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# Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain

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# *Hawaii Housing Authority v. Midkiff*: A Final Requiem for the Public Use Limitation on Eminent Domain?*

Eminent domain, the power of the government to seize private property,[1] is limited by the fifth amendment to the United States Constitution which provides that "private property [shall not] be taken for *public use* without just compensation."[2] The fifth amendment's public use limitation does not substantially restrict the government's taking power, however, because both state and federal

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* This note may be viewed as a postscript to a comment published in 1949 in the Yale Law Journal entitled *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599. That comment began with the following observation:

> Legal doctrines usually die quietly, if slowly. Their demise is generally accompanied by no more than soft sighs of relief at the courts' final acknowledgment of decay. But the theory of "public use" as a limitation on eminent domain—the notion that there are only certain limited "public purposes" for which private property may be expropriated—bulked so large in its prime and has taken so long in dying that, at the risk of disturbing the death-watch, a few final words may be in order.

*Id.* at 614. The author argued that the Supreme Court had repudiated the doctrine of public use and then concluded that "the doctrine will continue to be evoked nostalgically in dicta and may even be employed in rare atypical situations. Kinder hands, however, would accord it the permanent interment in the digests that is so long overdue." *Id.*

The above thesis has been criticized because "it assumes the courts took the pure form of the public use doctrine more seriously than they probably did." C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY 1365 n.1 (1974). Nevertheless, the author's prospective arguments have proved correct and the case discussed herein only buries the public use clause deeper under the weight of judicial authority.

1 The powers of the federal government are enumerated in the Constitution. Nowhere does the Constitution grant the power to seize private property. Nevertheless, since the late 19th century the Supreme Court has recognized the taking power of the federal government. The Court has held that the eminent domain power is an attribute of national sovereignty and a political necessity. *See* Kohl v. United States, 91 U.S. 367, 371-72 (1875). *See also* Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559-62 (1972). Where the federal government exercises eminent domain on the grounds that it is "necessary and proper" to carry out one of its enumerated powers, its legitimacy is strengthened. Within the District of Columbia, Congress possesses general police powers and may claim authority to seize private property just as states do within their territorial boundaries. *See* District of Columbia v. Thompson Co., 346 U.S. 100, 108 (1953).

State governments claim the power of eminent domain either through the tenth amendment, which grants to the states all powers (police powers) not expressly granted to the federal government, or alternatively, as an attribute of sovereignty. The police power and eminent domain power are closely related, but possess discrete characteristics. Under its police power, a state may regulate behavior to promote the public health, safety, welfare, or morals. Eminent domain allows the state to seize property for public use. While the latter power may be viewed as one of the general police powers, or separately as an attribute of sovereignty, any taking is subject to the same constitutional constraints. Since 1897, the public use and compensation requirements of the fifth amendment have applied to the states through the fourteenth amendment. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 227 (1897).

2 U.S. CONST. amend. V (emphasis added).

legislatures have broadly interpreted that term, and courts have accorded wide deference to legislative determinations.[3]

In recent years, legislatures have shown increasing willingness to exercise the power of eminent domain for uses which seem distinctly private.[4] In Hawaii, for example, the state legislature created a land condemnation scheme whereby title in real property is taken from certain lessors and transferred to lessees.[5] This legislation purportedly serves the public purpose of reducing the concentration of land ownership within the state.[6] In *Hawaii Housing Authority v. Midkiff*,[7] the United States Supreme Court upheld this legislation as a "comprehensive and rational approach to correcting market failure."[8]

Notably, courts have not required that expropriated property be *used* by the public; rather, they have upheld condemnations even if made only for the public benefit or for public purposes.[9] This broadened meaning of public use defies objective definition and no attempt will be made here to define its parameters.[10] Instead, this note addresses a separate but related issue—the standard of review appropriate to the public use aspect of eminent domain. The standard adopted will bear heavily on whether a legislative determination will be upheld. In *Midkiff*, the Supreme Court applied the "rational basis test"[11] in analyzing the constitutionality of the Ha-

3 *See* notes 14-54 *infra* and accompanying text.

4 *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (per curiam) (discussed in text accompanying notes 87-97, 130-31 *infra*). *See also* City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982). In *Oakland Raiders*, the California Supreme Court, holding that the seizure of a football franchise could satisfy the public use requirement, reversed the lower court's summary dismissal of the City's action. On remand, the lower court, after a full evidentiary hearing, again dismissed the City's complaint. The California appeals court subsequently overruled this decision as "contrary to the law of the case established in *Oakland I*." *See* City of Oakland v. Superior Court, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1983).

5 HAWAII REV. STAT. §§ 516-1 to -83 (1976 & Supp. 1982).

6 *See* note 15 *infra* and accompanying text.

7 104 S. Ct. 2321 (1984).

