NOTE

TAKINGS FOR ECONOMIC DEVELOPMENT IN NEW YORK: A CONSTITUTIONAL SLAM DUNK?

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Professional sports stadiums and arenas funded or subsidized by taxpayers are not a new development. In recent years, however, the use of eminent domain to facilitate the aggregation of land for these major projects is a tactic that has gained in popularity. While this is clearly permissible under recent Supreme Court interpretations of the United States Constitution, it is less clear that this is permissible under the New York constitution. The New York Court of Appeals has never directly confronted this constitutional question. Instead, the Court of Appeals usually upholds seizures on less controversial grounds, such as public use in the classic sense or curing harmful conditions like urban blight. The court used these less controversial grounds to uphold a seizure of private land to facilitate construction of a new basketball arena in Brooklyn for the New Jersey Nets. The Court of Appeals' silence on the use of eminent domain to facilitate the aggregation of land for major projects has led to decisions in lower courts that allow such takings based solely on economic development grounds and lower courts possibly using subterfuge or pretext in classifying certain areas as blighted. The Court of Appeals should expressly state that economic development is not a permissible public use, as constrained by the New York constitution, and more diligently police the boundaries of the definition of blight to prevent pretext and ensure that the public purpose of a project is truly the dominant purpose.

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INTRODUCTION

Eminent domain and possible legislative protections against takings have recently become a divisive issue nationwide, and New York is no exception.[1] The ability to take private property for public purpose under eminent domain is recognized as a sovereign power, not dependent on any express grant of power by a constitutional provision.[2] This power, however, is limited. The United States Constitution,[3] the Constitution of the State of New York,[4] and, more recently, New York Eminent Domain Procedure Law[5] govern the state's eminent domain power.

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[1] *See generally* Bernard W. Bell, *Legislatively Revising* Kelo v. City of New London: *Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165 (2006) (discussing congressional restraints on state and local control over government takings in the wake of the Court's decision); John Caher, *"*Kelo*"-related Bills Pass Senate Judiciary Body*, 235 N.Y.L.J. 2 (2006) (discussing progress of New York legislation); Alberto B. Lopez, *Revisiting* Kelo *and Eminent Domain's "Summer of Scrutiny,"* 59 ALA. L. REV. 561 (2008) (reviewing the court's decision and legislative responses); James Freda, Note, *Does New London Burn Again?: Eminent Domain, Liberty and Populism in the Wake of* Kelo*,* 15 CORNELL J.L. & PUB. POL'Y 483 (2006) (discussing popular outcry and legislative reaction to *Kelo*).

[2] Heyward v. Mayor of New York, 7 N.Y. 314, 324 (1852).

[3] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see* Kelo v. City of New London, 545 U.S. 469, 472 n.1 (2005).

[4] N.Y. CONST. art. I, § 7 (amended 2001).

[5] N.Y. EM. DOM. PROC. LAW §§ 101–709 (2002).

At the heart of the debate is *Kelo v. City of New London*,[6] a controversial decision that explored the outer bounds of "public use" as it is used in the Fifth Amendment. While the court narrowly affirmed a taking under Connecticut law, which did not require a finding of blight,[7] many considered the case an uncontroversial outgrowth of twentieth century eminent domain jurisprudence.[8] Inarguably, however, the *Kelo* opinions helped define three competing interpretations of "public use."[9] The majority opinion, written by Justice Stevens, accepted economic development as a permissible public use.[10] Justice O'Connor's dissent rejected pure economic development as public use and instead would require that any transfer of public land to private parties first show that it remedies a public harm such as blight or oligopoly.[11] The third opinion, a dissent by Justice Thomas, argued that neither a finding of blight nor an intention to ameliorate blight constitutes a valid public purpose.[12] Notably, the majority in *Kelo* pointed out that if states were unhappy with this permissive interpretation of public use, they could restrict it by statute or state constitution.[13]

This Note explores whether New York allows the same expansive definition of public use adopted by the court in *Kelo* or whether the New York constitution further limits the eminent domain power. Part I discusses the history of New York eminent domain law. This historical tracing begins in the early days of the Takings Clause in the New York constitution and follows its treatment in subsequent constitutional conventions and legislation. Part II examines the current state of eminent domain law, the modern interpretation of "public use," and the New York Court of Appeals' reluctance to definitively speak on the matter. The capture of a large array of public uses under the current definition of blight and the effect this has had on the development of the law of public use in New York is also discussed. Part III studies in depth the case of *Goldstein v. New York State Urban Development Corp.*[14] This recent decision by the New York Court of Appeals illustrates many of the key

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6 545 U.S. 469 (2005).

7 *Id.* at 483–84.

8 *See e.g.*, Marcilynn A. Burke, *Much Ado About Nothing*: Kelo v. City of New London*,* Babbitt v. Sweet Home*, and Other Tales from the Supreme Court*, 75 U. CIN. L. REV. 663, 682–83 (2006).

9 *See, e.g.*, Trent L. Pepper, Note, *Blight Elimination Takings as Eminent Domain Abuse: The Great Lakes States in* Kelo's *Public Use Paradigms*, 5 AVE MARIA L. REV. 299, 304–08 (2007).

10 *Kelo* 545 U.S. at 484.

11 *See id.* at 500–01 (O'Connor, J., dissenting).

12 *See id.* at 521 (Thomas, J., dissenting) ("[T]he government may take property only if it actually uses or gives the public a legal right to use the property.").

13 *See id.* at 489 (majority opinion).

14 921 N.E.2d 164 (N.Y. 2009).

issues in New York takings law. While this case had the potential to fundamentally alter New York takings law, it does not substantially deviate from other eminent domain cases. Part IV discusses potential judicial solutions to the main issues surrounding takings law. This Part highlights the missed opportunities to rein in the expansive scope of eminent domain power, and the potential consequences of not acting.

I. THE SCOPE OF THE EMINENT DOMAIN POWER UNDER THE NEW YORK CONSTITUTION

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation."[15] This clause, incorporated against the states by the Fourteenth Amendment, functions as a limit on states' takings power. Under the U.S. system of federal and state jurisdictions, incorporated constitutional rights define a minimum level of legal protection, while the states are free to add further protections through their own constitutions.[16] Thus, while the Takings Clause principles elaborated in *Kelo* do not restrict states such as New York from adding heightened protections for property owners, they preserve a mandatory floor of protection.

Eminent domain as a limited sovereign power has taken several forms through different periods of New York's history. Unsurprisingly, the New York courts and legislatures have expanded the power over time, seeking to allow the government greater flexibility to take private property for a public purpose. When the evolution of permissible public uses under the eminent domain power is neatly separated into three separate regimes (not necessarily divided chronologically) they fit nicely into the framework of the three opinions in *Kelo.*[17]

A. Eminent Domain Takings in the Nineteenth Century

The eminent domain power was weakest during the early years of statehood. During this period, the state government had power to take private property only for "classic" public uses: situations when the state or municipality owns the property or when a private party holds the property in common for the public. Under this understanding of public use, the courts would overrule the taking unless its purpose was truly public.

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15 U.S. CONST. amend. V.

16 *See* Judith S. Kaye, Assoc. Judge, N.Y. Court of Appeals, Benjamin N. Cardozo Lecture Before the Association of the Bar of the City of New York: Dual Constitutionalism in Practice and Principle (Feb. 26, 1987) (transcript available at http://www.nycourts.gov/history/elecbook/kaye_cardozo/pg1.htm) (describing the historical and theoretical underpinnings of federalism and the preservation of rights).

