MISUSING EMINENT DOMAIN: PRETEXTUAL TAKINGS FOR A TRADITIONAL PUBLIC USE

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Eminent domain is a powerful tool at the disposal of local, state and federal governments. The Fifth Amendment to the U.S. Constitution imposes two conditions on this sovereign power: the taking must be for "public use," and the condemner must pay "just compensation" to the property owner. There are minimal guardrails in place to police potential misuse of the eminent domain power in the courts. The U.S. Supreme Court equates "public use" with "public purpose" and applies a deferential standard of review to a condemner's determination that a taking serves a public purpose. Nonetheless, the Court in Kelo v. City of New London *asserted that courts should inquire whether a condemnation's purported public purpose is pretext to confer a purely private benefit and, if so, that taking would be unconstitutional.*

However, the Supreme Court has not clarified whether courts should consider a condemner's pretextual motive if the taking otherwise satisfies a purely public use, such as a park. Some lower courts review a condemner's motivation underlying the taking. They ask whether the actual goal was to prevent unwanted use of land that the condemner was unwilling or unable to stop by other means. If so, those courts find that the taking fails to satisfy the Public Use Clause. Other lower courts hold that it is enough that the property provide a public amenity, despite the condemner's asserted pretextual reason for the condemnation.

This Note argues that courts should review plausible claims of pretext, even for traditional public use takings, under a "rational basis plus" standard of review that follows a two-step analysis. Step one requires courts to decide whether there is evidence that the condemnation came after a proposed, unwanted commercial use. Step two requires courts to consider whether the asserted public purpose is simply pretextual for thwarting the alleged proposed use under a rational basis plus standard of review. This review will prevent condemners from using eminent domain in bad faith to

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take private property for a public amenity, thereby avoiding zoning and other land use processes.

INTRODUCTION

"The power of eminent domain is a fundamental and necessary attribute of sovereignty . . . ."[1] Although an individual's right to property is rooted in the nation's common law, the power of eminent domain—the power of the government to "take" private property—supersedes that right as a natural power of a sovereign state.[2] In order to balance that power with an individual's right to property, the Fifth Amendment to the U.S. Constitution conditions the right of eminent domain with two requirements: the taking must be for a "public use," and the condemner must pay market value compensation to the property owner.[3] Although the power of eminent domain is essential to ensuring the proper functioning of a sovereign state, overuse of eminent domain risks undermining the objectives of a protected, individual private property regime and has the potential to sidestep rational basis government zoning review.

In defining the contours of the Fifth Amendment's Public Use Clause, the U.S. Supreme Court has not articulated whether courts should look to a condemner's motivation underlying a taking for a traditional public use.[4] The Court's last significant analysis of the Public Use Clause came almost twenty years ago in *Kelo v. City of New London*,[5] where the Court asserted that a taking is unconstitutional if the public purpose for the taking is "mere pretext" for impermissibly benefiting a private actor.[6] Therefore, a pretextual taking fails the public use requirement when the condemner states a public purpose when, in reality, it intends to benefit a private party.[7]

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1. Rosenthal & Rosenthal Inc. v. N.Y. Urb. Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985); *see also* Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924).

2. *City of Chattanooga*, 264 U.S. at 480 ("The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state.").

3. U.S. CONST. amend. V. ("[N]or shall private property be taken *for public use*, without just compensation." (emphasis added)). This is commonly referred to as the "Takings Clause." *Takings Clause*, BLACK'S LAW DICTIONARY (12th Ed. 2024). This Note will refer to the clause "for public use" as the "Public Use Clause." *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984) (referring to the public use requirement as the Public Use Clause).

4. *See* New England Ests., LLC v. Town of Branford, 988 A.2d 229, 252 (Conn. 2010).

5. 545 U.S. 469 (2005).

6. *Id.* at 478 ("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.").

7. *Id.* at 477–78. *Black's Law Dictionary* defines pretext as "[a] false or weak reason or motive advanced to hide the actual or strong reason or motive." *Pretext*, BLACK'S LAW

However, the Court did not address any previous judicial review of pretextual or bad faith motivation by condemners under the Fifth Amendment.[8] Therefore, whether courts can find a pretextual violation of the Public Use Clause in situations besides that discussed in *Kelo*—where a purported public purpose may be pretext for conferring a private benefit—remains an open question.[9] This has led to an inconsistent analysis across state and federal courts. Some courts invalidate traditional takings for a public use[10] based on condemner bad faith motive, and other courts defer to legislative determinations of public use without inquiring into alleged pretexts or motives.[11]

Thus, the following questions remain unresolved: Should courts review pretextual, bad faith motivation behind an otherwise valid taking to decide whether it is justified by the claimed traditional public use? And how much deference should the courts give to a claimed, traditional public use if there is evidence of pretextual, bad faith motive? This Note argues that courts should elevate to a "rational basis plus" standard of review when there is evidence that a condemner invoked eminent domain after a proposed, and ultimately disfavored, use.[12]

In reaching this conclusion, this Note proceeds in three parts. Part I illustrates the history of eminent domain takings jurisprudence under the Fifth Amendment's Takings Clause and explains the core of the Supreme Court's takings jurisprudence interpreting the public use requirement. Next, Part II examines the recent case from the U.S. Court of Appeals for the Second Circuit, *Brinkmann v. Town of Southold*,[13] which analyzed whether a court should review alleged pretext or motive behind a taking for a public park. Part II further illustrates the various applications of pretext and bad faith analysis in lower courts. Finally, Part III proposes that the Court should use a "rational basis plus" standard of review when it is confronted with plausible evidence of pretext, even for an otherwise valid public use. It suggests a two-step test where the heightened review is triggered by evidence

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DICTIONARY (12th Ed. 2024); *see also* Daniel S. Hafetz, Note, *Ferreting Out Favoritism: Bringing Pretext Claims After* Kelo, 77 FORDHAM L. REV. 3095, 3096 n.7 (2009) ("A pretext is . . . a cover for a purpose one wishes to hide." (quoting Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1152 (1986))).

8. *See New England Ests.*, 988 A.2d at 253 n.27 (noting that the Court in *Kelo* did not address the issue of whether a bad faith taking would violate the public use requirement because that issue was not before the Court).

9. *See id.* at 252.

10. *See infra* Part I.A.1. "Traditional takings" refer to land seizures with the goal of a traditional public use—such as a park or recreational field. *See infra* Part I.A.1. This is "traditional" in the sense that the purpose for the land is a classic public use under interpretations of the Fifth Amendment's Public Use Clause. *See infra* Part I.A.1.

11. *Compare infra* Part II.A, *with infra* Part II.C. For the purposes of this Note, the condemner acts in bad faith when it provides a pretextual purpose for the taking to hide its actual purpose.

12. *See infra* Part III.

13. 96 F.4th 209 (2d Cir.), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).

that a taking occurred after the discovery of an otherwise valid—but unwanted—use.

I. THE POWER OF EMINENT DOMAIN AND THE TAKINGS CLAUSE

Part I explains the Supreme Court's interpretation of the public use requirement and how it applies to pretextual takings. Part I.A. provides a brief history of eminent domain and the Fifth Amendment. Part I.A.1 explains the common types of property takings, and Part I.A.2 notes how they are litigated in federal court today. Part I.B illustrates modern Supreme Court jurisprudence around the expansion of the Public Use Clause to mean "public purpose" and how the Court generally defers to condemner determinations of public purpose. Part I.C explains the Court's decision in *Kelo v. City of New London* where the Court held that a taking for economic development constitutes a valid public purpose and said that pretextual takings which cover a private benefit would be unconstitutional. Part I.D then examines how the Second Circuit analyzed a pretextual challenge to a taking post-*Kelo*.

A. The Fifth Amendment and the Public Use Clause

The sovereign power of eminent domain existed before the Fifth Amendment, and early court cases justified this power through natural law.[14] The framers, such as James Madison, were concerned about a failure of the political process should government overreach into individual property ownership.[15] Madison sought to ensure that the Constitution embodied a national commitment "against arbitrary interference with property interests."[16] This fear was rooted in a concern from previous interference by the British government in the colonies.[17] The framers envisioned a government responsible to the people and not a monarch.[18] Ultimately, the framers struck a balance between the power to condemn with the protection of individual property rights from government overreach.[19]

The power of eminent domain is conditioned by the Fifth Amendment to the U.S. Constitution, which states in part "nor shall private property be taken for public use, without just compensation."[20] This clause of the Fifth Amendment, known as the "Takings Clause," places two conditions on a sovereign's natural power of eminent domain: the "public use" and "just

14. *See* David L. Schwed, *Pretextual Takings and Exclusionary Zoning: Different Means to the Same Parochial End*, 2 ARIZ. J. ENV'T L. & POL'Y 53, 55–56 (2011) (citing William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972)).

15. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782–84 (1995).

16. *Id.* at 784.

17. *See id.* at 782–85.

18. *See id.*

19. *See id.*

20. U.S. CONST. amend. V.

compensation" requirements.[21] The Takings Clause implies that the power to condemn private land for public use is within the natural powers of a sovereign.[22] Furthermore, the Takings Clause of the Fifth Amendment is applied to the states through the Fourteenth Amendment, and the power of eminent domain is given to state governments through the Supreme Court's decision in *Kohl v. United States*.[23]

The Public Use Clause is enshrined in the Constitution to ensure that the government cannot seize land solely for private benefit.[24] The Court has expanded the scope of the public use requirement over the years, moving from requiring that the seized land be put toward a traditional public use, or "use by the public," into a valid "public purpose."[25] This public purpose can include public benefit through economic development.[26] This Note primarily examines the public use requirement and, ultimately, how much deference courts should give to a determination of public use if there is evidence of condemner pretextual motive behind the stated public use.

1. Types of Property Takings

There are three main types of takings in modern property law: traditional takings for public use,[27] economic development takings,[28] and regulatory takings.[29] This part explains the difference between traditional takings and economic development takings.

Traditional takings are condemnations for a public amenity such as parks or recreational fields, government buildings, land for public utilities, public transportation, or roads.[30] In any of these examples, the government typically ends up owning title to the seized land.[31] The Court originally analyzed whether a taking served a public use under a traditional "use by the public" test, but expanded to a broader notion of public "purpose."[32] Due to this expansion, a condemner may seize land for a public purpose when it seeks to revitalize a "blighted" area for neighborhood revitalization.[33] The Court has held that "urban renewal," or clearing blight, is a valid public

21. Kelo v. City of New London, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting) (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32 (2003)).

22. *See* Schwed, *supra* note 14 at 55–56 (citing Stoebuck, *supra* note 14, at 555).

23. 91 U.S. 367 (1875); *id.* at 372–73.

24. *See* Hafetz, *supra* note 7, at 3107.

25. *See Kelo*, 545 U.S. at 496–97.

26. *See infra* Part I.C.1.

27. *See* Debra Pogrund Stark, *How Do You Solve a Problem Like in* Kelo*?*, 40 J. MARSHALL L. REV. 609, 648–50 (2007). This Note predominantly focuses on this type of taking.

28. *See id.* at 640. *See generally Kelo*, 545 U.S. 469.

29. Regulatory takings occur when the government denies an owner an economically viable use of their land through regulation. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). Note, however, regulatory takings are not the focus of this Note.

30. *See* Stark, *supra* note 27, at 612.

31. *See id.* at 612, 636–37.

32. *See Kelo*, 545 U.S. at 478–80 (noting Justice Oliver Wendell Holmes Jr.'s rejection of the strict use by the public test in the early twentieth century).

33. *See infra* Part I.B.

purpose and, furthermore, that the Court will defer to legislative determinations of such public purpose.[34] Although that is a significant departure from the original meaning of a public use—such as a park or government building—it is now an appropriate justification for eminent domain.

An economic development taking is when the condemner seizes the land under eminent domain, and the land is ultimately transferred to a private owner in furtherance of an economic development plan.[35] These takings are valid so long as it benefits the public through providing tax revenue or well-planned economic redevelopment.[36] Here, the condemner typically transfers title from private property owner A to private property owner B. The Supreme Court noted that such a transfer of property may run the risk of a pretextual purpose when it ultimately serves a private benefit.[37] Under those circumstances, it would be held unconstitutional under the Public Use Clause because the purported public purpose is pretext for a solely private benefit.[38] However, so long as it widely benefits the public, the Court held that economic development takings are constitutional under the Public Use Clause.[39]

2. How Takings Claims Are Litigated in Federal Court

Until 2019, litigants with takings claims had to initially file suit in state court and seek just compensation there before filing a claim in federal court.[40] However, after the Supreme Court decision in *Knick v. Township of Scott*,[41] litigants may now bring takings claims in the first instance in federal district courts under 42 U.S.C. § 1983.[42] The Court reasoned that the "state-litigation" requirement moves the Takings Clause to a lower status among the rest of the Bill of Rights.[43] Therefore, the ability to bring an individual takings claim under § 1983 would "[restore] takings claims to the full-fledged Constitutional status" as envisioned by the framers.[44] The Court overruled the "state-litigation requirement" that required the litigants to

34. *See infra* Part I.B; *infra* notes 51–52 and accompanying text.
35. *See infra* Part I.C.1.
36. *See infra* Part I.C.1.
37. *See Kelo*, 545 U.S. at 478.
38. *Id.*; *see also infra* Part I.C.1.
39. *See Kelo*, 545 U.S. at 485–86.
40. *See* Laura D. Beaton & Matthew D. Zinn, Knick v. Township of Scott*: A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation*, 47 FORDHAM URB. L.J. 623, 623–25 (2020).
41. 139 S. Ct. 2162 (2019).
42. *Id.* at 2170, 2172–73 (explaining that 42 U.S.C § 1983 allows individuals to sue for the deprivation of a right secured by the Constitution); *see also* Beaton & Zinn, *supra* note 40, at 623–26.
43. *Knick*, 139 S. Ct. at 2169–70, 2177.
44. *Id.* at 2177 ("Takings claims against local governments should be handled the same as other claims under the Bill of Rights.").

exhaust their claim in state court and not receive just compensation before filing a federal claim.[45]

This shifted a key procedural issue that may influence the substance of federal takings law.[46] Today, litigants may file their claim in either federal or state court, but lower federal courts have not developed significant takings jurisprudence.[47] Most takings claims arrived at the Supreme Court from state courts of last resort, and the Court does not often rule on takings issues.[48] The Court's decision in *Knick* now allows more federal takings claims in district courts, requiring them to answer public use issues more frequently.[49]

B. Berman *and* Midkiff*: Judicial Deference to the Legislature*

The Court's consequential expansion of the definition of public use to encompass a valid public purpose grew out of twentieth century takings case law.[50] This part explains two key cases that illustrate deference to broad legislative pronouncements of what constitutes a public purpose.

