REDISTRIBUTIVE TAKINGS UNDER A MODERN *MIDKIFF*

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In cities throughout the United States, residential property markets have grown concentrated. Corporate real estate companies, also known as institutional investors, have swallowed up an inordinate percentage of homes for sale, effectively boxing out individual Americans who desire to own a home. Property ownership concentration, however, is not a new problem in the United States. In fact, Hawaii faced this precise problem after achieving statehood: nearly half of all state land was owned by a mere seventy-two individuals.

The Hawaiian legislature identified this defective market and passed the Land Reform Act of 1967 to correct it. The Act allowed the government to utilize its eminent domain power to condemn certain property owned by that small group of property owners. In effect, the Act allowed for a forced transfer of fee simple ownership from the owner to the tenants on that land. Because the Act involved a forced transfer of private property from one private citizen to another, some landowners sought to invalidate the Act on Fifth Amendment grounds in Hawaii Housing Authority v. Midkiff.

In a unanimous decision, the Supreme Court validated the Act's takings scheme, affirming the constitutionality of its forced transfer of fee simple ownership. Based on Midkiff *and subsequent Supreme Court takings cases, this Note posits that states experiencing concentrated homeownership markets as a result of institutional investors' market presence may consider enacting legislation modeled off Hawaii's Act to dilute the market and provide individual Americans a feasible path to homeownership once again.*

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I. INTRODUCTION

Homeownership is a cornerstone of the American Dream.[1] Beyond its symbolic importance, owning a home confers a slew of tangible benefits. Financially, homeownership is the best source of upward mobility.[2] Indeed, homeownership helps individuals grow their wealth, strengthen their credit, and enjoy several tax benefits.[3] But owning a home also furnishes a more basic function: it provides individuals with a stable place to live. Beyond that, homeownership holds emotional importance; for many, the home is a source of pride and a place to start a family, raise children, and develop a sense of community. The American

1. Brian H. Robb, *Homeownership and the American Dream*, FORBES (Sept. 28, 2021, 7:15 AM), https://www.forbes.com/sites/forbesrealestatecouncil/2021/09/28/homeownership-and-the-american-dream/?sh=302193c823b5 [https://perma.cc/E2EM-RP6J].

2. KRITI RAMAKRISHNAN, ELIZABETH CHAMPION, MEGAN GALLAGHER & KEITH FUDGE, WHY HOUSING MATTERS FOR UPWARD MOBILITY 1 (2021), https://www.urban.org/sites/default/files/publication/103472/why-housing-matters-for-upward-mobility-evidence-and-indicators-for-practitioners-and-policymakers.pdf [https://perma.cc/Z3XX-5CH2].

3. JD Esajian, *15 Benefits of Homeownership You May Have Never Considered*, FORTUNEBUILDERS, https://www.fortunebuilders.com/benefits-of-homeownership/ (last visited Oct. 24, 2023) [https://perma.cc/36ZN-JM5G].

property law system has likewise recognized the importance of owning property, emphasizing freedom of ownership as a core principle.[4]

Sadly, it's becoming much harder to own a home.[5] This means a diminishing number of Americans can enjoy the benefits homeownership confers. Worse yet, there appears no end in sight to this lack of access to homeownership, as the homeownership rate is expected to decrease in the coming decades.[6]

But this decrease in homeownership is not due to a lack of consumer desire or demand.[7] Instead, homeownership has become increasingly concentrated in the hands of corporate real estate investment companies who have swallowed up an inordinate amount of homes, distorting the market and crowding out would-be individual buyers.[8] These companies, known as institutional investors, have made the American Dream of homeownership functionally impossible for many Americans.[9] Institutional investors have caused an array of additional consequences: driving home prices upward, contributing to price and rent instability, forcing individuals to rent despite a desire to buy, and, at times, pushing individuals out of their communities in search of affordable housing elsewhere.[10]

As a result of institutional investors' increased market presence, the homeownership market in many cities throughout the United States has become concentrated.[11] Worse yet, the degree of ownership concentration continues to rise.

Invitation Homes, a former Blackstone Group backed real estate investment company,[12] encapsulates this trend of institutional investor market dominance. In fact, Invitation Homes is the largest owner of single-family properties in the United States, amassing an inventory exceeding 85,000 homes.[13] And while its reach is vast, Invitation Homes' reputation is poor. Indeed, it has been involved in litigation with countless tenants across the country over a myriad of

4. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1312 (2014) ("If the system of property law does not make it realistically possible for each person to become an owner of the property needed for a full human life, then we have deprived individuals of the freedom that was the reason for creating property rights in the first place.").

5. Aimee Picchi, *For Most Americans, Owning a Home Is Now a Distant Dream*, CBS NEWS (Feb. 22, 2022, 11:17 AM), https://www.cbsnews.com/news/real-estate-home-prices-middle-class-affordability-2022-02-23/ [https://perma.cc/6WYM-A8WD].

6. *Forecasting State and National Trends in Household Formation and Homeownership*, URB. INST., https://www.urban.org/policy-centers/housing-finance-policy-center/projects/forecasting-state-and-national-trends-household-formation-and-homeownership (last visited Sept. 19, 2023) [https://perma.cc/8D2E-J5CC].

7. Picchi, *supra* note 5.

8. *See generally infra* Section II.A.

9. *See* Picchi, *supra* note 5.

10. *See infra* Subsection III.A.1.

11. Joshua Beroukhim, *The Story and Lessons Behind Invitation Homes: Blackstone's Acquisition of 50,000 Single Family Homes for $10 Billion Between 2012 and 2016*, BEHIND THE DEALS (Mar. 15, 2017), https://behindthedeals.com/2017/03/15/the-story-and-lessons-behind-invitation-homes-blackstones-acquisition-of-50000-single-family-homes-for-10-billion-between-2012-and-2016/ [https://perma.cc/K6X4-W5YM].

12. *Id.*

13. Patrick Clark & Gillian Tan, *Invitation Homes Seeks $1 Billion to Cash In on Housing Slowdown*, BLOOMBERG (Oct. 21, 2022, 1:52 PM), https://www.bloomberg.com/news/articles/2022-10-21/invitation-homes-seeks-1-billion-to-cash-in-on-housing-slowdown#xj4y7vzkg [https://perma.cc/WN4R-UTU4].

issues ranging from improper maintenance[14] to failure to obtain required building permits[15] to illegal imposition of fees.[16] Notwithstanding these significant managerial shortcomings, Invitation Homes' presence in the homeownership market continues to expand and comes at the expense of individual Americans seeking to own a home.[17]

While concentration of property ownership may feel like a new phenomenon in the United States, one state has already dealt with this problem and taken extraordinary steps to alleviate it: Hawaii.[18] Immediately after achieving statehood, Hawaii found itself with a significant property ownership problem—nearly half of all property in the state was owned by a mere seventy-two individuals.[19] This degree of ownership concentration motivated the Hawaiian legislature into action to correct the oligopolistic,[20] highly concentrated homeownership market.[21]

Hawaii's solution was the Land Reform Act of 1967 (the "Act").[22] The Act embodied an outwardly redistributive process whereby the government could compel those seventy-two landowners to transfer fee simple ownership of their property to the individual Hawaiians who were forced to enter into long-term rental agreements with them.[23] This legislation necessarily raised constitutional questions centering around the Fifth Amendment, which requires the government to pay just compensation when it takes private land for public use.[24] Because the Act involved the government forcing a transfer of private property from one private individual to another, some Hawaiian landowners challenged the Act based

14. Michelle Conlin, *Spiders, Sewage, and a Flurry of Fees–the Other Side of Renting a House from Wall Street*, REUTERS (July 27, 2018, 1:00 PM), https://www.reuters.com/investigates/special-report/usa-housing-invitation/ [https://perma.cc/8UKF-UBZ4].

15. Jonathan O'Connell, Peter Whoriskey & Kevin Schaul, *At Invitation Homes, Unpermitted Work Leaves Leaky Plumbing, Faulty Repairs, Renters Say*, WASH. POST (July 12, 2022, 6:00 AM), https://www.washingtonpost.com/business/2022/07/12/invitation-homes-corporate-landlord-permits/ [https://perma.cc/37EN-5NVD].

16. Corrado Rizzi, '*Wall Street Landlords': Invitation Homes Hit with Class Action Over Allegedly Illegal Late Rent Fees, Other Penalties*, CLASSACTION.ORG (Oct. 12, 2022), https://www.classaction.org/news/wall-street-landlords-invitation-homes-hit-with-class-action-over-allegedly-illegal-late-rent-fees-other-penalties [https://perma.cc/9ER9-HQ6Z].

17. Prashant Gopal, *Investors Help Crowd Out Everyday Homebuyers as U.S. Prices Soar*, BLOOMBERG (Jan. 10, 2022, 7:15 AM), https://www.bloomberg.com/news/articles/2022-01-10/investors-help-crowd-out-everyday-homebuyers-as-u-s-prices-soar#xj4y7vzkg [https://perma.cc/W5Q6-BRCP].

18. *See generally* HAW. REV. STAT. ANN. § 516 (West 2018).

19. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

20. Oligopoly, while a ubiquitous economic term, eludes precise definition even among economics scholars. *See* David Harbord & Georg von Graevenitz, *Market Definition in Oligopolistic and Vertically-Related Markets: Some Anomalies*, 21 EUR. COMPETITION L. REV. 1, 1 (2000) ("Market definition . . . remains a difficult and widely misunderstood topic."); R.E. Caves & M.E. Porter, *Market Structure, Oligopoly, and Stability of Market Shares*, 26 J. INDUS. ECON. 289, 289–90 (noting a "lack of theoretical consensus on outcomes in oligopolistic markets"). For the purposes of this Note, oligopoly is used and understood in its plainest meaning: a market controlled by a small, finite number of players.

21. *Midkiff*, 467 U.S. at 232–33.

22. *See generally* HAW. REV. STAT. ANN. § 516 (West 2018).

23. *Id.*

24. U.S. CONST. amend. V.

on the Fifth Amendment's Public Use Clause.[25] The dispute eventually found its way to the Supreme Court in one of the Court's more surprising, yet forgotten, cases.[26] Ultimately, the Supreme Court unanimously upheld as constitutional the Act's takings scheme, finding the property redistribution system it facilitated to be a valid exercise of Hawaii's eminent domain power.

This Note proposes that a redistributive takings scheme like Hawaii's Act may be a viable legislative solution to the modern-day homeownership concentration crisis. Part II provides the landscape of the modern-day homeownership market before exploring the legal backdrop for implementing a redistributive scheme similar to Hawaii's Act. Part III analyzes the legal viability in the present day of a potential legislative scheme modeled off the Act. Part IV provides recommendations for legislatures interested in pursuing such a course of action. Part V concludes.

II. BACKGROUND

The modern homeownership market is growing increasingly concentrated, paralleling Hawaii's experience with property ownership concentration in the mid-1960s. Hawaii's legislative response to combat the issue, the Act, was the subject of a constitutional challenge in *Hawaii Housing Authority v. Midkiff*, culminating in the Supreme Court's subsequent interpretation of the Fifth Amendment's Public Use Clause.[27]

A. The Modern-Day Homeownership Market

1. Current Market Conditions

Americans overwhelmingly prefer owning a home to renting one.[28] Americans agreeing on anything is rare—particularly in the current polemical climate—but the preference for homeownership is clear across countless demographics.[29] A convincing 88% of Americans would rather own a home than rent one, though half of all current renters believe homeownership is no longer attainable.[30] This has resulted in a sharp increase in renting,[31] not by choice, but

25. *Midkiff*, 467 U.S. at 231–32.

26. *See id.*

27. *Id.* at 234–35.

28. Brian J. McCabe, *Why Buy a Home? Race, Ethnicity, and Homeownership Preferences in the United States*, 4 J. SOC. RACE & ETHNICITY 452, 452 (2018); Hous. Fin. & Dev. Corp. v. Castle, 898 P.2d 576, 593–94 (Haw. 1995) ("Owning property, especially real property . . . is an American dream.").

29. McCabe, *supra* note 28, at 452.

30. Kamaron McNair, *48% of Renters Worry They'll Never Be Able to Buy; Down Payments Biggest Barrier*, LENDINGTREE (Aug. 31, 2021), https://www.lendingtree.com/home/mortgage/homeownership-renting-survey/ [https://perma.cc/9N39-H2UE].

31. Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households Are Renting Than at Any Point in 50 Years*, PEW RSCH. CTR. (July 19, 2017), https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/ [https://perma.cc/D7L8-LEFF].

rather out of necessity due to near-insurmountable conditions in the homeownership market for individuals desiring to own a home.[32]

Rising prices have not made things easier for Americans looking to own a home. The average home listing price has increased 14%—equivalent to over eighty-five thousand dollars—since the fall of 2019.[33] And while some hope this price increase will be short-lived, many industry players do not expect this seller's market to cool off in the next year.[34] Naturally, the average purchasing price of homes has also increased significantly, surging 55% from 2021 to 2022.[35] As a result of soaring prices, renting is now cheaper than buying by the largest margin in over two decades.[36] These inflated home prices impact all aspiring homeowners, but disproportionately impact would-be first-time homebuyers,[37] who usually have no previous property to sell to fund their new purchase.[38]

Despite individual Americans expressing a clear preference for homeownership, institutional investors are the parties dominating the homeownership market, contributing to both inflated prices[39] and record low inventory of available homes for purchase.[40] One necessary consequence of institutional investors' dominating position is the exclusion of individuals from the market.[41] This is

32. McNair, *supra* note 30 (showing 76% of current renters would rather own than rent, whereas only 2% of current homeowners would rather rent than own); Vanessa Casado Perez, *Ownership Concentration: Lessons from Natural Resources*, 117 NW. U. L. REV. 37, 42 (2022).

33. *See* Andrew Osterland, *This Could Be the Worst Market for a First-Time Homebuyer, Experts Say*, CNBC (Oct. 25, 2021, 10:39 AM), https://www.cnbc.com/2021/10/19/this-could-be-the-worst-market-for-a-first-time-homebuyer-experts-say.html [https://perma.cc/CWQ3-K5NW].

34. *Id.*

35. Quintin Simmons, *NAR Chief Economist Lawrence Yun Predicts Uncertainty for the Housing Market*, NAT'L ASS'N OF REALTORS (May 4, 2022), https://www.nar.realtor/newsroom/nar-chief-economist-lawrence-yun-predicts-uncertainty-for-the-housing-market [https://perma.cc/PW9D-H6QD].

36. Gregory Schmidt, *Cost of Owning a Home Surges Above the Cost of Renting One*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/realestate/owning-renting-disparity.html [https://perma.cc/9FC4-GLBP].

37. Jonnelle Marte, *First-Time U.S. Home Buyers Feeling 'Defeated' by High Prices*, REUTERS (Mar. 15, 2022, 2:37 PM), https://www.reuters.com/world/us/first-time-us-home-buyers-feeling-defeated-by-soaring-prices-rising-rates-2022-03-15/ [https://perma.cc/KTR4-F9CR].

38. *See* Osterland, *supra* note 33 ("Current homeowners are in the catbird seat. If they 'overpay' for a new home, they can make up for it by selling their old one. For first-time homebuyers, however, it's a different story.").

39. Lance Lambert, *Investors–Including Wall Street–Helped to Drive Up Home Prices During the Pandemic Housing Boom. Here's the Proof*, FORTUNE (June 26, 2022, 1:07 PM), https://web.archive.org/web/20220728215343/https://fortune.com/2022/06/26/housing-market-and-home-price-boom-made-bigger-by-investors-and-wall-street/ [https://perma.cc/5HCA-4ZQU]; Caitlin Young, *Institutional Investors Brought Higher Home Prices and Lower Vacancies to the Housing Recovery*, URB. INST. (Mar. 5, 2020), https://www.urban.org/urban-wire/institutional-investors-brought-higher-home-prices-and-lower-vacancies-housing-recovery [https://perma.cc/8G7B-76EJ]; NAT'L ASS'N OF REALTORS, IMPACT OF INSTITUTIONAL BUYERS ON HOME SALES AND SINGLE-FAMILY RENTALS 13 (2022), https://cdn.nar.realtor/sites/default/files/documents/2022-impact-of-institutional-buyers-on-home-sales-and-single-family-rentals-05-12-2022.pdf [https://perma.cc/SRZ9-AK7A].

40. Simmons, *supra* note 35.

41. ACCE INST., WALL STREET LANDLORDS TURN AMERICAN DREAM INTO A NIGHTMARE 18, https://assets.nationbuilder.com/acceinstitute/pages/1153/attachments/original/1570049936/WallstreetLandlordsFinalReport.pdf?1570049936 (last visited Oct. 25, 2023) [https://perma.cc/T9LM-NBKD] [hereinafter WALL STREET LANDLORDS]; Matt Phillips, *Big Investors Are Hogging American Homes*, AXIOS (Feb. 18, 2022), https://www.axios.com/2022/02/18/investors-homes-wealth-families [https://perma.cc/LGJ6-LEEM]; Dana Anderson &

especially true because institutional investors tend to buy the most affordable properties and convert them into rentals, burdening first-time homebuyers who can only afford homes at a certain price.[42]

These market conditions may only be getting worse. Institutional investors have been swallowing up increasingly large portions of the market, buying nearly one of every five homes for sale in the fourth quarter of 2021.[43] Despite a constant rate of purchasing in the late 2010s, a "remarkable increase" in purchases began in 2021, when a quarter of all single-family homes were purchased by corporate real estate entities.[44] This purchasing pace is both record-breaking and representative of a continuing trend.[45]

While high prices have displaced individual homebuyers from the market, those high prices are actually a main source of institutional investors' appetite for accelerating their purchasing pace.[46] Unlike individual Americans who may struggle to drum up funds to place competitive bids, institutional investors have ready access to capital and possess superior institutional knowledge, allowing them to wade through the market with significantly lower costs.[47]

Institutional investors have endeavored to enter the housing market in this capacity since the 2008 foreclosure crisis.[48] Despite Wall Street's role in contributing to the housing bubble burst in 2008,[49] in some ways it was also a primary beneficiary of the fallout. For instance, corporate real estate investment firms spent billions post-collapse to acquire homes at remarkably low prices at foreclosure sales.[50] Indeed, 95% of homes sold by Fannie Mae and Freddie Mac (which they acquired due to delinquent mortgages) were purchased by institutional investors for pennies on the dollar.[51] This was the beginning of the homeownership concentration problem, as institutional investors swallowed up tens of thousands of homes.[52]

Sheharyar Bokhari, *Real Estate Investors Are Buying a Record Share of U.S. Homes*, REDFIN NEWS, https://www.redfin.com/news/investor-home-purchases-q4-2021/ (Apr. 6, 2022) [https://perma.cc/B3TQ-7GHQ].

42. TJ Porter, *How Real Estate Investors Affect the Housing Shortage*, BANKRATE (Feb. 15, 2023), https://www.bankrate.com/real-estate/how-investors-affect-housing-shortage/ [https://perma.cc/N7XQ-N9GH].

43. Anderson & Bokhari, *supra* note 41.

44. Martha C. White, *Biden is Aiming to Make Home Buying Easier. But Keeping Wall Street Out Could Be a Heavy Lift*, NBC NEWS (Oct. 7, 2021, 4:50 AM), https://www.nbcnews.com/business/business-news/biden-aiming-make-home-buying-easier-keeping-wall-street-out-n1280805 [https://perma.cc/KAU2-T64F].

45. *See* Anderson & Bokhari, *supra* note 41.

46. *Id.*

47. Young, *supra* note 39.

48. DESIREE FIELDS & MANON VERGERIO, CORPORATE LANDLORDS AND MARKET POWER: WHAT DOES THE SINGLE-FAMILY RENTAL BOOM MEAN FOR OUR HOUSING FUTURE? 7 (2022); Elora Lee Raymond, Richard Duckworth, Benjamin Miller, Michael Lucas & Shiraj Pokharel, *From Foreclosure to Eviction: Housing Insecurity in Corporate-Owned Single-Family Rentals*, 20 CITYSCAPE 159, 161 (2018) ("In part responding to encouragement by the government, private sector institutional investors realized an opportunity and poured cash into an illiquid housing market.").

49. Eric Rauchway, *The 2008 Crash: What Happened to All That Money?*, HIST. (Aug. 30, 2023), https://www.history.com/news/2008-financial-crisis-causes [https://perma.cc/SYD3-U6W8].

50. *See* WALL STREET LANDLORDS, *supra* note 41, at 9.

51. *Id.* at 5, 16.

52. *Id.* at 4.

Not only do institutional investors continue to swipe up existing homes, but these same companies are constructing new homes—not to sell to interested homebuyers, but rather exclusively to rent.[53] This "built-to-rent" model is a recent trend that directly impacts the market in two ways.[54] First, built-to-rent properties necessarily increase the number of rentals. Intuitively, the addition of new property constructed solely to rent adds additional rental properties into the market. Second, built-to-rent homes decrease the number of homes available for purchase.[55] With each property that could be sold to an interested buyer but instead is listed as a rental, fewer homes are placed on the market for sale.[56] Institutional investors began construction of built-to-rent homes at a record pace in recent years, forming a two-fronted chokehold on the homeownership market, controlling both the existing home market and the newly-constructed home market.[57]

While estimates of the exact degree of homeownership concentration by institutional investors are eye-opening, they are also appreciably underinclusive. There are several reasons for this. First, studies tend to exclude homes bought by institutional investors which are then sold to third parties to rent out.[58] Second, studies generally exclude homes built as condominiums, even though most condominiums are rented out like traditional apartments.[59] Third, institutional investors tend to be "deliberately opaque" in reporting acquisitions and transactions, making tracking purchases challenging.[60] Lastly, some estimates exclude certain private institutions that traditionally participate in the rental market from their definition of institutional investor.[61] Each factor alone contributes to a low estimate, and taken together, the degree of homeownership concentration in the hands of institutional investors is likely markedly greater than current data reveal.

53. Debra Kamin, *The Market for Single-Family Rentals Grows as Homeownership Wanes*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/realestate/single-family-rentals.html [https://perma.cc/4QTY-9SUQ]; Robert Dietz, *Single-Family Built-for-Rent Growth in 2021*, NAT'L ASS'N OF HOME BUILDERS (Feb. 17, 2022), https://eyeonhousing.org/2022/02/single-family-built-for-rent-growth-in-2021/#:~:text=The%20number%20of%20single%2Dfamily,breaking%20third%20quarter%20for%20production [https://perma.cc/KE4K-4NN2].

54. Robert Dietz, *Single-Family Built-for-Rent Construction Surging*, NAT'L ASS'N OF HOME BUILDERS (Aug. 16, 2022), https://eyeonhousing.org/2022/08/single-family-built-for-rent-construction-surging/ [https://perma.cc/G6BZ-KKCL].

55. NAT'L ASS'N OF REALTORS, *supra* note 39, at 4.

56. *Id.*

57. *See* Kamin, *supra* note 53; Dietz, *supra* note 53.

58. Dietz, *supra* note 54; AMS. FOR FIN. REFORM, RESEARCH MEMORANDUM: ESTIMATE OF PRIVATE EQUITY OWNERSHIP OF HOUSING UNITS 1 (2022), https://ourfinancialsecurity.org/2022/06/letters-to-congress-new-afr-research-estimating-minimum-number-of-private-equity-owned-housing-units/ [https://perma.cc/X7GP-XTDW].

59. Dietz, *supra* note 54.

60. AMS. FOR FIN. REFORM, *supra* note 58, at 1–2 ("The lack of transparency to investors, regulators, and the public about what private equity firms hold makes it difficult to get the full picture of their portfolio holdings and means that this estimate is conservative in that it likely understates actual holdings.").

61. *Id.* at 1 (naming nonprivate equity real estate investment trusts, hedge funds, and other asset managers as examples).

Exact estimations aside, the trend of highly concentrated property ownership by institutional investors is not confined to discrete geographic regions of the United States. Instead, it is readily apparent in big cities and rural country towns alike.[62] In Memphis and Atlanta, for example, these investors have recently purchased roughly a third of all single-family homes on the market.[63] In other mid-market cities like Charlotte and Miami, institutional investors bought 25% and 24%, respectively, of all properties in 2021.[64] At the county-level, ownership is even more concentrated.[65]

An analysis of rural parts of the country yields similar data and trends. In West Virginia, for instance, the top two dozen corporate owners hold title to over 17% of all state land.[66] Just as with urban areas, analyzing county-wide data reveals higher levels of concentration: in six West Virginia counties, the top ten landowners hold title to at least half of all county property.[67]

Nationally, the extent of concentration continues to grow, with the largest one hundred landowners in the country now owning property equal to the size of all New England states save Vermont.[68] The impact of ownership concentration is particularly pronounced in communities of color, where the percentage of investor-owned single-family homes is greater than in majority white communities.[69] This level of property ownership concentration is "reminiscent of feudal times" and produces adverse consequences for ordinary Americans.[70]

2. Effects of Current Market Conditions

When would-be homebuyers are forced to rent from institutional investors, they pay a steep price. Corporate landlords are not only more likely to evict tenants, but are also more likely to initiate eviction proceedings predicated on small (or, at times, fabricated) infractions.[71] Startlingly, corporate landlords, including

62. W. VA. CTR. ON BUDGET & POL'Y & AM. FRIENDS SERV. COMM., WHO OWNS WEST VIRGINIA? 3 (2013), https://wvpolicy.org/wp-content/uploads/2018/5/land-study-paper-final3.pdf [https://perma.cc/5HB4-8NC6]; AMS. FOR FIN. REFORM, *supra* note 58, at 3.

