BOOK REVIEW

THE "DESPOTIC POWER" RECONSIDERED


 Reviewed by James W. Ely, Jr.*

INTRODUCTION

After decades of neglect and disinterest by jurists and scholars, the rights of property owners are once again a lively subject in the constitutional polity. A series of Supreme Court and state court decisions have shown renewed interest in vindicating property rights.¹ Thus, it is a propitious time to reconsider the use of eminent domain, one of the most intrusive powers of government, to compel individuals to sell their property. The waxing and waning of eminent domain over time is a window into the shifting place of property rights in constitutional law.

For centuries the right of owners to possess and use their property has been a bedrock principle of the Anglo-American constitutional tradition and political culture.² The desire to safeguard property rights was a major driving force behind the constitutional convention of 1787, and prominent provisions of the Constitution and Bill of Rights attest to its importance.³ The Fifth Amendment contains two important property guarantees, stating in

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¹ See, e.g., *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2431 (2015) (holding that the mandate that grower set aside part of raisin crop for government was a physical appropriation of property requiring just compensation under the Fifth Amendment); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) (holding that the nexus requirement for exactions imposed as part of permit scheme applies to cases where government levies financial obligation); *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 519 (2012) (temporary government-induced flooding may qualify as a taking of property).


³ Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wis. L. Rev. 1135, 1136 (“Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.”).
part that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” 4 Yet by the twentieth century, the Progressive movement and New Deal had substantially downgraded the place of property in the constitutional order. 5 Yielding to statist imperatives and the regulatory state, courts generally gave the property rights of individuals less protection than that extended to other constitutional rights. 6 The diminishing judicial regard for private property—notwithstanding occasional lip service to the contrary—opened the door for ever more expansive exercise of the power of eminent domain to acquire private property for “public use.” 7 Increasingly, property was taken from one owner and transferred to another on the vague promise that the shift would somehow benefit the public. 8 By the post-World War II era, the authority of government to condemn property appeared virtually limitless, however problematic the purpose. 9 An eviscerated “public use” requirement simply reflected the diminished status of property rights generally. Scholars showed little interest in the topic. Indeed, a 1949 article proclaimed that “public use” as a limitation on eminent domain was effectively dead. 10 Much of the public, moreover, seemed indifferent. 11 Eminent domain was hardly a topic of everyday conversation and concern.

This permissive approach to eminent domain would be sharply challenged in the landmark case of Kelo v. City of New London, 12 in which a closely divided Supreme Court ruled that government could take private property for transfer to another private party for economic development purposes. 13 The case grew out of a redevelopment scheme for the City of New London, Connecticut, an economically depressed community. 14 The city authorized the New London Development Corporation (“NLDC”), a private entity, to formulate a plan to revitalize the area. 15 In close associa-

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4 U.S. CONST. amend. V.
6 Id. at 281.
8 Id.
9 Id. at 58.
10 Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 YALE L.J. 599, 608, 614 (1949) (“The Supreme Court has repudiated the doctrine of public use. Most state courts have arrived at the same conclusion . . . .”); see also BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977) (maintaining that “any state purpose otherwise constitutional should qualify as sufficiently ‘public’ to justify a taking”).
11 SOMIN, THE GRASPING HAND, supra note 7, at 66.
13 Id. at 485.
14 SOMIN, THE GRASPING HAND, supra note 7, at 15.
15 Id.
tion with Pfizer, Inc., the NLDC sought to acquire some ninety acres of
land for redevelopment.\textsuperscript{16} The plan called for replacing a community of
modest residences with a corporate headquarters, upscale housing, an
everseous hotel, and other facilities.\textsuperscript{17} Many homeowners, facing pressure
tactics by the NLDC and threats of resort to eminent domain, agreed to sell
their parcels.\textsuperscript{18} The “voluntary” nature of these transactions, however,
seems questionable. A few homeowners resisted,\textsuperscript{19} and the resulting fight to
keep their land forced a dramatic reopening of what constitutes “public use”
for which government may take property.

Ilya Somin, a leading scholar of property rights, has authored a splen-
did book on the pivotal \textit{Kelo} decision.\textsuperscript{20} He carefully delineates the circumstances in New London both before and after implementation of the de-
velopment project,\textsuperscript{21} probes the history of the “public use” limitation on emi-
nent domain,\textsuperscript{22} and examines the problems caused by taking private prop-
erty for economic development and blight removal.\textsuperscript{23} Somin then analyzes the
various opinions by Supreme Court justices in \textit{Kelo}, and considers both the political and judicial response to the decision.\textsuperscript{24} He does not mince words,
declaring that “the \textit{Kelo} decision was a major error that the Court should
eventually overrule.”\textsuperscript{25} Somin maintains that meaningful judicial enfor-
cement of the “public use” restraint on eminent domain is both consistent with
the constitutional scheme and has significant practical benefits.\textsuperscript{26}

