conditions.[212]

Concerns also arise in instances where an agency contributes to the blighted or substandard conditions of an area.[213] For example, property owners in the Times Square area who lost their land to the 42nd Street Redevelopment Project alleged that the UDC had contributed to the blighted state of the area by creating the very blight it had used as a justification for the condemnation, making it impossible for the property owners to recover the value of their land during the twenty years prior to the lawsuit.[214] In addition to contributing to the blighted state of an area, there have also been instances where un-blighted property has been condemned to serve the purpose of ridding a neighborhood of blight.[215] Thus, the arbitrary determination that an area is blighted, coupled with a proposed increase in tax revenue, which is often used to justify an economic development taking, exemplify the apprehension that property owners constantly face.

Furthermore, the definition of blight itself has posed problems. Dana Berliner, an attorney at the Institute of Justice, a public interest law firm, has advocated restricting New York's eminent domain laws to "truly blighted" areas and to prohibit takings that serve only to promote private development.[216] Such recommendations would most likely prohibit projects that serve the public purpose of removing property that is deemed blighted under a broad reading of blight—substandard in the urban renewal

---

210. *Yonkers*, 335 N.E.2d at 332 (stating that the broad definition of blight "'is something more than deteriorated structures'" and "'involves improper land use'" (quoting Cook, *supra* note 46, at 445)).

211. 60 Minutes, *Eminent Domain: Being Abused?*, CBSNews.com, July 4, 2004, http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml?source=search_story (retelling a story that aired on CBS in 2003 by correspondent Mike Wallace on eminent domain takings benefiting private entities).

212. *See Yonkers*, 335 N.E.2d at 330–31.

213. *See, e.g.*, *W. 41st St. Realty*, 744 N.Y.S.2d at 123.

214. *See id.*

215. *See, e.g.*, Rosenthal & Rosenthal v. N.Y. State Urban Dev. Corp., 771 F.2d 44, 45–46 (2d Cir. 1985). The Rosenthal building was not blighted, yet it was located in a blighted area. The court held that its taking was acceptable because it served the public purpose of eliminating slum conditions and economic stagnation. *Id.*

216. Dana Berliner, Op-Ed., *Search and Destroy*, N.Y. Times, Sept. 26, 2004, § 14 (Long Island), at 15 (arguing that municipalities, the legislature, and New York courts need to act together to restrict and enforce New York's eminent domain laws). Berliner suggests that New York courts should follow the Michigan Supreme Court's holding in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), which ruled that under Michigan's constitution "cities cannot take property for private development just because it might be more economically productive as something else." *Id.*

context—which often allows for agencies to condemn property in areas that are deemed economically stagnant.[217]

Berliner has not been alone in calling for restrictions in New York's eminent domain laws. Shortly after the *Kelo* decision, a few New York state senators proposed bills that set out to define and restrict the state's eminent domain powers and to prevent the categorization of economic development as constituting a public use.[218] Instead of using eminent domain to maintain and promote economic development, Berliner has recommended using other means such as "[r]educing land use and other regulations, creating economic incentive zones and tax abatement programs and transferring publicly owned and unused property" to condemning agencies.[219] Thus, by restricting public use to "truly blighted" areas, and using other means to maintain and promote economic development, property owners will no longer fear losing their un-blighted (in the narrow sense) property, nor will they fear losing their property to condemnation projects that only serve to rid an area of economic stagnation.

2. New York's Eminent Domain Law Hurts Poor Communities

The wealth and political power of communities has the potential to contribute to a municipality's or agency's decision to use eminent domain to condemn property. Justice Clarence Thomas, in his dissenting opinion in *Kelo*, predicted that one of the many consequences of the decision to allow for the use of eminent domain for economic development would be a disproportionate harm to lower income communities.[220] He stated that poor communities are "not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful," requiring the judiciary to protect the "discrete and insular minorities."[221] Justice Thomas's view has been echoed by other individuals and groups, such as the National Association for the Advancement of Colored People (NAACP), which stated in its amicus curiae brief in *Kelo* that "'[a]bsent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm

217. *See* Berliner, *supra* note 216; *see also Yonkers*, 335 N.E.2d at 330.

218. *See supra* note 34 and accompanying text; *see also* LaGrasse, *supra* note 36.

219. Berliner, *supra* note 216.

220. Kelo v. City of New London, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

221. *Id.* (internal quotation marks omitted). Justice Clarence Thomas went on to state that of the families displaced by urban renewal from 1949 to 1963, over sixty percent of the families were nonwhite (based on families whose race was known), and over fifty percent of nonwhite families and close to forty percent of the white families had incomes that were low enough to qualify for public housing. *Id.* at 522 (citing B. Frieden & L. Sagalyn, Downtown, Inc.: How America Rebuilds Cities 17 (1989)). Writing for the dissent in the *Kelo* decision, Justice Sandra Day O'Connor also pointed out the flaws in a broad interpretation of the public use requirement by stating, "The government . . . has license to transfer property from those with fewer resources to those with more." *Id.* at 505 (O'Connor, J., dissenting).

the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly.'"[222]

Whereas Justice Thomas advocated for judicial restrictions on the broad use of eminent domain, others have advocated for legislative restrictions to provide protection to less powerful communities. During one of a series of New York State Senate Judiciary Committee Hearings on New York's eminent domain law in 2005, State Senator Alesi voiced his concern for the livelihood of small business owners who lose everything in state takings.[223] Steven Anderson, a public interest attorney from the Institute for Justice, which represented the homeowners in *Kelo,* has voiced similar concerns.[224] He recently stated that many low-income communities are often targeted for takings "simply because they are home to low-income individuals and small, independently owned businesses that aren't big money-makers for a municipality compared with a new housing development or a shopping mall."[225]

Besides requesting changes in New York's eminent domain law, proponents have highlighted the inadequacy of "just compensation" for New York takings, which is required under the U.S. Constitution's Fifth Amendment when property is seized for a public use.[226] Just compensation is also required under the New York Constitution[227] and the EDPL.[228] Although just compensation is required, opponents of New York's current law, such as Michael Rikon, an attorney specializing in eminent domain law, state that many property owners, especially small business owners, who have lost their land to eminent domain, are very rarely given just compensation.[229] In many instances, the amounts these property owners are given are not enough to move to another location to start over. Rikon states,

---

222. *See "The Kelo Decision: Investigating Takings of Homes and Other Private Property": Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2005) (testimony of U.S. Sen. John Cornyn), http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4543 (quoting from the NAACP's amicus brief for the *Kelo* decision and testifying that the broad use of eminent domain targets disadvantaged persons and ethnic minorities).

223. *See* Benjamin, *supra* note 204.

224. *Id.*

225. *Id.* Steven Anderson, who also coordinates the grassroots property rights project Castle Coalition, points out that neighborhoods that are less politically connected, as opposed to affluent neighborhoods, tend to be eminent domain targets. *Id.*

226. *See* U.S. Const. amend. V.

227. N.Y. Const. art I, § 7.

228. N.Y. Em. Dom. Proc. Law §§ 500–514 (McKinney 2006). New York courts have found that "[j]ust compensation necessarily includes not only the full value of the property taken, but also interest on that amount throughout the period between the taking and final payment." Marine Midland Bank, N.A. v. State, 460 N.Y.S.2d 902, 903 (1983) (citing *In re* Bronx River Parkway, 29 N.E.2d 465 (N.Y. 1940), and A.F. & G. Realty Corp. v. City of New York, 313 U.S. 540 (1941)).

229. Phil Reisman, *Where's Robin Hood When You Need Him?*, J. News, Sept. 20, 2005, at 1B (discussing the battles surrounding the Port Chester taking, which gave the downtown area to developers).

