NOTES

Constitutional Review of State Eminent Domain Legislation: *Hawaii Housing Authority v. Midkiff*

I. INTRODUCTION

The State of Hawaii has a unique land ownership problem directly affecting many of the state's homeowners: a handful of people own a large percentage of the land available for residential housing.[1] Consequently, a significant proportion of homeowners rent, under long-term leases, the land on which their homes are built.[2]

In 1967 the Hawaii legislature took action to break up this

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1. This problem resulted from a feudal land tenure system in which there was no such concept as fee simple ownership. All the land belonged to the Great Chief of the Kingdom, the alli-'ai moku. The Great Chief assigned land units to subchiefs, who in turn reassigned smaller sections of land to lower ranking chiefs; the latter were responsible for administering the land and governing the farmers and other tenants of the general population. Government and landholdings were therefore inextricably woven together. Non-Hawaiians were not permitted to hold land.

In 1819, following the death of Great Chief King Kamehameha, this native system of landholding began to wane. At first, the pressure of Western influence resulted in non-Hawaiians receiving grants of land under the traditional system. Dissatisfied with the insecurity of such landholdings, Westerners pressed for fee simple ownership. By 1847, legislation was enacted permitting fee simple ownership by non-Hawaiians. A prosperous sugar cane industry provided the economic incentive to purchase land, and by the close of the nineteenth century, control of the Hawaiian economy and ownership or control of Hawaiian land had passed from the native Hawaiians to the Westerners, primarily Americans. Additionally, with the annexation of Hawaii to the United States in 1893 came extensive ownership of Hawaiian land by the United States Government. Despite attempts to break up this concentration of land ownership, much of the land in Hawaii is owned by a few. As of 1967, the state government has owned approximately 39% of the total land area in the state, the federal government approximately 10%, and 72 private landowners 47%, consisting of tracts of 1,000 acres or more. Further, the 18 largest landowners own over 40% of the land, consisting of tracts of 21,000 acres or more. On Oahu, the most urbanized of the Hawaiian islands, 22 landowners owned over 72% of all land as of 1975. For a complete discussion of the history and development of land ownership in Hawaii, see the Brief of Amici Curiae the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984). *See also* STATE OF HAWAII, LEGISLATIVE REFERENCE BUREAU, REPORT NO. 3, 1967, *Public Land Policy in Hawaii: Major Landowners* (1969 reprint).

2. *See infra* note 4.

concentration of ownership by enacting the Land Reform Act.[3] The legislature declared that such ownership was a threat to the health, safety, and welfare of Hawaii's citizens because of its significant contribution to the spiraling inflation of land values.[4] To alleviate the problem,[5] the Act authorized a redistribution of the fees simple from the few landowner/lessors to the many homeowner/lessees, using the power of eminent domain.[6]

Since, at first blush, it appeared that the State of Hawaii was merely transferring private property from one private per-

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3. 1967 Hawaii Sess. Laws Act 307 (codified as amended at HAWAII REV. STAT. §§ 516-1 to -101 (1976 & Supp. 1983)). The Hawaii Housing Authority is empowered under the Act to "[a]cquire by eminent domain proceedings, all necessary property interests as provided in this chapter." HAWAII REV. STAT. § 516-7(7). The Act operates only upon land subject to leases that exceed twenty years, *id.* §§ 516-1(5), -2, and upon land within a "development tract," *id.* § 516-21. A development tract is a "single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots." *Id.* § 516-1(2). The Authority may acquire all or a portion of a development tract if,

> after twenty-five or more lessees or the lessees of more than fifty percent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority . . . and if, after due notice and public hearing, . . . the authority finds that the acquisition of the leased fee interest . . . will effectuate the public purposes of this chapter.

Id. § 516-22. Once the Authority has acquired such land,

> [t]he lessee of a residential lot within a development tract . . . who has applied to the authority and has qualified for purchase of the leased fee interest shall purchase from the Hawaii housing authority by contract within sixty days of acquisition of the interest by the authority, the leased fee interest to the lot . . . .

Id. § 516-30.

Other relevant provisions include compensation, *id.* § 516-24; negotiation, *id.* § 516-51; interest acquired, *id.* § 516-25(a); existence of mortgage, lien, or encumbrance, *id.* § 516-25(b); disposition of land, *id.* § 516-28; qualifications for purchase, *id.* § 516-33; and legislative findings and declaration of necessity and purpose, *id.* § 516-83.

4. Section 516-83 contains a lengthy statement of the legislature's findings. Essentially, the legislature found that there was a concentration of ownership because the landowners preferred to lease rather than sell their land. *Id.* § 516-83(1). This resulted in a shortage of fee simple residential land and an artificial inflation of residential land values. *Id.* § 516-83(2). Therefore, the homeowners were deprived of a choice whether to own or lease the land on which their homes were built and were subjected to onerous long-term leases. *Id.* § 516-83(3). *But cf. id.* §§ 516-61 to -70 (lessees have the right, *inter alia*, to extend the length of leaseholds executed after June 24, 1967, at a statutorily computed rental). Finally, "[t]he economy of the State and the public interest, health, welfare, security, and happiness of the people . . . are adversely affected [by such concentrated ownership and] . . . [t]he acquisition of residential land in fee simple . . . at fair and reasonable prices by people who are lessees . . . will alleviate these conditions . . . ." *Id.* § 516-83(4)-(5); *see infra* note 48.