Somin is careful to point out that this volume does not seek to address
all aspects of takings jurisprudence under the Fifth Amendment and its state
counterparts.\textsuperscript{27} For example, he does not consider what governmental regu-
lations or physical incursions, short of the acquisition of title, might consti-
tute a compensable taking.\textsuperscript{28} Nor does Somin explore the often-contested
meaning of “just compensation.”\textsuperscript{29} His focus is on the crucial question of

\begin{flushleft}
\textsuperscript{16} \textit{Id.} at 15-16.
\textsuperscript{17} \textit{Id.} at 16.
\textsuperscript{18} \textit{Id.} at 19-20.
\textsuperscript{19} \textit{Id.} at 22.
\textsuperscript{20} Somin, \textit{The Grasping Hand}, supra note 7.
\textsuperscript{21} See \textit{id.} ch. 1.
\textsuperscript{22} See \textit{id.} ch. 2.
\textsuperscript{23} See \textit{id.} ch. 3.
\textsuperscript{24} See \textit{id.} chs. 4-7.
\textsuperscript{25} \textit{Id.} at 4.
\textsuperscript{26} Somin, \textit{The Grasping Hand}, supra note 7, at 4.
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} See, \textit{e.g.}, Steven J. Eagle, \textit{Regulatory Takings} § 1-12 (5th ed. 2012).
\textsuperscript{29} See, \textit{e.g.}, James Geoffrey Durham, \textit{Efficient Just Compensation as a Limit on Eminent Domain}, 69 Minn. L. Rev. 1277, 1278 (1985); Gideon Kanner, “Fairness and Equity,” or Judicial Bait-and-
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which takings of property satisfy the “public use” requirement. With that in mind, let us examine some of the telling arguments that Somin advances.

I. THE HISTORY OF “PUBLIC USE”

One of the most significant contributions of this volume is the comprehensive examination of the understanding of “public use” by judges and commentators over time. The majority opinion in Kelo by Justice John Paul Stevens purported to follow precedent when giving a broad construction to “public use.” Somin puts this claim to the test and finds it wanting. Although recognizing that decisions were not entirely uniform, he forcefully concludes that the prevailing view before 1900 restricted taking property to transfers to government or to private entities with a legal duty to serve the public.

A brief glance at the history of eminent domain casts light on the meaning of “public use” and lends support to Somin’s position. The authority to acquire property by eminent domain was well settled by the eighteenth century. William Blackstone acknowledged that the legislature could, upon payment of “a full indemnification and equivalent,” compel a person to transfer property for the good of the community. Although Blackstone did not discuss the range of permissible takings, he suggested as an example a new road. The American colonies utilized eminent domain to acquire land for roadways, forts, courthouses, and lighthouses. These projects would clearly qualify as public use. Colonial legislatures also enacted mill acts, which authorized private parties to build a dam across a creek and flood adjacent land to generate water power for a grist mill. Bear in mind, however, that grist mills were required to serve all members of the public and were subject to rate regulation. They were in a sense an early form of public utility.

33 Id. at 6.
34 Id. at 40.
35 1 William Blackstone, Commentaries *139.
36 Id.
38 Id.
39 Id. at 12.
41 Id.
The Bill of Rights, including the Fifth Amendment, did not initially bind the states. The Constitution, moreover, does not expressly confer on Congress the power to condemn private property. In fact, it is not clear that that federal government was originally understood to have any eminent domain power outside of federal enclaves. Historically the federal government relied on the states to condemn land needed for federal purposes. The federal courts therefore did not address issues pertaining to the exercise of eminent domain until late in the nineteenth century. Still, two prominent members of the Supreme Court in the 1790s strongly intimated that eminent domain should be confined. Justice William Paterson characterized eminent domain as “a despotic power” that “exists in every government.” He insisted that governments could only exercise this power upon payment of compensation and that this power did not encompass cases where lawmakers attempted to “take land from one citizen, who acquired it legally, and vest it in another.” Justice Samuel Chase was more emphatic. In a frequently quoted observation he declared that “a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers.” At the very least, these comments indicate that leading figures in the founding era looked skeptically at any use of eminent domain to take property for transfer to private parties.

With the Bill of Rights applicable only to the national government, state constitutions governed the rights of property owners throughout much of the nineteenth century. Consequently, state courts took the lead in shaping the meaning of “public use.” Somin has carefully analyzed state court opinions, and persuasively concluded that the clear majority of courts endorsed a narrow view of “public use.” A recurring challenge was presented by legislative delegation of eminent domain power to privately owned canal, turnpike, and railroad companies. This development forced courts to consider “public use” in the context of large, government-sponsored pro-

