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# A Standardless Standard

## HOW A MISAPPLICATION OF *KELO* ENABLED COLUMBIA UNIVERSITY TO BENEFIT FROM EMINENT DOMAIN ABUSE

### INTRODUCTION

In 2010, the New York Court of Appeals in *Kaur v. New York State Urban Development Corp.* granted Empire State Development Corporation (ESDC), a public authority, permission to take land in Manhattanville by eminent domain for sale to Columbia University, a private institution.<sup>1</sup> The taking indirectly displaced thousands of vulnerable residents and failed to create meaningful public benefits.<sup>2</sup> Though ESDC justified the taking as a means to eliminate urban blight,<sup>3</sup> substantial evidence strongly indicated that its primary motivation was Columbia's private benefit.<sup>4</sup> By deferring to ESDC's findings, the court misapplied important judicial principles and failed to prevent an unconstitutional exercise of eminent domain.

The government's power to take property for public use is both created and limited by the Public Use Clause of the Fifth Amendment, which dictates that "private property [shall not] be taken for *public use*, without just compensation."<sup>5</sup> Since the founding of the United States, courts have interpreted the requirement that property only be taken to serve public purposes as a necessary restriction on the power of legislatures to seize land.<sup>6</sup> By restricting the government's authority to take private property only for public purposes, the clause imposes a safeguard against governmental favoritism and the abusive

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<sup>1</sup> *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 724 (N.Y. 2010), *cert. denied* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

<sup>2</sup> Brief of Amicus Curiae New York State Senator Bill Perkins at 19-20, *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010) (No. 2010-1025), 2010 WL 3952034, at \*19-20 [hereinafter Perkins Amicus Brief].

<sup>3</sup> *Kaur*, 933 N.E.2d at 724.

<sup>4</sup> See *infra* Part V.

<sup>5</sup> U.S. CONST. amend. V (emphasis added).

<sup>6</sup> *Calder v. Bull*, 3 U.S. 386, 388 (1798).

dispossession of property owners.<sup>7</sup> Because takings often disproportionately harm vulnerable populations—such as the elderly and ethnic minorities—courts must ensure that such power is in fact used only to further the public good.<sup>8</sup> Failing to do so in *Kaur*, the court approved an unconstitutional taking<sup>9</sup> with devastating effects on many Manhattanville residents.<sup>10</sup>

The Supreme Court established the standard for public-use review in *Kelo v. City of New London*. In *Kelo*, the Court upheld a taking where the City intended to transfer property to a private developer with the public purpose of encouraging economic development.<sup>11</sup> In so holding, the Court explicitly established the government's ability to take private property and subsequently convey such property to another private party so long as a predominantly public purpose is served.<sup>12</sup> Nevertheless, the *Kelo* Court maintained the judiciary's traditional responsibility to review whether a taking is actually intended to serve a public purpose rather than solely to provide a private benefit.<sup>13</sup> The Court suggested the existence of a taking where the evidence of hidden impermissible favoritism is so substantial as to warrant a presumption of constitutional invalidity.<sup>14</sup> Such a case requires heightened judicial scrutiny into whether the taking is actually intended to accomplish a public purpose rather than the traditional deference applied in *Kelo*.<sup>15</sup>

This note argues that where affected landowners present sufficient evidence that the purported public purpose of a taking is merely pretextual to bestowing a private advantage, courts must consider all such evidence and deny absolute deference to the condemning authority.<sup>16</sup> This way, courts can prevent governmental agencies from abusing their power of eminent domain to transfer property from vulnerable populations to private parties who enjoy governmental favoritism.<sup>17</sup>

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<sup>7</sup> See, e.g., *Vill. Auto Body Work, Inc. v. Inc. Vill. of Westbury*, 454 N.Y.S.2d 741, 743 (N.Y. App. Div. 1982).

<sup>8</sup> See *infra* Part I.

<sup>9</sup> See *infra* Part V.

<sup>10</sup> See *infra* Part I.

<sup>11</sup> *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005).

<sup>12</sup> See *id.*

<sup>13</sup> *Id.* at 478.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part II.

<sup>17</sup> *Kelo*, 545 U.S. at 522 (2005) (Thomas, J., dissenting) (citing *id.* at 505 (O'Connor, J., dissenting)).

Since *Kelo*, courts have disagreed over whether the requirement of serious judicial inquiry into substantiated allegations of pretext extends to takings justified by blight remediation.<sup>18</sup> While some courts correctly extend the *Kelo* analysis to any takings challenged with substantial evidence of impermissible favoritism,<sup>19</sup> the Second Circuit explicitly rejected the application of heightened scrutiny in *Goldstein v. Pataki*, where a taking was intended to remediate blight because the court found that *Kelo*'s pretext analysis only applied to economic development takings.<sup>20</sup> However, though findings of blight were traditionally limited to unsafe and unsanitary conditions,<sup>21</sup> the modern definition of blight removal applied in New York is so broad that it encompasses the spirit of economic development addressed by the Court in *Kelo*.<sup>22</sup> Therefore, the Second Circuit's absolute deference to the condemning authority's findings of blight in *Goldstein* failed to properly apply *Kelo* and invited future abuses of the eminent domain power.<sup>23</sup>

This failing led the New York Court of Appeals in *Kaur* to review the exercise of eminent domain with absolute deference where ESDC claimed its actions were intended to eliminate blight.<sup>24</sup> Substantial evidence indicated the taking was primarily intended to benefit Columbia: Columbia created blighting factors, ESDC assisted in manufacturing a blight study at Columbia's behest, and ESDC sought to withhold important documents from the challengers during litigation, clearly indicating a conspiratorial relationship between ESDC and Columbia.<sup>25</sup> Furthermore, the procedural protections for property owners seeking to bring public use challenges in New York are prone to abuse because the statutes governing eminent domain procedure do not allow trial-level review of such claims.<sup>26</sup> Nevertheless, the New York Court of Appeals upheld the taking

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<sup>18</sup> See *infra* Part III.

<sup>19</sup> *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 170-71 (D.C. 2007) (finding impermissible favoritism where an agency gave taken land to a private party for the purpose of developing a purportedly blighted area); *In re Condemnation Proceeding by the Redevelopment Auth. of Phila.*, 938 A.2d 341, 345 (Pa. 2007) (citing Kennedy's concurrence for the requirement to seriously review the record for impermissible favoritism).

<sup>20</sup> *Goldstein v. Pataki*, 516 F.3d 50, 64 n.10 (2d Cir. 2008).

<sup>21</sup> *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 330 (N.Y. 1975).

<sup>22</sup> See *infra* Part IV.

<sup>23</sup> See *infra* Part III.

<sup>24</sup> See generally *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y.), *cert. denied*, *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

<sup>25</sup> See *infra* Part IV.

<sup>26</sup> See N.Y. EM. DOM. LAW § 207 (Consol. 2011).

without even mentioning the heightened standard required by *Kelo*.<sup>27</sup> By failing to apply heightened scrutiny, the court misapplied *Kelo* and enabled ESDC to abuse the power of eminent domain. Thus, the Supreme Court should have reversed the New York Court of Appeals and remanded *Kaur* for review using the heightened scrutiny required by *Kelo*. In denying the challengers' petition for certiorari,<sup>28</sup> the Court failed to defend the vulnerable populations who will be harmed by eminent domain abuse in Manhattanville<sup>29</sup> and also missed an opportunity to clarify its misunderstood holding in *Kelo*.<sup>30</sup>

This note will argue that the New York Court of Appeals applied an overly deferential standard of review to the taking at issue in *Kaur* and, in doing so, disobeyed the constitutional requirements of the Fifth Amendment under *Kelo* to the detriment of Manhattanville's economically disadvantaged citizens. Part I will describe the harms imposed on vulnerable populations when courts permit eminent domain abuse. Part II will explain that *Kelo* requires a heightened standard of judicial review where challengers to a taking must present substantial evidence that a condemning authority's stated public purpose is mere pretext for bestowing a private benefit. Part III will discuss the divergent standards of review applied by courts to public use challenges where takings are not solely justified by the need for economic development. Part IV will argue that courts in New York should apply heightened scrutiny to takings for blight remediation where challengers allege an unconstitutional private purpose because the factors in New York for determining whether an area is blighted and those for determining the need for economic development are indistinguishable from one another. Part V will argue that the New York Court of Appeals failed to prevent eminent domain abuse in *Kaur*. This part will argue that the court should have applied heightened scrutiny to ESDC's motives because substantial factual evidence supported a finding of impermissible favoritism and because the procedures for challenging a taking under the Public Use Clause in New York are particularly prone to abuse. It will further suggest that, due to the failures of the New York judiciary to prevent eminent domain abuse, the state legislature should take action

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<sup>27</sup> See *Kaur*, 933 N.E.2d at 737.

<sup>28</sup> *Tuck-It-Away, Inc.*, 131 S. Ct. at 822-23.

<sup>29</sup> See *infra* Part I.

<sup>30</sup> See *infra* Part III.

to protect vulnerable parties from private takings with merely pretextual public benefits. Finally, this note concludes by suggesting further discussion.

#### I. THE NEED FOR HEIGHTENED SCRUTINY OF SUSPICIOUS TAKINGS TO PREVENT HARMFUL ABUSE

The government's power to take private property has the dangerous potential to harm vulnerable populations and thus must be restricted to its constitutional limitations. The Public Use Clause forbids the exercise of eminent domain for purely private transfers, which could otherwise unconstitutionally harm property owners who do not enjoy governmental favoritism.<sup>31</sup> Without proper restraints on legislative power to take and transfer property, "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."<sup>32</sup> Thus, eminent domain abuse results in legislatures favoring rich and powerful citizens over those with less means to promote their economic and political interests,<sup>33</sup> just as the residents of Harlem were harmed in favor of Columbia University.

Takings for economic development "disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged."<sup>34</sup> This proposition, championed by Justice Thomas's dissent in *Kelo*,<sup>35</sup> is supported by substantial anecdotal evidence.<sup>36</sup> As of 2007, eminent domain project areas nationally were composed of, on average, 58 percent of minority residents while the surrounding

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<sup>31</sup> *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (quoting *id.* at 505 (O'Connor, J., dissenting)).

