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WHEN THE LEGISLATURE ROBS PETER TO PAY PAUL: PRETEXTUAL TAKINGS AND *GOLDSTEIN V. PATAKI*

*Michael V. Bernier**

I. INTRODUCTION

The power of eminent domain conferred upon municipalities and government entities has created a long line of controversial issues. Particularly, the requirement for proposed takings to further a "public use" continuously provides courts with questions of great importance. The supreme deference historically afforded to the legislature in determining the satisfaction of the "public use requirement" has consistently left property owners feeling helpless and without confidence in the judicial system. In *Goldstein v. Pataki*,[1] the United States Court of Appeals for the Second Circuit analyzed such an instance, focusing not only on whether a proposed taking satisfied the "public use requirement," but also whether the asserted public justifications were pretextual.[2] A three-judge panel of the Second Circuit held that a taking's proposed public use satisfied the "public use requirement" and that an asserted pretextual challenge was meritless.[3] While the *Goldstein* court appropriately recognized the availability of the pretextual challenge, it failed to set forth a workable standard for its application. In this Note, I analyze the derivation of the pretextual challenge, as well as the standards applied by *Goldstein* and other courts. I then propose a burden-shifting analysis based on a set of threshold factors for application in pretextual taking claims.

II. FACTS AND PROCEDURAL HISTORY

"The Atlantic Yards Arena and Redevelopment Project (the 'Atlantic Yards Project' or the 'Project') is a publicly subsidized development project set to cover twenty-two acres in . . . an area in the heart of downtown Brooklyn, New York."[4] The plan for the Project included construction of a sports arena to be home to the New Jersey Nets, approximately sixteen high-rise apartment towers, and numerous office towers.[5] The Project was to be carried out, in part, through the assistance of the New York State Urban Development Corporation, d/b/a the Empire State Development

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1. 516 F.3d 50 (2d Cir. 2008).
2. *Id.*
3. *Id.* at 57-65.
4. *Id.* at 53.
5. *Id.* The New Jersey Nets is a team in the National Basketball Association.

Corporation (the "ESDC"), a public-benefit corporation and political subdivision of New York State.[6] The Project involved two main parcels of land: (1) the Atlantic Terminal Urban Renewal Area ("Renewal Area"), a heavily blighted area owned in part by the Metropolitan Transit Authority ("MTA"); and (2) an adjacent area with less blight (referred to in the complaint as the "Takings Area") that was held by private parties.[7] According to the plan for the Project, the ESDC intended to acquire the privately held land in the Takings Area through the use of eminent domain if necessary.[8]

The ESDC issued a Notice of Public Hearing and held the hearing on August 23, 2006, as well as a community forum to discuss the Project on September 12, 2006.[9] The ESDC identified the following as the public purposes to be served by the Project:

(1) The elimination of blight in both the Takings and Non-Takings Areas, which is the purported "principal" public purpose of the Project;
(2) An arena to be used by a major-league sports franchise, for athletic contests featuring local academic institutions, and for other entertainment and civic events;
(3) Approximately 2,250 units of "affordable" rental housing and between 3,075 and 4,180 units of "market rate" housing;
(4) Between 336,000 and 1,606,000 square feet of office space;
(5) "Possibly" a hotel;
(6) Eight acres of publicly accessible space;
(7) Ground-level retail space "to activate the street frontages";
(8) "Community facility spaces," including those offering child care and "youth and senior center service";

6. *Id.* Various sections of New York's Eminent Domain Procedure Law were at play here. New York law requires a condemner to conduct a pre-acquisition public hearing "in order to inform the public [of the proposed public project] and to review the public use to be served by a proposed public project." Goldstein v. Pataki, 488 F. Supp. 2d 254, 257 (E.D.N.Y. 2007) (quoting EM. DOM. PROC. § 201 (McKinney 2006)). "At the [s]ection 201 hearing, the condemnor must announce the purpose and location of the proposed project, and those in attendance must be given an opportunity to present oral or written statements and to submit other documents concerning the project." *Id.* (quoting EM. DOM. PROC. § 203). "A 'condemnor' is 'any entity vested with the power of eminent domain.' " *Id.* n.1 (quoting EM. DOM. PROC. § 103(D)). "When . . . the condemnor is an entity other than the State of New York, the condemnor must file a petition in New York State Supreme Court in order to acquire the condemned property." *Id.* at 259 (citing EM. DOM. PROC. §§ 402(B), 501). "Should the court find that the procedural requirements of New York's Eminent Domain Procedural law have been met, it must enter an order granting the petition." *Id.* (citing EM. DOM. PROC. § 402(B)(4)). "Within ninety days of a public hearing, a condemnor must publish a synopsis of its determination and findings" specifying "(1) the public use, benefit, or purpose to be served by the proposed public project; (2) the location of the project and the reason(s) that location was selected; (3) the general effect of the project on the environment and residents of the locality; and (4) other factors the condemnor considers relevant." *Id.* at 258 (citing EM. DOM. PROC. § 204(A)-(B)). "An aggrieved person may seek judicial review of the condemnor's determination and findings within thirty days of their publication." *Id.* (citing EM. DOM. PROC. § 207(A)).

7. *Goldstein*, 516 F.3d at 53.

8. *Id.*

9. *Goldstein*, 488 F. Supp. 2d at 257.

(9) A facility for the Long Island Railroad to store, clean, and inspect its trains;
(10) An additional entrance to an already existing subway station;
(11) "[S]ustainability and green design"; and
(12) "[E]nvironmental remediation of the Project Site."[10]

The plaintiffs-appellants ("Appellants") were fifteen property owners with homes and/or businesses in the Takings Area that were slated for condemnation pursuant to the eminent domain proceedings proposed by the Project.[11] In October 2006, Appellants filed this suit in the United States District Court for the Eastern District of New York.[12] The complaint asserted, *inter alia*, that the use of eminent domain in furtherance of the Project would violate the Public Use Clause of the Fifth Amendment to the United States Constitution.[13] In short, Appellants argued that the public uses advanced for the Project were pretexts for a private taking that violated the Takings Clause of the Fifth Amendment.[14] Appellants contended that the Project was not driven by legitimate concern for the public benefit and a "substantial motivation" of the governing officials with approval authority for the Project was to benefit Bruce Ratner, a man whose company first proposed the Project, served as the Project's primary developer, and was the principal owner of the New Jersey Nets.[15]

The district court dismissed the federal claims, concluding that Appellants failed to state an actionable claim.[16] The primary issue raised on appeal was whether the district court overlooked substantial allegations that

10. *Id.* at 258 (citing Determinations and Findings; internal citations omitted).

11. *Goldstein*, 516 F.3d at 53.

12. *Id.* The action named as defendants Bruce Ratner, the private developer carrying out the Project; several entities affiliated with him (collectively, the "Ratner Group"); and various officials, agencies, and subdivisions of New York State and New York City (respectively, the "State Appellees" and City Appellees"). *Id.* at 53-54. In addition, the action was filed pursuant to EM. DOM. PROC. § 207(A).

13. *Goldstein*, 516 F.3d at 54 (citing U.S. CONST. amend. V). The complaint asserted three federal-law claims: that the use of eminent domain in furtherance of the Project would violate both the "Public Use" Clause of the Fifth Amendment and the Equal Protection Clauses of the Fifth and Fourteenth Amendments, as well as a cause of action under New York state law against the ESDC.

14. *Id.*

15. *Id.* Appellants specifically alleged in support of the claim that the "public does not benefit from the taking of plaintiffs' properties" and "[a]lternatively . . . any benefit from the taking of plaintiffs' properties . . . is secondary and incidental to the benefit that inures to [the Ratner Group]" because the "desire to confer a private benefit to [the Ratner Group] was a substantial, motivating factor, in defendants' decision to seize plaintiffs' property and transfer it to [the Ratner Group]." *Id.* n.3. A second cause of action asserted the claim that Appellees violated the Equal Protection Clause by "[e]levating the status of one citizen or group of citizens" and by "singling out plaintiffs, for unequal, adverse [ ] treatment" without a rational basis." *Id.* (alteration in original). A third cause of action asserted that "in circumventing the local review process (and instead working at the state level with the ESDC), [Appellees] violated [Appellants'] procedural due process rights." *Id.* A fourth cause of action alleged various violations of New York's Eminent Domain Procedural Law section 207. *Id.*

16. *Id.* at 55. The district court concluded that the Project "would serve several public uses such as the redress of blight, the construction of a sporting arena, and the creation of new housing." *Id.* As to the equal protection claim, the district court deemed it not viable because, among other things, there was no rational basis for any distinction between the plaintiffs and other persons. *Id.* (citation omitted). As to the due process claim, the district court held that the eminent domain process was insufficient to

Mr. Ratner was the sole beneficiary of the Project and the public uses advanced by New York Governor George E. Pataki, New York State Urban Development Corporation, Mr. Ratner, and others ("Appellees") were a mere pretext.[17] Appellants argued that the sole purpose was to take land from the plaintiffs to give to Mr. Ratner so Mr. Ratner could then develop the property for his personal benefit.[18]

A three-judge panel of the Second Circuit affirmed the dismissal of the land owners' Public Use Clause claim, holding that the Project was rationally related to public use and the mere fact that a private party stood to benefit from the proposed taking did not suggest that the public use was invalid.[19] The Second Circuit agreed with the district court that a " 'pretext' argument provided a valid basis for a public[ ]use challenge under the Supreme Court's decision in *Kelo v. City of New London.*"[20] However, after discussing its decision not to apply a different standard for pretext claims, the majority found no plausible accusations of favoritism.[21]

III. BACKGROUND AND HISTORY OF THE LAW

The power of eminent domain finds its origins in the Fifth Amendment, which provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."[22] The Fifth Amendment does provide limits to this power; one such limit is known as the "public use requirement."[23] The boundaries of the public use requirement have evolved a great deal since its inception, as will be described below.