43 William Baude, Rethinking the Federal Eminent Domain Power, 122 YALE L.J. 1738, 1759 (2013). In Kohl v. United States, 91 U.S. 367, 373 (1875), the Supreme Court determined that eminent domain was an inherent power of the national government. It is difficult to square this decision with the principle that the federal government was one of limited and enumerated powers.
45 Id. at 573-74.
46 Vanhorne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (1795).
47 Id. at 312.
50 SOMIN, THE GRASPING HAND, supra note 7, at 44.
jects carried out by private enterprises. Stressing that “public use” was not synonymous with public ownership, state judges invariably sustained such delegations. They likened railroads to a type of improved public highway, and pointed out that railroads, as common carriers, were under a legal duty to transport passengers and freight at reasonable rates. Turnpikes and canals were open to all comers upon payment of the requisite fare. So understood, privately owned transportation facilities fit within a strict definition of “public use.” The Supreme Judicial Court of Maine in 1855 correctly articulated the dominant opinion among state courts:

Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well defined rights to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad, and the like. But when it is so appropriated that the public have no rights to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use.

As Somin notes, prominent treatise writers in the nineteenth century provide additional support for his position. Thomas M. Cooley, in his authoritative 1868 volume, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, clearly endorsed the view that “public use” meant use by the public or public agencies. In language that anticipated the controversy in *Kelo* over takings for economic development by private parties, Cooley declared in an 1878 edition of his work that “a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.” Cooley’s underlying worry was that eminent domain, unless confined, would become a tool for the powerful and politically well-connected to advance their interests. Likewise, John Lewis, the author of prominent 1888 treatise on eminent domain law, maintained that “public use” was correctly limited to actual use by the public.

52 Id.
53 Id. at 75.
54 Jordan v. Woodward, 40 Me. 317, 324 (1855).
55 Somin, The Grasping Hand, supra note 7, at 54-55.
56 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Powers of the States of the American Union 531 (Boston, Little, Brown, & Co. 1868).
Nonetheless, as Somin points out, the view of Cooley and Lewis did not ultimately carry the day. State and federal courts gradually endorsed a broader understanding of governmental authority to acquire private property.60 By the late nineteenth century courts were starting to equate the “public use” norm with the more expansive notion of “public purpose.”61 Coupled with this open-ended construction of “public use,” courts in the early twentieth century, under the influence of the Progressive movement, began to stress judicial deference to legislative determinations of public purpose.62 Consequently, judicial supervision of eminent domain grew slack. The effect, of course, was to virtually eliminate the constitutional requirement of “public use” as a check on the exercise of eminent domain.

The history of “public use” is particularly important in understanding Kelo because the Supreme Court majority claimed to follow “more than a century” of Court precedent.63 Some scholarly defenders of Kelo have repeated this claim.64 As Somin demonstrates, this assertion is dubious. To sustain such a claim, Justice Stevens cited several early Court decisions which construed “public use” as “public purpose.”65 Two warrant attention and neither lends support to his position.

The first, Fallbrook Irrigation District v. Bradley (1896),66 was in fact not an eminent domain case at all.67 Indeed, the Supreme Court expressly stated that the Fifth Amendment was not applicable to the states and was not at issue.68 Instead, the litigation concerned a lawsuit by a California landowner contesting an assessment imposed on her by an irrigation district for the purpose of providing water for arid lands.69 Resisting sale of her land for nonpayment, the landowner argued that irrigation was not a public purpose and hence the assessment amounted to a deprivation of property without due process of law in violation of the Fourteenth Amendment.70 She pointed to the rule established in Loan Association v. Topeka (1874)71

60 SOMIN, THE GRASPING HAND, supra note 7, at 56.
61 Id. at 55-56.
62 Id. at 56.
64 See, e.g., KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 138 (2006) (“Despite the outraged reaction, the Court’s decision [in Kelo] was entirely unremarkable. It followed quite naturally from a line of cases extending back over a hundred years . . . .”).
65 Kelo, 545 U.S. at 480.
66 164 U.S. 112 (1896).
67 See Gideon Kanner, The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”? 7, 33 PEPP. L. REV. 335, 376 (2006) [hereinafter Kanner, Public Use Clause] (observing that Fallbrook “was not truly an eminent domain case, and really had nothing to do with the Fifth Amendment’s ‘public use’ clause”).
68 Fallbrook, 164 U.S. at 158.
69 Id. at 118-22.
70 Id. at 156-57.
71 87 U.S. (20 Wall.) 655 (1874).
that “there can be no lawful tax which is not laid for a public purpose.” 72

Dismissing the landowner’s contention, the Court’s rambling opinion sometimes used the terms “public purpose” and “public use” interchangeably and found that irrigation satisfied the public purpose requirement under the particular circumstances of California. 73 Focused primarily on the question of legitimate taxation, *Fallbrook* is a curious and unpersuasive case to be seen as a seminal authority in defining “public use” for purposes of eminent domain.

