HAWAII HOUSING AUTHORITY V. MIDKIFF
467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984)
LARGE LANDOWNER BIAS STILL HERE AFTER FORTY YEARS

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

The Act

STATEMENT OF THE CASE

The Hawaiian Legislature passed the Hawaii Land Reform Act of 1967 (the Act)[1] in an attempt to alleviate what it had identified as economic and social hardships caused by an oligopoly in the State's residential land market.[2] The Act sets out the circumstances under which the State may condemn residential lots presently leased to homeowners and transfer the fee simple titles to the lessees.

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

1. HAWAII REV. STAT. § 516 et. seq. (1976) (Supp. 1983).

2. "Oligopoly" means few sellers or a shared monopoly. The antitrust problem presented by an oligopoly in a private market is essentially that "where relatively few firms control the market, they may recognize their 'interdependence' with the result that each may restrict his output in order to charge a near-monopoly price." PHILLIP AREEDA, ANTI-TRUST ANALYSIS: PROBLEMS, TEXT, CASES, 270 (3rd ed. 1981). *See also* Kemper, *The Antitrust Laws and Land: An Answer to Hawaii's Housing Crisis?*, 8 HAWAII B. J. 5 (Apr. 1971), 7–9, for a general discussion of ownership concentration in Hawaii's land market and its effects on land and land-related prices in the State.

3. Section 516-83(a) consists of 13 paragraphs detailing the findings of the Legislature and the public purposes to be served by the Act. Additional findings and declarations are set out in 1975 Hawaii Sess. Laws, ch. 184, § 1.

> The economy of the State and the public interest, health, welfare, security and happiness of the people . . . are adversely affected by such shortage of fee simple residential titles and such artificial inflation of residential land values and by such deprivation . . . of the choice to own or take a lease. . . .[4]

By tagging the evil addressed as "artificial inflation," the Legislature implies that prices are higher than those which would exist in a healthy competitive market taking generalized inflation into account; *i.e.*, higher than "natural" prices. It thereby also suggests that the current fee owners have some power to control the market price of land, either by design or as the inevitable consequence of concentrated ownership.[5]

The Hawaii Housing Authority (HHA) is the administrative agency in charge of implementing the terms of the Act. The terms provide that tenants on single-family residential lots[6] in development tracts[7] may file applications requesting that HHA condemn the lots on which their homes sit.[8] If 25 eligible tenants[9] or those on 50 percent of the lots in a tract, whichever is less, make proper application, then HHA may hold a public hearing to determine whether acquisition of all or some of the lots would serve the purposes of the Act.[10] If HHA finds that those purposes would be served, then it may acquire the landowner's fee simple title at prices set by condemnation trial or through negotiations between the owners and lessees.[11] HHA may then sell the lots to applying tenants. No single tenant or family can acquire more than one lot.[12] The Act contains no prohibition against subsequent leasing of lots.

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4. HAWAII REV. STAT. § 516-83(a)(4) (1976).

5. "When one or two individuals or entities own all of the land in an area capable of development, . . . price is subject to some negotiation, but, ultimately, the bargaining cards are all in the hands of the property owners, and it soon becomes a take it or leave it situation. When most of the developed areas are owned by a few, then the developer really has no choice but to pass the high price on to purchasers.

"[W]idespread leasehold tenure has aggravated the price structure in the state. First, it maintains concentration of ownership and control, and it drives up the price of available fee land. The value of fee land then becomes inflated, which in turn inflates the value of leased land. . . ." Kemper, *supra* note 2 at 8.

6. A "residential lot" is defined as "a parcel of land, two acres or less in size, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for one or two families." HAWAII REV. STAT. § 516-1-(11) (Supp. 1983). The definition was amended in 1980 to include two-family residences.

7. A "development tract" is defined as "a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots." HAWAII REV. STAT. § 516-2(2) (1976).

8. HAWAII REV. STAT. § 516-22 (1976).

9. Eligible tenants must, among other things, be 18 years of age, own the house sitting on the lot, be or have a *bona fide* intent to be a resident of the State, show proof of his or her ability to pay for a fee simple interest in the lot, and not own residential land elsewhere nearby. HAWAII REV. STAT. § 516-33 (Supp. 1983).

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

11. HAWAII REV. STAT. § 516-56 (Supp. 1983).

12. HAWAII REVV. STAT. § 516-28 (1976).

Diligent implementation of the Act could result in a continuous transfer of fee simple titles from lessors to lessees. That process would undermine any oligopolistic power in the State's residential land market and satisfy some portion of public demand for fee simple titles. Theoretically, as the large landowners lose control over the market, land prices will seek more competitive levels, thereby lessening both market-specific and generalized inflation in the State.

The Suit

In April 1977, HHA began proceedings to condemn tracts of land held by the Trustees of the Estate of Bernice Pauahi Bishop (the Bishop Estate), one of the larger private landowners in Hawaii. In February 1979, the Bishop Estate filed suit against the Commissioners and Executive Director of HHA and HHA itself. The case was originally filed in the U.S. District Court for the District of Hawaii as *Midkiff v. Tom* (*Midkiff I*),[13] and later appealed to the Ninth Circuit under the same style (*Midkiff II*).[14] The Ninth Circuit reversed the District Court decision, and the case was then appealed to the U.S. Supreme Court under the title *Hawaii Housing Authority v. Midkiff* (*HHA*).[15] The suit sought a declaration that the Act was unconstitutional and a corresponding injunction.[16]

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

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

13. 483 F. Supp. 62 (D. Hawaii 1979).

14. 702 F.2d 788 (9th Cir. 1983).

15. ___ U.S. ___, 104 S. Ct. 2321 (1984).

16. The District Court issued a preliminary injunction in May of 1979 which held that the mandatory arbitration and compensation provisions of the Act were unconstitutional. 471 F. Supp. 871 (D. Hawaii 1979).

over the *Midkiff* case. The Supreme Court held that the District Court had not abused its discretion under either the *Pullman-* or *Younger*-abstention doctrines.[17] The Court noted particularly that *Pullman*-abstention was inappropriate because there was no uncertain question of state law at issue. The Act "unambiguously provides that 'the use of the power . . . to condemn . . . is for a public use and purpose.'"[18] The Supreme Court overruled the Ninth Circuit majority decision on the Fourteenth Amendment challenge. It based its holding on the breadth of the states' police powers and the degree of deference courts, particularly the federal courts, should give a legislative determination that a public taking will result in a public use.

