

FERRETING OUT FAVORITISM: BRINGING PRETEXT CLAIMS AFTER *KELO*

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In 2005, the U.S. Supreme Court ruled in Kelo v. City of New London that governments may take one's private property and give it to another for the purpose of promoting economic development. The Court held that, in evaluating Fifth Amendment challenges to such takings, courts should defer to legislative judgments as to what constitutes a valid public purpose. Critics argue that this decision opened the floodgates to pretextual abuse. Specifically, they contend that local governments that exercise the eminent domain power are often motivated by a desire to favor another private party. After Kelo, courts have struggled to reconcile the decision's general call for deference to legislative judgments with the majority's and concurrence's implicit call for heightened scrutiny of takings claimed to be motivated by favoritism.

This Note argues that courts should adopt a "process scrutiny" approach to evaluating pretext claims whereby courts infer favoritism from a variety of circumstantial evidence arising from the condemnation process. This Note also draws on a conflict among courts over whether to apply the Court's plausibility pleading standard derived from Bell Atlantic Corp. v. Twombly in arguing that permissive review of pretext claims on the pleadings lends substance to them. This Note builds on pretext case law in an effort to illustrate the wide variety of factors courts have used to infer improper motivation. Ultimately, this Note argues that a robust process scrutiny approach gives teeth to challenges that assert the political process is being manipulated impermissibly for someone's private gain.

INTRODUCTION

In *Kelo v. City of New London*,¹ the U.S. Supreme Court affirmed an expansive interpretation of the eminent domain power, holding that governments may take one's private property and give it to another for the purpose of promoting economic development.² This decision engendered

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1. 545 U.S. 469 (2005).

2. *Id.*

fear across the nation that the Court had so weakened constitutional protections for private property that anyone's land could now be turned over to private developers who propose a more profitable use.³ Much of the negative response to *Kelo* focuses on what some perceive is the potential use of eminent domain for the purpose of conferring benefits to private parties.⁴ This specific criticism of *Kelo* came to the fore in Brooklyn, New York. There, fifteen property owners sought to enjoin the taking of private property⁵ for the development of the twenty-two-acre Atlantic Yards Project.⁶ Plaintiffs there did not contest *Kelo*'s central tenet that economic development constitutes a public use. Rather they claimed under *Kelo* that the asserted public purpose was a mere pretext for conferring a benefit to a private party⁷—a new claim after *Kelo*⁸—in violation of the Fifth Amendment.⁹

Specifically, they claimed that “a ‘substantial’ motivation of the various state and local government officials who approved or acquiesced in the approval of the Project has been to benefit Bruce Ratner, the man whose company first proposed it and who serves as the Project’s primary

3. Adam Liptak, *Case Won on Appeal (To Public)*, N.Y. TIMES, July 30, 2006, at WK3; see also DANA BERLINER, INST. FOR JUSTICE, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-KELO WORLD 2–3 (2006), available at <http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf> (arguing that since *Kelo v. City of New London*, there has been significant abuse of the power of eminent domain).

4. See BERLINER, *supra* note 3, at 2–5.

5. *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008).

6. Nicholas Confessore, *Group Calls for Major Changes in Atlantic Yards Plan*, N.Y. TIMES, June 16, 2006, at B4. As of September 29, 2008, this project was on hold pending review by the New York State Supreme Court, Appellate Division. Posting of Charles V. Bagli to City Room Blog, <http://cityroom.blogs.nytimes.com/2008/09/29/atlantic-yards-faces-another-delay> (Sept. 29, 2008, 17:35 EST).

7. *Goldstein*, 516 F.3d at 52–53. In defining pretext, one author writes “[a] pretext is . . . a cover for a purpose one wishes to hide.” Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1152 (1986) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (Marshall, C.J.)).

8. See *Goldstein*, 516 F.3d at 60 (“*Kelo* opened up a separate avenue for a takings challenge under which a plaintiff could claim a taking had been effectuated ‘under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit.’” (quoting *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 282 (E.D.N.Y. 2007)); see also Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 624 (2008) (“The pretext notion was not the focal point in much earlier takings litigation, but it looms larger now as the behavior of public bodies has become more aggressive in the wake of *Kelo*.”).

9. *Goldstein*, 516 F.3d at 54 & n.3. The final clause of the Fifth Amendment reads “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. This clause is termed the Takings Clause. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part). The “public use” phrase of this clause is sometimes referred to as the Public Use Clause. See *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring). In addition to arguing that the public benefit of the Atlantic Yards Project was “secondary and incidental to” (and thus a pretext for) conferring a benefit to Bruce Ratner, the property owners argued the taking also violated their rights under the Equal Protection Clause and under the Due Process Clause. *Goldstein*, 516 F.3d at 54 n.3. The court dismissed both of these arguments as well. *Id.* at 65.

developer.”¹⁰ Ultimately, the U.S. District Court for the Eastern District of New York rejected this claim on the pleadings, using the narrow plausibility pleading standard announced in *Bell Atlantic Corp. v. Twombly*,¹¹ in a decision affirmed by the U.S. Court of Appeals for the Second Circuit.¹² The Supreme Court denied certiorari in the summer of 2008.¹³ For those who believed that pretext claims were the last best hope in challenging a taking in federal court in the wake of *Kelo*,¹⁴ the Second Circuit’s decision in *Goldstein v. Pataki*¹⁵ may prove otherwise.

The plaintiffs in *Goldstein* based their pretext claims on both Justice John Paul Stevens’s brief discussion of pretext in the majority opinion of *Kelo*¹⁶ and Justice Anthony Kennedy’s more lengthy discussion in his concurrence.¹⁷ Acknowledging that “[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption . . . of invalidity is warranted,”¹⁸ Kennedy’s fifth-vote concurrence identified the possibility of “a more stringent standard of review than [rational basis review] for a more narrowly drawn category of takings.”¹⁹ Although the Second Circuit rejected the application of this heightened pretext standard in *Goldstein*, it acknowledged that “*Kelo* opened up a separate avenue for a takings

10. *Goldstein*, 516 F.3d at 54. Plaintiffs claimed that these benefits included “special discretionary perks,” including capital contributions of \$305 million from city and state governments, exceptions to zoning codes, “a government blank check eliminating the risk of ‘extraordinary infrastructure costs,’” various tax exemptions, low-cost financing for the sports arena, city land conveyed for the low cost of one dollar, and the guarantee to transfer condemned properties. Petition for Writ of Certiorari at *13, *Goldstein v. Pataki*, 128 S. Ct. 2964 (2008) (No. 07-1247) (denying certiorari), 2008 WL 899311 [hereinafter *Goldstein Cert. Petition*].

11. 127 S. Ct. 1955 (2007); see *Goldstein*, 488 F. Supp. 2d at 286–90 (applying the *Bell Atlantic Corp. v. Twombly* standard).

12. *Goldstein*, 516 F.3d at 52–54. The U.S. Court of Appeals for the Second Circuit also applied the *Bell Atlantic Corp. v. Twombly* pleading standard in rejecting plaintiffs’ pretext claims. *Id.* at 56–57.

13. *Goldstein*, 516 F.3d 50, cert. denied, 128 S. Ct. 2964 (2008).

14. *Kelo v. City of New London* made clear that states are free to enact stronger protections for property owners. See *infra* notes 62–64 and accompanying text. In fact, many states have enacted such protections since 2005. See, e.g., Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 245–52 (2007).

15. 516 F.3d 50.

16. *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (“Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”); see *Goldstein Cert. Petition*, *supra* note 10, at *27 n.13 (discussing the majority’s reference to pretext in *Kelo*).

17. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (“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”); see *Goldstein Cert. Petition*, *supra* note 10, at *18 (discussing Justice Anthony Kennedy’s reference to pretext in *Kelo*).

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

19. *Id.*

challenge” where the plaintiff alleges the asserted public purpose is a pretext for bestowing a private benefit.²⁰

Nevertheless, the rejection of the pretext claim in *Goldstein* is important for several reasons. First, it raises serious questions as to the viability of any future pretext claims when a narrow plausibility pleading standard is used.²¹ How readily these claims should be dismissed is a question that has already received disparate responses from the Second Circuit (as well as the Eastern District of New York) in *Goldstein* and the D.C. Court of Appeals in *Franco v. National Capital Revitalization Corp.*²² A second, related consideration is whether *Goldstein*’s treatment of the pretext claim—as opposed to a more flexible reading by the *Franco* court—marks a general reluctance to apply a “mere pretext” standard.²³ In light of the conflict between *Goldstein* and *Franco* on both substance and procedure, this Note examines the factors Justice Kennedy discusses,²⁴ as well as evidence other courts have examined in finding pretext,²⁵ in order to determine what standard of review courts should use in meeting Justice Kennedy’s warning against the risk of “undetected impermissible favoritism.”²⁶

The aftermath of *Kelo* is itself an example of how the interplay of substance and procedure is critical to pretext claims. Only months after the Supreme Court’s decision, an exposé revealed that the City of New London had entered into talks with Pfizer Corporation before implementing the redevelopment plan.²⁷ This later revelation by no means demonstrates

20. *Goldstein v. Pataki* 516 F.3d 50, 60 (2d Cir. 2008) (internal citations omitted).

21. Both the district and circuit courts in *Goldstein* applied *Twombly*’s plausibility pleading standard. See *infra* Part II.A.1 (discussing the importance of the Second Circuit’s application of *Twombly*’s plausibility pleading standard, which is more demanding than *Conley v. Gibson*’s notice pleading standard). The *Twombly* standard applies to review of motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964–65 (2007).

22. 930 A.2d 160, 166 n.6 (D.C. 2007) (declining application of *Twombly* to pretext claims). Compare the *Franco* decision with that in *Goldstein*, 516 F.3d at 56–57 (applying *Twombly* to pretext claims); see also Robert H. Thomas, *Pleading Kelo Pretext: What About Justice Kennedy?*, INVERSECONDEMNATION.COM, Feb. 6, 2008, <http://www.inversecondemnation.com/inversecondemnation/2008/02/pleading-kelo-p.html> (explaining that while the Second Circuit pays lip service to the notion that, in reviewing a Rule 12(b)(6) motion to dismiss of the Federal Rules of Civil Procedure, a court is supposed to take as true the factual allegations and view them in the most favorable light, “the court held that the complaint did not plead enough facts to show pretext”); *infra* Part II.A.1.

23. See *infra* Part II.A.2.

24. These four factors are (1) the “taking occurred in the context of a comprehensive development plan”; (2) the projected benefits are not de minimis; (3) “the identities of most of the private beneficiaries were unknown at the time the city formulated its plans”; and (4) the city complied with procedural requirements to review its purposes. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring); see *infra* Part I.D.2.a.

25. See *infra* Part I.D.1–2.

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

27. See Ted Mann, *Pfizer’s Fingerprints on Fort Trumbull Plan—Wired in at Birth*, NEW LONDON DAY, Oct. 16, 2005, at A1 (“NLDC and city officials have long characterized their efforts to recast the working-class neighborhood as a response to Pfizer’s decision to build . . . rather than a move made as a condition of Pfizer’s involvement in the project”). In fact, the article supplies evidence that Pfizer conditioned its agreement to build a facility in

pretext, nor does this Note argue that *Kelo* was wrongly decided in light of these facts. But, disclosure that Pfizer might have conditioned creating a research facility in New London on the state's promise to redevelop the neighborhood—an effort which would likely entail the use of eminent domain—might have made the Court and lower courts more suspicious of the taking.²⁸ This exposé is of no small importance given that the Supreme Court and even the dissenters in the Connecticut Supreme Court²⁹—who would have invalidated the takings—concluded that the inquiry into the project demonstrated no such dealings between Pfizer and the city.³⁰

The result of *Kelo* is a mixed message about how far courts can or will go in reviewing pretext claims.³¹ On the one hand, *Kelo*'s central holding is deference to legislative judgments about what constitutes a public purpose.³² This posture theoretically sends a signal to property owners that overcoming deference to legislatures is a steep climb, and maybe not worthwhile.³³ However, on the other hand is *Kelo*'s reference to pretext, which has emboldened plaintiffs and led to a “growth industry” in pretext claims.³⁴ In fact, federal courts are more willing to entertain public use challenges without first litigating them in state court.³⁵ And therein is the confusion *Kelo* has engendered: while the reference to pretext has made courts more willing to hear challenges to condemnations, courts typically

New London on the city's agreement to revitalize the neighborhood, a process which was likely to entail eminent domain. *See id.*; *see also* JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* 235–38 (2009). While presence of such dealings on the record may not have swayed the Court's decision, that these dealings were not fully known is potentially suggestive of hidden motives and, thus, of pretext.

28. Mann, *supra* note 27; *see also infra* note 275 and accompanying text.

29. *Kelo v. City of New London*, 843 A.2d 500, 595 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part) (“The record clearly demonstrates that the development plan was not intended primarily to serve the interests of Pfizer . . .”).

30. *See Kelo v. City of New London*, 545 U.S. 469, 492 (2005) (Kennedy, J., concurring).

31. Amy Brigham Boultris & Annette Lopez, *2007–2008 Update on Judicial Reactions to Kelo*, 2008 A.L.I.-A.B.A. LAND USE INST.: PLANNING, REGULATION, LITIG., EMINENT DOMAIN, AND COMPENSATION 983, 985. These authors note several trends since in the aftermath of *Kelo*: “the willingness of federal courts to entertain public use challenges to state action without first litigating them in state court, the proliferation of litigation and refinement of the ‘pretext’ defense left open by *Kelo*, and the lack of uniformity of rules and results among the states.” *Id.* They also note that “[a]n emerging trend is the exercise of more judicial restraint in citing *Kelo* out of its context.” *Id.* (summarizing cases in 2007–2008 which respond to *Kelo*'s ruling on public use).

32. *See Kelo*, 545 U.S. at 479–83.

33. *See* BERLINER, *supra* note 3, at 2–3.

34. Amy Brigham Boultris, *Case Law Developments Post-Kelo*, 2008 LAND USE INST.: PLANNING, REGULATION, LITIG., EMINENT DOMAIN, AND COMPENSATION, 961, 963 (citing *In re 49 WB. LLC v. Vill. of Haverstraw*, 839 N.Y.S.2d 127, 130 (App. Div. 2007)); *see also* Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543, 548 (2006) (discussing outrage sparked by the *Kelo* decision).

35. Brigham Boultris & Lopez, *supra* note 31, at 985.

feel constrained by *Kelo*'s message of deference.³⁶ It is perhaps this confusion that has led to the disparate treatment of pretext claims in cases like *Franco* and *Goldstein*.

Part I begins with background on *Kelo* and pretext claims in general. This analysis culls from pretext case law essential features of a pretext claim, while also providing an analysis of Justice Kennedy's concurrence in the case. This part also examines pretext case law to provide an overview of how courts use a variety of objective factors to infer motive (or purpose), but do so without relying on subjective statements of legislators. Part II begins with an analysis of the contrasting decisions in *Goldstein* and *Franco* in order to illuminate the extremes in potential interpretations of Justice Kennedy's pretext discussion. Next, this part examines a variety of options with regard to heightened standards of review for pretext claims—strict scrutiny, means-ends scrutiny,³⁷ a tripartite burden-shifting standard,³⁸ and process scrutiny³⁹—assuming that *Kelo* does warrant such review in some cases.

In Part III, this Note argues that the best method for heightened scrutiny for pretext claims is process scrutiny. This part describes what this rule would look like, as applied to pretext claims, arguing that its strength is in allowing courts to consider factors that may fall outside of a strictly-followed process scrutiny test. Ultimately this Note argues that courts should take an expansive view in examining factors from which they may infer pretext. Additionally, this Note argues that courts' willingness to hear

36. Brigham Boulris & Lopez, *supra* note 31, at 985 (“While landowners do not always prevail in their defenses to condemnation, courts are no longer giving them as short a shrift as they did before the *Kelo* controversy captivated the public, press, and legislatures.”).

37. There are numerous names for this level of scrutiny. One author refers to it as “mid-level scrutiny,” Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 67 (1997) (“[M]id-level scrutiny . . . asks whether a statute is substantially related to an important state interest.”), whereas another terms it intermediate scrutiny, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 671–72 (3d ed. 2006) (“Under intermediate scrutiny a law is upheld if it is substantially related to an important government purpose.” (citing *Lehr v. Robertson*, 463 U.S. 248, 266 (1983); *Craig v. Boren*, 429 U.S. 190, 197 (1976))). For the purposes of convenience and consistency, this Note uses the term means-ends scrutiny. In the equal protection context, it is triggered by quasi-suspect classifications like gender. In the context of a particular type of takings claim, cases involving exactions by the government, an essential nexus test is applied, which is similar to intermediate or midlevel scrutiny. But largely, midlevel or means-ends scrutiny functions like a balancing test:

The Court first identifies constitutional values threatened by governmental action; next it assesses the degree of their implication in a particular case; then the Court weighs the harm to protected values against the interests that the government has endeavored to promote. The Court may also consider alternative means by which the government might achieve its ends at less cost to constitutional values.

Fallon, *supra*, at 68 (citing an example of such a balancing test in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), a case dealing with a statute regulating “fusion-tickets” in elections under the First Amendment); *see infra* Part II.B.

38. *See infra* Part II.B.3.

39. *See infra* Part II.C.

pretext claims should not be frustrated by a view that doing so would undermine *Kelo* and its forebears.

I. BACKGROUND ON *KELO* AND PRETEXT: JUSTICE KENNEDY'S
REFERENCE TO HEIGHTENED SCRUTINY FOR CLAIMS OF "UNDETECTED
IMPERMISSIBLE FAVORITISM"

This part begins with a discussion of *Kelo* in the context of a series of public use cases in which the Court upheld the taking based on a standard of judicial deference to legislative judgments. This part then defines pretext claims, illustrates the kind of favoritism animating the Court's discussion of pretext, and explains the relevance between pretext and public purpose. Next, Part I provides an in-depth analysis of Justice Kennedy's and Justice Stevens's contrasting discussions of pretext claims, paying special attention to Justice Kennedy's discussion of claims involving "undetected impermissible favoritism." Then this part overviews pretext case law before and after *Kelo* in order to provide an understanding of how courts reach a conclusion of pretext. Finally, this part concludes with a discussion of how courts' deference to legislatures poses a roadblock to mounting a pretext claim.

A. *Background and Relevance of Kelo*

Susette Kelo and eight other New London, Connecticut property owners challenged New London's decision to condemn their homes, under the theory that the city's asserted purpose of economic development was invalid under the Public Use Clause of the Fifth Amendment.⁴⁰ The Court rejected *Kelo*'s Public Use Clause challenge, holding that in government-authorized private-to-private transfers of property, challenges to condemnation will fail so long as the project is rationally related to a valid public purpose.⁴¹ The Court found that the public purpose asserted in *Kelo*—economic development⁴²—was a valid public purpose under the Fifth Amendment's Public Use Clause, thereby rejecting calls for heightened scrutiny of such takings.⁴³ In essence, the Court affirmed the proposition that a government may take the private property of one party, and give it to another private party if the other pays more taxes.⁴⁴

The city intended to transfer this land to private developers as part of a comprehensive redevelopment plan for the city's failed downtown and waterfront.⁴⁵ Acting through the not-for-profit New London Development Corporation (NLDC), New London claimed that it initiated the plan in an effort to combat an unemployment rate nearly double that of the state, and

40. *Kelo v. City of New London*, 545 U.S. 469, 472, 475 (2005).

41. *Id.* at 485–90.

42. *Id.* at 472.

43. *Id.* at 477, 489–90.

44. Transcript of Oral Argument at 29–30, *Kelo*, 545 U.S. 469 (No. 04-108).

45. *Kelo*, 545 U.S. at 474.

that the project would create jobs, increase the tax base, and revitalize the city.⁴⁶ Additionally, it sought to “capitalize” on Pfizer’s plan to build a \$300 million research facility and the new commerce that the facility would bring.⁴⁷ A crucial issue, although one not litigated in *Kelo*, was whether the NLDC was acting at the behest of Pfizer in condemning these properties.⁴⁸ As the Court understood it, however, the city’s goal was to use the Pfizer facility to attract new commerce to the city.⁴⁹

Kelo marked a culmination of a series of Supreme Court cases—first, *Berman v. Parker*,⁵⁰ and later *Hawaii Housing Authority v. Midkiff*⁵¹—solidifying the rule that the Court would review deferentially legislative decisions to take private property.⁵² The standard, Justice Kennedy explained in *Kelo*, is that “a taking should be upheld as consistent with the Public Use Clause . . . as long as it is ‘rationally related to a conceivable public purpose.’”⁵³ The Court then noted that Supreme Court jurisprudence in this area had long shown deference to legislatures in defining the limits of public use.⁵⁴

While the Court sought to situate the decision in this trajectory of deference to legislatures, the *Kelo* decision’s blockbuster quality stems from its recognition that economic development itself is a justifiable public use.⁵⁵ In that sense, the decision marks a departure from *Berman* and *Midkiff*, in which the taking itself achieved the public purpose—ending blight and breaking up a land oligarchy, respectively.⁵⁶ In *Kelo*, on the

46. *Id.* at 472–73.

47. *Id.* at 473–74.

48. See *infra* notes 137–43 and accompanying text (explaining that the NLDC allowed Pfizer to dictate the terms of the deal and boundaries of the development, including the decision to condemn petitioners’ property).

49. *Kelo*, 545 U.S. at 473–74.

50. 348 U.S. 26 (1954) (holding that the District of Columbia could condemn a nonblighted department store in furthering the goals of a redevelopment plan which sought to end blight because the project should be judged as a whole and not parcel by parcel).

51. 467 U.S. 229 (1984) (holding that using eminent domain in furtherance of a land redistribution scheme was rationally related to the legitimate public purpose of ending a land oligopoly and stabilizing home prices).

52. *Kelo*, 545 U.S. at 488–90.

53. *Id.* at 490 (Kennedy, J., concurring) (quoting *Midkiff*, 467 U.S. at 241). Rational basis review is a judicial test “applied under the Due Process and Equal Protection Clauses to legislation that neither classifies on a ‘suspect’ basis [e.g., race, class, gender] nor implicates a ‘fundamental’ right [e.g., the right to vote].” Fallon, *supra* note 37, at 69.

54. *Kelo*, 545 U.S. at 480. One author has argued that the rhetoric of *Kelo* suggests that the Court “is determined to avoid the excesses of the *Lochner* era [when the Court used the Due Process Clause of the Fourteenth Amendment to invalidate economic and public welfare regulations] by refusing to substitute its own judgment for that of the democratic branches of government on the ‘public use’ question.” Charles E. Cohen, *The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate*, 46 DUQ. L. REV. 375, 379 (2008).

55. See Gideon Kanner, *The Public Use Clause: Constitutional Mandate or ‘Hortatory Fluff’?*, 33 PEPP. L. REV. 335, 335–38 (2006).

56. *Midkiff*, 467 U.S. at 245; *Berman*, 348 U.S. at 35–36.

other hand, the taking encompassed private property that was not blighted,⁵⁷ which was not the case in *Berman*.

What is most significant for pretext claims is that *Kelo*'s requirement of deference presents a judicial hurdle to challenges that the actual purpose is a private one.⁵⁸ Typically, rational basis review "is so deferential to the legislative process that a challenged law will be upheld if it could be rationally interpreted as advancing any *conceivable* legitimate public purpose."⁵⁹ Courts grant this deference "even if there is nothing other than judicial speculation to suggest that the government was, in fact, attempting to advance that purpose in enacting the law."⁶⁰ One author argues, that "[t]he Court thus offered a legal standard so open-ended and deferential that it left open the question of when, short of clear evidence of corruption, a taking for economic development purposes is sufficiently suspect to warrant invalidation."⁶¹

While noting a deferential approach's potential for abuse, Justice Stevens invited state legislatures to erect safeguards that the Court felt constrained from doing itself.⁶² In this regard, *Kelo* establishes a floor below which federal rights of property owners may not be violated, and grants states the right to create a more protective ceiling.⁶³ *Kelo* sets a minimum of protections under the Fifth Amendment against takings of private property—for example, that a taking may not be for a private purpose—but allows states to offer more protections, which a number have done since *Kelo*.⁶⁴ Thus, for those who have criticized *Kelo* for the potential abuse to property rights it created,⁶⁵ that many states have enhanced protections for

57. *Kelo*, 545 U.S. at 475.