8 *Id.* at 2330; *see* notes 50-54 *infra* and accompanying text.

9 In Rindge County v. County of Los Angeles, 262 U.S. 700 (1923), the Supreme Court stated: "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Id.* at 707. In *Midkiff*, the Court stated that legislative attack on the concentration of land ownership constituted a "legitimate public purpose." 104 S. Ct. at 2331.

10 Several scholars have attempted to define the parameters of the public use clause. *See* Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978); Meidinger, *The Public Uses of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717 (1964); Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447 (1980); Comment, *The Public Use Limitation in Eminent Domain*, 82 W. VA. L. REV. 357 (1979).

11 The Court noted that the Hawaii legislation was "rationally related to a conceivable public purpose." 104 S. Ct. at 2329; *see* text accompanying notes 53-54 *infra*.

waii Land Reform Act. This note examines, in light of *Midkiff*, the prevailing standard of review in eminent domain cases and discusses the appropriateness of applying that standard from both a constitutional and public policy perspective.

## I. Standard of Review in Eminent Domain Cases

The United States Supreme Court historically has not applied a uniform standard of review in enforcing the fifth amendment's public use limitation on eminent domain. The divergent decisions of the United States Court of Appeals for the Ninth Circuit[12] and the United States Supreme Court in their respective considerations of *Hawaii Housing Authority v. Midkiff* reveal this lack of uniformity.[13]

In *Midkiff*, the trustees of a private estate challenged the constitutionality of the Hawaii Land Reform Act of 1967 (the Act).[14] This Act, promulgated to remedy the enduring concentration of land ownership inherited from Hawaii's feudal past,[15] established a condemnation scheme designed to transfer land ownership to existing lessees of property held by large estates.[16] In its simplest form, the Act authorized lessees living on single-family residential lots within tracts of at least five acres to request that the Hawaii Housing Authority (HHA) condemn the property which they leased.[17] The HHA, in turn, was authorized to hold a public hearing to determine whether the requested condemnation would effectuate the public purposes of the Act.[18] Upon a determination favorable to the lessee, the HHA could acquire full title to the property by condemnation and then sell the property to the lessee.[19]

This Act was challenged on the ground that it violated the public use clause of the fifth amendment.[20] The district court assented to the Act's constitutionality[21] but the Ninth Circuit reversed.[22] In determining the appropriate standard of review to be applied to the public use requirement, the court of appeals first discussed several leading cases,[23] beginning with *Old Dominion Land Co. v. United*

12 Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983).

13 104 S. Ct. 2321 (1984).

14 HAWAII REV. STAT. §§ 516-1 to 83 (1976 & Supp. 1982).

15 *See* Brief for Appellants at 1-4, Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984).

16 HAWAII REV. STAT. §§ 516-1 to -30.

17 *Id.* at §§ 516-1 to -22.

18 *Id.* at § 516-22.

19 *Id.* at § 516-25.

20 483 F. Supp. 62, 64 (D. Hawaii 1979).

21 *Id.* at 70.

22 702 F.2d at 788.

23 *See, e.g.*, Berman v. Parker 348 U.S. 26 (1954); Rindge County v. County of Los Angeles, 262 U.S. 700 (1923); United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896).

*States*,[24] in which the Supreme Court deferred to legislative rulings on the public use question. In *Old Dominion*, the United States, pursuant to wartime appropriation legislation,[25] seized land leases from Old Dominion for military purposes.[26] The government later attempted to acquire the property by purchase and, when that failed, condemned the property.[27] The Supreme Court, in language that has been widely cited, stated that the decision of the federal Congress "is entitled to deference until it is shown to involve an impossibility."[28] Twenty years later, the Supreme Court upheld *Old Dominion* in *United States ex rel. Tennesee Valley Authority v. Welch*.[29] In that case, the United States seized land pursuant to the Tennesee Valley Authority Act,[30] which authorized the construction of a reservoir and power dam for war production.[31] Lands near the dam were seized for the safe development of the project.[32] The Court, in reviewing that taking, reiterated the language of *Old Dominion* and stated that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision . . . ."[33]

Apart from wartime condemnations, *Berman v. Parker*[34] provides the strongest support for judicial deference to legislative determinations of what constitutes public use for fifth amendment purposes. In *Berman*, private property owners challenged the constitutionality of the District of Columbia Redevelopment Act,[35] which provided the framework for area urban renewal.[36] Pursuant to that Act, private property was condemned to effectuate proposed redevelopment.[37] In affirming the lower court's decision, the Supreme Court held that the public use requirement was satisfied[38] and, in doing so, applied a standard of review that has been regularly followed in both federal and state courts:

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24 269 U.S. 55 (1925).

25 Act of July 11, 1919, 41 Stat. 104; Act of July 1, 1922, 42 Stat. 767.

26 269 U.S. at 63-66.

