
PANTS ON FIRE: HOW THE *BRINKMANN* MAJORITY FORGOT ABOUT THE TAKINGS CLAUSE IN A TAKINGS CLAUSE CASE

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ABSTRACT

Some think the Takings Clause will soon be a “virtual nullity,”¹ and the Second Circuit’s decision in Brinkmann v. Town of Southold² could be viewed as merely the “latest in a string”³ of cases in which a court tortures logic to subvert the protections of the Fifth Amendment’s Takings Clause.⁴ Indeed, one could now argue that the Second Circuit permits sham takings whose ostensible public purpose is merely to mask governmental discrimination toward condemnees.⁵ A burgeoning divergence of opinion among the circuits underscores how contentious takings jurisprudence has become: the Connecticut Supreme Court,⁶ the Seventh Circuit,⁷ and the Ninth Circuit⁸ (granted, to varying degrees) are at odds with the Second Circuit. In addition to examining the circuit tension, this Note also argues

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1. *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (5-4 decision) (Thomas, J., dissenting) (“[*Kelo*] is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.”).

2. *Brinkmann v. Town of Southold*, 96 F.4th 209 (2d Cir. 2024).

3. *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting).

4. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

5. *Brinkmann*, 96 F.4th at 209.

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

7. *See United States v. 58.16 Acres of Land*, 478 F.2d 1055 (7th Cir. 1973).

8. *See Southern Pacific Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966); *Scott Lumber Co. v. United States*, 390 F.2d 388 (9th Cir. 1968).

that the Equal Protection Clause and the doctrine of unconstitutional animus are suboptimal mechanisms for addressing bad-faith takings, with heightened scrutiny yielding better outcomes. This Note therefore proposes a tripartite burden-shifting evidentiary framework for purposes of adjudicating bad-faith takings claims in a uniform and fair manner. Although the framework was originally posited by Daniel B. Kelly, it has heretofore only been applied in the context of takings motivated by favoritism.⁹ This Note aims to broaden takings scholarship by extrapolating this framework to takings arising out of discrimination, animosity, and bias—the very opposite of favoritism-driven takings. These all-too-clever abuses of the eminent domain power must be stopped by means of an effective mechanism that is efficient, flexible, and responsive to the ever-evolving bad-faith takings landscape.

TABLE OF CONTENTS

INTRODUCTION	407
I. HISTORY AND BACKGROUND: THE RAPID EXPANSION OF “PUBLIC USE”	411
II. THE <i>BRINKMANN</i> CASE	416
A. THE IMPOSSIBLE INQUIRY THAT IS (ACTUALLY) POSSIBLE.....	416
B. THE <i>BRINKMANN</i> MAJORITY’S DISREGARD OF THEIR OWN PRECEDENT, <i>GOLDSTEIN V. PATAKI</i>	418
1. Significance of Objective Evidence	418
2. Possibility of Closer Objective Scrutiny	419
3. Pretextual Taking: A Claim of Dubious Jurisprudential Pedigree?.....	420
C. THE POSSIBLY FATAL MISTAKE OF <i>KELO</i> MISINTERPRETATION	421
1. An Unwarranted Inference Drawn by the <i>Kelo</i> Majority	421
2. Two Ways of Interpretation: Examining <i>New England</i> <i>Estates LLC v. Town of Branford</i>	423
III. THE NINTH & SEVENTH CIRCUITS.....	425
A. ANALYSIS OF THE NINTH CIRCUIT.....	425
B. THE SEVENTH CIRCUIT & QUESTION OF LEGISLATIVE DEFERENCE.....	428
IV. WHAT NOW?.....	431

9. See Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173 (2009).

A. THE DANGERS OF RATIONAL BASIS REVIEW 431

B. HEIGHTENED REVIEW: THE TRIPARTITE BURDEN-SHIFTING STANDARD..... 435

 1. Direct Versus Indirect Evidence..... 435

 2. Beyond a Merely Cognizable Reason for Condemnation..... 437

 3. Elevated Risk of Pretext/Bad Faith 438

C. SO WHAT ABOUT THE EQUAL PROTECTION CLAUSE? 440

 1. The Three-Tier Framework 440

 2. Doctrine of Unconstitutional Animus 443

D. BRINKMANN IMPLICATIONS 445

CONCLUSION..... 446

INTRODUCTION

In 2016, Ben and Hank Brinkmann (the “Brinkmanns”) embarked on a journey of building a hardware store on an empty, commercially zoned lot in the Town of Southold, New York (“the Town”).¹⁰

In 2017 and early 2018, the Brinkmanns met with the Town Planning Department to “create and revise site plan applications” for the hardware store.¹¹ At the beginning of 2018, the Brinkmanns filed their first permit application.¹² This application contained a site plan, which allegedly underwent two rounds of revisions while implementing the Planning Department’s requests.¹³ The Town denied the permit three months later. The Brinkmanns claimed that the Town informed them that “no site plan had been approved by the Planning Department.”¹⁴ In May 2018, the Brinkmanns again applied for site plan approval.¹⁵ In July 2018, the Town allegedly demanded that the Brinkmanns pay for a \$30,000 Market and Municipal Impact Study.¹⁶ According to the Town, such a market study was required because the Brinkmanns wanted to “construct a big box hardware store in a small, semi-rural hamlet on eastern Long Island,”¹⁷ which was not in the best interest of the Town.

10. Complaint for Declaratory and Injunctive Relief at 6–7, *Brinkmann v. Town of Southold*, No. 2:21-cv-02468, 2022 U.S. Dist. LEXIS 180199 (E.D.N.Y. Sept. 30, 2022).

11. Brief in Opposition, On Petition for Writ of Certiorari at 5, *Brinkmann v. Town of Southold*, No. 23-1301 (2d Cir. June 11, 2024).

12. Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 8–9.

13. *Id.*

14. *Id.* at 9.

15. *Id.*

16. *Id.* at 10–11.

17. Brief in Opposition, On Petition for Writ of Certiorari, *supra* note 11, at i.

There are two sides to every story, and this is where the stories begin to significantly diverge. For their part, the Brinkmanns allege that the Town never conducted the \$30,000 study they paid for, despite being legally required to do so.¹⁸ Yet the Town asserted that it had “complied procedurally and substantively with New York eminent domain law.”¹⁹

The Brinkmanns argue that the Town chose to acquire their parcel despite the availability of an adjacent undeveloped plot of land, which the Town “never [even] considered acquiring.”²⁰ The Brinkmanns further allege that in October 2018, the Town took even more “drastic measures,” “pressur[ing]” the bank to breach its own “purchase contract [with the Brinkmanns] for the vacant lot” and demanding that the bank enter into a purchase contract with the Town of Southold instead.²¹ The Brinkmanns were “[u]ndeterred” by the Town’s intimidation tactics.²²

In February 2019, the Town enacted a six-month moratorium on new building permits.²³ The Brinkmanns argue that the moratorium was limited to a “one-mile stretch of road,” essentially targeting their lot.²⁴ The Town claims, however, the six-month moratorium was on “*any* new building permits along one mile of Route 25, which included the Brinkmanns’ proposed site, among several other businesses.”²⁵

The Town then twice extended the moratorium—first in August 2019 and then again in July 2020.²⁶ The Brinkmanns allege that the Town extended the moratorium contrary to Suffolk County’s disapproval and despite lacking any evidentiary support for these moratoriums.²⁷ The Town also generously gave out moratorium waivers, but not to the Brinkmanns.²⁸ The Town emphasizes the Brinkmanns never applied for such a waiver in the first place—an application which the Brinkmanns “believed [would be] futile, as the moratorium was clearly target[ing them].”²⁹ In May 2019, the

18. Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 15–16.

19. Brief in Opposition, On Petition for Writ of Certiorari, *supra* note 11, at 1.

20. Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 13–14.

21. *Id.* at 14.

22. Memorandum and Order at 5, *Brinkmann v. Town of Southold*, No. 2:21-cv-02468, 2022 U.S. Dist. LEXIS 180199 (E.D.N.Y. Sept. 30, 2022).

23. Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 15.

24. *Id.*

25. Brief in Opposition, On Petition for Writ of Certiorari, *supra* note 11, at 5 (emphasis added).

26. Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 16.

27. *Id.* at 16–17.

28. *Id.* at 17–18.

29. Brief in Opposition, On Petition for Writ of Certiorari, *supra* note 11, at 5; Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 18.

Brinkmanns sued the Town to end the moratorium.³⁰ In June 2020, “[t]he state trial court denied the Town’s motion to dismiss.”³¹

In August 2020, the Planning Board “held a public hearing on the proposed project to build a public park” on the Brinkmanns’ lot.³² In September 2020, the Town issued a “Findings and Determination” in which it concluded that the “acquisition [of the Brinkmanns’ lot would] benefit the public” because a public park would allow “the residents of Mattituck and Southold . . . the opportunity to create . . . [a] community gathering place.”³³ In May 2021, the Town “initiat[ed] condemnation proceedings on the [Brinkmanns’ lot].”³⁴ The Brinkmanns note that the Town’s September 2020 announcement of the acquisition of their lot via eminent domain conveniently occurred shortly after the state trial court allowed the Brinkmanns to proceed with their moratorium claim against the Town.³⁵ The Brinkmanns also emphasize that the park the Town decided to build was a passive use park that lacks “any improvements” or facilities.³⁶

Moreover, a September 2020 article published in *The Suffolk Times* by Southold Town Board Member Sarah Nappa drew attention to the Brinkmanns. In the article, Nappa hints at there being good probability that the Town exercised its eminent domain power because it disliked the Brinkmann family.³⁷ Nappa opined that the Brinkmanns’ fate would have likely been different had they been members of the Town of Southold’s “old boys club,” as opposed to being community “outsider[s].”³⁸

In a 2-1 decision in 2024, the Second Circuit’s *Brinkmann* majority affirmed the lower court’s ruling in favor of the Town.³⁹ Even though the panel agreed that the Brinkmanns’ complaint alleged “facts sufficient to support a finding that the [Town’s] decision to create the park was a *pretext*

30. Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 16.

31. Petition for Writ of Certiorari at 5, *Brinkmann v. Town of Southold*, No. 23-1301 (June 11, 2024).

32. Brief in Opposition, On Petition for Writ of Certiorari, *supra* note 11, at 6.

33. *Id.* at 6–7.

34. *Id.* at 7.

35. Petition for Writ of Certiorari, *supra* note 31, at 5. The Brinkmanns argue that with the Town of Southold’s “moratorium gambit on the rocks, the Town suddenly decided that it needed a new park.”

36. *Id.*

37. Sarah Nappa, *Guest Column: Eminent Domain Decision Sets a Dangerous Precedent*, THE SUFFOLK TIMES (Sept. 19, 2020), <https://suffolktimes.timesreview.com/2020/09/guest-column-eminent-domain-decision-sets-a-dangerous-precedent> [<https://perma.cc/7YD2-XQ4X>]. Nappa wrote: “I can’t help but wonder, if this application had been filed by anyone but an outsider, if this business was owned and operated by a member of the ‘old boys club,’ would the town still be seizing their private property? The use of eminent domain by Southold Town to take private property from an owner because it doesn’t like the family or their business model is a dangerous precedent to set.” *Id.*

38. *Id.*

39. *Brinkmann v. Town of Southold*, 96 F.4th 209, 210 (2d Cir. 2024).

for defeating the Brinkmanns' commercial use"⁴⁰ and conceded that the Town exercised its eminent domain power only after the failure of its various "regulatory hurdles,"⁴¹ the Brinkmanns still lost. So, what went wrong for the Brinkmanns?

Apart from examining the *Brinkmann* majority's reasoning to answer this question, this Note proposes a heightened scrutiny analysis for bad-faith takings via the tripartite burden-shifting framework. Although this evidentiary framework was put forth in *McDonnell Douglas Corporation v. Green*,⁴² an employment discrimination case, the application of the framework has not stopped there. The framework has also been applied by Daniel B. Kelly in the context of takings driven by "impermissible favoritism": when a "favored private entit[y]" or person has a "benefit[]" conferred on them, "with only incidental . . . public benefits."⁴³

What happened to the Brinkmanns, however, is arguably the exact opposite of favoritism. Thus, this Note extrapolates the tripartite burden-shifting framework to takings arising out of disfavor, from reasons ranging from discrimination and animosity to outright bias. Such an inquiry has largely gone unexplored due to the common assumptions that (1) strict deference to the legislature should somehow justify or excuse bad-faith takings or (2) the Equal Protection Clause is sufficient to address discriminatory takings. This Note will address both of these arguments and also illustrate what is at stake if bad-faith takings continue to slip consequence-free through the cracks of American jurisprudence.