<sup>32</sup> *Id.* at 503 (O'Connor, J., dissenting).

<sup>33</sup> *See id.* at 505.

<sup>34</sup> Brief of Amici Curiae National Association for the Advancement of Colored People, et. al. in Support of Petitioners at 3, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811057, at \*3 [hereinafter NAACP Amicus Brief].

<sup>35</sup> *See Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

<sup>36</sup> *See* NAACP Amicus Brief, *supra* note 34, at 10 ("In San Jose, California, ninety-five percent of the properties targeted for economic redevelopment are Hispanic or Asian-owned, even though only thirty percent of businesses are owned by minorities . . . . In Ventnor, New Jersey, forty percent of the city's Latino community lives in a zone targeted for economic redevelopment . . . . In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African-American residents (44%) is twice that of the entire Township and nearly triple that of Burlington County, and in which the percentage of Hispanic residents (22%) is more than double that of all of Mt. Holly Township, and more than five times that of the county.").

communities contained an average of only 45 percent of minorities.<sup>37</sup> Similarly, the median incomes of persons living within eminent domain project areas was \$18,935.71, while the median income of persons in the surrounding communities was \$23,113.46.<sup>38</sup> Generally, properties are often selected for eminent domain partially due to their low market values, which dictates the amount of compensation the government is required to pay upon condemnation.<sup>39</sup> Thus, displaced citizens typically face difficulties finding “adequate replacement housing.”<sup>40</sup> This is particularly burdensome on the elderly, many of whom do not own their homes and are more likely to spend the end of their lives in nursing homes if displaced.<sup>41</sup> Clearly, those harmed by takings for economic development and blight remediation are groups with relatively little political and economic power who are in the greatest need of protection by the courts.<sup>42</sup>

The exercise of eminent domain in Manhattanville will primarily harm economically disadvantaged residents.<sup>43</sup> In an amicus brief in support of the challengers in *Kaur*, New York State Senator Bill Perkins urged against the taking because the proposed development would indirectly displace between three thousand and five thousand Harlem residents.<sup>44</sup> In particular, as the affected area was composed of 29.4 percent African-Americans and 52.3 percent Latinos, the taking would disproportionately burden minority citizens.<sup>45</sup> Like the takings before it,<sup>46</sup> the use of eminent domain in Manhattanville will invariably impose hardships on economically disadvantaged and politically impotent residents while further enriching a wealthy and powerful private actor, here Columbia University.

Standing up to legislative abuse on behalf of powerless citizens is an essential function of the courts and should be embraced under the Public Use Clause.<sup>47</sup> Justice Stone’s famous Footnote Four in *United States v. Carolene Products Co.*

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<sup>37</sup> DICK M. CARPENTER II & JOHN K. ROSS, INST. FOR JUSTICE, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN 6 (2007), available at [http://www.atg.wa.gov/uploadedFiles/Home/Office\\_Initiativess/Eminent\\_Domain/Demographics%20of%20Eminent%20Domain%20Abuse.pdf](http://www.atg.wa.gov/uploadedFiles/Home/Office_Initiativess/Eminent_Domain/Demographics%20of%20Eminent%20Domain%20Abuse.pdf).

<sup>38</sup> *Id.*

<sup>39</sup> NAACP Amicus Brief, *supra* note 34, at 13.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Kelo v. City of New London*, 545 U.S. 469, 521-22 (2005) (Thomas, J., dissenting).

<sup>43</sup> Perkins Amicus Brief, *supra* note 2, at 1.

<sup>44</sup> *Id.* at 19.

<sup>45</sup> *Id.* at 19-20.

<sup>46</sup> CARPENTER II & ROSS, *supra* note 37, at 6.

<sup>47</sup> See *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting).

established the need for heightened judicial scrutiny of legislative decisions when they harm “discrete and insular minorities.”<sup>48</sup> Eminent domain abuse tends to cause such harm because it “eliminates (or severely undermines) established community support mechanisms and has a deleterious effect on those groups’ ability to exercise what little political power they may have established as a community.”<sup>49</sup> Thus, takings that benefit private parties should not receive deferential treatment when challenged under the Public Use Clause because they “curtail the operations of those political processes ordinarily to be relied upon to protect minorities . . . .”<sup>50</sup> For these reasons, courts should apply *Kelo*’s test for impermissible favoritism to takings where evidence suggests that a stated public purpose is mere pretext for the unconstitutional transfer of property to a private party.<sup>51</sup> The New York Court of Appeals failed to do so in *Kaur* and thus unconstitutionally harmed the vulnerable residents of Manhattanville.<sup>52</sup>

## II. *KELO V. CITY OF NEW LONDON*: SETTING THE STANDARD OF REVIEW

The Supreme Court established the standard for reviewing challenges to eminent domain takings under the Public Use Clause in *Kelo*.<sup>53</sup> Where substantial evidence shows a taking “is intended to favor a particular private party, with only incidental or pretextual public benefits,” the court must not defer to the condemning authority.<sup>54</sup> Rather, the court must review the evidence to determine if the taking will result in actual benefits to the public.<sup>55</sup> If such review reveals impermissible favoritism rather than a valid public use, then the taking is unconstitutional.<sup>56</sup> In *Kaur*, the court misapplied this standard and, in doing so, ratified a flagrant violation of the Public Use Clause.<sup>57</sup>

In *Kelo*, the New London Development Corporation (NLDC), a nonprofit entity authorized to assist the City of New

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<sup>48</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>49</sup> NAACP Amicus Brief, *supra* note 34, at 15.

<sup>50</sup> *Carolene Products*, 304 U.S. at 152 n.4.

<sup>51</sup> See *infra* Part II.

<sup>52</sup> See *infra* Part V.

<sup>53</sup> *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005).

<sup>54</sup> See *id.* at 491-93 (Kennedy, J., concurring).

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* at 491.

<sup>57</sup> See *infra* Part V.



London, sought to take private land for the purpose of promoting economic development.<sup>58</sup> NLDC planned to give the land to the pharmaceutical giant Pfizer Inc. so they could build a \$300 million research facility.<sup>59</sup> The City projected the project would create over one thousand jobs, increase tax revenues, and generally improve the area's economy.<sup>60</sup> Susette Kelo, a homeowner whose property was at risk from the proposed project, filed a suit against the City for violating the Public Use Clause.<sup>61</sup> Justice Stevens, writing for the five-justice majority, rejected the petitioner's claim and held that private transfers of land taken through eminent domain are constitutional under the Public Use Clause where the purpose is to promote economic development.<sup>62</sup>

Though the Court gave deference to the legislature's determination that the public purpose of economic development would be served by the taking,<sup>63</sup> Justice Stevens noted that the government may not "take property under the *mere pretext* of a public purpose, when its actual purpose was to bestow a private benefit."<sup>64</sup> Such was not the case in *Kelo*, Stevens noted, because the taking was "executed pursuant to a 'carefully considered' development plan."<sup>65</sup> Thus, the Court left the door open for a hypothetical taking that might be found unconstitutional due to a stated public purpose that is "mere pretext" for enriching a private party.<sup>66</sup> However, in applying *Kelo*, subsequent courts have experienced difficulty applying this restriction because "the *Kelo* majority did not define the term 'mere pretext.'"<sup>67</sup>

Justice Kennedy, in a concurrence that qualified his agreement with the majority in *Kelo*, took steps to outline a hypothetical taking that would be unconstitutional under the Public Use Clause for "mere pretext."<sup>68</sup> He defined as unconstitutional "transfers intended to confer benefits on particular, favored private entities, and with only incidental or

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<sup>58</sup> *Kelo*, 545 U.S. at 473.

<sup>59</sup> *Id.*

<sup>60</sup> *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004).

<sup>61</sup> *Kelo*, 545 U.S. at 475.

<sup>62</sup> *Id.* at 489-90.

<sup>63</sup> *Id.* at 483.

<sup>64</sup> *Id.* at 478 (emphasis added).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 486-87.

<sup>67</sup> *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007).

<sup>68</sup> *See Kelo*, 545 U.S. at 490-93 (Kennedy, J., concurring).

pretextual public benefits.”<sup>69</sup> Though he agreed with Justice Stevens that generally courts should afford legislatures deference in their determinations to take land for public purposes, he noted that “[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit.”<sup>70</sup> While the majority opinion approached the stated public purpose with a “presumption of validity,” Justice Kennedy put forth a hypothetical where the risk of hidden impermissible favoritism in a transfer of taken land to private parties is so severe that courts should instead apply a presumption of constitutional invalidity.<sup>71</sup> Such a case would exist where “the transfers are . . . suspicious, or the procedures employed . . . [are] prone to abuse, or the purported benefits [to the public] are . . . trivial or implausible . . .”<sup>72</sup> Thus, Kennedy’s concurrence sets forth guidelines by which a successful claim of pretext for impermissible favoritism can be brought to prevent a taking that benefits a private party.<sup>73</sup>

In joining the majority to uphold the taking in *Kelo*, Justice Kennedy identified several reasons why the taking at issue did not exhibit signs of impermissible favoritism.<sup>74</sup> Among these factors were the City’s formulation of a development plan and commitment of public funds for the project before the private beneficiaries were identified.<sup>75</sup> In addition, the City’s compliance with “elaborate procedural requirements that facilitate review of the record and inquiry into the city’s purposes” led Kennedy to join the majority in upholding the taking as constitutional.<sup>76</sup> Notably, such procedural safeguards included a seven-day trial before the superior court with regard to the public use challenge.<sup>77</sup> As indicated in his concurrence, the absence of such factors would have prompted Justice Kennedy to apply a heightened level of scrutiny, which could have resulted in a finding that the taking was an unconstitutional violation of the Public Use Clause.<sup>78</sup>

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<sup>69</sup> *Id.* at 490.

<sup>70</sup> *Id.* at 491.

<sup>71</sup> *Id.* at 493.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 491-93.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 493.

<sup>77</sup> *Id.* at 475 (majority opinion).

<sup>78</sup> *Id.* at 493 (Kennedy, J., concurring).