17 *See Kelo*, 545 U.S. 469; *see also* Pepper, *supra* note 9.

For example, in *In re Niagara Falls & Whirlpool Railway Co.*, the court declined to uphold a proposed taking that would create a private railroad to service sightseeing trips to Niagara Falls.[18] Distinguishing this project from more traditional rail lines and noting that the railroad would serve only interested sightseers for a short time during the year, the court reasoned that the taking's purpose was not truly public.[19]

Justice Thomas' dissent in *Kelo* also illustrates this traditional and narrow understanding of eminent domain power.[20] Justice Thomas found the line of cases leading to *Kelo* to be at odds with the basic constitutional principles upon which they purportedly relied, and instead supported the idea that "the government may take property only if it actually uses or gives the public a legal right to use the property."[21] Under this construction of "public use," only a classic public use is recognized as valid.

B. Muller *and the 1938 and 1967 Constitutions*

The New York Court of Appeals began recognizing a greatly expanded concept of public use in the early twentieth century. The court reached a significant turning point in *New York City Housing Authority v. Muller* where it deviated from its restrictive readings of the Takings Clause and approved a novel public use.[22] In *Muller,* the New York City Housing Authority made plans to erect a low-income housing development, and, to accomplish this, it needed to condemn privately owned tenement houses pursuant to its statutorily granted power of eminent domain.[23] Acknowledging the lack of precedent, the court upheld this project as a valid exercise of eminent domain power.[24] By replacing "unsanitary and substandard housing conditions," the housing project would serve a valid public use because the new buildings would eliminate the public menace of a slum and provide low-cost housing.[25]

Two years after the *Muller* decision, the 1938 Constitutional Convention added a provision that expressly created a new ground for exercise of the eminent domain power.[26] In addition to preserving the classic public uses, the new provision explicitly empowered the state to con-

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18 *See In re* Niagara Falls, 15 N.E. 429, 432–33 (N.Y. 1888).

19 *Id.* at 432.

20 *Kelo*, 545 U.S. at 515–21 (Thomas, J., dissenting).

21 *Id.* at 520–21 (Thomas, J., dissenting).

22 *See* 1 N.E.2d 153 (N.Y. 1936).

23 *See id.* at 153–54.

24 *Id.* at 155–56.

25 *See id.* at 154–55.

26 *See* N.Y. CONST. art. XVIII, § 1 (amended 2001).

demn land for the purpose of clearing slums or constructing low-cost housing.[27]

In 1967, New York voters called another constitutional convention. A provision proposed by this convention explicitly authorized eminent domain takings for economic development unconnected with slum clearance or creation of low-cost housing.[28] The constitution proposed in 1967 failed to gain enough votes for ratification, and so the proposed constitutionally explicit recognition of economic development as a public use was defeated.

Justice O'Connor's *Kelo* opinion roughly approximates this concept. In her dissent, O'Connor argued that a taking for purely economic development is not a valid public use.[29] Instead, under her framework, a taking that would result in a transfer to another private party must eliminate some harmful use to be valid.[30] The 1938 constitution's concept of slum clearance can be fairly described as elimination of a harmful use, while the provision relating to creation of public housing can be considered simply a modification of the previous understanding of classic public uses.[31]

C. Economic Development

The twentieth century saw significant expansion in the interpretation of the New York Takings Clause. While the New York Court of Appeals has never held that economic development constitutes a public use, lower state courts have accepted the doctrine.[32]

The majority opinion in *Kelo* held that economic development is a public use under the U.S. Constitution.[33] There is no requirement that the property be blighted or that the public have access to, or otherwise benefit from, the condemned property.[34] Though the opinion generated significant publicity and controversy when it was first issued,[35] it essentially only shifted the minimum required showing for a condemnation.

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27 *See* TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION: HOUSING LABOR AND NATURAL RESOURCES 20 (1967) [hereinafter STATE COMMISSION] (explaining that "[s]ection 1 [of Article XVIII] was intended merely to obviate any doubt as to the power of the Legislature to provide for 'low rent housing for persons of low income' and 'the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas'"); *infra* Part II.A.

28 *See* STATE COMMISSION, *supra* note 27, at 22–24.

29 *See* Kelo v. City of New London, 545 U.S. 469, 498 (2005) (O'Connor, J., dissenting).

30 *See id.* 500–01 (citing previous Court decisions upholding takings to correct territorial ills of blight and oligopoly).

31 *See* N.Y. CONST. art. XVIII, § 1 (amended 2001).

32 See *infra* Part II for in-depth discussion of this development.

33 *See Kelo*, 545 U.S. at 483–84.

34 *See id.*

35 *See* Burke, *supra* note 8, at 684. U.S. Representative Maxine Waters (D-CA) went so far as to compare the Court's holding to "undermining motherhood and apple pie." *Id.*

In New York, the current and future ramifications of the opinion are still unclear.

II. NEW YORK'S IMPLICIT RECOGNITION OF ECONOMIC DEVELOPMENT AS A VALID PUBLIC USE

The New York Court of Appeals has not yet held that New York State's Takings Clause is coterminous with the U.S. Constitution's Takings Clause. Despite this lack of explicit endorsement for economic development as a public use, the Court of Appeals has upheld takings that draw close to, and sometimes blur, the line between economic development and blight reduction or slum clearance.

A. No Explicit Recognition of Bare Economic Development as Public Use

New York's highest court has never endorsed economic development as a valid public use without other factors, despite ample opportunity to do so. Instead, the Court of Appeals has repeatedly couched its discussions of public use in terms of blight or "substandard and insanitary" conditions and clearance of slums for low-cost housing, as provided for in the 1938 constitution[36] and pre-1938 common law,[37] respectively.

The early recognition of an expansive interpretation of public use came in *New York City Housing Authority v. Muller*.[38] In that case, a property owner resisted seizure of two tenement houses, alleging that the condemnation violated the takings clauses of both the federal and state constitutions.[39] The court confronted, for the first time, the issue of slum clearance coupled with creation of low-income housing as a public use.[40] Finding no controlling precedent, the court held that eliminating the evil of slums, when necessarily combined with the production of low-cost housing, constituted a valid public use based on rulings in fellow states and because of the health and safety risks posed by the slums.[41]

The *Muller* court insisted that the valid public use in that case included both slum clearance *and* low-cost housing, going so far as to say "the two things necessarily go together."[42] The handcuffing of slum clearance and creation of low-cost housing did not last long. The 1938 New York Constitutional Convention added Article XVIII, § 1, which

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36 N.Y. CONST. art. XVIII, § 1 (amended 2001).
37 *See* New York City Hous. Auth. v. Muller, 1 N.E.2d 153, 154–55 (N.Y. 1936).
38 *Id.*
39 *Id.* at 153.
40 *See id.* at 154.
41 *Id.* at 154–56.
42 *Id.* at 155.

curiously allowed for either slum clearance *or* erection of housing for low-income persons to constitute public use.[43] Accordingly, the question remained as to whether housing and blight must operate in tandem to allow a taking.