> [N]o amount of money will ever make them whole because they have businesses, and in New York we don't compensate for good will, we don't compensate for cheap leases. All we can do is try to get them some compensation for the trade fixtures of their real property—and it never comes out. It's short. It's always short.[230]

Justice Thomas has also expressed concern for inadequate just compensation in general. When writing about a broad interpretation of the public use requirement, he pointed to the psychological loss, in addition to the economic loss, that many people face when their property is condemned.[231] Thus, although the Fifth Amendment, the New York Constitution, and New York's EDPL require condemning agencies to compensate property owners for the economic value of their land, such compensation does not take into consideration the total value of the property, which in many cases constitutes more than just the market value of the land. A lack of just compensation plus the targeting of low-income areas has often hurt New York's less powerful communities.

3. New York Must Limit the Powers of Condemning Authorities

Those in favor of changing New York's laws have argued that the power of eminent domain should be taken away from condemning authorities. For instance, Carol LaGrasse from the Property Rights Foundation of America, a grassroots organization dedicated to promoting property rights, testified before the New York State Senate Judiciary Committee and urged lawmakers to approve legislation that would take the power of eminent domain away from the public authorities.[232] She stated that in New York, citizens could potentially lose their property to over 640 state, regional, and local unelected public authorities, such as the Empire State Development Authority (also known as the UDC), which are all insulated from voters.[233] Her views are echoed by those who believe that condemning authorities' enormous powers stem from the legacy of New York's infamously powerful builder Robert Moses, who had unchecked power to forever

---

230. *Id.*

231. *See* Kelo v. City of New London, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) ("[N]o compensation is possible for the subjective value of [condemned] lands to the individuals displaced and the indignity inflicted by uprooting them from their homes."); *see also* William M. Treanor, *On My Mind: Upper West Side Story*, Forbes.com, Nov. 16, 2005, http://www.forbes.com/columnists/2005/11/16/oped-eminent-domain-cx_wmt_1116domain.html (discussing the beneficial use of economic development purposes while also acknowledging that there may be problems with "just compensation").

232. *See Eminent Domain: Hearing Before the N.Y. State S. Comm. on the Judiciary*, 110th Cong. (2006) (testimony of Carol W. LaGrasse, President of Property Rights Foundation of America, Inc.) [hereinafter Testimony of Carol W. LaGrasse], *available at* http://prfamerica.org/testimony/Testimony4-3-2006.html.

233. *Id.*; *see also* Eleanor Randolph, Opinion, *Robert Moses, Builder, Left Behind His Power Tool*, N.Y. Times, Feb. 14, 2007, at A26 (discussing the legacy that Robert Moses left behind and advocating for condemning agencies to act more responsibly when determining where and how they will use their eminent domain powers).

change the landscape of New York in the early to mid-twentieth century.[234] Although given credit for making "today's thriving New York" possible, he is also viewed as "arrogantly destroy[ing] neighborhoods, often the poor and black ones, that got in the way of his grand metropolitan vision."[235] Robert Moses's "weapon is [today] called an authority, a public private hybrid that can collect fees, take on debt and build things with little government interference . . . [and is] enormously powerful."[236] Although authorities, such as the Empire State Development Authority, are no longer as powerful as they were during Moses's era, they are still very powerful and arguably not accountable to the public. Some point to the Port Authority of New York and New Jersey as the most "potent authority" because it is controlled by both states but at the same time cannot be regulated unless both states pass "exactly the same laws to regulate" it, which they have failed to do.[237] Thus, these authorities have the ability to exert their unchecked powers against those that can least protect themselves.

In her dissent in *Kelo*, Justice O'Connor expressed similar concern when referring to the broad interpretation of the public use requirement upheld by the majority, stating that "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."[238] To remedy the problem, some have suggested that the governor should "push for more rules imposing transparency and accountability, like requiring authority directors to sign an oath that they will carry out their fiduciary duties responsibly."[239] Others, such as LaGrasse, have called for the adoption of legislation requiring that such authorities' condemnation determinations be subject to local government approval (through a voting mechanism).[240] Therefore, with such protective measures in place, citizens could band together to persuade their lawmakers to vote against controversial economic

234. *See* Randolph, *supra* note 233; *see also* Robert A. Caro, The Power Broker 399, 837 (1974). Robert Caro writes about the rise and fall of Robert Moses in the 1920s and 1930s and the way Moses used his unchecked powers, especially as the "Park Commissioner [with] absolute power" and as the City Construction Coordinator, to transform New York City while at the same time disregarding the homes and businesses the city's citizenry had created. *Id.* "[M]ost of the great roads of antiquity . . . were roads through open country. Their builders . . . did not have to evict from their homes tens of thousands of protesting voters, demolish those homes, tunnel under or cut across subways and elevated railroads . . . ." *Id.* (referring to the Cross-Bronx Expressway).

235. *See* Randolph, *supra* note 233; *see also* Caro, *supra* note 234, at 557. Caro discusses the way Robert Moses transformed different parts of New York City, such as the West Side, without caring about the effects of his transformation on the African American population in Harlem: "Robert Moses spent millions of dollars enlarging Riverside Park . . . but he did not spend a dime for that purpose between 125th and 155th streets . . . not one acre to the part of the park most likely to be used by black people." *Id.*

236. *See* Randolph, *supra* note 233.

237. *Id.*

238. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting).

239. *See* Randolph, *supra* note 233.

240. *See, e.g.*, Testimony of Carol W. LaGrasse, *supra* note 232.

development projects and therefore provide a check on condemning authorities' powers.

B. *New York Should Maintain Its Current Interpretation of the Public Use Requirement*

1. Restricting New York's Eminent Domain Law Will Hinder Economic Development

New laws restricting the definition of public use to eliminate takings that have the purpose of ridding an area of economic stagnation and deficient land use could result in stalled economic development in New York City. Just as the Supreme Court has upheld takings in *Berman*, *Midkiff*, and *Kelo* to transform blighted areas into well-balanced communities,[241] to break up a land oligopoly that "created artificial deterrents to the normal function[] of the . . . residential land market[s],"[242] and to spur economic growth to prevent a small town from succumbing to economic stagnation,[243] respectively, New York has also used eminent domain to rid areas of blight, prevent economic deterioration, and promote economic growth.

Over the past century, cities across the nation have used economic development projects to specifically address land use problems that have resulted in urban poverty.[244] Such projects have attempted to bring together small lots under different ownership, which more often than not were not residential properties, but instead undeveloped or poorly used land, such as parking lots, warehouses, and commercial properties.[245] New York City is an example of a city that has used development projects to address urban poverty and economic stagnation. By bringing together small lots and

---

241. *See* Berman v. Parker, 348 U.S. 26, 33 (1954).

242. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984).

243. *See Kelo*, 545 U.S. at 483–85.

244. *See* Mihaly, *supra* note 154, at 44–45 stating,

> A century of trial-and-error approaches to the stubborn persistence of economic decline and social impoverishment in large areas in central cities has led both the public and private sectors to conclude that a major obstacle to economic revitalization of urban cores is "over-subdivision," where old land use patterns leave the artifact of multiple small lots under different ownerships that the unassisted market, even over time, cannot assemble into lots of a shape and size that would accommodate contemporary land uses. If the private sector attempted to redevelop such a deteriorated area, some owners would sell or join as partners in a revitalization effort, but others would simply hold out for a higher price, one that rendered an already pioneering project financially impossible. The effort would collapse.

Id.; *see also Berman*, 348 U.S. at 35 (discussing the difficulty that would result if individual property owners were allowed to resist condemnations in an area targeted for a development program).

