Response to Progress and the Taking of Indigenous Land by Ezra Rosser
The Truth About *Midkiff* Justifies *Kelo*'s Reversal

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I. INTRODUCTION

Professor Ezra Rosser's article on *Hawai'i Housing Authority v. Midkiff* encourages us to look at the use of eminent domain power as another one of the many guises under which Indigenous peoples have been deprived of their rightful property. To do so, Rosser draws back the curtain to provide a closer look at the landowners who constituted the "evil oligarchy" that the Hawai'i Land Reform Act of 1967 (HLRA) aimed to disrupt. Who were these land hoarders? In 1967, the three largest landowners on Oahu—the most populous island and thus the focus of the HLRA—consisted of the federal government, owning 36.74 percent; the state government, owning 14.88 percent; and the Bernice P. Bishop Estate, owning 15.50 percent.[1] Because the Bishop Estate was the largest private landowner and leased out more of its land for residential purposes than any other large private landowners, it was therefore subject to more than half of the lease-to-fee conversions targeted by the Act.[2] But what is not evident in the *Midkiff* opinion is that the Bishop Estate held land originally belonging to the indigenous Hawaiian people in trust for the benefit of Native Hawaiian children and their education.

Rosser does an excellent job of succinctly relating Hawai'i's history from the Great Māhele of 1850, which created a tripartite division of land (crown land, land for chiefs and headmen, and land for tenants), through the annexation

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[1] Ezra Rosser, *Progress and the Taking of Indigenous Land*, 85 OHIO ST. L.J. 623, 644 (2025).

[2] *Id*. at 653–54.

of the Hawaiian Kingdom by the United States in 1898 and Hawai'i's eventual statehood in 1959. This history includes the overthrow of the Kingdom of Hawai'i by the United States in 1893 and Queen Lili'uokalani's subsequent abdication of her throne while imprisoned in the 'Iolani Palace. And as Rosser points out, the Bishop Estate and its creator's legacy are both a response to and product of this turbulent history.[3] When Princess Bernice Pauahi Bishop, the last of the direct Kamehameha line, died in 1884, she established a trust for the education of Native Hawaiian boys and girls with instruction not to sell the property unless necessary to do so.[4] The trust was funded with land from the Māhele that had been set aside for the chiefs and headmen[5] and was crucial as a means of preserving Hawai'i's culture and identity after the monarchy was overthrown.[6]

We are encouraged by Rosser to devote renewed scholarly attention to the *Midkiff* decision as a reminder that the progressive advancement of important social goals involving the taking of land for public use has often resulted in the mistreatment of Native peoples as part of a pattern of colonialization. That is, too often, Indigenous lands (as opposed to State or Federal lands) are used to achieve our broader societal goals, such as establishing national parks,[7] providing space for affordable clean energy infrastructure,[8] or, as in *Midkiff*, facilitating land ownership to create a productive real estate market.[9] Certainly, the Amicus Curiae brief of the Office of Hawaiian Affairs recognized the irony of the Hawaiian Land Reform Act (HLRA) that says the need for single-family residential lots is critical and attributes this scarcity to a concentration of land ownership in the hands of a few, but then only applies its reform to lands leased as residential lots and does not encourage the development of new residential property.[10] Why should the HLRA take residential land owned by the Bishop Trust that uses revenues from Hawaiian land to educate Hawaiian children and transfer those leases into fee interests for the well-to-do rather than take land from the state or federal government to develop new residential property?

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[3] *See id*. at 656–57.

[4] *Id*. at 654.

[5] *See id*. at 636.

[6] Rosser, *supra* note 1 at 626.

[7] *Id*. at 672.

[8] *See id*. at 630.

[9] *See id*. at 629–30.

[10] Brief of Amicus Curiae the Office of Hawaiian Affairs in Support of Appellees, Haw. Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (Nos. 83–141, 83–226, 83–283), 1984 WL 987629, at *28.

