

# PUBLIC USE: A VANISHING LIMITATION ON GOVERNMENTAL TAKINGS

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## I. Introduction

On May 30, 1984, the Supreme Court of the United States decided a case that all but buried the public use restraint on the government's power to take private property. In *Hawaii Housing Authority v. Midkiff*<sup>1</sup> a unanimous Court condoned the taking of property by the state's housing authority from large landowners to be resold to leaseholders under the provisions of the Hawaii Land Reform Act of 1967. Justice O'Connor, writing the decision for her colleagues, concluded that nothing in the public use clause of the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment, barred such a transfer.

What is ominous about the Court's failure to discover a constitutional impropriety in this eminent domain procedure is that from its inception, the public use proviso has been understood to be a barrier to governmental transfers of property from one owner to another, unless a clear, pressing public use can be discerned. In this instance, however, the Hawaii legislature used merely its desire to reduce the concentration of ownership in the state as a justification for the taking of property from one set of owners to be resold to another set.

What this case seemingly solidifies is a trend discernible in some state courts in recent years—a trend aided in no small part by a case, *Berman v. Parker*,<sup>2</sup> that the Supreme Court decided in 1954. This

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<sup>1</sup>52 LW 4673 (1984).

<sup>2</sup>348 U.S. 26 (1954).

trend has been to neutralize the public use constraint on the government's exercise of its eminent domain power. The portion of the Fifth Amendment that reads, "nor shall private property be taken for public use without just compensation," is not a grant of power to government; rather it is a limitation—indeed, two limitations—placed upon the power of eminent domain, a power that everyone at the time of the drafting of the Bill of Rights considered an inherent attribute of government. Following the logic of the Fifth Amendment, government can take property only if it adheres to two restrictions. First, the taking has to be for a public use; consequently a taking that simply takes property from one owner and sells it or distributes it to another private owner would clearly fall afoul of this public use proviso. Second, the divested property owner must be paid "just compensation."

The just compensation restraint on governmental takings has not proven entirely unproblematical. Property owners subject to eminent domain proceedings often complain that such ancillary losses as moving expenses and loss of business goodwill go uncompensated under the "fair market value" standard employed in such proceedings. When compared to the evisceration of the public use restraint, however, the just compensation portion of the Fifth Amendment at least is still fairly well intact.

The remainder of this paper reviews the historical development of judicial interpretation of the public use proviso. Section II traces this development up through *Berman v. Parker*, a decision that significantly reversed the earlier limitations placed on governmental takings. Section III examines two state court decisions—*City of Oakland v. Oakland Raiders* and *Poletown Neighborhood Council v. City of Detroit*—that figured prominently in the saga of the courts' apparent indifference to the explicit language of the Fifth Amendment's taking clause.<sup>3</sup> In Section IV we consider the most recent development, *Hawaii v. Midkiff*. Finally, Section V offers some concluding remarks concerning the implications of the *Hawaii* decision.

## II. *Berman v. Parker* Cripples Public Use

With one mighty obfuscation Justice Douglas, in a 1954 decision that managed to mangle the law almost beyond redemption, dealt a devastating blow to the public use limitation upon what government could constitutionally take. Prior to Douglas's coup de grace in *Berman v. Parker*, "public use" had been interpreted as placing at least

<sup>3</sup>183 Cal. Rptr. 673, 646 P. 2d 835 (1982); 304 N.W. 2d 455 (Mich.) (1981).

some limitations upon governmental confiscations. One of the most hallowed of these limitations, adverted to by a plethora of courts, was the stricture that one could not use the power of eminent domain to transfer property from one private individual to another for principally private, profitmaking purposes.

*Berman v. Parker* eroded this limitation, as it decreed that urban renewal—even with the sale of property for development to private contractors—constituted a “public use,” or in Douglas’s much looser reformation of the Fifth Amendment, a “public purpose.”

