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COLUMBIA UNIVERSITY'S BITE OUT OF THE BIG APPLE: THE PROBLEM OF UNRESTRICTED EMINENT DOMAIN IN NEW YORK AND THE NEED FOR MORE ACTIVE COURTS

Katherine McGlynn Mirett *

I. INTRODUCTION

Gurnam Singh came to the United States from India in 1981 with his brother.¹ Through his own hard work, determination, and tenacity, he created his family-operated business in Manhattanville, a neighborhood located in the western part of New York City's Harlem.² Singh and his wife own a home in Queens, two gasoline stations in Manhattanville, both located on West 125th Street, and they hope to send their daughter to medical school.³

Nicholas Sprayregen is another small-business owner in the Manhattanville neighborhood.⁴ His properties include Tuck-it-Away storage facilities on Broadway, West 131st, and West 125th streets.⁵ Sprayregen, sympathetic to the Singhs' struggle, called the Singhs a "prime example of the American dream."⁶ Unwilling to go down without a fight, Sprayregen proudly flew banners outside of his buildings which exclaimed: "Stop Columbia! We Won't Be Pushed Out!"⁷

What sort of a fight? Both of these men represent a small minority of landowners in West Harlem who were willing to stand up to Co-

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¹ Timothy Williams, *2 Gas Stations, and a Family's Resolve, Confront Columbia's Expansion Plan*, N.Y. TIMES, Sept. 20, 2008, at A39.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 724 (N.Y. 2010).

⁶ Williams, *supra* note 1 (internal quotation marks omitted).

⁷ James Barron, *Self-Storage King Takes a Moment to Savor His Victory Over Columbia*, N.Y. TIMES, Dec. 4, 2009 at A14 (internal quotation marks omitted).

olumbia University's ("Columbia") intrusive expansion⁸ that threatened to destroy the "American dreams" of many. Columbia University certainly has a strong interest in expanding its campus and developing new resources for its privately-educated students. Most landowners in the project area were mere speed bumps in the process,⁹ but Singh and Sprayregen represent a group of people whose lives are forever changed because of Columbia's uncompromising desire to provide additional resources to its privileged students.¹⁰ These courageous landowners expended substantial resources to bring a suit, *Kaur v. New York State Urban Development Corp.*, challenging their properties' designation as "blighted" alleging that the stated "public use" was merely a pretext for conferring private benefits to Columbia.¹¹ Despite their efforts, the courts undeservedly provided considerable deference to the legislative determinations of "blight" and "public use."¹² Columbia's expansion illustrates the adverse consequences of eminent domain and the dangerous power of private interests. Courts need to play a stronger and more active role in eminent domain challenges, particularly in those cases in which the plaintiff claims that the stated public purpose is merely a pretext for conferring a benefit on a private entity. To accomplish this, courts should demand that the local governmental organization demonstrate with "reasonable certainty" that the stated public benefits will actually flow from a particular project; the government should not merely hope that the stated benefits will occur.

Part II of this Comment explains the Columbia University plan. Next, Part III provides an overview of the Takings Clause and public use in addition to exploring the nature of pretext challenges. Part IV describes the history of eminent domain jurisprudence, first detailing the three major Supreme Court eminent domain decisions and then describing the New York state court cases that led to the *Kaur* decision. Part V details the various problems associated with an expansive view of public use. Part VI revisits the *Kaur* decision in light of the existing eminent domain jurisprudence and finds that, given the courts' prior treatment of pretext challenges, the result is not surprising. Finally, Part VI also considers whether courts or legislatures are better equipped to determine public purpose and proposes that courts

⁸ See Williams, *supra* note 1.

⁹ *Id.* Williams reports that the Singhs and Sprayregen are the only two landowners in the redevelopment area who refused to sell their property to Columbia. *Id.*

¹⁰ *Id.*

¹¹ *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 724 (N.Y. 2010).

¹² See *id.* at 730-31.

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should require an evidentiary showing that the stated public purposes of the eminent domain project will actually accrue.

II. BACKGROUND OF THE COLUMBIA EXPANSION PLAN

It is crucial to understand the complicated history of the Columbia project in order to comprehend the challenges that Singh and Sprayregen raised. Columbia University's main campus is located in the Morningside Heights neighborhood of Manhattan, running approximately from West 113th Street to West 122nd Street, bounded by Morningside Drive to the east and Broadway to the west.¹³ Columbia's plan will greatly expand the campus to the north and west; the project site extends from the south side of West 135th Street to the north side of West 133rd Street and is bound by Broadway/Old Broadway to the east and 12th Avenue to the west.¹⁴

Columbia first approached the New York City Economic Development Corporation (EDC) to redevelop the West Harlem area in 2001, at which point the EDC performed a preliminary economic study of the neighborhood.¹⁵ The EDC issued its report in August 2002 and set out various strategies for "economic redevelopment" of the area.¹⁶ In 2003, the EDC hired Urbitran Associates, an engineering, architecture, and planning firm, to conduct its own survey of the neighborhood, which, when issued by the EDC in 2004, found that the neighborhood merited a "blighted" designation.¹⁷ The study focused its analysis on four major criteria: signs of deterioration, substandard or unsanitary conditions, adequacy of infrastructure, and indications of the impairment of sound growth in the surrounding community.¹⁸

During this time, Columbia began to purchase property located within the project site.¹⁹ Columbia approached both the Singhs and Sprayregen about the potential purchase of their properties.²⁰ For the Singhs, the proposed purchase amount was far too low considering the success of their business.²¹ Sprayregen, another successful

¹³ See *Interactive Map of Morningside Campus*, COLUM. U., http://www.columbia.edu/about_columbia/map/ (last visited Nov. 16, 2011).

¹⁴ *Kaur*, 933 N.E.2d at 724.

¹⁵ *Id.* at 725.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Barron, *supra* note 7; Williams, *supra* note 1.

²¹ Williams, *supra* note 1.

businessman, committed himself to fighting the expansion plan led by the belief that “eminent domain always seems to be used against the down-and-out, people who can’t fight back in a meaningful way. I can.”²²

The EDC met with Columbia and the Empire State Development Corporation (ESDC) in March 2004 to discuss the condemnation of the Singhs’ and Sprayregen’s land.²³ Columbia hired an environmental planning and consulting firm, Alee King Rosen & Fleming (AKRF), to assist in obtaining approval for the project.²⁴ Significantly, the ESDC had previously relied on AKRF’s findings of blight in the Atlantic Yards project in Brooklyn.²⁵ Around the same time, Columbia agreed to pay ESDC’s costs associated with the project.²⁶ In November 2007, AKRF, on Columbia’s payroll, unsurprisingly found that the proposed project site was blighted, and Columbia began to move toward obtaining the requisite agency approval from the New York City Planning Commission (“Planning Commission”) to carry out the expansion plan.²⁷ The Planning Commission approved the rezoning that permitted Columbia to construct “a new urban campus” to be integrated with open, public space.²⁸ The Planning Commission also noted that the ESDC was permitted to use eminent domain to further the plan’s stated public benefits.²⁹

At the same time, business owners in the project area, including the Singhs and Sprayregen, requested documents to examine the relationship between the ESDC, AKRF, and AKRF’s finding of blight.³⁰ The New York State Supreme Court’s Appellate Division ordered Columbia to hand over the documents.³¹ Due to the concerns raised

²² Robin Finn, *Pushing Back as Columbia Moves to Spread out*, N.Y. TIMES, Jan. 11, 2008, at B2 (internal quotation marks omitted).

²³ *Kaur*, 933 N.E.2d at 725–26.

²⁴ *Id.*

²⁵ *Id.* at 726 n.6 (citing *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 166 (N.Y. 2009)). *Goldstein* permitted the taking of private property for a privately developed land-use improvement project known as the Atlantic Yards in Brooklyn. *Goldstein*, 921 N.E.2d at 165. In *Goldstein*, the court relied on the blight study conducted by AKRF and found that even though a dispute existed between the parties as to whether the area truly was “substandard and insanitary” (the New York legislative definition of “blight”), the dispute was not a sufficient predicate for the court to supplant the study’s determination. *Id.* at 173.

²⁶ *Kaur*, 933 N.E.2d at 726.

²⁷ *Id.* at 727.

