Hawaii Housing Authority v. Midkiff a New Slant on Social Legislation: Taking from the Rich to Give to the Well-to-DO

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EMINENT DOMAIN—PUBLIC USE CLAUSE—The United States Supreme Court holds that Hawaii’s use of eminent domain to redistribute fee simple titles among its citizens as the means to reduce oligopolistic control of the State’s land market is a constitutionally valid exercise of state police power. Hawaii Housing Authority v. Midkiff, ___ U.S. ___, 104 S. Ct. 2321, 52 U.S.L.W. 4673 (1984).

STATEMENT OF THE CASE

The Act

The Hawaiian Legislature passed the Hawaii Land Reform Act of 1967 (the Act) in an attempt to alleviate what it had identified as economic and social hardships caused by an oligopoly in the State’s residential land market. The Act sets out the circumstances under which the State may condemn residential lots presently leased to homeowners and transfer the fee simple titles to the lessees.

In Section 516-33(a) of the Act, the Legislature asserted, among other things, that: 1) most of the State’s private land is held by a small number of parties who refuse to sell their lands, choosing instead to lease them under long-term leases; 2) because of the concentration of land ownership and the persistent practice of leasing, the State’s residential land market is “artificially inflated” and subject to a chronic shortage of fee simple titles available for sale; 3) inflation in the residential land market contributes to economy-wide inflation in the State, thereby ultimately and adversely affecting all Hawaiians; 4) the pervasive practice of leasing deprives homeowners of the choice whether to own or lease the land on which their homes are built; and 5) lessees are often forced to lease on financially unfavorable terms and are generally restricted in their freedom to enjoy the land. Most broadly stated, the Legislature found that:

2. “Oligopoly” means few sellers or a shared monopoly. The antitrust problem presented by an oligopoly in a private market is essentially that “where relatively few firms control the market, they may recognize their ‘interdependence’ with the result that each may restrict his output in order to charge a near-monopoly price.” Phillip Areeda, Antitrust Analysis: Problems, Text, Cases, 270 (3rd ed. 1981). See also Kemper, The Antitrust Laws and Land: An Answer to Hawaii’s Housing Crisis?, 8 Hawaii B. J. 5 (Apr. 1971), 7–9, for a general discussion of ownership concentration in Hawaii’s land market and its effects on land and land-related prices in the State.
3. Section 516-83(a) consists of 13 paragraphs detailing the findings of the Legislature and the public purposes to be served by the Act. Additional findings and declarations are set out in 1975 Hawaii Sess. Laws, ch. 184, § 1.
The economy of the State and the public interest, health, welfare, security and happiness of the people . . . are adversely affected by such shortage of fee simple residential titles and such artificial inflation of residential land values and by such deprivation . . . of the choice to own or take a lease. . . .

By tagging the evil addressed as "artificial inflation," the Legislature implies that prices are higher than those which would exist in a healthy competitive market taking generalized inflation into account; i.e., higher than "natural" prices. It thereby also suggests that the current fee owners have some power to control the market price of land, either by design or as the inevitable consequence of concentrated ownership.

The Hawaii Housing Authority (HHA) is the administrative agency in charge of implementing the terms of the Act. The terms provide that tenants on single-family residential lots in development tracts may file applications requesting that HHA condemn the lots on which their homes sit. If 25 eligible tenants or those on 50 percent of the lots in a tract, whichever is less, make proper application, then HHA may hold a public hearing to determine whether acquisition of all or some of the lots would serve the purposes of the Act. If HHA finds that those purposes would be served, then it may acquire the landowner's fee simple title at prices set by condemnation trial or through negotiations between the owners and lessees. HHA may then sell the lots to applying tenants. No single tenant or family can acquire more than one lot. The Act contains no prohibition against subsequent leasing of lots.

5. "When one or two individuals or entities own all of the land in an area capable of development, . . . price is subject to some negotiation, but, ultimately, the bargaining cards are all in the hands of the property owners, and it soon becomes a take it or leave it situation. When most of the developed areas are owned by a few, then the developer really has no choice but to pass the high price on to purchasers."
6. A "residential lot" is defined as "a parcel of land, two acres or less in size, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for one or two families." HAWAII REV. STAT. § 516-1-(11) (Supp. 1983). The definition was amended in 1980 to include two-family residences.
7. A "development tract" is defined as "a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots." HAWAII REV. STAT. § 516-2(2) (1976).
9. Eligible tenants must, among other things, be 18 years of age, own the house sitting on the lot, be or have a bona fide intent to be a resident of the State, show proof of his or her ability to pay for a fee simple interest in the lot, and not own residential land elsewhere nearby. HAWAII REV. STAT. § 516-33 (Supp. 1983).
Diligent implementation of the Act could result in a continuous transfer of fee simple titles from lessors to lessees. That process would undermine any oligopolistic power in the State's residential land market and satisfy some portion of public demand for fee simple titles. Theoretically, as the large landowners lose control over the market, land prices will seek more competitive levels, thereby lessening both market-specific and generalized inflation in the State.