5. *See supra* note 4.

6. *See supra* note 3.

son to another[7] in defiance of the public use requirement of eminent domain,[8] serious doubts were raised as to the constitutionality of the Act.[9] The United States Supreme Court, however, had "no trouble concluding" that the Act was a constitutional exercise of the eminent domain power.[10]

The Court gave complete deference to the Hawaii legislature's determination of public use[11] by classifying the Act as ordinary socio-economic legislation enacted pursuant to the state's police power.[12] By focusing on the breadth of a state's police power and on the deferential standard of review, the Court successfully avoided an independent examination of public use,[13] a traditional judicial function.[14]

This Note will demonstrate that the Supreme Court's deference to the Hawaii legislature's public use determination was an unwarranted departure from case precedent and that the Court should have decided the case on the merits.[15] This Note also will argue that the minimum rationality standard generally used to review socio-economic legislation is inappropriate in state eminent domain cases because only the state's power is considered, while the interests of the condemnees are ignored.[16]

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7. "The taking by a State of the private property of one person . . . for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896). *See generally* J. GELIN, THE FEDERAL LAW OF EMINENT DOMAIN § 1.3, at 11-16. (1982); J. LEWIS, EMINENT DOMAIN § 250, at 494-96 (3d ed. 1909); 2A J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 7.01, at 7-13 (rev. 3d ed. 1983) [hereinafter cited as 2A J. SACKMAN].

8. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation."); *see infra* text accompanying notes 19-46. For an historical treatment of eminent domain and the public use doctrine, *see generally* 2A J. SACKMAN, *supra* note 7; Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972). For an analysis suggesting that the public use doctrine no longer serves any purpose, see Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

9. *See infra* note 48.

10. Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2330 (1984); *see infra* notes 54-59 and accompanying text. Since the constitutionality of the Hawaii Act was determined under the federal constitution, this Note will analyze only the federal constitutionality of state eminent domain legislation.

11. 104 S. Ct. at 2329; *see supra* note 4 & *infra* notes 54-59 and accompanying text.

12. 104 S. Ct. at 2330; *see infra* notes 54-59 and accompanying text.

13. *See infra* notes 54-59 & 67 and accompanying text.

14. *See infra* notes 60-64 and accompanying text.

15. *See infra* notes 54-78 and accompanying text.

16. *See id.*

II. The Doctrine of Public Use

The takings authorized by the Hawaii Land Reform Act are unprecedented; in few legislative exercises of the eminent domain power has the public benefit been so tenuous.[17] The cases that have been the most controversial and that have provided the more expansive readings of the public use doctrine provide little support for the Act.[18] A brief discussion of these cases followed by a synthesis of their principles will demonstrate this point.

New York City Housing Authority v. Muller,[19] the first of the early twentieth century slum clearance cases, established that a state could enact legislation to benefit the broad public health, safety, and welfare of its citizens by exercising its power of eminent domain.[20] The *Muller* court reasoned that decreasing the juvenile delinquency, crime, and disease that slum conditions generated served to confer a broad public benefit that satisfied the public use requirement; thus, eminent domain could very properly be used for such purposes.[21] The court equated the concepts of police power, eminent domain, and taxation as each being designed to protect the health, safety, and general welfare of the public.[22] Eminent domain could be used for slum clearance because "the legitimacy of the purpose as a whole is the criterion, not the intended use of the particular property

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17. The slum clearance and urban renewal cases, discussed *infra* in text accompanying notes 19-46, greatly expanded traditional notions of public use. The cases generally involved the eradication of some tangible harm to the community. *See* Note, *Public Use as a Limitation on Eminent Domain in Urban Renewal*, 68 Harv. L. Rev. 1422 (1955). Moreover, the takings in these cases conferred a direct benefit upon the community, and any private gain was deemed incidental. *See* Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 Pace L. Rev. 231 (1984); *cf.* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 894, 304 N.W.2d 455 (1981) (per curiam) (community of approximately 4,000 residents condemned for a General Motors assembly plant; benefit to GM held to be incidental to the public benefit inuring from the prospect of 6,000 jobs).

In contrast, the Hawaii Act does not directly eradicate any harm to the community; it merely allows homeowners to take fee simple title to the land that they are leasing. Furthermore, homeowners are the primary beneficiaries of the takings; the public benefit is the decrease in the overall rate of inflation of the Hawaiian economy. *See infra* note 48 and accompanying text.

18. *See infra* notes 19-48 and accompanying text.

19. 270 N.Y. 333, 1 N.E.2d 153 (1936).

20. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615 (1940).

21. 270 N.Y. at 339-40, 1 N.E.2d at 154-55; *see* Meidinger, *supra* note 8, at 33.

