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

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My new book, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* is now in print. It is the first book about the *Kelo* decision and the massive political backlash it generated, written by a legal scholar. *The Grasping Hand* is coming out just in time for the tenth anniversary of *Kelo* on June 23.

Here is a summary from the University of Chicago Press website (the book is also co-published by the Cato Institute):

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.

Here is a very early review by economist Alex Tabarrok at the Marginal Revolution blog.

In addition to Amazon, the book is also available at Barnes & Noble, The University of Chicago Press website, and elsewhere.

Longtime Volokh Conspiracy readers will not be surprised to learn that *The Grasping Hand* is highly critical of the *Kelo* decision. But I also tried hard to give serious consideration to the many arguments on the other side, some of which I recognize have a measure of validity. This is one of the very few books that takes a strong stance on a controversial Supreme Court case that is endorsed by lawyers representing both sides in the Supreme Court: Dana Berliner and Scott Bullock for the property owners, and Wesley Horton for the City of New London. All three generously submitted to multiple interviews (as did a number of other participants in the case), and all three read the manuscript and made numerous helpful suggestions.

Over the next two weeks, I plan to write a series of posts based on the book. In this one, I would like to briefly explain why I wrote it in the first place.

Nonacademics sometimes ask why I bothered to write a book attacking a ruling that is already so widely reviled. As discussed in Chapter 5, polls show that over 80% of Americans oppose the ruling, and this opposition cuts across partisan, ideological, racial, and other divides. It's one of the few issues that brings together such disparate people and groups as Ralph Nader, Rush Limbaugh, Bill Clinton, libertarians, and the NAACP. I myself authored an amicus brief in the case on behalf of the late legendary left of center urban development theorist Jane Jacobs, whose views on most political issues were very different from my own. Given such widespread opposition to the ruling, a book criticizing *Kelo* may seem no more necessary than a book criticizing *Dred Scott* or *Buck v. Bell*. Justice Antonin Scalia actually compared *Kelo* to *Dred Scott* in a 2011 speech in which he predicted that *Kelo* will be overruled.

But the public's opposition to *Kelo* is not shared by the vast majority of legal scholars. Although I don't have survey data on this, my impression is that law professors probably support the result in *Kelo* by almost as lopsided a margin as the general public opposes it. The decision is also overwhelmingly endorsed by left-of-center federal judges (though some liberal state judges differ), and by many government officials and urban planners. Having previously written a book about the dangers of political ignorance, I recognize that having majority public opinion on my side does little to prove my position correct. When experts disagree with the public, we should take seriously the very real possibility that the group with greater knowledge of the subject is

right. One of the main purposes of *The Grasping Hand* is to explain why dominant view among my fellow academic experts is wrong – not only from the standpoint of my own preferred approach to constitutional theory, but from that of a variety of widely accepted versions of both originalism and living constitutionalism.

In the course of criticizing *Kelo*, I provide an extensive overview and critique of state and federal "public use" jurisprudence more generally. It may be the most thorough analysis of this subject published in many years. That is not so much a tribute to my work as a reflection of the relative neglect of public use in recent decades. Before *Kelo*, all but a few experts thought that the question was more or less definitively settled in favor of the nearly limitless definition of "public use" endorsed by earlier Supreme Court decisions, such as *Berman v. Parker* (1954). Debates over takings law among lawyers and legal scholars generally focused on other issues that were considered more open to dispute.

In addition, I believe the time has come for a thorough examination of the massive political and legal reaction to *Kelo*. Whatever you think of the *Kelo* decision itself, the backlash it generated is worth studying for the lessons it conveys about the interaction between judicial review, public opinion, and political mobilization. The story is important both for its own sake also because it teaches some valuable strategic lessons for constitutional reform movements.