THE STATUS OF THE PUBLIC USE REQUIREMENT: POST-*MIDKIFF*

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When we depart from the natural import of the term "public use," and substitute . . . that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property.[1]

I. INTRODUCTION

The power of eminent domain enables a government, upon payment of just compensation, to condemn a person's private property. This extraordinary power is subject only to the requirement that condemnation be for a legitimate public use.[2] The term "public use," however, has eluded precise definition.[3] Although "public use" once was

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1. Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9, 60 (N.Y. 1837) (Tracy, Sen., concurring).

2. The fifth amendment to the Constitution contains the provision generally referred to as the public use clause. The provision states in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Read literally, the clause does not prevent the government from taking property for private use, but only states that when property is taken for public use, compensation must be paid. Nevertheless, courts have consistently viewed the clause as an implicit prohibition against takings for private use. 2 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 7.01[2] (rev. 3d ed. 1983) [hereinafter cited as 2 NICHOLS); *See also* Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n., 16 Ill.2d 539, 543, 158 N.E.2d 766, 768 (1959) (in absence of constitutional authorization, general rule is that property cannot be taken for private use).

3. 2 NICHOLS, *supra* note 2, at § 7.02.

thought to require public ownership,[4] courts have gradually expanded the concept to include transfers to private individuals when such transfers ultimately benefit the public. State and local authorities, recognizing the effectiveness of condemnation as a tool for social and economic reform, constantly seek to widen the scope of the eminent domain power through redefinition of the term "public use."[5]

These attempts have met with nearly unanimous judicial approval. Thus, when the Hawaii legislature decided to break up the large, landed estates present within Hawaii, eminent domain provided a ready vehicle. The major landowners in Hawaii for many years had resisted pressure by the legislature to sell off large portions of their residential property, preferring instead to lease it out under long-term lease agreements.[6] Consequently, the legislature enacted the Hawaii Land Reform Act of 1967,[7] whereby tenants under these long-term leases could petition to have the property condemned and transferred to them in fee. In *Hawaii Housing Authority v. Midkiff*,[8] the United States Supreme Court upheld this radical approach to land reform, ruling that the deconcentration of fee simple ownership was a legitimate public purpose.[9]

Midkiff is the most recent in a line of cases that has stretched the

4. *See infra* notes 28-30 and accompanying text.

5. With a substantial degree of success, condemning agencies have attempted to extend the public use label to a wide array of activities. *See, e.g.*, City of Phoenix v. Phoenix Civil Auditorium & Convention Center Ass'n., 99 Ariz. 270, 277, 408 P.2d 818, 822 (1965) (construction of convention center valid public use); City of Oakland v. Oakland Raiders, 31 Cal.3d 656, *modified*, 32 Cal.3d 60, 73, 64 P.2d 835, 841 (1982) (acquisition of sports franchise may constitute public use); Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 636, 304 N.W.2d 455, 459 (1981) (per curiam) (construction of General Motors factory satisfies public use requirement); Courtesy Sandwich Shop v. Port of New York Auth., 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405, 240 N.Y.S.2d 1, 6, *appeal dismissed*, 375 U.S. 78 (1963) (activity functionally related to construction of World Trade Center meets public use test). *But cf.* Baycol, Inc. v. Downtown Dev. Auth., 315 So.2d 451 (Fla. 1975) (building of shopping center does not constitute public use).

6. 1975 Hawaii Sess. Laws Act 184 § 1, *cited in* Midkiff v. Tom, 702 F.2d 788, 815 (9th Cir. 1983), *rev'd sub nom.* Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984). The landowners' reluctance to sell large tracts of property was in response to their fear of adverse tax consequences. *See* Brief for Appellants at 2, n.6, Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984) [hereinafter cited as Brief for Appellants].

7. 1967 Hawaii Sess. Laws Act 307 (codified as amended HAWAII REV. STAT. § 516 (1976)).

8. 104 S.Ct. 2321 (1984).

9. *Id.* at 2331.

public use limitation to its outer boundary. Indeed, one might reasonably ask, as courts have been doing for nearly 150 years,[10] whether there remain any discernible restraints on a government's power to acquire private property.

This Note will argue that in cases when property is condemned for transfer to private individuals, claims of public benefit should not be left to speculation. Courts must require condemning agencies to reveal the facts upon which their decisions rest so that a reviewing court can determine effectively whether a public purpose actually exists. Part II examines the historical development of the public use limitation, paying particular attention to the situations in which legislatures have most frequently applied the doctrine. This section also reviews judicial responses to the various applications. Part III analyzes *Midkiff* in light of both precedent and the unique land situation present in Hawaii. Part IV identifies the major problems with an expansive reading of the public use requirement and suggests approaches to re-establish the doctrine as an effective limitation on eminent domain.

II. HISTORICAL DEVELOPMENT OF THE PUBLIC USE LIMITATION

A. *Genesis*

While scholars have engaged in lively debate, one can probably trace the birth of the eminent domain power to the early days of the Roman Empire.[11] Etymological birth, however, did not occur until the seventeenth century when Hugo Grotius, describing the relationship between property and the state, applied the term "*dominuim eminens*."[12] Traditionally, justification for a sovereign's right to expropriate private property has rested on the premise that such power is essential to effec-

10. *See supra* note 1 and accompanying text.

11. Historians often cite the Roman aqueducts and the long, straight roads running through the Empire as evidence that some type of expropriation power existed. It appears, however, that takings during this time were without compensation and without meaningful legal proceedings to determine the validity of government action. *See* Jones, *Expropriation in Roman Law*, 45 LAW Q. REV. 512, 516 (1929); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554 (1972). Other scholars, most notably Nichols, doubt that the Romans recognized any power of expropriation and claim that they built roads and aqueducts on primarily conquered territory that the government possessed. *See* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.2[1] (rev.3d ed. 1983) [hereinafter cited as 1 NICHOLS].

12. 1 NICHOLS, *supra* note 11, at § 1.12[1] (citing H. GROTIUS, DE JURE BELLI ET PACIS 20 (1625)).

tive government.[13] The accepted theory is that eminent domain is an inherent attribute of sovereignty that arises simultaneously with the formation of government.[14]

The civil law writers, however, contributed much more to the evolution of eminent domain law than a useful nomenclature. Undoubtedly concerned with the awesome magnitude of the power to condemn, as well as with eminent domain's offensiveness to notions of private ownership of property, Grotius and his contemporaries searched for some limiting principles.[15] They agreed that the state should limit its exercise of eminent domain to situations affecting the public good, but were in disagreement concerning the precise standard to apply to such a determination.[16] These differences, however, did not diminish the profound effect their discourse had on the development of the public use doctrine in America.

Throughout the Colonial period in America, the eminent domain power received very little attention. This was due primarily to the fact that there existed an abundance of undeveloped land so that governments rarely needed to turn to private property when they felt a need to expand.[17] If condemnation became necessary, the only issue likely

13. *See* Kohl v. United States, 91 U.S. 367, 371-72 (1875) ("The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.").

14. Professor Stoebuck questions the fundamental soundness of the inherent power theory, taking issue with the assumption that government would cease to function if it did not have the power to condemn. Nevertheless, he admits that American courts and commentators approve the theory. Stoebuck, *supra* note 11, at 559-60.

15. John Locke, perhaps the most influential of these civil law writers, was reluctant to recognize a sovereign right to seize private property. Locke wrote:

> The supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society which was the end for which they entered into it; too gross an absurdity for any man to own.

J. LOCKE, OF CIVIL GOVERNMENT 187-88 (Everyman's Library ed. 1924) (1st ed. n.p. 1690) (quoted in Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. REV. 409, 412 n.16 (1983)).

16. Stoebuck, *supra* note 11, at 586, 595. Their differences were basically matters of degree. For example, Grotius believed that private property could be taken for "public advantage," H. GROTIUS, *supra* note 12, at 385, while Pufendorf took the stricter view that it had to be for "necessity of the state." S. PUFENDORF, DE JURE NATURAE ET CENTIUM 1285 (C. and W. Oldfather trans. 1934).

17. *See* Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 600 (1949). The author also points out that the effect of a

to be in dispute was whether the state had to pay compensation.[18] By the end of the seventeenth century, landowners injured by eminent domain usually could obtain some form of court hearing to establish their damages.[19] With respect to the actual purposes for which government might validly condemn land, however, there seemed to be very little concern. Whatever the reason for this lack of interest,[20] it is clear that the public use doctrine remained largely undeveloped, or at least unarticulated, prior to the American Revolution.[21]

The draftsmen of the federal Constitution, however, were well versed in the teachings of the civil law writers and adopted many of their ideas on the sanctity of private property.[22] Accordingly, James Madison's draft of what eventually became the fifth amendment included the precursor to the modern public use limitation: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[23] This language was amended

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taking was less dramatic because of the large amount of unoccupied land on which the condemnee could relocate. *Id.*

The first recorded uses of eminent domain in the colonies involved the construction of roads and mill dams. Nichols reports that the first statute authorizing the condemnation of private property for the construction of public roads appeared in Massachusetts in 1639. 1 NICHOLS, *supra* note 11, at § 1.22[2].