27 *Id.* at 63.

28 *Id.* at 66.

29 327 U.S. 546 (1946).

30 16 U.S.C.A. § 831 (1974 and West Supp. 1984).

31 327 U.S. at 548.

32 *Id.* at 550-51.

33 *Id.* at 552.

34 348 U.S. 26 (1954).

35 D.C. CODE ANN. §§ 5-701 to -719 (1951)

36 348 U.S. at 28-30.

37 The land seized was to be used for "housing, business, industry, recreation, education, public buildings, public reservations, and other general categories of public and private use of the land." *Id.* at 29.

38 *Id.* at 33.

> 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 . . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.[39]

The court of appeals in *Midkiff* distinguished *Old Dominion*, *Welch*, and *Berman* on the ground that these cases involved judicial review of federal congressional determinations, rather than state determinations.[40]

The court of appeals noted that the Supreme Court had not applied a deferential standard of review to state legislative determinations of what constitutes public use.[41] In *Cincinnati v. Vester*,[42] for example, the Court declared, "[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 ultimately a judicial one."[43] The *Midkiff* court interpreted this language not merely as restating the principle of judicial review established in *Marbury v. Madison*,[44] but as indicating that the court would make an independent determination on the matter and decide the question in accordance with its views of constitutional law.[45] Such an interpretation is justified in light of the Supreme Court's language in two earlier cases[46] decided in 1896, on which the *Vester* Court relied.

While relying on the *Vester* line of cases to justify a heightened

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39 348 U.S. at 32 (emphasis added).

40 *Midkiff v. Tom*, 702 F.2d at 797-98. "The cases cited by [the Hawaii Housing Authority] . . . involved the review of a *Congressional* determination that there was a public use, *not* the review of a *state* legislative determination." *Id.* at 798 (emphasis added).

41 *Id.*

42 281 U.S. 439 (1930). This case involved the appropriation of land by the City of Cincinnati to widen city streets.

43 *Id.* at 446.

44 5 U.S. (1 Cranch) 137 (1803).

45 The court of appeals stated that it "must properly make the ultimate determination of whether the use is public." *Midkiff v. Tom*, 702 F.2d at 798.

46 In Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896), involving a state seizure of land to form irrigation districts in arid lands, the Court stated:

> We do not assume that [state legislative statements as to what constitutes public use], together with the decisions of the state court [in other cases], are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use . . . . [W]e must decide [these questions] in accordance with our views of constitutional law.

*Id.* at 159-60. In Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896), the Court invalidated a compensated taking of property, stating that "the 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 a violation . . . of the Constitution." *Id.* at 417.

standard of review, the court of appeals also distinguished between public *use* and public *benefit*.[47] Determining that the Hawaii legislation involved the seizure of property for the private benefit of leaseholders, the court stated that the Act involved "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."[48] The court therefore held the Act facially unconstitutional.[49]

The Supreme Court rejected the distinctions drawn by the court of appeals[50] and upheld the Hawaii Land Reform Act as a permissible exercise of the State's taking power.[51] Giving scant attention to previous cases in which it had applied close scrutiny,[52] the Court stated that "where the exercise of the eminent domain power is *rationally related to a conceivable public purpose*, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[53] The Court, affirming the application of a rational basis test embodied in *Berman*, provided the following rationale for according absolute deference to the legislature:

> Judicial deference is *required* because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power . . . . 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.[54]

This language suggests that courts are limited to a deferential standard of review regardless of the circumstances surrounding a particular seizure of property. Although the application of a deferential standard does not dictate that all condemnations will be upheld, it does provide a strong presumption of constitutionality.

## II. Constitutional Analysis

The Supreme Court's decision in *Midkiff* is a reminder of the fragile nature of our constitutional protections. The case raises im-

47 *Midkiff v. Tom*, 702 F.2d at 793-96.

48 *Id.* at 798.

49 *Id.*

50 The Court stated:

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose . . . .
>
> Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate.

Hawaii Housing Authority v. Midkiff, 104 S. Ct. at 2328-31.

51 Relying on *Berman*, the Court maintained that a state's taking power is "coterminous with the scope of a sovereign's police powers." *Id.* at 2329.

52 *Id.*

53 *Id.* at 2329-30 (emphasis added).

