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Progress and the Taking of Indigenous Land

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The taking of Indigenous land in furtherance of other societal goals is so ubiquitous and so fundamental to the American project that sometimes acts of dispossession are not even recognized as such. This Article argues that the generally accepted understanding of Hawaii Housing Authority v. Midkiff*, a key case of the American takings law canon, is wrong because it overlooks Native Hawaiian claims to the land taken. Hawai'i's Land Reform Act allowed tenants a right to purchase land over the objections of the owner of the underlying property and in* Midkiff *the U.S. Supreme Court said that states had the right to use their eminent domain authority in such a way. The common understanding of the case is that it is a progressive victory, an example of how government can fight back against inequality and the power of large landowners. But beneath the surface, this Article argues, the case is really about dispossession. By showing how land reform predictably worked to transfer Indigenous land to upper class, relatively wealthy tenants, the Article situates* Midkiff *within a long history of taking Native land in order to accomplish progressive ends. By seeing* Midkiff *for what it is—a judicially authorized taking of Indigenous land—the significance of the case within the Property and Indian Law cannons can be more fully appreciated. Indigenous peoples are often forced to pay—in the form of diminishment of their property rights—for progressive victories, with their losses swept under the rug by courts and scholars alike. The* Midkiff *decision is part of a pattern of treating the property rights of Indigenous peoples as impediments to progress.*

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Introduction

The story told about *Hawaii Housing Authority v. Midkiff*[1]—that it was a progressive victory in the battle against oligarchy—is wrong. Instead, it's about a state power grab of Indigenous land, blessed by the Supreme Court, and ignored by scholars and everyone else. Though the unanimous decision suggests the case is about correcting a feudal legacy, *Midkiff* is best understood as part of the long history of native land dispossession.[2] Indigenous property rights stood in the way of progressive goals, so

[1] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[2] This Article uses a variety of terms to refer to Indigenous peoples and Native nations, including Indigenous, Native Hawaiian, Native American, Native, Indian, Native nations, and tribe. The trend today is to use labels and capitalization in such a way to recognize the sovereign status of Indian nations, though the distinct history and irregular status of Native Hawaiians compared to federally recognized tribes complicates such stylistic choices. *See generally* Angelique EagleWoman, *The Capitalization of "Tribal Nations" and the Decolonization of Citation, Nomenclature, and Terminology in the United States*, 49 MITCHELL HAMLINE L. REV. 624 (2023); Christine Weeber, *Why Capitalize "Indigenous"?*, SAPIENS (May 19, 2020), https://www.sapiens.org/language/capitalize-indigenous. That said, both terms and capitalization norms are in flux and subject to debate among Indigenous peoples and within the academic community. Many Native Hawaiians also identify themselves as Kanaka Maoli, though because that term was less commonly used at the time of the events described in this Article, this Article uses the term Native Hawaiian. For more on the rise of Kanaka Maoli identity starting in the 1970s, see JONATHAN Y. OKAMURA, ETHNICITY AND INEQUALITY IN HAWAI'I 98-108 (2008); Noelani Goodyear-Ka'ōpua, *Introduction*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 1-2 (Noelani Goodyear-Ka'ōpua et al. eds., 2014). This Article aims to use terms in a way that does not distract from the overall argument and that supports increased sovereignty and independence for Indian nations and Indigenous peoples.

the dominant narrative focused on the need for progress rather than on the taking of land from Native Hawaiians.

This Article challenges the conventional narrative surrounding *Midkiff* and shows why, forty years after its release, the case merits reconsideration and elevation in both the Property and Indian law canons. In *Midkiff*, the Supreme Court upheld Hawai'i's Land Reform Act of 1967,[3] enabling lessees to use the state's eminent domain power to acquire fee simple ownership over the objections of large estates with significant residential holdings. The Land Reform Act and the subsequent 1984 *Midkiff* decision are generally considered both rational and necessary.[4] According to this conventional view, the Land Reform Act helped Hawai'i move beyond its "feudal past" by breaking up land monopolies that made homeownership difficult and expensive.[5] A unanimous Supreme Court, in a decision written by Justice O'Connor, held that it was within the state's power "to attack certain perceived evils of concentrated property ownership."[6] And that was it: Hawai'i could break apart the large estates that were created prior to statehood. Progressive legislation supporting the little guy passed constitutional muster and left-leaning academics cheered.[7] It is a conveniently simple account.

Though one article cannot capture the full depth of Hawaiian history, a historical sketch is necessary to understand the land reform efforts that followed statehood. For a variety of reasons, major landowners avoided selling off their land and instead offered only leaseholds to lots on their property.[8] Steadily increasing home prices and the rising percentage of homes subject to long-term leases in the Hawaiian home market led to passage of the 1967 Land Reform Act, which allowed tenants to purchase the underlying fee in spite of landowner objections.[9] The Supreme Court unanimously approved of Hawai'i's use of eminent domain as an anti-oligarchy tool. Justice O'Connor's opinion generated its fair share of critical commentary, primarily directed against the highly deferential standard of review adopted by the Court.[10]

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[3] Haw. Rev. Stat. ch. 516.

[4] *See, e.g.*, Linda Greenhouse, *Justices Uphold Hawaii's Statute on Land Reform*, N.Y. TIMES (May 31, 1984), at A1.

[5] *See* Brief for Appellants at 1, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (Nos. 83-141, 83-283).

[6] *Midkiff*, 467 U.S. at 245.

[7] *See, e.g.*, Rashmi Dyal-Chand, *"A Poor Relation?" Reflections on a Panel Discussion Comparing Property Rights to Other Rights Enumerated in the Bill of Rights*, 16 WM. & MARY BILL RTS. J. 849, 860-61 (2008); Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICH. L. REV. 1695, 1753 (2021).

[8] For an explanation of this preference, see *infra* Part I (B).

[9] Haw. Rev. Stat. ch. 516.

[10] *See, e.g.*, Viol Vetter, Kelo—Midkiff*'s Latest Victim*, 16 TEMP. POL. & CIV. RTS. L. REV. 257, 276 (2006) ("In 1984, Justice O'Connor bestowed upon the government a virtually uninhibited power to take control of private property . . . she instated a standard of review so deferential to any decision of the legislature to effectively delete the public use requirement from the constitution."); Martha Rohrbaugh, Note, *The Forgotten Taking Clause: Hawaii Housing Authority v. Midkiff*, 4 PUB. L. FORUM 493, 504 (1985) ("This is the most

However, the fact that most of the land subject to land reform in Hawai'i belonged to the Bishop Trust was largely ignored by the Court and by subsequent academic case commentary.[11]

Though the Court describes land reform as a way of correcting for feudalism, the Bishop Trust complicates matters. Understanding what happened in *Midkiff* requires understanding the history of the Bishop Trust, the significance of the trust for Native Hawaiians, and controversies involving the trust. The Bishop Trust's mission, created through the will of Princess Bernice Pauahi Bishop in 1884, is the education of Native Hawaiian children.[12] As a trust meant to benefit Indigenous children and as the last holder of much of the land owned by royal families from before the Kingdom was overthrown in 1893, many Native Hawaiians feel a sense of ownership over land held by the Bishop Trust. From this perspective, the land is held in trust for the benefit of Native Hawaiian children and is distinctly Native land. Importantly, while the Trust owned large parcels across Hawai'i, the Trust's most valuable lands were on Oahu. Because of the location of Bishop Trust land, the Land Reform Act and *Midkiff* disproportionately—and quite predicatably—impacted the Bishop Trust, even though on its surface the decision did not explicitly target Native Hawaiian land. Land reform's facial neutrality—the fact that it was framed as an attack on all large estates—allowed the Court to escape acknowledging the problematic racial and political aspects of taking away Native interests in land held by the Bishop Trust.

As this history reveals, the *Midkiff* decision is part of a pattern of treating the property rights of Indigenous peoples as impediments to progress. Notwithstanding the demands of Native Hawaiians, the state of Hawai'i continues to prevent the islands' original inhabitants from gaining meaningful access to former Crown Lands and to land set aside by the Hawaiian Homelands Act.[13] Today, many Native Hawaiians struggle to find land upon which to build homes and lives, in part because of larger market forces, but, also, in part because of policy choices and bureaucratic hurdles that block their access even to land earmarked for them.[14] The ongoing

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radical eminent domain decision yet. It is unprecedented and violates the constitutional boundaries of the fifth and fourteenth amendments.").

[11] *See generally* L.A. Powe, Jr., *Economic Make-Believe in the Supreme Court*, 3 CONST. COMMENTARY 385 (1986) (highlighting the ways the Court sidestepped the identity of the plaintiff even though the Bishop Trust was the most important landowner impacted by land reform).

[12] For more on the Bishop Trust, see *infra* Part II.

[13] *See, e.g.*, Kirstin Downey, *'Place Them Back Upon The Soil': Prince Kuhio Threw a Lifeline to Hawaiians Who Wanted Homes*, HONOLULU CIV. BEAT (Feb. 19, 2023), https://www.civilbeat.org/2023/02/place-them-back-upon-the-soil-prince-kuhio-threw-a-lifeline-to-hawaiians-who-wanted-homes (noting that one Native Hawaiian applicant has waited over 51 years for a homestead under the Home Lands program).

[14] *See* Rob Perez & Agnel Philip, *To Reclaim Ancestral Land, All Native Hawaiians Need Is a $300,000 Mortgage and to Wait in Line for Decades*, PROPUBLICA (Oct. 24, 2020, 6:00 AM), https://www.propublica.org/article/hawaii-native-land-homesteads-department-of-hawaiian-home-lands (reporting on the long waitlists Native Hawaiians face for homesteads).

dispossession of Native Hawaiians is part of a pattern in the United States of dispossessing Indigenous peoples through legal means. The Supreme Court has used a number of theories to justify subordinating the property rights of Native Americans and elevating the claims of non-Indians, however, the basic idea is fairly simple: Indian land rights must give way to progress. According to this outcome-based logic, Natives have too much land, non-Indians can make better use of the land, and formal title requirements are more important than historical or equitable claims to land.[15] Given Hawai'i's history as an independent kingdom annexed by the United States during a period of open colonial ambition, it is not surprising that the history of, and justifications for, taking property from Native Hawaiians mirror many of those that rationalized the taking of land from Native American tribes. What is surprising is that *Midkiff* has largely escaped critical engagement, allowing the case to be celebrated as a progressive victory rather than viewed more critically.

Today, *Midkiff* is treated as a stepping stone to *Kelo* by property scholars and overlooked by Indian law scholars.[16] The decision was followed by a minor wave of law review articles,[17] but such academic commentary quickly petered out. Academics largely accepted the Court's characterization of the stakes and of the parties involved in *Midkiff*.[18] Lost was the fact that in practice the Land Reform Act had little effect on the broader patterns of public and private landownership.[19] Land reform, instead, operated against a single large estate, the Bishop Trust, formed to support the

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[15] *See infra* Part III. *See also* Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-first Century*, 40 ARIZ. L. REV. 425, 459 (1998) ("Indians had too much land!").

[16] The Cohen Handbook, for example, dedicates only two sentences to the case. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[4][f] (Nell Jessup Newton eds, 2012).

[17] *See, e.g.*, Karen L. Shinkle, Note, *The Public Use Limitation on Eminent Domain after* Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984): Does It Still Exist?*, 12 N. KY. L. REV. 65 (1985); James Janda, Comment, Hawaii Housing Authority v. Midkiff*: The Supreme Court's Assault on Private Ownership of Property*, 90 DICK. L. REV. 199 (1985); Julie Sullwold Hernandez, Note, *Can They Do That? Taking from Peter and Giving to Paul: The Public Use Limitation After* Hawaii Housing Authority v. Midkiff, 15 SW. U. L. REV. 817 (1985); Gail Lewis, Note, Hawaii Housing Authority v. Midkiff*: The Public Use Requirement in Eminent Domain*, 15 ENVTL. L. 565, 588 (1985).

[18] *See, e.g.*, *The Supreme Court, 1983 Term, Leading Cases, Constitutional Law, Takings Clause*, 98 HARV. L. REV. 225, 226 (1984) ("*Hawaii Housing Authority v. Midkiff* grew out of the passage of the Hawaii Land Reform Act of 1967, a state law enacted in response to the heavy concentration of land ownership that resulted from the feudal system of land tenure in effect in Hawaii before it became a state.").

[19] *See generally* STATE AUDITOR, LOCATIONS, INC. RESEARCH & CONSULTING DIVISION, STUDY OF THE RESALE OF LEASEHOLD PROPERTIES CONVERTED TO FEE SIMPLE OWNERSHIP UNDER THE HAWAII LAND REFORM ACT OF 1967: REPORT TO THE GOVERNOR AND LEGISLATURE OF THE STATE OF HAWAII (1992) [hereinafter 1967 REPORT] (highlighting the limited effect of lease-to-fee conversions on the land market of Hawai'i).

education of Native Hawaiian children.[20] While the public was outraged by the 2005 decision in *Kelo v. New London*,[21] which allowed private property to be taken for economic redevelopment purposes, public reaction to *Midkiff* was relatively muted.[22] Similarly, though commentators correctly observed that *Midkiff* opened the door for *Kelo*, textbook coverage of the *Midkiff* case is limited.[23] Scholarship on race and property or on Indians and property tends to ignore the case entirely. *Midkiff* has been tied off, leading to the view that the case is about Hawai'i successfully fighting against oligarchy with the U.S. Supreme Court's blessing. The end.

Midkiff deserves more. Neglect of the ways *Midkiff* continued the country's longstanding practice of taking land from Indigenous peoples impoverishes our understanding of how governmental power selectively favors particular groups. Such neglect also permits progressives to mischaracterize these types of land grabs as principled victories.[24] Scholars, as a consequence, ignore the need for a critical reassessment of how denial of Indigenous property rights has long been an important precondition for policies aimed at democratizing land holdings.[25] Framed in this way, Hawai'i's land reform efforts from the 1960s to 1990s are less a fight against oligarchy and more part of a continuing process of dispossessing Indigenous peoples of their land—in Hawai'i and in the continental United States. This Article aims to tell the full story of *Midkiff*; that the case is fundamentally a seminal example of dispossession. In the process of retelling the *Midkiff* narrative, this Article broadens our understanding of the many ways that dispossession occurs and the justifications offered for such takings. The reaction to *Midkiff* suggests that land reform proponents succeeded in subordinating Indigenous claims by characterizing the property owners affected as large landowners rather than as caretakers of Native Hawaiian land. By resurfacing the Native aspects of what was lost, this Article forces progressive defenders of land

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[20] For more on the formation of the Bishop Trust, see *infra* Part II (A).

[21] Kelo v. City of New London, 545 U.S. 469 (2005).

[22] *See* RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW 110 (2011).

[23] *See, e.g.*, JESSIE DUKEMINIER ET AL., PROPERTY 442, 1026-32, 1038 (10th ed., 2022) (including *Midkiff* only within the *Kelo* decision and in two other small notes).

[24] *See* Gideon Kanner, *Eminent Domain Projects that Didn't Work Out*, 12 BRIGHAM-KANNER PROP. RTS. J. 171, 197 (2023) [hereinafter Kanner, *Eminent Domain Projects that Didn't Work Out*](observing that "the legal literature is replete with leftist fantasies to the effect that [Hawai'i's Land Reform Act] was some sort of land redistribution from the rich to the poor").

[25] The Homestead Acts, for example, helped broaden the class of property owners and democratized capital, but such an outcome relied upon dispossessing Indians of their land so that such property was available for redistribution. Similarly, the creation of national parks and reservation of land for other national interest systems generally did not operate to take away pre-existing private claims, with "one noteworthy exception to this generalization," namely Native American rights over land. Bruce Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1003 fn. 51 (2014). Significantly, this observation, a counter-factual in Professor Huber's account of the withdrawal of land to be held by the federal government, is discussed only in passing and below the line. *Id.*

reform and of other programs ordinarily understood as socially beneficial to recognize how easily Indigenous property rights are sacrificed for the greater good.

The rights, especially the property rights, of Indigenous peoples are routinely sacrificed to accomplish progressive policy goals.[26] Indigenous land—Native American and Native Hawaiian—is taken and transformed into the raw material necessary for creation of public space and democratization of land holdings. A strong middle class requires access to land. In Hawai'i, access alone was not deemed sufficient, so the legislature embraced, and the Supreme Court affirmed, outright ownership as a prerequisite for a functioning housing market. Something had to give, but it would not be agricultural land or government land; public or quasi-public land was treated as outside of the debate. Instead, it was land held for the benefit of Native Hawaiians, a thinly disguised target. American history is full of examples of non-Indian politicians making the same basic calculation, using Native land as a pressure valve for large societal forces. By briefly exploring a few select examples—national parks, homesteading, and energy development—this Article unearths how Indigenous land is the neglected raw material behind many progressive successes. The point is not that national parks, a deep middle class, and affordable clean energy are bad things, but rather that there is little recognition that time and again the country asks Natives to foot the country's bill for these advances.

For nearly forty years, the connection between *Midkiff* and the country's pattern of denying Indigenous land rights has been neglected. True, commentators decried how the decision seemed to give the government carte blanche to take land by claiming the taking was for public use. But even that sort of critique receded after the uproar surrounding the *Kelo* decision sucked all the air out of the room.[27] *Kelo* replaced *Midkiff* in property textbooks and Hawai'i's Land Reform Act faded from view, pigeonholed as a one-off legislative correction to Hawai'i's feudalistic concentration of land holdings. It is time to bring *Midkiff* back into the light. The case deserves renewed scholarly attention by both property law and Indian law scholars. *Midkiff* is a reminder that progressively-oriented programs that purport to advance important social goals involving land often owe their strength to the taking of land from Indigenous peoples. By failing to critically engage with and recognize such seizures as part of a pattern of colonialization, the Supreme Court and legal scholars end up licensing continuing mistreatment of Native peoples.

This Article proceeds in four parts. Part I describes the conventional understanding of *Midkiff*, focusing on history, the land reform legislation, and the

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[26] *See generally* Rep. of the G.A. on its Fourth Session, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, U.N. Doc. A/HRC/4/32 (2007) (observing that the global loss of Indigenous land and resources is a continuing trend leading to forced migration, poverty, and human rights violations).

[27] *See* Ilya Somin, Opinion, *The Political and Judicial Reaction to Kelo*, WASH. POST (June 4, 2015, 1:12 PM) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo (highlighting *Kelo* as an unusually controversial case that generated "intense and widespread hostility").

litigation history culminating in the Supreme Court decision. Part II focuses on the Bishop Trust, the estate that predictably suffered the greatest loss of property and control as a result of the *Midkiff* decision. Using a wider-angle lens, Part III contextualizes *Midkiff* by showing how the taking of land in the case is part of a pattern of Indigenous land being taken to further progressive goals.

I. History of Land Ownership and Land Reform

The Fifth Amendment provides, in relevant part, "nor shall private property be taken for public use, without just compensation."[28] A lot is packed into the Takings Clause: What constitutes private property?[29] What does it mean for property to be taken?[30] Is the reference to public use a limitation on the state's power to take?[31] And what qualifies as just compensation?[32] *Midkiff* focused on the public use question. And although there are some exceptions, most academic commentary on the case centers on critiquing the Court's expansive and highly deferential approach to the public use requirement.[33] Those most disturbed by the path taken in *Midkiff* argue that the Court had killed the public use requirement, leaving the just compensation requirement as the only check on the use and abuse of eminent domain by states and localities.[34]

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[28] U.S. CONST. amend. V.

[29] *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (allowing a city to regulate a business out of operation without having to pay compensation); Pa. Nw. Distrib. v. Zoning Hearing Bd., 565 A.2d 1169 (Pa. 1989) (requiring compensation when a city zones a business out of operation).

[30] *Compare* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding that a regulation amounted to a taking of a company's subsurface rights) *with* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978) (holding that a regulation limiting vertical construction above a historical landmark was not a taking).

[31] *See* Kelo v. City of New London, 545 U.S. 469, 485 (2005) (economic development satisfies the public use requirement); Berman v. Parker, 384 U.S. 26, 33 (1954) (community redevelopment to transform a blighted area qualifies as a valid public use); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (taking property from large landowners to give to tenants is a permitted public use).

[32] *See, e.g.*, Marisa Fegan, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L. J. 269 (2007); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239 (2007).

[33] *See, e.g.*, John A. Humbach, *Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use*, 66 OR. L. REV. 547, 597 (1987) ("The statements in *Hawaii Housing*, albeit dicta, treating the fifth amendment words 'for public use' as a restriction on the takings power and equating them with use for a public purpose, were a significant departure from the precedents.").

[34] *See* James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1278 (1985) (arguing that the *Midkiff* decision made the definition of "public use" largely irrelevant and subject to minimal judicial supervision, leaving the "just compensation" requirement as the sole viable check on the government's use of eminent domain).

Notably absent from most critiques of *Midkiff* is any discussion, outside of a passing remark, of the fact that much of the land that was taken belonged to a trust set up to benefit Native Hawaiians. That is not to say that Hawai'i and Hawaiian history is entirely ignored, only that the state succeeded in erasing the case's racial and political saliance. The Land Reform Act of 1967 is presented as a corrective measure to deal with the problem of concentrated landholdings on the islands. Pulling the figures directly from the majority opinion, in the mid-1960s, 47% of the state's land was "in the hands of only 72 private landowners" and "22 landowners owned 72.5% of the fee simple titles" on O'ahu.[35] Seen in this light, Hawaiian landholdings were out of step with the rest of the United States and something had to be done to create a functioning land market.