18. Because of the abundance of undeveloped land, governments originally did not feel an obligation to pay compensation. Note, *supra* note 17, at 600, n.6; *see also* Stoebuck, *supra* note 11, 572-88 (discussion of development of just compensation requirement).

19. *See* Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 13 (1983).

20. Many believe that the British rarely abused the expropriation power, because there was seldom a need to analyze the public use limitation. Some suggest, however, that the colonists simply never assumed that the government could take private property for anything but a public purpose. Meidinger, *supra* note 19, at 17; Stoebuck, *supra* note 11, at 594.

21. At the time of the signing of the Declaration of Independence, only two state constitutions included provisions dealing with public use of expropriated land. The Pennsylvania provision, for example, read: "But no part of a man's property can be justly taken from him, or applied to public uses, without their own consent." PA. CONST. of 1776, Declaration of Rights, art. VIII. *See also* VA. CONST. of 1776, Bill of Rights § 6. The absence of language directly limiting the government's ability to take land for nonpublic uses suggests that there was very little fear of possible abuses of the eminent domain power. *See* Stoebuck, *supra* note 11, at 591.

22. *See* Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 68-71 (1931); 2 NICHOLS, *supra* note 2, at § 7.01.

23. 1 ANNALS OF CONG. 433-36 (J. Gales ed. 1789), *reprinted in* Meidinger, *supra* note 19, at 17.

slightly to its present form: "nor shall private property be taken for public use, without a just compensation."[24] Though many posit that this modification signified the Framer's intent to dilute the original language, evidence of such an intent is considerably lacking.[25] The only clear inference to be drawn from the drafting process is that the public use limitation emerged as a largely undefined concept that would receive most of its shaping from the courts.[26]

B. *Early Judicial Treatment*

State courts were mainly responsible for developing the contours of eminent domain law.[27] From the beginning, two distinct views defined when the government could properly condemn private property. Under the narrow view,[28] adopted by the majority of early courts, the state could take private property only in those cases in which it guaranteed the public the right to use such property. In other words, as courts often declared, the government could not take property from A and give it to B.[29] Courts adopting the narrow view frequently relied on principles of natural law to support their construction of the public

24. U.S. CONST. amend. V.

25. *See* Meidinger, *supra* note 19, at 17. Meidinger suggests that it would be equally plausible to assume that the Framers were simply economizing their use of language. *Id.*

26. *Id.* at 19.

27. Until 1875 courts did not recognize that the federal government had its own eminent domain power. *See* Kohl v. United States, 91 U.S. 367, 371-72 (1875). Prior to 1875, if the federal government needed certain land it prodded the state governments to condemn the land on the federal government's behalf. *Id.* at 373. This practice was satisfactory so long as the state courts upheld the condemnations. When state courts refused to do so, see for example, Trombley v. Humphrey, 23 Mich. 471 (1871), it became necessary for the federal government to assert its own eminent domain power. *Kohl*, 91 U.S. at 373.

Not until 1897 did the Supreme Court hold that the public use limitation of the fifth amendment applied to the states through the due process clause of the fourteenth amendment. *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 236 (1897). Thus, prior to 1897, aggrieved landowners had difficulty getting into federal court.

28. Some commentators describe the narrow view as the "use by the public" test; this Note will sometimes refer to it as such.

29. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (seriatum opinion) (legislature cannot enact law authorizing it to take property from A and give it to B); Taylor v. Porter & Ford, 4 Hill. 140, 145 (N.Y. 1843). In *Taylor*, the court stated more forcefully:

> [I]f there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of

use clause.[30]

As society expanded, a broader view of public use began to develop. Under the broader approach, courts equated public use with public advantage and upheld condemnations that resulted in some tangible public benefit.[31] This view began to gain acceptance in the first half of the nineteenth century as legislatures and courts sought to encourage private development of the nation's vast resources.[32] This expansion of the definition of public use sparked a proliferation of condemnation actions; some courts responded to that liberal trend by reverting to the narrow "use by the public" standard.[33]

The conservative backlash, however, was short lived. The strictures of the narrow view began to cause difficult conflicts, particularly in the manufacturing states in which exploitation of natural resources was es-

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their authority if they can take the property of A, either with or without compensation, and give it to B.

Id. at 145.

Adoption of a broader view of public use, see *infra* text accompanying note 31, greatly undercuts the statement that governments cannot take property from A and give it to B. Only jurisdictions adhering to the narrow view still use similar language when striking down a taking. *See, e.g.*, City of Owensboro v. McCormick, 581 S.W.2d 3, 5 (Ky. 1979). The court stated:

> [N]aked and unconditional governmental 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. . . .

Id. One should note that even this language seems to allow the forced transfer of property from A to B, where B's use is found to be predominantly public.

30. Gardner v. Village of Newburgh, 2 Johns. Ch. 162 (N.Y. 1816), illustrates these courts' reliance on natural law principles. A New York statute authorized a village to take water from a nearby spring, but did not require the village to compensate the spring's owner. Ordering the village to pay compensation despite the absence of constitutional language to that effect, Chancellor Kent thought it "a clear principle of natural equity, that the individual, whose property is thus sacrificed, must be indemnified." *Id.* at 164 (citing Grotius, Pufendorf and Bynkershoeck). *See generally* Grant, *supra* note 22.

31. *See* 2 NICHOLS, *supra* note 2, at § 7.02[2].

32. *See* Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 617 & n.13 (1940). Railroad development was the most significant factor in the expansion of the public use doctrine during this period. These railroads were privately owned, profit motivated concerns, yet courts generally found that the benefit derived by the public from their operation outweighed the incidental private benefit. *See, e.g.*, Buffalo & N Y.R.R. Co. v. Brainard, 9 N.Y. 100, 108 (1853) (citing Bloodgood v. Mohawk Hudson R.R., 18 Wend. 9 (N.Y. 1837)).

33. For a concise discussion of the case law during this period see Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 206-12 (1978).

sential to the maintenance of growing industrialism.[34] In a characteristic display of functional jurisprudence, sympathetic courts began to carve out exceptions to the narrow view in cases in which they thought condemnation was necessary to protect or enhance the general welfare.[35] Eventually, these exceptions swallowed the rule.[36]

The subsequent wavering between the broad and narrow views has led most courts and commentators to conclude that the distinction contributes little to the determination of what uses satisfy the public use clause.[37] This finding recognizes that neither view can provide acceptable results in every situation in which condemnation is sought.[38] To the extent that courts maintain the distinction today, most will fol-

34. *Id.* at 619.

35. *See* M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977). Horowitz argues that beginning with the American Revolution, and extending until about 1860, a major transformation of our legal system took place. Primarily due to the great social struggle that was taking place in our developing nation, courts were forced to bend the formerly immutable common law doctrines. Thus, it came to be during the nineteenth century that common law judges played a central role in accommodating social change. *Id.* at 1, 63.

36. A leading case exemplifying the return to the broad view is Murdock v. Stickney, 62 Mass. (8 Cush.) 113 (1851), in which the court upheld a statute authorizing mill owners to build dams for the operation of their mills. *See id.* at 117. The obstructions caused flooding on the lands of upstream property owners who, under the statute, were limited to compensation. Aware that the statute was in direct conflict with the "use by the public" approach, the *Murdock* court sidestepped the issue by stating that, in effect, no taking had occurred. *Id.* at 116. The statute was merely an exercise of the police power that authorized the mill owner to provide a needed public service, but did not allow him to use the land of his neighbor. *Id.* To the extent that he did so, the landowner must be compensated. The end result, of course, was that a taking had occurred; nevertheless, many courts accepted such rhetoric as a way around the narrow rule. *See* Amoskeag Mfg. Co. v. Head, 56 N.H. 386 (1876), *aff'd sub nom.* Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885); Great Falls Mfg. Co. v. Fernald, 47 N.H. 444 (1867).

Courts became even more adept at developing ways to evade the use by the public test. For example, some courts ruled that so long as the public had a theoretical right to use the property taken, the public use clause was satisfied. Thus, government could take land to construct a railroad that would ultimately service a single logging company. Goose Creek Lumber Co. v. White, 219 Ky. 739, 294 S.W. 494 (1927). *See generally* Nichols, *supra* note 32, at 621-23 and cases cited therein.

37. 2 NICHOLS, *supra* note 2, at § 7.02[3].