The New York Court of Appeals resolved the ambiguity of Article XVIII, § 1 in *Murray v. La Guardia*.[44] The court ruled, based on the plain meaning of the text and the legislative history, that either slum clearance or low-cost housing could be a valid public use. One would suffice without the other.[45] Because the need for slum clearance in *Murray* was so clear, the court reasoned that substandard and insanitary conditions could be the sole justification of a governmental taking for rehabilitation of an area.[46]

In *Yonkers Community Development Agency v. Morris,*[47] the New York Court of Appeals issued a strong statement to municipalities and agencies that land taken for blight must indeed be substandard.[48] While the court seemed to interpret the state constitutional limits of takings strictly, language in the opinion nonetheless supported a greatly expanded power of eminent domain for municipalities and community redevelopment corporations.[49]

At issue in *Yonkers* was the condemnation of land by a municipal redevelopment corporation that the municipality created in order to implement its permissible goals of slum clearance or creation of low-cost housing.[50] The court makes clear that an agency needs more than just an assertion in its pleadings that blight exists:

> Here, other than the agency's bare pleading of its "substandard" finding, it provided no further data as to the condition of the area, except for the general statement that at least 50% of the structures in the area are "substandard," a figure which, as defendants point out, did no more than coincide with the figure found in an earlier comprehensive city plan, which had designated the area

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43 *See* N.Y. CONST. art XVIII, § 1 (amended 2001). Courts consistently interpret this clause as creating two separate legislatively approved public uses, despite continued insistence by petitioners that both uses were required based on a separate statement in the legislative history. *See, e.g.*, Goldstein v. New York State Urban Development Corp., 921 N.E.2d 164, 167 (N.Y. 2009); Murray v. La Guardia, 52 N.E.2d 884, 889 (N.Y. 1943).

44 52 N.E.2d 884 (N.Y. 1943).

45 *See id.* at 889.

46 *See id.*

47 335 N.E.2d 327 (N.Y. 1975).

48 *Id.* at 332–34 (noting that "courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases").

49 *See id.* at 333–34.

50 *Id.* at 330; *see* N.Y. CONST. art XVIII, § 1 (amended 2001).

> here involved as suitable for rehabilitation rather than clearance. No more can be found in the rest of the agency's supporting papers. They supply only information about the improvements which will be made by Otis *after* it receives the land and the conditions placed upon Otis' subsequent use of the land. The agency has not indicated in any manner the grounds upon which it concluded that the land is presently substandard.[51]

Despite the agency's failure to adequately prove that the land was substandard, the court did not grant relief to the property owners because they failed to properly raise the issue of the quality of the land in their pleadings.[52] Notwithstanding the holding, the language of the court makes clear that without a finding that the condemned land was substandard, a taking is impermissible under the constitution unless the respondents can advance some other public use.[53]

The *Yonkers* decision marked an expansion of what the term "substandard and insanitary" encompasses.[54] Although the government must make an actual showing of substandard conditions, "the agency's road is made easier by the liberal rather than literal definition of 'blighted' area now universally indorsed by case law."[55] Thus, the *Yonkers* decision provided a firm commitment to the substandard conditions requirement while also significantly expanding what constitutes substandard conditions.

The holdings in *Cannata v. City of New York*[56] and *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*[57] represent the ostensible high-water mark for economic development as a public purpose for eminent domain takings. Both cases authorize takings on grounds that approach bare economic development.

In *Cannata,* sixty-eight homeowners challenged the proposed condemnation of their properties under New York General Municipal Law which authorized takings when an area was predominantly vacant and contained other indicia of blight.[58] Although the statute appeared to eliminate a requirement of physical blight for the purposes of slum clear-

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51 *See Yonkers*, 335 N.E.2d at 332–33.

52 *See id.* at 334.

53 *See id.* at 331.

54 *See* N.Y. CONST. art. XVIII, § 1.

55 *Yonkers*, 335 N.E.2d at 332.

56 182 N.E.2d 395 (N.Y. 1962).

57 190 N.E.2d 402 (N.Y. 1963).

58 *See Cannata*, 182 N.E.2d at 396; s*ee also* N.Y. GEN. MUN. LAW § 72-n (1960) (repealed 1961).

ance as a public use, it still required some form of intangible blight.[59] Over plaintiffs' argument that the land could not be taken because it lacked "tangible physical blight," the New York Court of Appeals held that redevelopment for public use could apply to areas that were not yet slums.[60] Accordingly, ameliorating conditions that "arrest the sound growth of the community . . . or tend to create slums or blighted areas" will constitute a valid public use.[61] The area in dispute in *Cannata* was at least 75% vacant, with poor street design and implicated several other statutory factors.[62] While *Cannata* may appear to authorize takings for any sort of economic development, it is important to note that the New York Court of Appeals still required a finding that the land was substandard pursuant to Article XVIII of the 1938 New York constitution.[63]

The New York Court of Appeals was faced with another expansive assertion of public use in *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*.[64] The justification for the taking in *Courtesy Sandwich Shop* did not hinge on blight, slum clearance, or insanitary conditions; rather, the public purpose that permitted the taking rested on "facilitating the flow of commerce and centralizing all activity incident thereto."[65]

The proposed public project at issue in *Courtesy Sandwich Shop* was the World Trade Center, a facility to be built for "the centralized accommodation of functions, activities, and services for or incidental to the transportation of persons, the exchange, buying, selling, and transportation of commodities and property."[66] The court reasoned by analogy that development of a World Trade Center was not very different from development of harbor facilities or promotion of public markets for the exchange of goods.[67] The court pointed out that both of these public purposes had been upheld without significant controversy as public uses in the traditional sense.[68] With these rulings in mind, as well as the very expansive interpretations of "public use" in recent decisions by the United States Supreme Court,[69] the *Courtesy Sandwich Shop* court did not consider the World Trade Center project a very controversial public

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59 *See* N.Y. GEN. MUN. LAW § 72-n (1951) (current version at N.Y. GEN. MUN. LAW § 500, art. 15).

60 *See Cannata*, 182 N.E.2d at 397.

61 *See id.* at 396–97.

62 *See id.*

63 *See id.* at 398 (Van Voorhis, J., dissenting); N.Y. CONST. art. XVIII, § 1 (amended 2001).

64 190 N.E.2d 402 (N.Y. 1963).

65 *See id.* at 405.

66 *Id.*

67 *See id.* at 404–05.

68 *See id.* (citing *In re* Mayor of New York, 31 N.E. 1043 (N.Y. 1892); *In re* Cooper, 28 Hun 515 (N.Y. Sup. Ct. 1882), *appeal dismissed in* 93 N.Y. 507 (1883)).

69 *See id.* (citing Berman v. Parker, 348 U.S. 26 (1954)).

use to uphold.[70] The New York Court of Appeals was careful to couch the public use in terms of traditional public uses like markets and never approached recognizing the validity of bare economic development as a public use.[71]

As the above-discussed cases illustrate, the New York Court of Appeals has never recognized economic development as a valid public use without some connection to slum clearance, tangible or intangible blight amelioration, or a public use in the classic sense. Nor has the court disavowed bare economic development, i.e. private improvement, and use alone as a valid justification.

B. Unwillingness to Strictly Police the Agencies and Municipalities

The New York Court of Appeals has refused to closely examine factual findings made by agencies and municipalities as they relate to determinations of blight, substandard conditions, over-inclusiveness of areas targeted for redevelopment, or questions of pretext. Instead, the court applies a highly deferential standard to factual findings made by agencies and municipalities, as well as those of the legislature.