First, the Court held in *Berman v. Parker*[51] that the District of Columbia could condemn land as blighted for the public purpose of "urban renewal" or redevelopment.[52] The plaintiff, the owner of a department store, challenged the condemnation because their store was neither "blighted" nor a residential building that the redevelopment plan sought to clear.[53] The Court held that the blight designation still applied to the plaintiff's store because the Court would not force the government to condemn in a piecemeal way through its redevelopment plan.[54] The Court held that once a valid public purpose is decided, it defers to the legislative determination of the "amount and character" of the land necessary.[55]

The Court also held that the concept of public use is "broad and inclusive," and there is nothing in the Takings Clause that prohibits the District of Columbia from condemning blighted land for community redevelopment.[56] The Court in *Berman* illustrated a strong deference to condemner judgment

45. *Id.* at 2177–79 (citing Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)).

46. *See* Beaton & Zinn, *supra* note 40, at 624–25.

47. *See id.* at 625–26.

48. *See* Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 668–70 (2007); Beaton & Zinn, *supra* note 40, at 625 n.12, 625–26 ("In the last 20 terms, the Court has decided only 13 takings cases, and only three since the 2012–13 term."); *see also* San Remo Hotel v. City & County of San Francisco, 545 U.S. 323, 347 (2005) ("[M]ost of the cases in our takings jurisprudence . . . came to [the Supreme Court] on writs of certiorari from state courts of last resort.").

49. *See* Beaton & Zinn, *supra* note 40, at 625.

50. *See* Kelo v. City of New London, 545 U.S. 469, 478–80 (2005).

51. 348 U.S. 26 (1954).

52. *Id.* at 34–36.

53. *Id.* at 31.

54. *Id.* at 35–36.

55. *Id.*

56. *Id.* at 33.

for what constitutes a valid public purpose.[57] It held that the Court's role in reviewing a legislature's determination of public use is a "narrow one."[58] Moreover, it catalyzed the ability of condemners to determine neighborhoods are "blighted" and seize them for redevelopment under the Public Use Clause.[59] Consequently, the Court dramatically expanded what qualifies under the Public Use Clause to include a broad public purpose.

Next, the Court reaffirmed its deferential stance to condemner determination of public purpose in *Hawaii Housing Authority v. Midkiff*.[60] Here, the condemning authority sought to break up a land oligopoly by condemning the land through eminent domain and reselling the land.[61] The housing authority argued that the public purpose was not to eliminate blighted buildings like those found in *Berman*, but rather to destroy an unfair real estate oligopoly in a limited housing market for Hawaiians.[62]

The Court in *Midkiff* held that this served a valid public use because a taking is constitutional if it is "rationally related to a conceivable public purpose."[63] Justice Sandra Day O'Connor, writing for a unanimous Court, asserted that legislatures are best at determining when and how to condemn property.[64] The Court further held how it is only the taking's "purpose, and not its mechanics," that must survive a public use analysis.[65] Therefore, courts "must" defer to the legislature's determination of public purpose because they are best at understanding the needs of their community.[66] Accordingly, the Court held that the breaking up of a land oligopoly to restore the housing market was a valid public purpose under the Public Use Clause.[67]

C. Kelo v. City of New London*: Pretextual Takings for an Impermissible Private Purpose Are Unconstitutional*

The Supreme Court in *Kelo v. City of New London*[68] held that a taking for a proposed economic development plan served a "public purpose," thus satisfying the Public Use Clause of the Fifth Amendment.[69] This decision had a few significant impacts on takings jurisprudence. First, it further

57. *Id.* This falls in line with the rational basis review standard for the Fifth Amendment, where the Court will usually side with the government.
58. *Id.* at 32.
59. *Id.*
60. 467 U.S. 229 (1984).
61. *Id.* at 241–43.
62. *Id.*
63. *Id.* at 241.
64. *Id.*; *cf.* Kelo v. City of New London, 545 U.S. 469, 499–501 (2005) (O'Connor, J., dissenting) (arguing that economic development is not a valid public use despite the city's determination that it served a public purpose).
65. *Midkiff*, 467 U.S. at 244 (following the holding in *Berman*).
66. *Id.* at 244 ("Judicial deference is required because . . . legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.").
67. *See id.*
68. 545 U.S. 469 (2005).
69. *Id.* at 484–87 (majority opinion).

expanded the definition of the Public Use Clause from public purpose to an "expected public benefit" through economic development.[70] It permitted condemners to transfer private property to a private developer, so long as the condemner presents a valid secondary public benefit by doing so.[71] Second, it reaffirmed a strong preference at the Supreme Court for a deferential review of legislative determinations of what constitutes a valid public purpose.[72] Third, the majority explained that a condemner may not take land for a public purpose if that purpose is "mere pretext" for conferring a private benefit.[73] This pretext pronouncement presented a new litigation opportunity to challenge condemnations—that the condemner's stated public purpose is pretextual.[74]

1. The *Kelo* Majority Opinion

Susette Kelo, along with eight other plaintiffs, owned nonblighted property in the City of New London's proposed redevelopment zone.[75] The New London Development Corporation (NLDC) sought to redevelop ninety acres of a New London neighborhood called Fort Trumbull.[76] The NLDC intended to redevelop the area by attracting Pfizer to build company headquarters there, and the NLDC determined it needed a specific amount of land to complete the project.[77] The NLDC purchased land from willing sellers, but Kelo and her copetitioners remained unwilling to sell their land to the NLDC, so the NLDC condemned their homes through eminent domain.[78]

Kelo challenged the condemnation, arguing that the use of eminent domain in furtherance of economic development violated the Public Use Clause.[79] The case went up through the Connecticut state courts, and the Connecticut Supreme Court held that the condemnation for economic development satisfied the Public Use Clause.[80] Kelo and the other homeowners appealed, and the Supreme Court granted certiorari to answer the question of whether

70. *Id.* at 488.
71. *Id.* at 486–87.
72. *Id.* at 483–84.
73. *Id.* at 477–78.
74. *See* Hafetz, *supra* note 7, at 3096, 3099–100. Hafetz suggests that *Kelo*'s central holding of deference to legislative determinations of public purpose is in inherent conflict with this pretext pronouncement. *Id.*
75. *See Kelo*, 545 U.S. at 473–76.
76. *Id.* at 472–75. The city of New London designated the NLDC, a nonprofit entity, through legislation to assist in planning this economic development. *Id.* at 473. The city council also authorized the NLDC to "exercis[e] eminent domain in the City's name" after approving the plan. *Id.* at 475. Thus, the Court referred to the NLDC interchangeably with the city. *Id.* at 475 n.3.
77. *Id.* at 474–75.
78. *Id.* at 472–73.
79. *Id.*; *see also* Robert H. Thomas, *Recent Developments in Public Use and Pretext in Eminent Domain*, 41 URB. L. 563, 563–64 (2009).
80. *See Kelo*, 545 U.S. at 475–76 (citing Kelo v. City of New London, 843 A.2d 500, 527 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005)) (noting that the Connecticut Supreme Court relied on *Berman* and *Midkiff* as precedent).

a taking for economic development qualifies as a public use under the Takings Clause.[81]

In a 5-4 decision, the Court affirmed the Connecticut Supreme Court and held that a taking that promotes economic development satisfied the Public Use Clause of the Fifth Amendment.[82] Justice John Paul Stevens, writing for the majority, agreed with the Connecticut Supreme Court that the city's "well-reasoned" development plan was not adopted to "benefit a particular class of identifiable individuals."[83] Rather, the government provided sufficient evidence that it would benefit the public.[84] Moreover, the Court held that the government's exercise of eminent domain to transfer land to a private owner satisfied the Public Use Clause, so long as it was under a thoughtful plan with expected public benefits.[85] Therefore, the majority held that economic development was a valid public purpose.[86]

The *Kelo* decision built on *Berman* and *Midkiff*, further expanding the scope of the Public Use Clause.[87] The Court continued to reject a narrow conception of "public use" in favor of a broader conception of "public purpose" throughout the twentieth century.[88] This jurisprudence evolved from a theory of judicial deference to legislative judgments on land use—which is ultimately rooted in federalism.[89] The "blockbuster quality" of the *Kelo* decision is due to the holding that a taking for economic development is within the confines of the Public Use Clause.[90] Furthermore, it differs from *Berman* in that some of the land seized was not blighted.[91] Therefore, although *Berman* and *Midkiff* expanded the definition of public use to public purpose under the Fifth Amendment, *Kelo* took it significantly further.[92]

Moreover, *Kelo* and the Stevens Court afforded "great faith" in the structures of land-use decision-making.[93] *Kelo* affirmed the federalist notion of deferring to "well-formulated, authorized decisions of local governments."[94] This reveals a preference for institutional governance,

81. *Id.* at 477.
82. *Id.* at 488–90.
83. *Id.* at 478.
84. *Id.*
85. *Id.*
86. *See id.*; *see also* Lynda Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENV'T. AFFS. L. REV. 243, 257–58 (2012).
87. *See* Oswald, *supra* note 86, at 246–48; Hafetz, *supra* note 7, at 3102 ("*Kelo* . . . solidif[ied] the rule that the Court would review deferentially legislative decisions to take private property.").
88. *Kelo*, 545 U.S. at 479–80 (citing Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906)). The Court discussed late nineteenth century and early twentieth century Supreme Court cases that held that the old use by the public test is inadequate because it limits condemners. *Id.*
89. *See id.* at 483 ("For more than a century, our public use jurisprudence 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.").
90. *See* Hafetz, *supra* note 7, at 3102.
91. *Id.* at 3102–03.
92. *Id.*
93. Fenster, *supra* note 48, at 734.
94. *Id.* at 737.

focused on "*who* should decide, rather than towards the substantive issue of *what* should be decided."[95] Some scholars argue that this deference to legislative determinations of public use is to ensure that there is no judicial replacement of legislative decisions.[96] This is important to many courts because, they argue, the democratic branches must address the questions of what constitutes a public purpose, especially as condemnations become entwined with "socioeconomic regulation."[97] As a result, the majority used a deferential rational basis review to uphold the City's decision to condemn land for economic development.[98]

Additionally, the *Kelo* majority reaffirmed that states may amend their own constitutions and employ different, or stricter, "restrictions" for judicial review of public use.[99] After *Kelo*, many state courts enacted more restrictive definitions of public use through state statutes, state common law, or state constitutions.[100] Therefore, when state courts review eminent domain challenges, they often interpret both the federal and state constitutions in determining the constitutionality of the taking.[101] Occasionally, dispositive issues are resolved by state constitutional analysis, but often, they also must interpret the Fifth Amendment takings clause.[102]

Finally, a crucial element of *Kelo*, which has since informed public use challenges, was its discussion of potential pretextual takings.[103] Justice Stevens asserted that a condemner is not "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a *private benefit*."[104] It was the first time the Court asserted that a taking that is pretextual for private benefit is unconstitutional under the Public Use Clause.[105] This rule against pretext gained traction in subsequent litigation and now is a common claim to challenge the constitutionality of a taking.[106]

Justice Stevens looked to a few key factors in determining that the NLDC's taking served a valid public purpose under the Takings Clause and thus was not pretextual. They were (1) an integrated economic development plan,

95. *Id.* at 670.

96. *See* Hafetz, *supra* note 7, at 3102 n.54 (citing Charles E. Cohen, *The Abstruse Science:* Kelo, Lochner, *and Representation Reinforcement in the Public Use Debate*, 46 DUQ. L. REV. 375, 379 (2008)).

97. *See* Oswald, *supra* note 86, at 278–79.

98. *See* Kelo v. City of New London, 545 U.S. 469, 484 (2005).

99. *See id.* at 489.

100. *See* Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALB. GOV'T L. REV. 1, 2–3 (2011).

101. *Id.*

102. *See* County of Hawaii v. C&J Coupe Fam. Ltd., 198 P.3d 615, 643 (Haw. 2008).

103. *See Kelo*, 545 U.S. at 478; *see also* Hafetz, *supra* note 7, at 3096; Thomas, *supra* note 79, at 564.

104. *Kelo*, 545 U.S. at 478 (emphasis added).

105. *See* Jason Kelley, *When a Township Exercises the Power of Eminent Domain, the Court Must Seek the True Purpose Behind the Taking and Void the Condemnation Where It Exceeds Statutory Authority:* Middletown Township v. Lands of Stone, 47 DUQ. L. REV. 655, 672–73 (2009); *cf. Kelo*, 545 U.S. at 477 (noting that a condemner may transfer property from one private party to another so long as there is a valid future public purpose).

106. *See* Hafetz, *supra* note 7, at 3102. This is not the only way to challenge a taking, but it opened a floodgate of litigation where plaintiffs claim a pretextual purpose. *Id.*

(2) the strength and "magnitude" of public benefits, and (3) any previous identification of private parties.[107] The presence of a well-developed economic development plan and a "reasoned explanation" were central to Justice Stevens's analysis and ultimate deference.[108] Justice Stevens's opinion stated that without an "integrated development plan," the taking may raise a suspicion of purely private purpose.[109] Here, the NLDC provided a substantial development plan which detailed how this taking would provide substantial jobs and economic benefit to the city.[110] Justice Stevens noted that without said plan, it may have raised suspicions of a purely private benefit, which would run afoul of the Public Use Clause.[111] After *Kelo*, lower courts have looked to the existence of an integrated plan as relevant evidence for examining a pretextual takings claim.[112]

Importantly, the majority asserted that although New London's economic development plan is not pretextual for a private purpose, there is potential for a valid pretextual claim in a future case.[113] The majority's concern for pretext arguably stemmed from the basis of the Public Use Clause: the government may not seize land under the Fifth Amendment *solely* for private gain.[114] Thus, the majority sought to ensure that a stated public purpose is not a cover for private benefit.[115] However, the Court neither specified whether it would conduct a heightened standard of review if presented with a plausible pretext claim, nor what that analysis would look like.[116]

2. Justice Kennedy's Concurrence: Meaningful Rational Basis Review for Pretextual Takings

Justice Anthony M. Kennedy wrote a concurrence agreeing with the majority that a taking for economic development did not violate the Public Use Clause.[117] However, Justice Kennedy wrote separately to argue for a "meaningful rational basis review" when there is evidence of pretext with

107. *See* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 184–85 (2009); *see also* Kelley, *supra* note 105, at 672–73.

