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Against Mushy Balancing Tests in Blight Condemnation Jurisprudence

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RETHINKING BALANCING TESTS IN BLIGHT CONDEMNATION JURISPRUDENCE

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A Response to Ilya Somin, *Let There Be Blight: Blight Condemnations in New York after Goldstein and Kaur*, 38 FORDHAM URB. L.J. 1193 (2011).

Professor Somin has written an incisive critique of the New York Court of Appeals' decisions in *Kaur*[1] and *Goldstein*,[2] the gist of which is that the Court did not do enough to stop "highly abusive blight condemnations."[3] There are, however, two difficulties with the critique. First, as a matter of legalistic interpretation of the New York Constitution, the critique is not very persuasive. Second, as a matter of policy, Professor Somin's proposal is unlikely to be adopted by any judge influenced by the same political process that lead to the condemnations that Professor Somin attacks.

Despite Professor Somin's short argument to the contrary, there is nothing in the text or

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

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

3. Ilya Somin, *Let There Be Blight: Blight Condemnations in New York after Goldstein and Kaur*, 38 FORDHAM URB. L.J. 1193, 1194 (2011).

traditions of the New York Constitution requiring courts to play the role that Professor Somin suggests. To the contrary, Article XVIII, section 1, the provision on which Professor Somin relies to urge a more robust judicial policing of eminent domain, was created to facilitate precisely the sort of statist interventions on behalf of private parties that Professor Somin dislikes. Article XVIII, section 1 permits condemnations that eliminate "substandard and insanitary conditions."[4] From its inception, however, this provision was used to eliminate under-populated but not especially blighted neighborhoods for the purpose of allowing private firms to improve these neighborhoods for private purposes.

Take *Murray v. LaGuardia*, a 1943 decision that Professor Somin cites for the proposition that the New York Constitution authorized only the condemnation of "slums."[5] Professor Somin's interpretation greatly underestimates the capaciousness of the concept of "slum" to the progressive mind of the 1930s and 1940s: Virtually any working class neighborhood with dense structures that lacked basic amenities——central heating and private bathrooms, for instance——could be regarded as a slum in contemporary parlance. *Murray*, for instance, involved the condemnation of the so-called Gas House District on the Lower East Side of Manhattan during the 1940s, explicitly to facilitate Metropolitan Life Insurance Company's construction of the gigantic middle-income housing project known as "Stuyvesant Town."[6] However, the Gas House District, named for the Consolidated Gas Company's facilities that occupied the area, was not especially noxious; surviving photos show streets lined with structurally sound shops and

4. N.Y. CONST. art. XVIII, § 1.
5. Murray v. LaGuardia, 52 N.E.2d 884 (N.Y. 1943).
6. *See id.* at 325.

apartments.[7] As Samuel Zipp's chapter on the Gas House District condemnation demonstrates, actual residents did not want their homes to be destroyed.[8] By the standards of the 1940s, the buildings in the Gas House District were not horrible: "[H]ousing conditions were less than ideal," with about half the buildings needing repairs and most without central heat or bathrooms.[9] But, by the standards of the time, structures without private bathrooms or central heating were not unusual. As late as 1960, 40% of houses in the United States lacked central heating.[10] The case for the condemnation was not that the housing in the Gas House District was unequivocally worse than average New York City housing, but rather that the housing could be improved. Therefore, the city arranged for the condemnation of an immense tract of land to benefit a specific private developer——Met Life—— simply to raise real estate values, provide middle-class urban housing, and improve welfare through reduced density.[11]

In short, the state constitution's definition of eminent domain for slum clearance, as originally understood, allowed condemnations that transferred mediocre but not horrible neighborhoods from one set of private owners to a known private developer merely for the purpose of improving the quality of the housing. This is exactly the sort of condemnation that Professor Somin opposes, and yet these condemnations are as deeply rooted in the history and law of New York as Stuyvesant Town.