Another case invoked by Stevens was *Clark v. Nash* (1905), 74 which also involved the irrigation of arid lands. 75 At issue was a Utah statute which empowered individuals to condemn land for the purpose of obtaining water for mining or irrigation. 76 The plaintiff sought to widen by one foot an already existing irrigation ditch on the contiguous land of the defendant. 77 The defendant maintained that this action constituted a taking of property for private not public use, and thereby deprived the defendant of property without due process of law in contravention of the Fourteenth Amendment. 78 Upholding the widening of the ditch, the Court emphasized that the determination of “public use” might depend upon unique local circumstances, including the condition of the soil and climate. 79 The Court, however, explicitly limited the reach of *Clark*. In language often overlooked, it remarked: “But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state.” 80 Clearly the Court reserved a role for policing legislative declarations of public purpose. Indeed, no decision by the Supreme Court in the early twentieth century accorded legislative determinations of “public use” the same level of supine deference as would subsequently become the norm.

The treatment of *Fallbrook* and *Clark* by Stevens cautions against the common tendency to pluck language from judicial opinions out of factual context. 81 Both of these cases involved the irrigation of arid land in rural areas. Neither entailed the large-scale displacement of residences or businesses from sizeable tracts of land. In short, it is not hard to distinguish

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72 *Id.* at 664.
73 *Fallbrook*, 164 U.S. at 161-62.
74 198 U.S. 361 (1905).
75 *Id.* at 362.
76 *Id.* at 367.
77 *Id.* at 364.
78 *Id.*
79 *Id.* at 370.
80 *Clark*, 198 U.S. at 369.
81 The opinions in *Fallbrook* and *Clark* were written by Justice Rufus W. Peckham. For an analysis of Peckham’s “public use” jurisprudence, see James W. Ely, Jr., *Rufus W. Peckham and Economic Liberty*, 62 VAND. L. REV. 591, 600-01, 612-16 (2009).
these early cases from more recent economic development projects, such as the project at issue in *Kelo*.

Although the Supreme Court was prepared to allow states some latitude in the early due process cases pertaining to the taking of property, it would be erroneous to conclude that the Court imposed no limits. In *Missouri Pacific Railway Company v. Nebraska* (1896), the Court reviewed a state statute that empowered a state agency to compel a railroad to grant part of its land to private individuals for the purpose of erecting a grain elevator. It characterized the proceedings as “in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners.” The Court struck down the statute on grounds that the taking of property “for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.” Such language seems to blend the takings doctrine with the due process norm.

Justice Stevens’s effort to establish a long historical pedigree for the *Kelo* opinion was deeply flawed. Still, there was no doubt that he could find support in the sweeping language of two post-World War II decisions by the Supreme Court. The post-war years witnessed the novel and far-reaching use of eminent domain to eliminate urban slums. The cornerstone of modern “public use” doctrine is *Berman v. Parker* (1954), which upheld the taking of land from one owner for transfer to a private development agency as part of an urban renewal scheme. A classic expression of New Deal constitutionalism, the unanimous opinion by Justice William O. Douglas envisioned a very narrow role for judicial review in the context of condemnation. Once “the legislature has spoken” he maintained, “the public interest has been declared in terms well-nigh conclusive.” Douglas also equated eminent domain with the police power to regulate, suggesting that the authority to take property was almost boundless. Following *Berman* local governments aggressively pursued urban redevelopment projects un-

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82 164 U.S. 403 (1896).
83 *Id.* at 403-04.
84 *Id.* at 417.
85 *Id.*
89 *Id.* at 36.
90 *Id.* at 32; see also Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 Mich. St. L. Rev. 877, 907-09 (picturing *Berman* as the product of Progressive ideology that sought to discredit claims of individual property rights).
91 *Berman*, 348 U.S. at 32.
under the heading of eradicating blight. In fact, definitions of blight were often so vague and open-ended as to allow government to take almost any property. Not only did many state courts adhere to Berman in construing the “public use” clauses in their state constitutions, but they pointed to Berman to justify the acquisition of property for economic development purposes even when the land was not blighted. For example, in the controversial case of Poletown Neighborhood Council v. City of Detroit (1981), the Supreme Court of Michigan put its seal of approval on a plan which displaced thousands of residents to convey the land to General Motors for the construction of a new automobile factory. Many other states followed suit.

The Supreme Court showed no inclination to depart from this highly deferential approach to ascertaining “public use” in Hawaii Housing Authority v. Midkiff (1984). In a unanimous opinion by Justice Sandra Day O’Connor, it validated a land redistribution scheme that entailed the transfer of fee simple title from landowners to tenants to overcome the perceived problem of concentrated land ownership. Remarkably unconcerned about whether a land oligarchy actually existed, the Court observed that it would sustain any exercise of eminent domain “rationally related to a conceivable public purpose.”

David L. Callies succinctly observed: “There was very little left of the Public Use Clause—at least in federal court—even before the Kelo decision.”

Somin notes that, even as the “public use” limitation seemed on the verge of disappearance, a few state courts continued to cast a skeptical eye of the exercise of eminent domain for the transfer of property to private parties. In 2004 the Supreme Court of Michigan dramatically overturned Poletown, ruling that economic development was not a “public use” justifying the acquisition of private property. It warned that “if one’s ownership of private property is forever subject to the government’s determination that...