The Suit

In April 1977, HHA began proceedings to condemn tracts of land held by the Trustees of the Estate of Bernice Pauahi Bishop (the Bishop Estate), one of the larger private landowners in Hawaii. In February 1979, the Bishop Estate filed suit against the Commissioners and Executive Director of HHA and HHA itself. The case was originally filed in the U.S. District Court for the District of Hawaii as Midkiff v. Tom (Midkiff I), and later appealed to the Ninth Circuit under the same style (Midkiff II). The Ninth Circuit reversed the District Court decision, and the case was then appealed to the U.S. Supreme Court under the title Hawaii Housing Authority v. Midkiff (HHA). The suit sought a declaration that the Act was unconstitutional and a corresponding injunction.

The primary issue addressed in the three court opinions resulting from the Midkiff suit was whether the Act violates the public use clause of the Fifth Amendment, applied to the states through the due process clause of the Fourteenth Amendment. The Bishop Estate's challenge was that the Act allows the State of Hawaii to use its eminent domain power to take private property without a justifying public purpose for the taking or subsequent public use of the property taken. In Midkiff I, the District Court held that the Act met the constitutional requirements of the public use clause. Its holding was based on the dual conclusions that the purposes of the Act were within the ambit of the State's police powers and the means chosen by the Legislature to accomplish its ends were neither arbitrary, capricious, nor in bad faith. The Ninth Circuit majority opinion applied a relatively narrow reading of the relevant case law and concluded that the Act contemplated a public taking for private use in violation of the public use clause.

Two issues were addressed by the Supreme Court on appeal: 1) whether the Act violates the public use clause; and 2) whether the District Court abused its discretion by not abstaining from exercising its jurisdiction.

14. 702 F.2d 788 (9th Cir. 1983).
16. The District Court issued a preliminary injunction in May of 1979 which held that the mandatory arbitration and compensation provisions of the Act were unconstitutional. 471 F. Supp. 871 (D. Hawaii 1979).
over the *Midkiff* case. The Supreme Court held that the District Court had not abused its discretion under either the *Pullman-* or *Younger-*abstention doctrines.¹⁷ The Court noted particularly that *Pullman*-abstention was inappropriate because there was no uncertain question of state law at issue. The Act "unambiguously provides that 'the use of the power . . . to condemn . . . is for a public use and purpose.'"¹⁸ The Supreme Court overruled the Ninth Circuit majority decision on the Fourteenth Amendment challenge. It based its holding on the breadth of the states' police powers and the degree of deference courts, particularly the federal courts, should give a legislative determination that a public taking will result in a public use.

**HISTORICAL BACKGROUND**

In *HHA*, the Supreme Court stated that "'[t]he people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs.'"¹⁹ In order to fully appreciate the truth of that statement—or its irony, depending on one's viewpoint—some understanding of the history of land ownership in Hawaii is necessary.

*The Traditional Land Tenure System in Hawaii*

Archeological evidence tentatively indicates that Hawaii was settled by peoples from the Marquesas and Society Islands as early as the eighth century, and by peoples from Tahiti during the twelfth and thirteenth centuries. From the thirteenth century until the arrival of Captain James Cook in 1778, the Hawaiians were apparently isolated from the rest of the world.²⁰

Under its traditional land tenure system, Hawaii was divided into various kingdoms. By virtue of conquest, each king had paramount power over the land within his realm. The kings chose their own lands and allotted the remaining lands to their warrior chiefs. The chiefs, in turn, chose their lands and reallocated the rest to their own supporters, and so on down to the common tenants. Any allotment of land was ultimately at the sufferance and subject to the continued power of the allottor. Though not a common practice, tenants could be dispossessed at will.²¹ Tenants were free to move among land divisions and from the governance of one chief to that of another.²²

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¹⁹. 104 S. Ct. at 2323.
²⁰. GAVAN DAWNS, SHOAL OF TIME, xii-xiii (1963).
²². Id. at 6.
The islands were also divided into named districts which were subdivided into *ahupua'a* subject to the supervision of a land manager, or *konohiki.* Ideally, an *ahupua'a* "stretched in a wedge from its apex at a mountain top to its base in the sea," thereby embracing the widest range of an island's resources.

In the very early 1800s, King Kamehameha I unified the islands under his control. By the mid-1820s when Kamehameha III took the throne, a large foreign population already existed in Hawaii. Although the individual interests of the foreign population may have differed on a number of other points, the traditional land tenure system in Hawaii was repugnant to all. The threat of dispossession became particularly disconcerting to the foreign population as its capital investment in Hawaiian agricultural enterprises increased during the 1830s and 1840s.