Justice Kennedy's concurrence is essential to clarifying the *Kelo* decision with regard to "mere pretext" because, as the deciding vote on a split court, Kennedy explicitly conditioned his agreement with the majority on specific actions taken by the City's planning process to convince him of the taking's constitutionality.<sup>79</sup> Though the concurrence expresses the opinion of only a single justice, it makes clear, in conjunction with the majority's warning about pretextual takings,<sup>80</sup> that courts must not apply an absolutely deferential standard when property owners raise legitimate and well-founded public use challenges.<sup>81</sup> Rather, "deference to the government's public purpose determination may be overcome . . . if the party challenging the taking makes a 'clear showing' that the government's stated public purpose is 'irrational,' with 'only incidental or pretextual public benefits.'"<sup>82</sup> Thus, courts should give close review to takings that clearly exhibit the possibility of unconstitutional transfers as described in Kennedy's concurring opinion.<sup>83</sup> As such, *Kelo* establishes a "federal baseline"<sup>84</sup> under which courts must apply a heightened standard of review<sup>85</sup> to challenges under the Public Use Clause that are supported by substantial evidence of impermissible favoritism.<sup>86</sup>

Takings that benefit private parties while only creating incidental public benefits are unconstitutional under the Public Use Clause.<sup>87</sup> Thus, where substantial evidence indicates that eminent domain is exercised with impermissible favoritism, courts must apply a heightened standard of review to prevent violations of the Fifth Amendment.<sup>88</sup> By failing to apply this scrutiny in *Kaur*, the New York Court of Appeals did not meet its constitutional obligation to prevent a taking justified by merely pretextual benefits to the public.<sup>89</sup>

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<sup>79</sup> See Petition for Writ of Certiorari at 20, *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010) (No. 10-402), 2010 WL 4232633, at \*20 [hereinafter *Tuck-It-Away Cert. Petition*].

<sup>80</sup> *Kelo*, 545 U.S. at 478 (majority opinion).

<sup>81</sup> *Hawaii v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615, 656 (Haw. 2008).

<sup>82</sup> *Id.* (citations omitted).

<sup>83</sup> See *Tuck-It-Away Cert. Petition*, *supra* note 79, at 20.

<sup>84</sup> *Cormack v. Settle-Beshears*, 474 F.3d 528, 531 (8th Cir. 2007).

<sup>85</sup> *W. Seafood Co. v. United States*, 202 F. App'x 670, 675 (5th Cir. 2006).

<sup>86</sup> *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

<sup>87</sup> *Id.* at 490-93.

<sup>88</sup> *Id.*

<sup>89</sup> See *infra* Part V.

III. MISAPPLYING *KELO*—A SPLIT IN THE COURTS

While courts uniformly apply *Kelo* to takings for which the stated purpose is economic development,<sup>90</sup> jurisdictions differ as to whether the heightened standard for reviewing pretext claims should be used for other categories of takings, such as those purportedly executed to eliminate blight.<sup>91</sup> Those courts that afford a deferential presumption of validity to takings where substantial evidence suggests the stated public purpose of blight remediation is mere pretext in order to bestow a private benefit operate against the dictates of *Kelo*.<sup>92</sup> The New York Court of Appeals suffered from this failing when it improperly upheld the taking in *Kaur*.<sup>93</sup>

In cases where the legitimacy of a taking for economic development is challenged under the Public Use Clause due to evidence of favoritism, courts uniformly apply *Kelo*'s standard for reviewing pretext claims.<sup>94</sup> For example, in *Western Seafood Co. v. United States*, the Fifth Circuit considered a public use challenge to a taking that sought to promote economic development through transfer of Western Seafood's waterfront property to Hiram Walker Royall, a private developer.<sup>95</sup> There, the court considered factual evidence of impermissible favoritism to determine whether the stated public purpose was merely a pretext for conferring a private benefit.<sup>96</sup> This evidence supported allegations that the private developer had himself proposed the development project and that the City had granted him complete operational control over the project.<sup>97</sup> However, the court upheld the taking as constitutional because the evidence "[did] not support the inference that the City exhibited favoritism or [had] a purpose other than to promote economic development."<sup>98</sup> In reaching this conclusion, the court considered all of the evidence presented by challengers to determine

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<sup>90</sup> See, e.g., *Fideicomiso de la Tierra del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 23 (1st Cir. 2010); *W. Seafood Co.*, 202 F. App'x at 674.

<sup>91</sup> Compare *Goldstein v. Pataki*, 516 F.3d 50, 64 n.10 (2d Cir. 2008), with *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 171-72 (D.C. 2007).

<sup>92</sup> See *supra* Part II.

<sup>93</sup> See *infra* Part V.

<sup>94</sup> See, e.g., *Fortuno*, 604 F.3d at 23; *W. Seafood Co.*, 202 F. App'x at 674.

<sup>95</sup> *W. Seafood Co.*, 202 F. App'x at 671.

<sup>96</sup> *Id.* at 675.

<sup>97</sup> *Id.* at 675 n.9.

<sup>98</sup> *Id.*

whether a heightened standard of review was necessary and thus correctly applied the analysis required by *Kelo*.<sup>99</sup>

On the other hand, a conflict exists between jurisdictions as to whether the heightened standard of review envisioned by *Kelo* for suspicious takings applies to cases where the stated public purpose is blight remediation rather than economic development.<sup>100</sup> While the Second Circuit has expressly limited heightened scrutiny to economic development takings,<sup>101</sup> the D.C. Circuit Court of Appeals has correctly applied *Kelo*'s pretext analysis to a taking for blight remediation.<sup>102</sup>

The Second Circuit failed to apply *Kelo*'s heightened standard of review to a blight remediation taking in *Goldstein*.<sup>103</sup> There, ESDC took petitioner's property with the intention of transferring it to Forest City Ratner Company (FCRC), a private developer, to develop a new sports stadium for the New Jersey Nets in the Atlantic Yards Project Area.<sup>104</sup> A blight study commissioned by ESDC found that the neighborhood was characterized by "unsanitary and substandard conditions," such as vacant and underutilized buildings, irregularly shaped lots, and a long-abandoned and deteriorating rail line.<sup>105</sup> The challenging property owners, however, claimed the finding of blight was merely pretext for the private benefit to FCRC.<sup>106</sup> The allegations of impermissible favoritism were supported by evidence that the private developer first conceived of the project and proposed the geographic boundaries thereof, that the blight study occurred after the project had been announced, and that the required public review was a "sham."<sup>107</sup> Regardless, the court rejected the public use challenge on its face, finding that the *Kelo* pretext analysis did not apply because "private economic development is neither the sole, nor the primary asserted justification" for

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<sup>99</sup> *Id.*; see also *City of Norwood v. Horney*, 853 N.E.2d 1115, 1137 (Ohio 2006) (applying Kennedy's concurrence in *Kelo* to a taking for economic development purposes to support the proposition that the court should "strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual benefits").

<sup>100</sup> Compare *Goldstein v. Pataki*, 516 F.3d 50, 64 (2d Cir. 2008), with *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 171-72 (D.C. 2007).

<sup>101</sup> *Goldstein*, 516 F.3d at 64.

<sup>102</sup> *Franco*, 930 A.2d at 171-72.

<sup>103</sup> *Goldstein*, 516 F.3d at 64.

<sup>104</sup> *Id.* at 53.

<sup>105</sup> *Id.* at 59.

<sup>106</sup> *Id.* at 52-53.

<sup>107</sup> *Id.* at 55-56.

the taking.<sup>108</sup> The court also refused to apply Justice Kennedy's concurrence, finding that, "Kennedy may well have intended [his opinion] to apply exclusively to cases where the *sole* ground asserted for the taking was economic development."<sup>109</sup>

Conversely, the D.C. Circuit Court of Appeals correctly applied *Kelo* in a public use challenge to a taking for blight remediation.<sup>110</sup> In *Franco v. National Capital Revitalization Corp.*, the court reversed the trial court's decision to dismiss a claim for impermissible favoritism where a municipal agency took and transferred land to a private party for the purpose of developing a purportedly blighted area.<sup>111</sup> There, the city alleged that the challenger's shopping center was a blighting factor and thus subject to taking by eminent domain.<sup>112</sup> The city based its finding on evidence that the area was "characterized by underused, neglected, and poorly maintained properties," and that fragmented ownership encouraged an increase in crime, trash, and "other blighting factors."<sup>113</sup> Further, the city claimed development by the private recipient would result in crime reduction, increased sanitation, local job creation, expansion of the tax base for the city, and the general "revitalization of an economically distressed community."<sup>114</sup> On the other hand, the landowner made "specific factual allegations" in support of his pretext claim, including allegations that the municipal agency had entered into an agreement with the private developer two years before the development program was introduced to the city council, that the agency had "refused to discuss redevelopment plans with any present owners," and that the site was not actually blighted.<sup>115</sup>

The D.C. Circuit remanded the case for the court below to try the pretext claim on its merits, finding that "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of a public purpose is a pretext

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<sup>108</sup> *Id.* at 64.

<sup>109</sup> *Id.* at 64 n.10. Furthermore, as Part IV of this note will explain, the criteria necessary in New York to take property for either blight remediation or economic development are indistinguishable from one another. *See infra* Part IV. Thus, the distinction is an unsound basis upon which to alter the application of the Public Use Clause. *See infra* Part IV.

<sup>110</sup> *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 171-72 (D.C. 2007).

<sup>111</sup> *Id.* at 162-63.

<sup>112</sup> *Id.* at 163.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 170-71.

designed to make a taking for private purposes.”<sup>116</sup> Unlike the Second Circuit in *Goldstein*,<sup>117</sup> other courts have correctly applied the heightened scrutiny required by *Kelo*.<sup>118</sup>

Due to the devastating consequences of eminent domain abuse to vulnerable communities,<sup>119</sup> courts should not apply a uniform standard of absolute deference when deciding whether the stated purpose of blight remediation is merely pretextual to bestowing a private benefit.<sup>120</sup> The Second Circuit failed to apply heightened scrutiny in *Goldstein* and thus violated the *Kelo* standard.<sup>121</sup> Similarly, the New York Court of Appeals failed to even mention *Kelo* when it upheld a taking justified by blight remediation despite well-founded allegations of impermissible favoritism in *Kaur*.<sup>122</sup> Thus, the court deferred to ESDC’s finding of blight and, in doing so, upheld a harmful and unconstitutional taking.

