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The Problem with Pretext

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"It is a familiar principle of constitutional law that [the Supreme Court] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[1]

INTRODUCTION

When the Supreme Court granted certiorari in *Kelo v. City of New London*[2] in September of 2004, many thought it signaled the Court's interest in recognizing a limiting principle inherent in the public use requirement that would rein in the expansive assertion of eminent domain powers by state and local governments undertaking economic development projects.[3] The

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1. United States v. O'Brien, 391 U.S. 367, 383 (1968).

2. 545 U.S. 469 (2005).

3. *See, e.g.*, Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 495-96 (2006) ("The Court's writ, coming as it did in the wake of several high-profile decisions from state supreme courts and lower federal courts employing unusually hard-

Kelo case starkly revealed the vulnerability of private landowners to the seemingly unfettered authority of local officials to condemn private property for what appeared to be mostly private gain. The petitioners in *Kelo* were homeowners, neighbors, and ordinary folks like you and me—only more so. One of the petitioners, Wilhelmina Dery, had been *born* in her home in New London nearly ninety years before, and all of the petitioners had "poured their labor and their love into their homes."[4] Yet the City of New London planned to take these homes against the owners' wishes so that Pfizer and other private companies could use the property for their own private development purposes.[5] If any case provided a perfect vehicle for the Court to announce that the Fifth Amendment had some teeth, this seemed surely to be it.

Alas, it was not to be. In the end, the *Kelo* Court said mostly what it had been saying all along, namely, that the concept of public use was expansive and encompassed projects undertaken purely for economic development purposes, and that the judiciary had little role in policing the legislature's determination that a proposed use satisfied the public use requirement.[6] But the Court did introduce a new idea into the mix. It suggested that if the legislature was asserting a public purpose for the taking of private property as a "mere pretext," and the true purpose for the taking was to bestow a private benefit, then that condemnation would violate the public use requirement.[7]

This Article addresses the problem with pretext. Part I contains a brief history of the public use requirement and the *Kelo* Court's rejection of the claim that economic development does not constitute a public use. Part II summarizes the widespread but essentially ineffectual political fallout from *Kelo* and the consequent return of public use challenges to the courts. Part III explores the argument that pretext may serve as a limiting principle in public use cases. Lastly, Part IV explains the problem with pretext.

nosed approaches to questions of public use, led some to believe that the Court was about to announce a new, tighter standard for judicial review of public use determinations.").

4. Petition for Writ of Certiorari, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 1659558 at *1, *2.

5. *See Kelo*, 545 U.S. at 473.

6. *See id.* at 481-83.

7. *See id.* at 478.

I. A BRIEF HISTORY OF PUBLIC USE, INCLUDING *KELO*

By the early twentieth century, the Supreme Court had long made clear its unwillingness to second-guess legislative determinations of public use.[8] That judicial restraint was tested and solidified in the wake of the urban renewal renaissance that followed World War II.[9] In *Berman v. Parker*,[10] which upheld the condemnation of a profitable business as part of a sweeping urban renewal plan for the District of Columbia in 1954, the Court emphasized that "the concept of the public welfare is broad and inclusive," and "within the power of the legislature to determine. . . ."[11] Thus, according to the Court, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" and "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[12] In *Hawaii Housing Authority v. Midkiff*,[13] the Court reiterated its unwillingness to substitute the judiciary's views of public use for those of the legislature, and embraced an extraordinarily deferential version of rational basis review for claims that a proposed use did not satisfy the public use requirement.[14] The *Midkiff* Court said that "deference to a legislature's 'public use' determination is required 'until it is shown to involve an impossibility'"[15] and "the Court . . . will not substitute its judgment for a legislature's judgment as to what constitutes public use 'unless the use be palpably without reasonable foundation.'"[16]

After *Midkiff*, it was clear that the Public Use Clause of the U.S. Constitution would not impose a significant impediment to state and local efforts to condemn private property.[17] The Court had made clear that public use is a concept broad enough to embrace a wide range of public purposes, and that courts should apply extreme deference to any legislative determination that a particular use serves a public purpose. As a consequence, urban revi-

8. *See* Cohen, *supra* note 3, at 508-10 (discussing the development of public use jurisprudence in the early twentieth century).

9. For a brief history of urban renewal in the United States, see Lynn E. Blais, *Urban Revitalization in the post*-Kelo *Era*, 34 FORDHAM URB. L.J. 657, 676-81 (2007).

10. 348 U.S. 26 (1954).

11. *Id.* at 33.

12. *Id.* at 32.

13. 467 U.S. 229 (1984).

14. *Id.* at 240-42.

15. *Id.* at 240 (quoting Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

16. *Id.* at 241 (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

17. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) ("In practice . . . most observers today think that the public use limitation is a dead letter.").

talization efforts intensified. Public-private redevelopment partnerships, which had long been used for urban renewal purposes, became even more popular, and the scope of redevelopment projects expanded beyond slum clearance and urban renewal to urban revitalization and redevelopment.[18]

In light of this extraordinarily deferential judicial review in federal courts, property owners looked to state constitutions to fill the perceived gap left by *Berman* and *Midkiff*. In a series of influential decisions, several state supreme courts responded by interpreting state constitutions to demand heightened judicial scrutiny of public use determinations, at least when private property was being condemned for economic development purposes or for transfer to other private parties.[19]

The Supreme Court's grant of certiorari in *Kelo* suggested that the Court was poised to revisit its public use holdings in light of the proliferation of condemnations in public-private urban redevelopment projects and the skepticism of state courts about those condemnations.[20] Some scholars expressed cautious optimism that the Court would finally discern limitations on condemnation authority in the Public Use Clause.[21] But the decision in *Kelo* proved a huge disappointment to those who thought the Court would, and should, recognize constitutional limits on the power to condemn property for economic development.[22]

Instead of reining in the breadth of prior public use jurisprudence, the *Kelo* decision powerfully reaffirmed its prior broad interpretation of the Public Use Clause in two important ways. First, the Court reaffirmed its

18. *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 550-52 (2009) (describing the historical and current practice of permitting private condemnation by private redevelopment companies and other government-mediated private takings); *see also* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423, 423-24 (2010).

