Case Comment

Hawaii Housing Authority v. Midkiff: The Continued Validity of the Public Use Doctrine

I. Introduction

Legislatures always have had the right to exercise the power of eminent domain. This legislative power is held in check by the judiciary's exercise of the public use doctrine. This doctrine limits the power of eminent domain by prohibiting the taking of private property for private use.[1] Without this judicial limitation, citizens would be without recourse if the government attempted to take their property through the exercise of eminent domain.

In *Hawaii Housing Authority v. Midkiff*,[2] the United States Supreme Court examined the public use doctrine in the context of the Hawaii Land Reform Act of 1967.[3] In an attempt to reduce the concentration of land ownership in Hawaii,[4] the Act permitted the exercise of the power of eminent domain through a required transfer of certain properties from lessors to lessees.[5] Reducing the concentration of land ownership through the use of the eminent domain power benefited the public and thus constituted a taking for public use.[6]

Not everyone agreed with the legislature's analysis. A lawsuit brought in the District Court of Hawaii challenged the taking of the lessors' property as being nothing more than a taking for the use of private individual lessees and thus prohibited by the public use doctrine.[7] On appeal, the United States Supreme Court, upholding the constitutionality of the Act, concluded that the taking of the lessors' property constituted a public use.[8]

To understand how *Hawaii Housing Authority* affects the public use doctrine, two aspects of the decision require consideration. First, the evolution of the public use doctrine must be examined. This background is necessary since the public use doctrine is not a static concept. Second, the history of Hawaii must be examined to understand how the case developed. After considering these two factors, it becomes evident that *Hawaii Housing Authority* is merely a further extension of the principles of the public use doctrine. The purpose of this Comment is to examine the importance and necessity of retaining the public use doctrine. Without the judicial use of the public use doctrine, the legislative power of eminent domain would go unchecked.

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1. 2A Nichols' The Law of Eminent Domain § 7.01[2] (J. Sackman & P. Rohan 3d rev. ed. 1983).
2. 467 U.S. 229 (1984).
3. Hawaii Rev. Stat. § 516-22 (1976).
4. Hawaii Rev. Stat. § 516-83 (1976).
5. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
6. *Id.* at 233.
7. Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
8. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

II. Evolution of the Public Use Doctrine

Eminent domain is defined as "[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character."[9] This definition recognizes that private ownership sometimes must be subservient to the public welfare and that individuals must endure private hardship for the sake of public convenience.[10] Although the origin of the term "eminent domain" is uncertain, some commentators suggest that it dates back at least to the time of the Ancient Romans.[11] Hugo Grotius and other seventeenth century writers brought the term into popular use.[12]

The power of eminent domain inheres in the sovereign and needs no recognition by any government constitution.[13] The power endures as long as the government endures.[14] When a government constitution does mention the power of eminent domain, it acts as a limitation on the otherwise unlimited power at common law.[15] The fifth amendment of the United States Constitution limits the power of eminent domain by commanding that "private property [shall not] be taken for public use, without just compensation."[16] Although this clause does not expressly prohibit the taking of private property for private use, courts have interpreted it to imply that all takings for private use, whether justly compensated or not, are prohibited.[17] The fourteenth amendment extends this public use limitation to the exercise of eminent domain power by the states.[18]

The federal government did not exercise its national right of eminent domain until 1872.[19] The Supreme Court first recognized the national right of eminent domain when the government's action was challenged in *Kohl v. United States*.[20] Although the federal government had not previously exercised its right of eminent domain, the Court held that the government's nonuse did not negate the existence of the power.[21] In *Kohl*, the government was successful in its quest to appropriate land for the establishment of a post office in Cincinnati, Ohio.[22]

Once the Supreme Court recognized the national right of eminent domain, the lower courts had to apply the doctrine and interpret the public use limitation. The lower courts could not easily define that limitation. One commentator has described

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9. Black's Law Dictionary 470 (5th ed. 1979).