HISTORICAL BACKGROUND

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

The Traditional Land Tenure System in Hawaii

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

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

17. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) and Younger v. Harris, 401 U.S. 37 (1971).
18. 104 S. Ct. at 2327 § 516-83(a)(12) (1977).
19. 104 S. Ct. at 2323.
20. GAVAN DAWS, SHOAL OF TIME, xii–xiii (1963).
21. JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 5 (1958).
22. *Id.* at 6.

The islands were also divided into named districts[23] which were subdivided into *ahupua'a* subject to the supervision of a land manager, or *konohiki*.[24] Ideally, an *ahupua'a* "stretched in a wedge from its apex at a mountain top to its base in the sea," thereby embracing the widest range of an island's resources.[25]

In the very early 1800s, King Kamehameha I unified the islands under his control.[26] By the mid-1820s when Kamehameha III took the throne, a large foreign population already existed in Hawaii.[27] Although the individual interests of the foreign population may have differed on a number of other points, the traditional land tenure system in Hawaii was repugnant to all. The threat of dispossession became particularly disconcerting to the foreign population as its capital investment in Hawaiian agricultural enterprises increased during the 1830s and 1840s.[28]

An Era of Land Reform

Using their political and religious influence, backed by economic and military muscle, the foreign population in Hawaii eventually persuaded King Kamehameha III and other native leaders that Hawaii's traditional political system, including its land tenure system, was no longer viable.[29] The King's first step toward political reform was to enact the Bill of Rights of 1839. That Bill provided that protection of law would be given to persons, their building lots, and property, and that a "landlord cannot causelessly dispossess his tenant."[30] In 1840, Kamehameha III granted the Hawaiian kingdom its first constitution, by which the government changed from an absolute to a constitutional monarchy.[31] An act passed in 1845 established a Board of Commissioners to Quiet Titles with power to investigate and confirm or reject existing claims to property rights in

23. In 1848, the Island of Oahu was divided into six districts, one of which has been renamed "Honolulu." The districts (*mokus*), or their geographic successors are important today as judicial districts. *Id.* at 3.

24. *Id.*

25. Roger C. Green, *Makaha Before 1880 A.D.*, 31 PACIFIC ANTHROPOLOGICAL RECORDS 5 (Dept. of Anthropology, Bernice Pauahi Bishop Museum, Honolulu, Hawaii, June 1980). Although divisions were often made according to prominent natural features, boundaries were also often elusive. Certain people were taught how to remember division boundaries and that information was passed on from one generation to the next. CHINEN, *supra* note 21, at 1.

26. CHINEN, *supra* note 21, at 6.

27. *Id.*

28. *See, e.g.*, DAWS, *supra* note 20, at 61-125, and CHINEN, *supra* note 21, at 7.

29. "The vigorous actions of the foreigners in the Islands, often supported by the commanders of the warships of their homelands visiting at the time in Hawaiian waters, forced Kamehameha III and his chiefs to review their national policy." CHINEN, *supra* note 21, at 7.

30. CHINEN, *supra* note 21, at 7; *see also In re* Matters of Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864).

31. *Id.*

land.[32] The Board identified the nature of a claimed title as either a fee simple or a leasehold.[33]

In 1848, Kamehameha III initiated a program which has come to be known as the "Great *Mahele*," or land division. During the *Mahele*, approximately 1,500,000 acres of Hawaii's land were conveyed by the King to the chiefs and *konohikis*, and about 30,000 acres as *kuleanas*[34] to native tenants.[35] The King divided his reserved lands into two types, setting aside about 1,500,000 acres as government lands and something under 1,000,000 acres as Crown lands.[36] The government, or public, lands were established by an instrument in which the King conveyed all his "rights, title and interest" in the lands described in the deed to "the chiefs and people of [his] Kingdom."[37] The Crown lands were reserved as the exclusive property of the King, his heirs and successors, forever.[38] The King's separate treatment of the Crown lands reflected both a desire to exercise complete control over the land and a deep concern over "the hostile activities of foreigners in the Islands."[39] The King did not want the Crown lands to become part of a "public domain and subject to confiscation by a foreign power in the event of a conquest."[40] When the monarchy ended in 1893, the remaining Crown lands were merged with the government lands creating a valuable public domain which later passed from the Republic to the Territory of Hawaii.[41]

By 1841, foreigners already held "good, doubtful and squatter claims" to land in the islands.[42] That year, the national legislature attempted to curb the increase of foreign land holdings in the Kingdom by requiring foreigners whose claims were not supported by written titles or leases to

32. 1846 Hawaii Sess. Laws, p. 107; re-enacted as *An Act to Organize the Executive Department of the Hawaiian Islands*, art. IV (1846). CHINEN, *supra* note 21, at 8, n.1.

33. "[T]here are but three classes of persons having vested rights in the land, 1st, the government (the king), 2nd, the landlord (the chief and konohiki), and 3rd, the tenant." CHINEN, *supra* note 21, at 9, *quoting* Preface to Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them, 1846; 2 Rev. Laws of Hawaii 2120-2152 (1925).

34. *"Kuleanas"* were the lands awarded to the native tenants under an act of 1850. CHINEN, *supra* note 21, at 30. "The kuleana was the functional unit in soil cultivation, corresponding to the peasant's holding in Europe, as the ahupuaa corresponds to the large estate of nobility, and the ili to a small estate, . . ." THEODORE MORGAN, HAWAII: A CENTURY OF ECONOMIC CHANGE 21 (1948).

35. CHINEN, *supra* note 21, at 31.

36. *Id.*

37. *Id.* at 25. The instrument was recorded in The Mahele Book, Office of the Commissioner of Public Lands, Territorial Office Building, Honolulu. *Id.* at 33.

38. *Id.* at 25.

39. *Id. See also*, 4 Privy Council Records 250–308; *In re* Matters of Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864).

