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The Green Costs of Kelo: Economic Development Takings and Environmental Protection

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THE GREEN COSTS OF *KELO*: ECONOMIC DEVELOPMENT TAKINGS AND ENVIRONMENTAL PROTECTION

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INTRODUCTION

The Supreme Court's recent decision in *Kelo v. City of New London* has rekindled the debate over "economic development" takings—condemnations that transfer property from one private owner to another solely on the ground that doing so might improve the local economy or increase tax revenue.[1] While such takings have been condemned by many commentators on both the right and the left, environmentalists have been notably absent among *Kelo*'s critics. Some environmentalists have even defended the *Kelo* decision and the use of eminent domain to spur private economic development.[2] At the same time, scholarly commentary on *Kelo* and other economic development takings decisions has largely ignored their potential environmental effects.

This Article provides the first detailed analysis of the environmental effects of *Kelo* and economic development takings generally. It contends that environmentalist support for economic development takings is misguided, and that the rule embodied by the Supreme Court's *Kelo* decision is bad for property owners and environmental protection alike. There is a strong environmental rationale for strictly limiting or prohibiting the use of eminent domain for economic development.[3]

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1. Kelo v. City of New London, 545 U.S. 469 (2005).

2. *See infra* notes 23–25 and accompanying text.

3. It should be noted at the outset that this paper does not contend that *Kelo* was wrongly decided as a matter of constitutional law. The coauthors disagree on this point. In any event, limits on the use of eminent domain for economic development need not come from federal courts. As discussed

Kelo's holding that economic development takings are a legitimate public use under the Fifth Amendment's Takings Clause[4] came shortly after *County of Wayne v. Hathcock*,[5] in which the Michigan Supreme Court overruled *Poletown Neighborhood Council v. City of Detroit*,[6] which, at the time, was the most famous earlier decision justifying economic development takings.[7] While it was not the first decision upholding economic development condemnations,[8] *Poletown* was by far the most widely publicized and notorious. Public attention primarily focused on the massive scale of Detroit's use of eminent domain; under the guise of economic development takings, Detroit destroyed an entire neighborhood by condemning numerous businesses, churches, schools, and the homes of some 4200 people. After condemnation, the land was transferred to General Motors for the construction of a new factory.[9]

Like *Poletown* before it, *Kelo* was met with public outrage, despite the fact that it arguably made few changes to existing federal Takings Clause

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below, eleven state supreme courts have already banned economic development takings under state constitutional law. *See infra* note 35. In the wake of *Kelo*, many state legislatures also began to consider restrictions on the use of eminent domain. *See, e.g.*, Patricia E. Salkin, *U.S. Supreme Court Upholds Use of Eminent Domain for Economic Development and Spurs a Firestorm of Legislative Activity to Limit Such Authority*, MUNICIPAL LAWYER, Summer 2005; *see also* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006) (showing that eminent domain reform efforts face serious obstacles); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUP. CT. ECON. REV. (forthcoming 2007) (manuscript at 64–84, on file with authors), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 874865 (last visited Mar. 11, 2006) [hereinafter Somin, *Controlling*] (discussing early post-*Kelo* reforms); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo (Geo. Mason Univ. Law & Econ., Research Paper No. 7-14, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298 [hereinafter Somin, *Limits of Backlash*] (discussing reform in thirty-five states).

4. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

5. 684 N.W.2d 765 (Mich. 2004) (holding that economic development takings are unconstitutional).

6. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).

7. For a detailed discussion of *Hathcock*, 684 N.W.2d 765, see Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005 (2004) [hereinafter Somin, *Overcoming* Poletown] (symposium on County of Wayne v. Hathcock). For evidence of *Poletown*'s widespread notoriety, see JEANNIE WYLIE, POLETOWN: COMMUNITY BETRAYED 110–38 (1989) (discussing publicity generated by Ralph Nader's role in the case); Somin, *Overcoming* Poletown, *supra*, at 1006–07.

8. *See, e.g.*, Prince George's County v. Collington Crossroads, Inc., 339 A.2d 278, 287–88 (Md. 1975) (holding that "industrial development" qualifies as a legitimate public use).