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

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

about the accuracy of AKRF's survey because of its previous work for the ESDC in connection with Atlantic Yards in Brooklyn, the ESDC conducted another survey with an independent firm, Earth Tech, which essentially confirmed the previous survey's findings of blight.³²

On July 17, 2008, the ESDC adopted a General Project Plan that would enable Columbia to move forward with its plan.³³ The ESDC designated the project as a "land use improvement project" and a "civic project" and specified the public uses, benefits, and purposes of the project.³⁴ First, the ESDC found that the project would address the city and statewide need for educational, community, recreational, cultural, and other civic facilities.³⁵ The ESDC observed that Manhattanville "suffered from long-term poor maintenance, lack of development and disinvestment" and that the project would help turn around these bleak conditions.³⁶ Second, the ESDC determined that the project would create approximately 14,000 jobs during the construction period in addition to 6,000 permanent jobs following completion.³⁷ Third, the project would also, according to the ESDC, generate substantial revenue for the state and city.³⁸ Fourth, the ESDC claimed that the project would also create much needed public space, "approximately 94,000 square feet of accessible open space and maintained as such in perpetuity that will be punctuated by trees, open vistas, paths, landscaping and street furniture and an additional well-lit 28,000 square feet of space of widened sidewalks that will invite east-west pedestrian traffic."³⁹ Fifth, the ESDC acknowledged that Columbia would open a limited number of its facilities, including libraries and computer centers, to students attending a new public school to which Columbia would provide rent-free land for forty-nine years.⁴⁰ In addition, Columbia also promised to open its new swimming facilities to the public.⁴¹ Finally, the ESDC determined that the project would improve local infrastructure—including the 125th

³² *Kaur*, 933 N.E.2d at 727–28.

³³ *Id.* at 729.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Kaur*, 933 N.E.2d at 729.

³⁹ *Id.* (internal quotation marks and citation omitted).

⁴⁰ *Id.*

⁴¹ *Id.*

Street subway station—through a substantial investment by Columbia in the newly created West Harlem Piers Park.⁴²

III. OVERVIEW OF EMINENT DOMAIN: WHY CAN THE GOVERNMENT TAKE PRIVATE PROPERTY?

The final sentence of the Fifth Amendment, commonly called the Takings Clause, provides that “nor shall private property be taken for public use, without just compensation.”⁴³ Technically, the Takings Clause only restricts the federal government, but its provisions have been held equally applicable to state and local governments through the Fourteenth Amendment.⁴⁴

The Takings Clause operates whenever the government “takes” private property. The Constitution authorizes the government to take private property only if the taking is for a public use and the government pays “just compensation” to the ousted landowner.⁴⁵ On the surface, the Takings Clause appears to give landowners some solace—it requires the government to pay the landowner compensation for whatever land it takes in addition to ensuring that the government takes land for public use, rather than for private use. Indeed, Justice Thomas confirmed that the Takings Clause is not a grant of governmental power, but rather a prohibition: “The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power.”⁴⁶ As described below, a literal understanding of the Takings Clause is flawed; through the phrase “public use,” governments have found many ways to abuse the takings power.⁴⁷ Thus, Justice Thomas is perhaps better understood as admonishing the Supreme Court’s broad interpretation of “public use.”

Public use is a key element in the Takings Clause. The public use requirement is important because, in theory, it ensures that the government may only compel an individual to forfeit his or her property rights for the public’s use, not to give a benefit to another private person.⁴⁸ Courts, however, have interpreted “public use” to be quite

⁴² *Id.*

⁴³ U.S. CONST. amend. V.

⁴⁴ See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

⁴⁵ Carol L. Zeiner, *Eminent Domain Wolves in Sheep’s Clothing: Private Benefit Masquerading as Classic Public Use*, 28 VA. ENVTL L.J. 1, 8 (2010).

⁴⁶ *Kelo v. City of New London*, 545 U.S. 469, 511 (2005) (Thomas, J., dissenting).

⁴⁷ *Id.*

⁴⁸ *Id.* at 497 (O’Connor, J., dissenting).

elastic, and, on many occasions, governments have used the public use requirement to transfer private property from one individual to another private individual.⁴⁹ Indeed, the United States Supreme Court has recognized that “public use” stands for two opposite propositions:

[O]n the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.⁵⁰

Judicial interpretation of public use has varied in breadth over the past couple of centuries.

In the 19th century, state courts, specifically New York courts,⁵¹ embraced a close, narrow definition of public use that required actual “use by the public” to satisfy the test.⁵² This test, however, proved to be problematic to administer, as it was difficult to determine how much use by the public was required to qualify as public use.⁵³ As industry grew rapidly and the federal courts began applying the Takings Clause to the states at the beginning of the 20th century, courts welcomed a more expansive definition of public use.⁵⁴

Through landmark public use cases like *Berman v. Parker*,⁵⁵ *Hawaii Housing Authority v. Midkiff*,⁵⁶ and *Kelo v. City of New London*,⁵⁷ the

⁴⁹ See e.g., *Kelo*, 545 U.S. 469 (majority opinion) (upholding the condemnation of private residences to allow Pfizer, a private pharmaceutical corporation, to build a new facility on the land).

⁵⁰ *Id.* at 477.

⁵¹ Nineteenth century decisions in New York made clear that private property could not be transferred to another private individual unless the second private owner’s use of the land was a meaningful, clear “public” use. See *In re Niagara Falls & Whirlpool Ry. Co.*, 108 N.Y. 375 (1888) (taking of private property for construction of a privately run sightseeing railroad not public use); *In re Deansville Cemetery Assn.*, 66 N.Y. 569 (1876) (taking of private land for construction of a cemetery is not a public use); *Taylor v. Porter*, 4 Hill 140 (Sup. Ct. 1843) (taking of land for a private road not allowed).

⁵² *Kelo*, 545 U.S. at 479.

⁵³ *Id.*

⁵⁴ *Id.* at 480; see also Philip Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 626–29 (1940). Nichols argues that the narrow public use doctrine—“[t]o take property rights from A to transfer to B for B’s private enjoyment is not a public use, regardless of what ultimate public purpose the transaction is intended to further”—was decaying as early as the 1920s when courts began to uphold condemnation for slum clearance and for the building of private housing. *Id.* at 626 (internal quotation marks omitted).

⁵⁵ 348 U.S. 26 (1954).

⁵⁶ 467 U.S. 229 (1984).

Court embraced a more flexible notion of “public use” by adopting a “public purpose” test.⁵⁸ Under the “public purpose” test, property taken for a legitimate public purpose and taken within the scope of the legislature’s police power satisfies the public use requirement.⁵⁹ The test does not include any requirement that the public actually use the land taken from the private landowner; it only requires that the taking of the land serve a general public purpose. Included in this broad public purpose is the elimination of blight, a term describing the condition of neighborhoods that contain substandard housing (i.e., housing not fit for human habitation in that it is “injurious to the public health, safety, morals, and welfare”).⁶⁰ At first, the designation of blight was aimed at eliminating real threats to public safety; however, current blight designations can include intangible “harm,” such as economic disinvestment.⁶¹ Open-ended blight definitions, such as that in New York, are troublesome because they provide ways for local governments to circumvent the public use requirement as it is traditionally understood.⁶² This broad public purpose definition is problematic because, as noted by Justice O’Connor, when the courts interpret it liberally, it affords almost no limit on the dangerous power of eminent domain.⁶³ It rationally follows that almost any government taking could be designated as “blighted,” therefore serving a public purpose and thus satisfying the public use requirement of the Takings Clause, so long as the stated public purpose appears legitimate on its face.

Like Sprayregen and the Singhs in the *Kaur* case, many plaintiffs challenge governmental takings under the concept of “pretext.”⁶⁴ There are a number of different types of governmental takings.⁶⁵ First, the sovereign may transfer private property to public ownership for purposes such as creating a road, a hospital, or a military base.⁶⁶

⁵⁷ 545 U.S. 469 (2005).

⁵⁸ For a detailed discussion of the three cases, see *infra* Part IV-A.

⁵⁹ See *Kelo*, 545 U.S. at 480.

⁶⁰ *Berman*, 348 U.S. at 28.

⁶¹ See *infra* note 176 and accompanying text.

⁶² 50 *State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo*, CASTLE COALITION (July 16, 2009), www.castlecoalition.org/about/component/content/2412?task=view [hereinafter CASTLE COALITION].

⁶³ *Kelo*, 545 U.S. at 501 (O’Connor, J., dissenting).

⁶⁴ See discussion *infra* Part IV.