Even before Douglas’s evisceration of the public use constraint, it had not proven much of a barrier to takings by government, or for that matter to takings by private businesses invested with the power of eminent domain as a delegation from some government. There were numerous instances in various states in which eminent domain was permitted even for transfers between private individuals, usually because such activities had been going on since colonial times, or because they were perceived as serving some desirable public end in furthering the development of the country. Examples of such transactions that transferred property from one private individual to another include the colonial Mill Acts, which carried over after the American Revolution; the practice in certain states of granting eminent domain powers to landlocked owners to take land for access roads; and such other uses as irrigation, drainage, reclamation of wetlands, mining operations, lumbering, and clearing a disputed title.<sup>4</sup>

These exceptions resulted more from the habits and accretions of history than from any consensus among early jurists that private takings in general were permissible. Rather, what judges found odious about transfers from one private individual to another was the injustice involved in government taking one party’s property at the government’s own pleasure and without any constraints and then giving it to another private party for that party’s profit. This judicial distaste can be seen most vividly in a passage from Justice Samuel Chase’s decision in *Calder v. Bull*, decided in 1798. Regarding laws that forcibly transfer property from one individual to another, Justice Chase remarked: “[I]t is against all reason and justice, for a people

<sup>4</sup>Philip Nichols, *The Law of Eminent Domain*, 3d ed., edited by Julius L. Sackman (New York: Matthew Bender, 1980), § 7.62, from which this list is compiled. Nichols states (§ 7.61) that the taking of property for a factory from an unwilling, selfish owner, even if it would benefit the whole community, would be inadmissible. Nichols says that the public mind would instinctively revolt at any attempt to take such land by eminent domain.

to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it.”<sup>5</sup>

Justices still imbued with natural law conceptions of property instinctively recoiled against such transfers. The Supreme Court, however, displayed great deference to the determination by state courts that a particular use constituted a public use, in that the Court never invalidated a single such determination. This deference, as we shall see, extended also to congressional acts, with the Court deferring with increasing subservience to legislative determinations of public use.<sup>6</sup>

By the time the Supreme Court became actively involved in the public use issue, around the turn of the 20th century, two different approaches—one narrow and one broad—had been developed by the state courts. The narrow approach greatly limited governmental adventurism in the field of takings. It limited “public use” to “use by the public,” meaning that even when private companies had been delegated the power of eminent domain, their projects had to be open to the public and the public was entitled to use the property by right. The broad approach was much more flexible and expansive, as it defined “public use” by such nebulous terms as “public advantage,” “public purpose,” “public benefit,” and “public welfare.” The broad approach, therefore, transformed the eminent domain power by making it as extensive as the taxing or police powers of government.

While indecisive in choosing between these two approaches in its early adjudication, the Supreme Court by the 1920s had opted for the broader, more permissive approach. A parallel movement in the state courts transpired in the late 1930s, when federal housing subsidies for states condemning slums were widely upheld, after an initial false start when a federal court declared that the federal government could not take property for such purpose in its own name.

What has transpired in recent decades, in addition to the adoption of the broader view of public use as being “public advantage,” is the Supreme Court’s growing reluctance to interfere once Congress has determined that a taking is for a public use. While such a determination in earlier years was not considered conclusive and judicial review consequently was appropriate, the modern tendency has been

<sup>5</sup>*Calder v. Bull*, 3 Da. 386, 388 (1798).

<sup>6</sup>The Court’s last invalidation on the grounds of failure to satisfy the public use proviso occurred in 1937. See *Thompson v. Consolidated Gas Util. Corp.*, 300 U.S. 55 (1937), in which the Court affirmed a district court decree enjoining the enforcement of a gas proration order of the Railroad Commission of Texas.

to consider such questions almost untouchable by the courts. The slight leeway left open by the earlier cases has been effectively closed in later cases.