10. I. Levey, Condemnation in U.S.A. § 1 (1969).

11. *See* Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 204 (1978); Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 553 (1972).

12. I. Levey, *supra* note 10, § 2.

13. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 837–38, 183 Cal. Rptr. 673, 676 (1982); I. Levey, *supra* note 10, § 3.02; *The Public Use Limitation of Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599, 602 (1948).

14. I. Levey, *supra* note 10, § 3.01.

15. *Id.* § 3.02.

16. U.S. Const. amend. V.

17. Nichols' The Law of Eminent Domain, *supra* note 1, § 7.01[2]. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984); North Carolina Pub. Serv. Co. v. Southern Power Co., 282 F. 837, 846 (4th Cir. 1922).

18. I. Levey, *supra* note 10, § 3.02.

19. *Id.* § 2.03.

20. 91 U.S. 367 (1875).

21. *Id.* at 373.

22. *Id.* at 368.

the term as "wondrous[ly] elastic"[23] since its definition varies with changing times and conditions. The courts, however, generally have followed two different approaches in attempting to define the breadth of the public use limitation. The narrow view of the public use limitation simply states that the use must be for the public.[24] The public must be entitled as a matter of right to use the taken property.[25] Under this approach, the public use cannot be for the benefit of a particular individual.[26] In contrast, the broad view of the public use limitation is that a taking is for a public use so long as some public advantage or benefit results.[27] Public advantage does not mean that the public is entitled to use the property as a matter of right, but that somehow the use of the property contributes to the general welfare and prosperity of the whole community.[28] Under this approach, the taking of property for public use is not invalid merely because an incidental benefit inures to an individual.[29]

Since the definition of public use varies with changing times and conditions, the case law surrounding the doctrine appears to be irreconciliable. Certain ideas, however, have developed to explain some of these differences. First, "where the question of 'public use' is a close one, the tendency of courts is to be more liberal in favor of permitting a taking where the condemnor is the government or one of its subdivisions or agencies."[30] Second, the courts are more willing to permit a taking for public use if it is impossible to get the land without the assistance of eminent domain than when the land can be obtained in some other manner.[31] Last, the courts look more favorably on a commercial or pecuniary benefit accruing to the public as opposed to a purely aesthetic or amusement benefit.[32]

Although legislatures may make an initial determination that a taking is for a public use, the judiciary is the ultimate decision maker.[33] The legislature's decision raises a presumption that the taking is for a public use, but this presumption is rebuttable.[34] Several assumptions underlie this presumption of constitutionality. First, it is assumed "that the government's decision represents a true public consensus, rather than a mere capitulation to private interests and that the consensus itself is constitutionally acceptable."[35] Second, it is also assumed "that the government has not only followed its own rules and performed its arithmetic correctly but also has respected constitutionally protected interests in distributing social

23. *The Public Use Limitation of Eminent Domain: An Advance Requiem*, *supra* note 13, at 601.

24. NICHOLS' THE LAW OF EMINENT DOMAIN, *supra* note 1, § 7.02[1]; Berger, *supra* note 11, at 204.

25. NICHOLS' THE LAW OF EMINENT DOMAIN, *supra* note 1, § 7.02[1].

26. *Id.*

27. *Id.* § 7.02[2]; Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161–62 (1896).

28. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161–62 (1896); NICHOLS' THE LAW OF EMINENT DOMAIN, *supra* note 1, § 7.02[2].

29. NICHOLS' THE LAW OF EMINENT DOMAIN, *supra* note 1, § 7.08.

30. *Id.* § 7.18[1].

31. *Id.* § 7.04.

32. *Id.*; I. LEVEY, *supra* note 10, § 19.

33. United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896).

34. United States *ex rel* Tenn. Valley Auth. v. Welch, 327 U.S. 546 (1946); Old Dominion Land Co. v. United States, 269 U.S. 55 (1925); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); I. LEVEY, *supra* note 10, § 16; NICHOLS' THE LAW OF EMINENT DOMAIN, *supra* note 1, § 7.16[1].

35. Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 427–28 (1983).

burdens."[36] Unfortunately, these assumptions do not always hold true.[37] A powerful minority can disproportionately influence a legislature.[38] Also, when a statute affects only a small number of citizens, legislators may feel no compulsion to protect the rights of these individuals.[39]

Despite these possible flaws in the legislative process, the courts usually give great deference to a legislative determination.[40] In *United States v. Gettysburg Electric Railway Co.*,[41] the Court set forth the test that the judgment by the legislature would be respected unless the use is "palpably without reasonable foundation."[42] In applying its newly articulated test, the Court held that the government could condemn land necessary for a national park at the Gettysburg battlefield site.[43] The rationale for giving deference to legislative determinations, explained in *Fallbrook Irrigation District v. Bradley*,[44] was that legislatures have the knowledge and familiarity with local conditions necessary to make an informed and well-reasoned decision.[45] The Court went on to state in *Gettysburg Electric* that "what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned."[46]

The importance of local conditions came to the forefront in *Clark v. Nash*[47] when a dispute arose over an attempt to condemn a right of way in order to enlarge an irrigation ditch.[48] Because of the arid climate of Utah, irrigation was necessary for the growth of crops. The Court allowed the condemnation, reasoning that the right to condemn was asserted under a state statute which had been upheld by the state courts.[49] The Court also noted that the public purpose was dependent on the peculiar condition of the soil and climate of Utah.[50] The Court cautioned, however, that it was not "approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."[51]

Just one year later, in *Strickley v. Highland Boy Gold Mining Co.*,[52] the Court tried to clarify the position taken in *Clark*. "[I]t [*Clark*] proved that there might be exceptional times and places in which the very foundations of public welfare could

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36. *Id.* at 428.

37. *Id.*

38. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1485 (1982).

39. *Id.*

40. Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896), represents the only time that the United States Supreme Court reversed a state supreme court decision on eminent domain. The Court reached its decision because the plaintiffs made no claim that the taking of the property was for a public use. *Id.* at 416.

41. 160 U.S. 668 (1896).

42. *Id.* at 680.

43. *Id.* at 669.

44. 164 U.S. 112 (1896).

45. *Id.* at 160.

46. *Id.* at 159–60.

47. 198 U.S. 361 (1905).

48. *Id.* at 362.

49. *Id.* at 368.

50. *Id.* at 367–68.

51. *Id.* at 369.

52. 200 U.S. 527 (1906).

not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent."[53] Thus, as in *Gettysburg Electric*, the legislative declaration of a public use deserved respect unless that declaration was shown to be clearly without reasonable foundation.[54]

From the preceding cases, a legislature evidently needs only to declare that a taking is for a public use for a court to uphold that use. The Court, however, sounded a warning note in *Block v. Hirsh*,[55] stating that a mere recitation in a statute that the act's purpose is "affected with a public interest" is not enough.[56] Legislatures otherwise would be free to destroy all private ownership rights merely by reciting the required public use purpose. The public use doctrine represents a proposition that is more limiting of legislative discretion. Although the Court sounded this warning, it did not apply it in *Block* to find a violation of the public use doctrine. The Court held that the public use requirement was satisfied in *Block* because of the existing emergency situation of a housing shortage during World War I.[57]

In *Rindge Co. v. Los Angeles*,[58] the Court clearly adopted the broad view of the public use doctrine:[59]

> It is not essential that the entire community, nor even a considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use. . . . In determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered.[60]

The Court still perceived its role to be the ultimate decision maker in determining whether a use is public or private. However, as the preceding cases illustrate, that determination can be influenced by local conditions and decisions by state courts.[61] The Court also emphasized that public uses are not limited merely to business necessities, but may also include public health matters such as recreation.[62]

The warning note sounded in *Block* became almost inaudible with the decision in *Old Dominion Land Co. v. United States*.[63] In that case, the Court found that Congress, by implication and not express words, had declared the purpose to be a public use.[64] A public use determination by Congress, the Court held, is entitled to deference unless a court finds that that determination represents an impossibility.[65] This requirement of impossibility places quite a burden on the challenging party.