#### IV. BLURRING THE LINE: THE EQUIVALENCE OF ECONOMIC DEVELOPMENT AND BLIGHT REMEDIATION

To justify a taking under the Public Use Clause, the factors for finding blight in New York are indistinguishable from those used to determine the need for economic development.<sup>123</sup> Thus, the Second Circuit’s theory that takings for blight remediation require less judicial scrutiny than those justified by economic development was illogical.<sup>124</sup> The New York Court of Appeals presumably followed *Goldstein* as precedent in *Kaur* when it improperly deferred to ESDC’s finding of blight in Manhattanville despite substantial evidence of impermissible favoritism.<sup>125</sup> Therefore, the deferential standard applied by the court failed to meet the constitutional

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<sup>116</sup> *Id.* at 171-72.

<sup>117</sup> *Goldstein v. Pataki*, 516 F.3d 50, 64 n.10 (2d Cir. 2008).

<sup>118</sup> *See Hawaii v. C & J Coupe Ltd. P’ship*, 198 P.3d 615, 650 (Haw. 2008) (directing the trial court in a public use challenge of a taking allegedly accomplished to improve a public highway to “consider any and all evidence . . . indicating that the private benefit . . . predominated”); *In re Condemnation Proceeding by the Redevelopment Auth. of Phila.*, 938 A.2d 341, 345 (Pa. 2007) (considering a pretext claim pursuant to Justice Kennedy’s concurrence in *Kelo* against a taking for blight remediation, and finding that the record does not support a bad faith claim).

<sup>119</sup> *See supra* Part I.

<sup>120</sup> *See supra* Part II.

<sup>121</sup> *See supra* Part III.

<sup>122</sup> *See infra* Part V.

<sup>123</sup> *See generally* Norman Siegel, Steven Hyman & Philip van Buren, *The Trouble with Eminent Domain in New York*, 4 ALB. GOV’T L. REV. 77 (2011).

<sup>124</sup> *Goldstein v. Pataki*, 516 F.3d 50, 64 (2d Cir. 2008).

<sup>125</sup> *See infra* Part V.

requirement of judicial review under the Public Use Clause as interpreted by the Supreme Court in *Kelo*.

Courts considered blight removal to be a valid public purpose for condemnation long before the Supreme Court ruled that economic development was, additionally, a valid public purpose.<sup>126</sup> The traditional definition of blight, however, was narrow: it was limited to “slums . . . whose eradication was itself found to constitute a public purpose for . . . condemnation” because they created conditions that threatened the health and welfare of the surrounding community.<sup>127</sup> Today, New York’s criteria for condemnation due to blight include a wide array of factors, including a simple lack of economic development.<sup>128</sup> The New York State Urban Development Corporation Act (UDC Act) prescribes that, for a finding of blight, the condemning authority must determine 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 or arrest the sound growth and development of the municipality.”<sup>129</sup> Though “insanitary” is a historical criterion for blight, “substandard” describes a broad range of conditions that a legislature might find in any area it determines to be in need of economic development without finding traditional blighting factors.<sup>130</sup> The New York Court of Appeals embraced this broad definition of blight in *Yonkers Community Development Agency v. Morris*, holding that, “areas eligible for . . . renewal are not limited to ‘slums’ as that term was formerly applied, and that, among other things, *economic underdevelopment* and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.”<sup>131</sup> This decision not only established economic development as a legitimate public purpose in New York; it also expanded the definition of blight to encompass the need for economic development. Thus, the line between economic development and blight remediation was blurred in New York well before *Kelo* established the federal baseline for economic development,<sup>132</sup> and certainly before the Second Circuit limited the application of *Kelo*’s heightened standard of review to allegations of pretext

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<sup>126</sup> See, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>127</sup> *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 330 (N.Y. 1975).

<sup>128</sup> *Id.*

<sup>129</sup> N.Y. UNCONSOL. LAW § 6260(c)(1) (McKinney 2000).

<sup>130</sup> *Morris*, 335 N.E.2d at 330.

<sup>131</sup> *Id.* (emphasis added).

<sup>132</sup> *Cormack v. Settle-Beshears*, 474 F.3d 528, 531 (8th Cir. 2007).



concerning takings accomplished solely for economic development purposes.<sup>133</sup>

The blurred distinction in New York between blight remediation and economic development is exemplified by the cases surrounding the use of eminent domain in Times Square during the mid 1980s.<sup>134</sup> There, courts relied on factors such as underutilization and suboptimal tax revenues to justify the elimination of urban blight through eminent domain.<sup>135</sup> In *Natural Resources Defense Council, Inc. v. New York*, the Second Circuit upheld a determination of blight based on, among other factors, the underutilization of property, high vacancy rates, rundown storefronts, and the presence of pornographic businesses.<sup>136</sup> These conditions, the court held, led to an “unproductive use of potentially valuable land,” and thus justified the use of eminent domain.<sup>137</sup> In *In re G. & A. Books, Inc.*, the findings of blight were clearly dependent on determinations that Times Square was less economically productive than it could have been with proper redevelopment.<sup>138</sup> This is precisely the justification the City of New London provided in determining the need to exercise its power of eminent domain as described in *Kelo*.<sup>139</sup> Thus, courts should apply the standard developed in *Kelo* to takings in New York that claim blight remediation as their public purpose.

As in blight cases, underutilization has also been used to justify takings solely for economic development in New York, underscoring the convergence of the two public purposes.<sup>140</sup> In *Sunrise Properties v. Jamestown Urban Renewal Agency*, the

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<sup>133</sup> Goldstein v. Pataki, 516 F.3d 50, 64 (2d Cir. 2008).

<sup>134</sup> See *Natural Res. Def. Council, Inc. v. New York*, 672 F.2d 292, 294 (2d Cir. 1982); see also *In re G. & A. Books, Inc.*, 770 F.2d 288, 291 (2d Cir. 1985).

<sup>135</sup> *Id.*

<sup>136</sup> *Natural Res. Def. Council, Inc.*, 672 F.2d at 294.

<sup>137</sup> *Id.*; see also *In re G. & A. Books, Inc.*, 770 F.2d at 292 (“Only 4,000 people, an extraordinarily low figure for a five-block area located adjacent to one of the world’s most densely developed business districts, work in the area. As a result of an absence of development for more than half a century, the existing buildings are old and run down; most are substandard for their intended commercial uses and many are vacant above the first floor. While the area is zoned for the highest density allowed in the City, 16% of the land area is used only for parking, 72% of the development rights have not been used, and 18% of the developed parts is vacant. The tax yield from the Project area is commensurately low: the FEIS estimated that while the existing properties in the Project area were expected to pay approximately \$5.4 million in taxes in 1984-85, a single building a block away was expected to pay \$6.2 million in taxes.”).

<sup>138</sup> See *In re G. & A. Books, Inc.*, 770 F.2d at 292.

<sup>139</sup> *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

<sup>140</sup> *Sunrise Props., Inc. v. Jamestown Urban Renewal Agency*, 614 N.Y.S.2d 841, 842 (N.Y. App. Div. 1994).

taking of private land was authorized for job creation, infrastructure development, and general economic improvement of the project area.<sup>141</sup> In upholding the taking as constitutional, the court stated, “The finding . . . that the property is *underutilized* is equivalent to a determination that condemnation of the property and subsequent development will serve a public purpose.”<sup>142</sup> Thus, underutilization was used to justify a taking for economic development just as it was used to justify takings for blight remediation in Times Square.<sup>143</sup>

Furthermore, just as creating jobs and increasing tax revenue were used to justify blight remediation in Times Square these exact factors are the basis for takings in New York aimed at promoting economic development. In *In re Fisher*, New York City took land in Lower Manhattan for a private transfer to the New York Stock Exchange without a finding of blight.<sup>144</sup> There, the court upheld the city’s actions because it found that the taking would spur economic development through increased job opportunities and tax revenues.<sup>145</sup> Clearly, the line between blight remediation and economic development in New York is blurred beyond any substantial distinction. Therefore, challenges to a taking under the Public Use Clause in New York should receive the same standard of review regardless of whether the taking is justified as a means to create economic development or to eliminate conditions that cause blight.

Though *Kelo* requires an inquiry into takings where the stated public purpose is mere pretext for bestowing a private benefit,<sup>146</sup> New York courts apply an absolutely deferential standard to a legislative or administrative decision to take land for blight remediation:

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 for those of the legislatively designated agencies; where . . . “those bodies have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (emphasis added).

<sup>143</sup> See *In re G. & A. Books, Inc.*, 770 F.2d at 292.

<sup>144</sup> See *In re Fisher*, 730 N.Y.S.2d 516, 516-17 (N.Y. App. Div. 2001).

<sup>145</sup> *Id.* at 517.

<sup>146</sup> *Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

to do about it, unless every act and decision of other departments of government is subject to revision by the courts.<sup>147</sup>

This deferential treatment is not appropriate for cases in which challengers allege impermissible favoritism in violation of the Public Use Clause and support such allegations with substantial evidence.<sup>148</sup> Thus, the standard applied by New York courts is below the federal baseline established in *Kelo* and enables legislatures to abuse their power of eminent domain.<sup>149</sup>

New York is one of only eleven states that permit takings for solely economic development purposes.<sup>150</sup> Thus, a

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<sup>147</sup> *In re Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009) (quoting *Kaskel v. Impellitteri*, 115 N.E.2d 659, 661 (N.Y. 1953)).

<sup>148</sup> See *supra* Part II.

<sup>149</sup> See *supra* Part II.