In *United States v. Gettysburg Electric Railway Co.* (1896),<sup>7</sup> for example, the Supreme Court allowed that a congressional act authorizing condemnation for the preservation of the Gettysburg battlefield was an appropriation for a "public use." Justice Peckham argued that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts unless the use be palpably without reasonable foundation."<sup>8</sup> He went on to express the Court's well-worn doctrine of obeisance to congressional pronouncements:

In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government.<sup>9</sup>

Thus even though the Court could focus here on no distinct constitutional provision that would grant the federal government the power to take property for monuments, it deduced such power from other provisions, by judicial inference from the power to declare war and raise taxes. Even this loose standard of review for palpable unreasonableness would undergo further emasculation.<sup>10</sup>

In *United States ex rel. TVA v. Welch* (1946),<sup>11</sup> Justice Black went a long way toward removing the Court from being the final arbiter over the question of public use. By an act of Congress the Tennessee Valley Authority (TVA) had been given the authority to condemn all property it deemed "necessary for carrying out its purpose" in constructing the Fontana Dam project. Construction of the dam had created a reservoir that swept away a highway that formed the only reasonable access to the plaintiffs' private property, which was sandwiched between the reservoir and a national park. Instead of constructing a new highway, which it deemed too expensive, the TVA decided to acquire the private land and add it to the national park.

<sup>7</sup>160 U.S. 668 (1896).

<sup>8</sup>*Id.* at 680.

<sup>9</sup>*Id.* at 680.

<sup>10</sup>However, the Court would still insist for a while that the ultimate decision regarding what constitutes a "public use" is a judicial question. See *Cincinnati v. Vester*, 218 U.S. 439, 446 (1930).

<sup>11</sup>327 U.S. 546 (1946).

The six landowners complained that in taking their property, the TVA had acted beyond the authority conferred upon it by Congress. In deciding against the landowners, the Court's majority displayed the utmost deference to congressional and administrative authority. Justice Black wrote: "We think it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority." Finally, dredging up a long-dormant standard that Justice Holmes had enunciated in 1925, when Congress had spoken on the subject of public use, Black declared, "Its decision is entitled to deference until it is shown to involve an impossibility."<sup>12</sup> Exactly what the Court meant by an "impossibility" remains a mystery to this day. What is clear from Black's declaration, though, is that even the cursory standard of review for palpable unreasonableness found in *Gettysburg Electric Railway* had been jettisoned.

These cases set the stage for Justice Douglas to hobble the public use limitation as a restraint upon governmental condemnation. In *Berman v. Parker*, the Court was called upon to determine the constitutionality of a congressional act granting to the District of Columbia the power to acquire through condemnation tracts of land for redevelopment in blighted areas. Lands acquired could be leased or sold to private developers willing to make improvements consonant with a comprehensive general plan drawn up by the D.C. Redevelopment Land Agency. The appellants owned a department store in one of the blighted areas, but the store itself was not in disrepair. They claimed that the condemnation of their property for urban redevelopment constituted a violation of due process and a taking under the Fifth Amendment. Particularly objectionable to them was the feature of the law that might permit their property to be transferred to another private party for its own private gain.

In a decision remarkable for the ease with which it confused the central issues, Douglas and his colleagues concluded that the appellants' "innocuous and unoffending" property could be taken for this larger "public purpose" of remediating urban blight. What should have been clear to Justice Douglas was that the case before him dealt with the federal government's power of eminent domain as exercised by delegation to an agency in the District of Columbia. The issues, then, were whether the use of this power as it affected this particular instance of the taking of an unoffending department store ran afoul of the Fifth Amendment, and whether the act itself was constitutional. What Douglas discerned instead, remarkably, was a case

<sup>12</sup>Id. at 552.

dealing with the federal government's police powers over the District of Columbia.

This inexplicable confusion opened the floodgates for expanding the takings power of government. Why is this so? The police power is another power by which the states control property. Unlike the power of eminent domain, it does not involve confiscation, and consequently no compensation is paid to property owners when use of their property is limited under an exercise of the state's police power. The police power, rather, is a regulatory device by which states place constraints upon the use of private property for the purpose of protecting the "health, safety, morals, and general welfare" of the public. The police power is presumed by virtually all commentators to be an inherent attribute of sovereignty. It is hedged in not by any explicit constitutional restrictions—contrary to the case in eminent domain—but rather by a high court decision that warned that a too-zealous application of the police power will be invalidated because its purpose constitutionally can be achieved only through an exercise of eminent domain, with its attendant compensation. Traditionally, too, an exercise of the police power has been limited by a requirement that the regulation must serve a "public purpose." This conveniently elastic phrase makes possible a wide range of state regulatory behavior, from minimum wage laws, maximum hour legislation, and price fixing to health and safety laws, as long as they serve some rather ill-defined notion of the "public purpose."