II. THE *MIDKIFF* BRIEFS

When I started reading this article, I wondered how Professor Rosser began thinking about this issue and whether it was difficult to discover the "behind the scenes" story. I looked at the briefs in the filings before the U.S. Supreme Court and found that the Brief for the Appellees and the Amicus Curiae brief of the Pacific Legal Foundation (PLF) in favor of the landowners against the state's exercise of eminent domain minimally discussed the HLRA's impact on native Hawaiian land interests. There were three short paragraphs and a few footnotes in the Appellees' brief describing the Trustees and the Schools and a reference in the PLF brief to *Berman v. Parker*, 348 U.S. 26 (1954) and the concern that municipalities have deprived minorities of housing because evidence of discriminatory intent is hard to find and deference is given to legislative determinations.[11] In contrast, the Amicus Curiae brief submitted by the Office of Hawaiian Affairs (OHA) in favor of the Appellees as landowners explained in detail through historical narrative how the challenged statute would seriously affect the lands dedicated to the betterment of the Native Hawaiians.[12] Similarly, the Amici Curiae brief of the Queen Lili`uokalani Trust, et al., as human service organizations working to meet the unique needs of Hawaiians, detailed the rich history of the Hawaiian Islands to support its contention that the challenged statute and its application to the Bishop Estate would adversely impact the interests and welfare of its Hawaiian clients and beneficiaries.[13]

The Ninth Circuit, in its decision finding the Hawaiian Land Reform Act (HLRA) unconstitutional,[14] did not have the benefit of the Amici Curiae briefs explaining the historical background of Hawaiian land ownership and the establishment of the Bishop Trust as land held for the betterment of Native Hawaiians. Indeed, the dissent's response to the majority's finding of unconstitutionality argues for a rule of deference to the legislature in determining what constitutes a public use and it restates the Hawai`i legislature's findings in regards for the need for land reform without once identifying that the major landowner affected was the Bishop Trust holding land for the benefit of Native Hawaiians.[15] Instead, the dissent analogized the *Midkiff* case to a land reform case from Puerto Rico where the legislature sought to break up the land holdings of Eastern Sugar Associates to distribute land to squatters using eminent domain and the court recognized that the takings were for a public

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[11] *See* Brief for Appellees, *Haw. Housing*, 467 U.S. 229 (Nos. 83-141, 83-236, 82-283), 1984 WL 987633, at *3–5; Brief of Amicus Curiae Pacific Legal Foundation in Support of Appellees, *Haw. Housing*, 467 U.S. 229 (Nos. 83-141, 83-283, 83-236), 1984 WL 987630, at *18–19.

[12] Brief of Amicus Curiae the Office of Hawaiian Affairs in Support of Appellees, *supra* note 10, at *3–17.

[13] Brief of Amicus Curiae of the Queen Lili`uokalani Trust, et al., *Haw. Housing*, 467 U.S. 229 (Nos. 83-141, 83-236, 83-283), 1984 WL 987631, at *2–11.

[14] Midkiff v. Tom, 702 F.2d 788, 807 (9th Cir. 1983).

[15] *See id.* at 813–17 (Ferguson, J., dissenting).

use.[16] This factual comparison of *Midkiff* by the dissent to a case favoring land squatters over a corporation indicates that the dissent viewed the landowners in *Midkiff* to be the "evil oligopoly," akin to a greedy corporation, rather than a trust protecting Native Hawaiian land rights.

But when the Court reversed the Ninth Circuit decision in *Midkiff* and held the HLRA to be constitutional, it *did* have the advantage of the Amici Curiae briefs that told the story of Hawai'i land ownership from the Great Māhele of 1848, through the surrender of Queen Lili'uokalani to U.S. forces in 1893, and up to the establishment of Hawai'i as a State in 1959. As the OHA brief so eloquently states:

> Taking one person's private property in eminent domain simply to convey it to another person is not a "public purpose" under anyone's definition. That is the only result assured by the challenged statute. In each case, the lessee, desirous of owning the fee simple interest in the land, applies under the statute to Appellant Hawaii Housing Authority. That agency condemns the interest from Appellees and sells the interest to the lessee. That is the total effect of the statute. There is no other effect.
>
> Here, also, it must be kept in mind just who are the beneficiaries of Chapter 516 [HLRA]. We are not dealing with poor, downtrodden tenants subjugated by a moustache-twisting and villainous landlord. Appellant associations represent affluent lessees who own expensive leasehold residential properties in the best neighborhoods of the City and County of Honolulu. Appellees are the trustees of a Native Hawaiian princess' only legacy to her people, left to them just at the time the rest of their world crumbled around them. If the roles were somehow reversed, or if Chapter 516 used the power of eminent domain to acquire land for a worthy purpose such as, for example, running a school for a disadvantaged group of citizens, then perhaps a public purpose argument could readily be made. Those are *not* the facts here, of course.
>
> Your amicus is painfully aware of the role that the lands for which Appellees are the trustees must play in the betterment of the condition of Native Hawaiians and Hawaiians now and in the future. To reverse the lower court and uphold the statute would not, perhaps, cause an immediate and devastating crippling of the trust or the programs of the Schools described above. It is submitted, however, that it has taken us over two hundred years to arrive at the conclusion that Native Hawaiians and Hawaiians need special educational programs. How ironic it would be to start weakening the greatest source for such programs at this turning point in the history of the Hawaiian People.[17]

Despite having the benefit of these amici briefs describing the Bishop Trust and the history of Hawaiian land ownership, the U.S. Supreme Court in *Hawaii*

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[16] *Id.* at 817–18 (Ferguson, J., dissenting) (citing People of Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir. 1946)).

[17] Brief of Amicus Curiae the Office of Hawaiian Affairs in Support of Appellees, *supra* note 10, at *28–29.

Housing Authority v. Midkiff held that the HLRA was constitutional because of the legitimate public purpose "to attack certain perceived evils of concentrated property ownership in Hawaii."[18] Indeed, as Rosser points out, progressives generally viewed the *Midkiff* decision as a government victory over inequality by forcing large, powerful landowners to sell their properties to leasehold tenants that were unable to realize the benefits of homeownership due to the greedy land capture of the ruling elite.[19]

As a property rights defender, I often found some solace in *Midkiff* because while the HLRA seemed to achieve a good result for housing equality, it also helped the property owners by allowing them to avoid capital gain taxes through the mechanism of eminent domain. Indeed, Justice O'Connor noted that the HLRA was enacted "to accommodate the needs of both lessors and lessees" by condemning the land to make the land sales involuntary so that the federal taxes would be less consequential.[20]

What I didn't realize until reading Rosser's article was the extent of the impact the HLRA had on Native Hawaiian property. It is now difficult to read the portion of the *Midkiff* decision declaring that "[t]he people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs."[21] Are the "people of Hawaii" the Court is referring to the wealthy, non-Native Hawaiian landowners that stood to benefit from upholding the HLRA while "their monarchs" are Queen Lili'uokalani, who abdicated to avoid the bloodshed of her people, and Princess Bernice Pauahi Bishop, whose goal was to preserve Native Hawaiian property for the education of Native boys and girls?

The *Midkiff* Court used the historical information provided by the Brief for Office of Hawaiian Affairs and the Brief for the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, to explain how 49% of the land in Hawaii came to be owned by the State and Federal Governments with 72 private owners owning the other 47%, thus justifying legislative action to correct the skewed residential fee simple market.[22] Unfortunately, the Court neglected to include the explanation of how that land was taken from the Native Hawaiians over time and that, as a result, the only remaining Native holdings of consequence were secured by the Bishop Trust for promoting the education of Native boys and girls. Instead, the Court viewed the Trust as part of a land oligopoly traceable to monarchs that "created artificial deterrents to the normal functioning of the State's residential land market" and justified the use of the police power to regulate the oligopoly "and the evils associated with it."[23]

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[18] *Midkiff*, 467 U.S. at 245.
[19] *See* Rosser, *supra* note 1, at 625–27.
[20] *Midkiff*, 467 U.S. at 233.
[21] *Id.* at 241–42.
[22] *Id.* at 233.
[23] *Id*. at 242.

The Court must have known of the ties and claims Native Hawaiians had to the land being taken based on the briefs submitted by the Bishop Trust and Native Hawaiian organizations, but framed the case as an anti-oligarchy issue, rather than the indigenous dispossession case it truly was following the United States' overthrow of the Kingdom of Hawai`i.[24] Instead of focusing on the identity of the property owner—as it did with Susette Kelo and her pink house in the *Kelo* case—,[25] the Court in *Midkiff* ignored the Bishop Trust's identity as the protector of Native Hawaiian land for the benefit of Hawaiian children.