<sup>150</sup> The following research was conducted by Justin Kamen, Whitney Philips, and Ellie Merle, under the direction of Norman Siegel, Esq., from June-August, 2010. The following eleven states allow eminent domain takings for the sole purpose of economic development:

Arkansas: ARK. CODE ANN. §§ 14-168-304, 14-169-802(a)(1)(A) (2010). Hawaii: HAW. REV. STAT. § 101-2 (2010). Illinois: 735 ILL. COMP. STAT. 30/5-5-5(c), 620/9 (2011); see *Friends of the Parks v. Chi. Park Dist.*, 786 N.E.2d 161, 167 (Ill. 2003); *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 13-14 (Ill. 2002). Kansas: KAN. STAT. ANN. § 26-501b (2009). Maryland: See *Mayor of Baltimore City v. Valsamaki*, 916 A.2d 324, 353 (Md. 2007). Massachusetts: See *Commonwealth v. Bos. Edison Co.*, 828 N.E.2d 16, 30 (Mass. 2005). Mississippi: MISS. CODE ANN. § 11-27-1 (2010); see *Phil West, Mississippi Senate Upholds Barbour Veto of Eminent Domain Bill*, COM. APPEAL (Mar. 26, 2009, 1:54 PM), <http://www.commercialappeal.com/news/2009/mar/26/mississippi-senate-upholds-barbour-veto-eminant-do/>. New York: See *In re Glen Cove Cmty. Dev. Agency*, 712 N.Y.S.2d 553, 554 (N.Y. App. Div. 1999); *Sunrise Props. v. Jamestown Urban Renewal Agency*, 614 N.Y.S.2d 841, 842 (N.Y. App. Div. 1994). Rhode Island: See R.I. GEN. LAWS § 42-64.12-8 (2011). South Dakota: S.D. CODIFIED LAWS § 11-8-50 (2010). Utah: See UTAH CODE ANN. § 10-8-2(e)(iii) (LexisNexis 2011).

The following thirty-nine states do not allow eminent domain takings for the sole purpose of economic development:

Alabama: See ALA. CODE § 18-1B-2 (2010). Alaska: ALASKA STAT. § 09.55.240(d) (2010). Arizona: A.Z. CONST. art. II, § 17; see ARIZ. REV. STAT. ANN. § 12-1111 (2010). California: CAL. HEALTH & SAFETY CODE § 33030 (West 2010); *Redevelopment Agency of S.F. v. Hayes*, 206 P.2d 105, 121 (Ca. Ct. Apps. 1954). Colorado: COLO. REV. STAT. § 38-1-101(b)(I) (2010). Connecticut: CONN. GEN. STAT. § 8-127a(1) (2010). Delaware: DEL. CODE ANN. tit. 29 § 9501A(a) (2010); *Wilmington Parking Auth. v. Land With Improvements*, 1986 De. Super. LEXIS 1348 (Del. Sup. Ct. Aug. 11, 1986). Florida: FLA. STAT. § 73.014 (2010). Georgia: GA. CODE ANN. § 22-1-1(9)(B) (2011). Idaho: IDAHO CODE ANN. § 7-701A(2)(b) (2010). Indiana: IND. CODE §§ 32-24-4.5-1(a), 36-7-14-20, 36-7-14-43(7) (2010); *Hawkins v. Greenfield*, 230 N.E.2d 396, 403 (Ind. 1967). Iowa: IOWA CODE § 6A.22(2) (2010). Kentucky: KY. REV. STAT. ANN. § 416.675 (West 2010). Louisiana: L.A. CONST. art. I, § 4(B)(3). Maine: ME. REV. STAT. ANN. tit. 1, § 816 (2010). Michigan: M.I. CONST. art. X § 2 (2010). Minnesota: MINN. STAT. § 117.025(11)(b) (2010). Missouri: MO. ANN. STAT. § 523.271 (West 2010). Montana: See MONT. CODE ANN. § 70-30-102 (2010). Nebraska: NEB. REV. STAT. § 76-710.04(1) (2010). Nevada: See NEV. REV. STAT. ANN. § 37.010 (2010). New Hampshire: N.H. REV. STAT. ANN. § 498-A:2(VII)(b) (2010). New Jersey: See N.J. CONST. art. VIII, § III, ¶ 1; *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 449 (N.J. 2007). New Mexico: N.M. STAT. ANN. § 3-60A-10(L)(3) (2010). North Carolina: N.C. GEN. STAT. § 160A-512(6) (2010). North Dakota: N.D. CONST. art. I, § 16. Ohio: OHIO REV. CODE ANN.

condemning authority can claim blight remediation, rather than economic development, as its purpose for taking property so as to avoid close judicial review of its motives.<sup>151</sup> In states that do not permit eminent domain solely for economic development purposes, courts review evidence to ensure that condemners do not manufacture blight findings in attempts to conceal a true purpose of strictly economic development.<sup>152</sup> For example, in *City of Norwood v. Horney*, the Supreme Court of Ohio struck down the use of eminent domain where the condemning authority sought to take property in what it deemed to be a “deteriorating area.”<sup>153</sup> There, the court found the taking illegal because the factors used to determine whether an area was deteriorating, including increased traffic, numerous curb cuts, and small front yards, created “a standardless standard,” by which a condemning agency could describe practically any city.<sup>154</sup> Therefore, the taking was founded solely on the promotion of economic development and, thus, did not have a sufficient public purpose under the Ohio Constitution.<sup>155</sup> However, in New York, no such scrutiny is applied to blight takings because economic development is a sufficient public purpose in and of itself for the use of eminent domain.<sup>156</sup> Also, the criteria used in New York to justify takings for both blight elimination and for economic development are nearly identical, rendering the line between these two public purposes blurred beyond substantive recognition.<sup>157</sup> Thus, it is vitally important that New York courts apply the federal baseline established in *Kelo* to blight-remediating takings.<sup>158</sup> Otherwise, legislatures can circumvent

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§ 163.01(H)(1) (LexisNexis 2011). Oklahoma: Bd. of Cnty. Comm’rs v. Lowery, 136 P.3d 639, 647 (Okla. 2006). Oregon: See OR. REV. STAT. § 35.015 (2009). Pennsylvania: See 26 PA. CONS. STAT. § 204 (2010). South Carolina: S.C. CONST. ANN. art. I, § 13. Tennessee: TENN. CODE ANN. § 29-17-102(2) (West 2010). Texas: TX. GOV’T CODE ANN. § 2206.001 (b)(3) (West 2010). Vermont: VT. STAT. ANN. tit. 12, § 1040(a) (2010); VT. STAT. ANN. tit. 24, § 3201(17)-(19) (2010). Virginia: VA. CODE ANN. § 1-219.1 (2010). Washington: See WASH. REV. CODE ANN. § 35.81.080 (West 2010). West Virginia: See W. VA. CODE § 54-1-2 (2010). Wisconsin: See WIS. STAT. § 32.03(6)(c) (2010). Wyoming: See WYO. STAT. ANN. § 1-26-801(c) (2010).

<sup>151</sup> See Goldstein v. Pataki, 516 F.3d 50, 64 (2d Cir. 2008).

<sup>152</sup> See, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006).

<sup>153</sup> *Id.* at 1145.

<sup>154</sup> *Id.* at 1144-45.

<sup>155</sup> *Id.* at 1142.

<sup>156</sup> See *In re Glen Cove Cmty. Dev. Agency*, 712 N.Y.S.2d 553, 554 (N.Y. App. Div. 1999); *Sunrise Props., Inc. v. Jamestown Urban Renewal Agency*, 614 N.Y.S.2d 841, 842 (N.Y. App. Div. 1994).

<sup>157</sup> Compare *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 726 (N.Y.), *cert. denied*, *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010), with *Sunrise Props., Inc.*, 614 N.Y.S.2d at 842.

<sup>158</sup> See *supra* Part II.

*Kelo*'s ban on takings for impermissible private purposes by claiming a purpose of blight remediation rather than economic development, as was the case in *Kaur*.<sup>159</sup>

With the Second Circuit's refusal to extend *Kelo*'s pretext analysis to takings for blight remediation in *Goldstein*,<sup>160</sup> condemning authorities in New York can avoid a heightened standard of review for takings that exhibit evidence of impermissible favoritism<sup>161</sup> by simply claiming blight remediation as the purpose for a taking rather than economic development. Thus, such an authority can bypass judicial scrutiny and bestow a private benefit through eminent domain by simply manufacturing a blight study.<sup>162</sup> This was the case in *Kaur*, where the finding of blight in Manhattanville was supported by the desire to create jobs, increase tax revenue,<sup>163</sup> and prevent underutilization of property.<sup>164</sup> In this way, the public purpose of blight remediation stated in *Kaur* is very similar to the public purpose of economic development used elsewhere in the State.<sup>165</sup> As such, judicial review of purpose in eminent domain takings should be equivalent in these instances. Because the New York Court of Appeals applied a deferential standard in *Kaur* and declined to apply the heightened scrutiny demanded by *Kelo*,<sup>166</sup> the Supreme Court should have remanded the case back to the New York Court of Appeals for argument on the merits as to the claims of impermissible favoritism.<sup>167</sup> Instead, the Supreme Court denied certiorari and tacitly condoned the erroneous deference applied by the New York Court of Appeals to ESDC's exercise of eminent domain for the sole benefit of Columbia University.<sup>168</sup>

V. *KAUR V. NEW YORK STATE URBAN DEVELOPMENT CORPORATION: AN UNCHECKED ABUSE OF POWER*

In *Kaur*, the New York Court of Appeals declined to address the mere pretext analysis demanded by *Kelo* despite

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<sup>159</sup> See *Kaur*, 933 N.E.2d at 724.

<sup>160</sup> *Goldstein v. Pataki*, 516 F.3d 50, 64 (2d Cir. 2008).

<sup>161</sup> See *supra* Part II.

<sup>162</sup> See *supra* Part II.

<sup>163</sup> *Kaur*, 933 N.E.2d at 729.

<sup>164</sup> *Id.* at 726.

<sup>165</sup> *In re Fisher*, 730 N.Y.S.2d 516, 516-17 (N.Y. App. Div. 2001); *Sunrise Props., Inc. v. Jamestown Urban Renewal Agency*, 614 N.Y.S.2d 841, 842 (N.Y. App. Div. 1994).

<sup>166</sup> See *supra* Part II.

<sup>167</sup> See *infra* Part V.