One constant source of controversy for the public use requirement has been the supreme deference afforded to the legislature and the corresponding narrow role of the judiciary. The pretextual takings issue raises certain questions regarding the propriety of the deference to the legislature and whether the judicial role should be expanded to protect against pretextual public justifications. Accordingly, the background of the balance between the legislature and judiciary in takings is worth a close look.

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satisfy the requirements of due process. *Id.* (citing Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005)). The district court "declined to retain supplemental jurisdiction over the state claim"; this issue was not challenged on appeal. *Id.*

17. *Id.*

18. *Id.* In Appellants' brief, they claimed that " 'favored' developer [Ratner] [was] driving and dictating the process, with government officials at all levels obediently falling into line . . . . That abdication has allowed Ratner to co-opt the power of eminent domain; and to wield it in service of his understandable desire to expand the Project to truly mammoth proportions, thus increasing the profit to himself, his companies[,] and his shareholders." *Id.* (internal citation omitted).

19. *Id.* at 57-65. The court also held that a state agency could make public use determination in exercise of power of eminent domain. *Id.*

20. *Id.* at 55 (citing Kelo v. City of New London, 545 U.S. 469 (2005)).

21. *Id.*; *see Kelo*, 545 U.S. at 490 (Kennedy, J., concurring).

22. U.S. CONST. amend. V.

23. The public use requirement was made applicable to the states through the Fifteenth Amendment to the U.S. Constitution. Phillips v. Wash. Legal Found., 524 U.S. 156, 163-64 (1998).

A. *Berman v. Parker: Eminent Domain as a Means to an End*

In 1945, Congress enacted the District of Columbia Redevelopment Act of 1945 (the "Act")[24] to address redevelopment of blighted areas throughout Washington, D.C.[25] The Act created a five-member agency (the "Agency")[26] and gave it eminent domain authority to acquire "real property for 'the redevelopment of blighted territory . . . . ' "[27] In addition to granting the Agency certain authority, the Act also directed the National Capital Planning Commission (the "Planning Commission") to make and develop a land-use plan for specific project areas.[28] After prospective acquisition of these "blighted areas," the Act granted the Agency authority to transfer the land to public entities, as well as to private entities.[29]

The first project undertaken by the Agency under the Act pertained to "Project Area B" in Southwest Washington, D.C.[30] The Planning Commission prepared a comprehensive redevelopment plan, and the District's Director of Health deemed it "necessary to redevelop Area B in the interests of public health."[31] Subsequently, the Agency undertook the steps for redevelopment, and landowners owning land within the project area commenced suit, claiming that their property could not be taken constitutionally.[32]

The plaintiffs in the *Berman* underlying action owned property in the project area on which a department store was located.[33] They claimed their property was included in the project "under the management of a private, not a public, agency and redeveloped for private, not public, use."[34] The plaintiffs further claimed the project constituted an unconstitutional taking under the Fifth Amendment, specifically asserting that the taking was contrary to the public use mandate therein.[35]

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24. Pub. L. No. 592, 60 Stat. 790 (1945).

25. Berman v. Parker, 348 U.S. 26, 28 (1954).

26. The Agency was named the District of Columbia Redevelopment Agency. *Id.* at 29.

27. *Id.* (quoting the Act, 60 Stat. 790, D.C.Code §§ 5-701 through 5-719 (1951)).

28. *Id.* (citing the Act § 6(a)).

29. *Id.* at 30 (citing the Act § 7(b), (f)). The land to be transferred to public entities was specified to be "devoted to such public purposes as streets, utilities, recreational facilities, and schools." *Id.* (citing the Act § 7(a)). The land to be transferred to private entities was made conditional on the carrying out of the redevelopment plan. *Id.* (citing the Act § 7(d)).

30. *Id.*

31. *Id.* "Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating." *Id.* The population in this area was 5012 persons, of which 97.5% were African American. *Id.*

32. *Id.* at 31. The district court limited the authority of the Act by holding that the "Agency could condemn property only for the reasonable necessities of slum clearance and prevention," but not the areas not considered slums on the grounds that they had the tendency to produce slums. *Id.* (citing Schneider v. District of Columbia, 117 F. Supp. 705, 724-25 (D.C.D.C. 1953)).

33. *Id.*

34. *Id.*

35. *Id.* (citing U.S. CONST. amend. V). The plaintiffs asserted that the taking was both a violation of due process and the public use requirement. *Id.*

Justice Douglas delivered the opinion for the *Berman* Court, opening with an overview of police power.[36] In describing the police power, Justice Douglas focused on the dichotomy between legislative and judiciary roles, noting that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."[37] In reference to the power of eminent domain, the majority opinion provided that "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[38] More specifically, common applications of police power to municipal affairs consist of advancements in "public safety, public health, morality, peace and quiet, [and] law and order."[39] The majority further elaborated that "[m]iserable and disreputable housing conditions" can be a "blight on the community" and potentially contrary to the public welfare.[40]

Turning to the propriety of the application of police power to "blighted areas," the majority focused once again on the role of the legislature, providing that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[41] The Court therefore concluded that when Congress makes determinations based on such values, it is not the role of the judiciary to appraise them.[42] Specifically, if the legislature decides that a given area "should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[43] Further, once the legislature deems a revitalization necessary, there is a "right to realize it through the exercise of eminent domain," and the "power is merely the means to the end."[44]

Throughout, the majority repeatedly refers to the power of eminent domain as the "means" of executing the project. Not only are the means by which the object will be attained for Congress to determine, but "the means of executing the project are *for Congress and Congress alone* to determine, once the public purpose has been established."[45] In essence, the majority proclaimed that *all* power pertaining to eminent domain resides in the legislature, including the decision to initiate eminent domain proceedings, as well as the authority to exercise the power by any means necessary as long as a "public purpose has been established."[46] Elaborating on this point, the majority maintained that the public end, or public purpose, "may

36. *Id.* at 31-32.
37. *Id.* at 32.
38. *Id.*
39. *Id.*
40. *Id.* at 32-33.
41. *Id.* at 33.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* (emphasis added).
46. *Id.*

be as well or better served through an agency of private enterprise than through a department of government."[47]

After the majority established the legislature's expansive authority to establish both the means and the purpose of eminent domain proceedings, it turned to the specific issue of whether project areas should be addressed on a structure-by-structure basis or, as the Agency did in the underlying action, the area addressed as a whole.[48] The majority reasoned that it was important to redesign the project area as a whole to eliminate the slum-causing conditions and that a "piecemeal approach" would be only a palliative, or mitigating solution.[49] Once again, the majority deemed this issue a legislative question and "not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area."[50] In conclusion, the Court held that "[i]f the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project . . . . The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[51] Essentially, *Berman* stands for the proposition that a legislature's determination of public justifications for a proposed taking should neither be disrupted by courts nor carried out on a piecemeal basis.

B. Hawaii Housing Authority v. Midkiff: The Redistribution of Land via Eminent Domain

Approximately thirty years after *Berman*, the Court was again confronted by the public use question in *Hawaii Housing Authority v. Midkiff*.[52] In 1984, the Supreme Court liberally construed the "public use requirement" to encompass the redistribution of concentrated property ownership to a wider population of residents.[53] The Hawaii Legislature redressed the overwhelmingly concentrated land ownership throughout the Hawaiian Islands in the Land Reform Act of 1967 (the "Act").[54] The Act "created a mechanism for condemning residential tracts" and transferring

47. *Id.* at 33-34. This principle that eminent domain is proper even when commenced through a private enterprise is of great importance in the instant case.

48. *Id.* The plaintiffs argued that "since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners." *Id.* at 34.

49. *Id.* The district court limited the Agency's authority by holding that the Act only gave it the authority to address the slums but not the areas around the slums that allegedly tended to produce slums. *Id.* at 35.

50. *Id.*

51. *Id.* at 36.

52. 467 U.S. 229 (1984).

53. *Id.*

54. Haw. Rev. Stat. Ann. § 516 (LexisNexis 2007); *see Midkiff*, 467 U.S. at 232-33. The Hawaii Legislature discovered that 49% of the state's land was owned by the government, but also that another 47% of the land was owned by only seventy-two private landowners. *Id.* at 232. The legislature concluded that this concentrated land ownership skewed the residential market, inflated land prices, and injured the public tranquility and welfare of the state. *Id.*

the ownership of these condemned parcels to the existing lessees.[55] Pursuant to the Act, the Hawaiian Housing Authority ("HHA") ordered certain landowners to submit to compulsory arbitration.[56] The appellees filed suit, asking for the Act to be declared unconstitutional.[57] The Supreme Court declined,[58] holding that it did not violate the public use requirement of the Fifth and Fourteenth Amendments.[59]

Justice O'Connor delivered the opinion for the Court.[60] The majority set forth that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."[61] Therefore, the role of courts in reviewing a legislature's judgment as to what constitutes a public use is " 'an extremely narrow' one."[62] In describing the narrow judicial role in reviewing a public use, the majority set forth that a taking will be consistent with the Public Use Clause as long as it is "rationally related to a conceivable public purpose."[63] In short, the legislature's determination that the overwhelmingly concentrated state of land ownership served as a public purpose for which the power of eminent domain was necessary was a "comprehensive and rational approach to identifying and correcting market failure."[64] Further, "[w]hen the legislature's purpose is legitimate and its means are not irrational," the debates pertaining to the wisdom of the takings "are not to be carried out in the federal courts."[65] Accordingly, the majority held that the Act passed the scrutiny of the public use requirement.[66] Building on *Berman*, the *Midkiff* Court reaffirmed the supreme deference accorded to public use determinations by legislatures.[67]

The Court also addressed the validity of the Act in reference to the fact that the property was to be transferred from private owners to private beneficiaries.[68] Specifically, "[t]he mere fact that property taken outright

55. *Midkiff*, 467 U.S. at 233. "Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live. When [twenty-five] eligible tenants, or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether the acquisition by the [s]tate of all or part of the tract will 'effectuate the public purposes' of the Act." *Id.* (citations omitted). If HHA finds public purposes served, it is then authorized to designate the land for acquisition. *Id.* at 233-34.