245. *See* Mihaly, *supra* note 154, at 43 (writing that the majority of property condemned around the country has not been residential property, but instead undeveloped land and land in "holding uses," such as warehouses and parking lots).

condemning entire areas of the city, the use of eminent domain has greatly benefited the city.[246]

Yet New York's eminent domain laws have been under attack by many who would like to restrict and redefine New York's Eminent Domain Procedural Law or the New York Constitution.[247] However, it has been argued that proponents of restricting and redefining New York's eminent domain laws do not consider the economic ramifications of such actions. The American Planning Association, New York Metro Chapter, states that many of the previously proposed bills that have come before the New York State Senate Judiciary Committee were "kneejerk reactions to the *Kelo* decision . . . [and] that legislative overreactions to *Kelo* may preclude the implementation of a number of beneficial projects that could create jobs, housing opportunities, and economic growth."[248]

For instance, some proponents of New York's eminent domain law have pointed out that economic development takings increase jobs and tax revenue, thus either aiding communities that are suffering from a lack of economic growth or preventing communities from falling into despair as may happen after plant closings or when commercial enterprises leave an area.[249] Professor Joseph Singer has suggested that communities facing plant closings should use their eminent domain powers to prevent plants from closing or moving, by taking the property and transferring it to third parties or the workers themselves, in order to protect the community from large job losses.[250] In its brief in support of the respondents in *Kelo*, the City of New York argued that if economic development takings were prohibited, "a crucial tool in the City's ability to meet its future, and create balanced and prosperous neighborhoods, [would] be lost."[251] Although the statement was in regard to the *Kelo* Court's later ruling, the theory holds

246. *See* Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985) (upholding the UDC's condemnation of two structurally sound buildings as part of a redevelopment program in Times Square); N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 153–54 (N.Y. 1936) (allowing the New York Housing Authority to condemn two tenement houses already surrounded by land that the City had previously acquired to clear the area of slum and build low incoming housing). *See generally* W. 41st St. Realty L.L.C. v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (App. Div. 2002).

247. *See supra* Part II.A.1, II.A.3; *see also supra* note 34 and accompanying text.

248. M. Robert Goldstein & Michael Rikon, *Condemnation and Tax Certiorari: What Hath 'Kelo' Wrought?*, N.Y.L.J., June 28, 2006, at 3 (internal quotation marks omitted).

249. *See* Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 737–39 (1988).

250. *Id.* (suggesting that such takings would fulfill the public use requirement because they would "achiev[e] the public purpose of correcting a market failure or otherwise promot[e] economic development or alleviat[e] economic distress").

251. Brief for the City of New York, *supra* note 152, at 5; *see* Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 Denv. U. L. Rev. 1, 18–19 (2006) ("Stung by movement of wealth and jobs to favored suburbs, many American cities have become desperate to retain and attract businesses and tax bases. . . . To lower the cost of doing business in their communities, cities are encouraged to take steps such as giving tax breaks, curbing regulations, and lowering the cost of land through creative use of eminent domain.").

true for the use of eminent domain to sustain economic growth in New York. The City of New York stated,

> The economy changes in unpredictable ways, but attracting and keeping a stable and varied base of employers, taxpayers, and commercial and industrial interest in the City is a fundamental obligation of City government and advances the public good. Consequently, economic redevelopment has become an integral element of sound land use and urban planning.[252]

The City of New York is not alone in its proposition. New York courts have also approved the use of eminent domain to sustain economic growth as evidenced by the *In re Fisher* decision, which upheld condemnations that would allow for the retention of the New York Stock Exchange in lower Manhattan.[253] The City of New York has stated that "[g]overnment must either plan for redevelopment or watch its cities become more congested, deteriorated, obsolescent, stagnant, inefficient, and costly."[254] Thus, without the option of using eminent domain to help sustain the economy, many communities could face crippling economic decline as they face congestion, deterioration, and economic stagnation.

Although New York is famous for using economic development takings to sustain or promote economic development,[255] it is not alone in its success. From the state that produced the controversial battle in *Kelo*, comes the story of Stamford, Connecticut—a success story for eminent domain. The signs sprinkled in downtown Stamford read, "The City That Works," referring to Stamford's use of eminent domain since the 1960s to transform the distressed downtown area to a "glistening . . . business district that is doing so well today."[256] Downtown Stamford was revitalized after the city took 130 acres of private property and turned it into fifteen million square feet of office space.[257] Only a month after the controversial *Kelo* decision, officials with Connecticut cities and towns responded to the outrage over the decision by stating that homeowners "facing the infinitesimal risk their homes might be taken for a competing use [are not the ones at risk,] but [instead] cities facing declining tax bases and competition from suburbs with large inventories of available dirt [are the

252. Brief for the City of New York, *supra* note 152, at 4–5.

253. *See In re* Fisher, 730 N.Y.S.2d 516, 517 (App. Div. 2001). The use of eminent domain to protect the economic welfare of a community has also been acknowledged by the Supreme Court. In *Kelo*, the majority discussed the importance of eminent domain for state welfare by stating that, "[i]n our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question." Kelo v. City of New London, 545 U.S. 469, 484 (2005).

254. Brief for the City of New York, *supra* note 152, at 9 (citing Wilson v. Long Branch, 142 A.2d 837, 842–43 (N.J. 1958), *cert. denied*, 358 U.S. 873 (1958)).

255. *See supra* Part I.A.2.b–c.

256. Peter Applebome, *City's Success Built on Power to Seize Land*, N.Y. Times, July 20, 2005, at B5.

257. *See id.*

ones at risk]."[258] Stamford's director of economic development echoed such concern over the potential *Kelo* fallout by pointing out that cities would not be able to compete with suburbs without having "some way to assemble rational pieces of land."[259] Thus, not only can economic development condemnations prevent a loss of jobs and tax revenue, they can also revitalize cities and allow them to compete with other areas in a state.

2. The Use of Eminent Domain for Economic Development Has Helped Revitalize Key Areas of New York City

Proponents of New York's current EDPL note that although New Yorkers have benefited greatly from revitalization projects throughout the state, especially in New York City, many are unaware or have forgotten that without the use of eminent domain, key areas of New York City may not have thrived to allow citizens to enjoy the fruits of such projects.[260] Supporters of New York's eminent domain practices, such as developers, whose development projects could face many obstacles if new laws are passed, may take comfort in using the many successful revitalized areas around New York, most notably within New York City, to demonstrate why New York's public use requirement should not be redefined to prohibit economic development takings.[261]

The eminent domain takings that transformed Times Square provide an example of the power of eminent domain to revitalize key areas of New York City. The projects, which were designed to rid the area of rampant crime, social problems, and physical blight, did just that—they successfully revitalized thirteen acres of land in Times Square.[262] In its brief in support of the respondents in the *Kelo* case, the City of New York wrote about the success of using eminent domain in Times Square, which resulted in the land "in and around Times Square [being] reborn as a tourist-friendly destination that, in the 2003–2004 season, drew an estimated 11.6 million people to the Broadway shows in that neighborhood, while the area west of

---

258. *Id.*

259. *Id.* (quoting Michael W. Freimuth, Stamford's director of economic development, in his support for cities using eminent domain to maintain economic stability).

260. Mihaly, *supra* note 154, at 42 (stating that "[m]ost Americans enjoy the fruits of revitalized urban cores, but they do not understand how the transformation occurred. Nor do they know that the very nature of land development in the city center has evolved"); *see also "The Kelo Decision: Investigating Takings of Homes and Other Private Property": Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2005) (testimony of Eddie A. Perez, Mayor of Hartford, Connecticut), http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4659 [hereinafter Testimony of Eddie A. Perez] (stating that "eminent domain is a powerful economic development tool used sparingly that helps cities create jobs, grow business and strengthen neighborhoods").

261. *See, e.g.*, Brief for the City of New York, *supra* note 152, at 1–2.