<sup>168</sup> *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822, 822-23 (2010).

well-founded allegations that the taking was motivated by a private purpose.<sup>169</sup> There, ESDC purportedly sought to remediate blight in Manhattanville, a neighborhood on the Upper West Side of Manhattan, by transferring property to Columbia University.<sup>170</sup> Because the challengers in *Kaur* presented a “plausible accusation of impermissible favoritism to private parties,”<sup>171</sup> the court should have applied heightened scrutiny rather than the standard deference afforded to legislatures in typical public use challenges. Moreover, the evidence of impermissible favoritism in *Kaur* was nearly identical to the hypothetical factors outlined in Justice Kennedy’s *Kelo* concurrence, which would be subject to heightened scrutiny.<sup>172</sup> Finally, the procedures in New York for effecting a condemnation of property are particularly prone to abuse and thus challenges to such takings should receive proper consideration by the judiciary.<sup>173</sup> Thus, the New York Court of Appeals should have applied a heightened standard of review in *Kaur* due to evidence strongly suggesting that the taking, purportedly justified by blight remediation, was actually intended to bestow a purely private benefit.<sup>174</sup> Because the courts have failed to prevent eminent domain abuse in New York, the legislature should take steps to reduce the instances and inequalities of takings that have private beneficiaries.

A. *Evidence of Impermissible Favoritism in Kaur*

The facts of *Kaur* were strikingly similar to those described as highly suspect by Justice Kennedy’s hypothetical example of an impermissible taking in his *Kelo* concurrence, and thus the case demanded heightened judicial scrutiny.<sup>175</sup> Unlike in *Kelo*, where the private beneficiary was unknown at the time the redevelopment plan originated,<sup>176</sup> Columbia’s attorneys, consultants, and architects drafted every document concerning the Manhattanville redevelopment plan.<sup>177</sup> Additionally, numerous actions taken by both ESDC and Columbia throughout the

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<sup>169</sup> See *Kaur*, 933 N.E.2d at 732.

<sup>170</sup> *In re Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 11 (N.Y. App. Div. 2009), *rev’d* 933 N.E.2d 721 (N.Y. 2010).

<sup>171</sup> *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

<sup>172</sup> *Id.* at 493.

<sup>173</sup> See *infra* Part V.B.

<sup>174</sup> See *In re Kaur*, 892 N.Y.S.2d at 28.

<sup>175</sup> See *supra* Part II.

<sup>176</sup> *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

<sup>177</sup> *In re Kaur*, 892 N.Y.S.2d at 20.

condemnation process suggest the kind of conspiratorial relationship envisioned by the Supreme Court in *Kelo* to constitute impermissible favoritism.<sup>178</sup> Such evidence includes Columbia's misdeeds as the dominant property owner in Manhattanville,<sup>179</sup> ESDC's reliance on blight studies performed by Columbia's advisor,<sup>180</sup> and ESDC's attempts to obfuscate the record by withholding important documents during the litigation process.<sup>181</sup>

Perhaps the most striking evidence of eminent domain abuse in *Kaur* was Columbia's own role in creating the factors that ultimately led to ESDC's determination of blight in the area, such as underutilization of property and the existence of building code violations.<sup>182</sup> When ESDC considered developing the area in 2002, its Master Plan described no blight or blighted conditions in Manhattanville.<sup>183</sup> No blight studies were conducted thereafter until 2006, when Columbia had already taken control of "the very properties that would form the basis for a subsequent blight study."<sup>184</sup> As owner of these properties, Columbia vacated much of the real estate by forcing more than 50 percent of the tenants out of seventeen buildings.<sup>185</sup> Additionally, Columbia facilitated the degeneration of the neighborhood by failing to address water infiltration and building code violations, allowing tenants to violate local codes and ordinances, and maintaining garbage and debris in its properties for several years.<sup>186</sup> Further, the Appellate Division found that Manhattanville "was not in a depressed economic condition when . . . ESDC embarked on their Columbia-prepared-and-financed quest."<sup>187</sup> As such, the taking in *Kaur* provided substantial evidence of impermissible favoritism.

Columbia's creation of blighting factors distinguishes *Kaur* from *Western Seafood*, where a private developer received taken land in an economically stagnant community to spur development.<sup>188</sup> In that case, the Fifth Circuit applied *Kelo*'s test for mere pretext because the private developer had a suspicious

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<sup>178</sup> *Id.* at 21.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 12-13.

<sup>181</sup> *Id.* at 29 (Richter, J., concurring).

<sup>182</sup> *Id.* at 21.

<sup>183</sup> *Id.* at 19.

<sup>184</sup> *Id.* at 21.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 19.

<sup>188</sup> *W. Seafood Co. v. United States*, 202 F. App'x 670, 675 (5th Cir. 2006).

amount of control over the project.<sup>189</sup> However, the court allowed the taking: “because the [private developer] own[ed] acres of property along the river where the marina [was] to be built, the City’s interest in their collaboration [was] logical.”<sup>190</sup> While this situation is similar to the facts of *Kaur*, *Western Seafood* shows no evidence that the private developer caused the very blighting factors that supplied the need for a taking.<sup>191</sup> In *Kaur*, on the other hand, the city rewarded Columbia for causing blight by giving the irresponsible property owner even more land.<sup>192</sup> Therefore, heightened scrutiny was appropriate in *Kaur* but not in *Western Seafood*.

ESDC’s complicity with Columbia’s efforts to justify the use of eminent domain in Manhattanville provides further evidence of impermissible favoritism.<sup>193</sup> In 2006, ESDC hired private consultant Allee King Rosen and Flemming, Inc. (AKRF) to conduct a blight study of Manhattanville.<sup>194</sup> AKRF’s finding of blight was tainted, however, by its previous role in assisting Columbia to develop and execute an expansion plan in 2004.<sup>195</sup> When the challenging property owners issued a Freedom of Information Law (FOIL) request for documents concerning the relationship between AKRF, ESDC, and Columbia, the court forced ESDC to disclose the documents because “the difficulty of offering perfectly objective advice while serving two masters elevate[d the] FOIL appeal beyond the average agency-consultant relationship that the FOIL exemptions are designed to foster and protect.”<sup>196</sup> By employing Columbia’s consultant for its initial blight study, ESDC clearly favored Columbia in the process of determining the need for exercising eminent domain in Manhattanville.<sup>197</sup> Though ESDC subsequently replaced AKRF with Earth Tech, a consultant without suspicious ties to Columbia, ESDC requested that Earth Tech “replicate’ the AKRF study using the same flawed

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *See id.*

<sup>192</sup> *In re Kaur*, 892 N.Y.S.2d at 21-22; *see also* *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y.), *cert. denied*, *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

<sup>193</sup> *Id.* at 20.

<sup>194</sup> *In re Tuck-It-Away Assocs. v. Empire State Dev. Corp.*, 861 N.Y.S.2d 51, 54 (N.Y. App. Div. 2008).

<sup>195</sup> *Id.* at 60.

<sup>196</sup> *Id.*

<sup>197</sup> *See In re Kaur*, 892 N.Y.S.2d at 20.



methodology” previously employed by AKRF.<sup>198</sup> Thus, ESDC’s final blight study was just as tarnished by favoritism to Columbia as the original AKRF study had been.<sup>199</sup> Additionally, Earth Tech’s study was not completed until 2008, at which point “the ESDC/Columbia steamroller had virtually run its course to the fullest.”<sup>200</sup> This is exactly the kind of public-private conspiracy Justice Kennedy envisioned in *Kelo* to demand heightened scrutiny under the Public Use Clause.<sup>201</sup>

One of the documents unveiled by the aforementioned FOIL litigation reveals the dramatic extent of ESDC’s role in creating a pretextual justification for the exercise of eminent domain on Columbia’s behalf.<sup>202</sup> In an e-mail sent before hiring AKRF in 2006, ESDC Senior Counsel Joseph Petillo questioned the wisdom of conducting a blight study: “I am uncomfortable with [ESDC] shining a spotlight on the process used to manufacture support for condemnation . . . . [M]aybe we want to craft the support for our blight findings in a less public way . . . .”<sup>203</sup> This e-mail was clearly evidence of unconstitutional collusion, as ESDC intended to “manufacture” support for the taking to benefit Columbia. Furthermore, ESDC not only withheld this and similar documents from challenging property owners despite numerous FOIL requests and litigations, but it also refused to keep the record open until the FOIL litigation initiated by the landowners was completed.<sup>204</sup> As such, ESDC exhibited impermissible favoritism toward Columbia from the planning phase through the entire litigation process.<sup>205</sup>

The Appellate Division, which first heard *Kaur*, concluded from this evidence that ESDC used its blight finding as pretext to bestowing a benefit on Columbia and, as per the Supreme Court’s instructions in *Kelo*, held that ESDC did not take the private property for a legitimate public purpose.<sup>206</sup> When the New York Court of Appeals reversed the Appellate Division’s decision, the court failed to even mention *Kelo*, let alone apply Kennedy’s test for heightened scrutiny.<sup>207</sup> Thus, the

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<sup>198</sup> *Id.* at 22.

<sup>199</sup> *See id.*

<sup>200</sup> *Id.* at 19.

<sup>201</sup> *See supra* Part II.

<sup>202</sup> Tuck-It-Away Cert. Petition, *supra* note 79, at 8.

<sup>203</sup> *Id.*

<sup>204</sup> *In re Kaur*, 892 N.Y.S.2d at 29 (Richter, J., concurring).

<sup>205</sup> *Id.* at 29-30.

<sup>206</sup> *Id.* at 28 (majority opinion).

<sup>207</sup> *See Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y.), *cert. denied*, *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

Court of Appeals misapplied the *Kelo* standard where it was clearly applicable and therefore decided *Kaur* incorrectly.