This Part begins with a brief sketch of Hawaiian history in Section A, paying particular attention to how land rights were distributed, and Section B explains why large landowners preferred leasing their land. Section C then details the factors leading to the Land Reform Act. It is impossible to present anything other than a cursory version of Hawaiian history here, but the hope is that even a basic history will suffice to set the scene for this Article's argument that in practice land reform was a familiar type of land grab targeting Indigenous property. Following the sketched-out history, Section D then turns to the Supreme Court's *Midkiff* decision and scholarly reaction to the case.

A. Brief Sketch of Hawaiian History and Land Rights

The Hawaiian Islands were home to a thriving society long before contact with European sailors in 1778.[36] Polynesians arrived at the islands hundreds of years before, estimates of their arrival vary from 1000 to 1200 AD,[37] and over time

[35] *Midkiff*, 467 U.S. at 232.

[36] As Congress noted in its Apology Resolution, prior to European arrival, "the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii (Apology Resolution), Pub. L. No. 103-150, 107 Stat. 1510, 1510-13 (1993) [hereinafter Apology Resolution]. *See also* Brief of Amicus Curiae Office of Hawaiian Affairs in Support of Appellees at 3, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (Nos. 83-141, 83-236, 83-283) ("Before its contact with Western Civilization, Hawaii persisted for nearly a thousand years as an outpost of a complex Polynesian Civilization. During this period, the Hawaiians had developed a highly complex culture focused on a stable land tenure system, a thriving cooperative and subsistence economy, a sophisticated societal hierarchy and religious practices which controlled every facet of the daily life of all.").

[37] *See Early Hawaiians*, NAT'L PARK SERV., https://www.nps.gov/hale/learn/historyculture/early-hawaiians.htm (last updated June 8, 2021). *See also* NATIVE HAWAIIANS STUDY COMMISSION, VOLUME 1: REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 147 (1983) (noting that "scholars do not agree on the origin, timing of the initial settlement, and the number of periods of migration").

established unique ways of living. With sufficient agricultural productivity to support a large population, including priests and royalty,[38] Native Hawaiian society at the time of contact was marked by hierarchical relations and in-fighting between island kingdoms. Captain James Cook's "discovery" of Hawai'i in 1788 on behalf of the British Navy forever altered the course of Hawaiian history.[39] Though Cook would later be killed by Native Hawaiians after he attempted to kidnap Chief Kalani'ōpu'u, in 1779,[40] the lives of all Hawaiians would come to be intertwined with the interests of outsiders.[41]

The Hawaiian Islands were united into a single kingdom by King Kamehameha I through a series of military battles lasting more than two decades, beginning in 1786.[42] Following his conquests, King Kamehameha I distributed land to his loyal supporters and military leaders, as was his right under Hawaiian law.[43] The Hawaiian system of royal land (re)distribution by new monarchs and the associated requirement that commoners pay tribute or a portion of their produce to those given rights to land is often described as a form of feudalism.[44] However, there were significant differences

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[38] Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 849 (1975) ("This system [of land rights pre-contact] successfully sustained an extremely dense population and provided surplus goods sufficient to support chiefs and priests and to replenish Cook's expedition."); Sumner J. La Croix & James Roumasset, *The Evolution of Private Property in Nineteenth-Century Hawaii*, 50 J. ECON. HIST. 829, 832 (1990) ("even with these substantial taxes and land rents, the common people lived well above subsistence levels").

[39] Lane Kaiwi Opulauoho, *Trust Lands for the Native Hawaiian Nation: Lessons from Federal Indian Law Precedents*, 43 AM. INDIAN L. REV. 75, 78 (2018) (listing changes that followed Cook's arrival); Maivan Clech Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 237 (1989) (stating that after Captain Cook's arrival, "Hawaiian society suffered a series of systemic shocks of an ideological, social, and, at times, physical nature").

[40] For an account of Cook's death, see JOHN LEDYARD, A JOURNAL OF CAPTAIN COOK'S LAST VOYAGE TO THE PACIFIC OCEAN, AND IN QUEST OF A NORTH-WEST PASSAGE, BETWEEN ASIA & AMERICA; PERFORMED IN THE YEARS 1776, 1777, 1778, AND 1779, at 144-51 (1783), https://www.loc.gov/item/05039321.

[41] Outsiders were not just westerners but included significant immigrant populations from Asia. *See generally* ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAI'I (Candace Fujikane and Jonathan Y. Okamura eds., 2008).

[42] PAUL D'ARCY, TRANSFORMING HAWAI'I: BALANCING COERCION AND CONSENT IN EIGHTEENTH-CENTURY KĀNAKA MAOLI STATECRAFT 147-80 (2018); *Kamehameha the Great*, NAT. PARK SERV., https://www.nps.gov/puhe/learn/historyculture/kamehameha.htm (last updated Apr. 27, 2023).

[43] *See* KING. HAW. CONST. OF 1840, *reprinted in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III (1842) (explaining that all the land belonged to Kamehameha I and "there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.").

[44] *See, e.g.*, Eugene A. Boyle, *Status of the Public Use Requirement: Post-*Midkiff, 30 WASH. U. J. URB. & CONTEMP. L. 115, 133 (1986) ("Prior to annexation, the land of Hawaii was held in a complex tenure system similar to the feudal system of medieval Europe."); Allan F. Smith,

between European feudalism and the hierarchical structure of Hawaiian life. First among those differences was that in Hawai'i, if tenants grew unhappy with the demands of their local lord or landowner, they had a right to move to the land of another lord.[45] Such freedom of mobility meant that tenants in Hawai'i were generally better treated and subjected to less exploitation because landowners knew they needed to keep tenants relatively happy lest they relocate.[46] That is not to say that Hawaiian royals did not enjoy a lifestyle far above that of ordinary Hawaiians—the Iolani Palace was electrified before the White House[47]—only that it is overly simplistic to equate Hawai'i's land system with that of feudal Europe.[48]

Hawai'i's location made it an ideal stopping point for ships sailing the Pacific and increasing numbers of outsiders began to move to the islands. Whaling ships, naval warships, and trading vessels docked at the islands, increasing Hawai'i's contact with Europe, Asia, and the United States. Ships also brought missionaries, especially from the Congregational Church (now known as the United Church of Christ), as well as laborers from China, Japan, and other Asian countries. Strong demand for exported Hawaiian sandalwood made control of such forests a matter of state concern and provided the resources needed for members of the royal families to acquire imported luxury goods.[49] Contact with outsiders also brought wave after wave of epidemics—including venereal diseases, pestilence, influenza, smallpox, and many others—that

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Uniquely Hawaii: A Property Professor Looks at Hawaii's Land Law, 7 U. HAW. L. REV. 1, 2 (1985) ("[I]n Hawaii, halfway around the world, a very similar feudal system arose in lands with no seeming connection with England and apparently for exactly the same societal purpose: land was governmental power, and it was used for that purpose."); Penrose Clibborn Morris, *The Land System of Hawaii*, 21 A.B.A. J. 649, 649 (1935) ("We know that at the birth of Hawaiian History, the system of land tenure was very definitely a feudal system, very like that prevailing in Europe during the middle ages.").

[45] Levy, *supra* note 38, at 849 ("Although a commoner in Hawaii owed a work obligation to those higher in the structure, he was free to leave an ahupuaa if unhappy with his landlord. This . . . may have been a major factor in ameliorating abuses by the chiefs . . .").

[46] La Croix & Roumasset, *supra* note 38, at 833 ("Common people were not bound to the soil, unlike the serfs in Europe during the Middle Ages, and their relative mobility understandably contributed to their real incomes. While migration was infrequent, the common people were free to seek better opportunities or escape oppressive conditions . . . . The commoners' ability to vote with their feet placed constraints on the ability of chiefs to extract all income above subsistence levels . . . .").

[47] HNN Staff, *130 Years Ago, 'Iolani Palace Turned on its Lights. Today, the Feat is Being Recognized*, HAW. NEWS NOW (Mar. 24, 2018), https://www.hawaiinewsnow.com/story/37799970/130-years-ago-iolani-palace-turn-on-its-lights-today-the-feat-is-being-recognized.

[48] *See* ROBERT H. HORWITZ & JUDITH B. FINN, PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS 1 (1967) ("Hawaii's early land system was never fully or properly a feudal one, inasmuch as military services was not required of the lowest order of tenants, the commoners who actually tilled the land. Furthermore, tenants were not bound to the land by law.").

[49] D'ARCY, *supra* note 42, at 206-08.

decimated the Native Hawaiian population.[50] From an estimated population of 683,200 in 1778, by 1850 the estimated number of Native Hawaiians fell to 80,574.[51]

The first modern effort at land reform on the Islands took place in 1848 and laid the groundwork what would eventually turn into *Midkiff*. Outsiders initially had little security when it came to property rights, but as the population of non-Hawaiians increased so did the demand for land reform.[52] King Kamehameha I died in 1819 and was succeeded by King Kamehameha II, who ruled for just over five years.[53] King Kamehameha III's rule was longer, from 1825 until 1854, and it was during his reign that the Kingdom instituted an ambitious land reform effort, which has been called the Māhele or the Great Māhele.[54] Finalized in 1848, the Māhele aspired to divide Hawaiian land so that after the King claimed his share the remaining land would be roughly split in thirds, with one-third being designated as government or crown land, one-third to the chiefs and headmen, and "the remaining third to the Tenants, the actual possessors and cultivators of the soil, to have and to hold to them, their heirs and successors forever."[55] In practice, recognized land titles did not live up to the tripartite division contained in the initial legal structure behind the Māhele.[56] Following the division, the King voluntarily gave more than half of his land, 1.5 million acres out of his original allocation of approximately 2.5 million acres, to the government for the benefit of the Kingdom.[57] For a variety of reasons, including the costs associated with getting a land survey necessary to stake their claims, few Native Hawaiian tenant farmers acquired rights to land promised to them by the Māhele.[58]

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[50] *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 19-21 (2008) [hereinafter VAN DYKE, CROWN LANDS] (detailing the timing and types of epidemics that impacted Hawai'i).

[51] David A. Swanson, *A New Estimate of the Hawaiian Population for 1778, the Year of First European Contact*, 11 KAMEHAMEHA PUBL'G 203, 207 (2019).

[52] Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 L. & SOC'Y REV. 273, 284 (2005); JON J. CHINEN, THE GREAT MAHELE 7 (1958).

[53] CHINEN, *supra* note 52, at 6.

[54] *Id.* at 8.

[55] VAN DYKE, CROWN LANDS, *supra* note 50, at 40 (emphasis omitted) (quoting 3A *Privy Council Records*, Series 421, at 47-56).

[56] *See* Lewis, *supra* note 17, at 566 ("In spite of an effort by King Kamehameha III to reform land ownership in the Great Māhele of 1848 by dividing the land among the crown, the government, the chiefs, and the common people, land remained in the hands of a few.").

[57] VAN DYKE, CROWN LANDS, *supra* note 50, at 42.

[58] *See* Eugene A. Boyle, *supra* note 44, at 133 ("This redistribution plan [of the Great Māhele], however, resulted in only one percent of the land ultimately being transferred to the common people."); HORWITZ & FINN, *supra* note 48, at 3 ("[T]he mahele did little to change the structure of land tenure in Hawaii; indeed, it served to reinforce the long-standing pattern of concentrated ownership."). *See also* VAN DYKE, CROWN LANDS, *supra* note 50, at 46-49 (2008) (providing reasons tenants acquired relatively little land through the Māhele); Levy, , *supra* note 38, at 856-57 (same); La Croix & Roumasset, *supra* note 38, at 839 (same).

Despite the implementation problems, the Māhele radically altered land tenure in Hawai'i.[59] In theory, prior to the Māhele all land was held subject to the possibility of loss upon the death of a monarch, even though neither King Kamehameha II nor King Kamehameha III exercised their royal prerogative of redistributing land upon their succession to the Crown.[60] The Māhele replaced such hierarchical redistribution with secure land tenure.[61] Much of the land earmarked for royal families through the Māhele eventually would be transferred through successive devises to the Bishop Trust.[62] Successive legislation, the Alien Land Ownership Act of July 10, 1850 gave foreigners the explicit right to own land.[63] The Māhele and the Alien Land Ownership Act of 1850 together attempted to navigate the tension between traditional understandings of land and outsider demands for greater security. On the one hand, allowing foreigners to own property eventually contributed to the rise of concentrated landholding by large agricultural interests and the increasing dominance of the sugar industry in the Hawaiian economy.[64] But the actual distribution of property accomplished through the Māhele was motivated in part by a desire to protect Native Hawaiian land from being captured by foreign governments.[65] King Kamehameha III hoped that the Māhele, by separating land into different categories and attaching formal title to such holdings, would protect the land held in the King's own name from expropriation in the event that a foreign government took control of Hawai'i.[66]

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[59] *See, e.g.*, Morris, *supra* note 44, at 652 ("We have passed from feudalism to a modern property system in less than a century.").

[60] Levy, *supra* note 38, at 849 (describing the traditional rights to redistribute land upon the death of a leader).

[61] CHINEN, *supra* note 52, at vii.

[62] *See* Kamehameha Schools, Kamehameha Schools' Land Lineage, https://www.ksbe.edu/assets/site/special_section/aina/KS_Land_Legacy_Hawaii_Island_Map.pdf.

[63] VAN DYKE, CROWN LANDS, *supra* note 50, at 50.

[64] *See* Levy, *supra* note 38, at 857 (arguing that by replacing traditional land laws with "the principle that government land could be sold off" to westerners, "Western Imperialism had been accomplished without the usual bothersome wars and costly colonial administration"); Banner, *supra* note 52, at 304 (observing that the Māhele "allowed Hawaiian landowners, who were often land-rich but cash-poor, to sell their land to foreigners, and many did").

[65] *See* Banner, *supra* note 52, at 278 (explaining that the Māhele's goal "was to ensure that, in the event of annexation, Kamehameha III and other Hawaiian elites would not be dispossessed of their landholdings. The strategy was to convert those landholdings into a legal form that would be recognized by an incoming colonial government . . . as private property."); VAN DYKE, CROWN LANDS, *supra* note 50, at 5 (explaining that the Māhele was done "[t]o try to keep the lands in Native Hawaiian hands").

[66] CHINEN, *supra* note 52, at 16 (noting that the Māhele recorded the King's lands "in the same book as all other allodial titles, and the only separate book was to be that listing the government lands. It was Kamehameha III who insisted upon [this division], as a means of protecting his private lands in the event of an invasion by a foreign power."); Maui County, *Maui Island History* (Mar. 2008), https://www.mauicounty.gov/DocumentCenter/View/3231/History ("The intent of the Great Mahele and the Kuleana Act was to protect lands from foreign acquisition and

It was "designed, in significant part, to prevent the wholesale seizure [of land] and ensure that the bulk of the land remained in the hands of Native Hawaiians."[67]

The Māhele's impact continues into the present. Many of the ongoing debates about land ownership and use in Hawai'i can be traced to the Māhele's expressed goals and implementation challenges. The Māhele, which distinguished Crown land from the King's personal land and from land held by those outside of royal families, attempted to both preserve enough land for the continued viability of the monarchy while also recognizing permanent land rights in individuals.[68] It was crafted in the shadow of ever-increasing foreign influence over the islands and it both conceded to and resisted that influence.[69] Following the Māhele, tensions related to the problem of foreign pressure continued all the way until independence was lost in 1893.[70]

In 1893, a group of foreign dissidents, led by Lorrin A. Thurston, and supported by John L. Stevens, U.S. Minister to the Kingdom of Hawai'i, as well as troops from the USS Boston, overthrew the Hawaiian government.[71] The coup came on the heels of an effort by Queen Lili'uokalani to replace the "Bayonet Constitution"—a constitution forcibly imposed upon Hawai'i by westerners in 1887—with a new constitution that would restore authority to the Crown.[72] Wanting to avoid bloodshed, Queen Lili'uokalani formally yielded, under protest, "to the superior force of the United States of America" and, subsequently, abdicated her throne while

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provide native Hawaiians with the security of landownership."); Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 511 (2017) (applauding Kamehameha III as "innovative enough to marry western and Native Hawaiian legal concepts with the hopes of preserving his nation's heritage for his people" through the Māhele).

[67] VAN DYKE, CROWN LANDS, *supra* note 50, at 376.

[68] *See* Morris, *supra* note 44, at 650 ("This division was consummated in the years 1848-1850, and resulted in bringing to an end once and for all the feudal system of land tenure in Hawaii, and finally and conclusively establishing the principle of private allodial titles.").

[69] VAN DYKE, CROWN LANDS, *supra* note 50, at 5 (noting that the Māhele's was done in response to pressure from "Western advisors" while also seeking to protect Native Hawaiian land holdings); CHINEN, *supra* note 52, at 25 (noting King Kamehameha III's concern over foreign influence and desire to protect his land).

[70] *See* ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS 10 (1984) ("America's interest in the islands grew relentlessly throughout the nineteenth century.").

[71] For a history of the overthrow, see, e.g., VAN DYKE, CROWN LANDS, *supra* note 50, at 151-71; JAMES L. HALEY, CAPTIVE PARADISE: A HISTORY OF HAWAI'I 278-299 (2014); Troy J.H. Andrade, *American Overthrow*, HAWAII BAR J. 4 (April 2018).

[72] *See* Thomas J. Osborne, *The Main Reason for Hawaiian Annexation in July, 1898*, 71 OR. HIST. Q. 161 (1970) (concluding that the U.S. annexed Hawai'i to "secure commercial advantages" by easing trade with Asia). For more on the Bayonet Constitution, see VAN DYKE, CROWN LANDS, *supra* note 50, at 120-24; JONATHAN KAY KAMAKAWIO'LIE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 193-249 (2002).

imprisoned in the Iolani Palace.[73] A provisional government held power until July 4, 1894 when the Republic of Hawai'i was formed, with Sanford B. Dole named as the first President of the Republic.[74] Following the coup, U.S. President Grover Cleveland appointed U.S. Commissioner James H. Blount to investigate the situation and give recommendations.[75] Blount's report was sharply critical of the Americans involved in the overthrow and of the role of the U.S. Navy in violating Hawai'i's sovereignty,[76] but such conclusions meant little after William McKinley was elected President in 1897.[77] Hawai'i was annexed to the United States in 1898 and made a U.S. territory in 1900.[78]

After annexation and continuing the trajectory of increasing foreign control that began with the Māhele, Hawai'i was no longer independent and capitalism was allowed to operate largely unchecked. After a couple of failed starts, sugar replaced sandalwood and whaling as the major industry on the islands.[79] Consolidation in that industry resulted in a few firms dominating both production numbers and overall landholdings.[80] Hawai'i's ties with the United States also deepened. The United States

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[73] Apology Resolution, *supra* note 36. *See also* Jason Daley, *Five Things to Know About Lili'uokalani, the Last Queen of Hawai'i*, SMITHSONIAN MAG. (Nov. 10, 2017), https://www.smithsonianmag.com/smart-news/five-things-know-about-liliuokalani-last-queen-hawaii-180967155 (quoting Queen Lili'uokalani, "Now, to avoid any collision of armed forces and perhaps loss of life, I do, under this protest, and impelled by said forces, yield my authority until . . . [I am reinstated] in the authority which I claim as the constitutional sovereign of the Hawaiian Islands").

[74] *See* Donald Rowland, *The Establishment of the Republic of Hawaii, 1893-1894*, 4 PAC. HIST. R. 201, 202 (1935) (explaining the formation of the Provisional Government).

[75] *See id.* at 202-03.

[76] *Id.* at 206; James Blount, Report of the Commissioner to the Hawaiian Islands, S. EXEC. DOC. NO. 53-47 (1893).

[77] Thomas C. Sutton, *William McKinley*, *in* THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY 316, 321-22 (Ken Gormley ed., 2016) (noting that McKinley "supported [Hawaiian] annexation as a way to ensure access to Hawaii's sugar plantations and to use the Hawaiian Islands as a means of entry into Asian markets and as a military base"); George F. Pearce, *Assessing Public Opinion: Editorial Comment and the Annexation of Hawaii: A Case Study*, 43 PAC. HIST. REV. 324, 340 (1974) (observing that the question of Hawaiian annexation was politically partisan and overwhelmingly supported by President McKinley's Republican colleagues).

[78] *See Territorial Hawai'i Timeline,* UNIVERSITY OF HAWAII AT MĀNOA, https://coe.hawaii.edu/territorial-history-of-schools/territorial-hawaii-timeline/#1820%e2%80%931898 (last visited Nov. 9, 2023); Joint Resolution to Provide for the Annexing the Hawaiian Island to the United States, H.R.J. Res. 55-51, 55th Cong., 30 Stat. 750, 750 (1898).

[79] *See, e.g.*, Lawrence H. Kessler, *A Plantation upon a Hill; Or, Sugar Without Rum: Hawai'i's Missionaries and the Founding of the Sugarcane Plantation System*, 84 PAC. HIST. REV. 129 (2015) (discussing the rise of sugar plantation agriculture); Linda K. Menton, *Hawai'i Sugar Plantations*, 44 HIST. NEWS 34, 34 (1989) (noting the connection between a decline in whaling and the rising interest in sugar production around 1848).