58. See Goldstein v. Pataki, 516 F.3d 50, 63 (2d Cir. 2008) (explaining that the deference standard affirmed in *Kelo* constrains courts' review of pretext claims).

59. Cohen, *supra* note 54, at 408.

60. *Id.*

61. Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 738 (2007) (citing *Kelo*, 545 U.S. at 488–89).

62. Cohen, *supra* note 54, at 410 ("[H]e was inviting the political process to enforce the public use clause more fully than the Court has been able to.").

63. *Kelo*, 545 U.S. at 489 ("[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline."); see also Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 671–76 (2007) (discussing state legislative responses to *Kelo*). Columnist George Will noted that *Kelo*'s holding, which leaves it to the states to enhance protections of private property, is consistent with the Court's doctrine of judicial restraint; however, conservatives who preach this approach, as well as call for the need to limit government, witnessed an ideological turning of the tables. George F. Will, *Damaging 'Deference'*, WASH. POST, June 24, 2005, at A31.

64. See, e.g., Somin, *supra* note 14, at 245–52 (discussing post-*Kelo* state-enacted protections in Alabama, Delaware, Ohio, and Texas). Additionally, at least eleven state supreme courts have banned takings for economic development, including Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, Ohio, Oklahoma, South Carolina, and Washington. *Id.* at 187 n.17; see, e.g., *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

65. See *infra* notes 80–84 and accompanying text.

property owners—some even forbidding by statute pretextual takings—may allay those fears.

Yet in the absence of such protections, concerns about the reach of *Kelo* remain. In her *Kelo* dissent, Justice Sandra Day O'Connor criticized the majority decision as an "abdication" of the Court's responsibility, arguing that while states "play many important functions in our system of dual sovereignty," compensating for the Court's "refusal to enforce properly the Federal Constitution . . . is not among them."⁶⁶ If the Public Use Clause is to have any meaning, she exhorted, the judiciary needs to act as a check.⁶⁷ The product of this deference, argued Justice O'Connor, is that "the government now has license to transfer property from those with fewer resources to those with more."⁶⁸ Put simply, "[n]othing 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."⁶⁹

Kelo's approval of economic development as a justification for taking property has either opened the door to substantial pretextual abuse or, at least, to fear of such abuse.⁷⁰ In his dissent, Justice Clarence Thomas noted that takings for economic development will likely have a disproportionate effect on urban minorities, writing that the rule is reminiscent of the "negro removal" of the 1950s.⁷¹ Justice Thomas found this risk so pronounced that he wrote in *Kelo* that takings for economic development are a prime case for invoking the protections to "discrete and insular minorities" announced in the famed *United States v. Carolene Products Co.*⁷² footnote number four, a text that the Court has used to authorize strict scrutiny review of legislation.⁷³

66. *Kelo*, 545 U.S. at 504 (O'Connor, J., dissenting).

67. *Id.* at 497 (citing *Cincinnati v. Vester*, 281 U.S. 439 (1930)).

68. *Id.* at 505.

69. *Id.* at 503 (citing 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); *Bugryn v. Bristol*, 774 A.2d 1042 (Conn. App. Ct. 2001); *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)).

70. See BERLINER, *supra* note 3, at 4 (arguing that the rapid increase in use of eminent domain confirms fears that this power is used to displace the poor).

71. *Kelo*, 545 U.S. at 521–22 (Thomas, J., dissenting). For a history of the destructive consequences of slum clearance programs in 1950s New York City, see ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 1961–83* (1974); see also ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 831 (3d ed. 2005) (discussing the effects of slum clearance in Washington D.C. in the aftermath of *Berman v. Parker*).

72. 304 U.S. 144 (1938).

73. *Kelo*, 545 U.S. at 521–22 (Thomas, J., dissenting) (discussing *Carolene Prods. Co.*, 304 U.S. at 152 n.4). While *United States v. Carolene Products Co.*, decided during the New Deal era, marked the Court's willingness to defer to Congress on economic regulation, footnote number four of that opinion has been interpreted by the Court to authorize judicial intervention in order to protect minorities who either lack adequate political representation or are targets of prejudice and discrimination. DAVID ANDREW SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA*, 43–44 (1996). The Court has interpreted footnote number four as a basis for "special scrutiny" of regulations that affect individuals closed off from the political process and those whom the regulation places

For some, the explosion in condemnations since *Kelo* has confirmed this fear of abuse. In the year after *Kelo* was decided, the Institute for Justice found that 5783 properties have been threatened or condemned for private commercial development, roughly equal to the number of such condemnations in the five years preceding *Kelo*.⁷⁴ The Institute for Justice notes that the power of eminent domain is not used as a last resort, despite local officials claiming otherwise, but is now being used on projects which are developing on their own without the need for government involvement through the condemnation process.⁷⁵ This, the Institute for Justice argues, means that local governments are favoring one private party at the expense of another.⁷⁶

Additionally, scholars have observed that eminent domain is capable of severe exploitation at the local governing level. Generally, private involvement in the exercise of eminent domain increases the risk of corruption,⁷⁷ secondary rent seeking,⁷⁸ and the threat of relocation.⁷⁹ The risk of favoritism may be especially acute on the local level given that “special financial interests may more often dominate smaller units of government, whose continued health and presence in the community are critical to the community and to its tax base.”⁸⁰ Permissive review of the use of eminent domain means that special interests may buy the power

in a suspect classification. *See id.* at 44; *see also* CHEMERINSKY, *supra* note 37, at 695–96 (discussing *Carolene Products* as a basis for courts applying strict scrutiny).

74. BERLINER, *supra* note 3, at 2. Of the 5783 figure, local governments actually filed for condemnations only 354 times, in contrast to the 3722 filed in the five years preceding *Kelo*. *Id.* at 2–3. The Institute for Justice explains the decrease in actual condemnations post-*Kelo* as a product of property owners’ view that *Kelo* made resistance to selling their property futile. *See id.* Thus, although after *Kelo* property owners voluntarily give up their property more frequently than before the decision, this is due to the “threat” of condemnation—for example, statements by public officials that eminent domain might be used. The Institute for Justice finds that such threats are as effective at taking the private property, if not more so, than actually condemning it. *Id.*

75. *Id.* at 5.

76. *Id.*

77. Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. (forthcoming Summer 2009) (manuscript at 4), available at <http://papers.ssrn.com/abstract=1132429>.

78. *Id.* at 5 (citing Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 50 (2003)) (describing secondary rent seeking as a process whereby private parties compete to capture the eminent domain power, causing social waste); *see also*, ELLICKSON & BEEN, *supra* note 71, at 838 (citing Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 86 (1986)) (explaining rent seeking as competitive lobbying for government favors).

79. Kelly, *supra* note 77, at 5 (“[P]rivate parties . . . threaten to relocate unless the local government condemns land on their behalf.”); *see, e.g.*, 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (“In short, the *very reason* that [the City of] Lancaster decided to condemn 99 Cents’ leasehold interest was to appease Costco.”).

80. Bernard W. Bell, *Legislatively Revising Kelo v. City of New London: Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165, 189 (2006).

without fear of judicial intervention.⁸¹ Some argue that because *Kelo* provides cities and developers with a constitutionally protected rationale for taking private property, it incentivizes them to exert influence on elected or appointed officials⁸² and to “engage in rent seeking to secure the benefit.”⁸³ In fact, the very reason there are more pretext claims being litigated since *Kelo* may be due in part to the fact that “public bodies [have] become more aggressive in the wake of *Kelo*.”⁸⁴

Against this backdrop of the Court’s commitment to deference to legislatures and concern over abuse of eminent domain is the pretext debate. This debate asks whether *Kelo* carved a more robust judicial role for reviewing claims of favoritism,⁸⁵ or whether such scrutiny would contradict the Court’s central holding in *Kelo*.⁸⁶

81. See Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 52 (1998) (“Legislators can sell the eminent domain power to special interests for almost any use, promising durability in the deal given the low probability that the judiciary will invalidate it on the grounds that the condemnation is private in nature.”).

82. See Kanner, *supra* note 55, at 365 (“*Kelo*’s promise, in effect, is that any property may be forcibly taken for any purpose deemed by redevelopers to be more lucrative than the existing one.”). That cities and towns may be willing to acquiesce to eminent domain requests is an indication of the unique advantage insiders have in wielding power over the property of others. Epstein, *supra* note 8, at 624 (“The instantaneous approval of the condemnation that [the private developer charged the redevelopment plan] received from the Village only confirms the advantage that the insiders have in these projects.”) (discussing *Didden v. Vill. of Port Chester*, 173 F. App’x 931, 932 (2d Cir. 2006), *cert denied*, 127 S. Ct. 1127 (2007)); 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, 34 (2006) (citing Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 977 (2003)) (“Indeed, because private parties can use eminent domain to obtain a relatively concentrated benefit, these parties have an incentive to use inordinate influence to achieve their private objectives through condemnations.”); Kochan, *supra* note 81, at 80–81.

83. Nicole Stelle Garnett, *Planning as Public Use*, 34 ECOLOGY L.Q. 443, 465 (2007) (“[T]he government’s ability to bypass the market . . . makes eminent domain an attractive ‘incentive’ to offer to private companies. The potential beneficiaries have a substantial incentive to engage in rent seeking to secure the benefit of this bypass (not to mention to capture all or part of the ‘condemnation bonus’ . . .”).

84. Epstein, *supra* note 8, at 624.

85. See *Franco v. Nat’l Capital Revitalization Corp.* 930 A.2d 160, 168 (D.C. 2007) (rejecting as too broad the lower court’s conclusion that “once the legislature has declared that there is a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext”). The *Franco v. National Capital Revitalization Corp.* court further explains that “*Kelo* recognized that “there may be situations where a court should not take at face value what the legislature has said.” *Id.* at 169.

86. See *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008) (rejecting the notion that *Kelo* overruled “over a century of precedent and [sought] to require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various government officials who approved it”).

B. *Pretext Claims: Kelo, Favoritism, and Private Purpose*

It is a fundamental and accepted principle of the Fifth Amendment that a taking that is purely private in nature is unconstitutional.⁸⁷ The Court has stated that “[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”⁸⁸ This principle prohibiting private takings is at the heart of pretext claims.⁸⁹

Pretext claims stem from this prohibition against purely private takings.⁹⁰ In essence, a court concluding that a taking is either pretextual or purely private—purely private meaning there is no valid asserted purpose⁹¹—finds a common central fact: the actual or primary purpose for the taking is nonpublic.⁹² The difference lies between whether a court construes the asserted purpose as having no public benefit and thus being solely for a private purpose,⁹³ or whether the court finds there is a valid asserted purpose but the actual, underlying purpose is a private one.⁹⁴ Thus, courts like the district court in *Goldstein* interpret *Kelo* as advancing two ways of demonstrating that the taking was for a private purpose: either “the ‘sole purpose’ of the taking is to transfer property to a private party,”⁹⁵ or “the asserted purpose of the taking is a ‘mere pretext’ for an actual purpose to bestow a private benefit.”⁹⁶

The concept of a pretext claim is that private purpose may go hand-in-hand with favoritism, and that favoritism, in turn, is masked by a pretextual

87. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”); *see also Kelo v. City of New London*, 545 U.S. 469, 478 n.5 (2005) (“[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.” (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798))).

88. *Midkiff*, 467 U.S. at 245; *see also Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (“[O]ne person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.”).

89. *See 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (citing *Midkiff*, 467 U.S. at 245).

90. *See Goldstein v. Pataki*, 488 F. Supp. 2d 254, 282 (E.D.N.Y. 2007).

91. *See, e.g., Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 106, 111 (N.J. Super. Ct. 1998) (holding that a project proposed by Donald Trump which sought to take private property to make way for a parking lot and rehabilitated hotel primarily served private, and not public, interests).

92. *See Goldstein Cert. Petition*, *supra* note 10, at *20.

93. *See Goldstein*, 488 F. Supp. 2d at 286–87.

94. *See Goldstein Cert. Petition*, *supra* note 10, at *20.

95. *Goldstein*, 488 F. Supp. 2d at 286 (quoting *Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

96. *Id.* at 286 (quoting *Kelo*, 545 U.S. at 478). In *Goldstein v. Pataki*, for example, the district court conducted these two analyses separately but concluded in both that the plaintiffs did not allege facts sufficient for a juror to find that the sole purpose was to bestow a private benefit to a private developer. *Id.* at 287. Nor did the plaintiff plead facts sufficient to support the claim that the asserted purpose was a mere pretext for benefiting a private developer. *Id.* at 290.

justification.⁹⁷ For example, if a government plans to condemn private property for the asserted purpose of creating a public parking garage, but its real purpose is to use that site to help Macy's secure a new location, the asserted purpose would be pretextual and the motive favoritism.⁹⁸ On the other hand, if a court discerns there is no potential benefit to the public, and that the taking merely allows a private party to reap a windfall, the taking is purely private.⁹⁹ In such a case the condemning authority would not claim that it lacks a secret purpose, but could claim, as New London did in *Kelo*, that the court should interpret its asserted purpose of economic development as a public one.¹⁰⁰

A condemning authority's reasons for favoring a certain party may have various explanations: corruption,¹⁰¹ a complex web of social and business relations marked by an exchange of benefits and favors over an extended period of time,¹⁰² or what one court has called the "'thickness' of the social and institutional connections."¹⁰³ Yet, whatever the source of favoritism, courts prohibit it out of concerns for basic fairness. The principle behind prohibiting favoritism is similar to the principle that prohibits discrimination¹⁰⁴; while courts prohibit discrimination because it violates basic fairness in that some individuals are singled out to bear heavier burdens than the rest of society, the corollary to this principle is that "fairness concerns should bar the government from allowing some people alone to enjoy benefits that in 'in all fairness and justice' should be enjoyed by the public as a whole."¹⁰⁵

97. See *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (explaining that pretextual takings intended to confer benefits to private parties are "forbidden" by the Public Use Clause); see also Regan, *supra* note 7 (discussing pretext in *McCulloch v. Maryland*).

98. This hypothetical convergence of pretext and favoritism is taken from an actual effort by the legendary "master builder" Robert Moses. CARO, *supra* note 71, at 741–42. Moses's real-life attempt to take private property for the asserted purpose of building a parking garage was thwarted when the New York City Traffic Commissioner learned that his real motivation was to secure for Jack Straus—owner of Macy's and a Moses ally—an uptown branch, and threatened to go to the press. *Id.*

99. See, e.g., *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 106, 111 (N.J. Super. Ct. Law Div. 1998).

100. See *supra* note 42 and accompanying text.

101. See Kelly, *supra* note 77, at 4.

102. See, e.g., CARO *supra* note 71, at 740–41 (discussing how in exchange for Moses's favors conferred on the Archdiocese of New York, most notably in the creation of Fordham University's Lincoln Center campus, Moses did not exact a one-for-one quid pro quo, but would instead call on the Archdiocese to assist him in giving local politicians a "push" when, from time to time, a project he was sponsoring stalled).

103. See *In re Oracle Corp.*, 824 A.2d 917, 936 (Del. Ch. 2003); see also *infra* note 237 and accompanying text.

104. Indeed, *Black's Law Dictionary* implies that favoritism and discrimination are synonymous. BLACK'S LAW DICTIONARY 641 (8th ed. 2004) ("Preference or selection, usu. invidious, based on factors other than merit. See NEPOTISM; PATRONAGE. Cf. DISCRIMINATION.") (defining favoritism).

105. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 578 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

As *Kelo* makes abundantly clear, that a taking yields private benefits neither invalidates the taking nor proves pretext or favoritism.¹⁰⁶ But what makes a pretextual taking invalid is that the government's actual purpose is illicit, even if the taking would achieve a permissible, perhaps even desirable outcome.¹⁰⁷ In *Aaron v. Target Corp.*,¹⁰⁸ the U.S. District Court for the Eastern District of Missouri granted an injunction on the condemnation of private property after it discovered the genuine reason for the taking.¹⁰⁹ There, even though the government asserted that the purpose was to end blight¹¹⁰—which under *Berman* is a legitimate purpose—it may not use its power of eminent domain “in the manner of a ‘default broker of land.’”¹¹¹ The improper purpose thus taints what might otherwise be a valid endeavor—what Professors Robert Ellickson and Vicki Been term “[w]hen a ‘giving’ taints a taking.”¹¹² In some cases, that the asserted purpose is a mere pretext may call into question whether the condemnation is capable of achieving or will be used to achieve a valid purpose.¹¹³ These claims boil down to arguing that the government takes A's property because it wants to benefit B, though it says its purpose is to benefit the public.¹¹⁴

106. *Id.* at 485 (“Quite simply, the government’s pursuit of a public purpose will often benefit individual private parties.”).

107. *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1177 (E.D. Mo. 2003). Some courts hold that to satisfy the “mere pretext” test for private use, plaintiffs “must do more than ‘alleg[e] that the purported purposes of the Project are dubious,’ but instead must ‘allege that the actual purpose of the Project is to bestow a private benefit.’” *CBS Outdoor, Inc. v. N.J. Transit Corp.*, No. 06-2428, 2007 U.S. Dist. LEXIS 64155, at *49 (D.N.J. Aug. 30, 2007) (quoting *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007)).

108. 269 F. Supp. 2d 1162.

109. *Id.* at 1177 (“‘Courts must look beyond the government’s purported public use to determine whether that is the genuine reason or if it is merely pretext.’” (quoting *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002))).

110. *Id.* at 1166–69.

111. *Id.* at 1177 (quoting *Sw. Ill. Dev. Auth. v. Nat’l City Envtl.*, L.L.C., 768 N.E.2d 1, 10 (Ill. 2002)).

112. ELLICKSON & BEEN, *supra* note 71, at 837; *see also* Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 193 (2008) (arguing that in the late 1970s, “it had become apparent that illegitimate racial motives powerfully taint the actions that they cause” (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977))). Professor Gordon Young discusses *Village of Arlington Heights v. Metropolitan Housing Development Corp.* in connection with *Kelo*’s reference to pretext, arguing that both cases call for examining legislative motives. *Id.* at 193, 230–231. In explaining that inquiry into government’s purpose as grounds of discerning the constitutionality of its acts fits within people’s ethical structures, Professor Richard H. Fallon, Jr., writes that “there is nothing mysterious about the idea that the quality and permissibility of governmental acts, and hence their constitutionality, should sometimes depend on their purposes” as opposed to their effects. Fallon, *supra* note 37, at 98.

113. Professor Gideon Kanner draws on an example from 1960s Los Angeles where a private home was taken to make way for the privately owned Motion Picture Museum, but where the property was later never developed for that use. Gideon Kanner, *We Don’t Have to Follow Any Stinkin’ Planning—Sorry About That*, *Justice Stevens*, 39 URB. LAW. 529, 546–48 (2007).

114. Issues regarding the propriety of courts examining the desire, intention, motivation, or purpose of government actions are discussed later in Part I.D.

The rule with respect to favoritism in a case like *Aaron* is thus a bright line: if a court finds the underlying purpose is favoritism, the taking will be invalidated.¹¹⁵

*C. Pretext in Justice Stevens's Opinion and Justice Kennedy's
Concurrence: What Is and Isn't Pretext and the Post-Kelo Debate*

The risk of favoritism and the constitutional prohibition on private takings underpin the Court's discussion of pretext in *Kelo*. A comparison of Justice Stevens's and Justice Kennedy's discussions of takings motivated by favoritism elucidates the Court's thinking about the kinds of tools available to courts for evaluating pretextual takings. The comparison also reveals how far each Justice went in his discussion of a potential rule for pretext claims.

1. Justices Stevens and Kennedy: No Pretext in *Kelo*, but the Aftermath
May Demonstrate Otherwise

To be clear, the *Kelo* Court found that the taking at issue was not motivated by favoritism.¹¹⁶ Furthermore, neither Justice clearly explicated a test for raising pretext claims in the future, nor had the Court ever developed a rule for distinguishing a permissible taking and a "purely-private taking."¹¹⁷ While Justice Stevens writes that a one-to-one transfer of property "would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise."¹¹⁸ Justice Kennedy also resisted such hypotheticals.¹¹⁹

In concluding that it was improbable that Susette Kelo's property was condemned for the purpose of benefiting another private party, Justice Stevens looked to two factors: the presence of a comprehensive plan and the fact that the city had not identified the party to benefit from the taking prior to the redevelopment plan.¹²⁰ First, since the private parties to benefit from the taking were not known before creating the redevelopment plan, the *Kelo* majority found that it did not make sense that the condemning authority could act out of a motivation to benefit a particular party when they did not even know who that party would be.¹²¹ Additionally, claiming that New London's asserted purpose of redevelopment was a mere pretext

115. Cohen, *supra* note 54, at 417.

116. *Kelo v. City of New London*, 545 U.S. 469, 478 n.6 (2005).

117. Cohen, *supra* note 54, at 385 ("Prior to *Kelo*, the Court had never attempted to set forth a rule for distinguishing a permissible taking and a purely-private taking." (internal quotation marks omitted)).

118. *Kelo*, 545 U.S. at 487.

119. *Id.* at 493 (Kennedy, J., concurring) ("This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard . . .").

120. *Id.* at 478 (majority opinion).

121. *Id.* at 478 n.6 ("[T]he identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown.").

for conferring benefit to Pfizer would have also been difficult to prove because Pfizer was not the developer of the condemned properties, and the ultimate developer was unknown prior to taking.¹²²

Second, Justice Stevens's opinion—and Justice Kennedy's concurrence as well—suggest that the presence of a comprehensive plan itself “almost always precludes a finding of pretext.”¹²³ Although one author explains that the Court finds planning and pretext “incompatible,”¹²⁴ planning and pretext is less a relationship of contradiction, than one of probability.¹²⁵ The thinking is that through “carefully considered” planning,¹²⁶ information about the project is divulged to the public, enhancing public scrutiny and causing local officials and private developers to “hesitate before proposing projects that are not in the public interest.”¹²⁷

Like Justice Stevens, Justice Kennedy found it significant that there was a comprehensive plan and that the identity of the beneficiary was not known at the time New London's plans were made.¹²⁸ In addition, Justice Kennedy identifies two other factors that foreclosed finding pretext:¹²⁹ first, that “the projected economic benefits of the project cannot be characterized as *de minimis*”; and, second, that “[t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes.”¹³⁰ Despite resisting outright explication of a rule, enumerating factors that do not make *Kelo* a pretextual taking allows courts a basis for inferring what might make such a taking. Some courts downplay its significance,¹³¹ but others predict that, while not the holding in *Kelo*, Justice Kennedy's concurrence “may accurately predict what the Court will hold when the record before it does not resolve the

122. See Kelly, *supra* note 77, at 42. A pretext claim in *Kelo* would be more convoluted than in a case like *Goldstein*. In *Goldstein* the alleged primary beneficiary of the taking was the party who actually took title to the property. See *Goldstein v. Pataki*, 516 F.3d 50, 54 (2d Cir. 2008). In *Kelo*, it would have been difficult to argue this because Pfizer would not benefit directly by taking the property from A and giving it to B, because Pfizer was not the proposed owner and developer of the takings area. Had the *Kelo* plaintiffs claimed that the primary purpose was to benefit Pfizer, the theory would have to have been that the primary purpose was to entice Pfizer to settle in New London, which the city could only do by taking property for a developer who would, in turn, serve Pfizer's demand for building residences for potential employees.

123. Garnett, *supra* note 83, at 454.

124. *Id.*

125. While the Court does not explicate this logic, some scholars suggest that comprehensive plans reduce the risk of favoritism, because planning “act[s] as a filtering mechanism.” Kelly, *supra* note 77, at 14.