9. *See* Somin, *Overcoming* Poletown, *supra* note 7, at 1016–22 (discussing the impact of the *Poletown* takings); Ilya Somin, *Mich. Should Alter Property Grab Rules*, DETROIT NEWS, Jan. 8, 2004, at 11A [hereinafter Somin, *Property Grab*] (brief description of the facts and background of *Poletown*).

jurisprudence.[10] A striking feature of the reaction to *Kelo*, *Poletown*, and *Hathcock* was the unusual political coalitions it fostered.[11] It is not surprising that *Kelo* was denounced and *Hathcock* cheered by many conservative and libertarian supporters of property rights. Indeed, the *Kelo* property owners were represented by lawyers affiliated with the Institute for Justice, a prominent libertarian public interest group.[12] Observers unfamiliar with the history of economic development takings might be more surprised to learn that an amicus brief supporting the property owners in *Kelo* was filed jointly by the NAACP, the AARP, and the Southern Christian Leadership Conference.[13] In *Hathcock*, pro-property owner amicus briefs included filings by the Michigan branch of the American Civil Liberties Union, and left-wing activist and third-party presidential candidate Ralph Nader.[14] Nader had also been a prominent opponent of the original *Poletown* condemnations in 1981.[15] One of the present coauthors filed an amicus brief in support of the property owners

10. For detailed discussions of both *Kelo*'s relationship to precedent and the public backlash to the decision, see Somin, *Controlling*, *supra* note 3, at 42–84, and Somin, *Limits of Backlash*, *supra* note 3, at 1–14. *See also* Charles E. Cohen, *Eminent Domain after* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 497–98 (2006) ("[T]he *Kelo* decision was well grounded in history and case law, right or wrong . . . ."); Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-*Kelo, 41 WAKE FOREST L. REV. 237, 283 (2006) ("[T]he only real difference between *Kelo* and its noteworthy predecessors, *Berman* and *Midkiff*, is that *Kelo* presented an economic development justification for eminent domain unadorned by more socially appealing purposes such as blight elimination or breaking a land oligopoly."); Sandefur, *supra* note 3. Although *Kelo* may not represent a significant change in eminent domain jurisprudence, there is some evidence that the use of eminent domain increased after the Supreme Court's decision. *See* Joyce Howard Price, *Eminent Domain Surges After Ruling*, WASH. TIMES, June 21, 2006, at A4 (reporting on apparent increase in use of eminent domain).

11. *See infra* notes 13–15 and accompanying text.

12. For general background on the Institute for Justice and other right-of-center public-interest legal organizations, see Jonathan H. Adler, *A Vast Right-Wing Conspiracy: It's Neither Vast nor a Conspiracy. Discuss.*, LEGAL AFFAIRS, May/June 2005, at 62–65; *see also* BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT (Lee Edwards, ed., 2005). For more background on the Institute for Justice, see their website at http://www.ij.org. For specific information on their handling of *Kelo v. New London*, see http://www.ij.org/private_property/connecticut/index.html.

13. Brief for NAACP et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811057.

14. Brief for Pacific Legal Foundation & ACLU Fund of Michigan as Amici Curiae Supporting Defendants-Appellants, County of Wayne v. Hatchcock, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070–124078), 2004 WL 687839; Brief for Ronald Reosti et al. as Amici Curiae Supporting Appellants, County of Wayne v. Hatchcock, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070–124078), *available at* http://www.courts.michigan.gov/supremecourt/Clerk/04-04/124070-78/124070-124078-Amicus.pdf.