Section I briefly provides an overview of takings in general, largely focusing on the history of the rapid expansion of "public use." Section II explores *Brinkmann's* reasoning, highlighting its many legal conclusions, each of which exhibits flaws. Section III focuses on the Ninth and Seventh Circuits to discuss the federal circuit split. Finally, Section IV examines the tension between rational basis review and some unspecified form of heightened scrutiny proposed by Justice Kennedy's concurrence in *Kelo v. City of New London*.⁴⁴ Section IV then uses Justice Kennedy's heightened scrutiny suggestion as an entry point to examining the tripartite burden-shifting framework and its application to takings motivated by discrimination and bias. After extrapolating Kelly's scholarship to bad-faith takings, Section IV examines the perils of adopting rational basis review instead. Section IV further underscores why the Equal Protection Clause and

40. *Id.* at 210 (emphasis added).

41. *Id.*

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

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

44. *Id.*

the doctrine of unconstitutional animus, while attractive solutions at first glance, are actually inadequate to the task in this context. Section IV concludes with an assessment of *Brinkmann*'s societal impact.

I. HISTORY AND BACKGROUND: THE RAPID EXPANSION OF “PUBLIC USE”

The Takings Clause of the Fifth Amendment provides: “[N]or shall private property be taken for public use, without just compensation.” This clause applies to the states through the Fourteenth Amendment.⁴⁵ What the Takings Clause prohibits is governmental takings of private property *without* just compensation, not takings altogether.

So, what does “public use” encompass? Perhaps the more salient question, though, is what does “public use” exclude? Traditionally, the Takings Clause was used by governmental entities to “condemn and acquire property to be used by the public” in innocent, even useful, ways: for example, “building public roads or providing for utilities infrastructure” like electric transmission lines.⁴⁶ Most people acknowledged, understood, and even “appreciate[d]” this eminent domain power to condemn private property for conversion into public use, provided there was just compensation.⁴⁷ Without this inherent power to appropriate land, the public would not have highways, courthouses, post offices, and railroads (the so-called clear instances of public use).⁴⁸ And without these amenities and structures, society would probably cease to function. The public was relatively content with this interpretation of public use because everyone got their share: all members of the public had access to these public uses and “benefit[ted] from the system” that provided the “basics of modern life.”⁴⁹ But then something happened—an expansion of the concept of public use beyond highway-building.

Public use became an “amorphous concept, resistant to precise definition”⁵⁰ and—conveniently for the government—began to be defined broadly.⁵¹ From its humble beginnings as a non-contentious issue, eminent domain erupted into a “hotly contested” area of law.⁵² In 1908, the Supreme

45. U.S. CONST. amend. V.

46. Kevin J. Lynch, *Forced Pooling: The Unconstitutional Taking of Private Property*, 75 U.C. L.J. 1335, 1342 (2024).

47. *Id.* at 1352.

48. *United States v. Carmack*, 329 U.S. 230, 236 (1946).

49. Lynch, *supra* note 46, at 1352.

50. Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENV'T AFF. L. REV. 45, 53 (2008).

51. *Id.*

52. Lynch, *supra* note 46, at 1344.

Court held in *Hairston v. Danville & Western Railway Company* “that it is beyond the legislative power to take . . . the property of one and give it to another for what the court deems private uses,” despite “full compensation.”⁵³ This was likely comforting to hear; members of the public probably understood this statement as the Court saying that taking private party A’s property to give it to private party B was off-limits. But then, private corporations began to seek the “power to condemn property for their own objectives.”⁵⁴ There had been a shift in takings jurisprudence.

In its 1925 *Old Dominion Land Corporation v. United States* decision, the Supreme Court emphasized that the legislative branch, as it pertains to public use, is “entitled to deference until it is shown to involve an impossibility.”⁵⁵ But the legislative branch’s limitless power to deem any non-impossible undertaking a public use was hardly the only facet of takings doctrine abused by both private and governmental entities.

In 1954, the Supreme Court decided *Berman v. Parker*.⁵⁶ In *Berman*, the Court allowed an administrative agency to take a non-blighted department store and redevelop it “so as to . . . prevent slum . . . housing conditions.”⁵⁷ The department store was also to be transferred to a “private development corporation for the purpose of curing blight.”⁵⁸ Petitioners argued that this would make it a “taking from one business [person] for the benefit of another.”⁵⁹ The Court ruled, however, that the so-called “means” of “executing [a] project are for Congress and Congress alone to determine”⁶⁰ and that the “public end may be as well or better served through an agency of private enterprise . . . or so the Congress might conclude.”⁶¹

So long as Congress believes that an act of conferring a private benefit from party A to party B “may” or “might” serve the public, such a taking is *Berman*-blessed. Thus, *Berman* found constitutional the District of Columbia Redevelopment Act of 1945—which, among other things, authorized sales of “condemned [private] lands to [other] private interests.”⁶² Under *Berman*, public use essentially became synonymous with everything

53. *Hairston v. Danville & W. R. Co.*, 208 U.S. 598, 606 (1908).

54. Daniel B. Kelly, *The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 10 (2006).

55. *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925).

56. *Berman v. Parker*, 348 U.S. 26 (1954).

57. *Id.* at 26.

58. U.S. COMM’N ON CIV. RTS., THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE iii (2014), https://www.usccr.gov/files/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf [<https://perma.cc/2FWM-5P6D>].

59. *Berman*, 348 U.S. at 33.

60. *Id.*

61. *Id.* at 33–34.

62. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239 (1984) (discussing *Berman*).

under the sun, just as long as the taking was justified by some nominal argument citing “public health, safety, morals, [or] welfare.”⁶³ But this *Berman* reiteration was hardly surprising in the context of *Old Dominion*. If anything, *Berman* was a case that truly legitimized hostility to private property owners, reinforcing public use as a broad concept that works to benefit governmental interests. *Berman* further underscored the irony that “public use” also serves to benefit private corporations that profit from such projects. This Note will return to *Berman* in Section IV.D to examine its catastrophic fallout.

In 1984, the Supreme Court decided *Hawaii Housing Authority v. Midkiff*, examining the validity of the Land Reform Act of 1967.⁶⁴ The Act authorized a transfer of titles from lessors to lessees, so as “to reduce the concentration of land ownership.”⁶⁵ This blunt conveyance of private property from party A to party B (a private beneficiary) neither raised concern nor constituted a taking “as having only a private purpose.”⁶⁶ So, although the *Midkiff* Court acknowledged that there was obviously some type of private purpose here (i.e., person B receiving person A’s private property), the Court emphasized that “[i]t is not essential that the entire community, nor even any considerable portion [of the community], . . . directly enjoy or participate in any improvement in order . . . to constitute a public use.”⁶⁷

Thus, under *Midkiff* the public use definition was even further expanded; a taking no longer even had to benefit a considerable portion of the community. This begs the question: how many members of the community would need to benefit for a taking to constitute a valid public use? Perhaps zero—if one subscribes totally to *Berman*-esque legislative deference where Congress might “conclude” that the public *may* be served in some way via a taking.

A basic overview of takings law cannot be complete without consideration of *Kelo v. City of New London*, a highly divisive 5-4 decision of the Supreme Court from 2005.⁶⁸ *Kelo* plays a major role in the *Brinkmann* decision, the unfortunate North Star of this Note. The *Kelo* majority authorized the taking of Susette Kelo’s “non-blighted”⁶⁹ little pink house in

63. *Berman*, 348 U.S. at 28 (quoting § 2 of the District of Columbia Redevelopment Act of 1945).

64. *Midkiff*, 467 U.S. 229.

65. *Id.* at 231–32.

66. *Id.* at 230.

67. *Id.* at 244 (quoting *Rindge Co. v. Cnty. Of Los Angeles*, 262 U.S. 700, 707 (1923)).

68. *Kelo v. City of New London*, 545 U.S. 469 (2005); Oswald, *supra* note 50, at 54.

69. Oswald, *supra* note 50, at 55.

the name of a “speculative” economic development rationale.⁷⁰ The little pink house and several others like it were to be torn down so Pfizer Inc., a private pharmaceutical company, could erect a \$300 million research facility in their place.⁷¹ The New London Development Corporation (“NLDC”) wanted to erect this \$300 million Pfizer facility so as to attract new commerce, create jobs, generate tax revenue, and help to “build momentum for the revitalization of downtown New London.”⁷² This “momentum” also apparently included making New London more “attractive.”⁷³

Kelo’s most egregious overstep is that none of these public uses were actually reasonably expected to occur or even had to occur. They were merely alleged, and indeed, were “speculative” because neither Pfizer nor NLDC would be required to use the condemned property “in a way that [actually] bolsters the local economy.”⁷⁴ Viewed differently, not only is the conveyance of private benefit to a private party permissible under *Kelo* if there is embedded therein some whiff of public use, but this whiff of public use no longer even need be actualized. Instead, it can simply be hypothetical. And this line of criticism tracks with the *Kelo* majority, who emphasized the sufficiency of NLDC merely “believ[ing]” the development plan would benefit the community.⁷⁵ The *Kelo* majority further disagreed with Susette Kelo that there needs to be “reasonable certainty” that the “expected public benefit[]” will actually “accrue.”⁷⁶

Where did this absolute faith in what NLDC was alleging come from? One can cite federalism, as did the majority in virtually every federal decision upholding a taking. Sure, the *Kelo* majority said that the “amount and character of land to be taken” and the “need” for specific land “rests in the discretion of the legislative branch.”⁷⁷ Sure, to negate these consequences of lack of oversight, checks and balances, and even *de minimis* accountability, states can impose public use requirements that are “stricter than the federal baseline.”⁷⁸ But if states are the only ones who care about not “wash[ing] out” all distinctions between public and private uses, this will lead to a drastic discrepancy.⁷⁹ Justice Sandra Day O’Connor warns that,

70. Gregory S. Knapp, *Maintaining Government Accountability: Calls for a “Public Use” Beyond Eminent Domain*, 83 IND. L.J. 1098, 1100 (2008) (“Another line of criticism focuses . . . on the speculative nature of economic development takings.”).

71. *Kelo*, 545 U.S. at 473.

72. *Id.* at 474.

73. *Id.*

74. Knapp, *supra* note 70, at 1100.

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

76. *Id.* at 487.

77. *Id.* at 489.

78. *Id.*

79. *Id.* at 494 (O’Connor, J., dissenting).

thanks to the *Kelo* majority, some states now might as well replace all “Motel 6[s] with . . . Ritz-Carlton[s],” or other little pink houses with shopping malls, or farms with factories, simply because they *might* revitalize or *possibly* beautify a city.⁸⁰ Justice O’Connor further posits that if the legislative branch is the “sole arbiter[] of the public-private [use] distinction, the Public Use Clause [will] amount to little more than hortatory fluff.”⁸¹ Judicial checks on interpretation of public use are necessary if the Public Use Clause, as a “constraint on government power[,] is to retain any meaning.”⁸²

Moreover, as Justice O’Connor further points out, the true impact of such radical deference to the legislative branch will, of course, be disparate.⁸³ What happens when the government can take “private property currently put to ordinary private use,” such as homes and small family businesses, and “give it over” for new private use—a use that can, but does not have to, “generate some secondary benefit for the public”?⁸⁴ The “beneficiaries” will likely be large entities, development firms, and people with “disproportionate influence and power in the political process” at the expense of those with less resources.⁸⁵

After *Kelo* was decided, newly discovered evidence revealed that NLDC “blocked” a competitive bidding process for the site to guarantee that Pfizer would get it.⁸⁶ NLDC used eminent domain to “appease” Pfizer.⁸⁷ So much so that the President of NLDC wrote a letter to Pfizer before Pfizer announced its plans, promising to “meet Pfizer’s requirements.”⁸⁸ To this end, NLDC promised to “buy up all the[] properties [in Susette Kelo’s neighborhood], clearing the way for redevelopment in line with Pfizer’s wishes.”⁸⁹ And NLDC ultimately did everything to “entice[] Pfizer to join the project by letting Pfizer dictate the contours of the [redevelopment], including the decision to condemn the properties in [Susette] Kelo’s neighborhood.”⁹⁰ None of this was known at trial, and one could certainly speculate that the *Kelo* decision may have been different had the *Kelo* Court

80. *Id.* at 503.