"Public purpose" had been considered a more expansive term than "public use," so that what Douglas accomplished by his confusion of the police power with eminent domain in *Berman v. Parker* was the substitution of the more permissive and elastic criterion of the police power's "public purpose" for "public use" in interpreting the eminent domain clause. "Public use" as a constraint on governmental seizures suffered a severe blow at the hands of Douglas's witting, or unwitting, confusion.

With Douglas's opinion in *Berman v. Parker* judicial deference to legislative judgments of public purpose or public use was virtually complete:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . [T]his principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.<sup>13</sup>

<sup>13</sup>*Berman v. Parker* at 32.

If the legislature is “well-nigh” the final arbiter of “public need,” who will protect private rights? The Court apparently lost sight of one of the principal purposes behind the Fifth Amendment’s property clauses: to protect private property owners by limiting governmental confiscations of property to those instances in which an overriding public necessity made the taking necessary. This is the whole point behind the public use proviso.

As Douglas’s opinion unfolds, protections for property rights fade. In one enormously influential passage (destined to be quoted in countless state and federal court decisions on the limits of both the power of eminent domain and the police power, which is not surprising considering that Douglas had so hopelessly confused the standards of the two powers), rhetoric waxed victorious over constitutional limitation. As Douglas wrote:

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.<sup>14</sup>

Judges at all levels of our judicial system are enamored of this passage, for it serves as a convenient peg upon which to hang decisions condoning a wide array of imaginative legislative interferences with private property, putatively in the “public interest.”

*Berman v. Parker* is without doubt the leading case in loosening constitutional restrictions on both the taking of property under the power of eminent domain and the regulation of it under the police power. Lamentably for those who hold the view that the Constitution had as one of its principal purposes the protection of property rights, *Hawaii v. Midkiff* took up where *Berman v. Parker* left off. The Burger court would prove no less hospitable to governmental takings than Justice Douglas.

### III. Two State Courts Take *Berman v. Parker* to its Limit

Recently courts in Michigan and California have seized upon the high court’s reasoning in *Berman v. Parker* and have driven more

<sup>14</sup>Id. at 33.



nails into the coffin of the public use proviso. This trend has led to bizarre consequences, particularly in California, where the Supreme Court of California has declared it permissible for a city to take a football franchise to prevent a team from leaving the city.

In the spring of 1980 the city of Detroit was faced with a virtual ultimatum from General Motors (GM): either come up with clean title to approximately 500 acres for a new Cadillac plant or GM would close its old plant and move its operations to a more hospitable Sunbelt locale. Hard pressed by economic reversals already, the city acceded. An old Dodge plant site would be combined with the homes of 1,362 residents of Hamtramck ("Poletown" to its residents) to form the desired parcel. Acquisition costs would range in the \$200 millions, but GM would pay only \$8 million to the city, and also would receive tax concessions. Supporters of the project claimed that eventually 6,000 jobs would be saved.

Skeptics pointed to the heavy-handedness exhibited by GM. Michigan Supreme Court Justice Ryan, who would eventually dissent from the opinion of his peers upholding the actions of Detroit and its Economic Development Corporation in *Poletown v. City of Detroit*, a case brought by 10 disgruntled Poletowners, had this to say:

The evidence then is that what General Motors wanted, General Motors got. The corporation conceived the project, determined the cost, allocated the financial burden, selected the site, established the mode of financing, imposed specific deadlines for clearance of the property and taking title, and even demanded 12 years of tax concessions.<sup>15</sup>