262. Jeffrey D. Friedlander, *Eminent Domain in the City: From Metrotech to 42nd Street*, N.Y.L.J., Mar. 28, 2005, at 3.

Times Square has since become a new residential neighborhood."[263] However, the Times Square redevelopment project has done more than attract tourists to the area. According to a 2007 economic impact report released by the Times Square Alliance, the Times Square revitalization has resulted in the area generating outstanding increases in tax revenues—$1.1 billion in annual tax revenues for New York City and $1.3 billion in annual tax revenues for New York State.[264] The Times Square revitalization's impact on jobs in the area is even more impressive. According to the Times Square Alliance report, "While Times Square represents only 0.1% of the City's land area, 5% of the City's jobs are located in Times Square."[265]

With such impressive statistics, it is no wonder that New York City Corporation Counsel Michael Cardozo has repeatedly highlighted important eminent domain takings, such as the one in Times Square, that have revitalized different areas of New York City. During the October 2005 State Senate Judiciary Committee hearings on Eminent Domain, Cardozo advocated for the maintenance of New York's current eminent domain law by stating that, without eminent domain, "Times Square would have remained the crime-infested 'national showcase for urban decay and blight' that it was in the 1970s."[266]

Although the Times Square redevelopment project stands out as a successful use of eminent domain, another large transformation had already occurred roughly two decades earlier. In 1963, the New York Court of Appeals dismissed a claim by private property owners in lower Manhattan who alleged that New York and New Jersey statutes giving the Port of New York Authority the power to condemn and acquire the Hudson & Manhattan Railroad System and a thirteen-block area of lower Manhattan to build the World Trade Center was unconstitutional.[267] The appellate court in *Courtesy Sandwich Shop, Inc. v. Port of New York Authority* recognized the development project as constitutional because the development served a public purpose.[268] In reaching its conclusion, the court reasoned,

> It is the gathering together of all business relating to world trade . . . which is supposed to attract trade with a resultant stimulus to the economic well-being of the Port of New York. This benefit is not too . . .

---

263. Brief for the City of New York, *supra* note 152, at 1; *see also* Press Release, Times Square Alliance, Times Square Alliance Announces Results of Latest Report on Economic Contribution of Times Square to NYC Economy (May 9, 2007), *available at* http://www.timessquarenyc.org/media/documents/economicrelease.pdf.

264. *See* Press Release, Times Square Alliance, *supra* note 263. In its report, the Times Square Alliance stated that "[t]he total economic output of Times Square is more than the 2006 GDPs of Bolivia and Panama combined." *Id.*

265. *Id.*

266. John Caher, *Existing State Law Protects Property Owners, Experts Say*, N.Y.L.J., Oct. 19, 2005, at 1 (recounting Michael Cardozo's speech to state senators during the New York State Senate Judiciary Committee Hearing on Oct. 18, 2005); *see generally* Brief for the City of New York, *supra* note 152.

267. Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402, 404 (N.Y. 1963), *appeal dismissed*, 375 U.S. 78 (1963).

268. *Id.* at 404–05.

> speculative as to render the means chosen . . . unreasonable; nor is the benefit sought itself an improper concern of government. The history of western civilization demonstrates the cause and effect relationship between a great port and a great city.[269]

Proponents of New York's current interpretation of the public use requirement can find comfort in the *Courtesy Sandwich Shop* decision. It is the New York Court of Appeals' notion of a "great city" that lends support to the importance of eminent domain in revitalizing New York City. The court seems to have been acknowledging the importance of the port of New York, as well as the need to improve it, to "facilitate[e] the flow of commerce."[270] The appellate court further stated that "the indirect benefits deriving from slum clearance and from a 'plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings' justified condemnation."[271]

The *Courtesy Sandwich Shop* court's prediction that the World Trade Center area would one day help bring economic success and a revitalization of the neighborhood was correct. Before the September 11th terrorist attacks, the success of the revitalization of the area was hard to deny. As stated in its brief in support of the respondents in the *Kelo* case, the City of New York pointed to the successful use of eminent domain in the World Trade Center area to revitalize "acres of lower Manhattan [which] led to the private development of an entirely new mixed-use neighborhood—Battery Park City."[272] Thus, another controversial economic development project used eminent domain to help transform a poorly developed part of the city into one of the most vibrant financial areas of Manhattan.

Further uptown, the Lincoln Center area in the Upper West Side of Manhattan is a success story that now houses the Lincoln Center for the Performing Arts and Fordham University's Lincoln Center campus. The dean of Fordham University School of Law, William Treanor, has written that the revitalization of the "Lincoln Center neighborhood, a world cultural center and one of the most powerful engines of New York's economy . . . illustrates how urban renewal plans that wisely use private developers and nonprofit organizations can transform local economies and invigorate city life."[273] The project provided the New York Philharmonic, the Metropolitan Opera, and Fordham University each with a new site. Furthermore, the project changed the city by bringing 3800 middle-class housing apartments, Lincoln Center ticket holders, musicians, actors, undergraduate and law students, and faculty and staff to the Upper West Side.[274] Thus, it helped revitalize an area of the city by creating increased economic revenue in the form of artistic performances, shops, restaurants,

269. *Id.*
270. *Id.* at 405.
271. *Id.* (quoting N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936)).
272. Brief for the City of New York, *supra* note 152, at 1.
273. Treanor, *supra* note 231.
274. *See id.*

and a university campus.[275] The benefits that each of the publicized economic development projects in Times Square, the World Trade Center area, and Lincoln Center have provided exemplify the power of eminent domain to alleviate economic stagnation and revitalize various areas of New York City.[276]

3. New York's Eminent Domain Procedure Law Provides Sufficient Protection to Property Owners

The New York Court of Appeals in *Courtesy Sandwich Shop* was unwilling to heed fears expressed by citizens that a proposed taking would be unconstitutional, because among other things, the court determined that the "procedures prescribed by [the] statute fully protect[ed] the respondents and others in like position against any taking for nonpublic purposes in violation of the Port Development Project Law."[277] Although at that time the court of appeals was confident in the port development project's procedural laws, courts were consistently faced with complaints from property owners who had lost property as a result of various condemning authorities using eminent domain under their own condemnation laws.[278]

Since New York State's condemnation law, which controlled eminent domain procedures, was different from the procedural laws the condemning agencies actually used, the average citizen did not have a clear understanding of the various laws and felt that such laws did not provide enough protection for property owners.[279] The legislature's enactment of New York's EDPL, which became effective in 1978, set out to resolve the problem of inconsistent and "unfair" proceedings.[280] With the creation of this new law, New York was no longer living in the aftermath of the Robert

---

275. *See id.*; *see also* Brief for the City of New York, *supra* note 152, at 1 ("Lincoln Center for the Performing Arts was created through the use of condemnation, and it, in turn, not only became the anchor for many of the City's leading cultural arts venues, but it also spurred tremendous private residential development on Manhattan's Upper West Side.").

276. These success stories exemplify how new public facilities, new commercial development, and new housing can provide businesses and amenities that can reinvent an urban center. *See* Mihaly, *supra* note 154, at 47 (stating that the "typical scenes of redevelopment" often feature "[n]ew public facilities, often in tandem with new affordable housing, rise on vacant or under-utilized sites, producing uses and amenities that reinvent the urban center").

277. Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402, 406 (N.Y. 1963), *appeal dismissed*, 375 U.S. 78 (1963).

278. *See* Lorraine Power Tharp et al., Warren's Weed, New York Real Property § 28.01 (5th ed. 2004) (discussing how, up until 1978, New York had followed the general condemnation law which had been the source of many complaints by all parties involved in eminent domain proceedings).

279. *See id.* Before the enactment of New York's Eminent Domain Procedure Law, the state's condemnation law was only used when a condemning authority did not have its own condemnation procedure laws. Furthermore, even takings where the City of New York sought to exercise the power of eminent domain were controlled by the City's Administrative Code, as opposed to the New York State Condemnation Law. *Id.*

280. *See supra* text accompanying notes 19–28.

Moses Era—condemning authorities were finally forced to comply with one uniform law.