40. CHINEN, *supra* note 21, at 25.

41. *Id.* at 27. Before January 3, 1865 when an act was passed which made the Crown lands inalienable (1864 Hawaii Sess. Laws, p. 69), "King Kamehameha III and his successors did as they pleased with the Crown lands, selling, leasing and mortgaging them at will." *Id.*

42. MORGAN, *supra* note 33, at 129.

negotiate leases with the Hawaiian governors. The leases were to be for a fixed term, not to exceed 50 years.[43] The Hawaiian government, however, was not strong enough to stem the tide of foreign power in the Kingdom.[44] In 1850 legislation was passed that allowed foreigners to hold and convey fee simple titles to Island land.[45]

From the Mahele to the Act

Plantation agriculture was introduced to the Islands as early as the 1820s. By 1876, the sugar industry dominated the Islands' economy.[46] The *kuleanas* quickly passed to foreign sugar and rice plantation owners and land speculators. The loss of land by the native tenants has been attributed to a number of factors, including native alienation from the concepts of private property and "booming land prices, giving a dazzingly large return for a lease or sale."[47] A similar fate befell the *Konohiki* lands. Plantations also purchased and leased government lands.[48]

Many of the largest plantation owners in Hawaii were North Americans who maintained close economic ties with the United States and whose interests would be served by annexation of Hawaii to the United States. Agitation for annexation reached a climax in the revolution of January 1893. Under extreme pressure, including that exerted by an informal U.S. military presence in the Islands, Queen Liliuokalani yielded her authority "until such time as the Government of the United States should, . . . undo the action of its representatives and reinstate her 'as the constitutional sovereign of the Hawaiian Islands.'"[49] The Queen's action had the political effect of an absolute and final abdication. A short-lived Hawaiian Republic soon after became the Territory of Hawaii.

Between the turn of the century and World War II, Hawaii's primary enterprises were the production and export of sugar and pineapples. During that era, "[a] tightly knit corporate and family structure dominated the Islands' plantations, financial institutions, shipping and a substantial portion of their wholesale and retail commerce."[50] That "structure" was predominately controlled by North Americans. At least one source has suggested that "[c]oncentration of land ownership both caused and reflected the unified outlook and objectives of this oligarchic regime."[51]

43. *Id.* Announcement in the *Polynesian*, June 1841. *Id.* at n.28.
44. *Id.* at 129.
45. *Id.* at 136.
46. *Id.* at 173–185.
47. *Id.* at 137.
48. CHINEN, *supra* note 21, at 27. The government lands were sold "as a means of obtaining revenue to meet the increasing costs of the Government." *Id.*
49. MERGE TATE, HAWAII: RECIPROCITY OR ANNEXATION 236 (1968).
50. HORWITZ & MELLER, LAND AND POLITICS IN HAWAII 3 (1963).
51. *Id.* at 4.

A good share of Hawaii's former Crown lands had ended up in various royal estates and trusts. In 1884, Princess Bernice Puauhi Bishop, heir to the estates of the Kamehamehas, died, leaving approximately one-ninth of Hawaii's land in trust. Her will provided that income from her estate be used to found two schools, one for girls and one for boys, to be called the Kamehameha Schools. The schools were to give preference to students of native Hawaiian ancestry.[52] A part of the lands subject to her estate was at issue in *HHA*.

Hawaii became the 50th state in August 1959. As part of his gubernatorial campaign of 1959, Governor Quinn proposed to institute a land redistribution program which he tagged the "Second *Mahele*."[53] The proposal was debated in the 1961 legislative session where the issue of State land law was generally explosive. Governor Quinn's plan proposed to offer about 145,000 acres of State lands for public sale. The lands were claimed to be on all the major islands and to include a complete cross-section of all types of island terrain. The plan called for dividing the land into blocs for subdivision into smaller lots to be sold on a one-to-a-family basis.[54]

Quinn's proposal was severely criticized on grounds including that the bulk of lands to be distributed were already under lease to sugar plantations and ranches, and that the proposal would destroy the agricultural industry.[55] The Second *Mahele* was blocked in both the House and Senate, but the legislative debates attending and following its demise were fierce and described the State's land problems in terms of monopoly and shortage.[56]

Concentration and Inflation in Hawaii's Land Market Circa 1967

Immediately prior to adoption of the Act, 72 private parties owned about 47 percent of the land in Hawaii; 18 of them holding nearly 80 percent of the privately owned fee simple land in the State.[57] The State and federal governments combined claimed to control about 48.5 percent, but that figure was high because both claimed some of the same land.[58] The tracts at issue in *HHA* are situated on the Island of Oahu where high ownership concentration may be particularly critical. The island supports

52. DAWS, *supra* note 20, at 299.

53. HORWITZ, *supra* note 50, at 2.

54. Governor Quinn's proposal was set out in the *Honolulu Star-Bulletin*, July 23, 1959, reproduced in HORWITZ, *supra* note 50, at 5.

55. HORWITZ, *supra* note 50, at 5.

56. *Id.* at 6–10.

57. Conahan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 HAWAII B. J. 31, 33 (Jul. 1969), *citing* LEGISLATIVE REFERENCE BUREAU, STATE OF HAWAII, PUBLIC POLICY IN HAWAII: MAJOR LANDOWNERS 13 (Report No. 3, 1967).

58. *Id.*

both plantation agriculture and dense urban development, including the City of Honolulu. In 1967, the federal government was the largest landowner on Oahu and held about 36.7 percent of the land.[59] The Bishop Estate was the second largest landowner, controlling about 15.5 percent of Oahu's land.[60] Twenty other private parties owned about 41.5 percent of the land on the island.[61]

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

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

LEGAL BACKGROUND

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

59. *Id.* Federal land on Oahu is largely set aside for military purposes and not likely to be relinquished to ease local private land shortages. The State of Hawaii owned about 14.9% of the land, but claimed that it had little to make available to residential buyers because of a need for parks, schools and other public facilities. *Id.* at 33–34.

60. *Id.* at 33, n.5.

61. *Id.* at 33.

62. Kemper, *supra* note 2, at 5.

63. *Id.*

64. *Id.* at 6.

65. MORGAN, *supra* note 33, at 135.

66. *See generally,* Kemper, *supra* note 2, at 7.

67. *See e.g,* Chicago Burlington & Quincy Ry. Co. v. Chicago, 166 U.S. 266 (1897).

property may be taken by a sovereign for its own use: 1) that the mechanism by which a taking is consummated will comport with due process;[68] 2) that the person from whom property is taken will receive just compensation;[69] and 3) that the property taken will be put to public use. For purposes of this discussion, the third guarantee will be broken down into two elements: that property will be taken for a public purpose and that it will be used in some sense by the public.