[80] *See* Kirstin Downey, *Prince Kuhio and King Sugar: The Powerful Industry Became a Double-Edged Political Sword*, HONOLULU CIV. BEAT (Feb. 12, 2023),

had acquired exclusive rights to Pearl Harbor through the 1875 Reciprocity Treaty with the Kingdom of Hawai'i but the base remained relatively small for decades.[81] The December 7, 1941 surprise attack on Pearl Harbor by the Japanese Navy only underscored the strategic importance of Hawai'i, which after World War II became an important forward base for the subsequent wars in Korea and Vietnam.[82] Hawai'i became the 50th state in 1959, following a popular referendum highly supportive of statehood.[83]

B. Large Landowner Preference for Leasing

Residential leaseholds as a share of total housing in Hawai'i grew noticeably following the end of World War II.[84] For a number of reasons, large landowners chose to offer their land to the public in the form of long-term, fifty-five year leases, rather than to sell their land in fee simple.[85] Though fee simple has long been the norm in the United States, with owner-occupancy surpassing even the landlord-tenant relationship in most markets, nothing in U.S. law requires that property be conveyed in a fee simple form.[86] Though long-term leaseholds have never been the norm in the continental United States, they are not unheard of: the Chrysler Building in New York

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https://www.civilbeat.org/2023/02/prince-kuhio-and-king-sugar-the-powerful-industry-became-a-double-edged-political-sword (observing the monopolization of the Hawaiian sugar industry with domination by five firms); Sumner J. La Croix, *The Economic History of Hawai'i: A Short Introduction*, 6 (Univ. of Haw. Working Paper No. 02-3, 2002), https://www.economics.hawaii.edu/research/workingpapers/WP_02-3.pdf (providing a history of sugar in Hawaii).

[81] *See* Convention between the United States of America and His Majesty the King of the Hawaiian Islands, Haw.-U.S., Jan. 30, 1875, 19 Stat. 625.

[82] Cory Graff, *Kaho'olawe: The Pacific's Battered Bullseye*, NAT'L. WORLD WAR II MUSEUM (Nov. 20, 2021), https://www.nationalww2museum.org/war/articles/kahoolawe-island-us-navy (explaining Hawai'i's role in the Vietnam and Korean Wars).

[83] *See* Act of Mar. 15, 1959, Pub. L. No. 86-3, 73 Stat. 4.

[84] Sumner J. La Croix, James Mak, & Louis A. Rose, *The Political Economy of Urban Land Reform in Hawaii*, 2 (Univ. of Haw., Working Paper No. 93-13(R), 1994), https://www.economics.hawaii.edu/research/workingpapers/88-98/WP_93-13R.pdf ("Residential leaseholds did not become a major factor in Honolulu until after World War II.").

[85] For more on the market for leasehold tenure in Hawaii, see SUMNER LA CROIX, HAWAI'I: EIGHT HUNDRED YEARS OF POLITICAL AND ECONOMIC CHANGE 213-20 (2019) [hereinafter LA CROIX, HAWAI'I].

[86] *See* Lee Anne Fennell, *Fee Simple Obsolete*, 91 NYU L. REV. 1457 (2016) (arguing that the United States should move away from fee simple as the dominant form of property).

City sits on a ground lease,[87] ground rents are fairly common in Baltimore,[88] Stanford University offers ground leases to eligible faculty,[89] and tribal members living on the Navajo reservation typically do not own the land upon which their homes sit.[90] The fifty-five year lease that came to dominate land leasing in Hawai'i met the requirements for federally-secured home loans and reduced the cost of homeownership for families in the wake of the war.[91] In other words, though the remainder of this section focuses on supply-side factors, demand for less expensive housing options also contributed to the rise of long-term residential leasing in Hawai'i.[92]

A number of large landowners opted to lease, rather than sell, their land in part because they felt legally bound to do so. As discussed further in Part II, when Princess Bernice Pauahi Bishop died, her will specified that "trustees shall not sell any real estate, cattle ranches, or any other property, but . . . continue to manage the same,

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[87] *See* Shimon Shkury, *In a Down Economy, Ground Leases Are an Underutilized Development Solution*, FORBES (Aug. 25, 2020), https://www.forbes.com/sites/shimonshkury/2020/08/25/in-a-down-economy-ground-leases-are-an-underutilized-development-solution/?sh=51dbe5b96ecc; Regina Strait, *Understanding Ground Rent in Maryland* , THE PEOPLE'S LAW LIBRARY OF MARYLAND, https://www.peoples-law.org/understanding-ground-rent-maryland (last updated Nov. 7, 2023) ("nearly unique to the Greater-Baltimore area, ground rent is a periodic monetary payment by a tenant to a ground leaseholder who holds a revisionary interest in the property or 'ground' underneath a home").

[88] *See* Aja' Mallory, *Ground Rent – What Is It and What Can You Do About It?,* BALT. TIMES (Aug. 10, 2023), https://baltimoretimes-online.com/latest-news/2023/08/10/ground-rent-what-is-it-and-what-can-you-do-about-it.

[89] *See Ground Lease-Holders*, STANFORD UNIVERSITY, https://fsh.stanford.edu/homeowners/ground-lease-program (last visiting Dec. 8, 2023).

[90] *See* EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT 141-61 (2021) [hereinafter ROSSER, A NATION WITHIN] (discussing homesite leasing and grazing rights on the Navajo Nation); Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J.L. PROP. & SOC'Y 1, 33-51 (2020) (giving an overview of the trust status of reservation land and highlighting challenges associated with such land).

[91] *See* La Croix, Mak, & Rose*, supra* note 84, at 4 ("In Hawaii, residential ground lease lengths vary among different properties, but typically have been set at 55 years (e.g. the standard Bishop Estate lease) . . . The long initial fixed rent period has been set "to allow long-term mortgage financing from FHA and other institutional lenders."").

[92] *See* Bertha Sue Ward, Note, Hawaii Housing Authority v. Midkiff*: A Wolf in Sheep's Clothing?*, 12 W. ST. U. L. REV. 325, 326 (1984) (explaining that in the immediate period following World War II "there was a heavy demand for single family residences by veterans and other young people, [as a consequence,] the potential buyer did not have sufficient capital to pay for fee simple titles . . . . The leasehold provided a solution to this problem."); La Croix, Mak, & Rose, *supra* note 84, at 7 ("since the market price of a leasehold property is less than the market price of an identical fee simple property, borrowing-constrained households may prefer to buy leasehold property instead of fee simple to obtain more housing").

unless in their opinion sales may be necessary . . . ."[93] James Campbell, a prominent industrialist, originally from Ireland, with significant land holdings in Hawai'i, included a similar clause in his will; Campbell Estate trustees were to "keep intact my estate . . . the realty thereof shall be particularly and especially preserved intact and shall be alienated only in the event, and to the extent, that the obvious interest of my estate shall so demand."[94] Such limitations, however, tell only part of the story. Some large landowners not subject to such bequest limitations likewise chose to lease rather than sell their lands.[95]

When it came to incentivizing large landowners to lease rather than sell, the tax consequences of selling land were at least as important as trust requirements. Large landowners had owned their land in most cases for generations, meaning their tax basis (the value of their land when it was initially acquired) was significantly lower than the amount that would be realized from any land sale.[96] Large institutional owners would be taxed on all that gain, or at least all the gain from 1913, when the IRS was created, onward.[97] The Bishop Trust could avoid having land transactions be treated as ordinary income so long as it behaved as a passive landowner, but if it had too high a volume of land sales, it would be treated as if it were in the real estate business.[98] High-volume sellers faced the possibility that income taxes would consume most of the value generated from selling their land.[99] In such circumstances, it is not hard to see why large landowners would prefer leasing out their land.

Finally, whether for physical or cultural reasons, Hawai'i arguably invites owners to hold onto their property. Physically, even though Hawai'i is one of the few places in the United States where, because of its active volcanoes, "new" land comes into

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[93] La Croix, Mak, & Rose, *supra* note 84, at 8 (quoting the Will of the Honorable Bernice Pauahi Bishop (1884)).
[94] *Id.* at 9 (quoting The Estate of James Campbell, JAMES CAMPBELL, ESQ. 25 (1978)).
[95] *Id.* at 12.
[96] For more on the impact of the tax basis on the willingness of large property owners to sell their land, see Ward, *supra* note 92, at 326.
[97] GEORGE COOPER & GAVIN DAWS, LAND AND POWER IN HAWAII: THE DEMOCRATIC YEARS 416 (1985).
[98] La Croix, Mak, & Rose, *supra* note 84, at 12 (arguing that if the IRS treated land sale revenues realized by the large estates "as capital gains, it would have taxed the revenues at effective rates of 25 to 35 percent. If the IRS were to have treated the net revenues as ordinary income, it would have taxed them at rates of 70 to 91 percent."). Notably, when the Hawai'i House Lands Committee was debating the Land Reform Act, the Bishop Trust opposed the Act but argued that if it were to happen, "condemnation of tracts of residential lots by public authority might furnish the most meaningful approach in respect to the requirements of the Internal Revenue Service and thus enable this Estate to preserve its tax exempt status." R. Lyman, Jr., President, Board of Trustees, Bernice P. Bishop Estate, Letter to House Fourth State Legislature Committee on Lands, Apr. 19, 1967 (on file with author).
[99] *See* Spec. Com. Rep. 2, Hawaii Senate J. 1967, 785-90, at 786 (discussing the tax liability issue).

existence, the Hawaiian Islands are also uniquely bounded.[100] Residents can feel the scarcity of land and the competition for land in ways that are often more obscured in the continental United States, where an abundance of rural land continues to offer an escape hatch for pent-up demand.[101] Cultural explanations of different relationships to land are rife with challenges and any claims rest on tenuous grounds. But there is merit to the idea that Native Hawaiians in particular, having witnessed a rapid process of land dispossession that began prior to the coup and continued beyond annexation, might be inclined, justifiably, to hold onto land.[102] And the same could be said of large landowners, for whom land acquisition often took years and was associated with either royal lineage or commercial success.[103] A local norm of preferring to hold onto land rather than sell it could have been an additional factor in the problem of concentrated land ownership.

By the early 1960s, a small number of large landowners controlled a relatively high proportion of all land in Hawai'i.[104] A 1967 study, relied upon heavily during the *Midkiff* litigation, found that there were seventy-two landowners who had more than 1,000 acres each and that "[t]hese major private landowners own 1,923,182.56 acres, or 47 per cent of the total land area of the State."[105] Moreover, at the time of the study, the eighteen largest landowners "own[ed] approximately 40 per cent of Hawai'i's lands, a total of 1,655,874.67 acres, and seven owners own[ed] nearly 30 per cent of the land, a total of 1,203,487.07 acres."[106] Such concentration meant that the vast majority of Hawai'i's land was either held by the federal or state governments or

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[100] *See* Sumner J. La Croix & Louis A. Rose, *Public Use, Just Compensation, and Land Reform in Hawaii*, 17 RSCH. IN L. & ECON. 47, 60 (1995) (identifying the small size of Hawai'i as a natural limit on housing supply).

[101] *See* Cassie Ordonio, *A 'Tremendous Need' For Affordable Housing in Hawaii Leads To Long Waitlists*, HONOLULU CIV. BEAT (Sept. 7, 2023), https://www.civilbeat.org/2022/09/a-tremendous-need-for-affordable-housing-in-hawaii-leads-to-long-waitlists ("while there's a nationwide housing shortage, Hawaii's issue is different because of its strict zoning laws and limited land"). For a colorful account of how rural land can absorb demand for ownership among people who cannot afford property elsewhere, see TED CONOVER, CHEAP LAND COLORADO: OFF-GRIDDERS AT AMERICA'S EDGE (2022).

[102] *See also* Davianna McGregor-Alegado, *Ho'oponopono: Public Interest or Hawaiian Rights?*, KA HULIAU (Jan.-Feb. 1985) (on file with the author) (arguing that in light of the decline of the Lunalilo Estate following sales of its land, the clear lesson was "DO NOT ALLOW THE LAND TO BE SOLD") (emphasis in original).

[103] *See* COOPER & DAWS, *supra* note 97, at 208 (relating the conversation between a Philadelphia banker and the Hawaiian director of a large agriculture company, in which the director said, "we in the Islands don't sell land"); 1967 REPORT, *supra* note 19, at 4 (identifying "the attitude on the part of many landowners that land should seldom, if ever, be sold" as one of the reasons property owners leased but did not sell their residential properties).

[104] For a chart of "Land Controlled by Major Landowners: Statewide," including land owned and leased by major landowners, see HORWITZ & FINN, *supra* note 48, at 19-22 Table 4.

[105] *Id.* at 13.

[106] *Id.* at 13-14.

in the hands of these seventy-two private landowners, leaving only five percent of the land for other private land owners.[107] Ownership concentration varies across Hawai'i. The island of Ni'ihau, clocking in at 46,080 acres, is today owned almost entirely by Keith and Bruce Robinson, and the island of Lāna'i, at almost double the size, 90,240 acres, likewise remains almost entirely privately owned to this day by Oracle founder Larry Ellison, who purchased it in 2012.[108] Perhaps most notably as far as news coverage, Facebook founder Mark Zuckerberg paid $100 million for 750 acres on Kaua'i and briefly attempted to remove Native Hawaiians living there from the land before public pressure forced him to back down.[109]

But what really matters when it comes to land concentration in Hawai'i is ownership and land use patterns on O'ahu. Though O'ahu's land mass, 597 square miles, only amounts to around nine percent of the total land in the archipelago, O'ahu is not only the most populous island but also home to Honolulu, the state capital.[110] With a population of roughly one million people, roughly seventy percent of the state's population lives on O'ahu, and most of that number in the greater Honolulu area.[111] In 1967, the federal government owned "139,924.61 acres or 36.74 per cent of the total 380,800 acres of the island . . . [,] the Bernice P. Bishop Estate, . . . own[ed] 59,007.10 acres or 15.50 per cent of the island . . . [, and] [t]he state government own[ed] 56,672.00 acres or 14.88 per cent of the total area of the island."[112] What these numbers meant in practice was that comparatively little land was available for

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[107] *Id.* at 13.

[108] *Id.* at 38; Shinkle, *supra* note 17, at 66-67; Brittany Lyte, *Lanai's Newspaper Is Now Owned By The Company That Owns Lanai*, HONOLULU CIV. BEAT (Sept. 29, 2023), https://www.civilbeat.org/2021/06/lanais-newspaper-is-now-owned-by-the-company-that-owns-lanai (reporting that Ellison purchased ninety-eight percent of Lāna'i for $300 million in 2012); Brittany Lyte, *Kauai Council Passes Tax Break for Niihau, The 'Forbidden' Private Isle*, HONOLULU CIV. BEAT (Dec. 14, 2022) https://www.civilbeat.org/2022/12/kauai-council-passes-tax-break-for-niihau-the-forbidden-private-isle (noting that in 1864 King Kamehameha V sold Ni'ihau to the Sinclair family for $10,000 on the condition that "they preserve the Hawaiian language and Niihau's unique culture and lifestyle." Today the descendants of the Sinclair's, the Robinson family, continues to privately own Ni'ihau and provides housing to forty Native Hawaiian families). TRD Staff, *Billionaire Ellison Turning Hawaii's Lanai into "Playground for the Rich,"* THE REAL DEAL (June 12, 2022 12:00 PM), https://therealdeal.com/new-york/2022/06/12/billionaire-ellison-turning-hawaiis-lanai-into-playground-for-the-rich (discussing Larry Ellison); Douglas Martin, *Helen Robinson, Island Matriarch, Dies at 91; Preserved Native Culture on Niihaw in Hawaii,* N.Y. TIMES (Aug. 7, 2002), https://www.nytimes.com/2002/08/07/us/helen-robinson-island-matriarch-dies-91-preserved-native-culture-niihau-hawaii.html.

[109] *See* J. Kēhaulani Kauanui, *Settler Colonial Purchase: Privatizing Hawaiian Land*, *in* ALLOTMENT STORIES: INDIGENOUS LAND RELATIONS UNDER SETTLER SIEGE 164-77 (Daniel Heath Justice & Jean M. O'Brien eds., 2021) (describing the controversy and the litigation).

[110] STATE OF HAW. DEP'T. OF BUSINESS, ECON. DEV. & TOURISM, HAWAI'I FACTS & FIGURES (2023), https://files.hawaii.gov/dbedt/economic/library/facts/Facts_Figures_browsable.pdf.

[111] *Id.* at 2-3.

[112] HORWITZ & FINN, *supra* note 48, at 42.

private development by small landowners. The state and federal governments controlled most of the land and did not make that land available for residential development. The Bishop Estate's holdings similarly were unavailable for outright ownership by the public, with the land generally retained by the Estate and outsiders limited to leasehold interests for reasons explained previously in this section. Compounding all of this was the nature of the island itself, with many areas unsuitable for residential construction and the Pacific Ocean providing a natural limitation on further development. The resulting high prices fit standard, Economics 101, modeling: high demand and low supply pushed fee simple ownership prices skyward and left residents struggling to obtain their piece of the American dream.[113]

C. Land Reform Act

The islands were poised for radical change by the time Hawai'i became a state in 1959.[114] That same year, regular jet airline service began between Hawai'i and the continental United States.[115] Even before U.S. Marines first landed in Vietnam, in 1965, Hawai'i had become the jumping off point for the American military's wars in Southeast Asia.[116] Tourism and military spending transformed the islands and the value of residential land skyrocketed.[117] Those who leased their land from the large estates in the late 1940s and early 1950s often were protected by the lease terms against increases in land rent for the first thirty years. Accordingly, they experienced an extended period of paying only a small fraction of the rental land value.[118] But built into these long-term leases was a requirement that the tenant and landlord renegotiate the rent owed for the later years of the lease. Tenants knew that, given the dramatic increase in the value of Hawaiian land over this period, renegotiation would result in a spike in the cost of their leases. Though tenants had not complained about the low

[113] *See* Standing Comm. Report 827 (Majority) Lands on S.B. No. 1128, Hawaii House J. (1967), 797-801, at 799 (arguing in favor of land reform by observing that "[o]wning property, especially real property on which one lives, together with all of its legal and equitable rights, is an American dream.").
[114] *See, e.g.*, Standing Comm. Rep. 483, Hawaii Senate J. 1967, at 1063-67, at 1063 ("Hawaii has been in the throes of great economic boom, population increase, and social and political changes, especially since the advent of statehood.").
[115] *Chronology of Aviation in Hawaii*, HAWAII AVIATION (Mar. 24, 2015), https://aviation.hawaii.gov/events/chronology/1950-1959; SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST: GREED MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST 53 (2006).
[116] *See, e.g.*, Simeon Man, *Aloha, Vietnam: Race and Empire in Hawai'i's Vietnam War*, 67 AM. Q. 1085 (2015) (discussing the militarization of Hawai'i during the Vietnam War).
[117] *See generally* Colin D. Moore, *Hawaii: Priced Out of Paradise*, 11 CAL. J. POL. & POL'Y 1 (2019) (discussing the impact of tourism on the Hawaiian economy).
[118] *See* COOPER & DAWS, *supra* note 97, at 425 (noting that "lessees seldom acknowledged that for years they had been getting an exceptionally good deal").

amounts they had been paying, as more tenants faced renegotiation and high rates, they clamored for relief in the form of land reform.[119]

In 1962, Democrat John A. Burns became Governor of Hawai'i.[120] During Hawai'i's territorial period, from annexation to statehood, wealthy Republicans, supported by Native Hawaiians, enjoyed a long run of political control.[121] But Burns marked the start of a four-decade period of Democratic dominance, not just of the Governor's mansion, Washington Place, but of all state institutions.[122] Land reform—leasehold reform measures that would force owners to sell their land to existing tenants—was one of the party's planks from the beginning, but it did not happen immediately.[123] Native Hawaiians recognized that dismantling the large estates, even if framed in progressive terms, would involve taking land from the Bishop Estate. So, for example, when the legislature considered a leasehold reform bill in 1963, Native Hawaiians "marched at night to 'Iolani Palace, home of the vanished monarchy, where the state legislature now sat in session, and ringed the building with burning torches. The measure did not pass."[124] But the matter was not dropped.

The Hawai'i legislature ultimately succeeded in passing the Land Reform Act of 1967, but it would be another decade until large estates would feel the full effects of the Act.[125] The Act gave tenants the right to acquire fee simple title over the objections of their landowners so long as the tenant was living on the property and enough tenants in the subdivision desired to purchase the underlying land. The price of the land was to be set by mandatory arbitration, but with conditions that pushed the price downward.[126] The Act also provided tenants a mechanism to access state funds to support such a purchase, but in practice the tenants affected were fairly wealthy and did not need such support.[127] The state's role was limited: tenants would notify the

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[119] *See* La Croix, Mak, & Rose, *supra* note 84, at 27 ("As the date of rent renegotiation and higher rent payments neared, the present value of future higher rent payments increased. Thus, lessees had increased incentives to vote, lobby, or make political contributions to reduce future rents.").

[120] Daniel W. Tuttle, Jr., *The 1962 Election in Hawaii*, 16 WESTERN POL. Q. 426, 426 (1963).

[121] *Id.* ("Hawaii, after a decade of transition, in 1962 completely abandoned a half-century of Republicanism and became a solid Democratic area.").

[122] For an outstanding history of the period of single-party rule of Hawaii by Democrats, see COOPER & DAWS, *supra* note 97.

[123] *See* La Croix, Mak, & Rose, *supra* note 84, at 20; COOPER & DAWS, *supra* note 97, at 410-45; THE DEMOCRATIC PARTY PLATFORM 4 (1960), *in* THE DEMOCRATIC PARTY OF HAWAII PLATFORMS, 1954-1976, LLMC Digital ("to give to the people of Hawaii a reasonable choice between lease and fee simple residential land through . . . giving lease holders an option to purchase their land in fee").

[124] KING & ROTH, *supra* note 115, at 60-61 (2006).

[125] Haw. Rev. Stat. ch. 516.

[126] Haw. Rev. Stat. § 516-56.