The new law, which replaced the New York State Condemnation Law, was created to provide a uniform condemning procedure for both the state and the various condemning agencies.[281] As it now states, the EDPL's purpose is

> . . . to assure that just compensation shall be paid . . . to establish [an] opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain; to give due regard to the need to acquire property for public use as well as the legitimate interests of private property owners, local communities and the quality of the environment, and to that end to promote and facilitate recognition and careful consideration of those interests; to encourage settlement of claims for just compensation and expedite payments to property owners . . . and to ensure equal treatment to all property owners.[282]

Thus, proponents of New York's eminent domain law can claim that eminent domain proceedings are now subject to New York's EDPL, and property owners know exactly what to expect when facing eminent domain. For instance, the EDPL requires that before a municipality or agency proceeds with a condemnation, it must conduct a public hearing to "(1) inform the public, (2) review the public use to be served by the proposed project, and (3) determine where the project will be constructed."[283] After such findings, the property owners are still given an option to seek judicial relief.[284] Property owners may seek relief from either the supreme court of the county in which they reside[285] or the appellate division of the supreme court of the county in which the property is located to determine, among other things, if the condemning agency's finding was within the state and federal constitutional limits and whether a public use will be served by the taking.[286]

Pointing to the EDPL's specific and detailed requirements, Professors John Nolan and Jessica Bacher observed that the "onerous, transparent, and lengthy processes that provide all the details of the [development] project and invite public participation and extensive debate" demonstrate that New York does not need to change its eminent domain laws.[287] In fact, under

---

281. *See* N.Y. Em. Dom. Proc. Law § 104 (McKinney 2006) (stating that "[t]he eminent domain procedure law shall be uniformly applied to any and all acquisitions by eminent domain of real property within the state of New York").

282. *See id.* § 101.

283. *See* Tharp et al., *supra* note 278, § 28.46 (discussing N.Y. Em. Dom. Proc. Law § 201).

284. *See* N.Y. Em. Dom. Proc. Law § 207(A).

285. *See, e.g.*, Matwijczuk v. Comm'r of Transp., 423 N.Y.S.2d 574 (Sup. Ct. 1979).

286. *See* N.Y. Em. Dom. Proc. Law § 207(c)(1)–(4).

287. John R. Nolon & Jessica A. Bacher, *'Takings' and the Court: Despite Alarmists, 'Kelo' Decision Protects Property Owners and Serves the General Good*, N.Y.L.J., June 29, 2005, at 5; *see, e.g.*, Ne. Parent & Child Soc'y, Inc. v. Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503, 504 (App. Div. 1985) (stating that the Schenectady Industrial Development

the State Environmental Quality Review Act, such project proposals require extensive environmental impact statements that analyze the economic and environmental consequences in addition to the impact on the community.[288] Furthermore, Nolan and Bacher state that "[p]ublic hearings . . . reviews of impact statements, open meeting laws, conflict of interest rules, and a host of other legal protections ensure that the public knows who is involved, how they were chosen, what the proposed benefits are, and who will suffer."[289] The City of New York, in its brief in support of the respondents in *Kelo*, pointed to the EDPL's extensive procedural requirements as proof of the EDPL's purpose to include public participation in the condemnation process and to consider other factors such as the quality of the environment, and the legitimate interests of the affected property owners and their surrounding communities.[290] With such an extensive and advanced procedural mechanism in place, New York's eminent domain law provides enough protection for affected property owners to contest takings and, if they are not successful, to have at least a full analysis of the impact such takings will have on their community.

4. Broad Eminent Domain Laws That Allow Pure Economic Development Takings Can Protect Poor Communities

Proposed legislation restricting a state's use of eminent domain for economic development to areas that fall under a narrow reading of the public use requirement may hurt, as opposed to protect, low-income communities. In his testimony before the U.S. Senate Judiciary Committee, Professor Thomas Merrill argued that eminent domain legislation that makes "'blight' a precondition of economic development takings seems designed largely to reassure the middle class that its property will not be targeted for such projects, not to protect the very poorest communities."[291]

Agency correctly followed eminent domain procedures by holding a public hearing concerning the proposed taking, and making findings relative to the condemnation site—"the economic, environmental and social impacts of the intended use of the property"—before determining that the condemnation would serve a public use).

288. *See* Nolan & Bacher, *supra* note 287.

289. *Id.* It is also important to note that the condemning agencies, such as the UDC (also known as the Empire State Development Corporation) provide copies of the project plan, environmental impact statement, a transcript of the public hearing, and a copy of the public hearing notice for development projects they proposes to undertake. *See, e.g.*, Empire State Dev. Corp., Atlantic Yards Arena & Redevelopment Project, http://www.empire.state.ny.us/AtlanticYards/ (last visited Sept. 22, 2007) [hereinafter Atlantic Yards].

290. Brief for the City of New York, *supra* note 152, at 8.

291. *"The Kelo Decision: Investigating Takings of Homes and Other Private Property": Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2005) (testimony of Thomas A. Merrill, Charles Keller Beekman Professor, Columbia Law School), http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4661 [hereinafter Testimony of Merrill]. This Note interprets Professor Merrill's use of the word blight in the narrow sense—conditions created by slums—as opposed to the liberal, or broad, definition of the word that the New York judiciary has used, which encompasses conditions created by improper land use and/or economic stagnation.

He stated that post–World War II urban renewal projects completed under statutes allowing eminent domain for ("truly") blighted areas "strongly suggests that poor and especially minority communities were disproportionately singled out for condemnation."[292] Similarly, others point out that governments have been able to "*jettison* existing poorer citizens from . . . communit[ies]" by designating an area as blighted.[293] Therefore, it is no surprise that historically, one of the perceived problems of eminent domain is its use against poor, politically underrepresented communities.[294]

Moreover, Professor Merrill stated that on the other hand economic development schemes are deemed more forward-looking because they concentrate on the benefits the community will gain from projects and thus lead to "more surgical interventions designed to jump start growth" as opposed to development projects that "justify bulldozing any property that falls below the benchmark of blight."[295] Therefore, broad eminent domain laws that allow for pure economic development takings may ultimately result in fewer and more selective takings that protect the poor, or at least revitalize low-income areas, as opposed to justifying the condemnation of property in poorer neighborhoods instead of middle-class and wealthy neighborhoods[296] suffering from the same ailment—economic stagnation.

III. NEW YORK DOES NOT NEED TO CHANGE ITS EMINENT DOMAIN LAWS

Although both sides to the debate over New York's eminent domain laws and practices put forth valid arguments, Part III argues for the maintenance of New York's current eminent domain laws, which broadly interprets public use to allow for economic development takings throughout the state, and most importantly, in New York City.

A. *New York's Interpretation of Public Use Mirrors the Supreme Court's Interpretation of the Public Use Requirement: Takings Need Only Benefit the Public*

The Supreme Court's decisions in *Berman v. Parker*, *Hawaii Housing Authority v. Midkiff*, and *Kelo v. City of New London* highlighted the federal

---

292. *Id.*; *see also* Boudreaux, *supra* note 251, at 9 (writing that eminent domain has often targeted poor and minority communities such as the condemnation that the Supreme Court upheld in *Berman*—most of the residents in the community were black). This Note uses the word "truly" to distinguish between a broad definition of blight, which defines blight as constituting social and economic blight in addition to physical blight, and the narrow definition of blight, which only constitutes deteriorated structures.

293. Boudreaux, *supra* note 251, at 19.

294. *Id.* at 21.

295. *See* Testimony of Merrill, *supra* note 291.

296. *Id.*

trend to recognize broad interpretations of the public use requirement.[297] The Supreme Court, over roughly fifty years, expanded the notion of public use from condemnations that were strictly used to prevent slum conditions,[298] to takings that ended a land oligopoly by redistributing fee simple ownership,[299] and finally to takings that provided for general economic development.[300] Although the notion of an economic development condemnation constituting a public use may have been a novel concept for the Supreme Court to examine and acknowledge in *Kelo*,[301] such takings were already both commonplace and valued in New York[302] decades before the controversial taking in New London, Connecticut. Moreover, New York courts had already undergone a broadening trend in their interpretation of the public use requirement.[303] They were not as hesitant to explicitly condone a broad definition of public use in order to fulfill the needs of rapidly growing cities.[304]

On the federal level, the determination of what constitutes public use has undergone a transformation that the *Kelo* majority outlined and explained.[305] The majority acknowledged the Court's use of the broader interpretation of public use in its jurisdictional history, which has resulted in the use of the more practical "public purpose" test.[306] The *Kelo* majority discussed the "diverse and always evolving needs of society" to explain the trend in state courts of embracing the nation's history of using eminent domain to carry out economic development projects in connection with various industries such as mining, irrigation, and agriculture.[307] Therefore, the Supreme Court's acceptance of developmental takings to carry out the public purposes of facilitating agriculture and mining, creating routes for common carriers, promoting a well-balanced community (slum clearance), and ridding an island of a land oligopoly has led it naturally to include economic development in its traditionally broad understanding of public use.