19. *See, e.g.*, Sw. Ill. Dev. Auth. v. Nat'l City Envtl. L.L.C., 768 N.E.2d 1 (Ill. 2002); Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004); Ga. Dep't of Transp. v. Jasper Cnty., 586 S.E.2d 853 (S.C. 2003). For a discussion of some of these cases, see David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 19 & n.31 (2009).

20. *See, e.g.*, Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). For a comprehensive survey of the outcome of cases involving public use challenges between 1954 and 1986, see Merrill, *supra* note 17, at 94-116. *See also* Bell, *supra* note 18, at 550-51 (discussing state court cases striking down public-private condemnations).

21. *See, e.g.*, James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 860 ("So, however unexpectedly, the subject of public use is back on the table, with a good chance of substantial change in the law across the country.").

22. It should be noted that this group was not limited to traditional private property rights advocates and conservative political think-tanks. For an example of the disappointed reaction to *Kelo*, see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2108-14 (2009) (documenting the "widespread outrage" that followed *Kelo* and "cut across partisan, ideological, racial, and gender lines") [hereinafter Somin, *Limits of Backlash*].

longstanding holding that the concept of public use is expansive and accommodates the reality that "the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances."[23] Second, the Court re-emphasized the primacy of the legislative role in determining public use, and affirmed the extraordinary degree of deference to which these legislative determinations are entitled.[24] The Court grounded both of these conclusions in "more than a century [of] public use jurisprudence," thus suggesting that the trend lines were long and not likely to deviate.[25]

Nevertheless, *Kelo* was not a total loss. The Court took pains to emphasize the federalism aspects of the decision, pointing out that the Federal Constitution is not the only, nor the most obvious, place where limits on the power to use eminent domain can be found.[26] The Court suggested that other—more appropriate—sources of limitations on this power are state constitutions and state statutes.[27] Moreover, the Court implied that the Federal Constitution remained an important constraint on "pretextual" condemnations—that is, condemnations that were said to be for a public purpose but were really intended to benefit private parties.[28] Justice Kennedy made this point more directly in his concurrence. According to Justice Kennedy, "[t]he determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause."[29]

Thus, *Kelo* could be read to represent the end of public use claims. The *Kelo* Court seemed intent on closing the federal courthouse doors to public use challenges and pointed the way to other avenues for seeking relief from the expansive exercise of eminent domain (that is, state referenda, state legislatures, and state courts).[30] At the same time, however, the Court ap-

23. Kelo v. City of New London, 545 U.S. 469, 482 (2005).

24. *See id.* ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

25. *See id.* at 483.

26. *See id.* at 482 ("Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs.") (internal citations omitted).

27. *See id.* at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

28. *See id.* at 478 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.").

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

30. *See supra* notes 26-27 and accompanying text.

peared to suggest that there was one more chapter to public use claims—a chapter in which pretext plays a leading role.

II. THE *KELO* AFTERMATH

The public response to *Kelo* was immediate and powerful, and it played out in the state arenas identified in the *Kelo* decision as being the appropriate fora for relief. The political fallout from *Kelo* has been well documented, most recently and thoroughly by Professor Ilya Somin, another participant in this symposium,[31] and there is no need for this Article to retread that ground.[32] As Professor Somin demonstrates, the *Kelo* decision was followed by widespread public outrage that encouraged private property rights advocates to seek political solutions to the problems of excessive economic development condemnations.[33] This outrage fostered a remarkable measure of success, at least by one measure: In just a few years, a large majority of states adopted statutes or amended their constitutions to limit the exercise of eminent domain.[34] As Professor Somin observes, "[t]he *Kelo* backlash probably resulted in more new state legislation than any other Supreme Court decision in history."[35]

Unfortunately, the political victories proved almost as disappointing as *Kelo* itself. Almost across the board, the eminent domain reforms fail to impose meaningful limitations on the use of eminent domain for economic development.[36] The predominant deficiency in the recently adopted limitations on the use of eminent domain for economic development is the widespread inclusion of an exception for blight.[37] These exceptions are exacerbated by the absence of meaningful limiting definitions for blight designations.[38]

31. *See* Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After* Goldstein *and* Kaur, 38 FORDHAM URB. L.J. (forthcoming 2011).

32. *See* Somin, *Limits of Backlash*, *supra* note 22; *see also* Blais, *supra* note 9, at 671-76.

33. *See* Somin, *Limits of Backlash*, *supra* note 22, at 2108-14.

34. *Id.* at 2120 ("As of early 2009, thirty-six state legislatures have enacted post-*Kelo* reforms.").

35. *Id.* at 2102.

36. *Id.* at 2114.

37. *Id.* at 2120-31 (detailing the blight exceptions).