56. *Id.* at 234.

57. *Id.* at 234-35.

58. The district court declared the compulsory arbitration and compensation formulae provisions of the Act unconstitutional, but that "the Act's goals were within the bounds of the [s]tate's police powers." *Id.* at 235 (citing Midkiff v. Tom, 483 F. Supp. 62 (Haw. D.C. 1979)). The Ninth Circuit reversed, holding that the Act did not meet the public use requirement. *Tom*, 702 F.2d 788.

59. *Midkiff*, 467 U.S. at 239 (citing U.S. CONST. amends. V, XIV). The Court decided another question of law pertaining to whether the district court abused its discretion in not abstaining from the exercise of its jurisdiction. *Id.* at 236. The Court held that no abstention was required. *Id.*

60. *Id.* at 231.

61. *Id.* at 240 (citing Berman v. Parker, 348 U.S. 26, 32 (1954)).

62. *Id.* (citing *Berman*, 348 U.S. at 32).

63. *Id.* at 241.

64. *Id.* at 242.

65. *Id.* at 242-43.

66. *Id.* at 243.

67. *Id.*

68. *Id.*

by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."[69] Here, the Act's public purpose of redressing the concentration of land ownership and the consequential market failure was advanced without the state ever taking actual possession of the land.[70] The fact that the state would never take actual possession of the land was deemed irrelevant by the Court, declaring that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[71]

C. Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp.: *The Second Circuit's Take on the Public Use Requirement*

The *Goldstein* opinion is largely based on the Supreme Court precedent outlined in this Note, but the majority also relies heavily on the Second Circuit precedent set forth in *Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp.* ("*Rosenthal*").[72] In 1980, defendants Urban Development Corporation ("UDC") implemented a plan to redevelop the Times Square vicinity in New York City.[73] UDC's stated goals were "to eliminate blight on 42nd Street between Broadway and Eighth Avenue, to revitalize this vital crossroad and integrate it into the theatrical, cultural[,] and commercial life of the city."[74] The site for the project would be acquired and assembled through the power of eminent domain, and "[t]he actual construction of the buildings . . . [would] be undertaken by [a] designated private developer, defendant Park Tower Realty, of which defendant Klein is a principal."[75] A significant issue in this case revolved around one of the towers to be constructed which would be built partially on the site then occupied by the Rosenthals' building.[76]

The Rosenthals ("Plaintiffs") asserted that their building was "structurally sound, attractively maintained, fully occupied, and in no way blighted."[77] They maintained that because their building did not contribute to the spread of blight, the condemnation was "not rationally related to the UDC's stated goal of combatting blight."[78] Plaintiffs claimed the taking was unconstitutional on two grounds: First, the building was condemned

69. *Id.* at 243-44.

70. *Id.* at 244.

71. *Id.*

72. Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44 (2d Cir. 1985).

73. *Id.* at 45.

74. Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 605 F. Supp. 612, 614 (S.D.N.Y. 1985) (quoting Compl. ¶ 16) (internal quotation marks omitted).

75. *Id.* ("The project consist[ed] of several elements: Renovation of nine theaters on 42nd Street, subways station improvements, a new hotel, a large wholesale merchandise mart, and four new office towers . . . . "). The buildings to be constructed would "be leased to Park Tower [Realty] on a long-term basis and operated by Park Tower as . . . office buildings" in return for Park Tower making contributions toward the subway and theater improvements. *Id.*

76. *Id.* at 613-14. The Rosenthals owned and did business in this building for twenty-five years at the time of the action. *Id.* at 614.

77. *Id.*

78. *Id.*

solely for the profit of a private entity, Klein, which was alleged to be an unconstitutional private purpose; second, the state's use of the condemnation to raise funds for the subway and theater renovations was an unconstitutional form of taxation.[79]

The Second Circuit affirmed the district court's dismissal for failure to state a claim, holding that the taking was "rationally related to a conceivable public purpose."[80] First, the court addressed whether the project addressed a legitimate public purpose, finding that the project did in fact "address legitimate public purposes in a reasonable manner."[81] Second, the court addressed whether the condemnation of Plaintiffs' building was within the law of eminent domain, noting that "[i]t makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end."[82] Further, it did not matter that Plaintiffs' building was in good repair because "community redevelopment programs need not . . . be on a piecemeal basis—lot by lot, building by building."[83] Accordingly, the court concluded that "[w]hen the legislature's purpose is legitimate and its means are not irrational, . . . debates. . . are not to be carried out in the federal courts."[84] Therefore, it is clear that the Second Circuit in *Rosenthal* adopted a similar level of deference to the legislature as set forth by *Berman* and *Midkiff*, as well as the low rational-basis standard for asserted public justifications.

D. Kelo v. City of New London*: Economic Redevelopment Takings and the Introduction to Pretextual Takings*

In 2005, the Court was presented with a new spin on eminent domain, focusing on the concept of economic redevelopment takings in *Kelo v. City of New London*.[85] In 1990, a state agency designated New London, Connecticut (the "City"), a "distressed municipality."[86] "In 1998, the City's unemployment rate was nearly double that of the [s]tate, and its population of just under 24,000 residents was at its lowest since 1920."[87] These conditions prompted officials to target the City for economic revitalization and appoint the New London Development Corporation (the "NLDC"), a nonprofit entity, to plan economic development.[88] The pharmaceutical company Pfizer Inc. made plans to build a $300 million research facility on the site.[89] "[L]ocal planners hoped that Pfizer would draw new business to the

79. *Id.* at 614-15.

80. Rosenthal & Rosenthal Inc. v. N.Y. Stat Urban Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985).

81. *Id.* at 46. The court stated that it had already taken note of the area's blighted condition. *Id.*; *see* Natural Res. Def. Council, Inc. v. City of New York, 672 F.2d 292, 294 (2d Cir. 1982).

82. *Rosenthal*, 771 F.2d at 45 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984)).

83. *Id.* (quoting Berman v. Parker, 348 U.S. 26, 35) (1954) (internal quotation marks omitted).

84. *Id.* (quoting *Midkiff*, 467 U.S. at 238) (internal quotation marks omitted).

85. 545 U.S. 469 (2005).

86. *Id.* at 473.

87. *Id.*

88. *Id.*

89. *Id.*

area, thereby serving as a catalyst to the area's rejuvenation."[90] Subsequently, the NLDC finalized a development plan for ninety acres of the City.[91] "In addition to creating jobs, generating tax revenue, and helping to 'build momentum for the revitalization of downtown New London,' " the plan was designed to beautify the City and create leisure and recreational opportunities.[92]

In 2000, "the NLDC initiated the condemnation proceedings that gave rise to this case."[93] Susette Kelo and eight other petitioners ("Petitioners") owned fifteen properties within the Project area.[94] There were no allegations that any of these properties were blighted or in poor disrepair, but they were nonetheless condemned because they happened to be in the designated development area.[95] Petitioners' complaint alleged that "the taking of their properties would violate the 'public use' restriction in the Fifth Amendment."[96] The United States Supreme Court "granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[97]

Justice Stevens delivered the opinion of the Court in this 5-4 decision upholding the constitutionality of the taking at issue.[98] Initially, Justice Stevens described a strong dichotomy between two classes of takings: First, "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation"; second, "it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking."[99] Concerning the first class, the majority made it quite clear that "the City would be forbidden from taking [P]etitioners' land for the purpose of conferring a private benefit on a particular private party."[100] Further, "[n]or 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."[101] However, the Court found

90. *Id.*

91. *Id.* at 473-74. The development plan encompassed seven parcels. *Id.* at 474.

92. *Id.* at 474-75 (citing App. Br. at 92).

93. *Id.* at 475. "The NLDC successfully negotiated the purchase of most of the real estate in the [ninety]-acre area, but its negotiations with petitioners failed." *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (citing U.S. CONST. amend. V) (internal citation omitted). "The Superior Court granted a permanent restraining order prohibiting the taking of" some of the properties, but denied the order concerning others. *Id.* at 475-76 (citation omitted). The Supreme Court of Connecticut held that all of the City's takings were valid and that the economic development plan qualified as a valid public use. *Id.* at 476 (citations omitted).

97. *Id.* at 477 (citing U.S. CONST. amend. V).

98. *Id.* at 470. Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. *Id.*

99. *Id.* at 477.

100. *Id.*

101. *Id.* at 478 (emphasis added).

that the City's development plan was not adopted to benefit a particular class of individuals.[102]

Next, the majority analyzed the boundaries of the public use requirement, providing that the "Court long ago rejected any literal requirement that condemned property be put into use for the general public."[103] Justice Stevens noted that the "use by the public test" was not only hard to administer, but it was also impractical in modern-day societies.[104] Accordingly, the Court adopted the broader interpretation of "public use" as the "public purpose" requirement adopted in the late nineteenth century.[105]

After providing an extensive background of caselaw, the opinion, like many before it, referenced the role of jurisprudence pertaining to the public use issue and emphasized that it is proper to "afford[ ] legislatures broad latitude in determining what public needs justify the use of the takings power."[106] Particularly, the Court declared the City's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation" was entitled to judicial deference.[107]

Petitioners urged the Court "to adopt a new bright-line rule that economic development [did] not qualify as a public use."[108] Yet, the Court refused to do so, primarily because it deemed promoting economic development "a traditional and long-accepted function of government."[109] Also, Petitioners urged the Court to "require a 'reasonable certainty' that the expected public benefits will actually accrue."[110] Relying on *Midkiff*, again the Court refused, reasoning that such a requirement would be "an even greater departure" from precedent.[111]

1. Justice Kennedy's Concurrence

Of particular importance in Justice Kennedy's concurrence is his assertion that the pretext argument discussed in the majority's opinion is appropriate for public use analyses.[112] Justice Kennedy did not contend that the *Midkiff* "rational-basis test" should be overruled, but he merely asserted that the "rational-basis test" should be used in unison with a pretext analysis.[113] Specifically, "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is

102. *Id.*

103. *Id.* at 479 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)) (internal quotation marks omitted).