**An Era of Land Reform**

Using their political and religious influence, backed by economic and military muscle, the foreign population in Hawaii eventually persuaded King Kamehameha III and other native leaders that Hawaii's traditional political system, including its land tenure system, was no longer viable. The King's first step toward political reform was to enact the Bill of Rights of 1839. That Bill provided that protection of law would be given to persons, their building lots, and property, and that a "landlord cannot causelessly dispossess his tenant." In 1840, Kamehameha III granted the Hawaiian kingdom its first constitution, by which the government changed from an absolute to a constitutional monarchy. An act passed in 1845 established a Board of Commissioners to Quiet Titles with power to investigate and confirm or reject existing claims to property rights in

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23. In 1848, the Island of Oahu was divided into six districts, one of which has been renamed "Honolulu." The districts (mokus), or their geographic successors are important today as judicial districts. *Id.* at 3.
24. *Id.*
25. Roger C. Green, *Makaha Before 1880 A.D.* 31 *Pacific Anthropological Records* 5 (Dept. of Anthropology, Bernice Pauahi Bishop Museum, Honolulu, Hawaii, June 1980). Although divisions were often made according to prominent natural features, boundaries were also often elusive. Certain people were taught how to remember division boundaries and that information was passed on from one generation to the next. CHINEN, *supra* note 21, at 1.
27. *Id.*
29. "The vigorous actions of the foreigners in the Islands, often supported by the commanders of the warships of their homelands visiting at the time in Hawaiian waters, forced Kamehameha III and his chiefs to review their national policy." CHINEN, *supra* note 21, at 7.
30. CHINEN, *supra* note 21, at 7; see also *In re Matters of Estate of His Majesty Kamehameha IV*, 2 Hawaii 715 (1864).
31. *Id.*
land. The Board identified the nature of a claimed title as either a fee simple or a leasehold.

In 1848, Kamehameha III initiated a program which has come to be known as the "Great Mahele," or land division. During the Mahele, approximately 1,500,000 acres of Hawaii's land were conveyed by the King to the chiefs and konohikis, and about 30,000 acres as kuleanas to native tenants. The King divided his reserved lands into two types, setting aside about 1,500,000 acres as government lands and something under 1,000,000 acres as Crown lands. The government, or public, lands were established by an instrument in which the King conveyed all his "rights, title and interest" in the lands described in the deed to "the chiefs and people of [his] Kingdom." The Crown lands were reserved as the exclusive property of the King, his heirs and successors, forever. The King's separate treatment of the Crown lands reflected both a desire to exercise complete control over the land and a deep concern over "the hostile activities of foreigners in the Islands." The King did not want the Crown lands to become part of a "public domain and subject to confiscation by a foreign power in the event of a conquest." When the monarchy ended in 1893, the remaining Crown lands were merged with the government lands creating a valuable public domain which later passed from the Republic to the Territory of Hawaii.

By 1841, foreigners already held "good, doubtful and squatter claims" to land in the islands. That year, the national legislature attempted to curb the increase of foreign land holdings in the Kingdom by requiring foreigners whose claims were not supported by written titles or leases to

32. 1846 Hawaii Sess. Laws, p. 107; re-enacted as An Act to Organize the Executive Department of the Hawaiian Islands, art. IV (1846). CHINEN, supra note 21, at 8, n.1.
33. "[T]here are but three classes of persons having vested rights in the land, 1st, the government (the king), 2nd, the landlord (the chief and konohiki), and 3rd, the tenant." CHINEN, supra note 21, at 9, quoting Preface to Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them, 1846; 2 Rev. Laws of Hawaii 2120-2152 (1925).
34. "Kuleanas" were the lands awarded to the native tenants under an act of 1850. CHINEN, supra note 21, at 30. "The kuleana was the functional unit in soil cultivation, corresponding to the peasant's holding in Europe, as the ahupuaa corresponds to the large estate of nobility, and the ili to a small estate, ..." THEODORE MORGAN, HAWAII: A CENTURY OF ECONOMIC CHANGE 21 (1948).
35. CHINEN, supra note 21, at 31.
36. Id.
37. Id. at 25. The instrument was recorded in The Mahele Book, Office of the Commissioner of Public Lands, Territorial Office Building, Honolulu. Id. at 33.
38. Id. at 25.
39. Id. See also, 4 Privy Council Records 250-308; In re Matters of Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864).
40. CHINEN, supra note 21, at 25.
41. Id. at 27. Before January 3, 1865 when an act was passed which made the Crown lands inalienable (1864 Hawaii Sess. Laws, p. 69), "King Kamehameha III and his successors did as they pleased with the Crown lands, selling, leasing and mortgaging them at will." Id.
42. MORGAN, supra note 33, at 129.
negotiate leases with the Hawaiian governors. The leases were to be for a fixed term, not to exceed 50 years. The Hawaiian government, however, was not strong enough to stem the tide of foreign power in the Kingdom. In 1850 legislation was passed that allowed foreigners to hold and convey fee simple titles to Island land.

From the Mahele to the Act

Plantation agriculture was introduced to the Islands as early as the 1820s. By 1876, the sugar industry dominated the Islands’ economy. The kuleanas quickly passed to foreign sugar and rice plantation owners and land speculators. The loss of land by the native tenants has been attributed to a number of factors, including native alienation from the concepts of private property and “booming land prices, giving a dazzlingly large return for a lease or sale.” A similar fate befell the Konohiki lands. Plantations also purchased and leased government lands.

