Cornell Law Review

Volume 71
Issue 2 *January 1986*

Article 9

Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry

Russell A. Brine

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

 Part of the Law Commons

Recommended Citation

Russell A. Brine, *Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry*, 71 Cornell L. Rev. 428 (1986)
Available at: http://scholarship.law.cornell.edu/clr/vol71/iss2/9

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

NOTES

CONTAINING THE EFFECT OF *HAWAII HOUSING AUTHORITY V. MIDKIFF* ON TAKINGS FOR PRIVATE INDUSTRY

INTRODUCTION

In *Hawaii Housing Authority v. Midkiff*,[1] the Supreme Court upheld the Hawaii Land Reform Act[2] against a challenge that the Act violated the public use provision of the fifth amendment.[3] The Act allows the state to use its eminent domain power to cause a transfer of residential lot ownership from large landholders to the lessees living on the lots.[4] Although this land reform scheme shifts property between private parties, the *Midkiff* Court held that the state's purpose of ameliorating the effects of a land oligopoly satisfied the fifth amendment's public use clause.[5]

The Supreme Court last confronted the public use provision in its 1954 landmark decision of *Berman v. Parker*.[6] The *Berman* Court set forth a highly deferential rational basis test and upheld an urban redevelopment act under which public agencies and private entities acquired condemned property.[7] The *Midkiff* court expanded *Berman*'s scope by applying the rational basis test to a land reform scheme that placed all of the condemned property in private ownership.[8]

This Note analyzes *Midkiff*'s potential impact on future cases involving the use of eminent domain to assist private industry because such cases are likely to continue generating the most controversy in the state courts.[9] The Note concludes that, under the federal constitution, the deferential rational basis standard will allow takings for private industry.[10] The Note then considers *Midkiff*'s potential influence on the review of takings for private in-

---

1 104 S. Ct. 2321 (1984).

2 HAWAII REV. STAT. § 516 (1976).

3 U.S. CONST. amend. V. The fifth amendment's public use provision is made binding on the states through the fourteenth amendment's due process clause. Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896).

4 *See infra* notes 68-73 and accompanying text.

5 *See infra* note 93 and accompanying text.

6 348 U.S. 26 (1954).

7 *See infra* notes 53-61 and accompanying text.

8 *See infra* notes 98-102 and accompanying text.

9 *See infra* notes 103-08 and accompanying text.

10 *See infra* notes 110-11 and accompanying text.

dustry under state constitutional public use provisions[11] and concludes that *Midkiff* will not persuade state courts to alter their construction of state constitutions. Furthermore, the Note argues that even if state courts are tempted to apply a rational basis test, they should not follow *Midkiff*'s deferential standard because it violates the policy against takings for private uses[12] and disregards the historical distinction between public and private transferee takings.[13]

I
HISTORICAL BACKGROUND

Eminent domain constitutes the goverument's power "to take property for public use without the owner's consent."[14] A "taking" occurs when the government forces a transfer of property from an individual to the government or to another individual.[15] The fifth amendment provides that "private property [shall not] be taken for public use without just compensation."[16] Hence, the government's eminent domain power is subject to two conditions: a taking must serve a public use,[17] and the taking entity must provide just compensation[18] to the former owner. In *Midkiff,* the Supreme Court confronted the public use component of the fifth amendment.

A. Defining Public Use

Historically, courts developed two definitions of public use: "use by the public" and "use for the public benefit." "Use by the public," a narrow view, sanctions the taking of property only for a use that opens the condemned property to the general public.[19] For example, in early America, acquisition of upstream flood lands to generate power for grist mills satisfied the "use by the public" formula because members of the local community were entitled to

---

11 *See infra* notes 112-28 and accompanying text.

12 *See infra* notes 129-45 and accompanying text.

13 *See infra* notes 146-65 and accompanying text.

14 1 J. SACKMAN & P. ROHAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 1.11, at 1-7 (rev. 3d ed. 1981).

15 Government regulations that unduly restrict the economic return from property interests also constitute a taking. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (state regulation of coal mining constituted a taking). This Note does not address this type of taking.

16 U.S. CONST. amend. V.

17 The fifth amendment does not expressly forbid taking property for nonpublic uses, but the public use clause is generally understood to imply a prohibition of such takings. 2A J. SACKMAN & P. ROHAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 7.14 (rev. 3d ed. 1983).

18 This Note does not consider the issue of the amount of compensation necessary to satisfy the fifth amendment.

19 2A J. SACKMAN & P. ROHAN, *supra* note 17, § 7.02[1].

use the mills.[20] Some courts adopted a "use for the public benefit" approach, which represents a broader view of the public use concept. The "use for the public benefit" formulation allows takings for the purpose of promoting the general welfare, even though the condemned property is not opened to the general public.[21] Thus, the taking of flood lands to generate power solely for private manufacturing enterprises satisfied the "use for the public benefit" test because the takings advanced the interests of the local communities.[22]

Following many years of development in the state courts,[23] the Supreme Court's initial approach to the public use concept avoided the selection of either the "use by the public" or the "use for the public benefit" definition.[24] In cases that defied the "use by the public" definition, the Court allowed an exception based on necessity. In *Clark v. Nash*[25] the Court upheld a statute that allowed a taking for an irrigation ditch that serviced only one individual's property. The "use by the public" formula was not satisfied because only one individual had access to the irrigation water. The Court reasoned instead that the absolute necessity of irrigation to make otherwise valueless land productive constituted a public use.[26] The

---

20 *See* Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 206 (1978); Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 23-25 (1980) (both discussing mill acts).

21 2A J. SACKMAN & P. ROHAN, *supra* note 17, § 7.02[2].

22 Meidinger, *supra* note 20, at 24.

The major treatise on eminent domain, 2A J. SACKMAN & P. ROHAN, *supra* note 17, warns against following either the "use by the public" or the "use for the public benefit" view in all cases. The authors argue that "use by the public" might be construed to allow takings for hotels and theaters but to prohibit other improvements necessary to promote prosperity. Furthermore, "use for the public benefit" might authorize takings to assist commercial enterprises but prevent condemnation for a highway that is open to the public yet does not present sufficient public benefit. *Id.* § 7.02[3]. *See also infra* notes 110-28 and accompanying text (discussing potential use of eminent domain to assist private enterprise).

23 Prior to the 1870s, the federal government brought condemnation actions under state statutes in the state courts. The federal government began taking property through the federal courts when a state court held that the state could not condemn property on behalf of the United States. Berger, *supra* note 20, at 212-13.

24 In Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896), the Court found that a taking to allow irrigation of millions of arid acres would yield great wealth to the entire state, thus serving a public "purpose." *Id.* at 161. The Court's reference to a public "purpose," rather than a public "use," is consistent with a "use for the public benefit" definition. The Court also noted that although the general public could not use the irrigation water, all of the adjacent landowners had access to it, *id.* at 162, thus arguably satisfying the "use by the public" definition.

25 198 U.S. 361 (1905).

26 *Id.* at 369-70. The Utah statute at issue provided that an individual could access irrigation water by widening an irrigation ditch through neighboring land. In upholding the statute the Court noted that it "must recognize the difference of climate and soil, which render necessary these different laws in the States so situated." *Id.* at 370.