22. 270 N.Y. at 340-41, 1 N.E.2d at 155; *see* Nichols, *supra* note 20, at 631.

taken."[23]

The case of *United States ex rel. Tennessee Valley Authority v. Welch*[24] expanded the scope of takings that could be justified by any given public purpose. In *Welch*, the Tennessee Valley Authority (TVA) was authorized to condemn land in the development of a reservoir project. The subsequent flooding of the land destroyed the only highway affording a reasonable means of access to a large mountainous area of land lying between the reservoir and a national park. Although a new road could have been built, the cost would have been disproportionate to the value to the public. The TVA then decided to condemn this mountainous area and add it to the national park.[25] Although condemning the area had little to do with the public purposes declared in the reservoir project,[26] the Court justified the taking with an "area approach" theory. "We view the entire transaction as a single integrated effort on the part of T.V.A. to carry on its congressionally authorized functions."[27]

Berman v. Parker[28] furnishes another example of the breadth allowed a taking under a given public purpose. In *Berman*, a blighted community was condemned pursuant to the District of Columbia Redevelopment Act of 1945.[29] Appellant's department store stood within this general condemned area. This store suffered from none of the ills associated with substandard housing and was to be redeveloped, along with the rest of the community, by private enterprise. Despite appellant's assertion that his land was being taken contrary to the fifth amendment,[30] the Court upheld the taking.

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as

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23. Nichols, *supra* note 20, at 631; *see Muller*, 270 N.Y. at 342, 1 N.E.2d at 155-56. The "purpose as a whole" criterion was the justifying rationale for taking properties that did not have all the aspects of slums yet were within the general area sought to be redeveloped. *See infra* notes 45-46 and accompanying text.

24. 327 U.S. 546 (1946).

25. *Id.* at 548-50.

26. *See* Meidinger, *supra* note 8, at 38.

27. *Welch*, 327 U.S. at 552-53.

28. 348 U.S. 26 (1954).

29. 60 Stat. 790; D.C. CODE ANN. §§ 5-701 to -719 (1951) (currently D.C. CODE ANN. §§ 5-801 to -820 (1981)).

30. *Berman*, 348 U.S. at 31.

> well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[31]

The *Berman* case is significant because it was the first case to expressly define the public use requirement of eminent domain in terms of the police power.[32] Conceding the vast reach of the police power, the Court stated that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[33]

A final significant case is *Puerto Rico v. Eastern Sugar Assocs.*[34] In *Eastern Sugar Associates*, the Puerto Rican legislature used its power of eminent domain to preserve the Islands' sugar cane industry. The sugar cane industry constituted nearly the entire economy of Puerto Rico and was the Islands' basic agricultural crop. Usable land was in short supply, however, much of it being held by a *corporative latifundia.*[35] When the federal government compounded the land shortage problem by condemning a substantial part of the best agricultural land for naval purposes, the legislature responded by enacting the Land Law of Puerto Rico[36] and the Vieques Act.[37]

Essentially, the two enactments effected a break up of the *corporative latifundia* and provided for the following: (1) homesteads for the *agregados*[38] and slum dwellers; (2) proportional-profit farms to aid the *agregados*; (3) subsistence farms for more skilled farmers; and (4) renewal of the sugar cane industry on the Island of Vieques, the island from which the federal government took land.[39] The Puerto Rican legislature considered the

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31. *Id.* at 33. The legislature in this case was Congress, which, in its exercise of power over the District of Columbia, had all the legislative powers of a state acting pursuant to its police power. *Id.* at 31-32.

32. *See* Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 482 (1983) ("In *Berman v. Parker*, . . . the Supreme Court took the dramatic step of transforming the two powers into interchangeable instruments for implementing government's generic legislative power . . . .").

33. *Berman*, 348 U.S. at 33.

34. 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946).

35. *Id.* at 318. *Corporative latifundias* are large, landed estates, much like those in Hawaii. *Id.* at 325; *see supra* note 1 and accompanying text.

36. P.R. LAWS ANN. tit. 28, § 241 (1941).

37. 1944 P.R. Laws, Act. No. 90.

38. An *agregado* is defined 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." 156 F.2d at 318 n.1.

39. *Id.* at 325.

breakup of the *corporative latifundia* essential to the continued prosperity of the community.[40]

These cases illustrate three important points. First, because the scope of public use is defined by the police power and because the police power is a concept that escapes definition,[41] the power of a state to condemn appears virtually unlimited.

Second, it is immaterial that a private entity, rather than a public entity, takes possession of and uses the condemned land. So long as the benefit to the private entity results in some benefit to the public, the taking will be upheld.[42] In each of these cases, with the exception of one,[43] the taking directly eradicated some tangible harm to the economy and to the society. Thus, while private interests were often the ultimate owners and occupiers of the condemned land, the private benefit was incidental to the direct public benefit.[44]

Third, any takings that did not directly eradicate a detrimental condition could be justified by the area approach the legislatures took to condemnation.[45] As the Court stated in

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40. *Id.* at 319, 325. While *Eastern Sugar Assocs.* does have some similarities to the *Midkiff* case, the court's analysis of the situation in Puerto Rico is important: "[A]lthough we cannot substitute our estimate of the extent of the evils aimed at for that of the Insular Legislature, we are required to make some inquiry into the facts with reference to which the Legislature acted." *Id.* at 324.

41. "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts." Berman v. Parker, 348 U.S. at 32; *see supra* note 32.

42. 2A J. SACKMAN, *supra* note 7, § 7.43, at 251-65; Nichols, *supra* note 20, at 622. Admittedly, the question in any particular case whether the public benefit is direct enough to validate the taking can be a close one. *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 410 Mich. 894, 304 N.W.2d 455, 459 (1981) (per curiam) (community of approximately 4,000 residents condemned for General Motors assembly plant; court held that the benefit to GM was incidental to the public benefit inuring from the prospect of 6,000 jobs).