81. *Id.* at 497.

82. *Id.*

83. *Id.* at 505 (“Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random.”).

84. *Id.* at 501.

85. *Id.* at 505.

86. Daniel S. Hafetz, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 *FORDHAM L. REV.* 3095, 3112 (2009).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

known about the driving force behind these vague promises of economic revitalization—or perhaps not.

Although these are seminal cases in takings jurisprudence, they focus solely on the act of conferring a private benefit on another private party through the transference of property rights. They do not discuss takings which are inherently driven by discrimination, racism, homophobia, or animosity toward condemnees. That is, they do not tackle the issue of what happens when a governmental entity simply decides to condemn party A's property out of hostility toward party A's family, for instance. Although *Brinkmann* ostensibly seeks to address this question, the *Brinkmann* majority relied heavily on *Kelo* to show that *Kelo* imposes no requirement that the "government's stated objective" be "genuine" and free from "pretext for some other, illegitimate purpose."⁹¹ Hence the importance of discussing *Kelo* at length before this Note could delve into an explanation of how the *Brinkmann* majority likely misinterpreted *Kelo*. This discussion will take place in Section II(C). Another crucial takeaway from *Kelo* resides in Justice Kennedy's concurrence, specifically Justice Kennedy's reference to the possibility of some unknown form of demanding scrutiny and when it should be invoked.⁹²

II. THE *BRINKMANN* CASE

The purpose of this Section is to examine some of the *Brinkmann* majority's arguments in support of their decision to dismiss the Brinkmanns' bad-faith takings claim. This Section demonstrates why the *Brinkmann* majority's reasoning is, in many ways, flawed and therefore does not support its holding.

A. THE IMPOSSIBLE INQUIRY THAT IS (ACTUALLY) POSSIBLE

According to the *Brinkmann* majority, looking beyond the Town's stated purpose behind a taking is an exercise "fraught with conceptual and practical difficulties."⁹³ Such inquiry, holds the *Brinkmann* majority, is too demanding and would require courts to look into the "subjective motivation of every official who supported the [taking]"; this task is too demanding because motives are "rarely, if ever, pure."⁹⁴ True, examining the intentions of every single official involved in the condemnation process would indeed be an exercise that is, at best, impracticable. Nonetheless, the logical assumption underpinning the *Brinkmann* rationale—namely, that scrutiny of

91. *Brinkmann v. Town of Southold*, 96 F.4th 209, 211 (2d Cir. 2024).

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

93. *Brinkmann*, 96 F.4th at 213.

94. *Id.* at 213–14.

every official's underlying motive is necessary to determine the presence of bad faith—is, to put it mildly, a bit flawed.

But the *Brinkmann* majority took it a step further: government officials can be outright “hostile,” and the *Brinkmann* majority would still deem the taking valid as long as there is merely an asserted valid public use.⁹⁵ As openly admitted by the Town, even if the Town condemns homes of “disfavored minorities” purely “out of animus toward those minorities and a desire to drive them out of [Town],” this, too, would constitute a valid taking if the park excuse is presented to disguise that animosity.⁹⁶

By prioritizing judicial efficiency and simple-to-apply bright-line rules over ones that actually protect rights, the legal landscape in the wake of the *Brinkmann* decision is not merely grimly unfair; it verges on dystopian because bad faith slips through the cracks in the name of judicial efficiency.

Simple-to-apply, bright-line rules are not without their charms, however: they are easy to comprehend, produce consistent results, and are hard to misapply. But what happens when said consistency renders unfair outcomes? What happens when a condemnee has fistfuls of objective evidence that they have been wronged, but the court refuses to even consider any of it because doing so would apparently be too demanding an undertaking?

These simple-to-apply rules produce blatant injustices: as precedent, *Brinkmann* authorizes courts to deem a taking valid as long as there is any asserted public use, even if the condemnees could prove that the condemnation process was initiated and executed in bad faith.

Critically, none of these examples of conduct tackle the incentives or motives of any official. Instead, they come down to objective evidence. One need not delve into *why* the town officials enacted a moratorium over the protest of the county planning commission. One need not know *why* the town officials refused to send the county any evidentiary support concerning the supposed need for a moratorium. Similarly, one need not know the reason *why* the town never conducted an expensive market study that the condemnees had paid for, thereby expressly violating its own city code.⁹⁷

95. *Id.*

96. *Id.* at 233 (Menashi, J., dissenting) (“During oral argument in this appeal, the Town frankly acknowledged that, under its view of the public use requirement, the Town could seize the homes of disfavored minorities—out of animus toward those minorities and a desire to drive them out of Southold—as long as the Town said it would build parks where the minorities’ homes once stood.”).

97. The Brinkmanns argued that the Town violated City Code § 280-45(B)(10)(b) (2025). *See* Town of Southold, N.Y., Town § 280-45(B)(10)(b) (2025) (“[T]he Planning Board shall conduct or hire a consultant to conduct a Market and Municipal Impact Study, at the expense of the applicant. The study shall be completed within 90 days of receipt of all requested materials . . .”).

None of this evidence demands discernment of inscrutable motivations. This impossible inquiry is possible because it need not address the motivations of every official involved.

What is truly egregious in *Brinkmann* is the objective evidence provided. Hence why the *Brinkmann* majority had no difficulty in finding that the Town's taking was pretextual.⁹⁸ The *Brinkmann* majority reached their conclusion via factual inquiry and managed to parse the evidentiary record. Other courts would similarly have no problem in conducting such inquiries on a routine basis.

B. THE *BRINKMANN* MAJORITY'S DISREGARD OF THEIR OWN PRECEDENT,
GOLDSTEIN V. PATAKI

If the plaintiff fails to provide sufficient evidence of a taking that is a pretext for private purpose or instead animus, dislike, or spite, courts can absolutely reject their claims and have done so in the past. But this ability to screen out plaintiffs who lack sufficient evidence is actually a good thing because it greatly streamlines the judicial process. No case better exemplifies this than *Goldstein v. Pataki*, a 2008 Second Circuit case that the *Brinkmann* majority, ironically, cites extensively.⁹⁹ Why ironically? Because *Goldstein* in no way supports the *Brinkmann* majority's position.

1. Significance of Objective Evidence

The *Goldstein* plaintiffs claimed that “the [alleged] public uses were pretexts for a private taking” because Mr. Ratner, the owner of the New Jersey Nets and the Project's primary developer, was the project's “sole beneficiary,” while all the invoked public uses were mere “pretexts advanced by corrupt . . . state officials.”¹⁰⁰ The plaintiffs did not prevail for various reasons—each of which would likely be sufficiently dispositive when taken individually.

The plaintiffs failed to provide objective evidence of the corruption they alleged, or of any bad faith for that matter. Thus, beyond “far-reaching allegation[s]” the plaintiffs had nothing to offer the court.¹⁰¹ The biggest

98. *Brinkmann*, 96 F.4th at 219 (Menashi, J., dissenting) (“The court acknowledges that the complaint in this case ‘alleges facts sufficient to support a finding that the decision to create the park was a pretext for defeating the Brinkmanns’ commercial use’ of their own property and that the Town decided to seize the Brinkmanns’ property for a park only ‘after varied objections and regulatory hurdles that the Town interposed and that the Brinkmanns did or could surmount.’”).

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

100. *Id.* at 54–55.

101. *Id.* at 54 (“The heart of the complaint . . . and the centerpiece of the instant appeal, is its far-reaching allegation that the Project, from its very inception, has not been driven by legitimate concern for the public benefit on the part of the relevant government officials.”).

error committed by the *Goldstein* plaintiffs was that they failed to allege “any specific examples of illegality . . . by which the Project was approved” or any “specific illustration of improper dealings between Mr. Ratner and . . . government officials.”¹⁰² Noteworthy here, however, is the fact that the *Goldstein* court was open to hearing such evidence in the first place. And, unlike the *Brinkmann* majority, the *Goldstein* court would not have considered the process of evaluating said evidence to be “fraught with conceptual and practical difficulties.”¹⁰³ Instead, the *Goldstein* court actively sought such evidence. The *Goldstein* court wanted the plaintiffs to provide them with evidence of bad faith, so they could actually assess and analyze the bad faith that the plaintiffs alleged. Yet the plaintiffs provided the *Goldstein* court with essentially nothing beyond “mere suspicion[s].”¹⁰⁴ It is unsurprising, then, that the *Goldstein* court dismissed the plaintiffs’ claim.

Further, as emphasized by Judge Menashi, the dissenting judge in *Brinkmann*, the *Goldstein* court dismissed the plaintiffs’ claim “not because pretextual takings are permissible” but only because the allegations of pretext lacked specificity.¹⁰⁵ The *Goldstein* court’s concern was that a “reasonable juror” would simply not be able to conclude that the asserted laundry list of traditional public uses was mere pretext.¹⁰⁶ Now, contrast this with *Brinkmann*: The *Brinkmann* majority expressly admitted that the Brinkmanns’ “complaint . . . allege[d] facts sufficient to support a finding that the decision to create the park was a pretext.” Thus, evidence of pretext was definitely not lacking in *Brinkmann*.¹⁰⁷

2. Possibility of Closer Objective Scrutiny

The *Goldstein* court also stated that they wished to “preserv[e] the possibility that a fact pattern may one day arise in which the circumstances” would so align that “a closer objective scrutiny” would be “required” in the context of pretextual takings.¹⁰⁸ To justify this closer objective scrutiny, the so-called “circumstances of the [condemnation’s] approval process” would have to “greatly undermine the basic legitimacy of the outcome reached.”¹⁰⁹ Naturally, the *Goldstein* plaintiffs’ utter failure to provide facts supporting their allegations of bad faith, pretext, and illegality did not trigger that closer

102. *Id.* at 64.

103. *Brinkmann v. Town of Southold*, 96 F.4th 209, 213 (2d Cir. 2024).

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

105. *Brinkmann*, 96 F.4th at 228 (Menashi, J., dissenting).

106. *Id.* (Menashi, J., dissenting).

107. *Brinkmann*, 96 F.4th at 210.

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

109. *Id.*

objective scrutiny to which the *Goldstein* court alluded as a possibility in some pretextual takings cases.

The *Goldstein* fact pattern, however, is not present in all cases, and there are cases in which the plaintiffs can and do provide the court with ample evidence concerning pretext, thus triggering a closer objective scrutiny. *Brinkmann* presented precisely such a fact pattern. In *Brinkmann*, the “circumstances” surrounding the process of a passive park approval ranged from the Town’s alleged lawbreaking arising out of the Town’s refusal to conduct the \$30,000 market study for which the Brinkmanns had paid to the allegedly baseless moratoriums. Such accusations must have, at a minimum, been supported by objective evidence that the Brinkmanns provided, as the *Brinkmann* majority even noted that the Brinkmanns’ complaint alleged “facts sufficient to support a finding that the [Town’s] decision to create the park was a pretext for defeating the Brinkmanns’ commercial use.”¹¹⁰

But returning to the *Goldstein* rule, here the “approval” consisted of the Town authorizing the condemnation of the Brinkmanns’ parcel. And as to the “outcome” reached: one could plausibly argue that a regulation-abiding family business was shut down, and the parcel was condemned simply so others could enjoy a park without any amenities. The rule that *Goldstein* sets out, calling for a closer objective scrutiny, can therefore be applied to the *Brinkmann* facts. On its face, *Brinkmann* checks off all three elements of the *Goldstein* rule: circumstances, approval, and outcome. Of course, counterarguments could be made here, such as (1) building a hardware store in this specific location might further “increas[e] traffic in an area that is already dangerous” and (2) residents of the Town of Southold have numerous “concerns” about this hardware store and do not want the Brinkmanns to build it.¹¹¹ But all of these accusations and counterarguments would likely require closer objective scrutiny—as opposed to automatically blessing a bad-faith taking because the condemner asserted some public use.

3. Pretextual Taking: A Claim of Dubious Jurisprudential Pedigree?

One last aspect of *Goldstein* worth addressing is how the *Brinkmann* majority emphasized that, apparently, pursuant to *Goldstein*, “a pretext-based challenge to a taking has a ‘dubious jurisprudential pedigree.’”¹¹² This is largely taken out of context and is an inappropriate generalization. The *Goldstein* court said that the “particular kind of ‘pretext’ claim the plaintiffs [raised] in this case . . . bears an especially dubious jurisprudential

110. *Brinkmann*, 96 F.4th at 210.