108. *See Kelo*, 545 U.S. at 483–84; *see also* Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 8 COLUM. L. REV. 2147, 2170 (2019) (noting how the majority relied on the "careful, deliberative process in the record" to afford a basis for deference to the city's determination of what qualified as a public purpose).

109. *See Kelo*, 545 U.S. at 487; *see also* Stark, *supra* note 27, at 613–15.

110. *See* Kelley, *supra* note 105, at 672.

111. *See Kelo*, 545 U.S. at 487. Justice Stevens noted that in *Kelo*, however, that there is no issue of a suspicious one-to-one transfer and that hypothetical issues can be "confronted if and when they arise." *Id.*

112. *See* City of Chicago v. Eychaner, 26 N.E.3d 501, 521–22 (Ill. App. Ct. 2015) ("A taking will likely pass constitutional muster where done in furtherance of a sound economic development plan, rather than the plan retroactively justifying the taking."); *see also* Kelly, *supra* note 107, at 189–90 (collecting cases).

113. *See Kelo*, 545 U.S. at 487.

114. *See* Hafetz, *supra* note 7, at 3107.

115. *Id.*

116. *See id.*

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

"impermissible favoritism" to a private party.[118] This would be a higher standard of review for a "more narrowly drawn category of takings," above the traditionally deferential rational basis test.[119] Justice Kennedy suggested that when a court is "confronted with a plausible accusation" of pretextual public purpose hiding private benefit, it should treat this accusation seriously and review the record meaningfully, while presuming that the government's actions were "reasonable and intended to serve a public purpose."[120]

In support of his argument, Justice Kennedy analogized this meaningful rational basis review to a type of rational basis review used in Equal Protection Clause cases, citing cases such as *City of Cleburne v. Cleburne Living Center*[121] and *Department of Agriculture v. Moreno*.[122] In those cases, the Court engaged in a heightened rational basis review, commonly known as rational basis with "bite" or "rational basis plus" review.[123] There, the class involved in the equal protection claim was not a protected one requiring intermediate or strict scrutiny.[124] Rather, it was a class that the Court normally reviews under a rational basis review.[125] Rational basis review is traditionally deferential to the government so long as the government action is "rationally related to a legitimate state interest."[126] However, in *Cleburne* and *Moreno*, the Court employed a rational basis plus review for a nonsuspect class, performing a slightly more exacting review of the government's decision.[127]

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118. *Id.* at 492–93; *see also* Oswald, *supra* note 86, at 258–59; Hafetz, *supra* note 7, at 3116–17; Stark, *supra* note 27, at 615–18.

119. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) ("[C]ases 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."); *see also* Oswald, *supra* note 86, at 258–59.

120. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

121. 473 U.S. 432 (1985).

122. 413 U.S. 528 (1973); *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

123. *See* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072–76 (2015); Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of* Olech*'s Class of One*, 55 LOY. L. REV. 697, 744 (2009). This Note will refer to this method of analysis as "rational basis plus" review instead of rational basis with "bite."

124. *See* Hafetz, *supra* note 7, at 3114. In equal protection claims, intermediate scrutiny is triggered by classifications like gender, and the law is upheld if it is "substantially related to an important government purpose." *Id.* at 3100 n.37 (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 671–72 (3d ed. 2006)). Strict scrutiny is triggered by suspect classes such as race, religion, or national origin. *Id*. In Fifth Amendment takings claims, public use determinations are typically reviewed by the most deferential standard of review—rational basis review. *See Kelo*, 545 U.S. at 490–91 (Kennedy, J., concurring).

125. *See* Hafetz, *supra* note 7, at 3114; Holoszyc-Pimentel, *supra* note 123, at 2074–76.

126. *See* Hafetz, *supra* note 7, at 3114 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)). Hafetz notes that "state interest" will be replaced with "public use" in the takings context and that the language Justice Stevens uses in *Kelo* is quite similar: "When the legislature's purpose is legitimate and its means are not irrational." *See id.* at 3114 n.157 (quoting *Kelo*, 545 U.S. at 488).

127. *See* Blackman, *supra* note 123, at 744–45. For example, in *Cleburne*, the Court engaged in a "searching inquiry" and scrutinized the government's reasons for treating a home

Accordingly, Justice Kennedy suggested that courts employ a rational basis plus standard of review to review a Takings Clause claim that a pretextual taking, which "by a clear showing," is intended to favor a private party.[128] Justice Kennedy provided three key factors that persuaded him that the Connecticut trial court properly examined the NLDC's condemnation under his proposed meaningful review.[129] First, Justice Kennedy emphasized the court's role in "scrutinizing" the condemning authority's procedures while exercising its eminent domain powers to investigate the condemner's purposes behind the taking.[130] Second, Justice Kennedy acknowledged that the evidence in the trial court's "careful and extensive inquiry,"[131] which included government official testimony and documentary evidence of communications between the government and corporate officers, suggested that there was no impermissible favoritism or private purpose.[132] Third, Justice Kennedy pointed to New London's carefully executed integrated economic development plan that served the public purpose of economic redevelopment.[133] Ultimately, Justice Kennedy agreed with the trial court's finding that the "primary motivation" of New London's plan was to take advantage of Pfizer's presence for economic development, rather than to directly benefit Pfizer.[134] This suggests that so long as a court examines similar factors, it would complete Justice Kennedy's proposed rational basis plus review.[135]

However, neither Justice Stevens's majority nor Justice Kennedy's concurrence provided specific instructions for how to analyze a pretextual claim moving forward.[136] Justice Kennedy's concurrence may be instructive, but it did not clearly state what might trigger rational basis plus review other than "a plausible accusation of impermissible favoritism to private parties."[137] Furthermore, the Court did not address the possibility of

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for the mentally handicapped differently than other similarly situated homes in the city. *See id.*

128. *Kelo*, 545 U.S. at 491 (2005) (Kennedy, J., concurring).

129. *Id.* at 491–92.

130. *Id.*; *see also* Stark, *supra* note 27, at 614–16.

131. *Kelo*, 545 U.S. at 491–92 (Kennedy, J., concurring).

132. *See id.*

133. *Id.*; *see also* Somin, *supra* note 100, at 28 n.152 (noting how *Kelo* emphasized an "integrated development plan" in its pretext analysis).

134. *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring).

135. *Id.* ("This case, then, survives the meaningful rational-basis review that in my view is required under the Public Use Clause.").

136. *See* Kelly, *supra* note 107, at 174–76 (noting that the Court did not "articulate a clear test" to determine whether a taking is pretextual); *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (arguing that the majority's pronouncement on "ferreting out takings" for a pretextual, private reason failed to detail "how courts are to conduct that complicated inquiry").

137. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring); *see also* Lynn E. Blais, *The Problem with Pretext*, 38 FORDHAM URB. L.J. 963, 977 (2011) (noting the need to identify a trigger to use a heightened scrutiny test for pretext claims); *cf. Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (arguing that Justice Kennedy's test for pretextual private purpose does not specify "what courts should look for in a case with different facts, [and] how they will know if they have found it").

pretextual takings made in bad faith other than for an impermissible private purpose.[138] However, lower courts have struck down takings as invalid because the condemnation was executed in bad faith, by, for example, thwarting an undesired use.[139] The *Kelo* Court did not specify whether a pretextual analysis would apply in any of those scenarios or whether it would apply to takings for a classic public use without any private benefit.[140] Therefore, the application of a pretextual analysis remains unclear.

3. Justice O'Connor's *Kelo* Dissent

Justice O'Connor authored the main dissent in *Kelo*, arguing that economic development is not a valid public purpose under the Public Use Clause.[141] Justice O'Connor argued that this interpretation of the Public Use Clause would have dangerous consequences to government overreach in eminent domain.[142] Although she agreed that judicial review of takings decisions should remain under the deferential rational basis standard, Justice O'Connor argued that the judiciary should not defer to a "purely private" transfer of property.[143] Justice O'Connor distinguished *Berman* and *Midkiff* from *Kelo* in arguing that the public purpose of those earlier cases "*directly* achieved a public benefit,"[144] whereas, in *Kelo*, the NLDC condemned nonblighted private property and "[gave] it over for new, ordinary private use" because it generated a "secondary benefit" to the public.[145] Thus, although Justice O'Connor agreed with a deferential review of legislative judgments of public purpose, she argued that economic development is not a valid public purpose out of a concern for an abuse of land use decision-making.[146]

Justice O'Connor also disagreed with Justice Stevens's assertion that "property owners should turn to the States" when analyzing the limits of the Public Use Clause.[147] Justice O'Connor argued that this extremely deferential approach is an "abdication" of the Supreme Court's responsibility and is essentially a "refusal to enforce properly the Federal Constitution."[148]

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138. *See* Hafetz, *supra* note 7, at 3117. Hafetz notes that not all pretextual takings, takings that "mask a hidden purpose," are motivated by direct private benefit or favoritism to a private party. *Id.*

139. *See id.*; *infra* Part II.C.

140. *Compare infra* Part II.A.2, *with infra* Part II.B (The *Brinkmann* majority and dissenting opinions disagreed on this specific lack of clarity in *Kelo*.).

141. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting); *see also* Raphael Janove, *Yielding to the Confiscation of Public and Private Property: Judicial Deference Under the Copyright and Takings Clause*, 39 VT. L. REV. 89, 101 (2014). Justice Thomas also authored a dissent arguing for a return to the strict "use by the public" standard of the Public Use Clause. *Kelo*, 545 U.S. at 513 n.2, 521 (Thomas, J., dissenting). He argued that the Court should not defer to legislative determinations of public use because the courts should interpret the Takings Clause—not the legislature. *See id.* at 520–21; *see also* Janove, *supra*, at 102.

142. *See* Janove, *supra* note 141, at 101.

143. *See id.*

144. *See Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

145. *Id.* at 501.

146. *See id.*; *see also* Janove, *supra* note 141, at 101–02.

147. *Kelo*, 545 U.S. at 504–05 (O'Connor, J., dissenting).

148. *Id.* at 504.

Justice O'Connor suggested that this dynamic actually undermines the role the Court has in enforcing and analyzing the Fifth Amendment.[149] Furthermore, Justice O'Connor argued that this expansion of what qualifies as a public purpose ultimately dilutes the Public Use Clause.[150]

D. Pretextual Challenges to Takings After Kelo

After *Kelo*, plaintiffs have used pretext as a way to challenge eminent domain condemnations by alleging that the condemner's stated public purpose is pretextual for an impermissible use.[151] Pretext litigation is typically devoted to uncovering an improper benefit to a private party because of *Kelo*'s facts and context.[152] However, some litigants also plead pretext by arguing that the stated public purpose is issued in bad faith and thus is a pretext for the real purpose—even if the land is used for a traditional public use.[153]

Additionally, *Kelo* did not provide a clear standard to lower courts on how to identify a pretextual taking, nor how to measure the public or private nature of a taking.[154] Similarly, there has been little state legislation devoted to resolving how to determine a pretextual taking.[155] Therefore, despite an increase of litigants pleading "pretext," there is general disagreement among lower courts as to how to analyze it.[156]

1. Scholarship on Pretext Claims

Scholars have analyzed the deficiencies and inconsistencies of pretextual analyses after *Kelo*.[157] Dean Daniel B. Kelly notes that there is a key disagreement about whether a condemner's motivation matters.[158] Dean Kelly argues that a test for pretextual takings based on intent alone is problematic.[159] He notes that since a condemner does not necessarily disclose their motivations in a particular decision, the test may be futile.[160] However, Dean Kelly also notes that the Supreme Court examines subjective motivation in a variety of other claims, and therefore, "the difficulty of determining motivation by itself" is not reason enough to completely reject a

149. *See id.*
150. *See id.* at 503–05. Justice O'Connor expressed concern that the majority's extremely deferential review failed to provide a concrete standard as to when a determination of public purpose would *not* be approved. *See id.* at 502–03; *see also* Landau, *supra* note 108, at 2170 n.140.
151. *See* Hafetz, *supra* note 7, at 3096 n.8.
152. *See infra* Part I.B.2.
153. *See infra* Parts II.A, C.
154. *See* Thomas, *supra* note 79, at 565; Kelly, *supra* note 107, at 174–76.
155. *See* Kelly, *supra* note 107, at 175–76.
156. *See infra* Part II.C.1.
157. *See, e.g.*, Kelly, *supra* note 107, at 184–86; Blais, *supra* note 137, at 177.
158. *See* Kelly, *supra* note 107, at 196–99.
159. *See id.*
160. *See id.* at 196.

motivation-based test for pretextual takings.[161] Dean Kelly concludes that condemners may be able to sidestep judicial scrutiny by hiding actual motivations, and thus, if they knew a test existed to uncover bad faith motivation, they could "circumvent" this motivation test.[162]

Professor Lynn E. Blais argues that it is challenging to examine motives in constitutional analysis, especially within the context of pretext challenges.[163] Professor Blais proposes that if pretext is going to matter in examining takings challenges, courts should employ the tiered review by the Supreme Court in claims where motive matters, such as Equal Protection Clause claims.[164] However, Professor Blais argues that because the other tiers of scrutiny for motive analysis require a "trigger" to elevate the level of scrutiny, it is difficult to determine what that "trigger" may be in the context of a pretext claim.[165] For example, neither the *Kelo* majority nor Justice Kennedy's concurrence specified what may trigger higher scrutiny for a potential pretext claim.[166]

Daniel Hafetz also notes that, in many pretextual takings cases, there usually is no document which clearly establishes that the primary motivation of the condemning authority is to confer a private benefit.[167] Therefore, courts may look to many factors, including circumstantial evidence, to determine a primary motivation or purpose.[168] Ultimately, even if motivation and pretext do matter to the specific court, lower courts have disagreed on ways to identify it.[169]

2. Pleading Pretext and Examining Motivation at the Second Circuit

A key example of a court examining a pretextual takings claim for an economic development taking post-*Kelo* is the Second Circuit's decision in

161. *Id.* at 197. Dean Kelly notes that the Court considered the motivation of city council members through "direct and circumstantial evidence" for a free exercise constitutional claim. *Id.* (citing Church of Lukumi Babalu, Inc. v. Hialeah, 508 U.S. 520 (1993)).