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53. *Id.* at 531.
54. *Id.* at 529.
55. 256 U.S. 135 (1921).
56. *Id.* at 146. *See also* I. LEVEY, *supra* note 10, § 16.
57. Block v. Hirsh, 256 U.S. 135, 138, 156 (1921).
58. 262 U.S. 700 (1923).
59. *See supra* notes 27–29 and accompanying text.
60. Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923).
61. *Id.* at 705–06.
62. *Id.* at 707.
63. 269 U.S. 55 (1925).
64. *Id.* at 66.
65. *Id.* The Court, however, has never defined the term "impossibility."

Once again, it appears that all a legislature needs to do for a court to uphold its decision is to state that the taking is for a public use.

In *United States v. City of Louisville*,[66] the Sixth Circuit Court of Appeals placed a limitation on the ever broadening scope of deference given to the legislature. The court held that the taking of one citizen's property for the purpose of improving it, with the subsequent selling or leasing of the property to another as a means to reduce unemployment, was not a public use.[67] Therefore, the taking was invalid since the government had taken private property for the benefit of private individuals.[68] The United States Supreme Court handed down a similar judgment in *Thompson v. Consolidated Gas Utilities Corp.*[69] In that case, the government ordered a private person to pay money to another private well owner in an attempt to reduce the amount of gas being produced by private well owners.[70] The Court held that this payment was not a taking for a public use and that one citizen's property may not be taken for the benefit of another private person even if just compensation is paid.[71]

Each time the Court would appear to place limitations on the scope of deference accorded legislative determinations of a public use, its next decision would revert back to endorsing the broad scope of deference. The decision in *United States ex rel Tennessee Valley Authority v. Welch*[72] is no exception. As the next major decision after *Thompson*, *Welch* reiterated the deference standard set forth in *Old Dominion Land Co.*, a standard which requires deference to the determination of Congress unless that decision represents an impossibility.[73]

Another interesting case to emerge in 1946 was *Puerto Rico v. Eastern Sugar Associates*.[74] This case concerned an agrarian reform measure known as the Land Law of Puerto Rico,[75] which was very similar to the Land Reform Act of 1967 challenged in *Hawaii Housing Authority*. Using the principles that had evolved under the public use doctrine, the First Circuit Court of Appeals acknowledged that, to be considered a taking for public use, a taking need not benefit everyone in the community.[76] The court also acknowledged that the legislature has broad authority in determining what takings are for a public use.[77] A court's role is to "determine whether their [the legislature's] enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist."[78] The court concluded that the legislature's determination was reasonable

66. 78 F.2d 684 (6th Cir. 1935).
67. *Id.* at 688.
68. *Id.* at 687–88.
69. 300 U.S. 55 (1937).
70. *Id.* at 78.
71. *Id.* at 80.
72. 327 U.S. 546 (1946).
73. *See supra* notes 63–65 and accompanying text.
74. 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946).
75. *Id.* at 318.
76. *Id.* at 323.
77. *Id.*
78. *Id.* at 324.

because of the social and economic conditions present.[79] Although this conclusion is quite similar to the one reached in *Hawaii Housing Authority*, the Court does not cite *Eastern Sugar Associates* in its *Hawaii Housing Authority* opinion.

The next major Supreme Court pronouncement in the area of the public use doctrine was *Berman v. Parker*,[80] in which the District of Columbia Redevelopment Act of 1945 faced challenge. Through the Act, Congress meant to eliminate slums and substandard housing by using eminent domain to claim the land, subsequently selling or leasing the claimed property to private interests for redevelopment.[81] Congress found that this procedure was the most appropriate means of reaching the desired ends since the ordinary operation of private enterprise could not finance the project.[82] "[T]he power of eminent domain is merely the means to the end."[83] The Court concluded that since Congress is the guardian of public needs and since the Act addressed some of those public needs, the Act was clearly within the realm of Congressional authority.[84] Congress' determination that it was justified in using the power of eminent domain therefore deserved deference.[85] "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[86]

At this stage in the evolution of the public use doctrine, state and federal legislatures evidently have broad discretion in determining whether a taking is for a public use. The courts will defer to the legislature's judgment as long as the taking meets the constitutional requirements that just compensation be paid and that no land be taken except for a public use.