104. *Id.*

105. *Id.* at 480; *see* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

106. *Kelo*, 545 U.S. at 483.

107. *Id.*

108. *Id.* at 484.

109. *Id.*

110. *Id.* at 487.

111. *Id.* at 487-88 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.") (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242-43 (1984)).

112. *Id.* at 490 (Kennedy, J., concurring).

113. *Id.* at 491.

intended to favor a particular private party, with only incidental or *pretextual public benefits* . . . . "[114] Simply stated, if the public benefits alleged by the party invoking eminent domain powers are merely pretextual, the taking does not meet the public use requirement.

2. Justice O'Connor's Dissent

Justice O'Connor, with whom Chief Justice Rehnquist and Justices Scalia and Thomas joined, dissented from the majority opinion.[115] The dissent proclaimed that "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded . . . . "[116] Further, Justice O'Connor provided that the government "cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property."[117] This dissent did not completely foreclose the avenue of transferring privately owned land to another private entity via eminent domain.[118] In fact, this dissent provided that the power of eminent domain may be utilized to "transfer private property to private parties . . . who make the property available for the public's use—such as with a railroad, a public utility, or a stadium."[119] Also, in certain circumstances, takings that serve a public purpose may also be constitutional even if the property is destined to be subsequently transferred to a private entity.[120]

Justice O'Connor first considered the constitutionality of economic development takings an issue of first impression, and second, deemed the takings unconstitutional.[121] In distinguishing this case from *Berman* and *Midkiff*, the dissent asserted that this case was different because, here, Petitioners' homes were not the source of any harm.[122] Consequently, the majority "holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure."[123] An economic redevelopment plan simply takes private property and transfers it to another private entity to be put to a "better" use.[124] In *Berman* and *Midkiff*, private property transferred to other private entities was deemed proper because "the extraordinary, precondemnation use

114. *Id.* (emphasis added).

115. *Id.* at 494 (O'Connor, J., dissenting).

116. *Id.* Justice O'Connor deemed the majority's decision an abandonment of a "long-held basic limitation on government power." *Id.*

117. *Id.* at 496.

118. *Id.* at 498.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 500.

123. *Id.* at 500-01.

124. *Id.*

of the targeted property inflicted affirmative harm on society."[125] Justice O'Connor's dissent represents the common fear of many Americans that the *Kelo* decision may allow the legislature to permit broad property reallocation powers through the power of eminent domain.

3. Justice Thomas's Dissent

Justice Thomas in his dissent agrees with Justice O'Connor on the point that "economic development" takings are improper and "erase the Public Use Clause from our Constitution."[126] Justice Thomas also addresses the deference afforded to legislative decisions regarding public use.[127] He finds no reason to "afford[ ] almost insurmountable deference to legislative conclusions that a use serves a 'public use.' "[128] Further, "it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause."[129] Practically speaking, Justice Thomas also expresses concern over the implications of the majority's decision: "Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities."[130]

IV. INSTANT CASE

Circuit Judge Katzmann authored the opinion of the Second Circuit in *Goldstein v. Pataki*.[131] Chief Judge Jacobs and Circuit Judge Livingston joined the opinion.[132] Appellants asserted that the proffered public justifications for the proposed taking were merely pretextual and that the true purpose was to confer a benefit upon a private entity.[133] The Second Circuit affirmed the district court and held that Appellants did not establish a viable Fifth Amendment claim.[134]

The opinion opened with a brief review of the power of eminent domain and the limitations provided by the Fifth Amendment, specifically the public use requirement.[135] In the Second Circuit's interpretation of the public use requirement, the opinion noted that the language guarantees that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."[136] The opinion drew a distinction between the roles of the

125. *Id.* at 500.
126. *Id.* at 506 (Thomas, J., dissenting).
127. *Id.* at 517.
128. *Id.*
129. *Id.*
130. *Id.* at 521.
131. 516 F.3d 50, 52 (2d Cir. 2008).
132. *Id.*
133. *Id.* at 52-53.
134. *Id.* at 53.
135. *Id.* at 57.
136. *Id.* (citing Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937) (internal quotation marks omitted)).

legislature and federal courts, providing that federal courts "address[ ] what type of governmental action constitutes a taking and what level of compensation is just," but it is the legislature's role to determine "whether a taking fulfills the public[ ]use requirement."[137] Nevertheless, the court did note that federal courts play a role, though a narrow one, in "reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power."[138] Accordingly, the court stated that its "review of a legislature's public[ ]use determination is limited such that 'where the exercise of the eminent domain power is rationally related to a conceivable public purpose,' . . . the compensated taking of private property for urban renewal or community redevelopment is not proscribed by the Constitution."[139]

After delineating the scope of the Second Circuit's judicial review, the court addressed Appellants' claims that the "alleged 'public benefits' " were "nonexistent" or "pretextual."[140] The court concisely diffused the claim that the "alleged 'public benefits' " were "nonexistent," stating that Appellants effectively conceded a complete defense to a public use challenge: "that viewed objectively, the Project bears at least a rational relationship to several well-established categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of a public open space, and various mass-transit improvements."[141]

Next, the court addressed Appellants' claim that the "proffered public uses" were merely " 'pretextual,' not because they [were] false, but because they [were] not the real reason for the Project's approval."[142] Appellants claimed that the Takings Area was never declared "blighted" and " 'never designated for redevelopment' until three years after the Project was announced," while the Renewal Area was first declared "blighted" in 1968.[143] In addition, Appellants claimed that the creation of "affordable housing" public use was also pretextual on the ground that "the Project is comprised of luxury housing because 69% of the housing units will be market rate, luxury units"[144]

In response to the pretextual claims, the court held that "redevelopment of a blighted area, even standing alone, represents a 'classic example

137. *Id.*

138. *Id.* (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984)). In *Midkiff*, Justice O'Connor explained the scope of federal judicial review in this area: "Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." *Midkiff*, 467 U.S. at 244 (citation omitted).

139. *Goldstein*, 516 F.3d at 58 (quoting Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985) (citation omitted)).

140. *Id.*

141. *Id.* at 58-59.

142. *Id.* at 59.

143. *Id.*

144. *Id.* (internal quotation marks omitted).

of a taking for a public use.' "[145] Further, noting that the complaint conceded that "at least 550 below-market units . . . are slated to be built in the first phase of development," the court declared that it did not matter that New York had enlisted the services of a private developer to execute such improvements.[146] Accordingly, the panel held that once a "valid public use to which the project is rationally related" was discerned, it "makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end."[147]

Appellants also sought relief on the ground that their individual lots were not blighted.[148] In response, the court held that it was without authority to grant relief because "once it has been shown that the surrounding area is blighted, the state may condemn unblighted parcels as part of an overall plan to improve a blighted area."[149] Furthermore, the panel rejected "the argument that the ESDC [was] undeserving of such deference because it [was] merely a state agency."[150]

The court then returned to the "pretext" claim, first addressing its history and its application to the power of eminent domain.[151] The landowners acknowledged the Project's relationship to several public uses, but contended that the public uses were mere pretexts for the officials with approval authority to confer a private benefit on the private developer, Brett Ratner.[152] The Second Circuit rejected the argument, holding as follows:

> [W]e must reject the notion that, in a single sentence, the *Kelo* majority sought *sub silentio* to overrule *Berman*, *Midkiff*, and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking 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.[153]

In conclusion, the Second Circuit, after rejecting Appellants' Fifth Amendment challenge, also rejected the due process and equal protection claims Appellants brought for essentially the same reasons as the district court.[154] Accordingly, the judgment of the district court was affirmed.[155]

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145. *Id.* (quoting *Rosenthal*, 771 F.2d at 46).

146. *Id.* at 59-60.

147. *Id.* at 60 (quoting *Rosenthal*, 771 F.2d at 46).

148. *Id.*

149. *Id.* (quoting *In re* G. & A. Books, Inc., 770 F.2d 288, 297 (2d Cir. 1985)).

150. *Id.* The panel noted that "[t]he Supreme Court has expressly extended deference in such matters to both Congress and its authorized agencies." *Id.* (internal quotation marks and citation omitted).

151. *Id.* at 60-61. The issue of pretext finds its origins in *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) ("under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit").

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

153. *Id.*

154. *Id.* at 65.

V. ANALYSIS

A. The Origin of the Pretext Claim under the Public Use Clause

The Courts in *Berman* and *Midkiff* set forth the deferential standard for courts to use in determining whether a taking is consistent with the Public Use Clause. The *Midkiff* Court provided that a taking is consistent with the Public Use Clause as long as it is "rationally related to a conceivable public purpose."[156] This extremely deferential standard carved a very narrow role for the judiciary in determining whether a taking has a sufficient public use within the context of the Fifth Amendment. The settled standard was put to the test when the Court was confronted by the difficult and controversial *Kelo* decision.

When confronted by the economic development taking in *Kelo*, the difficulty of the decision was bolstered by the fact that Justice O'Connor, who substantially contributed to the deferential standard by writing for the majority in *Midkiff*, wrote a sobering dissent, eloquently outlining the dissenters' reluctance to extend the *Berman* and *Midkiff* standard to this area of takings.[157] However, readers need not skip to the *Kelo* dissents to find reservations among the justices in extending the deferential standard to this area of takings. The majority, in a subtle attempt to provide a safeguard, proclaimed: "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."[158] While the majority opinion did not elaborate on what it specifically meant by this statement, the proverbial cloud was thrown into the air. Fortunately, Justice Kennedy wrote a concurring opinion that provides readers with a little insight into what was meant by "pretext."[159]

At this point, it is important to note the utility of concurring opinions. The United States Supreme Court once stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[160] Therefore, while Justice Kennedy's concurrence is not the holding of the Court, it is instructive of what the Court would hold when faced with a fact pattern more susceptible to the pretextual challenge.