162. *See id.* at 182–84; *see also* Lynda Oswald, *Public Uses and Non-uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENV'T AFFS. L. REV. 45, 62–65 (2008) (noting how condemning authorities can be dishonest about their motives to circumvent proper scrutiny and a proper political process).

163. *See* Blais, *supra* note 137, at 975.

164. *See id.* at 976–77.

165. *Id.* at 976–77. Professor Blais also argues that the lack of a "trigger" informs the practical considerations of a litigant's pleading because of the heightened "plausible allegations" standard under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Blais, *supra* note 137, at 983–84 (citing *Twombly*, 550 U.S. 544 and *Iqbal*, 556 U.S. 662). Professor Blais argues that this heightened standard will be hard to overcome because pretext claims are driven by factual allegations of improper motive. *Id.* (citing Carol L. Zeiner, *When* Kelo *Met* Twombly-Iqbal*: Implications for Pretext Challenges to Eminent Domain*, 46 WILLAMETTE L. REV. 201 (2009)).

166. *See id.* at 976–77.

167. *See* Hafetz, *supra* note 7, at 3122–23.

168. *See id.*

169. *See infra* Part II.C. Hafetz argues that this may be due to the inherent tension between the central holding in *Kelo*—focusing on judicial deference—with this exception for review of pretextual takings. *See* Hafetz, *supra* note 7, at 3154.

Goldstein v. Pataki.[170] In *Goldstein*, the Second Circuit evaluated the plaintiff's claim that the Downtown Brooklyn, New York economic redevelopment plan primarily benefited Bruce Ratner—the real estate developer hired to execute this plan.[171] The plaintiffs pleaded that the taking impermissibly benefitted Ratner, but in doing so, they also admitted that the project would bear a "rational relationship" to several public uses.[172] The Second Circuit held that the plaintiffs "conceded" that the project created a public use, affirming the district court's ruling that the plaintiffs did not plead a substantive allegation of pretext.[173]

In supporting its holding, the Second Circuit expressed general concerns about pretextual takings inquiries. First, the court asserted that reviewing takings claims for underlying motive would have an "unprecedented level of intrusion into the [approval and planning] process."[174] It rejected the idea that *Kelo*'s pronouncement on pretext required an inquiry into the subjective motivation of every legislator who commenced an eminent domain proceeding for economic development.[175] The court held that Supreme Court precedent requires that courts simply "patrol[] the borders" of condemnation and not look into "illicit improper motivation."[176] Accordingly, the Second Circuit declined to examine any allegations of ulterior motives, maintaining a deferential standard of review for condemnation proceedings—simply looking to whether the decision is rationally related to a public purpose.[177]

Although the *Goldstein* court held that there were no plausible allegations of pretext in this instance, the Second Circuit specified that there may be a claim where "the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required."[178] Therefore, the Second Circuit remained willing to examine hypothetical, impermissibly pretextual takings in future cases.[179] However, like the Supreme Court in *Kelo*, the

170. 516 F.3d 50 (2d Cir. 2008).

171. *Id.* at 54. This economic redevelopment plan condemned residential homes for the Downtown Brooklyn commercial redevelopment, which included the future Barclays Center. This was known as the Atlantic Yards Redevelopment Project. *Id.* at 53.

172. *See id.* at 58–59; *see also* Thomas, *supra* note 79, at 576–77.

173. *Goldstein*, 516 F.3d at 53, 58–59; *see also* Thomas, *supra* note 79, at 576–77.

174. *Goldstein*, 516 F.3d at 62; *see also* County of Hawaii v. C&J Coupe Fam. Ltd., 198 P.3d 615, 648–50 (Haw. 2008).

175. *See Goldstein*, 516 F.3d at 62. ("Accordingly, we 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 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.").

176. *Id.* at 63.

177. *See id.* at 62. The Second Circuit noted that even if they applied Justice Kennedy's rational basis plus review, the court still would not have found any plausible allegations of pretext. *Id.* at 64 n.10.

178. *Id.* at 63.

179. *Id.*

Second Circuit also did not provide examples of what may trigger this heightened scrutiny.

In short, the Second Circuit relied on a strong standard of deference to legislative determinations of public purpose by focusing on the "purpose, and not the mechanics" of the taking.[180] Moreover, the pretextual analysis in *Goldstein*, like that in *Kelo*, focused on a stated public purpose with an alleged private benefit. The Supreme Court has not spoken to whether courts should review allegations of pretext or bad faith if the taking is for a classic public use: when there is no alleged private benefit. Lower courts have interpreted this ambiguity in different ways.[181] Thus, a specific rule is needed to resolve this question and clarify pretextual takings jurisprudence.

II. DEFERENCE DESPITE PRETEXT: *BRINKMANN V. TOWN OF SOUTHOLD*

The Supreme Court in *Kelo* declared that a condemner may not assert a pretextual public purpose disguising a private benefit in takings where the land transfers to a private party.[182] However, the Court has not specified whether courts should review alleged pretext or bad faith motive behind a taking for a traditional public use. This part examines how various lower courts review allegations of pretextual, bad faith condemner motivation behind a taking for a traditional public use.

Specifically, Part II examines the Second Circuit's decision in *Brinkmann v. Town of Southold*,[183] in which the Second Circuit held that it will not consider alleged pretext or condemner motivation if the public purpose is to build a traditional public amenity.[184] This question remains open at the Supreme Court and in other circuits because the Supreme Court denied the Brinkmanns' petition for certiorari in October 2024.[185] This is a legal question that deserves a clear answer because various courts disagree on how and whether to consider pretext in public use challenges involving a traditional public use.[186]

Part II proceeds in four parts. Part II.A explains Judge Dennis Jacobs's majority opinion in *Brinkmann*. Part II.B explains Judge Steven J. Menashi's dissenting opinion in *Brinkmann*. Part II.C illustrates examples of other courts that review pretext and condemner bad faith to invalidate takings for an otherwise valid public use. Part II.D briefly examines an analogue in

180. *Id.* at 62.
181. *Compare infra* Part II.A, *with infra* Part II.C.
182. *See* Kelo v. City of New London, 545 U.S. 469, 478 (2005).
183. 96 F.4th 209 (2d Cir.), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).
184. *Id.* at 210–11.
185. *See* Brinkmann v. Town of Southold, 145 S. Ct. 428 (2024) (mem.). Justices Thomas, Gorsuch, and Kavanaugh would have granted the petition for writ of certiorari. *Id.* Notably, Justices Thomas and Gorsuch previously indicated that they would overturn *Kelo* in the dissent of a different denial of certiorari. *See* City of Chicago v. Eychaner, 171 N.E.3d 31 (Ill. App. Ct. 2020), *cert. denied*, 141 S. Ct. 2422 (2021) (mem.) (Thomas, J., dissenting).
186. *See infra* Part II.C.

constitutional analysis under the Equal Protection Clause that examines government motive in a "class of one" claim.

A. The Brinkmann *Majority*

In *Brinkmann*, the Second Circuit examined the legal question of "whether the Takings Clause is violated when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use."[187] The court acknowledged that the plaintiffs alleged sufficient facts that the Town of Southhold's (the "Town") decision to condemn was a pretext to defeat the plaintiff's proposed commercial use.[188] Nevertheless, the *Brinkmann* majority held that the court does not investigate pretext or motivation of the legislature when the taking is for a traditional public use.[189] Part II.A.1 illustrates the factual background of the lawsuit, and then Part II.A.2 explains the majority opinion.

1. Background of the *Brinkmann* Lawsuit

Ben and Hank Brinkmann own a chain of midsize hardware stores on Long Island, New York.[190] In 2016, the Brinkmann brothers contracted the Bridgehampton National Bank to purchase land in the Town to develop a new store location.[191] The contract included a due diligence provision to ensure that the Brinkmanns could develop the land to their liking.[192] Therefore, they began a land-use process with the Town of Southold, the eventual defendants in this case.[193]

However, the Town of Southold continually implemented barriers to the Brinkmanns' ability to develop this land. In 2017, the Brinkmanns held a meeting with the local civic association where residents "expressed concern about traffic near the proposed store."[194] To address this concern, the Brinkmanns funded a traffic study which found that the store would not cause traffic problems.[195] Next, the Town required that the Brinkmanns fund a "Market and Municipal Impact Study" and apply for special building permits.[196] While the Brinkmanns conducted this requested study, the Town attempted to purchase the lot from the bank.[197] The bank refused, and the Brinkmanns ultimately closed on the land.[198] However, after closing, the

187. *Brinkmann*, 96 F.4th at 210.
188. *See id.* at 211.
189. *See id.*
190. *Id.*; Brinkmann v. Town of Southold, No. 21-CV-2468, 2022 WL 4647872 at *1 (E.D.N.Y. Oct. 1, 2022), *aff'd*, 96 F.4th 209 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).
191. *Brinkmann*, 2022 WL 4647872, at *1.
192. *Id.* at *1–2.
193. *Id.*
194. *Id.* at *1.
195. *Id.* The Brinkmanns also agreed to pay for any traffic improvements to the intersection. *See id.*
196. *Brinkmann*, 96 F.4th at 211.
197. *Brinkmann*, 2022 WL 4647872, at *1.
198. *Id.*

Town instituted a six-month building moratorium for a strip of land which included the Brinkmanns' lot.[199] Despite the county not finding any supportive evidence for the building moratorium, the Town extended the moratorium twice.[200] Finally, the Town instituted formal findings through state eminent domain procedures to establish that a park would constitute a public use, and the Town authorized eminent domain proceedings for a "passive-use park."[201]

The Brinkmanns brought a § 1983 claim in the U.S. District Court for the Eastern District of New York against the Town of Southold challenging the taking as unconstitutional and "pretextual."[202] Despite conceding that the park served a valid public use, the Brinkmanns argued that the Town's public purpose of a park was pretextual for defeating their planned commercial use based on the various roadblocks the Town tried to implement over the years.[203] The district court granted the Town's motion to dismiss, holding that the Brinkmanns failed to state a valid takings claim under the Fifth Amendment.[204] It held that the plaintiffs' allegations simply showed that the town "desire[d] to leave the plot of land undeveloped" and that there is a rational relationship to public use.[205] The Brinkmanns appealed to the Second Circuit, claiming that a taking violates the Public Use Clause if there is pretextual motive behind an otherwise facially valid public purpose.[206]

2. The Second Circuit's Majority Opinion

The Second Circuit held that it will not inquire into alleged pretext or motive when a condemner takes land for a classic public amenity.[207] The majority asserted that because the Town took the land for a public park, even if that park is a "passive use park," the court's analysis should stop there.[208] It refused to consider any alleged pretextual motive despite finding that the complaint alleged sufficient facts to show that the Town created various regulatory hurdles that the Brinkmanns could or did surmount.[209] The court remained unwilling to scrutinize a taking "rationally related to a classic public use" and to "gauge the purity of the motives" of the officials who

199. *See* Brief in Opposition at 5, *Brinkmann*, 96 F.4th 209 (No. 23-1301) (noting that certain landowners applied for waivers to this moratorium, but the plaintiffs did not).

200. *Brinkmann*, 96 F.4th at 211.

201. *Id.* at 211. The passive use park would merely be an undeveloped, open plot of wooded land. *Id.*

202. *Id.* at 210–12.

203. *Id.*; *see also* Martin Flumenbaum & Brad Karp, *The Relevance of Pretextual Motives in Takings Clause Challenges*, N.Y.L.J. (May 21, 2024), https://www.law.com/newyorklawjournal/2024/05/21/the-relevance-of-pretextual-motives-in-takings-clause-challenges/. [https://perma.cc/3UNW-N6TJ].

204. *Brinkmann*, 2022 WL 4647872, at *5.

205. *Id.* The trial court noted how the town supervisor specifically said that he will never let anything be built on the land. *Id.*

206. *See Brinkmann*, 96 F.4th at 210–11.

207. *Id.*

208. *Id.*

209. *Id.* at 210–12 ("[T]he Takings Clause is not an overarching prohibition against any and all purposes alleged to be 'illegitimate.'").

approved it.[210] The majority ruled this way for three key reasons. First, it did so out of deference to legislative determinations of public use; second, it held an inquiry into legislative motivation is an "unworkable" exercise in Fifth Amendment takings challenges; and third, it read *Kelo*'s pretext pronouncement to cabin such an inquiry only to takings that may have conferred a private benefit.[211]

First, the majority held that it will defer to the Town's determination of what is a necessary public use.[212] It reasoned that a pretext limitation on a taking for a traditional public use, such as the park here, would unwind a "longstanding policy of deference to legislative judgments in the field."[213] Therefore, the Town could maintain this land as a public, open space despite evidence of pretext for defeating the proposed commercial use.[214] According to the majority, this deferential review allows condemners to make the best and most expedient land use decisions for their communities.[215] The majority relied on precedent that the condemner determination of public use simply requires a "rational relationship" to a stated public purpose.[216] Thus, the majority held that it would not inquire past the stated public purpose of a park out of deference to the Town's decision and knowledge of its needs.

Second, the majority asserted that determining the motivations of legislators is often a "fraught" judicial exercise and does not work in a Fifth Amendment takings claim.[217] The majority separated purpose from motive[218] and held that so long as the taking's purpose is purely public, the court will not inquire into pretextual motive.[219] The Town's stated purpose here was a public park, and as such, the court held "[t]here can be no dispute that a public park, even an unimproved one, is a public use" because "parks have been recognized as a 'public use' for more than a century."[220] In their view, the takings clause should not authorize courts to analyze government

210. *Id.* at 213–14 (quoting Goldstein v. Pataki, 516 F.3d 50, 62 (2d Cir. 2008)).

211. *See id.* at 217. The court determined it need not inquire past the valid public purpose because the taking involved no private actor—unlike the economic development taking in *Kelo*. *Id.*

212. *Id.* at 213.