Court thereby created a necessity-based exception to the "use by the public" definition.[27]

Eventually, the Court confronted a case that satisfied neither the "use by the public" definition nor the necessity-based exception. In *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*,[28] the Court applied a "use for the public benefit" test and upheld a statute permitting the taking of downstream lands to accommodate the egress of water from a hydroelectric dam. The Court did not categorize the taking as necessary to make the property productive but stated that energy production formed "the very foundation of all our achievements and all our welfare."[29] Thus, the Court keyed into a "use for the public benefit" definition and then declared that "[t]he inadequacy of use by the general public as a universal test is established."[30] The Court's subsequent decisions continue to reflect a preference for the "use for the public benefit" definition of public use.[31]

B. The Supreme Court's Standard of Review

Under the Supreme Court's "use for the public benefit" definition, a public use constitutes the sovereign's purpose for using eminent domain and a taking represents the means of achieving that end. The Court's standard of review requires, first, that the sovereign's purpose yield a sufficient public benefit, and second, that the taking adequately further the government's ends.[32]

The Court has been more deferential in reviewing takings that transfer property to the government (public transferee takings) than those that transfer property to other private parties (private transferee takings). Public transferee takings are less likely to purposefully benefit private individuals and serve private use ends.[33] The

---

27 In Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906), the Court again applied the necessity-based exception. The *Strickley* Court upheld the taking of a right-of-way for an aerial bucket line to transport coal from a mine. The Court asserted that *Clark* "proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other." *Id.* at 531.

28 240 U.S. 30 (1916).

29 *Id.* at 32.

30 *Id.*

31 *See, e.g.*, Brown v. United States, 263 U.S. 78, 82 (1923) (upholding taking of private property for transfer to private individuals dislocated by construction of reservoir); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923) ("It is not essential that the entire community, nor even any considerable portion, should directly enjoy . . . any improvement in order to constitute a public use."); Block v. Hirsh, 256 U.S. 135, 155 (1921) ("use by the public generally of each specific thing affected cannot be made the test of public interest").

32 *See infra* notes 37-52 and accompanying text.

33 In United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896), the Court illumi-

Court's deferential attitude toward public transferee takings means that the degree of benefit and the relationship between the taking and that benefit are not closely scrutinized. The Court has been less deferential, however, to private transferee takings because they are more likely to further private use ends. Consequently, in private transferee cases the Court has required a more substantial degree of benefit and a stronger relationship between the taking and the public benefit or purpose.[34]

Finally, the requirement that the sovereign may only take property for a public use implies the corresponding restriction that the sovereign may not take property for a private use. The transfer of property from one private party to another, merely to benefit the recipient, constitutes a private use. Of course, if the condemned property is transferred from a private party to the government for use, the use will not be private. Even in the event of a public transferee, however, there must still exist a justifying public use.[35] For example, government confiscation of an unpopular individual's private property solely to hurt that individual does not qualify as a public use.

---

nated the reason for applying a deferential standard to public transferee takings. The Court upheld the federal condemnation of lands to preserve and mark a historic battlefield. The Court stated that the legislature's declaration of public use "will be respected by the courts, unless the use be palpably without reasonable foundation." *Id.* at 680. The Court explained that it would take a "different view" if the legislature transferred the power of condemnation to a private corporation, because "the presumption that the intended use . . . is public is not so strong as where the government intends to use the land itself." *Id.* *See infra* notes 140-145 and accompanying text (discussing policy reasons for avoiding private uses).

34 Commentators generally have not distinguished the Court's treatment of public and private transferee takings. Many commentators have referred to the Court's review as uniformly deferential and have classified takings into federal and state categories. *See, e.g.*, Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 608-09 (1949); Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 414 (1983).

The Court's takings cases, however, indicate a distinction between public and private transferee takings. *See, e.g.*, Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55 (1937) (private transferee, less deference); Old Dominion Land Co. v. United States, 269 U.S. 55 (1925) (public transferee, extreme deference); Brown v. United States, 263 U.S. 78 (1923) (private transferee, less deference); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (public transferee, extreme deference); *see infra* notes 41-46, 48-52 and accompanying text. The chronological order of these cases supports the proposition that the Court considers the nature of the transferee as an independent variable in determining the standard of review. The Court granted great deference in *Rindge*, a public transferee case, in the same year that it yielded less deference in *Brown*, a private transferee case. Two years after *Brown* and *Rindge*, the Court granted extreme deference in the public transferee case of *Old Dominion*, but 12 years later the Court held the private transferee taking in *Thompson* unconstitutional.

35 2A J. SACKMAN & P. ROHAN, *supra* note 17, § 7.10 (discussing transfers that are not private but do not meet public use requirement).

1. *Private Transferee Takings*

The Court has upheld private transferee takings that promote substantial public purposes.[36] In *Block v. Hirsh*[37] Congress sought to relieve a wartime housing shortage in the District of Columbia by allowing lessees to hold over past the expiration of their leases,[38] thus taking the lessor's right to use the property. The Court emphasized public health purposes and stated that "[h]ousing is a necessary of life."[39] The furtherance of a human necessity constitutes a substantial benefit and typifies the kind of public purpose that satisfies the Court's requirements in private transferee cases.[40]

The Court also has required a reasonable relationship between a private transferee taking and the government's purpose for the taking. In *Thompson v. Consolidated Gas Utilities Corp.*[41] the Court held that pro rata limitations on gas production were not reasonably related to the public purpose of preventing waste. The gas producers in *Thompson* established that they conducted their operations without waste, and therefore the taking of their gas through production limits was not reasonable.[42] Absent a reasonable relationship between the taking and the public purpose, the taking constituted an impermissible private use in favor of other producers.[43]

---

36 Originally, the Court chose to yield to state court opinions rather than develop its own public use test. Berger, *supra* note 17, at 213. The Court reasoned that state courts were in a better position to judge local conditions that would give rise to a distinction between a public and private use. *See, e.g.*, Hairston v. Danville & W. Ry., 208 U.S. 598, 606-07 (1908) (state courts more familiar with factors like "the capacity of the soil, the relative importance of industries to the general welfare, and the long-established methods and habits of the people"); Clark v. Nash, 198 U.S. 361, 369 (1905) (state courts more familiar with local conditions important to irrigation and mining). The Court still required, however, that a substantial public purpose support the exercise of eminent domain. *See infra* notes 37-40 and accompanying text.

37 256 U.S. 135 (1921).

38 The holdover tenants in *Block* were to pay the same rent they had been paying during the term of the lease, unless modified by the designated government commission. *Id.* at 154.

39 *Id.* at 156.

40 Several other private transferee cases demonstrate the Court's requirement of a substantial benefit. In Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896), the Court concluded that the comprehensive irrigation scheme at issue would tap tremendous wealth and held that for any individual farmer to be included in the project, the benefit to that individual's productive capacity had to be "substantial." *Id.* at 166-67. In Clark v. Nash, 198 U.S. 361 (1905), the Court allowed a taking for an irrigation ditch that aided only one person. The Court based its decision on necessity and cautioned that it was not approving "the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State." *Id.* at 369.

41 300 U.S. 55 (1937).

42 *Id.* at 69-70.

43 *Id.* at 78-80.

Brown v. United States, 263 U.S. 78 (1923), another private transferee case, demonstrates the reasonable relationship requirement. The *Brown* Court upheld a taking of

2. *Public Transferee Takings*

The benefit in public transferee cases can be less significant than the substantial benefit required in the private transferee cases. In *Rindge Co. v. County of Los Angeles*[44] the state took ranch property for a highway that terminated within the ranch boundaries. The ranch owners complained that the highway did not connect with any major road and was not necessary to public travel.[45] The Court held that the mere recreational benefits provided by these coastal mountain roads constituted a sufficient public purpose.[46] The Court's review of legislative claims of a public use for public transferee takings often approached total deference, with the Court stating that "it is the function of Congress to decide what type of taking is for a public use."[47]

In addition to its limited scrutiny of the government's ends, the Court requires only a minimal relationship between the taking and the public purpose in public transferee cases. In *Old Dominion Land Co. v. United States*[48] the federal government condemned property that it had leased for military warehouses in World War I. The military purpose clearly constituted a public purpose,[49] but the condemnee alleged that the government took the property to prevent

---

land to resettle people dislocated by a reservoir. The Court stated that "the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site." *Id.* at 81.