III. *Hawaii Housing Authority v. Midkiff*

A. *Background*

An understanding of the early history of Hawaii is necessary to follow the development of *Hawaii Housing Authority v. Midkiff*.[87] Polynesians settled Hawaii and developed the economy there around an ancient feudal system.[88] No private ownership of land was allowed.[89] The ali'i nui, the island high chief, controlled all the land and assigned it to other subchiefs for development.[90] This system continued until 1840.[91] At that point, King Kamehameha III was under enormous pressure to

79. *Id.*
80. 348 U.S. 26 (1954).
81. *Id.* at 28–29.
82. *Id.* at 29.
83. *Id.* at 33.
84. *Id.*
85. *Id.* at 32–33.
86. *Id.* at 32.
87. 467 U.S. 229 (1984). Although the Court also discussed the issue of abstention, this Comment will address only the Court's public use doctrine analysis.
88. *Id.* at 232.
89. *Id.*
90. *Id.*
91. Kemper, *The Antitrust Laws and Land: An Answer to Hawaii's Housing Crisis?*, 8 HAWAII B.J. 5, 7 (1971).

institute some sort of land reform.[92] He succumbed to the pressure and inaugurated the great *mahele* (land division).[93] Under this program, the King vested two-fifths of the land in native chiefs and gave thirty thousand acres to commoners, with the rest of the land remaining in the government's possession.[94] As plantation agriculture flourished, concentration of ownership and control of land in the hands of a few increased despite the land reform of King Kamehameha III.[95]

By 1960, the concentration of land in the hands of a few significantly impaired the Hawaiian economy. Over ninety-five percent of the land was concentrated in the hands of the state government, federal government, and seventy-two of the largest private landowners.[96] On Oahu, Hawaii's most populated island, twenty-two major private landowners owned and controlled seventy-two and one-half percent of the land.[97] This ownership scheme led to a skewing of the housing market and an inflating of land prices which injured the local economy and hence the public welfare.[98] Renters found it difficult to purchase homes, leaving them dependent on the major landowners for housing. The renters had no bargaining power.

In response to the worsening housing situation, the Hawaii Legislature enacted the Land Reform Act of 1967.[99] In an attempt to reduce the concentration of ownership, the Act authorizes the exercise of eminent domain to purchase property from lessors and transfer the title to lessees.[100] Under the Act, the Hawaii Housing Authority can institute condemnation proceedings when twenty-five or more lessees or more than fifty percent of the residential lease lots within the development tract (whichever number is lesser) have applied to the Authority.[101] A lessee may only purchase one residential lot in fee simple.[102] If a lessee is unable to obtain sufficient financing, then the Act allows the Hawaii Housing Authority to provide financing for up to ninety percent of the purchase price.[103] To qualify as a purchaser under the Act, a person must be eighteen years of age, a bona fide resident of the state with a bona fide intent to reside in the development tract if successful in purchasing the lot, and may not own any fee simple property in that county that is suitable for residential purposes.[104]

The Hawaii Legislature justified its enactment by citing thirteen legislative findings and declarations.[105] In its enumerated findings, the legislature recognized that the serious shortage of fee simple residential land compounded both high

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984); Conahan, *Hawaii's Land Reform Act: Is it Constitutional?*, 6 HAWAII B.J. 31, 33 (1969).
97. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).
98. *Id.*
99. HAWAII REV. STAT. § 516 (1976).
100. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984).
101. HAWAII REV. STAT. § 516-22 (1976).
102. *Id.* § 516-28.
103. *Id.* § 516-34.
104. *Id.* § 516-33.
105. *Id.* § 516-83.