63. AMS. FOR FIN. REFORM, *supra* note 58, at 3.

64. Kevin Schaul & Jonathan O'Connell, *Investors Bought a Record Share of Homes in 2021. See Where.*, WASH. POST (Feb. 16, 2022), https://www.washingtonpost.com/business/interactive/2022/housing-market-investors/ [https://perma.cc/Z8SE-D86B].

65. *See generally* AMS. FOR FIN. REFORM, *supra* note 58.

66. W. VA. CTR. ON BUDGET & POL'Y, *supra* note 62, at 9.

67. *Id.* at 13.

68. *The Biggest U.S. Landowners Own Nearly as Many Acres as New England States*, FERN (Jan. 1, 2018), https://thefern.org/ag_insider/biggest-u-s-landowners-nearly-many-acres-new-england-states/ [https://perma.cc/UR6L-KEF8].

69. Peter Whoriskey & Kevin Schaul, *Corporate Landlords Are Gobbling Up U.S. Suburbs. These Homeowners Are Fighting Back.*, WASH. POST (Mar. 31, 2022, 6:00 AM), https://www.washingtonpost.com/business/2022/03/31/charlotte-rental-homes-landlords/ [https://perma.cc/7MHC-YC7Z].

70. Casado Perez, *supra* note 32, at 39.

71. Jennifer Ludden, *Corporate Landlords Used Aggressive Tactics to Push Out More Tenants than Was Known*, NPR (July 28, 2022, 4:36 PM), https://www.npr.org/2022/07/28/1114128514/corporate-landlords-used-aggressive-tactics-to-push-out-more-tenants-than-was-kn [https://perma.cc/NB8E-XLSK]; Kriston Capps, *Corporate Landlords 'Aggressively' Evicted Tenants During Pandemic, House Report Says*, BLOOMBERG (July 28,

Invitation Homes discussed earlier,[72] were found to have committed a bundle of violations of the CDC's eviction moratorium instituted during the COVID-19 pandemic.[73] These violations included deceptive tactics like falsely convincing tenants they were not protected by the eviction moratorium, evicting tenants with pending rental assistance applications, and underreporting the number of eviction proceedings they initiated by up to three times.[74] As a result of homeownership concentration in the hands of institutional investors, renters not only lose out on benefits of homeownership in the form of wealth accumulation, but also lose the most fundamental benefit: having a stable place to live.

Not only are corporate landlords more likely to evict, but they are also more likely to raise rents, impose high fees, and fail to adequately maintain the property they own.[75] Tenants of corporate-owned properties pay higher rents than the national average and faced increased rent prices at noticeably higher rates during the COVID-19 pandemic.[76] On top of higher rents, these tenants are forced to pay more numerous and more expensive fees.[77] Lastly, tenants do not even get the benefit of better facilities despite paying more on average. In fact, quite the opposite is true: tenants face significant hurdles when requesting maintenance for not only mere cosmetic issues but even for those that carry significant health and safety risks absent repair.[78]

B. Hawaii's Property Ownership Concentration and the Act

Hawaii, a state with a unique history and founding, faced a near-unprecedented level of homeownership concentration after achieving statehood.[79] Hawaii's history impacted both the state's property system and also the subsequent property ownership concentration issues it faced in the mid-to-late twentieth century.[80]

2022, 11:51 AM), https://www.bloomberg.com/news/articles/2022-07-28/house-report-corporate-landlords-defied-cdc-eviction-ban [https://perma.cc/5665-6WVN].

72. *See generally supra* Part I.

73. STAFF OF SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, EXAMINING PANDEMIC EVICTIONS: A REPORT ON ABUSES BY FOUR CORPORATE LANDLORDS DURING THE CORONAVIRUS CRISIS 7 (July 2022).

74. *Id.* Indeed, these companies aggressively evicted financially struggling tenants despite recording "record profits, making large investments in expansion, or obtaining significant governmental support." *Id.*

75. *See* AMS. FOR FIN. REFORM, *supra* note 58, at 6–7; WALL STREET LANDLORDS, *supra* note 41, at 5.

76. *See* AMS. FOR FIN. REFORM, *supra* note 58, at 6.

77. *Id.* at 7.

78. *Id.*

79. *See infra* Subsections II.B.1–2.

80. *See infra* Subsections II.B.1–2.

1. Hawaii's Founding

Hawaii, the most recent state to achieve statehood,[81] has a unique history.[82] While the Hawaiian Islands were founded by Polynesian explorers around 400 C.E.,[83] Western colonizers landed on the islands in 1778.[84] Pre-colonization, native Hawaiians developed their own rich culture, highly functional economy, and unique religion.[85]

Hawaii's pre-colonization system of property allocation was similarly unique. Unlike the American property system predicated on private ownership,[86] all Hawaiian land was owned in full by the King and administered for the benefit of the Hawaiian people who enjoyed use of, but no ownership over, the Hawaiian acreage.[87] In fact, there was no such concept of title or fee simple ownership in Hawaii's pre-colonization property system at all, and all rights to a given parcel of land were revocable at any time.[88] Rather, the property system rested on a relationship of mutual benefit between ordinary and royal Hawaiians.

Instead of individual private ownership, Hawaiians worked and lived on parcels of land called a'hupua'a.[89] These a'hupua'a consisted of coastal fishing areas and forest lands to allow each community to harvest food and create a self-sufficient local economy.[90] The King would assign a'hupua'a to sub-chiefs, who could assign the land further if desired.[91] Regardless of who operated and controlled the land, however, it remained "owned" entirely by the King.[92]

While Hawaii thrived pre-colonization, it was predictably met with significant disruption upon the arrival of Western settlers.[93] These settlers began to whittle down Hawaii's culture and forcibly impose Western property law, at times employing violent means to execute their defeudalization of the territory.[94] For instance, English settlers in 1825 forced King Kamehameha III to permit a

81. *The Last Time Congress Created a New State*, NAT'L CONST. CTR. (Mar. 12, 2023), https://constitutioncenter.org/blog/the-last-time-congress-created-a-new-state-hawaii [https://perma.cc/M378-PW7H].

82. *See generally* Brief of Amici Curiae, the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (No. 83-141) [hereinafter Amicus Brief].

83. *Hawaii–History and Heritage*, SMITHSONIAN MAG. (Nov. 6, 2007), https://www.smithsonianmag.com/travel/hawaii-history-and-heritage-4164590/ [https://perma.cc/96ET-4PGB].

84. Amicus Brief, *supra* note 82, at 5.

85. *Id.*

86. PAUL J. LARKIN JR., THE FRAMERS' UNDERSTANDING OF 'PROPERTY' 2 (2020), https://www.heritage.org/sites/default/files/2020-07/LM263.pdf [https://perma.cc/3J22-3RFJ].

87. Amicus Brief, *supra* note 82, at 4–7.

88. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 798 (Rennard Strickland et al. eds., Michie Bobbs-Merrill ed. 1982).

89. Amicus Brief, *supra* note 82, at 5–6.

90. *Id.* at 6.

91. *Id.* at 6–7.

92. *Id.* ("[King] Kamehameha thereupon became the alli-'ai moku of the entire Hawaiian Island kingdom, with sole authority, as 'owner' and as government, over all of the lands of the kingdom.").

93. *Id.* at 8.

94. *Id.* (quoting COHEN, *supra* note 88, at 799) ("After [King] Kamehameha's death in 1819, the native system of land holding began to change under the pressure of Western influence. . . . 'A small number of Westerners residing in Hawaii, bolstered by Western warships which intervened at critical times, exerted enormous political influence.'").

right of inheritance to land, a right wholly inconsistent with Hawaii's existing property system in which all landownership would revert back to the King.[95] After that, Westerners compelled the King to furnish them the right to receive land grants in fee simple and the right to alienate the land they were granted—an unprecedented grant of rights not previously afforded to even native Hawaiians.[96]

Frustrated that they were still boxed out from owning Hawaiian land in fee, Western colonizers next set up a commission, comprised of two native Hawaiians, two Westerners, and a half-Hawaiian to distribute land.[97] Hawaiian land was subsequently distributed in fee simple to three groups during the Great Mahale ("division"): a third to the King and chiefs, a third to the government held by the King, and a third to commoners.[98] While native Hawaiians nominally were to receive land, in function, native Hawaiians received an insulting 1% of Hawaiian land.[99] Conversely, the King and roughly 245 chiefs owned 99% of the acreage.[100] Further yet, an 1847 statute permitted non-Hawaiians who held land grants or leases to acquire fee simple ownership of that land upon making payment to the King or chiefs.[101] As a result, Westerners in Hawaii bought land at discounted prices from Hawaiian royalty, who had little use for the excessive acreage they owned.[102] The result was a forced overhaul of the Hawaiian property system, ripe for Western manipulation—by the 1890s, non-native Westerners in Hawaii owned 67% of all land despite comprising only 9% of the population.[103]

In some ways, Hawaii's trajectory tracked closely to that of Indigenous Americans who owned land in the mainland United States.[104] Not only was native Hawaiians' land forcibly taken from them and their existing systems Westernized, but Hawaiians received none of the economic benefits from the sugar industry after losing their land.[105] Moreover, Native Hawaiians lost not only their land, but their people—the native Hawaiian population plummeted from a precolonial contact count of 300,000 to merely 41,000 by 1890.[106]

Though these similarities are evident, one difference between the groups highlights the uniqueness of Hawaii's struggle with property ownership concentration. Given Hawaii's history as a feudal kingdom, the land appropriation in Hawaii took from individuals who had established, respected fee claims to the

95. Amicus Brief, *supra* note 82, at 7–10.
96. *Id.* at 11.
97. *Id.* at 12–13.
98. COHEN, *supra* note 88, at 800; Amicus Brief, *supra* note 82, at 13–14.
99. COHEN, *supra* note 88, at 800; Amicus Brief, *supra* note 82, at 15.
100. COHEN, *supra* note 88, at 800.
101. Amicus Brief, *supra* note 82, at 16.
102. COHEN, *supra* note 88, at 800.
103. Amicus Brief, *supra* note 82, at 17; COHEN, *supra* note 88, at 800 n.20.
104. Amicus Brief, *supra* note 82, at 8 (citing COHEN, *supra* note 88, at 799).
105. *Id.* at 17.
106. COHEN, *supra* note 88, at 799; SYLVESTER K. STEVENS, AMERICAN EXPANSION IN HAWAII 1842-1898 145 (1968 ed.); *see also* Brief of Amicus Curiae the Office of Hawaiian Affairs in Support of Appellees at 18, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (Nos. 83-141, 83-236, 83-283).

land.[107] Thus, while native Hawaiians and Indigenous Americans shared a similar plight, Hawaii's subsequent struggles with property ownership were without precedent in American history.