54 *Id.* at 2331 (emphasis added).

portant questions regarding the role of the judiciary in interpreting the Constitution and, more specifically, the propriety of employing a deferential standard of review in eminent domain actions. In resolving these questions, it is useful to focus on the analytical foundation of *Berman* and *Midkiff*, namely, a "police power/due process analysis."[55]

The Supreme Court in *Midkiff* characterized government takings as "socioeconomic legislation"[56] which involved a "classic exercise of a State's police powers."[57] As in the substantive due process context, legislation characterized in this manner will ordinarily survive constitutional attack.[58] Moreover, once the taking power is defined "coterminous[ly]"[59] with the police power, the public use limitation on eminent domain becomes less compelling.[60] Yet, despite this characterization of government takings, two factors suggest that judicial deference should not be mandated in all condemnation cases. First, even within substantive due process analysis, the Court will accord strict scrutiny where "fundamental rights"[61] are challenged. Second, as reflected in recent contracts clause cases,[62] the Court has indicated a concern for upholding specific constitutional guarantees against a state's police power. A closer examination of substantive due process and contracts clause analyses provides support for allowing judicial discretion in determining the appropriate standard of review in eminent domain cases.

### A. *Substantive Due Process and Fundamental Rights*

In substantive due process cases, the Supreme Court will ordinarily uphold legislation which may be characterized as economic in

55 483 F. Supp. 62, 67 (D. Hawaii 1979). While both the district court and the Supreme Court expressly adopted this analysis, it is likely that the Supreme Court's concern for states' rights played a role in its decision.

56 104 S. Ct. at 2330.

57 *Id.*

58 *See* notes 63-75 *infra* and accompanying text.

59 *See* note 51 *supra.*

60 As the Court explained in *Berman*, the police power is broad and inclusive:

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . .
>
> The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

348 U.S. at 32-33.

61 *See* text accompanying note 81 *infra.*

62 *See* text accompanying notes 106-08 *infra.*

nature,[63] but will closely scrutinize legislation affecting "fundamental rights."[64] While condemnations are often viewed as economic regulatory measures, the rights implicated by government seizure may also bear a proximate relation to those specific rights which merit close scrutiny on review.[65] To the extent that the facts surrounding a government taking confirm such a relation, courts should accord heightened scrutiny to the public use requirement.

Judicial protection under substantive due process analysis has fluctuated in a cyclical fashion throughout our constitutional history.[66] In the early years of this century, the Court regularly employed substantive due process analysis in striking down state regulations which impinged on individual liberty or property interests.[67] In *Lochner v. New York*,[68] for example, the Court struck down a law which regulated the number of hours a baker could work. The Court determined that such a regulation constituted an improper exercise of the state police power.[69] In *West Coast Hotel Co. v. Parrish*,[70] a 1937 decision, the Court signaled that it would no longer use substantive due process doctrine to invalidate economic regulation, but would defer to the legislature.[71] Since *Parrish*, the Court has consistently upheld economic regulation against due process attack if the regulation satisfies the "rational basis test" (i.e., as long as it bears a rational relation to a constitutionally permissible legislative activity).[72]

The Court, however, has not surrendered its authority to strike down legislation where specific constitutional guarantees are threatened. Only one year after *Parrish*, in *United States v. Carolene Products Co.*,[73] the Court reviewed federal legislation prohibiting the interstate shipment of adulterated milk.[74] In upholding this economic regulatory measure, the Court deferred to the legislature's decision.[75] Justice Stone, however, writing for the majority, cautioned that such deference might not be appropriate in all situations: "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its

63 *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 443-51 (1983) [hereinafter cited as J. NOWAK].
64 *See* text accompanying note 81 *infra*.
65 *See* notes 84-100 *infra* and accompanying text.
66 *See* J. NOWAK, *supra* note 63, at 425-51.
67 *Id.* at 436-43.
68 198 U.S. 45 (1905).
69 *Id.* at 64.
70 300 U.S. 379 (1937).
71 *Id.* at 398-400.
72 *See* J. NOWAK, *supra* note 63, at 444-45.
73 304 U.S. 144 (1938).
74 *Id.* at 145-46.
75 *Id.* at 154.

face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[76] The Court has since closely scrutinized legislation which potentially jeopardizes certain express constitutional guarantees or other fundamental rights placed in question on substantive due process or equal protection grounds.[77]

The test to determine whether a specific provision of the Bill of Rights merits scrutiny is not clear. One leading author provides the following guideline:

> When the Supreme Court holds a provision of the Bill of Rights applicable to the States, it does so because the justices are of the opinion that it is a right which can be deemed "fundamental" to the American system of government. Accordingly, the justices will not tolerate either federal or state activities which impair the right.[78]

The fifth amendment's public use limitation is one provision of the Bill of Rights which has been held to apply to the states.[79] Curiously, however, this express provision now receives less judicial attention than certain other *implied* fundamental rights such as the right to interstate travel.[80] What makes a right "fundamental" and deserving of strict scrutiny is not clear, but the preeminent characteristic of such rights is that they are deemed essential to the preservation of liberty.[81]

By requiring that courts defer to legislative determinations of what constitutes public use,[82] the Supreme Court has seemingly characterized all takings as economic regulatory measures which do not impinge on individual liberty interests.[83] But this characterization disregards the close relationship between private property ownership and liberty.[84] This relationship is easily recognized when a person's home or lifetime business is condemned, purport-

76 *Id.* at 152 n.4.