38. *Id.* Nichols points out that under the use by the public test, courts should uphold condemnations for hotels and restaurants because such establishments are required by law to serve all the public without discrimination. Conversely, under the broad view of public advantage, the construction of a highway in a remote rural area might not be of sufficient public benefit to justify a taking. *Id.* at §§ 7-41 to 7-42.

low the broader public benefit standard.[39] Thus, no clear standard emerged from the nineteenth century judicial treatment for determining when courts should uphold takings. Courts were left with only elusive guidelines that they have used in a number of circumstances to achieve results consistent with the social and economic climate of the moment.[40]

C. *The Modern Framework*

In the twentieth century, two developments had significant impact on the shaping of the modern public use doctrine. The first was the entry of the federal courts and the imprimatur they placed on the broad view of public use.[41] In *Mt. Vernon-Woodberry Duck Co. v. Alabama Interstate Co.*,[42] the Supreme Court upheld the condemnation of certain land and water rights for use by a hydro-electric power company.[43] In so doing, the Court specifically rejected the use by the public test.[44] Though *Mt. Vernon* is not binding on state courts, many continue to rely on the decision as authorizing the abandonment of the narrow view of public use.[45] In *Rindge Co. v. County of Los Angeles*,[46]

39. *See* Mount Vernon Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916) ("inadequacy of use by the general public as a universal test is established"); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 630, 304 N.W.2d 455, 457 (1981) (per curiam) ("the term 'public use' has not received a narrow or inelastic definition by this court in prior cases").

A minority of courts still follow the narrow rule. In Karesh v. City Council, 271 S.C. 339, 247 S.E.2d 342 (1978), the court stated: "While in other jurisdictions the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, the courts of South Carolina have adhered to a strict interpretation of our constitutional provision . . . ." *Id.* at 342, 247 S.E.2d at 344. *Cf.* Phillips v. Foster, 215 Va. 543, 211 S.E.2d 93 (1975).

40. One author aptly stated: "[W]here the desire was strong to encourage exploitation of natural wealth and to increase industrial development, the courts found—and, on further explorations, still find—the natural law concept of 'public good' to be of wondrous elasticity." Note, *supra* note 17, at 601.

41. *See supra* note 27 (discussing the federal courts' late arrival in the field of eminent domain).

42. 240 U.S. 30 (1916).

43. *Id.* at 31.

44. *Id.* at 32.

45. *See, e.g.*, New York City Housing Auth. v. Muller, 270 N.Y. 333, 342 (1936). In *Muller*, the court asserted that "[u]se of a proposed structure, facility or service by everybody and anybody is one of the abandoned universal tests of public use." *Id.*

46. 262 U.S. 700 (1923). *Rindge Co.* dealt with the proposed taking of private land for a California coastal highway. The landowners argued that such a highway was not necessary for public travel and therefore was not a legitimate public use. *Id.* at 704.

the Supreme Court removed any lingering doubts the state courts might have had concerning the constitutionality of the broad view. The Court held that it would give great deference to a state's determination of public use.[47]

A second major influence on the public use doctrine was the increasing size and complexity of projects that required an exercise of the taking power. Having spent an entire century establishing the foundation for an industrialized society, state and local governments now faced the more difficult problem of maintaining an atmosphere within which that society could function. The growing demand for energy pressured many utility companies to develop and explore new sources.[48] Transportation networks required enlarging to handle both an increase in industrial productivity and the rapidly growing use of the automobile.[49] Urban housing, run down by massive migration to the cities, desperately needed renovation.[50] These projects frequently demanded a concerted effort by government and the private sector and, consequently, contributed to an expansion of the public use doctrine.[51]

Most of the twentieth century cases involving the public use issue fall into three loosely definable factual categories, each category representing another step toward the erosion of the public use clause as an effective limitation on the taking power. These categories are: (1) development of transportation and industrial networks; (2) urban renewal; and (3) local community prosperity. These divisions, not intended to be exhaustive, provide a useful organizational framework.

1. Development of Transportation and Industrial Networks

Efforts to develop the branches of our transportation system encountered little resistance from the public use limitation. Condemnations for highways, railroads, canals and harbors frequently were upheld

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The court responded that what is or is not a legitimate public use depends to a large extent on local conditions, and judgments by state courts should be given great respect. *Id.* at 706.

47. *Id.* at 706.

48. *See, e.g.*, McMeekin v. Central Carolina Power Co., 80 S.C. 512, 61 S.E. 1020 (1908) (authorizing condemnation for hydroelectric power plant).

49. *See, e.g.*, Shirley v. Russell, 149 Va. 658, 140 S.E. 816 (1927) (condemnation to build highway).

50. *See, e.g.*, New York Housing Auth. v. Muller, 270 N.Y. 333 (1936) (approving taking for urban renewal).

51. *See* Note, *Eminent Domain: Private Corporations and the Public Use Limitations*, 11 U. BALT. L. REV. 310, 316 (1982).

under what became known as the "instrumentality of commerce" exception to the public use clause.[52] Despite the fact that the state transferred land directly to private individuals or corporations, courts normally upheld these takings on the assumption that the new transportation services provided were essential to a vital industry—an industry of which the public was the ultimate beneficiary.[53]

In a similar manner, eminent domain provided a useful tool when governments turned to developing new sources of energy. The Supreme Court indicated in *United States* ex rel. *Tennessee Valley Authority v. Welch*[54] that government projects in this area would experience minimal judicial interference. In *Welch*, the Tennessee Valley Authority (TVA) built a large dam that flooded the sole highway into a small community.[55] After failing to reach a settlement, the TVA condemned the entire community and joined it to a neighboring national park.[56] The district court invalidated the condemnation on the ground that the TVA had authority to take only that portion of land necessary to construct the dam.[57] The Court of Appeals for the Fourth Circuit, affirming this judgment on separate grounds, held that the condemnation was not for public use but was merely an effort to limit the TVA's potential liability under the proposed settlement agreement.[58]

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52. Justice Ryan thoroughly discusses the "instrumentality of commerce" exception in his dissent in Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 674-81, 304 N.W.2d 455, 477-80 (1983) (Ryan, J., dissenting). The exception has its basis in practicality: "With regard to highways, railroads, canals, and other instrumentalities of commerce, it takes little imagination to recognize that without eminent domain these essential improvements, all of which require particular configurations of property—narrow and generally straight ribbons of land—would be 'otherwise impracticable'; they would not exist at all." *Id.* at 675-76.

53. Charles Wilson, former executive of General Motors, summarized the relationship between private enterprise and the general welfare in the following words: "[W]hat's good for General Motors is good for the country." Bennett, *Eminent Domain and Redevelopment: The Return of Engine Charlie*, 31 DE PAUL L. REV. 115 (1982).

54. 327 U.S. 546 (1946).

55. *Id.* at 548. In 1942 the TVA authorized the dam to meet the growing demand for power due to wartime production. *Id.*

56. *Id.* at 550. Negotiations centered around the amount of damages TVA would pay for the road's reconstruction. Rebuilding the old road would have cost about $1.4 million, but all parties agreed that the road was below modern highway standards. *Id.* Because the state refused to pay the additional costs of building a new road, the parties determined that the TVA should acquire all the land in the isolated area. *Id.* All but six landowners agreed to the plan. *Id.* at 551.

57. *Id.*

58. 150 F.2d 613, 616 (4th Cir. 1945).

The Supreme Court rejected these arguments, opting for a more deferential approach.[59] The majority opined that the determination of public use fell within the province of the legislature and that to avoid impinging on a traditional legislative function the Court should exercise restraint.[60] To the extent that this view implied a limited power of judicial review, three justices concurred only in the result.[61] In the opinion of the concurring justices, the nature of a use, public or private, was a matter for the Court to determine.[62] Despite these reservations, courts frequently cite *Welch* in support of the proposition that the judiciary's role in determining public use is a very limited one.[63]

2. Urban Renewal

The influx of social legislation brought on by the Depression had a dramatic effect in the areas of urban redevelopment and slum clearance.[64] The prospect of federal monies enticed many state and local governments to vigorously pursue the eradication of urban blight.[65] In *New York City Housing Authority v. Muller*,[66] the New York Court of Appeals upheld a statute authorizing the condemnation of slum property for land clearance and construction of public housing.[67] Eschew-

59. 327 U.S. at 551-52.

60. *Id.* The Court cited Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925), for the proposition that Congress' decision as to what constitutes a public use "is entitled to deference until it is shown to involve an impossibility."

61. 327 U.S. at 555-58 (Reed J., concurring). Chief Justice Stone joined in this concurrence and Justice Frankfurter wrote a separate concurring opinion.

62. *Id.* at 556. Justice Reed stated:

> This taking is for a public purpose but whether it is or is not is a judicial question. Of course, the legislative or administrative decision has great weight but the constitutional doctrine of the Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize its action against a judicial examination in contests between the agency and the citizens.

Id. at 556-57.

63. *See, e.g.*, Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321, 2329 (1984); Berman v. Parker, 348 U.S. 26, 33 (1954).

64. For a good summary of the legislation enacted during the depression era, and the effect of the Roosevelt administration on housing and land redevelopment, see RIESENFELD & MAXWELL, MODERN SOCIAL LEGISLATION 830-76 (1950).

65. *See* Meidinger, *supra* note 19, at 33.

66. 270 N.Y. 333 (1936).