2. Hawaii's Property System and the Act

Partially as a result of its unique history,[108] Hawaii struggled with a highly concentrated fee simple market upon gaining statehood.[109] As of the mid-1960s—less than a decade after achieving statehood—a mere seventy-two private individuals owned 47% of all Hawaiian land.[110] More granularly, the eighteen largest landowners held title to 40% of all Hawaiian land.[111] Indeed, the petitioner in *Midkiff* alone owned 9% of all state land.[112]

The effects of ownership concentration were high prices and a functionally nonexistent path to homeownership for Hawaiians, who instead were forced to enter into long-term lease arrangements with the limited group of landowners.[113] The Hawaiian legislature found that owners' refusals to sell their land caused not only a shortage of fee simple ownership opportunities for citizens but also an artificial inflation of price.[114]

Thus, it enacted the Land Reform Act of 1967.[115] To dilute the highly concentrated property ownership market, the Act sought to forcibly redistribute property from that small portion of landowners who otherwise were unwilling to relinquish title to their land to the Hawaiians who were forced to rent from them.[116] As the legislature found, ownership concentration caused not only a malfunctioning housing market and economic hardship, but also harmed the "public interest, health, welfare, security, and happiness of the people."[117] Its major concern was that its extreme ownership concentration effectively removed from Hawaiian citizens the choice between renting and buying.[118]

The Act set up a step-by-step process of forced condemnation that ultimately resulted in the transfer of fee simple ownership from the landlord to the former tenant.[119] When the requisite number of tenants from qualifying

107. *See generally* HAW. REV. STAT. ANN. § 516 (West 2018).
108. *See supra* Subsection II.B.1.
109. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).
110. Amicus Brief, *supra* note 82, at 32.
111. *Id.* at 32–33.
112. *Id.* at 33.
113. Brief for Appellants at 2–3, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (Nos. 83-141, 83-283).
114. HAW. REV. STAT. ANN. § 516-83 (West 2018).
115. Brief for Appellants, *supra* note 113, at 1.
116. *See generally* HAW. REV. STAT. ANN. § 516 (West 2018).
117. *Id.* § 516-83.
118. The Hawaiian legislature recognized this concern explicitly:

> [T]he people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land.

Id.
119. *Id.*; *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233–34 (1984).

properties filed an application with the Hawaiian Housing Authority (the "HHA"), the HHA would hold a hearing on the potential condemnation to determine whether a forced transfer would achieve the Act's purposes.[120] If so, the owner and tenant would negotiate a price, and if negotiations failed, a compulsory arbitration process would take effect to determine the fair market value of the property.[121] Once the fair market value was set, the condemnation would commence, transferring ownership to the HHA.[122] The HHA would then sell the property to the former tenant at the previously determined fair market value.[123] At the conclusion of the process, all rights and title in the property would transfer to the former tenant, transforming them into owner in fee simple absolute.[124]

3. The Midkiff *Litigation and the Fifth Amendment*

In utilizing the state's eminent domain power, the Act necessarily raised Fifth Amendment concerns.[125] When the government[126] exercises its eminent domain power to take title to private property, the Fifth Amendment requires it to both provide just compensation and to ensure the taking is for public use.[127] At issue in *Midkiff* was the public use requirement.[128] At its core, the public use limitation prevents the government from taking private property from private individuals for the benefit of other private individuals without conferring a sufficiently public benefit.[129]

One of Hawaii's largest landowners, the Bishop Estate, refused to participate in the obligatory negotiation process once the HHA condemned its land.[130] Instead, the Estate filed suit requesting injunctive relief, contending the Act violated the Fifth Amendment's Public Use Clause.[131] While the district court did find certain provisions of the Act unconstitutional, it did not enjoin the HHA from continuing to enforce the Act.[132]

The Ninth Circuit reversed, finding the Act to be a "naked attempt" to forcefully transfer private property between private individuals to confer a private benefit in violation of the Fifth Amendment's public use limitation.[133] The Supreme Court then opted to review the case, considering whether the Act's

120. *Midkiff*, 467 U.S. at 233–34.
121. *Id.* at 234.
122. *Id.*
123. *Id.*
124. HAW. REV. STAT. ANN. § 516-181 (West 2018); *Midkiff*, 467 U.S. at 234.
125. *Midkiff*, 467 U.S. at 231–32.
126. Because the Fifth Amendment has been incorporated against states, action by either a state government or the federal government is covered. *Id.* at 244 n.7.
127. U.S. CONST. amend. V.
128. *Midkiff*, 467 U.S. at 231–32.
129. *Id.* at 241 (citing Thompson v. Consol. Gas Corp., 300 U.S. 55 (1937)).
130. *Id.* at 234.
131. *Id.* at 234–35.
132. *Id.*
133. Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983), *rev'd* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

forced condemnation and transfer scheme amounted to an unconstitutional taking of real property by the government.[134]

The Supreme Court reversed the Ninth Circuit and instead found the Act to be a constitutional exercise of eminent domain power.[135] In validating the Act's taking scheme, the Supreme Court relied heavily on *Berman v. Parker*.[136] *Berman* concerned a taking by the District of Columbia aimed at redeveloping slum areas in the city.[137] Some of the taken property in *Berman* was designated for sale or lease to private companies to aid in redevelopment efforts, which petitioners argued amounted to an invalid forced transfer from one private party to another.[138] The *Berman* Court rejected the petitioner's contentions and synonymized the state's taking power to the exercise of its police power, concluding that because regulating public welfare was comfortably in the purview of a state's police power, so too were takings aimed at improving community conditions.[139]

The *Berman* Court clearly delineated the roles of the judiciary and legislative branches in a proper public use analysis: the legislative branch makes a determination after finding facts and evaluating evidence, and the judiciary accepts the legislature's findings.[140] While the judiciary may have some place in the public use inquiry, its role is "extremely narrow."[141]

With *Berman* in mind, the *Midkiff* Court found a rational relationship between forced transfer of ownership and the legislature's goals of diluting the highly concentrated property market.[142] Indeed, the Court had "no trouble" finding the Act constitutional[143]—because there existed "artificial deterrents to the normal functioning" of the state's residential property market, the Act was a rational response to combat that issue.[144]

Not only did the Court find the goals of the Act constitutionally permissible, so too it found the process by which the Act realized those goals.[145] The Act combatted property ownership concentration through forced property transfer, which was sufficiently tailored to the Act's goals.[146] Further, it imposed qualifying criteria that limited the types of lots that could be eligible for condemnation proceedings.[147]

134. *Midkiff*, 467 U.S. at 239.
135. *Id.* at 245.
136. *Id.* at 239–43.
137. *See* Berman v. Parker, 348 U.S. 26, 28, 31 (1954).
138. *See generally id.*
139. *Id.* at 32–33.
140. *Id.* at 33.
141. *Id.* at 32. Indeed, the *Midkiff* Court was clear that the Supreme Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use." *Midkiff*, 467 U.S. at 241.
142. *Midkiff*, 467 U.S. at 239–43.
143. *Id.* at 241.
144. *Id.* at 242.
145. *Id.*
146. *Id.* at 242–43.
147. *See* HAW. REV. STAT. ANN. § 516-33 (West 2018).

Importantly, the Court instructed that the outwardly redistributive transfer mandated by the Act—from one private party to another private party—was nevertheless public because it accomplished a public benefit.[148] It explicitly rejected the notion that the public use limitation requires public ownership or control over the taken property and explained that the ends, not the means, are the proper subjects of analysis.[149] Thus, the "mechanics" of the taking (that title was transferred from one private party to another private party) did not impact the public use question; only the purposes did.[150]

Moreover, despite private parties receiving a benefit, such private benefit was merely incidental to the decidedly public benefit: diluting the residential property market.[151] Even more broadly, the Court held a public purpose need not even be certain, but rather merely "conceivable." Importantly—and oddly—the Court gave no suggestion that its holding on the scope of the Public Use Clause was applicable only to the unique facts before it.[152]

4. Midkiff*'s Scant Progeny and the Public Use Clause*

Midkiff is a unique public use case, one in which a state exercised its eminent domain power to take property in an unabashedly redistributive manner. While the Court has heard a litany of takings cases since *Midkiff*,[153] most of these cases involved regulatory, not physical, takings.[154] Whereas physical takings concern the use of eminent domain to appropriate ownership of property, regulatory takings arise when a government imposes a regulation so burdensome on property it is as if the government took title.[155] Because regulatory takings are both more common and more complex, they comprise a majority of takings cases heard by the Court.[156] As a result, there is a dearth of cases that present the same, or even largely similar, questions as those raised in *Midkiff*.

Partially due to its scant progeny, *Midkiff* has remained undisturbed for nearly four decades.[157] While the Court has referenced *Midkiff* in a handful of cases over the years since it decided the case,[158] *Midkiff*'s holding and analytical

148. *Midkiff*, 467 U.S. at 243–44.

149. *Id.*

150. *Id.* at 244.

151. *Id.* at 245.

152. *See infra* Subsection III.A.2.

153. *See generally* ROBERT MELTZ, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 3 (2015), https://sgp.fas.org/crs/misc/97-122.pdf [https://perma.cc/2MLX-227T].

154. *Id.* at 1 ("The regulatory taking concept opened up vast new legal possibilities for property owners, and underlies many of the Supreme Court's takings decisions from the 1970s on.").

155. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–15 (1992).

156. MELTZ, *supra* note 153, at 1.

157. Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" – A Proposal to Redefine "Public Use,"* 2000 L. REV. MICH. ST. U. DET. C. L. 639, 653 ("there has been little change in judicial interpretation of the Public Use Clause" post-*Midkiff*).

158. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014–15 (1984); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 741–42 (1999) (Souter, J., concurring in part); E. Enters. v. Apfel, 524 U.S. 498, 544 (1998) (Kennedy, J., concurring in part); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 544 (1989) (Marshall, J., dissenting); First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482

framework have been untouched. We can expect this treatment to continue, which bodes well for a potential modern-day *Midkiff* effort by a state legislature.[159]

The most notable case addressing the Public Use Clause since *Midkiff* is *Kelo v. City of New London*. New London, Connecticut was struggling economically in the 1990s and enlisted the help of a private entity, the New London Development Corporation ("NLDC"), to revitalize the economy.[160] Part of this revitalization was to come from pharmaceutical giant Pfizer, which announced it would build a $300 million research facility in New London.[161] The NLDC and city officials believed a new Pfizer campus would attract new business, create jobs, and generally restore the city's economy.[162] To create space for construction of the Pfizer campus, the city authorized the NLDC to exercise its eminent domain power to acquire existing private property that sat atop the land the NLDC intended to build on.[163] Susette Kelo, who was to be ousted from her property, filed suit to invalidate the redevelopment plan and subsequent taking of her property.[164]

The fractured *Kelo* Court, in a 5–4 decision, validated the city's economic development plan and subsequent takings, finding the plan consistent with the Public Use Clause.[165] The majority relied heavily on both *Midkiff* and *Berman*.[166] While it affirmed once more that a taking of private property purely to benefit a private class of individuals is impermissible, it further added that the NLDC's plan was "carefully considered" and was not proposed to "benefit a particular class of identifiable individuals."[167] Thus, the plan's purpose of restoring the local economy provided sufficiently public benefits to satisfy the public use requirement.[168] Reaffirming the principles outlined in *Midkiff*, the Court once more refused to question legislative findings underpinning the NLDC's requested takings.[169]

Interestingly, Justice O'Connor, the author of the *Midkiff* opinion, dissented in *Kelo*. Her dissent attempted to walk back the broad construction of the Public Use Clause she herself articulated in *Midkiff*.[170] While agreeing that a

U.S. 304, 321 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 511 (1987) (Rehnquist, J., dissenting). Other references to *Midkiff* relate to a separate issue presented: judicial abstention. *See* City of Houston v. Hill, 482 U.S. 451, 468 (1987); Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 82 (2013); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 29 (1987) (Blackmun, J., concurring); Ohio C.R. Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627 n.2 (1986); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 508 (1985) (O'Connor, J., concurring).

159. *See infra* Section III.B.
160. Kelo v. City of New London, 545 U.S. 469, 473 (2005).
161. *Id.*
162. *Id.* at 473–74.
163. *Id.* at 475.
164. *Id.*
165. *Id.* at 485–87.
166. *Id.* at 480–83.
167. *Id.* at 477–78.
168. *Id.* at 480.
169. *Id.* at 484–85.
170. *Id.* at 494–505 (O'Connor, J., dissenting).

conceivable public purpose generally satisfies the public use requirement, Justice O'Connor, now regretting the consequences associated with a sweeping public use interpretation rooted in her very own language, contended no such public purpose existed in *Kelo*.[171] Attempting to distinguish *Kelo* from *Midkiff*, she concluded that while ownership concentration in the Hawaiian fee simple market adversely impacted the public, the public purpose of the *Kelo* plan did not directly alleviate a public harm in the same way.[172] She reasoned that because Susette Kelo's home was not "the source of any social harm," the taking did not achieve a public purpose.[173] Perhaps recognizing that her attempt to distinguish *Kelo* from *Midkiff* was tenuous, Justice O'Connor attributed any lingering confusion about a proper construction of the Public Use Clause to her own "errant language" in *Midkiff*.[174] Despite her attempt to distinguish, even staunch protectors of private property rights appear unable to square Justice O'Connor's *Kelo* dissent with her *Midkiff* majority opinion.[175]

While the *Kelo* Court did not maintain the unanimity the Court achieved in *Midkiff*, the majority reaffirmed key public use principles announced in *Midkiff* and *Berman*. First, that efforts aimed at improving the economy can satisfy the public use limitation.[176] Second, that direct use by the public is not required, and private control of the land taken is not fatal.[177] Third, that in fact realizing the public purpose set forth by a legislature is not relevant to the public purpose inquiry, only the goals themselves are.[178] And last, that the legislature is owed broad deference with the Court's role in the public use determination being slight.[179] Thus, despite having the opportunity to depart from the Court's "traditionally broad understanding" of the Public Use Clause two decades post-*Midkiff*, the Court consciously opted not to.[180]

Kelo was not the only time the Court affirmed the public use principles it announced in *Midkiff*.[181] *National Railroad Passenger Corp. v. Boston & Maine Corp.* involved Amtrak, a private for-profit corporation that owned train routes, utilizing eminent domain to initiate condemnation proceedings to acquire land to build railroad tracks.[182] In affirming Amtrak's power to take property for this purpose, the majority reiterated that eminent domain power is coterminous with a state's regulatory power and that when a taking is rationally related to a public

171. *Id.* at 500–01 (O'Connor, J., dissenting).