[127] *See* Debra Pogrund Stark, *How Do You Solve a Problem Like in* Kelo, 40 J. MARSHALL L. REV. 609, 627 (2007) (observing that the tenants did not make use of the state financing assistance and noting that "[t]he Brief for the Appellees raised the point more than once that the tenants who were now to benefit from the Act were wealthy, yet the Court failed to

Housing Authority of their desire to become owners and the Housing Authority would enforce the terms of the forced sale, but the land never became public land.[128] Instead, the tenancy and the underlying fee were merged and became the property of the former tenant. Notably, after obtaining fee simple title, the tenant-turned-owner was free to relet the property as a leasehold, free from the threat of that leasehold being taken under the Act.[129] The Act was, in short, a way to transfer property from one set of private parties, the large estates, to another set of private parties, middle- and upper-class tenants holding long term leases.

Despite its passage, implementation of the Act was delayed. Governor Burns did not want to enforce it and let it be known that he would not process lease-to-fee applications.[130] Nevertheless, most of the large estates got the message—residential lease arraignments were vulnerable. Following passage of the Act in 1967, only the Bishop Estate continued to negotiate new leasehold contracts.[131] The state stepped up its pressure in 1975 through amendments providing tenants the right to the value of any improvements on the land at the end of the lease term.[132] The contracts had given landowners the right to any improvements not removed from the property,[133] but the 1975 amendments further eroded landowner rights by taking away this reversionary interest.[134] By tilting the scales in favor of tenants and applying that pressure not just to new contracts but to pre-existing leases, the amended version of the Land Reform Act "was designed not merely to force the transfer of land for an

address this."); Lewis, *supra* note 17, at 587 ("Since no public funds have been used to purchase the property, it may be fairly assumed that the purchasers are upper-income tenants with no need for public financing (in contrast to many of the Hawaiians who are beneficiaries of the Bishop Estate).").

[128] Haw. Rev. Stat. § 516-22.

[129] Brief for Appellees at 11, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (Nos. 83-141, 83-283) (noting that the Land Reform Act "*does not restrict* the lessee-acquirers from reimposing the same long-term leaseholds the legislature has supposedly found so harmful").

[130] La Croix, Mak, & Rose, *supra* note 84, at 21; COOPER & DAWS, *supra* note 97, at 412.

[131] La Croix, Mak, & Rose, *supra* note 84, at 21.

[132] A Bill for an Act Relating to Residential Leaseholds, Act 184, S.B. No. 1200, 1975 Haw. Sess. Laws 408. *See also* La Croix, Mak, & Rose, *supra* note 84, at 22 ("Act 184 (1975) required that at the termination of a lease, the lessor compensation the lessee for unremoved onsite improvements at fair market value. This provision applied to existing and future leases.").

[133] Benjamin A. Neil, *Ground Rents from Maryland to Hawaii, Leasehold Interests in Residential Real Estate*, REAL ESTATE ISSUES 55-59, at 56 (Fall 2006) ("[A]t the conclusion of the lease term, a residential lessee had three choices: renegotiate the lease, remove his or her dwelling or forfeit the value of improvements.").

[134] For coverage of the loss of this reversionary right, see Susan Lourne, Comment, Hawaii Housing Authority v. Midkiff *a New Slant on Social Legislation: Taking from the Rich to Give to the Well-to-Do*, 25 NAT. RES. J. 773, 775 (1985).

equivalent amount of wealth, but to force a transfer of land without just compensation, as measured by market value."[135]

In 1979, in response to a lease-to-fee application, the trustees of the Bishop Estate sued the Hawai'i Housing Authority seeking a declaratory judgment that the Land Reform Act was unconstitutional. Five years later, the U.S. Supreme Court came down on the side of the state, upholding the Land Reform Act as a valid exercise of the state's eminent domain power.[136]

D. Litigation and the *Midkiff* Decision

The U.S. Supreme Court decision in *Hawaii Housing Authority v. Midkiff*, as well as the academic understanding of the case ever since, largely followed the path laid out by Harvard Law Professor Laurence H. Tribe in the Brief for Appellants. At the time, Tribe was serving as Special Deputy Attorney General, and he was joined on the powerhouse brief by, among others, fellow Harvard Law professor, David Rosenberg, and by Kathleen Sullivan, who would go on to be the Dean of Stanford Law School.[137] According to Tribe, "[t]he issue in this case is whether the United States Constitution freezes our fiftieth state into its feudal past."[138] Seen from this light, the problem to be corrected was a land monopoly caused by a "few large landowners, retaining a tight grip on the land, [who] have chosen to lease rather than sell [the land] to the many who make their homes there."[139] This land oligopoly, Tribe argued, could be traced to Hawai'i's feudal past, during which time "landlord chiefs . . . were able to exact land, labor, and property" from tenants.[140] It was the landowners who were to blame. They "persistently refused to sell their land in fee simple,"[141] "strangling the supply of houselots for sale."[142] Missing from Tribe's account, and from most scholarly commentary on the case, is acknowledgement of the unique position of the Bishop Estate as both land reform's primary target and the holder of land meant to benefit Native Hawaiian children.

Following oral argument, the State of Hawai'i won, with Justice O'Connor writing the opinion for the unanimous, 8-0, Court (Justice Marshall did not participate in the hearing or holding of the case).[143] Though the case reached the Court at a somewhat

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[135] La Croix & Rose, *supra* note 100, at 69. *See also Id.* at 49, 65 (further explaining the just compensation problem).
[136] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). State-level litigation continued until the Hawaii Supreme Court, in 1985, affirmed the legality of the Land Reform Act under the state constitution. Haw. Hous. Auth. v. Lyman, 704 P.2d 888 (Haw. 1985).
[137] *See Midkiff*, 467 U.S. at 231 (1984) (list of counsel).
[138] Brief for Appellants at 1, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (Nos. 83-141, 83-283).
[139] *Id.*
[140] *Id.* at 2.
[141] *Id.* at 3.
[142] *Id.* at 4.
[143] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

awkward stage, with some parties calling for the Court to hold off on making a determination until the matter had been fully resolved by the state court system,[144] Justice O'Connor issued a sweeping opinion. Under the Fifth Amendment of the U.S. Constitution, the Court held, Hawai'i could take land from landowners and transfer title to lessees.[145] So long as just compensation was paid, the Court has an "extremely narrow" role when reviewing whether use of the eminent domain power by the state meets the Fifth Amendment's public use requirement.[146] Although the Court acknowledged a long line of cases holding that compensation alone is not enough to immunize takings of private property from one party for the benefit of another party, it distinguished those cases by arguing that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[147]

The Court's adoption of the rational basis standard of review determined the result, even for a taking with a questionable public use that transferred property from one private party to another.[148] The Court agreed with Tribe's characterization of the Land Reform Act, explaining, "[t]he people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs."[149] Justice O'Connor went on to observe that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers," and argued that the Land Reform Act was a "rational approach to identifying and correcting market failure."[150] But in light of the highly deferential approach the Court took when considering the public use requirement, such justifications are little more than window dressing. According to the unanimous Court, "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

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[144] *See* La Croix & Rose, *supra* note 100, at 48 ("Parallel litigation in Hawaii state courts ended in 1985 when the Hawaii State Supreme Court found that the LRA did not violate the Hawaiian constitution.").
[145] *Midkiff*, 467 U.S. at 245.
[146] *Id.* at 240.
[147] *Id.* at 241.
[148] *See* Stuart P. Kastner, Note, *Constitutional Review of State Eminent Domain Legislation:* Hawaii Housing Authority v. Midkiff, 9 U. PUGET SOUND L. REV. 233, 246 (1985) ("The Court examined neither the facts of the precedent upon which it relied nor the tenuity of the public benefit to be achieved under the Hawaii Act.").
[149] *Midkiff*, 467 U.S. at 241-42. *But see* Rohrbaugh, *supra* note 10, at 508 ("In sum, in dealing with the problem of a land oligopoly in early America, the redistribution of land was accomplished through less oppressive means that the use of eminent domain.").
[150] *Midkiff*, 467 U.S. at 242. *But see* Miles Woodlief, Note, *Public Use Doctrine Redefined under an Economic Analysis:* Hawaii Housing Authority v. Midkiff, 20 U. SAN FRANCISCO L. REV. 121, 135 (1985) (noting that the Court, "using high housing prices as proof, held that the market share controlled by the various land trusts was sufficient evil in itself," and adding that "the Court ignored the impact that various external factors (such as popularity, weather, beaches, surf, etc., that is, the intrinsic value of land on a tropical island) have on the market price.").

legislation—are not to be carried out in the federal courts."[151] The Court was not going to second-guess Hawai'i's declared reasons, even if in practice such land reform transferred property to tenants with no guarantee that such transfers would facilitate more homeownership in the state.[152]

The Court's evisceration of "public use" as a meaningful check on the state's power of eminent domain is the primary focus of most academic commentary on the case.[153] That is not to say that the result in *Midkiff* was entirely a surprise.[154] The Court

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[151] *Midkiff*, 467 U.S. at 242-43.

[152] *See* Lewis, *supra* note 17, at 589 ("Fee simple ownership of land in Hawaii will increase, but where is the broad societal benefit when the only beneficiaries under this scheme are upper-income tenants?"); Lourne, *supra* note 134, at 790 (arguing that the gains anticipated by the Act were speculative and required significant time, and "[i]n the meantime, private parties enjoy the property taken by the State while the public can be guaranteed no benefit.").

[153] *See, e.g.*, James W. Ely, *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 98, 105 (David J. Bodenhamer & James W. Ely eds., 3rd ed. 2022) ("In *Hawaii Housing Authority v. Midkiff* (1984), the Court virtually eliminated the public use requirement as a restriction on the exercise of eminent domain power."); David L. Callies, Emily Klatt, & Andrew Nelson, *The Moon Court, Land Use, and Property: A Survey of Hawai'i Case Law 1993-2010*, 33 U. HAW. L. REV. 635, 652 (2011) ("the Supreme Court's virtual elimination of the public use clause of the Fifth Amendment in *Hawaii Housing Authority v. Midkiff*"); Sara B. Falls, Note, *Waking a Sleeping Giant: Revisiting the Public Use Debate Twenty-Five Years After* Hawaii Housing Authority v. Midkiff, 44 WASHBURN L.J. 355, 378 (2005) (discussing *Berman* and *Midkiff*: "the public use requirement has been rendered useless through modern case law . . . . The effect of this is that public use now can mean any use . . ."); David L. Callies, Donna H. Kalama, & Mahilani E. Kellett, *The Lum Court, Land Use, and the Environment: A Survey of Hawaii Case Law 1983-1991*, 14 U. HAW. L. REV. 119, 153 (1992) ("the United States Supreme Court decimated the public purpose of the Fifth Amendment to the United States Constitution in *Hawaii Housing Authority v. Midkiff*"); Jonathan Neal Portner, Comment, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BALT. L. REV. 542, 554 (1988) ("By limiting the public use requirement examination to a reasonableness test, courts have kept the requirement in name only. By deferring to the state's expansive use of eminent domain, courts have left the term devoid of meaning."); Janda, *supra* note 17, at 213 ("The impact of this logic on the public use limitation is devasting. The equating of the eminent domain power with the police power reduces the public use clause to mere surplusage, leaving little more than legislative imagination to protect private property from the whims of majoritarian politics."); Lewis, *supra* note 17, at 589 ("The power of eminent domain seems to be limitless provided there is any semblance of a public use."); Durham, *supra* note 34, at 1283 ("*Midkiff* eliminates the judicial power to enforce the fifth amendment's "public use" check."); Kastner, *supra* note 148, at 249 ("Another important and related consequence of the *Midkiff* decision is that it eviscerates the protections afforded private landowners under the public use clause of the fifth amendment."); *The Supreme Court, 1983 Term, supra* note 18, at 226 ("The decision in *Hawaii Housing Authority v. Midkiff* all but prohibits courts from independently assessing whether appropriations of property or regulatory takings serve a public use.").

[154] *See* Sullwold Hernandez, *supra* note 17, at 819 ("the breathtaking scope of the holding in *Midkiff* may have been unexpected, but it was not entirely unpredictable"); Lourne, *supra* note 134, at 788 ("Considering only the language used in recent cases deciding public use

in 1954 had upheld the use of the eminent domain power for a private-to-private transfer in *Berman v. Parker*.[155] Though that case involved redevelopment of a blighted area of Washington, D.C., while *Midkiff* involved a transfer from large landowners to middle- and upper-class tenants, Justice O'Connor's decision leaned into the deferential standard announced in *Berman*.[156] Together, *Berman* and *Midkiff* came to symbolize the demise of the "public use" requirement,[157] though it would take two more decades for the public to become aware of the Court's deferential approach to state justifications for taking property. In the *Kelo v. New London*[158] decision in 2005, the Court signed off on the taking of private property for the purpose of private-led economic redevelopment.[159] This was but a reaffirmation of *Berman* and *Midkiff*. Yet, as Richard Epstein observed, *Kelo* generated "widespread public outrage, while twenty-one years earlier *Midkiff* had been passed over in silence."[160] But given the deferential approach which *Midkiff* carried forward and extended from *Berman*, *Kelo* itself was hardly an outlier in terms of applicable doctrine.[161] After all, the Court had

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clause challenges to an exercise of sovereign eminent domain power, the outcome in [*Midkiff*] was predictable."); Terri A. Muren, *Eminent Domain:* Hawaii Housing Authority v. Midkiff- *Public Use Coterminous with Scope of Police Power*, 53 UMKC L. Rev. 324, 346 (1985) ("The outcome in *Midkiff* is not surprising in light of precedent and the Court's "hands off" approach evident in the judicial review of socioeconomic legislation. Although the just compensation requirement of the fifth amendment remains vital, the public use requirement is non-existent for all practical purposes."); Tom Grande & Craig S. Harrison, Hawaii Housing Authority v. Midkiff—*The Hawaii Land Reform Act is Constitutional*, 6 U. HAW. L. REV. 601, 602 (1984) ("[T]he Court's opinion and analysis are dictated by sound judicial precedent. *Hawaii Housing Authority v. Midkiff* simply affirms the minimum rationality standard that the Court has always applied in its review of state legislative findings of public use.").

[155] 348 U.S. 26 (1954).

[156] *Midkiff*, 467 U.S. at 239. The Ninth Circuit, in contrast, emphasized the difference between "condemnation of buildings in a slum area" in *Berman* and the granting to the "lessee of condemned property with greater rights to the property than the owner" under Hawaii's Land Reform Act. *Midkiff v. Tom*, 702 F.2d 788, 796-97 (9th Cir. 1983).

[157] *But cf.*, Case Comment, *Constitutional Law. Fifth Amendment. Ninth Circuit Rejects Public Use Clause Challenge to Honolulu's Lease-to-Fee Ordinance.* Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997)*, 111 HARV. L. REV. 1614, 1614 (1998) ("it is difficult to reconcile the Supreme Court's 1984 decision in *Hawaii Housing Authority v. Midkiff*, which nearly eliminated judicial review of compensated takings, with the Court's subsequent decisions, which increased judicial scrutiny of uncompensated regulation").

[158] 545 U.S. 469 (2005).

[159] *Id.* at 478.

[160] EPSTEIN, *supra* note 22, at 110. *See also* Michael Allan Wolf, *Hysteria versus History: Public Use in the Public Eye*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 15, 15 (Robin Paul Malloy ed., 2008) (observing that neither *Berman* nor *Midkiff* "resulted in public and political reactions that were in any way comparable in breadth and intensity to the furor spawned by the decision in New London's favor that the Court announced on June 23, 2005.").

[161] *See* D. Benjamin Barros, *Nothing "Errant" About It: The* Berman *and* Midkiff *Conference Notes and How the Supreme Court Got to* Kelo *with Its Eyes Wide Open*, *in* PRIVATE PROPERTY,

already dismantled the Fifth Amendment's public use requirement back in 1984 with *Midkiff*.[162]

Notably absent from both the Court's opinion in *Midkiff* and most critical commentary is acknowledgment that the land subject to the taking was Native land; that the large estate that would predictably lose the most from the case held the land for the benefit of Native Hawaiian children.[163] Instead, the Land Reform Act is understood exactly as the State of Hawai'i hoped, as an effort to deal "with a land oligopoly traceable to its monarchy," as Tribe described it in the first sentence of presentation during oral argument.[164] Individual homeowners, "forced to build on top of land that they must rent," are the good guys, and "the small number of owners [who] simply refuse to sell" are the bad guys.[165] The Ninth Circuit's conclusion that the Land Reform Act was "a naked attempt on the part of the state of Hawai'i to take

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COMMUNITY DEVELOPMENT, & EMINENT DOMAIN (Robin Paul Malloy ed. 2007) (arguing that the Court deliberately weakened the public use requirement in ways that opened the door for *Kelo*); Russell A. Brine, *Containing the Effect of* Hawaii Housing Authority v. Midkiff *on Takings for Private Industry*, 71 CORNELL L. REV. 428 (1986) (predicting the outcome of *Kelo*-type takings based on *Midkiff*'s deferential approach to the public use requirement). *See also* Glen H. Sturtevant, Jr., Note, *Economic Development as Public Use: Why Justice Ryan's* Poletown *Dissent Provides a Better Way to Decide* Kelo *and Future Public Use Cases*, 15 FED. CIR. B.J. 201, 214 (2005) ("Both *Berman* and *Midkiff* combine to lay the foundation for the Supreme Court's holding in Kelo."); Vetter, *supra* note 10, at 257 ("[Kelo] failed to resurrect property rights to the prominence guaranteed by the Constitution and timidly followed the 1984 precedent of *Hawaii Housing Authority v. Midkiff*, which, by use of language utterly and needlessly deferential to the legislature, upheld private property takings literally void of public use and virtually void of proper public benefit.").

[162] *See*, *e.g.*, Falls, *supra* note 153, at 370 (discussing *Berman* and *Midkiff*: "By directing courts to defer to state legislative definitions of blight and public use, states can now condemn private property and transfer that property to private parties for almost any use or purpose."); Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 295-96 (2000) ("In *Hawaii Housing Authority v. Midkiff*, the United States Supreme Court dealt the public use requirement a final mortal wound."); Durham, *supra* note 34, at 1278 ("In the recent decision of *Hawaii Housing Authority v. Midkiff*, the Supreme Court made the definition of "public use" largely irrelevant"); Shinkle, *supra* note 17, at 85 ("In *Hawaii Housing Authority v. Midkiff* a unanimous Court pushed the public use restriction on eminent domain takings to its furthest point, if not complete extinction."); Muren, *supra* note 154, at 324 ("the decision in *Midkiff* may represent the final death knell of any effective purpose of the public use limitation in the fifth amendment."); Grande & Harrison, *supra* note 154, at 609 ("The Supreme Court confirmed the demise, accurately predicted forty years ago, of public use as a limitation upon a legislature's exercise of the power of eminent domain.").

[163] *See also* Lewis, *supra* note 17, at 588 ("The Court in *Midkiff* assumes that all tracts of land subject to the Land Reform Act are similar. This assumption does not recognize the subjective value of the land. Certain lands affected by the Act are sacred to the native Hawaiians.").

[164] Transcript of Oral Argument at 1, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (No. 83-141).

[165] *Id.* at 2.

the private property of *A* and transfer it to *B* solely for *B's* private use and benefit" drops away entirely.[166] The case—and the commentary—centers on the Court's deferential approach to the public use requirement, leaving behind the actual taking that the Court was asked to consider.[167] But as subsequent Parts of this Article show, the identity of the "loser" in the case was readily apparent and not at all surprising. Though academics and the Court tend to think of *Midkiff* as an anti-oligarchy case, exactly as the case was framed by Tribe, it is better understood as an anti-Native case involving colonial exercise of power over the sliver land that remained in Native hands following the country's conquest of Hawai'i.

II. The Bishop Trust

The large landowner with the most to lose from land reform was the Bishop Estate, the *Midkiff* plaintiff, but you would not know that from the state's arguments. During oral arguments, Tribe started down a path that could have led the Court to hone in on the Bishop Estate when he noted that "the economic problem [of the housing market] is focused on O'ahu."[168] But as Tribe went on to observe, "the [Hawai'i] legislature found that a statewide solution would make more sense,"[169] and the conversation continued without acknowledgment of the unique position of the entity, the Bishop Estate, most affected by the Land Reform Act. The Court, likewise, told only part of the story when it accepted Hawai'i's anti-oligopoly land reform rationale at face value and chose to avoid the messiness that would have come from exploring the Bishop Estate's significance and history.

The Bishop Trust is not the single largest landowner in Hawai'i, that distinction belongs to the federal and state governments, but it did own 369,699.68 acres of land in 1967, or nine percent of the state's total acreage.[170] The vast majority of that land was leased out to others, for everything from grazing (104,020.92 acres) to commercial

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[166] Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

[167] *See, e.g.*, Sturtevant, Jr., *supra* note 161, at 213 ("The *Midkiff* Court reaffirmed this blind deference [from *Berman*] to the legislature."); Woodlief, *supra* note 150, at 139 ("*Midkiff* has made clear that only adequate compensation, a legislative declaration, and an imaginary judiciary are necessary to validate an eminent domain action. . . . *Midkiff* apparently proposes that adequate compensation pursuant to a legislative declaration constitutes a valid taking."); Kastner, *supra* note 148, at 245 ("After the *Midkiff* decision, however, so long as the legislature recites some public purpose for its eminent domain legislation, the Court must defer.").

[168] Transcript of Oral Argument at 12, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (No. 83-141).

[169] *Id.* at 12-13.