15. *See* WYLIE, *supra* note 7, at 110–51 (1989) (discussing Nader's role). For a more detailed elaboration of Nader's views on economic development takings, see Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207 (2004).

in *Kelo* on behalf of Jane Jacobs, a prominent urban development theorist normally associated with the political left.[16]

Many left-of-center scholars and activists oppose economic development takings because of their tendency to inflict disproportionate harm on the poor and on ethnic minorities, often for the benefit of corporate development interests.[17] After the *Kelo* decision was announced, it was denounced by numerous liberal political leaders including former President Bill Clinton;[18] Democratic National Committee Chair Howard Dean, who blamed the result on a "Republican-appointed Supreme Court;"[19] and California Representative Maxine Waters, a prominent liberal African-American politician.[20]

Environmentalists have been notably absent among *Kelo*'s critics. The American Farmland Trust was one of the few conservation organizations to express concern in the immediate wake of the decision.[21] Most other environmental groups stayed on the sidelines.[22] Moreover, some prominent environmental lawyers actively supported the City of New London's arguments against judicial limitations on the use of eminent domain. John D. Echeverria, executive director of the Georgetown Environmental Law & Policy Institute, collaborated on an amicus brief for the American Planning Association defending the use of eminent domain for economic development.[23] The Community Rights Counsel, a public interest law firm focusing on environmental issues, filed an amicus brief in support of New London on behalf of various local government

16. Brief for Jane Jacobs as Amica Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2803191.

17. For more detailed discussion and citations, see Somin, *Overcoming* Poletown, *supra* note 7, at 1005–07; Somin, *Controlling*, *supra* note 3, at 18, 65.

18. *See* Erik Kriss, *More Seek Curbs on Eminent Domain*, SYRACUSE POST-STANDARD, July 31, 2005, at A16 (noting Clinton's opposition to the ruling).

19. *See Howard Dean Comes to Utah to Discuss Politics* (KSL TV television broadcast July 16, 2005), *available at* http://tv.ksl.com/index.php?nid=39&sid=219221 (last visited Dec. 5, 2005) (quoting Dean's remark denouncing "a Republican appointed [sic] Supreme Court that decided they can take your house and put a Sheraton hotel in there").

20. *See* Charles Hurt, *Congress Assails Domain Ruling*, WASH. TIMES, July 1, 2005, at A1 (quoting Waters denouncing *Kelo* as "the most un-American thing that can be done").

21. *See Supreme Court Ruling Has Implications for Private Landowners*, FED. UPDATE (Am. Farmland Trust, Washington, D.C.), July 7, 2005, http://www.farmland.org/programs/federal/Federal_Updates/0702005.asp.

22. Among those environmental groups that frequently participate in environmental litigation that neither participated in nor urged a given outcome in the *Kelo* case were the Natural Resources Defense Council, Earthjustice, Environmental Defense, and Friends of the Earth.

23. Brief for the American Planning Association et al. as Amici Curiae Supporting Respondents, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), *available at* http://www.planning.org/amicusbriefs/pdf/kelo.pdf.

associations.[24] After the decision, Environmental Law Institute President Leslie Carothers wrote that limiting state and local governments' use of eminent domain for economic development would have been a "serious setback" from "an environmental perspective."[25]

Environmentalists have been suspicious of judicial protection of property rights under the Takings Clause because of the fear that it might impede environmental regulation[26] and restrict the use of eminent domain to create public parks and other environmental amenities. Whatever the merits of this view with respect to other takings issues,[27] we contend that it has virtually no relevance to judicial bans on "economic development" takings.[28] More importantly, allowing such condemnations could actually harm the environment in several ways. Conservationists and other environmental advocates, we suggest, should support barring the use of eminent domain for economic development.

Part I of this Article briefly explains the rationales of the *Kelo* and *Hathcock* decisions and shows why a *Hathcock*-like ban on economic development takings is highly unlikely to impede environmental regulation or threaten the use of eminent domain for legitimate conservation purposes. The doctrinal rules advocated by the *Hathcock*

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24. Brief for the National League of Cities et al. as Amici Curiae Supporting Respondents, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), *available at* http://www.communityrights.org/PDFs/Briefs/Kelo.pdf. Community Rights Counsel (CRC) also labeled an early draft of this paper the "outrage of the month" in their monthly newsletter, arguing that "voluntary sale of rural lands for development poses a far greater threat to environmental quality than eminent domain." *Kelo v. the Environment: A Skewed View from the Libertarian Fringe*, COMMUNITY RIGHTS REPORT (Community Rights Counsel, Washington, D.C.), Apr. 2006, http://www.communityrights.org/PDFs/Newsletters/Apr2006.pdf.