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93 Id. at 548 (“While seemingly well intentioned, blight determinations are subjective and thus vulnerable to abuse.”).
95 Id. at 457.
98 Id. at 242-43.
99 Id. at 241.
101 SOMIN, THE GRASPING HAND, supra note 7, at 60.
another private party would put one’s land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, ‘megastore,’ or the like.”103 Gradually a challenge to the dominant broad reading of eminent domain gained strength, and set the stage for the important and controversial *Kelo* decision.

II. A LOOK AT THE ACTUAL IMPACT OF EMINENT DOMAIN

In an especially insightful chapter, Somin considers at length the real-world impact of eminent domain for economic development and blight removal purposes.104 He paints a gloomy picture of political favoritism, individual hardship, and abuse.

Somin advances three telling points. First, he maintains that governments too often utilize the eminent domain process to serve politically connected interest groups.105 Recent beneficiaries of eminent domain, for instance, have included the *New York Times*,106 Las Vegas casinos,107 Columbia University,108 and a prominent developer planning to construct a sports arena and other commercial and residential buildings.109 The footprints of Pfizer Corporation were prominent in the New London development plan.110 Justice O’Connor cogently warned in her *Kelo* dissenting opinion: “The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.”111 Absent meaningful judicial oversight, there is a real danger that interest groups may in effect capture the exercise of eminent domain for their own gain.

Second, Somin powerfully argues that courts erroneously fail to consider the costs, both human and financial, of economic and blight takings.112 He charges that the victims of this enlarged eminent domain power will be predominately poor, elderly, and members of racial minorities.113 As Justice

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103 *Id.* at 786; *see also* Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 768 N.E.2d 1, 11 (Ill. 2002) (holding that a contribution to regional economic growth did not justify a taking of property).
104 SOMIN, THE GRASPING HAND, *supra* note 7, at 73.
105 *Id.* at 81.
111 *Id.* at 505 (O’Connor, J., dissenting).
113 *Id.* at 82-84.
Clarence Thomas, also in dissent in *Kelo*, commented: “[E]xtending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.” Somin presents ample evidence to buttress Thomas’s concern. The condemnation approved in *Berman* displaced about five thousand poor, black residents and transferred the land to developers. A similar pattern emerged with other blight takings. Urban neighborhoods were destroyed and hundreds of thousands of mostly poor people were removed. Many wound up in worse living conditions. Little wonder that during the 1950s and 1960s, commentators sometimes bitterly characterized urban renewal as “Negro removal.” City planners gave conspicuously little attention to the plight of displaced residents, and certainly did not provide any substantial amount of alternative housing. A similar story emerged with respect to the economic development condemnations upheld in *Poletown* and *Kelo*. The outcome in both cases wrecked stable neighborhoods inhabited largely by middle class and elderly homeowners. In sharp contrast, there is no evidence that wealthy residential areas, where more political and legal resistance might be anticipated, were targeted for economic development.

Somin also takes courts to task for failure to even consider the financial costs of economic development or blight takings. Courts routinely decline to give weight to the economic harm of such projects, while accepting at face value legislative claims about the supposed advantages. Yet proponents have every incentive to inflate claims about the benefits to flow from such projects, and to minimize estimates of costs. In fact, it is simply impossible to know in advance which development projects will be a success. By ignoring (1) the sizeable expense to taxpayers resulting from the utilization of eminent domain, (2) the loss of jobs as local businesses shut down, and (3) the loss of local tax revenue as homeowners and businesses are forced to relocate, courts often have a highly skewed view of the bene-

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114 *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).
116 *Id.*
117 *Id.*
118 *Id.* at 88.
119 See David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 379 (2007) (asserting that blight condemnations “have typically been part of development or redevelopment efforts that remove poor occupants and replace them with wealthier, often less-likely-to-be-minority occupants”); see also Dick M. Carpenter & John K. Ross, *Testing O’Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 URB. STUD. 2447, 2450 (2009).
121 *Id.* at 78-79.
122 *Id.* at 80.
fits actually resulting from a condemnation. Somin acknowledges that cost/benefit analysis is complex, and that courts may not be well qualified to make such assessments. However, courts address difficult issues in other areas of law, and it is not apparent why they should not take into account the economic harm likely to result from massive displacements in the wake of economic development or blight takings.

Third, Somin criticizes courts for failing to require that the beneficiaries of economic development takings actually provide the promised, public advantages that served to justify the taking. This is a particularly important point because often the grandiose development schemes do not produce the promised results. Although a few courts have imposed conditions that seek to ensure that property transferred to private parties is in fact employed to benefit the public, this is not the norm. In *Kelo* itself Justice Stevens, writing for the majority, explicitly refused to require a reasonable certainty that the public would benefit from the development plan at issue. Somin succinctly explains the mischief resulting from this judicial neglect:

> In the absence of any binding obligations to deliver on the promised economic benefits, little prevents municipalities and private interests from using inflated estimates of economic benefits to justify condemnations and then failing to monitor or provide any such benefits once courts approve the takings, and the properties are transferred to their new owners.