7. *See* SAMUEL ZIPP, MANHATTAN PROJECTS: THE RISE AND FALL OF URBAN RENEWAL IN COLD WAR NEW YORK 90-95 (2010).

8. *See id.* at 76.

9. *Id.* at 85.

10. U.S. CENSUS BUREAU, FINANCIAL CHARACTERISTICS, *http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=tp14_housing_financial* (last updated Sept. 17, 2004).

11. *See* ZIPP, *supra* note 4, at 77-115.

If the strictly legal sources——the state constitution's text and original understanding——do not support an aggressive role for New York courts in policing eminent domain, then what about policy considerations? Here, I think that Professor Somin's diagnosis stands on stronger ground. But his prescription——tougher standards for finding neighborhoods to be "blighted"——seems less convincing because the cure is unlikely to be adopted by the patient and because there are other medicines that might be more effective and more palatable.

The best policy argument that courts should play a more vigorous role in policing eminent domain is that the costs of false positives (eminent domain that reduces social welfare) exceed the costs of false negatives (lack of land assembly that reduces social welfare) resulting from either private land markets or more robust judicial review. The history of eminent domain abuse during the era of urban renewal suggests a number of potential false positives——that is, governmental tendencies to over-use eminent domain. One can hypothesize a political economy to explain such over-use where majorities of voters ignore the social costs of eminent domain because they affect only a small group of landowners, while influential elites press for more land assembly because they will reap the surpluses from assembly as a result of their political connections. In theory, the compensation paid to condemnees ought to induce local taxpayers to use eminent domain only when the benefits exceed the tax burden.[12] In practice, much of eminent domain's cost is spread across the entire nation of taxpayers through federal grants, diffusing the incentive of voters to monitor the

12. For the classic defense of this position, see generally Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

costs very carefully.[13] Moreover, the measures of compensation typically exclude lost business goodwill and consumers' subjective value of their housing, leaving condemnees manifestly under-compensated.[14] One can plausibly assume, therefore, that certain jurisdictions will engage in too much land assembly at significant social cost.

The problem is that the alternatives to judicial deference are not ideal. False negatives, induced by aggressive judicial policing of local governments' decisions have costs to the extent that private land markets do not assemble urban land at an efficiently high rate. The reason for excessively low private assembly is the familiar holdout problem: If each landowner on a city block knows that her parcel is necessary for a private land assembly to go forward, then she has an incentive to misrepresent the opportunity costs of foregoing the pre-assembly use of the land in order to extract whatever surplus is created by the assembly. That landowners refuse to sell even when it is in their interest to do so is demonstrated by the familiar anecdotes about disappointed prospective sellers opportunistically increasing their asking price one time too many, thereby inducing prospective buyers to simply build the proposed structure around the recalcitrant holdout's parcel.[15] That similar tactics might doom cost-justified assemblies is not difficult to imagine.

So which is more costly——excessive eminent domain inadequately deterred by democratic politics, or insufficient land assembly inadequately advanced by the strategic bargaining

13. On the role of federal grants in diminishing the incentive of local voters to control eminent domain, see William Fischel, *Before* Kelo*: Federal Grants Encourage Excessive Use of Eminent Domain*, 28 REG. MAG. 32 (2005).

14. *See id*. at 35.

15. For a litany of such anecdotes lovingly described, see ANDREW ALPERN & SEYMOUR DURST, NEW YORK'S ARCHITECTURAL HOLDOUTS (1984).

of buyers and sellers? This is obviously a tricky empirical question. I am inclined to side with Professor Somin in thinking that the costs of the false positives exceed the costs of the false negatives. But I suspect that the average state supreme court judge will not take up Professor Somin's invitation to weigh these imponderable magnitudes. According to Professor Somin, judges should assess whether there is too much private influence causing, or too little public benefit resulting from, the use of eminent domain. It is difficult to imagine, however, that very many judges will accept an invitation to deploy such mushy and policy-laden tests in the interest of those libertarian values that Professor Somin and I share. After all, the same political influences that allegedly lead to excessive use of eminent domain will also affect the appointment of state judges. Why would the political economy that Professor Somin decries somehow stop at the courtroom door? Judges appointed by business coalitions are likely to trust businessmen who secure the right to develop condemned tracts. Judges appointed by planning-oriented politicians with a penchant for statist reorganization of real estate patterns are likely to share a trust in state planning. The mushy balancing tests urged by Professor Somin seem well-suited to allowing judges to do whatever they like. And what they like to do, for the most part, is defer to politicians.