44 262 U.S. 700 (1923).

45 *Id.* at 706.

46 *Id.* at 707-08. The *Rindge* Court stated that "[a] road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery." *Id.* at 708. The public benefit in *Rindge* falls short of the substantial public purpose required in private transferee cases. *See supra* notes 37-40 and accompanying text.

47 United States *ex rel.* TVA v. Welch, 327 U.S. 546, 551 (1946). In *Welch* the TVA flooded lands for a reservoir which cut off the only highway access to a small North Carolina town. The TVA agreed to acquire property on which a highway could be built, relieving the state from responsibility for constructing a new access route to the isolated community. *Id.* at 548-51. The Court viewed "the entire transaction as a single integrated effort on the part of T.V.A. to carry on its congressionally authorized functions," *id.* at 553, and found that "when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public." *Id.* at 554. The *Welch* Court even went so far as to distinguish previous cases that held that public use was subject to judicial review, suggesting the possible abolition of public use review. *Id.* at 552.

The majority opinion in *Welch* prompted a concurring justice to take exception to the implication that public use issues are beyond judicial inquiry. *Id.* at 556-57 (Reed, J., concurring). One commentator also concluded that "[t]he Supreme Court has repudiated the doctrine of public use." Comment, *supra* note 34, at 614.

48 269 U.S. 55 (1925).

49 *Id.* at 57-58. The *Old Dominion* Court stated that "the military purposes mentioned . . . clearly were for a public use." *Id.* at 66.

the loss of the buildings it had erected, and not to serve future military purposes.[50] The Court held that the government's assertion that the taking served military purposes was "entitled to deference until it is shown to involve an impossibility."[51] Because military purposes "may have been entertained" by the government, the relationship between the taking and the purpose proved sufficient.[52]

C. *Berman v. Parker*

In 1954, the Supreme Court handed down the landmark public use decision of *Berman v. Parker*.[53] *Berman* upheld a congressional act[54] that provided for the acquisition and redevelopment of a blighted area in the District of Columbia. A plan adopted under the act called for the transfer of part of the property to public agencies for streets and recreational areas and the sale or lease of the remainder to private individuals.[55]

A department store owner sought to enjoin the taking of his property, alleging that the condemnation of commercial nonslum property to develop a more attractive area did not qualify as a sufficient public use. He alleged further that the resale of the property to a private individual resulted in an invalid private use.[56] The Court announced a very deferential standard for determining a legitimate public purpose, stating that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[57] Discussing the relationship between the taking and the public purpose, the Court stated that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine."[58]

Applying this deferential standard of review, the *Berman* Court easily upheld the taking. The Court concluded that the promotion of urban renewal and aesthetic goals fell within the scope of the police power[59] and constituted a valid public purpose. The Court rejected the contention that the resale of condemned property to private individuals was an invalid private use and recognized private enterprise as a legitimate vehicle for urban redevelopment.[60]

---

50 *Id.*
51 *Id.*
52 *Id.*
53 348 U.S. 26 (1954).
54 District of Columbia Redevelopment Act of 1945, ch. 736, 60 Stat. 790 (1946) (codified as amended at D.C. CODE ANN. §§ 5-801 to -820 (1981 & Supp. 1984)).
55 348 U.S. at 30.
56 *Id.* at 31.
57 *Id.* at 32.
58 *Id.* at 33.
59 *Id.*
60 *Id.* at 33-34.

Although the Supreme Court applied a highly deferential standard to a private transferee taking in *Berman,* the Court's holding can be explained by the public transferee takings inherent in the urban redevelopment plan. The Court, in rejecting the property owner's contention that urban renewal should operate on a structure-by-structure approach, stated that "[t]he entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers."[61] Consequently, the private transferee taking could be viewed as incidental to the public transferee taking, thereby justifying the more deferential standard of review.

II

THE CASE: *HAWAII HOUSING AUTHORITY V. MIDKIFF*

After deciding *Berman,* the Supreme Court did not hear another public use case for thirty years, until the decision in *Hawaii Housing Authority v. Midkiff.*[62] *Midkiff* arises as a modern land reform case with ancient roots. Polynesian immigrants settled the Hawaiian Islands over one thousand years ago and established a feudal system which divided the islands into large estates.[63] The concentration of land ownership survived Hawaiian statehood and led to a situation in which large landholders leased residential property, rather than conveying the lots outright.[64] Hence, people owned their homes but leased the land beneath them.[65] The Hawaii legislature found that the land oligopoly distorted the market for residential property, caused a shortage of fee simple residential lots, and inflated residential land prices.[66]

---

61 *Id.* at 34-35.

62 104 S. Ct. 2321 (1984).

63 Brief for the Office of Hawaiian Affairs at 3-5, Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321 (1984) (amicus curiae for appellee).

64 104 S. Ct. at 2325. In the mid-1960s the Hawaii legislature found that the state and federal governments owned nearly 49% of the land and 72 private landowners held 47% of the land in Hawaii. On Oahu, the most urbanized island, 22 large landowners held 72.5% of the land titles. *Id.*

65 *See* Midkiff v. Tom, 483 F. Supp. 62, 65 (D. Hawaii 1979).

66 The Hawaii legislature's findings as to the problems associated with concentrated land ownership were quoted by the district court in *Midkiff*:

> The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values. . . . If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people.

The legislature enacted the Hawaii Land Reform Act of 1967[67] to provide for the transfer of residential lots from landowners to their lessees. The Act permits residential lessees to request the Hawaii Housing Authority (H.H.A.) to designate for acquisition the lots they are leasing.[68] If the threshold statutory requirements are met,[69] the H.H.A. may adopt either of two methods to transfer title from lessors to lessees. Under one method the H.H.A. may itself acquire title through condemnation, or the threat of condemnation,[70] and subsequently sell the lot to the lessee.[71] Under a second method, available when *Midkiff* was commenced, the H.H.A. could forego acquisition and mandate the negotiation of a sale between the lessor and lessee.[72] The lessee provides the constitutionally required just compensation under both methods by payment of the purchase price.[73]

In 1978 the H.H.A. directed the trustees of the Bishop Estate,[74] a large Hawaii landowner, to negotiate the sale of residential lots with several lessees.[75] The trustees brought an action in federal district court alleging a violation of the fifth amendment's public use clause and seeking a judgment declaring the Act unconstitutional and enjoining its enforcement.[76] The district court, relying on *Berman,*[77] evaluated whether the ends of the Act "further the health,

---

Id. at 69 (quoting HAWAII REV. STAT. § 516-83(a)(4), (7) (1976)).

67 1967 Hawaii Sess. Laws 488 (codified as amended at HAWAII REV. STAT. § 516 (1976 & Supp. 1984)).

68 HAWAII REV. STAT. § 516-22 (1976 & Supp. 1984).

69 The lessees requesting the H.H.A.'s assistance must be living on lots that are part of tracts of at least five acres. *Id.* § 516-1(2), (11). In addition, the H.H.A. is authorized to act only when 25 tenants, or tenants on more than one-half of the lots, have applied to the H.H.A. to designate the lots for acquisition. The H.H.A. must also hold a hearing and find that the transfer of title involved will further the goals of the act. *Id.* § 516-22.

70 *Id.* § 516-22.

71 *Id.* § 516-30.