While the Second Circuit and the New York Court of Appeals also declined to apply a heightened standard of review in the *Goldstein* cases,<sup>208</sup> the facts of the Atlantic Yards taking were more closely aligned with the facts of *Kelo* than with Kennedy's hypothetical, and thus, unlike in *Kaur*, the courts were justified when they dismissed the public use challenges.<sup>209</sup> When ESDC decided to improve the Atlantic Yards Project Area through private development by the FCRC, the finding of blight was supported by over forty years of previous studies that had reached similar conclusions.<sup>210</sup> Particularly, the blight studies determined the need to eliminate a large abandoned railway that was the main factor in the area's economic deterioration.<sup>211</sup> This supported ESDC's decision to condemn property for transfer to FCRC on the basis that the area was, in fact, blighted.<sup>212</sup> As blight remediation is a legitimate public purpose for the exercise of eminent domain, the courts were correct to uphold the taking of land in Atlantic Yards despite their failure to properly apply *Kelo*.<sup>213</sup> Such evidence was not present in *Kaur*, however,<sup>214</sup> and thus that case was erroneously decided under an overly deferential standard of review.

*B. Procedural Impediments to Public Use Challenges in New York*

The New York Court of Appeals should have applied heightened scrutiny in *Kaur* not only because factual evidence strongly suggested impermissible favoritism, but also because, under New York law, the challengers were unable to seek review at a trial level court.<sup>215</sup> Instead, they were required to begin the litigation process at the appellate level after establishing the record at a public hearing conducted by

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<sup>208</sup> *Goldstein v. Pataki*, 516 F.3d 50, 64 (2d Cir. 2008); see *In re Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009).

<sup>209</sup> See *supra* Part II.

<sup>210</sup> *Goldstein v. N.Y. State Urban Dev. Corp.*, 879 N.Y.S.2d 524, 534 (N.Y. App. Div.), *aff'd sub nom. In re Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009).

<sup>211</sup> *In re Goldstein*, 921 N.E.2d at 175.

<sup>212</sup> *Goldstein*, 879 N.Y.S.2d at 527-28.

<sup>213</sup> See *supra* Part III.

<sup>214</sup> *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y.), *cert. denied*, *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

<sup>215</sup> See N.Y. EM. DOM. LAW § 207 (Consol. 2011).

ESDC.<sup>216</sup> In *Kelo*, Justice Kennedy's call for heightened scrutiny in some public use challenges included cases where "the procedures employed [are] prone to abuse . . . ."<sup>217</sup> Kennedy found a seven-day bench trial before the Superior Court to be an adequate procedural safeguard because property owners could challenge the legitimacy of the taking in a fair, adversarial proceeding.<sup>218</sup> On the other hand, New York is currently the only state in which challenges to the legitimacy of an alleged public purpose for the exercise of eminent domain do not receive judicial review at the trial court level.<sup>219</sup> Thus, the

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<sup>216</sup> *Id.*

<sup>217</sup> *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring).

<sup>218</sup> *Id.*

<sup>219</sup> The following research was conducted by Justin Kamen, Whitney Philips, and Ellie Merle, under the direction of Norman Siegel, Esq., from June to August 2010. The following forty-nine States provide trial court level judicial review to determine the legitimacy of a stated public purpose for use of the eminent domain power:

Alabama: *See* ALA. CODE §§ 18-1A-91(b), 18-1A-94(b), 18-1A-130 (2010). Alaska: ALASKA STAT. §§ 09.55.290, 09.55.300 (2010). Arizona: ARIZ. REV. STAT. ANN. § 12-1116(H) (2010). Arkansas: ARK. CODE ANN. §§ 18-15-1202(b)(1), 18-15-1505 (2010). California: CAL. CIV. PROC. CODE §§ 1260.110, 1260.120 (2010); *see* *City of Stockton v. Marina Towers LLC*, 88 Cal. Rptr. 3d 909, 923-24 (Cal. Ct. App. 2009). Colorado: *See* *Dunham v. City of Golden*, 504 P.2d 360, 361-62 (Colo. App. 1972) (affirming the district court's decision to allow condemnation of private property where the city sought to widen a public street). Connecticut: *Hall v. Weston*, 355 A.2d 79, 85 (Conn. 1974). Delaware: DEL. CODE ANN. tit. 10, § 6107 (2010); *see* *State ex rel. Sharp v. 0.62033 Acres of Land*, 112 A.2d 857, 859 (Del. 1955). Florida: *Rukab v. City of Jacksonville Beach*, 811 So. 2d 727, 733 (Fla. Dist. Ct. App. 2002). Georgia: GA. CODE ANN. §§ 22-1-11, 22-2-130 (2011). Hawaii: HAW. REV. STAT. § 101-10 (2010). Idaho: IDAHO CODE ANN. §§ 7-706, 7-721(2) (2010). Illinois: *See* *Wheeling v. Exch. Nat'l Bank of Chi.*, 572 N.E.2d 966, 969 (Ill. App. Ct. 1991). Indiana: *See* IND. CODE ANN. §§ 32-24-1-6, 32-24-1-8 (2010). Iowa: IOWA CODE § 6A.24 (2010). Kansas: KAN. STAT. ANN. §§ 26-501, 26-504 (2009); *Urban Renewal Agency v. Decker*, 415 P.2d 373, 374 (Kan. 1966). Kentucky: *See* *Commonwealth v. Cooksey*, 948 S.W.2d 122, 123 (Ky. Ct. App. 1997). Louisiana: *See* *United Gas Pipe Line Co. v. Blanchard*, 149 So. 2d 615, 616 (La. Ct. App. 1963). Maine: *See* *Cent. Maine Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 235 (Me. 1971). Maryland: *See* *Anne Arundel Cnty. v. Burnopp*, 478 A.2d 315, 316, 318 (Md. 1984). Massachusetts: *See* *Poremba v. Springfield*, 238 N.E.2d 43, 48 (Mass. 1968) (affirming the superior court's decision to uphold the taking of private land for the construction of a public highway). Michigan: *See* MICH. COMP. LAWS ANN. § 213.25 (2012). Minnesota: *See* MINN. STAT. § 117.075 (2010). Mississippi: *See* MISS. CODE ANN. § 11-27-15 (2010); *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940, 941 (Miss. 1994). Missouri: MO. ANN. STAT. § 523.261 (West 2011). Montana: *See* *Groundwater v. Wright*, 588 P.2d 1003, 1004 (Mont. 1979). Nebraska: *See* *City of Omaha v. Tract No. 1*, 778 N.W.2d 122, 125 (Neb. Ct. App. 2010). Nevada: NEV. REV. STAT. ANN. § 37.060 (2010); *see* *Glenbrook Homeowners Ass'n v. Pettitt*, 919 P.2d 1061, 1062 (Nev. 1996). New Hampshire: N.H. REV. STAT. ANN. § 498-A:9-b (2010). New Jersey: N.J. STAT. ANN. §§ 20:3-2(e), 20:3-5 (2010). New Mexico: N.M. STAT. ANN. § 42A-1-21 (2010); *Santa Fe S. Ry. v. Baucus Ltd. Liab. Co.*, 952 P.2d 31, 33-34 (N.M. Ct. App. 1997). North Carolina: N.C. GEN. STAT. § 40A-42(c) (2010). North Dakota: *City of Medora v. Golberg*, 569 N.W.2d 257, 258 (N.D. 1997). Ohio: OHIO REV. CODE ANN. §§ 163.08, 163.63 (2011). Oklahoma: *See* *City of Midwest City v. House of Realty, Inc.*, 100 P.3d 678, 682 (Okla. 2004). Oregon: OR. REV. STAT. § 35.015(c) (2009); *see* *Eugene v. Johnson*, 192 P.2d 251, 255 (Or. 1948). Pennsylvania: *See* *In re Condemnation Proceeding by the Redevelopment Auth. of Phila. (1839 N. Eighth St.)*, 938 A.2d 341, 344 (Pa. 2007). Rhode

New York Court of Appeals should have applied more exacting scrutiny in *Kaur* due to suboptimal procedural protections against the exercise of eminent domain for an illegitimate private purpose.<sup>220</sup>

Under New York’s Eminent Domain Procedural Law (EDPL), a condemning authority is required to make a “determination and findings concerning the proposed public project,” in which it must specify “the public use, benefit or purpose to be served by the proposed public project.”<sup>221</sup> Prior to its decision to take property, the condemnor must hold a public hearing<sup>222</sup> where “any person . . . shall be given a reasonable opportunity to present [a] . . . statement . . . concerning the proposed public project. A record of the hearing shall be kept . . . .”<sup>223</sup> Any party wishing to challenge a decision to condemn property “may seek judicial review thereof by the *appellate division* of the supreme court . . . . The court shall either confirm or reject the condemnor’s determination and findings. The scope of review shall be limited to whether . . . a public use, benefit or purpose will be served by the proposed acquisition.”<sup>224</sup> In *Jackson v. New York State Urban Development Corp.*, the New York Court of Appeals found that the EDPL does not “[require] a trial-type hearing to challenge a tentative decision to condemn.”<sup>225</sup> Therefore, a property owner who wishes to challenge the legitimacy of a taking under the Public Use Clause does not have the opportunity to present evidence to a neutral decision maker in a trial court for preservation of a record.<sup>226</sup> Rather, such property owner must first present evidence at a public hearing conducted by the

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Island: *See* R.I. Econ. Dev. Corp. v. Parking Co., L.P., 892 A.2d 87, 91 (R.I. 2006). South Carolina: *See* Brown v. Aiken Cnty., 244 S.E.2d 514, 515 (S.C. 1978) (reviewing the trial court’s decision to uphold the condemnation of property owners’ land). South Dakota: S.D. CODIFIED LAWS § 21-35-10.1 (2010). Tennessee: Ryan v. Louisville & N. Terminal Co., 50 S.W. 744, 746 (Tenn. 1899). Texas: TX. PROP. CODE ANN. § 21.003 (2010). Utah: *See* Salt Lake Cnty. v. Ramoselli, 567 P.2d 182, 183-84 (Utah 1977). Vermont: VT. STAT. ANN. tit. 19, §§ 504, 505 (2010). Virginia: *See* Hoffman Family, LLC v. City of Alexandria, 634 S.E.2d 722, 725 (Va. 2006). Washington: *See* King Cnty. v. Theilman, 369 P.2d 503, 503 (Wash. 1962). West Virginia: *See* Charleston Natural Gas Co. v. Lowe & Butler, 44 S.E. 410 (W. Va. 1901) (reversing the Circuit Court’s decision and allowing a gas company to condemn land for use of its pipeline). Wisconsin: WIS. STAT. § 32.06(7) (2010). Wyoming: *See* Conner v. Bd. of Cnty. Comm’rs, Natrona Cnty., 54 P.3d 1274, 1278 (Wyo. 2002).

