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PUBLIC USE OR PRIVATE BENEFIT?
THE POST-KELO INTERSECTION OF RELIGIOUS
LAND USE AND THE PUBLIC USE DOCTRINE

Nicholas William Haddad*

INTRODUCTION

North Philadelphia, a neighborhood composed of predominantly poor, working class African-Americans and Hispanics, lies immediately north of Philadelphia’s Center City district. Over the past thirty years, crime, drugs, and economic recession took their toll on this once burgeoning middle class neighborhood, and today North Philadelphia is among the city’s most troubled areas. The U.S. Census Bureau indicates that Census Tract 155, which is located entirely within North Philadelphia, has a 34% employment rate. More than 50% of its residents over the age of twenty-five have not graduated from high school and 61.6% of its residents live below the poverty level. Despite these grim statistics, there are indications that North Philadelphia is on the mend. Residents are renovating once-
abandoned houses, neighborhood organizations are planting community gardens, and businesses are opening on once-decaying blocks.  

Numerous nonprofit and social service organizations have played an important role in this revitalization. The Hope Partnership for Education (the “Hope Partnership”) is one of these organizations. The Hope Partnership is a self-described “independent middle school and adult education center,” endorsed and founded by two Roman Catholic groups—the Society of the Holy Child Jesus and the Sisters of Mercy. The Hope Partnership insists that it is not a Catholic School and that it does not proselytize its students. The Hope Partnership serves “students of low-income urban families, who would not otherwise have access to such an education,” and its services are “[n]ot tuition driven.” The school currently operates in space leased from a North Philadelphia community center and expects to increase its enrollment from 30 to 120 students. To realize this goal and further serve North Philadelphia, the Hope Partnership planned to construct a $5.3 million educational center and requested that the Philadelphia Redevelopment Authority (the “Authority”) condemn land on its behalf in eastern North Philadelphia through the exercise of eminent domain. In response, on October 20, 2002 the Authority proposed the seizure of thirty-nine properties, which were certified as blighted in 1968, on behalf of the Hope Partnership for a nominal price.

8. See Sierra, supra note 3, at 93. As new money begins to pour into North Philadelphia, however, the district has begun to experience the pressures of gentrification. See generally Gregory, supra note 1.  
9. See Sierra, supra note 3, at 93; see also Gregory, supra note 1.  
15. See id.  
17. Scolforo, supra note 13, at 8.  
19. Id. at 823.
Homeowner Mary Smith’s property on North Eighth Street was among the condemned properties. On December 23, 2003, after Philadelphia’s planning commission approved the proposal, Mary Smith filed preliminary objections to the condemnation, alleging in part that the taking failed to satisfy the Fifth Amendment’s public use requirement and that the transfer of her property to the Hope Partnership violated the First Amendment’s Establishment Clause. The trial court overruled Ms. Smith’s objections, holding that “[o]nce the land was certified as blighted, it [was] proper to then transfer the land to private development, regardless of ‘who’ that future developer may be.” The Pennsylvania Commonwealth Court reversed, holding that the condemnation violated the Establishment Clause. In dicta, the court noted that the condemnation also failed to satisfy the Fifth Amendment’s public use requirement because the actual purpose of the taking was to bestow a private benefit to a private religious organization.

Religious organizations such as North Philadelphia’s Hope Partnership provide significant cultural, educational, welfare, and health services to the general public. At the same time, however, religious organizations increasingly exert a tremendous influence on the political process and increasingly play a prominent role in government decision-making processes. These issues, along with the public’s renewed focus on the extent of the government’s eminent domain power in the wake of Kelo v.
City of New London,28 will likely lead to increased scrutiny of any government decision to transfer land to a religious organization.29

This Note examines whether and to what extent the government may exercise eminent domain to condemn private property for redevelopment—in whole or in part—by a private religious organization.

Government land transfers to religious organizations have given rise to legal challenges based on both the Fifth Amendment's public use requirement and the First Amendment's Establishment Clause. Part I of this Note examines the legal framework governing these challenges. Part I.A explores the scope of the public use requirement, the thin line between public and private uses when condemned land is transferred to private parties, and courts' role in reviewing public use cases. Part I.B then examines the First Amendment's Establishment Clause and discusses the difficulty of line drawing in Establishment Clause cases.

Only a handful of courts have considered challenges to government transfers of land to religious organizations. Part II examines these decisions and explores the public policy reasons for upholding or invalidating such transfers. Part II.A discusses cases upholding government land transfers to religious organizations, and examines the concomitant public benefits provided by such organizations to the general public. Part II.B discusses In re Redevelopment Authority of Philadelphia, which invalidated a condemnation of Mary Smith's and others' private land in favor of a private religious organization, and explores the potential harms flowing from religious land uses.

Finally, Part III argues that government land transfers to religious organizations can pass constitutional muster. Part III.A.1 explains why in certain circumstances the taking of private property for redevelopment by a private religious organization can satisfy the public use requirement. Part III.A.2 then argues that heightened judicial scrutiny is an appropriate mechanism to guard against particularly suspect religious land transfers. Finally, Part III.B reexamines Redevelopment Authority in light of the standards articulated in this Note.

I. THE PUBLIC USE REQUIREMENT AND THE ESTABLISHMENT CLAUSE

This section sets forth the legal framework governing public use and Establishment Clause challenges to religious land transfers. Part I.A

28. 125 S. Ct. 2655, 2663-64 (2005) (holding that economic development can qualify as a "public use" for eminent domain purposes); see also Gideon Kanner, The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?, 33 Pepp. L. Rev. 335 (2006) (arguing that Kelo eviscerated the public use clause of any significant meaning); Vicki E. Land & Andrew J. Sokolowski, The Overreaction to the Kelo Decision, L.A. Lawyer, Jan. 2006, at 52 (noting that Kelo "touched off a firestorm of controversy").

29. See Gina Passarella, Eminent Domain Can't Aid Religious Groups, The Legal Intelligencer, Feb. 7, 2006, at 1, 9 (noting that the increased number of government-sponsored faith-based initiatives will likely lead to an increase in challenges to where those initiatives will be placed).
discusses the Fifth Amendment's public use requirement. Part I.B discusses the First Amendment's Establishment Clause and the difficulty of line drawing in Establishment Clause cases.

A. The Public Use Requirement

This section traces the evolution of courts' interpretation and application of the Fifth Amendment's public use requirement. Part I.A.1 discusses the Fifth Amendment's Takings Clause. Part I.A.2 examines the public use requirement and the thin line between public and private uses when condemned land is transferred to private parties. Part I.A.3 explores the role of the judiciary when reviewing public use cases.

1. The Fifth Amendment and the Takings Clause

The Fifth Amendment of the United States Constitution provides in part that no "private property [shall] be taken for public use, without just compensation."30 This provision, known as the Takings Clause,31 is made applicable to the states through the Fourteenth Amendment's Due Process Clause.32

In ratifying the United States Constitution, state conventions advocated for every provision in the Bill of Rights except the Takings Clause, and there are no records of discussion regarding the Clause's meaning.33 As such, much debate has centered on the extent of the constraints imposed by the Takings Clause on the government's power to expropriate property from private interests through the power of eminent domain.34 The scope of these constraints often turns on varying interpretations of the phrase "public use."35 Nineteenth century courts, for instance, took the view that the Takings Clause limited the government's exercise of eminent domain to instances where doing so would satisfy a "public good" or "public

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30. U.S. Const. amend. V.
32. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897); see also Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 n.7 (1984) (the "public use" requirement is "made binding on the States only by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause").
33. William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 791 (1995); see also Hart, supra note 31, at 1132-33 (discussing the sparse legislative record surrounding the drafting of the Takings Clause).
35. See, e.g., Harrington, supra note 34; Nichols, supra note 34.
necessity." Some commentators, however, argue that these courts' injection of a "public use" requirement into the Takings Clause represents a fundamental misreading of constitutional text. The Takings Clause was not meant to impose any substantive limitation on government takings, these scholars argue, but instead was intended to distinguish between those "takings which required just compensation from those that did not." Despite such contentions, however, the public use requirement is widely interpreted as imposing at least some substantive limitations on government takings, and "[i]t is settled law in every American court today that private property may not be taken by eminent domain except for a public use."

2. The Thin Line Between Public and Private Uses When Condemned Land is Transferred to Private Parties

Despite general acceptance of the notion that the public use requirement imposes at least some substantive limitations on government takings, there is no bright-line rule as to the distinction between private and public uses. This section examines the thin line that exists between private and public uses when eminent domain is used to transfer land from one private party to another.

The substantive limitations imposed by the public use requirement prevent the government from exercising its eminent domain power and condemning property solely for the benefit of a private interest. Accordingly, the Court has routinely struck down takings that conferred solely a private benefit upon a private party or that failed to provide a justifying public use.

Courts' notion of what exactly constitutes a public use, however, has changed and shifted along with their perception of when the exercise of eminent domain is appropriate. In the late eighteenth and early nineteenth

36. Harrington, supra note 34, at 1246-47 (explaining that early courts incorporated a public use requirement into the Fifth Amendment, relying in part on the writings of Hugo Grotius and Samuel Pufendorf).
37. See, e.g., id. at 1248.
38. Id. at 1299-1301 ("[I]t appears that in proclaiming that private property shall not be taken for 'public use,' without just compensation, the Fifth Amendment merely declares that the expropriations require compensation while other takings, such as tax levies or forfeitures, do not.").
39. Nichols, supra note 34, at 615; see also Kelo v. City of New London, 125 S. Ct. 2655, 2661 (2005) (noting that it has long been accepted that the government may not take property from a private interest for the sole purpose of transferring it to another private party, even if just compensation is paid).
40. See Nichols, supra note 34, at 615.
41. See Kelo, 125 S. Ct. at 2661 (noting that local governments are forbidden from taking private land for the sole purpose of conferring a private benefit on a private party); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (same); Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937) (same); see also Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 416-17 (1896) (invalidating a compensated taking of a railroad right-of-way to benefit private individuals where no justifying public purpose or use was alleged).
42. See generally Nichols, supra note 34.
centuries, for instance, there were only a few situations in which the use of eminent domain was deemed necessary, including rights of way and easements. In such limited circumstances, the public benefit flowing from natural resource or infrastructure development was held to satisfy the public use requirement. By the mid-nineteenth century, however, courts began to define "public use" as "use by the public." This view reflected the concern that an expansive definition of public use would justify the taking of private property for any purpose. This narrower interpretation of the public use requirement, which proved to be difficult to administer and impractical in its application, was short-lived. Indeed, by the late nineteenth and early twentieth centuries, the modern demands of industry, transportation, mining, and agriculture led the U.S. Supreme Court to embrace the broader and more encompassing definition of public use as "public purpose." Yet, the mere assertion of an overarching public purpose is not enough to satisfy the public use requirement. If the alleged public use is merely a pretext for conferring a private benefit upon a private interest, the taking will not be upheld under the Takings Clause. An actual pretext must be demonstrated, however, and the mere possibility of ulterior motivating factors is likely insufficient to invalidate a proposed land transfer. Further, in gauging the distinction between private and public uses, the Court has been reluctant to establish any bright-line rule as to what portion of the community must benefit to satisfy the public use requirement.