77 Where a court employs "strict scrutiny," it will require that the legislation in question promote a compelling governmental interest. *See, e.g.*, Matthews v. Diaz, 426 U.S. 67 (1976); Storer v. Brown, 415 U.S. 724 (1974); Bolling v. Sharpe, 347 U.S. 497 (1954).

78 J. NOWAK, *supra* note 63, at 457.

79 *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

80 *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

81 *See* J. NOWAK, *supra* note 63, at 418-19. Surely, private property may be essential to the protection of liberty. For an early judicial acknowledgment of this, see Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

82 *See* text accompanying note 54 *supra*.

83 In characterizing takings as "socioeconomic legislation," the Court did not limit its holding to the narrow set of facts in question. *See* Hawaii Housing Authority v. Midkiff, 104 S. Ct. at 2330.

84 Professor Michelman has characterized property as an a "essential component of individual competence in social and political life" and as "material foundation" for "self-determination and self-expression." *See* Michelman, *Mr. Justice Brennan: A Property Teacher's*

edly to benefit the public good.[85] Indeed, the Framers of the Constitution understood the inseparable link between private property and liberty when they imposed the public use limitation on eminent domain.[86] While it is not suggested that every government seizure merits strict scrutiny, it is proposed that courts should be able to exercise discretion, depending on the circumstances of each case, in arriving at the appropriate standard of review.

A recent Michigan case, *Poletown Neighborhood Council v. City of Detroit*,[87] illustrates the need for judicial flexibility in choosing the appropriate standard of review. In *Poletown*, the City of Detroit condemned an area of land which General Motors desired for the site of a new assembly plant.[88] The condemned land, however, did not consist of investment properties, but of a "tightly knit residential enclave of first- and second-generation Americans, for many of whom their home was their single most valuable and cherished asset . . . ."[89] The City defended the taking on the ground that it would alleviate the bleak unemployment picture in the area.[90] The Michigan Supreme Court, following *Berman*, deferred to the legislature, noting that the promotion of industry constituted a legitimate public purpose.[91] This case probably involves the most eggregious use, or abuse, of the taking power in recent history.[92] Yet, if courts are limited to "rational basis" analysis, they have little choice but to affirm such legislation.

Lawrence Tribe, in his brief on behalf of the Hawaii Housing Authority in *Midkiff*, acknowledged the *Poletown* taking as one which

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*Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296, 298-99, 304 (1980). *See also* Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

85 Property is most closely tied to liberty when that property may be classified, in the words of Professor Radin, as "personal property." Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

86 *See* note 121 *infra*.

87 410 Mich. 616, 304 N.W.2d 455 (1981) (per curiam).

88 *Id.* at 646-60; 304 N.W.2d at 467-71 (Ryan, J., dissenting).

89 *Id.* at 658; 304 N.W.2d at 470 (Ryan, J., dissenting).

90 *Id.* at 630; 304 N.W.2d at 458; *see* text accompanying note 130 *infra*.

91 *Id.* at 634; 304 N.W.2d at 459. "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to the private interest is merely incidental." *Id.*

92 In dissent, Justice Ryan stated:

> The reverberating clang of its economic, sociological, political and jurisprudential impact is likely to be heard and felt for generations. By its decision, the Court has altered the law of eminent domain in this state in a most significant way and, in my view, seriously jeopardized the security of all private property ownership.

*Id.* 410 Mich. at 645; 304 N.W.2d at 464-65. For critical reviews of the *Poletown* decision, see Note, *Public Use in Eminent Domain: Are there Limits after* Oakland Raiders *and* Poletown?, 20 CAL. W.L. REV. 82 (1983); Comment, *Corporate Prerogative, "Public Use" and a People's Plight: Poletown Neighborhood Council v. City of Detroit*, 1982 DET. C.L. REV. 907 (1982).

involved more than a mere seizure of economic interests.[93] Tribe, however, referred to the case in discussing the fifth amendment's just compensation clause, not its public use provision:

> If this Court should ever decide that the Constitution's promise of just compensation insufficiently protects some particular category of property, . . . such a decision could surely occur only in a context where no amount of money could "compensate" for the special harm government was doing—where government was expropriating not an impersonal and fungible economic investment, but a person's home or place of worship or center of political association, so as to effect some combination of dispossession, desecration, or disenfranchisement in addition to a taking of compensable wealth.[94]

Shifting attention to the just compensation requirement may provide a means of retaining the rational basis test without fully sacrificing private property rights.[95] Nevertheless, private property owners would probably find little comfort in such protection. On the one hand, if Tribe means that takings should be struck down only where "*no* amount of money *could* compensate" the condemnee, it is likely that every condemnation would pass constitutional muster. As the economist would argue, even the value of the condemnees' interests in *Poletown* could be determined.[96] If, on the other hand, Tribe is referring to the actual price set in the condemnation proceeding, then it is likely that most condemnations would have to be set aside, for otherwise the property would have sold on the private market and not been subjected to involuntary conversion.[97]

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93 Brief for Appellants, *supra* note 15, at 34.