213. *See id.* (quoting Kelo v. City of New London, 545 U.S. 469, 478–80 (2005)); *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) ("[L]egislatures are better able to assess what public purposes should be advanced.").

214. *Brinkmann*, 96 F.4th at 214.

215. *See id.*; *see also* Thomas, *supra* note 79, at 563–64 (explaining why federal courts defer to legislative determinations of public purpose); Oswald, *supra* note 86, at 244–49 (same).

216. *Brinkmann*, 96 F.4th at 213–14.

217. *Id.* (citing Goldstein v. Pataki, 516 F.3d 50, 63 (2d Cir. 2008)).

218. *See id.* at 218. The majority contended that the dissent "conflate[d]" purpose and motivation. *Id.*; *cf.* Oswald, *supra* note 162, at 74–75 (noting that courts confuse purpose and motive in takings cases and therefore cause inconsistent outcomes across takings caselaw).

219. *Brinkmann*, 96 F.4th at 218.

220. *See id.* at 212–13 (first citing Shoemaker v. United States, 147 U.S. 282, 297 (1893); and then citing Rindge Co. v. Los Angeles County, 262 U.S. 700, 707–08 (1923) ("[C]ondemnation of lands for public parks is now universally recognized as a taking for public use.")).

motive because it would "stifle the making of public infrastructure."[221] Furthermore, the majority held that it is not workable to discern the "subjective motivation[s]" of multiple legislators,[222] especially as it pertains to a determination of public purpose.[223] Thus, it held that the stated public purpose is the only judicially reviewable issue despite evidence of pretextual motive.[224]

However, the majority noted that its decision did not foreclose an opportunity to bring a different constitutional claim for a taking which "runs afoul of some *other* constitutional or statutory provision which *does* permit an examination of motives."[225] Accordingly, although the majority foreclosed an analysis of motive under a Fifth Amendment claim, they suggested that if an individual has a claim that the government seized land based on their race or religion, they should bring both a takings claim and an equal protection claim in federal court.[226] Even though the former claim may fail if the property is devoted to a public use, the latter will succeed to the extent that the choice of property violated the Fourteenth Amendment.

Property scholars have examined whether courts should look to legislative motivation when analyzing a takings challenge.[227] Historically, courts analyze the question of public use by focusing on the "ends"—the ultimate purpose—rather than the "means" by which the government achieves the goal.[228] However, Professor Debra Pogrund Stark argues that reviewing for pretext or bad faith motive (the "means") does not constitute "second guessing" of the legislature.[229] Rather, it provides better checks and balances between the branches of government.[230] To that end, David Schwed suggests a revised judicial inquiry that reviews pretextual motive behind the stated purpose of the condemnation.[231] Schwed proposes two judicial solutions to analyzing pretext: (1) eradicating the presumption of rationality of a public use decision and (2) shifting the burden to the government to show good faith where there is prima facie evidence of pretext.[232]

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221. *Id.* at 218.

222. *Id.* at 214 (quoting Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting)).

223. *Id.*

224. *Id.*

225. *Id.* at 217.

226. *See id.*

227. *See, e.g.*, Kelly, *supra* note 107, at 196–97; Oswald, *supra* note 162, at 58 ("[W]hile legislative *motives* are considered outside the realm of appropriate judicial inquiry, legislative *purpose* . . . is considered fair game for judicial scrutiny.").

228. *See* Oswald, *supra* note 86, at 278 (citing Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 64–66 (1986)) (explaining how public use analysis is typically focused on the ends—the purpose—rather than the means of the process).

229. *See* Stark, *supra* note 27, at 638–40.

230. *See id.*

231. *See* Schwed, *supra* note 14, at 75–79.

232. *Id.* at 75–77.

However, Professor Lynda Oswald notes the "hazy distinction" between purpose, motive, and bad faith in takings analyses.[233] Although Professor Oswald illustrates how certain courts distinguish between them, she argues that the distinction is artificial because usually once a condemner seizes land for public use, "the [judicial] inquiry ceases."[234] Professor Oswald warns of the possible dangers of such a deferential judicial inquiry and rote approval of public use.[235] First, she argues that it encourages condemners to engage in "strategic and deceitful behavior" and "legislative gaming" because any improper motive can be hidden by a stated public purpose.[236] Second, she posits that local government condemners subvert the political process with their constituents when they do not "honestly" state their motivations behind their eminent domain actions.[237] She argues that the dishonesty prevents any opportunity for the public to evaluate the land use actions through an otherwise public zoning process.[238]

Finally, the *Brinkmann* majority held that federal courts only conduct a pretext inquiry if the public purpose is pretext for an impermissible private benefit.[239] It distinguished pretext in *Kelo*—where there is an economic development taking—from the pretextual claim in *Brinkmann*—a pretext claim behind a classic public use.[240] Furthermore, it dismissed any prior federal courts' mention of bad faith examination as dicta or simply not the dispositive issue.[241] Per the majority, *Kelo*'s pronouncement on pretext stated the current standard, preempting any prior federal precedent.[242] According to the majority, any federal cases noting a "bad faith or pretext limitation on the power of eminent domain" are not applicable today.[243] Consequently, district courts in the Second Circuit may only inquire into

233. *See* Oswald, *supra* note 162, at 58–60. Professor Oswald argues that this is a reason for the of lack of clarity in lower courts in how they review pretext. *Id.*

234. *Id.* at 60.

235. *Id.* at 61–62.

236. *Id.* at 61.

237. *Id.* at 76. Professor Oswald hypothesized the exact fact pattern in *Brinkmann*. *Id.* However, she argued that a legislature may condemn property to prevent an undesired use under the Public Use Clause so long as the condemner is honest in stating that its purpose was to prevent an undesired use. *See id.*

238. *Id.*

239. Brinkmann v. Town of Southold, 96 F.4th 209, 217 (2d Cir.), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).

240. *Id.*

241. *Id.* at 217. *But see infra* Part II.C.2.

242. *Brinkmann*, 96 F.4th at 217. In discussing a pre-*Kelo* U.S. Court of Appeals for the Ninth Circuit decision that stated that the Supreme Court declined to rule out the possibility of judicial review for condemnations allegedly made in bad faith, the majority stated: "That may have been so in 1966, but it is not so now." *Id.* (discussing S. Pac. Land Co. v. United States, 367 F.2d 161, 162 (9th Cir. 1966)). *But see id.* at 226 (Menashi, J., dissenting) (arguing that *Kelo* did not overrule previous federal court prohibitions on pretextual, bad faith analysis for takings claims).

243. *Id.* at 217 (majority opinion).

alleged pretext or bad faith motive to decide whether a claimed public purpose is used to disguise an improper private benefit.[244]

The *Brinkmann* majority continued federal precedent devoted to a deferential judicial review of a public use determination.[245] It foreclosed any examination of pretext or bad faith if the purpose is a traditional public use, such as a park.[246] The Second Circuit thereby rejected all consideration of condemner motivation behind a taking so long as it results in a traditional public use under the Fifth Amendment Takings Clause.

B. The Brinkmann *Dissent*

Judge Menashi's dissent argued that the Town of Southold's taking violated the Public Use Clause.[247] Judge Menashi dissented for three key reasons. First, he suggested that the court should examine condemner motivation if presented with a plausible pretextual takings challenge because motivation analysis is used in other constitutional claims.[248] Second, Judge Menashi argued that a condemnation for a "passive use park," or open, undeveloped space, is in violation of the Public Use Clause.[249] Third, Judge Menashi argued that *Kelo*'s pretext pronouncement is not limited to economic development takings with the threat of impermissible private benefit.[250] Instead, an examination into alleged pretext should extend to all takings under the Fifth Amendment, even those for a traditional public use.[251]

First, Judge Menashi argued that courts should examine subjective motivations of condemners in eminent domain challenges for traditional, public use takings.[252] Judge Menashi contended that the majority's deferential approach to legislative determinations of traditional public uses gives "governments virtually unlimited power over private property" so long as the stated public purpose is a public amenity.[253] Further, he noted that the majority admitted that the public purpose of the condemnation was pretext to defeat the owners' proposed commercial use.[254] Thus, Judge Menashi would have courts examine the actual purpose, or motive, of the condemner's action when analyzing pretextual taking challenges and use evidence of bad faith to

244. *Id.* ("The Supreme Court's current pronouncement on 'pretext' concerns only the pretext of non-public . . . use."). Moreover, the majority also asserted that state courts that review pretext root their analyses in state law or statute rather than the Fifth Amendment, and, therefore, such cases are not relevant to federal takings challenges. *See id.*

245. *Id.* at 214 (quoting Goldstein v. Pataki, 516 F.3d 50, 58–59 (2d Cir. 2008)) ("A condemning authority, therefore, has 'a complete defense to a public-use challenge' if, 'viewed objectively, the Project bears at least a rational relationship to . . . well-established categories of public uses, among them . . . the creation of a public, open space.'").

246. *See id.*

247. *See id.* at 219, 233 (Menashi, J., dissenting); *see also* Flumenbaum & Karp, *supra* note 203.

248. *See Brinkmann*, 96 F.4th at 219–21 (Menashi, J., dissenting).

249. *See id.*

250. *See id.* at 226.

251. *See id.* at 226–27.

252. *See id.* at 219–21.

253. *See id.* at 220.

254. *See id.* at 219.

hold the taking unconstitutional under the Fifth Amendment.[255] Furthermore, Judge Menashi disputed the majority's "workability" concern by citing cases where lower courts invalidated pretextual takings under similar circumstances.[256] Where the majority would have an aggrieved party bring two separate constitutional claims, Judge Menashi would examine the motivation of government action through a singular Fifth Amendment takings claim.[257]

Second, Judge Menashi argued that a "passive use park" is not a valid public purpose under the Fifth Amendment.[258] Judge Menashi argued that the "passive use park" does not satisfy the public use requirement because it is pretextual for defeating the Brinkmanns' commercial use, and, moreover, there would be no maintenance of the empty land.[259] In contrast, the majority held that any park is a classic public use and that courts should defer to the Town's judgment in condemning the land for a public amenity.[260]

Scholars have argued that an open space (here, the "passive use park") can be a constitutional public use.[261] Professor Oswald analyzed that a "non-use" is likely a valid public use under the Takings Clause and Supreme Court precedent.[262] In the same vein, Professor Oswald argued that "prevention of an undesired use" is a valid public use.[263] However, David Schwed argued that condemnation in furtherance of conservation or open space is typically used to mask a "not in my backyard" (NIMBY) sentiment, "NIMBY-ism",[264] especially by local governments.[265] Ultimately, both Schwed and Professor Oswald argue that open space preservation is a constitutional public use under the Fifth Amendment but there should be judicial review of such condemnations because they are at risk of being exclusionary or made in bad faith.[266]

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255. *See id.* at 219–23.

256. *Id.*; *see also infra* Part II.C.

257. *See Brinkmann*, 96 F.4th at 223–26 (Menashi, J., dissenting); *see also* Reply in Support of Certiorari at 10, *Brinkmann*, 96 F.4th 209 (No. 23-1301). According to the plaintiffs, this would strengthen the constitutional power of the Fifth Amendment and strengthen individual property rights. *Id.*

258. *Brinkmann*, 96 F.4th at 219–20 (Menashi, J., dissenting) (arguing that there is no "Fake Park Exception to the public use requirement of the Takings Clause").

259. *See id.*

260. *See id.* at 218–19 (majority opinion); *see also* Brief in Opposition, *supra* note 199, at 11–12 ("[A] public park is the archetypal public use contemplated by the Fifth Amendment.").

261. *See* Schwed, *supra* note 14, at 63–64; Oswald, *supra* note 162, at 49.

262. *See* Oswald, *supra* note 162, at 49 (arguing that the Supreme Court would likely hold that a "non-use" is a public use because of their deferential standard of review of public use determinations).

263. *Id.* at 49 ("Prevention of an undesired use is, in effect, a form of public use, and the sovereign should be able to use eminent domain as yet one more tool in its regulatory toolbox . . . .").

264. NIMBY is an acronym for "not in my backyard." *See* Schwed, *supra* note 14, at 57. NIMBY-ism reflects a sentiment against development in one's neighborhood, usually motivated by a desire to protect property values and to preserve community character. *Id.* at 57 n.24 (citing Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1656 (2006)).

265. *See id.* at 57–58.

266. *See id.*; Oswald, *supra* note 162, at 74–76.

Finally, Judge Menashi disagreed with the majority's assertion that *Kelo* overruled any prior court analysis of bad faith behind a taking.[267] Judge Menashi disagreed with the proposition that courts only investigate pretext or bad faith behind economic development takings to expose hidden private benefit.[268] He argued that the *Kelo* Court described the pretext rule narrowly to fit the facts specific to *Kelo*, rather than to prevent any previous possible examination of bad faith motivation.[269] According to Judge Menashi, because the facts in *Kelo* dealt with a potential private benefit, that is the only kind of pretext it needed to address.[270] Thus, according to the dissent, the question arguably remains open at the Supreme Court as to whether a taking for a purely public use—that is, with no private actor involved—is Constitutional.[271]

C. Lower Courts That Examine Pretext and Bad Faith in Relevant Public Use Challenges

There is not a clear consensus among lower courts as to how to analyze pretextual takings claims.[272] Thus, Part II.C analyzes state courts and federal circuit courts that invalidate takings for a traditional public use by analyzing pretextual motive. These cases range from pre-*Kelo* (decided in 2005) to post-*Kelo*. The majority in *Brinkmann* asserted that many of these cases are purely dicta, not dispositive, or not controlling because they come from state courts.[273] However, many of these cases analyze both the federal and relevant state constitutions.[274] Part II.C.1 analyzes state courts that review pretextual motive behind a taking that is for a traditional public use. Many of them present similar facts to *Brinkmann* and provide examples of courts that strike down takings because the municipality "hides its true intent" behind a stated public use.[275] Part II.C.2 illustrates examples of federal courts that acknowledge the ability for federal courts to conduct judicial review of a condemnation decision if there is evidence of bad faith.

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267. Brinkmann v. Town of Southold, 96 F.4th 209, 226 (2d Cir.) (Menashi, J., dissenting), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).

268. *See id.*

269. *Id.* ("[N]either *Kelo* nor our court's decision in *Goldstein* discarded the longstanding prohibition on pretextual, bad faith takings.").