As the majority of the Michigan Supreme Court viewed the issue in the case, it came down to the following consideration: Did the use of eminent domain here constitute a taking of private property for private use, thereby contravening the Michigan state constitution, which, like that of the United States, bars taking property "for public use without just compensation"? The state legislature, in its Economic Development Corporations Act of 1974, had granted to municipalities the use of the power of eminent domain to provide industrial and commercial sites to assist "industrial and commercial enterprise in locating, purchasing, constructing, reconstructing, modernizing, improving, maintaining, repairing, furnishing, equipping, and expanding in this state and its municipalities" to prevent and alleviate conditions of unemployment. The act declares that the functions delegated to municipalities under the act constitute an essential "public purpose." However, the Michigan Supreme Court queried:

<sup>15</sup>*Poletown Neighborhood Council v. City of Detroit* at 470.

Is it legitimate for a municipality, under this act, to condemn private property to be transferred to another private party to build a plant that would add jobs and taxes to the economy?

What the Poletowners objected to was not the declaration by the legislature that programs to alleviate unemployment and promote industry constitute essential "public purposes" but rather the constitutionality of using the power of eminent domain to condemn one person's property and then convey it to another private entity, ostensibly to bolster the economy. They contended that there is a distinction in the law between "public use" and mere "public purpose," the former being a much more limiting notion, limiting the exercise of eminent domain to instances in which there will be a direct public use of the property taken, or at the very least a sense in which the public is the direct beneficiary of the taking. In this instance, they argued, there was only an incidental benefit to the public from the taking, with the principal beneficiary being none other than GM in its profit-making capacity, a decidedly "private use."

Detroit and its Economic Development Corporation disputed the Poletowners' contention that the GM taking was not a constitutionally legitimate public use. Rather, the city pled, the taking of this land to create an industrial site that would be used to combat unemployment and fiscal distress, constituted a "controlling public purpose." The fact that the land once acquired would be transferred to a private manufacturer did not defeat the predominant "public purpose" embodied in the taking.

In its *per curiam* decision the court summarily dismissed the argument of the Poletowners that a legal distinction exists between "public use" and "public purpose." Both terms, the court concluded, were used interchangeably and were synonyms for "public benefit." Therefore the sole issue remaining was whether this condemnation amounted to a taking for private use, thus being constitutionally prohibited, or was primarily for public benefit and only incidentally, or secondarily, for private profit, and thus was constitutionally permissible. In other words, was the condemnation primarily for public or private use?

The court paid great deference to the judgment of the state legislature. It noted that the legislature had determined that government actions of this type serve a public purpose and therefore that the "Court's role after such a determination is made is limited." The determination of what "public purpose" encompasses is a legislative function, subject to judicial review, but usually not reversible "except in instances where such determination is palpable and manifestly arbitrary and incorrect." As has become habitual in these cases, the

court invoked the Supreme Court's decision in *Berman v. Parker* for good measure: When the legislature speaks, the public interest has been declared in terms "well-nigh conclusive."

The Michigan Supreme Court concluded that in this case clear benefits would accrue to the municipality in the form of alleviating unemployment and revitalizing the city, while a private benefit would accrue to GM only as an "incident thereto." The court's parting note was a homily to ad hoc decision making; it cautioned that the court's decision may not necessarily be the same in other cases where the public benefit may not be so clear and significant.

Two justices dissented from the majority's decision. Both disparaged the notion that courts ought to pay great deference to legislatures in the determination on public use. Justice Fitzgerald wrote: "If a legislative declaration on the question of public use were conclusive, citizens could be subjected to the most outrageous confiscation of property for the benefit of other private interests without redress." Both justices viewed the Poletown taking as one inspired by GM's desire for private gain, with only incidental benefit to the public. For them, clearly, the public use restriction had been transgressed.

The case of the Oakland Raiders is even more ominous. When the Oakland Raiders deserted their fans for the greener pastures of Los Angeles, thereby diminishing Oakland's municipal treasury, the city fathers, having exhausted all other remedies to retain the team, tried a novel ploy. Why not seize the team under Oakland's power of eminent domain? The California Supreme Court approved this approach by permitting the city of Oakland to pursue its case in a trial court.