[170] HORWITZ & FINN, *supra* note 48, at 17 Table 3. *See also* CLINTON T. TANIMURA & ROBERT M. KAMINS, A STUDY OF LARGE LAND OWNERS IN HAWAII 17 (1957) (reporting that in 1957 the Bishop Trust had nearly the same amount of land, "some 369,467 acres, or approximately 577 square miles").

(136.00 acres) use.[171] Though the Bishop Trust owned land on five islands, "95 per cent of the Estate's lands and 99 per cent of their aggregate market value are concentrated on Oahu and Hawaii."[172] Because so much of its land, 59,007 acres, was located on O'ahu in particular,[173] the Bishop Trust's property was extremely valuable and subject to greater political wrangling than if more of its holdings were on less populated islands. The Bishop Trust also leased out more of its land, 11,427.92 acres, for one- and two-family residential purposes than any other large private landowner.[174] The Trust was not just a big player relative to other large estates, its residential leases were a big part of the overall housing market: "On Oahu overall during the 1960s, Bishop's lease lots accounted for 40% of all new lots coming on the market. From 1970 to 1975 the figure rose to 50%."[175] This meant that implementation of the Land Reform Act's lease-to-fee conversion program would predictably impact the Bishop Trust more than it would other large landowners. And that is exactly what happened. *Midkiff* opened the door and, ultimately, the Bishop Estate was subject to more than half, 57.3 percent, of all lease-to-fee conversions.[176] Though Land Reform was described by both the legislature and the Supreme Court as a statewide program, in practice it worked as it was designed to work, disproportionately taking residential leasehold property from the Bishop Estate—and from the Native Hawaiian children who were the beneficiaries of the trust—and turning it over to the relatively wealthy tenants living on leased land.[177]

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[171] HORWITZ & FINN, *supra* note 48, at 26-29 Table 5.
[172] TANIMURA & KAMINS, *supra* note 170, at 17.
[173] HORWITZ & FINN, *supra* note 48, at 44 Table 8.
[174] *Id.* at 23 Table 5.
[175] COOPER & DAWS, *supra* note 97, at 422.
[176] LA CROIX, HAWAI'I, *supra* note 85, at 224. The heavy burden on the Bishop Estate of such conversions owed itself both to its practice of continuing to offer long term residential leases after other large estates stopped doing so, as well as its significant land holdings on Oahu. *See* 1967 REPORT, *supra* note 19, at I-9 ("A total of 23,754 single family leased fee conversions were identified in Hawaii. Most of these conversions occurred during two time periods—1979-1982 and 1986-1990. All but 295 of these leased fee conversions have been on Oahu."). But even beyond Oahu, "Bishop Estate properties account for all of the Neighbor Island (Maui and Hawaii) conversion transactions." *Id.* at 21. For a chart of all the conversions, see *id.* at 19 Table II-1.
[177] COOPER & DAWS, *supra* note 97, at 428 ("As of the mid-1980s, then, the residential leasehold situation involved some of Hawaii's most privileged people seeking land redistribution from the least. To call this 'land reform,' as though it bore some similarity to land redistributions in the Third World, was an incongruous use of language."). *See also id.* at 445 ("most lessees of the 1980s were by all other socio-economic standards fairly conspicuous 'haves,' as compared with the Hawaiian children who were the beneficiaries of the Bishop Estate."); Stark, *supra* note 127, at 647 ("the Land Reform Act actually benefited wealthy non-native Hawaiians (the tenants who in fact used the Act to force a sale of land to them) at the expense of native Hawaiian children who were the beneficiaries of the Bishop Estate's trust and beneficial owner of the land forcibly taken.").

A. The Trust

When Princess Bernice Pauahi Bishop died in 1884, her will gave the bulk of her estate to the named trustees and their heirs and assigns "to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools . . . giving the preference to Hawaiians of pure or part aboriginal blood."[178] The will went on to direct the trustees to "not sell any real estate, cattle ranches, or other property" unless it is necessary to do so.[179] Bernice Pauahi Bishop had not been in possession of most of the land given to the trust for long; 353,000 acres came to her by way of the death in 1883 of her cousin, Ruth Keʻelikōlani.[180] The great-granddaughter of Kamehameha I, Bernice Pauahi Bishop had previously inherited 16,042.84 acres from her parents, plus an additional 9,557 acres from an aunt.[181] Bernice Pauahi Bishop was survived by her husband, Charles Reed Bishop, who "conveyed the 29,069 acres he had inherited back to the Bernice Pauahi Bishop Estate . . . [and] deeded an additional 64,619 acres of his own lands to the Estate."[182] The Bishop Trust, therefore, was funded with what amounted to the remains of much of the land set aside for royalty in the Māhele of 1848.[183] Bernice Pauahi Bishop was the "last of the direct Kamehameha line."[184] This was land, separate from Crown land, that Kamehameha III had distributed in part to try to keep such land "in Native Hawaiian hands in the event sovereignty over the Hawaiian Islands was lost to a foreign power."[185] It was also land dedicated to the education of Native Hawaiians.

Today, the Kamehameha Schools include multiple campuses, educating more than seven thousand students, and an array of outreach programs that push the number of students served up another seventy thousand.[186] Though the boys' school and the girls' school were separate until 1965, the principal school, located on a 600-acre Honolulu campus, is now one of the leading coed schools in the state.[187] Alumni

[178] *Appendix*, *The Charitable Trust Provisions of Princess Pauahi's Will and Two Codicils*, *in* COOPER & DAWS, *supra* note 97, at 301.
[179] *Id.*
[180] COOPER & DAWS, *supra* note 97, at 26.
[181] VAN DYKE, CROWN LANDS, *supra* note 50, at 313.
[182] VAN DYKE, CROWN LANDS, *supra* note 50, at 308 fn. 3.
[183] *See* TANIMURA & KAMINS, *supra* note 170, at 17 (noting that Bernice Pauahi Bishop was the "last of the direct Kamehameha line" and left an estate consisting of land "on the five principal islands of the Territory").
[184] *Id.*
[185] VAN DYKE, CROWN LANDS, *supra* note 50, at 315.
[186] KAMEHAMEHA SCHOOLS, REPORT ON FINANCIAL ACTIVITIES JULY 1, 2022 – JUNE 30, 2023 (2023), https://www.ksbe.edu/assets/annual_report/Financial_Activities_2023.pdf. For more on the Kamehameha Schools, see *About Us*, KAMEHAMEHA SCHOOLS, https://www.ksbe.edu/about-us (last visited Sept. 29, 2023).
[187] *See The Best High Schools in Hawaii*, POLARISLIST, https://www.polarislist.com/best-high-schools-in-hawaii (last visited Nov. 13, 2023) (ranking the school second).

of the schools include some of the most powerful and influential people in the state, and admission to the schools is considered equivalent to winning a golden ticket.[188] Additionally, the Trust's enormous resources have enabled it to open campuses on Maui and on the island of Hawai'i, as well as 30 preschool sites across the islands.[189] In keeping with the original bequest, the Kamehameha Schools give an admissions preference to Native Hawaiians.[190] Finally, the Trust engages in a variety of outreach programs designed to serve Native Hawaiian students in other school systems in the state.[191] The Trust's assets in 2022 amounted to $15.1 billion, with Hawaiian real estate comprising roughly a third, $4.8 billion, of the Trust's total endowment.[192] Highly public controversies involving the Bishop Trust in the 1990s[193] led the Bishop

[188] *See* Adam Liptak, *School Set Aside for Hawaiians Ends Exclusion to Cries of Protest*, N.Y. TIMES (July 27, 2002) (likening being admitted to winning the lottery).
[189] *See* 2022 KAMEHAMEHA SCHOOLS ANNUAL REPORT 6 (2022), https://www.ksbe.edu/assets/annual_report/KS_Annual_Report_2022.pdf.
[190] This preference has been subject to numerous challenges, but for the moment remains operational. *See* Doe ex rel. Doe v. Kamehameha Schs., 470 F.3d 827 (9th Cir. 2006) (upholding the admissions policy). *See also* Judy Rohrer, *Attacking Trust: Hawai'i as a Crossroads and Kamehameha Schools in the Crosshairs*, 62 AM. Q. 437, 440-44 (2010) (discussing the lawsuits challenging this preference). The U.S. Supreme Court's recent decision in *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 230 (2023), which restricted affirmative action in higher education, has led to some speculation that the Kamehameha Schools' preference might be vulnerable to a future challenge. *See* Esme M. Infante, *Affirmative Action Ruling Could Test Admission Policies at Hawaii Schools*, HONOLULU STAR ADVERTISER (July 2, 2023), https://www.staradvertiser.com/2023/07/02/hawaii-news/affirmative-action-ruling-could-test-admission-policies-at-hawaii-schools (discussing this possibility).
[191] *See* KING & ROTH, *supra* note 115, at 54 (discussing these outreach and extension programs); *See Programs and scholarships*, KAMEHAMEHA SCHOOLS, https://www.ksbe.edu/programs (last visited Oct. 24, 2023) (detailing the Pauahi Keiki Scholars and Kipona Scholarship programs that provide need-based aid to students attending non-Kamehameha schools).
[192] 2022 KAMEHAMEHA SCHOOLS ANNUAL REPORT 17 (2022), https://www.ksbe.edu/assets/annual_report/KS_Annual_Report_2022.pdf. To put that figure in context, Harvard's endowment at the end of the university's 2022 fiscal year, June 30, 2022, stood at $50.9 billion. FINANCIAL REPORT: FISCAL YEAR 2022, HARVARD UNIVERSITY 13 (Oct. 2022), https://finance.harvard.edu/files/fad/files/fy22_harvard_financial_report.pdf.
[193] Though it is beyond the scope of this Article, no discussion of the Bishop Trust is complete without an acknowledgment of the scandals that rocked the Trust in the 1990s. The misdeeds took place over several decades, included the land reform period of late-1970s and mid-1980s. However, in part because of general Native Hawaiian support, it would not be until the mid-1990s that trustees were held partially accountable for using the trust as a path to riches and neglecting basic trustee responsibilities. KING & ROTH, *supra* note 115, at 3. Land reform preceded such accountability by more than a decade and a half, but only because the power of the trustees—given their relationships with politicians and with the Hawaiian Supreme Court—was almost beyond question in the Islands. *See* Turner, *supra* note 195 (noting that the trustee's "influence is pervasive, akin to that of the du Pont family in Delaware"). It took publication of a exposé style report, "Broken Trust," by the *Honolulu Star-Bulletin* on August 9,

Trust to change its name to the Kamehameha Schools on January 1, 2000.[194] But regardless of the name, the Bishop Trust has been a force in Hawaiian education, politics, and land ever since its formation.[195]

Though the most direct beneficiaries of the Bishop Trust are the Native Hawaiian children educated in the Kamehameha Schools, the land held by the Trust is also considered by many Native Hawaiians as part of their inheritance, with the Trust serving as informal steward for Native Hawaiian interests in the land. As indirect beneficiaries, Native Hawaiians do not have a legal right to control the Trust or set the Trust's land use policies. On the other hand, the Bishop Estate arguably is

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1997, written by five leading individuals (a former Kamehameha Schools principal, a retired judge, a retired priest, a law professor, and a federal court judge) for public and legal pressure to mount against the trustees. *See* KING & ROTH, *supra* note 115, at 153-54 (giving the backgrounds of the exposé authors). The trustees had been treating the estate as their private investment entity, making investment decisions based more on personal connections than on sound management practices. *Id.* at 195. Having divvied up responsibilities among themselves, they also allowed one trustee, Marion Mae Lokelani Maples Lindsey, to impose her will on the daily operation of the Kamehameha Schools and in the process to alienate faculty, students, and alumni. *See id.* at 105-24 (for more on Lindsey's micromanagement and problematic involvement in the Kamehameha Schools). Though large non-profits often are led by a volunteer board, Bishop Estate trustees paid themselves lavishly, taking home upwards of a million dollars per year in addition to perks such as free golf club memberships. *Id.* at 76. *See also id.* at 100 (reporting that "trustee fees had grown to slightly more than $925,000 per trustee" by 1987).

Many of the problems with the trust were structural. The terms of Princess Bernice Pauahi Bishop's will gave the Hawai'i Supreme Court the right to select trustees, but the Trust's power within Hawai'i, as well as the high compensation paid to trustees, invited political involvement in that selection process. *See id.* at 303 (providing the will provisions related to the selection of trustees). Justices and state-level politicians came to see appointment as a trustee as a lucrative way to end a career. *Id.* at 1 (detailing trustee benefits); *See also* COOPER & DAWS, *supra* note 97, at 126 ("A seat on the Bishop board was one of the true pinnacles of power in Hawaii."). Political patronage rather than merit drove appointments and the connection of the justices to the trust limited the appetite within Hawai'i to check trustee abuse. *See, e.g.*, Samuel King et al., *Broken Trust*, HONOLULU STAR-BULLETIN (Aug. 9, 1997) (recounting the nomination of Sharon Himeno, the underqualified wife of then Hawaii Attorney General, Warren Price). Litigation over whether trustees should be removed from office was slow to gain steam despite damning conclusions by those tasked with investigating mismanagement. KING & ROTH, *supra* note 115, at 167-244 (discussing the investigations and the enforcement delays). Ultimately, it took a threat by the IRS to no longer consider the trust a charitable entity and to impose significant retroactive tax liability on the estate for a judge to suspend the trustees and replace them with an alternative body. *Id.* at 253-54.

[194] KING & ROTH, *supra* note 115, at 267.

[195] *See, e.g.*, Wallace Turner, *Hawaii Trust Wields Unusual Power*, N.Y. TIMES (July 17, 1983), https://www.nytimes.com/1983/07/17/us/hawaii-trust-wields-unusual-power.html ("In Hawaii, only the government has more power and influence than the five-member board of trustees of the Bishop Estate.").

"sacred" to Native Hawaiians and was already in use "for a public purpose" before being taken by the Land Reform Act.[196] As Professor Debra Pogrund Stark explains, "[s]ince the income from the Bishop Estate benefited poor native Hawaiian school children, many viewed the Bishop Estate landholdings as in essence owned by native Hawaiians."[197] It is not surprising, therefore, that Native Hawaiians, even if they were not students or family members of those connected with the Kamehameha Schools, were generally opposed to land reform legislation that would result in the forced dispossession of Princess Bernice Pauahi Bishop's estate.[198]

B. The Taking of Native Land Hidden in Plain Sight

Although the Court avoided consideration of the plaintiff's identity and unique positionality, *Midkiff*'s disproportionate impact on the Bishop Estate was predictable all along. As previously noted, the location of the Trust's property, most significantly the Trust's extensive holdings on O'ahu, as well as its practice of leasing out land for residential purposes, meant that the Land Reform Act would disproportionately impact the Trust.[199] Rather than the Bishop Trust being one of many entities that had to suffer through forced lease-to-fee conversions, it arguably was the intended victim of the state's taking.[200] That is how it worked in practice—the Bishop Trust bore the brunt of the Land Reform Act—and given the nature of the Trust's landholdings, the concentrated effect of forced conversions on the Trust was foreseeable long before the Court blessed Hawai'i's taking in *Midkiff*.

Native Hawaiians certainly understood the Land Reform Act was an attack on the Bishop Trust. When the Land Reform Act was being debated, Rev. Abraham K. Akaka, on behalf of Kawaiahao Church, Council of Hawaiian Organizations, and Friends of Kamehameha Schools, argued that the Bishop Estate was not "concentrated in the hands of a few," because "[t]he beneficiaries of those estates are not just a few people but about 120,000 Hawaiian and part Hawaiian people."[201]

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[196] Lewis, *supra* note 17, at 588.
[197] Stark, *supra* note 127, at 625.
[198] *See* La Croix, Mak, & Rose, *supra* note 84, at 18-19 ("In response to this history [of land loss after the Great Mahele] and the alleged importance of land ownership as an anchor for the preservation of Hawaiian culture, Native Hawaiian groups have over many years opposed the further alienation of Hawaiian lands. . . .").
[199] *See* Philip Lee, *A Wall of Hate: Eminent Domain and Interest-Convergence*, 84 BROOK. L. REV. 421, 450 (2019) (criticizing *Midkiff* for seizing Trust land serving a "indisputable public use").
[200] *See, e.g.*, Wallace Turner, *Hawaiians Foresee Change in Homeowners' Status*, N.Y. TIMES (May 31, 1984), https://www.nytimes.com/1984/05/31/us/hawaiians-foresee-change-in-homeowners-status.html (documenting the immediate reaction of the Trust to the *Midkiff* decision).
[201] Rev. Abraham K. Akaka, Pastor Kawaiahao Church, President Council of Hawaiian Organizations, Friends of Kamehameha Schools, Statement to the Lands Committee of the Hawaii House of Representatives, April 25, 1967 (on file with author). The author wishes to thank Professor Troy Andrade for reviewing and copying the legislative history material

According to Rev. Akaka, Native Hawaiians "need the land bequeathed to them by our Alii for their spiritual and material uplift" and "fear basic discontinuity with the past."[202] Rev. Akaka also submitted to the Hawai'i House Lands Committee the text of a sermon he delivered the previous Sunday that took an even stronger tone against land reform:

> Native people connect their life with their land, and their land with their life. . . . The greatest fear of the native is that one day the newcomer he welcomed might trample him into the very soil that was his and make it a grave rather than a garden. . . . land reform laws have been proposed which THREATEN TO BREAK UP THE LAST REMAINING ESTATES OF OUR NATIVE PEOPLE, LAWS WHICH THREATEN EVENTUAL DEPRIVATION AND DISPOSSESSION. And what shall we do about it? Phone calls and visits are made to me every day by our native people and friends expressing bitterness and despair about these laws. . . . we have these lands bequeathed to us as a people by our Alii for great and important reasons – reasons more important today than ever before. . . .
>
> According to the newspapers, the land-reform law passed last Saturday by the Senate would force our estates to sell our lands. If this is forced, then the people who are least capable of buying these lands are our native people. The effect of this law will be to FURTHER DISPOSSESS THE HAWAIIAN OF HIS LANDS – LANDS THAT ARE NOW AN IMPORTANT SOURCE OF POWER IN HIS LIFE AND IDENTITY. . . .[203]

Rev. Akaka argued that his sermon expressed the views of most Native Hawaiians, who "do not agree to any legislation that threatens to dispossess them of lands they own as a people, and that threatens to negate the wills of our Alii concerning the use of these lands.[204] As George H. Mills, President of the Association of Hawaiian Civic Clubs, explained to the same committee, "The sordid

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connected to the 1967 Land Reform Act contained in this paragraph from the Hawai'i State Archives.

[202] *Id.*

[203] Rev. Abraham K. Akaka, Pastor Kawaiahao Church, President Council of Hawaiian Organizations, Friends of Kamehameha Schools, Statement to the Lands Committee of the Hawaii House of Representatives, April 25, 1967 (emphasis in original) (sermon given by Rev. Akaka at Kawaiahao Church, Apr. 23, 1967 and included in the statement given to the Committee) (on file with author).

[204] *Id.*

history of the legalized "land grabs" of the past have caused us to become hypersensitive to the potential loss of our remaining lands."[205]

Native Hawaiians recognized that the Land Reform Act, by targeting estates such as the Bishop Trust, worked to dispossess them of their land. The President of the Board of Trustees for the Bishop Trust urged the Lands Committee to not advance the Land Reform Act because legislation authorizing use of the power of eminent domain must "clearly show that a public use is involved" and that burden had not been met.[206] On behalf of the Friends of Kamehameha, one letter to the editor published in 1982 observed that the Land Reform Act did not increase the supply of housing "so the intent seems more political and singles out special targets," specifically the Bishop Estate.[207] Notably, out of "concern for the protection of our Hawaiian resources," the trustees of the Office of Hawaiian Affairs, a semi-independent arm of the state meant to benefit Native Hawaiians, opted to file an amicus brief to the Supreme Court when it was considering *Midkiff*.[208]

Recognizing that the land involved in lease conversions came from the Hawaiian monarchy, Native Hawaiians argued that "dispossessing them of the land passed down by ancestors severs the unique "umbilical cord" between their land, ancestors, and future generations—an "irreparable injury.""[209] They "strongly opposed Bishop selling much or any of its land."[210] Though one could argue that Princess Bernice Pauahi Bishop herself had partly removed the trust from Native Hawaiian hands by turning over control of the land to those appointed by the Supreme Court,[211] the land was still meant to assist Native Hawaiians and they felt a claim over the estate. So, for example, when the Bishop Estate sought to evict a pig farmer between 1969 and 1971, in order to clear the land for development, protests erupted.[212] Tellingly, when the Land Reform Act was being debated in the Hawai'i Senate, Senator William Hardy Hill stood and said that he would "vote against the bill because it will adversely affect

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[205] George H. Mills, President, Association of Hawaiian Civic Clubs, Letter to the Honorable George Toyofuku and Members of the House Lands Committee, Apr. 25, 1967 (on file with author).

[206] Lyman, Jr., *supra* note 98.

[207] Louis Agard, Friends of Kamehameha, *Letter to the Editor*, KA WAI OLA O OHA (Fall 1982) (on file with the author).

[208] *OHA to File Supreme Court Brief in Support of Bishop Estate*, KA WAI OLA O OHA (Winter 1984) (on file with the author). *See also* Gard Kealoha, *We Shall Endure*, KA WAI OLA O OHA (Oct. 1984) (on file with the author) (noting "the Bishop Estate's potential losses due to the impact of the Hawaii State Land Reform legislation").

