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**BLIGHT, PRETEXT, AND  
EMINENT DOMAIN IN NEW YORK**

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A Reply to Roderick Hills, *Rethinking Balancing Tests in Blight Condemnation Jurisprudence*, 39 FORDHAM URB. L.J. CITY SQUARE 29 (2011), <http://urbanlawjournal.com/?p=366>.

**INTRODUCTION**

I would like to thank Professor Roderick Hills for his insightful commentary<sup>1</sup> on my Article criticizing the New York Court of Appeals' two recent decisions that adopt a definition of blight so broad that it would allow almost any area to be declared "blighted" and thereby eligible for condemnation.<sup>2</sup> In the original Article, I criticized the decisions on two main grounds: that their licensing of virtually unlimited "blight" condemnations violates the New York Constitution, and that they failed to properly apply the U.S. Supreme Court's rule banning "pretextual" takings where the official rationale for condemnation is

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1. See generally Roderick Hills, *Rethinking Balancing Tests in Blight Condemnation Jurisprudence*, 39 FORDHAM URB. L.J. CITY SQUARE 29 (2011), <http://urbanlawjournal.com/?p=366>.

2. See generally Ilya Somin, *Let There Be Blight: Blight Condemnations In New York After Goldstein and Kaur*, 38 FORDHAM URB. L.J. 1193 (2011). The cases in question are *Kaur v. New York State Urban Development Corp.*, 933 N.E.2d 721 (N.Y. 2010) and *Goldstein v. New York State Urban Development Corp.*, 921 N.E.2d 164 (N.Y. 2009).

just a pretext for a scheme to benefit a private party.

Professor Hills argues that the state constitutional provision permitting blight takings is broad enough to justify the Court of Appeals' decisions. He also criticizes the possible standards for assessing pretextual condemnations on various grounds.

Unfortunately, Professor Hills's interpretation of the state constitution is unconvincing. He is wrong to conclude that almost any area can be considered a "slum" and therefore condemned. While the pretext standards applied by various lower courts since the U.S. Supreme Court's decision in *Kelo v. City of New London*<sup>3</sup> are far from perfect, the pretext standards are more defensible than Professor Hills allows. At the very least, they are preferable to judicial abdication.

#### I. "SLUMS" AND THE NEW YORK STATE CONSTITUTION

In *Goldstein v. New York State Urban Development Corp.*, the Court of Appeals adopted a virtually limitless definition of "blight" that includes any area where there is "economic underdevelopment" or "stagnation."<sup>4</sup> The Court took essentially the same approach in *Kaur*.<sup>5</sup> Pretty much any property can be described as underdeveloped relative to some other potential use of the same land. Even if the property somehow falls outside this definition, judges can only strike down a condemnation if "there is no room for reasonable difference of opinion as to whether an area is blighted."<sup>6</sup> In virtually every case, there is at least some room for "reasonable

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3. 545 U.S. 469 (2005).

4. *Goldstein*, 921 N.E.2d at 172 (quoting *Yonkers Community Dev. Agency v. Morris*, 335 N.E.2d 327, 330 (N.Y. 1975)).

5. See *Kaur*, 933 N.E.2d at 731-32.

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

difference of opinion" on the question of whether stagnation or underdevelopment is present.<sup>7</sup>

I argued that this expansive definition of blight is at odds with the text and original meaning of Article XVIII of the New York Constitution of 1938, which allows blight condemnations only in "substandard and unsanitary areas."<sup>8</sup> The text requires that such takings must be confined to areas that are "unsanitary," or in unusually bad condition ("substandard").<sup>9</sup> That is a far cry from *Goldstein's* holding that an area can be condemned merely because there is room for "reasonable disagreement" over whether it is "stagnant" or "underdeveloped."<sup>10</sup> Moreover, historical evidence suggests that the original understanding of this provision when it was enacted was that the provision was limited to "slum" areas, the term repeatedly used to describe the provision's scope during the Constitutional Convention of 1938.<sup>11</sup>

Professor Hills does not dispute most of the above. But, he argues that the term "slum" was used in a sense broad enough to encompass almost any area that in some way "could be improved."<sup>12</sup> In reality, however, this is not at all the way the term was used at the time Article XVIII was enacted.