Many of the largest plantation owners in Hawaii were North Americans who maintained close economic ties with the United States and whose interests would be served by annexation of Hawaii to the United States. Agitation for annexation reached a climax in the revolution of January 1893. Under extreme pressure, including that exerted by an informal U.S. military presence in the Islands, Queen Liliuokalani yielded her authority “until such time as the Government of the United States should, ... undo the action of its representatives and reinstate her ‘as the constitutional sovereign of the Hawaiian Islands.’” The Queen’s action had the political effect of an absolute and final abdication. A short-lived Hawaiian Republic soon after became the Territory of Hawaii.

Between the turn of the century and World War II, Hawaii’s primary enterprises were the production and export of sugar and pineapples. During that era, “[a] tightly knit corporate and family structure dominated the Islands’ plantations, financial institutions, shipping and a substantial portion of their wholesale and retail commerce.” That “structure” was predominately controlled by North Americans. At least one source has suggested that “[c]oncentration of land ownership both caused and reflected the unified outlook and objectives of this oligarchic regime.”

43. *Id.* Announcement in the Polynesian, June 1841. *Id.* at n.28.
44. *Id.* at 129.
45. *Id.* at 136.
46. *Id.* at 173-185.
47. *Id.* at 137.
48. CHINEE, supra note 21, at 27. The government lands were sold “as a means of obtaining revenue to meet the increasing costs of the Government.” *Id.*
49. MERGE TATE, HAWAI: RECIPROCITY OR ANNEXATION 236 (1968).
51. *Id.* at 4.
A good share of Hawaii's former Crown lands had ended up in various royal estates and trusts. In 1884, Princess Bernice Pauahi Bishop, heir to the estates of the Kamehamehas, died, leaving approximately one-ninth of Hawaii's land in trust. Her will provided that income from her estate be used to found two schools, one for girls and one for boys, to be called the Kamehameha Schools. The schools were to give preference to students of native Hawaiian ancestry. A part of the lands subject to her estate was at issue in HHA.

Hawaii became the 50th state in August 1959. As part of his gubernatorial campaign of 1959, Governor Quinn proposed to institute a land redistribution program which he tagged the "Second Mahele." The proposal was debated in the 1961 legislative session where the issue of State land law was generally explosive. Governor Quinn's plan proposed to offer about 145,000 acres of State lands for public sale. The lands were claimed to be on all the major islands and to include a complete cross-section of all types of island terrain. The plan called for dividing the land into blocs for subdivision into smaller lots to be sold on a one-to-a-family basis.

Quinn's proposal was severely criticized on grounds including that the bulk of lands to be distributed were already under lease to sugar plantations and ranches, and that the proposal would destroy the agricultural industry. The Second Mahele was blocked in both the House and Senate, but the legislative debates attending and following its demise were fierce and described the State's land problems in terms of monopoly and shortage.

Concentration and Inflation in Hawaii's Land Market Circa 1967

Immediately prior to adoption of the Act, 72 private parties owned about 47 percent of the land in Hawaii; 18 of them holding nearly 80 percent of the privately owned fee simple land in the State. The State and federal governments combined claimed to control about 48.5 percent, but that figure was high because both claimed some of the same land. The tracts at issue in HHA are situated on the Island of Oahu where high ownership concentration may be particularly critical. The island supports

52. Daws, supra note 20, at 299.
53. Horwitz, supra note 50, at 2.
54. Governor Quinn's proposal was set out in the Honolulu Star-Bulletin, July 23, 1959, reproduced in Horwitz, supra note 50, at 5.
55. Horwitz, supra note 50, at 5.
56. Id. at 6-10.
58. Id.
both plantation agriculture and dense urban development, including the City of Honolulu. In 1967, the federal government was the largest landowner on Oahu and held about 36.7 percent of the land.59 The Bishop Estate was the second largest landowner, controlling about 15.5 percent of Oahu’s land.60 Twenty other private parties owned about 41.5 percent of the land on the island.61

In 1970, the selling prices for new homes in Hawaii were almost 60 percent above national figures and those for existing homes about 90 percent higher.62 The market value of the home site in Hawaii made up more than 40 percent of the total property value; the national average was closer to 20 percent.63 Between 1960 and 1969, land costs increased by 73.2 percent for new homes and by 94 percent for existing homes. Between 1952 and 1970, land costs had risen 225 percent.64

Hawaii is subject to a number of forces besides a high concentration of ownership which contribute to the situation reflected in these statistics. By 1967, land prices in the Islands had been notoriously high for almost 100 years. A fair portion of Hawaii’s land is unusable for any purpose. By 1860, nearly nine-tenths of the available land had already been taken up.65 A higher population growth than the national average also increases demand relative to other parts of the country, exacerbates existing land shortages, and puts constant upward pressure on land prices. Also, an excellent return on agricultural land keeps a high floor on land prices in the State.66