172. *Id.* (O'Connor, J., dissenting).

173. *Id.* (O'Connor, J., dissenting).

174. *Id.* at 501 (O'Connor, J., dissenting).

175. Richard A. Epstein, *The Property Rights Decisions of Justice Sandra Day O'Connor: When Pragmatic Balancing Is Not Enough*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 177, 189–97 (2012).

176. *Kelo*, 545 U.S. at 484–86.

177. *Id.* at 486.

178. *Id.* at 487–89. This is a further affirmation of the holding in Keystone Bituminous Coal Ass'n. v. Duncan, 771 F.2d 707, 719 (3d Cir. 1985), *aff'd sub nom*. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987).

179. *Kelo*, 545 U.S. at 489.

180. *Id.* at 485.

181. Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 423–24 (1992).

182. *Id.* at 415–16.

purpose, it is consistent with the Fifth Amendment.[183] Since the legislature found that facilitating Amtrak's rail line would serve a public purpose by making transportation more available for the public, the condemnation and subsequent physical taking by Amtrak was decidedly constitutional.[184] These physical takings cases both point in the same direction, indicating that a government retains broad latitude when taking property it asserts will achieve a benefit for the public.

III. ANALYSIS

A. A Midkiff *for the Modern Age?*

1. The Factual Foundation

The modern homeownership market mirrors that of post-statehood Hawaii in several ways, supporting the viability of a modern-day *Midkiff*. Indeed, the market conditions caused by concentration of residential property in the hands of institutional investors parallel the inherited concentration of property in Hawaii during its post-statehood period. This is apt across a number of metrics—skewing of the state's residential fee simple market, price inflation, and general injury to public welfare—all of which the *Midkiff* Court viewed as clear manifestations of a defective market ripe for government regulation.[185]

First, homeownership concentration is increasingly apparent now as it was in post-statehood Hawaii. As explained above, institutional investors have systematically ramped up their home purchasing efforts.[186] This is particularly acute in certain state-level markets, but nevertheless apparent in markets throughout the country.[187] This level of market control creates an inordinate crunch on first-time homebuyers as investors tend to target the most affordable housing units—generally the type sought by first-time homebuyers.[188] Indeed, as a share of the market, institutional investors grabbed the greatest share they ever had in 2022, accounting for one-fifth of the entire market even despite a decline in the absolute number of homes purchased.[189] In conjunction with their home purchasing endeavors, these companies have simultaneously constructed new homes exclusively for rent, shrinking the market for Americans seeking a home to buy.[190] High prices, the result of ownership concentration, are the essence of a market

183. *Id.* at 422.

184. *Id.* at 424.

185. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

186. Tim Henderson, *Investors Bought a Quarter of Homes Sold Last Year, Driving Up Rents*, STATELINE (July 22, 2022, 12:00 AM), https://stateline.org/2022/07/22/investors-bought-a-quarter-of-homes-sold-last-year-driving-up-rents/ [https://perma.cc/T3YH-9S2H].

187. *Id.*

188. *See supra* Section II.A.

189. Lily Katz & Sheharyar Bokhari, *Investor Home Purchases Slump 17% from Pandemic Peak as Interest Rates Rise*, REDFIN NEWS, https://www.redfin.com/news/investor-home-purchases-q1-2022/ (June 22, 2022) [https://perma.cc/2Z4J-ERGB].

190. *See* Dietz, *supra* note 53.

failure in the eyes of the *Midkiff* Court, and government intervention to correct the market is, therefore, a proper remedial measure.[191]

Second, home prices are soaring, just as they did in Hawaii.[192] Homes are now 55% more expensive than compared to just one year ago.[193] With prices rising alongside mortgage rates recently breaking 7%, a first since 2002, there exists a concurrent upward pressure on home prices.[194] As a result, June 2022 brought the highest median sales price on record.[195] The price increase is higher than even during the era of subprime lending not too long ago, when home buyers were able to offer more than they actually had given their uninterrupted access to loans.[196] Prices are now essentially supra-competitive, leaving individuals who have the means to engage in bidding wars amongst themselves while kicking other would-be homebuyers aside.[197] Unfortunately, not even improved wages have offset ballooning prices, as home price increases have outpaced wage increases.[198]

Third, buyers have been boxed out of the market such that they are forced to rent despite a clear desire to own, paralleling the experience of Hawaiians.[199] This is particularly clear as it relates to first-time homebuyers, who now comprise the smallest percentage of the homeownership market in over four decades.[200] The result of fewer houses on the market and higher average prices is that aspirational homebuyers are effectively forced to rent, removing their ability

191. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984):

> The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning. When such a malfunction is signalled [sic], the Act authorizes HHA to condemn lots in the relevant tract. . . . This is a comprehensive and rational approach to identifying and correcting market failure.

192. *See* Simmons, *supra* note 35.

193. *See supra* Section II.A.

194. Stefanos Chen, *The Housing Market Is Worse Than You Think*, N.Y. TIMES (Nov. 4, 2022), https://www.nytimes.com/2022/11/04/realestate/housing-market-interest-rates.html [https://perma.cc/UP3N-ZLMA].

195. *Why Is the Housing Market So Expensive?*, LBM J. (Sept. 15, 2023), https://lbmjournal.com/why-is-the-housing-market-so-expensive/#:~:text=June%202022%20saw%20the%20highest,sidelines%20in%20an%20affordability%20crunch [https://perma.cc/LX9Y-TR8K].

196. Chris Arnold, *Home Prices Rose Faster Than Ever in 2021. The Typical Home Gained $50,000 in Value*, NPR (Jan. 20, 2022, 2:46 PM), https://www.npr.org/2022/01/20/1074377076/home-prices-rose-faster-than-ever-in-2021-the-typical-home-gained-50-000-in-valu [https://perma.cc/38KV-E8WJ]; Lance Lambert, *Home Prices Are Rising Faster Than Ever Before. See How Your State is Doing*, FORTUNE (July 21, 2021, 6:00 AM), https://fortune.com/2021/07/21/home-prices-rising-us-record-rate-2021-update/ [https://perma.cc/548B-MGBW].

197. Will Parker, *Bidding Wars Overheated the Home-Buyer Market, Now They're Coming for Renters*, WALL ST. J. (June 27, 2022, 6:17 PM), https://www.wsj.com/articles/bidding-wars-overheated-the-home-buyer-market-now-theyre-coming-for-renters-11656322200 [https://perma.cc/FAQ4-YKSF].

198. Gregory Schmidt, *Wages Can't Keep Up with Spike in Housing Prices*, N.Y. TIMES (May 5, 2022), https://www.nytimes.com/2022/05/05/realestate/housing-prices-affordability.html [https://perma.cc/STS5-8HRD]; *Home Prices Are Rising Faster Than Wages*, NAT'L ASS'N OF REALTORS (Apr. 8, 2022), https://www.nar.realtor/magazine/real-estate-news/home-prices-are-rising-faster-than-wages [https://perma.cc/6JKH-TJUZ].

199. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984).

200. *NAR Finds Share of First-Time Home Buyers Smaller, Older Than Ever Before*, NAT'L ASS'N OF REALTORS (Nov. 3, 2022), https://www.nar.realtor/newsroom/nar-finds-share-of-first-time-home-buyers-smaller-older-than-ever-before [https://perma.cc/6MWQ-UYW7].

to pick between buying and renting.[201] Indeed, the *Midkiff* opinion recognized that when "a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices," a legislative response aimed at curing that ailment may be warranted.[202]

Unfortunately, as the percentage of renters increases, so too has the average monthly rent.[203] Economic conditions aside, the rental market is expanding further due to a strategic change by institutional investors, who are constructing built-to-rent properties at a record pace.[204] Whereas fixed-rate mortgages, one common financing method utilized by homebuyers, hedge against inflation as the rate is fixed over time,[205] monthly rent payments are victims of inflation since they tend to rise proportionally with inflation.[206] The relationship between rent increases and inflation is, unfortunately, cyclical, as higher rents are a main driver of inflation.[207] The result is economic hardship on Americans who are now not only forced to rent instead of buy, but also forced to pay significantly more to rent than expected.

Fourth, prices have not only skyrocketed, but they have also grown increasingly unstable—a problem magnified during times of high inflation, like now.[208] When compared to March 2021, buyers paid an average of 38% more for a home in March 2022.[209] Price instability affected not only homes for sale but also those for rent.[210] Due to average rent increases of 18%, the funds a would-be homebuyer was stowing away for a future down payment must instead go toward monthly rent payments, foreclosing their ability to buy a home.[211] Largely a function of variable supply (a major side effect of ownership concentration),

201. Will Parker & Nicole Friedman, *Record Home Prices Force Prospective Buyers to Rent*, WALL ST. J. (June 28, 2022, 8:00 AM), https://www.wsj.com/articles/record-home-prices-rev-up-the-single-family-rental-market-11656417601 [https://perma.cc/GNU3-L6E7].

202. *Midkiff*, 467 U.S. at 242.

203. Parker & Friedman, *supra* note 201.

204. *See* Dietz, *supra* note 53.

205. Dock David Treece, *Fixed-Rate Mortgage: What Is It and When to Use One*, FORBES, https://www.forbes.com/advisor/mortgages/fixed-rate-mortgage/ (Nov. 2, 2022, 1:44 PM) [https://perma.cc/8FP2-SNLE].

206. Saad Dar, *The Inflation Effect on Rent: When to Increase Rent*, BASELANE (Aug. 9, 2022), https://www.baselane.com/resources/the-inflation-effect-on-rent-when-to-increase-rent/ [https://perma.cc/JPZ9-DMLM].

207. Madeleine Ngo, *Rising Rent Prices Are Keeping Inflation High*, VOX (Sept. 14, 2022, 12:20 PM), https://www.vox.com/policy-and-politics/2022/9/14/23351128/inflation-rent-prices-high [https://perma.cc/KG7Z-RSBV]; Lydia DePillis, *Inflation Has Hit Tenants Hard. What About Their Landlords?*, N.Y. TIMES (Sept. 27, 2022), https://www.nytimes.com/2022/09/27/business/economy/landlords-rent-inflation.html [https://perma.cc/XV3C-7M72].

208. The experience of one Maryland family epitomizes this issue. After finding a home to buy and agreeing to a price, their monthly mortgage rate increased such that the estimated $3,300 monthly mortgage price at the time of them agreeing to buy had now increased to $4,000 by the time the seller moved forward with their deal. *See* Ronda Kaysen, *Older, White and Wealthy Home Buyers Are Pushing Others Out of the Market*, N.Y. TIMES (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/realestate/housing-market-buyer-wealth-race.html [https://perma.cc/46FY-6P46].

209. Alicia Adamczyk, *The Housing Market Is Changing So Fast That Waiting Just 3 Months Can Mean You're Paying an Extra 20%*, FORTUNE (Apr. 20, 2022, 12:54 PM), https://fortune.com/2022/04/20/housing-market-20-percent-more-three-months-zillow-projection/ [https://perma.cc/6DP6-E4BB].