Justice Richardson, writing for the majority, focused on two principal issues: first, whether intangible property (here, a football franchise and all of the property rights attendant upon that ownership) can be taken under eminent domain, and second, whether the public use constraint upon the condemnation power precludes an action of this type. The city contended that what it sought to condemn was "property," and hence subject to established eminent domain law, and that the validity of its public use contention must be determined by a court after a full trial adducing all the relevant facts. The Raiders argued that, on the contrary, eminent domain does not permit the taking of "intangible property" unrelated to realty, thereby precluding the taking of their football franchise, a "network of intangible contractual rights." On the second point, the Raiders denied, as a matter of law, that the taking could be for a "public use."

On the first issue the court concluded that intangible property is just as subject to confiscation as real or personal property. Franchises, material men's liens, contracts, bus systems (including routes and operating systems), and private utilities have all been taken by various organs of government and the takings have been upheld by the courts. Furthermore, Richardson could discern no constitutional or statutory barrier to the taking of such intangible property. Thus, despite the court's inability to discover any precedent for the taking of a football franchise, it concluded that sufficient precedent existed for the taking of other intangible property, and therefore no bar to this taking could be discerned on this ground.

The public use issue resolved itself in a manner remarkable only to those ignorant of the evisceration of the public use constraint in recent years. After rehearsing the refrain that public use is a use that concerns the whole community or promotes the general interest, but that it is "not essential that the entire community, or even any considerable portion thereof, shall directly enjoy or participate in an improvement," the court grudgingly acknowledged that no case anywhere has ever held that a municipality can acquire and operate a football team. Nevertheless Justice Richardson found sufficient analogy in other recreational purposes pursued by governments and upheld by courts to conclude that the "operation of a sports franchise may well be an appropriate municipal function." If government can acquire a baseball field in order to construct recreational facilities, employ eminent domain to take land for a county fair or to build an opera house, or take land for parking facilities at a stadium, why not this, the court wondered.

The ensuing passage in Justice Richardson's decision dramatically underscores my fear that the public use constraint as currently understood is nearly bankrupt. "A public use defies absolute definition," Richardson proceeds, quoting an earlier case, "for it changes with varying conditions of society . . . changing conceptions of the scope and functions of government." His next claim is even more troubling:

While it is readily apparent that the power of eminent domain formerly may have been exercised only to serve traditional and limited public purposes, such as the construction and maintenance of streets, highways and parks, these limitations were not imposed by either constitutional or statutory fiat. Times change.<sup>16</sup>

What this implies is that once the conventional notions of judges change concerning the proper limits of government, constitutional provisions can be simply read into oblivion.

<sup>16</sup>City of Oakland v. Oakland Raiders at 680.

One member of the court, Chief Justice Rose Bird, entertained serious reservations about the wisdom of Oakland's action and the possible future ramifications of any holding that an organ of government has the power to take an ongoing business to prevent it from leaving a locality. What particularly troubled her was not only the novelty of the court's interpretation of eminent domain principles but the potentiality for abuse of such a boundless power as the court propounded. If the city of Oakland were allowed to take the Oakland Raiders, then where could the line be drawn in the future? Thus,

if a rock concert impresario, after some years of producing concerts in a municipal stadium, decides to move his production to another city, may the city condemn his business, including his contracts with the rock stars, in order to keep the concerts at the stadium? If a small business that rents a store-front on land originally taken by the city for a redevelopment project decides to move to another city in order to expand, may the city take the business and force it to stay at its original location? May a city condemn *any* business that decides to seek greener pastures elsewhere under the unlimited interpretation of eminent domain law that the majority appear to approve?<sup>17</sup>

These two cases proved providential, for the Supreme Court, in very short order, would put its seal of approval upon this trend toward reading the public use proviso out of the Bill of Rights.