LEGAL BACKGROUND

The federal sovereign power of eminent domain is limited by the Fifth Amendment mandate that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use without just compensation.” Through the due process clause of the Fourteenth Amendment, that mandate also restricts the eminent domain power of the states.67 Courts have construed the Fifth and Fourteenth amendments as establishing three guarantees to persons whose

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59. Id. Federal land on Oahu is largely set aside for military purposes and not likely to be relinquished to ease local private land shortages. The State of Hawaii owned about 14.9% of the land, but claimed that it had little to make available to residential buyers because of a need for parks, schools and other public facilities. Id. at 33–34.
60. Id. at 33, n.5.
61. Id. at 33.
62. Kemper, supra note 2, at 5.
63. Id.
64. Id. at 6.
65. MORGAN, supra note 33, at 135.
66. See generally, Kemper, supra note 2, at 7.
67. See e.g, Chicago Burlington & Quincy Ry. Co. v. Chicago, 166 U.S. 266 (1897).
property may be taken by a sovereign for its own use: 1) that the mechanism by which a taking is consummated will comport with due process; 68 2) that the person from whom property is taken will receive just compensation; 69 and 3) that the property taken will be put to public use. For purposes of this discussion, the third guarantee will be broken down into two elements: that property will be taken for a public purpose and that it will be used in some sense by the public.

Public Purposes and the Police Power

Public purposes define the ends sought by a lawmaking body. If the public purposes stated by a legislature are found by the Court to be within the scope of the police power, then the use of eminent domain to achieve those purposes is simply a means to an end. 70 If the means is rationally related to a constitutional objective, then the use of eminent domain will be upheld. 71

Both the District Court in Midkiff I and the Supreme Court in HHA applied a “police power/due process” analysis to conclude that the Act did not violate the public use clause. That analysis is based on the rationale used by the Supreme Court in a 1954 eminent domain decision, Berman v. Parker. 72 In its discussion of the nature of the states’ police power, the Berman Court noted that “an attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.” The Court went on to say that what constitutes a state’s police power is “essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.” 73 The Berman Court cited public health, safety, peace, and morality as among the common issues addressed by exercises of police power, but noted that the “concept of public welfare is broad and inclusive,” and that the “values it represents are spiritual as well as physical, aesthetic as well as monetary.” 74

The federal judiciary, construing the ramifications of dual sovereignty and separation of powers, has adhered to a policy of extreme deference

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68. As well as guaranteeing just compensation and that taken property will be put to public use, due process of law protects property owners against any form of procedure in eminent domain cases which would deprive them of an opportunity to be heard and to make whatever claims and objections they are entitled to make. 26 Am. Jur. 2d Eminent Domain § 8 (1966).
73. Berman, 348 U.S. at 32.
74. Id. at 32–33.
to legislative definitions of what constitutes a valid exercise of state police power when the exercise will not impinge on activities, persons, property, or rights subject to the plenary jurisdiction of the federal government. In Berman, the Court stated that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." The latitude given legislatures to define their own police power to promote the public welfare as described in Berman suggests that what constitutes valid public purposes within the context of an eminent domain action is fundamentally a political question and subject to appropriately limited judicial scrutiny.

Public Use

Although the Berman decision is best known for its discussion of the breadth of the police power, it also stated the limits on that power: the facts of each case and "specific constitutional limitations." To the extent that the public use clause protects the property rights of individuals against collective lawmaking authority, the clause constitutes a limit on sovereign police power. Standing alone, then, the requirement that a taking serve a public purpose seems to beg the question of what constitutes a valid exercise of police power within the context of a public use clause challenge.

A separate requirement that property taken be put to public use potentially introduces an issue of fact which could limit the scope of otherwise valid public purposes. The distinction between public purposes and uses, however, is inherently vague. Arguably, once the legislature has stated a public purpose which may be furthered by an exercise of the state's eminent domain power, the public "uses" the property taken to serve that purpose. Perhaps the simplest way out of this conundrum is to assess the extent to which the taken property is subsequently put to private, rather than public, use. For instance, both a taking of land for military purposes and a taking under the Hawaiian Act may serve public purposes as defined by lawmakers. The former, however, will not result in direct use of the land by private citizens; the latter, obviously, will. These examples represent opposite ends of a private use spectrum. Most cases will fall somewhere between.

In Midkiff II, the Ninth Circuit majority (Ninth Circuit) described the fundamental constitutional limitation on sovereign eminent domain power in terms of the republican compromise with pure democracy contemplated.

75. Compare the strict scrutiny given state determinations regarding what constitutes valid exercises of state police power when those exercises will burden interstate commerce. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
76. Berman, 348 U.S. at 32.
77. Id.
by U.S. founding fathers. Its discussion suggested that a major objective reflected in constitutional debates was that the tools of government would not be used to redistribute private property among private parties. The Ninth Circuit cited early case law in support of its position. In 1979, the Supreme Court declared that "[a] law that takes property from A and gives it to B... is against all reason and justice." Similarly, an 1896 case, *Missouri Pac. Ry. Co. v. Nebraska*, held that "[t]he taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the fourteenth [amendment]." As literal propositions, all of the above have been undermined by subsequent social legislation aimed at redistributing resources among the population and by case law upholding the validity of such legislation.