[209] Jennifer M. Young, *The Constitutionality of a Naked Transfer: Mandatory Lease-to-Fee Conversion's Failure to Satisfy a Requisite Public Purpose in Hawai'i Condominiums*, 25 U. HAW. L. REV. 561, 580 (2003).

[210] COOPER & DAWS, *supra* note 97, at 428.

[211] *See* Levy, *supra* note 38, at 860.

[212] *See id.* at 872; Neal Milner, *Home, Homelessness, and Homeland in the Kalama Valley: Re-Imagining a Hawaiian Nation Through a Property Dispute*, 40 HAWAIIAN J. HIST. 149 (2006).

the Kamehameha Schools and the Bernice Pauahi Bishop Trust."[213] And after the Supreme Court issued its opinion, Hawaiians gathered at the Kamehameha Schools to insist on the continued "availability of educational opportunities for Hawaiian children" and that "the land must be kept intact for the future of the children."[214] At that gathering, the President of the Kamehameha Schools Alumni Association, Leroy Akamine, pointedly argued that:

> We, the Hawaiian people, can make far better use of Princess Pauahi's lands by retaining them, as she intended, and utilizing their revenues towards the education of our children, rather than being forced to sell them below market value. . . . Our future as a people, as a race, is being threatened. There is no other way to look at it. The Hawaii Land Reform Act amounts to nothing less than yet another thinly veiled theft of Hawaiian land.[215]

Despite such arguments, the Court's description of Hawai'i's land reform efforts contains almost no acknowledgement that the taking involves Native land. Instead, the Court uncritically accepts the State of Hawai'i's presentation of the Land Reform Act as a necessary way to correct for the Islands' feudal past.[216] Large landowners are to blame for the high cost of housing in Hawai'i and the Land Reform Act is an appropriate way to broaden the market.[217] Though the identity of the property owner ordinarily matters when it comes to eminent domain disputes, the Court does not find the Bishop Trust's role as protector of land for the benefit of Native Hawaiians to be particularly troublesome.[218] Two decades later, Susette Kelo, and her pink house, would capture the public imagination,[219] leading states to pass laws providing property owners with greater protections against takings.[220] In contrast, in *Midkiff*, the Court focused on the benefits of the Land Reform Act and glossed over the identity and

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[213] HAWAI'I SENATE JOURNAL 399 (1967).
[214] *Hawaiians Rally Behind KS/BE Land Issue*, KA WAI OLA O OHA (Dec. 1984) (on file with the author).
[215] Leroy Akamine, *Land Question Aroses Hawaiian Community*, KA WAI OLA O OHA (Dec. 1984) (on file with the author).
[216] Haw. Hous. Auth v. Midkiff, 467 U.S. 229, 233-34 (1984).
[217] *Id.* at 241-42.
[218] *See* Lee, *supra* note 199, at 448 ("Midkiff also had a racial dimension that was not acknowledged by the Court").
[219] *See* Bethany Berger, Kelo *and the Constitutional Revolution that Wasn't*, 48 CONN. L. REV. 1429, 1434-45 (2016) (arguing that Kelo's identity as a white woman whose house was being taken helps explain the level of attention the case received).
[220] *See* Andrew P. Morriss, *Symbol or Substance: An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237 (2009) (analyzing state legislative responses to *Kelo*). *See also* Bethany Berger, *What Owners Want and Governments Do - Evidence from the Oregon Experiment*, 78 FORDHAM L. REV. 1281 (2009) (discussing the politics and problems involved in such reactive legislation in a state that passed a particularly strong set of protections for property owners).

interests of the property owners targeted by the legislation.[221] The same can be said for most commentary on the case, which tends to accept the Court's presentation of the facts and ignores the unique character of the named plaintiff in the case.[222]

From one perspective, it is easy to understand why the Court and most academics think of the case in terms of an evil land oligarchy and a valiant state government.[223] Doing so allows the *Midkiff* decision to be cast as a victory for democratic capitalism, for the use of state power to establish the conditions necessary for a broadening the distribution of wealth and economic opportunity.[224] Eminent domain, seen in this light, is a powerful corrective tool that saves the little guy, the tenant, from exploitation, in the form of exorbitant rent increases, by oligarchic landowners.[225] This is a compelling, attractive vision of the use of state power.

The problem is that such an account whitewashes over the racialized and, arguably, colonial elements of Hawai'i's Land Reform Act. Forced lease-to-fee conversions took land from an estate held by the last surviving heir of King Kamehameha I that she dedicated to the support of Native Hawaiian children. It then transferred title of that land, over the objections of the Bishop Trust, to relatively wealthy non-Natives.[226] The story told by Tribe and by the State of Hawai'i would have been cleaner if the facts had better aligned with their account; if the estates subject to land reform belonged to non-Native sugar barons who had tricked Native Hawaiians out of their inheritance, then the conventional understanding of the case might have sufficed. But the fact that the state used eminent domain to take land from

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[221] *See Midkiff*, 467 U.S. at 232 (describing the class subject to the taking as simply "private landowners" without discussing their identities).

[222] For two articles that are exceptions to the rule, see Lee, *supra* note 199 (likening *Midkiff*'s treatment of Native Hawaiians to *Johnson v. McIntosh*'s rejection of Native American land rights); Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Role"? A Response to Professor Dyal-Chand*, 31 HAWAII L. REV. 423, 432 (2009) [hereinafter Kanner, *Do We Need to Impair*] ("what happened on Oahu was not a land redistribution from the powerful haves to the downtrodden have-nots . . . but rather a political battle in which prosperous, influential suburbanites . . . prevailed over the legitimate interest of Bishop Estate, . . . [which supported the education of] native Hawaiian children"); Powe, Jr., *supra* note 11, at 392 (observing that "*Midkiff* is a reverse Robin Hood case.").

[223] *See State's Right*, TIME (June 11, 1984), https://content.time.com/time/subscriber/article/0,33009,926537,00.html (quoting a Honolulu lessee who supported the taking as saying, "I have three kids, and I'd like to turn property over to them").

[224] Lee, *supra* note 199, at 448-49.

[225] *Midkiff*, 467 U.S. at 232 (stating that concentrated ownership was "responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare").

[226] *See* Kanner, *Eminent Domain Projects that Didn't Work Out*, *supra* note 24, at 197 (describing the beneficiaries of the Land Reform Act as "affluent suburbanites who already owned upscale homes in the best parts of Oahu"); Alfred L. Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 85 OR. L. REV. 771, 800 (2007) (documenting criticism of the Land Reform Act as "providing additional rights to non-Native Hawaiians at the expense of trusts that own land and rent it out for the benefit of Native Hawaiians").

the Bishop Trust and give it to non-Native property owners complicates things and demands a reconsideration of *Midkiff*. Notably, when it comes to non-Native owners, Hawai'i continues to tolerate their ownership of almost the entirety of several of the archipelago's Islands.[227] Rather than being a rare victory in the battle against concentrated wealth, *Midkiff* is better understood as yet another example in a long line of cases and policies involving the racialized taking of property.

III. Continuing Dispossession of Indigenous Land

Understanding the taking involved in *Midkiff* requires situating the decision within a long history of using the law to dispossess Indigenous peoples of their land. This Part explains how *Midkiff* is part of the larger narrative of the dispossession of Indigenous peoples which is presented in Section A. It then concludes by tying this history to *Midkiff* in Section B.

Native Hawaiians—whose status as Indigenous is generally recognized but who do not enjoy the benefits of sovereignty—occupy a unique space under U.S. law.[228] While Indian tribes in the continental United States are treated as "domestic dependent nations" with recognized rights to sovereignty,[229] Native Hawaiians have been denied similar rights to sovereignty ever since the Hawaiian monarchy's fall.[230] Nevertheless, through statements and targeted programs, the United States and the State of Hawai'i have acknowledged that Native Hawaiians are not simply one of many groups, but instead have particular rights tied to their history. In 1993, a joint resolution of Congress apologized "to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai'i on January 17, 1893, with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination."[231] The State of Hawai'i has issued a number of apologies as well.[232]

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[227] *See supra* notes 108-109, and accompanying text.

[228] *See* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998); J. Kehaulani Kauanui, *Precarious Positions: Native Hawaiians and U.S. Federal Recognition*, 17 CONTEMP. PAC. 1 (2005); Melody Kapilialoha Mackenzie, *Ke Ala Loa - The Long Road: Native Hawaiian Sovereignty and the State of Hawai'i*, 47 TULSA L. REV. 621 (2012). For comprehensive coverage of the rights and status of Native Hawaiians, see NATIVE HAWAIIAN LAW: A TREATISE (Melody Kapilialoha Mackenzie et al. eds. 2015).

[229] Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

[230] For an overview of the legal status of Native Hawaiians, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[4] (Nell Jessup Newton ed., 2017).

[231] Apology Resolution, *supra* note 36, at § 1(3).

[232] *See e.g.*, Ben Gutierrez, *Lawmakers Adopt Resolution Apologizing for Ban on Hawaiian Language in Schools*, HAW. NEWS NOW (Apr. 28, 2022, 4:16 AM), https://www.hawaiinewsnow.com/2022/04/28/lawmakers-adopt-resolution-apologizing-ban-hawaiian-language-schools (documenting a legislative resolution "apologizing for what was seen as an effort to erase the native language – an effort that nearly succeeded").

Apologies only go so far, however. The U.S. Supreme Court in *Rice v. Cayetano*, [233] for example, invalidated the state's rule that had allowed only Native Hawaiians to vote for trustees of the Office of Hawaiian Affairs (OHA), a state-level body roughly akin to the Bureau of Indian Affairs, to Native Hawaiians.[234] As Justice Stevens observed in his dissent, the United States has a "a well-established federal trust relationship with the native Hawaiians."[235] The majority acknowledged Congress' apology but determined that when it came to elections of OHA trustees, Native Hawaiians were a racial, not political group: "Ancestry can be a proxy for race. It is that proxy here."[236] The tension between understanding Indigenous peoples as racial or political groups is nothing new,[237] but because they are not classified as a federally recognized tribe, Native Hawaiians are especially vulnerable to being understood solely in racial terms.

Treating Native Hawaiians as a racial group rather than as the descendants of a sovereign nation provides cover for the ongoing denial of land rights that would otherwise attach to Native Hawaiians. The Great Māhele divided the lands of Hawai'i into three types: private land held by royalty, land for commoners, and Crown land.[238] Through descent, a sizeable portion of the land set aside for royalty became land base of the Bishop Trust. For many reasons, including the cost of surveys and other bureaucratic hurdles, commoners did not get the share of the land they were expected to receive under the Great Māhele.[239] The Crown lands were a partial substitute; Crown lands were set aside for the benefit of the people and the revenues "were used for the common good."[240] But the Crown lands became state and federal lands following the overthrow of the Hawaiian monarchy.[241] In his exhaustive history of the Crown lands, Professor Jon Van Dyke shows that "after 1893, the Native Hawaiian People were deprived of their links to these lands and their sovereign

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[233] 528 U.S. 495 (2000).
[234] *Id.* at 524.
[235] *Id.* at 533 (Stevens, J., dissenting).
[236] *Id.* at 496.
[237] *See* Morton v. Mancari, 417 U.S. 535, 553 (1974) (defining Indians as a political, not racial group). *See also* Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012) (arguing in support of Indian tribes' political identity); Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009) (critiquing the treatment of Indian tribes as racial rather than political groups).
[238] VAN DYKE, CROWN LANDS, *supra* note 50, at 40-42.
[239] *See* Kamanamaikalani Beamer & N. Wahine'aipohaku Tong, *The Mahele Did What? Native Interest Remains*, 10 HULILI 125, 127 (2016) ("kanaka [the people] had become alienated from their interest in aina [land] because of the change in land tenure . . . they had either forever lost their claim to land or that their interest . . . was largely undefined at the time"); VAN DYKE, CROWN LANDS, *supra* note 50, at 214-15 (noting the United States' acceptance of the Crown Lands upon annexation).
[240] VAN DYKE, CROWN LANDS, *supra* note 50, at 7.
[241] *See* Beamer & Tong, *supra* note 239, at 134 ("the Crown Lands were claimed by the Provisional Government and Republic of Hawai'i").

independence."[242] Van Dyke argues that "Native Hawaiians have been deprived of their lands without compensation or their consent, and that these lands must be returned to them."[243] With neither the state nor the federal government giving any indication they are contemplating such a radical return of land to Native Hawaiians, arguments for the return of the Crown lands remain more theoretical than real,[244] but it is worth pausing to recognize the ways non-Natives have benefited from this denial of Native Hawaiian land rights. The land use patterns, not to mention the relative wealth of different groups, would be dramatically different if Native Hawaiian land rights in Crown lands had survived the overthrow of the monarchy.

While Crown lands were arguably lost through conquest, the same cannot be said for the losses—in time, use, and value—that Native Hawaiians have suffered in relation to land set aside for them in 1921 through the Hawaiian Homes Commission Act.[245] The Act "set aside about 203,500 acres of what had been part of the Crown and Government Lands inventory to provide ninety-nine year homestead leases of land at a nominal fee for residences and farm lots for Native Hawaiians."[246] The Act's passage reflected an awareness that Native Hawaiians were struggling and an appreciation of the U.S. government's obligations to them. But the program has been beset by problems since its founding. As Professor Van Dyke explains, "Western elites wanted to keep the best lands available for lease by their sugar plantations," which meant only lands with "marginal agricultural potential" were made available to Native Hawaiians.[247] Opponents of the program also successfully fought for a high blood quantum (50 percent) requirement for Native Hawaiian eligibility as a way to minimize the number of recipients.[248] Underfunding and mismanagement of the program left Native Hawaiians waiting for decades for leases. The majority of the land was leased out to non-Hawaiians in order to raise revenue, such that a 1986 report found that "only 32,528 acres were being used for homesteads."[249] In 1996, the Hawaiian Supreme Court held that leasing land set aside for the Homes Commission Act to non-Natives violated the terms of the Act.[250] Despite this and other litigation-

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[242] VAN DYKE, CROWN LANDS, *supra* note 50, at 9.
[243] *Id.* at 9.
[244] *See, e.g.*, Note, *Aloha 'Āina: Native Hawaiian Land Restitution*, 133 HARV. L. REV. 2149 (2020) (developing an unjust enrichment theory for the return of land to Native Hawaiians); R. Hōkūlei Lindsey, *Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN L. REV. 223 (2010) (arguing for the return of ceded lands to serve as a foundation for Native Hawaiian sovereignty).
[245] Hawaiian Homes Commission Act, 1920, 67 Pub. L. No. 67-34, 42 Stat. 108 (1921). For more on Hawaiian Homelands, see Levy, *supra* note 38, at876-80.
[246] VAN DYKE, CROWN LANDS, *supra* note 50, at 237.
[247] *Id.* at 246.
[248] *See id.* at 247.
[249] *Id.* at 251.
[250] *Id.*

tied policy improvements,[251] to this day Native Hawaiians struggle to access the land promised to them by Congress in 1921. Though the return of all Crown lands to Native Hawaiians is arguably unrealistic,[252] the effective denial of the right of Native Hawaiians to lease land promised them under the Homes Commission Act serves to underscore the state and the nation's indifference to the land rights of Native Hawaiians.[253] No wonder that today Native Hawaiians struggle to find a place to live in their homeland.

A. Dispossession as the Norm

Rather than being an anomaly, the denial of the land rights of Native Hawaiians is part of a larger pattern of dispossession.[254] As Professor Melody Kapilialoha MacKenzie observes, "The story of the Native Hawaiian people, a people who love their land, is a complicated and difficult one. But when told in broad strokes, it is a familiar one: a story of an indigenous people and of greed, racism, and imperialism."[255] This section connects Indigenous land dispossession in Hawai'i—which manifested in the acquisition of Crown lands following conquest, the state's failure to properly implement the Homes Commission Act, as well as the taking of land from the Bishop Trust—with the ways Native Americans have been denied their rights to land in the rest of the United States. It is beyond the scope of this Article to give a full account of the ways non-Indians acquired Indian land.[256] A few salient

[251] *See id.* at 251-52 (discussing settlements involving the program and Native Hawaiian litigants).

[252] *See* Rob Perez & Agnel Philip, *The Government Promised to Return Ancestral Hawaiian Land, Then Never Finished the Job*, PROPUBLICA (Dec. 19, 2020), https://www.propublica.org/article/the-government-promised-to-return-ancestral-hawaiian-land-then-never-finished-the-job (listing challenges the Hawaiian land back movement faces, including lack of supply, chronic funding issues, and mismanagement).

[253] For extended coverage of the problems with the implementation of the Homes Commission Act and the effect of such mismanagement on Native Hawaiians, see Troy J.H. Andrade, *Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act*, 46 AM. INDIAN L. REV. 1 (2022).

[254] The recognition of dispossession as a recurring event in U.S. history and as a fundamental feature of property law has been explored by a number of scholars in recent years. *See, e.g.*, Sherally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L.J. 1021 (2022); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022); ROBERT NICHOLS, THEFT IS PROPERTY!: DISPOSSESSION AND CRITICAL THEORY (2019); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 127-144 (2013).

[255] Melody Kapilialoha MacKenzie, *Ever Loyal to the Land: The Story of the Native Hawaiian People*, 33 A.B.A. HUM. RTS. J. 15, 15 (2006).

[256] For works covering select parts of the history of non-Indian acquisition of Indian land, see, e.g., CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (2021); DANIEL J. SHARFSTEIN, THUNDER IN THE MOUNTAINS: CHIEF JOSEPH, OLIVER OTIS HOWARD, AND THE NEZ PERCE WAR (2017).

examples of how Indian land rights have been denied show that *Midkiff* cannot be properly understood without an appreciation of the role that the Native status of the land, though unacknowledged by the Court, played in the case.

Upon the "discovery" of the New World, European nations found it easy to convince themselves of the righteousness of taking land from the Indigenous peoples they encountered.[257] Backed by both religion and racism, settler colonial powers acquired land from Native peoples through a combination of force and purchase.[258] Following independence, the United States stepped into the shoes of England, incorporating European excuses for denying Indians the full recognition of their rights in land into U.S. law.[259] In *Johnson v. M'Intosh*, Chief Justice Marshall ruled that a non-Indian who acquired land from the U.S. government had superior title relative to a non-Indian who purchased the same land directly from an Indian tribe.[260] Marshall based his decision on a combination of the Doctrine of Discovery and on the fact of Conquest.[261] As Marshall explained, North America's "vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency."[262] Drawing on how European nations treated Indians following contact as precedent, Marshall concluded that by virtue of discovery, "the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired."[263] Not only were Indians "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest," according to Marshall, but "[t]o leave them in possession of their country, was to leave the country a wilderness."[264] Looking back on the opinion, it is clear that racism infuses nearly every part of Marshall's writing,

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[257] Europeans—and later, Americans—also took Indigenous peoples as slaves, starting at almost their point of first contact. Most histories of the United States focus only on the transatlantic slave trade and the enslavement of Blacks, but a growing literature highlights the long history of enslaving Native Americans. *See, e.g.*, ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA (2016); ALAN GALLAY, THE INDIAN SLAVE TRADE: THE RISE OF THE ENGLISH EMPIRE IN THE AMERICAN SOUTH, 1670-1717 (2003).

[258] *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1992); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1997).

[259] Johnson v. M'Intosh, 21 U.S. 543, 574-80 (1823).

[260] *Id.* at 604-05. *See also* Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 L. & HIST. REV. 67, 111-13 (2001) (arguing that the rule helped lower the price to the United States of acquiring Indian land).

[261] For a detailed history and analysis of the case, see LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2007).

[262] *Johnson*, 21 U.S. at 573.

[263] *Id.*

[264] *Id.* at 590.

yet the case continues to be relied upon by the U.S. Supreme Court when it acts to limit the land rights of Indian nations.[265]

Johnson v. M'Intosh laid the groundwork for a vast edifice of Supreme Court decisions defending colonialism and casting aspersions on how tribes use land and on their forms of governance.[266] Following *Johnson*, Indian land rights could be treated as secondary and as not meriting the level of protection afforded to non-Indian property. In *Cherokee Nation v. Georgia*, Marshall described tribes as "domestic dependent nations"—a label with considerable sticking power—and observed that they "occupy a territory to which we assert a title independent of their will."[267] More than a century later, in *Tee-Hit-Ton Indians v. United States*, the Court reaffirmed "the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained."[268] The Tee-Hit-Ton clan of the Tlingit Tribe of Alaska had sued the United States for the taking of timber from land that the clan had occupied since time immemorial, but the Supreme Court denied them compensation.[269] According to the Court, "[n]o case in this Court has ever held that taking of Indian title or use by Congress required compensation."[270] Glossing over variations in the historical relationship between distinct Native nations and the U.S. government, the Court highlighted the "compassion" non-Indians have "for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization."[271] If the racism in celebrating the "drive of civilization" is just below the surface, by the end of the opinion it is expressed unapologetically.[272] According to the Court, "Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without

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[265] *See, e.g.*, City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 125 (2005) (citing *Johnson v. M'Intosh*); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-80 (1955) (citing *Johnson v. M'Intosh*). *See also* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 391 (2011) (including *Johnson* in a list of cases scholars have identified as anticanon cases but focusing only on the four cases most identified as part of the anticanon).

[266] *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (tracing the impacts of the Court's racism, starting with *Johnson*, on Indian nations); BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: JOHNSON V. MCINTOSH AND THE HISTORY OF NATIVE LAND RIGHTS (2012) (arguing that the Doctrine of Discovery of *Johnson* should be explicitly rejected).

[267] Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

[268] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

[269] *Id.* at 291.