126. *Kelo*, 545 U.S. at 478 (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

127. Kelly, *supra* note 77, at 14.

128. Compare *Kelo*, 545 U.S. at 478 n.6, with *id.* at 492 (Kennedy, J., concurring).

129. *Id.* at 493 (Kennedy, J., concurring).

130. *Id.*

131. See *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008) (“[W]e must reject the notion that, in a single sentence, the *Kelo* majority sought *sub silentio* to overrule *Berman*, *Midkiff*, and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking . . .”).

pretext issue.”¹³² The Court itself has embraced this logic, finding that a fifth vote concurrence on a fragmented court may be determinative of future cases.¹³³ Most basically, Justice Kennedy’s concurrence has been applied in mounting a defense to condemnation.¹³⁴

However, the core assumption that the taking in *Kelo* was not pretextual is challenged by a post-*Kelo* exposé and history of the case.¹³⁵ According to a recent history of the events leading up to *Kelo*, the Court actually did get the sequence of events mostly correct: the NLDC identified the area as ripe for redevelopment and then Pfizer announced its plans to build a research facility in the area.¹³⁶ However, what this simple rendition of the facts misses is that the NLDC enticed Pfizer to join the project by letting Pfizer dictate the contours of the plan, including the decision to condemn the properties in *Kelo*’s neighborhood.¹³⁷ Thus, while the NLDC may have, in the Court’s words, “intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract,”¹³⁸ facts revealed after *Kelo* indicate that the decision to use eminent domain may have been an effort to appease Pfizer. Indeed, the city’s desire to install Pfizer was so strong that it blocked an effort to impose a competitive bidding process for the site in order to “ensure the land got developed in a manner that complemented the Pfizer development.”¹³⁹

A letter from the NLDC president months before Pfizer announced its plans detailed the NLDC’s effort to meet Pfizer’s “requirements.”¹⁴⁰ In addition to the mill site, which the city was to convey to Pfizer for the research facility, the biggest such demand Pfizer made was for the NLDC to assemble two adjacent properties that aligned with Pfizer’s vision for the area.¹⁴¹ One of these sites was the takings area, where the NLDC would “buy up all these properties, clearing the way for redevelopment in line with Pfizer’s wishes.”¹⁴² One Pfizer official, who was incidentally the NLDC

132. *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 169 n.8 (D.C. 2007).

133. *Id.* at 169 n.8 (quoting *Marks v. United States*, 430 U.S. 188, 193, (1977)). The *Marks v. United States* Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (Stewart, J.)).

134. *See Franco*, 930 A.2d at 169–75; *MHC Fin. Ltd. P’ship v. City of San Rafael*, No. C 00-3785 VRW, 2006 U.S. Dist. LEXIS 89195, *42–45 (N.D. Cal. Dec. 5, 2006) (citing Justice Kennedy’s concurrence in noting that pretext claims must be taken seriously and given careful and extensive inquiry).

135. *See* BENEDICT, *supra* note 27, at 235–38; Mann, *supra* note 27.

136. BENEDICT, *supra* note 27, at 17–18, 24, 60–61.

137. *Id.* at 235–36.

138. *Kelo v. City of New London*, 545 U.S. 464, 474 (2005).

139. BENEDICT, *supra* note 27, at 70–71.

140. *Id.* at 236.

141. *Id.* at 49–50.

142. *Id.* at 50.

president's husband, stated the reason for the taking in simpler terms: Pfizer did not want to be surrounded by tenements.¹⁴³

In their brief to the Court, the *Kelo* petitioners did make mention of Pfizer's "requirements," writing that New London "clearly intended to benefit Pfizer," but the discussion of Pfizer's role was not a pretext argument. Rather, petitioners explained that the motivation for benefiting Pfizer was for the city "to reap the supposed trickle-down" benefits Pfizer's development would bring.¹⁴⁴ Focusing on the validity of economic development as a public purpose, *Kelo* petitioners conceded that New London's desire to benefit Pfizer was a means to their primary and public purpose. Yet they also argued that such trickle-down benefits demonstrate that economic development lacks a "limiting principle."¹⁴⁵ Had the case been litigated as a pretext claim, perhaps the *Kelo* petitioners would have made more of Pfizer's "10,000 pound gorilla" role.¹⁴⁶

This next section distinguishes the hypothetical pretext cases mentioned in *Kelo* from other standards the Court could apply to invalidate an improper taking.

2. Three Ways of Striking Improper Takings: Rational Basis Review, Equal Protection Clause, and Undetected Impermissible Favoritism

Taken together, both Justice Kennedy and Justice Stevens suggested three bases for striking impermissible takings: (1) rational basis review under the Public Use Clause;¹⁴⁷ (2) the Equal Protection Clause;¹⁴⁸ and (3) perhaps, a new rule where property owners raise a "suspicion that a private purpose was afoot"—essentially, a pretext claim.¹⁴⁹ Like Justice Kennedy, Justice Stevens addressed fears of takings for a private purpose, and in doing so outlined methods for scrutinizing takings. First, in reserving the power to confront "hypothetical cases . . . if and when they arise," Justice Stevens drew on the Court's general power to strike takings when eminent domain power goes too far.¹⁵⁰ This reference implies a constitutional source of authority for a future pretext standard. Second, Justice Stevens noted that there are other constitutional mechanisms at the Court's disposal

143. *Id.* at 230.

144. Brief of Petitioners at 14, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108).

145. *Id.*

146. *Id.*

147. *Compare Kelo*, 545 U.S. at 487 & n.17 (discussing invalidating a statute "for lack of a reasoned explanation"), *with id.* at 491 (Kennedy, J., concurring) (explaining that rational basis review is capable of striking down a taking that "is intended to favor a particular private party").

148. *Compare id.* at 487 & n.17 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam) (holding that taking violated the Equal Protection Clause where it discriminated against a "class of one")), *with id.* at 491 (Kennedy, J., concurring).

149. *Id.* at 487 n.17; *accord id.* at 493 (Kennedy, J., concurring).

150. *Id.* at 487 n.18 ("The power to tax is not the power to destroy" (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting))).

than just the Public Use Clause to strike down an impermissible taking, including rational basis review¹⁵¹ and the Equal Protection Clause.¹⁵²

Justice Kennedy explicates how rational basis review under the Public Use Clause is capable of striking takings motivated by favoritism:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.¹⁵³

In analogizing to the Equal Protection Clause, Justice Kennedy arguably was not suggesting that impermissible favoritism claims be brought under the Equal Protection Clause, but that Equal Protection Clause analysis in *City of Cleburne v. Cleburne Living Center, Inc.*¹⁵⁴ and *U.S. Department of Agriculture v. Moreno*¹⁵⁵ are illustrations of the potential bite that rational basis review has in voiding a condemnation.¹⁵⁶ Practically, when a court applies rational basis review, the government action will be upheld so long as it is “rationally related to a legitimate state interest”¹⁵⁷—even the “flimsiest” of reasons will survive scrutiny.¹⁵⁸ However, a case like *Cleburne* demonstrates that deference to the legislative branch—which *Kelo* prescribes for public use challenges—does not grant carte blanche to

151. See *id.* at n.17 (explaining that takings may be invalidated for “lack of a reasoned explanation”).

152. Here, Justice Stevens noted that in cases “rais[ing] a suspicion that a private purpose was afoot” courts may respond to such “aberrations with a skeptical eye” by applying the Equal Protection Clause. *Kelo*, 545 U.S. at 487 & n.17 (citing *Olech*, 528 U.S. at 562). *Village of Willowbrook v. Olech* announced the rule that the Equal Protection Clause applies to discrimination against a “class of one.” See CHEMERINSKY, *supra* note 37, at 676.

153. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47, 450 (1985) (striking down a zoning regulation as irrational)); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533–36 (1973) (invalidating a statute that limited public benefits where the statute was motivated by a desire to discriminate against hippies, evincing a bare desire to harm). Claims brought under the Equal Protection Clause where the statute does not implicate a suspect or quasi-suspect class are analyzed under rational basis review. See CHEMERINSKY, *supra* note 37, at 677–78, 687–88.

154. 473 U.S. 432 (1985).

155. 413 U.S. 528, 534 (1973) (“[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

156. See Bell, *supra* note 80, at 170 (“[Kennedy] cited [*Cleburne* and *Moreno*], two equal protection cases, as examples of cases in which the Supreme Court had found that a governmental action failed ‘rational basis’ review precisely because the challenged action was primarily intended to disadvantage certain private parties.” (internal citations omitted)).

157. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The Equal Protection Clause analysis would substitute “legitimate state interest” for public use, but for the purposes of this analysis, there is no substantive difference. This language in *City of New Orleans v. Dukes* is nearly identical to Justice Stevens’s reference in *Kelo* that a taking is upheld “[w]hen the legislature’s purpose is legitimate and its means are not irrational.” *Kelo*, 545 U.S. at 488 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984)).

158. Young, *supra* note 112, at 201.

legislatures. In *Cleburne*, a local ordinance failed rational basis review under the Equal Protection Clause where the Court found that a zoning ordinance that distinguished between a home for the mentally disabled and other facilities was irrational.¹⁵⁹ Applied to the takings context, rational basis review is ostensibly capable of striking down at least two kinds of condemnations: either if the asserted purpose is not a cognizable public purpose (and thus is irrational) under the Public Use Clause¹⁶⁰ or because a clear intention to benefit a private party is itself an irrational or invalid purpose under the Public Use Clause.¹⁶¹ The type of “undetected” favoritism to which Justice Kennedy referred would not be scrutinized under such review, because either the asserted purpose is likely to be rational or the underlying purpose would not be marked by a “clear intention” of favoritism.

Justice Stevens cited to a different Equal Protection Clause case, *Village of Willowbrook v. Olech*,¹⁶² perhaps to suggest that the Equal Protection Clause may also serve as a separate, independent basis for challenging impermissible takings.¹⁶³ For example, in cases where the taking is done out of “spite” the Equal Protection Clause may be a proper tool.¹⁶⁴ There

159. 473 U.S. at 450.

160. Lack of a logical basis for the asserted purpose was part of the U.S. Court of Appeals for the Ninth Circuit’s rationale for invalidating the taking in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1130 (C.D. Cal. 2001) (rejecting prevention of “future blight” as speculative and without support under state eminent domain law). However, this court also struck the taking on grounds of pretext. *Id.* at 1129. Presumably, Justice Stevens interpreted the taking in *99 Cents* as simply lacking a rational basis, as he left for a separate footnote discussion of a new rule that would address hypothetical cases that raise a suspicion that a private purpose is afoot. Compare *supra* note 150 and accompanying text, with *supra* note 151 and accompanying text.

161. The hidden purpose of a desire to benefit a private party is a logical corollary of equal protection cases like *U.S. Department of Agriculture v. Moreno* where the hidden purpose is a “bare . . . desire to harm.” 413 U.S. 528, 534 (1973). See *supra* note 153.

162. 528 U.S. 562 (2000) (per curiam).

163. *Kelo*, 545 U.S. at 487 & n.17 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam)).

164. Although the *Olech* Court did not find the taking to be motivated by spite, Professor Debra Poggrund Stark believes this decision serves as a basis for a future court to invalidate a taking where the motive is one of ill will toward the property owner, and that such a taking would be pretextual. See Debra Poggrund Stark, *How Do You Solve a Problem Like in Kelo?*, 40 J. MARSHALL L. REV. 609, 615–17 (2007) (discussing *Kelo*’s reference to the applicability of *Olech*). Applied to a hypothetical situation involving the condemnation of Justice David Souter’s farmhouse in Weare, New Hampshire, Stark finds that “if the purpose of the taking is to harm Justice Souter and [is] motivated by ill will towards him” then it could be enjoined. *Id.* at 617. The reasoning behind such a conclusion is that “when a property owner is treated differently from other property owners . . . based on ill will rather than a rational basis, such action violates the Equal Protection Clause and will be struck down.” *Id.* This hypothetical is actually based on a real chain of events whereby the town of Weare sought to condemn Justice Souter’s property in response to his vote with the majority in *Kelo*. See Peter J. Smith, *Understanding Kelo: Why Justice Souter Should Be Praised*, N.H. UNION LEADER, Aug. 3, 2005, at A9 (explaining that the criticism of *Kelo* has become so personal that opponents of the decision joined in a campaign to seize Justice Souter’s farmhouse to build a luxury hotel in honor of the U.S. Constitution).

may also be cases like *Armendariz v. Penman*,¹⁶⁵ where the government action may fail under both the Public Use Clause (because the effort masks a private purpose) and the Equal Protection Clause (because it is discriminatory).¹⁶⁶

However, Kennedy was perhaps not satisfied that rational basis review or Equal Protection Clause analysis are capable of invalidating all pretextual takings.¹⁶⁷ Justice Stevens also indicated that he would invalidate a taking where the asserted purpose was pretextual.¹⁶⁸ In discussing the new category of pretext claims, Justice Kennedy explicitly left open the possibility that a court may presume some takings do not deserve deferential review: “There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”¹⁶⁹ The remainder of this Note examines more closely the standard of review for claims of undetected impermissible favoritism and what factors, perhaps other than those Justice Stevens and Justice Kennedy discuss in *Kelo*, might trigger such scrutiny.

Justice Kennedy based his discussion of heightened scrutiny on the notion that some categories of takings are prone to risks that make them deserving of suspicion.¹⁷⁰ He cited to *Eastern Enterprises v. Apfel*¹⁷¹ for the proposition that some kinds of regulations are inherently suspicious and thus deserve heightened scrutiny.¹⁷² In *Apfel*, the Court struck down a retroactive act of Congress that forced a former coal company to pay additional medical benefits after it had left the coal industry.¹⁷³ To Justice

165. 75 F.3d 1311 (9th Cir. 1996).

166. *Id.* at 1321, 1326, 1328 (holding that property owners stated a cause of action when they claimed the city “faked violations” of the housing code in order to initiate a chain of events that led to condemnation of their homes). The Ninth Circuit did not reach a decision on the merits, but held that the claim was enough to survive summary judgment. *Id.* at 1328.

167. *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring) (noting the possibility of “a more stringent standard of review than that announced in *Berman* and *Midkiff*”).

168. See Stark, *supra* note 164, at 614–15. Stark explains that Justice John Paul Stevens’s reference to *City of Cincinnati v. Vester*, 281 U.S. 439 (1930), a case in which the lower courts found a pretextual motive, is a basis to conclude that Stevens would have invalidated a taking that “failed to provide evidence of a valid purpose, and where the evidence to the contrary indicated a purpose that [was] private in nature.” Stark, *supra* note 164, at 615.

169. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 549–50 (1998) (Kennedy, J., concurring in judgment and dissenting in part)) (analogizing to a case where the Court applied heightened scrutiny to retroactive legislation under the Due Process Clause).

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

171. 524 U.S. 498.

172. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (citing *Eastern Enters.*, 524 U.S. at 549–50 (Kennedy, J., concurring in judgment and dissenting in part)).

173. *Eastern Enters.*, 524 U.S. at 548 (Kennedy, J., concurring in judgment and dissenting in part) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)). In his concurrence of that judgment, Justice Kennedy noted that retroactive lawmaking may amount to a “means of retribution against unpopular groups or individuals” and thus the very act itself is deserving of suspicion. *Id.*

Kennedy, some takings for economic development presented a similar risk of impermissibility. On one hand, Justice Kennedy noted that just because the purpose is economic development does not necessitate heightened scrutiny.¹⁷⁴ On the other hand, in the next paragraph, Justice Kennedy references factors that may establish pretext, implying that the suspicion of undetected impermissible favoritism is raised by the presence of those factors.¹⁷⁵ He noted that these factors form a body of “cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose.”¹⁷⁶ Professor Daniel Kelly suggests a framework for identifying situations where there is such a risk.¹⁷⁷

Finally, in elucidating the kind of pretextual takings Justice Kennedy identified and the type of scrutiny it might entail, it is important to note that not all takings that mask a hidden purpose are motivated by favoritism.¹⁷⁸ There are cases where, absent knowledge of the ultimate beneficiary, the taking is still invalid, but not because the purpose is to confer a private benefit; for example, in some cases, the underlying purpose may be one of spite¹⁷⁹ or ending an undesired use (and thus condemned in bad faith).¹⁸⁰

3. Kennedy’s Concurrence: Importance and Limitations

Justice Kennedy’s concurrence in *Kelo* is significant in its potential promise of heightened judicial intervention when government agencies or

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

175. *See id.* (noting that factors present in *Kelo*—presence of a comprehensive plan, benefits that are more than de minimis, unknown identities of the beneficiaries, and compliance with procedural requirements—distinguish it from a case in which the taking might be motivated by favoritism).

176. *Id.*

177. *See generally* Kelly, *supra* note 77. Kelly divides private involvement that might risk favoritism into two stages: the precondemnation involvement in the form of identifying a site for development and private involvement in the postcondemnation development of that site. *Id.* at 20–24. Application of this standard is discussed further in Part II.B.3.

178. *See, e.g.*, *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455, 460–61 (Ga. 1981) (holding that a taking for the asserted purpose of building a park was actually an effort to prevent the construction of a hazardous waste facility, and was done in bad faith). While this case is a bad faith case, that the court looked behind the asserted purpose to find a furtive motive provides precedential support for pretext case law.

179. *See supra* note 164 and accompanying text.

180. *See, e.g.*, *Carroll County v. City of Bremen*, 347 S.E.2d 598 (Ga. 1986) (taking for asserted purpose of building a training facility for police and fire employees masked an effort to prevent construction of a water-waste facility and was in bad faith); *Earth Mgmt.*, 283 S.E.2d 455; *Pheasant Ridge Assocs. v. Town of Burlington*, 506 N.E.2d 1152 (Mass. 1987) (taking for asserted purpose of creating a park was actually to prevent construction of affordable housing and done in bad faith); *Borough of Essex Fells v. Kessler Inst. for Rehab. Inc.*, 673 A.2d 856 (N.J. Super. Ct. 1995) (taking was an effort to block use of land as a nursing facility and was in bad faith); *see also* *Denver W. Metro. Dist. v. Geudner*, 786 P.2d 434 (Colo. Ct. App. 1989) (taking was in bad faith when the condemnation of property was for the benefit of the family who happened to control the condemning authority).

condemning authorities abuse their authority.¹⁸¹ As Justice O'Connor put it, Justice Kennedy failed to specify "what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not."¹⁸²

Indeed, some judges have criticized Justice Kennedy for engendering confusion in lower courts. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit opined that

Justice Kennedy's action is a[n] . . . example of the Court's tendency . . . to disregard the consequences of its decisions for the lower courts that have to apply them. If Kennedy had reservations concerning the majority opinion that he was not willing to swallow, he should have concurred in the judgment only; then the lower court judges and future litigants would know where they stood.¹⁸³

The recent explosion of pretext claims¹⁸⁴ reveals a central paradox in Justice Kennedy's concurrence: in rejecting heightened review in favor of rational basis review for Public Use Clause claims, the Court seemingly deprived itself of an adjudicative tool that might help it evaluate the record and establish impermissible favoritism. It is thus difficult to meet Justice Kennedy's criteria without "colliding with the no-heightened-level-of-review standard laid down by the majority."¹⁸⁵

Even if Justice Kennedy did announce a new rule, his guidance is incomplete. It has been criticized for failing to explain "[j]ust how 'the record' could possibly establish 'undetected impermissible favoritism'";¹⁸⁶ what evidence would be admissible for probing such an illicit motive;¹⁸⁷ how such evidence could be attained;¹⁸⁸ or how the evidence would trigger heightened scrutiny that could give relief.¹⁸⁹ Additionally, even if these matters were resolved, a more serious problem is that once the rule was clarified, it is unclear how it would have any efficacy if only the "stupid staffer" failed to comply.¹⁹⁰ In other words, condemning authorities could use Justice Kennedy's factors as a roadmap for what not to do and how to take the precautions that would prevent a court from finding favoritism.

181. See, e.g., *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007) (holding that *Kelo* recognized a pretext defense to takings); see also *MHC Fin. Ltd. P'ship v. City of San Rafael*, 2006 U.S. Dist. LEXIS 89195, *39–43 (N.D. Cal. Dec. 5, 2006) (interpreting *Kelo* as providing grounds to invalidate a taking when the purpose is pretextual).

182. *Kelo v. City of New London*, 545 U.S. 469, 502 (2005) (O'Connor, J., dissenting).

183. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 95 (2005).

184. See *supra* notes 31, 34, 35 and accompanying text.

185. Kanner, *supra* note 55, at 360.

186. *Id.* (quoting *Kelo*, 545 U.S. at 492–93 (Kennedy, J., concurring)).

187. *Id.* at 362.

188. *Id.*

189. *Id.*

190. *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025–26 & n.12 (1992)).

Additionally, public officials are not likely to admit to an illicit purpose,¹⁹¹ and, as the post-*Kelo* revelations about Pfizer's role prior to the creation of a development plan demonstrate, some information turns up only when it is too late.¹⁹²

D. *Pretext Case Law*

Despite the limitations of Justice Kennedy's concurrence in failing to clearly establish a new rule and in failing to explicate how it would work to address takings motivated by favoritism,¹⁹³ federal and state jurisprudence may provide guidance. This section is divided into two parts: First, through an analysis of pretext case law, as well as a related area of jurisprudence, bad faith claims, this section examines how courts analyze claims of improperly-motivated takings. Specifically, this section investigates how courts distinguish the words motive and purpose, what it means when a court infers motive, and also whether courts require evidence that the government expected a specific benefit in return for favoritism. Second, this section discusses one of the factors mentioned in Justice Kennedy's concurrence,¹⁹⁴ namely that the benefits of the taking are not de minimis, and then also discusses other factors state and federal courts have examined as a basis for inferring pretext.

1. How Pretext Analysis Works

a. *Motive and Purpose Is Not Inferred from Legislative Statements*

Whether *Kelo* allows courts to examine the motives of legislatures brings the discussion of pretext into an area where "courts use a confusing, and often overlapping, array of terms."¹⁹⁵ For some, motive analysis is off-limits; Justice Antonin Scalia has written that the Court ought not consider legislative motive or intent,¹⁹⁶ and the Second Circuit in *Goldstein* similarly wrote that legislative judgments must be viewed objectively and that courts

191. See Kanner, *supra* note 55, at 362.

192. See Mann, *supra* note 27.

193. See *supra* notes 181–90 and accompanying text.

194. This section does not specifically discuss the remaining three factors—presence of a comprehensive plan, that the identities of the private beneficiaries were not known prior to the taking, and compliance with elaborate procedural requirements. See *supra* note 130 and accompanying text. However, compliance with procedural requirements may be a factor that subsumes other indicators of pretext, such as availability of alternatives, post hoc justifications, sequence of events, and failure to negotiate or failed negotiations.

195. Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV. 45, 57 (2008).

196. *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., concurring) ("To look for the sole purpose of even a single legislator is probably to look for something that does not exist.").

may not “second-guess[] every detail in search of some illicit improper motivation.”¹⁹⁷

And yet some scholars argue that Justice Kennedy’s discussion of pretext calls for analysis of motive. Professor Gordon Young argues that Justice Kennedy’s reference to takings “‘intended to favor a particular private party,’” like *Moreno*’s language about a “‘*bare congressional desire*,’” is “‘the language of mental states.’”¹⁹⁸ In drawing an analogy to race discrimination cases, some authors argue that in rare circumstances calling individual legislators to the stand to testify may be appropriate in assessing pretext.¹⁹⁹ The Court of Appeals for the District of Columbia agreed that there is at least ambiguity here, that “‘pretextual’ is used to characterize the public benefits that will flow from the taking, not the thought processes of legislators or other government officials” but that, in *Kelo*, the “same sentence [also] refers to intent . . . presumably the intent of the legislators.”²⁰⁰ Nevertheless, the D.C. Court of Appeals did not resolve this ambiguity. The court first noted the difficulty in “discovering the motives and intentions of individual legislators,”²⁰¹ adding that some federal courts may expressly forbid such inquiry.²⁰² But then it punts, writing that “a reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking.”²⁰³

Distinctions between motive and intent on one hand, and purpose on the other may be more confusing than helpful.²⁰⁴ Arguably, a court’s analysis of what the government is really trying to achieve—regardless of whether it uses the terms desire, intention, motivation, purpose or, in the case of *Franco*, “hopes”²⁰⁵—may simply amount to a court’s “search for adequate reasons.”²⁰⁶ For example, under the Equal Protection Clause, “a statute will fail scrutiny . . . if its purpose is to promote [or inhibit] religion,” in other words, if what is motivating legislators to enact the statute is the promotion of religion.²⁰⁷

Confusion over the use of subjective terms like intent, motive, purpose, and hope may obscure what pretext claims really analyze: objective

197. *Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008) (citing *Brody v. Vill. of Port Chester*, 434 F.3d 121, 135 (2d Cir. 2005)).