38. *See* Judge Harold L. Lowenstein, *Redevelopment Condemnations: A Blight or a Blessing Upon the Land?*, 74 MO. L. REV. 301, 302 (2009) ("Despite widespread eminent domain reform legislation, redevelopment statutes in almost every state retain a loophole–indeed, a legislative backdoor–to condemnation for economic development in permitting condemnation to eradicate blight. Given that most states define blight in vague and general terms, a finding of blight with regard to a redevelopment area is little more than a procedural hurdle for the developer to overcome."); *see also* James W. Ely, Jr., *Post*-Kelo *Reform:*

Goldstein[39] and *Kaur*,[40] the two cases that inspired this symposium, starkly reveal the potential for broad, deferential interpretations of blight to eviscerate statutory and constitutional limits on the exercise of eminent domain. Both *Goldstein* and *Kaur* involved challenges to high profile public-private redevelopment projects in New York City in which the landowners claimed that their property did not satisfy the state constitution's equivalent of a blight standard. In *Goldstein*, the landowner challenged the Atlantic Yards Arena and Redevelopment Project—developer Bruce Ratner's efforts to condemn more than twenty-two acres in Brooklyn to build residential, retail, and office buildings as well as a new arena for the New Jersey Nets.[41] *Kaur* involved another massive public-private initiative, in which Columbia University sought the help of the Empire State Development Corporation (in particular its eminent domain powers) to acquire seventeen acres of land in the Manhattanville section of New York City for the construction of a new urban campus.[42]

Article XVIII, Section 1 of the New York State Constitution was adopted in 1938, in response to "the dire circumstances of urban slum dwelling,"[43] to authorize the state legislature to empower public corporations to condemn "substandard and insanitary areas"[44] and provide for the clearance, reconstruction, and rehabilitation of those areas.[45] At issue in *Goldstein* and *Kaur* was whether the threshold of "substandard and insanitary"[46] imposed an independent substantive limitation on the State's eminent domain power that could be enforced in the courts. The answer, it turns out, is no.

In *Goldstein*, the New York Court of Appeals embraced a broad and evolving understanding of the concept of "substandard and insanitary"[47] and emphasized that "lending precise content to these general terms has not been, and may not be, primarily a judicial exercise."[48] Rather, the court said, "[w]hether a matter should be the subject of a public undertaking–

Is the Glass Half Full or Half Empty?, 17 SUP. CT. ECON. REV. 127, 135 (2009); David S. Yellin, Note, *Masters of Their Own Eminent Domain: The Case for a Reliance Interest Associated with Economic Development Takings*, 99 GEO. L.J. 651, 659-60 (2011).

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

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

41. *Goldstein*, 921 N.E.2d at 165-66.

42. *Kaur*, 933 N.E.2d at 724-25.

43. *Goldstein*, 921 N.E.2d at 171.

44. N.Y. CONST. art. XVIII, § 1.

45. *Id.*

46. *Id.*

47. *Id.*

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

whether its pursuit will serve a public purpose or use–is ordinarily the province of the Legislature" and "[i]t is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views . . . for those of the legislatively designated agency."[49] Less than one year later the court reaffirmed this stance in *Kaur*.[50]

The battle over blight in New York City mirrors conflicts in many other jurisdictions, many of which have seen similar outcomes.[51] Having incorporated blight exceptions into their post-*Kelo* reforms, in many states those exceptions are so broad that they threaten to eviscerate the heart of the reform.[52] Landowners who cannot rely on challenges to blight designations to constrain the use of eminent domain power for public-private redevelopment are now reaching for the remaining lifeline offered by *Kelo*–the power of pretext–to invalidate an attempt to take private property for an otherwise public use.

III. THE POWER OF PRETEXT?

In light of the limited effectiveness of most of the political responses to *Kelo*, the focus of attempts to constrain local eminent domain authority has turned back to the Federal Constitution. In particular, property owners and their advocates have seized on the pretext language of *Kelo*[53] and, more importantly, of Justice Kennedy's concurrence,[54] to locate meaningful limits on the power of state and local governments to use eminent domain for

49. *Id.*

50. Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 730-31 (N.Y. 2010), *cert. denied sub nom.* Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

51. *See e.g.*, City of Parker v. State, 992 So.2d 171, 177-79 (Fla. 2008) (adopting a broad and deferential interpretation of the Florida blight statute); City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 11-12 (Nev. 2003) (adopting an expansive interpretation of blight); *see also* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 320-23 (2004) (discussing the wide latitude that local governments have to define or determine blight). *But see* Gallenthin Realty Dev., Inc., v. Borough of Paulsboro, 924 A.2d 447, 460 (N.J. 2007) (rejecting an interpretation of "blight" that embraces property that is merely underutilized).

52. Somin, *Limits of Backlash*, *supra* note 22, at 2120-37.

53. *See* Kelo v. City of New London, 545 U.S. 469, 478 (2005) ("Nor would the City be allowed to take property under the mere pretext of a public purpose . . . .").

54. *See id.* at 491 (Kennedy J., concurring) ("A court applying a 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 justifications.").

economic development purposes. In my view, the Public Use Clause of the Federal Constitution is not up to the task of restricting eminent domain.[55]

A. The Origins of Pretext in Eminent Domain

The *Kelo* Court did not invent the concept of pretext as a potential limiting principle in eminent domain cases. Rather, the concern about pretext in eminent domain law was first raised in a Supreme Court opinion in 1848, in Justice Woodbury's concurrence in *West River Bridge Co. v. Dix*.[56] In *West River Bridge Co.*, the Court rejected the claim that the exercise of eminent domain over a previously granted franchise to operate a toll bridge constituted an unconstitutional impairment of contract.[57] Rather, the Court held that the franchise stood in the same position as title to real property—both were subject to the eminent domain power of the state.[58] In a separate opinion, Justice Woodbury concurred in this result, but expressed a plethora of concerns about the reach of the eminent domain power, many of which presage contemporary debates.[59] In particular, Justice Woodbury was the first to express doubt as to the constitutionality of an exercise of eminent domain—even if the property was to be used for an otherwise valid public purpose—if the condemnation had been motivated by bad faith or pretext. In particular, he noted:

> Finally, I do not agree that even this franchise, as property, can be taken from this corporation without violating the contract with it, unless the measure was honest, *bonâ fide*, and really required for what it professed to be, beside being, as before remarked, proper, on account of the locality and nature of this property, to be condemned for this purpose.[60]

Although Justice Woodbury conceded that the legislature is the best judge of public purpose, and that for the most part the Court should defer to

55. For a thorough exposition of the opposing case and an argument that courts should adopt a "process scrutiny" approach for evaluating pretext claims, see Daniel S. Hafetz, Note, *Ferreting Out Favoritism: Bringing Pretext Claims After* Kelo, 77 FORDHAM L. REV. 3095 (2009).

56. 47 U.S. 507 (1848). This is the first time this author could find such a concern raised.

57. *Id.* at 536.

58. *Id.* at 534.

59. *See, e.g.*, *id.* at 546-48 (Woodbury, J., concurring) ("But when we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without this power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or state prison?").

60. *Id.* at 548.

a legislative determination of public use, he suggested that in certain circumstances courts should probe more deeply:

> And though I agree, that, for most cases and purposes, the public authorities in a State are the suitable judges as to this point, and that the judiciary only decide if their laws are constitutional; that the legislature generally acts for the public in this; that road agents are their agents, under this limitation; yet I am not prepared to agree, that if, on the face of the whole proceedings,-the law, the report of commissioners, and the doings of the courts,-it is manifest that the object was not legitimate, or that illegal intentions were covered up in forms, or the whole proceedings a mere "pretext," our duty would require us to uphold them.[61]

This expression of concern for the motives and intentions underlying condemnation decisions appears to directly track Justice Kennedy's observations in *Kelo*.

Nevertheless, for the one hundred fifty years between *West River Bridge Co.* and *Kelo*, the concern for pretextual motive lay dormant and the concern for pretext could only be seen in other forms. Following *West River Bridge Co.*, the concept of pretext next arose in eminent domain cases in the context of the government's attempt to deny the legal consequence of its actions, rather than the motives behind those actions. The flooding cases—which were a precursor to modern regulatory takings jurisprudence[62]—raised the question of when, if ever, governmental interference with the use of private property constitutes a compensable taking. In *Pumpelly v. Green Bay Co.*,[63] the landowner asserted a claim for compensation under the Takings Clause after the Green Bay and Mississippi Canal Company ("Canal Company") built a dam that flooded six hundred forty acres of his land.[64] The Canal Company resisted the compensation claim on the grounds that there had been no "taking" of Pumpelly's property—for public use or otherwise.[65] Rather, the Canal Company argued, the damage was merely the consequential result of a valid governmental action and therefore was not compensable.[66] Although the Supreme Court was interpreting the Wisconsin Constitution (because the Fifth Amendment had not yet been

61. *Id.* (citations omitted).

62. For a discussion of how the flooding cases established one of the three factors relevant to modern regulatory takings doctrine, see Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1083-86 (1993).

63. 80 U.S. 166 (1871).

64. *Id.* at 167.

65. *Id.* at 177.

66. *Id.*

incorporated against the states),[67] the takings prohibitions were almost identical in the U.S. and Wisconsin Constitutions,[68] and the Court rejected the Canal Company's attempt to find shelter in the semantics of the Takings Clause:

> It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen . . . instead of the government, and make it an authority for invasion of private right under the pretext of the public good . . . .[69]

This quote, which makes clear that the government cannot evade its obligation to compensate landowners for the destruction of their property by denying that the destruction constitutes a taking, is repeated often in subsequent years.[70] It appears, however, to be the only context in which pretext is mentioned in eminent domain cases until *Kelo*. Thus, although pretext as motive appeared very early in the jurisprudence of eminent domain, it did not resurface in future cases until it reappeared in *Kelo* a century and a half later.

B. Pretext in its Contemporary Form—*Kelo*

The reincarnation of pretext as motive in eminent domain jurisprudence occurred in a short aside in the majority opinion in *Kelo*. Explicating the polar propositions of the public use requirement, the *Kelo* Court explained that the sovereign may not take property from one person to transfer it to another for the sole purpose of conveying a private benefit on the second party; however, it may take private property from one party and transfer it

67. The Takings Clause of the Fifth Amendment was incorporated against the states in 1897. *See* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 238-41 (1897).

68. *Compare* U.S. CONST. amend. V, *with* WIS. CONST. art. I, § 13. *See also Pumpelly*, 80 U.S. at 177 ("The Constitution of Wisconsin . . . has a provision almost identical in language . . . .").

69. *Pumpelly*, 80 U.S. at 177-78.