94 *Id.*

95 One author suggests that the just compensation clause provides a "promising touchstone for substantive review of the noneconomic aspects of takings." *Leading Cases of the 1983 Term*, 98 HARV L. REV. 87, 234 (1984). Professor Michelman also acknowledges that the just compensation clause is a "plausible candidate for the office of mediating device between property and police power." Michelman, *Property As A Constitutional Right*, *supra* note 84, at 1110. Nevertheless, he concludes:

> It's such a nice idea; too bad it doesn't work. Alas, there are a number of reasons why the device of compensating owners with money for governmental incursions on their property cannot avoid occasions when either property or police power must give way—and a choice, therefore, has to be made between two constitutional principles which, it follows, cannot both be absolutes. The most obvious, and least interesting, of these reasons is the sheer impracticability of providing monetary compensation for all property value impairments caused by governmental action in pursuit of valid goals.

*Id.* at 1111.

96 This would be the amount of money the condemnees would be willing to accept in exchange for their property in a market transaction.

97 A legislature ordinarily will resort to condemnation only where its attempts to purchase the desired property have been rebuffed, i.e., where the owner has rejected the government's offering price. When a legislature refuses to pay the asking price in a private

To protect private property owners, then, the focus must return to an examination of the fundamental link between property and liberty.[98] Not every seizure of property will interfere with interests essential to liberty, but, as the *Poletown* case reflects, liberty interests may be irrevocably injured by the seizure of property. Courts, therefore, should be empowered to look beyond whether a particular taking is merely rationally related to a conceivable public purpose.

In the wake of *Midkiff*, at least two authors have proposed that courts employ a balancing test to take into account the liberty interests of private property owners.[99] The application of this standard would allow courts to measure the injury to the condemnee, the interests of and alternatives available to the condemnor, and other factors. Surely, the bare words of the Constitution's public use clause do not call for such a balancing test. But, if courts were to adhere to a literal reading of the Constitution, there would be no need to seek alternative protection for the rights of private property owners.[100]

### B. *The Contracts Clause and Limitations on the Police Power*

The contracts clause states that "[n]o State shall . . . pass . . . any law impairing the Obligation of Contracts."[101] In many ways, it is closely related to the fifth amendment's public use limitation. First, like the public use limitation, the contracts clause provides a blanket prohibition on government activity. Second, the two provisions were designed to protect the private property interests of individuals, and both must be balanced with the police power. Third, to the extent that contractual agreements constitute property interests, an impairment of contracts may constitute a taking of property for fifth amendment purposes.[102] Similarly, contracts clause issues

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transaction, it is not likely that it would offer the desired amount in a condemnation proceeding.

98 *See* notes 84-85 *supra*. Oliver Wendell Holmes expressed the gist of this relationship when, in a letter to W. James dated April 1, 1907, he stated: "The true explanation of the law of prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting his life." *Reprinted in* M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 417 (1943), *cited in* Michelman, *Property as a Constitutional Right*, *supra* note 84, at 1112.

99 *See generally* Radin, *supra* note 85; Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409 (1983). *See also* Berger, *supra* note 10, at 235.

100 If courts required that takings *actually* be for a public *use*, private property owners would realize adequate protection of their interests.

101 U.S. CONST. art. I, § 10.

102 The definition of property for fifth amendment purposes is not limited to tangible property. *See* note 103 *infra*. One author has argued that the results in contracts clause cases "might be the same if the contract clause were dropped out of the Constitution, and

may also arise in the context of government takings where the property condemned is subject to contractual agreements.[103]

Once employed regularly to invalidate conflicting legislation,[104] the contracts clause subsequently became subordinate to the state's police power, or, more generally, to the government's right to regulate economic behavior.[105] Yet, in *Allied Structural Steel Co. v. Spannaus*,[106] the Supreme Court recently revived the contracts clause as a specific and effective restriction on state power.[107] To implement this restriction, the Court determined that government interests must be balanced with the essential protections afforded in the Constitution.[108] In terms of underlying policy, the Court's reasoning in this context also provides support for reviving the public use limitation as an effective limitation on government power.