On the other hand, the expanding notion of what constitutes a public use or purpose has been a part of the New York judiciary's eminent domain analysis for many years. Thirty years before the *Kelo* controversy, New York courts were already facing the prospect of interpreting public use to

297. *See* Kelo v. City of New London, 545 U.S. 469 (2005); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); *see also supra* Part I.B.

298. *See Berman*, 348 U.S. at 28.

299. *See Midkiff*, 467 U.S. at 241–42.

300. *See Kelo*, 545 U.S. at 484.

301. *See id.*

302. *See In re* Fisher, 730 N.Y.S.2d 516, 517 (App. Div. 2001); Vitucci v. N.Y. City Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (App. Div. 2001); Ne. Parent & Child Soc'y, Inc. v. Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503, 505 (App. Div. 1985).

303. *See generally supra* Part I.A.2.a–c.

304. *See generally supra* Part I.A.2.a–c.

305. *See Kelo*, 545 U.S. at 480–83.

306. *See id.*; *see also* text accompanying notes 147–49.

307. *See Kelo*, 545 U.S. at 479–83; *see also supra* note 147 and accompanying text.

encompass more than just the classically accepted takings (e.g., takings that transferred private property to public ownership or to common carriers[308]). As early as 1936, New York's judiciary had moved away from an analysis that required determining whether the public could "use" the property, to an analysis inquiring whether the public could "benefit" from the condemned property.[309] Forty years later, the New York Court of Appeals, in *Yonkers Community Development Agency v. Morris*,[310] acknowledged that public use should include both the removal of blight in the narrow sense, which is generally known as slum clearance, to the removal of blight in the broad sense—the removal of substandard conditions in the urban renewal context, which includes the removal of conditions contributing to economic stagnation.[311]

Precedent soon allowed for increasingly broad interpretations of the public use requirement, such as the one the court in *Byrne ex. rel.* used when it upheld the building of a boat refuge by interpreting public use as "broadly defined to encompass any use which contributes to the health, safety, general welfare, convenience or prosperity of the community."[312] In the same time period, validations of projects that increased tax revenue and ultimately increased a city's economic welfare, either on their own,[313] or in addition to the removal of blighted conditions, [314] became the norm in New York. Therefore, by the time the Court decided *Kelo*, New York courts[315] had already come to understand the "diverse and always evolving needs of society" and had accepted that economic development takings constituted the public use and/or purpose of increased employment, tax revenue, and overall neighborhood revitalization.[316] It seems that now, as indicated by *Kelo*, the Supreme Court has also come to embrace this concept.[317] Thus, it may not be outrageous to suggest that the Supreme Court has finally acknowledged what New York courts had already recognized—the use of eminent domain to promote economic development has become the new generation of takings that benefit the public and thus constitute a public use or purpose.

---

308. The *Kelo* dissent discussed the three accepted categories of takings which constituted public use. *Kelo*, 545 U.S. at 497–98 (O'Connor, J., dissenting).

309. *See* N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 154 (N.Y. 1936).

310. 37 N.Y.2d 478, 483–84 (1975).

311. *Id.* at 481.

312. Byrne *ex rel.* Pine Grove Beach Ass'n v. N.Y. State Office of Parks, Recreation & Historic Preservation, 476 N.Y.S.2d 42, 42 (App. Div. 1984); *see also Muller*, 1 N.E.2d at 155.

313. *See In re* Fisher, 730 N.Y.S.2d 516, 517 (App. Div. 2001); Vitucci v. N.Y. City Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (App. Div. 2001); Ne. Parent & Child Soc'y, Inc. v. Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503, 504 (App. Div. 1985).

314. *See* Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985); W. 41st St. Realty L.L.C. v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 126 (App. Div. 2002); *Byrne*, 476 N.Y.S.2d at 42–43.

315. *See generally* Part I.A.2.a–c.

316. *Kelo*, 545 U.S. at 479.

317. *See generally id.* at 484.

Not only has the Supreme Court's acceptance in *Kelo* of takings that ultimately serve an economic development purpose paralleled New York court decisions, but it has also paralleled the public's comfort with what constitutes a public use. The public's understanding of public use has changed over time, as evidenced by the public's ability to embrace economic development projects that may at first seem only to benefit a private entity (e.g., mining companies and railroad companies).[318] For instance, the development of the railroad and its expansion across the nation could have been seen as benefiting a private entity—the railroad company. However, it can be inferred that the public gradually came to regard transportation services, such as the railroad, as private entities that benefit the public, so that condemnations that transfer private property to common carriers fulfill the public use requirement.[319] At this time, Americans as a whole may not be ready to accept takings that set out to generate tax revenue and increase employment.[320] However, the public, especially those citizens in urban centers, may soon have to adapt to follow New York and the Supreme Court in recognizing and accepting the benefits of economic development condemnations and thus viewing such takings as satisfying the public use requirement.

B. *New York's Public Use Decisions Have Been Beneficial for New York City*

New York's current eminent domain laws and practices have been quite beneficial to New York City. The majority in *Kelo* stated, "Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances."[321] This statement best applies to New York City. As the city has become more populated and congested, it has benefited from good land use policy that has used eminent domain to condemn property in order to sustain and promote economic development.[322]

Advocates of a broad interpretation of the public use requirement continually emphasize the power of eminent domain to decrease crime, reduce social problems, remove physical blight, and sustain and promote economic growth through increased jobs and tax revenue.[323] Yet opponents of New York's eminent domain laws are quick to point to flaws in certain procedural requirements and express concern over the broad interpretation

318. *Id.* at 498 (O'Connor, J., dissenting).

319. *See id.* (listing the transfer of private property to common carries as one of the three "generally identified categories of takings that comply with the public use requirement").

320. *See supra* Part I.C.

321. *Kelo*, 545 U.S. at 482 (majority opinion).

322. *See supra* text accompanying notes 244–46; *see also supra* Part II.B.2.

323. *See supra* notes 263–66, 272–76 and accompanying text; *see also* Brief for the City of New York, *supra* note 152, at 1.

of the public use requirement. [324] However, they fail to acknowledge the benefits that have resulted from economic development takings.[325] Although it is likely that some condemnations have not resulted in the economic growth expected, the success stories stemming from court-approved condemnations are too obvious to ignore.

New York decisions that some may consider as "eminent domain abuses," such as *West 41st Street Realty L.L.C. v. New York State Urban Development*[326] and *Rosenthal & Rosenthal Inc. v. New York State Urban Development Corporation*,[327] have resulted in successful economic development projects that have helped "reinvent the urban center."[328] Both cases upheld the UDC's proposed condemnation of property in the Times Square area, which, without a doubt, can be categorized as an eminent domain triumph. In the fifty years before the UDC's gradual condemnation of private property in Times Square,[329] the Times Square area had spiraled into a "national showcase for urban decay and blight."[330] The thirteen revitalized acres of land in the Times Square area speak for themselves. These days, just by walking around the Times Square neighborhood, one can see that the area houses large apartment complexes, Broadway theaters, *The New York Times*, MTV headquarters, some of the largest law firms and financial services companies in the country, and numerous chain and locally owned delis, restaurants, and souvenir shops. The staggering statistics reported by the Times Square Alliance in their economic impact report demonstrate how the Times Square revitalization projects have resulted in immense economic benefits for the city.[331] Moreover, besides the increase in housing and corporate opportunities, the redevelopment of the Times Square area has also provided for an increase in both corporate and service jobs for residents of all boroughs of the city[332] as well as increased revenues for both Broadway and the city.[333]

In addition to the Times Square redevelopment project cases, the New York Court of Appeals' broad interpretation of the public use requirement to allow for an economic development taking in *Courtesy Sandwich Shop* resulted in a transformation that is now dear to many New Yorkers and Americans alike.[334] The condemnation of the thirteen-block area of lower Manhattan to build the World Trade Center buildings resulted in the creation and maintenance of the area as one of the financial centers of the

---

324. *See supra* Part II.A.1; *supra* notes 226–30 and accompanying text.
325. *See supra* Part II.B.2.
326. 744 N.Y.S.2d 121 (App. Div. 2002).
327. 771 F.2d 44 (2d Cir. 1985).
328. Mihaly, *supra* note 154, at 47; *see also supra* text accompanying notes 262–65.
329. *See supra* note 266 and accompanying text.
330. *See id.*
331. *See* Press Release, Times Square Alliance, *supra* note 263; *see also supra* text accompanying notes 262–65.
332. *See supra* text accompanying notes 262–65.
333. *See supra* text accompanying notes 262–65.
334. *See supra* text accompanying notes 267–72.

world. Rationalizing that New York City needed to capitalize on "the flow of commerce,"[335] the decision was the catalyst for transforming the area to house some of the most prominent law firms, investment banks, commercial businesses,[336] restaurants, hotels, and local delis—all contributing to an increase in employment and tax revenue.