25. Leslie Carothers, *Strange Bedfellows in the Uproar Over the* Kelo *Case*, ENVTL. FORUM, Nov./Dec. 2005, at 56.

26. *See, e.g.*, FRANK BOSSELMAN ET AL., THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS iv (1973) ("[A]ttempts to solve environmental problems through land use regulation are threatened by the fear that they will be challenged in court as an unconstitutional taking of property without compensation."); J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239 (1990); John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331 (2003); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Costal Council, 45 STAN. L. REV. 1433 (1993); Patrick C. McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. 10,369 (1987); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Glenn P. Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 FORDHAM ENVTL. L.J. 521 (1997).

27. For an overview of arguments that environmentalist suspicion of judicially protected property rights is misguided, see Jonathan H. Adler, *Back to the Future of Conservation: Property Rights and Environmental Protection*, 1 N.Y.U. J. L. & LIBERTY 987 (2005).

28. *See infra* Part I.

Court and the *Kelo* dissenters, and adopted by courts in the eleven states that ban economic development takings,[29] leave ample room for the use of eminent domain to advance environmental goals.[30] This doctrinal point is buttressed by empirical evidence indicating that none of the eleven states with *Hathcock*-like bans on economic development takings have ever used this rule to block condemnation of property for environmental or conservation purposes.[31]

Part II shows that economic development takings may cause environmental harm. Allowing the use of eminent domain for economic development poses a particular danger to private conservation lands, agricultural lands, and open space.[32] Because land owned by conservation nonprofits produces few economic benefits and does not contribute to tax revenue, it is likely to be targeted by developers and local governments that use eminent domain to advance their development interests.[33] Economic development takings can also harm the environment by promoting environmentally harmful development, undermining property rights, and furthering dubious development plans that sap community wealth and reduce resources available for environmental protection.[34] In many situations, economic development takings end up giving us the worst of both worlds: they cause environmental harm *and* reduce economic growth by transferring land to inefficient development projects.

I. WHY BANNING ECONOMIC DEVELOPMENT TAKINGS DOES NOT IMPEDE ENVIRONMENTAL PROTECTION

A ban on economic development takings does not threaten government efforts to protect environmental values. This is readily demonstrated on the basis of both doctrinal analysis and empirical evidence from the eleven states whose supreme courts have forbidden the economic development rationale.[35] None of these states have had successful challenges to

29. *See infra* note 35.
30. *See infra* Part I.A–B.
31. *See infra* Part I.C.
32. *See infra* Part II.A.
33. *See infra* Part II.A.
34. *See infra* Part II.B.
35. The eleven states are Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, Ohio, Oklahoma, South Carolina, and Washington. *See* City of Little Rock v. Raines, 411 S.W.2d 486, 494–95 (Ark. 1967) (private economic development project not a public use); Baycol, Inc. v. Downtown Dev. Auth., 315 So.2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9–11 (Ill. 2002) (holding that a "contribut[ion] to positive economic growth in the region" is not a public use justifying condemnation), *cert. denied*,

environmental regulations arise from their rulings on economic development takings.[36] At the same time, public officials in these states retain the power to use eminent domain for conservation purposes.[37]

A. The Rationales of Kelo *and* Hathcock

The *Kelo* decision upheld economic development takings in a case that arose from the condemnation of ten residences and five other properties as part of a 2000 development plan in New London, Connecticut, which sought to transfer the property to private developers.[38] None of the properties in question were alleged to be "blighted or otherwise in poor condition."[39] The condemnations were initiated under a plan prepared by the New London Development Corporation (NLDC), a private, nonprofit entity established "to assist the city council in economic development planning."[40] The city claimed the project would "provide appreciable benefits to the community, including, but not limited to, new jobs and