III. DISPOSSESSION OF INDIGENOUS PEOPLES

Professor Rosser connects the dispossession of Native Hawaiian land by the acquisition of Crown lands following the United States' conquest, the failure of the State to implement the Hawaiian Homes Commission Act, and the taking of land from the Bishop Trust under *Midkiff*'s approval of the HLRA, to the denial of Native American land rights in the rest of the United States.[26] Upon achieving independence, the United States employed European concepts of property ownership to deny Indians their property rights in *Johnson v. M'Intosh*, and continues to rely on the "doctrine of discovery" to limit Native American land rights.[27] Rosser identifies the problem as the way America has chosen to respond to obstructions to progress—if we fully recognized the land rights of Indigenous peoples, such recognition would stand in the way of progress.[28] Instead, we "deny Indians, Native Alaskans, and other Indigenous peoples, including Native Hawaiians, legal protection against the loss of their property rights" so that we can fund the government through land sales, construct transcontinental railroads, give free land to settlers, harness energy and natural resources, and provide for land grants institutions, homesteading opportunities, and national parks and public lands.[29]

Rosser's emotional indignation is justified and compelling as applied to the treatment of Indigenous lands in general, but I would like to focus the remainder of my response on the use of eminent domain as the crude cudgel that allows a state or local government to discriminate against disfavored property owners based upon race or status. This focus aligns with Rosser's Section IV B. ("Midkiff *as Dispossession*"), where he notes that it was okay for the Court to "undercut the property rights of a trust benefitting Indigenous children if doing so furthered the goal of converting tenants into owners."[30] As he explains, this

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[24] *See* Rosser, *supra* note 1, at 681.

[25] *See* Kelo v. City of New London, 545 U.S. 469, 475 (2005) (describing Petitioner Susette Kelo as having "made extensive improvements to her house, which she prizes for its water view").

[26] *See* Rosser, *supra* note 1, at 665.

[27] *Id*. at 665–68.

[28] *Id*. at 673.

[29] *Id*. at 672–77.

[30] *Id*. at 681.

was not the first time the Court deprived Native nations of their property rights by using a different status for Indian land.

IV. EMINENT DOMAIN AS A DISCRIMINATION TOOL

Local governments have used eminent domain to discriminate against racial minorities for decades. "By the mid-twentieth century, 'slums' and 'blight' were widely understood euphemisms for African American neighborhoods" and slum clearance reinforced racial segregation and the impoverishment of African Americans.[31] In *Berman v. Parker*, the Court affirmed a District Court finding that the government "could condemn property only for the reasonable necessities of slum clearance and prevention" because these slum conditions were "injurious to the public health, safety, morals and welfare."[32] The Court's decision in *Berman* established the level of judicial deference for the "public use" determination in eminent domain actions as "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[33] Further, eminent domain was also used for slum clearance in the construction of the federal interstate highway system by designing routes to destroy urban African American communities since zoning them away from white neighborhoods was constitutionally prohibited.[34]

In the early 1920s, Willa Bruce bought two lots of beach property in Manhattan Beach and together with her husband, Charles, developed a seaside resort known as "Bruce's Beach" that was open to Black beachgoers.[35] Other Black families purchased nearby land to build vacation homes. But in 1924 the City Council voted to condemn the Bruce resort site and surrounding properties through eminent domain for the purpose of building a public park.[36] While there was no question that a public park is a public use, the evidence is clear that the eminent domain action was motivated by the predominately White community's racial hostility.[37] In fact, the land sat vacant for 30 years and no park was built until 1956.[38] Eventually, the property was returned to the legal heirs of Charles and Willa Bruce on July 20, 2022 through the work of the Los Angeles County Board of Supervisors.[39] The story of Bruce's Beach has what some would consider a happy ending and provides a model of reparations for Black

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[31] Richard Rothstein, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 127 (2017).

[32] 348 U.S. 26, 31 (1954).

