THE WALL STREET JOURNAL.

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They Can Take It If They Want It

Most states passed laws to restrict eminent-domain takings after Kelo. They won't do us any good.

Susette Kelo's house in New London, Conn., being dismantled. *PHOTO: ASSOCIATED PRESS*

By **EDWARD GLAESER**

July 24, 2015 3:53 p.m. ET

What limits should be placed on the public power to take private property? Ten years ago, when the Supreme Court heard the case of *Kelo v. City of New London*, the question of eminent domain gained newfound prominence in the arena of ideas. When the Supreme Court ruled in favor of New London's land grab, the public was furious. Over the next two years, according to a report by the anti-eminent domain Castle Coalition, 44 state legislatures "passed new laws aimed at curbing the abuse of eminent domain for private use."

Yet in reality, the public power to take private property for almost any purpose remains practically unchanged. In "The Grasping Hand," Ilya Somin argues that "the backlash has yielded far less effective reform than many expected." Mr. Somin, a law professor at

George Mason University, 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.

THE GRASPING HAND

By Ilya Somin
Chicago, 356 pages, $30

The Kelo case arose because the state of Connecticut and the nonprofit New London Development Corp. (or NLDC) wanted to attract pharmaceutical giant Pfizer to New London to provide an economic jolt to that post-industrial city. Landing this big corporate fish would require serious public largess: both tax breaks and land. A former mill site was available for Pfizer itself but, according to Mr. Somin, Pfizer insisted on more—a former naval facility and 60 acres of other property—"in order to turn them into upscale housing, office space, a conference center, a five-star hotel and other facilities" for its customers and employees.

Susette Kelo owned a little pink house on the Fort Trumbull peninsula. When the NLDC tried to take her (and her neighbors') land using eminent domain, the case went all the way up to the Supreme Court.

It was an ideal poster child for the argument in favor of limiting eminent domain. One study found more than 10,000 examples of "actual or threatened condemnation for private parties between 1998 through 2002." Out of all these, the Institute of Justice, the self-titled "national law firm for liberty," chose to represent Ms. Kelo and her neighbors, partially because the lawyers felt that "their case would play well in the court of public opinion."

Why did *Kelo* make eminent domain look so bad? The justification for the taking was economic development, a fuzzy concept with few natural limits, so every homeowner felt threatened. The taking appeared to be at the behest of big business. "Pfizer representatives did indeed demand the redevelopment plan and its associated takings," Mr. Somin writes, "as a quid pro quo for its agreement to build a new headquarters in New London."

The land grab looked even worse because the leader of the NLDC, the nonprofit that took the land, was married to a Pfizer executive, who told the Hartford Courant in 2001 that "Pfizer wants a nice place to operate." I share Mr. Somin's belief that the corporation chief "genuinely believed that she was acting for the public good and was not simply trying to advance the private interests of Pfizer." Still, it didn't look great.

Moreover, as public policy, the plan looked bad. The use of tax breaks and eminent

domain to lure large employers to declining cities is almost always an error. Urban reinvention typically proceeds from education and small-scale entrepreneurship, not large-firm relocations. How exactly were the city's poor going to benefit from "upscale housing" or a "five-star hotel"?

Pfizer's investment in New London lasted about as long as its tax breaks. In 2009, Pfizer spent almost $70 billion to acquire another pharmaceutical giant, Wyeth, and Pfizer's New London facility was closed as part of a post-merger consolidation. One recent newspaper article writes that "to the naked eye, Fort Trumbull may look today like a barren tract of land that has not seen much progress in the decade since the U.S. Supreme Court upheld the use of eminent domain." Other such eminent-domain-abetted economic development projects, such as Detroit's 1981 seizure of the Poletown neighborhood for a General Motors factory, look equally unwise.

Yet the U.S. Supreme Court supported the New London taking by a 5-4 margin. And to the more than 80% of Americans who disagreed—including both Rush Limbaugh and Ralph Nader—the court appeared to be radically redefining property rights. According to Mr. Somin, this view is wrongheaded.

The court had already given city planners extremely broad powers to take non-blighted land via eminent domain—in 1954, not 2005. (The case was *Berman v. Parker*.) In 1984, the justices unanimously reaffirmed (in *Hawaii Housing Authority v. Midkiff*), their deference to local government, and confirmed that eminent domain could transfer land from one private owner to another private owner. Indeed, Mr. Somin concludes, *Kelo* "represented progress relative to the Court's previous ultradeferential public use jurisprudence."

Eminent domain cases all look back to the Fifth Amendment, which states: "nor shall private property be taken for public use, without just compensation." The Due Process clause of the 14th Amendment extended this right to takings by state governments. Mr. Somin provides new evidence supporting the view that 19th-century courts often held a narrow definition of "public use" that would have excluded economic development. Hence an originalist approach in *Kelo* could have led the Supreme Court to reject the New London taking. Yet a sudden judicial shift restricting eminent domain would have also been a radical break with recent precedent—and a power grab, moving authority from local governments to federal courts.

Mr. Somin doesn't think we can trust the political process to protect private property, concluding that the majority of new state laws "provide little or no protection for

property owners against economic development takings." But I don't think we can the trust courts entirely, either. For almost a century, courts have smiled on the overregulation of land use, which is a far more insidious threat to private property than eminent domain. A world of judicial empowerment over eminent domain would mean that judges could allow the takings that they like and ban the rest.

If property owners like Susette Kelo are to be protected, we need both judicial and legislative action. The simplest reform—a blanket ban on eminent domain—is off the table: No U.S. government will ever abjure the power to take land, which is clearly accepted in the Bill of Rights. But there are many more modest limitations that could be instituted.

Legislatures could require heightened scrutiny of costs and benefits and higher compensation rules: Some owners might still lose from a taking, but a market-price-plus-50% rule for compensation would do much to alleviate their pain. Lawmakers could also pass laws that banned the use of eminent domain for the purpose of transferring land to private entities. Finally, they could limit the purposes permitted for takings.

This last option is hard, because the government can so easily manufacture alternative justifications. If we ban the economic-development rationale used in *Kelo*, grasping governments will just try to define the desired property as blighted or focus takings in poorer areas. Mr. Somin recognizes this risk and favors a ban on blight-based eminent domain as well. But if we ban blight as a justification, governments will turn to alternative excuses, like promoting public safety or environmental sustainability. Reducing the current virtually limitless definition of "public use" seems wise, but I am more skeptical than Mr. Somin about the courts' ability to give much bite to a more limited definition.

I am even less enthusiastic about proposals to ban takings that transfer land to private entities. There is no reason to restrict the private provision of public services. A taking that expands an underperforming public school is surely worse than an identical one that expands a far better charter school. We should not shut down the option of using eminent domain to build privately operated highways or sewage systems.

Conversely, I am far more enthusiastic than Mr. Somin is about the option of requiring compensation above fair market value. After all, owners typically value their property above current market prices. (That's why they haven't sold them.) And we should only risk takings when great public value is being created.

Finally, every state should invest in independent cost-benefit analyses, modeled perhaps on those of the Congressional Budget Office. These offices should rule on every new taking and land-use regulation. If we want proper evaluation, we need independent, specialized expertise that does not exist in the judiciary.

Mr. 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. Susette Kelo suffered significantly, but I hope she takes some pride in the fact that her name is now a rallying cry for those who fight for a freer, better future.

—Mr. Glaeser is an economics professor at Harvard University and a senior fellow at the Manhattan Institute.