"[T]he Court has made it clear that it will not substitute its judgment for a legislature's judgment as to what constitutes [taking of private property for] a public use 'unless the use be palpably without reasonable foundation.' "

Hawaii Housing Authority v. Midkiff

467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

In the mid–1960s, an investigation by the Hawaiian legislature showed that 72 people held more than 90 per cent of the privately owned land in the state. They leased land to those who wished to build their own homes. Claiming that this concentration of ownership was inflating real estate prices and contributing to public unrest, the legislature passed the Land Reform Act of 1967, which authorized the Hawaiian Housing Authority, when asked by people leasing the land on which they lived, to condemn large tracts of land occupied by single family homes, pay the land owner(s) a fair price as determined either by negotiation between the lessors and the lessees or by arbitration, and resell the land to the home owners at the purchase price, with the proviso that no person could so purchase more than one lot.

In 1977, the HHA began condemnation procedures under the Land Reform Act and ordered Frank E. Midkiff and others to negotiate with some of their lessees over the value of land they were leasing. When those negotiations broke down, the HHA ordered arbitration. Midkiff et al. refused and sued in a federal district court for an injunction against enforcement of the Act. The district judge upheld the statute as constitutional, but the Court of Appeals for the Ninth Circuit reversed, saying the Act was "a naked attempt on the part of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." Hawaii then appealed to the Supreme Court.

Justice **O'CONNOR** delivered the opinion of the Court. ...

III ...

A

The starting point for our analysis of the Act's constitutionality is the Court's decision in Berman v. Parker (1954) ... [which] 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," the Court stated

> We deal ... with what traditionally has been known as the police power. ... 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 be Congress legislating concerning the District of Columbia ... or the States legislating concerning local affairs. ... This principle admits of no exception merely because the power of eminent domain is involved. ...

The 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.

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. ... But the Court in *Berman* made clear that it is "an extremely narrow" one. ... 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. (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. (1937). ... [W]here 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;* Block v. Hirsh (1921).

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,[1] to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. ... Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers. See Exxon Corp. v. Maryland (1978); Block v. Hirsh. We cannot disapprove of Hawaii's exercise of this power.

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[1]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. ... [Footnote by the Court.]

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 signalled, 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. ... When the legislature's purpose is legitimate and its 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. ... Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.

B

The Court of Appeals 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. 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]." 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 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. 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 [1923]. ... 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 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.[2] Judicial deference is

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[2]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 the incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause. See Chicago, Burlington & Quincy R. Co. v. Chicago (1897). It would be ironic to find that state legislation is subject to greater scrutiny under the

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*. 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. ...

[*Reversed*.]

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

Editors' Notes

(1) **Query:** In footnote 2 Justice O'Connor argued that the Court should accord state legislatures the same deference as Congress because the Fourteenth Amendment "incorporated" the Fifth's eminent domain clause and so provided the same constitutional text to interpret. To what extent is this argument based on the constitutional text? Whether arguing from plain words or not, is O'Connor persuasive about equal deference? To what extent do considerations of federalism—and of WHO interprets, state or national officials—come into play? James Bradley Thayer argued that federal judges do not owe the same degree of deference to state legislatures as they do to Congress, which is a coordinate branch of the federal government. See his article, reprinted above at p. 602. Is O'Connor more persuasive in the body of her opinion when she addresses the functional capabilities of courts and legislatures? For an analysis of the underlying problems, see Charles L. Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969), ch. 3.

(2) **Query:** Does *Hawaii Housing Authority* leave room for any judicially enforceable limit to a state's authority to redistribute private property as long as it provides just compensation to the former owners? For another important decision in accord with *HHA*, see a case from the Supreme Court of Michigan, Poletown v. Detroit (1981).

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incorporated "public use" requirement than is congressional legislation under the express mandate of the Fifth Amendment. [Footnote by the Court.]