111. Nappa, *supra* note 37.

112. *Brinkmann*, 96 F.4th at 213.

pedigree.”¹¹³ What has a dubious jurisprudential pedigree is the evidentiary underpinning of the *Goldstein* plaintiffs’ pretext claim, not all other pretext-based claims outside of the *Goldstein* realm; Mr. Ratner offered an extensive list of “well-established” public uses to counter the *Goldstein* plaintiffs’ claim.¹¹⁴ Contrast *Goldstein*’s “creation of affordable housing units,” “mass-transit improvements,” and “redress of blight” with *Brinkmann*’s 1.7-acre empty park.¹¹⁵ The difference is as starkly evident as it is profound, indicating that the Brinkmanns’ assertion of a pretextual taking was not of dubious jurisprudential pedigree.

C. THE POSSIBLY FATAL MISTAKE OF *KELO* MISINTERPRETATION

Before this Note addresses the *Brinkmann* majority’s possible misinterpretation of *Kelo*—or at least, its failure to consider alternative interpretations and dispose of them appropriately—an important question should be addressed: Why does it matter how the *Brinkmann* majority interpreted *Kelo*? The answer is simple: the *Kelo* misinterpretation alone likely cost the Brinkmanns their property.

The *Brinkmann* majority helped themselves to generous portions of *Kelo*—or, more specifically, the following *Kelo* passage—which is the key in this analysis: “[T]he [C]ity would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party . . . 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.”¹¹⁶

1. An Unwarranted Inference Drawn by the *Kelo* Majority

The *Brinkmann* majority confidently asserted that the “mere pretext of a public purpose” language is not an “overarching prohibition against any and all purposes alleged to be ‘illegitimate.’”¹¹⁷ Per the *Brinkmann* majority, *Kelo* imposed no requirement that the “government’s stated objective . . . be genuine, and not a pretext for some other, illegitimate purpose,” unless that purpose concerns bestowal of private benefit.¹¹⁸ The *Brinkmann* majority concluded that, under *Kelo*, “the *only* impermissible pretext is bestowing a private benefit.”¹¹⁹ So only when there is an alleged private purpose (e.g.,

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

114. *Id.* at 55.

115. *Id.* at 52–59.

116. *Brinkmann*, 96 F.4th at 212 (quoting *Kelo v. City of New London*, 545 U.S. 469, 477–78 (2005)) (emphasis added).

117. *Id.* at 211; *id.* at 212 (quoting *Kelo v. City of New London*, 545 U.S. 469, 477–78 (2005)).

118. *Id.* at 211 (quoting Appellants’ Brief at 19).

119. *Id.* at 226 (Menashi, J., dissenting) (emphasis added).

private party A conferring a private benefit on B, another private party) does the *Brinkmann* majority actually care to delve into whether the government's stated objective is genuine. Other kinds of pretext such as prevention of a legal land use (think a family-owned hardware store), spite, and discrimination are permissible under *Brinkmann*—as long as there is an asserted valid public use.¹²⁰

And in *Brinkmann*, bestowal of private benefit was not alleged, so the Brinkmanns were simply out of luck.¹²¹ In *Brinkmann*, the issue was not that the government bestowed a private benefit upon some private party at the Brinkmanns' expense. Nor was there some other permutation of the "private benefit" concern. Instead, at issue was a municipality taking private land for a pretextual public use (i.e., a passive use park)—not for purposes of giving the land to some other private party.

But here an interesting wrinkle emerges in the *Brinkmann* majority's logic: when did *Kelo* say that the *sole* impermissible takings are those in which the government's actual motive is to bestow a private benefit upon some private party? Similarly, when did *Kelo* say that takings driven by spite, discrimination, or animus are allowed and require no inquiry into both purpose and mechanics? These are trick questions because *Kelo* never said either, and yet the *Brinkmann* majority inferred that it did.

It would seem that the likely reason why *Kelo*'s "mere pretext of a public purpose" language is immediately followed by a bestowal of private benefit qualifier is because *Kelo*, as a case, focused exclusively on private use. At issue in *Kelo* was whether the city could seize private property from one private party in order to confer a benefit on another private party, all for the ostensible purpose of economic development. Accordingly, by what logic can the *Brinkmann* majority confidently decree which other pretextual takings are permissible or impermissible when the only issue before the *Kelo* court involved private use and nothing else? Or are we supposed to assume that because private benefit was the only kind of pretext mentioned by *Kelo*, this now suddenly means that all other kinds of pretext are excluded from this status of impermissibility, therefore making them permissible under all circumstances—even the most egregious?

120. *Id.* (Menashi, J., dissenting).

121. *Id.* at 213 (Per the *Brinkmann* majority, the Brinkmanns did not prevail because they did "not allege that the Town meant to confer [a] . . . private benefit," and thus did "not point[] to any Town purpose that violate[d] the Takings Clause").

2. Two Ways of Interpretation: Examining *New England Estates LLC v. Town of Branford*

The *Brinkmann* majority interpreted “mere pretext of a public purpose” as stating that the only impermissible takings are those in which there is a conveyance of private benefit.¹²² The same language, however, can also be interpreted thusly: takings that convey a private benefit, along with other forms of pretextual takings (e.g., those arising out of spite, discrimination, or unfair prohibition of running a regulation-abiding family business) are all impermissible. This *Kelo* language does not necessarily close all doors to other claims stemming from other forms of pretext, as claimed by the *Brinkmann* majority. One can just as well argue that *Kelo* merely provided a single, non-exclusive example of pretext (i.e., conveyance of private benefit) and the reason why this example pertained to conveyance of private benefit and not something else is because *Kelo* is a case that narrowly addresses the private benefit issue. But this act of providing a single example of pretext does not deny protection to all other kinds of pretextual takings. The “mere pretext of a public purpose” language does not delineate what is excluded from the so-called “pretext.” Nor does *Kelo* place any restrictions or limits upon potential plaintiffs raising other types of pretextual takings claims, such as those involving discrimination or spite.

This idea of varying interpretation of the *Kelo* language was also examined in *New England Estates, LLC v. Town of Branford*, a 2010 Connecticut Supreme Court decision which is in direct opposition to *Brinkmann*.¹²³ Notably, the Second Circuit (where *Brinkmann* was decided) includes Connecticut in its footprint.¹²⁴ In *New England Estates*, New England Estates wanted to build an affordable housing development near the landfill.¹²⁵ The Town committee then abruptly decided that the town had an urgent need for playing fields precisely where the affordable housing development was to be built.¹²⁶

Apart from the dire need to build a playing field, the town in *New England Estates* also decided to bolster its tenuous position via an alternative justification for the taking by citing environmental concerns surrounding the proposed development’s proximity to the landfill.¹²⁷ And this justification

122. *Id.* at 226 (Menashi, J., dissenting) (“Today’s decision interprets [*Kelo*] . . . to mean that the only impermissible pretext is bestowing a private benefit.”).

123. *See New England Estates*, 988 A.2d 229.

124. Besides New York and Vermont, the Second Circuit of the United States Court of Appeals, where *Brinkmann* was decided, also includes Connecticut.

125. *New England Estates*, 988 A.2d at 236–37.

126. *Id.* at 238.

127. *Id.* at 236.

would have probably worked had there been no evidence to the contrary: (1) an internal memorandum outlining which strategies had already been implemented by the town for the sole purpose of “protecting the town against affordable housing appeals” and (2) “internal communications” among town officials revealing just how much they did not want an affordable housing development.¹²⁸

To justify its environmental concerns, the town relied on a one-page sketch of the playing fields and a five-page letter, which outlined “generic” concerns regarding building residential developments near landfills.¹²⁹ Beyond alluding to “possibilities” of such contamination, the letter said nothing substantive in regard to the specific landfill at issue.¹³⁰ The incriminating internal communications, coupled with the town officials’ sudden environmental concerns at a time very convenient for them, followed swiftly by the exercise of eminent domain power to stop the affordable housing project, made it rather easy for the *New England Estates* court to properly halt the town’s bad faith actions.¹³¹

The town argued that it did not violate the Takings Clause by being “dishonest” about its reasons for taking the land because the Takings Clause only prohibits takings for private use, not other kinds of pretextual takings.¹³² If this argument sounds familiar, it is because this is precisely what the *Brinkmann* majority emphasized: the “[Brinkmanns’] complaint does not allege that the Town meant to confer [a] private benefit” and because an “unimproved” public park still constitutes public use, this makes the condemnation valid.¹³³ Unlike the *Brinkmann* majority, however, which praised this reasoning, the *New England Estates* court rejected the town’s assertion that takings become violations *solely* when the government seizes private property for a private use.¹³⁴ This assertion made by the town in *New England Estates* is identical to that of the *Brinkmann* majority¹³⁵ and also has its roots in a possible misinterpretation of *Kelo*, as examined in this Section.

128. *Id.* at 237.

129. *Id.* at 238.

130. *Id.*

131. *Id.* at 252–53.

132. *Id.* at 252 (The Town in *New England Estates* “argue[d] that the public use clause prohibits only a taking of private property for a use that is not a public use and does not provide a remedy for a taking that is undertaken in bad faith . . .”).

133. *Brinkmann v. Town of Southold*, 96 F.4th 209, 213 (2d Cir. 2024).

134. *New England Estates*, 988 A.2d at 252.

135. *Brinkmann*, 96 F.4th at 217 (Per the *Brinkmann* majority, *Kelo*’s “current pronouncement on ‘pretext’ concerns only the pretext of non-public (that is, private) use.”).

The *New England Estates* court emphasized that the town's reliance on *Kelo* "for the proposition that only a taking for the purpose of conferring a benefit on a private party constitutes a violation of the [Takings Clause]" is incorrect.¹³⁶ Such a reading of *Kelo*'s "mere pretext of a public purpose" language interprets the Takings Clause in an unjustifiably "overbroad[]" manner.¹³⁷ That is, it takes *Kelo*'s prohibition against bestowals of private benefits and extends it to say that the *sole* impermissible takings are those in which there is a bestowal of private benefit. Further, because the "issue of whether a bad-faith taking would violate the [Takings Clause]" was never before the *Kelo* court to begin with,¹³⁸ the inference that bad-faith takings should go unchecked cannot be made. Thus, the Connecticut Supreme Court would disagree with the *Brinkmann* majority concerning the interpretation of the pretext language in *Kelo*.

It is the current reality of the takings landscape that whether a Connecticut resident loses or prevails on their pretextual taking claim now largely depends on choice of venue.¹³⁹ In Connecticut state court, someone with a *Brinkmann*-esque fact pattern would likely prevail on the merits.¹⁴⁰ Yet that same hypothetical person marching into federal court would summarily lose for lack of an alleged bestowal of private benefit.¹⁴¹

III. THE NINTH & SEVENTH CIRCUITS

This Section examines the reasoning of the Ninth and Seventh Circuits in cases that resemble *Brinkmann* and tackle bad-faith takings analysis. Both circuits, to varying degrees, stand in contrast to the *Brinkmann* majority which conducted no such analysis.

A. ANALYSIS OF THE NINTH CIRCUIT

In the 1966 Ninth Circuit decision, *Southern Pacific Land Company v. United States*, the Ninth Circuit stated that when administrative agencies engage in takings for an "authorized public purpose," such takings are "not subject to judicial review," with one crucial exception.¹⁴² Takings for an

136. *New England Estates*, 988 A.2d at 253 n.27.

137. *Id.*

138. *Id.* ("*Kelo* did not involve any allegations that the city of New London acted in bad faith in taking private property.>").

139. Petition for Writ of Certiorari, *supra* note 31, at 12.

140. *Id.*

141. *Id.*

142. *S. Pac. Land Co. v. United States*, 367 F.2d 161,162 (9th Cir. 1966) ("[T]he Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith. And various courts of appeal, including this one, have said that an exception to judicial non-reviewability exists in such circumstances.") (citations omitted).

authorized public purpose can be subject to judicial review if the administrative agency's decision to condemn a property is "alleged to be arbitrary, capricious, or in bad faith."¹⁴³ While easy enough to allege, this standard is deferential to administrative agencies, resulting in a low likelihood of success for plaintiffs. In fact, the Ninth Circuit even stressed how unlikely it is for plaintiffs in such cases to succeed: "in each instance in which a lower court set aside a federal agency's determination that it was necessary to take [a] particular property . . . the lower court's ruling was reversed on appeal."¹⁴⁴ The principle nevertheless stands: there are instances when the Ninth Circuit will examine alleged bad faith in takings claims, even though these allegedly bad-faith takings all bear expressly stated ostensible public uses.

