

The Grasping Hand: "Kelo v. City of New London" and the Limits of Eminent Domain

By Ilya Somin

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In 2005, the Supreme Court ruled that the city of New London, Connecticut, could condemn fifteen residential properties in order to transfer them to a new private owner. Although the Fifth Amendment only permits the taking of private property for "public use," the Court ruled that the transfer of condemned land to private parties for "economic development" is permitted by the Constitution - even if the government cannot prove that the expected development will ever actually happen. The Court's decision in *Kelo v. City of New London* empowered the grasping hand of the state at the expense of the invisible hand of the market.

In this detailed study of one of the most controversial Supreme Court cases in modern times, Ilya Somin argues that *Kelo* was a grave error. Economic development and "blight" condemnations are unconstitutional under both originalist and most "living constitution" theories of legal interpretation. They also victimize the poor and the politically weak for the benefit of powerful interest groups, and often destroy more economic value than they create. *Kelo* itself exemplifies these patterns. The residents targeted for condemnation lacked the influence needed to combat the formidable government and corporate interests arrayed against them. Moreover, the city's poorly conceived development plan ultimately failed: the condemned land lies empty to this day, occupied only by feral cats.

The Supreme Court's unpopular ruling triggered an unprecedented political reaction, with forty-five states passing new laws intended to limit the use of eminent domain. But many of the new laws impose few or no genuine constraints on takings. The *Kelo* backlash led to significant progress, but not nearly as much as it may have seemed.

Despite its outcome, the closely divided 5-4 ruling shattered what many believed to be a consensus that virtually any condemnation qualifies as a public use under the Fifth Amendment. It also showed that there is widespread public opposition to eminent domain abuse. With controversy over takings sure to continue, *The Grasping Hand* offers the first book-length analysis of *Kelo* by a legal scholar,

alongside a broader history of the dispute over public use and eminent domain, and an evaluation of options for reform.

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
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Editorial Review

Review

"Somin's thorough rebuttal of the constitutional reasoning and philosophical implications of the Supreme Court's *Kelo* decision demonstrates why that ruling was a constructive disaster: It was so dreadful it has provoked robust defenses of the role of private property in sustaining Americans' liberty."

(George F. Will, journalist and Pulitzer Prize winner)

"By dint of his uncommon thoroughness, Ilya Somin has become the leading and most persuasive critic of the Supreme Court's ill-fated 2005 *Kelo* decision. His close examination of the case's factual backdrop offers chilling confirmation of his central thesis: weak constitutional protection of property rights opens the door to political intrigue that exacts its greatest toll on the poor and vulnerable in society. Somin's gripping account of the Grasping Hand confirms your worst fears about big government."

(Richard A. Epstein, NYU School of Law, author of *Takings: Private Property and the Power of Eminent Domain*)

"Mr. Somin... provides a fine tour of the case and of the intellectual history of eminent-domain law. More important, he provides a framework for thinking about the future of eminent domain and private property... Somin has written an important book that maps the road ahead for those who believe that individual freedom cannot be separated from the protection of private property."

(Edward Glaeser, Harvard University, *Wall Street Journal*)

"*The Grasping Hand* is likely to be the definitive analysis of the Supreme Court's controversial decision in the *Kelo* case. But Somin attends to much more than that. He sets out the political and doctrinal history that led up to *Kelo* and critiques the legislative and judicial developments provoked by the reaction to it. Somin has long been a champion of strong property rights. What he has to say will be of value to those who share that commitment and perhaps even more to those who don't."

(James E. Krier, University of Michigan Law School)

"Ilya Somin is one of the world's leading scholars on property rights...[and] his legal analysis of... eminent domain and the *Kelo* decision is extremely thorough and insightful. But *The Grasping Hand* has something more than just solid legal history and reasoning..... [U]nlike virtually all other scholarly works on eminent domain, [it] compellingly communicates the human... cost of governments teaming up with private interests to take the homes, small businesses, and other property of Americans."