198. Young, *supra* note 112, at 230–31 (quoting *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

199. See ELLICKSON & BEEN, *supra* note 71, at 116 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

200. *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 173 (D.C. 2007).

201. *Id.* (citations omitted).

202. *Id.* at 173 n.11.

203. *Id.* at 173 (contrasting its holding with *Kelo*, 545 U.S. at 487).

204. See Young, *supra* note 112, at 231.

205. *Franco*, 930 A.2d at 173.

206. Young, *supra* note 112, at 231.

207. *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997) (“[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion . . .”).

evidence of official acts and statements²⁰⁸ or sequence of events,²⁰⁹ not necessarily legislators testifying as to what they believed they were personally attempting to accomplish.²¹⁰ As the Massachusetts Supreme Court put it in a case where there was an allegation that the taking was motivated by bad faith, “we consider not only what [legislators] have said but we also draw inferences concerning their intentions from what they have done and what they have not done.”²¹¹ Thus, in *Pheasant Ridge Associates, Ltd. v. Town of Burlington*,²¹² the statements of an individual legislator were relevant to the issue of intent when, after no other council members objected to his speech that revealed a motive of bad faith, the council voted for the condemnation. In another case, *Aaron*, the sequence of events was determinative: that the taking occurred following statements made by the beneficiary of the taking who threatened to abandon its current location—bringing economic harm to the city—unless it acquired fee title over the plaintiff’s property was evidence of improper purpose.²¹³ Furthermore, legislators may give testimony that points to facts that suggest what parties, acting in concert, were trying to achieve.²¹⁴

b. *Inferring Purpose/Motive from Circumstantial Evidence*

Closely related to courts’ examination of objective evidence that suggests motive is courts’ analysis of circumstantial evidence in inferring that a particular scheme’s purpose was to benefit a private party.²¹⁵ Even in *99 Cents Only Stores v. Lancaster Redevelopment Agency*,²¹⁶ where the scheme that worked a private benefit was relatively straightforward,²¹⁷ the court reinforced its conclusion that the taking was pretextual through

208. See, e.g., *Pheasant Ridge Assocs. v. Town of Burlington*, 506 N.E.2d 1152, 1156 (Mass. 1987) (holding that in determining whether a taking is in bad faith the court will “draw inferences concerning their intentions from” their acts and nonacts).

209. *Id.* at 1157–58 & n.8 (noting that the town is not bound by remarks made by a councilman revealing his awareness that the taking was an effort to achieve an illegitimate purpose, but the town is bound when, after such remarks, it votes to take the property without hearing the merits of the taking).

210. See *id.*

211. *Id.* at 1156.

212. 506 N.E. 2d 1152 (Mass. 1987).

213. *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1172 (E.D. Mo. 2003), *rev’d on other grounds*, 357 F.3d 768 (8th Cir. 2004).

214. For example, in the post-*Kelo* exposé, the reporter interviewed a high-ranking official who was privy to the negotiations between Pfizer and the state prior to the announcement of the redevelopment plan. The official explained that Pfizer “would not have done the deal without the commitment to make the surrounding area more livable.” Mann, *supra* note 27 (internal quotation omitted).

215. While the favoritism in *99 Cents* amounts to a relatively simple scheme—threat of relocation—some schemes, like that in, *In re 49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127 (App. Div. 2007) are more complex. See *infra* notes 254–56 and accompanying text.

216. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

217. The court concluded that the city’s purpose was to take private property in order to appease the demands of an important commercial resident. *Id.* at 1129.

circumstantial evidence.²¹⁸ In *99 Cents*, the U.S. Court of Appeals for the Ninth Circuit found that the City of Lancaster's condemnation of 99 Cents was an effort to retain Costco Wholesale. The drive to oust 99 Cents on behalf of Costco began when Costco threatened to relocate from Lancaster unless it acquired 99 Cents's property.²¹⁹

As *99 Cents* demonstrates, the conclusion drawn is not that the asserted public purpose fails the rationality test—although in *99 Cents* it did not hurt that it did fail that test.²²⁰ Rather, there was enough evidence to conclude pretext based on indicators of ulterior motive and evidence of an insufficient asserted purpose.²²¹ In another case, *In re 49 WB, LLC v. Village of Haverstraw*,²²² the New York Supreme Court, Appellate Division concluded that the taking of a private property for the purpose of creating more affordable housing was pretextual where the underlying purpose was favoritism.²²³ The court wrote that “[t]he only rational conclusion that can be drawn is that the Village's true purpose for condemnation was to assist its waterfront developer in meeting” his obligation to provide affordable housing—as though the facts could support no other conclusion.²²⁴ Thus, in pretext cases, taking a number of factors together—often times including circumstantial evidence of acts and non-acts²²⁵—enables courts to infer underlying purpose.

Commonly, in pretext cases, there tends to be no document or statement that conclusively establishes that the primary or underlying purpose is to confer a private benefit,²²⁶—in other words, there is no smoking gun. Even in *99 Cents*, while the court uncovered a town resolution that admitted the only reason it enacted the taking “was to satisfy the private expansion demands of Costco,”²²⁷ other evidence (albeit not conclusive proof) also supported the conclusion that the taking was pretextual. For example, the court found that Costco had alternate means for expanding and did not have to displace 99 Cents;²²⁸ there was no evidence on the record that the asserted purpose—prevention of future blight—was the actual reason for

218. *See id.* at 1129–30; *see infra* notes 227–30 and accompanying text (discussing specific evidence used to surmise pretext).

219. *99 Cents*, 237 F. Supp. 2d at 1126.

220. *Id.* 1130–31 (finding that ending “future blight” is a not rational public purpose).

221. *See infra* notes 227–30 and accompanying text.

222. 839 N.Y.S.2d 127, 141 (App. Div. 2007).

223. *Id.*

224. *Id.*

225. *Pheasant Ridge Assocs., Ltd. v. Town of Burlington*, 506 N.E.2d 1152, 1156 (Mass. 1987); *see supra* note 180 and accompanying text (discussing bad-faith cases).

226. Indeed, the Supreme Judicial Court of Massachusetts explained that even if a legislator gave a speech demonstrating improper motives for the taking prior to a vote on the taking, the court was not bound to conclude the taking was in bad faith. *Pheasant Ridge*, 506 N.E.2d at 1157–58 & n.8. However, a court may conclude that the taking is in bad faith if, after hearing such an uncontested speech, there is no subsequent hearing on the merits for the taking and the condemning authority votes in favor of the taking. *Id.*

227. *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

228. *Id.*

the condemnation at the time it was initiated;²²⁹ and even if future blight was the underlying reason for condemnation, it was not a valid public use under state law.²³⁰ Thus, absent conclusive proof, a court may infer pretext by adding together a variety of circumstantial evidence.

c. *No Evidence of Quid Pro Quo Required*

Finally, *99 Cents* is similar to other pretext cases in that the court was able to unmask a scheme—the actual purpose of the taking—without making a determination of whether the condemning authority desired to receive a benefit in return for conferring one.²³¹ For example, the Ninth Circuit did not need a record of bribes that the city expected from Costco, or any other quid pro quo—all that was required was a showing that the primary purpose was a private purpose.²³² Inquiry into purpose thus does not go very deep: there is no investigation into or requirement of finding a motivation for the actual purpose of the taking.²³³

A hypothetical mentioned *supra*, in reference to an attempted pretextual taking by Robert Moses,²³⁴ illustrates that an act of favoritism—what Black’s Law Dictionary defines as “preference or selection, usually invidious, based on factors other than merit”²³⁵—may even be rooted in a convergence of ideology on the part of the condemner and the benefiting party. In the case of Moses and Macy’s, it is possible that Moses attempted to secure the uptown location for Macy’s because his personal vision of economic development meshed with the store’s business.²³⁶ But even if the favoritism emerged from a different source, what the Delaware Court of Chancery might call Moses’s “‘thickness’ of the social and institutional connections”²³⁷ with New York City’s wealthy and powerful,²³⁸ in either case there would be favoritism without a specific expectation of return of

229. *Id.* at 1130.

230. *Id.* at 1131.

231. In concluding that the “condemnation efforts rest[ed] on nothing more than the desire to achieve the naked transfer of property from one private party to another” the Ninth Circuit explained that the city desired to retain a major commercial resident, but nowhere in the opinion did the court mention whether the city expected recompense for using eminent domain. *Id.* at 1129.

232. *Id.*

233. However, without a showing of the reason for the actual purpose, the analysis may be flawed. If, in the case of *99 Cents*, the motivation for conferring a benefit to Costco Wholesale was to placate an important corporate resident, one could infer that the city’s immediate purpose was to confer a private benefit. But it is also plausible that this immediate purpose served the larger public purpose of preventing damage to the local economy through loss of a major commercial presence.

234. See *supra* note 98 and accompanying text.

235. BLACK’S LAW DICTIONARY, *supra* note 104 at 641.

236. CARO, *supra* note 71, at 741–42.

237. See *In re Oracle Corp.*, 824 A.2d 917, 936 (Del. Ch. 2003) (explaining that assessing corporate conflicts of interest on the basis of social relations constituted a departure from traditional analysis in which the key focus is on “the effect on one’s personal wealth” in inquiries into independence of board members).

238. See CARO, *supra* note 71 at 753–54.

benefit. As the Moses example illustrates, the relationship may be so complex that proving quid pro quo is virtually impossible. Such examples support the Ninth Circuit's practice of looking for favoritism without requiring finding the particular reason for it.

2. Factors Mentioned in Kennedy's Concurrence and Other Factors Indicating Pretext

Building on the methodology examined in the previous section, this section examines factors—the kinds of circumstantial evidence—courts use to ascertain pretext. This section does not attempt an exhaustive examination of the main factors courts have found relevant in inferring pretext—including whether the taking or justification for the taking is post hoc,²³⁹ the content of legislative statements,²⁴⁰ or the overall sequence of events²⁴¹—but attempts to illustrate what courts dealing with claims actually do. Potentially, two of the factors discussed in this section—availability of alternatives to eminent domain and failure to negotiate or evidence of failed negotiations—may be encompassed by Justice Kennedy's reference to compliance with “with elaborate procedural requirements.”²⁴² Nevertheless, an illustrative discussion of such examples demonstrates the flexibility in courts' analyses of pretext. Additionally, this section also discusses the relevance of one of the factors Justice Kennedy

239. Post hoc justifications occur in cases like *Goldstein*, where the condemning authority added a reason to take the property—to end blight—after it made the decision to condemn. 516 F.3d 50, 56 (2d Cir. 2008); see also *infra* note 319 and accompanying text (discussing pretextual factors in *Goldstein*). A different kind of post hoc action, but nonetheless indicative of pretext, is the addition of the takings area after a comprehensive plan is already in place. See, e.g., David Schultz, *What's Yours Can Be Mine: Are There Any Private Takings After Kelo v. City of New London?*, 24 UCLA J. ENVTL. L. & POL'Y 195, 233 (2006) (noting that in one case “the late addition of the property to the plan appeared to be an opportunistic move on the part of a specific business that wished to expand” and looked suspicious to the court).

240. Some courts have relied on legislative statements to infer pretext. See, e.g., *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 233 (Del. 1986) (letter from condemning authority to would-be beneficiary newspaper company, explaining that the city was “willing to accommodate all your needs,” was evidence that the city used the condemning authority to entice the would-be beneficiary of the taking to remain in Wilmington). Also, in a bad faith case, the Supreme Judicial Court of Massachusetts found it significant that the condemning authority's interest in the takings area arose suddenly. See *Pheasant Ridge Assocs. v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987).

241. Some courts have held that events leading to the condemning authority's interest in using eminent domain—for example, whether the decision to take private property followed discussion with a potential private beneficiary—is evidence of a “motivating factor” and thus pretext. See, e.g., *Wilmington Parking Auth.*, 521 A.2d at 230 (“development of the interest of the [condemning authority] in the project provided insight into the ‘motivating factor’ in the decision of the [condemning authority] to proceed with” taking property to give News-Journal Company extra parking in order to entice them to stay in Wilmington).

242. See *supra* note 130 and accompanying text. Justice Anthony Kennedy does not specifically mention that availability of alternatives and failed negotiations or failure to negotiate as encompassed in his hypothetical test. However, Part III argues for the importance of considering such factors. See *infra* Part III.A.2 (arguing for an expansive view of the kinds of evidence courts should review in ascertaining pretext).

mentions—that the benefits are not *de minimis*—also in an effort to illustrate how courts might apply such a concept.²⁴³

a. *The “economic benefits of the project cannot be characterized as de minimis”*

In his *Kelo* concurrence, Justice Kennedy mentions that if the economic benefits of a project are *de minimis* the taking might justify a more demanding standard of scrutiny.²⁴⁴ But since the benefits in *Kelo*—development of New London’s tax base and addition of jobs to the city²⁴⁵—were not *de minimis*, the Court gave little indication of what would constitute *de minimis* economic benefits. Specifically, if the project proposes noneconomic benefits, it is unclear how courts will ascertain whether those benefits are trivial, and how far courts should go in measuring whether a project’s benefits are trivial.²⁴⁶ This portion of Justice Kennedy’s concurrence has been criticized as adding ambiguity because he does not demarcate the line between *de minimis* and non-*de minimis* benefits.²⁴⁷ Illustrating ways courts have concluded that the absence of benefits—or significant benefits—may be a useful tool for future litigants.

Some takings may result in benefits that are so disproportionate to the harm of depriving an individual of her property or so ephemeral as to suggest that the motive is favoritism.²⁴⁸ The court in *Casino Reinvestment Development Authority v. Banin*²⁴⁹ came close to such a finding, but stopped short of finding pretext when it did not have enough evidence to conclude that the primary purpose was to confer private benefits.²⁵⁰ In *Casino*, the court found that lack of restrictions on property ceded to the developer, Donald Trump, amounted to granting him a blank check.²⁵¹ Although the court held that there was not enough evidence to surmise pretext, the benefits were so expansive as to suggest that the condemnation “primarily benefits a private party with only incidental public benefit.”²⁵² Other courts in future cases, with sufficient evidence, and assessing the

243. See *infra* Part I.D.2.a–c.

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

245. See *supra* note 46 and accompanying text.

246. See *supra* notes 182–83 and accompanying text.

247. See Kelly, *supra* note 77, at 9. Daniel B. Kelly suggests that a court concluding pretext from *de minimis* benefits might merely find that the taking is not warranted because of the risk that the taking is pretextual, not because it actually is pretextual. *Id.* at 10.

248. See *In re Aspen Creek Estates, Ltd. v. Town of Brookhaven*, 848 N.Y.S.2d 214, 222 (App. Div. 2007) (Lifson, J., dissenting) (“[T]he potential benefit to the public is so disproportionate and ephemeral when compared to the actual benefit conferred on the tenant that the proposed taking cannot be justified as an efficient advancement of the stated public policy.”).

249. 727 A.2d 102 (N.J. Super. Ct. 1998).

250. *Id.* at 104.

251. *Id.* at 111.

252. *Id.* at 104.

“consequences and effects of the proposed project”²⁵³ might conclude that the paucity of benefit implies favoritism.

In *In re 49 WB*, in which the court found pretext, the court concluded that the public would be better off without the taking than with it.²⁵⁴ Scrutinizing the record, the New York appellate court unearthed a convoluted scheme whereby, in taking private property and giving it to a nonprofit developer for the purpose of developing affordable housing, the village’s condemnation would actually result in the construction of less-affordable housing than if the property were not condemned.²⁵⁵ This scheme, the court held, illustrates that the village’s purpose in condemning property for the benefit of building affordable housing was “merely pretextual, and hence, improper” and that “[t]he only rational conclusion that can be drawn is that the village’s true purpose for condemnation was to assist its waterfront developer.”²⁵⁶ On balance, the public benefits that would be achieved by the taking were de minimis—the consequences were “instead actually harmful”—when compared to the benefits if the property were not condemned, and were thus evidence of favoritism.²⁵⁷ This comparison demonstrates that *In re 49 WB* goes even further than mere analysis of the net benefits; rather, the court balances proposed benefits against the alternatives in assessing the degree of benefit. Such analysis could give guidance to future courts struggling to apply Justice Kennedy’s concurrence.

b. Availability of Alternatives

In at least three cases, two federal and one state, the availability of alternative methods for achieving the same asserted public purpose provided courts a basis to infer pretext. In the seminal pretext case, *99 Cents*, the Ninth Circuit found that the city did not have to condemn the plaintiff’s property in order to retain an important commercial tenant, because “Costco could have easily expanded [in the shopping center] onto adjacent property *without* displacing 99 Cents at all but refused to do so.”²⁵⁸

253. *Id.*

254. *In re 49 WB, LLC v. Vill. of Haverstraw* 839 N.Y.S.2d 127, 140 (App. Div. 2007) (“In other words, by exercising eminent domain, the Village achieves fewer affordable housing units for its residents and volunteers, whereas by not condemning the site, the Village would realize a *greater* number of affordable housing units.”).

255. The property would be condemned and given to a nonprofit organization, which, the court found, had an agreement with a developer that would allow the developer to fulfill its affordable housing construction requirements. *Id.* at 238. Through a loophole in a city resolution, the developer could satisfy its affordable housing construction requirements (at lower cost than if it built it itself) by donating money to the nonprofit Housing Opportunity for Growth, Advancement and Revitalization, Inc. (HOGAR); those funds, in turn, would be used to build affordable housing, and then HOGAR would use the developer’s donation to purchase the condemned property. *Id.* at 241.

256. *Id.* at 243.

257. *Id.* at 242.

258. *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

Based on this evidence, *inter alia*, the court concluded the “condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another.”²⁵⁹

In a separate case, *Cottonwood Christian Center v. Cypress Redevelopment Agency*,²⁶⁰ also dealing with taking property for the benefit of a Costco, the U.S. District Court for the Central District of California held that there was sufficient evidence of pretext to raise a fair question on the merits.²⁶¹ There, the court found it possible that (another) Costco could have expanded its store without requiring the condemnation of adjacent property.²⁶² This evidence was enough for the court to conclude that the city was trying to appease Costco, not that its purpose was to generate revenue.²⁶³ In a third case, *In re 49 WB*, discussed *supra*, the court supported its finding of pretext with evidence of alternative means: that a nonprofit organization that was to benefit from the taking could have continued its community outreach programs without taking fee title to the condemned property—contrary to the opinion of the condemning authority.²⁶⁴ In other words, the public benefits sought could be achieved without the use of eminent domain. Thus, while it is not required that there are no alternatives to condemnation in order to uphold the condemnation, these courts used this fact—the absence of what the Institute for Justice calls a “last resort”²⁶⁵—as evidence that supports a finding of pretext.

c. Failed Negotiations or Failure to Negotiate with the Property Owner

Courts may infer that favoritism is the real reason for the taking when either the condemning authority or the beneficiary of the taking fails to negotiate (or failed in negotiating) with the condemned property owner. In a series of cases in the U.S. Court of Appeals for the Ninth and Eighth Circuits—*99 Cents*,²⁶⁶ *Aaron*,²⁶⁷ and *Cottonwood*²⁶⁸—the courts found evidence that the taking resulted after the ultimate beneficiary of the condemnation failed in negotiating a buyout of the property. In *99 Cents*, the condemning authority was enlisted—seemingly by way of threat of relocation—by Costco to condemn the property after Costco’s negotiations with the property owner of the 99 Cents location failed.²⁶⁹ A similar chain

259. *Id.*

260. 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

261. *Id.* at 1230.

262. *Id.*

263. *Id.* at 1229–30.

264. *In re 49 WB, LLC v. Vill. of Haverstraw*, 839 N.Y.S.2d 127, 139 (App. Div. 2007).

265. BERLINER, *supra* note 3, at 5.

266. 237 F. Supp. 2d 1123, 1126 (C.D. Cal. 2001).

267. 269 F. Supp. 2d 1162, 1167 (E.D. Mo. 2003), *rev’d on other grounds*, 357 F.3d 768 (8th Cir. 2004) (finding that Target’s effort to get city to take the property for its benefit resulted after failed negotiations).

268. 218 F. Supp. 2d at 1214.

269. *99 Cents*, 237 F. Supp. 2d at 1126.

of events unfolded in several other cases.²⁷⁰ In some cases, the city does not even attempt to negotiate a purchase from the property owner.²⁷¹

E. Legislative Deference and the Difficulty in Prevailing on a Pretext Claim

While the previous section noted a handful of state and federal court cases where the property owner successfully proved a taking was pretextual, the Supreme Court's requirement of legislative deference can often prove fatal to pretext claims.²⁷² When rational basis review is the standard, the presumption of permissibility "usually motivates trial judges to see no evil, hear no evil, and speak no evil in such cases, even when [such cases] fail the 'smell test.'"²⁷³ In some ways, *Kelo* itself is an example of how the combination of legislative deference and the general difficulty of discovering an underlying purpose are at times insurmountable obstacles.²⁷⁴ The fact that evidence suggesting pretext was not found in *Kelo*, a case in which there was extensive inquiry into the taking, but the trial court did not discover the full extent of dealings which might have persuaded it to find pretext, suggests that courts may be less capable of finding pretext when there is even less inquiry than *Kelo*'s seven-day bench trial.²⁷⁵

That the lower court in *Kelo* conducted extensive inquiry into the taking was a fact of no small consequence to the Court. In confidently noting that New London's purpose was not an example of pretext, Justice Kennedy based his concurrence and faith on a substantial evidentiary hearing: "Here, the trial court conducted a careful and extensive inquiry into whether, in fact, the development plan is of primary benefit" to Corcoran Jennison, the developer, "and in that regard, only of incidental benefit to the city."²⁷⁶ On the basis of this record, Justice Kennedy noted the absence of a factor that might have indicated pretext—that "[t]he identities of most of the private beneficiaries were unknown at the time the city formulated its plans."²⁷⁷ With a more complete record, Justice Kennedy might not have found that New London's "development plan was intended to revitalize the local

270. See, e.g., Sw. Ill. Dev. Auth. v. Nat'l City Envtl., LLC, 768 N.E.2d 1, 10 (Ill. 2002) (holding that a taking initiated after the private beneficiary's failure to negotiate with property owner corroborated development authority's intention to act as default broker); *Aaron*, 269 F. Supp. 2d at 1167.

271. See, e.g., *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455, 460 (Ga. 1981).

272. See, e.g., *infra* notes 345–51 (discussing the Second Circuit's failure to find pretext in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008)).

273. *Kanner*, *supra* note 55, at 362.

274. See *supra* note 27.

275. See *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) (noting that *Kelo* was a bench trial conducted over seven days); see also *Mann*, *supra* note 27; *supra* notes 135–39 and accompanying text.

276. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (citations omitted) (internal quotation marks omitted).

277. *Id.* at 493.

economy, not to serve the interests of Pfizer” and may have invalidated the taking.²⁷⁸

Given the importance of conducting an extensive inquiry in building a pretext claim, judicial procedure can assume substantive importance. The U.S. District Court for the Eastern District of Missouri, in *Aaron*, dismissed the defendants’ *Younger v. Harris*²⁷⁹ abstention defense because the summary nature of the alternative proceeding, without discovery, would have impaired the plaintiff property owners’ ability to successfully raise a pretext claim.²⁸⁰ For this court, a summary hearing of the property owners’ claims would make or break their constitutional claim.