[33] *Id.* at 32.

[34] Rothstein, *supra* note 31.

[35] Anti-Racism, Diversity, And Inclusion Initiative, Bruce's Beach, *Returning Bruce's Beach: A 100-Year Journey to Justice*, https://ceo.lacounty.gov/ardi/bruces-beach/ [https://perma.cc/ZHZ9-92GV].

[36] *Id.*

[37] *See id.*

[38] *Id.*

[39] *Id.*

Americans. However, it is questionable as to whether the remedy of receiving land worth $20 million today is sufficient to help the heirs build up the generational wealth they could have realized if the property had not been unjustly stripped from them 100 years ago.

Eminent domain also helped build Dodger Stadium when Walter O'Malley moved his Brooklyn Dodgers to Los Angeles.[40] In the early 1950s, eminent domain forced families out of the Mexican-American village located in Chavez Ravine for the purpose of building low-income public housing with the promise of new housing for those displaced.[41] The City of Los Angeles bought the land back from the Federal Housing Authority and, instead of building housing, it sold the land to the baseball team to build a stadium and the remaining few families in Chavez Ravine were evicted.[42]

General Motors was the beneficiary of Detroit's decision in 1980 to raze Poletown, a working-class integrated neighborhood, to build the Detroit-Hamtramck auto plant.[43] Ultimately, the City bulldozed 1,500 homes, 144 Businesses, and 16 churches.[44] Poletown's 4,200 residents included Polish immigrants, African Americans, and immigrants from Albania, Yugoslavia, Yemen, and the Philippines, mostly poor and living in rundown housing.[45] While some residents took the city's buyout offer, others protested, but eventually the fight ended and GM built its new plant, but employed only half the number of people it had initially promised to bring in the form of new jobs.[46] Although there were concerns the plant might be shutting down in 2019 with the potential loss of 1,500 jobs and millions of dollars in property taxes,[47] it appears that it has recently been retooled to manufacture EV vehicles.[48]

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[40] *See* Elina Shatkin, *The Ugly, Violent Clearing of Chavez Ravine Before It Was Home to the Dodgers*, LAIST (Oct. 17, 2018) https://laist.com/news/la-history/dodger-stadium-chavez-ravine-battle [https://perma.cc/MDN4-JUTH].

[41] *Id.*

[42] *Id.*

[43] *See* Amy Crawford, *Can Poletown Come Back After a General Motors Shutdown*?, BLOOMBERG (Dec. 20, 2018) https://www.bloomberg.com/news/articles/2018-12-10/the-history-of-gm-poletown-and-its-impact-on-detroit.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See id.*

[48] Jamie L. LaReau, *GM Commits to $2.2 Billion Investment and 2,200 Jobs at Detroit Hamtramck Assembly*, DETROIT FREE PRESS (Jan. 27, 2020) https://www.freep.com/story/money/cars/general-motors/2020/01/27/gm-detroit-hamtramck-poletown-assembly-plant-jobs/4564108002/. *But see* Joseph Buczek, *GM Will Lay Off 200 Workers at Factory Zero Detroit-Hamtramck Assembly*, CBS NEWS DETROIT (Apr. 20, 2025) https://www.cbsnews.com/detroit/news/gm-layoff-200-workers-factory-zero-detroit-hamtramck/ [https://perma.cc/HF4T-94BA].

V. THE INEVITABILITY OF *KELO* AND THE DISSENT'S DUPLICITY

Inspired by Professor Rosser's scathing critique of the *Midkiff* opinion and its opacity regarding the impact on Native Hawaiian land, my concluding thoughts address Justice O'Connor's dissent in *Kelo*, joined by Rehnquist, Scalia, and Thomas, in their attempt to justify how the holdings in *Berman* and *Midkiff* did not support the majority's decision in *Kelo*. First, Justice O'Connor explained that "in certain circumstances" takings for a public purpose may be constitutional even if they subsequently serve a private use.[49]

Berman's use of eminent domain was constitutional because the blighted neighborhood as a whole (even though each lot was not blighted) was "injurious to the public health, safety, morals, and welfare" and only the government purpose to eliminate the blight, not the mechanics was required to pass scrutiny.[50] As for *Midkiff*, O'Connor noted that the oligopoly in land ownership injured the public tranquility and welfare and justified legislative condemnation deserving of deference.[51] So how is this different from New London's legislative decision in *Kelo* that the city's economic base needed revitalization to bring new jobs and revenue to aid the city's residents for the public welfare?