67. *Id.* at 343. The court emphasized that slum areas had plagued New York for over 70 years. *Id.* at 341. The city had previously applied both the taxing and the police powers, but both failed to stem the flow of urban blight. *Id.* Thus, the court

ing the narrow view of actual public use,[68] the court found that the reduction of juvenile delinquency, crime and disease, afflictions commonly associated with slum conditions, was of sufficient public benefit to satisfy the public use requirement.[69]

A separate line of urban renewal cases—those involving condemnation of blighted areas for reconveyance to private developers[70]—caused greater difficulty. Several courts initially held that condemnations for the distinct purpose of reconveyance to private concerns, despite any incidental public benefit, violated the public use clause.[71] In 1954, however, the Supreme Court decided the seminal urban renewal case, *Berman v. Parker*.[72] *Berman* examined the constitutionality of the District of Columbia Redevelopment Act,[73] under which the city conducted a large-scale, residential renewal project. The challenge came from a department store owner whose property the plan had slated for condemnation. The store was a viable, going concern, but was located

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concluded, there could be no objection to the application of the last remaining power. *Id.*

68. *See supra* note 45. It is important to note that while the court purported to abandon the narrow view of public use, its actual holding did not require it to do so. Public housing is premised on the idea of availability to every individual, regardless of that individual's current income. Thus, even though the new housing will accommodate only a portion of the public at any given time, every person has at the outset an equal opportunity to participate in the new use. This differs significantly from the case where the government condemns land and transfers it directly to another private interest. *See infra* notes 78-97 and accompanying text (discussing cases in which land is transferred from one private interest to another).

69. 270 N.Y. at 339. Shortly after the decision in *Muller*, Congress passed the United States Housing Act of 1937, ch. 896, 50 Stat. 888 (1937) (current version at 42 U.S.C. §§ 1401-40 (1976)). The Act authorized federal loans and grants to local housing agencies to clear slums and develop public housing. This legislation, in conjunction with *Muller*, has led a great majority of courts to conclude that condemnations for the dual purpose of slum clearance and public housing construction comport with the public use limitation. *See* Berger, *supra* note 33, at 214-15 & n.66.

70. Certain limiting restrictions generally attached to these transfers. These restrictions usually confined transferees to residential, industrial or commercial development. *See* Berger, *supra* note 33, at 215. By this close regulation of private development, local governments insured that the public uses they envisioned were carried out.

71. *See, e.g.*, Adams v. Housing Auth., 60 So.2d 663, 669 (Fla. 1952) ("Incidental benefits accruing to the public from the establishment of some private enterprise is not sufficient to make the establishment of such enterprise a public use."); Housing Auth. v. Johnson, 209 Ga. 560, 563 (1953) (public benefit does not always justify a taking).

72. 348 U.S. 26 (1954).

73. District of Columbia Redevelopment Act of 1945, ch. 736, 60 Stat. 790, D.C. CODE ANN. §§ 5-701 to 5-719 (1951) (current version at D.C. CODE ANN. §§ 5-801 to 5-820 (1981)).

in an area in which more than eighty percent of the dwellings failed to meet minimum housing standards.[74] Under the plan, the city was to condemn the entire area and transfer the land to private developers.

The Court rejected the owner's argument that such a transfer contravened the public use requirement. Justice Douglas, writing for the Court, stated that private enterprise was just one means of effecting the legitimate end—revival of a blighted community.[75] By defining the issue in terms of the police power rather than the taking power, Justice Douglas adopted a very lenient standard of public use.[76] With respect to the scope of judicial review the Court demanded even less, stating that Congress' determination of the public interest was "well-nigh conclusive."[77]

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74. 348 U.S. at 30.

75. *Id.* at 33.

76. *Id.* at 32. Justice Douglas stated: "We deal, in other words, with what traditionally has been known as the police power." Douglas' easy characterization, however, seems to defy a more basic distinction between the two powers. One court has stated:

> [W]e should bear in mind that there is a clear distinction between the power of eminent domain and the police power. The power of eminent domain is that sovereign power to take property for a public use or purpose . . . . On the other hand, the police power is that power by which the Government may destroy or regulate the use of property in order to "promote the health, morals and safety of the community" . . . .

Adams Housing Auth., 60 So.2d 663, 666 (Fla. 1952); *cf.* McCoy v. Sanders, 113 Ga. App. 565, 569, 148 S.E.2d 902, 905 (1966) (eminent domain is different than the police power).

In Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 (1966), the Maryland Supreme Court held that the constitutional limitations on the taking of private property for public use were not intended to restrain exercises of the police power. *Id.* at 564, 214 A.2d at 779. This language implies that the standard for a taking of property is more rigorous than that justifying an exercise of the police power.

77. 348 U.S. at 32. In full context, the statement reads: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* This language has become a useful source of authority for courts seeking to justify government exercises of eminent domain. *See, e.g.*, Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321, 2328-29 (1984) (discussed *infra* notes 103-64 and accompanying text); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 633, 304 N.W.2d 455, 460 (1983) (discussed *infra* notes 85-90 and accompanying text). *See also* Berger, *supra* note 33, at 216; Note, *Public Use, Private Use, supra* note 15, at 417.

It is perhaps unfortunate that Justice Douglas felt obligated to apply such broad language, for the Court undoubtedly could have reached a similar result under a more conservative approach. For 30 years, courts recognized slum clearance, to create cleaner, safer residences, as a valid public use. *See supra* notes 66-69 and accompanying text. The restrictions limiting the developers to construction of new housing insured that the benefits of the taking inured primarily to the public. Thus, Justice Douglas

3. Local Community Prosperity

Were it not for a handful of isolated state court decisions,[78] and a strongly worded dissenting opinion,[79] the cases falling under this general heading would clearly mark the end of the modern day public use requirement. The common thread running through the cases in this somewhat amorphous, vague category is the involuntary transfer of property, usually from one private interest to another, on the assumption that the new use will be more beneficial to the community.

Puerto Rico v. Eastern Sugar Associates[80] is one of the earlier cases to refer to community prosperity. The Puerto Rico legislature, as part of its policy of major agrarian reform, enacted a statute authorizing the condemnation of vast tracts of farm land formerly owned by several large, absentee corporations.[81] The Court of Appeals for the First Circuit upheld the statute, stating that local governments are particularly qualified to make land use decisions that best promote community prosperity.[82] In so holding, however, the court recognized a specific duty on its part to "make some inquiry into the facts with reference to which the Legislature acted."[83] Based on the depressed social and economic conditions existing in Puerto Rico at the time, the court concluded that the legislature had acted reasonably in its attempt to strengthen the island's agricultural foundation.[84]

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could have found that the Redevelopment Act complied with the public use clause, without destroying an effective check on legislative determinations of public use. Additionally, it is significant to note that in *Berman* the city took land from private individuals and put it to an entirely new use. Private developers tore down an area the city found to be suffering from urban blight, and replaced it with completely new structures. This fact distinguishes *Berman* from later cases in which the government authorizes transfers to private individuals without an accompanying new use. *See, e.g.*, Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984); City of Oakland v. Oakland Raiders, 31 Cal.3d 656, *modified*, 32 Cal.3d 60, 646 P.2d 835 (1982).

78. *See* Ownesboro v. McCormick, 581 S.W.2d 3 (Ky. 1979) (land cannot be condemned for conveyance to private industrial developer); Karesh v. City Council, 271 S.C. 339, 247 S.E.2d 342 (1978) (shopping center not valid public use).

79. *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 645, 304 N.W.2d 455, 464 (1981) (Ryan J., dissenting). Justice Ryan's dissent is discussed *infra* note 88.

80. 156 F.2d 316 (1st Cir. 1946).

81. *Id.* at 318.

82. *Id.* at 324.

83. *Id.*

84. *Id.* at 324-25. It is significant that *Sugar Associates* was a pre-*Berman* case. Without access to the sweeping *Berman* language, the *Sugar Associates* court was careful to point out the delicate balance of power between legislature and judiciary. *Id.* at

In *Poletown Neighborhood Council v. City of Detroit*,[85] the Michigan Supreme Court held that Detroit could condemn an entire residential community to provide a site for a new General Motors (GM) factory. Feeling the crunch of an industry-wide recession, GM threatened to leave Detroit unless the city found a suitable site for a new plant the company was planning to build.[86] The threat occurred when unemployed in Detroit was of "calamitous proportions."[87] Thus, when GM determined that the Poletown area would satisfy its needs, the only question remaining was whether the courts would sanction the condemnation of a healthy, nonblighted community for transfer to a private corporation.

Despite caustic dissents by Justices Ryan and Fitzgerald,[88] the majority upheld the condemnation. The court emphasized the judiciary's extremely limited role in reviewing legislative determination of public

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323-24. The opinion gave due respect to the legislative determinations of public use, yet did not shirk its judicial responsibility regarding the facts upon which those determinations were made. *Id.*

More recently, courts have found sufficient a nod in the direction of judicial review and a cite to *Berman* prior to affirming the legislature's finding of public use. *See* Note, *supra* note 15, at 418.