A natural inquiry in this line of analysis is to examine what is required to clear the Ninth Circuit's high bar for challenging administrative agencies' "arbitrary" takings. The Ninth Circuit instead provides multiple examples of how not to satisfy it, which all come down to the quality of bad faith evidence. If the evidence of bad faith is insubstantial or nonexistent—especially coupled with very big, almost scandalous, but largely unsupported assertions—the Ninth Circuit will not invalidate the administrative agency's taking.

In *Southern Pacific*, the Southern Pacific Land Company ("SPLC") owned 4,600 acres of land, including the mineral rights.¹⁴⁵ The U.S. Government wanted to condemn the land and the mineral rights for purposes of constructing a naval air station.¹⁴⁶ SPLC thought it advantageous to essentially imply that the U.S. Government decided to profit off SPLC's land and engage in an "outside land speculation."¹⁴⁷ When deposed, the Assistant Secretary of the Navy testified to the exact opposite of this assertion, stating that mineral extraction was actually "inconsistent with the establishment of the naval air station, and was not [even] contemplated when the declaration of taking was filed."¹⁴⁸ In fact, the primary reason for condemnation was so that the land and the associated mineral rights would be utilized to produce

143. *Id.*

144. *Id.* There are many ways of challenging an arbitrary administrative action. For instance, a plaintiff can demonstrate that the agency has "relied on factors which Congress has not intended it to consider [for purposes of executing an administrative action]," failed to consider "relevant factors" or an "important aspect of the problem" before engaging an administrative action, or failed to examine potential policy alternatives of "achieving the objectives." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Because this Note focuses on the Takings Clause, a comprehensive discussion of administrative law and arbitrary administrative actions is beyond its scope.

145. *Id.* at 161.

146. *Id.*

147. *Id.* at 163 (quoting *Brown v. United States*, 263 U.S. 78, 84 (1923)).

148. *Id.* at 162–63.

oil only “in the case of emergency.”¹⁴⁹ And just like that, with absolutely no evidence to refute any of the U.S. Government’s aforementioned points, the plaintiffs did not prevail on their bad-faith taking claim.¹⁵⁰

A subsequent 1968 Ninth Circuit decision, *Scott Lumber Company v. United States*, is largely identical to *Southern Pacific*’s reasoning and, unfortunately, its outcome too.¹⁵¹ Here, the United States (on behalf of the United States Forest Service) sought to condemn appellant’s estate in timber land “for the construction, maintenance and permanent use of highways . . . and for the use, conservation and protection . . . of [the] forests [on appellant’s land].”¹⁵² Similar to SPLC in *Southern Pacific*, the *Scott Lumber* appellant claimed that the “taking was not for a public purpose” but instead for the “purpose of benefitting certain competitors of appellant pursuant to an illegal agreement.”¹⁵³ As in *Southern Pacific*, the assertion was as unsupported as it was bold.¹⁵⁴ Moreover, the deposition of the Acting Secretary of the Department of Agriculture also revealed nothing suspicious.¹⁵⁵ Accordingly, the *Scott Lumber* court ruled that it was “completely satisfied” that the government’s taking was for public use—given that the “facts alleged by [the appellant], [even] taken in the light most favorable to [the appellant]” still did not “show that the action of the officials ha[d] such an arbitrary, capricious or bad faith quality as to justify [judicial] interference.”¹⁵⁶ Crucially, however, the *Scott Lumber* court did contemplate judicial interference and was even willing to possibly invalidate a bad-faith taking had the appellant actually produced sufficient evidence of bad faith, beyond claims that were as baseless as they were audacious.¹⁵⁷

The *Scott Lumber* court even agreed with the lower court’s declaration that “[t]his Court need not, and will not, stand idly by and allow administrative officials to take private property arbitrarily, capriciously, [or] in bad faith,” something that cannot be said about the *Brinkmann* majority.¹⁵⁸ If anything, this “idle” manner is emblematic of *Brinkmann*’s reasoning: even when there is blatant evidence of bad faith coupled with some suspect public use, the *Brinkmann* majority would decline to look into any “alleged

149. *Id.* at 163.

150. *Id.*

151. *Scott Lumber Co. v. United States*, 390 F.2d 388 (9th Cir. 1968).

152. *Id.* at 390.

153. *Id.*

154. *Id.* at 391–92.

155. *Id.* at 391.

156. *Id.*

157. *Id.* (“[A] limited power of review of an administrative decision exists where it is contended that the administrative decision was arbitrary, capricious, or made in bad faith . . .”).

158. *Id.*

pretexts and motives.”¹⁵⁹ The *Scott Lumber* court was not only eager to conduct itself in a non-idle manner but also examined the facts in the light most favorable to the appellant. Yet, even with the *Scott Lumber* court largely cheering the appellant on and giving the appellant all the necessary tools to prevail, the appellant simply failed to provide evidence of bad faith.

Would a similar evidentiary framework, as employed by the *Southern Pacific* and *Scott Lumber* courts (specifically in the context of arbitrary takings by administrative agencies) make sense in the Takings Clause context? This is a ready-to-go framework that can be easily applied beyond cases where administrative agencies (such as *Scott Lumber*'s United States Forest Service) are accused of engaging in bad-faith takings.

Although it offers a potential solution, this framework has its pitfalls. One, it is similar to rational basis review, so much so that it even uses rational basis review's "arbitrary" language. Such language is called for in rational basis review *only* because higher levels of scrutiny require something more than the regulatory action not being arbitrary. At the end of the day, it is a pretty low bar, offering little protection for condemnees' interests; *any* legitimate interest (e.g., a passive use park) would suffice. Two, it is hard to define just what constitutes "good" evidence in a manner sufficient to demonstrate bad faith. And three, even if condemnees provide satisfactory evidence, the government can simply argue the following:

- (1) That only one or two members of the agency (or a municipality like in *Brinkmann*) had bad-faith intent in condemning the land (while the rest did not);
- (2) That it is not the province of the judicial system to disrupt a democratic process; and
- (3) That it is not bad faith but mere incidental disparate impact that was not actually intended.

B. THE SEVENTH CIRCUIT & QUESTION OF LEGISLATIVE DEFERENCE

The Seventh Circuit takes a similar approach to the Ninth Circuit: although some deference may be given to administrative agencies, evidence of arbitrariness and bad faith matters when a court evaluates whether an administrative agency's taking was indeed for a public use. That is, the Seventh Circuit holds that there is *no* valid or legitimate public use if such public use stems from bad faith or pretext. So even if there is an alleged unimpeachable public use (such as a public park), the administrative agency's taking is declared invalid if the plaintiff can prove bad faith or

159. *Brinkmann v. Town of Southold*, 96 F.4th 209, 211 (2d Cir. 2024).

pretext associated with said public use.¹⁶⁰ This is a stronger iteration of what the Ninth Circuit decided in *Scott Lumber* and *Southern Pacific*. The Ninth Circuit provided the condemnees with an opportunity to present evidence that *could*, in theory, demonstrate bad faith or arbitrariness by the administrative agency. But again, realistically, because the evidentiary bar is high and administrative agencies are (automatically) given much deference, such efforts will likely fail. The Seventh Circuit, on the other hand, made “public use” determinations conditional on there being *no* bad faith and reserved the judicial right to dig deeper to see if legislative deference is warranted.

In *United States v. 58.16 Acres of Land*—a 1971 Seventh Circuit decision—a husband and wife owned a 58.16-acre tract which primarily contained farmland on which the landowners’ home stood.¹⁶¹ The United States wanted to take this farmland for purposes of flood control and reduction of flood crests.¹⁶² The landowners then argued that the United States’ action was “arbitrary, discriminatory, capricious, vindictive, and in bad faith,” thus warranting a “valid defense to the condemnation proceeding.”¹⁶³ Or, in short, landowners contended that the asserted public use (to prevent flood control and reduce flood crests) was a pretext. To prove this, they cited their repeated complaints to the government regarding erosion and the government’s “failure to maintain proper water levels” from 1968 through 1970.¹⁶⁴ The landowners went on to stress that “no [government] action had [ever] been taken to repair the damage or to prevent further erosion.”¹⁶⁵ After three years of refusing to fix the issue and not responding to any of the landowners’ complaints, the government responded to the complaints in 1971, informing the landowners that condemning their property would be much cheaper than protecting it from erosion or floods.¹⁶⁶

It was unclear to the Seventh Circuit why the district court judge denied without merit the motion to vacate the order for possession.¹⁶⁷ The Seventh Circuit surmised that perhaps the reason the motion had been denied without merit (i.e., the motion was basically deemed frivolous) was that the district judge found against the landowners’ bad faith claim.¹⁶⁸ Or, as the Seventh Circuit further posited, perhaps the district court ruled that way because the

160. See *United States v. 58.16 Acres of Land*, 478 F.2d 1055 (7th Cir. 1973).

161. *Id.* at 1057.

162. *Id.* at 1056.

163. *Id.* at 1057.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1058.

168. *Id.*

court thought that the administrative decision to condemn the land “was [simply] not judicially reviewable”—given that there was an alleged public use, regardless of the substantial pretext evidence.¹⁶⁹

The *Brinkmann* majority also greatly relied on a “longstanding policy of deference to legislative judgments” to rationalize inaction.¹⁷⁰ *Brinkmann* is actually far from being the only court that emphasizes legislative deference in the takings context; it is neither a novel argument nor dispositive. For instance, even in *58.16 Acres of Land*, the Seventh Circuit emphasized that “once the question of the public purpose has been decided, the amount and character of land to be taken . . . rests in the discretion of the legislative branch.”¹⁷¹ But the Seventh Circuit does not use this discretion to justify its own inertia. To the contrary, while the Seventh Circuit acknowledges and even embraces legislative deference, it nevertheless considers it proper for the judicial branch to “materially . . . aid[]” public use analysis “by exploring the good faith and rationality of the governmental body in exercising its power of eminent domain.”¹⁷² Therefore, the two—that is, a substantive bad-faith takings analysis and deference to the legislative branch—are not mutually exclusive. According to the Seventh Circuit, the “determination of the extent, amount or title of property to be taken . . . rests wholly in legislative discretion,” assuming there is (1) an “absence of bad faith” and (2) the “determination” to condemn was “made in good faith.”¹⁷³ These “restraints” that the Seventh Circuit cleverly placed serve as evidence of how bad-faith takings analysis can peacefully co-exist with legislative deference.¹⁷⁴

The main takeaway here is that the Seventh Circuit emphasized that the district court was “required to resolve . . . questions” of “bad faith, arbitrariness, and capriciousness,” all of which bore upon the “determination of public use.”¹⁷⁵ The Seventh Circuit is firm that *there is no valid public use without an absence of bad faith* and a presence of “good faith and rationality of the governmental body in exercising its power of eminent domain,”¹⁷⁶ and this assertion runs directly counter to the *Brinkmann* majority.

169. *Id.*

170. *Brinkmann v. Town of Southold*, 96 F.4th 209, 213 (2d Cir. 2024).

171. *58.16 Acres of Land*, 478 F.2d at 1058.

172. *Id.*

173. *Id.* (quoting *United States v. Meyer*, 113 F.2d 387, 392 (7th Cir. 1940)).

174. *Id.*

175. *Id.* at 1059 (“In sum, questions of bad faith, arbitrariness, and capriciousness, all bearing upon the determination of public use, having been raised by the [landowners], the district court was required to resolve those questions.”).

176. *Id.* at 1058.

While the Ninth Circuit was, in theory, willing to look at evidence of bad faith, which would *potentially* invalidate the taking, the Seventh Circuit made a pronouncement with which the *Brinkmann* majority would certainly disagree. Specifically, if there is strong evidence of bad faith or arbitrariness (and the *Brinkmann* majority acknowledged that there had been), there can be no legitimate public use, making the taking invalid. Unlike the Seventh Circuit, the Ninth Circuit does not make a valid public use expressly dependent upon a lack of bad faith. Regardless, both circuits prioritize and actively consider evidence of bad faith, so they can draw an inference of a taking's validity.