The New York Court of Appeals' deference to findings by other political bodies has a long history. In a well-respected treatise on municipal corporations, Judge Forrest Dillon explained that once a legislature has declared a public use, the courts will respect the declaration unless it is "plainly without reasonable foundation."[72] This deference can be traced back at least as far as *New York City Housing Authority v. Muller*.[73] In adjudicating the taking of land for improvement and housing, the *Muller* court carefully noted that while "legislative findings and the determination of public use are not conclusive on the courts . . . they are entitled at least to great respect, since they relate to public conditions concerning which the Legislature both by necessity and duty must have known."[74] The court accepted the findings of fact and conclusions made by the legislature, in part because all of the conditions that had concerned the legislature were actually present in this case.[75] The court concluded, based on its own independent analysis of relevant case law in New York and other states, that a finding of public purpose in slum clearance and public housing was justified.[76]

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70 *See id.* at 405–06.

71 *See id.* at 405 (rejecting the argument that the taking's principle purpose was revenue production).

72 JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1036 (600) (5th ed., rev. 1911).

73 *See* 1 N.E.2d 153 (N.Y. 1936).

74 *Id.* at 154.

75 *See id.*

76 *Id.* at 154–56.

The New York Court of Appeals employed very similar thinking in *Murray v. La Guardia*[77] just seven years later. In that case, the court considered the legislature's declaration of policy as embodied by the constitution, rather than through statute.[78] The court again accepted the statement of legislative reasons as sufficient to sustain a public purpose.[79]

In *Kaskel v. Impellitteri*,[80] the New York Court of Appeals made another strong statement regarding its unwillingness to look closely at a political branch's determination of whether a public purpose exists where the government is attempting to exercise its eminent domain power. In *Kaskel,* the plaintiff sued under New York General Municipal Law § 51, which authorized prosecution of government agents for illegal acts.[81] The plaintiff alleged that several public officials made incorrect findings regarding the "substandard or insanitary" condition of the disputed area.[82] The plaintiff wanted a trial to determine as a matter of fact whether the proposed site was "substandard or insanitary" and ultimately, whether the officials acted illegally by exceeding the bounds of the enabling statute.[83] The court issued two strong opinions.

In the majority opinion, Judge Charles S. Desmond looked to other cases interpreting the rights of taxpayers to challenge official acts of government agents under § 51.[84] Under the standard generally applied to § 51, an official action should not be enjoined unless the action involves fraud or a waste of public money in the sense that the official was acting for entirely illegal purposes.[85] Because the plaintiff only alleged that the actions complained of were "arbitrary and capricious," and had not pleaded fraud or illegality, he failed to state a claim under the statute, and the court granted summary judgment.[86] The majority went on to say:

> One can conceive of a hypothetical case where the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary, in which case, probably, the conditions for the exercise of the power would not be present. However, the situation here actually displayed is one of those as to which the Legislature has authorized the city officials,

77 Murray v. La Guardia, 52 N.E.2d 884 (N.Y. 1943).
78 *Id.* at 887–88.
79 *Id.* at 888.
80 115 N.E.2d 659 (N.Y. 1953).
81 *See id.* at 661; *see also* N.Y. GEN. MUN. LAW § 51 (2007).
82 *See Kaskel*, 115 N.E.2d at 661.
83 *See id.*
84 *See id.*
85 *See id.*
86 *See id.*

> including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts. If there were to be a trial here and the courts below should decide in favor of plaintiff, there would be effected a transfer of power from the appropriate public officials to the courts. The question is simply not a justiciable one.[87]

The court also pointed out that though it was unlikely that responsible public officials would wrongfully label an area as substandard and insanitary, it may occur at some point in the future, and, upon that occurrence, the court would address the situation.[88]

In a separate opinion, Judge John Van Voorhis dissented, writing that triable issues of fact existed and that the plaintiff's pleadings sufficiently raised the issues as evinced by the record before the court.[89] The dissent took the view that a showing of fraud or illegality was not literally required, but rather, this requirement was simply an unfortunate phrasing of an extreme abuse of discretion.[90] For purposes of a summary judgment motion in the *Kaskel* case, Van Voorhis explained that the facts on the record, read in conjunction with the pleading, were sufficient to "rebut the presumption of regularity of official acts."[91] The dissent also took issue with the majority's view that this sort of question is inappropriate for decision by the judicial branch.[92] The dissent urged that though the court should not involve itself in every determination involving agency discretion, this question was within the court's competence and jurisdiction.[93] The dissent further urged that it was appropriate to limit the bounds of agency or official discretion in some circumstances.[94]

Of these two competing viewpoints, the majority has proved more lasting.[95] Other courts have followed the *Kaskel* court's hands-off approach not only in cases where procedural limitations inform the outcome, but also in challenges to takings by property owners who are directly affected and are asserting a substantive, constitutional defense to

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87 *See id.* at 662.

88 *See id.* at 663.

89 *See id.* at 665 (Van Voorhis, J., dissenting).

90 *See id.*

91 *Id.* at 669.

92 *See id.* at 665–66.

93 *See id.*

94 *See id.*

95 *See, e.g.*, Goldstein v. New York State Urban Dev. Corp., 921 N.E.2d 164, 173 (N.Y. 2009).

the taking.[96] In *Goldstein v. New York State Urban Development Corporation*, for example, the court held that as long as the agency's findings are reasonable, its determination that a taking is valid will stand—even over plaintiff's reasonable objections.[97] Accordingly, "It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views."[98]

The Court of Appeals applied this strongly deferential standard in the *Yonkers* decision as well. Although it noted that courts need to do more than simply rubber-stamp agency and municipality decisions,[99] the court did precisely this in holding for the government agency in *Yonkers*. The Community Development Agency of the City of Yonkers made a determination that at least 50% of the land in question was substandard and sought to condemn it.[100] In its pleadings, however, the agency did not provide any factual support for its assertion.[101] It merely supplemented its pleading with information about the improvements to the land.[102] But because the landowners focused their appeal on the benefit to private parties rather than on the condition of the land, the court did not take issue with the agency's inadequate pleadings.[103] As a result, the issue of whether the land was actually substandard was foreclosed, and, relying on the decision in *Kaskel*, the court held that the agency's determination that the land was substandard was "adequate" and entitled to deference.[104] Even though the agency had no evidence to support its bare assertion that substandard conditions existed, the court declined to scrutinize the agency's determination because the landowners failed to properly address the issue in their pleadings.[105] Rather than require the agency to supplement its pleadings with some sort of factual predicate on which to base its assertions, the court deferred—again deftly side-stepping its role in determining the limits of the government's eminent domain power.

The New York Court of Appeals has repeatedly and emphatically renounced any significant role in policing the limits of public use as it relates to agency or municipality findings of blight, substandard conditions, and other issues appropriate for review by a court. This deference has produced predictable results: A tie between a landowner and the gov-

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96 *See id.* at 172.
97 *See id.* at 173.
98 *Id.*
99 *See* Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 333 (N.Y. 1975).
100 *See id.* at 332.
101 *See id.* at 333.
102 *See id.*
103 *See id.* at 334.
104 *See id.*
105 *See id.*

ernment will almost certainly result in deference to the government. This is undoubtedly a troubling way to guard constitutional rights.

C. Expansive and Questionable Holdings

The problems created by the New York Court of Appeals' reluctance to police the limits of eminent domain power are compounded by its issuance of unclear and convoluted holdings. Later courts have often misconstrued or misapplied the Court of Appeals' ambiguous holdings, and this is gradually shifting the law away from the original holdings without explicit constitutional authorization or even intention to do so.