Whether property taken through eminent domain will be put to public use has been treated, at least in part, as a question of fact. In *Midkiff II*, the Ninth Circuit set out a list of instances where federal courts had found a public taking to be for a constitutionally acceptable public use. That list includes instances when the taking resulted in: 1) an historically acceptable public use; 2) a change in the use of the land; 3) a change in possession of the land; 4) a transfer of ownership from a private party to a governmental entity; and 5) a *de minimis* condemnation necessary to develop nearby land. The Ninth Circuit noted that the Hawaiian Act fit none of those descriptions.

In *People of Puerto Rico v. Eastern Sugar Assoc.* the First Circuit Court of Appeals upheld the validity of a condemnation of over 3,000 acres of private land on the Island of Vieques. The public purposes declared in the Land Law of Puerto Rico included ending an existing *latifundia*, blocking its reappearance in the future, and assisting in the creation of new landowners. The land condemned was to be redistributed

78. "[In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole;... there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. ... A republic promises... the cure for which we are seeking. ..." *Midkiff II*, 702 F.2d at 792, quoting *The Federalist* No. 10, 104-09 (J. Madison) (Hamilton ed. 1863).
80. 164 U.S. 403.
81. *Id.* at 417.
82. "Following the establishment of the United States Constitution, there were two major kinds of activities for which the power of eminent domain was undisputedly properly employed: mill acts and road building." *Midkiff II*, 702 F.2d at 794.
83. *Id.* at 793-794.
84. *Id.* at 794.
85. 156 F.2d 316 (1946).
86. A "*latifundia*" is a system of large landholdings. A "*latifundio*" is a large landed estate.
in small parcels to individual *agregados*\(^8\) to build their homes on, in larger parcels to farmers for subsistence farms, and in large parcels, by lease, to professional agriculturalists to develop "proportional-profit" farms.\(^9\) The court of appeals stressed that if any of the uses set out in the Law was found not to be public, then the petition in that case would have been properly dismissed. It concluded, however, that the uses must be looked at in the aggregate and in the context of a comprehensive program of statewide agrarian reform.\(^9\)

At least three potentially diverse interpretations of the court of appeals' conclusion are possible: 1) that the individual users, in the aggregate, constituted the public; 2) that the individual uses, in the aggregate, constituted public use; or 3) that the public purposes served by the Law rendered the individual private uses public. If the public purposes supporting a taking are viewed as rationale and severable from the issue of the actual use to which property is put, then the third possible conclusion listed above would not, by itself, support a public taking. That position was taken by the Ninth Circuit in *Midkiff II* when it held that, stripped of its rationale, the Act constitutes a blatant attempt by the State of Hawaii to redistribute property among its citizens for the private use of some of them.\(^9\)

Early case law indicates that there is a limit to the judicial deference which should be given a legislature's public use determination. In a 1905 decision, the Court quoted an 1882 state decision for the proposition that "[i]t is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain. . . . For if the use be not public . . . the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."\(^9\)

\(^8\) "Agregado" is defined in 1941 P.R. Laws § 78 as "any family head residing in the rural zone, whose home is erected on lands belonging to another person or to a private or public entity, and whose only means of livelihood is his labor for a wage."

\(^9\) *Puerto Rico*, 156 F.2d at 321.

\(^8\) The four contemplated uses for the land enumerated above are closely inter-related. Each use plays a part in a comprehensive program of social and economic reform. Thus we see no basis for analyzing each proposed use separately. Instead we think the entire legislation should be regarded as a single integrated effort, to improve conditions on the island, and so viewed we think enactment of the statutes within the power of the Insular Legislature." *Id.* at 323.

\(^9\) *Midkiff II*, 702 F.2d at 798. "This court need not, and will not, stand idly by and allow [federal] administrative officials to take private property arbitrarily, capriciously, in bad faith, or for what is essentially a private purpose." (emphasis added). *Id.* quoting United States v. 23.9129 Acres of Land, 192 F. Supp. 101, 102 (W.D. Cal. 1961). "When we strip away the statutory rationalizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Midkiff II*, 702 F.2d at 798.

legislature’s public use determination is to be deferred to until it is shown to “involve an impossibility”93 or to be “palpably without reasonable foundation,”94 then any substantive control by the courts is questionable. If the concepts of public use and purpose are then equated without reference to private use, the protection afforded individual property rights by the public use clause becomes extremely elusive.