Opponents of New York's eminent domain court decisions[337] should not dismiss the beneficial impact that has stemmed from these decisions. New York's lenient eminent domain laws have sustained and spurred tremendous economic growth and neighborhood revitalization and have resulted in increased tax revenue that has been available for use in various public projects.[338] New Yorkers have long recognized the importance of maintaining New York City as a strong American financial center as evidenced by the New York legislature's creation of the UDC to "retain existing industries and to attract new industries through the acquisition, construction, reconstruction and rehabilitation of industrial and manufacturing plants and commercial facilities."[339] Additionally, as stated in its amicus brief in *Kelo*, the City of New York has historically emphasized that the prosperity of New York "has always been inextricably linked to business and industry."[340] It is committed to "insur[ing] the growth and development of sound and prosperous communities, with the requisite services, and open space, for the people who live, work, and visit [the City]."[341]

By upholding a broad interpretation of the public use requirement to allow for economic development projects, New York courts, like their counterparts in Connecticut,[342] have also recognized that as the country's population grows and the cost of property, especially in larger cities with space limitations, increases, cities face declining tax bases and competition from suburbs that have large areas of available land.[343] Court decisions upholding the use of eminent domain for economic development projects have allowed cities, like New York, to compete with surrounding suburbs,

---

335. *See* Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402, 405 (N.Y. 1963), *appeal dismissed*, 375 U.S. 78 (1963).

336. *See* Parke Chapman, *Commercial Development Still on Track*, Real Estate Wkly., Nov. 7, 2001, at 1.

337. *See generally supra* Part II.A.

338. *See* Press Release, Times Square Alliance, *supra* note 263 ("Times Square is not just one of New York City's most popular destinations—it in essence represents its own distinct and powerful economy within the City, pumping tens of billions of dollars into the local economy. In this way, Times Square is a vital organ to New York City—a critical element in the City's financial landscape."); *see also supra* Part II.B.1–2.

339. *See* New York State Urban Development Corporation Act § 2 (McKinney 2006); *supra* text accompanying notes 65–69.

340. Brief for the City of New York, *supra* note 152, at 2.

341. *Id.* at 3.

342. *See supra* text accompanying notes 256–59.

343. *See supra* text accompanying notes 249–54; *see also* Brief for the City of New York, *supra* note 152 and accompanying text.

just like other cities (e.g., Stamford, Connecticut).[344] The World Trade Center and Times Square revitalization project decisions exemplify the efficient land use and benefits that have resulted from the judiciary's broad interpretation of the public use requirement, resulting in the maintenance and promotion of financial stability in New York City.

Without the use of eminent domain, New York would lose a "crucial tool in the City's ability to meet its future, and create balanced and prosperous neighborhoods."[345] If the New York legislature follows other state legislatures and enacts prohibitory legislation to prevent economic development takings,[346] or if the judiciary begins to interpret the public use requirement narrowly, it is doubtful that New York City will maintain its financial strength.

C. *New York's Eminent Domain Law Already Implements Many of the Rigorous Procedural Requirements That Other States Have Recently Adopted in Response to* Kelo

Before any consideration is given to reforming New York's procedural requirements for eminent domain takings, it should be noted that many of the procedural changes other states implemented after *Kelo*[347] have been a part of New York's eminent domain law for many years. For instance, legislation passed in Utah, where greater public notice and public hearing are required before a condemnation can take effect, are commonplace in New York.[348] New York's EDPL already requires a condemning entity to give public notice by serving notice upon an owner,[349] conduct public hearings, and review the public use served by the proposed project.[350] Additionally, the requirements to provide all of a development project's details and to provide for extensive public debates[351] during the hearings, furnish New Yorkers with an opportunity to examine, comment, and question the proposed condemnations and subsequent development projects.[352]

Moreover, the EDPL is not the only procedural obstacle a condemning entity faces. The State Environmental Quality Review Act also prescribes procedural protections in the form of a review of the extensive environmental impact statements each condemning authority is required to

344. *See supra* text accompanying notes 255–57.

345. Brief for the City of New York, *supra* note 152, at 5; *see also supra* text accompanying note 248.

346. *See supra* Part I.C.2.a.

347. *See supra* Part I.C.2.b.

348. *Compare* S.B. 117, 56th Leg., Gen. Sess. (Utah 2006), *with* N.Y. Em. Dom. Proc. Law §§ 201–02 (McKinney 2006), *and* Tharp et al., *supra* note 278, § 28.46 (discussing the EDPL's requirements for public hearings).

349. *See* Tharp et al., *supra* note 278, § 28.46 (discussing the EDPL's requirements in § 201).

350. *See id.* § 28.46; *see also supra* text accompanying notes 283–86.

351. *See supra* text accompanying notes 283–87.

352. *See supra* text accompanying notes 287–90.

provide.[353] In addition, condemning agencies, like the UDC, outline their proposed plans and provide transcripts of hearings, copies of general project plans, public hearing notices, and the final environmental impact statements on their web sites.[354]

Furthermore, any concern about developmental agencies' eminent domain powers[355] should not be exaggerated. The procedural safeguards New York's EDPL establishes are not limited to city and municipality takings; they also apply to situations where developmental agencies and/or authorities seek to condemn an area—thus, they apply to all "condemnors."[356] Therefore, New York's uniformly applied EDPL and the State Environmental Quality Review Act provide citizens with two layers of protection against controversial economic development takings by supplying them with a case-by-case review of every condemnation to ensure public participation and well-planned land use.[357]

D. *New Yorkers Can Use the Political Process to Implement Any Necessary Procedural Changes to New York's Eminent Domain Law*

Although New York's EDPL provides extensive procedural requirements to ensure that condemning authorities proceed according to both the requirements of the U.S. Constitution and New York Constitution,[358] times change and New York law must have the flexibility to reform and accommodate various concerns. For example, opponents of New York's current eminent domain law and procedures have proposed limiting economic development takings to strictly blighted areas.[359] They have also recommended procedural changes to pacify concerns resulting from the lack of "just compensation" that is given to property owners whose property has been condemned.[360] However, even if these concerns about certain eminent domain procedural flaws are valid, they require neither restricting the current procedural laws nor prohibiting economic development from constituting a public use or purpose. Instead, citizens can turn to the political process to amend the EDPL.[361]

---

353. *See supra* text accompanying notes 288–89.

354. *See* Empire State Dev. Corp., *supra* note 289 and accompanying text.

355. *See supra* Part II.A.3.

356. *See* N.Y. Em. Dom. Proc. Law §§ 103–104 (McKinney 2006); *see also* Tharp et al., *supra* note 278, § 28.46. Section 103 defines a "condemnor" as "any entity vested with the power of eminent domain," and section 104 states that "[t]he eminent domain procedure law shall be uniformly applied to any and all acquisitions by eminent domain of real property within the state." N.Y. Em. Dom. Proc. Law §§103–104.