85. 410 Mich. 610, 304 N.W.2d 455 (1981).

86. *Id.* at 651, 304 N.W.2d at 467 (Ryan J., dissenting). The recession hit General Motors (GM) particularly hard because of the company's initial refusal to meet the competition of the down-sized foreign car market. Bennet, *supra* note 53, at 139. Rather than meet the changing nature of the industry, GM preferred to "stick with its traditional policies, which had earned it dominance of the highly profitable big-car market." *Id.* at n.164 (quoting Burck, *How G.M. Turned Itself Around*, FORTUNE, Jan. 16, 1978, at 88). As oil prices continued to rise and other auto manufacturers began producing down-sized cars, GM finally decided to change its policies. Bennett, *supra* note 53, at 140. Thus finding itself in a precarious position, GM unleashed its demands on the City of Detroit. *Id.*

87. 410 Mich. at 647, 304 N.W.2d at 465. Justice Ryan reported that unemployment in the city was at 18%. *Id.* The final agreement evidences the fact that the city was truly at GM's mercy. In exchange for a proposed 6000 jobs, the city agreed to acquire and clear a 465-acre site, at a cost of about $200 million, and to convey it to GM for $8 million. *Id.* at 656.

88. *Id.* at 645-84, 304 N.W.2d at 464-82. Ryan contended that the majority had "seriously jeopardized the security of all private property ownership." *Id.* After a detailed statement of the facts surrounding the controversy, Ryan carefully distinguished between public use and public purpose. The latter, he argued, was a less restrictive standard and applied only to the taxing power. *Id.* at 666, 304 N.W.2d at 474. Ryan also strongly disagreed with the majority's deferential approach, stating that "it has always been the case that this court has accorded little or no weight to legislative determinations of 'public use'." *Id.* at 667, 304 N.W.2d at 474. *See infra* notes 178-83 and accompanying text for further discussion of Justice Ryan's dissent.

use,[89] and felt that the city had presented substantial evidence showing the need for retaining the auto industry.[90] In the face of such need, the court explained that the benefits flowing from keeping GM in Detroit were sufficiently clear to satisfy the public use requirement.[91]

In perhaps the most unique application of eminent domain law to date, the California Supreme Court held, in *City of Oakland v. Oakland Raiders*,[92] that the taking of a professional sports franchise may also meet the public use requirement. To prevent the Oakland Raiders, a successful National Football League franchise, from moving to Los Angeles, the City of Oakland sued to acquire the team and all incidental rights and interests.[93] The trial court granted a motion for summary judgment in favor of the Raiders,[94] but the California Supreme Court reversed, ordering a full evidentiary hearing on the merits.[95] Noting that the taking of property to build and run an athletic stadium long had been considered a valid public use,[96] the court saw no reason why the same logic could not be applied to the taking of a team playing within the stadium walls.[97]

These cases illustrate that the public use requirement is dangerously close to being read out of the Constitution. Public use, when equated with any modicum of public benefit, is no more than a convenient label to apply when legislatures feel one use of property would be more beneficial than another. Clearly, the static and inflexible nature of the narrow "use by the public" test makes it an undesirable standard for dealing with many of the complex situations that arise in our society today. Nevertheless, it remains the courts' responsibility to insure that a condemnation does in fact further some clear and significant public benefit, especially in cases when the immediate beneficiaries of the condemnation are private individuals.[98] Unless courts begin to define

89. *Id.* at 633, 304 N.W.2d at 459 (citing Berman v. Parker, 348 U.S. 26, 32 (1954)).

90. *Id.*

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

92. 31 Cal.3d 656, *modified*, 32 Cal.3d 60, 646 P.2d 835 (1982).

93. 32 Cal. 3d at 64, 646 P.2d at 837.

94. Superior Court of Monterey County, No 76044.

95. 32 Cal.3d at 77, 646 P.2d at 844.

96. *Id.* at 74-75, 646 P.2d at 841-42.

97. *Id.*

98. It is ironic that one of the best statements of the judiciary's responsibility in this area comes from the majority opinion in *Poletown*:

> The power of eminent domain is restricted to furthering public uses and purposes *and is not to be exercised without substantial proof that the public is primarily*

some limiting principle, many observers fear that legislatures will become mere conduits for the involuntary transfer of private property from one individual to another.[99]

III. *HAWAII HOUSING AUTHORITY V. MIDKIFF*

Against this background, the Supreme Court's decision in *Hawaii Housing Authority v. Midkiff*[100] appears to stand in wholehearted support of the liberal trend in eminent domain law. A unanimous Court upheld the use of the condemnation power to deconcentrate land ownership in Hawaii.[101] Many state courts will undoubtedly rely on *Midkiff* in much the same manner as they have relied on *Berman* for the past thirty years.[102]

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benefitted. Where, as here, 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 advanced. *Such public benefit cannot be speculative or marginal but must be clear and significant* if it is to be within the legitimate purpose as stated by the Legislature.

410 Mich. at 634-35 (emphasis added).

99. Professor Meidinger, for example, states: "For the most part then, the public use requirement operates as an incremental and somewhat idiosyncratic restraint—a slight added drag on takings, the exact operation of which is somewhat unpredictable." Meidinger, *supra* note 19, at 42. Justice Ryan, in his *Poletown* dissent, observes that "when the private corporation to be aided by eminent domain is as large and influential as General Motors, the power of eminent domain, for all practical purposes, is in the hands of the private corporation. The municipality is merely the conduit." 410 Mich. 616, 683, 304 N.W.2d 455, 481 (1981) (Ryan, J., dissenting).

100. 104 S.Ct. 2321 (1984).

101. *Id.* at 2331-32.

102. *See supra* note 77. This also raises an interesting question concerning the extent to which state courts justifiably can rely on these decisions when interpreting their own state constitutions. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan approves a recent trend of state court decisions that have interpreted their own state constitutions as providing more protection to individual liberties than the federal Bill of Rights requires. *Id.* at 495. Justice Brennan states:

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

Id. at 491.

A. *Land Reform in Hawaii*

Prior to annexation, the land of Hawaii was held in a complex tenure system similar to the feudal system of medieval Europe.[103] Fee simple ownership of land was nonexistent; all land was under the control of a high chief who distributed it to a series of lower chiefs.[104] Between 1780 and 1850, however, the forces of Westernization began to dismantle this land tenure system.[105] Under the *"Great Mahele"* of 1848,[106] the government of Hawaii divided its land into rough thirds, with one third each going to the king, the chiefs and the common people.[107]

This redistribution plan, however, resulted in only one percent of the land ultimately being transferred to the common people.[108] In order to claim his rightful grant to land, the commoner apparently had to prove that he actually lived on and cultivated the particular parcel that he now sought to own.[109] This required him to appear before a commission to argue his claim, a burden he had neither the means nor the inclination to carry.[110] Thus, a large portion of land originally set aside for the common people remained in the hands of the king and the chiefs.

This pattern of concentrated land ownership has persisted to the present[111] and has been a source of concern to the Hawaii legisla-

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103. For a general discussion from which this section draws heavily, see Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 848-49 (1975).

104. *Id.* at 849.

105. *Id.* at 850-52. The process began with the centralization of all the islands under the rule of Kamahameha I. European settlers, who received grants of land from the lower chiefs, prompted this process in an effort to stabilize their holdings. *See* Brief of the Hou Hawaiians at 7-9, Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984).

106 Levy, *supra* note 103, at 855. The Hawaiian Government opened the *"Mahele Book"* on January 27, 1848, into which the king and the chiefs quit-claimed all of their interests in land. The land was then redistributed in thirds to the Crown, the government and the common people. *Id.*

107. *Id.*

108. *Id.* at 856.

109. *Id.*

110. *Id.* To stake a claim, a commoner would first need a survey of the individual tract; most could not even afford to have this done. Further, many of these commoners reportedly feared reprisals from the chiefs who formerly held the land. *Id.*

111. In 1975, combined holdings of the government and the 72 largest land owners constituted about 95% of all the land in Hawaii. *See* 1975 Hawaii Sess. Laws Act 184 § 1(a). On Oahu, one of the largest islands, three major landowners owned 58.4% of all privately held land. *See* Brief for Appellants, *supra* note 6, at 2 n.4 (citing Midkiff v. Amemiya, Civil No. 47103 (Haw. 1st Cir. June 29, 1978) (finding of fact No. 96)). Not surprisingly, the statistics cited by the appellees portray a less drastic situation. For

ture.[112] Land owners, fearing the adverse tax consequences flowing from sales of large tracts of land, continued to lease their property under long-term contracts.[113] In response to a growing demand for fee simple land, the legislature determined that the landowners' reluctance to sell was causing a serious land shortage and was artificially inflating land values.[114] Further, they found that inflated land prices were contributing significantly to an overall inflationary trend in the cost of living.[115]

To remedy these perceived evils, in 1967 the Hawaii legislature passed the Hawaii Land Reform Act.[116] Aimed at the redistribution of residential fee simple land, the Act authorizes certain tenants under long-term leases to compel the condemnation of the land upon which their residences are situated.[117] Tenants wishing to own their lots file an application with the Hawaii Housing Authority (HHA), an agency set up to administer the Act.[118] Once the HHA determines that certain statutory requirements have been satisfied, it can initiate condemnation proceedings.[119]

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example, appellees report that on the island of Oahu 69% of new homes in 1981 were built on land that was sold with the residence in fee. Further, out of the 108,378 residences on Oahu, single and multi-family units, only 35,539 were on land leased by the homeowner. *See* Brief for Appellees at 6 n.18 (citing State of Hawaii Data Book table 486 (1982)), Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984) [hereinafter cited as Brief for Appellees]. These statistics appear to indicate that the seriousness of the land shortage existing in Hawaii is subject to considerable dispute.