70. *See, e.g.*, United States v. Lynah, 188 U.S. 445, 469-70 (1903) ("It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment.").

to another if the purpose is for use by the public.[71] In clarifying the first pole, the Court elaborated, "[n]or would the [sovereign] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[72]

Justice Kennedy devoted more attention to the role of pretext in his concurrence in *Kelo*, discussing both the process and the substance of a pretext claim. Regarding the process of judicial review, Justice Kennedy said that a "plausible accusation" of "impermissible favoritism to private parties" triggers an obligation to "treat the objection as a serious one and review the record to see if it has merit. . . ."[73] Substantively, the claim is to be reviewed under a rational basis standard.[74] Thus,

> [a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.[75]

Both the majority and Justice Kennedy in his concurrence readily agreed that there was no credible evidence of pretext in *Kelo* itself.[76]

IV. THE PROBLEM WITH PRETEXT

Kaur is not the only case in which a landowner has seized on *Kelo*'s pretext language to challenge a proposed condemnation.[77] Indeed, given the limited options for objecting to the exercise of eminent domain after *Kelo*, and the generally ineffectual state reforms enacted in reponse to *Kelo*, a pretext challenge may be the primary defense for many landowners against public-private redevelopment projects. This Part evaluates the suitability of the pretext inquiry for providing substance to the public use requirement, and concludes that the concept of pretext is inadequate in providing such substance.

71. Kelo v. City of New London, 545 U.S. 469, 478-79 (2005).
72. *Id.* at 478.
73. *Id.* at 491 (Kennedy, J., concurring).
74. *Id.*
75. *Id.*
76. *See id.* at 478 (majority); *id.* at 490 (Kennedy, J., concurring).
77. *See, e.g.*, Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160 (D.C. 2007); Cnty. of Haw. v. C & J Coupe Family Ltd. P'ship, 198 P.3d 615 (Haw. 2008).

A. Unconstitutional Motive

Although the Supreme Court is fond of saying that motives do not matter in constitutional adjudication—the quote from *United States v. O'Brien*[78] that opened this Article is but one of many in which the Court eschews a judicial role in examining legislative motives[79]—in reality, motives matter.[80] Several scholars have argued that concern for illicit motives is the driving force behind some of our most fundamental constitutional safeguards.[81] It is beyond the scope of this short symposium piece to fully explore the various roles that motive plays in constitutional law. But it will be helpful to our consideration of pretext to outline several circumstances in which the Supreme Court appears to employ various methodologies of judicial review to invalidate government actions animated by impermissible legislative motives.

The challenges of motive-based constitutional analysis are daunting. Since many governmental actions are the product of multiple decision makers, one must decide whether to inquire into the individual motivations of each decision maker or the motive underlying the legislation as a whole. If individual motive is the relevant factor, then whose individual motive counts and what should we make of the multifarious motives that are most likely to account for any particular legislative decision? The alternative is to consider the motive of the decision-making body as a whole. But this raises more problems than it solves. Collective or institutional motive is at best a difficult concept to define; in fact, it may not even be a comprehensible concept. Moreover, even if we could develop a coherent concept of collective bias, problems of proof would abound.[82]

Nonetheless, it is relatively well settled that many constitutional safeguards implicate constraints on illicit motive and that "[t]he nature of tiered scrutiny, whether strict or lax, is assessment of the government's objective and the relationship of its chosen means to accomplish that objective."[83]

78. 391 U.S. 367, 383 (1968).

79. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 225 (1971) (suggesting that "the motive or purpose behind a law" simply is not "relevant to [the law's] constitutionality").

80. *See* Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191 (2008).

81. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1 (2007); Young, *supra* note 80, at 195 n.12 (listing some of the more influential articles addressing motive in constitutional law).

82. *See* Kagan, *supra* note 81, at 438 (discussing the impediments to discerning governmental motive).

83. Massey, *supra* note 81, at 17.

For example, Justice Kagan, writing fifteen years ago as Professor Kagan, has argued that "First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives."[84] Kagan argues that the general divide between content-neutral and content-based restrictions on speech reflects the use of content-based restrictions as a proxy for impermissible motive.[85] In general, the Court imposes strict scrutiny on content-based restrictions as a mechanism for ensuring that something other than illicit motive justifies the restriction.[86] In practice, the government can rarely overcome the presumption of illicit motive that is triggered by the use of content-based restrictions.[87] Similarly, equal protection analysis employs suspect classifications as a threshold for the imposition of rigorous judicial scrutiny, and strict scrutiny follows the implication of a fundamental right in substantive due process analysis.[88] As in the First Amendment context, governmental actions that trigger strict scrutiny are almost always invalidated.[89]

B. Pretext and Public Use

If pretext is to have a role in public use challenges, it would most logically follow the structure of tiered review employed by the Supreme Court in other contexts in which motive matters. Unfortunately, that structure does not map well onto the pretext inquiry for two reasons. First, it is not clear what factor should be used to trigger heightened scrutiny. Second, none of the tiers of heightened scrutiny currently employed by the Court suits the type of inquiry that is required in the public use context.

Each of the constitutional inquiries above begins with a trigger. In the context of equal protection law, strict scrutiny is triggered by a suspect classification; for substantive due process claims, heightened scrutiny is triggered by the interference with a fundamental right.[90] Under the First

84. Kagan, *supra* note 81, at 414.

85. See *id.* at 443-57.

86. *Id.* at 451.

87. *Id.* at 455.

88. Massey, *supra* note 81, at 17-18.

89. *See* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 UNIV. ILL. L. REV. 145, 155 ("[Strict scrutiny] has long been viewed as 'strict in theory and fatal in fact.'") (quoting Gerald Gunther, *Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

90. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) ("[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized."); Roe v. Wade, 410 U.S. 113, 152-57 (1973) (recognizing that the right of privacy is a fundamental right and thus laws attempting to limit that right must be narrowly drawn to satisfy a compelling state interest).