In *Spannaus*, the Supreme Court reviewed legislation which increased the contractual obligations of companies under certain pension plans.[109] The Court, in striking down the legislation, stated "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[110] The Court held that the standard of review is determined by the level of impairment of contractual relationships:

> *The severity of the impairment measures the height of the hurdle the state legislation must clear.* Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination

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the challenged statutes all judged as reasonable or unreasonable deprivations of property." Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 852, 890 (1944).

103 The Supreme Court has held that intangible property, such as contracts or charters, is subject to condemnation under eminent domain. West River Bridge v. Dix, 47 U.S. (6 How.) 507 (1848), involved the state seizure of a bridge owned by a company incorporated under a state charter. The Court acknowledged that the taking of the bridge necessarily entailed the concomitant seizure of contract rights associated with the bridge and the charter, but held that all property rights, whether tangible or otherwise, were subject to condemnation by the state. The Court reaffirmed *Dix* in Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390 (1912).

In *Midkiff*, the condemnee landowners argued that the Hawaii Land Reform Act violated not only the public use clause, but also the contracts clause. *See* Brief for Appellees at 85-89, Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984).

104 "The Supreme Court from 1874-1898 used the clause in thirty-nine cases to invalidate state legislation." J. NOWAK, *supra* note 63, at 466.

105 Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934), marked the Court's retreat from an expansive reading of the contracts clause.

106 438 U.S. 234 (1978).

107 *See* J. NOWAK, *supra* note 63, at 469.

108 *See* text accompanying note 111 *infra*.

109 438 U.S. at 238-39.

110 *Id.* at 242.

of the nature and purpose of the state legislation.[111]

The Court stated that where a specific constitutional guarantee was involved, the legislation must be narrowly tailored to promote a legitimate state interest.[112]

The test formulated in *Spannaus* has been followed in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*[113] In *Energy Reserves*, the Supreme Court, quoting *Spannaus*, clarified that the threshold inquiry was "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."[114] The Court affirmed that a substantial impairment calls for heightened scrutiny.[115] Moreover, once the threshold inquiry is passed, the state must show "a significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem."[116] If the state meets this burden, the court must finally determine whether the adjustments of "the rights and responsibilities of the contracting parties [are based] upon reasonable conditions and [are] of a character appropriate to the public purpose justifying [the legislation's] adoption."[117] Only on this latter point, the Court stated, is deference properly granted to the legislature.[118]

Thus, the Supreme Court has recognized limits to the police power and has expressed a willingness to balance that power against specific constitutional guarantees. Like contractual agreements, private property interests in eminent domain are impaired to a varying degree depending on the nature of the government's action. Therefore, it seems appropriate that courts should have the discretion to apply a corresponding measure of scrutiny where a seizure of private property causes substantial injury.[119] The precise

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111 *Id.* at 245 (emphasis added). The Court went on to say:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. *Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.*

*Id.* (emphasis added).

112 *Id.* at 250.

113 103 S. Ct. 697 (1983). This case involved an action by a natural gas supplier to enforce a contractual termination clause. The Kansas Natural Gas Price Protection Act, passed after the contracts were entered into, nullified the effect of the termination clause. KAN. STAT. ANN. §§ 55-1401 to -1415 (1981).

114 103 S. Ct. at 704-05.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at 706. The Court ultimately determined that the legislation in question did not violate the contracts clause.

119 Considering the potential threat to liberty interests posed by government takings, the need for judicial flexibility is even more compelling in the eminent domain context.

test in contracts clause cases does not fit well in the eminent domain context[120] but the general thrust of the Court's newly adopted standard of review, that of heightened scrutiny, should be afforded to the interests of private property owners made subject to the government's taking power.

## III. Public Policy Analysis

The Framers of the Constitution designed the public use clause to limit government power and, more specifically, to protect the rights of private property owners in the possession of their property.[121] Such protection promotes security in property and, in turn, secures investment backed expectations. To this extent the public use clause encourages investment and economic growth.[122] At the same time, the clause reduces the inefficiencies which often result from government takings.[123] Notwithstanding these considerations, legislatures often postulate that the exercise of eminent domain power promotes economic efficiency and the proper functioning of markets.[124] Because legislatures may be incorrect in assessing the economic impact of policy measures, this legislative exercise is often disconsonant with the underlying purposes of the public use clause.

Characterized in this light, the divergent economic stances of the Framers and legislatures are not amenable to judicial reconciliation. Judges are not public policy analysts and it is not the province of the courts to determine whether the legislature has miscalculated its economic findings. But courts need not conduct such an economic inquiry to uphold the protections of the public use clause. Rather, those protections, which secure both economic and liberty interests, may be guarded simply by a more careful reading of the public use clause itself; that is, by providing specific parameters to the broadened meaning of that term and by applying close scrutiny

120 Private property owners would receive little additional protection by requiring, as in *Energy Reserves*, that the state show evidence of a "significant and legitimate public purpose." 103 S. Ct. at 704-05. For an alternative balancing test tailored to the eminent domain context, see Note, *supra* note 99.