The potential for serious abuse is obvious. Indeed, the new owner might even put the condemned property to an alternative use. Somin contends that if binding commitments are not feasible, this calls into question the very rationale for sustaining economic development takings.

The sad outcome in *Kelo* illustrates Somin’s point. The defeated homeowners eventually settled with local officials, who were anxious to avoid further negative publicity. The supposed development plan collapsed almost at once. Pfizer lost interest in the proposed new facilities and closed its New London facilities. Ten years after *Kelo*, the condemned land remains vacant, inhabited only by a colony of feral cats. In the meantime, the city incurred substantial legal fees, lost tax revenue, and

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123 Id. at 78.
124 Id. at 76.
125 For example, the economic benefits promised as a consequence of the taking approved in *Poletown* never materialized. The General Motors plant produced only half of the anticipated jobs, and the taxpayers were saddled with massive costs. Id. at 78-79.
128 Id. at 77-78.
129 Id. at 232-33.
130 Id. at 235.
131 Id.
failed to benefit from productive use of the property.\textsuperscript{132} It was hardly a poster child for successful economic development takings.

\section{III. The \textit{Keelo} Opinions}

Somin carefully analyzes the various opinions in \textit{Keelo}, finding fault with each.\textsuperscript{133} The majority opinion by Stevens relied heavily on precedent, much of it inapt as discussed above.\textsuperscript{134} It was as if precedent somehow made him do it. He also stressed judicial deference to legislative determinations about the exercise of eminent domain.\textsuperscript{135} In this connection, Stevens gave great weight to the notion that the taking was part of a comprehensive development plan, even though the supposed plan was vague and incomplete.\textsuperscript{136} He added that “a one-to-one transfer of property, executed outside the confines of an integrated development plan” would raise a suspicion of an unconstitutional transfer for private gain.\textsuperscript{137} As Somin points out, however, the emphasis on the existence of a development scheme is not much of a check on the power to take property.\textsuperscript{138} It is easy for officials to contrive a plan to justify just about any condemnation. Despite disappointment with the Stevens opinion, Somin detects some potential silver linings. The opinion dropped some of the more extravagant language in \textit{Berman} and \textit{Midkiff} about the reach of eminent domain and the “well-nigh conclusive” nature of legislative determinations.\textsuperscript{139} Even more promising, Stevens suggested that a pretextual taking “for the purpose of conferring a private benefit on a particular private party” would be invalid.\textsuperscript{140}

Although Justice Anthony Kennedy joined the majority opinion, he penned an opaque concurring opinion. He took the position that courts should invalidate “a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . .”\textsuperscript{141} Neither Stevens nor Kennedy explored the question of what amounted to a pretextual taking. By cautioning against second guessing development plans, however, the majority opinion increased the difficulty

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\item\textsuperscript{132} Id. at 235-37.
\item\textsuperscript{134} See supra Part I.
\item\textsuperscript{135} \textit{Keelo} v. City of New London, 545 U.S. 469, 480 (2005).
\item\textsuperscript{136} See Nicole Stelle Garnett, Planning as Public Use?, 34 ECOLOGY L.Q. 443, 444 (2007) (noting the frequency with which the Stevens opinion invoked the terms “plan” or “planning”).
\item\textsuperscript{137} \textit{Keelo}, 545 U.S. at 487.
\item\textsuperscript{138} Somin, The Grasping Hand, supra note 7, at 113-14.
\item\textsuperscript{139} See id.
\item\textsuperscript{140} \textit{Keelo}, 545 U.S. at 477.
\item\textsuperscript{141} Id. at 491 (Kennedy, J., concurring).
\end{itemize}
of ferreting out a pretext. Yet any judicial decision that a taking was pretextual would seemingly require an evaluation of the motives behind the project. Thus, courts have been left to grapple with an unresolved puzzle.

“The true meaning of Kennedy’s opinion,” Somin shrewdly notes, “is extremely difficult to judge.”

Somin carefully dissects the two dissenting opinions as well. O’Connor authored a blistering dissent in which she charged that the majority had in effect eliminated the words “for public use” from the takings clause. Although pleased with the result reached by O’Connor, Somin nonetheless highlights problems with her analysis. Like other scholars, he finds it difficult to square O’Connor’s dissent in Kelo with her expansive language in Midkiff about the scope of eminent domain power. Asserting that Midkiff was “true to the principle underlying the Public Use Clause,” O’Connor sought to distinguish rather than overrule Midkiff. The result was intellectual confusion. Somin speculates that O’Connor may have changed her mind about the exercise of eminent domain since the Court decided Midkiff in 1984 to an extent that she was not willing to acknowledge. Quite possibly, state court decisions tightening the definition of “public use” to bar economic development takings could have influenced O’Connor. Other factors might also have been at work. O’Connor tended toward ad hoc decisionmaking in takings cases. She may simply have found the middle class homeowners in New London more sympathetic than the large landowners in Hawaii.