43. Id. at 617.
44. See, e.g., Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 42, 73 (N.Y. Ch. 1831) (holding that the general public derives a benefit from railroads and, as such, the exercise of eminent domain to seize land for railroad improvements satisfies the public use requirement); see also Nichols, supra note 34, at 617.
45. Nichols, supra note 34, at 617-18.
46. Id. at 618.
47. See Kelo v. City of New London, 125 S. Ct. 2655, 2662 (2005); Nichols, supra note 34, at 624-33.
48. Nichols, supra note 34, at 624; see Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (noting the inadequacy of the "use by the general public" definition when determining what satisfies the public use requirement); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 164 (1896) (holding that the taking of land for irrigation purposes served a public purpose and thus satisfied the public use requirement).
49. See Kelo, 125 S. Ct. at 2661.
50. Id. (noting that municipalities are not permitted to exercise eminent domain power to take property under the pretext of a public purpose when the taking's actual purpose is to bestow a private benefit upon a private party); see also 99 Cents Only Stores v. Lancaster Redevelop. Agency, 237 F. Supp. 2d 1123, 1126, 1129 (C.D. Cal. 2001) (holding that the condemnation and transfer of land from one retailer to another was based on a desire to transfer property from one private party to another, and that the alleged public use was "demonstrably pretextual").
51. See Gohld Realty Co. v. City of Hartford, 104 A.2d 365, 370 (Conn. 1954) (noting that the abuse of eminent domain in a comprehensive redevelopment plan could be "conceivable" in isolated instances, but that such possibilities did not invalidate the plan, which clearly set forth the purposes for which property could be condemned).
52. See Rindge Co. v. County of L.A., 262 U.S. 700, 707 (1923) (rejecting any requirement that the entire community or even "any considerable portion" of a community
By eschewing any rule that required takings to be used by the general public, the Court opened the door for the exercise of eminent domain to transfer land from one private interest to another. In fact, the Court has since acknowledged that the transfer of land to private interests may well be the most effective means of achieving a public purpose. In light of such a view, the Court early on demonstrated its willingness to look beyond challenged land transfers and to instead focus on the motivating factors behind such transfers. In so doing, the Court upheld the condemnation of private land to allow an individual to access a stream for irrigation, the creation of a right of way for an aerial bucket line across a private landowner's property, the taking of land, water, and water rights belonging to a private landowner for use by a power company, and the transfer of land from one private railroad company to another.

The Court first addressed the validity of a large-scale transfer of condemned land to a variety of private interests in Berman v. Parker. In Berman, the owner of a Washington D.C. department store challenged the constitutionality of the taking of his property pursuant to the District of Columbia Redevelopment Act of 1945. The Act provided for the condemnation and transfer of “blighted” land to private interests. The owner argued that his property was not blighted and that the taking of his property violated the public use requirement because the seized land would be managed by a private agency and redeveloped for private use. The Court upheld the transfer, speaking with approval of the public benefits that accrue from plans aimed at redeveloping neighborhoods for a variety of private uses.

53. Kelo, 125 S. Ct. at 2661.
54. Berman v. Parker, 348 U.S. 26, 33-34 (1954) (“The public end may be as well or better served through an agency of private enterprise than through a department of government . . . . We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”).
55. See Block v. Hirsh, 256 U.S. 135, 155 (1921) (observing that land transfers which appear to be private transactions on first blush may be raised by their very “class or character to a public affair”); Clark v. Nash, 198 U.S. 361, 368 (1905) (noting that the propriety of land condemnations benefiting private interests often turns “upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private”).
56. Clark, 198 U.S. at 369-70.
61. Id. at 28-31.
62. Id.
63. Id. at 31.
64. Id. at 33-34 (emphasizing the public purposes served by the elimination of blight and the creation of clean, attractive, safe, and well-balanced communities).
Berman is often cited to support the proposition that the elimination of blight alone is sufficient to qualify as a public use. Justice William O. Douglas was careful to point out, however, that it was not the elimination of blight through condemnation alone that satisfied the public use requirement, but also the subsequent balanced redevelopment of the land to prevent the spread of, and possible reversion to, blight. Thus, in the context of a comprehensive redevelopment plan, a variety of future private uses must be balanced and considered, which as a whole may contribute to a valid public purpose.

The Court did not limit these private uses to those that were residential in nature, but instead extended such uses to include education and religion. Outside of the context of a redevelopment plan, however, the Court has indicated that the transfer of land to private interests could run afoul of the public use requirement. As such, courts tend to invalidate land transfers allegedly serving the public purpose of "redevelopment" where such transfers were not made pursuant to any design or plan.

The Court next considered the validity of a large-scale transfer of condemned land to a variety of private interests in Hawaii Housing Authority v. Midkiff. In Midkiff, the trustees of landholding estates challenged the constitutionality of Hawaii's Land Reform Act of 1967, which aimed to reduce the concentration of land ownership in the state by providing for the condemnation of privately held land and transferring ownership of the condemned land to existing lessees. The Court upheld the Act, finding that the elimination of the harms associated with land

65. See, e.g., Fishman v. City of Stamford, 267 A.2d 443, 448 (Conn. 1970) ("It has long been settled that, when . . . the redevelopment agency formulates a plan for the alleviation of blight and takes land pursuant to that plan, it is taking land for a public purpose, namely, the rehabilitation of the area. This public purpose is not affected by the agency's subsequent resale of the property to private redevelopers"); 64th St. Residences, Inc. v. City of N.Y., 150 N.E.2d 396, 399 (N.Y. 1958) (discussing the "valid municipal purpose of eliminating a slum").

66. See Berman, 348 U.S. at 34-35 (noting that the city's planning commission had determined that if the community were to remain healthy and vibrant, it "must be planned as a whole"); see also Kelo v. City of New London, 125 S. Ct. 2655, 2665 n.13 (2005) (noting that if the public use in Berman were defined more narrowly, there would have been little justification for the proposed redevelopment plan).


68. Id. ("The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers." (emphasis added)).

69. See Kelo, 125 S. Ct. at 2661, 2667 & n.17 (discussing but not reaching the issue of whether one-to-one transfers of property to private interests outside the confines of a comprehensive redevelopment plan violate the public use requirement, and noting that courts tend to view such transfers with a "skeptical eye").

70. See, e.g., 99 Cents Only Stores v. Lancaster Redevel. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (invalidating a municipality's transfer of land from one private retailer to another for expansion purposes where no integrated development plan existed, and the land transfer "rest[ed] on nothing more than the desire to achieve the naked transfer of property from one private party to another").


72. Id. at 233.
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oligopolies served a valid public purpose.73 The Court emphasized the broad scope of the public use requirement,74 and held that the probability of a condemnation accomplishing its stated objectives is irrelevant so long as the government could have believed that it would accomplish those objectives.75 By focusing on the condemnation’s purpose (to deconcentrate land ownership) instead of its mechanics (the transfer of land to private parties), the Court reaffirmed its willingness to look beyond challenged land transfers and to instead focus on the motivating factors behind such transfers.76

The Supreme Court, in Kelo v. City of New London, provided both clarity and confusion as to where the line between public and private uses lies.77 In Kelo the Court addressed the validity of New London’s redevelopment plan, which aimed to reinvigorate its economically depressed downtown and waterfront areas.78 The plan called for the acquisition of land from unwilling sellers through the power of eminent domain and the transfer of that land to private developers.79 The Court, noting that promoting economic development is a well-established government function, held that economic development qualifies as a public use for eminent domain purposes.80

If the Court’s forward-looking approach to the exercise of eminent domain was implicit in its holding in Berman,81 it was explicit in Kelo.82 While emphasizing its traditionally broad understanding of “public use,” the Court rejected any contention that a valid taking must eliminate a harmful property use.83 Instead, the Court interpreted its takings jurisprudence as depending on a private party’s future use of the seized property, and held that “[b]y focusing on a property’s future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause.”84 This prospective approach to public use determinations indicates that the Court likely will require something more than the mere

73. Id. at 241-43 (holding that the redistribution of fees simple to eliminate market inefficiencies caused by land oligopolies was a classic exercise of Hawaii’s police powers and a rational exercise of its eminent domain power).
74. Id. at 240 (noting that the public use requirement and a sovereign’s police powers are coterminous).
75. Id. at 242. This deferential viewpoint is reflected in the Court’s preference for a rational-basis standard of review. See infra Part I.C.1.
76. Id. at 245 (noting that the Act was enacted “not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose”).
78. Id. at 2658.
79. Id. at 2658-59.
80. Id. at 2665 (relying on Berman and emphasizing that the challenged takings were to be executed pursuant to a comprehensive development plan).
81. See supra notes 65-68 and accompanying text.
82. See Kelo, 125 S. Ct. at 2665-66, 2666 n.16.
83. Id.
84. Id. at 2666 n.16.
certification of blight to satisfy the public use requirement.\textsuperscript{85} Although some commentators contend that \textit{Kelo} eviscerated the public use requirement of any substantive meaning,\textsuperscript{86} the Court rejected any argument that its holding blurred the boundary between public and private takings.\textsuperscript{87}

3. Courts’ Role in Reviewing Public Use Cases

This section examines the role that courts typically play when reviewing public use cases. Part I.A.3.a discusses the deference most courts give to local determinations of public use—a deference that is often compared to rational-basis review. Part I.A.3.b examines some courts’ and commentators’ arguments in favor of heightened judicial scrutiny of public use determinations in certain circumstances.

\textbf{a. Rational Basis Review}

As the Court began to embrace a broader and more encompassing definition of public use as “public purpose,”\textsuperscript{88} it also began to allow legislatures and municipalities significant latitude in determining which land uses served a public purpose.\textsuperscript{89} This latitude includes the ability to determine that a community be “beautiful as well as healthy, spacious as well as clean, [and] well-balanced as well as carefully patrolled.”\textsuperscript{90} The Court in \textit{Midkiff} justified this deferential treatment of public use cases through its belief that legislatures were best equipped to determine which public purposes should be advanced through the exercise of eminent domain.\textsuperscript{91} In fact, Justice Douglas went so far as to note that legislative determinations of public uses are “well-nigh conclusive.”\textsuperscript{92} Thus, courts’ role in reviewing public use determinations is generally viewed as being

\begin{itemize}
  \item \textsuperscript{85} Compare supra notes 83-84, with supra note 65.
  \item \textsuperscript{86} See, e.g., Kanner, supra note 28.
  \item \textsuperscript{87} \textit{Kelo}, 125 S. Ct. at 2666.
  \item \textsuperscript{88} See supra notes 48-59 and accompanying text.
  \item \textsuperscript{89} See, e.g., Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (holding that a congressional determination that the condemnation of land for military purposes constitutes a public use is “entitled to deference until it is shown to involve an impossibility”); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (refusing to second-guess the Utah legislature’s determination that the state’s public welfare demanded aerial bucket lines across private landowners’ property); see also \textit{Kelo}, 125 S. Ct. at 2664 (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”).
  \item \textsuperscript{90} \textit{Berman} v. Parker, 348 U.S. 26, 33 (1954).
  \item \textsuperscript{91} Haw. Hous. Auth. v. \textit{Midkiff}, 467 U.S. 229, 244 (1984); see \textit{Kelo}, 125 S. Ct. at 2664 (noting that judicial deference to legislative public use determinations recognizes the varying and evolving needs that exist throughout the country); \textit{Berman}, 348 U.S. at 32 (noting that the legislature, not the judiciary, is the appropriate custodian of the public purposes served by the takings power).
  \item \textsuperscript{92} \textit{Berman}, 348 U.S. at 32.
\end{itemize}
extremely narrow. When deferring to legislative discretion in public use cases, courts typically engage in a rational-basis standard of review: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."94

The Court reaffirmed its commitment to rational-basis review of public use determinations in Kelo by rejecting any requirement that the transfer of land to private interests undergo a heightened form of scrutiny or "require a 'reasonable certainty' that the expected public benefits will actually accrue."95 Justice Kennedy's concurrence in Kelo was careful to note, however, that the Court's commitment to rational-basis review did not alter the public use requirement's prohibition against land transfers benefiting private interests "with only incidental or pretextual public benefits."96

b. Heightened Judicial Scrutiny

Despite the Supreme Court's consistent endorsement of rational-basis review in public use cases, some lower courts have engaged in heightened judicial scrutiny of land transfers to private interests. In Poletown Neighborhood Council v. City of Detroit,97 for example, a neighborhood association and individual residents challenged the exercise of eminent domain to transfer land to General Motors for economic development.98 Although the court upheld the condemnation, it noted (without citation) that when "the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being

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93. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984); Midkiff, 467 U.S. at 240; Berman 348 U.S. at 32. The U.S. Supreme Court has been careful to note, however, that any deference it gives to legislative or municipal public use determinations does not altogether eliminate courts' role in reviewing such determinations. See Midkiff, 467 U.S. at 240. But see Kanner, supra note 28 (arguing that Kelo eviscerated the Public Use Clause of any significant meaning).