210. *Id.*

211. *See* Kaysen, *supra* note 208.

prices have fluctuated significantly month-over-month, leaving some Americans unable to anticipate how much their housing budget will be.[212]

Fifth, some Americans have responded to the homeownership concentration problem by moving elsewhere to find affordable housing.[213] This phenomenon is the subject of many exposition pieces, wherein frustrated would-be homebuyers uproot their lives and abandon their community "in search of affordable markets."[214] These anecdotes are backed by data, which show the average distance homebuyers moved was fifty miles, a "significant increase" from the average over the previous three years of fifteen miles.[215]

These market similarities mirror the instances in which the Supreme Court has validated physical takings—correcting a market artificially deterred from proper functioning,[216] utilizing a legislative scheme with a procompetitive purpose,[217] and remedying circumstances in which individuals are stripped of their ability to decide between renting and owning a home.[218]

2. The Legal Foundation

The factual similarities enumerated above bode well for the extension of *Midkiff* to the modern day, but another question remains: whether there is sufficient legal similarity to apply *Midkiff* to new, modern property issues.

Midkiff is undoubtedly a unique case with underlying facts that almost certainly will not be repeated in American history. Unless, of course, the U.S. has plans to colonize another quasi-feudal kingdom soon. But importantly, very little, if any, of *Midkiff* turned on the factual underpinnings or Hawaii's history. While the anomalous historical events may have motivated the state legislature to pass the Act, they do not appear to have motivated the Supreme Court to validate it. Indeed, the Court's repeated centering on the *effects* of Hawaii's history, as opposed to the history giving rise to property concentration, is telling.[219] This likely explains why the Court describes the detrimental *impacts* of the state's land concentration and concludes that attempts at regulating such concentration are plainly within the state's police power.[220]

While the Court did reference the "unique way titles were held in Hawaii [which] skewed the land market," this appears to be in reference to the uniquely concentrated nature of the market, not an apparent reference to the unique history of the state.[221] This explains why the Court found the Act constitutional when

212. *Id.*
213. *Id.*
214. *Id.*
215. *2022 NAR Profile of Home Buyers and Sellers*, NAT'L ASS'N OF REALTORS (Nov. 3, 2022), https://www.nar.realtor/research-and-statistics/research-reports/highlights-from-the-profile-of-home-buyers-and-sellers [https://perma.cc/LH73-AS2V].
216. *See generally* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
217. *See generally* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).
218. *See generally Midkiff*, 467 U.S. 229.
219. *Id.* at 241–42.
220. *Id.* at 242.
221. *Id.* at 244.

the legislature found the concentration "attributable to land oligopoly" as opposed to attributable to the state's feudal history.[222]

That the Court read *Midkiff* in light of *Berman* further indicates its focus on the substance of the public use analysis, not the underlying causes of the government's subsequent response. The circumstances that gave rise to the takings in *Berman* were notably different from those in *Midkiff*, yet the Court's reliance on *Berman* demonstrates its interest in how the circumstances inform the relevant legal issues, not how those underlying circumstances function as a threshold issue that must be of a certain character before turning to the legal questions raised.[223]

Thus, a reading of the opinion that confines its holding to instances of concentration rooted in peculiar property systems derived from feudal kingdoms is unsupported by the opinion itself. Indeed, even those who take issue with the wisdom of *Midkiff* find this to be the case.[224] The *Midkiff* majority even scorned the Ninth Circuit for construing the Court's public use precedent too narrowly, so a reading of the majority opinion that is too narrow is likewise improper.[225] So long as circumstances yield similar undesirable results, *Midkiff* should control the analysis.

Interestingly, a review of the justices' notes from the *Midkiff* Court's case conference shows that Justice O'Connor was advised to limit the holding's application to the *Midkiff* facts alone, but opted not to.[226] Despite pleas from Justices Rehnquist and Powell to opine carefully and tightly, Justice O'Connor instead articulated the broadest-yet pronunciation of the Public Use Clause and failed to confine the holding to Hawaii's unique factual circumstances.[227] Thus, the revelation that Justice O'Connor contemplated a narrow opinion but ultimately selected to write broadly indicates a deliberate choice to not cage *Midkiff*'s holding.[228]

To the extent one argues the Court's emphasis on the term "oligopoly" complicates applying *Midkiff* to the modern-day market, the implication is minimal. Aside from the indications of a blooming oligopoly in the homeownership market identified above,[229] the Court emphasized impacts the market conditions

222. *Id.* at 243, 245.

223. *Id.* at 239–45.

224. Eugene A. Boyle, *The Status of the Public Use Requirement: Post*-Midkiff, 30 WASH. U. J. URB. & CONTEMP. L. 115, 138 (1986) ("Unfortunately, courts will probably extend the *Midkiff* decision well beyond its facts; the language employed is certainly as broad as that found in *Berman*.").

225. *Midkiff*, 467 U.S. at 243.

226. *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, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 68, 68–74 (Robin Paul Malloy ed., 2008).

227. *Id.* at 69–71. Indeed, many were surprised by the language Justice O'Connor employed, resulting in conference notes expressing just that: "I am a bit surprised at the breadth of the opinion since SOC's comments at Conference indicated that she wanted a narrow opinion." *Id.* at 70.

228. *Id.* at 69–73. Even certain language that attempts to walk back the broad articulation in the opinion is "overwhelmed by the broad language in the rest of the opinion." *Id.* at 72.

229. *See supra* Section II.A.

yielded[230] before characterizing the market as an "oligopoly."[231] In any event, the Court used "oligopoly" interchangeably with "ownership concentration," as the opinion concludes with a characterization of the Act as an endeavor to "attack certain perceived evils of *concentrated property ownership*."[232] Had the Court desired to cage its decision to Hawaii's unique historical circumstances alone or to its own classification of the market as an "oligopoly," it would have tailored its articulation of legal principles more precisely. Instead, it wrote broadly and relied on precedential public use cases that involve an array of circumstances, giving rise to the taking at issue and a variety of market types.[233] This, too, is a strong indication that the holding may apply more broadly than just in *Midkiff*.

Semantics aside, seeing as economics scholars continue to disagree on the exact market conditions that warrant an oligopoly label,[234] it is even less likely that a court could meaningfully distinguish a true oligopolistic market from a market that is somewhat concentrated but not enough to qualify as oligopolistic.

Lastly, even if one improperly confines the *Midkiff* holding only to instances of abnormal historical circumstances, a proper takings analysis should remain unchanged. A takings determination is not contingent on whether the scheme resolves a century-old property ailment as opposed to swapping ownership over a newly constructed apartment complex. Both are plainly within the ambit of a constitutional takings analysis, uninterrupted by the interesting—or perhaps uninteresting—nature of the circumstances.

B. A Modern Midkiff *and the Public Use Clause*

Beyond whether current market conditions meet the loose criteria for a valid takings scheme, a further question is whether such an endeavor in the modern age would be constitutional. To some, such conduct on its face may appear to be a forced taking by the government, transferring ownership from one private actor to another in violation of the Public Use Clause.

The public use requirement is generally split into two interpretive camps: the narrow interpretation and the broad interpretation.[235] The narrow interpretation requires public ownership or control over the property to satisfy the public use requirement.[236] In contrast, the broad interpretation finds the public use limitation satisfied when the taking results in conferral of a benefit to the public, even if the property is transferred into private hands.[237]

230. *Midkiff*, 467 U.S. at 242 (emphasizing the "evils associated" with oligopoly such as "artificial deterrents to the normal functioning of the State's residential land market" and the forcing of "thousands of individual homeowners to lease, rather than buy").

231. *Id.* at 243.

232. *Id.* at 245 (emphasis added).

233. *See generally id.*

234. Harbord & Graevenitz, *supra* note 20, at 1 ("Market definition . . . remains a difficult and widely misunderstood topic."); Caves & Porter, *supra* note 20, at 289–90 (noting a "lack of theoretical consensus on outcomes in oligopolistic markets.").

235. *See* Boyle, *supra* note 224, at 120–21.

236. *Id.* at 120.

237. *Id.* at 121.

The broad view is widely accepted as the proper interpretative lens.[238] As it relates to physical takings, the public use limitation does not require the public to "use" the taken property so long as the public is the primary beneficiary of it.[239] Thus, when the government physically takes property from one private individual, even if the taking results in private ownership by another private individual, that taking would not violate the Public Use Clause so long as the eventual private ownership is incidental to the broader public benefit it confers.[240] This explains why the *Midkiff* Court emphasized the irrelevance of the scheme's mechanics, instead zeroing in on its conceivable public character.[241]

The *Midkiff* Court defined the public use requirement in terms even broader than the traditional articulation of the broad interpretation. Instead of merely holding that private ownership can still satisfy the limitation, it announced that a state's eminent domain power is derived from its police powers.[242] Given the expansive scope of a state's police powers, *Midkiff* explicitly validated most state efforts to provide for the general welfare—of course, subject to the proper constitutional level of tailoring.

This broad view of the public use limitation was likewise affirmed in *Kelo*. In rejecting the petitioners' plea for the Court to bar any economic development as constituting a public use, the *Kelo* Court once more framed the analysis around the taking's purpose.[243] The operative question is not whether the taking results in private ownership, but rather whether the public is the dominant beneficiary of a taking justified by a conceivable public purpose.[244] If that is the case, a modern scheme would likely be constitutional.[245]

Indeed, some scholars believe that *Midkiff*'s affirmance of *Berman* has effectively erased the public use limitation altogether.[246] If these academics are correct, then a modern-day *Midkiff* would enjoy an even easier path to validity than previously suspected. This line of legal theorizing has resulted in legal scholarship proposing a litany of fixes to inject teeth back into the public use limitation, ranging from heightening the level of judicial scrutiny the Court should apply to physical takings—including by arguing that governmental takeover of one's property amounts to invasion of a fundamental Fourteenth Amendment right—to developing a balancing test between the interests of related

238. *Id.* at 122–23; *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) (citing Rindge Co. v. Los Angeles County, 262 U.S. 700, 707 (1923) and Block v. Hirsh, 256 U.S. 135, 155 (1921)) (noting the broad view was established as the proper interpretation "long ago").

239. Michael B. Bixby, *The "Public Use" Requirement After* Midkiff, 24 AM. BUS. L.J. 621, 623 (1987).

240. *Id.* at 623–24.

241. *Midkiff*, 467 U.S. at 244.

242. *Id.* at 239 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)) ("We deal, in other words, with what traditionally has been known as the police power.").

243. Kelo v. City of New London, 545 U.S. 469, 484–85 (2005).

244. *Id.* at 485–86.

245. *See id.* at 489–90.

246. Bixby, *supra* note 239, at 625; Boyle, *supra* note 224, at 117; James Burling, *Private Property for the Politically Powerful*, 6 BRIGHAM-KANNER PROP. RTS. CONF. J. 179, 194 (2017) ("And so with *Kelo* the veil was lifted, and everyone knew that 'public use' meant 'public interest,' which meant whatever damn-fool thing the politicians thought was a good idea to do with peoples' homes and lives at the moment.").

parties.[247] These proposals, however, remain entirely academic and have not made their way into federal law.

In addition to the public purpose aspect of the Public Use Clause, the limitation also turns in part on to whom title transfers. In a modern day application, title would transfer either directly to the former renters or perhaps to a Land Reform Board of sorts modeled off the HHA.[248] In *Kelo*, for instance, title initially vested with the city of New London before ultimately transferring to the private hands of Pfizer—and such a scheme was validated.[249] Thus, while specifics of a modern *Midkiff* scheme would matter, so long as a state is sensitive to certain transfer mechanics—by, for example, having a state agency temporarily take title before deeding it to the former renters who petitioned for ownership—it would likely survive a constitutional challenge.

More broadly, there are several reasons to believe that the legal foundation for a modern *Midkiff* is firm. The first is the Court's treatment of the few physical takings cases after *Midkiff* in which the Court validated several takings premised on various justifications and factual circumstances, as explained in depth above.[250]

The second reason for optimism that a modern-day *Midkiff* effort would survive judicial review is simple stare decisis. Stare decisis is the idea that a court has a duty to respect its own previous decisions on point.[251] Despite academic disagreement over whether stare decisis has direct constitutional roots,[252] it is generally understood to oblige some degree of fidelity to previous decisions by the Court.[253] While not an "inexorable command,"[254] it is, at a minimum, strong deference to precedent that generally prevents destabilization of legal outcomes.[255] And while there are recent, legitimate concerns over the doctrine's vitality, it is still embraced by the Court as an animating principle.[256] Plus, unlike recent instances in which the Court has run afoul of stare decisis,[257] there is no justice clamoring to overturn *Midkiff*.[258]

Further, and independent of the Court's theoretical obligation to stare decisis, some academics have theorized that *Midkiff*'s broad interpretation of the

247. Bixby, *supra* note 239, at 640; Boyle, *supra* note 224, at 141–45.

248. *See* Kelo v. City of New London, 545 U.S. 469, 487–90 (2005).