72 *Id.* § 516-51. The district court held the provisions allowing the H.H.A. to direct mandatory arbitration unconstitutional in Midkiff v. Tom, 471 F. Supp. 871 (D. Hawaii 1979). The H.H.A. did not appeal this ruling, and the statute has been amended to provide only mandatory negotiation. *See Midkiff,* 104 S. Ct. at 2326 n.3; HAWAII REV. STAT. § 516-51 (Supp. 1984).

73 HAWAII REV. STAT. § 516-1(14), -24 (1976 & Supp. 1984) (requiring just compensation equal to fair market value). The Act provides that the H.H.A. may lend the lessees a portion of the purcbase price, *id.* § 516-34, but in practice lessees have provided the funds. *Midkiff,* 104 S. Ct. at 2326.

74 Princess Beruice Pauahi Bishop, the last lineal descendant of the first Hawaiian monarch, left a will that placed her lands in a charitable trust for the Kamehameha Schools. The trustees of the Bishop Estate administered this trust, which consisted of approximately 8% of Hawaiian lands. Brief for the Appellees at 3-4, Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321 (1984).

75 *Midkiff,* 104 S. Ct. at 2326.

76 *Id.*; *see also* Midkiff v. Tom, 483 F. Supp. at 64-65.

77 Midkiff v. Tom, 483 F. Supp. at 65-66.

safety, morals, or general welfare of the people of Hawaii, and if the means chosen to accomplish that objective are rational and not in bad faith."[78] The court held that the transfer of title provided a rational means of achieving the legitimate public purpose of land redistribution.[79]

On appeal by the Bishop Estate,[80] the court of appeals identified five types of valid public uses[81] but found that *Midkiff* did not comport with any of them. The court distinguished *Berman* by explaining that the taking in that case involved a change in use, which fit into one of the Ninth Circuit's public use pigeonholes. The transfer of title in *Midkiff,* however, did not involve a change in use.[82] The court also reasoned that the government's temporary possession of the property in *Berman* before resale distinguished that case because at this point only a public transferee taking had transpired. The public purpose of redevelopment was theoretically accomplished before transfer from the government to a private individual.[83] The court rejected the district court's test as inapplicable to takings cases in general[84] and noncongressional takings in particular.[85] The

---

78 *Id.* at 67.

79 *Id.* at 69. The court held in the alternative that any of the Act's purported goals would serve a public use. *Id.* at 69-70 (citing HAWAII REV. STAT. § 516-83 (1976)). *See supra* note 66 (enumerating act's goals).

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

81 The court's five categories of valid public uses are:

A. The taking will result in condemnation of property for an historically accepted public use.
B. The taking will result in a change in the use of the land.
C. The taking will result in a change in possession of the land.
D. The taking will result in a transfer of ownership from a private party to a governmental entity.
E. The taking will result in a de minimis condemnation necessary to facilitate the development of nearby land.

Id. at 793-94.

82 *Id.* at 796. A concurring judge articulated a different standard from the majority's standard based on changes in use. The concurrence applied a primary purpose test to evaluate whether the primary purpose of the taking was a public or private use. *Id.* at 805 (Poole, J., concurring). The concurring judge found the Act in *Midkiff* unconstitutional because "it authorizes an agency of the state, upon the application of a tenant, to divest his landlord of the latter's entire property and to convey it to the erstwhile tenant in fee for the sole purpose of constituting that tenant as the owner." *Id.* at 806; *see also infra* note 118 and accompanying text (discussing the "primary purpose" test).

One dissenting judge disagreed with the majority's conclusion that there was no change in use. The dissent argued that residential ownersbip differs from investment ownership because residential owners treat the land differently than do lessees. The dissent also stated that the real issue was whether there was a "public advantage" to the transfer of title. 702 F.2d at 818-19 (Ferguson, J., dissenting).

83 702 F.2d at 797 ("The key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose, i.e., the redevelopment of the area."). *See infra* notes 121-23 and accompanying text (discussing state court reaction to *Berman*).

84 Deferential review of government regulation is appropriate under the tenth

court characterized the act as "a naked attempt . . . to take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit."[86] Consequently, the court of appeals reversed the district court and held the act facially unconstitutional.[87]

The H.H.A. appealed to the Supreme Court.[88] The Court quoted *Berman* with approval[89] and summarized the *Berman* approach by stating that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."[90] After acknowledging the prohibition against private uses,[91] the Court held that the proper test was whether "exercise of the eminent domain power is rationally related to a conceivable public purpose."[92] The Court applied this deferential rational basis test to uphold the Act, finding that the condemnation of residential lots to transfer title from lessors to lessees was rationally related to the public purpose of increasing residential fee simple ownership.[93] In response to the court of appeals' assertion that the government must use or possess the condemned property, the Court stated that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[94]

III
ANALYSIS

The *Midkiff* Court's application of a deferential rational basis

---

amendment police power, but the court concluded that a stricter analysis should be used in takings cases. The court noted that the Constitution considers a taking so much more severe than a regulation that it requires just compensation. 702 F.2d at 797.

85 The cases employing a deferential standard involved congressionally authorized takings, and the court found this a sufficient distinction from the state taking in *Midkiff*. *Id.* at 797-98.

86 *Id.* at 798.

87 *Id.* at 796-98.

88 Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321 (1984).

89 *Id.* at 2328-29 (quoting Berman v. Parker, 348 U.S. 26, 31-33 (1954)).

90 *Id.* at 2329.

91 *Id.* (citing Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55 (1937); Cincinnati v. Vester, 281 U.S. 439 (1930); Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239 (1905); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896)).

92 *Id.* at 2329.

93 *Id.* at 2330. The Court identified alleviation of the evils of concentrated land ownership as a legitimate state end dating back to early America. *Id.* at 2330 & n.5. The specific evil the Court found with the Hawaiian land oligopoly was that it "forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." *Id.* at 2330. The facilitation of homeowner fee simple ownership of residential lots, therefore, was a valid public purpose. The Court also found a rational relationship between the taking and the public use ends because the Act authorized the transfer of title only when a significant number of lessees wanted to purchase the residential lots they occupied. *Id.*

94 *Id.* at 2331.

test could prove most significant in future determinations of the constitutionality of takings to assist private industry. Many of the most controversial takings cases arising in the future will likely involve takings to benefit private industry.[95] Under the federal Constitution, *Midkiff*'s rational basis test permits any taking for private industry that is merely "rationally related to a conceivable public purpose."[96] State courts, however, are free to subject takings to a higher standard of review under public use provisions of state constitutions.[97] State courts are unlikely to adopt *Midkiff*'s deferential rational basis test because state courts do not prefer this test and because the extraordinary land reform project at issue in *Midkiff* is unlikely to resurface and encourage the adoption of *Midkiff*'s approach. Furthermore, state courts should not adopt the highly deferential *Midkiff* formulation because it ignores the policy against takings that are motivated to serve private ends and disregards the historical distinction between public and private transferee takings.

A. The Impact of *Midkiff*'s Rational Basis Test

The *Midkiff* Court echoed *Berman* in announcing that the public use requirement and the police power are "coterminous"[98] and that the rational basis test the Court applies with great deference to socioeconomic legislation under the police power also applies in public use cases.[99] The rational basis test requires that legislative means bear a rational relation to legitimate state ends.[100] Since the 1930s, the Court has applied this standard to socioeconomic legislation in a

---

95 *See, e.g.*, Meidinger, *supra* note 20, at 35 ("Though no logical limits are evident in the cases, it nonetheless remains to be seen how far courts will be willing to go in allowing local development authorities to condemn property for commercial purposes."); 2A J. SACKMAN & P. ROHAN, *supra* note 17, § 7.02[3], 7-42 ("If . . . 'public use' is synonymous with 'public advantage', or rather what the legislature might reasonably conceive to be the public advantage, eminent domain might constitutionally be employed in behalf of all large industrial enterprises.").