43. United States *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. at 551-55. This case can be justified by the area approach. *See infra* notes 45-46 and accompanying text.

44. *See* Swan Lake Hunting Club v. United States, 381 F.2d 238, 242 (5th Cir. 1967) ("Where both public and private use are to be made of property sought to be condemned, the exercise of the power will not be defeated if the private use is sufficiently subordinate to the public use as to be incidental to it."); *see also* 2A J. SACKMAN, *supra* note 7, § 7.43, at 251-65, and cases cited therein.

45. *See, e.g.*, Berman v. Parker, 348 U.S. at 34-35 (department store condemned along with the rest of a blighted community even though the store suffered from none of the ills associated with substandard housing); United States *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. at 552-53 (isolation of land as a result of flooding from a reservoir project necessitated the condemnation of the land); Puerto Rico v. Eastern Sugar Assocs., 156 F.2d at 323 (although there were four contemplated uses of the condemned land, the uses were interrelated and regarded as " 'a single integrated effort' "). *See generally* Note, *supra* note 17, at 1431-32.

Berman,

> [i]t was important to redesign the whole area so as to eliminate the conditions that cause slums . . . . It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed . . . .[46]

In comparison, the Hawaii Land Reform Act stands upon unsteady ground. The primary beneficiaries of the Act are the lessees, who obtain the fee simple to the land on which their homes are built.[47] The public benefit declared by the legislature is not accomplished directly by the transfer of the fee; instead it is accomplished indirectly by the predicted future decreases in the overall rate of inflation of the Hawaiian economy.[48] Further,

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46. Berman v. Parker, 348 U.S. at 34.

47. *See infra* note 48.

48. The legislature, after stating its findings on land distribution and rents, *see supra* note 4, concluded that economic and political stability were endangered. Because of the "intimate relationship between [land values] . . . and the stability and strength of the State's economy," HAWAII REV. STAT. § 516-83(9) (1976 & Supp. 1983), the artificial inflation resulting from the concentrated ownership is "[a] substantive and significant contributing factor to the high and rising cost of living." *Id.* § 516-83(6). This "high cost of living is denying [the majority of citizens] . . . such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate . . . health services." *Id.* If left unchecked, the "total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people." *Id.* § 516-83(7). Thus, all the citizens are to benefit at some future time from the present transfers of fee simple title.

A divided Ninth Circuit Court of Appeals declared the Hawaii Act unconstitutional under the fifth and fourteenth amendments. Justice Alarcon saw the Act as "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 v. Tom, 702 F.2d 788, 798 (1983). Justice Poole, concurring, stated that the Act

> authorizes an agency of the state, upon the application of a tenant, to divest his landlord of the latter's entire property and to convey it to the erstwhile tenant in fee for the sole purpose of constituting that tenant as the owner. The statute does not accomplish this transformation merely incidentally en route to the effectuation of other, different, presumably more urgent objectives; nor is it that in its unreconstituted form, the present right of freeholding threatens, interferes with, delimits, pollutes or offends against the commonweal. The divestiture is single-minded and patent of purpose: it strips the owner of the fee and vests the fee in the tenant. Otherwise, there is not an iota of change . . . . [I]ts only service is to sever ownership from A and bestow the same on B.

Id. at 806 (Poole, J., concurring).

That the condemning tenants themselves are paying for the fee title to the lands

the takings cannot be justified by the area approach. In both *Berman* and *Welch* the scope of the taking was contested, but the public purpose was not.[49] In *Hawaii Housing Authority v. Midkiff*, however, the public purpose underlying the project is questionable.

With the tenuity in the Hawaii legislature's conclusions, one might expect the *Midkiff* Court to analyze the public benefit to be achieved under the Hawaii Act.[50] Unfortunately, the *Midkiff* Court employed the minimum rationality test in reviewing the Hawaii Act and deferred to the Hawaii legislature on the issue of public benefit.[51] The dangers in this approach are demonstrated in the following hypothetical.

III. *Hawaii Housing Authority v. Midkiff*

A. A Hypothetical Application

Suppose that in a small county, *X*, about one-third of the citizens are people with low incomes who live on small farms. The remaining two-thirds of the citizens are people with high incomes who live in suburban homes and condominiums. Since the county is fairly small, there is a shortage of fee simple land available for a proposed private country club. This new club, which would boast tennis courts and a full-sized golf course, would require nearly two hundred acres of relatively flat land. The only such land available is the farm acreage.

The well-to-do citizens of this county wage a battle for several years with the farm owners, attempting unsuccessfully to force them to sell. Finally, the well-to-do citizens organize and

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further supports the Court of Appeals' view. Although the Housing Authority is authorized to lend the purchaser up to 90% of the purchase price, HAWAII REV. STAT. § 516-34(a), "[i]n practice, funds to satisfy the condemnation awards have been supplied entirely by lessees." Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2326 (1984). Moreover, under § 33 of the Act, the condemning tenant must show proof of financial ability to pay for the land. HAWAII REV. STAT. § 516-33(4).

For an analysis of the view that the means employed in the Hawaii Act are inapposite to achieving the purposes declared by the legislature, see the Brief of Amicus Curiae The Office of Hawaii Affairs in Support of Appellees, Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984).