Justice O'Connor claimed that in *Berman* and *Midkiff*, the purpose of using eminent domain was to eliminate a public harm while in *Kelo*, the purpose of using eminent domain was "to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure."[52] Of course, couldn't we say that in *Berman* and *Midkiff* eminent domain was generating a public benefit? In the case of *Midkiff*, tenants of the Bishop Trust were able to obtain fee ownership thanks to the Hawai'i Land Reform Act and the oft-cited quote from *Berman* supported the notion of public use including "esthetic pleasure."[53]

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[54]

And so, it is interesting that Justice Scalia would join a dissent that distinguishes between situations where eminent domain prevents a harm versus when it is used to convey a benefit. After all, in *Lucas v. S. C. Coastal Council* he told us that a legislature cannot shield itself from paying just compensation by claiming that it has taken action to prevent a harm because "such a

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[49] *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).
[50] *Id.*
[51] *Id*. at 499.
[52] *Id.* at 501.
[53] *Id*.
[54] *Berman*, 348 U.S. at 33.

justification can be formulated in practically every case [and] amounts to a test of whether the legislature has a stupid staff."[55] Just as "the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations,"[56] the constitutionality of an eminent domain action should not depend on whether the purpose is to prevent a harm or confer a benefit.

The majority's decision in *Kelo* was inevitable given the *Berman* and *Midkiff* precedents, but what if the Court had instead chosen to increase the judicial scrutiny applied to eminent domain in the same way it increased judicial scrutiny applied to land use exactions by adopting the *Nollan/Dolan* test? The *Nollan/Dolan* two-part test evaluates the constitutionality of exactions that local or state governments impose on property owners seeking development permits.[57] First, there must be an essential nexus between the permit conditions requested and the government's land-use interest.[58] "Second, permit conditions must have 'rough proportionality' to the development's impact on the land-use interest."[59] A permit condition that does not meet this two-part test is considered a taking under the Fifth Amendment.[60]

Professors David Callies and Nicole Garnett, joined by eleven other property and land use professors, proposed in one of many amicus briefs filed in support of the property owners that the Court should subject "public use" claims to intermediate-level scrutiny, rather than rational basis review.[61] Using the *Nollan/Dolan* test as one possible model for "an appropriate means-oriented test for eminent domain," the brief suggested that courts first require "the government to establish a link between the exercise of eminent domain and the particular purpose for which it was condemned," and second, require the government to make a specific, "individualized determination of the need for the particular parcel in question."[62]

VI. APPLYING INTERMEDIATE SCRUTINY IN *MIDKIFF*?

If the Court in *Midkiff* had applied the intermediate level of scrutiny proposed by Callies and Garnett in their amicus brief filed in *Kelo*, rather than

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[55] 505 U.S. 1003, 1025 n.12 (1992). What is even more duplicitous than relying on the distinction between preventing a harm and conveying a benefit (done away with by *Lucas*), to distinguish *Kelo* from *Berman* and *Midkiff*, is Justice O'Connor's reference to Justice Kennedy's "as-yet-undisclosed test" from his concurrence, speculating that "it is difficult to envision anyone but the '**stupid** staff[er]' failing it," quoting the same footnote from *Lucas*. *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (emphasis in original).

[56] *Lucas, 505* U.S. at n.12.

[57] Sheetz v. Cnty. of El Dorado, Cal., 601 U.S. 167, 276–78 (2024).

[58] *Id*.

[59] *Id*.

[60] *Id*. at 279.

[61] *See* Brief Amicus Curiae of Professors David L. Callies, et. al., *Kelo*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2803192, at *15–21.