Justice Kennedy likened the deferential standard of *Berman* and *Midkiff* to the rational-basis test used in reviewing due process and equal protection cases.[161] Significantly, Justice Kennedy noted: "The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular,

155. *Id.*
156. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).
157. *Kelo*, 545 U.S. at 494-505 (O'Connor, dissenting).
158. *Id.* at 478.
159. *Id.* at 490-93 (Kennedy, J., concurring).
160. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 (1976)) (internal quotation marks omitted).
161. *Kelo*, 545 U.S. at 490.

favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause."[162] In short, even under the deferential standard of *Berman* and *Midkiff*, takings with stated public benefits that are incidental or pretextual to an actual intent to provide benefits to private entities are in violation of the Public Use Clause.[163] Likewise, "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits."[164]

For further insight, Justice Kennedy directs our attention to the rational-basis review courts utilize in Equal Protection Clause cases in determining whether government classifications should be found in violation when a class of private parties is injured, "with only incidental or pretextual public justifications."[165] In *Cleburne*, a zoning ordinance excluding group homes for the mentally retarded from permitted uses in the zoning district was found to be in violation of the Equal Protection Clause.[166] Justice Kennedy's citation to *Cleburne* is significant because the *Cleburne* decision involved judicial scrutiny for determination of legislation's true purpose.

The *Cleburne* Court went through the rational-basis analysis providing that "legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose."[167] From reading this language, it is quite clear why Justice Kennedy likened the Equal Protection Clause analysis to that of the deferential standard of *Midkiff* which provides that a taking is consistent with the Public Use Clause as long as it is "rationally related to a conceivable public purpose."[168] The *Cleburne* Court considered the city's arguments that "the ordinance [was] aimed at avoiding concentration of population and at lessening congestion of the streets," but found the city's arguments meritless.[169] It is evident that the Court looked beyond the stated purpose of the ordinance and attempted to determine if the stated purpose was also the true purpose. In essence, the Court looked beyond the ordinance's stated pretextual purpose of lessening population concentration and determined that the ordinance was actually "an irrational prejudice against the mentally retarded."[170] Justice Kennedy's reference to *Cleburne* in his *Kelo* concurrence called upon courts applying rational-basis review under the Public Use Clause to look beyond the stated purpose of takings and determine whether the stated purpose is merely pretextual to an intention to confer a benefit upon a private entity.[171]

162. *Id.*
163. *Id.*
164. *Id.* at 491.
165. *Id.*; *see* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47, 450 (1985).
166. *Cleburne*, 473 U.S. at 450.
167. *Id.* at 446.
168. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).
169. *Cleburne*, 473 U.S. at 450.
170. *Id.*
171. *Kelo*, 545 U.S. 469, 491 (2005) (citing *Cleburne*, 473 U.S. 432).

B. The Availability and Application of the Pretextual Challenge

While both the *Kelo* majority and Justice Kennedy's concurrence open the door to claims of pretextual takings, various questions concerning the concept remain unanswered. Specifically, did the *Kelo* decision create a challenge to takings on the grounds that the stated public use was pretextual? If so, what is the standard and proper analysis for a pretextual claim?

It is quite clear that courts have embraced the idea of the pretextual claim, as well as recognized the availability of the claim as a takings challenge pursuant to the Public Use Clause.[172] The court in *Franco v. National Capital Revitalization Corp.* recognized the difficulty associated with the challenge and the need for a remedy: "The government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual."[173] The Second Circuit and the district court recognized the availability of the pretextual claim in the *Goldstein* proceedings, but the appropriate application remains unclear.

1. Availability of the Pretextual Challenge

In *Goldstein*, the heart of the complaint was the allegation that the Project was not driven by legitimate concern for the public benefit, but was actually substantially motivated by intentions of government officials to benefit Brett Ratner, the Project's primary developer.[174] In short, Plaintiffs alleged that the stated public uses for the Project were pretexts for a private taking in violation of the Public Use Clause of the Fifth Amendment.[175] Pertaining to availability, the *Goldstein* district court held that a "pretext argument provided a valid basis for a public[ ]use challenge under the Supreme Court's decision in [*Kelo*]."[176]

Courts have generally recognized the pretextual challenge created by *Kelo*. In *Carole Media LLC v. New Jersey Transit Corp.*, the Third Circuit recognized the availability of a pretextual taking challenge, providing that "[w]e recognize that the Supreme Court has suggested that a taking may be invalid under the Public Use Clause where an avowed public purpose is actually a 'mere pretext' to an 'actual purpose . . . to bestow a private benefit.' "[177] In *Western Seafood Co. v. United States*, the Fifth Circuit refused to address whether a heightened standard should be applied when the

172. *See* Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 169 (D.C. Ct. App. 2007); Carole Media LLC v. N.J. Transit Corp., 550 F.3d 302, 311 (3d. Cir. 2008); W. Seafood Co. v. United States, 202 Fed. Appx. 670, 675 (5th Cir. 2006); 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001); MHC Fin., Ltd. v. City of San Rafael, No. C-00-03785 VRW, 2008 WL 440282, at *25 (N.D. Cal. Jan. 29, 2008).

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

174. Goldstein v. Pataki, 516 F.3d 50, 54 (2d Cir. 2008).

175. *Id.*

176. *Id.* at 55 (citing *Kelo*, 545 U.S. at 478) (internal quotation marks omitted).

177. *Carole Media LLC*, 550 F.3d at 311 (quoting *Kelo*, 545 U.S. at 478).

plaintiff alleged a pretextual taking, but the court did consider the allegations and discussed whether the city exhibited favoritism, implying recognition of the pretextual challenge.[178]

In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, a district court case out of California, the court stated that "[n]o judicial deference is required, for instance, where the ostensible public use is demonstrably pretextual."[179] The *99 Cents* court further elaborated by declaring that officials deciding to take private property and later trying to justify the decision in court "merely by positing a 'conceivable public purpose' to which the taking is rationally related" would be in violation of the Takings Clause.[180] It is of particular interest that this decision was from 2001, approximately four years prior to the *Kelo* decision.

In a more recent district court case out of northern California, *MHC Financing, Ltd. v. City of San Rafael*, the court, citing *Kelo*, not only recognized the availability of a pretextual challenge, but also found the asserted public purposes to be pretextual.[181] Accordingly, the court held that the taking was not for the public use and in violation of the Fifth Amendment.[182] In *Franco*, the Court of Appeals for the District of Columbia proclaimed that "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of a public purpose is a pretext designed to mask a taking for private purposes."[183]

2. Application of the Pretextual Challenge

Although *Kelo* opened the door for the pretextual challenge, and courts, including the Second Circuit in *Goldstein*, have certified the challenge, the appropriate standard remains unclear. The deferential standard of *Berman* and *Midkiff* limited the role of the judiciary to a rational-basis assessment. The *Kelo* majority "rocked the boat" with one sentence: "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."[184] Other than some minor discussion of development plans and whether the identity of the proposed private developer was known, the *Kelo* majority provided little additional guidance or explanation.[185] However, the majority's subtle reference to a different or additional scrutiny for the courts into a legislature's proposed public use opened the door to a fair share of litigation. Accordingly, considering the lack of guidance or criteria for such litigation, the standard for courts to apply is far from clear.

178. W. Seafood v. United States, 202 Fed. Appx. 670, 675 (5th Cir. 2006).

179. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

180. *Id.* (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984)).

181. MHC Fin., Ltd. v. City of San Rafael, No. C-00-03785 VRW, 2008 WL 440282, at *25 (N.D. Cal. Jan. 29, 2008).

182. *Id.* at *25.

183. Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 171 (D.C. Ct. App. 2007).

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

185. *Id.* at 478-80.

In *Goldstein*, the district court, in a very cursory analysis of plaintiffs' pretext claim, held that "even if [p]laintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project are 'mere pretexts' within the meaning of *Kelo*."[186] It appears that the district court did nothing more than apply the rational-basis test, and, after finding that the test was met, ignored the pretext claim. The Second Circuit, like the district court, appears to have dismissed the prospect of any additional analysis into the pretext allegations as heightened scrutiny contrary to caselaw, declaring that "[a]llowing such a claim to go forward, founded only on mere suspicion, would add an unprecedented level of intrusion into the process."[187] Additionally, the Second Circuit explicitly confirmed its dismissive attitude, providing the following:

> [W]e must reject the notion that, in a single sentence, the *Kelo* majority sought *sub silentio* to overrule *Berman*, *Midkiff*, and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking 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.[188]

This statement and the corresponding perception is where the Second Circuit erred in its analysis. Here, the Second Circuit delineated a dichotomy between the judicial deference of *Berman* and *Midkiff* and a "close scrutiny" implied by pretextual allegations, but the clear-cut dichotomy is unwarranted. The rational-basis test adopted in *Midkiff* can coexist with a pretext analysis while remaining deferential. As I will further discuss below, the proper analysis is not the excessively low standard used by the Second Circuit here, but a rational-basis test similar to the *Cleburne* Equal Protection Clause analysis referenced by Justice Kennedy in his *Kelo* concurrence.[189]

It is important to note that the Second Circuit did not dismiss the idea of a pretextual taking altogether. In fact, the *Goldstein* opinion specifically preserved "preserving the possibility that a fact pattern may one day arise in which 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."[190] While it is laudable that the court appreciated the prospect of unjustifiable use of the eminent domain power and the great value of an objective analysis, guidelines for determining the presence of such a situation and the corresponding mechanics for an objective analysis remain to be seen.