249. *Id.*

250. *See supra* Subsection II.B.4.

251. Frederick Schauer, *Stare Decisis–Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 125 (2018).

252. Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1178–83 (2008).

253. *Id.* at 1207–10.

254. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

255. Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 790–91 (2018).

256. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261–62 (2022) ("*Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends.").

257. *See, e.g.*, *id.* at 2262–65.

258. *See* Robert Barnes & Shelly Tan, *What the Supreme Court Justices Have Said About Abortion and* Roe v. Wade, WASH. POST (May 3, 2022, 9:33 AM), https://www.washingtonpost.com/politics/interactive/2021/supreme-court-abortion-stances/ [https://perma.cc/3VCG-SZK2] (tracking certain Justices' previous statements and comments expressing a desire to overturn *Roe v. Wade*).

Public Use Clause will remain the standard interpretation in the substantive arm of "federal eminent domain jurisprudence for well into the future."[259] Indeed, another scholar has noted that *Midkiff*'s broad holding has definitively settled the question of whether redistributive property transfers are constitutional.[260] Moreover, and as discussed in greater detail above,[261] nothing in *Midkiff* suggests its holding is confined solely to Hawaii—indeed, the opposite is likely the case.

The fourth reason to suspect the Court may accept a modern *Midkiff* is based on the lack of precedent on point. Despite a palpable dearth of physical takings cases, the Court's public use jurisprudence in regulatory takings comports surprisingly well. For instance, the Court used *Ruckelshaus v. Monsanto Company* to affirm core public use principles raised in *Midkiff*.[262] *Ruckelshaus* concerned whether a private company's forced disclosure of the composition of its insecticides as required by the Federal Insecticide, Fungicide, and Rodenticide Act amounted to a taking that warranted just compensation.[263] Monsanto challenged the requirement on public use grounds, arguing forced disclosure of its proprietary pesticide formulas was not for public use since the primary beneficiaries of such disclosure would be competitors who could now skip resource-intensive research and development given unfettered access to Monsanto's insecticides.[264] The Court rejected this argument and instead affirmed that the public use inquiry does not turn on who "the most direct beneficiaries" of government action are but rather whether that action has "a conceivable public character."[265]

In some respects, the Court in *Monsanto* went further than *Midkiff* in articulating certain public use principles.[266] Rather than dodging litigants' repeated, implicit requests for the Court to enumerate the types of conduct that are sufficiently public, the Court explicitly noted that legislative efforts motivated by a "procompetitive purpose" are plainly within the ambit of the Public Use Clause.[267] Thus, even when private individuals are the primary beneficiaries of government conduct, so long as the government action is motivated by a desire to promote competition and lower barriers to enter a market, that government conduct almost certainly satisfies the public use limitation.[268] And while regulatory takings decisions are distinct, they may nevertheless accurately gauge the Court's temperature on broad property law principles.

Thus, while a takings scheme modeled off the Act may *feel* like a forced taking facilitated by the government from one private individual to another in

259. *See, e.g.*, Kulick, *supra* note 157, at 653.

260. Gia L. Cincone, *Land Reform and Corporate Distribution: The Republican Legacy*, 39 STAN. L. REV. 1229, 1246 (1987).

261. *See supra* Section III.A.

262. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014–16 (1984).

263. *Id.* at 986.

264. *Id.* at 998–99.

265. *Id.* at 1014.

266. Bixby, *supra* note 239, at 634.

267. *Id.*

268. *Ruckelshaus*, 467 U.S. at 1015.

violation of the Fifth Amendment, such a scheme—in line with *Kelo* and its predecessors—would likely merit the same stamp of constitutional approval as the Act received in *Midkiff*.

C. A Modern Midkiff *and Rational Basis Review*

1. Relevant Legal Principles

The *Midkiff* Court applied the minimal rationality standard and comfortably concluded the Act's process and mechanics were sufficiently tailored to established public purposes and, therefore, constitutional.[269]

As a starting point, the Court held fighting the social ills associated with property ownership concentration to be a "classic" exercise of a state's police powers.[270] Citing to cases in which states prohibitively regulated various state-level markets, the *Midkiff* Court reaffirmed its respect of a state's power to decide when, and what kind, of market intervention is proper.[271] Thus, while different in form and substance from several other exercises of police powers the Court has validated, because the principle of a state-level response to a state-level economic problem existed, the Act's process of market correction was likewise valid in *Midkiff*.

Next, it validated the Act's "approach" of market correction.[272] Listing several statutory criteria in the Act that limited the types of property and tenants that qualify for the condemnation process, the Court concluded the Act's process was a proper response to the malfunctioning property ownership market.[273] The empirical question of whether such a scheme would, in fact, cause dilution of the homeownership market was not relevant to the assessment of the Act's constitutionality.[274] What matters is not whether the goals, in fact, will be accomplished, but rather whether the state legislature reasonably could have believed the Act would achieve its stated goals.[275] *Kelo* demonstrates this principle with exacting clarity: Pfizer ended up abandoning New London, causing the city to fall remarkably short of achieving the economic growth it predicated its taking scheme on.[276] And Justice O'Connor herself recognized that federal courtrooms are not the appropriate place for "empirical debates over the wisdom of takings."[277] Indeed, "experimentation is consistent with good governance," and thus, even

269. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).
270. *Id.* at 242.
271. *Id.* (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) and others).
272. *Id.*
273. *Id.*
274. *Id.* at 242–43.
275. *Id.* at 242.
276. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), https://www.nytimes.com/2009/11/13/nyregion/13pfizer.html [https://perma.cc/JQT4-LHPN].
277. *Midkiff*, 467 U.S. at 243.

drastic city planning failures are permittable so long as the basis is sufficiently reasonable.[278]

Further, the Court articulated it would defer heavily to state legislatures on public use cases. Indeed, the Supreme Court will almost never "substitute its judgment for a legislature's judgment."[279] Not only is the role of judiciary "extremely narrow" in analyzing public use cases, but federal courts owe deference to a state legislature "until it is shown to involve an impossibility."[280] The alternative would result in impracticable outcomes and drive inconsistency in judicial decisions.[281] As a result, the prudence of such a takings scheme may be properly discussed in the legislature but not in the judiciary.

Any suggestion that the Court should grant less deference to a state legislature than it should to Congress lacks merit.[282] It would be counterintuitive to hold state legislatures to a higher level of scrutiny when such institutions have a more intimate level of understanding of the needs and problems within its jurisdiction. Thus, state legislatures are just as capable as Congress is at making factual findings and thus are owed the same degree of deference.[283]

2. Predicting the Current Court's Response

Theoretical application of public use principles does not mean much if the current Court is not willing to honor them. Thus, another relevant question is whether a modern *Midkiff* would survive scrutiny by *this* Supreme Court. Given that the composition of the current Court aligns generally with conservative politics and constitutional interpretation,[284] naturally, one may raise questions about the impact of that analytical framework on the Court's potential decision. After all, justices are not legal automatons, but rather are products of politics, preferred interpretative methods, and perhaps even outcomes.

While it is true that the Court, in its current composition, has taken strong stances on infringements of private property rights, it has done so only to the extent to ensure just compensation is paid when a taking has definitively occurred.[285] In *Cedar Point Nursery v. Hassid*, for instance, the Court concluded that a regulation allowing physical government imposition on public property amounts to a per se taking, automatically requiring just compensation, as opposed to a regulatory taking, which may not require such compensation.[286] Such a position may indicate the Court's inclination to protect private property owners from government trickery—such as attempting to mask a physical taking as a

278. David Linhart, Note, *Eminent Domain Conversion of Vacant Luxury Condominiums into Low-Income Housing*, 21 B.U. PUB. INT. L.J. 129, 133 (2011).

279. *Midkiff*, 467 U.S. at 241.

280. *Id.* at 240 (quoting Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

281. *Id.* at 240–41 (quoting United States *ex rel.* TVA v. Welch, 327 U.S. 546, 552 (1946)).

282. *Id.* at 244.

283. *Id.*

284. *See* Barnes & Tan, *supra* note 258.

285. *See generally* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); Horne v. Dep't of Agric., 576 U.S. 350 (2015); Murr v. Wisconsin, 582 U.S. 383 (2017).

286. *Hassid*, 141 S. Ct. at 2074–77.

regulatory taking to qualify for analysis under the more forgiving standard[287]—but has no cognizable impact on the Court's position on the wisdom of questioning a state's overt exercise of eminent domain. To this extent, a modern *Midkiff* would survive, given the just compensation component is necessarily intertwined with the ownership transfer process.[288]

Similarly, in *Horne v. Department of Agriculture*, the Court held that a California state law requiring raisin growers to hand over a certain percentage of their yield to the state amounted to a per se physical taking that required just compensation.[289] Again addressing primarily the threshold question of whether the government conduct amounted to a taking,[290] *Horne* has little to teach about instances in which the government explicitly invokes its eminent domain power to physically take property. A firm insistence by the Court that just compensation be paid is plainly not an issue that a modern *Midkiff* takings scheme must sweat over. In fact, the *Horne* Court emphasized the importance of keeping regulatory takings cases distinct from physical takings, suggesting a holding in one is not applicable to the other.[291] This suggests that even if the current Court had the strongest inclination to defend private property in regulatory takings cases, such feelings may be irrelevant to the Court's judgment of a modern *Midkiff* scheme.

The Court in *Murr v. Wisconsin*, composed of seven of the nine current justices, likewise endeavored to clarify certain aspects of takings jurisprudence.[292] In tracing the lineage of key regulatory takings cases, the Court provided the correct method to determine the exact composition of a parcel for takings purposes.[293] While this inquiry would be irrelevant for a modern *Midkiff*, the Court did provide valuable insight into some of its general views about takings issues. One such observation is that a core tenet of regulatory takings analyses is flexibility when balancing private rights with public considerations.[294] Second, it identified the "central purpose" of the Takings Clause as ensuring a handful of private individuals do not bear burdens that should, in fact, be carried by the public collectively.[295] A modern instantiation of Hawaii's Act would surely operate consistently with that fundamental principle, as it properly compensates private individuals for their burden while providing the public benefit of diluting the concentrated homeownership market.

A theme of some sort may exist in the current Court's takings jurisprudence: protection of private property owners from takings of their property without just compensation. While such a theme is adjacent to the issues presented in

287. *Horne*, 576 U.S. at 356.

288. *Id.* at 367.

289. *Id.* at 364–65.

290. *Id.* at 354–55.

291. *Id.* at 361 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 323 (2002)) ("Our cases have stressed the 'longstanding distinction' between government acquisitions of property and regulations.").

292. *See generally* Murr v. Wisconsin, 582 U.S. 383 (2017).

293. *Id.* at 393–96.

294. *Id.* at 394.

295. *Id.* at 406–07.

a *Midkiff*-like takings scheme, it is merely tangential to the larger question of whether such a transference is a taking. All of the Court's recent cases answer that question in the affirmative, yet *none* have banned the practice.[296] Even a realist, therefore, could find little indication in these lines of cases that the conservative majority would depart from precedent on the question of the scope of the Public Use Clause when just compensation is not an issue. This is particularly the case given the Court's repeated insistence to not conflate regulatory takings principles with those of physical takings.[297] It is, therefore, unlikely that any of the recent takings cases would weigh negatively on a modern-day *Midkiff* takings scheme.

In any event, a conservative-majority Supreme Court has already once passed on the opportunity to rein in the sweeping scope of the Public Use Clause in *Kelo*.[298] This was true even despite the Court's trending direction toward staunch protection of private property rights.[299]

Lastly, to the extent that the just compensation requirement is challenged, fair market value for the property suffices to meet that constitutional requirement. *Midkiff*'s creative just compensation structure, where the compensation is ultimately paid by private parties instead of the government,[300] is equally viable in a current application. Fair market value is the traditional metric for damage calculations and is, therefore, almost certainly shielded from a colorable legal challenge.[301] And as further discussed in Part IV, the fair market value calculation would be grounded in an estimate of the property's value in a properly functioning, nonoligopolistic market, thereby ensuring the public enjoys a benefit.

IV. RECOMMENDATION

Given the state of the homeownership market and the continuing trend toward ownership concentration in the hands of corporate real estate investment entities,[302] it may be time to consider legislative action to correct the homeownership market. While legislators have access to an array of policy levers to respond to this problem, naturally some will be more effective than others.