112. *See* Brief for Appellants, *supra* note 6, at 1 n.2. The brief states that since 1955 there had been numerous senate proposals calling for the large estates to divest those lands they held for investment purposes. *Id.* As indicated, the landowners had been highly successful in diverting this pressure.

113. *See supra* note 6 and accompanying text.

114. *See* 1975 Hawaii Sess. Laws Act 186 § 2(a)(2). This section states: "The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State." *Id.*

115. *Id.* at § 2(a)(7).

116. HAWAII REV. STAT. Ch. 516 (1976). Originally enacted in 1967, see 1967 Hawaii Sess. Laws Act 307, the Act lay dormant for nearly a decade due to questions about its constitutionality. *See* Brief for Appellees, *supra* note 111, at 13. In 1975, the legislature adopted amendments to the Act designed to "reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307." 1975 Hawaii Sess. Laws Act 186 § 1.

117. HAWAII REV. STAT. § 516-22 (1976).

118. *Id.* at § 516-26.

119. *Id.* at § 516-22. The Act authorizes the HHA to designate "development

B. *The* Midkiff *Litigation*

One of the largest fee simple landowners in Hawaii is the Bishop Estates.[120] Established in 1887 by the will of Princess Bernice Pauahi Bishop, the estate is a perpetual charitable trust designed to provide support for the education of native Hawaiian children.[121] Long-term leases generate trust income that the trustees use primarily to maintain the Kamahameha Schools.[122] Beginning in 1978, several residential lessees of Bishop Estate property became interested in acquiring fee simple title to their lots and filed an application with the HHA. The HHA reviewed the application and then ordered the trustees of the estate to submit to arbitration to determine a fair price for the land.[123] Refusing to comply with the HHA's order, the trustees instead brought an action in federal court claiming that the Land Reform Act was unconstitutional because it violated the public use clause.[124]

The district court upheld the Act as a valid exercise of the police power.[125] The Court of Appeals for the Ninth Circuit reversed,[126] viewing the Land Reform Act as a "naked attempt" to take property

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tracts" of not less than five acres. After 25 tenants, or tenants on half of the lots in the tract, whichever is fewer, apply to purchase their lots, the HHA must hold hearings to determine whether acquisitions of such lots would be consistent with the purposes of the Act. *Id.* After acquisition, the HHA can authorize a loan of up to 90% of the purchase price to those tenants who are unable to obtain sufficient funds. *Id.* at § 516-34.

The drastic nature of this legislation is apparent. In effect, it allows any tenant in a specified development tract, regardless of his financial situation, to force the sale of the land upon which his house is built. One article states:

> The Hawaii Land Reform Act constitutes a fairly radical approach to the special land problems that face Hawaii; its radical nature can be traced directly to the political pressures that have built up over decades as the major landowners have fought and defeated land reform measures time and time again.

Conahan, *Hawaii's Land Reform Act: Is it Constitutional?*, 6 HAWAII B.J. 31 (1969).

120. Levy, *supra* note 103, at 870-72. Some estimates report holdings of the estate to constitute about nine percent of the land in Hawaii. *Id.*

121. Brief for Appellees, *supra* note 111, at 3.

122. *Id.* at 4.

123. *Id.* at 14.

124. Midkiff v. Tom, 483 F. Supp. 62, 65 (D. Hawaii 1979), *aff'd sub nom.* Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984).

125. 483 F. Supp. at 68. The court abandoned the public use requirement in favor of a police power—due process analysis, stating that "the Legislature had the right, pursuant to its police power, to conclude that the general welfare of the people of Hawaii was served by condemning the land." *Id.* This analysis completely ignores the distinction between the police power and the taking power. Indeed the court states that it would be "irrational" to hold eminent domain to a standard different than that applied to other government interferences with private property. *Id.* at 67.

owned by the lessor and transfer it to the lessee solely for the latter's personal benefit.[127] The circuit court focused on the fact that the taking effected no change in the use of the property.[128] The end result, therefore, was merely an involuntary transfer of title from one person to another, a result the court found in direct conflict with settled law.[129] With respect to the scope of judicial review, the court read the *Berman* language as demanding a *high* level of scrutiny.[130]

The Supreme Court took a much narrower view of the judiciary's role in eminent domain cases. Reciting full paragraphs of the *Berman* opinion, the Court insisted that the public use requirement was "coterminous with the scope of a sovereign's police powers."[131] This view, reminiscent of an approach first taken over a century ago,[132] grants to legislatures the widest possible latitude in determining what constitutes a public use. Indeed, as the Court emphasized, the judicial inquiry is at an end once it becomes apparent that the legislature's determination of public use does not "involve an impossibility."[133]

Turning to the merits, the Court found that the Hawaii Legislature's attempt to eliminate the evils it associated with a continuing land oligopoly was clearly within the purview of a state's police power.[134] Ac-

126. Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom.* Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984).

127. 702 F.2d at 798.

128. *Id.* at 796. Judge Alarcon's analysis of the applicable case law revealed the following five basic situations in which takings were considered to be for a public use: (1) Takings for historically accepted public use; (2) takings that result in a changed use of the land; (3) takings that result in changed possession of the land; (4) takings that result in a transfer of property to the government; and (5) takings of a nominal or inconsequential degree. *Id.* at 793-96.

129. *Id.* at 793 (citing Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896) and Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (seriatum opinion)). *See supra* note 29 and accompanying text.

130. 702 F.2d at 797. The court pointed out that the *Berman* language, so often quoted in support of judicial deference, begins with the phrase "*Subject to specific constitutional limitations . . .* " *Id.* (quoting *Berman*, 348 U.S. at 32). (emphasis supplied by court). The court continued: "We read this language as requiring the judiciary to scrutinize carefully any legislative attempt to take private property so as to determine if it is in violation of any constitutional provision." 702 F.2d at 797.

131. Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321, 2329 (1984).

132. *See supra* note 36 (discussing Murdock v. Stickney, 62 Mass. (8 Cush.) 113 (1851)).

133. 104 S.Ct. at 2329 (quoting Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

134. *Id.* at 2330 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117

cording to Justice O'Connor, the condemnation scheme was a rational approach to correcting this problem and, therefore, the Court would not question the plan's ultimate wisdom.[135] The Court also rejected the contention that the Land Reform Act authorized purely private takings. The purpose of this legislation, in the Court's opinion, was restoration of the fee simple market and any benefit to individual parties was merely incidental.[136]

C. *Analysis*

While the *Midkiff* opinion warrants criticism in the end, there are considerations that support the Court's deferential approach. The Supreme Court has consistently, and perhaps wisely, been reluctant to interfere with the states' use of their eminent domain power.[137] In *Rindge Co. v. County of Los Angeles*,[138] the Court noted that while determining the public or private nature of a use is ultimately a judicial question, the answer will always vary with respect to local conditions.[139] Because it is reasonable to assume that state legislatures will be most familiar with local conditions, their judgments should receive

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(1978)). The Court's reliance on *Exxon* is spurious; it assumes the very question to be answered. *Exxon* dealt with a Maryland statute enacted to regulate its retail gas industry during the oil crisis of 1973. 437 U.S. at 121. The statute required oil producers and refiners, as a prerequisite to doing business in Maryland, to divest themselves of all retail operations within the state. *Id.* at 119. The issue before the Court was whether this *regulation* was a valid exercise of the state's police power and, if so, whether it survived commerce clause analysis. *Id.* at 124-25. There was, however, no taking involved in *Exxon*; while certain types of situations possibly justify excessive state regulation it does not necessarily follow that a taking would also be justified. *See supra* note 76.

135. 104 S.Ct. at 2330.

136. *Id.* at 2331-32.

137. *See, e.g.*, Hairston v. Danville Ry., 208 U.S. 598, 607 (1908) (improper for Supreme Court to invalidate a taking that state court upheld); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 160 (1896) (decisions of state legislatures and state courts to be treated with great respect); People of Puerto Rico v. Eastern Sugar Ass'n, 156 F.2d 316, 324 (1st Cir. 1946) (local governments particularly qualified to make local land use decisions).