186. Goldstein v. Pataki, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007).
187. *Goldstein*, 516 F.3d at 62.
188. *Id.*
189. *See Kelo*, 545 U.S. at 490-93 (Kennedy, J., concurring) (citing *Cleburne*, 473 U.S. at 446-47).
190. *Goldstein*, 516 F.3d at 63.

This brings us back to the same question; now that we know there is an available pretextual challenge, what is the standard? In the end, the Second Circuit did recognize Justice Kennedy's reference to the rational-basis review under the Equal Protection Clause, but in a conclusory manner, dismissed the value of his proffered analytical mechanisms, writing "even assuming, *arguendo*, we were to apply a version of Justice Kennedy's standard here, we would scrutinize objectively and find no 'plausible' accusations of favoritism."[191] This question elicits two main questions: 1) What does it mean to "scrutinize objectively," and 2) what are "plausible accusations of favoritism?" As will be discussed below, these are two very important and relevant questions.

It is also important to see how other courts have analyzed pretextual challenges. In *Carole Media LLC*, the Third Circuit made specific reference to Justice Kennedy's *Kelo* concurrence, providing that "aside from making a conclusory allegation that N[ew] J[ersey] Transit engaged in the alleged taking 'solely to benefit a private party . . .,' Carole Media has not made 'a plausible accusation of impermissible favoritism.' "[192]

In *MHC Financing, Ltd.*, the court combined the *Midkiff* standard and the *Kelo* pretextual challenge into a two-part test, providing that the plaintiff, in order to succeed in challenging the taking under the Public Use Clause, must prove that the proffered public purposes were palpably without reasonable foundation,[193] "or that the [c]ity imposed the [o]rdinance under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[194] The *MHC* court found the proffered public purposes to be pretextual, and thus unjustifiable, because of prior attempts by the city to transfer the ownership of the property at issue for different purposes.[195]

The *Franco* court may have summed up its standard most precisely, providing as follows:

> We conclude that a reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking. If the property is being transferred to another private party, and the benefits to the public are only "incidental" or "pretextual," a "pretext" defense may well succeed. On the other hand, if the record discloses (in the words of the trial court) that the taking will serve "an overriding public purpose" and that the proposed development "will provide substantial benefits to the public," the courts must defer to the

191. *Id.* at 64 n.10 (citing *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring)).

192. Carole Media LLC v. N.J. Transit Corp., 550 F.3d 302, 311 (3d Cir. 2008) (citation omitted).

193. MHC Fin., Ltd. v. City of San Rafael, No. C-00-03785 VRW, 2008 WL 440282, at *19 (N.D. Cal. Jan. 29, 2008); *see* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

194. *MHC Fin., Ltd.*, 2008 WL 440282, at *19 (citing *Kelo*, 545 U.S. at 478). It is noteworthy that this case was decided under regulatory takings grounds.

195. *Id.* at *25.

judgment of the legislature. Harder cases will lie between these extremes.[196]

C. A New Standard Based on Justice Kennedy's Kelo Concurrence

The *Kelo* majority recognized the validity of pretextual challenges to takings, but we must look to Justice Kennedy's *Kelo* concurrence for further guidance. It is well settled by *Berman*, *Midkiff*, and over a century of precedent that the Public Use Clause analysis is one of deference to the legislature consisting of a rational-basis review. However, Justice Kennedy urged that courts applying rational-basis review under the Public Use Clause apply a more stringent standard for determining whether a taking "is intended to favor a particular private party, with only incidental or pretextual public benefits."[197] The Second Circuit in *Goldstein* considered this more stringent standard a great departure from the well-settled rule of deference.[198] However, Justice Kennedy's concurrence merely set forth a standard that supplements instead of supplants rational-basis review.[199] In short, the pretextual challenge is an objective analysis intended to ensure that the proposed public benefits asserted by a legislature are in fact rationally related to the true purpose of the proposed taking, rather than pretextual public justifications.[200]

1. A Burden-Shifting Analysis for Determining Whether a "Plausible Accusation of Impermissible Favoritism" Has Been Made

Justice Kennedy provided that "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit."[201] Such review should be made "with the presumption that the government's actions were reasonable and intended to serve a public purpose."[202] While Justice Kennedy did provide us with a test for courts to use in determining whether a condemnee challenging a taking has raised a judicial question of pretextual public justifications, the mechanics of making such a determination were not set forth and have caused confusion for lower courts. It is apparent that Justice Kennedy recognizes courts' obligation to determine whether the party challenging the taking has made a "plausible accusation of impermissible favoritism."[203] If plausible accusations are made, courts should review the facts and determine whether the accusations have merit. This scrutiny does represent a more stringent evaluation of the taking than *Berman* and *Midkiff*; however, the standard Justice Kennedy urges is not an additional level of scrutiny, but rather a procedure for the judiciary to

196. Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 173-74 (D.C. Ct. App. 2007).
197. *Kelo*, 545 U.S. at 491 (Kennedy, J. concurring).
198. *Goldstein*, 516 F.3d at 62.
199. *See Kelo*, 545 U.S. at 491-93 (Kennedy, J. concurring).
200. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47, 450 (1985).
201. *Kelo*, 545 U.S. at 491 (Kennedy, J. concurring).
202. *Id.*
203. *Id.*

determine whether the proposed public benefits are in fact rationally related to the goals of the proposed taking.[204]

To apply Justice Kennedy's proposed standard, courts must first delineate what it means to make a "plausible accusation of favoritism." One purpose of this Note is to set forth a workable standard utilizing a burden-shifting analysis for courts to use in determining whether a condemnee has made such an accusation. This burden-shifting analysis is best applied in the pleading stage as a preliminary inquiry into whether a condemnee has set forth a "plausible accusation of favoritism" and thus deserves his day in court.

The tripartite burden-shifting analysis proposed in this Note originated in the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*,[205] which involved employment discrimination under Title VII.[206] Since *McDonnell Douglas*, courts have expanded the application of the burden-shifting analysis to areas outside of Title VII to include land use cases, such as discrimination suits under the Fair Housing Act (the "FHA")[207] and Land Use Retaliation claims.[208]

I do agree with the Second Circuit that the pretextual claim analysis should be made on an objective basis.[209] This means that courts should evaluate a pretextual challenge by applying a series of objective factors to the pleadings and ascertaining whether a "plausible accusation of favoritism" toward a private entity exists. A difficult question is what objective factors must be present for the challenger to satisfy her burden of alleging a "plausible accusation of impermissible favoritism." One thing to remember when considering these factors is that they are not just factors for determining whether a taking does not meet the public use requirement, but actually an objective series of factors for determining whether the proposed public benefits of a taking fails to be rationally related to the true purpose of the taking on the grounds that the proposed public benefits are merely pretextual to a true purpose of conferring benefits onto particular, favored private entities.[210]

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204. *Id.*

205. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

206. *Id.*

207. Graoch Assocs. v. Louisville/Jefferson County Metdo Human Relations Comm'n, 508 F.3d 366 (6th Cir. 2007) (applying burden-shifting to FHA race discrimination disparate claim); Sharpvisions, Inc. v. Borough of Plum, 475 F. Supp. 2d 514 (W.D. Pa. 2007) (utilizing the burden-shifting analysis to determine whether a borough's conditional use permit requirement discriminated against persons with disabilities); Texas v. Crest Asset Mgmt., Inc., 85 F. Supp. 2d 722 (S.D. Tex. 2000).

208. Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32 (1st Cir. 1992) (applying a burden-shifting analysis to a First Amendment Retaliation Claim to determine whether government justifications were pretextual).

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

210. *See Kelo*, 545 U.S. at 491-93 (Kennedy, J. concurring).

In *McDonnell Douglas*, the tripartite burden-shifting analysis provided a means for determining whether indirect evidence established discriminatory intent.[211] Likewise, a pretextual challenge to public justification concerns indirect evidence rather than direct evidence of alternative intent. Accordingly, a burden-shifting analysis in the takings context is a practicable mechanism for assessing whether conferring private benefit is pretextual in the face of asserted public justifications.[212]

The first step in the burden-shifting analysis is the prima facie case of the condemnee. In order to establish a prima facie case of pretextual private involvement, a condemnee must put forward specific, nonconclusory factual allegations which establish pretext.[213] Consistent with the Second Circuit's requirement for objective evidence, this prima facie prong should be established through a set of objective factors based on a totality of the circumstances.[214] The next section develops factors that, when pleaded, satisfy the plaintiff's initial burden to plead sufficient facts to create a "plausible accusation of impermissible favoritism." The burden is on the plaintiff to plead enough facts to state a claim to relief that is plausible on its face.[215] If the plaintiff satisfies her initial burden, the burden will shift to the condemnor to show legitimate public justification.

Factor 1: Identity of the Transferee

The first factor pertains to the identity of the proposed transferee. In *Kelo*, Justice Kennedy put great weight on the fact that the City of New London had not chosen a private developer prior to asserting the public justifications for the taking.[216] In fact, evidence showed "the substantial commitment of public funds by the [s]tate to the development project before most of the private beneficiaries were known."[217] Logically speaking, for the true purpose of a transfer to be the conferring of a benefit to particular private entities, the identity of the proposed transferee or beneficiary must be known or established prior to the statutorily provided taking mechanism has been set in motion. If the transferee is known before the public justifications are asserted, it is more likely the taking is intended to benefit the private entity and not the public.

In situations, such as *Kelo*, when funding is committed to a project prior to selecting a transferee, it would be very hard to imagine a set of circumstances in which the proposed public benefits were mere pretexts for conferring benefit on "particular, favored private entities."[218] On the other hand, in *Goldstein*, the City knew Mr. Ratner was to be the developer

211. *McDonnell Douglas*, 411 U.S. at 802.

212. *See* Daniel B. Kelly, *Pretextual Takings: of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CR. ECON. REV. 173, 216 (2009).