94. Midkiff, 467 U.S. at 241; W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981) ("[W]hether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if... the [state] Legislature rationally could have believed that the [Act] would promote its objective."); see also Kelo, 125 S. Ct. at 2669 (Kennedy, J., concurring) (characterizing the Court's deferential standard of review as rational-basis review); cf. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 309, 313 (1993) (applying the rational-basis test to review economic regulation under the equal protection component of the Fifth Amendment).

95. Kelo, 125 S. Ct. at 2667-68 (noting that postponing judicial review of condemnations until the likelihood of such condemnations' success was assured would have a chilling effect on redevelopment plans).

96. Id. at 2669 (Kennedy, J., concurring) (noting that such transfers, if demonstrated by a "clear showing," should be struck down).


98. Id. at 457-58.
advanced. \textsuperscript{99} Other courts, although not explicitly endorsing a heightened form of review, have closely examined such condemnations (and their alleged justifications) with a probing, critical eye. \textsuperscript{100} Such approaches, that look not only to the alleged public use but also to the necessity of the takings themselves, differ significantly from the deferential standard of review that courts typically engage in when reviewing public use cases. \textsuperscript{101}

Although the Supreme Court generally has adhered to rational-basis review of takings cases, \textsuperscript{102} it has indicated that it would be suspicious of any exercise of eminent domain to transfer land from one private interest to another outside of a comprehensive redevelopment plan. \textsuperscript{103} The Court's skepticism could indicate the possibility of heightened judicial scrutiny in such circumstances. \textsuperscript{104} Justice Kennedy's concurrence in \textit{Kelo} was much more explicit as to when strict or heightened scrutiny could be appropriate:

[\textit{A} more stringent standard of review than that announced in \textit{Berman} and \textit{Midkiff} might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. \textsuperscript{105}]

Justice Kennedy agreed, however, with the majority's conclusion in \textit{Kelo} that heightened judicial scrutiny was not required merely because the alleged public purpose of the taking was economic development. \textsuperscript{106} In refusing any departure from rational-basis review, Justice Kennedy identified five characteristics of challenged public takings that militate against heightened scrutiny: (1) the presence of a comprehensive

\textsuperscript{99} \textit{Id.} at 459-60 (noting that any public benefit flowing from such condemnations cannot be “speculative or marginal,” and finding that the condemnation at issue served a “clear and significant” public purpose).

\textsuperscript{100} \textit{See}, e.g., \textit{Casino Reinvestment Dev. Auth. v. Banin}, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (refusing to uphold condemnation of private land for redevelopment as a casino based on a detailed and comprehensive examination of the condemnation's purposes, consequences, and effects); \textit{City of Jamestown v. Leevers Supermarkets, Inc.}, 552 N.W.2d 365, 370, 374 (N.D. 1996) (refusing to uphold condemnation of two privately held parking lots for redevelopment by a retail store, where even though the taking was “subject to limited judicial review,” there were no specific findings as to the details surrounding the primary object of the development project).

\textsuperscript{101} \textit{See} Nancy K. Kubasek, \textit{Time to Return to a Higher Standard of Scrutiny in Defining Public Use}, 27 Rutgers L. Rec. 3, 10 (2003) (noting that such approaches, even though not explicitly characterized as heightened judicial scrutiny, are more likely to determine whether challenged takings further a public purpose).

\textsuperscript{102} \textit{See infra} Part I.A.3.a.

\textsuperscript{103} \textit{See supra} note 69; \textit{see also} \textit{Kelo v. City of New London}, 125 S. Ct. 2655, 2667 (2005) (noting that the issue of one-to-one transfers would be addressed if and when it arose).

\textsuperscript{104} \textit{But see} \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528, 540-43 (2005) (holding that heightened judicial scrutiny in the form of a “substantially advances” formula has no place in the Court's takings jurisprudence).

\textsuperscript{105} \textit{Kelo}, 125 S. Ct. at 2670 (Kennedy, J., concurring).

\textsuperscript{106} \textit{Id.}
development plan; (2) the seriousness of the problems addressed by the takings; (3) the nature of the benefits flowing from the takings; (4) the identity of the takings’ beneficiaries being unknown; and (5) the presence of elaborate procedural requirements that facilitate public review and inquiry into the proposed takings.107

Some commentators disagree with courts’ nearly uniform adherence to rational-basis review, especially in cases where eminent domain is used to transfer land from one private party to another.108 One-to-one land transfers give rise to numerous concerns regarding the preservation and sanctity of individual property rights,109 the uncertainty of the proposed benefits flowing from such transfers,110 the disproportionate effect such transfers have on the politically vulnerable,111 and the susceptibility of local officials to powerful private interests.112 In light of such concerns—along with the Court’s expansive interpretation of the public use requirement—these commentators argue that one-to-one land transfers should be subjected to some form of heightened judicial scrutiny.113 Although the details of the proposed standards of review differ,114 these commentators

107. See id. At least one commentator has argued that procedural safeguards that ensure public scrutiny of condemnations and land transfers could “thwart the corruption and unfair dealing” commonly associated with land use decision making. See Alejandro Esteban Camacho, Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions—Installment Two, 24 Stan. Envtl. L.J. 269, 279 (2005).

108. See, e.g., Ralph Nader & Alan Hirsch, Making Eminent Domain Humane, 49 Vill. L. Rev. 207 (2004) (arguing that heightened scrutiny is appropriate where eminent domain is used to transfer property to a private party).


110. See Kubasek, supra note 101, at 7 (noting that benefiting private parties are rarely held accountable to the public, thus preventing the alleged public benefits from being realized); Nader & Hirsch, supra note 108, at 220-21 (discussing the inability to determine whether alleged public benefits flowing from such transfers would ever accrue).

111. See Nader & Hirsch, supra note 108, at 224-26 (arguing that heightened scrutiny is appropriate where takings adversely affect groups that historically have been subject to unfavorable treatment).

112. Laura Mansnerus, Note, Public Use, Private Use, and Judicial Review in Eminent Domain, 58 N.Y.U. L. Rev. 409, 432-35 (1983) (arguing that judicial deference to local public use decisions is often inappropriate due to reasons of institutional competence, impartiality, and potential for abuse).

113. See Kubasek, supra note 101; Nader & Hirsch, supra note 108; Portner, supra note 109.

114. Compare, e.g., Kubasek, supra note 101, at 10 (arguing that one-to-one transfers should be upheld only where (1) the state identifies a legitimate public purpose, (2) substantial evidence demonstrates that public benefits will likely flow from the taking, and (3) the taking is necessary to achieve the public purpose), with Nader & Hirsch, supra note 108, at 224-25 (arguing that one-to-one land transfers should be upheld only where the state demonstrates a “compelling need for the transfer” which cannot be met by a less harmful alternative, but noting that such transfers may be upheld if they are “substantially connected to an important government purpose” so long as the affected party suffers primarily economic loss and is not politically powerless), and Portner, supra note 109, at 556 (“[T]he condemnor must show that the taking serves [an] urgent and necessary governmental interest.”).
agree that rational-basis review is an inappropriate mechanism of reviewing one-to-one land transfers.\textsuperscript{115}

\textbf{B. Opaque Readings of the Establishment Clause: The Difficulty of Line Drawing}

Even if a state’s or municipality’s exercise of eminent domain satisfies the public use requirement, such takings can run afoul of other constitutional guarantees.\textsuperscript{116} Thus, some lower courts have addressed Establishment Clause challenges to government land transfers,\textsuperscript{117} invariably drawing from the Court’s public use jurisprudence.\textsuperscript{118} This section provides a brief introduction to the legal framework governing these challenges.

The First Amendment of the United States Constitution provides in part that “Congress shall make no law respecting an establishment of religion.”\textsuperscript{119} This provision, known as the Establishment Clause,\textsuperscript{120} does not provide courts with any precisely defined constitutional prohibitions.\textsuperscript{121} Accordingly, the Court has been reluctant to draw any bright-line interpretation as to what constitutes a violation of the Establishment Clause,\textsuperscript{122} and instead tends to provide general guidance as to what are permissible and impermissible church and state entanglements.\textsuperscript{123}

Generally, the Court has taken a broad interpretation of the Establishment Clause, and has noted that the First Amendment merely requires the state to be neutral—not adversarial—in its relations with religious organizations.\textsuperscript{124} In fact, the Court has noted that “[s]ome limited and incidental entanglement between church and state authority is inevitable in a complex

\begin{itemize}
  \item \textsuperscript{115} See Kubasek, \emph{supra} note 101, at 9; Nader & Hirsch, \emph{supra} note 108, at 213-14; Portner, \emph{supra} note 109, at 554.
  \item \textsuperscript{116} See \emph{Kelo} v. City of New London, 125 S. Ct. 2655, 2667 & n.17 (2005); cf. Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (reinstating the plaintiff’s claim that the municipality’s exercise of eminent domain violated the Equal Protection Clause).
  \item \textsuperscript{117} See \textit{infra} Part II.A.2, B.1.
  \item \textsuperscript{118} See, e.g., \textit{infra} note 159 and accompanying text.
  \item \textsuperscript{119} U.S. Const. amend. I.
  \item \textsuperscript{120} Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).
  \item \textsuperscript{121} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
  \item \textsuperscript{122} See Bauchman v. W. High Sch., 132 F.3d 542, 550 (10th Cir. 1997) (discussing the Supreme Court’s reluctance to confine Establishment Clause analysis to any one test), \textit{cert. denied}, 524 U.S. 953 (1998).
  \item \textsuperscript{123}\textit{Everson} v. Bd. of Educ. of Ewing, 330 U.S. 1, 15-16 (1947) (noting that the Establishment Clause precludes the government from aiding a single religion, aiding all religions, preferring one religion over another, or becoming involved in the activities of religious organizations).
  \item \textsuperscript{124}\textit{Everson}, 330 U.S. at 15-18; cf. Boyajian v. Gatzonis, 212 F.3d 1, 10 (1st Cir. 2000) (noting that by “protecting religious uses of land among others that are favored by communities generally, but that may encounter particular neighborhood disfavor, [a zoning exemption for religious institutions] does not itself advance religion but clears the way so that churches themselves may do so”).
\end{itemize}
modern society." Thus, although the Establishment Clause ensures that the government does not make religious belief relevant to an individual's or group's position in the political community, it does not forbid government policies with legitimate secular objectives from incidentally benefiting religion.