49. *See* Berman v. Parker, 348 U.S. at 31-34 (condemnation of department store accompanied condemnation of blighted residential community); United States *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. at 552-54 (condemnation of land attendant to development of reservoir project).

50. *See infra* notes 60-64 and accompanying text.

51. *See infra* notes 54-59 and accompanying text.

petition the state legislature to pass legislation authorizing a "Community Enhancement Authority" (CEA). After several years of petitioning, the legislature succumbs to the demands of the well-to-do majority.

The CEA is authorized to condemn land in furtherance of its stated public purpose, which is to "enhance the beauty, quality, economy, and desirability of county *X*." Among its specific findings of purpose, the legislature declares that "improving the quality of life and bettering the economy of county *X* shall be a public purpose."

The CEA institutes condemnation proceedings against many of the small farms. Although the families of these farmers have lived on these farms for several generations and, because of their incomes, have viewed their crops as essential to their continued prosperity, the CEA declares that taking the fee simples of these farms and conveying them to private interests to build the country club will enhance the beauty, quality, and desirability of county *X*. The CEA further declares that the economy will be stimulated by the increased tax revenues generated by the club and by the sale of condominiums that the county intends to build with the excess condemned land.

The problems posed in this hypothetical are obvious. First, the majority is subjecting the minority's property rights to the majoritarian political process. Second, the legislature has exercised a preference for the well-to-do residents of county *X* owning and using the land for recreational purposes over the farmers owning it and using it for residential and agricultural purposes. Third, the public purposes declared by the legislature are vague generalizations; virtually any taking could be rationalized under such a declaration. Fourth, the private residents of county *X* are the primary and direct beneficiaries of the takings, and any benefit to the general public is obscure. Yet, when the condemnation is challenged in the state courts, which have chosen to follow the dictum in *Berman v. Parker*,[52] the farmers lose. Upon

52. An example of such reliance on *Berman* is Courtesy Sandwich Shop v. Port of New York Auth., in which the court stated the following in approving the excess condemnation of property for private uses incidental to the World Trade Center: "[E]ven esthetic improvements have been held to be a public purpose justifying condemnation . . . . No further demonstration is required that improvement of the Port of New York . . . is a public purpose supporting the condemnation of property for any activity functionally related to that purpose." 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405, 240 N.Y.S. 2d 1, 5-6, *appeal dismissed*, 375 U.S. 78 (1963).

appeal to the United States Supreme Court, the Court follows its decision in *Midkiff* and summarily affirms the state decisions, giving great deference to the legislature's declaration of public purpose. The farmers' interests thus are relegated to the majoritarian political process, and the effect of condemnation on personal liberties receives no judicial consideration.[53]

The *Midkiff* Court justified its decision to employ this deferential standard of review by relying on case precedent. Such reliance was misplaced, as the following analysis demonstrates.

B. The Court's Analysis

The *Midkiff* Court began its analysis by citing *Berman v. Parker* for the proposition that the public use requirement is "coterminous" with the police power.[54] The Court then cited four cases, including *Berman*, that espouse near-absolute deference to legislative determinations of public use.[55] All four cases, however, involved congressional determinations.[56]

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53. The very purpose of a Bill of Rights was to withdraw certain subjects from the viscissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 585 (1981); *see infra* note 91 and accompanying text.

54. 104 S. Ct. at 2329. The other main issue in *Midkiff*, not discussed in this Note, was whether the district court should have abstained from hearing the case. *Id.* at 2327-28; *see also* Midkiff v. Tom, 702 F.2d 788, 799-803 (1983) (Poole, J., concurring). Additionally, for an analysis of whether the Hawaii Act violates the contract clause of the federal constitution, see Conahan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 HAWAII B.J. 31 (1969).

55. 104 S. Ct. at 2329. The four cases the Court cited were as follows: Berman v. Parker, 348 U.S. 26, 32 (1954) ("when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."); United States *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. 546, 552 (1946) ("when Congress has spoken on this subject '[i]ts decision is entitled to deference until it is shown to involve an impossibility.' "); Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (Congress' "decision is entitled to deference until it is shown to involve an impossibility."); United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896) (a congressional act is "presumed to be valid unless its invalidity is plain and apparent . . . .").

56. That the *Midkiff* Court relied upon cases reviewing congressional acts rather than state legislative acts is significant because of the difference in the standard for review. Historically, acts of Congress have been presumed valid, and assertions of invalidity have had to be demonstrated "clearly and unmistakably." United States v. Gettysburg Elec. Ry., 160 U.S. at 680. Acts of state legislatures affecting rights protected under the federal constitution have not been accorded presumptions of validity and have been subjected to judicial scrutiny under a variety of standards. *See infra* note 91 and accom-

The Court then upheld the constitutionality of the Hawaii Act by terming it a "classic exercise of a State's police powers."[57]

> "[W]hether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective."[58]
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>
> Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts *must* defer to its determination that the taking will serve a public use.[59]

The *Midkiff* holding is contrary to a long line of authority supporting independent judicial evaluation of asserted public uses.[60] At the same time, judicial deference still has been given

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panying text.

57. 104 S. Ct. at 2330. The regulation of oligopoly was tendered as the legitimate exercise of the state's police power. Interestingly, the Hawaii legislature did not include such a finding in its declaration of public purpose. *See supra* notes 4 & 48.

