Princeton Legal Journal Forum

Volume 2 Spring 2022

FORUM

The Supreme Court's Perversion of Property Rights

Beck Reiferson

Political philosophers have long regarded the right to property as one of man's most essential rights. John Locke, whose writings were among the most influential on the political thought of America's Framers, believed the primary purpose of governments is to protect its citizens' property rights. In his *Two Treatises of Government*, he argued that the "great and chief end… of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property." The Framers agreed that protections of property rights were of paramount importance, as the pervasiveness of precisely such protections throughout the Constitution makes clear. Among the Constitution's explicit protections of Americans' property rights is the Fifth Amendment, which says that "private property [shall not] be taken for public use, without just compensation." Known as the Takings Clause, this clause lays out the proper scope of the federal government's eminent domain power: it may seize private property, but only if it justly compensates the property-owner and the property will serve a public use. The public use requirement—called the Public Use Clause—is central to Takings Clause jurisprudence. I will argue, however, that through its rulings in *Hawaii Housing Authority v. Midkiff* and *Kelo v. New London*, the Supreme Court has whittled away at Americans' property rights by erroneously contorting the Public Use Clause into a "Public Utility Clause."

In 1967, Hawaii passed a law to address the fact that only seventy-two private landowners owned almost half of the property in the State. The law transferred

legal titles from these landowners to lessees. In *Midkiff* (1984), the Court unanimously held that this law did not violate the Takings Clause of the Fifth Amendment because the "'public use' requirement is… coterminous with the scope of a sovereign's police powers." In other words, as long as the government is seizing property to advance the public good, the taking satisfies the Public Use Clause. Justice O'Connor, writing for the Court, put this point bluntly: "The mere fact that property taken outright by eminent domain is transferred… to private beneficiaries does not condemn that taking as having only a private purpose." Since the law in question could plausibly be said to benefit the public, the Court deemed it constitutionally permissible.

The Court's emphasis on the law serving a public *purpose* has no basis in the text of the Fifth Amendment. The Public Use Clause means exactly what it says: for a taking to be constitutionally valid, the property that is being taken must be made available for the public to use—not just confer some indirect benefit on the public. And for the public to use property, one of two criteria must be met: either the public must have a right to enter the property or the property must be publicly owned. A park, for example, obviously meets the first of these criteria, while a government building meets the second. The privately owned homes at issue in *Midkiff*, however, met neither of these criteria. Therefore, contrary to the Court's decision in the case, the Public Use Clause *prohibits* the actions of the Hawaiian legislature. If the Framers wanted governments to be able to seize private property that would be used in any way to benefit the public, they would have written a Public Utility Clause. Instead, they wrote the Public Use Clause, and "public use" means "public use."

Kelo v. New London (2005) presented the Court with an opportunity to correct its error in *Midkiff*. Instead, the Court doubled down, declaring that the City of New London's transfer of private property from private homeowners to private companies satisfied the Public Use Clause because the City could plausibly argue that the transfer served the public purposes of improving the local economy and raising tax revenues. Just as in *Midkiff*, the majority in *Kelo* did not contend that the public would literally use the seized property. Rather, they weighed the merits of the City's argument that the property transfer would be economically beneficial and decided that the public utility derived from the seizure was enough to satisfy the Public Use Clause. The majority thus again wrongly conflated public use, which the Constitution requires, and public utility, which, by itself, is insufficient to make a government's exercise of the eminent domain power constitutionally valid.

The distinction between "use" and "utility" is more than just semantic: the Court's misguided interpretation of the Public Use Clause has significant

implications for the security of Americans' property rights. By interpreting the Public Use Clause as a Public Utility Clause, the Court has greatly expanded the scope of the government's eminent domain powers. A government that can only seize private property if either the government itself or the citizenry at large will use that property is a government with a very limited ability to seize private property. Such a government could permissibly seize private property if it planned to turn it into something like a government building, park, highway, or school, but seizing private property just to transfer it to other private owners for their own use would be strictly off-limits. On the other hand, a government that can seize private property as long as its plan for that property can plausibly be said to indirectly benefit the public is a government with a nearly limitless ability to confiscate property. This is particularly true when courts afford legislatures broad discretion to determine what constitutes public utility, as the Supreme Court promised to do in *Midkiff*. When a government has that much latitude to seize private property, property rights are extremely insecure. For the Court to supply Americans' property rights with a greater degree of protection—the degree of protection the Framers intended Americans to enjoy—it must interpret the Public Use Clause as a strict requirement that governments can only seize private property if the public or government will actually use the property. The overruling of *Midkiff* and *Kelo* is long overdue.