[62] *Id*. at *22–25.

the standard that "the exercise of eminent domain power is rationally related to a *conceivable* public purpose," would the HLRA have survived constitutional validity under the "public use" requirement of the Fifth Amendment? First, establishing a link between the exercise of eminent domain and the particular purpose requires the government to "demonstrate that a given exercise of eminent domain was 'reasonably necessary' for, or 'related in nature and extent' to, the public purpose for which the condemnation power was invoked."[63]

It appears likely the government would lose this initial requirement given the information presented by OHA in their *Midkiff* amicus brief. There, OHA explained that the preamble to the HLRA stated its purpose was to cure the social problem of land ownership and the need for more single-family residential lots.[64] However, the HLRA applied only to "lands leased as residential lots," and did not "encourage the development of any *new* residential property," which could have been taken from the largest landowners, the state and federal governments, rather than from the only large landowner that was leasing its property, the Bishop Trust, to preserve Native land for the education of Hawaiian children.[65] The HLRA required the Trust to convert its residential leases to fee ownership by its relatively wealthy tenants, who would not be similarly restricted from leasing the land to others in the future.[66] Therefore, the only purpose achieved by the HLRA was to turn over fee ownership of existing residential to well-to-do tenants—not to create additional single-family residential housing.

Applying the second prong of intermediate scrutiny proposed by Callies and Garnett to *Midkiff* would have required the State to make an "individualized determination of the need for the particular parcel in question."[67] The State would have difficulty showing that it made such an individualized determination since the HLRA concluded the condemnation of residential properties were to be made in bulk rather than through individual house lot conversions.[68] Nevertheless, it is doubtful that the State could show that converting the leaseholds held by the Bishop Estate Trust into fees would address the perceived social problem resulting from concentrated land ownership and address the problem of residential fee simple affordability in Hawai`i.

In reality, Hawai`i now has the highest housing costs in the country,[69] lowering the standard of living for residents and restricting the State from

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[63] *Id.* at *23.

[64] Brief of Amicus Curiae the Office of Hawaiian Affairs in Support of Appellees, *supra* note 10, at *26.

[65] *See id*. (emphasis in original).

[66] *See id*. at *28.

[67] *See* Brief Amicus Curiae of Professors David L. Callies, et. al., *supra* note 61, at *25.

[68] *See Midkiff*, 467 U.S. at 233.

[69] JUSTIN TYNDALL, DANIELA BOND-SMITH, & RACHEL INAFUKU, THE HAWAII HOUSING FACTBOOK 1 (2023), https://uhero.hawaii.edu/wp-content/uploads/2023/06/TheHawaiiHousingFactbook.pdf [https://perma.cc/TXW3-VGG2].

recruiting workers.[70] While the HLRA was viewed by some "as a 'land grab' by other ethnic groups to take the basic asset of the Kamehameha Schools, land, away from the Native Hawaiians."[71] "[T]he effect of the Land Reform Act is still a matter of hot debate" and some claim that Kamehameha Schools (formerly the Bishop Estate Trust) is worth much more today because by selling the leasehold interests as fee simple estates they acquired substantial money to invest in higher return projects.[72] Regardless, I submit that the "public use" justification for the Hawai`i Land Reform Act in *Midkiff* would not have survived an intermediate scrutiny test like that proposed by Professors Callies and Garnett in their amicus brief in support of the property owners in *Kelo*.

VII. CONCLUSION

In conclusion, we should ask whether Professor Rosser's efforts to bring the *Midkiff* case back into our crowded consciousness will help us prevent future mischief where the government uses eminent domain to strip away property rights from those less powerful in our society or those whom our Constitution purports to protect under the Bill of Rights. Certainly, if the Supreme Court decides to reexamine the *Kelo* decision, as many have advocated for,[73] a renewed look at *Midkiff* through the lens of Rosser's work could help bring about a more searching judicial review standard for eminent domain.

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[70] *Id*.

[71] Melvin Masuda, *Cases and Places in Hawai`i*, 10-JUL HAW. B. J. 110, 112 (2006).

[72] *See id*. at 112, n.15.

[73] *See* Bowers Dev., LLC v. Oneida Cnty. Indus. Dev., No. 24-670, 2025 WL 889146 (Mem) (petition for writ of certiorari by Institute for Justice seeking overturn of *Kelo* decision denied March 24, 2025).