58. 104 S. Ct. at 2330 (quoting Western and Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981) (emphasis and brackets in original)). Significantly, neither *Western and Southern Life Ins. Co.* nor the other two cases the Court cited in support of employing the minimum rationality test, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), and Vance v. Bradley, 440 U.S. 93 (1979), are eminent domain cases. *See also infra* note 60 and accompanying text.

59. 104 S. Ct. at 2331 (emphasis supplied).

60. *E.g.*, Cincinnati v. Vester, 281 U.S. 439, 446 (1930) ("It is well established that . . . the question what is a public use is a judicial one."); Rindge Co. v. Los Angeles, 262 U.S. 700, 705 (1923) ("The nature of a use, whether public or private, is ultimately a judicial question."); Sears v. City of Akron, 246 U.S. 242, 251 (1918) ("It is well settled that . . . the question whether the purpose of a taking is a public one is judicial . . . ."); Hairston v. Danville & Western Ry., 208 U.S. 598, 606 (1908) ("The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."); Clark v. Nash, 198 U.S. 361, 368 (1905) (the level of judicial inquiry varies with the facts and circumstances of each case); Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 251-52 (1905) (the state does not have final say in determining what is a public use); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159 (1896) (legislative and judicial decisions of states as to what constitutes a public use are not binding upon the Court); Puerto Rico v. Eastern Sugar Assocs., 156 F.2d 316, 324 (1946) (the court felt required to make "some inquiry into the facts with reference to which the Legislature acted."); *see* J. LEWIS, *supra* note 7, § 10, at 21; 2A J. SACKMAN, *supra* note 7, § 7.16(1), at 107-08; Note, *supra* note 17, at 1430-36; *see also* United States *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. at 556 (Reed, J., concurring) ("This taking is for a public purpose but whether it is or is not is a judicial question."); *id.* at 557 (Frankfurter, J., concurring) ("This Court has never deviated from the view that under the Constitution a claim that a taking is not 'for public use' is open for judicial consideration, ultimately by this Court."). *But cf.* Berman v. Parker, 348 U.S. at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive . . . . This principle

to legislative determinations, particularly in situations where the legislature was in a position to have intimate knowledge of the facts giving rise to the takings and where the takings were *de minimus*,[61] or where congressional determinations were involved.[62] Thus, the Court has been flexible and has approached questions of public use on a case by case basis,[63] giving more or less weight to legislative determinations depending upon the specific circumstances;[64] deference was discretionary, not compelled. After the *Midkiff* decision, however, so long as the legislature recites some public purpose for its eminent domain legislation, the Court must defer.[65]

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admits of no exception merely because the power of eminent domain is involved.").

61. *See* Cincinnati v. Vester, 281 U.S. at 446 (Court respects "judgments of state courts as to the uses considered to be public in the light of local exigencies."); Clark v. Nash, 198 U.S. at 367-69 (whether condemnation is valid "may depend upon a number of considerations relating to the situation of the State . . . ."); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. at 159-60 ("what is a public use frequently . . . depends upon the facts and circumstances surrounding the particular subject-matter . . . .").

62. *E.g.*, Berman v. Parker, 348 U.S. 26 (congressional enactment authorizing condemnation of blighted community); United States *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. 546 (congressional enactment empowering the TVA to condemn land for a dam and reservoir); Old Dominion Land Co. v. United States, 269 U.S. 55 (congressional enactment authorizing appropriation of property for military purposes); United States v. Gettysburg Elec. Ry., 160 U.S. 668 (congressional enactment authorizing appropriation of property to preserve the lines of battle at Gettysburg); *see* 2A J. SACKMAN, *supra* note 7, § 7.18(1), at 116.

63. *See, e.g.*, Clark v. Nash, 198 U.S. 361:

> [A] valid enactment may depend upon a number of considerations relating to the situation of the State and its possibilities for land cultivation, or the successful prosecution of . . . other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition . . . of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State . . . .
>
> But we do not . . . [approve] . . . of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State.

Id. at 367-69 (irrigation ditch for mining operation); Cincinnati v. Vester, 281 U.S. 439 (excess condemnation of small strip of land in widening street); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (irrigation ditches to make arid lands farmable); *see* 2A J. SACKMAN, *supra* note 7, § 7.08(4), at 65.

64. *See* Comment, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 424 (1983).

65. *See supra* notes 58-59 and accompanying text. While *Berman* incorporated

Because determinations of public use have been made on a case by case basis, the courts generally have examined the facts and circumstances surrounding each taking, particularly with respect to the asserted public benefit.[66] The *Midkiff* Court instead focused on the breadth of the state's police power and on the appropriate level of deference.[67] The Court examined neither the facts of the precedent upon which it relied nor the tenuity of the public benefit to be achieved under the Hawaii Act.[68]

Even if the *Midkiff* decision was correct, the Court should have decided the case on much narrower grounds.[69] An explication of the unique land problem in Hawaii, with discussion and analysis of the legislature's declarations of public use,[70] would at least have limited the holding to the peculiar facts and circumstances presented by this case.[71] This approach, moreover, is not foreclosed by *Berman v. Parker*. The *Berman* Court's sweeping language[72] was largely dicta[73] and, in some respects, merely reca-

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strong language favoring deference, it dealt with federal legislation. As a precedent it is limited to its facts. *Midkiff* has extended *Berman's* dictum to state legislation.