270. *Id.* at 227.

271. *See id.* at 221–24; *see also infra* Part II.C.2.

272. *See* Somin, *supra* note 100, at 3; Hafetz, *supra* note 7, at 3102; Thomas, *supra* note 79, at 565.

273. *Brinkmann*, 96 F.4th at 214–17.

274. For example, the Connecticut Supreme Court in its *Kelo* opinion (ultimately affirmed by the U.S. Supreme Court) analyzed both the federal and state constitutions in holding that the economic development plan "qualified as valid public use." Kelo v. City of New London, 545 U.S. 469, 476 (2005). The court agreed that the plan served a valid public use under the Fifth Amendment *and* its state Constitution and statutes. *Id.* at 476–77.

275. *See* Oswald, *supra* note 162, at 74.

1. State Courts That Review Pretext and Bad Faith for Traditional Public Use Takings

A review of several state court cases on pretextual takings, both before and after *Kelo*, reveals that state courts generally apply a heightened standard for pretextual takings than federal courts.[276] Some state courts will inquire whether the "stated" public purpose is the "actual" purpose of the taking or merely pretextual.[277] Thus, they may look to motivation to the extent it reveals bad faith on the part of the legislature.[278] More specifically, many cases look to pretext and bad faith motivation to invalidate takings where municipalities used their eminent domain power to "prevent undesired uses" when the ultimate public purpose is a traditional public use.[279] Each of these cases uses different methods of analyzing bad faith and "actual" purpose through the evidence provided. Many courts infer pretextual purpose and motive from circumstantial evidence, statements of legislators, and even nonactions.[280]

For example, the Connecticut Supreme Court in *New England Estates, LLC. v. Town of Branford*[281] invalidated a taking for a classic public use because it was pretextual for stopping an affordable housing development.[282] The court held that it violated the Public Use Clause of the Fifth Amendment because the condemning town acted in bad faith by hiding its motivating purpose behind the stated public purpose.[283]

The facts of *New England Estates* mirror the process issues behind the taking in *Brinkmann*.[284] The petitioners entered into an option contract to build an affordable housing development on the land.[285] The court examined communications between various town officials that discussed how the town was not open to an affordable housing development.[286] First, the town planner submitted a memorandum suggesting that the town update its regulations to "protect[] the [t]own against affordable housing appeals."[287]

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276. *See, e.g.*, City of Lafayette v. Town of Erie Urb. Renewal Auth., 434 P.3d 746, 750 n.5 (Colo. App. 2018) ("Decisions before and after [*Kelo*] have examined the motives of condemning authorities when considering whether a taking was pretextual."); New England Ests., LLC v. Town of Branford, 988 A.2d 299 (Conn. 2010); County of Hawaii v. C&J Coupe Fam. Ltd. P'ship, 198 P.3d 615 (Haw. 2008); Earth Mgmt. Inc. v. Heard County, 283 S.E.2d 455 (Ga. 1981); Pheasant Ridge Assocs. v. Town of Burlington, 506 N.E.2d 1152 (Mass. 1987).

277. *See* Oswald, *supra* note 162, at 61, 73–74.

278. *Id.* at 73–74. For example, providing a pretextual reason is indicative of the bad faith.

279. *See id.* at 72–73 (arguing that takings that hide the intent of the condemner subvert the political process).

280. *See* Hafetz, *supra* note 7, at 3121–23.

281. 988 A.2d 229 (Conn. 2010).

282. *Id.* at 252–53.

283. *New England Ests.*, 988 A.2d at 244–46.

284. *Compare id., with supra* Part II.A.1.

285. *New England Ests.*, 988 A.2d at 236–38. For nearly two decades before this contract to build an affordable housing development, the prior owners had planned to build lower density residential units with a golf course—that plan never came to fruition. *Id.*

286. *Id.* at 236–39.

287. *Id.* at 237.

Then, the town selectmen suggested initiating an eminent domain proceeding with the potential for development of a playing field for public use.[288] The town ultimately determined there was a "significant need" for playing fields, and that there was environmental risk to building residences due to its proximity to the landfill.[289] However, the town solicited new environmental tests after the development proposal despite many years of reports noting that it was low-risk to build residences there.[290]

New England Estates filed a § 1983 claim, alleging that the Town of Branford ("Branford") violated the Fifth Amendment takings clause for condemning their property in bad faith.[291] It became clear that Branford did not want an affordable housing development and commenced an eminent domain proceeding for playing fields—a classic public use.[292] Thus, the petitioners claimed that the taking was made in bad faith because the public purpose served as pretext for the actual purpose—stopping the affordable housing development.[293] Branford did not dispute that it either took the land for pretextual reasons or in bad faith.[294] Rather, Branford argued that *Kelo* only spoke to pretextual takings as unconstitutional for takings that covered up an ulterior motive for private benefit.[295] Therefore, Branford argued it could not have violated the Public Use Clause because of a "dishonest" reason.[296]

The Connecticut Supreme Court rejected that argument.[297] *New England Estates* presented an example of a state high court, post-*Kelo*, interpreting the *Kelo* majority's pretextual takings line to disallow bad faith, pretextual takings for takings purely for public use.[298] Like in *Brinkmann*, the "pretext" pleaded was the bad faith assertion of a public purpose masking Branford's "actual" purpose. Here, it was to prevent an affordable housing development through a condemnation for a classic public use—a playing field.[299] Ultimately, the Connecticut Supreme Court held that the Town was in violation of the Public Use Clause because there is "no merit" to the Town's argument that a pretextual taking is only invalid in cases where the

288. *Id.*
289. *Id.* at 238. Note that the Town of Southold also determined the need for a passive use park after a political process seeking to stop the Brinkmanns from developing on the land. *See supra* Part II.A.
290. *New England Ests.*, 988 A.2d at 238–39.
291. *See id.*
292. *See id.*
293. *Id.* at 245.
294. *Id.* at 252–53.
295. *Id.* at 253 n.27; *see also* Brinkmann v. Town of Southold, 96 F.4th 209, 211–12 (2d Cir.) (majority opinion asserting the same reading of *Kelo*), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).
296. *New England Ests.*, 988 A.2d at 252–53.
297. *See id.*
298. *See id.*
299. *See id.*

condemner takes the property for a nonpublic use.[300] However, the court acknowledged that the Supreme Court has not addressed this issue directly.[301]

Similarly, the Supreme Court of the State of Hawai'i in *County of Hawaii v. C & J Coupe Family Ltd. Partnership*[302] held that the court must review the record to ensure that a condemner's stated public purpose, although a classic public use, is not pretextual.[303] The *Coupe* majority's decision explicitly disagreed with the *Coupe* dissent's assertion that a pretextual taking can only be analyzed for impermissible private purpose.[304] The majority said that traditional public uses are open to pretextual challenges.[305] Furthermore, the majority supported its decision to examine pretext by citing the Second Circuit's exception in *Goldstein v. Pataki*.[306] The Supreme Court of the State of Hawai'i asserted that this situation required a "closer objective scrutiny" of the justification due to circumstances which "undermine the basic legitimacy" of the stated public purpose.[307] Therefore, the court remanded to the state trial court in order for the plaintiff to show that the public use was pretextual and for the trial court to review that evidence.[308]

There are instances of state high courts pre-*Kelo* invalidating a taking based on bad faith. For example, the Supreme Court of Georgia reviewed condemner bad faith motivation behind the stated public purpose of a condemnation for a park in order to ensure that the condemnation satisfied the Public Use Clause.[309] In *Earth Management, Inc. v. Heard County*,[310]

300. *Id.* The court asserted that the petitioner's interpretation of *Kelo* is overly broad. *Id.* at 253 n.27. Judge Menashi also argues this point in the *Brinkmann* dissent in disagreeing with the *Brinkmann* majority. *See Brinkmann*, 96 F.4th at 223 (Menashi, J., dissenting).

301. *New England Ests.*, 988 A.2d at 252 ("Although the United States Supreme Court has not yet addressed this issue directly, we agree with those jurisdictions concluding that the Public Use Clause should not be interpreted so narrowly. Indeed, many state courts have found a violation of the takings clause on the basis of a bad faith exercise of the power of eminent domain.").

302. 198 P.3d 615 (Haw. 2008).

303. *See id.* at 620, 649. Here, the classic public use was a road. *See also* Somin, *supra* note 100, at 26 (discussing this case); Thomas, *supra* note 79, at 565–68 (same).

304. *See Coupe*, 198 P.3d at 647; *see also* Thomas, *supra* note 79, at 567–68.

305. *Coupe*, 198 P.3d at 647–48; *see also* Oswald, *supra* note 86, at 273–74.

306. 516 F.3d 50 (2d Cir. 2008); *Coupe*, 198 F.3d at 642; *see also supra* Part I.B.2.

307. *Coupe*, 198 P.3d at 649 (quoting *Goldstein*, 516 F.3d at 62–63); *see also* Thomas, *supra* note 79, 565–68.

308. *See Coupe*, 198 P.3d at 653; *see also* Blais, *supra* note 137, at 977–79. Professor Blais discussed how the Supreme Court of the State of Hawai'i explained that it should give deference to "legislative findings and declarations of public use," while also shifting the burden to the plaintiff to show that the declaration of public use was "mere pretext." *Id.* at 978. On remand, the trial court ultimately rejected the landowner's claim of pretext, but only after reviewing the record per the Supreme Court of the State of Hawai'i's instructions. *See id.* The Hawai'i court noted how the *Kelo* majority did not need to examine the pretext defense because the trial court, and the Connecticut Supreme Court, had already done so. *See Coupe*, 198 P.3d at 651.

309. *See* Earth Mgmt., Inc. v. Heard County, 283 S.E.2d 455 (Ga. 1981). Although this case relies on Georgia's constitution's Public Use Clause and the Takings Clause as applied by the Fourteenth Amendment, it is worthwhile to examine to understand how state courts are reviewing allegations of pretext and bad faith.

310. 283 S.E.2d 455 (Ga. 1981).

Heard County initiated a condemnation proceeding for a public park to thwart the development of a hazardous waste facility.[311] There was no evidence that the county pursued the park except to block the facility.[312] The county did not conduct any planning or inspections before the condemnation, county leaders suggested they would "do anything within their power" to block this facility's construction, and the county commissioner attempted to prohibit the facility by passing three different zoning ordinances and a zoning referendum.[313] Nevertheless, the county condemned the land for a public park during ongoing studies and investigations for proper permits.[314] Ultimately, the Supreme Court of Georgia held that Heard County's taking amounted to bad faith and was in violation of the Public Use Clause because the stated purpose of a park was pretextual for its actual purpose—thwarting a proposed commercial use.[315]

Similarly, the Massachusetts Supreme Judicial Court struck down a condemnation because its stated public purpose was pretextual, or used in bad faith, to prevent an undesired use.[316] The plaintiff property owner applied for a permit with the Town of Burlington ("Burlington") to build low- and moderate-income housing.[317] Shortly after, Burlington unanimously voted to condemn the property for parks, recreation, and some moderate-income housing, but not low-income housing.[318] Although the court acknowledged that it is often difficult to prove bad faith, it nevertheless exercised its authority of judicial review in holding that the taking was unlawful and void.[319] The court distinguished between a valid, stated public purpose and an improper public purpose—pretextual to the actual reason—and thus held that the taking was in violation of the Public Use Clause.[320]

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311. *See id.* at 456–57; *see also* Oswald, *supra* note 162, at 65–67.

312. *See Earth Mgmt.*, 283 S.E.2d at 460.

313. *See id.*

314. *Id.*; *see also* Oswald, *supra* note 162, at 64–67.

315. *Earth Mgmt.*, 283 S.E.2d at 460–61. The Supreme Court of Georgia soon after held that a county acted in bad faith by condemning land to prevent a public-sewage treatment plant. *See* Carroll County v. City of Bremen, 347 S.E.2d 598, 599–600 (Ga. 1986) ("The condemning authority of a county may not be used simply to block legitimate public activity."); *see also* Oswald, *supra* note 162, at 67–68. The court held that it was improper to initiate eminent domain proceedings when zoning or alternative, "legitimate" efforts to stop the construction fail. *See Carroll County*, 347 S.E.2d at 599; Oswald, *supra* note 162, at 68.

316. *See* Pheasant Ridge Assocs. v. Town of Burlington, 506 N.E.2d 1152, 1156 (Mass. 1987); *see also* Oswald, *supra* note 162, at 63–65; Hafetz, *supra* note 7, at 3121.

317. *See Pheasant Ridge Assocs.*, 506 N.E.2d at 1154; *see also* Oswald, *supra* note 162, at 63–65.

318. *See Pheasant Ridge Assocs.*, 506 N.E.2d at 1154; *see also* Oswald, *supra* note 162, at 63–65.

319. *See Pheasant Ridge Assocs.*, 506 N.E.2d at 1155–56. The court acknowledged that this was an unusual circumstance. *Id.* However, it acknowledged that the court, under state precedent, could determine a condemnation was executed in bad faith. *Id.* It also noted that, although rare, federal courts have recognized the ability to review takings challenges to uncover bad faith. *Id.* (citing S. Pac. Land Co. v. United States, 367 F.2d 161, 162 (9th Cir. 1966)).

320. *See id.*; *see also* Oswald, *supra* note 162 at 63–65 (referring to this improper, pretextual purpose as a "sham" public purpose).

In reviewing the record for bad faith, the Massachusetts Supreme Judicial Court looked to "objective evidence of official acts and statements or sequence of events" to determine that the town legislature condemned in bad faith.[321] The court looked to legislators' specific statements and actions around the time of the condemnation, as well as recent town studies regarding parks and recreation.[322] The court recognized that the record was "clear": Burlington expressed interest in this location for a public use only after the plaintiff's housing development proposal.[323] The court acknowledged that, although not controlling, "the absence of any prior town interest in the site or its neighborhood [can be] instructive on the matter of good faith."[324] Furthermore, the town deviated from its usual practices throughout the attempted acquisition of the land in question.[325] Thus, the court invalidated the taking as unlawful.[326]

In short, these state courts drew inferences from condemners' actions and nonactions in holding that these takings are invalid because the condemners acted in bad faith.[327] The condemners' purported public use was pretextual to mask their actual purpose—to stop a proposed, unwanted use through eminent domain.[328] These cases are clear examples of courts using a less deferential review when confronted with plausible allegations of pretext or bad faith and, thus, ultimately not deferring to condemner judgment of a valid public purpose.[329]

2. Federal Courts That Review Condemner Bad Faith for Traditional Public Use Takings

There are pre-*Kelo* federal cases that consider setting aside a taking because the condemner acted arbitrarily, capriciously, or in bad faith.[330] For

321. *See* Hafetz, *supra* note 7, at 3120–21 (citing *Pheasant Ridge Assocs.*, 506 N.E.2d at 1156–58 & n.8).