At the 1938 Constitutional Convention where the Article was adopted, a leading proponent stated that:

[s]lum clearance is the redemption of areas where the physical condition of the housing and the neighborhood is so squalid, so demoralized, so lacking in light,

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7. For a more detailed discussion of this definition, see Somin, *supra* note 2, at 1201-03.

8. N.Y. CONST. art. XVIII, § 1; see also Somin, *supra* note 2, at 1201-03 (making these points).

9. See N.Y. CONST. art. XVIII, § 1.

10. *Goldstein*, 921 N.E.2d at 172-73.

11. See Somin, *supra* note 2, at 1202.

12. See Hills, *supra* note 1, at 31.

ventilation, fire protection and sanitation, so overcrowded with buildings and people that the existence of such areas endangers the health, safety and morals of those living there and impairs the welfare of the entire community wherein such areas exist.<sup>13</sup>

"Squalid" and "demoralized" neighborhoods are a far cry from ones that merely could be improved in some way.

Moreover, the ordinary language usage of the term "slum" in the 1930s was quite similar to today's practice and to the way the word was used at the 1938 Convention. Contemporary dictionaries uniformly defined it as denoting an unusually "squalid" or dilapidated area.<sup>14</sup> Some "progressives" may, as Professor Hills suggests, have preferred a broader definition.<sup>15</sup> But that was not the usage publicly employed by advocates of Article XVIII, nor was it prevalent in ordinary language. Furthermore, it is worth emphasizing that the word "slum" is not actually found in the text of the New York Constitution itself, but was merely an interpretation of language ("substandard and unsanitary") that itself denoted unusually poor conditions. Calling an area "substandard" implies that there is a "standard" norm below which the area falls. Similarly, an "unsanitary"

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13. Revised Record of the Constitutional Convention of the State of New York, April Fifth to August Twenty-Sixth, 1938, at 1512-85 (1938) [hereinafter Constitutional Convention]; see also Somin, *supra* note 2, at 1202.

14. See, e.g., THE NEW CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1742 (H.G. Emery & K.G. Brewster eds. Vol. 2, D. Appleton-Century 1936) (1927) (defining "slum" as "a thickly populated, squalid part of a city, inhabited by the poorest or lowest class of the people: as 'a small and shabby room in a Folkestone *slum*'" (quoting H.G. WELLS, KIPPS 101 (1905))); THE POCKET OXFORD DICTIONARY OF CURRENT ENGLISH 807 (F.G. Fowler & H.W. Fowler eds., rev. American ed. 1935) (defining "slum" as a "dirty, crowded poor district in a town"); WEBSTER'S HANDY-CONDENSED DICTIONARY OF THE ENGLISH LANGUAGE 311 (C.M. Stevens ed., rev. ed. 1928) (defining "slum" as "a low, dirty street or district of a city or town").

15. See Hills, *supra* note 1, at 30.

area is one that poses some sort of threat to public health or safety, not merely one that could be "improved."

Professor Hills is perhaps on firmer ground in claiming that the word "slum" was broad enough to include any area that lacked "basic amenities" such as central heating and indoor plumbing.<sup>16</sup> That definition is, of course, much narrower than his alternative formulation claiming that the term was used to justify condemnations in any areas that "could be improved." As Professor Hills notes, such basic amenities were lacking in a substantial percentage of New York homes in the 1930s and 1940s, thereby potentially authorizing condemnations in a wide range of neighborhoods.