Other courts have applied the “extensive inquiry” element of *Kelo* in a more direct fashion by deciding to hear a pretext claim. In one case, *MHC Financing Ltd. Partnership v. City of San Rafael*,²⁸¹ the “extensive inquiry” reasoning was grounds to survive a motion for summary judgment against the property owners.²⁸² Thus, with pretext claims, the distinction between procedure and substantive law can blur: a controversy over the adequacy of the pleadings has substantive significance because it may determine whether the pretext claim is heard, and whether hard-to-get evidence may be adduced via discovery to support the claim.²⁸³

Yet the post-*Kelo* backstory is evidence, if anything, of how difficult it is to search out these claims.²⁸⁴ Whether this is a result that the Court need merely tolerate or whether it is an indication of the need for courts to hear these claims is at the center of current debate.²⁸⁵ However, this anecdote suggests that courts might consider a full range of tools that have proved successful in balancing deference to legislatures with a desire to ferret out pretext.²⁸⁶

278. *Id.* at 492 (Kennedy, J., concurring).

279. 401 U.S. 37 (1971).

280. *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1171 (E.D. Mo. 2003), *rev’d on other grounds*, 357 F.3d 768 (8th Cir. 2004). In *Aaron*, the defendant (property owners) asserted that the Supreme Court’s decision in *Younger v. Harris* precluded a federal court from addressing claims that were pending in state court, absent “very unusual circumstances,” an argument the court dismissed. *Id.* at 1170 (citing *Younger*, 401 U.S. at 44).

281. No. 00-3785, 2006 U.S. Dist. LEXIS 89195 (N.D. Cal. Dec. 5, 2006).

282. *See id.* at *43. On this point, the U.S. District Court for the Northern District of California summoned *Kelo*: “The trial court in *Kelo* satisfied Justice Kennedy’s standard through ‘careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer . . . [and] only incidental benefit to the City.’ Such an inquiry will likewise be necessary in the present action.” *Id.* (quoting *Kelo*, 545 U.S. at 491).

283. *See infra* Part II.A.1.

284. *See supra* notes 135–39 and accompanying text.

285. Indeed, the Second Circuit in *Goldstein* implied it was willing to tolerate such outcomes. *See infra* Part II.A.2.a.

286. *See supra* Part I.D.2; *see also infra* notes 573–75 and accompanying text.

II. DID *KELO* CHANGE ANYTHING? IF SO, HOW SHOULD COURTS REVIEW PRETEXT CLAIMS AND WHAT FACTORS MIGHT THEY CONSIDER IN ASCERTAINING PRETEXT?

This part begins by contrasting two decisions, the Second Circuit's opinion in *Goldstein*²⁸⁷ and the D.C. Court of Appeals' opinion in *Franco*,²⁸⁸ in order to show the conflict among courts over whether *Kelo* announced a new rule calling for more aggressive review of takings alleged to be pretextual or whether, as *Goldstein* holds, it changed nothing. Assuming that the *Kelo* Court called for heightened scrutiny of alleged pretextual takings, this part then considers four possibilities for heightened scrutiny of pretext claims: strict scrutiny review,²⁸⁹ means-ends scrutiny,²⁹⁰ a tripartite burden-shifting test²⁹¹ and process scrutiny,²⁹² which scrutinizes the process leading up to the condemnation in order to determine whether the asserted purpose is the actual purpose.

A. Apply Substantive Weight or Not? The *Franco* and *Goldstein* Conflict

At a most basic level, two leading and recent cases addressing pretext are divided as to which pleading standard should govern pretext claims in the takings context. In *Goldstein*, the Second Circuit dismissed a pretext claim on the pleadings,²⁹³ while in *Franco*, the D.C. Court of Appeals did not dismiss a similar claim with similar facts.²⁹⁴ Perhaps decisive in the opposing outcomes between these courts was the Second Circuit's use of a "plausibility pleading standard," adapted from *Twombly*,²⁹⁵ and *Franco*'s use of *Conley*'s less stringent notice pleading standard.²⁹⁶

287. 516 F.3d 50 (2d Cir. 2008).

288. 930 A.2d 160 (D.C. 2007).

289. See *infra* Part II.B.1.

290. See *infra* Part II.B.2.

291. See *infra* Part II.B.3.

292. See *infra* Part II.C.

293. *Goldstein*, 516 F.3d at 56–57. In reaching this conclusion, the *Goldstein* court applied the *Twombly* plausibility standard, which holds that "[f]actual allegations [are] enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* at 56 (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968 (2007)).

294. *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 174–75 (D.C. 2007). The court held that "a motion to strike a defense as insufficient will be denied 'if [the defense] fairly presents a question of law or fact which the court ought to hear.'" *Id.* at 166 (quoting *SEC v. Gulf & Western Indus. Inc.*, 502 F. Supp. 343, 345 (D.D.C. 1980) (alteration in original)). Unlike in *Goldstein*, the *Franco v. National Capital Revitalization Corp.* court rejected applying *Twombly*, and instead applied a pleading standard derived from *Conley v. Gibson*, 355 U.S. 41 (1957). *Franco*, 930 A.2d at 166 n.6. However, the *Franco* court amended this pleading standard to excise the "no set of facts" language in *Conley* that *Twombly* expressly overruled. *Id.* (quoting *Conley*, 355 U.S. at 45).

295. See *supra* note 11. In *Twombly*, the suit was brought by a group of subscribers to local telephone and internet providers against a group of region telephone monopolies, called "Incumbent Local Exchange Carriers" (ILECs) for violations of the Sherman Act. *Id.* at 1961. Specifically, plaintiffs alleged, inter alia, that the ILECs engaged in "parallel conduct" in their service areas to stifle the entry of competitors (CLECs) to the local market, and that

But, apart from the pleading standard issue, there appears to be a more substantive debate between *Franco* and both the district and appellate courts in *Goldstein*.²⁹⁷ Fundamentally, these courts split as to whether deference to legislative judgments should govern review of pretext claims or whether pretext claims apply only to cases where economic development is among the asserted purposes. On one side is *Franco*, where, in rejecting National Capital Revitalization Corporation's (NCRC) Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure, the court was motivated by the belief that legislatures are not always deserving of deference.²⁹⁸ On the other side is the Second Circuit in *Goldstein*, which interpreted the property owners' pretext claim through a prism of deference to legislative judgments.²⁹⁹

Franco involved the property of Samuel Franco, owner of the Discount Mart in the Skyland Shopping Center in southeast Washington, D.C.³⁰⁰ In 1998, the city created the NCRC, which was charged with "job creation by developing and updating a strategic economic development plan for the District."³⁰¹ Later, in 2002, the NCRC entered into a Joint Development Agreement with four private developers to redevelop the Skyland Shopping Center, agreeing to make good faith efforts to acquire any property by purchase before exercising the power of eminent domain.³⁰² Then, in 2004, the NCRC submitted to the city council a bill to grant it the power to condemn properties in the Skyland mall, Franco's property among them. The bill was passed a month later, but the version passed included a segment that was not present in the original and included findings that the shopping center "is a blighting factor" in the surrounding neighborhood.³⁰³ The following year, the NCRC filed a complaint to condemn Franco's property, which he defended against with, *inter alia*, a pretext claim.³⁰⁴ As will be discussed, many of these facts are strikingly similar to those in *Goldstein*, but the split is more than just procedural: it is marked by opposing underlying attitudes toward the pretext claims altogether.

1. Procedural Split: Whether or Not to Apply a Plausibility Pleading Standard

Most narrowly, *Franco* and *Goldstein* appear to evince a conflict over pleading standards. In both the district and appellate court decisions in

the ILECs restrained trade by agreeing not to compete with one another. *Id.*; see also A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV 431, 439–40 (2008).

296. *Franco*, 930 A.2d at 166–67 n.6.

297. See *infra* Part II.A.2.

298. *Franco*, 930 A.2d at 169 ("Kelo recognized that there may be situations where a court should not take at face value what the legislature has said.").

299. See *infra* notes 345–51 and accompanying text.

300. *Id.* at 162.

301. *Id.*

302. *Id.* at 163.

303. *Id.*

304. *Id.* at 162.

Goldstein the courts applied *Twombly*'s plausibility pleading standard.³⁰⁵ In *Franco*, however, the D.C. Court of Appeals applied the more flexible notice pleading standard derived from the Court's seminal decision in *Conley*.³⁰⁶ To contrast these standards, one author notes that *Twombly* departed from precedent by holding that "factual allegations must paint a plausible picture of liability," which is more than just requiring that the plaintiff make factual allegations.³⁰⁷ In deciding *Twombly*, the "Court . . . expressly stated that allegations that are 'merely consistent with' liability leave only a depiction that 'stays in neutral territory' and 'stops short of the line between possibility and plausibility.'" ³⁰⁸ Thus, where a court applies *Twombly*, plaintiffs must go further in their presentation of facts in their pleading in order to survive dismissal.

This Note does not undertake an in-depth analysis of the Court's *Twombly* decision and whether that decision, which covered an antitrust conspiracy claim, is applicable to takings law. Suffice it to say that applying that decision outside of the context of antitrust law has engendered controversy.³⁰⁹ However, what is important about applying *Twombly* to pretext cases is the effect that such a standard has on preventing pretext claims from surviving motions to dismiss and thus from being heard.³¹⁰ Additionally, a court's decision to apply *Twombly*'s plausibility standard may demonstrate its underlying attitude toward pretext claims, just as other courts' application of *Twombly*, in an attempt to weed out what courts consider frivolous claims, conveys an underlying attitude about those types of claims.³¹¹

Twombly's plausibility pleading standard is more stringent than *Conley*'s pleading standard because a "plaintiff may no longer survive a motion to dismiss if she pleads facts that are equivocal, meaning the allegations are consistent both with the asserted illegality and with an innocent alternate explanation."³¹² Another court, also applying *Twombly* to a pretext claim and interpreting the Eastern District of New York's decision in *Goldstein*, explained that the pleading must go beyond legal allegations by alleging

305. *Goldstein v. Pataki*, 516 F.3d 50, 56–57 (2d Cir. 2008); *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 286–90 (E.D.N.Y. 2007).

306. The *Franco* court explained that this pleadings standard, discussed *infra* in note 321, is taken from *SEC v. Gulf & Western Industries, Inc.*, 502 F. Supp. 343, 345 (D.D.C. 1980), which, in turn, the *Franco* court derived from the Court's decision in *Conley*, 355 U.S. 41, 45 (1957) (applying a notice pleading standard). *Franco*, 930 A.2d at 166 & n.6.

307. Spencer, *supra* note 295, at 444.

308. *Id.* at 445 (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007)).

309. See generally Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177 (2008).

310. See *id.* at 2221–22 (discussing the likelihood that more cases will be dismissed if courts were to apply *Twombly*'s plausibility pleading standard than if they were to apply *Conley*'s notice pleading standard).

311. See *id.* at 2204–05 (discussing courts' application of *Twombly* in cases "'where massive discovery is likely to create unacceptable settlement pressures'" (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007))).

312. Spencer, *supra* note 295, at 445.

actual facts that may make a legal conclusion plausible: “Plaintiffs’ bald legal allegations of arbitrariness and irrationality need not be accepted by this Court. Rather, Plaintiffs’ factual allegations must be sufficient to make such a legal conclusion ‘plausible.’”³¹³ In other words, “because private transfers to achieve public purposes are legal under the *Kelo* doctrine, the defendants’ conduct was as consistent with lawful behavior as with unlawful behavior.”³¹⁴

The stringency of *Twombly*’s plausibility standard means that a court granting a motion to dismiss under *Twombly* can do so even if the plaintiff alleges specific facts consistent with its legal claim. Applying *Twombly*, the Second Circuit held that, because the facts alleged included a private transfer but also conceded a number of accepted public benefits, there were “no ‘plausible’ accusations of favoritism.”³¹⁵ While the *Goldstein* court noted that the plaintiffs pled “conclusory” allegations,³¹⁶ the plaintiffs also made allegations not present in *Kelo*, including that the beneficiary of the takings proposed the redevelopment plan in the first instance,³¹⁷ that the city departed from normal procedure in accepting the developer’s bid,³¹⁸ and that the public purposes asserted to justify the takings (namely, to end blight) were asserted post hoc.³¹⁹

The pleading standard adopted by the *Franco* court, on the other hand, is permissive in allowing complaints to survive motions to dismiss.³²⁰ The court explained that, under the standard it applied, “a motion to strike a defense as insufficient will be denied ‘if [the defense] fairly presents a question of law or fact which the court ought to hear,’”³²¹ although the

313. *CBS Outdoor, Inc. v. N.J. Transit Corp.*, No. 06-2428, 2007 U.S. Dist. LEXIS 64155, at *47 (N.J. Aug. 30, 2007) (citing *Twombly*, 127 S. Ct. at 1974).

314. Brigham Boulris, *supra* note 34, at 967.

315. *Goldstein v. Pataki*, 516 F.3d 50, 56, 64 n.10 (2d Cir. 2008). The U.S. District Court for the District of New Jersey in *CBS Outdoor, Inc. v. N.J. Transit Corp.* and the U.S. District Court for the Eastern District of New York in *Goldstein* found support for applying this standard outside of the context of an antitrust case and to a takings case based on Justice Kennedy’s use of the word “plausible” in *Kelo*. *CBS Outdoor*, 2007 U.S. Dist. LEXIS 64155, at *47–48 (finding that Justice Kennedy’s instruction in *Kelo* that a court must find “‘a plausible accusation of impermissible favoritism,’” (quoting *Kelo*, 545 U.S. 469, 491 (Kennedy, J., concurring)), is “‘consistent with the rule that a plaintiff must allege ‘enough facts to state a claim to relief that is plausible’ in order to survive a motion to dismiss for failure to state a claim.” (quoting *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007)). Even though *Kelo* was decided before *Twombly*, as the *CBS* court notes, Kennedy did use the term “plausible” in reference to pretext. Thus, argued the Eastern District of New York, the “plausibility standard recognized in *Twombly* arguably applied to eminent-domain cases even before *Twombly* was decided.” *Goldstein*, 488 F. Supp. 2d at 289.

316. *Goldstein*, 516 F.3d at 56.

317. *Id.* at 64.

318. *Id.* at 56.

319. *Id.*

320. Nichols, *supra* note 309, at 2221.

321. *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 166 (D.C. 2007) (quoting *SEC v. Gulf & W. Indus. Inc.*, 502 F. Supp. 343, 345 (D.D.C. 1980)).

court adds that not just any allegation would survive a motion to dismiss.³²² On the issue of conclusory allegations—allegations that do not plead facts but merely draw legal conclusions about general conduct—the *Franco* court is, in fact, in agreement with the Second Circuit.³²³ Nevertheless, the *Franco* court, applying the *Conley* pleading standard, determined that the defendant pled sufficient factual allegations to support his claim.³²⁴ These allegations included several of the same types of facts the plaintiffs in *Goldstein* alleged³²⁵: that the government discussed the project with the private beneficiaries prior to announcing plans to redevelop and that the government asserted the blight findings at the last minute.³²⁶

In support of its decision to reject the motion to dismiss, the *Franco* court noted that an extensive inquiry, occurring over the course of a seven-day bench trial, supported *Kelo*'s holding.³²⁷ It is unclear to what extent the *Franco* court's decision not to dismiss the pretext defense was informed by the fact that *Kelo* rested on such an "extensive record";³²⁸ perhaps the court wanted to give *Franco* the same assurances that *Susette Kelo* received. It may be a signal of the court's intent that, after discussing the extensive record in *Kelo*, it noted that plaintiffs "must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual."³²⁹

Taken together, it is unclear to what extent the pleading standards controlled the outcomes in *Franco* and *Goldstein*. Both courts agreed that merely conclusory allegations are not enough, yet, in both cases, the property owners alleged specific facts consistent with the conclusion that the takings were pretextual.³³⁰ The more exacting plausibility standard in *Goldstein* may have kept the court from allowing claims that did have a factual basis to go forward.³³¹ Thus, it is unclear, even given these

322. *Franco*, 930 A.2d at 170 ("These allegations may be too conclusory by themselves to survive a motion to strike . . .").

323. Compare *id.* (explaining that merely conclusory allegations may not survive a motion to strike), with *Goldstein*, 516 F.3d at 63 (finding that conclusory allegations are not enough to survive a motion to dismiss).

324. *Franco*, 930 A.2d at 170.

325. See *supra* notes 317–19 and accompanying text.

326. *Franco*, 930 A.2d at 170–71. To compare these allegations with similar factual allegations in *Goldstein*, see *infra* notes 361–65 and accompanying text (discussing the Metropolitan Transit Authority's (MTA) (a New York State public benefit corporation) deal with *Ratner* prior to a competitive process); *supra* note 319 and accompanying text (discussing the condemning authority's post hoc addition of blight as a justification for condemnation).

327. *Franco*, 930 A.2d at 169.

328. *Id.*

329. *Id.*

330. Compare *id.* at 170 (stating that *Franco* made many specific factual allegations to support his claim), with *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 290 (E.D.N.Y. 2007) (finding that the factual allegations in the property owners' pretext claims were "as consistent with lawful behavior as with unlawful behavior").

331. It is also possible that these allegations would not have survived the more relaxed pleading standard, like that in *Franco*. See *Nichols*, *supra* note 309, at 2191 ("In reality, notice pleading still requires an appropriate number of facts supporting the allegation, such

opposing pleading standards, whether courts are evaluating pretext claims consistently. Nevertheless, these cases highlight how the choice of pleading standard may have an impact on whether a pretext claim survives the pleading stage.

2. Substantive Split: Did *Kelo* Change Anything?

In substance, both the *Goldstein* and *Franco* courts agree that just because a legislature declares that there is a public purpose for a condemnation does not mean that the owner is foreclosed as a matter of law from demonstrating that the asserted purpose is pretextual.³³² Furthermore, both courts acknowledged the logic that “it is not enough for the protesting landowner to demonstrate that private parties will benefit from the project.”³³³ But conflict emerges over how strong the claims need to be for a court to critique—or at least hear claims critiquing—the process by which eminent domain is granted.³³⁴ This issue over how extreme the allegation of favoritism must be in order for the court to hear the claim³³⁵ overlaps significantly with the discussion of pleading standards addressed in the preceding section.³³⁶ Yet, it is both of these courts’ attitudes toward and interpretation of *Kelo* that reveals a more substantive split over whether courts are inclined to allow pretext claims to overcome deference to legislative judgment.

a. Goldstein: *The Narrow View*

As stated *supra*, it is possible that the factual allegations in *Goldstein* were so weak that the pretext claim would have failed under any heightened level of review.³³⁷ Nevertheless, several key aspects of the *Goldstein*

that there is adequate information regarding the claim for relief for the defendant to answer.”). Similarly, the converse may also be true: with *Franco*, the factual allegations were strong enough to pass muster under the *Twombly* standard.

332. Compare *Franco*, 930 A.2d at 168, with *Goldstein*, 516 F.3d at 64 & n.10.

333. *Franco*, 930 A.2d at 172; accord *Goldstein*, 516 F.3d at 60 (“Once we discern a valid public use to which the project is rationally related, it ‘makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end.’” (quoting *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985))).

334. See *supra* Part II.A.1.

335. See *Goldstein*, 516 F.3d at 64 (“[The plaintiffs] have failed to allege . . . any specific defect in the Project that would be so egregious as to render it, on any fair reading of precedent, ‘palpably without reasonable foundation.’” (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984))).

336. See *supra* note 331 and accompanying text.

337. See *Goldstein*, 516 F.3d at 64. In discussing *Goldstein*, this Note focuses only on the mere pretext portion of the decision, not on the Second Circuit’s discussion of “sole purpose.” See *id.* at 57–60. The Second Circuit (and the Eastern District of New York) found that in addition to failing to allege that the taking was a mere pretext, the plaintiffs also failed to allege facts plausible to support the conclusion that the sole purpose was to render a private benefit to Ratner. *Id.* at 60. Additionally, the plaintiffs alleged that the taking effected two other constitutional violations. First, they argued that, in violation of the Equal Protection Clause, the Project provided no rational basis for elevating the status of one

decision demonstrate that granting the motion to dismiss may have been due to the court's reluctance to buck deference to legislative judgment: its overall adherence to deference to legislative judgments;³³⁸ the import the court attaches to the fact that the plaintiffs conceded that the project might generate public benefits³³⁹; its treatment of the facts plaintiffs allege³⁴⁰; its narrow reading of the pretext cases cited in *Kelo*³⁴¹; and that it treats the factors in Justice Kennedy's concurrence as advisory.³⁴² Taken together, these factors suggest a court that is hostile to pretext claims.³⁴³

Although *Goldstein* acknowledged the possibility of a category of pretext claims,³⁴⁴ the court held that it would review such claims in light of deference to the legislative branch: "[T]he issue of pretext must be understood in light of . . . the [*Kelo*] holding . . . which . . . reaffirmed the 'longstanding policy of deference to legislative judgments in this field' . . ."³⁴⁵ The Second Circuit understood that the Court's reference to such claims must be read both as confined to cases where the asserted purpose is economic development and *Kelo*'s core commitment to deference.³⁴⁶ Thus, under *Goldstein*, pretext claims receive the same low-scrutiny review that any other claim under the Public Use Clause receives.³⁴⁷

Behind the court's resistance to granting discovery to the property owners was its fear of launching a full judicial inquiry into the subjective motives of officials who supported the project,³⁴⁸ an inquiry that the court held was not permitted by *Kelo* or its forebears.³⁴⁹ The court concluded that the role of federal courts in reviewing takings is limited to "'patrolling the borders'" of takings.³⁵⁰ The court's "border" approach and its reluctance to hear claims that it associated with analyzing the subjective motives of public officials raise serious questions given that the *Kelo*

group of citizens (Ratner) while singling out private land owners "for unequal, adverse treatment." *Id.* at 54 n.3 (internal citations and quotation omitted). Second, they argued—and the court quickly dismissed—that the defendants violated their due process rights by circumventing the local review process for eminent domain plans. *Id.*

338. See *infra* notes 345–51 and accompanying text.

339. See *infra* notes 352–56 and accompanying text.

340. See *infra* notes 357–67 and accompanying text.

341. See *infra* notes 366–69 and accompanying text.

342. See *infra* notes 358–65 and accompanying text.

343. Thomas, *supra* note 22.

344. See *Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008).

345. *Id.* at 61 (quoting *Kelo v. City of New London*, 545 U.S. 469, 480 (2005)).

346. The court wrote *Kelo* "self-identifi[ed] with a tradition of public use jurisprudence that . . . 'has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.'" *Id.* (quoting *Kelo*, 545 U.S. at 483).

347. *Goldstein*, 516 F.3d at 62 (rejecting "the notion that . . . the *Kelo* majority sought *sub silentio* to overrule . . . over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking . . . as a means to gauge the purity of the motives of the various government officials who approved it" (citing *Kelo*, 545 U.S. at 483)).

348. *Id.* at 63 (citing *Brody v. Vill. of Port Chester*, 434 F.3d 121, 136 (2d Cir. 2005)).