121 The court of appeals in *Midkiff* provides an interesting discussion of the Framers' intent in establishing the public use limitation. Midkiff v. Tom, 702 F.2d at 790-93. *See also* Note, *supra* note 99, at 412-13.

122 One historian has characterized "security in one's property" as an "indispensible condition of productive investment and the accumulation of wealth." D. LANDES, THE UNBOUND PROMETHEUS 16 (1980).

123 Indeed, Judge Posner maintains that the exercise of eminent domain power is justified in economic terms only in the context of certain holdout situations. POSNER, ECONOMIC ANALYSIS OF LAW 41-42 (1977). *See also* Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473 (1976).

124 *See* text accompanying notes 126, 130 *infra*.

to takings which impair essential liberty interests.[125]

In *Midkiff*, the state legislature explained the Hawaii Land Reform Act as a measure to correct market failure caused by the concentration of land ownership:

> [T]he Hawaii Legislature discovered that while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners . . . . The Legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring public tranquility and welfare.[126]

The Supreme Court refrained from making an independent policy analysis of these findings, noting that "empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts."[127] Nevertheless, by accepting the legislature's determination that the Act satisfied the public use requirement, the Court affirmed the diluted reading of that concept. Without resorting to public policy analysis, the Court could have upheld the economic protection afforded by the takings clause by simply interpreting its language more narrowly.[128] The Hawaii Land Reform Act may in fact have passed such a hurdle, for the special circumstances surrounding Hawaii's land problem supported the government's actions.[129]

The *Poletown* taking probably would not pass a more narrow reading of the public use clause. In that case, which involved the seizure of property on behalf of General Motors, the City of Detroit argued that the "controlling public purpose in taking this land is to create an industrial site which will be used to alleviate and prevent conditions of unemployment and fiscal distress."[130] If general claims regarding the reduction of unemployment satisfy the public use requirement, then the concept has little meaning today. Indeed, it is ironic that such specultive economic arguments would prevail over a specific constitutional restriction which itself embodies firm economic values.[131]

One may well argue that the cumulative impact of government

125 *See* note 10 *supra*.

126 Hawaii Housing Authority v. Midkiff, 104 S. Ct. at 2325.

127 *Id.* at 2330.

128 Even assuming that the Hawaii legislation could have passed a more narrow reading of public use, that concept could have retained a measure of economic protection had the court placed limits on its meaning.

129 Land ownership in Hawaii is unique among the 50 states. Had the Supreme Court limited the *Midkiff* holding to the facts of the case, its decision would not have become subject to the present critique.

130 *Poletown*, 410 Mich. at 632, 304 N.W.2d at 458. *See* notes 87-98 *supra* and accompanying text.

131 *See* notes 121-23 *supra* and accompanying text.

takings is to cause the destabilization of private property rights through an increase in risk associated with property ownership.[132] To protect the rights of property owners and check the "fair minded" goals of legislatures, courts should enforce that specific clause of the Constitution which operates not only to protect property interests, but also those liberty interests essential to our freedom.[133]

## IV. Conclusion

The Supreme Court in *Midkiff* held that courts must defer to legislative determinations as to what constitutes public use for fifth amendment purposes. The decision straps courts to a rigid standard of review and almost ensures that all government takings will be upheld. An examination of the potential abuse of the eminent domain power and the little judicial protection offered to private land owners under a deferential standard of review reflects the unreasonableness of such a holding.

Where property interests are meshed with fundamental liberty interests, the need for judicial protection of those interests becomes particularly acute. Only if courts have the discretion to closely scrutinize condemnations will individuals receive a proper measure of protection. We should recall that the power of eminent domain itself is not directly derived from the Constitution but is implied as an attribute of sovereignty or a political necessity.[134] To imply a power in government, to give that power the broadest possible meaning, and then to defer to the exercise of that power in the face of a specific constitutional restriction, effectively nullifies the public use limitation and disregards those individual rights which the fifth amendment was designed to protect.[135]

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132 "Using the legislature to coerce transfer of private lands encourages bypassing private markets in favor of political markets to decide what property should be transferred and at what price." Epstein, *Asleep at a Constitutional Switch*, Wall St. J., Aug. 9, 1984, at 28, col. 3.

133 *See* notes 121-23 *supra* and accompanying text.

134 *See* note 1 *supra*.

135 Nor does the government discriminate in choosing the target of its takings, for both the wealthy investor and the ordinary citizen suffer at its expense. This should cause greater concern among ordinary citizens for, as one writer noted, "[p]utting the rich and poor on equal footing is giving the wealthy an amazing advantage." Whitlock, Pa. Evening Post, May 22, 1777, *cited in* W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS 189 (1980).