This trend appeared early in modern New York eminent domain jurisprudence. In *Kaskel v. Impellitteri,* the court was presented with a complicated factual question of possible overinclusion in a seized area.[106] The disputed area contained many areas that both sides accepted as "substandard and insanitary," but the plaintiffs contended that the contested property was unrelated to the disputed areas and its seizure was not necessary to accomplish the city's goals.[107]

The majority in *Kaskel* decided the case on narrow grounds. Presiding over a taxpayer action under § 51 of the New York General Municipal Law, the court held that it could only prevent the seizure of property if the taxpayer funds were being expended entirely for illegal purposes.[108] Because the plaintiffs failed to specifically allege municipal fraud, the court held that it could not enjoin the seizure.[109] The court also reasoned that because the question under § 51 was one of bare illegality of the seizure rather than the legality of the *scope* of the seizure, a challenge based on a theory of over-inclusion was inappropriate for the court to review.[110]

Although the *Kaskel* majority avoided a closer examination of the particulars of this taking, it did not completely foreclose an attack upon the scope of an eminent domain seizure. The court recognized that in some circumstances, a party might validly argue that a seizure was simply overinclusive, saying: "One can conceive of a hypothetical case where the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary."[111] The dissenters who took this tack did not feel as constrained as the majority in a

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106 *See* 115 N.E.2d 659, 661 (N.Y. 1953).

107 *See id.* at 661–62.

108 *See id.*; *see also* N.Y. GEN. MUN. LAW § 51 (consol. 2010).

109 *See Kaskel*, 115 N.E.2d at 661–62.

110 *See id.* at 662.

111 *Id.*

taxpayer-plaintiff case, and they would have allowed this case to at least move past the summary judgment stage, and come before a fact finder.[112]

Notably, both the majority and the minority in *Kaskel* appear to agree that the primary purpose of an eminent domain taking must be its public purpose. This peculiarity was noted specifically in *Yonkers*.[113] This small aside, however, garnered no significant attention, and the New York Court of Appeals has almost never revisited at length the idea that a project's public purpose must be its primary purpose.[114]

This forgotten rule is far from unique in New York takings law. The New York Court of Appeals in *Cannata* helped shape another rule that struggled to find its niche. In that case, a group of homeowners brought a suit seeking to enjoin the taking of their land for a redevelopment project.[115] The public use in *Cannata* was decidedly unique. The court based its holding on § 72 of the New York General Municipal Law, which granted eminent domain power where a particular location showed mere risk of blight.[116] The statute listed several conditions that, when found, could justify an eminent domain taking:

> [S]ubdivision of the land into lots of such form, shape or size as to be incapable of effective development; obsolete and poorly designed street patterns with inadequate access; unsuitable topographic or other physical conditions impeding the development of appropriate uses; obsolete utilities; buildings unfit for use or occupancy as a result of age, obsolescence, etc.; dangerous, unsanitary or improper uses and conditions adversely affecting public health, safety or welfare; scattered improvements.[117]

This list seems to greatly expand the power of eminent domain, but it came with a major limitation: For the enumerated conditions to fulfill a finding of public use thereby enabling the use of eminent domain power, the land had to be predominantly vacant.[118]

The land involved in *Cannata*, being 75% vacant, met this newly-articulated requirement, and the court had no trouble determining that the taking in question served a public use.[119] Section 72 may have been constitutionally suspect for its broad grant of power over private land for

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112 *See id.* at 663 (Van Voorhis, J., dissenting).

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

114 *But see* Goldstein v. New York State Urban Dev. Corp., 921 N.E.2d 164, 188 (N.Y. 2009) (Smith, J., dissenting).

115 *See* Cannata v. City of New York, 182 N.E.2d 395, 396 (N.Y. 1962).

116 *See id.*; *see also* N.Y. GEN. MUN. LAW § 72 (1960) (repealed 1961).

117 *Cannata*, 182 N.E.2d at 396.

118 *See id.*

119 *See id.*

mere risk of blight, and indeed, it was subsequently repealed.[120] Notwithstanding the status of the statute, however, the area in question was arguably substandard even by a traditional understanding.[121]

The real harm from the statute was not truly revealed until years later, when the New York Court of Appeals' decided *Yonkers*. The breadth of the factors enumerated in the statute was narrowed in *Cannata* by the statutory requirement that an area be predominantly vacant.[122] The court in *Yonkers*, however, seemed more concerned with following the national trend in eminent domain law rather than observing established precedent. The court cited with approval all seven statutory factors quoted *Cannata*, as well as other public uses found in commentary and cases from other states.[123] Rather than detail the intricacy of the statute—that it required a finding of vacancy along with the listed conditions, and furthermore, that it had long been repealed by the time of the *Yonkers* decision—the court treated the factors cursorily.[124] The court was primarily concerned with clarifying that New York would follow a "liberal rather than a literal definition" of blight.[125]

The New York Court of Appeals in *Yonkers* thus altered the understanding of public use by liberalizing the definition of blight in its dicta.[126] By including the expansive terms found in the repealed § 72 without an in-depth examination of how those conditions apply, the court invited misinterpretation in subsequent decisions.[127]

The expansion of the eminent domain power, however, was not only attributable to misconstruction and liberalization of the definition of blight. The court in *Courtesy Sandwich*, for example, expanded eminent domain through a more traditional means: namely, stretching questionable facts to fit a commonly accepted classic public use.[128] The majority allowed a taking for the World Trade Center based on a public use in the classic sense—a public building to be used to "facilitate the flow of commerce."[129]

The dissent, however, was suspicious of a massive project in which the theory of public use rested on public benefits from a centralization of international trade.[130] The vague statutory mandate authorizing the pro-

120 *See id.* at 397 (Van Voorhis, J., dissenting).
121 *See id.*
122 *See id.* at 396–97 (majority opinion).
123 *See* Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 333 (N.Y. 1975).
124 *See id.*
125 *See id.*
126 *See id.*
127 *See, e.g.*, Courtesy Sandwich Shop, Inc. v. Port of New York Auth., 190 N.E.2d 402, 405 (N.Y. 1963).
128 *See id.*
129 *See id.* at 404–05.
130 *See id.* at 409 (Van Voorhis, J., dissenting).

ject seemed so broad as to allow nearly any proposed business project to fit the profile.[131] The dissent argued that this statute allowed the city to transform the project from a public works building into a simple real estate investment, with the city as the proprietor.[132] The majority and dissent's rebranding of the same facts did nothing to clear the waters for subsequent eminent domain cases.

D. Lower Courts

Several lower court decisions have fallen victim to the quagmire of eminent domain law created by the New York Court of Appeals. The combination of a failure to explicitly disavow economic development as a valid public use, an exceedingly deferential approach to the findings of municipalities and agencies, and the expansive trend of holdings and dicta in the New York Court of Appeals has given the Appellate Division little guidance.

The first lower court case to explicitly recognize economic development as a public use with no mention of amelioration of blight or slum clearance was *Northeast Parent & Child Society, Inc. v. Schenectady Industrial Development Agency*.[133] In that case, an agency condemned a former school recently purchased by the petitioners in order to entice an industrial tenant to remain in the community.[134] The court upheld this as a valid public purpose by finding that the project's public purpose "was to increase Schenectady's tax base and diversify its economy."[135] Unsurprisingly, the court made no mention of substandard or insanitary conditions, blight, or slum clearance. The building was clearly none of these things and was only seized in order to entice another private party to remain in the city.