I am not convinced that the mere lack of heating or indoor plumbing was enough to qualify an area as "substandard and unsanitary" under Article XVIII, especially in an era where the lack of such amenities was not nearly as unusual as it would be today. But even if I am wrong on this point, a definition of blight that covers only areas that lack basic amenities is still a far cry from *Goldstein's* holding that Article XVIII allows the condemnation of any neighborhood where there is room for "reasonable differences of opinion" over whether it is "underdeveloped."<sup>17</sup> Unlike in the 1930s, today only a tiny minority of New York homes lack the kinds of basic amenities that Professor Hills describes, and there was no evidence of any such flaws in the areas declared "blighted" in the *Goldstein* and *Kaur* cases.

Obviously, Professor Hills is right to suggest that Article XVIII licenses "statist intervention" of which I disapprove.<sup>18</sup> I am skeptical of blight condemnations even in genuinely slum-like areas because such

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16. See *id.* at 30-31.

17. See *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172-73 (N.Y. 2009).

18. Hills, *supra* note 1, at 30.

condemnations often cause far more harm than good, victimizing the poor and politically weak for the benefit of politically influential business interests.<sup>19</sup> But even though Article XVIII authorizes a broader range of takings than I consider justifiable, it does not permit the kind of limitless blight condemnations that the Court of Appeals endorsed in *Goldstein* and *Kaur*.

Before leaving the issue of "blight," it is important to emphasize that the Court of Appeals' errors went well beyond simply adopting an extremely expansive definition of the term. It also upheld "blight" determinations that were based on studies conducted by a firm that was on the payroll of the very same private interest groups who would take over the property should the use of eminent domain be authorized.<sup>20</sup> In addition, the firm was issued highly biased instructions that made clear that the authorities wanted it to reach a predetermined conclusion.<sup>21</sup> Moreover, the evidence suggests that Ratner and Columbia themselves may have created much of the "blight" that was then used to justify the condemnation of property for transfer to them.<sup>22</sup>

## II. THE FEDERAL PRETEXT STANDARD

In addition to its misinterpretation of the New York Constitution, the New York Court of Appeals also failed to properly apply federal constitutional standards that forbid "pretextual" condemnations. In *Kelo*, the U.S. Supreme Court ruled that virtually any potential public benefit qualifies as a "public use" justifying the use of

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19. See Somin, *supra* note 2, at 1209; see also Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 269-71 (2007) [hereinafter Somin, *Controlling the Grasping Hand*].

20. See Somin, *supra* note 2, at 1203-06.

21. See *id.*

22. See *id.* at 1206-08.

eminent domain,<sup>23</sup> but also reaffirmed that “pretextual” takings remain forbidden under the Fifth Amendment. Such condemnations occur when the official rationale for the taking is a pretext “for the purpose of conferring a private benefit on a particular private party.”<sup>24</sup>

Since *Kelo*, state courts and lower federal courts have disagreed greatly over the question of how to determine whether a taking qualifies as pretextual.<sup>25</sup> Courts have identified four potential criteria for addressing this issue:

1. The magnitude of the public benefit created by the condemnation. If the benefits are large, it seems less likely that the condemnation is merely pretextual.
2. The extensiveness of the planning process that led to the taking.
3. Whether the identity of the private beneficiary of the taking was known in advance. If the new owner’s identity was unknown to officials at the time they decided to use eminent domain, it is hard to conclude that government undertook the condemnation in order to advance this party’s interests.
4. The intentions of the condemning authorities. Under this approach, courts would investigate the motives of government

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23. See *Kelo v. City of New London*, 545 U.S. 469, 480 (2005); see also *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (concluding that a public use was any objective “rationally related to a conceivable public purpose”); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (ruling that the legislature has “well-nigh conclusive” discretion in determining what counts as a public use); Somin, *Controlling the Grasping Hand*, *supra* note 19, at 224-25 (discussing these two cases in greater detail).