⁶⁵ *Kelo*, 545 U.S. at 497 (O’Connor, J., dissenting).

⁶⁶ *Id.*; see also Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 225 (1977). Professor Berger distinguishes between public takings and private takings. *Id.* Similarly to Justice O’Connor’s first classification, he explains

This type of transfer is relatively uncontroversial.⁶⁷ Second, the sovereign may transfer private property to another private party who then makes the property available to the general public.⁶⁸ Examples of such transfers include the construction of railroads, public utilities, and stadiums.⁶⁹ While still owned by a private entity, the property is open for use by the general public, and like the first type of transfer, this transfer is relatively uncontroversial.⁷⁰ The third type of taking is the most controversial and occurs when the sovereign transfers private property to another private party for that party's private use.⁷¹ This occurs often in the context of "economic revitalization" projects and these cases, like *Kaur*, typically turn on the question of whether the stated public purpose of the project satisfies the public use requirement of the Takings Clause.⁷² Pretext challenges claim that the true purposes of the government taking are not the public benefits explicitly listed as part of the project plan but rather to bestow a benefit on a more favored private party at the expense of other private home and business owners.⁷³ Typically in these challenges, it appears that the government is in fact facilitating a transfer of private land to another private owner while stripping the original owner of his or her property rights. In the *Kaur* case, for example, the Singhs and Sprayregen challenged the ESDC findings on the grounds that the project only served the private interests of Columbia and not the interests of the general public.⁷⁴ As a result, Singh and Sprayregen argued that the public benefits listed as the purpose of the project were

that a "public taking is one which benefits large numbers of persons in a nondiscriminatory and non-exclusionary manner. Takings for railroads, hospitals, streets and governmental buildings would clearly come within the classification." *Id.*

⁶⁷ *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).

⁶⁸ *Id.* at 498; see also Berger, *supra* note 66, at 225. Professor Berger explains that this second type of transfer is "not normally considered to be a 'public use' under traditional eminent domain doctrine [but] would also come within the classification. Thus, industrial plants and even hotels (assuming they are open to all members of the public) would for purposes of this analysis be classified as 'public.'" *Id.*

⁶⁹ *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting)

⁷⁰ *Id.*; see also Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164 (N.Y. 2009) (holding that a taking of private property for the building of a new sports stadium, which was to be privately-owned yet open to the public, constituted sufficient public use).

⁷¹ *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting); see also Berger, *supra* note 66, at 226. Professor Berger explains that "[a]s a general proposition, . . . a private taking is one which benefits one, or a relatively limited number of people." *Id.*

⁷² *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

⁷³ Zeiner, *supra* note 45, at 9.

⁷⁴ *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 730 (N.Y. 2010).

a mere pretext for the government to use the immense power of eminent domain to transfer their private property to Columbia.

IV. THE PATH TO EMINENT DOMAIN ABUSE

In order to fully understand the depth and strength of the public purpose test and courts' great deference to the legislature, one should review a number of key federal decisions in the past century that shed light on the evolution of eminent domain jurisprudence. Twentieth century courts endorse a broader notion of "public purpose" than those in the nineteenth century did. Particularly relevant is the great deference both federal and state courts give to legislative definitions of blight and public purpose in rendering eminent domain decisions.

Before exploring the New York courts' application of the public use requirement, it is necessary to first examine the United States Supreme Court's interpretation of the Takings Clause.

A. *The Big Three*

1. *Berman v. Parker*

Berman was the first of the "big three" Supreme Court eminent domain decisions rendered during the past century.⁷⁵ In *Berman*, the District of Columbia condemned plaintiff's department store—located in a blighted area—as part of a large-scale urban renewal program to eliminate unsafe, unsanitary, and unsightly buildings.⁷⁶ The District of Columbia planned to sell the land to private enterprises that would build privately-owned projects consistent with the redevelopment plan.⁷⁷ The plaintiffs argued for an injunction, asserting that the project was simply taking from one businessman "for the benefit of another businessman."⁷⁸ The plaintiffs argued that this was a private-owner-to-private-owner transfer, and because the project appeared at its heart to promote only the development of a "more attractive community," that the project did not serve any "public purpose."⁷⁹ Unfortunately, the Court disagreed and focused its analysis on the purpose for the government taking, not the true identity of future land users.⁸⁰ The Court expanded the public purpose test and

⁷⁵ *Berman v. Parker*, 348 U.S. 26 (1954).

⁷⁶ *Id.* at 28.

⁷⁷ *Id.* at 30.

⁷⁸ *Id.* at 33.

⁷⁹ *Id.* at 31.

⁸⁰ *Id.* at 35–36.

noted that “the public end may be as well or better served through an agency of private enterprise than through a department of government.”⁸¹ The Court concluded that it could not “say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”⁸² The *Berman* Court’s acknowledgment that private ownership could serve a public purpose demonstrates a complete abdication of the traditional public use test, which required actual use by the public.

Additionally, the Court showed extreme judicial deference for the definition of public purpose to Congress, which retains ultimate authority over Washington D.C.⁸³ The Court stated that “the role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.”⁸⁴ This set the stage for dangerous deference to legislatures. The Court further stated that “it is well within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . [and] it is not for us to reappraise them.”⁸⁵ Therefore, in addition to demonstrating deference to the legislature, the Court noted that a “clean community” could pass muster as a “public purpose” to satisfy the Takings Clause.⁸⁶ With perhaps the most striking statement regarding deference to Congress, the Court abdicated its constitutionally-required role to check the power of the legislature: “Once the question of public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”⁸⁷ Thus, *Berman* set the stage for *Midkiff* and *Kelo*; the precedent that the *Berman* Court established is still wreaking havoc in eminent domain jurisprudence fifty-eight years later.

2. *Hawaii Housing Authority v. Midkiff*

Midkiff presented a different question than *Berman*, yet the Court applied the *Berman* precedent and declined to revise its broad inter-

⁸¹ *Berman*, 348 U.S. at 33–34.

⁸² *Id.*

⁸³ The power that Congress has over Washington, D.C. includes all powers that a state may exercise over its affairs. *Id.* at 31.

⁸⁴ *Id.* at 32.

⁸⁵ *Id.* at 33.

⁸⁶ *Id.* at 33.

⁸⁷ *Id.* at 35–36.

pretation of “public purpose.”⁸⁸ The history of land ownership in Hawaii dates back to the original settlement of the islands by Polynesian immigrants from the western Pacific.⁸⁹ The early Hawaiians established a feudal-type system of land ownership, in which the island high chief controlled the land and assigned it for development to sub-chiefs, who then re-assigned it to lower ranking chiefs, who found tenants.⁹⁰ As a result, Hawaiian land had remained largely in the hands of a few landowners.⁹¹ A 1960 study conducted by the Hawaii legislature showed that the state and federal governments owned almost forty-nine percent of Hawaii’s land, and that the other forty-seven percent of land was in the hands of only seventy-two landowners.⁹² Residents could easily lease land, but it was difficult to purchase fee simple title to their homes.⁹³

To correct these issues, the legislature adopted a statute that permitted tenants living in single-family homes to petition a state agency, the Hawaii Housing Authority, to condemn the properties and then re-sell the property to the tenants in fee simple.⁹⁴ In *Midkiff*, the plaintiff landowners sued to invalidate the statute on the grounds that it authorized an unconstitutional exercise of eminent domain power;⁹⁵ the Court disagreed and held that the statute was constitutional.⁹⁶

In making its determination, the *Midkiff* Court relied on the *Berman* decision and deferred to the legislature.⁹⁷ Justice O’Connor, writing for the majority, declared that “in short, the Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”⁹⁸ The Court recognized that it plays a role in reviewing a legislature’s judgment as to what constitutes public use “even when the eminent domain power is equated with the police power;” however, the Court noted that this role is an “ex-

⁸⁸ Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

⁸⁹ *Id.* at 232.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *Midkiff*, 467 U.S. at 233.

⁹⁵ *Id.* at 235.

⁹⁶ *Id.* at 245.

⁹⁷ *Id.* at 241.