The closest the Court has come to a bright-line delineation of Establishment Clause violations is the three-pronged Lemon test, which requires government activity to (1) have a secular purpose; (2) neither advance nor inhibit religion; and (3) not foster excessive government entanglement with religion. Notably, when addressing Establishment Clause challenges to religious land transfers, lower courts' analysis of the "secular purpose" prong is strikingly similar to courts' analysis of the public use requirement. Although many state and lower courts continue to apply the Lemon test, most Supreme Court Justices differ at least to some extent as to the test's applicability, and some have expressed their hostility towards the test.

Part II of this Note explores cases that have applied this legal framework to religious land transfers. In these cases, most courts have upheld such transfers as consistent with Supreme Court precedent. Part II.A discusses these cases, and explores the public policy reasons for upholding such transfers. Not all cases, however, have upheld such transfers. In Redevelopment Authority, for instance, the Pennsylvania Commonwealth Court invalidated a condemnation in favor of a private religious school, finding violations of both the Establishment Clause and the Fifth

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126. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (noting that government endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community" (internal quotations omitted)).
127. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 10 (1989) (finding that the goals of the government and private religious interests may at times overlap).
129. See infra note 158.
131. See Cutter v. Wilkinson, 544 U.S. 709, 717 n.6 (2005) (discussing the Lemon test and noting that the Court would resolve the case "on other grounds"); id. at 726 n.1 (Thomas, J., concurring) ("The Court properly declines to [apply] the discredited test of Lemon v. Kurtzman.").
132. See, e.g., Southside Fair Housing, 928 F.2d at 1347, 1356 (following Berman and upholding city's sale of urban renewal land to the Hasidic religious community); Ellis v. City of Grand Rapids, 257 F. Supp. 564, 570-71 (W.D. Mich. 1966) (upholding condemnation in favor of a church-affiliated hospital); Kintzele v. City of St. Louis, 347 S.W.2d 695, 701-02 (Mo. 1961) (citing Berman and upholding a transfer of blighted land to private Jesuit university).
II. PUBLIC USE AND ESTABLISHMENT CLAUSE CHALLENGES TO RELIGIOUS LAND TRANSFERS

A. Upholding Religious Land Transfers

In light of the thin line that separates private and public uses, most lower courts, when confronted with public use or Establishment Clause challenges, have upheld the validity of condemnations or land transfers in favor of religious institutions. This section examines these decisions. Part II.A.1 discusses the public use analysis used in these cases and Part II.A.2 discusses their Establishment Clause analysis. Finally, Part II.A.3 explores the public policy reasons for upholding religious land transfers, and examines the educational, cultural, and health services that religious institutions provide to the general public.

1. Public Use Challenges to Religious Land Transfers

Most courts generally have found religious land transfers to be valid public policy consistent with Supreme Court precedent. In *Ellis v. City of Grand Rapids*, for example, the city’s “Master Plan for Urban Renewal” called for the acquisition of land through the exercise of eminent domain for the development of a medical center by St. Mary’s Hospital—a church-affiliated institution. The stated objectives of the plan, which aimed to strengthen and define the city’s central business district, included the removal of blight and deterioration, the elimination of substandard structures, the modification of an obsolete street pattern, the provision of residential uses, and the establishment of a medical center. Although the plaintiff did not pose a Fifth Amendment challenge to the condemnation, the court analyzed in detail the public purpose of the transfer.

The court acknowledged that the land transfer would confer a private benefit to St. Mary’s to the extent that it would have the opportunity to purchase land for a lower price than if it would have had to negotiate

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133. *In re Redev. Auth.*, 891 A.2d at 830 n.3, 831.
134. See, e.g., *Kintzele*, 347 S.W.2d at 702 (approving of planning authority’s policy to not acquire property held by religious institutions and to accept such institutions as redevelopers; noting that various churches, a YMCA, and the Christian Board of Publication took advantage of this policy, and that the “United States Supreme Court recognized this policy as proper” in *Berman*).
136. Id.
137. The objecting landowner’s complaint alleged violations of the First and Fourteenth Amendments to the United States Constitution, along with violations of Michigan state law. *Id.*
138. *Id.* at 569-72.
separately with private landowners. However, the court held that the "participation by a private sectarian hospital as a redeveloper in an urban renewal project is not unconstitutional." The court took a broad approach to what satisfies a public use, essentially holding that any uses subsequent to condemnation were irrelevant. The court also emphasized that it found no pretext in the land's condemnation.

Similarly, in Kintzele v. City of St. Louis, the city proposed to sell "blighted" land to St. Louis University, a private Jesuit university, pursuant to a comprehensive redevelopment plan aimed at eliminating blight. The plaintiffs challenged the transfer in a taxpayers' action, alleging unconstitutional use of public funds in aid of a religious organization and an unconstitutional taking of private property for private use. The Missouri Supreme Court rejected the plaintiffs' contentions, noting that the case before it did not involve the condemnation and transfer of a single tract of land to a private religious interest, but instead the acquisition of an entire area for the public purpose of eliminating blight. In upholding the transfer, the court emphasized that the University was acquiring the land by purchase instead of by condemnation and gave great deference to the city's determination of a public use.

Another example is Fishman v. City of Stamford, in which the city proposed to take land held by a Roman Catholic Church to increase affordable housing, eliminate blight pursuant to a redevelopment plan, and replace that land with other contiguous land so as not to reduce the church's land holdings. The Connecticut Supreme Court rejected the plaintiffs' Establishment Clause and public use objections, emphasizing that the basic purpose of the land transfer was to provide affordable housing for the city's residents without displacing the church. These public benefits, in the context of a plan to alleviate blight, led the court to hold that the taking of land from a private landowner and the subsequent transfer of that land for

139. Id. at 569.
140. Id. at 570. The court also noted that in the context of a comprehensive redevelopment plan, the use of condemned property by private persons for private uses is irrelevant and the partial allocation of such land to churches is unimportant. Id. at 571.
141. Id. at 571. This broad approach resulted from the court's emphasis on the public purpose served by the taking itself (the elimination of blight). The court still noted, however, the public nature of the subsequent uses of the property once it was seized (the provision of medical services to the general public). Id. at 574.
142. Id. at 574 (noting that the primary purpose of the taking was to provide adequate medical care to the surrounding community, which overrode any incidental or indirect benefits flowing to a private religious interest).
143. 347 S.W.2d 695 (Mo. 1961).
144. Id. at 697-98.
145. Id. at 697.
146. Id. at 701.
147. Id. at 701-02.
149. Id. at 444-45, 448.
150. Id. at 446-47.
religious use did not make the original taking one for private purposes. Finally, the court expressed no doubt that a redevelopment agency could include churches as part of its development plan.

2. Establishment Clause Challenges to Religious Land Transfers

Some lower courts, although not faced with Fifth Amendment challenges to land transfers to religious organizations, have analyzed the public purpose of such transfers when addressing Establishment Clause claims. The Establishment Clause’s opaque language gives rise to a degree of uncertainty as to whether land transfers to religious interests implicate First Amendment concerns. Most courts that have addressed land transfers or condemnations in favor of religious interests, however, have upheld the transfers after applying the Lemon test.

Consider Southside Fair Housing Committee v. City of New York, for instance, where plaintiffs alleged Establishment Clause violations flowing from the city’s proposed sale of urban renewal property in Williamsburg, Brooklyn to the United Talmudic Academy for the development of a boys’ yeshiva, a faculty apartment complex, and a 6000-seat synagogue. The U.S. Court of Appeals for the Second Circuit applied the Court’s Lemon test to the plaintiffs’ First Amendment challenge and determined that the city’s sale of land to the Hasidic community did not violate the Establishment Clause. The court found a secular purpose for the sale of land to a religious institution within the context of urban renewal plans.

In analyzing the land transfer’s secular purpose, the Second Circuit drew upon the Supreme Court’s public use jurisprudence and emphasized courts’ deference to local determinations of public purpose so long as no pretext is present. Accordingly, the court “look[ed] behind” the challenged land transfer and focused on the underlying development plan. The court, as previous courts had, took a broad retrospective approach as to what constitutes a public use, holding that urban renewal plans, by their very nature, benefit the public by improving depressed areas. In the context

151. Id. at 447-48 (“It has long been settled that, when . . . the redevelopment agency formulates a plan for the alleviation of blight and takes land pursuant to that plan, it is taking land for a public purpose, namely, the rehabilitation of the area. This public purpose is not affected by the agency’s subsequent resale of the property to private redevelopers . . . .”).
152. Id. at 447 (“[T]he mere fact that a plan . . . provides for the retention of a church plant in a given area does not render that plan unconstitutional.”).
153. See generally Part I.B.
154. See, e.g., infra notes 157, 173, 180 and accompanying text.
155. 928 F.2d 1336 (2d Cir. 1991).
156. Id. at 1338.
157. Id. at 1356.
158. Id. at 1348. The court’s analysis of the land transfer’s secular purpose was strikingly similar to public use analysis. For a discussion of the Lemon test, see supra notes 128-31 and accompanying text.
159. See id. at 1347-48.
160. Id. at 1347.
161. Id.
of such plans, the court held, land could be sold to numerous private interests, including religious organizations. 162

The primary effect of the land transfer, the court found, "was to dispose of urban renewal property that might otherwise lie fallow. The fact that the [Hasidic community was] the incidental beneficiar[y] does not make the system by which the land sales were consummated constitutionally infirm."163 The court further noted that the sale did not require any continuing relationship between the city and the Hasidic community, and thus did not reflect any excessive government entanglement with religion.164

New York City’s proposed condemnation of land lying within the Lincoln Square Project area on Manhattan’s West Side from 60th Street to 70th Street gave rise to similar objections.165 A portion of the condemned land was to be conveyed to Fordham University, a Roman Catholic institution, for “collegiate or educational purposes.”166 Although no Fifth Amendment challenges were raised, holders of this land did challenge the public purpose of the proposed transfer, claiming that it amounted to an “unconstitutional grant or subsidy of public moneys to a religious” organization.167 The New York Court of Appeals rejected the plaintiffs’ contentions.168 Although the court acknowledged that Fordham would receive a private benefit to the extent that it would be permitted to acquire valuable property, it balanced this benefit against the public benefits the city would receive through “the achievement of its valid municipal purpose of eliminating a slum.”169 The court concluded that any alleged “subsidy of public moneys” merely reflected the difference in land value resulting from Fordham’s agreement to clear the land and use it for restricted purposes.170

Similarly, in In re Condemnation by the Minneapolis Community Development Agency,171 the Minneapolis Community Development Agency filed a petition for condemnation to acquire land pursuant to a comprehensive redevelopment plan for the restoration, expansion, and construction of new facilities for several interests, including the Young Men’s Christian Association of Metropolitan Minneapolis (“YMCA”).172 The court applied the Lemon test and held that the condemnation proceeding neither advanced religion nor resulted in excessive government