96 *Midkiff*, 104 S. Ct. at 2329.

97 City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 291-93 (1982) (state court may read state constitution more broadly than Supreme Court reads federal Constitution). *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501-02 & n.80 (1977) (Supreme Court "cannot review state court determinations of state law even when the case also involves federal issues"); *see also* Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 359 & n.14 (1983) (some state courts have prohibited private transferee takings on the ground that such takings are not for public use).

98 *Midkiff*, 104 S. Ct. at 2329.

99 *Id.* at 2330 ("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 socio-economic legislation—are not to be carried out in the federal courts.").

100 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW ch. 13, § IV (2d ed. 1983) (discussing substantive due process and rational basis test).

highly deferential manner, interpreting legitimate ends broadly and hypothesizing such ends to match the legislation under review.[101] The Court has permitted a minimal relationship between means and ends and has presumed sufficient facts to support a rational basis.[102] The Court will not "second-guess" the legislature unless an act is arbitrary or irrational. An act would be arbitrary or irrational only if no arguable relationship connected the ends and means. This rational basis test yields wide latitude to the government in the use of eminent domain. Consequently, a considerable expansion of state taking power could result if state courts choose to follow the *Midkiff* approach.

1. *The Emerging Issue of Takings to Assist Private Industry*

Midkiff's influence on the future use of eminent domain will be determined in the context of the kinds of takings cases that arise. The government is permitted to employ eminent domain only in situations that can meet the just compensation and public use requirements common to both state and federal constitutions. The just compensation requirement is the most immediate restriction confronting the government because absent the ability to compensate the condemnee, the state is unable to reach the stage where it can argue that its exercise of power satisfies the more malleable public use provision.[103]

The necessity of raising funds through taxation or other politically unpopular mechanisms to provide the requisite just compensation may prevent the state from using large scale condemnation to achieve its ends.[104] This barrier, however, disappears when the transferee provides the funds to compensate the condemnee. Under the act at issue in *Midkiff,* the lessees themselves were re-

---

101 *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 490 (1955) (hypothesizing various ends for state regulation of sellers of eyeglass frames and lenses); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949) (upholding state's right-to-work law as within state's authority to regulate "injurious practices"); United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (rational basis test permits state regulation of "filled" milk); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage law for women). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7 (1978) (discussing virtually complete judicial abdication of review under rational basis test).

102 *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("existence of facts supporting the legislative judgment is to be presumed").

103 The state is always free to argue that the taking constitutes a public use. The just compensation requirement, on the other hand, is concrete and unyielding.

104 The just compensation requirement, in addition to compensating property owners for their losses, ensures that the taking is actually for the public benefit. *See* L. TRIBE, *supra* note 101, § 9-2, at 458 ("The public's willingness to pay . . . would serve as proof that the public had in fact been the beneficiary of what otherwise appeared to be a forbidden transfer . . . .").

quired to pay the fair market value of the leased property, thus providing the just compensation for the taking.[105] A self-financing condemnation scheme, funded by the benefiting private transferee, eliminates the necessity of imposing revenue-raising burdens on the community.[106] A self-financing condemnation plan removes the burden from the government and places it upon the private transferee. The placement of the burden is important because the private transferee may find it easier to overcome than the government.

A private corporation that desires to obtain certain property may be able to meet the just compensation requirement more easily than the government. Corporations have greater access to funds for the acquisition of income-producing properties because they pool the wealth of many investors through instruments of debt and equity which offer the investor a pecuniary incentive.[107] The relative ease with which commercial enterprises can meet the burden of providing just compensation is likely to encourage the government to use eminent domain to aid private industry. State court cases involving takings of land for a shopping center, an industrial cite, a retail outlet, and an automobile assembly plant have borne out this possibility.[108]

2. *Takings for Private Industry Under the Federal Constitution*

Under *Midkiff*'s rational basis test, government use of the condemnation power to transfer property to private industry for development would satisfy the public use clause of the federal

---

105 *Midkiff*, 104 S. Ct. at 2325-26 n.2; *see supra* note 73.

106 The act challenged in *Midkiff* enables the state to compensate landowners through funds provided by the lessees who receive title in exchange. This self-financing scheme relieves the state from providing compensation. *See supra* notes 67-73 and accompanying text. However, for the land reform project to work, the lessees must be able to afford to purchase their lots. The limitation of affordability may render the land reform project at issue in *Midkiff* a less than perfect example of an "innovative us[e] of the powers of eminent domain to redress social inequities." Mallin, *American Land Reform*, N.Y.L.J., June 25, 1984, at 1, col. 1.

107 *See* W. HUSBAND & J. DOCKERAY, MODERN CORPORATION FINANCE 27 (7th ed. 1972) ("flexibility of financial arrangement available to corporations makes it possible to cater to both individual and institutional outlets in both a qualitative and quantitative manner").

108 *See, e.g.*, City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967) (invalidating taking for industrial park); City of Owensboro v. McCormick, 581 S.W.2d 3 (Ky. 1979) (invalidating taking for industrial site); Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 339 A.2d 278 (1975) (permitting taking for industrial development); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (permitting taking for automobile assembly plant); Courtesy Sandwich Shop, Inc. v. Port of New York Auth., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963) (permitting taking for World Trade Center); Karesh v. City Council of Charleston, 271 S.C. 339, 247 S.E.2d 342 (1978) (invalidating taking for convention center).

Constitution. The *Midkiff* Court applied its deferential test to a wholly private land transfer from lessors to lessees.[109] The standard of review when the transferee is a private commercial enterprise remains the same; the taking need only be "rationally related to a conceivable public purpose."[110] The government's purpose in transferring property to private industry would be to increase employment and stimulate economic development. These ends are sufficiently legitimate to satisfy the public purpose requirement of the rational basis test because they promote the general welfare. The government would argue that facilitating the transfer of property for development by private enterprise is rationally related to increasing employment and economic prosperity. This argument satisfies the relational element of the rational basis test because *Midkiff* requires only that the connection between the ends and the means not be impossible.[111] *Midkiff*'s rational basis test, therefore, permits government assistance to private industry through exercise of the condemnation power under the federal Constitution.

3. *Takings for Private Industry Under State Constitutions*

Although takings to aid private industry easily meet the public use provision of the federal Constitution, states may still reject such takings under their constitutional standards. Several state courts have applied their state public use provisions to invalidate takings that benefit commercial endeavors.[112] The post-*Midkiff* issue in the state courts is whether *Midkiff* will prompt state courts previously rejecting takings for private industry to alter their views and adopt a rational basis test to permit these takings.

Midkiff may influence state courts to adopt a rational basis test in two ways. First, *Midkiff*, a unanimous Supreme Court opinion, could lead state courts by example to apply a more deferential standard. Second, if state courts agree that land reform serves a valid public use, they may adopt the rational basis test because it is the only test consistent with allowing land reform. This Note concludes that neither possibility is likely to prevail because state courts do not

---

109 The Hawaii Land Reform Act does contemplate instances when the transfer will not be "wholly private." *See* HAWAII REV. STAT. § 516-33 (Supp. 1984) ("In the event of a wilful breach of contract of a lessee to purchase the leased fee interest, the authority may sell or assign its interest . . . ."). Moreover, exercise of the power of eminent domain actively involves the government in the transfer of property. *See id.* § 516-23, -30 (1976). These provisions, however, do not defeat the proposition that the Act has "no . . . intermediate step in which the government holds the property for the accomplishment of a public purpose." Midkiff v. Tom, 702 F.2d 788, 797 (9th Cir. 1983); *see infra* note 125.