Amendment, the Court is more wary, and will scrutinize more closely, restrictions on speech that are not content-neutral.[91] In order to import a heightened scrutiny test into takings law, we would need to identify an appropriate trigger. The Court has already rejected the use of economic development and public-private partnerships as the threshold for invoking heightened scrutiny.[92] That, after all, is what *Kelo* was all about. If those two facts are not sufficient to warrant a presumption of pretext, it is not obvious what other trigger would.

Moreover, as noted above, the threshold identified in each context as indicating the likely presence of improper motive, triggers scrutiny so rigorous that few governmental actions can survive the review.[93] Few advocates of heightened scrutiny in the public use context suggest the application of scrutiny that searching. The most plausible candidate for the appropriate standard of review would be something like the intermediate scrutiny applied to "quasi-suspect," gender-based classifications. Under this standard, such classifications will be invalidated unless the government can show "that they serve important governmental objectives and . . . [that they are] substantially related to achievement of those objectives."[94] In fact, one of the tests adopted in state courts in the context of pretext challenges closely mirrors intermediate scrutiny.[95]

Courts and scholars have offered several different standards for evaluating pretext challenges, and they can be grouped roughly into three categories: the burden-shifting motives test,[96] the sufficiency of the plan test,[97] and the benefits to the public test.[98] The benefits to the public test most closely resembles tests used by the Supreme Court in other intermediate scrutiny contexts. I will consider each test in turn.

The burden-shifting motives test is best illustrated by the decisions of the Hawaii Supreme Court in a protracted dispute between the County of Hawaii and the C&J Coupe Family Partnership, which resulted in two opi-

91. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992).

92. *See* Kelo v. City of New London, 545 U.S. 469, 488 (2005) ("The disadvantages of a heightened form of review are especially pronounced in this case.").

93. *See supra* note 89 and accompanying text.

94. Califano v. Webster, 430 U.S. 313, 317 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

95. *See* Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 459 (Mich. 1981).

96. *See* Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443 (2007).

97. *See* Cnty. of Haw. v. C & J Coupe Family Ltd. P'Ship, 198 P.3d 615, 648 (Haw. 2008) [hereinafter *Coupe I*] (remanding for consideration of the landowner's evidence of pretextual motive); Cnty. of Haw. v. C & J Coupe Family Ltd. P'Ship, 242 P.3d 1136, 1150 (Haw. 2010) [hereinafter *Coupe II*] (rejecting the landowner's claim of pretext).

98. Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 173-74 (D.C. 2007).

nions from the Hawaii Supreme Court.[99] In the *Coupe* cases, the landowner challenged the county's decision to condemn his property in order to permit a private developer to construct a bypass highway, and connect its new development to the public highway.[100] The county had determined that the bypass was necessary to "alleviate unacceptable and unsafe traffic conditions."[101] The landowner disputed that finding, claiming that the bypass was intended to confer a private benefit on the developer, and the proffered public purpose was a mere pretext.[102] In *Coupe I*, the Hawaii Supreme Court explained that "legislative findings and declarations of public use" are accorded "great weight" and are entitled to "prima facie acceptance of [the determination's] correctness."[103] Once the presumption of public use attaches, the burden rests on the landowner, who must show that the public purpose asserted in the findings or declarations was "mere pretext," and the "actual purpose was to bestow a private benefit."[104] The court remanded the case for "an express determination by the court of whether the asserted public purpose was pretextual."[105] In *Coupe II*, the court rejected all of the landowner's arguments in support of its claim of pretext.[106]

This test appears to be modeled after the burden shifting motives test employed in *Batson* claims and Title VII disproportionate impact cases.[107] *Batson v. Kentucky*[108] involved an equal protection challenge to alleged racial discrimination in the exercise of peremptory jury strikes. Motives are central to the resolution of *Batson* claims, because the nature of a peremptory challenge is that it entitles prosecutors to strike jurors for any reason at all, except for a reason that would violate the Equal Protection Clause.[109] Thus, a successful *Batson* claim requires a showing of "purposeful discrim-

99. *See Coupe I*, 198 P.3d 615; *Coupe II*, 242 P.3d 1136. The Hawaii Supreme Court heard this case twice. The first time, in 2008, it remanded the case and the second time, in 2010, it reached a decision. *See supra* note 97.

100. *Coupe I*, 198 P.3d at 620.

101. *Id.*

102. *Id.* at 637.

103. *Id.* at 637-38.

104. *Id.* at 642 (quoting Haw. Hous. Auth. v. Ajimine, 39 Haw. 543, 550 (1952)).

105. *Id.* at 653.

106. *Coupe II*, 242 P.3d 1136, 1149-58 (Haw. 2010).

107. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); Batson v. Kentucky, 476 U.S. 79 (1986).

108. 476 U.S. 79.

109. *See id.* at 89 ("Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . .") (internal quotations and alteration omitted).

ination."[110] In *Batson*, the Court adopted a burden shifting test that takes into account the difficulty of demonstrating the requisite invidious motive.[111] Under this test, the criminal defendant raising the *Batson* challenge can establish a prima facie case of purposeful discrimination by showing that he is a member of a cognizable racial group, that the prosecutor has used his peremptory challenges to remove from the jury panel members of this group, and that other circumstantial evidence exists that raises an inference that race was a motivating factor.[112] In this context, the defendant "is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[113] Once the defendant has made his prima facie case "the burden shifts to the State to come forward with a neutral explanation for challenging . . . [these particular] jurors."[114] The prosecutor's burden is fairly light, as "at this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[115] Moreover, "[a]lthough the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[116] The trial court then "[has] the duty to determine if the defendant has established purposeful discrimination."[117] This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."[118]

The burden shifting motives test employed in *Coupe I* and *Coupe II* resembles the *Batson* test, but with two crucial differences. First, the challenged action in *Batson* implicates a suspect classification, which warrants careful scrutiny by the Court.[119] In *Coupe*, there was a striking absence of a suspicious trigger, such as ownership of condemned property by another

110. *Id.* at 93 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

111. *See id.* at 93 n.17.