IV. WHAT NOW?

The purpose of Part IV is to examine the *Brinkmann* fallout, while remaining solution-oriented with an eye toward the future. This Note examines which standard of review could be used to evaluate bad-faith takings on a federal level, focusing on the tripartite burden-shifting framework and also discussing the downsides of the Equal Protection Clause and the doctrine of unconstitutional animus in the context of bad-faith takings. This Section continues to imagine what could be, with the intention to move forward jurisprudentially from *Brinkmann* to a more fair, uniform, and dignified approach to bad-faith takings.

A. THE DANGERS OF RATIONAL BASIS REVIEW

In the context of bad-faith takings, there is a conflict between rational basis review and the various forms of heightened review. While there exist various permutations of what heightened review can and should look like—and of course, much disagreement too—this Note will only closely examine the tripartite burden-shifting framework. But first, rational basis review.

One cannot talk about rational basis review in the context of property law without, yet again, mentioning *Kelo*. The *Kelo* majority “declared that a taking should be upheld as consistent with the Public Use Clause,” just as long as it is “‘rationally related to a conceivable public purpose.’”¹⁷⁷ This “deferential standard of review echoes the rational-basis test.”¹⁷⁸ And rational basis review is extremely deferential to the legislative process—so much so that a “challenged law will be upheld if it could be rationally interpreted as advancing any *conceivable* legitimate public purpose.”¹⁷⁹ In

177. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (analyzing the *Kelo* majority's reasoning).

178. *Id.*

179. Hafetz, *supra* note 86, at 3103.

fact, “even the ‘flimsiest’ of reasons will survive [said] scrutiny.”¹⁸⁰ Courts are known to grant this legislative deference “even if there is nothing other than judicial speculation” to imply that the government was trying to advance a public purpose when enacting the law.¹⁸¹ This is precisely what happened in *Kelo*.

Under *Kelo*, a mere prediction (or judicial speculation) that some public use will generate some secondary public benefit is enough.¹⁸² Even the *Kelo* majority itself, likely sensing a risk for the potential abuse of eminent domain under rational review, suggested that states can and should place “further restrictions” upon the takings power.¹⁸³ A large concern with this standard is that the embedded presumption of permissibility within the rational basis of review may “motivate[] trial judges to see no evil, hear no evil, and speak no evil” even in takings cases which “fail the smell test”¹⁸⁴—chief among them the *Brinkmann* case.

In the takings context, rational basis review can invalidate two types of condemnations: (1) when the “asserted purpose is not a cognizable public purpose” and (2) when there is a “clear intention to benefit a private party.”¹⁸⁵ Takings driven by bad faith (such as discrimination or arbitrarily forbidding a property owner from running a regulation-abiding family business) do not fall into either category. Why? Because an asserted public purpose such as a park is a cognizable public purpose, and discrimination would likely not involve a conveyance of private benefit upon a private party. This is why Justice Kennedy’s concurrence in *Kelo* suggested that “a more stringent standard of review” might be suitable for a “more narrowly drawn category of takings,” though largely referring to takings marked with “impermissible favoritism.”¹⁸⁶

To clarify, favoritism alludes to the governmental entity’s inherent reason “for favoring a certain party”; these reasons range from corruption to “a complex web of social and business relations.”¹⁸⁷ One could arguably view favoritism as a particular form or sub-category of bad-faith taking, one that punishes a property owner to benefit someone else. Favoritism is prohibited “out of concerns for basic fairness.”¹⁸⁸ The same exact logic,

180. *Id.* at 3114.

181. *Id.* at 3103.

182. *Kelo*, 545 U.S. at 501 (O’Connor, J., dissenting).

183. *Id.* at 489.

184. Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 2, 335, 362 (2006).

185. Hafetz, *supra* note 86, at 3115.

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

187. Hafetz, *supra* note 86, at 3108.

188. *Id.*

however, applies to takings which are marked by other kinds of bad faith, manifested in things like discrimination, racism, or animosity toward specific individuals—this, too, violates our inherent sense of fairness. Although Justice Kennedy’s concurrence speaks to issues of favoritism in the takings context, the reasoning outlined in the concurrence can be extrapolated further to other kinds of bad faith.

Justice Kennedy made reference to a more heightened standard of review, but he did not actually delve into the logistics of this more “stringent” standard.¹⁸⁹ For instance, it remains unclear as to which situations warrant a “meaningful rational-basis review that in [Justice Kennedy’s] view is [always] required under the Public Use Clause” *versus* those meriting a “demanding level of scrutiny” which in some cases even justifies a “rebuttable” “presumption of [a taking’s] invalidity” if the “risk of undetected impermissible favoritism of private parties is [] acute.”¹⁹⁰ Would Justice Kennedy’s “demanding level of scrutiny” be akin to strict scrutiny? Rational basis plus? Justice Kennedy’s *Kelo* concurrence is vague on these questions. Justice Kennedy also failed to identify what evidence would trigger these standards or what exactly the court is supposed to do with said evidence of favoritism,¹⁹¹ an omission for which he received much criticism.¹⁹²

This Note disagrees with the assertion that Justice Kennedy *exclusively* referred to “rational basis plus” review.¹⁹³ Justice Kennedy referred to multiple standards. And yes, while Justice Kennedy’s *Kelo* concurrence creates much unnecessary confusion, that is the nature of the contemplated standards. Thus, the extra layer of complexity should not be swept under the rug. In fact, certain scholars even argue that the criteria¹⁹⁴ Justice Kennedy

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

190. *Id.* at 492–93 (Kennedy, J., concurring).

191. *Id.* at 502 (O’Connor, J., dissenting) (Not only do the “details” of Justice Kennedy’s remain “undisclosed,” but Justice Kennedy also failed to “specify[] what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not.”).

192. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 95 (2005) (Justice Kennedy “casting the essential fifth vote for the [*Kelo*] ‘majority’ opinion while also writing a separate opinion qualifying the Court’s opinion is bad practice because it leaves the reader uncertain whether the majority opinion or the concurring opinion should be regarded as the best predictor of how the Court would decide a similar case in the future. Justice Kennedy’s action is a further example of the Court’s tendency . . . to disregard the consequences of its decisions for the lower courts that have to apply them. If Kennedy had reservations concerning the majority opinion that he was not willing to swallow, he should have concurred in the judgment only; then the lower court judges and future litigants would know where they stood.”) (footnote omitted).

193. Cameron P. Hellerman, *Misusing Eminent Domain: Pretextual Takings for a Traditional Public Use*, 93 FORDHAM L. REV. 2229, 2243 (2025) (“Accordingly, Justice Kennedy suggested that courts employ a rational basis plus standard of review . . .”).

194. *Kelo*, 545 U.S. at 491–93 (Kennedy, J., concurring) (criteria such as “testimony from government officials,” “documentary evidence of communications between these parties,” and presence

considers (which supposedly triggers some form of heightened scrutiny) directly “collid[e]” with the *Kelo* majority’s assertion that there should be no “intrusive scrutiny”¹⁹⁵—suggesting that Justice Kennedy indeed took it a step further than rational-basis-plus review. Accordingly, this Note posits that in addition to rational-basis-plus review, Justice Kennedy was also hinting at something even more demanding.

Furthermore, although not a focus of this Note, prudence demands a discussion, albeit brief, of rational-basis-plus review. Although Justice O’Connor characterizes it as a “more searching form of rational basis review,”¹⁹⁶ the Supreme Court “has never acknowledged its existence” and Justice Scalia downright denied it.¹⁹⁷ Previous inquiries into this doctrine (such as the “justification” of its presence or the “underlying theory”) were “the equivalent of a constitutional snipe hunt, and about as productive.”¹⁹⁸ Overall, there certainly exists the notion that the doctrine is “suspicious” and “problematic,” given that it “lack[s] an articulated basis in principle” and “is impossible to either apply or constrain in a principled way.”¹⁹⁹ Also, on a more practical level, it is often difficult to identify which level of scrutiny the court actually applied (i.e., rational basis *versus* rational-basis-plus) and most of the time this distinction is rooted in mere speculation.

Contrast the rational-basis-plus review doctrine with the burden-shifting evidentiary framework first put forth in *McDonnell Douglas Corp. v. Green*, a 1973 Supreme Court case.²⁰⁰ This framework has frequently been used to analyze claims of discriminatory treatment such as discrimination claims under the Americans with Disabilities Act and Title IX gender discrimination claims.²⁰¹

Thus, this Note will next explore the *McDonnell Douglas* burden-shifting evidentiary framework for purposes of steering bad-faith takings analysis in a more uniform and fair direction.

of a “comprehensive development plan”).

195. Hafetz, *supra* note 86, at 3118 (“It is thus difficult to meet Justice Kennedy’s criteria without ‘colliding with the no-heightened-level-of-review standard laid down by the [*Kelo*] majority.’”); *Kelo*, 545 U.S. at 483.

196. Thomas B. Nachbar, *Rational Basis “Plus,”* 32 CONST. COMMENT. 449, 450 (2017).

197. *Id.*

198. *Id.*

199. *Id.* at 450–51.

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

201. Kelly, *supra* note 9, at 215–16.

B. HEIGHTENED REVIEW: THE TRIPARTITE BURDEN-SHIFTING STANDARD

In the context of takings, this standard was originally proposed by Daniel Kelly to examine takings which are rooted in favoritism only.²⁰² The goal of this Note is to see how this framework would operate in the context of takings driven by discrimination and bias.

1. Direct Versus Indirect Evidence

In part one of the analysis, an allegedly wronged employee can either produce direct or indirect evidence of discrimination.²⁰³ Similarly, a condemnee would be required to demonstrate that a taking is tainted with favoritism via either producing direct or indirect evidence.²⁰⁴ Direct evidence could essentially act as a “smoking gun.”²⁰⁵ And in the context of favoritism, for example, direct evidence could be satisfied by an email exchange between some private developer and a municipal official in which it is clear that the “actual purpose of the taking [was] to benefit the [private] developer.”²⁰⁶ This is a high burden to satisfy, so the indirect evidence would be more practical. The condemnee (again, in the favoritism context) would need to prove two elements: (1) that the “project involves a private party” and (2) said private party “might obtain a distinct benefit” (given that “favoritism is only possible in a project in which a private party expects to obtain an advantage”).²⁰⁷

In the context of other kinds of bad faith, the analysis would look something like this: If the condemnee who (allegedly) was on the receiving end of bad faith decides to take the direct evidence route, they would be required to demonstrate some form of smoking gun. For example, a documented exchange in which municipal officials exhibit disdain for the condemnee—whether it be discrimination, racism, homophobia, or something else. There are a few issues with the direct evidence route, however. For instance, how likely is it that a condemnee will obtain records of these discriminatory written exchanges from multiple municipal officials, and not just one? If the animosity toward the condemnee stems from just one municipal official, should this suffice as conclusive evidence of bad faith? For instance, other municipal officials on the same board may have voted for condemnation under a genuine belief that condemnation would promote an actual public interest. Another issue with direct evidence is that most conduct

202. See Kelly, *supra* note 9.

203. *Id.* at 217.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

is simply not marked with blunt evidence of discrimination. Further, municipal officials can easily argue that something they said was taken out of context—which may raise evidentiary issues—or was misinterpreted. So, it is therefore unlikely that a condemnee would easily satisfy the direct evidence threshold.

As to indirect evidence, *Brinkmann* supplies a great example. In a nutshell, the Brinkmanns could argue that the Town of Southold engaged in multiple machinations to prevent construction of the Brinkmanns' hardware store (allegedly ranging from pressuring the bank to breach its contract with the Brinkmanns²⁰⁸ to inventing moratoriums).²⁰⁹ So what kind of evidence would the Brinkmanns need to show to satisfy this indirect evidence standard and establish a *prima facie* case of bad faith, thus satisfying the first element of the tripartite burden-shifting framework and thereby shifting the burden onto the Town to prove that the taking was not driven by bad faith? Largely mirroring the requirements of a Title VII claim, the Brinkmanns would be required to show that:²¹⁰

(1) Either

- (a) They are members of a protected group (think religion, race, pregnancy, sex, gender, sexual orientation, national origin, etc.) or
- (b) Their fundamental right was infringed upon (although the right to own and use property has not been deemed a fundamental right, certain scholars have argued that such rights “need to be protected with nothing less than the judiciary’s strictest level of scrutiny.”²¹¹ This is certainly an

208. Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 14 (“Scott Russell, the Southold Town Supervisor, called the president of Bridgehampton National Bank, Kevin O’Connor. Russell pressured O’Connor not to sell the property to the Brinkmanns . . . Russell [then also] called the president of Bridgehampton National Bank to demand that the bank breach its real-estate contract with the Brinkmanns and not close on the Property.”).