110 *Midkiff*, 104 S. Ct. at 2329.

111 *Id.* (citing Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925)).

112 *See supra* note 108.

favor the Supreme Court's rational basis test and the land reform fact pattern remains a rarity.

a. *The* Midkiff *Example.* As a Supreme Court decision, *Midkiff* is persuasive authority for application of the rational basis test. Several state courts, however, have a history of rejecting the Supreme Court's approach to public use cases.[113] Thirty years before *Midkiff*, *Berman* advocated an extremely deferential test, yet *Berman* did not inspire state courts to adopt the rational basis test.[114] State courts simply disfavor the rational basis test.

b. *Accommodating Land Reform.* State courts refusing to allow takings for private industry employ either a "use by the public" standard[115] or a "primary purpose" test to review public use cases.[116] The "use by the public" standard requires that the condemnation support a use that is open to the public.[117] A taking for a commercial endeavor would fail the "use by the public" test because a private corporation is not typically accessible for use by the public. The "primary purpose" test compares the benefit to private transferees with the benefit to the public to determine which benefit is greater.[118] One notable industry taking case found that the public benefit prevailed,[119] but several courts have held that the private transferee received the primary benefit of the taking and invalidated it as an illegitimate private use.[120] *Midkiff*'s rational basis test does not require "use by the public" and is more deferential in assessing

---

113 *See infra* notes 115-16 (citing cases employing tests other than the rational basis test).

114 *See, e.g.*, Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 (Fla. 1975) (a stricter "primary purpose" test is required because "private ownership and possession of property was one of the great rights preserved in our constitution"); Karesh v. City Council of Charleston, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978) ("The restrictive view of the power of eminent domain . . . is indicative of a high regard for private property.").

115 *See, e.g.*, City of Little Rock v. Raines, 241 Ark. 1071, 1083, 411 S.W.2d 486, 493 (1967); City of Owensboro v. McCormick, 581 S.W.2d 3, 7 (Ky. 1979); Karesh v. City Council of Charleston, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978).

116 *See, e.g.*, Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 (Fla. 1975); Rudee Inlet Auth. v. Bastian, 206 Va. 906, 910, 147 S.E.2d 131, 135-36 (1966); Hogue v. Port of Seattle, 54 Wash. 2d 799, 834, 341 P.2d 171, 191 (1959).

117 *See supra* notes 19-20 and accompanying text.

118 If the taking serves a predominantly public purpose, then the private purpose is considered merely incidental. *See, e.g.*, Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455-56 (Fla. 1975) (elaborating on primary purpose test).

119 Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (per curiam). In *Poletown* the City of Detroit condemned an area of the city to provide a site for an automobile assembly plant. Detroit was suffering from high unemployment, and the court found that alleviating this problem was a public benefit that outweighed the private transfer to the automobile company. *Id.* at 634, 304 N.W.2d at 459.

120 *See* cases cited *supra* note 116.

the public benefit than the "primary purpose" test because it does not attempt to weigh the private benefit.

Berman did not prompt universal acceptance of the rational basis test, but many states did develop formulations to allow takings for the clearance of blighted areas.[121] State courts applying the "use by the public" standard or the "primary purpose" test to reject takings for private industry created special exceptions for urban redevelopment and distinguished urban redevelopment takings from private industry takings. Some courts indicated approval of takings for blight removal under a necessity-based exception, reasoning that urban redevelopment was necessary to make unproductive land productive.[122] Other courts asserted that blight removal involved a public transferee taking in which the government accomplished the public purpose of slum clearance before incidentally transferring the property to private individuals.[123]

If state courts confronted *Midkiff* as the law on land reform, as they faced *Berman* on blight removal, then *Midkiff* might encourage reappraisal of their public use tests. The taking in *Midkiff* is irreconcilable with either the "use by the public" or the "primary benefit" test. The transfer of title from lessors to lessees does not satisfy the "use by the public" standard because the residential lots remain inaccessible to the public. The land reform scheme also has difficulty passing the "primary benefit" standard because the lessees who receive the property obtain the primary benefit from the transfer.[124]

Land reform also does not lend itself to either of the two excep-

---

121 2A J. SACKMAN & P. ROHAN, *supra* note 17, § 7.43, at 7-251 (urban redevelopment is almost universally accepted as a public use); *see infra* notes 122-23.

122 *See, e.g.*, City of Owensboro v. McCormick, 581 S.W.2d 3, 6 (Ky. 1979) (invalidating state statute providing for taking to assist private industry, but noting that slum clearance satisfies public use requirement); Hogue v. Port of Seattle, 54 Wash. 2d 799, 833, 341 P.2d 171, 190 (1959) (invalidating taking, but stating that "[t]his is not a reclamation project, or a slum clearance project, or a blighted area redevelopment").

The Supreme Court established a similar necessity-based exception in two of its earliest private transferee cases. *See supra* notes 25-27 and accompanying text.

123 *See, e.g.*, City of Little Rock v. Raines, 241 Ark. 1071, 1085, 411 S.W.2d 486, 494 (1967) (noting past holdings that public use not defeated by right to sell property after public purpose accomplished); Rudee Inlet Auth. v. Bastian, 206 Va. 906, 911-12, 147 S.E.2d 131, 135-36 (1966) (housing authority takings are legitimate although the government can dispose of the property to private individuals when it is no longer needed).

There is little support for this distinction because redevelopment involves more than the removal of blight. Redevelopment implies reconstruction, a task that private transferees complete. *See* Comment, *Eminent Domain: Private Corporations and the Public Use Limitation*, 11 BALT. L. REV. 310, 325 (1982) ("vacant lots serve no public purpose . . . and cannot alone be considered as legitimate objectives of state police power"). Nonetheless, the court of appeals attempted to make the same distinction in *Midkiff*. *See supra* note 83 and accompanying text.

124 The concurrence in Midkiff v. Tom, 702 F.2d 788, 805-06 (1981) (Poole, J., concurring), applied a "primary purpose" test and found that the private benefit to the residential lessees was greater than the public benefit. *See supra* note 82.

tions established for blight removal. First, land reform does not fit within the necessity exception. The title transfers in *Midkiff* were not necessary to make unproductive land productive; they merely shifted the ownership of already productive residential lands. Second, land reform cannot be justified as a public transferee taking because there was no intermediate government possession in *Midkiff* sufficient to make the private transfer incidental. The transfer of title to private lessees was not an incidental purpose, but rather the primary purpose of the government's actions.[125]

State courts that have rejected takings for private industry could not allow *Midkiff*'s land reform under their current tests or under the exceptions that were created for urban redevelopment cases. State court acceptance of the land reform scheme, therefore, would prod them to adopt a more accommodating rational basis test.

State court consideration of *Midkiff*'s land reform scheme, however, appears improbable because state courts are unlikely to confront land reform cases. The feudal foundations that give rise to land reform cases are unique to the state of Hawaii,[126] and only one other jurisdiction has encountered the land reform fact pattern.[127] State courts were situated to adopt *Berman*'s blight removal position because urban blight is widespread.[128] If state courts do not confront land reform cases, they will not feel compelled to adopt *Midkiff*'s more lenient rational basis test. Thus takings for private industry will continue to founder on state constitutional requirements.

B. State Courts Should Reject *Midkiff*

Even if state courts consider adopting the rational basis test as the test under state constitutions, they should not rely on the *Midkiff* approach because it reflects unsound policy. The *Midkiff* Court held that any claim of a conceivable public purpose prevents invalidation of a taking for a private use. Consequently, *Midkiff* ignores the policy reasons for prohibiting takings motivated to serve private uses.