66. *See supra* notes 60-64 and accompanying text.

67. *See supra* notes 54-59 and accompanying text.

68. The only discussion and analysis of public benefit was at an abstract level. *See* 104 S. Ct. at 2328-32.

69. *See supra* notes 60-64 and accompanying text. Because most eminent domain cases do not involve difficult questions of public use, the Court could reserve the power of review for unique, borderline cases and, as it has done in the past, defer to legislative declarations of public use in the more typical cases. As the Court stated in 1896 in United States v. Gettysburg Elec. Ry.,

> [i]t is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public, is not so strong as where the government intends to use the land itself.

160 U.S. at 680; *see* Cincinnati v. Vester, 281 U.S. at 447; Comment, *supra* note 64, at 425.

70. *See supra* notes 4 & 48.

71. *See supra* notes 1 & 2 and accompanying text.

72. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs . . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

348 U.S. at 32; *see supra* notes 31-33 and accompanying text.

The *Berman* Court intertwined not only public use and the police power, *see* Costonis, *supra* note 32, at 482, but also judicial standards of review. The Court has always

pitulated twentieth century public use jurisprudence.[74] The United States Supreme Court has long recognized that the states could use the eminent domain power to promote the public welfare.[75]

For the *Midkiff* Court to read the *Berman* dicta[76] as requiring the Court to use the minimum rationality test in review of a state legislature's public use determination is unnecessary and eviscerates the protections afforded private property owners under the fifth amendment.[77] In rejecting nearly a century of precedent,[78] the Court has precluded an independent examination of state legislatures' declarations of public use in the future. While considerable deference may be appropriate in certain circumstances,[79] a broad rule mandating deference may dismiss significant opposing interests.[80]

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given extreme deference to congressional determinations of public use, yet has reserved the power of review of state determinations. *Compare* United States v. Gettysburg Elec. Ry., 160 U.S. at 680 ("In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality . . . . This rule has been stated and followed by this court from the foundation of the government.") *with* Cincinnati v. Vester, 281 U.S. at 446 ("It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one . . . . [The] Court must decide [this question] in performing its duty of enforcing the provisions of the Federal Constitution.").

73. *See* 2A J. SACKMAN, *supra* note 7, § 7.45(2)(a), at 304.

74. *See infra* note 75 and accompanying text.

75. *See, e.g.*, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (condemnation for right of way for mining operation essential to the public welfare); Clark v. Nash, 198 U.S. at 368 (condemnation for irrigation of arid land that would otherwise be valueless); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. at 163-64 (condemnation of land for irrigation "essential or material for the prosperity of the community . . . .").

76. *See supra* notes 72-73.

77. If the Court gives complete deference to state legislative declarations of public use, the public use requirement of the fifth amendment is without effect. *See* United States v. New York, 160 F.2d 479, 482 (2d Cir. 1947) (Hand, J., dissenting) ("[United States *ex rel.* Tennessee Valley Auth. v. Welch] did not change the law by removing from all judicial review the 'public use' for which . . . property may be taken. I find it hard to believe that any such radical step was intended . . . ."); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 (1980) (the fundamental purpose of a Bill of Rights was to guarantee the enjoyment of explicitly defined rights and other fundamental rights indispensable to the enjoyment of those explicit rights); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . ."); Note, *supra* note 8, at 613.

78. *See* cases cited *supra* note 60.

79. *See supra* notes 61-64 and accompanying text.

80. *See supra* note 60 and accompanying text. As Professor J. Ely observed, deference to legislative declarations of purpose will result in the legislature adopting a "boilerplate" statement of purposes. J. ELY, DEMOCRACY AND DISTRUST 125-31 (1980); *see also* Cincinnati v. Vester, 281 U.S. at 447 (if a mere statement by the legislature were suffi-

C. Consequences of the Midkiff *Decision*

A consequence of the *Midkiff* decision is that judicial consideration of the condemnee's interests is eliminated. Under the minimum rationality test, the focus of the inquiry is on the state's power and on the interests of the condemnor.[81] The inquiry under this test is whether the state legislature rationally could have believed that the particular legislation would accomplish its objectives.[82] The test has been used by the Court for over forty years to review socio-economic legislation enacted by a state pursuant to its police power.[83] The character of the intrusion upon the individual, however, is significantly different under classic exercises of the police power, such as taxation, than under exercises of the eminent domain power:

> The degree of compelled deprivation of property is manifestly less intrusive in the former case: it is one thing to disagree with the purposes for which one's tax money is spent; it is quite another to be compelled to give up one's land and be required . . . to leave what may well be a lifelong home and community.[84]

Eminent domain can entail intangible losses beyond the economic; yet the minimum rationality test ignores these losses, even when the personal liberty involved is significant.[85]

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cient for the Court, then "the taking of any land . . . would be sustained on a bare recital.").

81. "Irresponsible application of the public benefit test could place undue emphasis upon the interests of the condemnor and the public, without giving proper consideration to the property rights of the private property owner." Note, *"Public Use" as A Limitation on the Exercise of the Eminent Domain Power by Private Entities*, 50 IOWA L. REV. 799 (1965); *see* Comment, *supra* note 64, at 411.