Public Purposes and the Police Power

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

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

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

68. As well as guaranteeing just compensation and that taken property will be put to public use, due process of law protects property owners against any form of procedure in eminent domain cases which would deprive them of an opportunity to be heard and to make whatever claims and objections they are entitled to make. 26 AM. JUR. 2D *Eminent Domain* § 8 (1966).

69. When real property is taken, just compensation is generally considered to be the fair market value of the land. *See, e.g.*, Bigham, *"Fair Market Value," "Just Compensation," and the Constitution: A Critical View*, 24 VAND. L. REV. 63 (1970).

70. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954), *citing* Luxton v. North River Bridge Co., 153 U.S. 525, 529–530 (1894).

71. *See, e.g.*, Rindge v. Los Angeles, 262 U.S. 700 (1923).

72. 348 U.S. 26.

73. *Berman*, 348 U.S. at 32.

74. *Id.* at 32–33.

to legislative definitions of what constitutes a valid exercise of state police power when the exercise will not impinge on activities, persons, property, or rights subject to the plenary jurisdiction of the federal government.[75] In *Berman*, the Court stated that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[76] The latitude given legislatures to define their own police power to promote the public welfare as described in *Berman* suggests that what constitutes valid public purposes within the context of an eminent domain action is fundamentally a political question and subject to appropriately limited judicial scrutiny.

Public Use

Although the *Berman* decision is best known for its discussion of the breadth of the police power, it also stated the limits on that power: the facts of each case and "specific constitutional limitations."[77] To the extent that the public use clause protects the property rights of individuals against collective lawmaking authority, the clause constitutes a limit on sovereign police power. Standing alone, then, the requirement that a taking serve a public purpose seems to beg the question of what constitutes a valid exercise of police power within the context of a public use clause challenge.

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

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

75. Compare the strict scrutiny given state determinations regarding what constitutes valid exercises of state police power when those exercises will burden interstate commerce. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

76. *Berman*, 348 U.S. at 32.

77. *Id.*

by U.S. founding fathers.[78] Its discussion suggested that a major objective reflected in constitutional debates was that the tools of government would not be used to redistribute private property among private parties. The Ninth Circuit cited early case law in support of its position. In 1979, the Supreme Court declared that "[a] law that takes property from A and gives it to B . . . is against all reason and justice."[79] Similarly, an 1896 case, *Missouri Pac. Ry. Co. v. Nebraska*,[80] held that "[t]he taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the fourteenth [amendment]."[81] As literal propositions, all of the above have been undermined by subsequent social legislation aimed at redistributing resources among the population and by case law upholding the validity of such legislation.

Whether property taken through eminent domain will be put to public use has been treated, at least in part, as a question of fact. In *Midkiff II*, the Ninth Circuit set out a list of instances where federal courts had found a public taking to be for a constitutionally acceptable public use. That list includes instances when the taking resulted in: 1) an historically acceptable public use;[52] 2) a change in the use of the land; 3) a change in possession of the land; 4) a transfer of ownership from a private party to a governmental entity; and 5) a *de minimis* condemnation necessary to develop nearby land.[83] The Ninth Circuit noted that the Hawaiian Act fit none of those descriptions.[84]

In *People of Puerto Rico v. Eastern Sugar Assoc.*,[85] the First Circuit Court of Appeals upheld the validity of a condemnation of over 3,000 acres of private land on the Island of Vieques. The public purposes declared in the Land Law of Puerto Rico included ending an existing *latifundia*,[86] blocking its reappearance in the future, and assisting in the creation of new landowners.[87] The land condemned was to be redistributed

78. "[In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . . A republic promises . . . the cure for which we are seeking. . . ." *Midkiff II*, 702 F.2d at 792, quoting THE FEDERALIST No. 10, 104–09 (J. Madison) (Hamilton ed. 1863).

79. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1748).

80. 164 U.S. 403.

81. *Id.* at 417.

82. "Following the establishment of the United States Constitution, there were two major kinds of activities for which the power of eminent domain was undisputedly properly employed: mill acts and road building." *Midkiff II*, 702 F.2d at 794.

83. *Id.* at 793–794.

84. *Id.* at 794.

85. 156 F.2d 316 (1946).

86. A "latifundia" is a system of large landholdings. A "latifundio" is a large landed estate.

87. *Puerto Rico*, 156 F.2d at 318, *citing* 1941 P.R. Laws, p. 388 *et. seq.*

in small parcels to individual *agregados*[88] to build their homes on, in larger parcels to farmers for subsistence farms, and in large parcels, by lease, to professional agriculturalists to develop "proportional-profit" farms.[89] The court of appeals stressed that if any of the uses set out in the Law was found not to be public, then the petition in that case would have been properly dismissed. It concluded, however, that the uses must be looked at in the aggregate and in the context of a comprehensive program of statewide agrarian reform.[90]

At least three potentially diverse interpretations of the court of appeals' conclusion are possible: 1) that the individual users, in the aggregate, constituted the public; 2) that the individual uses, in the aggregate, constituted public use; or 3) that the public purposes served by the Law rendered the individual private uses public. If the public purposes supporting a taking are viewed as rationale and severable from the issue of the actual use to which property is put, then the third possible conclusion listed above would not, by itself, support a public taking. That position was taken by the Ninth Circuit in *Midkiff II* when it held that, stripped of its rationale, the Act constitutes a blatant attempt by the State of Hawaii to redistribute property among its citizens for the private use of some of them.[91]

Early case law indicates that there is a limit to the judicial deference which should be given a legislature's public use determination. In a 1905 decision, the Court quoted an 1882 state decision for the proposition that "[i]t is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain. . . . For if the use be not public . . . the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."[92] If, however, as indicated in other decisions, the

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

89. *Puerto Rico*, 156 F.2d at 321.

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

91. *Midkiff II*, 702 F.2d at 798. "'This court need not, and will not, stand idly by and allow [federal] administrative officials to take private property arbitrarily, capriciously, in bad faith, *or for what is essentially a private purpose*.' (emphasis added)." *Id. quoting* United States v. 23.9129 Acres of Land, 192 F. Supp. 101, 102 (W.D. Cal. 1961).