112. *See id.* at 96.

113. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

114. *Id.* at 97 (alteration to original).

115. Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion).

116. Rice v. Collins, 546 U.S. 333, 338 (2006) (quoting Purkett v. Elem, 514 U.S. 765, 767-68 (1995)).

117. *Batson*, 476 U.S. at 98.

118. *Elem*, 514 U.S. at 768 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).

119. *See Batson*, 476 U.S. at 96.

private entity. Rather, in *Coupe*, the condemned property was to be used for a highway that was owned by and open to the public.[120] Second, the inquiry into motive triggered by this suspect classification in the *Batson* context requires a trial judge to assess the credibility of a single decision-maker with respect to a decision that was made in open court.[121] As a result, a trial court's conclusion that a prosecutor acted with improper motive constitutes a finding of fact that is accorded substantial deference, since it will depend in large upon on the trial judge's evaluation of credibility.[122] As the Court in *Hernandez* noted: "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."[123] Unlike *Batson*, the motive-based challenge in the eminent domain context will involve a deliberation over a lengthy period of time by a multi-member decision-making body that has determined a particular condemnation is in the public interest. A court reviewing the legislature's proffered public interest justification will have little direct evidence of motive and will have to resort to circumstantial indications and/or evidence of the individual motive of one or more of the members of the decision-making body.[124]

The second test, the sufficiency of the plan test, has the advantage of being most closely aligned with the reasoning of the *Kelo* decision itself. The majority in *Kelo* suggested that the existence of an "integrated development plan" distinguished the case from one that might be more problematic,[125] and Justice Kennedy's concurrence relied heavily on the existence of an extensive planning process to satisfy the concern for pretext.[126] Nevertheless, this test has the distinct disadvantage of being the most attenuated from the

120. *Coupe II*, 242 P.3d at 1154-55 (Haw. 2010).

121. *See Batson*, 476 U.S. at 97.

122. *See id.* at 98.

123. Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion).

124. *See Couple II*, 242 P.3d at 1153-57 (assessing the record at great length in an attempt to determine whether illicit motive was behind the county's decision to condemn private property to build a highway overpass).

125. Kelo v. City of New London, 545 U.S. 469, 487 (2005) ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.").

126. *See id.* at 493 (Kennedy, J., concurring) (outlining the aspects of the case that justified the application of rational-basis review).

concerns animating pretext claims in the first place, and therefore of being relatively easily satisfied, even if a taking is impermissibly pretextual.[127]

The third test, the benefits to the public test, is most similar to the heightened scrutiny that the Court employs in other contexts where motive is examined. The District of Columbia Court of Appeals employed this test in *Franco v. National Capital Revitalization Corp.*[128] The *Franco* court viewed a private transfer of condemned land as triggering the benefits to the public test.[129] Specifically, the *Franco* court stated:

> 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 . . . 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 judgment of the legislature.[130]

The *Franco* court conceded that "[h]arder cases will lie between these extremes."[131]

This test is problematic on three levels. First, as noted above, the trigger is so broad that it will encompass virtually all economic development condemnations, essentially imposing a heightened level of scrutiny in every case. A broad trigger in general, and this trigger in particular, was expressly rejected in *Kelo*.[132] Second, the Supreme Court rejected a very similar form of heightened scrutiny in the regulatory takings context in *Lingle v. Chevron U.S.A. Inc.*,[133] just one month before it decided *Kelo*. The *Kelo* Court relied on that rejection to eschew the landowner's claim that the Court should require a "reasonable certainty" that public benefits will accrue in eminent domain cases.[134] Third, the "test" is really of little use for resolving future pretext challenges, as all of the interesting cases are likely

127. *See* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 189-93 (2009) (explaining the inadequacies of the planning test).

128. 930 A.2d 160 (D.C. 2007).

129. *Id.* at 173-75.

130. *Id.* at 173-74 (citations omitted).

131. *Id.* at 174.

132. Kelo v. City of New London, 545 U.S. 469, 485-86 & n.16 (2005).

133. 544 U.S. 528 (2005).

134. *Kelo*, 545 U.S. at 488 ("[E]arlier this Term we explained why similar practical concerns (among others) undermined the use of the 'substantially advances' formula in our regulatory takings doctrine. The disadvantages of a heightened form of review are especially pronounced in this type of case.") (citation omitted).

to be the "harder cases" that lie in the area in which the Court provided no guidance.

Lingle warrants mention here, because its holding can be viewed in conjunction with *Kelo* as foreclosing all attempts to use heightened scrutiny to detect pretext in public use challenges. In *Lingle*, the Court finally faced head-on the problems caused by its seemingly rote recitation of the requirement that a regulation "substantially advance a legitimate public purpose" in many regulatory takings cases.[135] Advancing a legitimate public purpose was often included in the litany of tests that a regulation had to meet, lest the regulation be deemed a taking for which compensation was required.[136] In *Lingle*, the Court put to rest any possibility that the phrase required heightened scrutiny of legislative determinations under regulatory takings challenges. In particular, the *Lingle* Court said that a "substantially advances" test would unwisely import into takings jurisprudence the "means-ends" inquiry best left in the realm of due process.[137] According to the Court,

> The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.[138]

The *Lingle* Court concluded that not only does the means-ends test not make sense in the context of the takings inquiry, but it does not make sense in the context of the legislative/judicial relationship. According to the Court,

> Finally, the "substantially advances" formula is not only *doctrinally* untenable as a takings test-its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property.