#### IV. *Berman v. Parker* Comes to Fruition

The Hawaii Land Reform Act of 1967 sought to address the problem of a perceived shortage of fee simple residential land in the islands, with an attendant "artificial inflation of residential land values." The state legislature viewed the land pattern as imposing "financially disadvantageous" terms, restricting the freedom of those who wished to fully enjoy the land, and favoring the few landowners over the many.<sup>18</sup> The solution reached was ambitious. Homeowners who currently leased their land could invoke the aid of the Hawaii Housing Authority to take the land by eminent domain and then repurchase it at "fair market value" from the authority. When challenged by a large landholding trust, this taking provision was found not violative of the public use restriction of the Fifth Amendment by the United States District Court for the District of Hawaii. The United States Court of Appeals for the Ninth Circuit found otherwise, with the two-judge majority concluding that, as one of them wrote, "In

<sup>17</sup>Id. at 683, Justice Bird, dissenting, and concurring opinion.

<sup>18</sup>Hawaii Revised Statute, §§ 516-83.

my view, the Hawaii statute accomplishes . . . [an] invalid result, for if it does not constitute a transfer for the private use of another, that term can have no meaning.”<sup>19</sup>

The case eventually found its way to the Supreme Court. Justice O’Connor, writing for a unanimous Court, began her analysis by rehearsing the Hawaii legislature’s finding that as a heritage from Hawaii’s early monarchical days of feudal land tenure, an oligopolistic pattern of landownership persisted in the islands. While the state and the federal government owned 49 percent of Hawaii’s land, 47 percent was in the hands of a mere 72 private landowners. The eminent domain solution was adopted by the legislature, in preference to an alternative scheme that would have required landowners to sell to their lessees, because the landowners were leery of the federal tax consequences of outright sale. Indeed, the landowners maintained that these tax liabilities were the primary reason for their choice to lease instead of sell their land in the first place.

*Berman v. Parker*, not surprisingly, served as the starting point for O’Connor’s analysis of whether the act violated the Fifth and Fourteenth amendments by falling afoul of the public use requirement. Here *Berman*’s confusion over police power versus eminent domain power, as I previously discussed, came to full fruition. In finding that no transgression of the public use proviso was triggered by the act, the Court’s decision relied heavily upon that confusion. The Court’s decision quoted extensively from Justice Douglas’s remarks, particularly those equating an eminent domain case with “traditionally . . . a police power” issue and concluding that “Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.” Deference to legislative judgments is also endorsed, in keeping with *Berman*.

The critical passage in the Court’s decision, with its elliptical language but clearly discernible intent, is worth quoting in full:

The “public use” requirement is thus coterminous with the scope of a sovereign’s police power. There is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is “an extremely narrow” one.<sup>20</sup>

The first sentence of this passage is perplexing. How can a limitation (that is, the public use requirement) be coterminous with a state’s power to regulate (that is, the police power)? The remainder

<sup>19</sup>*Midkiff v. Tom*, 702 F. 2d 788, 805 (1983), Justice Poole’s concurring opinion.

<sup>20</sup>*Hawaii v. Midkiff* at 4676.

of the passage, however, makes the Court's meaning unmistakable. What the Court now contends is that the eminent domain power is as broad as the police power—that whatever legislatures can regulate, they can also take. This makes explicit what is still only implied in *Berman*. Why is this so significant? Because if the police power is almost unlimited in its purview (as indeed it has been since the Court abandoned substantive due process in the late 1930s), then so is eminent domain. This, in effect, reads the public use clause as a limitation on government takings out of the Fifth Amendment. Following this reasoning, if a legislature determines that a public purpose is served by taking one individual's property and giving it to another, one would imagine that only the most blatant seizures, clothed in no public purpose language, would fail the Court's test. If the Court refuses to pierce the veil of an act's justificatory language and examine the substance of its public use claim, then the clear language of the Fifth Amendment means nothing. It is just such a strict scrutiny that the United States Court of Appeals for the Ninth Circuit was willing to undertake, and the Supreme Court was not. Their diametrically opposed conclusions, then, should come as no surprise.