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

25. See Ilya Somin, *Introduction: The Judicial Reaction to Kelo*, 4 ALB. GOV’T L. REV. 1, 25-35 (2011) (reviewing the relevant case law in detail).

decision-makers to determine what the true purpose of a taking was.<sup>26</sup>

What is unique about the *Goldstein* and *Kaur* cases is that the New York Court of Appeals and the federal Second Circuit, which addressed the pretext issue in *Goldstein v. Pataki*,<sup>27</sup> ruled that the takings were not pretextual despite the fact that *all four* factors were present.<sup>28</sup> As I described at some length in the original Article,<sup>29</sup> there was abundant evidence showing that the New York authorities intended to benefit developer Bruce Ratner and Columbia University, the private parties who would reap the lion's share of the benefits from the two condemnations; that the planning process was dubious at best; and that the identities of the private beneficiaries were well-known in advance.

Professor Hills does not contest any of this evidence. He does, however, doubt that "any of the four factors urged by Professor Somin will ever be deployed by many state judges to place major constraints on eminent domain" because they are too "mushy" and "policy-laden."<sup>30</sup> Depending on the definition of "very many,"<sup>31</sup> he might ultimately be proven right about this. So far, however, the vast majority of state and federal courts that have addressed the issue have adopted at least one of these four standards. The New York Court of Appeals and the Second Circuit are unusual outliers in rejecting all four.

I have reviewed the relevant case law in great detail elsewhere.<sup>32</sup> Here I will only

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26. See *id.* at 25; Somin, *supra* note 2, at 1211.

27. *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008). The federal pretext question in *Pataki* was addressed in a separate federal lawsuit rather than being considered in the same court as the state case, as happened in *Kaur*.

28. See Somin, *supra* note 2, at 1212-18.

29. See *id.*

30. See Hills, *supra* note 1, at 35.

31. *Id.* at 34.

32. See Somin, *supra* note 25, at 24-35.

summarize briefly. Two state supreme courts and several federal courts have focused on pretextual intent.<sup>33</sup> The highest court of the District of Columbia and at least one federal district court have emphasized the distribution of benefits from the taking.<sup>34</sup> Three state supreme courts have relied on the absence of extensive planning as an indication of a pretextual taking.<sup>35</sup> Finally, in

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33. See *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a mere pretext for “[a] scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price”); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-75 (E.D. Mo. 2003) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation), *rev’d on other grounds*, 357 F.3d 768 (8th Cir. 2004); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (“Courts must look beyond the government’s purported public use to determine whether that is the genuine reason or if it is merely pretext.”); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (holding that “[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual” and that the condemnation must be invalidated because “Lancaster’s condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another”); *Cnty. of Haw. v. C & J Coupe Family Ltd. P’ship*, 198 P.3d 615, 642 (Haw. 2008); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007). Over the last twenty years, the trend of state decisions has been towards greater scrutiny of such takings. See *Somin*, *supra* note 25, at 21-23.

34. See *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 173-74 (D.C. 2007); *MHC Financing Ltd. P’ship v. City of San Rafael*, No. C 00-3785 VRW, 2006 WL 3507937, at \*14 (N.D. Cal. 2006).

35. See *Mayor of Balt. v. Valsamaki*, 916 A.2d 324, 352-53 (Md. 2007) (noting absence of a clear plan for the use of the condemned property and contrasting with *Kelo v. City of New London*, 545 U.S. 469 (2005)); *Middletown Twp.*, 939 A.2d at 338 (concluding that “evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking”); *Rhode Island Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 104 (R.I. 2006) (emphasizing that “[t]he City of New London’s exhaustive preparatory efforts that preceded the takings in *Kelo*, stand in stark

*Carole Media v. New Jersey Transit Corp.*, the United States Court of Appeals for the Third Circuit focused on the presence of a private beneficiary of the taking whose identity is known in advance.<sup>36</sup> Perhaps even more tellingly, eleven state supreme courts have ruled that *Kelo*-style "economic development" takings are categorically banned under their state constitutions,<sup>37</sup> while others have also moved to restrict blight

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contrast to [the condemning authority's] approach in the case before us").