"When we strip away the statutory rationalizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Midkiff II*, 702 F.2d at 798.

92. Tracy v. Elizabethrtown, B. & S. R.R., 80 Ky. 259, 265 (1882).

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

THE *HHA* DECISION

In *HHA*, the Court defined the issue before it as

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

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

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

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

93. Old Dominion Land Co. v. U.S., 269 U.S. 55, 66 (1925).
94. United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896).
95. *HHA*, 104 S. Ct. at 2324.
96. *Id.* at 2329.
97. *Id.*
98. *Id.* at 2329–2330.

Applying the theory set out above to the facts before it, the Court concluded that it could not disapprove of Hawaii's use of its eminent domain power in this instance because: the people of Hawaii, via the Act, were attempting to alleviate perceived evils of a land oligopoly "traceable to their monarchs"; the legislature had alleged that that oligopoly created "artificial deterrents to the normal functioning of the State's residential land market"; the pervasive practice of leasing deprived thousands of the choice whether to lease or buy the land on which their homes were built; and regulating oligopoly and its attendant evils was a classic exercise of the State's police power.[99]

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

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

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

99. *Id.* at 2330.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 2331.
104. *Id.*
105. *Id.* at 2331–2332.
106. *Id.* at 2332.

ANALYSIS

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

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

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

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

107. *Berman*, 348 U.S. at 32.
108. *Old Dominion*, 269 U.S. at 66.
109. 269 U.S. 55.
110. *Id.* at 66.

be the rule; *i.e.*, if public purpose is established, then public use will be presumed. The use to which property is put is inherently a factual issue, whereas the validity of a public purpose appears to be purely legal. The collapsing of the factual issue into the legal one has the effect of seriously undermining the importance of the statement in *Berman* that "each case must turn on its own facts."

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

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

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

111. Hawaii Atty. Gen. Op. 62-39 (August 7, 1962).

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

CONCLUSION

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

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

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

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

SUSAN LOURNE

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)

Argued:
March 26, 1984

Decided:
May 30, 1984

Annotation

PRIMARY HOLDING

The public use requirement of a taking by the state is satisfied when it transfers title in land from landlords to tenants in order to reduce the concentration of fee ownership in the state.

FACTS

In the history of Hawaii, land ownership was restricted to the state and federal governments, which owned about half of the land, and a small group of landholders. The Hawaii legislature determined that this concentration of land harmed the state's well-being because it inflated land prices, so it created the Land Reform Act. Under this law, the Hawaii Housing Authority was established and endowed with the authority to seize fee titles when a sufficient number of tenants in any given development tract asked the HHA to seize a fee title.

Once the HHA took the titles and paid the landowners for them, it could sell the titles for the tenants while lending them up to 90 percent of the land's purchase price. This meant that the state was using its sovereign power to transfer land ownership from landlords to tenants. The landlords argued in federal court that this system violated the Public Use Clause of the Fifth Amendment.

OPINIONS

Majority
- Sandra Day O'Connor (Author)
- Warren Earl Burger
- William Joseph Brennan, Jr.
- Byron Raymond White
- Harry Andrew Blackmun
- Lewis Franklin Powell, Jr.
- William Hubbs Rehnquist
- John Paul Stevens

The Public Use Clause should be broadly interpreted such that it covers everything covered by the state police power, including in the eminent domain context. As a result, a taking does not violate the Clause if the state's use of the eminent domain power is rationally related to a conceivable public purpose, and the government provides just compensation. The state's effort to mitigate the harm caused by a land oligopoly is a rational exercise of the police power, so this is not a taking for purely private use. It is logical to use the condemnation power in furtherance of the state's purpose.

Recused
- Thurgood Marshall (Author)

CASE COMMENTARY

It is a legitimate public purpose to remedy a limited concentration of ownership that inflates prices in the real estate market. The state thus could use eminent domain to redistribute land, even though it did not take ownership of the land.

Show Less

Syllabus

U.S. Supreme Court

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984)

Hawaii Housing Authority v. Midkiff

No. 83-141

Argued March 26, 1984

Decided May 30, 1984*

467 U.S. 229

Syllabus

To reduce the perceived social and economic evils of a land oligopoly traceable to the early high chiefs of the Hawaiian Islands, the Hawaii Legislature enacted the Land Reform Act of 1967 (Act), which created a land condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce the concentration of land ownership. Under the Act, lessees living on single-family residential lots within tracts at least five acres in size are entitled to ask appellant Hawaii Housing Authority (HHA) to condemn the property on which they live. When appropriate applications by lessees are filed, the Act authorizes HHA to hold a public hearing to determine whether the State's acquisition of the tract will "effectuate the public purposes" of the Act. If HHA determines that these public purposes will be served, it is authorized to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set by a condemnation trial or by negotiation between lessors and lessees, the former fee owners' "right, title, and interest" in the land, and may then sell the land titles to the applicant lessees. After HHA had held a public hearing on the proposed acquisition of appellees' lands and had found that such acquisition would effectuate the Act's public purposes, it directed appellees to negotiate with certain lessees concerning the sale of the designated properties. When these negotiations failed, HHA ordered appellees to submit to compulsory arbitration as provided by the Act. Rather than comply with this order, appellees filed suit in Federal District Court, asking that the Act be declared unconstitutional and that its enforcement be enjoined. The court temporarily restrained the State from proceeding against appellees' estates, but subsequently, while holding the compulsory arbitration and compensation formulae provisions of the Act

unconstitutional, refused to issue a preliminary injunction and ultimately granted partial summary judgment to HHA and private appellants who had intervened, holding

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the remainder of the Act constitutional under the Public Use Clause of the Fifth Amendment, made applicable to the States under the Fourteenth Amendment. After deciding that the District Court had properly not abstained from exercising its jurisdiction, the Court of Appeals reversed, holding that the Act violates the "public use" requirement of the Fifth Amendment.

Held:

1. The District Court was not required to abstain from exercising its jurisdiction. Pp. 467 U. S. 236-239.

(a) Abstention under *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496, is unnecessary. *Pullman* abstention is limited to uncertain questions of state law, and here there is no uncertain question of state law, since the Act unambiguously provides that the power to condemn is "for a public use and purpose." Thus, the question, uncomplicated by ambiguous language, is whether the Act, on its face, is unconstitutional. Pp. 467 U. S. 236-237.