⁹⁸ *Id.* (citing *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896)).

tremely narrow one.”⁹⁹ To explain its deference, the Court highlighted the legislatures’ abilities “to assess what public purposes should be advanced by an exercise of the takings power.”¹⁰⁰ The Court did not seem to consider that, while the political process responds to popular concerns, it also responds to heavily organized and funded interest groups.¹⁰¹

In its deference to the legislature, the *Midkiff* Court established its “rationally related” test for determining whether or not there is in fact a “public purpose.”¹⁰² The Court affirmed that it had never held a compensated taking to be prohibited by the Public Use Clause when the exercise of eminent domain power was rationally related to a conceivable public purpose.¹⁰³ The *Midkiff* Court conclusively established that, when an exercise of eminent domain by the legislature is questioned, the appropriate question before the Court is not whether in fact the condemnation serves a public purpose, but whether the “legislature rationally could have believed that the [law] would promote its objective.”¹⁰⁴ The Court further explained that even though the Hawaii Act authorized the use of eminent domain to force a transfer of private property to private beneficiaries, the transfer could not be condemned automatically as violating the Takings Clause.¹⁰⁵ According to the *Midkiff* Court, the state does not have to be the primary user of the property to legitimize the taking; “*it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.*”¹⁰⁶

This “rational relationship” test affords almost no protection to the landowner. Under *Midkiff*, most takings will have a public purpose, and therefore, will be permitted. Furthermore, it makes succeeding on a pretext challenge even more difficult because, essentially, any public purpose that the legislature proffers satisfies the test, which requires the legislature to have only a rational belief that its eminent domain actions satisfy the stated purpose.

⁹⁹ *Id.* at 240 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

¹⁰⁰ *Midkiff*, 467 U.S. at 244.

¹⁰¹ Julia D. Mahoney, *Kelo’s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 126; see discussion *infra* Part VI.B.

¹⁰² *Midkiff*, 467 U.S. at 241.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 242 (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671–72 (1981)) (internal quotation marks omitted).

¹⁰⁵ *Id.* at 243.

¹⁰⁶ *Id.* at 244 (emphasis added).

3. *Kelo v. City of New London*

Kelo continued expanding the definition of “public use” and reinforced the Court’s deference to local government determinations of what constitutes public purpose.¹⁰⁷ New London, Connecticut—an economically depressed area with a high unemployment rate—adopted a comprehensive redevelopment plan for its downtown district.¹⁰⁸ The plan was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically-distressed city, including its downtown and waterfront areas.”¹⁰⁹ Additionally, the redevelopment plan sought to make New London more attractive by creating leisure and recreational space on the waterfront.¹¹⁰ Pfizer, the pharmaceutical giant, served as a catalyst to this redevelopment project by promising to build a \$300 million research facility on the site immediately adjacent to the designated redevelopment area.¹¹¹ City officials used the redevelopment plan to provide Pfizer with a property tax break for ten years to entice Pfizer to build its research division headquarters in the area.¹¹²

In order for the project to proceed, New London needed to acquire title to the area where the redevelopment was to occur.¹¹³ While many homeowners sold their homes voluntarily,¹¹⁴ Susette Kelo and the other petitioners refused.¹¹⁵ Kelo and her neighbors stressed that their homes were in excellent condition and were not by any definition blighted.¹¹⁶ The Court acknowledged that there were no allegations that the homeowners’ properties were blighted, but insisted that the properties be condemned because they were located in the development area.¹¹⁷ Kelo and the petitioners argued that condemning their properties would not serve the public purposes stated in the project; the Court disagreed.¹¹⁸

¹⁰⁷ *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁰⁸ *Id.* at 473.

¹⁰⁹ *Id.* at 472 (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004)).

¹¹⁰ *Id.* at 474.

¹¹¹ *Id.* at 473.

¹¹² Patrick McGeehan, *Pfizer to Leave City that Won Land-Use Case*, N.Y. TIMES, Nov. 12, 2009 at A1.

¹¹³ *Kelo*, 545 U.S. at 472.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 475.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 490.

This case turned on the question of whether the city's plan served a public purpose. Justice Stevens, writing for the majority, noted that its precedent had defined public purpose broadly, which reflected the Court's "longstanding policy of deference to legislative judgments in this field."¹¹⁹ Additionally, the Court reasoned that the economic benefits to be derived from development in this case were substantially similar to the benefits that flowed from redevelopments in *Berman* and *Midkiff*.¹²⁰ Justice Stevens indicated that it would be incongruous to find that the economic benefits here were of a less a public character than the interests in these previous cases, stating that "clearly, there [was] no basis for exempting economic development from our traditionally broad understanding of public purpose."¹²¹ The Court held that promoting economic development is a traditional and long-accepted function of government and that the determination of the city's governing body that the area was "sufficiently distressed to justify a program of economic rejuvenation [was] entitled to [the Court's] deference."¹²² Justice Stevens examined the redevelopment plan and concluded that the plan had to be reviewed as a comprehensive whole and not on a piecemeal parcel-by-parcel basis.¹²³ Noting that Kelo's property was not blighted or distressed, he then determined that the taking satisfied the public use requirement of the Takings Clause because the plan as a whole "unquestionably serve[d] a public purpose."¹²⁴

The Court also addressed Kelo's request that the Court require a showing of "reasonable certainty" that the expected public benefits would actually accrue.¹²⁵ Justice Stevens denounced this request as an unwarranted departure from precedent.¹²⁶ He declared that this type of review was unnecessary because it would be a strain on judicial resources and would ultimately serve as a hindrance to timely completion of condemnation proceedings: "A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful

¹¹⁹ *Kelo*, 545 U.S. at 480.

¹²⁰ *See id.* at 485–86.

¹²¹ *Id.*

¹²² *Id.* at 483.

¹²³ *Id.* at 484.

¹²⁴ *Id.*

¹²⁵ *Kelo*, 545 U.S. at 487.

¹²⁶ *Id.*

consummation of many such plans.”¹²⁷ If only the Court had foresight; in a cruel twist of fate, just eight years after Pfizer’s arrival, the pharmaceutical giant ceased operations in New London and left for greener pastures in Groton, Connecticut.¹²⁸ Pfizer abandoned its new research facility, located next to a large plot of barren land that was cleared to make room for a hotel, condos, and stores that were never built.¹²⁹ Kelo and her neighbors lost their homes based on vague promises of new jobs and increased tax revenue¹³⁰—promises that never came to fruition.¹³¹

Justice Kennedy’s concurring opinion stressed that rational basis review does not permit a transfer to a private entity when the transfer primarily benefits the private party and provides only incidental benefits to the public.¹³² The concurrence attempted to provide some assurance to land owners that the Court’s chosen standard of review does protect against these unjustified transfers of property.¹³³ Justice Kennedy, however, also emphasized that the government must be afforded a presumption that its actions are reasonable and intended to serve a public purpose.¹³⁴ While trying to ensure that courts would take pretext claims seriously, Justice Kennedy also reiterated the majority’s position that courts must give deference to legislative decisions.¹³⁵ After conducting his own review, Justice Kennedy found that Pfizer did not motivate the economic redevelopment in New London.¹³⁶ Accordingly, New London’s actions survived Justice Kennedy’s “meaningful rational basis review.”¹³⁷ Justice Kennedy acknowledged that the presumption that the government agency acted reasonably will not be warranted for economic-redevelopment takings in which there is favoritism to private parties.¹³⁸ After *Kelo*, however, it is difficult to think of a situation in which the Court would find that the primary purpose of the taking was to favor a private party.

¹²⁷ *Id.* at 488.

¹²⁸ McGeehan, *supra* note 112.

¹²⁹ *Id.*

¹³⁰ *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting).

¹³¹ See McGeehan, *supra* note 112.

¹³² *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring).

¹³³ *Id.* at 493.

¹³⁴ *Id.* at 491.

¹³⁵ *Id.*

¹³⁶ *Id.* at 492.