349. See *id.* at 62.

350. *Id.* at 63 (quoting *Brody*, 434 F.3d at 135).

majority and concurrence were both skeptical of takings marked by impermissible favoritism.³⁵¹

It also appears that the Second Circuit could not get past the fact that the plaintiffs conceded that the asserted purpose of the taking was a valid purpose. Here, it took issue with the kind of pretext claim the plaintiffs made: that plaintiffs conceded that the project was rationally related to “numerous well-established public uses, but contend[ed] that it [was] constitutionally impermissible nonetheless” because of a desire to favor the developer, Ratner.³⁵² This type of pretext claim contrasts with one where the asserted purpose is not legitimate or rational.³⁵³ The characterization of the plaintiffs’ claim seems consistent with a mere pretext claim as found in other cases.³⁵⁴ Yet, the court seems not to accept the proposition that a taking may have an improper purpose and yet pose conceivable benefits.³⁵⁵ To demonstrate the taking is invalid, the court argued that the plaintiff needed to allege “specific defect[s] in the Project that would be so egregious as to render it . . . ‘without reasonable foundation.’”³⁵⁶

Perhaps most important is the *Goldstein* court’s treatment of the plaintiffs’ factual allegations in light of the factors discussed in Justice Kennedy’s concurrence.³⁵⁷ The court acknowledged that the property owners alleged that the project was undertaken at the request of Ratner himself who was to become the private beneficiary of the takings.³⁵⁸ And while the court noted that the sequence of events was “certainly one of the factors considered in *Kelo*,”³⁵⁹ it ignored a sequence of events which might raise suspicion, because it found that New York State permitted such a process.³⁶⁰

A recent state court decision in the Atlantic Yards case fleshed out the allegation the Goldstein plaintiffs made, although here, too, plaintiffs lost. The Supreme Court of New York, Appellate Division, First Department, noted that the Metropolitan Transit Authority (MTA) (which owned one of the parcels in the Atlantic Yards site) initially avoided a competitive bidding process, but later, after signing an agreement to cede the property to Ratner’s company, Forest City Ratner Corporation (FCRC), it issued an

351. See *supra* notes 18, 118 and accompanying text.

352. *Goldstein*, 516 F.3d at 62.

353. *Id.* at 60–61 (explaining that the district court’s analysis did not stop at an evaluation of whether the taking was rationally related to a public use, but also included analysis of plaintiffs’ pretext claim).

354. See *supra* Part I.D.

355. See *supra* notes 107–15 and accompanying text.

356. *Goldstein*, 516 F.3d at 64 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)).

357. See *Kelo v. City of New London*, 545 U.S. 469, 491–92 (Kennedy, J., concurring) (2005).

358. *Goldstein*, 516 F.3d. at 55–56.

359. *Id.* at 64.

360. *Id.*

Request for Proposal (RFP)³⁶¹—arguably an indicia of procedural irregularity.³⁶² And, despite using this “‘competitive’ selection process,”³⁶³ the MTA ultimately awarded this project to FCRC anyway, receiving from him a third of the amount that it would have received from a competitor whose proposal did not even contemplate using eminent domain.³⁶⁴ One author argues that the preselection of the developer before the plan was actually developed evinces favoritism.³⁶⁵ Such factual allegations are arguably enough to persuade other courts that the pretext claim should at least survive a motion to dismiss.

Similarly narrow is the *Goldstein* court’s reading of other pretext cases. The court questioned whether other courts that found pretext even needed to do so in order to invalidate the taking.³⁶⁶ Indeed, in *99 Cents*, the Ninth Circuit conceded that preventing “future blight” was not a valid public purpose, but the court also gave credence to pretext claims in general.³⁶⁷ However, this was but one factor in the Ninth Circuit’s holding that “the evidence is clear beyond dispute that [the condemning authority’s] efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another.”³⁶⁸ Thus, reading *99 Cents* in light of the fact that the court found that the local government asserted no valid public use is in conflict with how the *Franco* court read that case.³⁶⁹

To be sure, *Goldstein* leaves open the possibility for a hypothetical case where the circumstances of the taking so severely undermine the legitimacy of the process that the court might find pretext. While the court acknowledged that a case may present circumstances where the “approval

361. See *In re Develop Don’t Destroy (Brooklyn) v. Urban Dev. Corp.*, No. 104597/07, 2009 N.Y. App. Div. LEXIS 1500, at *32–33 (Feb. 26, 2009). For a discussion of Requests for Proposal (RFPs), see Robert C. Marshall et al., *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 HOFSTRA L. REV. 1, 38 (1991) (discussing that RFPs are “usually evaluated on quality as well as cost measures”). Because RFPs incorporate evaluation of more subjective criteria like qualitative benefits, there is room for local governments to manipulate the review process in order to award the contract to a favored party.

362. See *supra* note 130 and accompanying text (Justice Kennedy’s discussion of “elaborate procedural requirements” as a potential hint that favoritism is afoot).

363. *Goldstein* Cert. Petition, *supra* note 10, at *8.

364. *Id.* at *8–9.

365. Epstein, *supra* note 8, at 626.

366. *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008) (“Tellingly, it appears that in each of these district court cases, the plaintiff had contested whether *any* public use would be served by the taking.” (citing *Aaron v. Target*, 269 F. Supp. 2d 1162, 1175 (E.D. Mo. 2003); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1130 (C.D. Cal. 2001))).

367. *99 Cents*, 237 F. Supp. 2d at 1130. Indeed, while the court did undertake an analysis of the purported purpose of ending future blight, *id.* at 1129–31, it noted that the “sole question” before it was whether the asserted public purpose was valid or pretextual. *Id.* at 1129.

368. *Id.*

369. See *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 172–73 (D.C. 2007) (citing *99 Cents* for the proposition that no deference to the legislature is required where the ostensible use is pretextual).

process so greatly undermine[s] the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required,” this was not such a case.³⁷⁰ But ruling that it would not hear pretext claims when a classic public purpose was asserted³⁷¹ may be too narrow an interpretation of *Kelo*.³⁷² The rule either ignores the possibility of heightened scrutiny or equates it with the more searching scrutiny under Equal Protection Clause analysis.³⁷³

b. *Franco*: Applying Substantive Weight to Pretext Claims

Several features of the *Franco* decision set it apart from *Goldstein*'s more reluctant recognition of pretext claims. While noting that courts are constrained to defer to legislative judgments in takings, the *Franco* court expressed that takings for economic development may warrant skepticism.³⁷⁴ The court did so in a case where ending blight, as in *Goldstein*,³⁷⁵ was an asserted purpose of the taking.³⁷⁶ Furthermore, like *Goldstein*, the *Franco* court noted that *Kelo*'s focus on deferential review posed a subtle contradiction to applying heightened scrutiny to claims under the Public Use Clause, but *Franco* demonstrates its comfort with such judgments.³⁷⁷ And finally, *Franco*'s treatment of the factual allegations of pretext—allegations similar to those made in *Goldstein*—signals that this court was willing to ascribe more substantive weight to pretext claims.³⁷⁸

In some regards, the *Franco* decision did not mark a major departure from *Goldstein*, either in its requirement that property owner plead specific factual allegations that are not merely conclusory,³⁷⁹ or in its reluctance to question legislative judgment.³⁸⁰ It also reaffirmed that governments do not have to show evidence that the taking will achieve its asserted purpose.³⁸¹

Despite its careful treatment of the deference standard in *Kelo*, the *Franco* court held that “*Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said.”³⁸² While there is seemingly a technical agreement with *Goldstein* in that both

370. *Goldstein*, 516 F.3d at 63.

371. *Id.*

372. See Thomas, *supra* note 22 (“If Justice Kennedy’s deciding vote and concurring opinion in *Kelo* mean anything, they mean that factual allegations of pretext should be taken seriously, and cannot be ignored simply because the record contains some evidence of public benefit . . .”).

373. See *Goldstein*, 516 F.3d at 64 n.10.

374. *Franco*, 930 A.2d at 169.

375. See *supra* note 319 and accompanying text.

376. *Franco*, 930 A.2d at 162.

377. See *infra* notes 382–84 and accompanying text.

378. See *supra* notes 357–60 and accompanying text.

379. *Franco*, 930 A.2d at 170.

380. *Id.* at 171 (“Recognizing the limited role of the courts in eminent domain jurisprudence, we are especially careful not to indulge baseless, conclusory allegations that the legislature acted improperly.”).

381. *Id.* at 173 n.13.

382. *Id.* at 169.

courts acknowledged that these claims may be heard in certain instances, underpinning *Franco*'s reasoning is a more cynical view of takings—that legislatures should not be taken at face value because the government “will rarely acknowledge that it is acting for a forbidden reason.”³⁸³ And in those situations, the court holds, “a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual.”³⁸⁴ The view that courts should defer to legislative judgments, even though this power may be abused, is a central tension in Justice Kennedy's concurrence, one which *Franco* attempts to reconcile by allowing pretext claims to be heard.³⁸⁵ The *Goldstein* court, on the other hand, does not address this tension, and pays more attention to the *Kelo*, *Berman*, and *Midkiff* trio's mandate for deference, which may be overridden only in extreme cases where government action is alleged to be egregious.³⁸⁶

Because of its treatment of the facts alleged, the *Franco* court seems to have adopted the attitude that the alleged facts do not have to be egregious, which the *Goldstein* court implied is a requirement to trigger heightened scrutiny.³⁸⁷ By advancing “specific factual allegations”³⁸⁸—even though the court noted that the likelihood of proving those claims may be improbable³⁸⁹—the court found that *Franco*'s pretext defense was sufficient to evaluate the claim on the merits.³⁹⁰ Indeed, some of the facts alleged in *Franco* were remarkably similar to those in *Goldstein*.³⁹¹ Yet, despite this similarity, these courts came to opposing conclusions as to whether the cases should proceed to discovery.³⁹²

Finally, the *Franco* court implicitly rejected another limitation that the Second Circuit imposed on pretext claims, mainly that when the condemning authority asserts a classical public purpose—in both cases, ending blight—the court may suspend its deference to legislative

383. *Id.*

384. *Id.*

385. *See id.*

386. *See supra* note 356 and accompanying text.

387. *See supra* note 356 and accompanying text.

388. *Franco*, 930 A.2d at 170.

389. *Id.* at 172.

390. *Id.*

391. Both takings took place inside an integrated development plan, but those plans were preceded by an agreement that identified the ultimate private beneficiary. *Compare Goldstein v. Pataki*, 516 F.3d 50, 64 (2d Cir. 2008), with *Franco*, 930 A.2d at 170–71, 175 (finding evidence that supported the claim that the condemning authority created a Joint Development Agreement with benefiting parties, implying that the benefiting parties were known prior to taking). Additionally, in both cases, evidence suggested that findings of blight were added subsequent to the initial request to confer the eminent domain power—*Franco* alleged they were “inserted at the last minute.” *Franco*, 930 A.2d at 171. For a comparison of similar facts in *Goldstein*, see 516 F.3d at 56.

392. *Compare Franco*, 930 A.2d at 175 (applying the *Conley* pleading standard and granting discovery to property owners), with *Goldstein*, 516 F.3d at 62 (applying the *Twombly* pleading standard and dismissing property owner's claim on the pleadings).

judgment.³⁹³ In suspending deference and scrutinizing the pretext claim, the *Franco* court did not limit this analysis to takings that ended blight or that asserted another “classical” purpose.³⁹⁴ This contrasts with *Goldstein*’s explicit limitation of pretext analysis to cases where the purpose is economic development.³⁹⁵

Although the D.C. Court of Appeals acknowledged the possibility of a heightened standard of review, it did not explicitly announce the standard it would apply in reviewing pretext claims.³⁹⁶ Indeed, in determining whether the plaintiffs’ claim should survive a motion to dismiss, the court only needed to determine whether the property owner adequately pled a pretext claim.³⁹⁷ The court left us with only hints of what the standard might look like: courts do not have to ascertain whether the taking will actually accomplish its purpose,³⁹⁸ but will determine whether “the taking will serve an overriding public purpose and that the proposed development will provide substantial benefits to the public.”³⁹⁹ But without a more explicit expression, this is a matter of conjecture.

B. Possibilities for Heightened Standard of Review for Pretext Claims

Although Justice Kennedy announced the possibility for a heightened standard of review for challenges to takings alleging favoritism, he did not explicate under what standard those claims would be reviewed,⁴⁰⁰ nor did the *Goldstein* court.⁴⁰¹ Furthermore, while the *Franco* court agreed to hear the pretext claim, it did not state the standard against which the claim would

393. See *supra* note 347 and accompanying text.

394. See *Franco*, 930 A.2d at 167–75.

395. *Goldstein*, 516 F.3d at 61 (arguing that because *Kelo* was granted certiorari on the limited question of whether a taking is permitted solely on the basis of economic development, “the issue of pretext must be understood in light of . . . the holding of the case,” which granted broad deference to legislative judgments about public use). Indeed, Justice Kennedy wrote that a more “demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.” *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring).

396. *Franco*, 930 A.2d at 170.

397. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964–65 (2007) (explaining the basic requirements of Rule 8(a)(2) (pleading standard) of the Federal Rules of Civil Procedure and survival of a motion to dismiss under Rule 12(b)(6)).

398. *Franco*, 930 A.2d at 173 n.13.

399. *Id.* at 174 (internal quotation marks omitted). The use of the terms “overriding” and “substantial benefits” may imply means-ends scrutiny review, which focuses on balancing of the ends against the means. See *supra* note 37 (discussing that means-ends review functions like a balancing test); see also Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 927–28 (arguing that *Midkiff*’s warning against “purely private taking[s]” which serve “no legitimate purpose of government” sounds like the language of substantive due process (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984))).

400. See *Kelo*, 545 U.S. at 492–93 (Kennedy, J., concurring); see also *supra* notes 182–83 and accompanying text.

401. See *Goldstein v. Pataki*, 516 F.3d 50, 64 & n.10 (2d Cir. 2008).

be reviewed.⁴⁰² Without guidance from any of these cases, this section entertains the possibility that courts face a number of choices should they apply heightened scrutiny to pretext claims. This section examines three possibilities for a heightened standard of review: strict scrutiny review, means-ends scrutiny, and a tripartite burden-shifting standard.⁴⁰³ The next section, Part II.C, examines a fourth possibility for heightened scrutiny, process scrutiny.

1. Option One: Apply Strict Scrutiny Review

In the aftermath of *Kelo*, some have called for courts to apply strict scrutiny to takings.⁴⁰⁴ Under strict scrutiny analysis, a law will be upheld if it is necessary to achieve a compelling government purpose and if it is narrowly tailored to achieve this end.⁴⁰⁵ When courts apply strict scrutiny, the burden is on the government to demonstrate that a “truly vital interest is served by the law in question,” and that it could not attain this goal “through any means less restrictive of the right.”⁴⁰⁶ Courts apply strict scrutiny analysis—an exacting standard of review which has been noted as “strict in theory” but “fatal in fact”⁴⁰⁷—to certain fundamental rights.⁴⁰⁸ This argument could find legitimacy in the *Kelo* majority’s reference to *Calder v. Bull*’s⁴⁰⁹ warning that a private taking “is against all reason and justice,”⁴¹⁰ language which one author notes “sounds in substantive due process.”⁴¹¹

However, such an argument bases its call for strict scrutiny on criticism of *Kelo* itself, not on the argument that Justice Kennedy’s pretext discussion created a new standard of review for a specific challenge to eminent domain.⁴¹² Also, recognizing private property rights as a fundamental right

402. See *Franco*, 930 A.2d at 173 (“We conclude that a reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking.”).

403. See *supra* note 37 for a description of the nomenclature of this type of judicial test.

404. Justin Morgan Crane, Note, *The Privatization of Public Use: Why Rational Basis Review of a Private Property Condemnation Is a Violation of a Fundamental Civil Right*, 28 WHITTIER L. REV. 511, 512, 527–28 (2006) (finding that private property rights should be construed as a fundamental right and thus heightened scrutiny should apply, rather than calling for heightened scrutiny based on *Kelo*’s discussion of pretext).

405. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (holding that public employer’s layoff policy enacted to redress past racial discrimination failed strict scrutiny analysis as it was not narrowly tailored enough to promote a compelling government interest).

406. CHEMERINSKY, *supra* note 37, at 797.

407. See Fallon, *supra* note 37, at 79.

408. See Eagle, *supra* note 399, at 951.

409. 3 U.S. (3 Dall.) 386 (1798).

410. *Id.* at 927–28 (quoting *Calder*, 3 U.S. at 388).

411. *Id.* at 928.

412. See, e.g., Crane, *supra* note 404, at 527–28 (finding that private property rights should be construed as a fundamental right and thus heightened scrutiny should apply).

fails to comport with *Kelo*'s central holding, which itself is a rejection of the argument that takings should receive strict scrutiny.⁴¹³

2. Option Two: Apply Means-Ends Review

In discussing review for future claims of impermissible favoritism, Justice Kennedy used the term “heightened scrutiny”—a term which others have found to refer to intermediate-level or means-ends scrutiny.⁴¹⁴ Support for applying such a form of means-ends or heightened scrutiny⁴¹⁵ is found in another takings context where the Court applied less deferential review of government acts.⁴¹⁶ *Nollan v. California Coastal Commission*⁴¹⁷ and *Dolan v. City of Tigard*⁴¹⁸ comprise a subset of takings claims called “exaction.”⁴¹⁹ Taken together, the *Nollan-Dolan* line of cases demands that a regulation is a taking “if either the government regulation is not rationally connected to the government’s reason for regulating or the burden imposed

413. See *supra* notes 40–54 (discussing *Kelo* as upholding rational basis review of takings for economic development).

414. See *Eagle*, *supra* note 399, at 951–52 (citing *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45 (1983)).

415. Heightened scrutiny in the takings context is an outgrowth of the seminal case *Pennsylvania Coal Co. v. Mahon*, where Justice Oliver Wendell Holmes explained that it is the duty of the court in land use regulations to determine whether a governing body has “[gone] too far.” 260 U.S. 393, 415 (1922) (invalidating a statute that interfered with mining company’s contractual rights to engage in subsurface mining); see Fenster, *supra* note 61, 680–81 (discussing the doctrine of applying heightened scrutiny to claims involving regulatory takings). However, Professor Mark Fenster is careful to note that courts do not evaluate all takings against this standard, and that *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), was a terminal point on this trajectory in that the Court did not apply heightened scrutiny in that case. *Id.* at 681.

416. See Stark, *supra* note 164, at 630–35 (discussing applying a standard akin to that in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to analysis of takings involving a heightened risk of abuse).

417. 483 U.S. 825, 837, 841–42 (holding that a town conditioning the grant of a building permit in exchange for property owners granting the city an easement across their property constituted a taking where there was no essential nexus between the permit condition and the asserted public purpose).

418. 512 U.S. 374, 391, 395 (holding that city’s conditioning issuance of a property owner’s building permit on dedication of land for construction of a greenway was not roughly proportionate to the justification for the regulation).

419. *Nollan v. California Coastal Commission* developed the first prong of what became a two-prong test. CHEMERINSKY, *supra* note 37, at 653. There, a court determines whether there is an “essential nexus” between the purpose of the government regulation and the condition exacted: “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs, Inc. v. Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981)). Later, in *Dolan v. City of Tigard*, the Court added an additional “rough proportionality” component to the *Nollan* test. *Dolan*, 512 U.S. at 391. The Court explained that courts must make an “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.* In contrast to rational basis review, “rough proportionality” asks more than just whether there is any reasonable explanation for the regulation, but whether burdens imposed by the regulation outweigh the benefits gained. CHEMERINSKY, *supra* note 37, at 654.

by the condition is not roughly proportionate to the benefits gained because of the condition.”⁴²⁰ Professor Debra Pogrud Stark explains that *Nollan* and *Dolan* apply to determining whether a regulation is a taking, not—as is the case with pretext claims—whether a taking is constitutional.⁴²¹ Yet, she nevertheless finds the *Nollan-Dolan* test a model for a heightened standard of review in pretext cases: “The *Nollan* and *Dolan* cases provide recent Supreme Court precedent for courts to more closely scrutinize governmental actions affecting private property when the governmental action is taken in a context where there is a heightened risk of abuse.”⁴²² Stark argues that, based on this precedent for heightened scrutiny, the burden should be on the government to prove that the taking is “‘necessary’ and that there are no other reasonable alternative ways to achieve the indirect pub[li]c benefit,”⁴²³ that it is “‘likely to occur,’”⁴²⁴ and that there is an important government interest, which is “measured by whether there is a ‘net social benefit’ from the taking.”⁴²⁵

However, the Supreme Court warned of limiting this method of review to cases where a governing body is seeking an exaction from a property owner.⁴²⁶ Recently, in *MHC Financing Ltd. Partnership v. City of San Rafael*, the U.S. District Court for the Northern District of California denied the city summary judgment as there was a triable issue on the pretext claim.⁴²⁷ There, the court resisted characterizing every regulation as an exaction, because to do so would flatly ignore the Court’s decision in *Lingle v. Chevron USA, Inc.*⁴²⁸ and “upend” takings law.⁴²⁹ Also, the Ninth Circuit has argued that means-ends scrutiny is the wrong lens for Public Use claims, and distinguishes between claims involving regulatory takings and those challenging the asserted public use.⁴³⁰ The Ninth Circuit held that, because of this difference, *Nollan-Dolan* is inapposite.⁴³¹ In *Richardson v. City of Honolulu*,⁴³² the Ninth Circuit concluded that “those

420. CHEMERINSKY, *supra* note 37, at 654.

421. Stark, *supra* note 164, at 634.

422. *Id.*

423. *Id.* at 640.

424. *Id.*

425. *Id.* at 642.

426. See *MHC Fin. Ltd. P’ship v. City of San Rafael*, No. 00-3785, 2006 U.S. Dist. LEXIS 89195, *43–44 (N.D. Cal. 2006) (citing *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999)). The *MHC Financing Ltd. Partnership v. City of San Raphael* court rejects the application of the substantial nexus test outside of the exaction context because doing so would “upend[] takings law.” *Id.* at *43.

427. *Id.*

428. 544 U.S. 528, 548 (2005) (holding that the government was not required to prove that a statute intended to control retail gas prices substantially advanced a legitimate state interest).

429. *MHC Fin.*, at *43–44 (citing *Del Monte Dunes*, 526 U.S. at 702).

430. *Richardson v. City of Honolulu*, 124 F.3d 1150, 1157–58 (9th Cir. 1997) (holding that a city ordinance that converted leasehold interests of condominium units into fee interests was constitutional and did not violate either the Due Process or Equal Protection Clauses).

431. *Id.* at 1158.

432. 124 F.3d 1150.

cases are not applicable because they involved uncompensated regulatory takings, in which the issues are quite different.”⁴³³

What remains to be seen is whether a version of heightened scrutiny, formed similarly to *Nollan* and *Dolan* could be applicable to pretext claims. Indeed, there are pretext cases where courts use language similar to or approaching that of *Nollan* and *Dolan*’s rough proportionality requirement that the benefits outweigh the burden.⁴³⁴ The Seventh Circuit has arguably approximated this standard in *Daniels v. Area Plan Commission*,⁴³⁵ where the court held that a taking violated the Public Use Clause because the condemning authority did not supply facts that demonstrated the taking was “substantially related to a public interest.”⁴³⁶ Similarly, in *Franco*, the D.C. Court of Appeals used similar terminology, perhaps suggesting that it was applying a standard of scrutiny similar to the means-ends analysis.⁴³⁷

Franco’s suggestion that heightened scrutiny for pretext claim is similar to heightened scrutiny under *Nollan-Dolan*, is an idea that has yet to gain traction in the courts. This next section analyzes an argument by Professor Kelly who suggests an alternative standard for heightened scrutiny, one that focuses on the risk of favoritism.

3. Option Three: Kelly’s Tripartite Burden-Shifting Framework

A third alternative is to subject pretext claims to an analysis that examines the type of proposed condemnation—whether it is a blighted area, redevelopment district, new assembly, or whether it is a one-to-one transfer of land⁴³⁸—in determining whether it poses a heightened risk of favoritism. This analysis of risk of favoritism derives from Professor Kelly’s framework for dividing potential private involvement in eminent domain into pre- and postcondemnation stages.⁴³⁹ Kelly hypothesizes that such an analysis provides a “coherent doctrinal framework” that is capable of navigating a course between the twin evils of too much judicial discretion, on one hand, and too much deference on the other.⁴⁴⁰

Kelly applies this framework of temporal private involvement to a variety of classes of takings to provide courts with a sense of when private

433. *Id.* at 1157.

434. *See supra* note 399.

435. 306 F.3d 445 (7th Cir. 2002).

436. *Id.* at 465-66 (holding that vacation of a restrictive covenant for the purpose of development amounted to a private taking because the developer was the primary beneficiary of the vacation).

437. *See Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 174 (D.C. 2007) (using the terms “overriding public purpose” and “substantial benefits to the public”); *see also supra* note 399.