---

125 The Act authorized the government to take possession of the property before transferring it to the lessees. *See supra* notes 70-71 and accompanying text. The sole purpose of the brief governmental possession is to facilitate transfer of title. Thus, the public purpose of the government's possession is even less significant than in the slum clearance cases, in which the government actually cleared the slums before transferring the property to private developers. *See supra* note 123 and accompanying text.

126 *See* J. STRAYER, FEUDALISM 11 (1965) (feudalism died out by seventeenth century, before settlement of America); *see also supra* notes 63-65 and accompanying text (discussing feudal origin of Hawaiian land oligopolies).

127 *See* Puerto Rico v. Eastern Sugar Assocs., 156 F.2d 316 (1st Cir.) (division of large landholdings for redistribution upheld), *cert. denied*, 329 U.S. 772 (1946).

128 2A J. SACKMAN & P. ROHAN, *supra* note 17 at § 7.43 (cases confronting urban blight situations).

In addition, *Midkiff* disregards the historical distinction between public and private transferee takings.

1. Midkiff *Ignores the Policy Reasons for Prohibiting Takings Motivated to Serve Private Uses*

The requirement that the sovereign may take property only for a public use dictates that the government may not take property for a private use. Thus, the state cannot transfer property from *A* to *B* merely to benefit *B*.[129] The taking in *Midkiff* involved several characteristics that indicated the legislature may have intended to serve primarily private ends. The transfer of title in *Midkiff* did not involve a physical change in the property's use or intermediate governmental possession. In addition, the private transferee initiated the taking and provided the just compensation. Consequently, the court of appeals in *Midkiff* found the taking unconstitutional because it supported an invalid private use.[130]

The Supreme Court dismissed the possibility that the taking in *Midkiff* was motivated to benefit private individuals without discussing the private use elements of the Hawaii land reform program.[131] The Court classified private use ends as illegitimate under its rational basis test,[132] explaining that "[a] purely private taking could

---

129 *See supra* note 35 and accompanying text.

130 Midkiff v. Tom, 702 F.2d 788, 798 (1983).

131 The trustees of the Bishop Estate argued before the Supreme Court that indicia of a private use in this case mandated the appellate court finding of the act's unconstitutionality. The trustees listed the following private use indicia as present in the case:

> (a) the takings may only be initiated by the very people who will receive the property; (b) the takings are paid for by the private recipients of the transfer; (c) the only property taken consists of the ground lots upon which the new owners already own houses; (d) the takings transfer property from one private party to another; (e) the takings effect no change in the use or usability of the property or its environs; (f) there is no continuing government oversight, regulation, or control once the transfer to other private parties is completed; and (g) there is no obligation on the part of the parties receiving the property to conform to any predetermined plan for its use.

Brief for the Appellees at 23-24, Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321 (1984).

In a section of the opinion separate from its application of the rational basis test, the *Midkiff* Court addressed the court of appeals interpretation of *Berman* that required intermediate government possession for a taking to avoid the fate of a forbidden private use. First, the Court pointed out that "use by the public" is not the Court's public use definition. Government possession that would satisfy a "use by the public" definition, therefore, is not mandated. Second, the Court noted that a private transferee taking may sufficiently promote the public benefit to constitute a public use. Finally, the Court concluded that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." 104 S. Ct. at 2331.

132 *Id.* The *Berman* Court did not address the position of private uses within the rational basis test but stated that private enterprise was an appropriate means of achieving redevelopment of a slum. *Berman*, 348 U.S. at 33-34.

not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[133] The Court, however, did not articulate a distinction between illegitimate takings for private use ends and acceptable takings for public use ends. Instead, the Court defined invalid private use ends as those which lack a legitimate public purpose.[134] This approach is consistent with previous cases in which the Court has distinguished private use ends from public use ends by examining the validity of the asserted public use.[135]

The difference between *Midkiff* and prior cases lies in the degree of public use benefits the Court required. In previous private transferee cases the Court looked for substantial public use ends,[136] but the *Midkiff* approach accepts any assertion of a "conceivable public purpose."[137] The Court interpreted *Missouri Pacific Railway v. Nebraska*[138] to mean that a prohibited private use exists when the state does not claim a public use.[139] Application of the deferential rational basis test increases the likelihood that the Court will find a sufficient public use end. The previous requirement of a substantial public use end resulted in a greater chance that the Court might not find a valid public use and that the taking would fail as a private use. Thus, *Midkiff*'s rational basis test allows takings for primarily private uses if the state advances some conceivable public purpose and low-

---

133 104 S. Ct. at 2331.

134 The *Midkiff* Court, after asserting that private use ends were illegitimate, explained that "no purely private taking is involved in this case." *Id.* There was no private use end because Hawaii did not pass its land reform legislation "to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose." *Id.*

135 *See, e.g.*, Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (taking for highway extension is for public use); Hariston v. Danville & W. Ry., 208 U.S. 598 (1908) (taking for railroad is for public use); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (upholding statute allowing taking for irrigation district); *see supra* note 43 and accompanying text.

136 *See supra* notes 36-40 and accompanying text.

137 *Midkiff*, 104 S. Ct. at 2329.

138 164 U.S. 403 (1896). In *Missouri Pacific* the state forced the railroad to transfer land to neighboring farmers to erect grain elevators. The state ordered the transfer to prevent the railroad from giving "any preference or advantage" to other farmers who had already built grain elevators with the railroad's permission. *Id.* at 413-14.

139 The *Midkiff* Court quoted *Missouri Pacific*, stating that 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.' " 104 S. Ct. at 2329 (emphasis in original) (quoting Missouri Pac. Ry v. Nebraska, 164 U.S. 403, 416 (1896)). However, *Missouri Pacific* did not articulate a standard of review. The Court merely emphasized that the case could not satisfy the public use provision because there was not even a claim of a public use end. At the minimum, therefore, the government must assert a public use goal. Furthermore, in Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896), decided the same year as *Missouri Pacific*, the Court indicated that a substantial public purpose was necessary. *See supra* note 40.

ers the degree of public benefit necessary to establish a public purpose.

The rational basis test neglects the possibility that a taking may be motivated to serve private use ends. Thus the test has the potential of allowing private industry to enlist the government's eminent domain power for its own purposes. The government might simply submit to the demands of a private corporation interested only in its own economic benefit. The private corporation wants only to acquire desired property that might otherwise be unavailable or might only be available at a much higher price than fair market value. Relatively unsophisticated local governments may be unable to resist powerful commercial interests,[140] and the small number of condemnees wield little political influence.[141] A modest increase in employment and economic activity, therefore, might not be the chief motive of either the corporation or the government, but it would satisfy the rational basis test as a conceivable public purpose.[142]

The marriage of government and private industry to facilitate takings motivated to benefit private individuals may produce unsavory results that go unchecked by the rational basis test. The use of eminent domain to assist private industry supplants the free market[143] and unjustly enriches the private transferee at the expense of a condemnee who either does not wish to sell at fair market value or does not wish to sell at all.[144] The rational basis test allows the private transferee an unjust benefit and inflicts an unfair loss on the condemnee because the requirement of only a conceivable public purpose necessarily means that the benefit to a private transferee may far outweigh the public benefit.[145]

---

140 *See* Millspaugh, *Eminent Domain: Is It Getting Out of Hand?*, 11 REAL EST. L.J. 99, 112 (1982) (noting that traditional public use doctrine may not provide appropriate legal response to new generation of government takings for private industry).