82. Note, *supra* note 81, at 814.

83. *See* 104 S. Ct. at 2328-32; *see also supra* notes 54-59 and accompanying text.

84. Poletown Neighborhood Council v. City of Detroit, 410 Mich. at 666, 304 N.W.2d at 474 (Ryan, J., dissenting).

85. The dichotomy between personal and property rights has inspired much argument by conservatives and liberals alike, both sides recognizing a personal element in property rights. Comment, *supra* note 64, at 429; *see* Reich, *The New Property*, 73 YALE L.J. 733 (1964); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 185-200 (1980). Although the justifications for the double standard are arguable, the standard unarguably has been adopted. *See* L. HAND, THE BILL OF RIGHTS (1958):

> There have been much more than intimations of a stiffer interpretation of the "Due Process Clause," when the subject matter is not Property but Liberty, as that word has now come to be defined. It would indeed be too much to say the Supreme Court has definitively and irrevocably committed itself to a difference, but certainly at the moment that seems likely.

Id at 50. Justice Stewart, writing for the Court in Lynch v. Household Fin. Corp., 405

The importance of property rights has been recognized by other recent decisions of the United States Supreme Court. For example, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[86] the garnishment of a corporate bank account without a probable cause hearing was challenged. In holding that the state statute authorizing the garnishment was unconstitutional, the Court stated that, "even though the debtor was deprived of . . . the use and possession of the property, and perhaps only temporarily, . . . the seizure [was not] beyond scrutiny under the Due Process Clause."[87] Whereas in *North Georgia Finishing* the procedure authorizing a deprivation of money was scrutinized, in *Midkiff* the substantive law authorizing a deprivation of the fee simple title to land was presumed valid.[88] This differentiation between procedural and substantive property rights is arbitrary when considered from the property owner's point of view; the deprivation of one's homestead is no less important than the garnishment of one's wages.[89]

Another important and related consequence of the *Midkiff* decision is that it eviscerates the protections afforded private landowners under the public use clause of the fifth amendment. By giving state eminent domain legislation presumptive validity, the Court has subjected property rights to the majority vote, a

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U.S. 538 (1972), criticized the double standard:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right . . . . That rights in property are basic civil rights has long been recognized.

Id. at 552. For theoretical discussions of property rights, see generally B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 41-87, 113-67 (1977); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1203-13 (1967).

86. 419 U.S. 601 (1975).

87. *Id.* at 606 (citing with approval Fuentes v. Shevin, 407 U.S. 67 (1972)).

88. *See* text accompanying notes 58-59 *supra*.

89. *See* Arnett v. Kennedy, 416 U.S. 134 (1974). In *Arnett*, the Court questioned the distinction between procedural and substantive protections in cases "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right." *Id.* at 153-54.

Judge Oakes of the United States Court of Appeals for the Second Circuit has suggested that this problem is inherent in our dualistic view of property rights. On the one hand, under the dominion view, property rights are absolute and are to be accorded the same respect as other rights. This view traces its roots to James Madison's view of property rights. On the other hand, under the social view, people hold property in trust for their own benefit and for that of other people and the state. This view traces its roots to Thomas Jefferson's view of property rights. *See* Oakes, *supra* note 53, at 584-87.

consequence wholly at odds with the fundamental purpose of Bill of Rights.[90] A constitutional amendment has little validity if a state legislature can declare away its very meaning. In no other case involving guarantees expressed in the Bill of Rights is a state legislature's judgment final.[91]

IV. CONCLUSION

The *Midkiff* decision destabilizes property rights and jeopardizes the security of all private property ownership. Responsible judicial review of state eminent domain legislation must include consideration of the impact of the taking upon those whom it will affect.[92] State courts, if possible, should look to their own state constitutions for greater authority to review legislative determinations of public use.[93] Because the federal courts are the ultimate guardians of constitutional rights, they are the last tribunals from which judicial inquiry should be eliminated.[94]

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90. *See supra* note 53; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 579-80 (fundamental purpose of Bill of Rights was to guarantee the enjoyment of explicitly defined rights and other fundamental rights indispensable to the enjoyment of those explicit rights).

91. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (eighth amendment cruel and unusual punishment clause); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (fifth amendment takings clause); Larson v. Valente, 456 U.S. 228 (1982) (first amendment establishment clause); Santosky v. Kramer, 455 U.S. 745 (1982) (fourteenth amendment due process clause); United States v. Lee, 455 U.S. 252 (1982) (first amendment free exercise clause); United States v. Sioux Nation, 448 U.S. 371 (1980) (fifth amendment just compensation clause); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (first amendment freedom of speech clause); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (fourteenth amendment due process clause); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (fourth amendment); Washington v. Texas, 388 U.S. 14 (1967) (sixth amendment compulsory process clause); Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., concurring) (ninth amendment).

92. For an excellent approach to proper judicial review of eminent domain legislation, see Comment, *supra* note 64, at 444-55.

93. *See, e.g.*, WASH. CONST. art. I, § 16 ("Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public . . . ."). Unfortunately, many state courts have found *Berman v. Parker* very persuasive on the issue of judicial review. *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 633, 304 N.W.2d 455, 459 (1981); *supra* note 52.

94. *See* cases cited *supra* note 60.