The trend toward pure economic takings continued nine years later in *Sunrise Properties v. Jamestown Urban Renewal Agency*.[136] In that case, the petitioner challenged a taking as providing no public use, benefit, or purpose.[137] The court unequivocally held that respondent's determination that "condemnation of the property would create jobs, provide infrastructure, and possibly stimulate new private sector economic development" satisfied the public purpose requirement.[138] There was no determination that the property was substandard, only that it was

131 *See id.*
132 *See id.* at 409–11.
133 494 N.Y.S.2d 503 (App. Div. 1985).
134 *See id.* at 504–05.
135 *Id.* at 504.
136 614 N.Y.S.2d 841 (App. Div. 1994).
137 *See id.* at 842.
138 *Id.*

underutilized, thus making it even clearer that the taking was only motivated by economic development.[139]

Following the Appellate Division's decisions in *Sunrise Properties* and *Northeast Parent & Child,* the determination in *In re Fisher*[140] was not a dramatic divergence. In *Fisher,* the government condemned petitioner's rent-stabilized apartment to clear space for a proposed New York Stock Exchange project.[141] The court held that the project constituted a public use by writing that it would "result in substantial public benefits, among them increased tax revenues, economic development and job opportunities as well as preservation and enhancement of New York's prestigious position as a worldwide financial center."[142] As in the two abovementioned cases, the court held on these economic grounds exclusively, with no mention of substandard or insanitary conditions.

The holding in *Fisher* illustrates the slowly creeping, judicially-interpreted definition of public use. To support its holding, the *Fisher* court cited *Greenwich Associates v. Metropolitan Transportation Authority*,[143] which defined public use "as any use which contributes to the health, safety, general welfare, convenience or prosperity of the community."[144] This broad language seems unnecessary, as the challenged taking in *Greenwich* did not involve a taking for economic development. Instead, the government intended the taking to provide increased access and support to a railroad facility, an objective which is properly understood as a classic public use[145] *Greenwich*, in turn, adopted the language from *Byrne ex rel. Pine Grove Beach Ass'n. v. New York State Office of Parks, Recreation & Historic Preservation*.[146] Despite the broad language, *Byrne* merely affirmed another uncontroversial, classic public use—the creation of a refuge for the safety of boaters on Lake Ontario.[147]

The unnecessarily broad language of these holdings originates with *Muller*.[148] The *Muller* court, however, narrowly stated that a public purpose could be found only when a condition seemed to be a "substantial

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139 *See id.*

140 730 N.Y.S.2d 516 (App. Div. 2001).

141 *See id.* at 516.

142 *Id.* at 517.

143 548 N.Y.S.2d 190 (App. Div. 1989), *dismissed sub nom.* Regency-Lexington Partners v. Metro. Transp. Auth., 552 N.E.2d 178 (1990).

144 *Id.* at 193 (quoting Byrne ex rel. Pine Grove Beach Ass'n. v. New York State Office of Parks, Recreation & Historic Pres., 476 N.Y.S.2d 42, 42 (App. Div. 1984) (internal quotation marks omitted)).

145 *See* Greenwich Associates v. Metropolitan Transportation Authority, 548 N.Y.S.2d 190, 191 (App. Div. 1989).

146 *Byrne*, 476 N.Y.S.2d at 42.

147 *See id.*

148 *See* 1 N.E.2d 153, 154–55 (N.Y. 1936).

menace." And the *Muller* court only allowed for action when the "power applied is reasonably and fairly calculated to check it, and bears a reasonable relation to the evil."[149] Accordingly, the court rested its holding on the dual public purposes of slum clearance and creation of low-cost public housing.[150] Despite these limitations, the *Muller* opinion contained dicta regarding the "fundamental purpose of government," which later courts used in subsequent opinions to support a broader definition of public use.[151] This expansive reading by later courts is made even more puzzling by the fact that the state constitution was amended two years after *Muller* to include creation of public housing or slum clearance as the basis for the eminent domain power without a mention of either economic development or the "health, safety, and general welfare of the public."[152] The definition of public use has changed dramatically from that time to the period of expansive holdings in cases such as *Fisher*.

The expansive holdings and dicta in New York Court of Appeals decisions have given the Appellate Division significant leeway in defining public use in eminent domain cases. With such flexibility and an unwillingness to specifically disavow economic development as a valid public use, the lower courts, unsurprisingly, have begun to craft their own meanings.

III. THE ATLANTIC YARDS DECISION: A STUDY IN THE COMMON ISSUES

Many of the issues that have befuddled both lower courts and lawyers are presented in the New York Court of Appeals' recent decision in *Goldstein v. New York State Urban Development Corp*.[153] In *Goldstein*, the court had a golden opportunity to clarify takings law in New York, but instead chose evade the difficult constitutional questions—perhaps indefinitely. The case also illustrates the many practical issues courts are faced with in large-scale eminent domain cases.

A. Facts and History of the Case

The court in *Goldstein* presented the factual and procedural history of the case in detail.[154] The proposed development in *Goldstein* was nothing if not grand. The Atlantic Yards project, to be located in downtown Brooklyn, envisioned sixteen towers for both housing and commercial purposes, a modernized rail yard with increased access to existing

149 *See id.* at 155.
150 *See id.* at 155–56.
151 *See id.* at 155.
152 *See* N.Y. CONST. art. XVIII, § 1 (amended 2001).
153 921 N.E.2d 164 (N.Y. 2009).
154 *See id.* at 165–67

facilities, large landscaped open space, and various transportation infrastructure improvements.[155] The centerpiece and driving factor behind the project was a basketball arena—the new home for the New Jersey Nets' NBA franchise.[156] The proposed site for this project included the Atlantic Yards railway terminal, previously designated as an urban renewal target, as well as other privately-owned properties.[157] While some private property owners willingly sold their lands to the developer, Empire State Development Corporation (ESDC), others refused.[158] ESDC then determined that the properties that had not been sold contained indicia of blight or of impending blight and condemned the properties.[159] The petitioners challenging the takings were the owners of some of the holdout properties.[160]

Before the case came to trial in state court, the petitioners brought a claim in federal district court alleging that the condemnation violated the Takings Clause of the Fifth Amendment.[161] The petitioners also brought a state law claim in an attempt to get the federal court to exercise its supplemental jurisdiction.[162] Dismissing the federal claim with prejudice, the district court unsurprisingly relied on the line of precedent begun by the Supreme Court in *Berman v. Parker*[163] and *Hawaii Housing Authority v. Midkiff*[164] and resulting in *Kelo v. City of New London*,[165] which broadly declared economic development a valid public use.[166] The district court declined to exercise its supplemental jurisdiction to decide the state law claims.[167] The Second Circuit Court of Appeals affirmed this holding, also leaving the state claims intact.[168]

Following their defeat in federal court, the petitioners brought a claim in state court alleging, among other claims, that the taking violated the New York constitution.[169] The Supreme Court, Appellate Division, however, accepted the respondent's position that the public purpose of

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155 *See id.* at 166.

156 *See id.*

157 *See id.* at 165–66.

158 *See id.*

159 *See id.*

160 *See id.*

161 *See* Goldstein v. Pataki, 488 F. Supp. 2d 254, 259 (E.D.N.Y. 2007).

162 *See id.*

163 348 U.S. 26 (1954).

164 467 U.S. 229 (1984).