438. Kelly, *supra* note 77, at 38.

439. *See supra* note 177 and accompanying text.

440. Kelly, *supra* note 77, at 48.

involvement is or is not necessary.⁴⁴¹ For example, in a situation where the condemnation is directed at ending blight or creating a redevelopment district, Kelly argues that precondemnation private involvement is usually unnecessary because governments are capable of identifying such needs without the assistance of private involvement.⁴⁴² He explains that courts should be suspicious of precondemnation private involvement in such scenarios where it is unnecessary.⁴⁴³ However, he argues that proving risk of favoritism is not enough; rather, through a tripartite burden-shifting standard, governments can rebut this presumption of invalidity by demonstrating a specific and valid purpose, shifting the burden back to the property owner to demonstrate that the taking was an act of favoritism.⁴⁴⁴ On this third step, Kelly postulates that property owners may prevail by proving the pre- or postcondemnation involvement of a preferred private party was unnecessary, which they prove by demonstrating that the private party was not selected through a competitive process.⁴⁴⁵ Ultimately, the test Kelly proposes does not purport to help courts determine whether the taking is actually pretextual; under Kelly's analysis, a court does not find ill motive but risk of ill motive.

Kelly explains that the alternatives to his test—either a test based on the factors discussed in Justice Kennedy's *Kelo* concurrence⁴⁴⁶ or a test based on intent⁴⁴⁷—are not up to the task of preventing pretextual takings.⁴⁴⁸ First, he attacks the “current test based on *Kelo*,”⁴⁴⁹ which he explains is a test based on the Kennedy factors—magnitude of benefits, extensiveness of planning and process, and identification of private parties—on a variety of grounds.⁴⁵⁰ He criticizes examining the extent of planning and process for its futility, because local officials may simply reconstitute the project in a way that will escape scrutiny;⁴⁵¹ he rejects analysis of the magnitude of benefits as inadministrable⁴⁵² and “vacuous” because it is difficult to

441. *Id.* at 36–47. These classes include (1) blighted areas, (2) redevelopment districts, (3) new assemblies, (4) positive externalities, (5) changed circumstances, (6) one-to-one transfers, and (7) “same-use” takings. *Id.*

442. Compare *id.* at 38 (describing precondemnation private involvement as unnecessary because “blight factors are usually observable”), with *id.* at 40 (explaining that governments do not need to rely on private involvement in assembling a redevelopment district because such districts usually contain deteriorating parcels which are “typically observable”).

443. *Id.* at 38, 40.

444. *Id.* at 32–36 (proposing application of a tripartite burden-shifting analysis which is based on a similar standard used in Title VII discrimination cases).

445. *Id.* at 36; see e.g., *id.* at 39 (risk of pretext where no competitive bidding and asserted purpose is ending blight); *id.* at 40 (risk of pretext where no competitive process and asserted purpose is redevelopment).

446. *Id.* at 9–17.

447. *Id.* at 18–20.

448. See, e.g., *id.* at 9 (a test based on the magnitude of benefits is inadministrable); *id.* at 15–16 (examination of procedural regularity is “futile”); *id.* at 20 (a test based on intent is marked by inadministrability, futility, and disutility).

449. See *id.* at 9.

450. See *id.* at 9–17.

451. *Id.* at 15–16.

452. *Id.* at 12.

predict the benefits of a project,⁴⁵³ and potentially violative of *Kelo*'s caution against courts evaluating the wisdom of takings.⁴⁵⁴

Next, Kelly assails an intent-based test, which he asserts is a different test from the Kennedy factors test. Kelly's rendition of motive analysis explains that he understands the test to be analytically different and separate from a test based on Kennedy's factors.⁴⁵⁵ For Kelly, the problem of mixed motives is the biggest flaw in motive analysis.⁴⁵⁶ The possibility that a condemning authority might have mixed motives—that it might respond to relocation threat with an intended benefit to a private party, but does so because it intends to keep that private party in the locality so that it continues to benefit the community—saddles the judiciary with the impossible problem of unpacking a paradox.⁴⁵⁷

Ultimately, at the center of Kelly's proposal is using the presence or absence of competitive bidding to assess the risk of favoritism. Kelly explains that if a government wants to favor a particular party, competitive bidding will ruin that scheme because competitive bidding forces governments to select the highest bidder.⁴⁵⁸ He explains that this analysis works in the context of a taking in a blighted area⁴⁵⁹ or in a redevelopment district.⁴⁶⁰ However, he implies that it would not be a determinative factor in all cases. For instance, in a situation where the taking results in a one-to-one transfer of property—as in a case like *Southwestern Illinois Development Authority v. National City Environmental, LLC*,⁴⁶¹ or *99 Cents*,⁴⁶² a property owner may prevail in step three of a tripartite burden-shifting test by demonstrating that there were alternatives to the taking.⁴⁶³

Kelly does look to other factors that could prove pretext on step three of his test. He imports examination of economic benefits to another type of taking—“‘same use’ takings,” which is when, for instance, a private golf course is taken and converted into a public golf course.⁴⁶⁴ Kelly suggests that the “economic benefits”—similar to magnitude of benefits, although Kelly does not import that term to this takings context—may be a factor in finding pretext.⁴⁶⁵

And yet, despite offering methods for proving pretext in these four contexts, Kelly does not explain how property owners might prevail under a

453. *Id.* at 11.

454. *Id.* at 11–12.

455. *See, e.g., id.* at 18 (referring to a test that focuses “on the intent of the condemnor” as an alternative to the “current framework” [the Kennedy factors]).

456. *Id.*

457. *See id.* at 19.

458. *See id.* at 28–29.

459. *Id.* at 38–39.

460. *Id.* at 40.

461. 768 N.E.2d 1 (Ill. 2002)

462. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

463. Kelly, *supra* note 77, at 45; *see also supra* Part I.D.2.b (discussing the availability of alternatives as a factor in assessing pretext).

464. *See Kelly, supra* note 77, at 46.

465. *See id.* at 47.

tripartite burden-shifting standard where the taking fits the profile of a new assembly, positive externality, or changed circumstances (where the original reason for the taking is changed after the condemnation).⁴⁶⁶ Interestingly, Kelly argues that *Kelo* fits the profile of a positive externality,⁴⁶⁷ which arises when potentially favored “private parties . . . obtain spillovers from the project,” but are not the direct beneficiaries of the taking.⁴⁶⁸ With regard to the additional facts discovered post-*Kelo*,⁴⁶⁹ Kelly suggests “that pretext is a distinct possibility even when a private developer is not the private party being favored,” but he ultimately avoids any conclusions on this issue, by failing to identify how a property owner might prevail under his framework.⁴⁷⁰ Given the centrality of competitive bidding to his test, it is unclear whether the fact that New London opposed a competitive process⁴⁷¹ would militate for finding pretext in *Kelo*.

The next section examines a test which combines what Kelly criticizes—an intent based test and a test based on the Kennedy factors—and serves as a potential way of assessing pretext claims in a larger variety of takings. Unlike the above tests, this test is grounded in pretext case law.

C. *An Alternative for Applying Heightened Scrutiny: Process Scrutiny*

Some scholars have interpreted *Kelo*'s reference to pretext as a call for judicial analysis of motive.⁴⁷² Precedent for motive analysis may be found elsewhere in constitutional jurisprudence, and thus would certainly not be anything new.⁴⁷³ For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁴⁷⁴ where the Court held that courts may examine legislative motivation in determining whether a law is discriminatory.⁴⁷⁵ Professor Young argues that the list of contexts in which

466. See *id.* at 40–44 (discussing new assemblies, positive externalities, changed circumstances, but failing to explain factors courts might use to find pretext).

467. *Id.* at 42–43.

468. *Id.* at 41.

469. See *supra* notes 135–38 and accompanying text.

470. Kelly, *supra* note 77, at 43.

471. See *supra* note 139 and accompanying text.

472. See generally Cohen, *supra* note 54. As this next section explains, Professor Charles E. Cohen terms his version of motive analysis in the eminent domain context a “process scrutiny” standard. See *infra* Part.II.C.1.

473. See Fallon, *supra* note 37, at 71. Richard Fallon’s work situates purpose inquiry in a broad discussion of constitutional doctrine and the numerous types of tests that the Court applies. He argues that in the past twenty-five years, the Court has been in the business of applying a test that determines whether the government has acted with an illicit motive, finding this type of analysis in Dormant Commerce Clause, Equal Protection Clause, Establishment Clause, Free Expression Clause, and Substantive Due Process jurisprudence. *Id.* at 90–94.

474. 429 U.S. 252 (1977).

475. *Id.* at 266 (explaining that courts may evaluate circumstantial evidence in assessing whether a city’s refusal to rezone a parcel of land to allow for moderate- and low-income housing masked a racially discriminatory purpose). There the Court announced several factors relevant to evaluating a discriminatory purpose: (1) “The historical background of the decision,” *id.* at 267; (2) “specific sequence of events leading up to the [act],” *id.*; (3)

the court conducts motive analysis is expansive: “[M]otive analysis is a pervasive feature of equal protection law, of substantive due process, including the First Amendment’s protections for speech, and even of Dormant Commerce Clause analysis.”⁴⁷⁶ This section examines motive analysis for pretext claims under the Public Use Clause in the form of what one author terms “process scrutiny.”⁴⁷⁷

1. Motive Analysis Through a “Process Scrutiny” Standard

A third option for heightened scrutiny is to scrutinize the process leading up to the condemnation to determine if the asserted purpose is pretextual. Professor Charles Cohen coined such analysis “process scrutiny,”⁴⁷⁸ although other authors have labeled the type of analysis for which Cohen calls either motive or purpose analysis.⁴⁷⁹ Process scrutiny, an alternative to means-ends and strict scrutiny, shifts the focus from rational basis review’s consideration of whether there is a conceivable purpose to evaluating the validity of the condemnation process itself.⁴⁸⁰ Some have argued that this test is implied from the importance *Kelo* attached to the fact that the taking occurred inside the presence of a “comprehensive plan.”⁴⁸¹ If *Kelo* did in fact announce a new process scrutiny rule, it would mark a major shift in public use jurisprudence.⁴⁸²

Process scrutiny, as opposed to means-ends, strict scrutiny, or rational basis review is analytically a different test. On one hand, the latter, “ends”-focused standards of review ask whether the asserted purpose is legitimate, both under federal and state constitutional law.⁴⁸³ Then, using various

departure from normal procedure, *id.* at 267; and (4) analysis of legislative or administrative history, *id.* at 268.

476. Young, *supra* note 112, at 193.

477. Cohen, *supra* note 54, at 411–19.

478. See generally *id.* at 411.

479. Another author, Bernard Bell, discusses this inquiry as analysis of motive, arguing that it stems from a type of standard of scrutiny traditionally recognized by the Court. Bell, *supra* note 80, at 187. Although Bell uses the term “motive” and not “purpose,” he cites to Fallon, who writes extensively on this topic calling the test a “purpose inquiry.” See, e.g., Fallon, *supra* note 37, at 71 (“[Under purpose inquiry] legislation or other governmental policies are invalid if developed or applied for constitutionally illegitimate reasons.”). Substantively, the inquiry in a “motive” test and a “process” test vary little, and in fact are essentially the same, although Cohen’s “process scrutiny,” with its focus on comprehensive planning, see, e.g., Cohen, *supra* note 54, at 418–19 (discussing a “comprehensive plan” rule in the context of a discussion of “process scrutiny” (quoting Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 18 (2005))), may be understood as a more specific version of Bell’s and Fallon’s inquiry into purpose or motive. This Note uses the term “process scrutiny” to refer to these related types of review.

480. Cohen, *supra* note 54, at 378.

481. See generally *id.*; see also *infra* notes 520–25 and accompanying text (critiquing Cohen’s analysis of the presence of a comprehensive plan).

482. Cohen, *supra* note 54, at 411. However, as Fallon notes, the Court engages in purpose inquiry in a variety of areas, including review under the Dormant Commerce Clause, the Free Speech Clause, and the Establishment Clause, as well as review of statutes that discriminate on the basis of race. Fallon, *supra* note 37, 90–102.

483. Cohen, *supra* note 54, at 416; see also *supra* note 53 and accompanying text.

levels of scrutiny—depending on the test—the court determines whether the asserted purpose is rationally related to the means of accomplishing it (rational basis review) or, as is the case with strict scrutiny, and to some extent means-ends scrutiny, whether the ends justify the means.⁴⁸⁴ Under these types of review “the *actual* purpose behind the government’s action is irrelevant, as long as there *could be* a legitimate purpose.”⁴⁸⁵

Process scrutiny, on the other hand, as an inquiry into the actual purpose, neither inquires into the rationality of the method of taking property to achieve a certain end nor balances the benefits against the burdens imposed; rather, this test seeks to confirm the veracity of what the legislature says it is trying to do.⁴⁸⁶ It is guided by the principle that “legislation or other governmental policies are invalid if developed or applied for constitutionally illegitimate reasons.”⁴⁸⁷ By applying process scrutiny, a court finds pretext by analyzing indicators which call into question the integrity of the legislative process that produced the decision to condemn the property.⁴⁸⁸

This type of scrutiny, applied to pretext claims evinces a straightforward rule: “a proposed taking may be struck down as lacking a justifying ‘public use’ *even if the project for which the targeted land is intended will, or conceivably could, produce a public benefit.*”⁴⁸⁹ In effect, the process approach “flush[es] out uses of the eminent domain power motivated by an improper desire to benefit private interests.”⁴⁹⁰ Professor Richard Fallon’s analysis of purpose inquiry—a similar standard to Cohen’s—would add to this rule an implicit second prong that addresses causation: once it is determined that the actual purposes are forbidden, “the question is whether, but for the influence of some illegitimate consideration in motivating one or more relevant decision-makers, the government would likely have enacted a challenged statute or taken other contested steps.”⁴⁹¹ Taken together and applied to pretext claims, these tests purport to restore protection to underenforced constitutional rights.⁴⁹² Adopting a process scrutiny

484. Cohen, *supra* note 54, at 416.

485. *Id.*

486. *Id.* at 411 (“[F]or the first time, the Supreme Court has hinted that the inquiry is not to be focused on the proposed end use of a property, but whether the political process has fallen victim to the very dangers that the Fifth Amendment public use clause was intended to prevent.”).

487. Fallon, *supra* note 37, at 71.

488. *See infra* note 505 and accompanying text.

489. Cohen, *supra* note 54, at 415 (citing Garnett, *supra* note 83, at 457–58).

490. *Id.* at 378.

491. Fallon, *supra* note 37, at 72 (citing Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 431, 439 (1996)); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (citing Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977)) (noting that after proving discriminatory purpose the burden would then shift to the government to prove that “the same decision would have resulted even had the impermissible purpose not been considered”).

492. *See infra* 514–17 and accompanying text.

standard could answer the criticism that *Kelo* emasculates the Fifth Amendment.⁴⁹³

2. Process Scrutiny Applied

A process scrutiny approach is not without precedent in state—and in cases like *99 Cents*,⁴⁹⁴ *Aaron*,⁴⁹⁵ and *Armendariz*,⁴⁹⁶ federal—court.⁴⁹⁷ In bolstering this view, Cohen draws on four cases, *Southwestern Illinois Development Authority*,⁴⁹⁸ *99 Cents*,⁴⁹⁹ *Baycol, Inc. v. Downtown Development Authority*,⁵⁰⁰ and *Wilmington Parking Authority v. Land with Improvements*,⁵⁰¹ where he finds the courts applied a version of process scrutiny in reaching a conclusion that the taking was pretextual.⁵⁰² In each case Cohen cites, the court concluded the taking was pretextual based on a variety of factors⁵⁰³; in none of these cases is there a mea culpa by a deceiving legislator (although there may be written or spoken statements to that effect),⁵⁰⁴ but an amalgamation of what Cohen calls “the stench of procedural irregularities or indicia of improper influence.”⁵⁰⁵ Grouping together under a single standard cases that examined a variety of factors in inferring pretext, this test contrasts with Kelly’s rendition of motive analysis, which he distinguishes from a test that uses the Kennedy factors.⁵⁰⁶ The process scrutiny approach subsumes the Kennedy factors into a motive test; thus, unlike Kelly’s characterization, they are not two tests, but one, and thus, analytically, one serves the other.

493. Cohen explains that while the public use requirement “is underenforced by federal courts because of the Supreme Court’s well-entrenched reluctance to evaluate socioeconomic legislation and the difficulty of formulating a workable public use test” it is possible that the requirement of “a ‘comprehensive development plan’ might help distinguish permissible from impermissible takings” and “embod[y] an invitation to fully enforce the public use clause.” Cohen, *supra* note 54, at 410. *But see* *Kelo v. City of New London*, 545 U.S. 469, 502–03 (2005) (O’Connor, J., dissenting) (criticizing a motive test as an insufficient constitutional protection).

494. *See supra* note 216.

495. *See supra* note 108.

496. 75 F.3d 1311 (9th Cir. 1996).

497. *Id.* at 412 (“Scrutiny of the process as opposed to the result, while not common, is not unprecedented in the state courts.”).

498. 768 N.E.2d 1 (Ill. 2002).

499. *See supra* note 216.

500. 315 So. 2d 451 (Fla. 1975).

501. 521 A.2d 227 (Del. 1986).

502. Cohen, *supra* note 54, at 412–15.

503. In discussing *Southwestern Illinois Development Authority v. National City Environmental, LLC* for example, Cohen points to a variety of factors the Illinois Supreme Court found illustrative of pretext: (1) the public was not the primary beneficiary because the condemning authority did not commission a study, (2) it did not develop an economic plan which would be required to be put into effect, (3) it advertised that it would condemn land for “‘private developers’” for their “‘private use’” for a fee, and (4) it made known that it would condemn whatever the private beneficiary in this case wanted. *Id.* at 412–13 (discussing *Southwestern Illinois Development Authority*, 768 N.E.2d at 10).

504. *See supra* notes 209–10 and accompanying text.

505. Cohen, *supra* note 54, at 411.

506. *See supra* note 455 and accompanying text.

3. Criticism of and Justification for a Process Scrutiny Standard

Despite these advantages, process scrutiny entails certain costs. Among its limitations may be that it is costly to conduct, it produces evidentiary problems, and it can be insulting to other branches of government.⁵⁰⁷ Justice O'Connor, in her *Kelo* dissent, questioned the logic of such a test, arguing that if a taking results in a private-to-private transfer of property, it should not matter what the legislature intended to achieve.⁵⁰⁸ Others question the efficacy of such a rule: Professor Bernard Bell questions the strength of this test altogether, calling it "anemic."⁵⁰⁹ Additionally, Kelly's criticism of motive analysis for its potential for disutility,⁵¹⁰ futility,⁵¹¹ and judicial inadministrability⁵¹² would likely be extended to Cohen's test. Even Cohen, who argues that *Kelo* introduced this new rule, questions whether it will stem abuse of eminent domain.⁵¹³

Nevertheless, scrutiny of legislative purpose and process restores trust in the legislative branch's power to declare eminent domain and ensures fairness in takings, as well as moral accountability. The rationale behind scrutiny of purpose and process is that the underenforcement of constitutional protections⁵¹⁴ rests on trust of other branches, which upends a

507. Fallon, *supra* note 37, at 98; *see also* Regan, *supra* note 7, at 1285 (noting that the Court engages in motive analysis although it is loath to do it, because the Justices "feel some disinclination to accuse state officials of improper purpose").

508. *Kelo v. City of New London*, 545 U.S. 469, 502–03 (2005) (O'Connor, J., dissenting) (criticizing a "purpose test" in favor of an outright ban on takings for economic development). Justice Sandra Day O'Connor wrote,

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the 'public purpose' in a taking, why should it matter, as far as the *Fifth Amendment* is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same from the constitutional perspective—private property is forcibly relinquished to new private ownership.

Id.

509. *See* Bell, *supra* note 80, at 187 ("[M]otive tests, such as that adopted by the majority, have often proven anemic and provided citizens with illusory protection against government officials at best.").

510. Kelly, *supra* note 77, at 7 ("Evaluating whether a certain use of eminent domain is pretextual means that a taking might be invalidated [on the basis of motivation] even though a forced transfer would have increased social welfare.").

511. *Id.* at 8 ("[E]ven if the [condemning] officials reveal their true motivation, the condemnees seek injunctive relief, and the court holds that the asserted purpose is pretextual, the [condemning authority] could simply approve the same condemnation without revealing the taking's actual purpose."). This criticism is akin to the "stupid staffer" problem. *See supra* note 190 and accompanying text.

512. *Id.* at 8 ("[E]ven in the event that a [condemning authority] declares her motivation, it is nearly impossible to know whether that member's motivation is representative of the other members.").

513. Cohen, *supra* note 54, at 379, 418.

514. *See id.* at 410.

claim of illicit purpose.⁵¹⁵ Thus, claims of illicit purpose ensure that underenforced constitutional provisions are not trampled, maintaining the integrity of a system where the judiciary defers to legislative judgments. A process test provides an institutional check on legislatures in defense of constitutional rights, ensuring that landowners will have a meaningful chance to be heard.⁵¹⁶ Cohen argues that this constitutes a “representation reinforcement model” whereby courts, which are unable to “promulgate a precise rule for resolution of a constitutional question” leave it to the political process on the front end to decide the issue, but then kick in on the back end, “scrutiniz[ing] the process to make sure that it operates fairly.”⁵¹⁷ Motive analysis is justified in moral terms, that it attempts to correct “deontological wrongness—illegitimate motives as wrong in themselves,”⁵¹⁸ but also seeks more concrete, consequentialist aims like preventing the psychic harm caused to victims of the improperly motivated act.⁵¹⁹

However, Cohen’s articulation of process scrutiny comes with a potential limitation. In labeling the process scrutiny rule a “comprehensive plan test”—a confusing aspect of his analysis because he uses this term interchangeably with “process scrutiny”⁵²⁰—he notes the possibility that legislators will use the presence of a comprehensive plan as a safe harbor.⁵²¹ Dodging scrutiny by creating a comprehensive plan and complying with procedure would indeed speak directly to the “stupid staffer” problem to which Justice O’Connor referred in her *Kelo* dissent.⁵²² Using the presence of a comprehensive plan as a safe harbor, local officials may mask the fact that they have engineered a comprehensive plan that is intended to appear as if it emerged from an open process.⁵²³ Indeed, on this

515. Fallon, *supra* note 37, at 94–95.

516. Cohen, *supra* note 54, at 418–19.

517. *Id.* at 375.

518. Young, *supra* note 112, at 196–97.

519. *Id.* at 253.

520. *See, e.g.*, Cohen, *supra* note 54, at 411–19. In addition to calling the rule in *Kelo* a process scrutiny, and even an “improperly motivated taking test,” *id.* at 417, Cohen calls the new rule coming out of *Kelo* a “comprehensive plan test,” *id.* at 411–19. Under a “comprehensive plan test” a taking will not be considered suspicious “if undertaken pursuant to some degree of ‘comprehensive’ planning,” but in the absence of a comprehensive plan, may be considered suspicious and cause a court to depart from rational basis review. *Id.* at 385–86. Presumably, Cohen means that presence of a comprehensive plan is a conclusion that courts draw after considering “whether the government actually evaluated the likelihood of success, considered alternatives, and even commissioned independent studies.” *Id.* at 417. However, it is unclear from Cohen’s discussion whether presence of a comprehensive plan is a conclusion that courts draw after they scrutinize the process, i.e., a conclusion about the adequacy of the process and thus a positive verdict on whether or not a taking triggers suspicion. An alternative possibility is that presence of what appears to be a comprehensive plan will prevent a court from presuming the taking is suspicious—and thus means it is deserving of rational basis review—unless property owners make a claim that might raise suspicion. *See infra* Part III.A.

521. Cohen, *supra* note 54, at 416.

522. *See supra* notes 190, 508 and accompanying text.