162. Id. (citing Berman and noting that on numerous occasions New York City had sold urban renewal land to churches and other houses of worship).
163. Id. at 1349. The court held that “within the context of an urban renewal scheme, there is a secular purpose for sales of land for houses of worship—of any type.” Id. at 1348.
164. Id. at 1351.
166. Id.
167. Id. at 398.
168. Id. at 398-99.
169. Id.
170. Id. at 398.
171. 439 N.W.2d 708 (Minn. 1989).
172. Id. at 709.
entanglement with religion, and thus did not violate the Establishment Clause.\textsuperscript{173} The court noted that for First Amendment purposes, "the question is not whether the YMCA has religious aspects, which admittedly it does, but the extent to which the religious dimension permeates the institution."\textsuperscript{174} The plaintiff conceded that the proceeding had a secular legislative purpose,\textsuperscript{175} and the court found no Establishment Clause violation because the YMCA’s secular functions were not subsumed by its religious mission.\textsuperscript{176} Finally, the court held that the coordination of planning and construction between the YMCA and the Authority did not create any excessive entanglement with religion.\textsuperscript{177}

Likewise, in \textit{Utah Gospel Mission v. Salt Lake City Corp.},\textsuperscript{178} although no condemnation was involved, plaintiffs challenged the City’s sale of an easement to the Church of Jesus Christ of Latter-day Saints ("LDS"), alleging violations of the Establishment Clause.\textsuperscript{179} The court applied the \textit{Lemon} test and upheld the transfer, finding numerous underlying secular purposes, including the resolution of a contentious legal dispute, the promotion of tourism, and the City’s receipt of land to be used by the general public as consideration for the easement.\textsuperscript{180} The court held that the City’s sale did not have the primary effect of advancing or endorsing religion, especially because LDS paid over ten times the market value of the land, and in light of the land the City received in exchange for the easement.\textsuperscript{181} Finally, because the sale ended the City’s involvement in any regulation of the church’s use of the easement, it actually eliminated the likelihood of excessive entanglement between the City and LDS.\textsuperscript{182}

3. Religious Institutions and Their Public Uses

In upholding condemnations in favor of religious organizations, courts have acknowledged the potential for public benefits to flow from such organizations.\textsuperscript{183} This section examines these public benefits.

Modern land use law generally recognizes that many religious organizations do not exist solely to provide a means of worship for their faithful.\textsuperscript{184} Religious organizations have dramatically extended the breadth

\textsuperscript{173} See \textit{id.} at 712-14.
\textsuperscript{174} \textit{id.} at 712.
\textsuperscript{175} \textit{id.} at 711.
\textsuperscript{176} \textit{id.} at 712 (noting that the YMCA provided "nonsectarian recreational, health, and social service activities without regard for any religious belief or affiliation").
\textsuperscript{177} \textit{id.} at 714.
\textsuperscript{178} 316 F. Supp. 2d 1201 (D. Utah 2004).
\textsuperscript{179} \textit{id.} at 1204-05.
\textsuperscript{180} \textit{id.} at 1238. The court ignored the possibility that improper concerns could have motivated the land transfer, in light of its secular benefits. \textit{id.} at 1239-40.
\textsuperscript{181} \textit{id.} at 1241-42.
\textsuperscript{182} \textit{id.} at 1244-45.
\textsuperscript{183} See, e.g., \textit{supra} notes 141-42; \textit{supra} text accompanying notes 166, 180.
\textsuperscript{184} See \textit{Slevin v. Long Island Jewish Med. Ctr.}, 319 N.Y.S.2d 937, 946 (Sup. Ct. 1971) (rejecting any contention that religious uses must be conducted solely for the benefit of a
of their activities, especially in the areas of education and social services.\footnote{Shelley Ross Saxer, When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood, 84 Ky. L.J. 507, 513-19 (1996).}\footnote{Mark W. Cordes, Where to Pray? Religious Zoning and the First Amendment, 35 U. Kan. L. Rev. 697, 737 (1987).} Today, religious organizations serve functions "ranging from bingo, to scout meetings, to lectures, to community action programs, to interfaith programs."\footnote{Slevin, 319 N.Y.S.2d at 946.}\footnote{Terry Rice, Re-evaluating the Balance Between Zoning Regulations and Religious and Educational Uses, 8 Pace L. Rev. 1, 2-4 (1988) (noting that churches and religious organizations no longer provide solely means of worship, but also serve "a variety of social, humanitarian, and educational functions").} In many instances, such organizations provide not only private services to their members, but also numerous philanthropic, cultural, educational, welfare, and health services to the general public,\footnote{See In re Condemnation by the Minneapolis Cmty. Dev. Agency, 439 N.W.2d 708, 712 (Minn. 1989) (finding that religious organization with religious aspects nonetheless provides "nonsectarian recreational, health, and social service activities without regard for any religious belief or affiliation").} thus demonstrating the many potential public uses of religious organizations. Additionally, some religious institutions provide services whose secular aspects predominate over any religious aspects,\footnote{Ellis v. City of Grand Rapids, 257 F. Supp. 564, 571 n.2 (W.D. Mich. 1966) (noting that the proposed uses of the property in question included ambulatory care, treatment, radiology, laboratories, diagnostic and mechanical facilities, housing for personnel, the aged, and parking); see also Kentucky Bldg. Comm’n v. Effron, 220 S.W.2d 836, 837-38 (Ky. 1949) (holding that the construction of nonprofit, religious hospitals serves the common good of the entire community).} demonstrating that religious belief and the benefits provided by religious institutions are not necessarily inextricably linked.\footnote{Ellis, 257 F. Supp. at 572.}

The Hope Partnership's provision of much-needed educational services to North Philadelphia exemplifies the potential for public benefits to flow from religious institutions.\footnote{Tilton v. Finch, 312 F. Supp. 1191, 1198-99 (D. Conn. 1970) (noting that the Supreme Court has long recognized that church-sponsored schools play a significant role in the provision of secular education); see Roman Catholic Archbishop of Diocese of Ore. v. Baker, 15 P.2d 391, 395 (Or. 1932).} Hospitals operated by religious organizations, for example, provide significant public, secular benefits to the surrounding community and often do not operate solely for the benefit of private religious interests.\footnote{See supra notes 10-11 and accompanying text.} Such institutions provide services to the general public and do not discriminate in the provision of necessary and often life-saving medical care.\footnote{See Ellis v. City of Grand Rapids, 257 F. Supp. 564, 571 n.2 (W.D. Mich. 1966) (noting that the proposed uses of the property in question included ambulatory care, treatment, radiology, laboratories, diagnostic and mechanical facilities, housing for personnel, the aged, and parking); see also Kentucky Bldg. Comm’n v. Effron, 220 S.W.2d 836, 837-38 (Ky. 1949) (holding that the construction of nonprofit, religious hospitals serves the common good of the entire community).} Education is another essential public service provided by private religious institutions, and so long as religious schools comply with curriculum requirements, such schools often enhance the general welfare.\footnote{See Ellis v. City of Grand Rapids, 257 F. Supp. 564, 571 n.2 (W.D. Mich. 1966) (noting that the proposed uses of the property in question included ambulatory care, treatment, radiology, laboratories, diagnostic and mechanical facilities, housing for personnel, the aged, and parking); see also Kentucky Bldg. Comm’n v. Effron, 220 S.W.2d 836, 837-38 (Ky. 1949) (holding that the construction of nonprofit, religious hospitals serves the common good of the entire community).} In fact, some commentators urge that "no difference
exists in the promotion of the general welfare of a community between public and private educational institutions."194 As such, the public benefit provided by religious schools is often viewed to be the same as the benefit provided by public schools.195 Other public services provided by religious institutions196 include drug rehabilitation centers,197 universities,198 homeless shelters,199 day care centers,200 and orphanages.201

The public benefits flowing from these services make such religious organizations desirable components of a community,202 especially because these services often compensate for inadequate local, state, and federal funding to care for those in need.203 Due to the many benefits flowing from religious institutions, some courts have held that religious institutions are by their very nature beneficial to the public welfare.204 The use of land by religious institutions is thus often found to have a beneficial and significant relationship to the "public health, safety, and general welfare."205 In light of the unique role held by churches and other religious institutions in American society, many courts have held that such institutions deserve special treatment in certain circumstances.206 Accordingly, religious

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194. Rice, supra note 187, at 40; cf. Diocese of Rochester v. Planning Bd. of Brighton, 136 N.E.2d 827, 834 (N.Y. 1956) (disapproving of ordinances that exclude private or parochial schools from residential areas where public schools are permitted).

195. Vill. of Brookville v. Paulgene Realty Corp., 200 N.Y.S.2d 126, 133 (Sup. Ct. 1960) ("[T]he contribution which a private school makes to the public good in educating youngsters, is rendered nonetheless valid because it earns a profit.").


198. Kintzele v. City of St. Louis, 347 S.W.2d 695 (Mo. 1961).


202. See Tarshis v. City of N.Y., 262 N.Y.S.2d 538, 542 (N.Y. App. Div. 1965) (Benjamin, J., dissenting) ("Enlightened community planning, recognizing the desirability of such [religious organizations], traditionally has assisted in making available land upon which cultural centers, colleges, universities, community centers and health institutions could be built.").

203. Saxer, supra note 184, at 551; see also Goldberg, supra note 199, at 75-76 (noting that inadequate government funding to address homelessness has required religious institutions to play a primary role in assisting those in need of shelter).

204. See Diocese of Rochester v. Planning Bd. of Brighton, 136 N.E.2d 827, 836-37 (N.Y. 1956) ("[C]hurch and school and accessory uses are, in themselves, clearly in furtherance of the public morals and general welfare.").


206. See, e.g., Saxer, supra note 184, at 508 (noting that religious institutions generally enjoy special treatment in the application of legislative land use restrictions); see also Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 689 (1970) (Brennan, J., concurring) ("[G]overnment
institutions are often protected, at least to some degree, from the application of zoning regulations.207

B. Invalidating Religious Land Transfers

This section discusses the invalidation of condemnations or land transfers in favor of religious institutions and explores the public policy reasons for striking down such transfers.

1. One Court Has Invalidated a Land Transfer in Favor of a Religious Institution

Not all courts have found religious land transfers to satisfy the public use requirement and the Establishment Clause.208 In Redevelopment Authority, the Pennsylvania Commonwealth Court applied the Lemon test to determine whether the transfer of land to the Hope Partnership violated the Establishment Clause209 and reached a different result than other courts in its application of the test.210 In a 4-3 decision, the court found that the transfer lacked any secular purpose because the Authority’s primary purpose in the condemnation was to acquire land on behalf of the Hope Partnership for the construction of a religious school.211 The court further

grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.”).

207. See Saxer, supra note 184, at 512 (noting that most jurisdictions prevent the absolute exclusion of religious institutions from areas zoned for residential use only); see also Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 513 (N.Y. 1986) (noting that schools and churches, which historically “were welcomed as benefits to the neighborhood,” have enjoyed special treatment as to residential zoning ordinances).