138. 262 U.S. 700 (1923). *See supra* note 46 (discussing *Rindge Co.*).

139. *Id.* at 705. *See also* 2 NICHOLS, *supra* note 2, at § 7.05. Nichols states:

> [W]hat is a public use is to a great extent a local question, and its determination in the courts of the different states has been influenced by considerations touching the resources, the capacity of the soil, and the relative importance of industries to the general public welfare . . . . In all these respects conditions vary so much in the different states that different results may well be expected.

Id.

great respect from the federal courts. Only in those cases in which it is abundantly clear that state action violates the public use requirement should the federal courts step in to strike down that action.[140]

Another factor which undoubtedly influenced the Court is the peculiar nature of the land situation in Hawaii. Regardless of its effect on the economy, it is indisputable that there exists an unusually high concentration of fee simple ownership in Hawaii.[141] Prior to 1967, the legislature constantly was struggling to loosen the grip of this tightly held oligopoly.[142] Particularly cognizant of the state's repeated failures,[143] the Court simply refused to impede the legislature in its efforts to deal with a highly unique and recurring problem.[144] Thus, one might profitably read *Midkiff* as adopting a pragmatic approach by which a court closely analyzes the facts of each case to determine whether the public use doctrine should be extended to allow needed social and economic reform, or conversely, should be restricted to fend off legislative abuses of private property rights.[145]

Unfortunately, courts will probably extend the *Midkiff* decision well beyond its facts; the language employed is certainly as broad as that found in *Berman*.[146] The Court's reliance on *Berman*, however, is subject to criticism. *Berman* involved a situation in which the government identified a specific area as infested with urban blight, condemned only that area, and reconveyed it to private developers subject to explicit

140. The Supreme Court's adherence to this philosophy is evidenced by the fact that the Court, in this century, has not held a use to be private that a state court has found to be public. *See* Note, *supra* note 17, at 609 n.54.

141. *See supra* note 111 and accompanying text.

142. *See supra* note 112.

143. 104 S.Ct. at 2330. Justice O'Connor likened the Hawaiian situation to that faced by the colonists after the American Revolution, when landowners had encumbered large portions of the land with feudal incidents. In response to this situation, several states enacted statutes for the purpose of eliminating such incidents. *Id.*

144. *See id.* at 2331, in which the Court stated: "As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified." *Id.*

145. Professor Meidinger suggests that this is exactly what courts have done:

> The main question is not whether a taking is for a "public" purpose, but whether it is for a *legitimate* purpose. By 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.

Meidinger, *supra* note 19, at 43 (emphasis in original).

146. 348 U.S. 26 (1954). *See supra* notes 72-77 and accompanying text.

regulation.[147] The *Berman* Court did not seriously question whether urban renewal constituted a legitimate public purpose—the courts had decided that question nearly thirty years earlier[148]—but only whether accomplishing this purpose via private enterprise violated the public use clause.[149]

By stark contrast, the Hawaii Land Reform Act authorizes condemnations at the behest of the individual lessee.[150] The HHA makes no initial inquiry as to whether there exists any need in the particular area for greater dispersion of fee simple ownership. In fact, in 1976 the legislature deleted a requirement that the HHA find a shortage of fee simple property in the county where the condemnation is to take place.[151] If the evils that the Act seeks to cure are due to the shortage of fee simple residential land,[152] it would seem reasonable that petitioners seeking condemnation show that a shortage exists before proceedings begin.

Another troubling aspect of the condemnation scheme in *Midkiff* is the absence of any regulation of the property subsequent to the taking.[153] The tenant, upon obtaining title to the property, is free to lease it out again on a long-term basis.[154] In *Berman*, the government emphasized that the Redevelopment Act required private developers to conform to a detailed redevelopment plan designed to maximize the public benefit.[155] In the absence of some form of continuing regula-

147. 348 U.S. at 28-29.

148. *See, e.g.*, New York City Housing Auth. v. Muller, 270 N.Y. 333 (1936). *See also supra* note 69.

149. 348 U.S. at 33-36.

150. HAWAII REV. STAT. § 516-22 (1976). *See supra* note 119.

151. *See* 1976 Hawaii Sess. Laws, Act. 242 § 2 (codified at HAWAII REV. STAT. § 516-83 (A) (2-3)).

152. *See id.*

153. *See* Midkiff v. Tom, 702 F.2d 788, 804 (9th Cir. 1983) (Poole, J. concurring), *rev'd sub nom.* Hawaii Housing Auth. v. Midkiff, 104 S.Ct. 2321 (1984).

154. *Id.*

155. *See* Brief for the D.C. Redevelopment Land Agency and National Capital Planning Commission at 28-29, Berman v. Parker, 348 U.S. 26 (1954). The Solicitor General stated:

> The lessee or purchaser is not given a free hand to deal with the property as he wishes. Instead, he is expressly required to conform to the redevelopment plan . . . . Congress has thus made specific and detailed provisions for such continuing supervision as is necessary to assure the attainment of its objectives.

Id. See also Puerto Rico v. Eastern Sugar Assoc's., 156 F.2d 316, 323 (1st Cir. 1946), in which the court noted the "comprehensive program of social and economic reform." *Id.*

tion, courts cannot ensure that those taking property in the name of public use will continue to use the property in a way that benefits the public.[156]

Finally, the *Midkiff* Court ignored the unique nature of the legislation involved. The Hawaii Land Reform Act empowers the HHA to transfer land by eminent domain to achieve a social goal and not to make a change in the land itself. This fact significantly distinguishes *Midkiff* from the earlier public use cases. In the urban renewal cases,[157] for example, condemning agencies cleared areas infested with urban blight and replaced them with public housing projects. Similarly, in *Eastern Sugar Associates,*[158] the government took land with the intention of changing methods of farming. Thus, the result in *Midkiff* is that the Supreme Court has provided state and local governments with a new means to enforce social reforms. Armed with this expansive interpretation of the public use limitation, local governments desiring to implement new reforms need only hint at the possibility of an eminent domain action to assure compliance in the private sector.[159]

Midkiff clearly illustrates the potential danger of substituting the police power-substantive due process test for the public use requirement in eminent domain actions. The issue is not a novel concern.[160] When reviewing regulations that fall under the police power, courts traditionally consider three factors: (1) whether there exists a legitimate government concern; (2) whether the regulation is reasonably related to the end it seeks to achieve; and (3) whether the regulation is unduly

156. Justice Ryan states in his *Poletown* dissent: "[I]t is clear that public control of the use of the land after transfer to the private entity invests the taking with far greater public attributes than would exist without the control and fortifies the justification for the abridgement of individual property rights in those cases." 410 Mich. at 679 (Ryan, J., dissenting). *See also* Bennett, *supra* note 53, at 148-49 (suggesting that where private interests benefit from condemnation, those interests have obligation to ensure the claimed public benefit).

157. *See supra* notes 66-77 and accompanying text.

158. *See supra* notes 80-84 and accompanying text.

159. It is, of course, not necessary that the state courts adopt *Midkiff*'s broad interpretation; however, past experience suggests that the state courts will indeed adhere to the Supreme Court's view. *See supra* note 77.

160. *See, e.g.*, Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717, 718-19 (1964). The author argues that certain factors justify a higher level of review for the power of eminent domain than normally is applied to other government powers. Among the factors discussed are the inadequacy of compensation and the lack of political safeguards for individual condemnees. *See also* Note, *supra* note 15, at 424-38.

oppressive.[161] This is a more lenient standard than the public use standard, which is the appropriate test to apply in a takings case.[162] By substituting the police power standards for the public use requirement, courts are effectively removing one of the few viable limitations on the government's taking power. State legislatures desiring to condemn a tract of private property can easily conclude that they take the action for the public use and thus remain free from judicial intervention.

Justice Marshall established long ago that all clauses in the Constitution are presumed to have some effect.[163] The presence of the public use clause within the Bill of Rights suggests that the Framers intended it to be a limiting principle.[164] A court faced with a contested taking must follow an approach that adequately recognizes both the government's need for latitude in addressing social and economic problems, and the individual's need for protection from wrongful deprivations of his private property. Only by meeting such a balanced standard can a government taking be deemed legitimate.

IV. IN DEFENSE OF A STRICTER STANDARD FOR EMINENT DOMAIN

Midkiff represents, perhaps, the final blow in a struggle that has not gone unnoticed by courts and commentators. The relaxation of the public use requirement has inspired numerous proposals aimed at strengthening the protections available to private property owners.[165]

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161. *See* Lawton v. Steele, 152 U.S. 133, 137 (1894). *See also* Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 WASH. U.J. URB. & CONTEMP. L. 3, 23-24 (1983).

162. 2 NICHOLS, *supra* note 2, at § 7.11[3]. That the police power standard is more lenient becomes clear when one considers that police actions involve only the regulation of private property. Because the landowner does not suffer the ultimate deprivation—complete loss of his property through transfer to another entity—the standard applied to the action need not be as rigorous. For an analysis of the differences between police power regulations and takings, see Stoebuck, *supra* note 161, at 36-40.

163. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 150 (1803).

164 James Madison, considered by most to be the Father of the Constitution, was aware of the need to place certain rights and interests beyond the reach of majoritarian politics. Madison predicted that "in future times a great majority of the people will not only be without landed, but any other sort of property. These [may] . . . combine under the influence of their common situation; in which case the rights of property & the public liberty, [will not be secure in their hands] . . . ." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 203-04 (M. Farrand ed. 1911), *reprinted in* Midkiff v. Tom, 702 F.2d 788, 791 (9th Cir. 1983).

165 *See* Berger, *supra* note 33, at 237-46; Meidinger, *supra* note 19, at 43-49.

The suggested approaches, while differing in certain particulars, are similar in two respects: the need for a more active judiciary at the state court level and the desirability of a stricter public benefit test.

A. *Heightened Judicial Scrutiny at the State Court Level*

When examining condemnations by state authorities, federal courts should adhere to a more deferential standard of review.[166] This approach preserves the balance between federal and state powers, and encourages potential litigants to pursue their claims in the state courts. Apart from lightening the federal docket, deference at the federal level is desirable because state courts are better qualified to decide public use issues under their own state constitutions. Unfortunately, in establishing their deferential stance, the federal courts often have employed very broad language that has had great influence on many state courts.[167]

Few of the reasons supporting deference at the federal level apply to state courts. Of course, one can make similar arguments with respect to the state legislature's need to have a free hand in all legislative matters, but several factors exist that make the argument much less convincing. Foremost among these is the fact that state legislatures derive their authority from state constitutions, which are free to include restrictions on legislative power that the federal Constitution does not recognize.[168] Even when state and federal constitutions are identically worded, state courts are free to interpret their own constitutions as implying added restraints.[169] Thus, Supreme Court interpretations of the federal Constitution do not necessarily provide strong support for judicial deference at the state level.[170]

Another consideration commonly recognized as favoring heightened review by state courts is the perceived incompetence of the local deci-

166. *See supra* notes 137-40 and accompanying text.

167. *See supra* note 77.

168. *See Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1478-82 (1982). The article analyzes several state constitutions that evince a clear intent to limit the ability of the legislature to interfere with property rights. *Id.* at 1482 & n.114. It also points out that several state courts have interpreted their constitutions as *requiring* substantive review when economic interests are impaired. *Id.* at 1480.

169. *Id.* at 1497.

170. Brennan, *supra* note 103, at 502. Justice Brennan states that "the decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law." *Id.*

sion-making process.[171] Municipal land use authorities are often under-staffed, self-interested and highly susceptible to outside manipulation.[172] Under such circumstances, some commentators suggest that the courts provide a more legitimate forum in which to determine public use.[173] *Midkiff* highlights the concern of self-interested condemnation in that the HHA does not make the initial decision to begin condemnation proceedings; rather, the recipient himself makes the decision.[174]

Rounding out this list of concerns supporting heightened state judicial scrutiny is the strength of the individual need to own property and the political vulnerability of small groups.[175] Monetary compensation can rarely mend broken emotional ties. Relocation for some people, especially the elderly, can be a very painful experience. Furthermore, depending on how the court arrives at "just" compensation, there are likely to be expenses that the award does not cover.[176] To make matters worse, under newly designed "quick-take" laws,[177] the decision to condemn is often made before the condemnee has an opportunity to present his case. Even were such a chance provided, the individual condemnee is unlikely to be able to muster significant political force to effect a change in the outcome.

So long as courts continue their pattern of deference in eminent domain cases, these hardships will go unnoticed. To prevent this from happening, courts must be willing to conduct a more rigorous inquiry into legislative determinations of public use.

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171. Note, *supra* note 15, at 432-35.

172. *Id.* Judicial deference in situations in which a condemning agency's integrity is at issue is particularly dangerous. Deerfield Park Dist. v. Progress Dev. Corp., 26 Ill.2d 296, 186 N.E.2d 360 (1962), *cert. denied*, 372 U.S. 968 (1963), offers a good example. Deerfield, an affluent suburb of Chicago, condemned certain land for the stated purpose of building a park. The suburb decided to condemn the land only days after an announcement that a low-cost housing development would be constructed on the site. Nevertheless, the court held that unless the condemnee could show that discrimination was the sole purpose of the condemnation, it would not inquire into the town's motive.

173. *See* Note, *supra* note 15, at 437-38.

174. *See supra* notes 117-19 and 150 and accompanying text.

175. *See supra* note 160.

176. Business goodwill and moving expenses are examples of costs that courts usually do not include in compensation. *See* Note, *supra* note 160, at 718.

177. *See* Note, *supra* note 51, at 319 & n.89. Governments enact these laws to expedite the legal procedures required to acquire property through condemnation. To be subject to the law, the condemning authority must show a high degree of necessity. *Id. See, e.g.*, MICH. COMP. LAWS §§ 213.51 to 213.77 (1980).

B. *A Stricter Standard for Public Use*

A second approach to the problem of revitalizing the public use requirement imposes certain standards on all local condemnation schemes. For example, Justice Ryan's *Poletown* dissent suggests three factors that should be present in all takings that involve a transfer to third parties.[178] The first factor requires that all such takings be for "public necessity of the extreme sort."[179] Ryan points to railroads, highways and canals as traditional examples of such necessity. The second factor Ryan considers indispensable is continuing accountability to the public.[180] If states are to authorize the condemnation of private property under the auspices of public benefit, then they must subsequently regulate the property to ensure that the benefit is maintained.[181] Third, Ryan insists that the condemning agency retain unfettered discretion when selecting the condemnation site.[182] The agency must base its decision solely on considerations of the public interest, free from any undue private influence.[183]

While stopping short of Justice Ryan's strict test, several state statutes contain language inviting a narrower application of the public benefit test.[184] These provisions are generally similar to the first step of Justice Ryan's test in that they require a condemning agency to consider whether a particular tract of property is necessary to achieve some public purpose.[185] When alternatives exist that appear less injurious to the private interests at stake, the government must provide some reasonable explanation for not pursuing those alternatives.[186]

Under such an approach, courts might also insist that the recipients

178. Poletown, 410 Mich. 616, 674-75, 304 N.W.2d 455, 460 (1981) (Ryan J., dissenting).

179. *Id.* at 675, 304 N.W.2d at 467.

180. *Id.* at 677, 304 N.W.2d at 467.

181. *Id.*

182. *Id.* at 680, 304 N.W.2d at 469.

183. *Id.* at 681, 304 N.W.2d at 469.

184. *See, e.g.*, MONT. REV. CODE ANN. § 93-9906 (1964); N.D. CENT. CODE § 32-15-02 (1975).

185. The Montana provision reads, in pertinent part: "[I]n all cases where land is required for public use . . . it must be located in the manner which will be the most compatible with the greatest public good and the least private injury." MONT. REV. CODE ANN. § 93-9906 (1964).

186. Several state court decisions have shifted the burden to the condemning agency in this manner. *See, e.g.*, Baycol, Inc. v. Downtown Dev. Auth., 315 So.2d 451, 455 (Fla. 1975); Hogue v. Port of Seattle, 54 Wash.2d 799, 838, 341 P.2d 171, 193 (1959).

of condemned property conform to some sort of predetermined plan. When a state legislature purportedly has identified an area of public need that necessitates the taking of private property, it is not unreasonable to require an overall plan guaranteeing that the property will, in fact, be put to the contemplated public use.[187]

Whatever standard the courts choose to follow, they must require the condemning agencies to provide rational justification for their actions. It is not enough that such agencies simply proclaim a public use, for any agency bent on condemning a person's property certainly can conclude that doing so will further the public interest. By placing the burden on the agency to show that the taking will further the proclaimed public use, courts can ensure that both the needs of government and the rights of individuals are protected.

V. CONCLUSION

It is evident that the public use requirement, though once strictly construed, has been drastically relaxed to the point that it provides no definite limits on the government's power to expropriate private property. The courts retain the doctrine in an undefined form, but seldom apply it. Rather, they have adopted a police power—substantive due process approach that precludes any meaningful judicial review. Under this approach, courts merely examine whether the stated purpose of the condemnation could possibly increase the public good by any insignificant degree. So long as the possibility exists, courts will not inquire whether the taking is reasonably necessary to accomplish the stated purpose.

Substituting the more deferential police power standard for the public use requirement is unjustifiable. The power of eminent domain and the police power exist independently of each other and courts should review the use of these powers under their respective standards. State courts should not read the broad language employed by the federal courts, such as that found in *Midkiff*, as unduly limiting judicial review. The cherished position of private property in our society, and the vulnerability of the individual whose property is taken, dictate that the state courts carefully review applications of the eminent domain power. So long as this review proceeds from an awareness of the government's need for flexibility and latitude, courts can use the public use requirement effectively to guard against legislative abuses.

187. *See supra* note 153-56 and accompanying text.