(b) Nor is abstention required under *Younger v. Harris*, 401 U. S. 37. *Younger* abstention is required only when state court proceedings are initiated before any proceedings of substance on the merits have occurred in federal court. Here, state judicial proceedings had not been initiated at the time proceedings of substance took place in the District Court, the District Court having issued a preliminary injunction bef[illegible]HA filed its first state eminent domain suit in state court. And the fact that HHA's administrative pro[illegible]ngs occurred before the federal suit was filed did not require abstention, since the Act clearly states that those proceedings are not part of, or are not themselves, a judicial proceeding. Pp. 467 U. S. 237-239.

2. The Act does not violate the "public use" requirement of the Fifth Amendment. Pp. 467 U. S. 239-244.

(a) That requirement is coterminous with the scope of a sovereign's police powers. This Court will not substitute its judgment for a legislature's judgment as to what constitutes "public use" unless the use is palpably without reasonable foundation. Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, a compensated taking is not prohibited by the Public Use Clause. Here, regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers, and redistribution of fees simple to reduce such evils is a rational exercise of the eminent domain power. Pp. 467 U. S. 239-243.

(b) 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. Government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under

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the Public Use Clause. And the fact that a state legislature, and not Congress, made the public use determination does not mean that judicial deference is less appropriate. Pp. 467 U. S. 243-244.

702 F.2d 788, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the cases.

U.S. Supreme Court

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467 U.S. 229

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Syllabus

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the remainder of the Act constitutional under the Public Use Clause of the Fifth Amendment, made applicable to the States under the Fourteenth Amendment. After deciding that the District Court had properly not abstained from exercising its jurisdiction, the Court of Appeals reversed, holding that the Act violates the "public use" requirement of the Fifth Amendment.

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the Public Use Clause. And the fact that a state legislature, and not Congress, made the public use determination does not mean that judicial deference is less appropriate. Pp. 467 U. S. 243-244.

702 F.2d 788, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the cases.

JUSTICE O'CONNOR delivered the opinion of the Court.

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the Public Use Clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii from taking, with just compensation, title in real property from

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lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State. We conclude that it does not.

I
A

The Hawaiian Islands were originally settled by Polynesian immigrants from the western Pacific. These settlers developed an economy around a feudal land tenure system in which one island high chief, the ali'i nui, controlled the land and assigned it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. There was no private ownership of land. *See generally* Brief for Office of Hawaiian Affairs as *Amicus Curiae* 3-5.

Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts proved largely unsuccessful, however, and the land remained in the hands of a few. In the mid-1960's, after extensive hearings, the 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. *See* Brief for the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, as *Amici Curiae* 32. The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles. *Id.* at 32-33. The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.

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To redress these problems, the legislature decided to compel the large landowners to break up their estates. The legislature considered requiring large landowners to sell lands which they were leasing to homeowners. However, the landowners strongly resisted this scheme, pointing out the significant federal tax liabilities they would incur. Indeed, the landowners claimed that the federal tax laws were the primary reason they previously had chosen to lease, and not sell, their lands. Therefore, to accommodate the needs of both lessors and lessees, the Hawaii Legislature enacted the Land Reform Act of 1967 (Act), Haw.Rev.Stat., ch. 516, which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees. By condemning the land in question, the Hawaii Legislature intended to make the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple. *See* Brief for Appellants in Nos. 83-141 and 83-283, pp. 3-4, and nn. 6-8.

Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live. Haw. Rev.Stat. §§ 516-1(2), (11), 516-22 (1977). When 25 eligible tenants, [Footnote 1] or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act. § 516-22. If HHA finds that these public purposes will be served, it is authorized

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to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set either by condemnation trial or by negotiation between lessors and lessees, [Footnote 2] the former fee owners' full "right, title, and interest" in the land. § 516-25.

After compensation has been set, HHA may sell the land titles to tenants who have applied for fee simple ownership. HHA is authorized to lend these tenants up to 90% of the purchase price, and it may condition final transfer on a right of first refusal for the first 10 years following sale. §§ 516-30, 516-34, 516-35. If HHA does not sell the lot to the tenant residing there, it may lease the lot or sell it to someone else, provided that public notice has been given. § 516-28. However, HHA may not sell to any one purchaser, or lease to any one tenant, more than one lot, and it may not operate for profit. §§ 516-28, 516-32. In practice, funds to satisfy the condemnation awards have been supplied entirely by lessees. *See* App. 164. While the Act authorizes HHA to issue bonds and appropriate funds for acquisition, no bonds have issued and HHA has not supplied any funds for condemned lots. *See ibid.*

B

In April 1977, HHA held a public hearing concerning the proposed acquisition of some of appellees' lands. HHA made the statutorily required finding that acquisition of appellees' lands would effectuate the public purposes of the Act. Then, in October, 1978, it directed appellees to negotiate with certain lessees concerning the sale of the designated properties. Those negotiations failed, and HHA subsequently ordered appellees to submit to compulsory arbitration.

Rather than comply with the compulsory arbitration order, appellees filed suit, in February, 1979, in United States District

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Court, asking that the Act be declared unconstitutional and that its enforcement be enjoined. The District Court temporarily restrained the State from proceeding against appellees' estates. Three months later, while declaring the compulsory arbitration and compensation formulae provisions of the Act unconstitutional, [Footnote 3] the District Court refused preliminarily to enjoin appellants from conducting the statutory designation and condemnation proceedings. Finally, in December, 1979, it granted partial summary judgment to appellants, holding the remaining portion of the Act constitutional under the Public Use Clause. *See* 483 F. Supp. 62 (Haw.1979). The District Court found that the Act's goals were within the bounds of the State's police powers and that the means the legislature had chosen to serve those goals were not arbitrary, capricious, or selected in bad faith.

The Court of Appeals for the Ninth Circuit reversed. 702 F.2d 788 (1983). First, the Court of Appeals decided that the District Court had permissibly chosen not to abstain from the exercise of its jurisdiction. Then, the Court of Appeals determined that the Act could not pass the requisite judicial scrutiny of the Public Use Clause. It found that the transfers contemplated by the Act were unlike those of takings previously held to constitute "public uses" by this Court. The court further determined that the public purposes offered by the Hawaii Legislature were not deserving of judicial deference. The court concluded that the Act was simply

"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."