165 545 U.S. 469 (2005).

166 *See Pataki*, 488 F. Supp. 2d at 279–87, 291.

167 *See id.* at 291.

168 *See* Goldstein v. Pataki, 516 F.3d 50, 65 (2d Cir. 2008).

169 *See* Goldstein v. New York State Urban Dev. Corp., 879 N.Y.S.2d 524, 526 (App. Div. 2008), *aff'd*, 921 N.E.2d 164 (N.Y. 2009).

the project was elimination of blight and denied the petition.[170] The petitioners appealed to the New York Court of Appeals.[171]

B. Goldstein and the Issues in New York Takings Law

The majority and dissenting opinions in *Goldstein* illustrate many of the problems in New York eminent domain jurisprudence. Even where the takings issues do not directly impact the court's holding, the opinions illuminate the key considerations.

The broadest question presented before the court was whether the New York constitution recognized a public use in economic redevelopment absent a finding of blight.[172] The New York Court of Appeals had never expressly held on this point, and *Goldstein* provided an ideal opportunity to do so.[173]

If the New York Court of Appeals interpreted the New York constitution to read that economic development alone was not a valid public use, the New York constitution would be more protective of property rights than the U.S. Constitution.[174] As the dissent pointed out, the majority did not foreclose that option.[175] The majority, in fact, left the door cracked open to that proposition: "While there remains a hypothetical case in which we might intervene to prevent an urban redevelopment condemnation on public use grounds —where 'the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary,'—this is not that case."[176] In short, the majority seemed at least willing to entertain the idea that the New York constitution places independent restrictions on state eminent domain power beyond those provided in the U.S. Constitution.

The blight requirement hardly restricts eminent domain, however, if it is accompanied by a low factual threshold for blight. As discussed above, New York courts have slowly expanded the scope of blight, from its original meaning of truly blighted areas to include areas that could not be considered blighted by any reasonable interpretation of the term.[177]

As a factual matter, it is unclear whether the areas that the developer deemed blighted and condemned were truly blighted. The dissent took serious issue with the blight study relied upon by the majority, instead arguing that the area "appears . . . to be a normal and pleasant residential

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170 *See id.* at 535–37.

171 *See* Goldstein v. New York State Urban Dev. Corp., 921 N.E.2d 164, 167 (N.Y. 2009).

172 *See id.* at 170–72.

173 *See supra* Part II.A.

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

175 *See id.* at 171 (majority opinion).

176 *See id.* at 172 (quoting Kaskel v. Impellitteri, 115 N.E.2d 659 (N.Y. 1953)).

177 *See supra* Part II.C.

community."[178] Even the majority acknowledged that the blight is not as severe or pervasive as that which existed during the Great Depression—when the state constitution was amended to allow for takings to ameliorate blight.[179] The majority opinion also conceded that "[i]t may be that the bar has now been set too low," but it did not explore this point in depth.[180]

Following the general trend in takings cases, the majority in *Goldstein* was highly deferential to the agency on the factual issues.[181] Any agency can quite easily meet its burden of showing blight because, as the court stated, "It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out . . . ."[182] The court readily acknowledged that in some cases a petitioner would be able to make out a colorable case that a property is not in fact blighted, but that argument may simply be considered another reasonable view that would not prevail.[183] The court's high degree of deference to the agencies is common in takings cases and it indicates the court's willingness to respect the legislature's policy choices—as carried out by the administrative agency—at the expense of protection of private property through higher burdens of proof in challenges to agency findings.[184]

Concerns over factual accuracy are not the only potential problems with the blight study. This type of study, though performed for municipal corporations, is often commissioned and paid for by the developers who seek to utilize the land.[185] The majority recognized, and the dissent agreed, that this can lead to pressure by developers on the consultants conducting the study, which calls the study's credibility into question.[186] The dissent forcefully argued that the area was not blighted and that the blight study indicates as much.[187] The dissent pointed out that the consultants selected their words carefully, and ultimately "concluded that the area of the proposed Atlantic Yards development, taken as a whole, was 'characterized by blighted conditions.'"[188] The dissent found the prospect of condemnation based on this rather weak finding highly troubling.

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178 *Goldstein* at 189–90 (Smith, J., dissenting).
179 *See id.* at 171 (majority opinion).
180 *Id.* at 172.
181 *See id.* at 173.
182 *Id.* at 172.
183 *See id.*
184 *See supra* Part II.B.
185 *See Goldstein*, 921 N.E.2d at 172–73.
186 *See id.* at 172–73, 189–90 (Smith, J., dissenting).
187 *See id.* at 190.
188 *Id.* (quoting ESDC's blight study).

The dissent also questioned whether blight had become a tool for transferring property from the powerless to the powerful.[189] Convinced that a finding of blight was simply a pretext in this case, Judge Robert S. Smith wrote that the true purpose of the project was profit, not blight amelioration or slum clearance.[190] In fact, the record incontrovertibly shows that when the project was initially proposed, there was no mention of blight, but only of the opportunity for economic gain.[191] Blight did not become the justification for the project until two years later.[192] Developers, municipal corporations, and consultants seemed to have realized that the magic word for major projects was blight, and they played along by finding blight wherever they could.

In addition to refusing to closely monitor agencies, the majority in *Goldstein* expressed unwillingness to second-guess what it deemed to be a legislative choice.[193] Here, the court lacked significant power to review the legislature's choice (i.e., vesting in the ESDC substantial power to determine that an area is blighted).[194] The majority felt that the power to curb eminent domain power is "appropriately situated in the policy-making branches of government."[195] The majority opinion, however, acknowledged that the concept of public use had undergone an evolution through judicial interpretations.[196] Even so, it remains unclear why the majority insisted that the legislature has the sole power to define public use. Moreover, it seems absurd that the *Goldstein* majority would require the legislature to pass a law to affirm what a previous law had already declared—especially when the standard would have been clear but for the actions of the New York Court of Appeals.

The dissent took the *Goldstein* majority to task for this view.[197] The opinion pointed to a line of New York cases dating back over a century to show that the determination of whether a taking is truly for a public use is in fact a matter for the courts to decide.[198] The dissent drew an analogy to other basic constitutional rights by highlighting the senselessness in proscribing the courts from deciding the constitutional issue of whether a taking is for a public use.[199] The dissent was also uncomfortable with leaving too much fact-finding in the hands of agencies and legis-

189 *See id.* at 189.
190 *See id.*
191 *See id.*
192 *See id.*
193 *See id.* at 172–73 (majority opinion).
194 *See id.*
195 *See id.*
196 *See id.*
197 *See id.* at 190 (Smith, J., dissenting).
198 *See id.*
199 *Id.*

latures: "[T]o allow them to decide the facts on which constitutional rights depend is to render the constitutional protections impotent."[200]

The *Goldstein* case provides an excellent example of many of the issues present in New York takings cases and how the court addresses many of the issues. The *Goldstein* court avoided the broad question of whether economic development alone is a public use for eminent domain purposes and, instead, decided the case on the narrower blight grounds. The court left determination of the difficult factual question of whether or not the area was truly blighted to the agency which imposes a low burden of proof in making such a determination.[201] Both the majority and the dissent acknowledged the possibility of pretext or impure motives on the part of the developer, but the idea did not carry any water in either opinion.[202] The majority also dodged the question of whether the judicially defined standard for blight had become too expansive by saying that a determination of blight should rightfully be made by the legislature rather than the courts.[203] The court seemed determined to visit each of the relevant issues without stopping long enough to significantly clear up any of the problems inherent in each issue.