inflation and a rising cost of living.[106] This combination of high inflation, rising cost of living, and shortage of fee simple residential land posed a serious threat to the economy of the state and to the public interest.[107] Therefore, the legislature concluded that the use of eminent domain was necessary to alleviate the problem.[108] The legislature explicitly declared that this use of eminent domain was for a public use.[109]

B. *Analysis of the Courts*

In *Midkiff v. Tom*,[110] the plaintiffs challenged the legislature's finding that its property-transfer plan constituted a public use. The plaintiffs claimed that takings under the Act were for a private use, rather than a public use, since land was taken from one private citizen and given to another.[111] The District Court of Hawaii dismissed the plaintiffs' challenge, reasoning that *Berman* limited the role of the judiciary.[112] This decision limited judicial review of eminent domain questions to determining if a taking is arbitrary and capricious, given the economic rationales underlying the legislature's determination.[113]

The Ninth Circuit Court of Appeals disagreed with the analysis of the District Court and reversed the lower court's decision.[114] The court of appeals found fault with the decision on several different grounds. First, the court pointed out that a sovereign may not take the private property of one citizen and transfer it to another citizen solely for the transferee's private use and benefit.[115] The court recognized that a taking is not invalid merely because some incidental benefit inures to an individual,[116] but found that the private benefit must not be the dominant purpose of the taking.[117] Second, the court stressed that a private purpose cannot be protected merely by a legislative declaration that the taking is for a public use.[118] Third, the court read the decision in *Berman* narrowly.[119] The plan to eradicate slums in *Berman* was based solely on the facts contained in that case.[120] The court argued that the key in *Berman* was that the property was transferred from a private individual to the government, rather than directly to another private individual.[121] *Berman* also

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. 483 F. Supp. 62 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
111. *Id.* at 65.
112. *Id.* at 67.
113. *Id.* at 66–67. For a discussion of *Berman*, see *supra* notes 80–86 and accompanying text.
114. Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
115. *Id.* at 793.
116. *See supra* note 29 and accompanying text.
117. Midkiff v. Tom, 702 F.2d 788, 805 (9th Cir. 1983) (Poole, J., concurring), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
118. *Id. See also* Block v. Hirsh, 256 U.S. 135, 154 (1921).
119. Midkiff v. Tom, 702 F.2d 788, 797 (9th Cir. 1983), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
120. *Id.*
121. *Id.*

involved the scope of judicial deference that a Congressional public use determination deserved.[122] *Berman*, the court argued, did not state that the judiciary owed the same amount of deference to a state legislature as it did to Congress.[123] Therefore, the court reasoned, the rationale of judicial deference to Congress underlying *Berman* did not apply in this case.[124] Last, the court pointed to shortcomings that became apparent when the Housing Authority applied the Act. The Act did not require the Housing Authority to find actual shortages of fee simple property in a county before commencing condemnation proceedings; it could rely on the legislative generalization of statewide shortages.[125] Also, the Act placed no restraint on the purchasers to prevent them from leasing the property to others once they obtained the fee simple title.[126] For these reasons, the court held that the Act constituted an unconstitutional taking for private use.[127]

In *Hawaii Housing Authority v. Midkiff*,[128] the Supreme Court reversed the Ninth Circuit Court of Appeals and upheld the constitutionality of the Land Reform Act of 1967 as involving a taking for the public use.[129] In reaching its decision the Court endorsed a broad reading of *Berman*. As stated in *Berman*, the "legislature . . . is the main guardian of public needs to be served. . . . "[130] The *Berman* Court did not intend to limit the term "legislature" to Congress, but included all state legislatures. Thus, the judiciary must accord state legislatures the same deference as that given Congress.[131] The Court also dispelled the Ninth Circuit's notion that if land is first transferred to an individual rather than to the government, then the use is automatically a private one.[132] Actually, the land need not be used by the public first.[133] "[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[134] This emphasis on purpose suggests that the means chosen to achieve the stated purpose are irrelevant to judicial review of the public use issue. The Court does not use hindsight, but rather looks to see if the legislative determination was reasonable at the time it was made.