Id. at 798. One judge dissented.

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On applications of HHA and certain private appellants who had intervened below, this Court noted probable jurisdiction. 464 U.S. 932 (1983). We now reverse.

II

We begin with the question whether the District Court abused its discretion in not abstaining from the exercise of its jurisdiction. The appellants have suggested as one alternative that perhaps abstention was required under the standards announced in *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941), and *Younger v. Harris,* 401 U. S. 37 (1971). We do not believe that abstention was required.

A

In *Railroad Comm'n v. Pullman Co., supra,* this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and "needless friction with state policies. . . ." *Id.* at 312 U. S. 500. However, federal courts need not abstain on *Pullman* grounds when a state statute is not "fairly subject to an interpretation which will render unnecessary" adjudication of the federal constitutional question. *See Harman v. Forssenius,* 380 U. S. 528, 380 U. S. 535 (1965). *Pullman* abstention is limited to uncertain questions of state law because "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States,* 424 U. S. 800, 424 U. S. 813 (1976).

In these cases, there is no uncertain question of state law. The Act unambiguously provides that "[t]he use of the power . . . to condemn . . . is for a public use and purpose." Haw. Rev.Stat. § 516-89(a)(12) (1977); *see also* §§ 516-

83(a)(10), (11), (13). There is no other provision of the Act -- or, for that matter, of Hawaii law -- which would suggest that

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§ 516-83(a)(12) does not mean exactly what it says. Since "the naked question, uncomplicated by [ambiguous language], is whether the Act, on its face, is unconstitutional," *Wisconsin v. Constantineau,* 400 U. S. 433, 400 U.S. 439 (1971), abstention from federal jurisdiction is not required.

The dissenting judge in the Court of Appeals suggested that, perhaps, the state courts could make resolution of the federal constitutional questions unnecessary by their construction of the Act. *See* 702 F.2d at 811-812. In the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary. Rather,

"[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction."

Zwickler v. Koota, 389 U. S. 241, 389 U. S. 251, and n. 14 (1967). These statutes are not of an uncertain nature and have no reasonable limiting construction. Therefore, *Pullman* abstention is unnecessary. [Footnote 4]

B

The dissenting judge also suggested that abstention was required under the standards articulated in *Younger v. Harris, supra.* Under *Younger* abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern

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important state interests. *See Middlesex Ethics Committee v. Garden State Bar Assn.,* 457 U. S. 423, 457 U. S. 432-437 (1982). *Younger* abstention is required, however, only when state court proceedings are initiated "before any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda,* 422 U. S. 332, 422 U. S. 349 (1975). In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them.

In these cases, state judicial proceedings had not been initiated at the time proceedings of substance took place in federal court. Appellees filed their federal court complaint in February, 1979, asking for temporary and permanent relief. The District Court temporarily restrained HHA from proceeding against appellees' estates. At that time, no state judicial proceedings were in process. Indeed, in June, 1979, when the District Court granted, in part, appellees' motion for a preliminary injunction, state court proceedings still had not been initiated. Rather, HHA filed its first eminent domain lawsuit after the parties had begun filing motions for summary judgment in the District Court -- in September, 1979. Whether issuance of the February temporary restraining order was a substantial federal court action or not, issuance of the June preliminary injunction certainly was. *See Doran v. Salem Inn, Inc.,* 422 U. S. 922, 422 U. S. 929-931 (1975). A federal court action in which a preliminary injunction is granted has proceeded well beyond the "embryonic stage," *id.* at 422 U. S. 929, and considerations of economy, equity, and federalism counsel against *Younger* abstention at that point.

The only extant proceedings at the state level prior to the September, 1979, eminent domain lawsuit in state court were HHA's administrative hearings. But the Act clearly states that these administrative proceedings are not part of, and are not themselves, a judicial proceeding, for "mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain." Haw. Rev.Stat. § 516-51(b) (1976). Since *Younger* is not a

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bar to federal court action when state judicial proceedings have not themselves commenced, *see Middlesex County Ethics Committee v. Garden State Bar Assn., supra,* at 457 U. S. 433; *Fair Assessment in Real Estate Assn., Inc. v. McNary,* 454 U. S. 100, 454 U. S. 112-113 (1981), abstention for HHA's administrative proceedings was not required.

III

The majority of the Court of Appeals next determined that the Act violates the "public use" requirement of the Fifth and Fourteenth Amendments. On this argument, however, we find ourselves in agreement with the dissenting judge in the Court of Appeals.

A

The starting point for our analysis of the Act's constitutionality is the Court's decision in *Berman v. Parker,* 348 U. S. 26 (1954). In *Berman,* the Court held constitutional the District of Columbia Redevelopment Act of 1945. That Act provided both for the comprehensive use of the eminent domain power to redevelop slum areas and for the possible sale or lease of the condemned lands to private interests. In discussing whether the takings authorized by that Act were for a "public use," *id.* at 348 U. S. 31, the Court stated:

"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. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. 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

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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. . . ."

Id. at 348 U. S. 32 (citations omitted). The Court explicitly recognized the breadth of the principle it was announcing, noting:

"Once 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. . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."

Id. at 348 U. S. 33. The "public use" requirement is thus coterminous with the scope of a sovereign's police powers.

There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is "an extremely narrow" one. *Id.* at 348 U. S. 32. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States,* 269 U. S. 55, 269 U. S. 66 (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The *Berman* Court also cited to *United States ex rel. TVA v. Welch,* 327 U. S. 546, 327 U. S. 552 (1946), which emphasized 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

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on that question at the moment of decision, a practice which has proved impracticable in other fields."

In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 160 U. S. 680 (1896).

To be sure, the Court's cases have repeatedly stated that

"one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

Thompson v. Consolidated Gas Corp., 300 U. S. 55, 300 U. S. 80 (1937). *See, e.g., Cincinnati v. Vester*, 281 U. S. 439, 281 U. S. 447 (1930); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 196 U. S. 251-252 (1905); *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 164 U. S. 159 (1896). Thus, in *Missouri Pacific R. Co. v. Nebraska*, 164 U. S. 403 (1896), where the

"order in question was not, *and was not claimed to be*, . . . a taking of private property for a public use under the right of eminent domain,"

id. at 164 U. S. 416 (emphasis added), the Court invalidated a compensated taking of property for lack of a justifying public purpose. But 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. *See Berman v. Parker, supra; Rindge Co. v. Los Angeles*, 262 U. S. 700 (1923); *Block v. Hirsh*, 256 U. S. 135 (1921); *cf. Thompson v. Consolidated Gas Corp., supra,* (invalidating an *uncompensated* taking).