¹³⁷ *Id.*

¹³⁸ *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

Kelo produced two dissenting opinions.¹³⁹ Justice O'Connor argued that the majority effectively deleted the words "for public use" from the Takings Clause.¹⁴⁰ So long as the local governmental agency labels a project "economic development," all private property is vulnerable to a transfer to another private owner, particularly if the new private owner uses the land in a way that the agency deems more beneficial to the public.¹⁴¹ Justice O'Connor called on the courts to take control of the definition of "public use," stating that "an external judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning."¹⁴² She recognized the dangerous consequences of the majority's decision, observing that it permits the government to take private property that is currently put to ordinary private use, and then give that same property to another private landowner to put it to a different ordinary private use, so long as this new use creates an incidental benefit to the public.¹⁴³ Those incidental benefits could include more jobs, increased tax revenue, or simply the creation of more visually appealing property.¹⁴⁴

Justice Thomas wrote a separate dissenting opinion in which he urged the Court to return to the original meaning of "public purpose."¹⁴⁵ Justice Thomas maintained that the original understanding of the Takings Clause was a meaningful limit on the government's eminent domain power; however, the Court's precedent, including the majority's opinion, has construed the public use clause to a "virtual nullity."¹⁴⁶ Justice Thomas asserted that the holding permits a determination that an expensive urban-renewal project that vaguely promises public benefits, such as the creation of new jobs and increased tax revenue, but is also extraordinarily agreeable to a large corporation, qualifies as a constitutional taking.¹⁴⁷ Additionally, Justice Thomas commented on the strange treatment of eminent domain cases in terms of judicial deference; no other property interest determinations receive the same degree of deference to the legisla-

¹³⁹ *Id.* at 494–506 (O'Connor, J., dissenting); *id.* at 506–23 (Thomas, J., dissenting).

¹⁴⁰ *Id.* at 494 (O'Connor, J., dissenting).

¹⁴¹ *Id.*

¹⁴² *Id.* at 497.

¹⁴³ *Id.* at 501.

¹⁴⁴ *Kelo*, 545 U.S. at 501.

¹⁴⁵ *Id.* at 506 (Thomas, J., dissenting).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

ture as the public use determinations in the eminent domain context.¹⁴⁸ As a result, one is safe in his home from government intrusion, yet his home itself is not safe from governmental taking.¹⁴⁹ Finally, Justice Thomas warned that the effects of the expanded definition of “public use” would fall disproportionately on the poor,¹⁵⁰ and he agreed with Justice O’Connor that the beneficiaries of such a definition would be those with power in the political processes, including large corporations and development firms.¹⁵¹

Given the strongly-divided Court, the immediate public backlash was not surprising.¹⁵² Rather than imposing higher standards on governments that use eminent domain to transfer land from one private owner to another, the majority encouraged state governments that disagreed with the decision to take action to restrict their own takings powers.¹⁵³ Following the *Kelo* decision, forty-two states, not including New York, passed laws aimed at curbing the abuse of eminent domain for private use.¹⁵⁴

B. New York Eminent Domain: Building Empires, Destroying Dreams

The New York State Constitution’s Takings Clause mirrors that of the United States Constitution, and states: “Private property shall not be taken for public use without just compensation.”¹⁵⁵ The State Constitution also grants the legislature the power to “provide in such manner, by such means and upon such terms and conditions as it may prescribe . . . for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas.”¹⁵⁶ Additionally, the State Constitution provides that “the legislature may . . . grant the power of eminent domain to any . . . public corporation.”¹⁵⁷ As a result, the legislature may vest eminent domain power in public corporations, such as the Empire State Development Corporation, so long

¹⁴⁸ *Id.* at 518; see also *infra* notes 230–34 and accompanying text.

¹⁴⁹ *Kelo*, 545 U.S. at 518; see also *infra* notes 230–34 and accompanying text.

¹⁵⁰ *Kelo*, 545 U.S. at 521.

¹⁵¹ *Kelo*, 545 U.S. at 505 (O’Connor, J., dissenting); see also *infra* notes 241–46 and accompanying text.

¹⁵² John Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, A1.

¹⁵³ See *Kelo*, 545 U.S. at 489.

¹⁵⁴ CASTLE COALITION, *supra* note 62.

¹⁵⁵ N.Y. CONST. art. I, § 7.

¹⁵⁶ N.Y. CONST. art. XVIII, § 1.

¹⁵⁷ N.Y. CONST. art. XVIII, § 2.

as it requires that these corporations use eminent domain in appropriate instances as determined by the legislature.

In New York, urban renewal projects had their beginnings in “slum clearance,” whereby development projects aimed to remove “substandard and insanitary” conditions that threatened the health and welfare of the public.¹⁵⁸ Throughout the twentieth century, courts expanded this initial understanding to encompass not only slum areas, but also areas that suffered from economic underdevelopment and stagnation. Courts found that clearing these underdeveloped areas served a public purpose, even though the areas did not technically qualify as “slums.”¹⁵⁹ New York even began recognizing, like the Supreme Court, that the government’s use of eminent domain power to transfer private property to a private developer does not change the acceptable nature of the taking.¹⁶⁰ As the dissent noted in *Goldstein v. New York State Urban Development Corp.* upon reviewing eminent domain case law in New York, the special status that New York courts have afforded to blight determinations makes succeeding on pretext claims—claims that blight is not the true motivation for the development—especially difficult.¹⁶¹

In 1936, the Court of Appeals of New York gave a more narrow interpretation of the Takings Clause than it would in later decisions.¹⁶² In *New York City Housing Authority v. Muller*, the New York City Housing Authority sought to condemn Andrew Muller’s blighted property as part of a slum clearance effort for the stated public use of protecting the health, safety, and general welfare of the public.¹⁶³ The state agency had already acquired the properties on either side of Muller’s home and acquisition of his property was necessary for the successful completion of the project.¹⁶⁴ The court recognized that, while legislative determinations of public use are not binding on the courts, these determinations are entitled to high degree of respect because they relate to public conditions, which the legislature

¹⁵⁸ *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 330 (N.Y. 1975).

¹⁵⁹ See *Vitucci v. N.Y.C. Sch. Constr. Auth.*, 735 N.Y.S.2d 560 (N.Y. App. Div. 2001) (holding that the condemnation of private property to assist commercial development that may be economically beneficial to the area, even if the condemned properties are not blighted, is appropriate); *Cannata v. City of N.Y.*, 182 N.E.2d 395 (N.Y. 1962) (holding that condemnation is appropriate to eliminate areas of intangible physical blight).

¹⁶⁰ *Morris*, 335 N.E.2d at 331.

¹⁶¹ 921 N.E.2d 164, 187 (N.Y. 2009) (Smith, J., dissenting).

¹⁶² See *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936).

¹⁶³ *Id.* at 154.

¹⁶⁴ *Id.* at 153.

has both the means and the duty to discover.¹⁶⁵ In comparison to later decisions,¹⁶⁶ the court acknowledged that legislative determinations of blight are not entitled to complete judicial deference. In this case, the court found that not only did the government allege that the proposed redevelopment area was blighted but that it also *proved* the existence of such conditions.¹⁶⁷ After finding that the “fundamental purpose of government is to protect the health, safety and general welfare of the public,”¹⁶⁸ the court held that the removal of the slum to provide low-income housing was indeed a valid public use because removal of slums was a “matter of far-reaching public concern,” and the project would protect and safeguard the entire public from the “menace” of slums.¹⁶⁹

Importantly, the *Muller* decision paved the way for future courts to find that takings for economic redevelopment serve public uses or public purposes.¹⁷⁰ In dicta, the court stated that a condemning authority is permitted to use eminent domain to promote economic development in blighted areas where “there is an equally heavy capital loss and a diminishing return in taxes.”¹⁷¹ Blighted areas, according to the court, strain local economies because of the large amount of public funds expended to “maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality.”¹⁷² While this was not the main holding of the *Muller* court, it opened the door for a more expansive view of economic development and its relationship to blighted areas.

In *Kaskel v. Impellitteri*, the Court of Appeals of New York stated that an entire area, not particular parcels, must be examined in determining whether slum clearance is appropriate because “such sta-

¹⁶⁵ *Id.* at 154.

¹⁶⁶ See *infra* notes 173–94 and accompanying text.

¹⁶⁷ *Muller*, 1 N.E.2d at 154.

¹⁶⁸ *Id.* at 155. Slums, according to the court, “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.” *Id.* at 154.

¹⁶⁹ *Id.* at 156.

¹⁷⁰ See Nichols, *supra* note 54, at 631. Nichols argues that during the time of the *Muller* decision, courts in many states, including New York, welcomed the generation of general public benefits as a justification for the taking by a private party, *id.* at 626–31, thereby abrogating the earlier narrower public use doctrine that demanded that “[t]o take property rights from A to transfer to B for B’s private enjoyment is not a public use, regardless of what ultimate public purpose the transaction is intended to further.” *Id.* at 626.

¹⁷¹ *Muller*, 1 N.E.2d at 154.