213. *See* Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J. concurring).

214. *See Goldstein*, 516 F.3d at 63.

215. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

216. Kelo v. City of New London, 545 U.S. 469, 491-92 (2005) (Kennedy, J. concurring).

217. *Id.*

218. *Id.* at 491.

throughout the entire process; he actually proposed the idea to begin with.[219] While this factor is not determinative, the fact that a beneficiary of a taking is known prior to an assertion of public justifications by the taking authority serves as an objective factor for a court to use in determining whether said proposed public justifications are merely pretextual.

Factor 2: Transferee Selection Process

The second factor inevitably stems from the first factor. After placing such great importance on whether the identity of the proposed transferee or beneficiary is known at the time public justifications were asserted by the taking authority, it becomes necessary to consider the transferee/beneficiary selection process itself. Scrutinizing the process is particularly important to determine whether there actually was a competitive process. The large projects inherent to economic development takings are especially prone to potential corruption and/or private influence.[220] In Daniel Kelly's article, he asserts that when a local government is capable of selecting a private party through a competitive process, but chooses not to do so, the taking should be considered pretextual.[221] While the extent of this assertion is problematic, the refusal to use a competitive process is indicative of impermissible favoritism. The absence of a competitive process for the choosing of a transferee increases the likelihood that the conferring of a private benefit is the true objective for the taking. A competitive process demonstrates indifference concerning any benefit that a transferee may receive.

Factor 3: Past Behavior

The third type of conduct that demonstrates impermissible favoritism regards a condemnor's intent to transfer property to or confer benefit upon a private entity prior to asserting different public justifications for a taking. This factor relates to the fact pattern and legal conclusions discussed by the *MHC* court in determining that the City of Rafael's prior support for the benefitting private entities to receive the wealth at question led to a finding of pretextual public purpose in the subsequent taking.[222] *MHC* concerned a regulatory takings issue regarding an ordinance enacted by the City of San Rafael with various asserted "legitimate governmental interests furthered by the [o]rdinance."[223] The court based its finding of a pretextual taking on the evidence that the city had "persistently supported the tenant's desire to convert the Contempo Marin [mobile home park] to a tenant-owned community," especially evidence that the city mayor sent a

219. *Goldstein*, 516 F.3d at 54.

220. Kelly, *supra* note 212, at 202.

221. Kelly, *supra* note 212, at 220.

222. *See* MHC Fin., Ltd. v. City of San Rafael, No. C-00-03785 VRW, 2008 WL 440282 (N.D. Cal. Jan. 29, 2008).

223. *Id.* at *20. "The [c]ity advances three purportedly legitimate governmental interests furthered by the [o]rdinance: (1) protection of mobile home owner equity; (2) protection of fixed-income residents[;] and (3) creation of more affordable housing." *Id.*

letter to the tenants of Contempo Marin asking for support in an upcoming election and specifically promised the tenants that he would continue to help the tenants acquire ownership of the park.[224]

This third factor is especially determinative. When accusations are made of prior efforts by the authority to confer a benefit upon the transferee or beneficiary for reasons different than the public justifications proffered by the taking authority, a "plausible accusation of impermissible favoritism" has been made. Essentially, subsequent justifications varying from initial justifications with the common outcome of conferring a benefit to a particular entity demonstrate that the objective was merely the benefit to the third party and *not* the justifications asserted subsequently.

Factor 4: Presence of an Integrated Development Plan

The fourth factor comes from the *Kelo* majority opinion when it suggested that a transfer of property from one private party to another "executed outside the confines of an integrated development plan, is not presented in this case."[225] An integrated development plan provides support for the proposed taking and reasoning for why a particular private transferee may be well suited for the plan or necessary for the proposed outcome. A taking that proposes a transfer to a private entity in the absence of an integrated development plan is indicative of impermissible favoritism because no support is set forth for the reasoning behind the private entities' involvement. This factor not only provides a basis for determining whether a transfer was made under suspicious circumstances, but also provides for full disclosure. If authorities are required to disclose an integrated development plan, it will be more difficult to conceal pretextual intent.

Factor 5: The Balancing Test

The fifth factor lending to a "plausible accusation of impermissible favoritism" is the most complex and probably the most controversial because it involves a balancing test. In the event that the projected private benefits outweigh the projected public benefits, a court should see the risk of impermissible favoritism and scrutinize the evidence more closely. This does not mean every instance in which a private transferee will reap benefits greater than the benefits projected for the public when a pretextual taking is present. However, when such a plausible accusation is made, a court shall then scrutinize the taking to determine whether the proposed public purpose is in fact rationally related to the true goals of the proposed taking.

It is not a novel concept for courts to analyze the magnitude of proposed public benefits when confronted by a pretextual challenge,[226] but

224. *Id.* at *24. The district court denied summary judgment and ordered a trial to determine whether the actual purpose of the ordinance was to further the asserted public justifications, or whether the public justifications were merely a pretext to justify a private taking. *Id.* at *23.

225. Kelo v. City of New London, 545 U.S. 469, 487 (2005).

226. *See* Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 173-74 (D.C. Ct. App. 2007).

there are inherent inadequacies in only analyzing the projected public benefits.[227] Simply determining whether there are any public benefits does little more than the *Berman/Midkiff* standards of old. Both the taking authority and the private beneficiaries have incentive to inflate projected benefits, and without a frame of reference, the projected benefits will be insulated from scrutiny. However, a balancing test weighing private benefits against public benefits provides a frame of reference and gives courts the ability to "see the big picture" and make a decision whether additional scrutiny is necessary.

This first prong of the burden-shifting analysis may be satisfied on a totality-of-the-circumstances basis through the set of factors outlined above. The standard should be one of plausibility.[228] At the pleading phase, a plaintiff's pretextual challenge likely will be met with a motion to dismiss for failure to state a claim, as in *Goldstein*.[229] In considering a motion for dismissal at this phase, a court should consider the plausibility of the pleadings and determine whether the plaintiff has made a "plausible accusation of impermissible favoritism" by setting forward specific, nonconclusory factual allegations which establish pretext.[230] If such a plausible accusation is made, the first prong of the burden-shifting analysis is met, and the burden would then shift to the government.[231]

The second step of the burden-shifting analysis pertains to government justification.[232] Specifically, step two should require the condemnor to articulate a legitimate justification for private involvement in the taking.[233] The condemnor's burden is to refute the condemnee's prima facie pretext case by justifying private involvement.

In Justice Kennedy's *Kelo* concurrence, he recognized the inadequacies of the supreme deference accorded to legislature in takings.[234] Essentially, under the traditional analysis, a condemnor, when faced with allegations of insufficient public justifications, can just direct a court's attention to a number of traditional public purposes, such as eliminating urban blight,[235] redistribution of concentrated property ownership,[236] and economic revitalization[237] to prevail as long as the taking is "rationally related" to the asserted public purpose.[238]

This step in the burden-shifting framework is the juncture at which the condemnor must demonstrate merit for the asserted public justifications.

227. *See* Kelly, *supra* note 212, at 187-88.
228. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).
229. *See* Goldstein v. Pataki, 516 F.3d 50, 54-55 (2d Cir. 2008).
230. Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J. concurring).
231. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
232. *Id.*
233. Kelly, *supra* note 212, at 218.
234. Kelo v. City of New London, 545 U.S. 469, 493 (2005) (Kennedy, J. concurring).
235. Berman v. Parker, 348 U.S. 26 (1954).
236. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
237. *Kelo*, 545 U.S. 469.
238. *Midkiff*, 467 U.S. at 241.

For guidance, courts should look to the *Cleburne* decision in which the Supreme Court recognized the need to examine the veracity of government justifications.[239] In *Cleburne,* the Court looked beyond the stated purpose of an ordinance and attempted to determine if the stated purpose was also the true purpose.[240] Likewise, in pretextual takings, courts are charged with the task of determining whether the condemnor's asserted public justifications are in fact the true purpose of the taking, rather than pretextual to an intent to confer private benefit.

The condemnor can carry this burden by demonstrating that the evidence presented by the plaintiff is insufficient to demonstrate a pretext. This can be done by providing evidence refuting the allegations made by the condemnee in its prima facie case. For example, if a local government is able to show that a particular private party is necessary because of knowledge, resources, or ability, and that pre-condemnation private involvement is not possible without designating the party as the post-condemnation developer, then the government might be able to satisfy its burden.[241] For the most part, the condemnor's burden is to provide specific justification for the private involvement and its necessity for the promotion of the asserted public justifications. This is the point where the government would likely introduce evidence of traditional public use justifications. If the government introduces evidence of legitimate public use, then it has met its burden.

If the condemnor carries its burden in the second step of the analysis, the burden shifts back to the condemnee.[242] The burden on the condemnee in this third step of the analysis is to show that the condemnor's asserted public justifications for the private involvement are pretextual. Essentially, the condemnee has the burden of showing that the conferring of a private benefit is more likely than not the true purpose of the proposed taking and that the asserted public justifications are merely pretextual.

The benefit to the condemnee in reaching this stage of the analysis is the ability to propound discovery. In order to refute the public benefit justifications asserted by the government in the second prong of the analysis, a condemnee would most certainly need discovery for adequate refutation.

This step in the analysis is an inherently heavy burden. The condemnee has the burden of showing that the legislature's asserted public justifications, which have been historically accorded supreme deference under the *Berman* and *Midkiff* standards, are not the true purpose for the taking. Essentially, as in *Cleburne*, evidence must be introduced that the

239. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47, 450 (1985).