[270] *Id.* at 281. For critiques of academic and judicial treatment of all tribes as the same, see Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141 (2006); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

[271] *Tee-Hit-Ton*, 348 U.S. at 281.

[272] *Id.*

compensation."[273] Rehnquist explains that Indian, or in the case before the Court, Native Alaskan, property rights are not deserving of Fifth amendment protection because "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that . . . it was not a sale but the conquerors' will that deprived them of their land."[274] Unfortunately, *Johnson* and *Tee-Hit-Ton* are not outliers, instead they are representative of the positions often taken by the United States—also apparent in *Midkiff*—that Indigenous peoples' excessively large land holdings are a problem and, relatedly, that progress demands diminishment of the land rights of Indigenous peoples.

First, the idea that Indians have too much land and that such excess is a "problem" that needs solving found its fullest expression in the allotment policy of the late nineteenth century and early twentieth century. The General Allotment Act of 1887, also known as the Dawes Act,[275] broke up existing reservations, dividing the land into farm-size parcels that were distributed to tribal members and opened up any surplus land to non-Indian settlement.[276] Treaties and other agreements had established the reservations, but proponents of the allotment policy felt that many tribes had too much land, so much land that they would not have to take on the intensive agricultural practices associated with small-scale farming.[277] The Dawes Act, by ending the communal holding of land and dramatically reducing the available land, was designed to force Indians to recognize the value of non-Indian farming norms and religious beliefs.[278] In short, advocates hoped it would make Indians into yeoman—individualistic not collective—farmers.[279]

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[273] *Id.* at 289; *see also* Sioux Tribe v. United States, 316 U.S. 317, 331 (1942) (allowing the government to take reservation land created by executive order without compensation).
[274] *Tee-Hit-Ton*, 348 U.S. at 289.
[275] General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-81).
[276] For more on the allotment policy, see Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, Vol. 2003, No. 4 WISC. L. REV. 729 (2003).
[277] *See* Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 KAN. L. REV. 383, 384 (2014) [hereinafter Shoemaker, *No Sticks in My Bundle*] ("By forcing the uniform 'allotment' of reservation land to individual Indians, Congress sought to break up tribes as a controlling social and political influence and to assimilate individual Indians into idealized versions of the agrarian, Jeffersonian farmer, all based on a belief in the transformative power of private property."); Donald J. Berthrong, *Legacies of the Dawes Act: Bureaucrats and Land Thieves at the Cheyenne-Arapaho Agencies of Oklahoma*, 21 J. SW. 335, 346 (1979) (noting that some white Americans were "disturbed" by perceived underuse of Native American land and sought to break it up so that "Indians would be forced to work . . . or starve").
[278] *See* Katherine Florey, *Tribal Land, Tribal Territory*, 56 GA. L. REV. 967, 993 (2022) (discussing the assimilative goals of allotment).
[279] Berthrong, *supra* note 277, at 336 (detailing the government's intention that the Act would be "supplemented by vocational education emphasizing farming, stock raising, and manual skills, and by religious instruction stressing individualism over tribalism").

But behind the stated justification for allotment was the understanding that in practice the policy would open up reservations to non-Indians.[280] The sale of surplus land to non-Indians destroys any pretense that allotment was done for the benefit of individual Indians.[281] Additionally, while Indians who received allotments were initially subject to paternalistic limitations that restricted their ability to transfer such allotments and protected them from taxation, when the limitations were lifted, non-Indians could purchase title to such land.[282] That allotment facilitated the transfer of reservation land into white hands was not a design flaw of the program but a design feature.[283] Indian nations lost ninety million acres, roughly two-thirds of their land prior to the policy, as a direct result of allotment.[284] And the Supreme Court did nothing to protect tribes from the policy. In 1903, the Court held in *Lone Wolf v. Hitchcock*[285] that Congress' plenary power meant that it could impose allotment on a tribe in violation of an express treaty provision requiring that any cession of reservation land be approved by three-fourths of the adult males of the tribes bound by the treaties.[286] In upholding Congress' power to break such treaty promises, the Supreme Court argued that allotment was "a mere change in the form of investment of Indian tribal property," and that the Court "must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made."[287] Such a presumption was of little consolation to the Kiowa, Comanche, and Apache plaintiffs whose land rights were so easily trampled by the Court under the banner of plenary power.[288]

Second, the notion that national progress requires diminishment of Indigenous peoples' land rights is a constant refrain in U.S. history. This is especially the case when the nation's goal is to broaden and extend market access and participation to a greater share of the non-Indian population. Though Marshall gave a full throated endorsement of this idea of progress in *Johnson v. M'Intosh*—"[t]o leave [the Indians] in possession of their country, was to leave the country a wilderness"—it often finds more subtle expression.[289] Homesteading, for example, is often celebrated as one of

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[280] Shoemaker, *No Sticks in My Bundle*, *supra* note 277, at 409.
[281] *Id.* at 409-410.
[282] *Id.* at 410.
[283] Cross, *supra* note 15, at 113 (observing that "[t]he American West has long been settled by non-Indians by virtue of the Indian allotment and land sales program of the late nineteenth century"). *See also* McGirt v. Oklahoma, 140 S. Ct. 2452, 2463 (2020) (noting that some allotment advocates "may have hoped that, with lands in individual hands and (eventually) freely alienable, white settlers would have more space of their own").
[284] Shoemaker, *No Sticks in My Bundle*, *supra* note 277, at 410.
[285] 187 U.S. 553 (1903).
[286] *Id.* at 568.
[287] *Id.*
[288] For more on plenary power over Indian nations, see generally Nell Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).
[289] Johnson v. M'Intosh, 21 U.S. 543, 590 (1823).

the nation's finest redistributive moments.[290] Rather than distribute the Great Plains to the highest bidder, the country choose to offer up the frontier to those willing to work the land.[291] Homesteading opened the property ownership door to lower-income white settlers, democratizing capital and deepening the country's emerging middle class.[292] Indeed, homesteading is considered so fundamental to U.S. economic growth and political stability that experts have pushed other countries to follow the U.S. example when considering land reform possibilities.[293] The dark side of homesteading is rarely acknowledged, that such broadly shared economic gains were only possible because Indians had been effectively cleared off the land through disease, wars, and treaties.[294] In *Far and Away*, Hollywood's depiction of homesteading in Oklahoma, Tom Cruise and Nicole Kidman triumphantly plant their flag in the Oklahoma dirt and claim their piece of the American Dream, a feat that only is possible if homesteaders do not have to worry about conflicting Indian land rights.[295]

Clearance of Indians allowed an imagined America to become real, enabling public goods that required vast tracts of land—the National Parks, public lands, and land grant institutions—to be carved out of the imagined vacant wilderness. Today, the nation's national parks are a wonder of the world and provide the public with

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[290] In his second inaugural address, for example, President George W. Bush argued that "[i]n America's ideal of freedom, citizens find the dignity and security of economic independence, instead of laboring on the edge of subsistence. . . . [And that this] broader definition of liberty . . . motivated the Homestead Act . . ." President George W. Bush, Inaugural Address, 151 Cong. Rec. 269, 297 (Jan. 20, 2005).

[291] Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 41 (1990).

[292] *See* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 299 n.106 (1991) (describing the goal of the Homestead Acts as "to provide average persons with the means to satisfy their needs so that they would not be dependent on others").

[293] *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 107-08 (2003) (arguing that the Homestead Acts recognized what had already happened on the ground as part of his broader argument that other countries should pass similar laws recognizing the rights of poor occupiers of land).

[294] *See, e.g.*, Gregory Hobbs, Opinion, *Sand Creek Massacre: Colorado's Land Grab from Native Tribes*, DENVER POST, https://www.denverpost.com/2014/11/21/sand-creek-massacre-colorados-land-grab-from-native-tribes (Nov. 23, 2016, 3:58 PM) (documenting the 1864 Sand Creek Massacre of peaceful Arapaho and Cheyenne people that opened up their ancestral land for homesteading). *See also* Douglas W. Allen, *Homesteading and Property Rights; Or, "How the West Was Really Won"*, 34 J. LAW & ECON. 1, 2 (1991) (describing homesteading as "a substitute for direct military force" by having settlers secure Indian land).

[295] Hal Hinson, *'Far and Away': Go West Already, Young Man*, WASH. POST (May 22, 1992), https://www.washingtonpost.com/archive/lifestyle/1992/05/22/far-and-away-go-west-already-young-man/14565470-bf98-497b-b4e3-dd9db1a6547b. For a rare example of a non-Indian struggling with the history of Indigenous land dispossession that became her family's wealth, see REBECCA CLARREN, THE COST OF FREE LAND: JEWS, LAKOTA, AND AN AMERICAN INHERITANCE (2023).

access to spaces of natural beauty and depth.[296] They permit people of all ages and economic classes the opportunity to get closer to nature, with all the healing and insight into the human condition that comes with such closeness.[297] But the federal government did not simply declare uninhabited parcels of land national parks, Indians were cleared so that the parks could be created.[298] The same can be said of much of the nation's public land, regardless of whether particular parcels are labeled national forest, Bureau of Land Management land, or other federal or state property. Recently, thanks to in-depth reporting by *High Country News* and other outlets,[299] attention is being paid to the ways that land grant institutions benefitted, and continue to benefit, from land taken from Indigenous peoples.[300] In all these cases, dispossession of Indians provided the raw material for the nation to make progress on other important values—whether that is environmental protection, public access to nature, or higher education. What is remarkable about such transfers, however, is how long the interests of the original owners of the land—together with the history of the taking of Indian land—have been swept under the rug.

Occasionally, the Court is given the opportunity to pull back history's curtain, to recognize the ways that the land rights of Indian nations complicate the nation's

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[296] *See generally* JOHN MUIR, OUR NATIONAL PARKS (1901); HENRY DAVID THOREAU, WALDEN, OR LIFE IN THE WOODS (1854).

[297] *But see* Lucy Tompkins, *Sierra Club Says It Must Confront the Racism of John Muir*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/22/us/sierra-club-john-muir.html (reporting on the overlooked anti-Native American and anti-Black views of the John Muir, the father of national parks, and noting that a "disproportionately low number of people of color visit national parks").

[298] For more on the taking of Indian land to create the national parks, see MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS (1999); ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS (1998). *See also* Sarah Krakoff, *Not Yet America's Best Idea: Law, Inequality, and the Grand Canyon National Park*, 91 U. COLO. L. REV. 559 (2020) (focusing on the denial of Indian rights and existence in the creation and management of the Grand Canyon National Park).

[299] *See* Robert Lee & Tristan Ahtone, *Land-Grab Universities*, HIGH COUNTRY NEWS (Mar. 30, 2020), https://www.hcn.org/issues/52.4/indigenous-affairs-education-land-grab-universities.

[300] *See* Tristan Ahtone & Robert Lee, Opinion, *Ask Who Paid for America's Universities*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/opinion/land-grant-universities-native-americans.html. For a catalogue of how universities have begun to take responsibility for the ways they benefited from dispossession, see Jon Parmenter, *Assessing Cornell University's Response to Recent Revelations Concerning the Origins of Revenues Obtained from the Morrill Act of 1862*, CORNELL UNIVERSITY AND INDIGENOUS DISPOSSESSION PROJECT (Aug. 11, 2022), https://blogs.cornell.edu/cornelluniversityindigenousdispossession/2022/08/11/assessing-cornell-universitys-response-to-recent-revelations-concerning-the-origins-of-revenues-obtained-from-the-morrill-act-of-1862.

narrative of progress.[301] But the Court's preferred response is to prioritize the non-Indian perspective and reiterate the idea that progress requires the diminishment of Indian land rights.[302] A good example of this is *City of Sherrill v. Oneida Indian Nation of N. Y.*,[303] a 2005 case in which the Court held that the Oneida Indian Nation (OIN) could not "unilaterally revive its ancient sovereignty."[304] In 1790, Congress passed the Indian Trade and Intercourse Act, better known as the Nonintercourse Act, that reserved the power to acquire land concessions from tribes to the federal government and barred states from independently acquiring Indian land.[305] In defiance of the Act, New York subsequently negotiated a purchase of large portions of the land within OIN's federally recognized reservation.[306] In 1985, the Supreme Court held that OIN could bring a damages suit associated with the denial of their property rights as a result of New York's violation of the Nonintercourse Act.[307] But by 2005, the Court had had enough. OIN had reacquired several parcels within the original reservation boundary and sought to unite fee and aboriginal title, thereby making it equivalent to trust land and immunizing it from state and local property taxes.[308] Rejecting OIN's efforts, Justice Ginsberg held for the majority that "[the Tribe is precluded] from rekindling embers of sovereignty that long ago grew cold" because too much time had passed since the Tribe held the land.[309] The Court also relied on the trope of progress as a way to justify blocking OIN from righting the wrongs of the past.[310] Ginsburg observed that "the properties here involved have greatly increased in value since the Oneidas sold them 200 years ago. . . . [I]t was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill."[311] The preference for non-Indian property owners and the related goal of protecting urban development in upstate New York from what the Court calls "the disruptive remedy" of having Indian land rights be fully recognized

[301] For a great example of the Court doing just that, even when confronted with a strong non-Indian interest in not recognizing the rights of tribes, see McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).
[302] *See* Stephanie Woodard, *Shaky Ground: How the United States Uses the Law to Steal Indigenous Land*, IN THESE TIMES (Apr. 26, 2023), https://inthesetimes.com/article/shaky-ground-derrico-indigenous-law-land ("The Supreme Court has long provided legal cover for those who wish to wrest land and resources from Indigenous peoples.").
[303] 544 U.S. 197, 198 (2005).
[304] *Id.* at 198.
[305] Act of July 22, 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177).
[306] *See* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 615 (2006) [hereinafter Singer, *Nine-Tenths of the Law*] (noting that "New York ignored the Nonintercourse Act when it entered negotiations with the Oneida Indian Nation to take its remaining lands").
[307] County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).
[308] City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 217 (2005).
[309] *Id.* at 214. *But see* Singer, *Nine-Tenths of the Law*, supra note 306, at 615-27 (giving reasons why the Oneida Indian Nation was not able to pursue its claim).
[310] *City of Sherrill*, 544 U.S. at 199.
[311] *Id.* at 199.

drives Justice Ginsburg's analysis.[312] One does not have to look for the racist subtext of an opinion when the Court is comfortable saying the quiet part out loud: the nation's progress and development depend on limiting Indian rights.

What is remarkable is just how openly racist and ends-driven the Court is in many of these examples. The problem is that if Indigenous peoples' land rights were fully recognized, such recognition would stand in the way of progress. The solution: to deny Indians, Native Alaskans, and other Indigenous peoples, including Native Hawaiians, legal protection against the loss of their property rights. Whereas one would be shocked if the Court cited approvingly *Plessy v. Ferguson* or other transparently racism opinions, in Indian law such uncritical—and at times disingenuous—use of racist precedent is the norm.[313] And when federal policy is not challenged before the courts, erasure of Indian land rights can be done in silence.[314] No wonder Indian land rights are considered matters of secondary concern compared to the demands of progress and prioritization of non-Indians when it comes to the form and distribution of land ownership.

So far, this Article's consideration of dispossession has largely by focused on the willingness of non-Indians to sacrifice the land rights of Indigenous peoples in the name of progress. Another way to understand the dispossession of Indigenous land is as a tool that federal and state governments use to release social and political pressure.[315] The goal of dispossession from this perspective is less progress per se and more about the use of Indian resources to achieve desired political goals. Because non-Indians know that Indigenous peoples' land rights are contested and conditional, non-Indians know they can draw upon Indigenous land and resources to solve political problems, often quite removed from the so-called "Indian problem." No clear line can be drawn between progress on the one hand and political victories on the other, of course, but the examples in this section show the ways Indian land serves as a convenient escape valve for pressures confronting politicians at the state and national level.

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[312] *Id. See also* Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 187-97 (2008) (exploring the problem of checkerboard areas and the possible harm to non-Indians of proximity to Indian land).

[313] Compare, for example, the openly racist language in Ex parte Crow Dog, 109 U.S. 556 (1883) with the disingenuous use of language from that case, with the racist parts silently excised but not acknowledged, in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (highlighting the Court's continued racist uses of history in modern cases).

[314] *See* Sherry Salway Black, *Native Americans and Alaska Natives: The Forgotten Minority*, 17 POVERTY & RACE RSCH. ACTION COUNCIL 1, 2 (2008) (discussing current challenges to Native rights, including ongoing land theft).

[315] *See, e.g.*, Jamie Vickery & Lori M. Hunter, *Native Americans: Where in Environmental Justice Research?*, 29 SOC'Y & NAT. RES. 36, 38 (July 25, 2015) ("Native American lands have increasingly become targets for unwanted land uses such as dump sites, nuclear and weapons testing facilities, and resource extraction").

Indian land dispossession provided the United States with needed revenue and with an ever-expanding frontier that could be used to absorb the growing population. The country was able to avoid imposing significant federal income taxes until 1913 in part because of revenue generated by the sale of public land.[316] The doctrine of discovery and conquest together helped ensure that the federal government initially acquired the land from Indian nations at a discount, allowing the government to fund itself and fund its objectives through land sales.[317] The most famous example of this is the construction of the transcontinental railroads.[318] The United States government "paid" the railroad companies racing to link the west coast with the rest of the country with checkerboard plots of land that followed the newly laid tracks.[319] Railroads in turn made the frontier more accessible, allowing riders to make the trip west in less than a week compared to the months-long ordeal of wagon trains.[320] In one of the most influential essays of American history, Frederick Jackson Turner highlighted the importance of the frontier in both the nation's imagination and in its growth.[321] According to Turner, American institutions were "compelled to adapt themselves to the changes of an expanding people—to the changes involved in crossing a continent, in winning a wilderness, and in developing at each area of this progress out of the primitive economic and political conditions of the frontier into the complexity of city life."[322] But the frontier was about more than just "winning a wilderness," it also permitted wave after wave of emigrants seeking "gifts of free land" to spread across the continent.[323] The fiction of free land—where the identity and claims of the dispossessed are forgotten quickly—converted Indian land into vacant prairie just waiting for settlers to arrive.

Frederick Jackson Turner ended his paean to the American frontier by declaring it dead, the map having been filled in,[324] but when it comes to energy resources, Turner failed to recognize the promise of Indian reservations as a continual frontier.

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316 U.S. CONST. amend. XVI.

317 *See* Kades, *supra* note 260.

318 *See generally* Alessandra Link, *150 Years After the Transcontinental Railroad, Indigenous Activists Continue to Battle Corporate Overreach*, WASH. POST (May 10, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/05/10/how-indigenous-activists-fought-transcontinental-railroad.

319 *See* Sean M. Kammer, *Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850-1903*, 35 L. & HIST. REV. 391 (2017) (discussing the extent and significance of land grants to railroad companies). *See also* RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA (2011).

320 Erin Blakemore, *What Was It Like to Ride the Transcontinental Railroad?*, HISTORY (Oct. 3, 2023), https://www.history.com/news/transcontinental-railroad-experience.

321 Frederick Jackson Turner, *The Significance of the Frontier in American History (1893)*, *in* THE FRONTIER IN AMERICAN HISTORY 1-38 (1920).

322 *Id.* at 2.

323 *Id.* at 2, 37.

324 *Id.* at 38.

When oil was discovered on the Osage reservation in the 1920s, frontier violence stalked the tribe as non-Indians sought access to the resulting wealth.[325] After uranium was discovered on the Navajo reservation, Navajo miners worked without the safety precautions that were known to lessen the dangers of such mining and subsequently died as a result of the government's cold war driven haste and indifference to tribal member health.[326] And after civic leaders in Phoenix realized the need to secure cheap water and electricity, public and private capital built massive strip mines and coal-fired power plants on the Navajo and Hopi reservations to power the waterways and power lines that fueled decades of off-reservation growth.[327] Today, at the same time that the Supreme Court denies the rights of tribes to get a proper accounting of the rights they have in Colorado River water,[328] non-Indian companies hope to construct utility-scale solar projects on tribal land to provide clean energy to Los Angeles and the rest of Southern California.[329] The resources at play may change, but the treatment of reservation land as the exploitable frontier for realization of non-Indian goals continues to animate relations between Indian nations and outside capital.[330]

When development proposals involve off-reservation land, Indian nations often find themselves powerless to block exploitation and degradation of culturally significant resources located within areas controlled by the federal government. Projects that likely would not be approved if they had similar negative impacts on non-Indian groups or religions are allowed to go forward when the cost *only* involves

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[325] *See* DAVID GRANN, KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI (2017).

[326] *See* TRACI BRYNNE VOYLES, WASTELANDING: LEGACIES OF URANIUM MINING IN NAVAJO COUNTRY (2015); PETER H. EICHSTAEDT, IF YOU POISON US: URANIUM AND NATIVE AMERICANS (1994).

[327] For an excellent history of the relationship between Phoenix and Navajo coal, see ANDREW NEEDHAM, POWERLINES: PHOENIX AND THE MAKING OF THE MODERN SOUTHWEST (2016). *See also* ROSSER, A NATION WITHIN, *supra* note 90, at 55-70.

[328] Arizona v. Navajo Nation, 599 U.S. 555 (2023). *See also* Rowan Moore Gerety, *The Forgotten Sovereigns of the Colorado River*, POLITICO (July 7, 2023, 4:30 AM), https://www.politico.com/news/magazine/2023/07/07/the-forgotten-sovereigns-of-the-colorado-river-00096002 (chronicling the difficulties tribes face in meaningful assertions of rights to Colorado River water); Anna V. Smith et al., *How Arizona Squeezes Tribes for Water*, HIGH COUNTRY NEWS (June 14, 2023), https://www.hcn.org/issues/55.7/indigenous-affairs-colorado-river-how-arizona-stands-between-tribes-and-their-water-squeezed (detailing Arizona's resistance to recognizing tribal water rights).