THE HHA DECISION

In HHA, the Court defined the issue before it as

[w]hether the Public Use Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State.95

The Court began its analysis by quoting the Berman decision to establish the breadth of the states’ police power, the degree of judicial deference which should be given legislative definitions of public needs, and that an exercise of eminent domain power is simply a means to an end. The Court then concluded that “[t]he public use requirement is coterminus with the scope of a sovereign’s police powers.”96

The Court went on to state that even when the power of eminent domain is equated with the full scope of the police power, a role for the courts exists in reviewing a legislature’s public use determination. It described that role as “extremely narrow,” concluding that a different rule would result in the judiciary supplanting its own judgment for that of the legislature in deciding what constitutes a valid governmental function or a public use.97

The Court acknowledged that its previous decisions had drawn a line at takings of one person’s property for the private benefit of another, absent a justifying public purpose. It identified the circumstances under which such takings would be unconstitutional as those which could not support any legitimate public purpose. The Court concluded that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [it had] never held a compensated taking to be proscribed by the Public Use Clause.”98

95. HHA, 104 S. Ct. at 2324.
96. Id. at 2329.
97. Id.
98. Id. at 2329–2330.
Applying the theory set out above to the facts before it, the Court concluded that it could not disapprove of Hawaii’s use of its eminent domain power in this instance because: the people of Hawaii, via the Act, were attempting to alleviate perceived evils of a land oligopoly “traceable to their monarchs”; the legislature had alleged that that oligopoly created “artificial deterrents to the normal functioning of the State’s residential land market”; the pervasive practice of leasing deprived thousands of the choice whether to lease or buy the land on which their homes were built; and regulating oligopoly and its attendant evils was a classic exercise of the State’s police power.\textsuperscript{99}

The Court concluded that the Act constituted a “comprehensive and rational approach to identifying and correcting market failure.”\textsuperscript{100} It then noted that whether the Act would, in fact, accomplish its purposes was not the object of judicial review; that if the public purpose is legitimate and the means are not irrational, then “empirical debates over the wisdom of the taking . . . are not to be carried out in the federal courts.”\textsuperscript{101} The Court further concluded that if the legislature “rationally could have believed” that the Act would promote its objectives, then the constitutional requirement is satisfied.\textsuperscript{102}

The Court next addressed the Ninth Circuit’s decision holding the Act unconstitutional. It first noted that the Ninth Circuit had read the relevant case law as supporting a much narrower view than that adopted by the Court in \textit{HHA}. It then rejected the argument that a transfer of property in the first instance to private parties would “condemn that taking as having only a private purpose.”\textsuperscript{103} The Court cited precedent for the proposition that “what in its immediate aspect is only a private transaction may . . . be raised by its class or character to a public affair,” concluding that it is “only the taking’s purpose and not its mechanics, that must pass scrutiny under the Public Use Clause.”\textsuperscript{104}

The Court ended its opinion by reiterating that the public purpose justifying the Act was “to attack certain perceived evils of concentrated property ownership” in the State and that the State’s use of eminent domain to that end was not irrational.\textsuperscript{105} Those circumstances, together with the fact that the “weighty demand” of just compensation had been met, satisfied the requirements of the Fifth and Fourteenth Amendments.\textsuperscript{106}

\textsuperscript{99} Id. at 2330.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 2331.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 2331–2332.
\textsuperscript{106} Id. at 2332.
A conflict between the states' police powers and the protection given persons in the Fifth and Fourteenth Amendments is ultimately one between the powers of lawmakers and the rights of individuals. Considering only the language used in recent cases deciding public use clause challenges to an exercise of sovereign eminent domain power, the outcome in HHA was predictable. Equally predictable was the Fourteenth Amendment challenge in that case. The inevitability of both the challenge and the outcome suggests a possible conflict between the Court's view of its role in such cases and public expectations regarding constitutional protection of private property. The key to this conflict may be found in the qualifying language in Berman that any attempt to define the scope of a state's police power "is fruitless, for each case must turn on its own facts."\textsuperscript{107}

The HHA Court cited Berman in support of the proposition that the public use requirement is coterminus with a state's police power. The scope of a state's police power is incapable of judicial definition, largely the product of legislative determinations of what collective actions will serve the public interest, and broad enough to allow social legislation serving the public welfare. After Berman, the public welfare is apparently a metaphysical as well as mundane concept because it includes spiritual and aesthetic values. The public welfare is the pool from which public purposes may be drawn.

In HHA, the Court stated that it had never found a compensated taking unconstitutional where the use of eminent domain was "rationally related to a conceivable public purpose." As partial support for that position, the Court quoted language from a 1925 decision stating that judicial deference should be given a legislature's public use determination "until that determination is shown to involve an impossibility."\textsuperscript{108} Arguably, two substantive conceptual changes are reflected in the HHA Court's elaboration on the earlier precedent.