141 *See* Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 435-38 (1983) (arguing that condemnees have no power in majoritarian political mechanism).

142 *See supra* notes 110-11 and accompanying text.

143 *See* Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 PACE L. REV. 231, 257-64 (1984) (discussing takings for private industry as infringement on "economic liberalism").

144 Furthermore, private transferee takings may prove detrimental to more than economic interests. One commentator has argued that the use of eminent domain may infringe liberty interests in some cases. *See* Note, Hawaii Housing Authority v. Midkiff: *A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 NOTRE DAME LAW. 388, 394-99 (1985) (arguing that taking may infringe liberty interests "when a person's home or lifetime business is condemned").

145 The potential for an improperly motivated transfer of property for a private use is not the only reason to disfavor private transferee takings. The private transferee may not be held continually accountable to serve public use ends. Moreover, private transferee takings may act as a disincentive to investments in property by the involuntary condemnee and other observers. Finally, allowance of private transferee takings might

2. Midkiff *Disregards the Historical Distinction Between Public and Private Transferee Takings*

The *Midkiff* Court extended *Berman*'s deferential test and ended the separate standard for public and private transferee takings by applying the rational basis test to a private transferee taking. The Court merged the stricter standard for private transferee takings into the more deferential standard for public transferee takings through a misplaced reliance on *Berman* and its public transferee precedents and a misuse of the private transferee cases.

The *Midkiff* Court labeled *Berman* the "starting point" for its analysis and relied heavily on the case as precedent for the rational basis test.[146] *Berman,* however, involved a comprehensive slum redevelopment plan entailing both public and private transferee takings.[147] The Court should have distinguished *Berman* as a predominantly public transferee taking[148] to remain consistent with the stricter standard that was previously applied to private transferee takings. Furthermore, the Court in *Berman* relied primarily on public transferee cases,[149] which utilized a different standard than private transferee cases. Given that *Berman* included both public and private takings and relied on public transferee cases for support, the Court in *Midkiff* unjustifiably relied on *Berman* to fuse the historically distinct tests for public and private transferee takings.

After discussing *Berman,* the *Midkiff* Court elaborated on several public transferee cases to establish support for its rational basis test.[150] The Court first discussed two public transferee cases cited in *Berman.* The Court used *Old Dominion Land Co. v. United States*[151] to declare that "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.' "[152]

---

encourage widespread use of eminent domain and thereby imperil the institution of private property. *See* Ross, *Transferring Land to Private Entities by the Power of Eminent Domain,* 51 GEO. WASH. L. REV. 355, 369-80 (1983) (discussing four policy reasons behind stricter standard states may apply to private transferee takings).

146 104 S. Ct. at 2328-29.

147 The public transferee takings in *Berman* included transfers to the government for homes, parks, streets, and recreational areas. 348 U.S. at 34. The private transferee takings in *Berman* resulted from the possibility of eventual resale of a portion of the property to private individuals. *Id.* at 31.

148 *See supra* note 61 and accompanying text (discussing private transferee takings as incidental to public transferee takings).

149 *Berman,* 348 U.S. at 32 (citing Old Dominion Land Co. v. United States, 269 U.S. 55 (1925), and United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946), to justify Court's "extremely narrow" judicial role).

150 104 S. Ct. at 2329.

151 269 U.S. 55 (1925).

152 104 S. Ct. at 2329 (quoting *Old Dominion,* 269 U.S. at 66); *see supra* notes 51-52 and accompanying text (explaining "impossibility" component of the rational basis test).

The Court also cited *United States ex rel. TVA v. Welch,*[153] which advocated almost absolute deference to congressional determinations of a public use.[154] The Court then relied on *United States v. Gettysburg Electric Railway,*[155] another public transferee case, to state that "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.' "[156] All of these cases apply a deferential test, and in light of the different treatment previously accorded to public and private transferee takings, they provide inadequate support for a private transferee test.

The Court cited two private transferee cases in support of its standard. First, the Court cited *Thompson v. Consolidated Gas Utilitites Corp.,*[157] which affirmed the invalidation of a taking as unreasonably related to the state's ends. The *Thompson* Court's refusal of a taking did not exhibit an extremely deferential standard,[158] but the *Midkiff* Court attempted to distinguish the case parenthetically as "invalidating an *uncompensated* taking."[159] Just compensation, however, stands as a separate requirement from the public use grounds on which the *Thompson* Court invalidated the taking. The *Thompson* Court held that a pro rata limitation on the complaining sweet gas producer was not rationally related to the public purpose of preventing waste.[160] Even if the state had provided just compensation, the taking would still have failed because just compensation does not affect the relationship of a taking to a public purpose.

Block v. Hirsh,[161] the second private transferee case cited in *Midkiff,* offers only illusory support. In *Block,* the Court uttered a similar "reasonable relation" test.[162] *Block,* however, should be distinguished on its facts. *Block* involved a congressional act that permitted lessees in the District of Columbia to retain possession beyond the expiration of their leases.[163] The Court focused on the sufficiency of the government's asserted ends of alleviating a wartime housing shortage that burdened government officers and em-

---

153 327 U.S. 546 (1946).

154 *See supra* note 47.

155 160 U.S. 668 (1896). *See supra* note 33.

The *Berman* Court cited *Gettysburg Electric,* but only to demonstrate that "the power of eminent domain is merely the means to the end." 348 U.S. at 33. *Berman* did not rely on *Gettysburg Electric* to determine the appropriate test. 348 U.S. at 32.

156 *Midkiff,* 104 S. Ct. at 2329 (quoting *Gettysburg Electric,* 160 U.S. at 680).

157 300 U.S. 55 (1937). *See supra* notes 41-43 and accompanying text.

158 *See* L. TRIBE, *supra* note 101, § 9.2 at 458 n.10 (indicating that *Thompson* conflicts with standard of review applied in other public use cases).

159 *Midkiff,* 104 S. Ct. at 2330 (emphasis in original).

160 *Thompson,* 300 U.S. at 69-70.

161 256 U.S. 135 (1921).

162 *Id.* at 158.

163 *Id.* at 153-54.

ployees and threatened public health.[164] This emergency, coupled with the temporary nature of the taking, prompted the Court to declare that the taking supported a sufficient public use.[165] Providing necessary housing in a wartime emergency is a more compelling interest than assisting residential lessees who already have housing in acquiring title to the ground lots beneath their homes. The importance of the ends in *Block* were considerably greater than those required under the *Midkiff* Court's rational basis test.

CONCLUSION

The potential for abuse of the eminent domain power becomes especially significant when the government and private industry join together for a common purpose. The government, by virtue of its eminent domain power, can force the transfer of private property, and private industry can pay the just compensation. The combination of these two entities can strip away much of the fifth amendment's protection of private property. Courts safeguard the rights of the condemnee to the extent that they require a public benefit to justify the taking. *Midkiff*'s rational basis test, however, demands only a minimal public benefit.

The state courts are not bound by *Midkiff*, and those that have rejected takings for private industry will not be persuaded to alter their positions by the decision. State courts disfavor the rational basis test in the eminent domain arena, and the *Midkiff* land reform scheme remains unlikely to present itself in jurisdictions east of the Hawaiian Islands. Even if those courts desire to adopt a rational basis test, they should not follow the *Midkiff* approach because it ignores the policy reasons for prohibiting takings motivated to serve private uses and disregards the historical distinction between public and private transferee takings. Consequently, state courts should continue to provide more security to the institution of private property than the scant protection afforded by *Midkiff*.

Russell A. Brine

---

164 *Id.* at 154.

165 *Id.* at 156. The Court stated that "[a] limit in time to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Id.* at 157.