36. See 550 F.3d 302, 311 (3d Cir. 2008).

37. See *City of Little Rock v. Raines*, 411 S.W.2d 486, 493 (Ark. 1967) (private economic development project not a public use); *Baycol, Inc. v. Downtown Dev. Auth. of Fort Lauderdale*, 315 So.2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); *Sw. Ill. Dev. Auth. v. Nat'l City Envtl.*, 768 N.E.2d 1, 9-11 (Ill. 2002); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) ("No public use is involved where the land of A is condemned merely to enable B to build a factory." (internal quotation marks omitted)); *Op. of the Justices of the Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution*, 131 A.2d 904, 905-06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 786-87 (Mich. 2004); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) (holding that "economic development" alone does not justify condemnation); *Board of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 648-52 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma state constitution); *Georgia Dep't of Transp. v. Jasper Cnty.*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a "projected economic benefit . . . cannot justify condemnation"); *Karesh v. City Council of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development); *In re Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (en banc) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); *Hogue v. Port of Seattle*, 341 P.2d 171, 181-91 (Wash. 1959) (denying condemnation of residential property so that agency could "devote it to what it considers a higher and better economic use," *id.* at 187) .

condemnations.<sup>38</sup> These developments undercut Professor Hills's claim that courts are no more likely than legislatures to impose serious constraints on takings.<sup>39</sup>

Professor Hills seems to assume that the above four pretext standards are my preferred solutions for the challenge of eminent domain abuse. Not so. I would rather overrule *Kelo* entirely and enforce a narrower definition of "public use" that restricts takings to condemnations where the condemned property is owned by the government or by a private party that is legally required to allow the general public to use it, as in the case of a public utility.<sup>40</sup> In the *Goldstein* and *Kaur* cases, I would have preferred that the New York Court of Appeals enforce the text and original meaning of Article XVIII of the state constitution, thereby obviating the need to consider the question of whether the takings qualify as "pretextual" under the federal Supreme Court's interpretation of the Fifth Amendment. The *Kelo* pretext doctrine is at most a second-best option.

But the Court of Appeals chose to adopt an ultra-broad definition of "blight" and obviously lacked the authority to overrule *Kelo*. Under such circumstances, the Court had to consider the federal "pretext" issue, which had been duly raised by the property owners in *Kaur*. By choosing to ignore all four factors identified by other federal and state courts, the Court effectively read the concept of pretext out of existence.<sup>41</sup> That approach is at odds with the U.S. Supreme Court's continued insistence that

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38. Somin, *supra* note 25, at 13-15.

39. See Hills, *supra* note 1, at 34-35. I have briefly discussed some of the reasons why state courts may be more willing to protect property rights than state legislatures in Somin, *supra* note 25, at 22-23.

40. See Somin, *Controlling the Grasping Hand*, *supra* note 19, at 184-85, 271.

41. See Somin, *supra* note 2, at 1212-18.

"pretextual" takings are a meaningful category that remains forbidden by the Public Use Clause.

Even if adoption of one or more of these pretext standards is required by federal jurisprudence, this could potentially lead to bad policy results, as Professor Hills suggests.<sup>42</sup> He argues that the standards are "self-contradictory" because pursuing a taking without knowing the identity of the new private owner in advance is at odds with the requirement of extensive planning.<sup>43</sup> Professor Hills wrongly assumes that I urge that all four requirements be applied simultaneously. In reality, neither I nor the various courts that have adopted these standards, have made any such suggestion. In most cases, courts have adopted only one or two of the four approaches. I am probably to blame for not being clearer on this point.

In any event, the contradiction noted by Professor Hills is more apparent than real. If a project is genuinely well-planned and likely to turn a profit, local government should be able to attract a variety of private investors willing to take it on simply by holding an auction selling the relevant development rights to the highest bidder. That approach both reduces the danger of political favoritism and increases the potential return to taxpayers. Given today's globalized capital markets, local government need not rely on a single, favored developer chosen in advance. Obviously, nothing in the pretext standards prevents the government from consulting economists and other development experts about the possible viability of their proposed project and its potential attractiveness to investors. If there is serious doubt about whether the plan is good enough to attract bidders, then perhaps it is also not good enough to justify forcing private property owners to give up their land.