¹⁷² *Id.*

tutes would not be very useful if limited to areas where every single building is substandard.”¹⁷³ This affirmed the *Muller* court’s decision that Muller’s home was properly condemned even if it itself was not blighted; however, *Kaskel* took the concept one step further by affirmatively stating that many non-blighted buildings may be condemned simply due to their unlucky location next to blighted ones. Again, the court deferred to the legislature’s definitions of blight and public use; according to the court, the legislature had authorized city officials to make a determination that an area is unsanitary and blighted—a determination that the courts could not overhaul.¹⁷⁴ Because the legislature had determined that slum and blight clearance constituted a public use, the government officials were authorized to condemn the land.¹⁷⁵ Interestingly, less than two decades after *Muller*, the court firmly established that courts must afford the legislature complete deference in findings of blight, making it nearly impossible for those findings to be overturned.

The following decades found New York courts embracing a more flexible definition of “blight” which, according to court in *Yonkers Community Development Agency v. Morris*, consisted of a multitude of malleable factors that governmental agencies could mold to fit their needs.¹⁷⁶ The appellate court held in *Cannata v. City of New York* that physical, tangible blight is not even necessary to find a “public purpose” for slum clearance.¹⁷⁷ The court held that condemnation can

¹⁷³ 115 N.E.2d 659, 662 (N.Y. 1953).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ 335 N.E.2d 327, 332 (N.Y. 1975). The *Morris* court identified the following as a definition of blight “universally indorsed [sic] by case law.” *Id.* at 332.

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

Id. at 332 (quoting John F. Cook, *Battle Against Blight*, 43 MARQUETTE L. REV. 444, 445 (1960)).

¹⁷⁷ *Cannata v. City of New York*, 221 N.Y.S.2d 457, 458 (N.Y. App. Div. 1961), *aff’d*, 182 N.E.2d 395 (N.Y. 1962).

be authorized not only for slum clearance but also to eliminate areas of “intangible” physical blight, which refers to areas that tend to create blight or hinder the productive development of a city.¹⁷⁸ Rather than reining in the power of the legislature to condemn private property, the court greatly expanded the government’s authority to employ its takings power.¹⁷⁹ Relying on decisions from other states, the court expanded its definitions of “blight” and “public purpose” by stating that “redevelopment may properly be accomplished by private persons; and the area condemned may thereafter be properly used for nonresidential purposes.”¹⁸⁰ This decision is troubling because it marks the moment when the interpretation of “public use” started permitting the transfer of private property to another private entity if a state agency determines that the area would benefit from a vague promise of redevelopment.¹⁸¹

While the *Cannata* holding seemed to establish that under New York’s eminent domain jurisprudence the eminent domain powers of the government had almost no boundaries, the *Morris* decision, on its face, appeared to rein in these powers.¹⁸² The court, however, made clear that its *Morris* holding was not a true limit on the government’s eminent domain power.¹⁸³ The *Morris* court reiterated that New York courts do not merely rubber stamp a determination of substandard conditions in the urban renewal context; rather, the courts must independently determine the existence of a true public purpose and substantiate that determination.¹⁸⁴ While at first blush this appears to restrain eminent domain power in New York, the court reasoned that the holding was in line with other New York eminent domain decisions, notably *Kaskel*.¹⁸⁵ Accordingly, the court determined that the government agency presented sufficient evidence to show that the area to be condemned was indeed substandard.¹⁸⁶ The *Morris* court explained that even when the stated public purpose of a project is the removal of blight, and even though government agencies have wide discretion in determining what constitutes blight, facts supporting

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 189 (N.Y. 2009) (Smith, J., dissenting).

¹⁸² See *Morris*, 335 N.E.2d at 333.

¹⁸³ *Id.* at 334.

¹⁸⁴ *Id.* at 333.

¹⁸⁵ *Id.* (citing *Kaskel v. Impellitteri*, 115 N.E.2d 659, 662 (N.Y. 1953)).

¹⁸⁶ *Id.*

the determination need to be adequately documented.¹⁸⁷ Again, even though this appears to be a heightened standard, the court quickly noted that meeting such a standard, in the majority of cases, is easy.¹⁸⁸

Modern New York decisions are continuing the tradition of ever-expanding definitions of public use and blight.¹⁸⁹ In *Vitucci v. New York City School Construction Authority*, the appellate court acknowledged that the term “public use” is to be broadly interpreted to include “virtually any project that may further the public benefit, utility, or advantage.”¹⁹⁰ The court also authorized the condemnation of private property to assist commercial development that may be *economically* beneficial to the area, even if the condemnation may benefit a private commercial entity.¹⁹¹ Remarkably, the court found that if the government “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.”¹⁹² With such a holding, the court’s deference to the legislature paved a very clear path for the taking in *Kaur*.

In *Goldstein v. New York State Urban Development Corp.*, the most recent New York eminent domain decision prior to *Kaur*, the court completely removed any judicial check on the government’s eminent domain power.¹⁹³ The *Goldstein* court held that where there is a reasonable difference in opinion as to whether the area in question is in fact substandard and unsanitary, the court will defer to legislative findings.¹⁹⁴

V. PROBLEMS WITH LIMITLESS PUBLIC USE

There are numerous problems with both the United States Supreme Court’s and the New York state courts’ interpretations of public use. The expansive definitions of public use give the government

¹⁸⁷ *Id.* at 332.

¹⁸⁸ *Morris*, 335 N.E.2d at 332.

¹⁸⁹ See *infra* notes 190–94 and accompanying text.

¹⁹⁰ 735 N.Y.S.2d 560, 562 (N.Y. App. Div. 2001).

¹⁹¹ *Id.*

¹⁹² *Id.*; see also *Byrne v. N.Y. State Office of Parks, Recreation & Historic Pres.*, 476 N.Y.S.2d 42 (N.Y. App. Div. 1984) (holding that “public use” constitutes any use which contributes to the health, safety, general welfare, convenience, or prosperity of the community). The *Byrne* court found that the construction of a safe boat refuge at Port Ontario served a valid public use because it was not only vital to the safety of boaters but also because the “influx of Federal funds for the project would have a *positive impact on the economy.*” *Id.* at 43 (emphasis added).

¹⁹³ *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 173 (N.Y. 2009).

¹⁹⁴ *Id.*

power to essentially take non-blighted land and the home of a private party and transfer it into the hands of another private party for the purposes of economic redevelopment.¹⁹⁵ It appears that the phrase “economic redevelopment” has magical powers when in the courts’ hands because it invites the courts to look at the entire scope of the plan, rather than at the stated individual goals of the plan. In these situations, it would be especially difficult not to find an underlying public purpose. Rationally, almost any economic redevelopment project that vaguely promises better parks, more jobs, and increased tax revenue to the neighborhood—in addition to expanding a large, private university—would seem to serve a public purpose. Even if the particular parcel itself is not blighted, the taking of the parcel to facilitate community-wide redevelopment now clearly serves a greater public purpose under the broad interpretation of public use.¹⁹⁶ Judge Posner posed the following question that gets to the heart of the problem:

If “economic rejuvenation” is a public use, what is to prevent a city from condemning the homes of lower-middle-class families and giving them free of charge to multimillionaires, provided it could show that the new owners would be likely to pay enough for various local goods and services, and in property and other local taxes, to offset the expense of compensating the owners of the condemned properties at market value?¹⁹⁷

Judge Posner’s insightful question demonstrates the dangers of such a broad definition of public purpose.

The public purpose test opens the door to Takings Clause abuse by the government. Some Justices, like Justice Thomas, believe that the public use definition has gone too far from its original meaning, which required that the public actually and as a whole “employ” the property.¹⁹⁸ As Justice Thomas asserted in his *Kelo* dissent, despite incidental benefits to the public from private use, it is disingenuous to assert that the public is employing the property that the government has awarded to a private individual.¹⁹⁹ Incidental benefits to the public are critical elements of eminent domain jurisprudence; accordingly, much Takings Clause litigation involves claims that the benefits of

¹⁹⁵ Zeiner, *supra* note 45, at 9.

¹⁹⁶ See, e.g., Vitucci v. N.Y.C. Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (N.Y. App. Div. 2001).

¹⁹⁷ Richard A. Posner, *The Supreme Court, 2004 Term: Forward: A Political Court*, 119 HARV. L. REV. 31, 93 (2005).

¹⁹⁸ *Kelo v. City of New London*, 545 U.S. 469, 508–09 (2005) (Thomas, J., dissenting).

¹⁹⁹ *Id.*

the taking are not truly for a public purpose, but rather confer a private benefit with only incidental public benefits.²⁰⁰ Economic redevelopment cases, such as the *Kaur* case, serve as a prime example of such pretext challenges.