Some states, localities, and grassroots organizations have attempted to put obstacles in the way of corporate entities endeavoring to swallow up single-

296. *See generally, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); Murr v. Wisconsin, 582 U.S. 383 (2017); Horne v. Dep't of Agric., 576 U.S. 350 (2015); Kelo v. City of New London, 545 U.S. 469 (2005).

297. *Horne*, 576 U.S. at 361; Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 323 (2002) ("[I]t [is] inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.").

298. *See generally Kelo*, 545 U.S. 469.

299. ROBIN PAUL MALLOY & JAMES CHARLES SMITH, PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 9 (Robin Paul Malloy ed., 2008).

300. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233–34 (1984).

301. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984) ("'Just compensation,' we have held, means in most cases the fair market value of the property on the date it is appropriated.").

302. *See supra* Subsection II.A.1.

family homes.[303] Certain homeowners associations, disgruntled by the increasing presence of corporate-owned rental properties in their communities, have imposed restrictions on ownership by institutional investors.[304] Most recently, Senator Jeff Merkley introduced the "End Hedge Fund Control of American Homes Act," a proposal designed to end corporate ownership of residential housing entirely.[305] While valiant, these types of efforts may very well fall short of accomplishing a true redistributive impact. Worse yet, they nevertheless would be subject to the political backlash associated with such a brash interference with free market transactions.

A state legislature eager to enact a creative solution to its homeownership concentration problem might instead consider drafting a bill modeled off Hawaii's Act. This would necessarily entail the state to be experiencing homeownership concentration that has yielded the detrimental impacts of concentration described above. If that is the case, for states approaching or already experiencing ownership concentration that has caused soaring prices, a *Midkiff*-esque act is one constitutionally acceptable option. And while this type of solution may not be at the top of the list now, it may gain salience over time—the more dysfunctional the homeownership market grows, the more likely a legislature may be willing to pursue a more impactful solution.

Were a state legislature to go this route, it would have to mirror Hawaii's Act in some key ways. First, a state legislature would need to make robust factual findings before it would be afforded the deference awarded in *Midkiff*.[306] The impetus for this type of solution must be grounded in true need and market deficiency, as was the case in post-statehood Hawaii.[307] Thus, a state or local government must present facts consistent with a concentrated market: ownership concentration by institutional investors, high prices, price instability, forced renting, or exodus of community members in search of affordable housing

303. S.B. 334, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); Jo Ingles, *Ohio Lawmaker Hopes Bill Can Help First-Time Homebuyers in Competitive Real Estate Market*, WKSU (May 10, 2022, 7:20 PM), https://www.wksu.org/government-politics/2022-05-10/ohio-lawmaker-hopes-bill-can-help-first-time-homebuyers-in-competitive-real-estate-market [https://perma.cc/795B-3XND]; Capps, *supra* note 71; Martha C. White, *Biden Is Aiming to Make Home Buying Easier. But Keeping Wall Street Out Could Be a Heavy Lift*, NBC NEWS (Oct. 7, 2021, 4:50 AM), https://www.nbcnews.com/business/business-news/biden-aiming-make-home-buying-easier-keeping-wall-street-out-n1280805 [https://perma.cc/P3AS-KJNX]; *see also* Peyton Guion, Gordon Rago & Tyler Dukes, *As Corporate Landlords Rise in Charlotte, Officials Are Watching, Not Acting–For Now*, CHARLOTTE OBSERVER (May 10, 2022), https://pulitzercenter.org/stories/corporate-landlords-rise-charlotte-officials-are-watching-not-acting-now [https://perma.cc/SZZ9-J78C].

304. Peter Whoriskey & Kevin Schaul, *Corporate Landlords Are Gobbling Up U.S. Suburbs. These Homeowners Are Fighting Back*, WASH. POST (Mar. 31, 2022, 6:00 AM), https://www.washingtonpost.com/business/2022/03/31/charlotte-rental-homes-landlords/ [https://perma.cc/XW3A-7YD3].

305. *Senator Merkley Introduces Legislation to Ban Hedge Fund Ownership of Residential Housing*, JEFF MERKLEY: SENATOR FOR OR. (Nov. 30, 2022), https://www.merkley.senate.gov/news/in-the-news/senator-merkley-introduces-legislation-to-ban-hedge-fund-ownership-of-residential-housing [https://perma.cc/F5UZ-2QAW].

306. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 544 (1989) (Marshall, J., dissenting) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)) ("Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good 'within their respective spheres of authority.'").

307. *See supra* Subsection II.B.2.

elsewhere.[308] Once such factual findings are made, the foundation may be sufficiently laid to justify a *Midkiff*-esque takings scheme. With a sufficient factual foundation laid, such a legislative endeavor would likely be permissible so long as it promotes competition in the market. This was the essence of *Monsanto*—governmental action that benefits the public through facilitating a healthier, better-functioning market falls squarely in the confines of a state's police power.[309] And given the level of deference the legislature would be afforded, it is unlikely that its factual findings would be the subject of demanding scrutiny by the Court.

Second, a *Midkiff*-esque act would likely have to include limitations that establish circumstances under which condemnation proceedings may begin, who can initiate such actions, which properties may qualify, and what must be subject to reasonable public notice.[310] Not every lot owned in an area experiencing concentration may be eligible for transfer of ownership, and not even every lot owned by an institutional investor may qualify. A state enacting this type of scheme must tailor the solution to the problem with reasonable precision. Thus, a legislature may consider limiting qualifying lots to those based on the amount of property in the locale owned by that institutional investor, establishing a requisite number of tenants desiring to own, ensuring each tenant be allowed ownership of only one lot, and requiring those new owners to not have existing ownership of lots in the area. Further, the legislature may wisely consider imposing a requirement that upon receiving fee simple rights from their former landlord, the new owner is barred from subsequently renting the property out. These limiting criteria would provide tailoring between the solution and the problem. Notably, the extent of the intervention and the merits of the limiting criteria would likely not be within the Court's purview. Just as the *Monsanto* Court deferred to Congress' determination of the proper extent of data disclosure, so too would the Court likely defer to a state legislature's decision to intervene significantly in the market and its enumeration of qualifying properties.[311] While these qualifying criteria may narrow the pool of viable applicants, they are necessary to ensure the proper property is identified.

One important distinction between a modern-day *Midkiff* and the original *Midkiff* scheme may be the type of property to which modern legislation would apply. Whereas the Act was targeted toward single-family residential lots that sat upon Hawaiian acreage,[312] a modern-day effort may be more applicable to apartment complexes and other buildings comprised of numerous single-family units. Given this difference in property type, in addition to the potential qualifying factors above, any potential legislation must be sensitive to such differences and may need to include additional restrictions or qualifications to ensure proper impact and fairness.

308. *See supra* Section III.A
309. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1015–16 (1984).
310. *See, e.g.*, HAW. REV. STAT. ANN. §§ 516-21–22 (West 2018).
311. *Ruckelshaus*, 467 U.S. at 1015–16.
312. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984) (noting "single-family residential lots").

Third, the just compensation component would have to be predicated not on the fair market value price an oligopolist would command, but rather on the true price in a competitive market. Absent this adjustment in valuation, the buyer would remain unable to purchase a home, the market would remain dysfunctional with supra-competitively high prices, and the public, therefore, would not benefit. This valuation ensures the solution is truly beneficial to consumers, as it would simulate the property's actual price in a truly competitive market. Once just compensation is equal to the true fair market value instead of the inflated current market price, the market would be corrected, and the public would benefit.[313] Such an estimation should be based on the lot as unencumbered and validated with relevant market data to ensure it encapsulates the value in a competitive, nonoligopolistic market, just as was the case with Hawaii's Act.[314]

The obvious impact of such a legislative effort would be the initiation and completion of condemnation proceedings resulting in the transfer of fee simple ownership. A potential secondary effect may be that institutional investors curtail their home acquisition efforts. The threat of looming condemnation proceedings may act as a deterrent for institutional investors' endeavors to broaden their market reach.[315] Thus, this potential solution may work on two levels, by both directly transferring ownership rights and removing incentives for institutional investors to enter the market in the first place.

While this potential solution may rightfully be labeled extreme, such a sweeping solution may be appropriate for a particular state experiencing extreme ownership concentration. The stronger grasp institutional investors have over the market, the more fleeting an individual's choice between buying and renting a home becomes. Indeed, without proper market intervention, institutional investors may "permanently lock middle income families out of homeownership."[316] Thus, incremental, piecemeal attempts at diluting a concentrated homeownership market may be less appealing than a more immediate, direct fix like a redistributive taking scheme.

It goes without saying that such a legislative effort would be met with significant political backlash, especially in the current contentious climate.[317] And simply because economics are parallel does not mean genesis must be the same. Indeed, this kind of solution may have been appropriate for Hawaii but may not be proper elsewhere given the island's cultural history, *even if* economics are the same in mainland states in the present day. But as concentration grows and states

313. Though the *Midkiff* court waded only shallowly into the fair market value calculation, it indeed recognized the value of the property must at no point exceed fair market value. *Id.* at 234 n.2.

314. *See generally* HAW. REV. STAT. ANN. § 516 (West 2018).

315. Boyle, *supra* note 224, at 140 ("[L]ocal governments desiring to implement new reforms need only hint at the possibility of an eminent domain action to assure compliance in the private sector.").

316. FIELDS & VERGERIO, *supra* note 48, at 47.

317. *See, e.g.*, Brian Kavanaugh, *Bisnow Interview—Kavanagh on Rent Reform Backlash: Real Estate 'Is Used to Getting Its Way'*, N.Y. STATE SENATE (July 7, 2019), https://www.nysenate.gov/newsroom/articles/2019/brian-kavanagh/bisnow-interview-kavanagh-rent-reform-backlash-real-estate [https://perma.cc/PCX5-SZ6T].

feel the strain from its side effects more acutely, a *Midkiff*-esque solution may be worth pursuing.

The political climate is subject to fluctuation given the nature of politics generally. The constitutional considerations of such an effort, however, are rightly more static. As a result, once the ever-dynamic political circumstances settle around a consensus to meaningfully protect American homebuyers, a modern application of *Midkiff*, which would intrinsically promote competition in the market,[318] may become attainable.

Given these considerations, a state legislature experiencing symptoms of homeownership concentration may want to contemplate a solution similar to Hawaii's Act. While not necessarily the case in every state, given that institutional investors' grasp of the homeownership market is expected to continue to grow, the time may come sooner than expected to act to protect individual homebuyers.

V. CONCLUSION

Today, there is a property ownership concentration problem for residential housing throughout America.[319] This problem is not new. In fact, it is remarkably the same problem Hawaii faced after gaining statehood.[320] And the state's response to the problem—a forced property redistribution program without precedent in American history—survived review before the Supreme Court.[321] While the circumstances that gave rise to Hawaii's problem sixty years ago may never be mirrored, the consequences are notably similar: high prices, price instability, forced renting, exodus of community members in search of affordable housing elsewhere, and more.[322] These effects are felt disproportionately by would-be first-time homebuyers in the United States who are effectively boxed out of the homeownership market given the malfunction of the market caused by institutional investors.[323]

Perhaps now is the right time for other states to pursue a similar market correction scheme. By setting up a process of forced transfer of title from a small group of owners to individual citizens, the Hawaiian legislature cured a substantial deficiency in the homeownership market.[324] And the Supreme Court upheld this intervention as not only consistent with the Takings Clause of the Fifth Amendment, but also consistent with many bedrock property law principles that have existed in our property system since our nation's founding.[325]

318. As previously observed, a pro-competitive purpose is sufficient to satisfy the public use requirement. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1015 (1984).

319. *See supra* Subsection II.A.1.

320. *See supra* Subsection II.B.2.

321. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231–32 (1984).

322. *See supra* Section III.A.

323. Marte, *supra* note 37.

324. *Midkiff*, 467 U.S. at 232–34.

325. *Id.* at 241–42 ("The 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.").

John Locke himself understood the consequences of ownership concentration, explaining in his labor theory that while man may have a right to the property which he labors over, his right exists only insofar as there is enough left for others.[326] Such a view is one our courts have shared, viewing concentrated corporate ownership skeptically for centuries now.[327] Having drifted off course from these principles, now may be the time to readjust. Such a response is quintessentially American: simultaneously radical, consistent with precedent, and constitutional.

326. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. V § 27 (Project Gutenberg ed. 2003) (1690); *see also* Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENV'T L. REV. 155, 156–67 (2016).

327. People *ex rel.* Moloney v. Pullman's Palace-Car Co., 51 N.E. 664, 674 (Ill. 1898) (limiting ownership to one company is "incompatible with the theory and spirit of our institutions").