523. Cohen, *supra* note 54, at 418.

point Cohen explains that the protections process scrutiny offers stop short of addressing structural problems with local representation.⁵²⁴ The check on illegitimate takings that public hearings are supposed to provide may fail when public officials hold those hearings just to go through the motions.⁵²⁵

The next part includes a discussion of several problems with Cohen's formulation of a comprehensive plan test. First, it is unclear how a court would actually apply a "comprehensive plan" test.⁵²⁶ Additionally, by attaching such import to the presence of a "comprehensive plan," Cohen potentially construes Justice Kennedy's concurrence in *Kelo* in a way that might constrain courts from examining a wide range of factors in a search for pretext.⁵²⁷ What is clear from the above discussion is that courts, like the D.C. Court of Appeals in *Franco*, which wish to give substantive weight to Justice Kennedy's concurrence, have available a body of case law on which to draw. In doing so they may either add to or flesh out the factors Justice Kennedy discusses.

III. PROCESS SCRUTINY: USING THE KENNEDY FACTORS TO INFER MOTIVE

It is clear that Justice Kennedy's fifth vote concurrence in *Kelo*, and to some extent Justice Stevens's reference to pretext, gave indication that the Court is willing to embrace a new rule that scrutinizes takings to determine whether the asserted purpose is pretextual.⁵²⁸ The point of Justice Kennedy's discussion of pretext was that *Kelo* was not a pretextual taking,⁵²⁹ but that other cases might be, and that these claims, which are hard to ferret out, require a more searching standard of review.⁵³⁰ This new standard, hinted at by Justice Kennedy, is thus more stringent than the deferential standard of review that the *Kelo* majority endorsed.⁵³¹ The seeming tension between deference and scrutiny is perfectly reconcilable: the Court applies rational basis review to determine what constitutes a valid public use under the Fifth Amendment, and it applies a more stringent standard to determine whether the asserted purpose is the legislature's actual purpose.⁵³² The logic of *Kelo*, that legislatures are better than courts in determining what constitutes a legitimate public purpose, still stands.⁵³³

524. *Id.* at 419 (explaining that a "comprehensive plan" test would not eliminate the risk of political capture of local public officials).

525. *Id.* at 418.

526. Cohen argues that scrutiny of a comprehensive plan may not necessarily mean that the Court will examine the "quality of the planning process," but may just evaluate the presence of a comprehensive plan. *Id.* at 418; see *supra* note 520 and accompanying text.

527. See *supra* Part I.D.2.

528. See *supra* Part I.C (discussing the pretext standard announced in *Kelo*); see also Part II.A.2.b (discussing the *Franco* court's subscription to a new pretext standard).

529. See *supra* note 116 and accompanying text.

530. See *supra* Part I.C.2, D.2 (discussing the Kennedy pretext factors and application of those factors in case law).

531. See *supra* notes 170–76 and accompanying text.

532. See, e.g., Parts I.D.1.a, II.A.2.b.

533. See *supra* notes 382–85 and accompanying text.

But pretext claims second-guess legislatures precisely where the courts should, challenging legislatures to demonstrate that they did not abuse their power in declaring eminent domain for a favored party.

A. *Process Scrutiny, A New Standard*

1. Rejecting the Alternatives

Justice Kennedy's call for a heightened standard of review for cases of undetected impermissible favoritism should be interpreted as a call for heightened judicial scrutiny of a legislature's purpose in taking private property. Process scrutiny is a heightened standard in the sense that courts should look beyond just satisfying providing a rational basis for the taking; when property owners plead sufficient facts supporting a pretext theory, courts should conduct an extensive factual inquiry—as the Connecticut state courts were purported to have done in *Kelo*⁵³⁴—into a variety of factors in order to ascertain the veracity of the government's asserted purpose. Pretext review is more stringent than rational basis review because, in evaluating these claims, courts will not just look for any conceivable purpose offered by the legislature, but at the legislature's real purpose.⁵³⁵

It is fairly clear that a heightened standard of review is not one, like the standard in the *Nollan-Dolan* line of cases, which searches for a nexus between purported benefits the government seeks and burdens born by the aggrieved property owner.⁵³⁶ *Lingle*, decided the same year as *Kelo*, forbids applying *Nollan-Dolan* outside of the regulatory takings context.⁵³⁷ True, *Lingle* may be limited to assessing what constitutes a taking and may not apply to the Public Use Clause, but the logic of the Ninth Circuit is sound: it is analytically the wrong test.⁵³⁸ If the government action is based on impermissible favoritism, and thus a violation of the cardinal rule set out in *Calder*,⁵³⁹ any amount of property taken is too much.⁵⁴⁰ Furthermore, a means-ends test is analytically inadequate to achieve what pretext claims ask, which is not a weighing of burdens against benefits, but a confirmation of purpose.⁵⁴¹

Additionally, applying strict scrutiny would be a direct contradiction of the central holding of *Kelo*, which is that courts should defer to legislatures in determining what legitimate state purposes warrant impinging on constitutional rights.⁵⁴² But even if courts applied strict scrutiny, as long as

534. See *supra* note 276 and accompanying text.

535. See *supra* notes 486–88 and accompanying text.

536. See *supra* notes 420–33 and accompanying text.

537. See *supra* notes 428–29 and accompanying text.

538. See *supra* notes 430–33 and accompanying text.

539. See *supra* note 87 and accompanying text.

540. See *supra* note 87 and accompanying text.

541. See *supra* note 486 and accompanying text.

542. See *supra* notes 40–54 and accompanying text.

the taking advanced a compelling government interest and was narrowly tailored,⁵⁴³ the taking might still be impervious to claims that its true purpose was favoritism. These “ends” focused modes of analysis add little, if anything, to correcting takings motivated by favoritism.

A third alternative—an assessment of risk of favoritism through a tripartite burden-shifting analysis⁵⁴⁴—also suffers a number of flaws and is not preferable to process scrutiny analysis. First, in making competitive bidding the prime method of establishing pretext under the third step of burden shifting,⁵⁴⁵ Kelly veers on making competitive bidding the panacea to favoritism. But as *Goldstein* shows, competitive bidding may not necessarily cleanse the taking of favoritism.⁵⁴⁶ There, the state-run MTA, conducted a RFP, and did not require that the highest bidder win. Competitive process analysis does little to guarantee absence of favoritism if the competitive process allows for potential manipulation.⁵⁴⁷ Thus in a situation like *Goldstein*, where the winning bid was not determined by price, but by other qualitative factors, governments have a lot more flexibility to hide their reason for not going with the highest bid.

Perhaps RFPs do not meet the rigorous standards that Kelly proposes, and Kelly has in mind a process that requires awarding contracts to only the highest bidder.⁵⁴⁸ If so, it is unclear that such a proposal does not itself suffer disutility by mandating to local governments what processes they must use in awarding contracts to private parties. Indeed, such an argument would constitute judicial intervention into legislative decision making—the very thing *Kelo* forbids.⁵⁴⁹ Without the competitive bidding requirement that Kelly’s test constructively imposes, proving pretext is made more difficult, if not impossible. And because Kelly does not explain what factors would prove pretext in situations involving new assemblies, changed circumstance, or positive externalities,⁵⁵⁰ it is unclear how his test is an improvement over a flexible, multifactor process test that gives courts a variety of tried-and-true tools to detect favoritism.

Taken to its logical conclusion, Kelly’s standard may alter the outcome in a case like *Kelo*; because it is now evident that New London railroad a competitive bidding process,⁵⁵¹ arguably Kelly’s standard would have required the Court to find pretext—an untenable outcome. Such an outcome elucidates the real problem with a standard based on one factor.

543. See *supra* note 405 and accompanying text.

544. See *supra* notes 177, 438–45 and accompanying text.

545. See *supra* notes 458–65 and accompanying text.

546. See *supra* notes 363–65 and accompanying text.

547. See *supra* note 361 and accompanying text.

548. Such a proposal would contrast to RFPs in some contexts, where the party awarding the contract may incorporate qualitative measures in determining the winner of the bid. See *supra* note 361 (discussing how reviews of RFPs incorporate qualitative and quantitative measures).

549. See *supra* note 54 and accompanying text.

550. See *supra* note 466 and accompanying text.

551. See *supra* notes 139, 471 and accompanying text.

Under a Kennedy process scrutiny approach, on the other hand, no single factor governs. Rather, it is the cumulative weight of probative evidence of favoritism that militates for finding pretext. Thus, if the only pretextual factor in *Kelo* had been lack of competitive bidding, it seems that no court would find pretext on the basis of that alone. And if that is true, then Kelly's test gets us nowhere. What is needed is a multifactor test that is used to infer actual purpose.

Finally, although Kelly denigrates motive analysis, his test uses some of the same factors that a process scrutiny/motive test does—specifically, by arguing that the availability of alternatives and the magnitude of benefits are factors that support finding pretext certain.⁵⁵² And yet he draws the line there, failing to consider other factors that may be relevant, like post hoc determinations or legislative statements.⁵⁵³ Ignoring such factors, which a process test potentially could analyze, Kelly's test risks the very problem of underinclusivity he warns against. The Court should not so disarm itself.

2. Using the Kennedy Factors to Infer Motive and Purpose

Process scrutiny reconciles a controversy in eminent domain law between why governments are using this substantial power and the reason for which they say they are using it.⁵⁵⁴ Process scrutiny may ask questions similar to those that means-ends analysis asks,⁵⁵⁵ but it does so not to assess whether the government act goes too far;⁵⁵⁶ but whether the taking is so disproportionate as to evince an ulterior motive.⁵⁵⁷ Absent judicial scrutiny, governments may simply go through the motions of asserting a purpose, knowing that the taking—even if motivated by an illegitimate purpose—will pass muster as long as a court can discern any conceivably valid purpose.⁵⁵⁸ A new rule sanctioning heightened scrutiny for pretext claims gives weight to a constitutional right, potentially ending legislatures' efforts to dupe citizens and the courts.⁵⁵⁹ For critics like Justice O'Connor, who believe that analyzing the purpose of a taking is senseless when the result—relinquishing private property to another private party—is the same,⁵⁶⁰ no rule for reviewing pretext claims will ever satisfy their concerns, which are directed at the validity of eminent domain for economic development. Additionally, a purpose test may just be the next-best line of

552. See *supra* notes 463–65 and accompanying text.

553. See, e.g., *supra* notes 209, 239–41 (discussing the relevance of several factors—post hoc justifications or actions, legislative statements, and sequence of events leading up to condemnation—to pretext claims).

554. See *supra* notes 486–88 and accompanying text.

555. See *supra* note 399 and accompanying text.

556. See *supra* note 415.

557. See *supra* Part I.D.2.a (discussing *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. 1998); *In re 49 WB, LLC v. Vill. of Haverstraw*, 839 N.Y.S.2d 127 (App. Div. 2007)).

558. See *supra* note 521 and accompanying text.

559. See *supra* note 517 and accompanying text.

560. See *supra* note 508.

defense after *Kelo*. Given that the Court is not likely to reconsider the holding in *Kelo*,⁵⁶¹ it is up to the judiciary to craft the best solution for protecting property rights.

This standard would authorize courts to strike down a proposed taking for its actual purpose even if the project will or could conceivably produce a legitimate public benefit.⁵⁶² Courts will strike the taking as long as property owners show that, but for the influence of the illegitimate consideration, the taking would not have occurred.⁵⁶³ This rule operates by examining a variety of facts and factors, and from them infers whether the only rational conclusion is that the purpose of the taking was really to benefit a private party.⁵⁶⁴ Furthermore, in unmasking this purpose, courts do not need to find evidence of a quid pro quo—that the condemning authority was expecting a specific or discrete benefit from the private party in return for its use of the eminent domain power.⁵⁶⁵

Finally, this standard looks at legislative intent (and motive and purpose), but does not examine what individual legislators personally believed the taking was intended to accomplish or what they personally wanted it to accomplish.⁵⁶⁶ The test is a hybrid of objective and subjective analysis: to the extent that legislative statements are evidenced, courts may examine it, but they do not depose legislators in order to learn what they as individuals hoped to achieve.⁵⁶⁷ Pretext analysis requires looking at objective acts—departure from normal proceedings, sequence of events, joint development agreements, and official statements preceding a legislative vote—and, by taking those acts and events *in toto*, permits courts to infer a purpose, motive, intent, desire, or hope.⁵⁶⁸

Courts should resist calls for framing process scrutiny as a comprehensive plan test.⁵⁶⁹ It is unclear from Cohen whether a comprehensive plan test means that courts scrutinize the taking to see if the process resulted in a comprehensive plan—and thus that it is beyond reproach—or whether mere presence of a comprehensive plan means courts will presume that it is not suspicious.⁵⁷⁰ This formulation of process scrutiny may be too narrow for the rule to reach its full potential. Some scholars are concerned that a focus on a comprehensive plan risks creating a

561. See *supra* note 13 and accompanying text.

562. See *supra* notes 107–12 and accompanying text.

563. See *supra* note 491 and accompanying text.

564. See *supra* Part I.D.1.b (discussing how courts infer purpose from a variety of factors indicating pretext).

565. See *supra* Part I.D.1.c (discussing pretext case law where courts found pretext without a finding of return of benefit to the condemning authority).

566. See *supra* note 210.

567. See *supra* notes 208–10.

568. See *supra* notes 198, 208–10 and accompanying text; see, e.g., *supra* note 226 (discussing a bad faith case where the condemning authority's intent was inferred from an affirmative vote by legislators following statements of one legislator).

569. See *supra* notes 520–25 and accompanying text.

570. See *supra* note 520 (describing Cohen's discussion of a "comprehensive plan" test).

safe harbor for officials.⁵⁷¹ If courts are limited to examining the comprehensive plan and the proceedings to which it gives rise, they may overlook important indicators of impermissible favoritism.⁵⁷² In fact, a strictly-adhered-to comprehensive plan test may straitjacket courts in a search for pretext. Such a narrow view might lead courts to miss considering whether the benefits are de minimis,⁵⁷³ or the presence of failed negotiations, or whether there was a failure to negotiate.⁵⁷⁴

Similarly, a narrow view might miss other evidence that could be characterized as expansive, like the availability of alternatives to condemnation. Presence of this factor suggests favoritism because if there is a viable alternative to using eminent domain, avoiding using it seems to indicate an ill motive.⁵⁷⁵ What pretext case law reveals is that courts are good at inferring pretext from a wide range of factors,⁵⁷⁶ and that if they are given a broad range of evidence to evaluate, they are better able to find pretext. Cohen's analysis is not wrong, but it does pose certain risks; without spelling out how courts may take cues about a flawed or broken process, it is possible courts might interpret Cohen's rule too narrowly.

Taking an expansive view of the kinds of evidence courts should review in ascertaining pretext is a way to both enforce constitutional protections of private property and preserve the integrity of the political process.⁵⁷⁷ On one hand, deference to legislatures leaves constitutional rights vulnerable to myriad forms of abuse by legislatures.⁵⁷⁸ On the other hand, a robust pretext standard gives teeth to challenges that assert the political process is being manipulated for someone's private gain.⁵⁷⁹ Citizens emerge with stronger protections for their property. Similarly, would-be private beneficiaries, like Costco in *99 Cents*, will have to answer to the law if they try to use their influence to hijack the political process.⁵⁸⁰ Applying this heightened standard for pretext claims also means that the legislative

571. See *supra* note 521 and accompanying text (noting Cohen's criticism of a "comprehensive plan rule" for its susceptibility to creating a safe harbor for abuse); see also Garnett, *supra* note 83, at 454 ("[G]overnment officials will view planning as a constitutional safe harbor and private litigants will consider lack of planning a constitutional red flag.").

572. See *supra* Part I.D. Albeit, one could argue that the two factors discussed in Part I.D. that Justice Kennedy did not mention—(1) the availability of alternatives to condemnation and (2) failed negotiations—might fit into a comprehensive plan test or fit under the rubric of "procedural irregularity" discussed in Justice Kennedy's concurrence. See *supra* notes 130, 194 and accompanying text.

573. See *supra* Part II.A.2.a.

574. See *supra* Part I.D.2.c.

575. See *supra* Part I.D.2.b.

576. See, e.g., *supra* notes 254–56 (discussing *In re 49 WB v. Village of Haverstraw*, 839 N.Y.S.2d 127 (App. Div. 2007), in which the court uncovered a complex scheme to benefit a private party at the expense of the condemned property owner).

577. See *supra* notes 516–17 and accompanying text.

578. See *supra* notes 66–84 and accompanying text.

579. See *supra* Part I.D.1.a.

580. See *supra* note 218 and accompanying text (discussing the Ninth Circuit's invalidation of a taking on behalf of Costco).

process will not be so easily corrupted by parties and condemning authorities who develop complex schemes to take private property,⁵⁸¹ restoring integrity to the political process. It potentially secures the long-cherished constitutional promise that A's property may not be taken to enrich B.⁵⁸² It bolsters public trust in the law-making branch and administrative offices, which in turn is the basis for trusting in a system that defers to legislative judgments.⁵⁸³

B. Pleading Pretext and Pleading Standard

This Note does not suggest where courts should come down on the debate over applying *Twombly*'s plausibility pleading standard or *Conley*'s notice pleading standard.⁵⁸⁴ However, which standard a court chooses may reflect an underlying attitude toward pretext claims.⁵⁸⁵ Courts like the Second Circuit in *Goldstein* may be resistant to giving weight to Justice Kennedy's concurrence out of fear that doing so will open the floodgates to more litigation.⁵⁸⁶ This fear raises the question whether such courts even accept the premise of a pretext claim altogether. Framed as the Second Circuit framed it—that plaintiffs need to allege that the asserted purpose of the project is egregious⁵⁸⁷—confounds a pretext standard with a rationality standard. A *Goldstein* pretext standard would obviate the need for a pretext claim altogether, because a taking that met that standard could be struck down on rational basis grounds anyway.⁵⁸⁸ Regardless of the pleading standard courts apply, what courts should recognize is that the core tension with regard to pretext—between deference to legislative judgments about valid purpose and judicial scrutiny of illegitimate motives—can be resolved, and that it should be resolved in favor of hearing pretext

581. See, e.g., *supra* notes 254–56 and accompanying text (discussing *In re 49 WB*); *supra* notes 166 (discussing *Armendariz*).

582. See *supra* note 87 and accompanying text.

583. See *supra* note 519 and accompanying text.

584. See *supra* Part II.A.1 (discussing the split between the Second Circuit and the D.C. Court of Appeals on the issue of applying *Twombly* or *Conley* to pretext claims).

585. See *supra* notes 311–12 and accompanying text.

586. See *supra* Part II.A.1. If the Second Circuit really does assume that Justice Kennedy's factors govern, then it should be irrelevant that New York State provides relief from such a requirement; to do otherwise would subvert the notion that *Kelo* set the floor for constitutional rights under the Takings Clause and not the ceiling. See *supra* note 64 and accompanying text. *Goldstein*'s treatment of this factor would suggest it has gone beneath the floor. See *supra* note 64 and accompanying text (federal constitutional protections set the minimum below which private property rights may not be violated).

587. *Goldstein v. Pataki*, 516 F.3d 50, 64 (2d Cir. 2005) (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)) (explaining how a taking that alleged “egregious” acts would trigger heightened scrutiny); see also *supra* notes 159–61 (discussing regulations which fail under rational basis review).

588. See *supra* Part I.C.

claims.⁵⁸⁹ This is precisely what the *Franco* court found.⁵⁹⁰ In doing so, it honored the concerns the Court expressed in *Kelo*.⁵⁹¹

Pretext claims are highly dependent on discovery precisely because legislatures have an incentive to hide facts so as to conceal their motive.⁵⁹² Indeed, even in *Kelo*, an extensive inquiry did not succeed in producing all available information that might have sustained a pretext claim.⁵⁹³ In light of this anecdote, the substantive dimensions of permitting pretext claims to go to discovery are stark: without the evidence produced in discovery, many pretext claims may not get very far in court.⁵⁹⁴ For this reason, and because constitutional rights are at stake, courts should err on the side of hearing pretext claims. Granted, conclusory allegations should not be enough, but when plaintiffs raise factual allegations that fit the profile of pretext, they should not be dismissed on the pleadings. Furthermore, evidence of the full story in *Kelo* may not have swayed the court anyway, but the point is that potentially critical information, even if it is a type that plaintiffs cannot imagine, may come to light in discovery.

This is exactly what happened in *Goldstein*.⁵⁹⁵ An analysis of that case reveals that the Second Circuit may have applied *Twombly* precisely because it sought to avoid hearing a pretext claim—just as courts applying *Twombly* in other contexts do so for various policy reasons.⁵⁹⁶ It did not matter that the plaintiffs actually pled factual allegations that fit the profile of a pretext claim, because the court, in hiding behind a plausibility pleading standard, may not have wanted to review these claims in the first place.⁵⁹⁷ Hence, the *Goldstein* plaintiffs' obstacle to getting to discovery may not have been caused by the choice of pleading standard—though a more liberal pleading standard would probably ensure that more pretext claims get to discovery.⁵⁹⁸ Rather, the obstacle was the Second Circuit's deep resistance to scrutinizing claims that it discerned undermine the Court's decision in *Kelo*, a fear that underpinned its dismissal of the pretext claim.⁵⁹⁹ Addressing this attitude is more important in giving substantive weight to pretext claims than is mandating that courts apply a particular pleading standard. If, in a future decision, the Court makes clear that it intended to create a new rule, the underlying concerns of the *Goldstein* court⁶⁰⁰ fall away; instead of a response like in *Goldstein*, courts will be

589. See, e.g., *supra* note 385 and accompanying text.

590. See *supra* notes 383–84 and accompanying text.

591. See *supra* Part I.C (discussing the Court's call for application of heightened scrutiny for claims alleging impermissible favoritism).

592. See *supra* note 383 and accompanying text.

593. See *supra* note 27.

594. See, e.g., *supra* Part II.A (discussing *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008)).

595. See *supra* Part II.A.

596. See *supra* note 311 and accompanying text.

597. See *supra* note 316 and accompanying text.

598. See, e.g., Part II.A.1.

599. See *supra* Part II.A.2.a (discussing the narrow view of pretext claims).

600. See *supra* note 347 and accompanying text.

receptive to such claims,⁶⁰¹ like they were in *Franco* and numerous other state and federal cases.⁶⁰²

CONCLUSION

Although Justice Kennedy's concurrence opened the door to pretext claims, *Kelo*'s reaffirmance of a rational basis test sent an opposing signal, leaving courts little room to invalidate takings under the Public Use Clause. The danger of such a holding is that courts will read deference as an indication that they must retreat to the "borders" of judicial review, no matter the degree of the stench of favoritism.

Fear of judicial retreat was confirmed in *Goldstein*. The *Goldstein* plaintiffs claimed that the developer, Ratner, was getting a sweetheart deal that came at the expense of the public interest, and which led to the taking of private homes. By confusing *Kelo*'s call for deferential review with an absolute bar on scrutiny for anything other than an egregious taking, the Court dismissed plaintiffs' pretext claims, denying them discovery and a chance to build their case. The *Goldstein* court's application of the *Twombly* standard evinced its hostility toward and disdain of pretext claims; it dismissed the case not because the facts plaintiffs alleged were insufficient, but because the court was deeply skeptical of the validity of pretext claims altogether. The outcome in *Goldstein* is exactly what Justice Kennedy sought to warn against in his concurrence.

However, Justice Kennedy's acknowledgment of a possible standard skin to a process scrutiny approach provides future courts with the tools to ensure that the taking is truly public. That test evaluates a variety of factors—mostly objective circumstantial evidence—to infer purpose. Application of this standard in numerous decisions demonstrates that it is a tried-and-true tool. The principle underlying these decisions is a full-bodied defense of the Public Use Clause. No matter what the asserted purpose—however reasonable it appears on the surface—if the intended benefit is private then the purpose is no longer public. Process scrutiny of pretext thus holds the potential to reverse the trend of abuse of the eminent domain power. By ferreting out favoritism, and thereby restoring faith in the legislative process, the Court would lend credit and trust to the very legislative process to which its decision in *Kelo* deferred.

601. See, e.g., *supra* Part II.A.2.b.

602. See, e.g., *supra* Part I.D.