Somin also calls into question O’Connor’s attempt to differentiate blight condemnations, which she would uphold, from economic development takings. He points out that there is no clear line between the elimination of an existing harm and the promotion of economic growth. Given the open-ended definition of blight in many states, Somin posits that there is no meaningful distinction between blight and economic development.

143 Somin, The Grasping Hand, supra note 7, at 115.
144 Kelo, 545 U.S. at 494 (O’Connor, J., dissenting).
146 Kelo, 545 U.S. at 500 (O’Connor, J., dissenting).
147 Somin, The Grasping Hand, supra note 7, at 128-29.
148 Kanner, Public Use Clause, supra note 67, at 357 (“Justice O’Connor’s intellectual misadventure thus demonstrates that she who lives by ad hocery dies by it.”).
149 Somin, The Grasping Hand, supra note 7, at 129.
takings. In fact, blight elimination is often an integral part of an economic development plan. Rather than pursuing a novel and likely untenable distinction, Somin suggests that O’Connor might better have called for the overruling of Berman, or at least for confining Berman to situations in which a deteriorated area was a genuine threat to health and safety.

Despite its shortcomings, O’Connor’s Kelo dissent was a welcome blow for the usually neglected rights of property owners. It did much to reopen public dialogue about the use and abuse of eminent domain. Unfortunately, O’Connor was of two minds. Indignant about the destruction of a middle class neighborhood in the name of economic development, she was still unwilling to let go of the precedents that sustained the majority opinion. In a sense, O’Connor wanted to have her cake and eat it too. The result was an opinion which, as Somin recounts, was heartwarming but analytically messy.

Somin is most enthusiastic about the Thomas dissenting opinion, declaring that “Thomas reached the correct conclusion to a greater extent than either the majority opinion or O’Connor.” He applauds Thomas for taking a serious look at the origins and history of the “public use” clause. Thomas maintained that over the years, the Supreme Court had wandered far from the original understanding of “public use,” and reduced the clause to a virtual nullity. He urged a return “to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.” Somin faults Thomas for some omissions and careless treatment of early cases, but on the whole offers only minor criticism.

There is no sugarcoating the fact that Kelo was a defeat for the rights of property owners. At another level, however, Kelo marked an important turning point in the struggle to revitalize the constitutional protection of property. Taken together, the various opinions in Kelo shattered the post-New Deal consensus regarding “public use” and reopened the long dormant debate concerning the appropriate constitutional standards to govern the exercise of eminent domain.

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150 Id. at 129-30.
151 Id. at 130.
152 Id. at 132.
153 Id.
155 Id. at 521.
156 SOMIN, THE GRASPING HAND, supra note 7, at 133-34.
IV. THE AFTERMATH

Most Supreme Court rulings arouse little public interest. *Kelo*, in contrast, ignited a political firestorm. The public reaction was intensely negative, and spanned all partisan, ethnic, and gender lines. Public opinion surveys showed widespread popular opposition. The House of Representatives, by a vote of 365 to 33, adopted a resolution disapproving the decision in *Kelo*, and asserting that the ruling “effectively negate[s] the public use requirement of the takings clause.” Some scholars and urban planners professed to be surprised by the outcry since, in their view, the Court was merely following precedent. The yawning gap between the perceptions of the public and elements of the academy was laid bare. Somin skillfully examines at length the public response, as well as the legislative and judicial reactions.

The threshold question is how to explain the hostile public reaction. To answer this question, Somin develops the thesis of political ignorance. Prior to *Kelo*, most of the public had never heard of eminent domain, and it was hardly a matter of national concern. Neither *Berman* nor *Midkiff* had caused a popular stir. Recall the factual settings of those cases. *Berman* arose from a slum elimination project, and the people removed were poor and members of racial minorities. Moreover, *Berman* was decided at a time when the New Deal orthodoxy was firmly in place and judicial regard for private property was at its nadir. *Midkiff* concerned the unique land-owning pattern in a single state. Yet *Kelo* touched a nerve because it appeared that middle class residents could be forced from their homes at the behest of a powerful corporation in league with local government officials. For the first time, average citizens realized that their property could be vulnerable to condemnation as part of a development scheme.