208. Several lower courts, for instance, have indicated in dicta that condemnations and land transfers in favor of religious institutions have at least the potential to violate the public use requirement and the Establishment Clause. See Policastro v. City of Boston, No. 04-4279, 2005 Mass. Super. LEXIS 579, at *19 (Mass. Super. Nov. 8, 2005) (holding that plaintiff taxpayer could “contest the sale of publicly owned land at a below-market price to a religious institution for the purposes of operating a house of worship and the endorsement of a particular religion and excessive entanglement created by the establishment of a particular lecture program at a public college”); Cont’l Enters., Inc. v. Cain, 387 N.E.2d 86, 90 (Ind. Ct. App. 1979). The court in Continental Enterprises stated that

[i]the fact that the party seeking the condemnation is of a religious, educational or other “public benefit” nature does not entitle it to take private land for its own purposes rather than for public purposes. That view has been expressly disavowed lest “... churches, lodges, clubs, civic organizations, ... theatres, circuses ... an endless chain ...” acquire a power which is an attribute of sovereignty.

387 N.E.2d at 90 (quoting Fountain Park Co. v. Hensler, 155 N.E. 465, 472 (Ind. 1927)).


210. Id. at 831 (“The law does not permit the Authority to take private property and then turn it over to a religious organization for its private development purposes; ... settled law precludes the Authority from taking private property in violation of the Establishment Clause.”).

211. Id. at 830 (holding that the land acquisition for the Hope Partnership “had a primary religious effect because it directly aided the religious organization’s mission to provide faith-based educational services, among other things, to residents in the blighted area”).
found that the Authority worked closely with the Hope Partnership throughout the planning and acquisition process, thus demonstrating excessive government entanglement with religion.\(^{212}\) Without any broader secular purpose, the court held that the exercise of eminent domain to transfer land to a private religious organization could not withstand Mary Smith's Establishment Clause challenge.\(^{213}\)

The court also stated in dicta that the condemnation failed to satisfy the public use requirement because the actual purpose of the taking was to bestow a private benefit to the Hope Partnership, a private religious organization.\(^{214}\) The court noted that the condemnation did not result from a comprehensive economic development plan, but instead from "a plan to acquire land with public funds for the benefit of a religious organization to build a private school" and therefore could not satisfy the public use requirement.\(^{215}\) The court's holding was based on a violation of the Establishment Clause, and as a result it did not conduct a thorough analysis of the City's development plan or its purported goals, other than mentioning that the plan was created pursuant to a general certification that the surrounding area was blighted.\(^{216}\)

Three judges dissented, asserting that the Authority "may exercise eminent domain power to condemn a private homeowner's property when the property is located in a blighted neighborhood."\(^{217}\) The dissent took a retrospective approach to the condemnation, and indicated that once blighted land is seized "the public purpose is completely realized."\(^{218}\) In addressing plaintiff's Establishment Clause claims, the dissent noted that the purpose of the condemnation was not to establish religion, but instead to "serve individuals who live in an economically depressed area."\(^{219}\) The dissent also emphasized that despite the Hope Partnership's religious affiliation, it served community members with "a variety of religious backgrounds and beliefs."\(^{220}\) Finally, and perhaps most importantly, the dissent noted that the challenged condemnation did not involve a one-to-one transfer from a private party to a private religious organization, but instead involved many condemnations pursuant to a comprehensive development plan.\(^{221}\)

The Authority appealed the Pennsylvania Commonwealth Court's decision, and on July 27, 2006 the Supreme Court of Pennsylvania granted

\(^{212}\) Id.
\(^{213}\) Id.
\(^{214}\) Id. at 830 n.3.
\(^{215}\) Id. But see infra note 221 and accompanying text.
\(^{216}\) In re Redev. Auth., 891 A.2d at 823, 830 n.3.
\(^{217}\) Id. at 831 (Pellegrini, J., dissenting).
\(^{218}\) Id. at 833 (internal quotations omitted).
\(^{219}\) Id. at 834.
\(^{220}\) Id. at 832 (internal quotations omitted).
\(^{221}\) See id. at 832 n.4 ("The Commission's proposal not only included projects to be developed by Hope Partnership, but also included projects for development by 14 other groups . . . ").
the Authority's Petition for Allowance of Appeal. As of this writing, the resolution of this case is unclear. At first blush, the Pennsylvania Commonwealth Court—consistent with Supreme Court precedent—properly looked to the future use of the seized property when invalidating the transfer. If in fact the Hope Partnership negotiated with the Authority to achieve a one-to-one land transfer, the court was rightfully suspicious of the condemnation. If, however, the land was condemned pursuant to a comprehensive redevelopment plan and sufficient procedural safeguards were in place to protect the condemnee, the court turned a blind eye to the potential for public benefits to flow from the transfer, and its holding was inconsistent with Supreme Court precedent.

As this case demonstrates, the resolution of public use and Establishment Clause challenges to land transfers varies depending on the facts of a particular case. Given the thin line between private and public uses and the Establishment Clause’s opaque language, a degree of uncertainty exists as to whether and when condemnations and land transfers to religious interests give rise to public use and First Amendment concerns. This uncertainty, as explained in Part III, gives rise to additional judicial concern surrounding the exercise of eminent domain in favor of religious interests.

2. The Potential Harms of Religious Land Uses

This section explores the potential harms flowing from religious land uses. In evaluating land use decisions in favor of religious institutions, courts are careful to focus on the secular—and not the religious—benefits flowing from such institutions. Courts often weigh these positive secular benefits against any harms that could potentially flow from the institutions. There is no conclusive presumption that the public benefits flowing from religious institutions outweigh the harms. Many groups have objected to the presence of religious institutions in their communities, at least in part due to the “increased traffic, noise, and litter; an increased tax burden to neighbors due to the religious use exemption from taxes; and the influx of people from outside the local residential community.”

223. See supra note 84 and accompanying text.
224. Cf. supra note 70 and accompanying text.
225. See supra notes 65-68 and accompanying text; infra Part III.
226. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 12 (1989) (focusing on the church property tax exemption’s “legitimate secular purpose and effect of contributing to the community’s moral and intellectual diversity”).
227. See Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 514-15 (N.Y. 1986) (noting that despite the many benefits flowing from religious institutions, such institutions’ presence may in fact detract from the public’s health, safety, welfare, or morals due to their adverse effects on traffic, property values, congestion, and municipal services).
228. Id. at 515; see also John Krakauer, Under the Banner of Heaven: A Story of Violent Faith (2003) (discussing the dangers of religious fundamentalism).
229. Saxer, supra note 184, at 509; see also Jonathan D. Weiss & Randy Lowell, Supersizing Religion: Megachurches, Sprawl, and Smart Growth, 21 St. Louis U. Pub. L.
Further, relying on religious organizations to provide education and social services to the general public has the potential to result in "reduced quality, unequal treatment, and outright corruption."\(^{230}\)

Additionally, although religious institutions provide significant public benefits to their surrounding communities, they also increasingly exert a tremendous influence on the political process.\(^{231}\) Consider Camden Churches Organized for People, an influential Camden, New Jersey religious organization.\(^{232}\) Although the organization aims to alleviate crime, substandard housing, and inadequate healthcare, it also takes "the Bible as a serious guide for involving [itself] in the community in order to promote love and justice and to enhance the dignity of every member of [its] congregations and community."\(^{233}\) The organization played a prominent and influential role in Camden's redevelopment during the city's fiscal crisis in 2001,\(^{234}\) thus demonstrating religious organizations' ability to dominate the local political process and land use decision making.\(^{235}\)

Finally, despite the numerous potential public uses of religious institutions, courts do not ignore the potential for religious doctrine or beliefs to intermix with the secular services provided by these institutions.\(^{236}\) In fact, sometimes courts acknowledge that the very reason religious organizations provide services to the general public is to advance their religious mission.\(^{237}\) Accordingly, courts are not hesitant to invalidate land use decisions that impermissibly establish religion.\(^{238}\) The balance between the potential public benefits flowing from religious institutions and

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\(^{231}\) See supra note 27 and accompanying text.

\(^{232}\) Peterson, supra note 27.


\(^{234}\) Peterson, supra note 27 (noting that CCOP “provided important political support for the state’s varying proposals for New Jersey’s poorest city”).


\(^{236}\) Cf. Shim v. Wash. Twp. Planning Bd., 689 A.2d 804, 811 (N.J. Super. Ct. App. Div. 1997) (noting that day care centers operated by religious institutions provide a valuable community service, but also holding that child day care centers are “an integral part of a church’s ministry” thus qualifying as an incidental use of church facilities in the zoning context).


\(^{238}\) See, e.g., Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 127 (1982) (holding that a statute giving churches the power to veto liquor license applications within a 500-foot radius of the church violated the Establishment Clause).
the concomitant risk for Establishment Clause violations is a factor in determining the extent to which eminent domain may be used to transfer land to a private religious institution.239

III. CONDEMNATIONS IN FAVOR OF RELIGIOUS INTERESTS CAN SATISFY THE PUBLIC USE REQUIREMENT

Religious organizations provide significant cultural, educational, welfare, and health services to the general public,240 a fact that often legitimizes the government's imposition of favorable land use exemptions.241 The public benefits flowing from religious organizations, however, are in constant tension with the tremendous influence these organizations often exert on the political process.242 This tension is amplified by an underlying concern that government involvement in religious land use issues could implicate Establishment Clause concerns.243 These issues, along with the public's renewed focus on the extent of the government's eminent domain power,244 will likely lead to increased scrutiny of any decision to transfer land to a religious organization through the exercise of eminent domain.245

This part argues that courts should reject any bright-line rule invalidating government land transfers to religious institutions. Part III.A.1 explains why in certain circumstances the taking of private property for redevelopment by a private religious organization can satisfy the public use requirement. Part III.A.2 argues that heightened judicial scrutiny is an appropriate mechanism to guard against particularly suspect religious land transfers. Finally, Part III.B reexamines Redevelopment Authority in light of the standards articulated in this Note.