The Court held that the only time a court should substitute its judgment for that of the legislature is when the legislature's judgment is palpably without reasonable foundation.[135] As long as the exercise of the eminent domain power is "rationally related to a conceivable public purpose," then the public use doctrine does not prohibit the taking.[136] In determining if the legislation is rationally related to a stated

122. *Id.* at 798.
123. *Id.*
124. *Id.*
125. Midkiff v. Tom, 702 F.2d 788, 804 (9th Cir. 1983) (Poole, J., concurring), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
126. *Id.*
127. *Id.* at 790–91 (majority opinion).
128. 467 U.S. 229 (1984).
129. *Id.* at 241–44.
130. Berman v. Parker, 348 U.S. 26, 32 (1954).
131. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).
132. *Id.* at 243–44.
133. *Id.* at 244.
134. *Id.*
135. *Id.* at 241.
136. *Id.*

purpose, the courts must ask the following two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?"[137] If the answer to both questions is yes, then the court should not interfere with the legislative judgment.

IV. Effects of *Hawaii Housing Authority v. Midkiff* on the Public Use Doctrine

The decision in *Hawaii Housing Authority v. Midkiff* is an opinion that will offer some guidance for the future development of the public use doctrine. Admittedly, as one commentator has noted, Hawaii's early development makes it unique among states in the nation.[138] In other states, courts would probably hold unconstitutional a legislative act that transferred title in real property from one citizen to another by utilizing the power of eminent domain as a taking of property for a private use. In Hawaii, however, the same act was upheld since the taking involved a public use. This difference in outcomes, it might be argued, is the result of Hawaii's unique circumstances. Thus, *Hawaii Housing Authority* is an aberration of the case law surrounding the public use doctrine. However, a better reasoned explanation of the difference is that the case is not an aberration of the case law, but merely a further extension of the principles already developed. The difference in the outcomes can be explained by applying the reasoning of *Fallbrook Irrigation District*.[139] The determination of whether a public use is involved, according to the Court in *Fallbrook Irrigation District*, depends on the "facts and circumstances surrounding the particular subject-matter."[140] Therefore, Hawaii's unique early history is a circumstance that courts must consider when deciding whether a use is public.

Undeniably, the courts have broadened the public use doctrine in recent years. As stated in *Hawaii Housing Authority*, the state need not possess the property first.[141] The property can be transferred from one private party to another without any governmental possession of that property. The implied rationale behind this position is that an unnecessary and time consuming step is eliminated. Requiring the government to possess the property first is an unnecessary, time consuming step. In the past, however, many considered it a necessary one. The requirement forced the government to consider in depth the necessity and reasons for invoking the eminent domain power. Eliminating this requirement broadened the public use doctrine because legislatures need not be as concerned as they once were with the mechanics of transferring the property. Once again, substance triumphs over form.

The expansion of the public use doctrine is due, in part, to the lack of a specific definition for the term "public use."[142] Recently, Oakland, California tried to invoke

137. Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981).
138. Conahan, *supra* note 96, at 40.
139. *See supra* notes 44–45 and accompanying text.
140. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 160 (1896).
141. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243–44 (1984).
142. *See supra* note 23 and accompanying text.

the power of eminent domain to keep the Oakland Raiders football team from leaving Oakland.[143] Although unsuccessful, Oakland's effort did raise the specter of using the power of eminent domain to restrain businesses from fleeing a city in pursuit of more profitable locations. Another municipality has also used the power of eminent domain to attract businesses to the city. In *Poletown Neighborhood Council v. City of Detroit*,[144] a city invoked the power of eminent domain to acquire a parcel of land for a General Motors plant.[145] The Michigan Supreme Court considered the legislative purpose of alleviating unemployment and revitalizing the community's economy to be sufficient to meet the public use requirement.[146] Although courts apparently are willing to accept new uses for the power of eminent domain, these courts evidently still place certain limitations on the expansion of the public use doctrine. The following statement by the Kentucky Supreme Court illustrates these limitations:

> Naked and unconditional government power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections whether they be cast in the fundamental fairness component of due process or in the prohibition against the exercise of arbitrary power.[147]

Although attempts have been made to define more clearly the term "public use,"[148] none of the attempted definitions have been adopted. One commentator has suggested that "[b]y retaining the public use requirement without clearly defining it, the courts have retained perhaps cannily, the prerogative of reviewing the legitimacy and wisdom of particular purposes."[149]

Like other areas of the law, the courts in eminent domain actions will have to consider the tension between the federal government and state governments. States consider the management of state property to be part of their inherent power. As a result, the outcome in an eminent domain case in one state may not be similar to the outcome of the case in another state. The states are required to comply with the fifth and fourteenth amendments of the United States Constitution in eminent domain cases, but other than those limitations federal courts have been reluctant to overturn state public use decisions.[150] In effect, this broadens the public use doctrine since this reluctance has led to states sanctioning many diverse public uses. The broadening of the public use doctrine makes it more difficult for a citizen to challenge the condemnation.

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143. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

144. 410 Mich. 616, 304 N.W.2d 455 (1981).

145. *Id.* at 628–29, 304 N.W.2d at 457.

146. *Id.* at 634, 304 N.W.2d at 459.

147. City of Owensboro v. McCormick, 581 S.W.2d 3, 4–6 (Ky. 1979). The Kentucky Supreme Court struck down the Kentucky Local Industrial Development Act which granted the city the unconditional right to condemn property and convey it to private developers for industrial development. *Id.* at 7–8.

148. *See* Sackman, *Public Use—Updated* (City of Oakland v. Oakland Raiders), in 1983 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 212.

149. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 43 (1980).

150. *See, e.g.*, Puerto Rico v. Eastern Sugar Assocs., 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946).

V. CONCLUSION

One commentator has stated that the public use doctrine no longer serves any useful purpose.[151] He has suggested that "[k]inder hands, however, would accord it [the public use doctrine] the permanent internment in the digests that is so long overdue."[152] Clearly, the courts have rejected that suggestion. Although the public use doctrine has been broadened by the courts in recent years, as a result of the decision in *Hawaii Housing Authority v. Midkiff*, the Supreme Court has made it clear that the public use doctrine remains a viable doctrine in the law today.

The courts still have an important role to perform when overseeing eminent domain actions. The power of eminent domain is a coercive one, and it is only through the courts' application of the limiting doctrine of public use that the legislatures are kept from overstepping their authority.

> [The term "public use"] has generally been applied with sufficient elasticity to meet the needs of the era involved. . . . It would be impractical for a court to insist upon a concept of a public use developed in the early stages of Constitutional history, in a day where it has become necessary for government to enter into so many areas which have heretofore been considered solely reserved for private enterprise. This is not to say, however, that the Court should abandon its function as the ultimate judge to avoid unnecessary waste or illegal activity which in the guise of public welfare may in reality have been designed solely for the private gain of an individual or a private corporation. While the term "public use" must be given an elastic definition so as to keep pace with changing conditions, it is also requisite for the Courts to continue to oversee that the taking involved bears a rational relation to some public need which is deemed so important and necessary to override all private considerations.[153]

As long as governments continue to exercise the power of eminent domain, the doctrine of public use will have to be available to the judiciary to keep legislatures in check. It is the only means by which an owner can challenge a condemnation and thus protect his individual rights.[154] Therefore, it is imperative that the public use doctrine remain a part of the judicial arsenal.

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151. *The Public Use Limitation of Eminent Domain: An Advance Requiem, supra* note 13, at 613–14.
152. *Id.* at 614.
153. I. LEVEY, *supra* note 10, § 17.
154. Note, *supra* note 35, at 410.