322. *See Pheasant Ridge Assocs.*, 506 N.E.2d at 1157–58; *see also* Hafetz, *supra* note 7, at 3120–21; Oswald, *supra* note 162, at 63–65.

323. *See Pheasant Ridge Assocs.*, 506 N.E.2d at 1157–58.

324. *Id.* at 1157.

325. *See id.* For example, the Town of Burlington did not consult with its usual town agencies (such as the Housing Authority and the Planning Board) which are usually involved in land use decisions. *See id.* For more insight into judicial review of the processes of government, or "process scrutiny," see Landau, *supra* note 108, at 2150.

326. *See Pheasant Ridge Assocs.*, 506 N.E.2d at 1158.

327. *See* Hafetz, *supra* note 7, at 3121 (discussing *Pheasant Ridge Assocs.*, 506 N.E.2d at 1186).

328. *See Pheasant Ridge Assocs.*, 506 N.E.2d at 1156–58; New England Ests. v. Town of Branford, 988 A.2d 229, 240 (Conn. 2010).

329. *See also* Oswald, *supra* note 86, 279–81; Thomas, *supra* note 79, at 574 (citing Middletown Township v. Lands of Stone, 939 A.2d 331 (Pa. 2007)). Professor Thomas also discusses how the Supreme Court of Pennsylvania held that a taking's stated purpose must not be "post-hoc or pre-textual." *See* Thomas, *supra* note 79, at 574–75. However, that case based its decision on state and local codes, statutes, and the state constitution. *Id.*

330. *See, e.g.*, United States v. Carmack, 329 U.S. 230 (1946); United States v. 58.16 Acres of Land, More or Less in Clinton Cnty., 478 F.2d 1055 (7th Cir. 1973); S. Pac. Land Co. v. United States, 367 F.2d 161 (9th Cir. 1966).

example, the Supreme Court in *United States v. Carmack*[331] asserted that there is room for judicial review when the condemnation decision is alleged to be arbitrary, capricious, or made in bad faith.[332] Here, the Court granted certiorari to look at whether the Public Buildings Act of 1926[333] authorized a Federal Works Agency administrator to condemn land held in a trust for a post office.[334] The district court held that the condemnation was made in bad faith and was therefore an invalid taking.[335] The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's holding but did not consider whether the officials acted arbitrarily or capriciously.[336]

The Supreme Court reversed the Eighth Circuit and upheld the administrator's decision to condemn the land, while also exercising the Court's authority to invalidate the condemnation had it been made arbitrarily, capriciously, or in bad faith.[337] In essence, the Court held that the condemnee could not be subjected to a taking without a proper procedure guaranteeing a "fair and reasoned conclusion" inclusive of "community sentiment" to ensure the decision was not made in bad faith.[338] However, here, it held that the condemner reached a fair conclusion.[339] The Court did not foreclose the possibility that in a future case, it may review the record and invalidate a taking based on an arbitrary, capricious, or bad faith decision.[340]

After *Carmack*, the U.S. Court of Appeals for the Seventh Circuit reviewed the good faith and rationality of a federal administrator's decision to take land for a public use in order to ensure that it satisfied the Public Use

331. 329 U.S. 230 (1946).

332. *See id.* at 247–48.

333. 40 U.S.C. §§ 341–347.

334. *Carmack*, 329 U.S. at 232. A post office is a classic public use, and the federal government has the constitutional authority to condemn land for a post office. *See id.*; Kohl v. United States, 91 U.S. 367, 371 (1876) (noting that post offices are a necessary public use acknowledged under the government's power of eminent domain). Although *Carmack* is distinct from *Brinkmann* and *Kelo* because it looked to both federal administrative eminent domain statutes and the Fifth Amendment, this suggestion of review is rooted in the Fifth Amendment's takings power. *Carmack*, 329 U.S. at 232. *But see*, Brinkmann v. Town of Southold, No. 21-CV-2468, 2022 WL 4647872, at *4 n.4 (E.D.N.Y. Oct. 1, 2022) (distinguishing the Brinkmanns' case from *Carmack* because it referred to review of a federal official's exercise of delegated statutory power, not a condemner's direct exercise of their Fifth Amendment power), *aff'd*, 96 F.4th 209 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 428 (2024) (mem.) . *Cf.* Portland Gen. Elec. Co. v. Or. by & Through Or. Dep't of State Lands, No. 22-cv-533, 2025 WL 27252, at *4 (D. Or. Jan. 3, 2025) (reviewing a condemnation for arbitrary, capricious, or bad faith decision-making and distinguishing this decision from *Brinkmann* because a private electric company condemned the land under statute).

335. *Carmack*, 329 U.S. at 234–35.

336. *See id.*

337. *Id.* at 248.

338. *Id.* at 243–48. This analysis is similar to Justice Stevens's analysis in *Kelo* for determining whether a taking is pretextual. *See supra* Part I.C.1.

339. *See Carmack*, 392 U.S. at 248.

340. *See id.* at 247–48. Similarly, in *Kelo*, although the Court held that the economic development taking was not pretextual, it noted the possibility of examining pretextual claims in future cases. *See* Kelo v. City of New London, 545 U.S. 469, 478–80 (2005).

Clause.[341] There, the U.S. Army Corps of Engineers ("Army Corps") condemned the petitioner's land to supposedly protect the land from flooding.[342] The landowner alleged that the administrator condemned the land only after the landowner frequently complained about erosion, due to Army Corps activity, and requested the Army Corps to fix the issue.[343] In analyzing the complaint, the Seventh Circuit held that they must explore "the good faith and rationality of the governmental body . . . exercising its power of eminent domain."[344] Accordingly, the court remanded the case to the district court to examine the plaintiff's allegations of bad faith in order to ensure that the Army Corps' stated public use satisfied the Public Use Clause.[345] It held that if the district court found allegations of bad faith, the taking could be invalidated.[346]

The U.S. Court of Appeals for the Ninth Circuit in *Southern Pacific Land Company v. United States*[347] upheld a taking but still acknowledged that a limited power of judicial review exists if a decision to condemn land was arbitrary, capricious, or made in bad faith.[348] Here, the federal government condemned land including the mineral interests for a naval air station.[349] The Southern Pacific Land Company owned many acres of that land and argued that their mineral rights could not be taken under a public use determination but conceded that the construction of a naval air station served a public use.[350] The district court held that the inquiry must stop at the government's determination of public use and that there was no evidence of arbitrary, capricious, or bad faith decision-making.[351] The Ninth Circuit agreed with the district court but noted—without holding—that the Supreme Court has not ruled out judicial review of a condemnation decision allegedly made in bad faith.[352]

Thus, the question remains as to whether *Kelo* overruled these federal court decisions that allow judicial review of condemner bad faith motivation behind a taking for a traditional public use. The Supreme Court recently

341. *See* United States v. 58.16 Acres of Land, More or Less in Clinton Cnty., 478 F.2d 1055, 1056–58 (7th Cir. 1973).
342. *Id.* at 1056–57.
343. *Id.* at 1057.
344. *Id.* at 1058.
345. *See id.* at 1061. There is also a post-*Kelo* district court opinion in the Seventh Circuit that notes that there is an opportunity for judicial review if there is evidence of condemner bad faith. *See* United States v. 5.0 Acres of Land, More or Less, Situated in Grundy Cnty., No. 04 C 4325, 2008 WL 4450315, at *4 (N.D. Ill. Sept. 30, 2008).
346. *See 58.16 Acres of Land*, 478 F.2d at 1059.
347. 367 F.2d 161 (9th Cir. 1966).
348. *See id.* at 162–63.
349. *Id.* at 161.
350. *Id.*
351. *Id.* at 162.
352. *Id.* (citing United States v. Carmack, 329 U.S. 230, 243–44 (1946)). The *Brinkmann* majority contended that this is purely dicta and not dispositive and, therefore, after *Kelo*, should not have any bearing on the Court's pronouncement of judicial review of bad faith. *See* Brinkmann v. Town of Southold, 96 F.4th 209, 217 (2d Cir.), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).

denied the Brinkmanns' petition for certiorari, leaving the question unresolved.[353]

D. Examining Motive of Government Action in an Equal Protection Class of One Claim

Although the Second Circuit in *Brinkmann* declined to extend an investigation into pretext or motivation in Fifth Amendment takings challenges, it acknowledged the ability to examine motive under other constitutional claims.[354] Thus, this part examines how the Court invalidated a land use decision by examining government motive through an equal protection claim.

The Supreme Court in *Village of Willowbrook v. Olech*[355] allowed for an equal protection claim to be brought by a single party, or a "class of one," through evidence that the village government acted irrationally and arbitrarily against the property owner.[356] The Village of Willowbrook (the "Village") demanded that the property owner, Grace Olech, grant an easement eighteen feet larger than similarly situated property owners in order to be connected to her municipal water supply.[357] Olech sued under § 1983, arguing that she had been discriminated against as compared to similarly situated property owners.[358] Olech claimed she garnered ill will with the town because she filed successful lawsuits against them in the past.[359] The district court dismissed the suit, but the Seventh Circuit reversed and remanded, finding that Olech stated a valid class of one equal protection claim through showing that the Village's action was motivated by spite[360] or "substantial ill will."[361]

The Court's per curiam opinion held that the Village's decision was "irrational and wholly arbitrary," and, therefore, Olech stated a valid equal protection "class of one" claim.[362] However, the Court stated that it need not take up any review of subjective ill will against Olech.[363] The Court looked to the Village's land use actions, processes, and motive in holding that a class of one plaintiff must simply allege that the government irrationally and arbitrarily treated them differently than similarly situated individuals.[364]

353. *See* Brinkmann v. Town of Southold, N.Y., 145 S. Ct. 428 (2024) (mem.).

354. *See Brinkmann*, 96 F.4th at 217 ("[C]ourts may intercede if an exercise of eminent domain runs afoul of some *other* constitutional or statutory provision which *does* permit an examination of motives, such as . . . the Equal Protection Clause.").

355. 528 U.S. 562 (2000) (per curiam).

356. *Id.* at 564–65.

357. *See id.* at 565.

358. *See id.* at 563; *see also* Blackman, *supra* note 123, at 714.

359. *See Olech*, 528 U.S. at 563; *see also* Blackman, *supra* note 123, at 714.

360. *See Olech*, 528 U.S. at 564.

361. Blackman, *supra* note 123, at 714.

362. *Olech*, 528 U.S. at 565.

363. *See id.* ("We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of 'subjective ill will' relied on by that court.").

364. *See id.* at 564–65.

Consequently, plaintiffs may now bring an equal protection claim as a "class of one" to challenge land use decisions.[365]

As compared to *Brinkmann*, *Olech* examines a government decision based on an already existing easement rule that it irrationally and arbitrarily applied to one owner.[366] In *Brinkmann*, the Town of Southold did not necessarily treat the Brinkmanns differently from other property owners.[367] Rather, the evidence revealed a desire to thwart the Brinkmanns' commercial use.[368] In fact, the majority cites a statement from the town supervisor that he "will never allow anything to be built on that property."[369] Ultimately, an *Olech* class of one analysis is contingent on whether there is evidence of irrational treatment in comparison to another property owner.[370]

Professor Josh Blackman suggests an equal protection class of one claim, like that in *Olech*, can be used to challenge an economic development taking.[371] Professor Blackman argues that this could protect minorities and poor communities from eminent domain abuse.[372] He notes that the plaintiff would have to establish class membership, that the government intentionally treated them differently than others, and that the directed land use was irrational and arbitrary.[373] Then, Professor Blackman suggests using the heightened rational basis plus review, as proposed by Justice Kennedy in *Kelo*,[374] to review these class of one claims challenging takings.[375] Thus, Professor Blackman's issue is distinct from that found in *Brinkmann*, especially since it is tailored to tackle economic development takings, but his concerns with an abuse of eminent domain are similar.

In short, because the Supreme Court in *Kelo* only spoke to alleged pretext if the taking served a private purpose, the question of whether federal courts should inquire into alleged pretext if the taking serves the public remains open. The *Brinkmann* majority held that the Second Circuit will not inquire into alleged pretext if the taking serves a classic public use.[376] It distinguished between claims where the taking may serve a potential private benefit, like the issue in *Kelo*, and takings which admittedly serve a valid public use.[377] However, there are clear examples of various state courts, pre- and post-*Kelo*, and pre-*Kelo* federal cases that inquire into bad faith and

365. *See* Blackman, *supra* note 123, at 713.
366. *See Olech*, 528 U.S. at 564, 566.
367. *See* Brinkmann v. Town of Southold, 96 F.4th 209, 211–13 (2d Cir.), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).
368. *See id.* at 210 (noting that the complaint sufficiently alleged that the Town's decision to create the park was pretextual to defeat the Brinkmanns' proposed commercial use).
369. *Id.* at 213.
370. *See Olech*, 528 U.S. at 565.
371. *See* Blackman, *supra* note 123, at 700–02.
372. *See id.* at 701.
373. *See id.*
374. *See supra* Part I.C.2.
375. *See* Blackman, *supra* note 123, at 701.
376. *See* Brinkmann v. Town of Southold, 96 F.4th 209, 211 (2d Cir.), *cert. denied*, 145 S. Ct. 428 (2024) (mem.).
377. *See id.*

pretext even if the taking serves a traditional public use.[378] To standardize the approach taken by courts, this issue needs clarification.