Indeed, some of the tests urged by Professor Somin are actually self-contradictory. Consider, first, the idea that judges should be especially suspicious of condemnations where the identity of the private developer is known in advance.[16] On

16. Justice Kennedy stressed this point in his *Kelo* concurrence where he found that the New London Development Authority's condemnation of Kelo's house was not primarily motivated by a desire to benefit private parties given that "[t]he identities of most of the private beneficiaries were unknown at the time the city formulated its plans." Kelo v.

this theory, judges should encourage cities to raze whole city blocks before cities have a firm commitment from a specific developer, to insure that the decision to use eminent domain was not tainted by private influence. But such a "purity first" approach to land assembly would be madness from the perspective of sensible planning, another factor urged by Professor Somin. Absent a specific and reliable developer's commitment, the assembled land might sit undeveloped for years before the city can find someone to bear the costs of improving it. That Bruce Ratner was involved from the outset in the development of Atlantic Yards[17] might suggest corruption, but it might also suggest that the relevant politicians were not such fools as to think that they could embark on a major land assembly without firm commitment from a developer with a track record of success in managing commercial development in Brooklyn. (Ratner demonstrated such success by his developing Metrotech Center, a few blocks west of Atlantic Yards). By contrast, the New London site now sits barren and empty as a result of the New London Development Authority's failure to secure a specific development commitment from a reliable developer up front.[18]

In short, I doubt that many state judges will employ any of the four factors urged by Professor Somin to place major constraints on eminent domain. The factors are simply too mushy and policy-laden. Even a judge making a good-faith effort to deploy these factors might balk at distinguishing between a municipality's careful

City of New London, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring).

17. *See Atlantic Yards*, N.Y. TIMES, *http://topics.nytimes.com/top/reference/timestopics/subjects/a/atlantic_yards_brooklyn/index.html* (last updated Mar. 17, 2011).

18. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), *http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html*.

selection of a reliable developer in advance of a project (the hallmark of good planning) and the municipality's being unduly influenced by that same developer (the hallmark of corruption).

What other reforms might be both more effective and more palatable to the policymakers (judges, state legislators, city leaders, etc.) that must, after all, install the reforms? Here is a modest suggestion: Give condemnees their attorney's and expert witness fees whenever the compensation award after trial is higher than the initial good-faith offer made by the condemnor in advance of condemnation. Such a reform has the advantage of employing the self-interest of that most assiduous breed of lobbyists—trial lawyers—toward the cause of constraining eminent domain. Moreover, the award of fees will create an incentive for the initial offers to be sufficiently high that, in an age of federal grant austerity, the likelihood of excessive use of eminent domain will be reduced, if not eliminated. Finally, the fee approach uses a crisp, bright line rule without mushy definitions of "blight," "private influence," or "public benefit."

Is it the perfect antidote to the overuse of eminent domain? No—there is no perfect antidote. One could, of course, eliminate all eminent domain. But, that would exclude the indisputably necessary condemnations that could be preserved by painstakingly defining when an area is uncontroversially noxious enough to justify eminent domain. Yet, this sort of detailed code might likely lead to false negatives—that is, failure to use eminent domain even when the status quo is merely shabby rather than noxious and the proposed assembly is a reasonably good idea. After all, Stuyvesant Town seems like an improvement on the Gas House District. Do we really want a test that would make such a change impossible?