357. *See supra* text accompanying notes 19–28, 283–90.

358. *See supra* text accompanying notes 7–8.

359. *See supra* Part II.A.1.

360. *See supra* text accompanying notes 229–31.

361. *See* Gallagher, *supra* note 115, at 1866–67 (arguing that the political process is a means by which concerned citizens can instigate eminent domain change). This proposition has also been suggested for citizens of other cities, such as those in Connecticut, where the mayor of the City of Hartford testified before the U.S. Senate Judiciary Committee and stated,

The series of New York State Senate Judiciary Committee hearings held in 2006 show that New Yorkers are not prevented from proposing reforms.[362] Besides committee hearings, New Yorkers have the option of lobbying their representatives to propose procedural legislation or to hold statewide referendums. In other parts of the country, citizens have used the political process to affect the use of eminent domain in their states.[363] For example, during the 2006 midterm elections, CNN reported that "[v]oters in nine states issued a stunning rebuke to all levels of government on the issue of eminent domain. In those states, voters halted the rising national trend of allowing primarily local governments to seize personal property for private commercial development."[364]

Although New Yorkers can turn to the political process to elect candidates that will work to change the state's eminent domain laws, they must still realize that hastily proposed laws that do not consider the full ramification of procedural or prohibitory measures will most likely result in great difficulties for New York's development projects.[365] Opponents of New York's eminent domain laws have called for restricting economic development takings to truly blighted areas[366] and thus want to prohibit any taking that is solely for economic development purposes or that encompasses areas that are not blighted in the narrow sense of the word.[367] However, preventing property that is not blighted, but is in an area that is deemed blighted, from being condemned will most likely have great ramifications. For a redevelopment project to take effect, an entire area must be condemned together. The condemning entity must assemble large parcels of land,[368] which often are under separate ownership and are not all necessarily physically blighted.[369] For instance, the contested

---

> There is a way for citizens that are particularly upset with the use of eminent domain to voice their discontent. Hartford residents vote policy makers into office. If there is a concern over a certain policy, the remedy for citizens is to make their opinions heard not only through civic involvement and awareness, but also through the ballot box.

Testimony of Eddie A. Perez, *supra* note 260.

362. *See supra* text accompanying note 266; *see also* Benjamin, *supra* note 204; LaGrasse *supra* note 38.

363. Lou Dobbs, *Dobbs: A Big 'Hallelujah' for American Voters*, CNN.com, Nov. 9, 2006, http://www.cnn.com/2006/US/11/08/Dobbs.Nov9/index.html.

364. *Id.*

365. *See supra* note 248 and accompanying text; *see also* Brief for the City of New York, supra note 152, at 5 (stating that economic development is a "crucial tool" for the city).

366. *See, e.g.*, Berliner, *supra* note 216; *see also* Part II.A.1.

367. *See* Part II.A.1.

368. *See* Gallagher, *supra* note 115, at 1866–67 (arguing that governments rely on the power of eminent domain to carry out large-scale development projects by assembling large parcels of land); *see, e.g.*, Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985); *supra* text accompanying notes 244–46.

369. *See* Gallagher, *supra* note 115, at 1866–67; *see also Rosenthal*, 771 F.2d at 46. Note that the Supreme Court has also recognized that a redevelopment project may sometimes require the condemnation of both blighted and un-blighted property. *See* Berman v. Parker, 348 U.S. 26, 35 (1954).

condemnations in the Times Square area that New York courts upheld[370] were part of a revitalization project that required the UDC to take both blighted and un-blighted property.[371] Restricting condemnations on a parcel-by-parcel basis to prevent the taking of an un-blighted piece of property will greatly hinder a development project because developers will not be able to use the entire area and will be forced to build around single pieces of un-blighted property.[372]

Additionally, any restrictions, such as those recently adopted by the Iowa legislature,[373] that only allow for economic development in areas that fall under a narrow definition of blight—slum conditions—will likely promote the targeting of low-income communities since these areas are often deemed blighted under the narrow definition of blight.[374] As Professor Merrill has argued, a pure economic development scheme can provide for better targeted condemnations that promote economic development as opposed to only removing blight.[375] By allowing for pure economic development takings, New York's condemnations will most likely result in more eminent domain success stories in the future, by minimizing the risk of displacing many lower-income families who may not be able to afford to relocate, and by "jump start[ing] growth"[376] in low-income areas.

Voters should also take care to address concerns over the alleged lack of satisfactory "just compensation" in the condemnations that occur in the state.[377] It is only logical to acknowledge that at times, New York's definition of just compensation may not be enough to truly compensate property owners. However, a flaw in the implementation of a procedural requirement is no reason to forbid economic development takings by preventing these takings from constituting a public use. Emotions must not override logic and efficient land use. It would be unwise for New York courts or the legislature to follow the large number of other states that have determined that a broad interpretation of public use or purpose is invalid.[378] Such prohibitory legislation creating an outright ban on economic development takings could smother many of the economic benefits, such as increases in tax revenue and employment, which have yet to come to New York City.[379]

Additionally, any disparity in compensation is an issue that can be tackled in procedural reform legislation. Recently passed legislation in Kansas provides an example of wise legislation that did not prohibit

370. *See supra* Part I.A.2.b.
371. *See, e.g.*, *Rosenthal*, 771 F.2d at 46.
372. *See supra* notes 244–46 and accompanying text.
373. *See supra* notes 178–82 and accompanying text.
374. *See supra* text accompanying notes 291–94.
375. *See* Testimony of Merrill, *supra* note 291; *see also supra* text accompanying note 295.
376. *See* Testimony of Merrill, *supra* note 291.
377. *See supra* Part II.A.2.
378. *See supra* Part I.C.2.a.
379. *See supra* text accompanying note 248; *see also supra* Part II.B.1.

economic development takings but instead reformed procedural requirements.[380] The Kansas legislature amended its eminent domain law by further defining the state's public use requirement without banning the use of eminent domain for economic development condemnations.[381] More importantly, it addressed the problem of just compensation by requiring compensation of 200% of the fair market value of the condemned property.[382] New Yorkers who are unhappy with the current compensation scheme can follow Kansas's lead and propose amending the EDPL to provide for more satisfactory just compensation. Carefully considered procedural reform, as opposed to hastily proposed procedural or prohibitory legislation, will allow New York to continue to use economic development condemnations to maintain economic stability while simultaneously providing its citizens with even more protection than is already in place.

CONCLUSION

A broadly interpreted definition of the public use and/or purpose requirement for condemnations has been a part of New York's legal landscape for decades.[383] Although New York's use of eminent domain for economic development projects has been repeatedly criticized,[384] the benefits from such condemnations outweigh any arguments put forth for prohibiting economic development takings from constituting a public use. The New York judiciary's approval of various contested economic development takings has resulted in very impressive success stories as evidenced by the redevelopment projects in Times Square, Lower Manhattan, and Lincoln Center.[385] The benefits that have resulted from these projects, including increased tax revenues, employment opportunities, and overall neighborhood revitalizations, exemplify the benefits that New York, especially New York City, has reaped from a broad interpretation of the public use requirement.[386] However, no system is perfect. Procedural flaws, such as the amount of compensation paid for the condemned properties, can, and do, pose problems. Yet, even if New York's EDPL is not perfect, its deficiencies should be addressed through the political process by implementing procedural reform.[387] An overhaul of the broadly interpreted public use requirement is unnecessary; it will result in compromising a "crucial tool in the [c]ity's ability to meet its future, and [prevent the] creat[ion] [of] balanced and prosperous neighborhoods"[388] able to maintain economic growth and stability.

---

380. *See supra* text accompanying notes 196–99.
381. *See supra* text accompanying notes 196–99.
382. *See supra* text accompanying note 199.
383. *See supra* Parts I.A.2.b–c, III.A.
384. *See supra* Part II.A.
385. *See supra* Part II.B.2.
386. *See supra* Part II.B.2.
387. *See supra* Part III.D.
388. Brief for the City of New York, *supra* note 152, at 5.