[329] *See* Sarah Donahue, *Clean Energy Produced on Navajo Land Could Help Power Los Angeles*, SALT LAKE TRIBUNE (Mar. 5, 2020, 9:34 AM), https://www.sltrib.com/news/nation-world/2020/03/05/clean-energy-produced; Kalen Goodluck, *In Search of Funding, Tribal Communities Are Turning to Corporate Investment to Embrace Solar Power*, TIME (Apr. 13, 2022, 5:44 PM), https://time.com/6166734/us-indigenous-utility-solar-power.

[330] Tellingly, a number of observers have called northern Arizona and northern New Mexico, including the Navajo Nation, a national sacrifice area. *See, e.g.*, THE FOUR CORNERS: A NATIONAL SACRIFICE AREA? (Sacred Land Film Project 1983); SIMON J. ORTIZ, OUR HOMELAND, A NATIONAL SACRIFICE AREA (1981); NATIONAL RESEARCH COUNCIL (U.S.), REHABILITATION POTENTIAL OF WESTERN COAL LANDS (1974) (introducing the term).

the connection Native Americans have to particular places. Just in the past decade, the path of the Dakota Access Pipeline was changed so that it crossed the Missouri River just upstream of the Standing Rock Sioux Reservation rather than just upstream of Bismarck, North Dakota.[331] The protests that erupted galvanized Native Americans from across the continent to join in the protests,[332] only to be met with water cannons and police dogs.[333] The legal wrangling over the pipeline continues long after the forcible clearance of the protestors.[334] Similarly, Apache leaders are fighting against a proposed copper mine in southern Arizona that would destroy the plant life and property of a site with significant cultural and religious value.[335] The contested property, Oak Flats, had been part of the Tonto National Forest until Congress passed a land exchange that gave the property to a mining company in return for other company-owned land.[336] The final chapter in the battle over Oak Flats has yet to be written,[337] but the exchange of sacred land, done without consultation and over tribal protests, highlights the extremely limited protection

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[331] *See* Andrew Buncombe, *North Dakota Pipeline: How it Favours White Community Over Native Neighbors—in One Map*, INDEPENDENT (Nov. 30, 2016), https://www.independent.co.uk/climate-change/news/north-dakota-access-pipeline-protests-map-white-indigenous-latest-a7448161.html (showing the changed path of the pipeline); Bill McKibben, *A Pipeline Fight and America's Dark Past*, NEW YORKER (Sept. 6, 2016), https://www.newyorker.com/news/daily-comment/a-pipeline-fight-and-americas-dark-past (discussing the changed path of the pipeline).

[332] For extensive coverage of the pipeline and the protests, see NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE (2019).

[333] *See* Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR: THE TWO-WAY (Feb. 22, 2017, 4:28 PM), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight; Julie Carrie Wong, *Standing Rock Protest: Hundreds Clash with Police over Dakota Access Pipeline*, THE GUARDIAN (Nov. 21, 2016, 12:08 AM), https://www.theguardian.com/us-news/2016/nov/21/standing-rock-protest-hundreds-clash-with-police-over-dakota-access-pipeline.

[334] *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032, 1054 (D.C. Cir. 2021) (requiring a new environmental impact statement but blocking an effort to shut down the pipeline).

[335] *See* Katharine E. Lovett, *Not All Land Exchanges Are Created Equal: A Case Study of the Oak Flat Land Exchange*, 28 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 353 (2017); Dana Hedgpeth, *This Land is Sacred to the Apache, and They are Fighting to Save It*, WASH. POST (Apr. 12, 2021, 7:00 AM), https://www.washingtonpost.com/history/2021/04/12/oak-flat-apache-sacred-land; Anna V. Smith, *At Oak Flat, Courts and Politicians Fail Tribes*, HIGH COUNTRY NEWS (July 26, 2022), https://www.hcn.org/articles/indigenous-affairs-justice-at-oak-flat-courts-and-politicians-fail-tribes.

[336] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3282 (2014) (codified at 16 U.S.C. § 539p).

[337] *See* Anita Snow, *Oak Flat Timeline: Native Americans vs. pro-mining interests*, AP NEWS (June 28, 2023, 8:08 AM), https://apnews.com/article/oak-flat-sacred-apache-copper-mine-26fa76965cf75a4addb4108c4818af09 (reporting that development of Oak Flat is paused pending a Forest Service environmental review).

afforded to off-reservation sites with recognized religious and cultural significance to Indians.[338] To return to Hawai'i, after Mauna Kea—a sacred dormant volcano on the Island of Hawai'i that is considered the home of Wākea, the sky god—was chosen as the site of a large reflecting telescope, some Native Hawaiians protested.[339] Though the Hawaiian Supreme Court initially ruled against the telescope builders, it later reversed course, allowing construction to resume.[340]

The point of these examples is not that the thing desired by non-Indians is necessarily bad—energy, minerals, and scientific advancement—but that Native land rights or claims over sacred sites are continuously forced to make way for non-Indian progress. Indian land not only formed the basis of the ever-expanding frontier, but to this day provides the raw material used in furtherance of non-Indian goals. There is not necessarily a lot of daylight between thinking of Indigenous land as available for "the superior genius" of non-Indians to lay claim to and thinking of land as providing a way for the nation to release political and social pressure. But as Part III has already shown, the United States has long treated, and continues to treat, the land rights of Indigenous peoples as unworthy of the sort of protection ordinarily afforded to property owners.[341] The remainder of Part III argues that *Midkiff* is part of the larger pattern of dispossessing Indigenous peoples of their land, demonstrated through both the ease with which Native Hawaiian land rights were sublimated and through the obfuscation of the identity of those whose land interest was taken.

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[338] For example, Native peoples for whom the mountain is sacred objected when Snowbowl, a ski resort located on National Forest Land on the San Francisco Peaks, decided to spray treated sewage effluent on the mountain in the form of artificial snow. But the courts ultimately found that the ski resort could proceed despite the religious harms experienced by Navajos, Hopis, and other tribes. *See* Michael D. McNally, *The Sacred and the Profaned: Protection of Native American Sacred Places That Have Been Desecrated*, 111 CAL. L. REV. 395, 412-18 (2023) (describing the controversy and discussing the court rulings that followed); Debra Utacia Krol, *San Fransisco Peaks: A Sacred Place is Imperiled by Snow Made with Recycled Sewage*, ARIZ. CENT. (Aug. 20, 2021, 10:29 AM), https://www.azcentral.com/in-depth/news/local/arizona/2021/08/20/reclaimed-sewage-water-san-francisco-peaks-contamination/7903872002 (documenting the fight between several Tribes and Snowbowl). *See also* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005) (discussing the challenge of protecting sacred sites located off reservation).

[339] *See generally* Joshua Rosenberg, *Ku Kia'I Mauna: Protecting Indigenous Religious Rights*, 96 WASH. L. REV. 277 (2021) (presenting the controversy and the legal response); Christine Hitt, *The Sacred History of Maunakea*, HONOLULU MAG. (Aug. 5, 2019), https://www.honolulumagazine.com/the-sacred-history-of-maunakea (giving an overview of the sacredness of the volcano to Native Hawaiians).

[340] Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 363 P.3d 224 (Haw. 2015); *In re* Conservation Dist. Use Application (CDUA) HA-3568, 431 P.3d 752, 757 (Haw. 2018).

[341] *See* Joseph William Singer, *Double Bind: Indian Nations v. the Supreme Court*, 119 HARV. L. REV. F. 1, 4 (2005) ("Arguments that would be rejected without a thought in cases involving non-Indian [property rights] claims are accepted, embraced, and presented as compelling justifications for denying rights that would be found if the case involved analogous non-Indian claims.").

B. Midkiff as Dispossession

Midkiff is not just and not even primarily a story of a state successfully battling against oligarchy and feudal land holdings, it is instead a modern variation within the pattern of dispossessing Indigenous peoples, including Native Hawaiians, of their land rights.[342] That is not to say that the Land Reform Act should be characterized as a product of anti-Native bias, only that the politics of land reform in Hawai'i and at the Supreme Court was such that the identity of, and harms suffered by, the most affected landowner could be ignored. By framing land reform as a way to correct for a market failure that resulted in high home prices, advocates of the policy were able to sidestep the fact that the land most affected by the taking was being held for the benefit of Native Hawaiian children.[343] Compared to all the attention paid to Susette Kelo and her little pink house, in *Midkiff* the identity of the property owners is treated as an afterthought.[344] Though the property that flowed into the Bishop Estate followed a distinct trajectory from the property that eventually was held by the large corporate interests operating in Hawai'i, such distinctions are buried by the Court, which uncritically accepts the state's narrative of land reform as progress.[345] While the identity and interests of property owners tend to dominate most eminent domain cases, even cases in which the taking is allowed, the fact that the most affected property owner, and the named plaintiff, was a trust holding land for the benefit of Native Hawaiians is barely acknowledged by the *Midkiff* Court.[346]

The layered nature of the land held by the Bishop Trust subject to land reform arguably aided the Court in sidestepping questions of Indigenous land dispossession. The land subject to the Land Reform Act taking was not held directly by Native Hawaiian children but was instead held by a trust. Maybe the Court, given the layering of legal title and equitable title, should be excused for not focusing on the beneficiaries. But such an argument goes too far and ignores the ways that changing the status of land has itself been a tool of colonial control and dispossession. As Office of Hawaiian Affairs Trustee Frenchy DeSoto noted:

> Land reform was to have prompted fundamental social change. That is, a change from having Hawaiian lands held in trust for the Hawaiian people to having those lands wrenched from our hands and put into the hands of

[342] *See* Levy, *supra* note 38, at 885 ("A central theme of Hawaiian history during the past two centuries has been the continual displacement of Native Hawaiians from the con- trol and ownership of the lands of Hawaii.").
[343] This is an especially noteworthy achievement since "[Native] Hawaiian children were about the Islands' most underprivileged people, with among the most social problems." COOPER & DAWS, *supra* note 97, at 428.
[344] *See supra* note 219 and accompanying text.
[345] *See supra* Part I (D).
[346] *See supra* notes 163-167 and accompanying text.

> others. But this is nothing new to Hawaiians. For the past 100 years we have been victims of "fundamental social change." We lost an entire kingdom to people whose only eoneem was to effect social change with little regard for native people.[347]

This Hawaiian perspective is keeping with Vine Deloria, Jr.'s observation that "[a]mong the more surprising elements of Indian land tenure is the aspect of continual experimentation with property rights which has been visited upon the individual tribes."[348] The Court has used the different status of Indian land as an excuse to deny Native nations of their land rights and as a reason to recognize federal authority over particular Indigenous groups.[349] Thus, the Supreme Court held that a taking of reservation land from an Indian nation was not a compensable taking if the land was set aside by executive order.[350] The Court also considered the fact that Pueblo Indians held land in fee as a reason for not treating them as Indians, but ultimately rejected that argument because Pueblo Indians shared enough other stereotyped and negative traits with other Indians.[351] One justification given for allotment was the idea that non-Indian governments would respect individually-held land holdings more than they had respected reservation boundaries; getting fee simple was supposed to protect tribes from further dispossession.[352] Indeed, the division of Hawaiian land that occurred through the Great Māhele was driven in part by a recognition that converting the land into individually-owned parcels might help Hawaiians retain their land should a foreign power eventually take over the islands.[353] *Tee-Hit-Ton*'s subsequent denial of any compensation to Alaska Natives for land that they had possessed since time immemorial arguably shows the wisdom of Indigenous groups experimenting with different land ownership forms as a shield against dispossession.[354]

What is disheartening about *Midkiff* is that the denial of an Indigenous interest in the land in question facilitated the taking of Indigenous land. The Court was able to imagine the *Midkiff* landowners as simply feudal landlords, rendering the taking a mere application of broad principles instead of being a direct attack on the Indigenous land rights associated with the Bishop Estate. Crucially, the Court is able to do so by

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[347] A. Frenchy DeSoto, *When Stealing Land is Called Land Reform*, KA WAI OLA O OHA (July 1990) (on file with the author).
[348] Vine Deloria, Jr., *Foreword*, *in* KIRKE KICKINGBIRD & KAREN DUCHENEAUX, ONE HUNDRED MILLION ACRES, at x (1973).
[349] *See supra* Part III (A).
[350] Sioux Tribe v. United States, 316 U.S. 317 (1942).
[351] United States v. Sandoval, 231 U.S. 28 (1916).
[352] For a collection of views of the "Friends of the Indian" who advocated for allotment, see AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900 (Francis Paul Prucha ed., 1973).
[353] *See supra* notes 65-67 and accompanying text.
[354] *See supra* notes 263-69 and accompanying text.

accepting the non-Indian understanding of the land. Had the Court looked into how Native Hawaiians considered the land held by the Bishop Trust, they would have had to confront the Native Hawaiian view that the land not only belonged to them but also that it should not be alienated.[355] Indeed, once *Midkiff* is recognized as an Indian law case, it can be understood as one of many cases in which the Court as decided not to use applicable legal protections—most notably the canons of construction—that recognize the uniqueness of Indian claims as the means by which to limit Indigenous rights.[356] The Court's framing of the case as an anti-oligarchy case has largely claimed the day. News coverage at the time,[357] academic commentary, and even Indian law textbooks and treatises largely neglect the fact that the majority of the lease-to-fee conversions involved taking property from a trust benefitting Native Hawaiian children and giving fee simple ownership to upper-middle class tenants.

Midkiff connects to the examples of the dispossession of Indians given previously in Part III because of the ease with which Hawai'i and the U.S. Supreme Court were willing to sacrifice Indigenous property rights in the name of progress. While it is true that large property owners controlled a relatively large share of private property on the islands, other land could have been opened up to homeownership. The scarcity of land available for development and the concentration of private ownership into the hands of only a few large estates was the product of a decision to not make state and federal land available for development.[358] Former Crown Land held by the state of Hawai'i and by the federal government, including significant parcels set aside for military purposes, were not included in the discussion. Instead, by taking conversion of public land into private housing off the table and narrowing the conversation to

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[355] *See supra* notes 196-198 and accompanying text; MacKenzie & Sproat, *supra* note 66, at 519-20 (discussing Native Hawaiian understandings of a permanent land trust). *See generally* D. Kapua'ala Sproat & MJ Palau-McDonald, *The Duty to Aloha 'Aina: Indigenous Values as a Legal Foundation for Hawai'i's Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525 (2022) (discussing Native Hawaiian views of the sacredness of the land).

[356] *See, e.g.*, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 US 382 (2023) (not applying ordinary principles of federal Indian law to undermine tribal sovereign immunity).

[357] Dan Rather, for example, reported that the Court "upheld the principle of a land reform program designed to end the concentration of real estate in the hands of the few, not in some third-world country, but in the fiftieth state—Hawaii." Wolf, *supra* note 160, at 26 (quoting CBS Evening News, May 30, 1984).

[358] *See* Stark, *supra* note 127, at 627 ("The brief also noted that 97% of the land statewide was zoned for non-urban, non-residential uses, and that the state owned 34.5% of the land, and that the state had the authority to use public lands for residential purposes, but the state had generally chosen not to do so."); Woodlief, *supra* note 150, at 128 ("Instead of divesting the state of its excess holdings or petitioning the Federal Government to do the same, both of which would have increased the tax base and the number of fee simple owners, the legislature chose to solve the problem by compelling private landowners to break up their estates."); Kanner, *Eminent Domain Projects that Didn't Work Out*, *supra* note 24, at 198-99 ("The reason for the shortage of buildable land was the fact that the government owns about half the land on Oahu, which was thus unavailable for housing construction.").

the problem posed by a few private landowners, Hawai'i and the Supreme Court could define the problem as feudalism and land oligarchy rather than recognizing the cost of government limitations on development and supply.[359] Having seized the Crown Land, the Land Reform Act offered a backdoor way to take the most valuable part—the residential leaseholds—of what little Native Hawaiian land remained, not necessarily with bad intent, just with relative indifference to Native losses.[360] For the State of Hawai'i, when it passed the Land Reform Act, and the U.S. Supreme Court, when it upheld the Act, it was okay to undercut the property rights of a trust benefiting Indigenous children if doing so furthers the goal of converting tenants into owners. Progress demands sacrifice and *Midkiff* shows that it is easier to sacrifice Native Hawaiian interests in land than it would have been to widen the lens to include public land parcels as part of the solution to Hawai'i's high home prices.[361] Once again, diminishment of Indigenous land rights became the preferred way of releasing pressure on a larger social issue, with both land reform advocates and the U.S. Supreme Court choosing to ignore the policy's disproportionate impact on Native Hawaiian land interests.[362]

Conclusion

The United States is a deeply unequal society and land holdings in the country both reflect and reproduce these inequalities. Land reform is not necessarily a bad

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[359] *See* Kanner, *Do We Need to Impair*, *supra* note 222, at 430 (arguing that the housing market, rather than malfunctioning, "was responding rationally to prevailing conditions, most of which were brought about by government land ownership patterns and regulatory policies"); La Croix & Rose, *supra* note 100, at 48 (arguing that "the legislature was wrong in alleging that a forced transfer of fee-simple interest from lessors to lessees would lower land prices. Rather, the wholly overlooked causes of the high prices of land were severe natural and governmental restrictions on the supply of residential land."); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 181 (1985) (arguing that the high price of residential property in Hawai'i is more a product of "the extensive network of state land use regulations" than market failures involving residential leaseholds). *See also* 1967 REPORT, *supra* note 19, at I-14 ("Broad economic or financial factors [not lease holdings and conversions] are the driving force behind major trends in the overall Oahu real estate market.").

[360] As one Native Hawaiian argued about land reform, "Hawaiians owning and controlling land in Hawai'i somehow constitutes a "social evil." Never mind that this is the only homeland we have on earth." DeSoto, *supra* note 347.

[361] *See also* Lewis, *supra* note 17, at 587 ("Although the concentration of land ownership may be reduced, no land is added to the market for others to purchase to fulfill the perceived need for fee simple housing."); 1967 REPORT, *supra* note 19, at 54 ("Leasehold to fee simple conversions do not appear to stimulate subsequent fee simple resale activity.").

[362] As the Trust argued in its brief to the Court, "Ironically, at a time in American history when the rights and special needs of the aboriginal population are finally receiving recognition, this statute strikes at the jugular of a unique non-profit trust dedicated to providing quality education for an underprivileged native group." Brief for Appellees at 5, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

idea and democratizing capital and markets by expanding access to land ownership can help the nation's stability as well as its overall growth. But the fact that a policy furthers progressive goals should not immunize it from critical scrutiny, especially where state power is being used to transfer property from a politically subordinated peoples to more powerful groups. Put differently, it is okay to support the idea of anti-oligarchic land reform while also objecting to forms of land reform that continue the country's pattern of dispossessing Indigenous peoples in order to favor progressive goals. If only vulnerable groups are asked to feel the heavy hand of the state, then even such uses of eminent domain should be critiqued no matter how well intended the policy was initially.

This Article shows that there is more to *Midkiff v. Hawaiian Housing Authority* than suggested by a surface reading of the case. Yes, it is an anti-oligarchy, progressive, case. But it is also an anti-Indigenous peoples case. At the time Hawai'i passed the Land Reform Act, the disproportionate impact that forced lease-to-fee conversions would have on Bishop Trust was readily apparent—given its heavy involvement in the residential leasehold market and the concentration of the Trust's holdings on the island of O'ahu. The choice to proceed with land reform efforts that targeted a trust benefitting Native Hawaiian children, and the decision of the U.S. Supreme Court to uphold the state's use of its taking authority against the Bishop Trust, is part of a pattern of using dispossession as a way to achieve larger goals. Today, *Midkiff* is taught as a stop on the way to *Kelo* and the identity of the party whose rights were taken reduced to being nothing more than oligarchic trusts. A lone white woman with a pink house has been elevated as the perfect victim when it comes to aggressive uses of the power of eminent domain power.[363] In contrast, most academic commentary on *Midkiff* by property scholars focuses on the Court's highly deferential approach when reviewing Hawai'i's justification for the Land Reform Act.[364] The identity of the property owners and nature of the interests at stake in allowing tenants to purchase fee simple over the objections of the owner were ignored by the Court and by most academics ever since.[365] The hope is that this article serves to reignite interest in the case among both property and Indian law scholars. The Land Reform Act attacked a trust benefiting Native Hawaiian children and should be recognized as part of the country's long pattern of dispossessing Indigenous peoples of their land and of trying

[363] *See, e.g.*, JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009) (celebrating Suzette Kelo's stand against New London's redevelopment plans).

[364] *See, e.g.*, Lewis, *supra* note 17, at 588 ("Based on the Midkiff decision, it is apparent that land redistribution is no longer seen as a threat to the established order of our society provided the legislature can detail some rational reasons for their actions.").

[365] Powe, Jr., *supra* note 11, at 386 ("instead of identifying the plaintiff, the Court simply referred to "appellees" without further description"). *See also id.* at 393 ("[T]he Court must have known who the plaintiff was. But it did not inform anyone else.").

to bury the fact of such dispossession.[366] It is time to stop defining and celebrating *Midkiff* as an anti-oligarchy case. It may in part be that but it is also a modern example of the systematic denial and devaluation of Indigenous land rights in order to further non-Native goals.

[366] *See* Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 52 (2005) (noting that "American Indians have long been confronted with the reality that no matter what legal interest one holds in property, those ownership interests are always subject to divestiture by the government.").