III. REVIEW PRETEXTUAL TAKINGS CLAIMS FOR PUBLIC AMENITIES TO PROTECT PROPERTY OWNERS AND ENSURE RATIONAL GOVERNMENT LAND USE PROCESSES

The *Brinkmann* case provided a means to answer the open legal question as to whether a court should examine plausible allegations of pretext if (1) the condemner stated a public purpose as a pretext to defeat the property owner's proposed use, and (2) the stated public purpose is a traditional public use or amenity, like a park.[379] Acknowledging that the town in *Brinkmann* intended to thwart an undesired use that it failed to prevent by regulatory means, the Second Circuit nonetheless held that it would not consider alleged pretext.[380] Unfortunately, this is a common scenario in many municipalities—using eminent domain to end-run property protections embedded in due process.[381]

Therefore, this Note argues that the Fifth Amendment should be interpreted to require review of pretext even where condemned land will be devoted to a classic public use.[382] A court's public use analysis should not end at whether the taking is simply for a "public amenity," allowing for no review of the process by which the condemner decided to create the amenity or the reasons for it.[383] Part III proceeds in two parts. Part III.A proposes a two-step test which suggests a rational basis plus standard of review if the pretextual taking is for a traditional public use, and it occurs after a proposed—and perhaps otherwise valid—use. Part III.B explains why the Supreme Court should adopt this test to clarify this open legal question.

A. Examine Allegations of Pretext for Traditional Public Use Takings Under a Rational Basis Plus Review

This part proposes a two-step, temporal analysis to review alleged pretext under a Fifth Amendment claim challenging a taking for a traditional public use. A two-step analysis is useful when a court is presented with a plausible allegation of a pretextual purpose for a taking otherwise dedicated to a public amenity. The test is designed to ensure that pretextual review does not unduly interfere with legitimate condemner discretion by rendering every public use challenge subject to costly delay and discovery to search for

378. *See supra* Part II.C.
379. *See supra* Part II.A.
380. *See supra* notes 207–11 and accompanying text.
381. *See supra* Part II.C.1.
382. This Note does *not* argue that any "non-use," or open space, is per se unconstitutional under the Public Use Clause. There may be circumstances where a condemning authority, in good faith, wishes to condemn to maintain open space. This Note argues that that would serve a valid public purpose. *See supra* notes 262–66 and accompanying text.
383. *See supra* notes 187–89 and accompanying text.

condemner motivation.[384] Thus, courts should have a presumption in favor of the condemner's public use decision, but evidence may be used to rebut the presumption if there is "evidence of bad faith, abuse of process or pretext."[385] For this analysis, the stated purpose may be mere pretext for the actual reason why the condemner took property for public use—to potentially stop a proposed, unwanted use. Thus, a condemner acts in bad faith when it does not provide the true reason for the condemnation for what is concededly a public use.

The test would require the following. Step one would require courts to decide whether there is plausible evidence that the condemner did not propose eminent domain proceedings until after the property owner's unwanted use became known to the condemner. Step two would require courts to consider whether the asserted public purpose is simply pretextual for thwarting the alleged proposed use under a rational basis plus standard of review. A court must determine whether the decision to condemn (contemplating both the need for the amenity and the choice of the site) is sufficiently justified to overcome the presumption that the taking was calculated to prevent the unwanted use rather than to achieve the stated public purpose.

1. Proposed Rational Basis Plus Two-Step Test

First, courts should look to whether the decision to condemn came after a proposed, unwanted, and perhaps otherwise valid, private use.[386] The temporal relationship creates a presumption of pretextual bad faith that can only be overcome by a showing that the condemner likely reached the decision to condemn in good faith, even if not made in response to a proposed, unwanted use. It requires examination into the timing and the motivation of the condemning authority.[387]

Courts should look to whether there is sufficient evidence that the condemnation occurred after the discovery of an unwanted use. If a plaintiff produces prima facie evidence of pretext or bad faith, the burden would shift to the condemner to produce evidence rebutting the plaintiff's plausible allegation of pretext.[388] Some factors that may weigh in favor of the condemning authority might be communications of legislators with a reasoned explanation and expressed desire for public space *prior* to the discovery of use or the presence of a subsequent well-developed plan to use the property for a traditional public use.[389] In contrast, the absence of any specific plan to establish a public amenity, evidence of attempts to block the

384. *See* Kelly, *supra* note 107, at 196–99 (expressing concern that a motive-based test for pretextual takings claims would unduly delay land use projects).
385. *See* Stark, *supra* note 27, at 612.
386. *See supra* Part II.C.1; *see also supra* notes 283–96 and accompanying text.
387. *See supra* Part II.C.1.
388. *See supra* notes 231–32 and accompanying text.
389. *See supra* Part I.C.1; *see also* Schwed, *supra* note 14, at 76–77.

proposed use through reconstruction of zoning regulations, or the implementation of roadblocks to the proposed use prior to condemnation may all be factors against the condemner.[390] Direct communication of legislators that the condemnation intended to thwart the unwanted use would also serve as evidence against the condemner.[391]

Second, if it is evident that the condemnation occurred after a proposed use (after reviewing the relevant evidence and pleadings), then courts should analyze the claim pursuant to a "rational basis plus" standard of review.[392] Rational basis plus review is a somewhat more exacting inquiry than the notably deferential rational basis review.[393] Courts may apply this heightened review to determine whether the condemner's primary purpose is to, in bad faith, thwart the unwanted use and thus would not be a valid public purpose. This analysis would require an inquiry into the condemner's motive and processes.[394]

Courts can follow Justice Kennedy's concurrence in *Kelo* as a model for analyzing pretextual takings claims even where the stated purpose is a traditionally public use.[395] Thus, a court may conduct a "careful and extensive inquiry" and scrutinize the condemner's procedures to uncover its actual purpose.[396] A court can also look to a "well-reasoned explanation" or evidence that the condemning authority acted in good faith to pursue this public purpose pursuant to testimony or documentary evidence.[397] Finally, a thorough plan that weighed the benefits to the public with the costs to the landowner would weigh in favor of the condemner.[398]

If a condemning authority determined in good faith and with adequate justification that the community would benefit from this public amenity, then the taking could reasonably be upheld. However, if confronted with evidence of a condemnation occurring after a proposed, unwanted use, a court should be able to review that decision to prevent potential abuse of such eminent domain power. This allows for proper judicial review to ensure that the condemner is adequately justifying its use of eminent domain and properly considering the public need.

Even where a court is examining a taking only to ensure that it is "rationally related to a conceivable public purpose,"[399] a court should not take the stated public purpose as a given where there is evidence of bad faith or pretextual motive.[400] Judicial deference on the question of public use is

390. *See supra* Part II.C.1.
391. *See supra* Part II.C.1.
392. *See supra* Part I.C.2.
393. *See supra* notes 119, 122, 123 and accompanying text; *see also* Hafetz, *supra* note 7, at 3114–15 (explaining Justice Kennedy's meaningful rational basis review from his *Kelo* concurrence); Janove, *supra* note 141, at 104.
394. *See supra* Part II.C.1.
395. *See supra* Part I.C.2.
396. *See supra* notes 128–35 and accompanying text.
397. *See supra* Parts I.C.2, II.C.2.
398. *See supra* Parts I.C.1, 2.
399. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).
400. *See supra* Part II.B.

itself built on the assumption that the public use project has received adequate and open consideration in the political process.[401] Thus, such analysis is essential when evaluating what may truly be for the public. Further, it ensures that condemning municipalities remain honest to their constituents through an open and rational zoning and land use process.[402]

Some argue that pretextual claims are difficult to win because a plaintiff must plead plausible allegations of improper motive under the heightened *Twombly-Iqbal* federal pleading standard.[403] However, this proposed standard of review ensures that a court would only review plausible and credible allegations of bad faith, avoiding any appearance of overzealous judicial review of condemnation decisions.[404] If a federal court plaintiff's pleading could only succeed under a plausible allegation of bad faith or pretext, then implausible claims would be weeded out by motions to dismiss. However, if presented with a plausible allegation, a court should be able to conduct a deeper investigation into motive under this test to uphold the Public Use Clause.

Therefore, courts should review pretextual takings challenges under rational basis plus review to ensure a condemner's decision was made in good faith. To both protect individual property rights and ensure that condemners are accountable to the political process, condemning authorities should not be able to use eminent domain to sidestep rational zoning proposals.[405] Such subversion, or dishonesty, of the condemner's stated public purpose is antithetical to ensuring trust in a legitimate government.[406]

B. This Test Would Clarify the Open Question on Pretext and Protect Property Owners Against Abuses of Eminent Domain

The Supreme Court should adopt this proposed test to solve significant issues with current pretextual takings law. First, there is no clarity from the Court as to whether courts review the record for allegations of pretext or bad faith when the taking is a traditional public use.[407] The *Kelo* Court only spoke to the issue of pretextual takings if they impermissibly benefit a private party.[408] Consequently, there remains a clear disagreement in lower courts.[409] Whereas the Second Circuit views *Kelo*'s pronouncement on pretext as specific to takings that are for nonpublic use, various lower courts analyze allegations of pretext as applied to a taking for a traditional public use.[410]

401. *See generally* Oswald, *supra* note 86 and accompanying text.
402. *See supra* notes 233–38 and accompanying text.
403. *See supra* notes 164–68 and accompanying text.
404. *See supra* Part I.D.2.
405. *But see supra* notes 261–62 and accompanying text.
406. *See supra* note 237 and accompanying text.
407. *See supra* notes 352–53 and accompanying text; *see also supra* Parts II.C.1, 2.
408. *See supra* Part I.C.1.
409. *See supra* Part II.C.
410. *Compare supra* Part II.A.2, *with supra* Part II.C.

Second, the Supreme Court should clarify this standard in light of *Knick*, where the Court permitted plaintiffs to bring a takings claim in federal court without first exhausting the claim in their state court.[411] The *Knick* decision causes more federal district courts to determine what is a valid taking under the Fifth Amendment.[412] Although many state courts examine pretextual motive and bad faith,[413] claimants in federal court under a § 1983 claim should be afforded similar judicial review for fairness and consistency's sake.

Third, this test would protect property owners against unguarded NIMBY behavior, especially by local municipal governments who often make land use decisions.[414] Local governments are more susceptible to unchecked decision-making because of undue influence of small but vocal interests.[415] Therefore, local municipal condemnations may be far less scrutinized, and there are likely fewer checks and balances between the branches of government.[416] Furthermore, eminent domain proceedings seeking to thwart an unwanted use are often motivated by a desire to exclude and to avoid zoning reform.[417] Thus, judicial review under a rational basis plus standard of review would be useful to uphold the Fifth Amendment and stop unchecked use of government eminent domain power.

Some argue that the examination of a multimember governing body's motivation behind a taking is difficult because of the multiple members and interests involved.[418] However, there are analogous constitutional claims where the Supreme Court reviews government motivation and processes in its analysis.[419] For example, the Court in *Olech* looked to government bad faith and pretext in a class of one equal protection claim for an arbitrary land use decision.[420] The class of one constitutional analysis is somewhat analogous to reviewing pretextual motive and a clear example of how this Note's proposed test can function in the Court's jurisprudence.[421] Here, however, a plaintiff would not need to prove that the condemner treated them differently than a similarly situated landowner.[422] Moreover, this test is triggered by evidence of bad faith after the proposal of an unwanted use,

411. *See supra* Part I.A.2.
412. *See id.*
413. *See supra* Part II.C.1.
414. *See* Schwed, *supra* note 14, at 66–69.
415. *See* Oswald, *supra* note 86, at 277–78.
416. *See supra* notes 229–30 and accompanying text.
417. *See* Schwed, *supra* note 14, at 66–69; *see also supra* Part II.C.1.
418. *See supra* notes 157–62 and accompanying text. Additionally, various lower courts successfully review motivation through a takings claim. *See supra* Part II.C.
419. *See* Kelly, *supra* note 107, at 197 (noting that the Supreme Court in *Church of Lukumi Bablalu v. Hialeah* examined the motives of the local council through their meeting records in a First Amendment challenge).
420. *See supra* Part II.D.
421. Professor Blackman suggested using class of one claims with a rational basis plus standard of review to challenge economic development takings. However, this Note's solution allows litigants to bring a claim under the Fifth Amendment for a pretextual, traditional taking and still receive rational basis plus review. *See supra* notes 371–75 and accompanying text.
422. *See supra* Part II.D.

rather than irrational and arbitrary treatment as compared to another landowner.[423]

In short, when a proposed land use is placed on a condemner's agenda, and it is ultimately disfavored, a condemner may seek ways to prevent this property use from moving forward. There could be legitimate reasons for the condemner to first recognize a need for public use through this proposal. In that event, courts may decide to uphold the taking for a rational public purpose. However, for fairness and political process reasons to the property owner, thwarting an unwanted use alone should not be grounds for a valid public use. Thus, the Court should adopt this two-step test to review plausible pretext claims for a classic public use taking under rational basis plus review.

CONCLUSION

Twenty years ago, the Supreme Court in *Kelo* declared that a taking may not be pretextual for conferring an impermissible private benefit.[424] That threat is especially pronounced in private-to-private transfers of land in economic development takings. However, the Court has not specified whether a pretextual analysis applies to takings that are for a traditional public use. Such lack of clarity has led to inconsistent pretextual analyses across state and federal courts. Moreover, this open question, coupled with the traditionally deferential standard of review for takings challenges, has led to an ongoing abuse of the eminent domain power under the Fifth Amendment.

This Note proposes a two-step test that suggests that courts review plausible allegations of pretext or bad faith motive in takings challenges under a slightly heightened rational basis plus standard of review. The rational basis plus review is triggered if there is evidence that the condemnation occurred after a proposed, unwanted use. This solution focuses on when the condemner intends to accomplish a different goal than what it states, making the public use that it did not actually intend to accomplish merely pretextual.

Furthermore, this test will prevent condemners from using an essentially unreviewable power to take property through eminent domain for public amenities—thereby avoiding zoning and other land use processes. These processes tend to ensure that the project's true public benefits and costs to the landowner have been adequately and openly considered. This solution would protect the rationality in government decision-making. Condemners should not rely on eminent domain as a back door to subvert a proper land use process. This proposed test would provide a much needed clarification on how to review pretextual takings for a traditional public use and,

423. *See supra* notes 366–70 and accompanying text. If there are concerns of invidious discrimination, such as a condemnation to thwart the development of a suspect class's housing development, a plaintiff may still bring an equal protection claim.

424. *See* Kelo v. City of New London, 545 U.S. 469, 478 (2005).

moreover, ensure that the power of eminent domain is used for a true public purpose.