Justice Stevens in *Kelo* suggested that states were free to adopt stricter “public use” requirements than the federal baseline by statutes or state constitutional law. States moved quickly to take up this invitation. In response to the public clamor, most states enacted measures that purported to

\[157\] Id. at 137.
\[159\] See SOMIN, THE GRASPING HAND, supra note 7, at 3.
\[160\] Id. chs. 5-7.
\[162\] SOMIN, THE GRASPING HAND, supra note 7, at 87.
curtail the use of eminent domain for economic development. Somin assesses the efficiency of these measures and finds many of them to be more symbolic than substantive. He is skeptical that many of the laws in fact afford increased protection for property owners. The most common weakness in the post-*Kelo* reform laws, according to Somin, is the continued exception for blight. The statutes seemingly bar takings for developmental purposes, but allow condemnations for blight defined so broadly as to permit the acquisition of almost any property. The blight exception can easily pave the way for an end run around any limitation of economic development takings. Somin attributes the prevalence of ineffective reform laws to public ignorance. Most members of the public do not scrutinize the details of eminent domain reform laws and are not in a position to evaluate them. Consequently, legislators can enact largely cosmetic measures which quiet public concerns without doing much to prevent powerful interest groups that gain from eminent domain to continue business as usual.

Somin acknowledges that the picture is not entirely bleak. A number of states have adopted, often by public referendum, laws or constitutional amendments that effectively shut the door on economic development takings. Somin concludes that despite the strong public reaction to *Kelo*, legislative reforms have in the main been disappointing. This checkered record calls into question the often-repeated canard that individual property owners can protect their interests through the political process.

The state judicial response to *Kelo* has been similarly mixed. Several state supreme courts have declined to follow *Kelo*'s interpretation of “public use,” invalidating economic development takings under state constitutions. Other courts have tightened the definition of blight, restricted quick-take condemnations, and grappled with the problem of ascertaining whether a taking was pretextual. The Supreme Court of Missouri put some teeth in a post-*Kelo* law barring the condemnation of property for

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166 It is noteworthy that a few states, including Massachusetts and New York, did not pass any reform legislation. See Somin, *The Grasping Hand*, supra note 7, at 143 tbl.5.4.

167 Id. at 141.

168 Id.

169 Id. at 145.

170 Id. at 165.


“solely economic development purposes.” It invalidated a taking by a Port Authority to improve river commerce and improve port facilities as a violation of the statute. These are promising developments. On the other hand, the federal courts have been extremely deferential to legislative decisions to take property, and the New York courts have, as a practical matter, eliminated any judicial oversight of eminent domain proceedings. Overall, there has been a gradual movement by state courts to enlarge the constitutional safeguards of property owners.

Finally, Somin explores proposed alternatives to outright bans on blight and economic development takings. These include the payment of increased compensation, special protection for homes, heightened procedural safeguards, and reliance on exit rights. Somin agrees that some of these ideas have merit, especially if a total ban cannot be achieved, but argues that each has shortcomings that would leave property owners largely unprotected. Consider, for instance, the proposal for enhanced compensation. A number of scholars have long contended that the usual compensation standard—“fair market value”—is inadequate and fails to place the owner in as good a position pecuniarily as if his or her property had not been taken. Somin supports the argument favoring increased compensation for all types of takings, but doubts that enhanced compensation levels, standing alone, will halt eminent domain abuse. He expresses concern that enhanced compensation would simply freight the taxpayers with higher bills. Taxpayers, Somin insists, are rarely in a position to assess the benefits of proposed development takings and are not realistically able to halt unwise projects.

175 State ex rel. Jackson v. Dolan, 398 S.W.3d 472, 478, 482-83 (Mo. 2013) (en banc).
176 Id. at 482 (declaring that although the law “may make a taking more difficult to effectuate, that difficulty is the intended result of the statute . . .”).
178 Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006) (“[O]ur state constitution provides its landowners more protection against a taking of their property than the United States Constitution.”).
179 SOMIN, THE GRASPING HAND, supra note 7, at 205.
180 Id. at 205-25.
181 Id. at 231.
182 See Kanner, Time to Reform, supra note 29, at 42; Merrill, supra note 29, at 128; see also St. Louis Cty. v. River Bend Estates Homeowners’ Ass’n, 408 S.W.3d 116, 136 (Mo. 2013) (en banc) (upholding heritage-value statutes requiring additional compensation of 50 percent over fair market value for property owned by a family for 50 years, and stating that the statutes promote “the legislature’s intended policy of providing additional benefits to certain property owners whose real property is taken for public use”).
183 SOMIN, THE GRASPING HAND, supra note 7, at 209.
184 Id.
185 Id. at 210.
CONCLUSION

The *Grasping Hand* is an outstanding study of a crucial Supreme Court decision. Somin’s meticulous research, supplemented by informative interviews with both parties and litigants in New London, gives readers a thorough account of the controversy surrounding the exercise of eminent domain for economic development purposes. Throughout the volume, Somin asks searching questions and is not content with easy answers. We are left to ponder whether, in the age of big government, the “despotic power” can be tamed so long as property rights are treated as a poor relation in constitutional law. This volume will surely become the definitive treatment of the *Kelo* decision and its impact on the law dealing with eminent domain. Even scholars who do not share Somin’s commitment to private property rights could benefit from reading this work. It belongs on the shelf of anyone interested in property rights and eminent domain in American society.