Courts in the state of New York adhere to a self-titled “public use” test, and some judges claim that they have not adopted the broader public purpose test endorsed by the United States Supreme Court.²⁰¹ Although this statement may look neat and tidy on paper, modern decisions in New York have shown acceptance of a much broader definition of “public use” than perhaps Judge Smith, who dissented in *Goldstein*, is willing to admit. Older decisions, like *Muller*, may not have been narrow in their interpretation of “public use,”²⁰² but at the very least those courts required that “slum clearance” serve a valid public use by protecting the health, safety, and general welfare of the public.²⁰³ The *Kaur* court determined that the “physical, economic, engineering and environmental conditions at the Project site” served as a valid finding of blight, thus creating a basis for the taking.²⁰⁴ This demonstrates the court’s departure from the *Muller* decision and the adoption of a more malleable definition of blight that includes other factors, including intangible conditions like economic depression.²⁰⁵ As a result, the *Kaur* decision reaffirmed that economic underdevelopment can serve as a valid basis for taking private property because such economic conditions satisfy a finding of blight.

²⁰⁰ See, e.g., *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010).

²⁰¹ See *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 186 (N.Y. 2009) (Smith, J. dissenting).

The good news from today’s decision is that our Court has not followed the lead of the United States Supreme Court in rendering the ‘public use’ restriction on the Eminent Domain Clause virtually meaningless. The bad news is that the majority is much too deferential to the self-serving determination by the Empire State Development Corporation (ESDC) that petitioners live in a ‘blighted’ area, and are accordingly subject to having their homes seized and turned over to a private developer.

Id.

²⁰² Compare *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936) (holding that slum clearance was a valid public use because it protects the health, safety, and general welfare of the public), with *In re Niagara Falls v. Whirlpool Ry. Co.*, 15 N.E. 429 (N.Y. 1888) (taking of private property for construction of a privately run sightseeing railroad was not a public use), and *In re Deansville Cemetary Assn.*, 66 N.Y. 569 (1876) (taking of private land for construction of a cemetery is not a public use), and *Taylor v. Porter*, 4 Hill 140 (Sup. Ct. 1843) (taking of land for a private road not allowed).

²⁰³ *Muller*, 1 N.E.2d at 155.

²⁰⁴ *Kaur*, 933 N.E.2d at 731 (emphasis added).

²⁰⁵ *Id.*

VI. COURTS MUST PROTECT AMERICANS FROM EMINENT DOMAIN
ABUSE BY PLAYING A MORE ACTIVE ROLE

A. *Columbia University's Bite out of the Big Apple*

The plaintiffs in *Kaur* raised several challenges to the taking of their property.²⁰⁶ Namely, the plaintiffs claimed that there was no true public purpose for the taking and that the project contemplated primarily benefiting a private party, Columbia University.²⁰⁷ It should be noted at the outset that, unlike *Kelo*, in which the city planned the redevelopment of the waterfront area before Pfizer claimed an interest,²⁰⁸ Columbia University approached the EDC to redevelop the West Harlem area.²⁰⁹ This should have been a big “red flag” to any court considering a pre-text challenge.

In the *Kaur* case, the ESDC set forth many public purposes. The first public purpose that the ESDC proposed addressed the city's and statewide “need for education, community, recreational, cultural and other civic facilities.”²¹⁰ The ESDC asserted that the project would enable the city and the state to maintain their positions as global centers for higher education and research.²¹¹ Second, the ESDC claimed that the project would create 14,000 jobs during the construction phase and 6,000 permanent jobs once the project was completed.²¹² Third, the ESDC stated that the project would create “substantial” revenue, with an estimated \$122 million in revenue for the state and \$87 million for the city.²¹³ Fourth, the ESDC indicated that another purpose of the project was to create 94,000 square feet of “much needed public space” that would be maintained in perpetuity.²¹⁴ This space would be punctuated by trees, open vistas, paths, landscaping and street furniture, and an additional 28,000 square feet of widened sidewalks that would invite east-west pedestrian traffic.²¹⁵ Additionally, the project would make necessary infrastructure improvements to the 125th street subway station in addition to the creation and mainten-

²⁰⁶ *Id.* at 730.

²⁰⁷ *Id.*

²⁰⁸ *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

²⁰⁹ *Kaur*, 933 N.E.2d at 725.

²¹⁰ *Id.* at 729.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Kaur*, 933 N.E.2d at 729.

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ance of the West Harlem Piers Park.²¹⁶ Finally, Columbia would provide rent-free land for forty-nine years to a new public school whose students would have access to Columbia's libraries and computer centers.²¹⁷ The new swimming facilities would also be open to the public at large.²¹⁸ After examining all of the amenities that the private university and the ESDC claimed would flow from the creation of the new campus, it appears that the only aspect of the project that is truly open for public use is the "desperately needed" public space and the new swimming pool.

It is on these grounds that the plaintiffs claimed that the stated public purposes were mere "pretext," which concealed the grant of a huge benefit to a private entity.²¹⁹ The Court of Appeals of New York, following the footsteps of the New York courts and the Supreme Court, gave heavy deference to the New York State Legislature.²²⁰ The *Kaur* court stated that "because the determinations of blight and public purpose are the province of the Legislature, [they] are entitled to deference by the Judiciary"²²¹ The court further explained its deference to the legislature by referencing its *Goldstein* decision regarding the Atlantic Yards; there, the court clarified that judges may substitute their views as to whether the government has properly determined that an area is blighted only when there is no room for reasonable differences of opinion.²²² The court noted that the New York Constitution grants the legislature broad power to take and clear substandard and unsanitary areas for redevelopment, and simultaneously deprives the judiciary of the power to interfere with such an exercise of legislative authority.²²³

Because the *Kaur* court could only apply a rational basis review to the plaintiff's pretext claims, it is not surprising that the court found that the blight determination and the taking were not irrational or baseless.²²⁴ For a New York governmental organization to invoke its eminent domain power and condemn an area as a land use im-

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 731–32.

²²⁰ *Id.* at 730–31.

²²¹ *Kaur*, 933 N.E.2d at 730.

²²² *Id.* (citing *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009)).

²²³ *Id.* (citing *Goldstein*, 921 N.E.2d at 173).

²²⁴ *See id.* at 731.

provement project, the Urban Development Corporation Act provides that the area must meet the following requirements:

That the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair and arrest the sound growth and development of the municipality;

That the project consists of a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation of such area and for recreational and other facilities incidental or appurtenant thereto; and

That the plan or undertaking affords maximum opportunity for participation by private enterprise, consistent with the sound needs of the municipality as a whole.²²⁵

These broad requirements for condemnation would allow most neighborhoods in New York City to qualify for condemnation under land use improvement projects. If the legislature does not have an interest in protecting its citizens from eminent domain abuse,²²⁶ then the courts must step in to place a check on the power of the legislature.

B. Courts Need to Require More than Vague Promises of Public Benefits

While most states took the initiative to protect their citizens' property rights in the aftermath of *Kelo*, New York continued to be, and still is, among the leaders in eminent domain abuse.²²⁷ There is no serious momentum towards comprehensive legislative reform in New York.²²⁸ Accordingly, the legislature willingly permits the government to take property of homeowners and businesses for private gain.²²⁹ Furthermore, in what appears to be an odd reality of eminent domain jurisprudence, courts heavily defer to legislative conclusions

²²⁵ N.Y. UNCONSOL. LAW § 6260(c)(1)–(3) (McKinney 2010).

²²⁶ CASTLE COALITION, *supra* note 62.

²²⁷ *Id.*; see also Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 850 (2008) (“[R]ural states, and other tending toward deference toward private property rights, have been the most active in forbidding condemnation practices that, for the most part, their subdivisions did not engage in anyway. Those states, largely in the northeast, which have engaged in extensive condemnation activity for private revitalization, largely have resisted change.”).

²²⁸ CASTLE COALITION, *supra* note 62. As of November 2011, New York has not enacted any laws that protect against eminent domain abuse. However, New York State Senator Bill Perkins, whose district encompasses Columbia University and the project area, introduced a bill in 2010 that proposed to give “blight” a firm definition in order to curb the government’s takings power. S. 6791, 2010 Leg., 232nd Leg. Sess. (N.Y. 2010).

²²⁹ CASTLE COALITION, *supra* note 62.