209. *Id.* at 17 (“When the Town sought a second extension of its moratorium . . . [from] to the Suffolk County Planning Commission, the County produced a report noting that the Town of Southold never provided the County with the supporting evidence it requested for the Town’s first extension. Thus, for this second extension, Suffolk County staff again recommended that the moratorium be ‘disapproved.’”).

210. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (“The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that [they] belong[] to a racial minority; (ii) that [they] applied and w[ere] qualified for a job for which the employer was seeking applicants; (iii) that, despite [their] qualifications, [they] w[ere] rejected; and (iv) that, after [their] rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”).

211. Daniel William Russo, *Protecting Property Rights with Strict Scrutiny: An Argument for the “Specifically and Uniquely Attributable” Standard*, 25 FORDHAM URB. L.J. 575, 595 (1998).

expansion of the framework, but an argument worth considering)

(2) That they have applied and complied with all requirements in their permit application;

(3) That, although the Brinkmanns complied with all regulatory requirements,

- (a) The Brinkmanns' permit application was rejected and
- (b) The municipality decided to seize the Brinkmanns' land via eminent domain; and

(4) That, after the rejection,

- (a) The municipality continued to grant permit applications to similarly situated individuals and
- (b) Did not seize property of similarly situated individuals (such as adjacent lots with virtually identical characteristics, for instance).

If the Brinkmanns successfully demonstrate indirect evidence, then the burden would shift to the governmental entity to articulate some "legitimate, nondiscriminatory" reason for the permit's rejection and subsequent taking.²¹²

2. Beyond a Merely Cognizable Reason for Condemnation

As to the second element of the test, the burden would then be on the municipality to articulate a legitimate, non-bad faith driven reason as to why it rejected the Brinkmanns' numerous permit applications and decided to take their land.²¹³ In analyzing favoritism-motivated takings, Kelly emphasizes that a condemner's mere articulation of *some* cognizable public purpose (such as "preserving open space" or "generating new jobs") would be insufficient to satisfy this element.²¹⁴ A condemner would instead be required to show why a specific kind of private involvement is required for the project to take place.²¹⁵ For instance, perhaps said private party possesses some crucial information or expertise that other similarly situated experts do not.²¹⁶

212. Kelly, *supra* note 9, at 218.

213. *Id.* (By analogy, in the favoritism context, assuming the "condemnee is able to satisfy step one [of this test], the burden would [then] shift to the condemner . . . [T]he condemner [would then be required] to articulate a legitimate justification for private involvement in the taking.").

214. Kelly, *supra* note 9, at 218.

215. *Id.* at 219.

216. *Id.*

The Town of Southold would satisfy this element by showing that their reason for rejecting the Brinkmanns' permit and taking their land was not driven by bad faith. What would be that "reasonable basis" for taking the Brinkmanns' land?²¹⁷ This could be a wide array of things. Perhaps the Brinkmanns' business was not compliant with regulations, or their proposed business constituted a hazard, a nuisance, or a danger to others, compelling the municipality to act to protect the safety of its residents. But such claims would require actual empirical evidence (e.g., studies done by civil engineers who hold proper qualifications) suggesting that the construction of a hardware store in that specific location would lead to a significant increase in traffic and thus present a real danger to residents. Further, these experts should be subject to cross-examination.

3. Elevated Risk of Pretext/Bad Faith

If the condemner (in this case, a municipality) meets the burden outlined in the previous element, the "presumption" of intentional bad faith would disappear.²¹⁸ The condemnee can nevertheless prove "disparate treatment" by showing that a condemner's explanation is pretextual.²¹⁹ In the context of favorability, a condemnee would satisfy this element by demonstrating a heightened risk of impermissible favoritism.²²⁰ For instance, a condemnee could show that a municipality was "capable of selecting a private party through a competitive process but decide[d] not to do so."²²¹

By analogy, for purposes of demonstrating a heightened risk of pretext, the Brinkmanns could demonstrate any of the following (this list is non-exhaustive):

- (1) An overwhelming majority of Town residents did not want a passive use park²²² or actively advocated for the Brinkmanns' hardware store;
- (2) The Town had not considered any other alternatives before condemning Brinkmanns' land and ignored the empty adjacent lot;²²³
- (3) The Town decided to condemn the Brinkmanns' land only after the

217. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973).

218. *Kelly*, *supra* note 9, at 219.

219. *Id.*

220. *Id.* at 220.

221. *Id.*

222. *Brinkmann v. Town of Southold*, 96 F.4th 209, 231 (2d Cir. 2024) (Menashi, J., dissenting) (Judge Menashi emphasizing how Sarah Nappa, "a member of the Southold Town Board . . . never even suggest[ed] anyone wanted a park at the location [where the Brinkmanns' empty lot was].").

223. *Id.* (Judge Menashi stating that the Town was not "proposing the purchase [of the Brinkmanns' lot] for the purpose of constructing a park because at that time the Town had not . . . [even] evaluated any alternative location for a new public park somewhere other than the property (including, for example, the possibility of purchasing the undeveloped land for sale next to the [Brinkmanns'] property) . . .").

Brinkmanns announced their plans to build a regulation-abiding, family-owned hardware store;²²⁴

(4) The Town became interested in acquiring the Brinkmanns' empty lot only after the court allowed the Brinkmanns to proceed with their claim against the Town's moratorium;²²⁵

(5) The Town never hired any professionals to evaluate whether the Brinkmanns' property was suitable for a park;²²⁶

(6) The "projected . . . benefits" of a passive use park were and remain de minimis and "trivial."²²⁷

Now, the Town could argue that because a park is an established public use, it was allowed to take the Brinkmanns' land, given that there is a presumptive benefit to the public.²²⁸ This line of argumentation should not be allowed (just as it is not allowed in the second element of this test) because that would make this test regress back into rational basis review. Furthermore, because this test largely centers around the *risk* of ill motive, the condemnees (like the Brinkmanns) should not be required to establish *actual* ill motive. All they would be required to show is an elevated or substantial risk of bad faith conduct. So for purposes of this last element, it should be sufficient for the Brinkmanns to demonstrate that there is a heightened risk that the municipality's taking is not justified; this can be achieved via a showing of 1-6, or some robust combination thereof.

224. *Id.* (Judge Menashi further pointing out that the "Town expressed no interest in acquiring the property for a park in 2011 when the property was up for sale or during the five years that the property sat vacant under the [b]ank's ownership. [Further,] [t]hroughout the Brinkmanns' discussions with the Town, no one communicated to the Brinkmanns any interest in placing a park on the property. No one mentioned such an interest during the meeting with the Civic Association, in communications with the Town Building Department, or when the Town required the Brinkmanns to pay \$30,000 for the Market and Municipal Impact Study.").

225. Complaint for Declaratory and Injunctive Relief, *supra* note 10, at 18–19 ("On June 22, 2020, the trial court in the Brinkmanns' state court lawsuit denied the Town's motion to dismiss, allowing their challenge to the moratorium to proceed . . . In September 2020, the Town authorized the acquisition of the Brinkmanns' [p]roperty via eminent domain . . .").

226. *Brinkmann*, 96 F.4th at 231 (Menashi, J., dissenting) (Judge Menashi highlighting how the Town "had not retained any outside consultants to evaluate the [Brinkmanns'] property as a location for a new public park.").

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

228. *Brinkmann*, 96 F.4th at 212 ("There can be no dispute that a public park, even an unimproved one, is a public use. Public parks have been recognized as a 'public use' for more than a century.").

C. SO WHAT ABOUT THE EQUAL PROTECTION CLAUSE?

The *Brinkmann* majority cited the Equal Protection Clause as an example of a hypothetical potential avenue available to those afflicted by governmental takings instead of the Takings Clause.²²⁹ But the Equal Protection Clause is a trap because it largely falters at the level of rational basis review, despite the existence of two other standards for Equal Protection Clause analysis (intermediate scrutiny and strict scrutiny). Under rational basis review, most condemnees will simply never meet the burden of proving that there is an absence of *any* legitimate municipal interest in condemnation. A cheap park or an empty playing field will satisfy that legitimate municipal interest just fine, or so rational basis review will typically find.

1. The Three-Tier Framework

The Equal Protection Clause of the Fourteenth Amendment states that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”²³⁰ When someone wants to argue that their equal protection rights were violated (in the context of challenging eminent domain takings), they are required to initiate suit under 42 U.S.C. § 1983.²³¹ To prevail on a § 1983 claim, the condemnee must successfully demonstrate two elements: (1) that their federal right was violated (that is, their right to “equal protection under the law as guaranteed by the Fourteenth Amendment”) and (2) the defendant “who violated [their] right did so under the color of state law.”²³² The defendant who is alleged to have violated the condemnee’s equal protection rights can be a person or entity “who effectuated the condemnation proceeding.”²³³ Thus, “local governing bodies” and “local officials” can be sued under § 1983 when their alleged unconstitutional action essentially violated the condemnee’s equal protection rights.²³⁴

Equal protection jurisprudence is analyzed under three tiers: strict scrutiny, intermediate scrutiny, and rational basis scrutiny.²³⁵ Rational basis review is the “default standard” and is the “lowest level of judicial

229. *Id.* at 217 (“Of course, courts may intercede if an exercise of eminent domain runs afoul of some *other* constitutional or statutory . . . provision which *does* permit an examination of motives, such as . . . the Equal Protection Clause.”).

230. U.S. CONST. amend. XIV, § 1.

231. Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of Olech’s Class of One*, 55 LOY. U. CHI. L.J. 697, 713 (2009).

232. *Id.*

233. *Id.*

234. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 660 (1978).

235. Blackman, *supra* note 231, at 709.

scrutiny.”²³⁶ Under rational basis review, the burden would be on the condemnee to show the absence of *any* legitimate municipal interest served by the condemnation.²³⁷ An overwhelming majority of equal protection cases are assessed under this very deferential standard.²³⁸ This means that plaintiffs overwhelmingly lose under rational basis review.²³⁹ In fact, the “number of rational basis cases in which plaintiffs have prevailed is so small that these cases have become an object of study in and of themselves.”²⁴⁰ For example, between 1971 and 1996, the Supreme Court “considered one hundred ten rational basis equal protection cases” and “of these cases the plaintiffs won only ten times,” rendering a nine percent success rate.²⁴¹ The Brinkmanns, for instance, would never prevail under this standard: A park is a recognized public use and even a park that is devoid of any facilities could rationally be said to benefit Town residents. The Town residents could still hold picnics there or let their kids run around. So, under rational basis review, the Town would be viewed as having had some conceivable or possible interest in condemning the Brinkmanns’ land.²⁴²

As to strict scrutiny, courts may depart from rational basis review in two instances: (1) when there is either a suspect or quasi-suspect classification or (2) a fundamental right at issue.²⁴³ These two are jurisprudential rabbit holes and thus beyond the scope of this Note, but the following are deemed examples of suspect classifications (thereby triggering strict scrutiny): race and national origin.²⁴⁴ Age, disability, and economic disadvantage—among many others—do not qualify as suspect classifications and would only be subject to rational basis review.²⁴⁵ In the takings context, the “suspicion” comes from the very fact that a government or municipality may have relied on one of these classifications when making the condemnation decision (in the takings context).²⁴⁶ Such reliance would

236. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 896 (2013).

237. *Id.* (“Under [rational basis review], the burden is on the plaintiff to prove the absence of any legitimate governmental interest served by the law.”).

238. *Id.* at 897.

239. *Id.* at 898.

240. *Id.*

241. Blackman, *supra* note 231, at 716.

242. *Id.* at 710–11 (Rational basis review standard is “supremely deferential to the legislature, as courts employing this method almost always uphold actions as long as some possible, conceivable basis can justify it.”).

243. Pollvogt, *supra* note 236, at 895–96. A fundamental right at issue could trigger both a due process and an equal protection claim. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644 (2015).

244. Pollvogt, *supra* note 236, at 895; Blackman, *supra* note 231, at 709. Please note that this is a non-exhaustive list of suspect classifications on the federal level. Further, some states such as California, recognize many other suspect classifications under the state constitution specifically.

245. *See* Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 *NOVA L. REV.* 407 (2010).