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42. See Hills, *supra* note 1, at 33-34.

43. *Id.* at 34.

Finally, Professor Hills worries that judicial enforcement of public use restrictions on takings might cause more harm than good because it could block beneficial "assembly" projects facilitated by eminent domain.<sup>44</sup> Such projects might otherwise fall victim to holdout problems. I have addressed such concerns in some detail elsewhere, where I pointed out that most real world blight and economic development condemnations that transfer property to private parties are likely to be driven by political calculations rather than genuine holdout issues.<sup>45</sup> Where genuine holdout problems exist, private developers often have effective market mechanisms for getting around such problems without resorting to eminent domain.<sup>46</sup> These mechanisms are not perfect, but living with their imperfections is a lesser evil than giving local and state officials nearly unconstrained power to condemn property and transfer it to private parties.

This is not the right place to rehash this much-debated issue in detail. Here, I will only add that the cases of development projects building around holdouts cited by Professor Hills actually prove the opposite of the point he intends to make.<sup>47</sup> Rather than showing that eminent domain is needed to prevent holdouts from blocking valuable projects, these cases demonstrate that many such projects can proceed even if a few holdouts refuse to sell. These stories thereby actually weaken the rationale for using eminent domain to clear away property owners who refuse to sell to developers.

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44. See Hills, *supra* note 1, at 35.

45. See Somin, *Controlling the Grasping Hand*, *supra* note 19, at 190-203.

46. See *id.* at 204-10; see also Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 18-24 (2006).

47. See Hills, *supra* note 1, at 33 n.15.

It turns out that these projects actually did not need to acquire 100% of the land demanded by their developers in order to succeed. And if the project can proceed without acquiring the land of every single owner in the area, there is little risk, if any, that a small number of "strategic" holdouts can scuttle the project by refusing to sell unless they get an exorbitant share of the project's expected profits. Indeed, the fact that the holdouts refused to sell even after it became clear that the development project would proceed despite their refusal is a strong indication that they were not strategic holdouts at all. Rather, they were "sincere dissenters" who genuinely valued the land in question more than the project developer.<sup>48</sup> In such a scenario, letting them stay not only shows respect for property rights, but also maximizes economic efficiency by leaving the property in the hands of those who value it the most.<sup>49</sup>

In any event, there may be more agreement between Professor Hills and myself on these points than initially meets the eye. He notes that he is "inclined to side with Professor Somin in thinking that the costs of the false positives exceed the costs of the false negatives,"<sup>50</sup> meaning that the danger of allowing harmful uses of eminent domain is greater than that of forestalling beneficial ones. If so, Professor Hills may yet be willing to accept the need for stronger judicial oversight of takings under the relevant provisions of our federal and state constitutions. For my part, I recognize that some of the procedural reforms to the eminent domain process he advocates would be a

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48. For the distinction between "strategic holdouts" who seek to appropriate a development project's benefits for themselves and "sincere dissenters" who genuinely value the land in question more than the developer does, see Somin, *Controlling the Grasping Hand*, *supra* note 19, at 204-05.

49. See *id.*

50. Hills, *supra* note 1, at 33-34.

clear improvement over the status quo in many states.<sup>51</sup>

#### CONCLUSION

Despite Professor Hills's formidable efforts, it is difficult to avoid the conclusion that the *Goldstein* and *Kaur* decisions misinterpreted the New York State Constitution by ruling that virtually any property can be declared "blighted" and condemned. The court also failed to properly apply federal constitutional restrictions on "pretextual" takings.

Fortunately, these rulings may well turn out to be aberrations rather than trend-setters. Courts in many other states have taken a more active role in enforcing state constitutional restrictions on takings. In time, even the Empire State might join them.

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51. See generally, Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008).