A. Government Takings that Benefit Private Religious Organizations Can Pass Constitutional Muster

1. Religious Land Transfers Are Not Per Se Unconstitutional

Eminent domain can be a powerful and effective tool for furthering municipal land use goals. The Supreme Court broadly interprets the Fifth Amendment's public use requirement, and generally upholds government takings so long as they satisfy an overarching public purpose.246 Accordingly, courts long ago rejected any bright-line rule that invalidated the transfer of land to private parties through eminent domain.247 It is the

239. See infra Part III.A.
240. See supra Part II.A.3.
241. See supra notes 206-07 and accompanying text.
242. See supra notes 231-35 and accompanying text.
243. See supra Part II.A.2, B.1; supra notes 236-39 and accompanying text.
244. See supra note 28 and accompanying text.
245. See supra note 29 and accompanying text.
246. See supra text accompanying notes 48-53.
247. See supra notes 53-55 and accompanying text.
public benefit flowing from the taking—and not the identity of the
benefiting party—that matters when analyzing public use cases.\textsuperscript{248} Thus, the mere fact that a religious institution benefits from a government land transfer should be insufficient to invalidate such a transfer.\textsuperscript{249}

Further, the Court’s prospective approach to condemnations in \textit{Kelo} indicates that the propriety of Fifth Amendment takings should turn on the future use of the seized property\textsuperscript{250}—an approach that ensures that the taking is indeed intended to serve a public purpose.\textsuperscript{251} Thus, the propriety of condemnations in favor of religious interests will likely turn on those interests’ future use of the land and the public benefits flowing from those uses, regardless of the religious identity of the benefiting party.\textsuperscript{252}

In recognition of the numerous public benefits flowing from religious organizations and their concomitant positive influence on the general welfare, municipalities often grant such organizations land use exemptions.\textsuperscript{253} These facts indicate that many municipalities will include such organizations in their comprehensive growth, development, or redevelopment plans.\textsuperscript{254} The Supreme Court explicitly acknowledged the validity of this policy in \textit{Berman} by including churches (and, implicitly, other religious interests) in its list of private land uses to be balanced and considered when redeveloping a neighborhood.\textsuperscript{255} Any bright-line rule invalidating all government transfers of seized land to religious interests would not only ignore the numerous public benefits that flow from these institutions,\textsuperscript{256} but also deny municipalities the ability to include a variety of private uses in their development plans.\textsuperscript{257} In practice, lower courts generally have followed this reasoning and have rejected such a bright-line rule.\textsuperscript{258} In fact, the vast majority of these courts have upheld religious land transfers.\textsuperscript{259}

A variety of factors should be relevant to courts’ review of challenged condemnations and land transfers in favor of religious organizations.\textsuperscript{260} When present, these factors strongly militate in favor of judicial deference

\textsuperscript{248} See id.
\textsuperscript{249} See, e.g., supra note 152.
\textsuperscript{250} See supra notes 81-87 and accompanying text.
\textsuperscript{251} See supra note 84.
\textsuperscript{252} See supra note 85.
\textsuperscript{253} See supra notes 206-07 and accompanying text.
\textsuperscript{254} See, e.g., supra note 162.
\textsuperscript{255} See supra note 68 and accompanying text.
\textsuperscript{256} See supra Part II.A.3.
\textsuperscript{257} See supra notes 67-68 and accompanying text.
\textsuperscript{258} See, e.g., Southside Fair Hous. Comm. v. City of N.Y., 928 F.2d 1336, 1348 (2d Cir. 1991) (rejecting the argument that the sale of city property to a Hasidic community “could inherently serve no secular purpose”); Ellis v. City of Grand Rapids, 257 F. Supp. 564, 570 (W.D. Mich. 1966) (holding that “participation by a private sectarian hospital as a redeveloper in an urban renewal project is not unconstitutional”); supra note 152.
\textsuperscript{259} See supra Part II.A.
\textsuperscript{260} These factors mirror some of the characteristics which led Justice Anthony Kennedy to refuse to strike down New London’s condemnation in \textit{Kelo}. See supra text accompanying note 107.
to legislative or local public use determinations, so long as the challenged takings have more than merely incidental or pretextual public benefits.\textsuperscript{261}

First, the presence of a comprehensive development plan would strongly indicate the absence of any pretextual purpose in legislative or municipality decision making.\textsuperscript{262} The inclusion of religious organizations in such plans is consistent with the valid policy of comprehensive community planning\textsuperscript{263} and rarely gives rise to suspicions as to whether solely a private benefit is being conferred upon a private religious interest.\textsuperscript{264} Further, when a religious organization is only one of many benefitting parties in a comprehensive development plan, it is less likely that the organization has captured the political process or was the primary influence motivating the transfer.\textsuperscript{265} In contrast, the alleged public benefits flowing from one-to-one transfers of condemned land to religious interests have an increased likelihood of being pretextual because such interests could have hijacked the condemnation process through negotiations outside of the public eye.\textsuperscript{266} Commentators have expressed concern as to the negative impacts that flow from such bilateral deal making between localities and private interests.\textsuperscript{267} In holding that the condemnation of Mary Smith’s home conferred a private benefit upon a private religious interest, the court in Redevelopment Authority acknowledged these concerns,\textsuperscript{268} while the court in Southside Fair Housing ignored such concerns in its failure to conduct any prospective inquiry into the nature of the proposed land use by the Hasidic community.\textsuperscript{269}

Second, courts should consider the presence or absence of procedural safeguards when reviewing condemnations in favor of religious interests.\textsuperscript{270} In light of judicial recognition of the public benefits flowing from the redevelopment of slums or blighted areas,\textsuperscript{271} municipalities primarily tend to condemn land that is considered undesirable.\textsuperscript{272} The exercise of eminent domain thus has the potential to disproportionately affect the politically and

\textsuperscript{261.} Cf. supra notes 102-07 and accompanying text.  
\textsuperscript{262.} See supra notes 67-69 and accompanying text.  
\textsuperscript{263.} See supra note 68 and accompanying text.  
\textsuperscript{264.} See supra notes 67-69 and accompanying text.  
\textsuperscript{265.} See supra notes 27, 67-69, 231-34 and accompanying text.  
\textsuperscript{266.} See supra notes 27, 67-69, 231-34 and accompanying text; see also Alejandro Esteban Camacho, Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One, 24 Stan. Envtl. L.J. 3, 41 (2005) (noting that negotiations regarding private development plans “are too frequently shielded from not only direct but also indirect observation and input by the other parties the proposed development affects”).  
\textsuperscript{267.} See, e.g., Camacho, supra note 266, at 5 (noting that these negative impacts “all too often fall on community members with little direct influence on the planning process”).  
\textsuperscript{268.} See supra note 215 and accompanying text. The record is unclear, however, as to whether in fact the condemnation existed independently of any comprehensive redevelopment plan. See supra note 221 and accompanying text.  
\textsuperscript{269.} See supra notes 161-63 and accompanying text.  
\textsuperscript{270.} See supra note 107 and accompanying text.  
\textsuperscript{271.} See supra note 66 and accompanying text.  
\textsuperscript{272.} See, e.g., supra notes 62, 78-79, 136, 149 and accompanying text.
economically disenfranchised. Often, courts are the only protection condemnnees have against abusive land-use decisions. For instance, despite the public hearings conducted by the Authority in Redevelopment Authority, the judicial system may have been Mary Smith's only real protection against the Authority's decision to condemn her home. Procedural safeguards can ensure that these organizations do not completely hijack condemnation proceedings and can give politically vulnerable individuals a means of objecting to the seizure of their land.

Additionally, by encouraging public review and inquiry into condemnations that benefit religious interests, procedural safeguards can expose both the public and private benefits flowing from such condemnations that otherwise may have remained hidden from the general public. Courts may be more suspicious of takings benefiting religious interests when the steps leading up to the condemnations took place behind closed doors. Conversely, widespread public involvement in the decision-making process leading up to condemnations could offer courts reassurance that the challenged condemnations indeed benefit the public as a whole, instead of solely private religious interests. Strikingly, however, cases that have addressed the transfer of land to religious interests are bereft of any real analysis of this issue.

Third, courts should consider whether or not the identity of the benefiting religious interest was known at the time condemnation proceedings were commenced. If the identity of the benefiting party is only determined after a tract of land is condemned, the risk of the alleged public purpose being pretextual is reduced. Because the identity of a benefiting party is at times necessary to begin the negotiations leading up to the condemnation, however, the context of the taking is significant in determining the relevance of the benefiting party's known identity. For instance, if land is condemned to make way for a medical center, as in Ellis, the fact that a religious hospital is the eventual recipient is unlikely indicative of any legislative desire to solely confer a private benefit upon a religious

273. See supra note 111 and accompanying text.
274. See supra notes 21, 24-25 and accompanying text.
275. See supra notes 21-25 and accompanying text.
276. See supra note 107 and accompanying text.
277. See supra note 107 and accompanying text; see also Camacho, supra note 107, at 284 (noting that procedural safeguards increase both the transparency and the quality of local land use decisions).
278. Cf supra note 107 and accompanying text; see Camacho, supra note 266, at 6 ("[I]mportant land use decisions are frequently made in closed-door negotiations that exclude many affected parties, further disenfranchising those with the least influence and fewest resources.").
279. See supra note 107 and accompanying text.
280. See generally supra Part II.
281. See supra note 107 and accompanying text.
282. See supra note 107 and accompanying text.
283. See supra notes 65-68 and accompanying text.
By the same token, if land is condemned to benefit a particular religious hospital (or a particular house of worship as in *Southside Fair Housing* or a particular educational facility as in *Redevelopment Authority*), a court should examine whether the condemnation aimed to provide the public benefits flowing from the religious organization or instead merely benefit the organization itself.

Finally—and perhaps most obviously—courts should consider the scope and nature of the alleged public benefits flowing from the challenged transfer. Condemnations in favor of religious organizations that provide services to the general public—such as hospitals, schools, and day care centers—will likely confer significant public benefits on the surrounding community, regardless of any incidental benefits such condemnations may confer upon the religious organizations themselves. As such, the courts in *64th Street Residences* and *Ellis* properly focused on the public benefits flowing from the educational and medical services provided by the benefitting organizations. The Pennsylvania Commonwealth Court, by contrast, failed to conduct any probing inquiry into the nature of the public benefits flowing from the educational services provided by the Hope Partnership. Condemnations in favor of churches, synagogues, and other houses of worship may raise more difficult questions as to the nature of the public benefits flowing to the surrounding community. Thus, in *Southside Fair Housing*, for instance, the court should have evaluated instead of ignored—the extent of the public benefits flowing from the Hasidic community’s future use of the land in question.

2. Heightened Judicial Scrutiny Can Guard Against Particularly Suspect Religious Land Transfers

Courts have long allowed legislatures and municipalities significant latitude in determining which land uses serve a public purpose. This judicial deference reflects a general belief that local planning officials are most familiar with the land use needs of the communities they serve and are

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284. See *supra* notes 139-42 and accompanying text.
285. See *supra* notes 155-56 and accompanying text.
286. See *supra* notes 18-21 and accompanying text.
287. *Cf. supra* note 215 and accompanying text. In *Redevelopment Authority*, for instance, the Hope Partnership appears to have been one of fourteen organizations included in the city’s development plan, thus potentially reducing any risks that the condemnation aimed to confer a private benefit to a private religious organization. See *supra* note 221 and accompanying text.
288. See *supra* note 107 and accompanying text; *supra* Part II.A.3.
289. See *supra* Part II.A.3.
290. See *supra* note 165 and accompanying text.
291. See *supra* notes 142, 191 and accompanying text.
292. See *supra* Part II.B.1.
293. *Cf. supra* notes 229-35 and accompanying text.
294. See *supra* text accompanying note 163.
295. See *supra* Part I.A.3.a.
capable of determining the necessary and proper components of their development plans. These components often include religious organizations.

The above-mentioned characteristics reduce the likelihood that religious organizations have captured the condemnation process and indicate the absence of any pretextual purpose in legislative or municipality decision making. Accordingly, these transfers should be upheld so long as such condemnations are rationally related to a conceivable public purpose. This standard of review is consistent with Supreme Court precedent and acknowledges the minimal risk that these condemnations pose of conferring solely a private benefit upon a private religious interest. Judicial deference to such transfers also maximizes the public benefits flowing from religious organizations' presence in a community and recognizes the institutional competence of planning officials and local authorities in determining the necessary and proper components of their development plans.

Similarly, condemnations benefiting religious organizations that lack the above characteristics are particularly suspect. Such takings give rise to heightened concerns as to whether private interests have captured the condemnation process, the potential for pretextual purposes in legislative or municipality decision making, and the possibility for political favoritism. These concerns, and the concomitant potential for Establishment Clause violations, militate in favor of heightened judicial scrutiny of such transfers.