246. Pollvogt, *supra* note 236, at 895.

indicate “prejudice or antipathy toward the named group rather than a basis for sound [decision].”²⁴⁷

A fundamental right, on the other hand, has a much more confusing roadmap, or lack thereof: despite the fact that strict scrutiny “presupposes” so-called fundamental rights, the strict scrutiny formula gives absolutely “no guidance concerning how the identification [of rights violations] should occur.”²⁴⁸ Some of the recognized fundamental rights are the right to vote,²⁴⁹ the right to have children,²⁵⁰ and the right to travel interstate.²⁵¹

Categories of suspect class and fundamental right are now considered to be “seemingly closed,” making strict scrutiny, therefore, “virtually inaccessible” unless there is an already recognized suspect classification or a fundamental right at play.²⁵² The Supreme Court has not “conferred suspect status on any [new] group since the 1970s,” even for “groups widely acknowledged to have suffered invidious treatment.”²⁵³

And the Brinkmanns, along with most other condemnees, would most likely not even make it to strict scrutiny analysis under the Equal Protection Clause in the first place. For instance, in *Brinkmann*, there was no alleged or potential suspect classification. And a property right is not a *fundamental* right in the eyes of substantive due process.

If a governmental action imposes a facially neutral classification (i.e., the law does not, on its face, single anyone out in particular, thereby implicating no suspect classification), condemnees could still argue that:

(1) The governmental action has a disparate impact (i.e., disadvantages a certain group of people) AND

(2) The governmental action was taken *purposefully* to harm this particular group of people (e.g., on the basis of race).

Although this would be an alternate pathway to strict scrutiny, most condemnees’ claims will likely fail prong #2’s discriminatory intent test and be given the short shrift of rational basis review instead.²⁵⁴ To demonstrate prong #2, condemnees (such as the Brinkmanns) would need to prove that a decision to condemn was because the government wanted to harm a certain

247. *Id.*

248. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007).

249. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

250. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

251. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

252. Pollvogt, *supra* note 236, at 898.

253. Blackman, *supra* note 231, at 710.

254. William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435, 453–54 (2013).

group of people, not “in spite of” their decision to condemn having a disparate effect on a certain group of people.²⁵⁵ That is, the Brinkmanns would need to prove that the Town initiated this bad faith condemnation action precisely *because of* the Town’s *intent* to cause “adverse effects” upon the Brinkmanns as members of an “identifiable group” (assuming that the Brinkmanns had been members of an identifiable group).²⁵⁶ Proving such discriminatory intent is widely acknowledged as being “exceptionally difficult” to do,²⁵⁷ and this is another reason why most claims are subject only to rational basis review.

2. Doctrine of Unconstitutional Animus

This Note also acknowledges the doctrine of unconstitutional animus, which is based largely on the Equal Protection Clause.²⁵⁸ At first glance, it presents an attractive solution: If a municipality’s condemnation is motivated by animus, why can’t the court just strike it down? Why is the Takings Clause even necessary? But unconstitutional animus has some glaring problems.

Unconstitutional animus is basically a loophole that allows an equal protection claimant to possibly prevail under rational basis review.²⁵⁹ While that would be good news for the Brinkmanns, the bad news is that it is, at best, unclear what constitutes forbidden animus.²⁶⁰ A law (or a decision to condemn, for instance) is animus-based if it is “based on *nothing more* than bias, hatred, or dislike.”²⁶¹ The Supreme Court has defined animus as “a *bare . . .* desire to harm” a person, which is a high burden to meet.²⁶² For one, what if a condemnation is based on both animus and some animus-free “public-regarding objective”?²⁶³ For instance, in *Brinkmann*, both the Town residents and even the dissenting judge (pursuant to the *Brinkmann* majority’s snarky suggestion) could come to the park, “breathe its air” and

255. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *see also* Araiza, *supra* note 254, at 454.

256. *Feeney*, 442 U.S. at 279.

257. Pollvogt, *supra* note 236, at 897.

258. Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 195 (2019).

259. Pollvogt, *supra* note 236, at 889 (“Proving that a law is based on unconstitutional animus is virtually the only way an equal protection plaintiff can prevail under this deferential and increasingly common standard.”).

260. Conkle, *supra* note 258, at 201 n.38.

261. *Id.* at 204–05 (emphasis added).

262. *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis added).

263. Conkle, *supra* note 258, at 202.

“spread [a] picnic.”²⁶⁴ A public park is, by definition, for the public to enjoy, and would thus constitute a public-regarding objective.

The definition of “animus” poses further issues. To illustrate, neither “religious belief[s]” nor “personal morality” are necessarily equated with animus.²⁶⁵ Take the 2015 Supreme Court decision, *Obergefell v. Hodges*, for instance.²⁶⁶ Although the *Obergefell* Court held that prohibiting same-sex couples from marrying violated both the Equal Protection Clause and substantive due process, the Court also noted that it declines to “disparage” those who “deem same-sex marriage to be wrong . . . based on decent and honorable religious or philosophical premises.”²⁶⁷ So when is it a decent and honorable religious belief and when is it animus-based homophobia?²⁶⁸ How does the court draw a consistent or predictable line between prejudice and a decent and honorable personal belief? This absence of a framework on how to arrive at a decision that something indeed constitutes animus is the reason that lower courts have been “wary of relying on animus” in the first place.²⁶⁹

Further, this doctrine necessitates an inquiry into subjective motivations of those officials who decided to condemn property. This takes us back to one of the *Brinkmann* majority’s concerns: that motivational inquiry is an “exercise as fraught with conceptual and practical difficulties.”²⁷⁰ And the *Brinkmann* majority, in the context of unconstitutional animus, would not be wrong because the unconstitutional animus doctrine has been criticized as “analytically empty, a conclusion clothed in argument.”²⁷¹ The unconstitutional animus doctrine largely sits on a famously shaky foundation of just four cases (the so-called “animus quadrilogy”).²⁷² Some scholars even argue that three of these cases “could and should have relied instead on [the traditional] equal protection doctrine for suspect and quasi-suspect classifications,” thereby expanding the suspect and quasi-suspect classifications.²⁷³ The unconstitutional animus doctrine is simply not as robust as the Takings Clause or the three tiers of scrutiny under the Equal Protection Clause. In contrast to the doctrine of unconstitutional animus, various bad-faith takings frameworks (all directly arising from the

264. *Brinkmann v. Town of Southold*, 96 F.4th 209, 219 (2d Cir. 2024).

265. Conkle, *supra* note 258, at 201.

266. *See generally* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

267. *Id.* at 672.

268. Conkle, *supra* note 258, at 206.

269. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 184 (2013).

270. *Brinkmann*, 96 F.4th at 213.

271. Carpenter, *supra* note 269, at 185.

272. *Id.* at 183.

273. Conkle, *supra* note 258, at 207.

interpretation of the “public use” language in the Takings Clause) were already employed by the Ninth Circuit in *Southern Pacific* and *Scott Lumber*, the Seventh Circuit in *58.16 Acres of Land*, and even the Connecticut Supreme Court in *New England Estates*. Although future jurisprudential analysis may well be able to rely on a vigorous animus framework, the current lack of such a framework, along with its high bar for success, makes animus analysis a suboptimal solution.²⁷⁴

D. BRINKMANN IMPLICATIONS

At its core, *Brinkmann* is more than just bad law. It is actually dangerous because it incentivizes governmental entities to lie when condemning someone’s land, which in turn denies basic accountability to the public. Under *Brinkmann*, any bad-faith taking can receive judicial blessing if the government or a municipality simply utters words like “passive use park” or “playing field.” Discrimination can be sanitized in this manner. Likewise, racism and outright hostility. In *Brinkmann*, the Town stated at oral argument that, under the *Brinkmann* majority’s interpretation of public use, it would be perfectly acceptable for the Town to “seize the homes of disfavored minorities out of animus toward those minorities and a desire to drive them out,” just so long as the Town “said it would build parks where the minorities’ homes once stood.”²⁷⁵ Frighteningly, the Town’s analysis is not incorrect under the *Brinkmann* rule. Even scarier is that this is now the law in the Second Circuit, and this is what the Second Circuit has authorized condemnors to do.

Law has real world consequences. For instance, *Kelo* expanded the concept of public purpose to “encompass any economically beneficial goal, guarantee[ing] that these losses [of property] will fall disproportionately on

274. This Note also acknowledges the presence of another potential solution: the class-of-one theory. The class-of-one theory essentially stands for the proposition that in the takings context, a condemnee can bring an equal protection claim, “alleging discrimination against [them] in [their] capacity as an individual.” Araiza, *supra* note 254, at 438. These claims are “hard to win,” partly because the class-of-one theory has a “disheartening” judicial record. *Id.* at 438–41. The whole theory essentially rests on the shoulders of two cases: the Supreme Court’s “short *per curiam* opinion,” *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), and *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008) where the Court declined to extend the class-of-one theory to the public employment context. *Id.* at 444. These two cases caused “extensive confusion in the lower courts” because it left “many matters unresolved,” including creating confusion as to how prevail on such a claim in the first place. *Id.* at 441; Blackman, *supra* note 231, at 727. Further, under this theory, a condemnee would still need to prove the “intent” element (similar to strict scrutiny under the traditional three-tier Equal Protection Clause framework) and show that a municipality (such as the Town of Southold) “singled out” the condemnee “because of” the condemnee’s “identity,” not merely “in spite of.” Araiza, *supra* note 254, at 455. This is, arguably, a high burden to meet. There is a great deal of debate fostering much scholarship concerning this theory, but it is largely beyond the scope of this Note.

275. *Brinkmann*, 96 F.4th at 233 (Menashi, J., dissenting).

poor communities.”²⁷⁶ *Kelo* gave a green light to “large corporations and development firms” to “victimize” people who are “less likely to put their lands to the highest . . . social use.”²⁷⁷ *Kelo* essentially “affirmed that a government may take the private property of one party and give it to another private party if the other pays more taxes.”²⁷⁸ It did not take long to confirm that *Kelo* “engendered fear across the nation”.²⁷⁹ In the year immediately after *Kelo* was decided, the Institute for Justice “found that 5783 properties ha[d] been [either] threatened or condemned for private commercial development, roughly equal to the number of such condemnations in the five years preceding *Kelo*.”²⁸⁰ Scholars also found that this *Kelo*-authorized “private involvement in the exercise of eminent domain” increased the risk of corruption and threat of relocation.²⁸¹

Berman serves as another notable example. Over 97% of the people “forcibly removed from their homes”²⁸² were Black—all for the *declared* sake of “public safety, public health, morality, peace and quiet, law and order.”²⁸³ Post-*Berman*, “public works projects [of the] 1950s and 1960s destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland.”²⁸⁴ And in 1981, “urban planners in Detroit, Michigan, [used eminent domain to] uproot[] the largely ‘lower-income and elderly’ Poletown neighborhood for the benefit of the General Motors Corporation.”²⁸⁵

So, what will *Brinkmann*’s impact be? While it is uncertain to what extent it will inform the actions of governmental entities, the impact will certainly not be a societal positive. Instead, it will continue its catastrophic trajectory because *Brinkmann* encourages, and even rewards, municipalities to lie about their intentions behind condemnation decisions.

CONCLUSION

Sometimes there are more questions than answers, but sometimes asking good questions is better than any answer—an endeavor that is by necessity limited in scope and applicability. And perhaps, this is the case here. The *Brinkmann* decision raises a lot of questions, ranging from the

276. *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

277. *Id.* at 521–22.

278. Hafetz, *supra* note 86, at 3101.

279. *Id.* at 3095–96.

280. *Id.* at 3105.

281. *Id.*

282. *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

283. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

284. *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

285. *Id.*

Brinkmann majority's disregard of their own *Goldstein* precedent to a likely misinterpretation of *Kelo*, which cost the Brinkmanns their lot.

But *Brinkmann* also sparks an important conversation concerning what could and should be employed instead of the *Brinkmann* rule. After examining decisions rendered by the Connecticut Supreme Court and the Seventh and Ninth Circuits, all of which stand in opposition (in varying degrees) to *Brinkmann*, this Note envisions an alternative to the *Brinkmann* rule via the tripartite burden-shifting standard. But that is not all. This Note also demonstrates the failings of rational basis review, the Equal Protection Clause, and the animus doctrine when applied to addressing bad-faith takings.

The Takings Clause can destroy lives, but it can also build and improve the society in which those same lives exist. Similarly, the Takings Clause can also preserve freedom and even “empower[]” people “to shape and to plan their own destiny in a world in which governments are always eager to do so for them.”²⁸⁶ It is all a matter of perspective, but also—and critically—cultivating good law.

286. *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017).