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about what serves a public purpose.²³⁰ As noted by Justice Thomas in his *Kelo* dissent, courts do not so heavily rely on legislative determinations in most other areas of the law.²³¹ Justice Thomas pointed to the Court's careful assessments of the reasonableness of a search of a home and the shackling of a defendant during sentencing proceedings as examples.²³² As a consequence of such legislative deference in eminent domain cases, Justice Thomas finds a paradox in the Court's jurisprudence relating to the home:

[There is] overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic, when the issue is only whether the government may search a home. Yet . . . the Court tells us that we are not to "second-guess the City's considered judgments" when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes.²³³

Essentially, people are free from government intrusion inside their home, but their homes themselves are not protected from the government's ability to tear them down.²³⁴ Continuing down the path of broadening the power of the Takings Clause will lead to dangerous consequences, as demonstrated by the *Kaur* decision. The public purpose test is far too expansive to have any true meaning because so many economic development projects satisfy the minimal requirements of the test. As a result, such projects would be permitted to proceed regardless of the true private-benefit nature of the taking. Furthermore, the public use limitation serves an important role by requiring that an independent, outside observer make the determination as to whether there is actual use by the public.²³⁵ To let the government agency itself determine what is public use makes the agency simultaneously a judge of and an advocate for its own cause.²³⁶ Courts need to require that local governments demonstrate with "reasonable certainty" that the taking of the private property would bring forth the expected public benefit.

²³⁰ *Kelo v. City of New London*, 545 U.S. 469, 517 (2005) (Thomas, J., dissenting); see discussion *supra* Part IV.

²³¹ *Kelo*, 545 U.S. at 517 (Thomas, J., dissenting).

²³² *Id.* at 518.

²³³ *Id.* at 519 (Thomas, J., dissenting) (quoting *Payton v. N.Y.*, 455 U.S. 573, 601 (1980)).

²³⁴ *Id.* at 518 (Thomas, J., dissenting).

²³⁵ *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 190 (N.Y. 2009) (Smith, J., dissenting).

²³⁶ *Id.*

Supporters of judicial deference to legislatures argue that there are many benefits to such deference. Justice Stevens, in a speech defending the *Kelo* decision, noted that the “public outcry that greeted *Kelo* is some evidence that the political process is up to the task of addressing” the issues surrounding eminent domain.²³⁷ In theory, the legislative and constitutional amendment processes are highly responsive and equipped to evaluate and consider competing public interests.²³⁸ While the Court has brought about sweeping change in a number of areas,²³⁹ generally, the methodology of constitutional interpretation tends to produce “incremental rather than discontinuous change.”²⁴⁰

At the same time, however, the legislature can be largely influenced by public interest groups,²⁴¹ leaving some citizens out in the cold without any influence on their local government.²⁴² Justice O’Connor observed in *Kelo* that citizens with disproportionate influence and power in the political process, including large corporations and development firms, would benefit.²⁴³ As noted by scholars, those groups of people who are primarily targets of urban renewal programs are racial minorities, who do not have the same political sway as their wealthy, white neighbors.²⁴⁴ Historically, especially following the *Berman* decision, racial motivations were often hidden behind the labels of “slum clearance” or “neighborhood revitalization,” but a primary goal of these urban renewal projects was to channel minority settlement into certain areas and to uproot minority communities in other areas.²⁴⁵ The West Harlem neighborhood in which Columbia has staked its flag is primarily a minority community. Often times, the goals of redevelopment initiatives receive wide praise; meanwhile

²³⁷ The Honorable John Paul Stevens, Assoc. J., Supreme C. of the U.S., Judicial Predilections, Address to the Clark County Bar Association (Aug. 18, 2005), in 6 NEV. L.J. 1,4 (2005).

²³⁸ Mahoney, *supra* note 101, at 125.

²³⁹ *Id.* Mahoney notes that the Court was able to bring huge transformation in contracts, commerce, and due process clause doctrine, particularly in the New Deal era. *Id.* at 126.

²⁴⁰ *Id.* at 126. Mahoney suggests that it is reasonable to look to statutes and constitutional amendments for more effective, permanent relief from eminent domain abuse. *Id.*

²⁴¹ *Id.* at 125.

²⁴² *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (O’Connor, J., dissenting).

²⁴³ *Id.*

²⁴⁴ Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 6 (2003).

²⁴⁵ *Id.* at 47.

in the poor areas to be redeveloped, neighbors struggle to build community in the midst of abandonment.²⁴⁶ It is a powerful reminder that blight, while sometimes obvious, remains in the eye of the beholder.²⁴⁷ As New York has failed to take any measurable steps towards protecting its citizens' homes and businesses, those who live within the boundaries of West Harlem are facing an incalculable harm and suffering to their businesses, homes and community. The near-total-deference standard protects only against the most obvious and egregious abuses, and does not facilitate valid pretext challenges.²⁴⁸

As an alternative to legislative deference, courts should demand from local governmental organizations a showing of "reasonable certainty" that the expected benefits from an economic redevelopment project will actually accrue. Opponents to this proposition have stated that requiring judicial approval of every condemnation until the likelihood of success of the plan has been sufficiently established would impose a significant obstacle to the successful consummation of many plans.²⁴⁹ However precious and valuable time is to the successful consummation of plans, the actual success of the proposed redevelopment project, not just the rapidity at which the plan can be implemented, should be equally important. Suzette Kelo and her neighbors would have stood a fighting chance of keeping their homes if the court had required the city to show more than mere promises of more jobs and increased tax revenue.²⁵⁰ Instead, in the place of their former beloved homes there are empty lots of land because the economic development project never came to fruition, presumably never delivering on those promises of increased jobs and other benefits.²⁵¹ If all that is required for a redevelopment plan to pass muster is a general statement of intended benefits to the public, then any economic redevelopment plan would pass the test. This is dangerous and injurious to neighborhoods all over the United States, particularly in regions, like New York, where there are no legislative initiatives to limit eminent domain power.

While many plans would likely prove to be successful under the current standard—meaning that individuals would lose their homes, businesses, and community—extended judicial review would ensure

²⁴⁶ *Id.* at 51–52.

²⁴⁷ *Id.*

²⁴⁸ Mahoney, *supra* note 101, at 131.

²⁴⁹ Kelo v. City of New London, 545 U.S. 469, 488 (2005).

²⁵⁰ See *id.* at 506 (Thomas, J., dissenting).

²⁵¹ McGeehan, *supra* note 112.

that this loss would, at a minimum, advance a true public purpose. In the *Kaur* case, it is possible that the proposed plan would not pass this heightened scrutiny. The redevelopment plan, like the plan in *Kelo*, lists broad estimations of new jobs and increased tax revenue. The plan, however, lacks specificity. The types of jobs to be created and an explanation of how the public at large would benefit from implementation of the project are conspicuously absent. At the same time, however, Columbia University is an established, stable institution. In contrast to Pfizer, Columbia is unlikely to “pull-out” of the neighborhood because of the proximity of the main campus and the apparent need to expand the school and its resources.

While this Comment cannot resolve this issue, it is one that deserves the Courts’ careful consideration. Requiring Columbia and the redevelopment team to show credible evidence that the stated public benefits would accrue would not unduly burden the affluent institution. The homes and businesses of the Singhs, Sprayregen, and their neighbors deserve the same fundamental judicial protections and checks that their other property interests receive.

VII. CONCLUSION

Eminent domain is a powerful land development tool that, when used appropriately, can have positive effects on communities. At the same time, eminent domain can be a dangerous weapon when it falls into the hands of private parties who use eminent domain as a way to advance their private agenda. The *Kaur* decision demonstrates just how powerful private interests can be and is a clear example of the need for additional judicial protection against this strong force. The current extreme judicial deference to legislatures provides only minimal protection against radical uses of eminent domain. Courts can only overturn a governmental finding of blight if it is not rationally related to the project. As a result, as long as the economic redevelopment projects list certain public benefits, such as new jobs and increased tax revenue, they would likely pass judicial review as constitutional exercises of the Takings Clause.

Courts must have a stronger, more active role in eminent domain challenges, particularly in those challenges in which the plaintiffs claim that the stated public purpose are merely pretexts for conferring benefits on private entities. To accomplish this, courts need to demand that local governments show a “reasonable certainty” that the stated public benefits would flow from the project. While this heightened review is not perfect—as projects with truly pretextual stated public benefits would fall through the cracks—it would at least

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assure home and business owners that the government will not take their property without a second check by the courts.