135. *See Lingle*, 544 U.S. at 531-32 ("A quarter century ago, in *Agins v. City of Tiburon*, 447 U.S. 255 . . . (1980), the Court declared that government regulation of private property 'effects a taking if [such regulation] does not substantially advance legitimate state interests . . . .' Through reiteration in a half dozen or so decisions since *Agins*, this language has been ensconced in our Fifth Amendment takings jurisprudence.") (citation omitted).

136. *See, e.g.*, Agins v. City of Tiburon, 477 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a takings if the ordinance does not substantially advance legitimate state interests.").

137. *Lingle*, 544 U.S. at 542.

138. *Id.* (internal citation and emphasis omitted).

> If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations-a task for which courts are not well suited. Moreover, it would empower-and might often require-courts to substitute their predictive judgments for those of elected legislatures and expert agencies.[139]

These two concerns—doctrinal fit and institutional legitimacy—also dictate that the concern for pretext fall out of eminent domain jurisprudence.

C. Additional Considerations—Pleadings and Remedies

The theoretical obstacles to importing a pretext consideration into the public use inquiry are substantial enough to undermine the wisdom of the enterprise. In addition, practical considerations—less weighty but nonetheless instructive—reinforce the prudence of removing motive from the public use inquiry altogether. The difficulty of identifying an appropriate trigger and crafting a workable standard of scrutiny go to the substance of the pretext claim; the practical considerations arise at either end of the substantive case—at the pleading and remedy stages.

As every advocate in federal court knows, the Supreme Court has recently adopted heightened pleading standards for federal litigation. In *Bell Atlantic Corp. v. Twombly*, the Court reversed the Second Circuit and affirmed the district court's dismissal of an antitrust complaint for failure to state a claim.[140] Purporting to clarify a longstanding misconstruction of the standard set forth fifty years earlier in *Conley v. Gibson*,[141] the Court adopted a plausible pleading standard, holding that in order to survive a motion to dismiss, an antitrust plaintiff must plead facts sufficient "to state a claim to relief that is plausible on its face."[142] The Court explained that its plausibility standard could not be met by mere "labels and conclusions" and that a "formulaic recitation of the elements of a cause of action will not do."[143] Rather, plausible pleadings contain "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the alleged illegal conduct.[144]

The pleading standard was raised once more just two years later in *Ashcroft v. Iqbal*, when the Supreme Court held that a court reviewing a complaint on a motion to dismiss should begin "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assump-

139. *Id.* at 544.
140. 550 U.S. 544 (2007).
141. 355 U.S. 41 (1957).
142. *Twombly*, 550 U.S. at 570.
143. *Id.* at 555.
144. *Id.* at 556.

tion of truth."[145] In that case, Javaid Iqbal alleged that then Attorney General John Ashcroft had violated his constitutional rights by adopting a discriminatory policy that imposed harsh conditions of confinement on Iqbal solely on account of his race, religion, and/or national origin.[146] This was a pure, motive-based discrimination claim. Yet, the conclusory allegations jettisoned from the Court's consideration of Iqbal's complaint were those allegations that went to the heart of the motive requirement—Iqbal's allegations that Ashcroft "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[147] The Court characterized these allegations as "bare assertions" that "amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim, namely, that petitioners adopted a policy because of, not merely in spite of, its adverse effects upon an identifiable group."[148] As such, the Court said, "the allegations are conclusory and not entitled to be assumed true."[149]

Eminent domain pretext claims, of course, are also driven by allegations of an unconstitutional motive. Thus, to survive the heightened pleading standards of *Twombly* and *Iqbal*, a pretext claim—at least one filed in federal court—must include credible, factually-supported assertions of improper motive.[150] This pleading hurdle will be difficult for most pretext plaintiffs to overcome.

Finally, the difficulty of fashioning a remedy for successful pretext claims suggests the inaptness of the inquiry. If a court finds that a proposed use is pretextual, presumably it will enjoin the condemnation. But if the proposed use also serves a valid public purpose, the government, presumably, would be free to enact the plan calling for the condemnation, this time making certain that the proposed use was the primary factor in its decision. On the other hand, if landowners seek damages for pretextual condemnations, the obvious dilemma is that damages for the harm are already contemplated in the requirement of just compensation.

145. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

146. *Id.* at 1944.

147. *Id.* at 1951 (internal quotations omitted).

148. *Id.*

149. *Id.*

150. For a discussion of the impact of *Twombly* and *Iqbal* on public use pretext claims, see Carol L. Zeiner, *When* Kelo *Met* Twombly-Iqbal*: Implications for Pretext Challenges to Eminent Domain*, 46 WILLAMETTE L. REV. 201 (2009) (describing the difficulty of satisfying the Supreme Court's new pleading requirements in a complaint alleging a pretextual taking).

CONCLUSION

Landowners have long sought to find substantive limitations on governmental powers of eminent domain in the Public Use Clause of the Federal Constitution. The Supreme Court has resisted their entreaties, consistently holding that the concept of public use is expansive and that legislative determinations of public purpose should be afforded great deference. In *Kelo*, however, the Court suggested that this deference would give way to evidence of pretext. Courts and scholars have responded to this suggestion with various strategies for implementing pretext-based judicial review of legislative determinations of public use. Ultimately, however, these strategies flounder, and pretext remains an unwise and unworkable mechanism for providing judicial oversight over legislative determinations of public use.