First, the 1925 case, \textit{Old Dominion Land Co. v. U.S.},\textsuperscript{109} equated the concepts of public use and purpose, if at all, in a manner which constitutes a transposition of the equation drawn in HHA. The full language used to describe the degree of deference due in that instance was that "'[Congress'] decision is entitled to deference until it is shown to involve an impossibility. But the military purposes mentioned at least may have been entertained and they clearly constituted a public use.'"\textsuperscript{110} The implication is that if public use is established, then public purpose may be presumed. In the more recent cases, particularly HHA, just the opposite seems to

\textsuperscript{107} Berman, 348 U.S. at 32.
\textsuperscript{108} Old Dominion, 269 U.S. at 66.
\textsuperscript{109} 269 U.S. 55.
\textsuperscript{110} Id. at 66.
be the rule; i.e., if public purpose is established, then public use will be presumed. The use to which property is put is inherently a factual issue, whereas the validity of a public purpose appears to be purely legal. The collapsing of the factual issue into the legal one has the effect of seriously undermining the importance of the statement in Berman that “each case must turn on its own facts.”

The second conceptual change arising from HHA further undermines the importance of the facts in any given case. Arguably, a test for impossibility as required by the Old Dominion language could allow a showing of impossibility in fact. The language used by the HHA Court requires only that a taking be supported by a conceivable public purpose. Even allowing for the moment that the equation of public purposes and uses is reasonable, a test for impossibility seems narrower than one for conceivability. Conceivability has little or nothing to do with facts as they exist in the objective world. Unless the legislature (or Congress) is particularly inarticulate and can't state a conceivable public purpose, its determination that a public taking will serve a public purpose is, for all practical purposes, irrebuttable. The fact that the legislature conceived the public purpose is proof of its conceivability.

The only issue remaining, then, is whether the use of eminent domain is rationally related to the end defined by the legislature. When “rational” is related to “conceivable” which in turn is linked to a realm of circumstances including the metaphysical, that term becomes akin to “rational,” and, again, is hardly a matter of fact.

As interpreted by the Supreme Court, the State of Hawaii is essentially alleging in the Act that the problem in the State's land market is oligopoly. The means developed by both federal and state governments to redress monopolistic power in private markets is the body of antitrust law. In 1962, the Hawaiian attorney general issued an opinion to the effect that the leasing and selling of land in the State would be subject to the State's antitrust laws.111 Ironically, an antitrust suit is a very complicated, factually-oriented action. The difference between the burden of proof placed upon an accusing party in an antitrust suit and that placed upon a legislature exercising its eminent domain power is staggering.112

112. In Midkiff I, the plaintiffs urged the court to allow them to “show that each and every legislative rationale for [HAWAII REV. STAT. § 516-83 (1976)] is wrong.” Id. at 65. They claimed that “if all the economic justifications for the statute are disproved, all that is left are social justifications—such as the social engineering goal of land redistribution.” Id. Those social goals, contended the plaintiffs, could not alone justify the taking as being for a public use. The court disagreed, stating that the issue before it was restricted to whether the plaintiffs had been denied substantive due process. To satisfy substantive due process, the court had only to determine whether the legislature's means of achieving its goal was arbitrary, capricious, or in bad faith. “If the Court determines (1) that any possible rationale for the statute, expressed or not, is within the bounds of the State's police power, and (2) that the statute is not arbitrary or the product of legislative bad faith, then the statute is constitutional.” Id.
CONCLUSION

The two cases which are factually most similar to HHA are Berman and the Puerto Rico case. In Berman, property was taken by Congress for the purpose of eliminating a slum area in the District of Columbia. The "blight" addressed in that instance could be isolated and addressed in its entirety, at least as a physical phenomenon. Also, whether the outcome of the redevelopment project was as expected and hoped, the change effected was immediate and included the provision of at least some additional or improved public facilities, such as parks and schools. The redistribution scheme in the Puerto Rico case was also comprehensive and entailed a change in both possession and use of the land at issue. By contrast, the scheme established in the Hawaiian Act seems piecemeal and accomplishes a change in neither use nor possession.

Although a loss of private fee simple title necessarily attends any public taking of land, the public has traditionally used the real property taken to accomplish its ends rather than the title to that property. In the Hawaiian instance, the private titles themselves are used by the public while the real property taken is used exclusively by private parties. The chain of events and span of time between the takings contemplated by the Act and the alleviation of, for instance, economy-wide inflation in the State is particularly long and speculative. In the meantime, private parties enjoy the property taken by the State while the public can be guaranteed no benefit from the taking.

If the "artificial inflation" complained of in the Act arises from a shortage of residential land on the Islands rather than illegal oligopolistic collusion, then a change in ownership will only allow more parties to enjoy the hardship imposed on others by the shortage. New owners cannot produce more land. Also, because the Act places no prohibition on subsequent leasing of the lots taken, those private parties to whom lots are transferred are in a position to enjoy whatever financial benefits accrue from the practice of leasing and to impose the same restrictions on subsequent possessors as were imposed by the original owners.

The states' power of eminent domain has been treated as sacred by the courts. Fourteenth Amendment rights have also been viewed as sacred, though perhaps primarily by the public. Unfortunately for those to whom the guarantee of just compensation is not terribly satisfying by itself, the only living protection one can count on from the Fourteenth Amendment in cases arising from an exercise of eminent domain power is that just compensation will be paid.

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