The criticism of appeals court Justice Alarcon of the district court's analysis is just as pertinent a challenge to the subsequent reasoning of the high court:

To hold . . . that the public use limitation is subsumed under a "police power/due process analysis" . . . would be to ignore the explicit language of the constitution and to disregard the fifth amendment protections granted to citizens of the states under the fourteenth amendment.<sup>21</sup>

By employing the much looser police power/due process test, under which an act need only be "rationally related to a conceivable public purpose," the Supreme Court had no difficulty upholding the Hawaii Land Reform Act. If regulating oligopolies is a legitimate exercise of the police power, and if willing buyers are unable to buy lots at "fair prices," then the Hawaii legislature's solution is a "comprehensive and rational approach to identifying and correcting market failure."<sup>22</sup> Whether the scheme holds out any likelihood of achieving its stated goals is not for the court to decide, said Justice O'Connor, repeating a refrain heard continuously since the late 1930s.

<sup>21</sup>Midkiff v. Tom at 799.

<sup>22</sup>Hawaii v. Midkiff at 4676. But is this a case of market failure? As Justice O'Connor herself pointed out earlier, landowners had been dissuaded from selling their land because of governmental policy; that is, punitive federal tax liabilities. This hardly constitutes market failure, but rather suggests governmental failure.

The reason why anyone other than a lawyer should care about *Hawaii v. Midkiff* is that by effectively neutralizing the public use limitation on government takings, the Supreme Court has opened the floodgates. Following this decision, would it be a legitimate exercise of eminent domain for a state to declare that it is a public purpose for tenants to own their apartments and then to condemn apartment houses and resell the units to their tenants? Evidently it would be legitimate, given suitable public purpose verbiage in the appropriate legislative act. Why not take a football franchise away from an owner who wants to move the team and transfer the team to a new owner?

And why should landowners lease their land when doing so could subject them to a forced sale to their tenants? This question should have given the Court pause, as it did one member of the appeals court. During the last 50 years, however, the Supreme Court has steadfastly refused to examine the cogency of legislative schemes. Now, in *Hawaii v. Midkiff*, the Court has extended its extremely loose standard of review of economic regulation under the due process clause to eminent domain proceedings. The Court has done so despite the explicit language of the Fifth Amendment: no "taking" without a public use. The modern Court has been leery of anything that may suggest the activist measures of the old Court of the early part of this century, a Court that struck down many regulatory measures as violations of the due process clause of the Fifth and Fourteenth amendments. Even if one endorses such judicial quiescence on property rights issues, which I do not, the eminent domain cases are different than due process adjudication. This is precisely because the takings clause of the Fifth Amendment is explicit in imposing limitations on takings, whereas the due process clause is much more nebulous, hence subject to judicial fads. The takings clause of the Fifth Amendment should not be so casually read out of the Constitution.

## V. Conclusion

Will *Hawaii v. Midkiff* be another *Berman v. Parker* in the sense that the latter case has had such far-reaching effects in weakening constitutional protection for property rights? My expectation is that it probably will. An early harbinger comes from the California Supreme Court. In *Nash v. City of Santa Monica*, decided in October 1984, that court rejected the challenge to a rent control ordinance raised by a landlord. Nash objected to a portion of that ordinance which prohibits the removal of rental units from the market by demolition. He raised due process objections after the rent control board had



denied him permission to demolish his building. His contention was that there must be a limit on the state's power to compel an individual to pursue a business against his will.

In rejecting Nash's contention, the court's majority opined that even if the rent control ordinance constrained the landlord's options—so that he only could escape his landlordly obligations by selling his property—he was *no worse off than the landowners in Hawaii v. Midkiff*. If it is permissible for a state to compel a sale of property from one private party to another, then what is wrong with constraining a landlord's options for the use of his property?

Just like *Berman*, *Hawaii v. Midkiff* seems to be spawning progeny in areas of the law beyond eminent domain, for this plaintiff raised due process, not a takings complaint. This does not bode well for the protection of property rights in the future.