<sup>220</sup> *See supra* Part II.

<sup>221</sup> N.Y. EM. DOM. LAW § 204 (Consol. 2011).

<sup>222</sup> *Id.* § 201.

<sup>223</sup> *Id.* § 203.

<sup>224</sup> *Id.* § 207 (emphasis added).

<sup>225</sup> *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 440 (N.Y. 1986).

<sup>226</sup> *Brody v. Vill. of Port Chester*, 434 F.3d 121, 133 n.10 (2d Cir. 2005).

condemning authority.<sup>227</sup> The record that would normally be established in a trial court before a judge<sup>228</sup> is thus developed under the guidance of the agency seeking to exercise eminent domain. When the property owner challenges the agency's decision to condemn, the appellate court hears evidence developed at such hearing.<sup>229</sup> This system creates procedural impediments to challenge the stated public purpose for a taking and is thus prone to abuse by condemning authorities.<sup>230</sup>

The procedures outlined in the EDPL have been upheld as constitutional in New York and thus do not, on their own, violate a challenger's due process rights under the Fifth Amendment.<sup>231</sup> The Fifth Amendment mandates that the government shall not deprive citizens of property without due process,<sup>232</sup> the adequacy of which is determined by considering the private interest at risk of deprivation by the procedure, the risk of erroneous deprivation of that interest, and the government's interest in implementing the procedure.<sup>233</sup> The Second Circuit ruled in *Brody v. Village of Port Chester* that the challenger of a taking "has no constitutional right to participate in the [agency's] initial decision to exercise its power of eminent domain, and the post determination review procedure set forth in EDPL § 207 is sufficient" to provide challengers adequate process.<sup>234</sup> Because challengers can raise their claims at the public hearing required under the EDPL, they have an opportunity to make a record by presenting their views and submitting evidence.<sup>235</sup> As such, the procedure here described is not itself a violation of the due process right "to be heard 'at a meaningful time and in a meaningful manner.'"<sup>236</sup>

However, Justice Kennedy's hypothetical in *Kelo* does not require a violation of due process to trigger heightened scrutiny when there are allegations that the stated public purpose for a

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<sup>227</sup> N.Y. EM. DOM. LAW § 204.

<sup>228</sup> See *supra* note 219.

<sup>229</sup> See *Vill. Auto Body Works, Inc. v. Inc. Vill. of Westbury*, 454 N.Y.S.2d 741, 743 (N.Y. App. Div. 1982).

<sup>230</sup> *Id.*

<sup>231</sup> *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 441 (N.Y. 1986).

<sup>232</sup> U.S. CONST. amend. V.

<sup>233</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>234</sup> *Brody v. Vill. of Port Chester*, 434 F.3d 121, 133 (2d Cir. 2005); see also *Vill. Auto Body Works, Inc.*, 454 N.Y.S.2d at 743 (holding that EDPL § 207 "does not violate either the procedural or substantive due process rights of the property owner" (citation omitted)).

<sup>235</sup> *Vill. Auto Body Works, Inc.*, 454 N.Y.S.2d at 743.

<sup>236</sup> *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

taking is mere pretext to bestow a private benefit.<sup>237</sup> Rather, his standards for denying a presumption of validity require only that “the procedures employed [are] prone to abuse . . . .”<sup>238</sup> Though a public hearing allows challengers to establish a record that can later be heard by an appellate court, there are “practical impediments” inherent in this non-adversarial forum to demonstrating impermissible favoritism.<sup>239</sup> For example, in *Kaur*, ESDC closed the record despite the fact that the challenging landowners were engaged in FOIL litigation to retrieve documents from ESDC in support of their public use challenge.<sup>240</sup> Had the record been established under the supervision of a neutral arbiter rather than by the condemning authority itself, the plaintiffs in *Kaur* may have been able to use these documents to state a more compelling case of impermissible favoritism.<sup>241</sup> Although the EDPL does not facially violate the Due Process Clause, it sufficiently burdens challengers to trigger heightened judicial review under Kennedy’s analysis for mere pretext.<sup>242</sup> Therefore, the New York Court of Appeals should have applied a heightened standard of review in *Kaur*.

### C. *Possible Legislative Solutions to Eminent Domain in New York*

If the New York courts continue to allow takings for unconstitutional private purposes, then the New York State Legislature must take steps to prevent the abuses that occurred in *Kaur* from recurring in the future. Most obviously, New York should join the other forty-nine states in requiring trial level review of eminent domain challenges under the Public Use Clause<sup>243</sup> to ensure procedures that are not “prone to abuse.”<sup>244</sup> Also, if the courts insist on maintaining different standards of review, the application of which depend on whether a taking is intended to eliminate blight or solely to promote economic development,<sup>245</sup> then the statutory scheme must redefine blight so as to avoid the

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<sup>237</sup> See *Kelo v. City of New London*, 545 U.S. 469, 491-93 (2005) (Kennedy, J., concurring).

<sup>238</sup> *Id.*

<sup>239</sup> *Vill. Auto Body Works, Inc.*, 454 N.Y.S.2d at 743.

<sup>240</sup> *In re Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 29 (N.Y. App. Div. 2009) (Richter, J., concurring), *rev'd* 933 N.E.2d 721 (N.Y. 2010).

<sup>241</sup> See *id.* at 30

<sup>242</sup> *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

<sup>243</sup> See *supra* note 219.

<sup>244</sup> *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

<sup>245</sup> See *supra* Part III.

manipulations devised by ESDC and Columbia to elude heightened judicial scrutiny.<sup>246</sup> Thus, New York should amend the UDC Act to construe “blighted area” narrowly. Specifically, the legislature should adopt Vermont’s statutory limitation that “[n]o area shall be determined to be a blighted area solely or primarily because its condition and value for tax purposes are less than the condition and value projected as the result of the implementation of any . . . private redevelopment plan.”<sup>247</sup> Finally, New York should reduce the hardships imposed on persons displaced and disinherited by takings that seek solely to promote economic development by providing increased compensation for the property taken.<sup>248</sup> The legislature should adopt Kansas’s approach, which requires the condemnor in an economic development taking to pay the landowner 150 percent of the subject property’s fair market value.<sup>249</sup> By adopting these new laws, the New York State Legislature can reduce the instances and inequalities of eminent domain abuse despite the courts’ unwillingness to oppose private development interests and their political enablers.

#### CONCLUSION

The Supreme Court should have reversed the New York Court of Appeals in *Kaur* and remanded the case for review using the heightened scrutiny required by *Kelo*. Such a decision would have both defended the vulnerable populations harmed by the taking itself<sup>250</sup> and settled the jurisdictional split regarding public use challenges to takings that are purportedly intended to remediate blight.<sup>251</sup> Instead, the Second Circuit and New York courts will continue to defer to the judgments of condemning authorities that seek to abuse their power of eminent domain and who, in doing so, contribute to the widening gap between rich and poor throughout the state.<sup>252</sup>

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<sup>246</sup> See *supra* Part IV.

<sup>247</sup> VT. STAT. ANN. tit. 24 § 3201(3) (2010).

<sup>248</sup> See *supra* Part I.

<sup>249</sup> KAN. STAT. ANN. § 26-501b (2009); see also R.I. GEN. LAWS § 42-64.12-8 (2011) (“Owners of property taken for economic development purposes shall be compensated for . . . [a] minimum of one hundred fifty percent of the fair market value of the real property.”).

<sup>250</sup> See *supra* Part I.

<sup>251</sup> See *supra* Part III.

<sup>252</sup> See generally FISCAL POLICY INST., PULLING APART IN NEW YORK: AN ANALYSIS OF INCOME TRENDS IN NEW YORK STATE (2008), available at [http://www.fiscalpolicy.org/FPI\\_PullingApartInNewYork.pdf](http://www.fiscalpolicy.org/FPI_PullingApartInNewYork.pdf).

The Supreme Court may have denied certiorari in *Kaur*<sup>253</sup> because the New York Court of Appeals held that, besides eliminating blight, the expansion of Columbia University's campus in Manhattanville would serve a public purpose in and of itself as a "civic project."<sup>254</sup> Under the UDC Act, ESDC is empowered to take land, not only to remediate blight,<sup>255</sup> but also to "undertake the acquisition . . . of a [civic] project [when] . . . there exists . . . a need for the educational . . . facility . . . [and that] the project shall consist of . . . facilities which are suitable for educational . . . purposes."<sup>256</sup> Thus, the Supreme Court may have declined to discuss the suspicious facts surrounding ESDC's finding of blight in *Kaur* due to an unwillingness to prevent the use of eminent domain in support of an important and beneficial educational institution.<sup>257</sup> If so, the Court should take the next available opportunity to address the improper judicial deference expressed in *Goldstein* and displayed in *Kaur* in order to prevent the New York courts from further abdicating their duties as defenders of individual rights against the excesses of governmental power.<sup>258</sup> However, if the New York courts continue to sanction eminent domain abuse despite the dictates of *Kelo*, the legislature must take action to protect vulnerable populations from takings that only benefit private parties.

*Justin B. Kamen*<sup>†</sup>

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<sup>253</sup> *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822, 822-23 (2010).

<sup>254</sup> *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 733 (N.Y.), *cert. denied*, *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).

<sup>255</sup> N.Y. MUN. LAW § 6253(12) (McKinney 2009).

<sup>256</sup> *Id.* § 6260(6)(d). This decision is controversial as well. The appellate division found that Columbia's new campus, most of which will be inaccessible to the public, does not qualify as a "civic project" for purposes of eminent domain because the UDC Act only applies to "only such educational purposes as constitute a 'civic purpose.'" *In re Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 23 (N.Y. App. Div. 2009), *rev'd* 933 N.E.2d 721 (N.Y. 2010).

<sup>257</sup> *Kaur*, 933 N.E.2d at 734.

<sup>258</sup> *Calder v. Bull*, 3 U.S. 386, 388 (1798).

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