(Dana Berliner & Scott Bullock, co-counsel for the homeowners in *Kelo v. City of New London*)

"For anyone interested in the *Kelo* case, I recommend Somin's book. It is the first book-length discussion of the *Kelo* appellate proceedings by a legal scholar. It is also by far the most exhaustively researched history of the public use doctrine in the state and federal courts before and since *Kelo*. While I do not share his opposition to the *Kelo* decision, I welcome his good scholarship on the subject."

(Wesley Horton, counsel for the City of New London in the US Supreme Court phase of the *Kelo* case)

"In this carefully researched and convincingly argued volume, Ilya Somin provides a powerful critique of the Supreme Court's "public use" jurisprudence and the controversial *Kelo* decision. He also gives careful attention to the hostile public reaction to the ruling, and points out that much of the post-*Kelo* reform

legislation is inadequate to prevent future eminent domain abuse. This insightful book belongs on the shelf of anyone interested in the place of property rights in constitutional law."

(James W. Ely, Jr., Vanderbilt Law School, author of *The Guardian of Every Other Right: A Constitutional History of Property Rights*)

"[A] key contribution to the literature on property rights. I dare say that this is the most important book on eminent domain since Richard Epstein's classic, *Takings*... [Somin's] voice is the voice of reason, precisely the kind of scholarship that is sorely needed in our polarized society. And this book is, today, the leading authority on Kelo."

(Fernando Teson, Florida State University College of Law)

"It's a book that is both scholarly and readable, and filled with details, history, and perspective. You can't do better than this."

-(Robert H. Thomas, Owners Counsel of America, Chair, American Bar Association Committee on Eminent Domain)

"The book provides a very well-written review of the background of the case, a close legal analysis of the relevant case law leading up to it, a detailed review of the legislative and judicial responses to the decision, and a discussion of possible safeguards against excessive use of eminent domain.... The book clearly advances a particular view of the case—namely, that it was decided in error—but it nevertheless provides a thorough and evenhanded review of the various perspectives on the public use issue."

-(Thomas Miceli, *Public Choice*, author of *The Economic Theory of Eminent Domain: Private Property, Public Use*)

"The Grasping Hand.... is an excellent read and the definitive treatment of eminent domain and the Kelo case. As you might expect, Somin discusses the legal issues with aplomb. So much so that the book is endorsed by both of Kelo's opposing counsel! In addition to the law and economics, Somin offers what for me was an eye-opening investigation of the history behind many of the major cases."

-Alex Tabarrok, George Mason University, *Marginal Revolution*

"Ilya Somin has now written what is likely to be the definitive legal analysis of Kelo, its aftermath, and its future prospects....The Grasping Hand is excellent at laying out the political and doctrinal developments that led up to Kelo and at canvassing the backlash and legislative response to it."

-(Justin Torres, *Weekly Standard*)

"I strongly recommend this book for its sharp legal, economic, and historical analysis of the eminent domain debate"

-(George Leef, *Forbes*)

"[T]his book is...a must read for anyone interested in the politics and history of property rights and property law in the United States. Its appeal is even broader though, and would be fruitfully read by anyone with an interest in constitutional theory, judicial impact, or cause lawyering. The book is accessible enough to be read by undergraduate students, and would be an excellent choice for an upper-level course on property law or the Supreme Court in American politics."

-(Logan Strother, *Law and Politics Book Review*, American Political Science Association).

"Throughout this skillfully assembled book, Somin has his cards face-up on the table.... But he is scrupulously fair throughout to every constitutional perspective on these questions, and scrupulous too in his

weighing of every policy variable, every interest at stake, and every measure of reform that might be taken. The story of the use and abuse of eminent domain is an unfinished one. But this is the book for understanding the story so far."

-(Matthew Franck, *National Review*).

About the Author

Ilya Somin is professor of law at the George Mason University School of Law. He is the author of *Democracy and Political Ignorance: Why Smaller Government is Smarter*. Somin's work has appeared in numerous academic and popular publications, including the *Yale Law Journal*, the *Los Angeles Times*, and *USA Today*. He writes regularly for the popular *Volokh Conspiracy* blog, affiliated with the *Washington Post*.

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