On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, [Footnote 5] to reduce the perceived social and economic evils of a

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land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers. *See Exxon Corp. v. Governor of Maryland*, 437 U. S. 117 (1978); *Block v. Hirsh, supra; see also People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (CA1), *cert. denied*, 329 U.S. 772 (1946). We cannot disapprove of Hawaii's exercise of this power.

Nor can we condemn as irrational the Act's approach to correcting the land oligopoly problem. The Act presumes that, when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices, the land market is malfunctioning. When such a malfunction is signaled, the Act authorizes HHA to condemn lots in the relevant tract. The Act limits the number of lots any one tenant can purchase, and authorizes HHA to use public funds to ensure that the market dilution goals will be achieved. This is a comprehensive and rational approach to identifying and correcting market failure.

Of course, this Act, like any other, may not be successful in achieving its intended goals. But

"whether *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."

Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U. S. 648, 451 U. S. 671-672 (1981); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456, 449 U. S. 466 (1981); *Vance v. Bradley*, 440 U. S. 93, 440 U. S. 112 (1979). When the legislature's purpose is legitimate and its

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means are not irrational, our cases make clear that empirical debates over the wisdom of takings -- no less than debates over the wisdom of other kinds of socioeconomic legislation -- are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause. [Footnote 6]

B

The Court of Appeals read our cases to stand for a much narrower proposition. First, it read our "public use" cases, especially *Berman*, as requiring that government possess and use property at some point during a taking. Since Hawaiian lessees retain possession of the property for private use throughout the condemnation process, the court found that the Act exacted takings for private use. 702 F.2d at 796-797. Second, it determined that these cases involved only

"the review of . . . *congressional* determination[s] that there was a public use, not the review of . . . state legislative determination[s]."

Id. at 798 (emphasis in original). Because state legislative determinations are involved in the instant cases, the Court of Appeals decided that more rigorous judicial scrutiny of the public use determinations was appropriate. The court concluded that the Hawaii Legislature's professed purposes were mere "statutory rationalizations." *Ibid.* We disagree with the Court of Appeals' analysis.

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

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purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public.

"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."

Rindge Co. v. Los Angeles, 262 U.S. at 262 U. S. 707. "[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair." *Block v. Hirsh*, 256 U.S. at 256 U. S. 155. As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.

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. [Footnote 7] 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. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. *See Berman v. Parker*, 348 U.S. at 348 U. S. 32. 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.

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IV

The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government, and would thus be void. But no purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals, but to attack certain perceived evils of concentrated property ownership in Hawaii -- a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied. Accordingly, we reverse the judgment of the Court of Appeals, and remand these cases for further proceedings in conformity with this opinion.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of these cases.

* Together with No. 83-236, *Portlock Community Association (Maunalua Beach) et al. v. Midkiff et al.;* and No. 83-283, *Kahala Community Association, Inc., et al. v. Midkiff et al.,* also on appeal from the same court.

[Footnote 1]

An eligible tenant is one who, among other things, owns a house on the lot, has a bona fide intent to live on the lot or be a resident of the State, shows proof of ability to pay for a fee interest in it, does not own residential land elsewhere nearby. Haw. Rev.Stat. §§ 516-33(3), (4), (7) (1977)

[Footnote 2]

See § 516-56 (Supp.1983). In either case, compensation must equal the fair market value of the owner's leased fee interest. § 516-1(14). The adequacy of compensation is not before us.

[Footnote 3]

As originally enacted, lessor and lessee had to commence compulsory arbitration if they could not agree on a price for the fee simple title. Statutory formulae were provided for the determination of compensation. The District Court declared both the compulsory arbitration provision and the compensation formulae unconstitutional. No appeal was taken from these rulings, and the Hawaii Legislature subsequently amended the statute to provide only for mandatory negotiation and for advisory compensation formulae. These issues are not before us.

[Footnote 4]

The dissentingjudge's suggestion that *Pullman* abstention was required because interpretation of the State Constitution may have obviated resolution of the federal constitutional question is equally faulty. Hawaii's Constitution has only a parallel requirement that a taking be for a public use. *See* Haw. Const., Art. I, § 20. The Court has previously determined that abstention is not required for interpretation of parallel state constitutional provisions. *See Examining Board v. Flores de Otero,* 426 U. S. 572, 426 U. S. 598 (1976); *see also Wisconsin v. Constantineau,* 400 U. S. 433 (1971).

[Footnote 5]

After the American Revolution, the colonists in several States took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the Colonies. *See, e.g.,* Act of May 1779, 10 Henning's Statutes At Large 64, ch. 13, § 6 (1822) (Virginia statute); Divesting Act of 1779, 1775-1781 Pa. Acts 258, ch. 139 (1782) (Pennsylvania statute). Courts have never doubted that such statutes served a public purpose. *See, e.g., Wilson v. Iseminger,* 185 U. S. 55, 185 U. S. 60-61 (1902); *Stewart v. Gorter,* 70 Md. 242, 244-245, 16 A. 644, 645 (1889).

[Footnote 6]

We similarly find no merit in appellees' Due Process and Contract Clause arguments. The argument that due process prohibits allowing lessees to initiate the taking process was essentially rejected by this Court in *New Motor Vehicle Board v. Fox Co.,* 439 U. S. 96, 439 U. S. 108-109 (1978). Similarly, the Contract Clause has never been thought to protect against the exercise of the power of eminent domain. *See United States Trust Co. v. New Jersey,* 431 U. S. 1, 431 U. S. 19, and n. 16 (1977).

[Footnote 7]

It is worth noting that the Fourteenth Amendment does not itself contain an independent "public use" requirement. Rather, that requirement is made binding on the States only by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause. *See Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226 (1897). It would be ironic to find that state legislation is subject to greater scrutiny under the incorporated "public use" requirement than is congressional legislation under the express mandate of the Fifth Amendment.