resolving such an issue.[600] As early as 1908, the Court was obligated to admit that, notwithstanding its retention of the power of judicial review, "[n]o case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses . . . ."[601] However, in a 1946 case involving federal eminent domain power, the Court cast considerable doubt upon the power of courts to review the issue of public use. "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[602] There is some suggestion that "the scope of the judicial power to determine what is a 'public use'" may be different as between Fifth and Fourteenth Amendment cases, with greater power in the latter type of cases than in the former,[603] but it may well be that the case simply stands for the necessity for great judicial restraint.[604] Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or expediency of the particular taking is exclusively in the legislature or the body to which the legislature has delegated the decision, and is not subject to judicial review.[605]

At an earlier time, the factor of judicial review would have been vastly more important than it is now, inasmuch as the prevailing judicial view was that the term "public use" was synonymous with "use by the public" and that if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. But this view was rejected some time ago.[606] The modern conception of public use equates it with the police power

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[600] Green v. Frazier, 253 U.S. 283, 240 (1920); City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930). *See also* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

[601] Hairston v. Danville & Western Ry., 208 U.S. 598, 607 (1908). An act of condemnation was voided as not for a public use in Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896), but the Court read the state court opinion as acknowledging this fact, thus not bringing it within the literal content of this statement.

[602] United States ex rel. TVA v. Welch, 327 U.S. 546, 551–52 (1946). Justices Reed and Frankfurter and Chief Justice Stone disagreed with this view. Id. at 555, 557 (concurring).

[603] 327 U.S. at 552.

[604] So it seems to have been considered in Berman v. Parker, 348 U.S. 26, 32 (1954).

[605] Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919); Berman v. Parker, 348 U.S. 26, 33 (1954). "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 . . . are not to be carried out in federal courts." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).

[606] Clark v. Nash, 198 U.S. 361 (1905); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916).