240. *Id.*

241. Kelly, *supra* note 212, at 218.

242. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

government's reasoning behind the private involvement enlisted by the government has no merit.[243]

2. A Presumption of Invalidity in Certain Situations

After discussing the concept of impermissible favoritism, Justice Kennedy then recognized a second category of takings in which a presumption of invalidity may be warranted.[244] Specifically, Justice Kennedy provided that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a *presumption* (rebuttable or otherwise) *of invalidity* is warranted under the Public Use Clause."[245] Although Justice Kennedy then went on to say that it is "not the occasion for conjecture as to what sort of cases might justify a more demanding standard,"[246] it is noteworthy to discuss the concept. As discussed above, the impermissible favoritism analysis is not necessarily a departure from *Berman* and *Midkiff*, and the pretextual challenge can supplement the deferential standard instead of supplanting it—but that is not true for this concept. As Justice Kennedy comments, this more stringent standard would be a departure from *Berman* and *Midkiff*.[247]

Noting that it seems such a burdensome task to make a claim within the purview of the impermissible favoritism prong of the pretextual challenge, it is hard to imagine circumstances in which the "risk of undetected impermissible favoritism"[248] is more acute. However, there are such instances that may raise such concern. For example, private transfers to transferees with certain relationships to the officials making eminent domain situations could possibly have the high risk of favoritism mentioned. These relationships could exist with a variety of individuals or entities: family, close friends, voters,[249] campaign contributors, etc. I would suggest that courts confronted by takings involving private transfers to transferees on the above-mentioned list presume invalidity and apply a more stringent standard in determining whether an impermissible private purpose exists.

D. Analyzing Goldstein Under the Analysis Set Forth Herein

The first step in the burden-shifting analysis is the prima facie case of the condemnee. In order to establish a prima facie case of pretextual private involvement, a condemnee must put forward specific, nonconclusory factual allegations which establish pretext.[250] The question to ask is whether the plaintiffs made a "plausible accusation of impermissible favoritism." To do so, we must apply the above factors, and determine on a

243. *See Cleburne*, 473 U.S. at 450.
244. Kelo v. City of New London, 545 U.S. 469, 493 (2005) (Kennedy, J. concurring).
245. *Id.* (emphasis added).
246. *Id.*
247. *Id.*
248. *Id.*
249. *See* MHC Fin., Ltd. v. City of San Rafael, No. C-00-03785 VRW, 2008 WL 440282, at *24 (N.D. Cal. Jan. 29, 2008).
250. *See* Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J. concurring).

totality-of-circumstances basis whether the condemnee has set forth a "plausible accusation of impermissible favoritism." It is important to note that the facts on the record were not derived with this analysis in mind, so its application is purely for demonstrative purposes.

First, the identity of the transferee, Mr. Ratner, was known prior to the assertion of public justifications; in fact, "[Mr.] Ratner was the impetus behind the Project, i.e., that he, not a state agency, first conceived of developing Atlantic Yards."[251] While this factor is not determinative of a finding of impermissible favoritism, it does open the door for potential favoritism to this private entity, Mr. Ratner, if other factors are also met.

Second, we look at the transferee/beneficiary selection process itself. Here, Mr. Ratner was "the impetus behind the Project," and therefore no competitive process ensued. This factor, like the first factor, is not determinative, but the fact that the first two factors were met indicates a risk of impermissible favoritism.

Third, we look to whether efforts were made to transfer the land by taking officials prior to the public justifications. Here, plaintiffs claim that "public uses being proffered by [A]ppellees . . . were *post hoc* justifications."[252] Specifically, plaintiffs alleged that the *Takings Area*, as opposed to the Renewal Area that was deemed blighted in 1968, was not deemed blighted until years after the Project was announced. While these may seem like just the kind of *post hoc* justifications this third factor is created to detect, we still must remember the deferential standard from over a century of precedent, and not depart from said standard. *Berman* informs us that courts will not use a "piecemeal approach," but will instead redevelop areas as a whole.[253] Further, the redevelopment as a whole meets the public use requirement.[254] Therefore, the *post hoc* justifications third factor is not met here, but remember, not all of these factors need to be satisfied. Rather, the factors are here to indicate whether there is favoritism.

The fourth factor is also not invoked because there were no allegations made that there was an absence of an integrated development plan.

The fifth factor is a predictably complex matter in this case. Weighing the projected benefits conferred to Mr. Ratner against the projected benefits to the public by redressing blight, building an arena, and building housing is quite the task, and is border-line intrusive scrutiny, but the duty here is to ensure that the proposed pubic justifications are in fact the true purposes of the transfer. Obviously, Mr. Ratner, a businessman, expects to make a great deal of money off this transaction. There is great value in building a professional sports arena, not to mention obtaining "some of the most valuable real estate in Brooklyn" for doing so.[255] The Project also

251. Goldstein v. Pataki, 516 F.3d 50, 55-56 (2d Cir. 2008).

252. *Id.* at 56.

253. Berman v. Parker, 348 U.S. 26, 33-34 (1954).

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

255. *Id.* at 59.

includes plans for affordable housing.[256] However, plaintiffs allege, and factual assertions are to be taken as true, that the Project will result in no below-market housing, but actually will be for the most part luxury housing.[257] Plaintiffs contend that this affordable housing paradox indicates the true intention of Mr. Ratner: making money off the luxury housing rather than redressing blight in the area.[258]

The second part of this balancing test requires weighing the projected public benefits. It is quite hard to quantify the value of removing blight and slums, as well as the value of the great number of jobs that the arena will create in the area. However, the affordable housing of the Project does indicate an alternative motive. If the housing aspect were to benefit the public, the housing would need to be affordable to the public, and not consist of mainly luxury homes.

The balance here is far from one-sided. While Mr. Ratner is projected to make a great deal of money, and he is able to obtain some of the most valuable real estate in Brooklyn at a low cost, the public is also benefitting as a whole. It is a fact that the Renewal Area was deemed blighted and there is value that the public will receive from redressing this blight and bringing jobs to the area. It appears to me that Mr. Ratner could potentially receive a greater benefit than the public through this taking. Thus, the projected private benefits may outweigh the projected public benefits.

Ultimately, it is hard to determine from the facts on the record whether the condemnee's first burden is met, but the facts do seem to indicate a "plausible accusation of impermissible favoritism" sufficient to carry the burden. The private transferee was known prior to the taking, there was no competitive process, and the projected private benefits potentially outweigh the projected public benefits. Assuming for demonstrative purposes that the condemnee's burden is met, the burden then shifts to the condemnor, the government.

The condemnor's burden is to demonstrate that the evidence presented by the plaintiff is insufficient to demonstrate a pretext. This can be done by providing evidence refuting the allegations made by the condemnee in its prima facie case. For example, if a local government is able to show that a particular private party's involvement is necessary because of knowledge, resources, or ability, and that pre-condemnation private involvement is not possible without designating the party as the post-condemnation developer, then the government might be able to satisfy its burden.[259] For the most part, the condemnor's burden is to provide specific justification for the private involvement and that it is necessary for the promotion of the asserted public justifications. This is the point where the government likely would introduce evidence of traditional public use justifications.

256. *Id.*
257. *Id.*
258. *Id.*
259. Kelly, *supra* note 212, at 218.

The condemnor in *Goldstein*, the ESDC, asserted the following as public purposes to be served by the Project:

> (1) The elimination of blight in both the Takings and Non-Takings Areas which is the purported "principal" public purpose of the Project;
> (2) An arena to be used by a major-league sports franchise, for athletic contests featuring local academic institutions, and for other entertainment and civic events;
> (3) Approximately 2,250 units of "affordable" rental housing and between 3,075 and 4,180 units of "market rate" housing;
> (4) Between 336,000 and 1,606,000 square feet of office space;
> (5) "Possibly" a hotel;
> (6) Eight acres of publicly accessible space;
> (7) Ground-level retail space "to activate the street frontages";
> (8) "Community facility spaces," including those offering child care and "youth and senior center service";
> (9) A facility for the Long Island Railroad to store, clean, and inspect its trains;
> (10) An additional entrance to an already existing subway station;
> (11) "[S]ustainability and green design"; and
> (12) "[E]nvironmental remediation of the Project Site."[260]

Clearly, the above-mentioned objectives represent substantial public justifications sufficient to carry the second burden. If so, the burden then shifts back to the condemnee.

The condemnee's burden in this third step of the analysis is to show that the condemnor's asserted public justifications for the private involvement are pretextual. Essentially, the condemnee has the burden of showing that the conferring of a private benefit is more likely than not the true purpose of the proposed taking and the asserted public justifications are merely pretextual.

Appellants should be allowed discovery at this stage in order to refute the condemnor's justifications. Appellants would strive to prove Mr. Ratner's and the state's true purpose in the taking was to transfer the property to Mr. Ratner for his personal benefit. This may be feasible by proving that the area was falsely deemed blighted, the housing plans were superficial, or prior attempts were made by Mr. Ratner and the state for such a transfer. However, this is all conjecture and mere speculation for the purpose of demonstrating the likely mechanics of this analysis. The burdens are heavy, and the likelihood of success is low; however, a day in court is well worth the struggle.

260. Goldstein v. Pataki, 488 F. Supp. 2d 254, 258 (E.D.N.Y. 2007) (citing Determinations and Findings) (citations omitted).

VI. CONCLUSION

The United States Constitution provides that no land shall be taken pursuant to eminent domain without sufficient public justifications.[261] It is the power of the legislature to dictate this authority, but it is the role of the judiciary, though a narrow one, to ensure that the legislature's authority is used responsibly. In the event that the legislature does overstep its authority by administering takings with insufficient public justifications, the judiciary must protect land-owners by rejecting those asserted justifications.

Goldstein does not simply set forth another decision debating whether a legislature's public justifications were sufficient; rather, the Second Circuit was confronted with the question of whether asserted public justifications were the actual purposes of the taking or merely pretextual. In this case, the Second Circuit dismissively rejected the pretextual challenge and took the legislature's proposed justifications for face value. However, the pretextual challenge is not going away, and courts must develop a sufficient standard. I only hope this Note provides future courts and litigants with some guidance.

261. U.S. CONST. amend. V.