IV. REINING IN EMINENT DOMAIN POWER

While the New York Court of Appeals in *Goldstein* did not forcefully address any of the issues surrounding the exercise of eminent domain, the door remains open for it to do so. Significant aspects of this power deserve a closer look by the court to ensure that the power of eminent domain is properly exercised.

A. *Expressly Exclude Economic Development Takings from "Public Use"*

The first step the New York Court of Appeals should take is to follow the urging in the *Goldstein* dissent and specifically disavow economic development as a public use under the New York constitution.[204] Despite lower court interpretations of the questionable dicta in New York Court of Appeals cases,[205] the court has not determined if the New York constitution is more protective than the U.S. Constitution regarding the issue of whether economic development alone can constitute a public use.[206] Notably, the 1967 Constitutional Convention deliberated over a

200 *Id.*
201 *Id.* at 172.
202 *Id.*; *id.* at 190 (Smith, J., dissenting).
203 *Id.* at 172.
204 *See id.* at 187–89 (Smith, J., dissenting).
205 *See supra* Part II.D.
206 *See Goldstein*, 921 N.E.2d at 173.

proposed amendment to Article XVIII of the Constitution to grant the legislature broad authority to carry out "urban" (including commercial) renewal.[207] The fact that this proposed constitutional amendment was not adopted is at least persuasive, though not dispositive, evidence for the proposition that the legislative branch does not, or at least did not, consider economic development a public use under the current formulation of the New York constitution.[208]

Without the New York Court of Appeals' clear rejection of economic development as a public use, lower courts will continue to affirm takings on economic development grounds and will, consequently, reduce protections for property owners. When considering the lower courts' jurisprudence regarding economic development in concert with the ease of finding blight on a tenuous factual basis, governmental condemnation of private property appears much easier than protection of the property by its owners.

B. Enforce a Requirement of Actual Blight

The New York Court of Appeals can take strong steps toward curing many of the problems in takings cases by ensuring that factual findings of blight are true and accurate. To cure the problems, courts must require increased factual accuracy and rely on actual determinations of fact, rather than simply deferring to agency determinations of blight.

As the court recognized in *Goldstein*, allowing a developer to commission its own blight study necessarily involves conflicts of interest.[209] The consultants whose blight studies have been commissioned by developers clearly face pressure to find blight, and they may couch their findings in terms that favor developers' interests.[210] Of course, findings may still receive significant deference by the courts, leading to condemnation on a questionable factual record. But, that inequity is currently the rule, not the exception. In both *Cannata* and *Kaskel* the court relied on agency determinations to form its decisions even though the agency determinations stood on questionable factual bases themselves.[211]

Even when parties have directly challenged the factual accuracy of a blight study, the courts have consistently upheld the agency's determination.[212] Even more troubling, the *Kaskel* court ignored an independent study, done by a qualified consultant at the petitioners' request, while

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207 *See* STATE COMMISSION, *supra* note 27, at 59.

208 *See* N.Y. CONST. art. I, § 7 (amended 2001); N.Y. CONST. art. XVIII, § 1.

209 *See Goldstein*, 921 N.E.2d at 172–73.

210 *See, e.g.*, *id.* at 190 (Smith, J., dissenting).

211 *See* Cannata v. City of New York, 182 N.E.2d 395, 397 (N.Y. 1962); Kaskel v. Impellitteri, 115 N.E.2d 659, 662 (N.Y. 1953).

212 *See, e.g.*, Jackson v. New York State Urban Dev. Corp., 494 N.E.2d 429, 441–42 (N.Y. 1986).

favoring the agency's determination.[213] Faced with such hurdles, it is unclear how a petitioner could possibly convince a court that "the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary."[214] When competing valid classifications exist, the courts consistently favor the agency.[215] In the realm of basic constitutional rights, this is more than a bit disconcerting.

Overzealous deference to agency findings creates an incentive for developers to posture takings for economic development as projects intended for blight reduction or slum clearance. The *Goldstein* dissent raised the issue of pretext, questioning whether blight reduction was truly the motive behind the project when it was not mentioned until two years after its inception.[216] Yet, strictly requiring a discussion of blight from the outset will only drive the problem underground: a savvy developer will know the magic words to use and will couch all discussions in those terms from the outset. Courts must instead police the line of pretext in other ways.

C. Ensure that the Public Purpose is the Dominant Purpose

To ensure that blight is not used as a smoke-screen justification for an ordinary real estate development venture, the courts must make an independent determination, based on a factually accurate record, that the public purpose is truly the dominant purpose of the project. The Court of Appeals agrees that landowners must have some legitimate recourse.[217]

The dominant purpose threshold, however, is too low. The courts have not invalidated a taking, despite perfunctorily stating that as between a taking's public purpose and private benefit, the public purpose must be dominant.[218] Courts seem more interested in the proposition's rhetorical value than its substantive value.

Taken separately or in concert, the abovementioned changes can solve many of the runaway aspects of the eminent domain power in New York.[219] The drastic transformation in New York eminent domain jurisprudence is the result of the New York Court of Appeals' continued insistence that the legislature resolve the current inequities in eminent

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213 *See Kaskel*, 115 N.E.2d at 661–62, 664–65 (Van Voorhis, J., dissenting).

214 *Id.* at 662 (majority opinion).

215 *See e.g.*, *id.* at 661–62.

216 *See* Goldstein v. New York State Urban Dev. Corp., 921 N.E.2d 164, 189 (N.Y. 2009) (Smith, J., dissenting).

217 *See, e.g.*, *Goldstein*, 921 N.E.2d at 167 (majority opinion); *In re* Waldo's Inc. v. Johnson City, 543 N.E.2d 74, 76 (N.Y. 1986); Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975).

218 *See, e.g.*, *Goldstein*, 921 N.E.2d at 167.

219 *See id.* at 172–73.

domain law, and its own capitulation to municipal agencies and powerful developers over the course of several decades.

CONCLUSION

The status of economic development as a recognized public use in New York is still uncertain.[220] While the New York Court of Appeals has not explicitly recognized economic development as a public purpose, it has come close to doing so in its expansive dicta and unwillingness to limit agency and municipality discretion as to the definition of blight. The result is a confusing morass of cases that are difficult for lower courts to navigate. Some lower courts have specifically recognized economic development as a public use, while others still require a showing of blight, plans for a public housing project, or other classic public uses to uphold a taking.[221]

The New York Court of Appeals can still take steps to protect property owners in New York. The court has continuously reserved judgment on the specific question of whether economic development is a valid public use under the New York constitution. A definitive holding that economic development alone does not constitute a public use will end abuse of the blight standard by powerful developers—such as those behind the Atlantic Yards project—and ensure that the courts do not sacrifice the true intent behind the empowering constitutional provisions. Unfortunately, the New York Court of Appeals may never find the "hypothetical case" it seeks to disavow economic development takings. Instead, it appears that the power to protect small property owners from abuse by powerful developers rests quietly in the legislature.

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220 *See supra* Part II.

221 *Compare* Ne. Parent & Child Soc'y, Inc. v. Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503 (App. Div. 1985) (finding promotion of Schenectady's economic welfare was a public use), *with* W. 41st St. Realty LLC v. New York State Urban Dev. Corp., 744 N.Y.S.2d 121 (App. Div. 2002).