Although few courts have explicitly endorsed heightened judicial review of public use determinations, a handful have reviewed condemnations that benefit private interests with a critical eye by looking beyond the alleged public use to the necessity of the takings themselves. Further, although the Court has yet to address the propriety of the exercise of eminent domain to transfer land from one private interest to another outside of a comprehensive redevelopment plan, it has expressed skepticism as to whether such transfers could pass constitutional muster. In fact, given the likelihood that such transfers are the result of political favoritism,

296. See supra notes 91-92 and accompanying text.
297. See supra note 68 and accompanying text.
298. See supra notes 102-07 and accompanying text; supra text accompanying notes 262, 279, 282.
299. See supra Part I.A.3.a.
300. See supra Part I.A.3.a.
301. See supra Part II.A.3.
302. See supra note 91 and accompanying text.
303. See supra notes 107, 266, 285-87 and accompanying text; text accompanying note 293.
304. See supra Part II.B.1.
305. See supra Part I.A.3.b.
306. See supra notes 100-01 and accompanying text.
307. See supra notes 103-04 and accompanying text.
Justice Kennedy has indicated that they warrant heightened judicial scrutiny under the Public Use Clause. 308

Condemnations lacking the above-mentioned characteristics give rise to some of the concerns that have led several commentators to argue for heightened judicial scrutiny of eminent domain decisions. 309 In many cases the purported public benefits flowing from such transfers are extremely uncertain and often difficult to discern. 310 The transfer of condemned land to a house of worship within the context of a comprehensive development plan, for example, could likely achieve its stated public purpose (that is, the achievement of a planned, well-balanced community). In the absence of such a plan, the likelihood of achieving the stated public purpose could be diminished. In Southside Fair Housing, for instance, had the court chosen to take a prospective approach when evaluating the challenged land transfer, it likely would have had difficulty finding any significant public benefits flowing from the Hasidic community's subsequent private use of the land. 311

Procedural safeguards can ensure that any alleged public purpose is well-documented and supported, while at the same time potentially reveal any hidden pretextual purposes behind the taking. 312 Absent these safeguards, there may be a decreased likelihood that the alleged benefits will in fact accrue. 313 Additionally, land transfers to religious interests whose alleged public benefits are more than de minimis likely present diminished concerns as to whether those benefits will actually accrue. 314

Condemnations lacking the above-described characteristics also have an increased likelihood of disproportionately affecting the politically vulnerable. Municipalities have a tendency to condemn land held in blighted areas, 315 and condemnations that lack development plans or procedural safeguards only increase this tendency. Condemnees such as Mary Smith are often underrepresented in local decision-making processes, 316 and judicial deference to local public use determinations in these situations would in effect result in judicial abandonment of individuals with the greatest need for judicial protection. Additionally, local officials are often vulnerable to powerful local interests, 317 and a one-to-one land transfer to a religious organization could indicate political favoritism or an undetected hijacking of the political process—especially given the influence religious interests often wield in the political arena. 318
In the absence of any overarching plan or set of goals, it would be difficult to determine whether the transfer was indeed intended to provide any benefits other than those bestowed directly to the religious organization. If such transfers were only subject to rational-basis review, local authorities would have little incentive to ensure the fulfillment of the public use requirement.

Perhaps most importantly, any public benefits flowing from condemnations in favor of religious interests are in constant tension with the potential for such condemnations to run afoul of the Establishment Clause. Without any more specific guidance from the Court, lower courts will likely continue to apply the Lemon test to Establishment Clause challenges to religious land transfers—a process that invariably draws from the Court’s public use jurisprudence. Given the Court’s opaque reading of the Establishment Clause, a significant degree of uncertainty surrounds the validity of these transfers. This uncertainty is greatly increased in the absence of the above-mentioned characteristics because such transfers are likely to give rise to skepticism as to the condemnations’ secular purposes and increase the possibility for government entanglement in religion.

Given the similarities between the public use requirement and the Lemon test’s “secular purpose” prong, and courts’ invariable reliance on public use jurisprudence when reviewing Establishment Clause challenges to religious land transfers, the limitations imposed by the public use requirement are perhaps coterminous with those imposed by the Establishment Clause. Thus, satisfaction of the above-mentioned characteristics could greatly reduce any risk for such transfers to implicate Establishment Clause concerns.

To alleviate the tension between municipalities’ desire to confer public benefits through condemnations lacking the above-mentioned characteristics and the potential such takings have for political favoritism and Establishment Clause violations, courts should focus on both the

319. See supra note 69 and accompanying text.
320. See supra note 110 and accompanying text.
321. See supra Part II.B.1.
322. See supra note 130 and accompanying text.
323. See, e.g., supra note 159 and accompanying text.
324. See supra Part I.B.
325. See supra note 158.
326. See supra note 159 and accompanying text.
327. Further, by ensuring that religious land use decisions satisfy the public use requirement, courts can ensure the validity of both the challenged condemnation and the subsequent transfer, whereas satisfaction of the Establishment Clause would only ensure the validity of the transfer and subsequent use of the property, and not the validity of the condemnation itself. Cf. In re Redev. Auth. of Phila., 891 A.2d 820, 834 (Pa. Commw. Ct. 2006), appeal granted, 903 A.2d 539 (Pa. 2006) (Pellegrini, J., dissenting) ("Even assuming that there was a contract in existence and it violated the Establishment Clause, that does not justify setting aside the condemnation. An Establishment Clause violation would only render the contract unenforceable.").
necessity of the takings themselves and on the likelihood that the alleged public benefits will flow from the takings. Such transfers should be upheld only where (1) substantial evidence demonstrates that legitimate public benefits will likely flow from the taking; and (2) the taking is necessary to achieve the public benefits. This heightened form of judicial review will protect the politically disenfranchised from the abuse of eminent domain, while ensuring that communities will still benefit from the services provided by religious organizations, so long as such benefits are likely to accrue.

B. The Hope Partnership: Public or Private Use?

Under the standards articulated above, the Authority’s exercise of eminent domain in favor of the Hope Partnership in Redevelopment Authority is of uncertain validity. The organization provides much-needed educational services to a struggling neighborhood with dire educational needs, and the public benefits flowing from these services are hardly de minimis. At first blush, however, some of the circumstances surrounding the condemnation of Mary Smith’s home are troubling. The Pennsylvania Commonwealth Court’s opinion indicates that the condemnation resulted in the naked transfer of land from Ms. Smith (and other private homeowners) to a private religious organization, a fact that is strongly indicative of a private benefit being conferred upon a private party. The record is unclear as to this point, though, and it appears that the condemnation may have been conducted pursuant to a comprehensive redevelopment plan. A public hearing of the proposed condemnation was held, thus permitting public scrutiny of the condemnation. The extent of the public’s involvement in this hearing, however, is unclear, which raises doubts as to the adequacy of this procedural safeguard. Further, not only was the identity of the Hope Partnership known when the condemnation proceedings were commenced, but in fact it was the Hope Partnership itself that approached the Authority about the prospect of condemning land on its behalf—a fact that increases any risk that the alleged public purpose of the condemnation was pretextual. Finally, the Hope Partnership is a private religious organization run by two Roman Catholic Groups—a

328. See supra Part I.A.3.b.
329. See supra note 114.
330. See supra Part II.A.3.
331. See supra notes 10-16 and accompanying text.
332. See supra note 214 and accompanying text.
333. See supra note 69 and accompanying text.
334. See supra note 221 and accompanying text.
335. See supra note 21 and accompanying text.
336. See id.
337. See supra note 18 and accompanying text.
338. See supra text accompanying notes 281-87.
339. See supra notes 11-12 and accompanying text.
fact that increases concerns regarding the propriety of the condemnation (and a fact that indeed led the Pennsylvania Commonwealth Court to strike down the condemnation as a violation of the Establishment Clause).

Nevertheless, the Hope Partnership claims that it does not proselytize its students and provides a secular education to children in a struggling neighborhood. Given the uncertain nature of the facts surrounding the condemnation, a more rigorous evaluation of the condemnation is necessary on appeal.

Heightened judicial scrutiny of the condemnation would be appropriate if on appeal the Pennsylvania Supreme Court finds that the condemnation resulted in the naked transfer of land to the Hope Partnership, that the public hearing failed to ensure public scrutiny of the condemnation, and that any public benefits flowing from the condemnation (i.e., educational services) are outweighed by the private benefit conferred upon the Hope Partnership. In such a case, the court should uphold the condemnation only if substantial evidence demonstrates that the alleged public benefits will likely flow from the condemnation, and only if the condemnation is necessary to achieve these public benefits. This heightened scrutiny would not necessarily invalidate the condemnation, but it certainly would provide greater protection against the abuse of eminent domain.

Similarly, if the court determines that the condemnation was conducted pursuant to a comprehensive redevelopment plan, that the public hearing adequately protected the homeowners’ interests, and that the public services provided by the Hope Partnership outweigh the private benefit conferred upon the Hope Partnership, rational-basis review is appropriate. Such an approach is consistent with Supreme Court precedent and would ensure that North Philadelphia can continue to benefit from the public benefits provided by the Hope Partnership.

CONCLUSION

The Supreme Court has long recognized the role that religious institutions can play in the redevelopment of blighted neighborhoods. Municipalities have not been hesitant to condemn land in favor of such institutions. Such condemnations, however, give rise to a complex and often tense relationship between church and state. Powerful, moneyed religious institutions, for instance, can use eminent domain to dominate

340. See supra text accompanying note 321.
341. See supra note 24 and accompanying text.
342. See supra note 13 and accompanying text.
343. For instance, the presence of fourteen other organizations in the purported redevelopment plan is strongly indicative of a lack of pretext in the condemnation, but the Commonwealth Court failed to address this fact. See supra note 221 and accompanying text.
344. See supra text accompanying note 329.
345. See supra notes 94-95 and accompanying text.
346. See supra note 68 and accompanying text.
347. See supra Part II.A.
land use decision making in areas populated by the politically vulnerable.\textsuperscript{348} Such a phenomenon is problematic, especially because there are public benefits that extend from such condemnations that do not necessarily require the religious engagement of the affected community.

Denying municipalities the ability to include religious organizations as one of the recipients of condemned land, however, would both stifle local planning efforts, and also deny communities the numerous public benefits flowing from religious organizations.\textsuperscript{349} Nevertheless, the public nature of religious land transfers is not always clear, and such transfers may also give rise to Establishment Clause concerns.\textsuperscript{350} Such concerns can be reduced in the presence of a comprehensive redevelopment plan, procedural safeguards, a detailed evaluation of the land transfer's public benefits, and the presence of arms-length negotiations leading up to the condemnation.\textsuperscript{351} In the absence of these characteristics, heightened judicial scrutiny can effectively ensure that public benefits indeed flow from a challenged condemnation,\textsuperscript{352} thus reducing the potential for religious interests to dominate land use decision making while still permitting the public to continue to benefit from the services offered by such interests.

\textsuperscript{348} See supra notes 231-35 and accompanying text.
\textsuperscript{349} See supra Part II.A.3.
\textsuperscript{350} See supra Part II.B.1.
\textsuperscript{351} See supra Part III.A.1.
\textsuperscript{352} See supra Part III.A.2.