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537 U.S. 880 (2002); City of Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory . . . .") (citation omitted); Opinion of the Justices, 131 A.2d 904, 905–06 (Me. 1957) (holding that private "industrial development" to enhance economy not a public use); County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown* and holding that economic development takings are unconstitutional); City of Bozeman v. Vaniman, 898 P.2d 1208, 1214–15 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project); City of Norwood v. Horney, 853 N.E.2d 1115, 1140–41 (Ohio 2006) (following *County of Wayne v. Hathcock* in holding that "economic development" alone does not justify condemnation); Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 642 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma Constitution); Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a substantial "projected economic benefit" cannot justify condemnation); Karesh v. City of Charleston, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development because such condemnations do not ensure "that the public has an enforceable right to a definite and fixed use of the property" (quoting 29 C.J.S. *Eminent Domain* § 31)); *In re* City of Seattle, 638 P.2d 549, 556–57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping where purpose was not elimination of blight); Hogue v. Port of Seattle, 341 P.2d 171, 187 (Wash. 1959) (denying condemnation of residential property where government sought to "devote it to what it considers a higher and better economic use"). In some of these states, the wording of the state constitution restricts private-to-private condemnations much more explicitly than does the Federal Takings Clause. *See, e.g.*, *Muskogee*, 136 P.3d at 639, 651–52 (discussing differences between the wording of the Oklahoma Constitution and that of the Fifth Amendment and using the distinction as justification for interpreting the state takings clause in a way contrary to the U.S. Supreme Court's interpretation of the Federal Takings Clause in *Kelo*).

36. *See infra* Part I.C.

37. *See infra* Part I.C.

38. Kelo v. City of New London, 545 U.S. 469, 472–75 (2005).

39. *Id.* at 2659–60. For a discussion of the significance of "blight" designations for condemnation, see *infra* Part I.B.3.

40. *Kelo*, 545 U.S. at 495.

increased tax revenue."[41] Landowners challenged the condemnations on the ground that such transfers from one private party to another were not for a "public use" as required by the Fifth Amendment's Takings Clause.[42] The constitutionality of the takings was upheld by the Supreme Court of Connecticut in a 4-3 decision.[43] The U.S. Supreme Court affirmed in an unexpectedly close 5-4 decision.[44]

The majority opinion by Justice Stevens focused on the alleged need to maintain the Court's "policy of deference to legislative judgment" on public use issues.[45] It refused to accept the property owners' argument that the transfer of their property to private developers, rather than to a public body, required a heightened degree of judicial scrutiny.[46] The Court also refused to require the city to provide any evidence that the takings were likely to achieve the claimed economic benefits which justified them in the first place.[47] On all these matters, the *Kelo* majority chose not to "second-guess the City's considered judgments about the efficacy of the development plan."[48]

The *Kelo* Court would uphold almost any economic development takings that arises from "an integrated development plan."[49] This approach, while slightly less deferential than earlier Supreme Court public use decisions,[50] still provides little protection for property owners. Virtually any condemnation can be legitimized by a plan of some kind—especially if the Court continues to refuse to "second-guess" the plan's rationale and efficacy.[51]

The Michigan Supreme Court's decision in *County of Wayne v. Hathcock* addressed the same issue as *Kelo*, but under the Michigan Constitution's takings clause rather than the federal one.[52] Overruling

41. *Kelo*, 545 U.S. at 469–70.

42. U.S. CONST. amend. V.

43. Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd* 545 U.S. 469 (2005).

44. *Kelo*, 545 U.S. at 469. The closeness of the outcome was unexpected because the Supreme Court had almost completely eliminated public use restrictions on takings in previous decisions. *See* Somin, *Property Grab*, *supra* note 9, at 42–55; *see generally supra* note 10.

45. *Kelo*, 545 U.S. at 480.

46. *Id.* at 487–88.

47. *Id.*

48. *Id.* at 488

49. *Id.* at 487.

50. *See* Somin, *Controlling*, *supra* note 3 (explaining why *Kelo* is marginally less deferential to the government than earlier decisions such as *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984)).

51. *Kelo*, 545 U.S. at 488.

52. MICH. CONST. art. 10, § 2. The wording of the Michigan state takings clause is actually very similar to that of the Federal Constitution. *Compare id.* ("Private property shall not be taken for public use without just compensation therefor being first made or secured in a matter prescribed by law."),

Poletown,[53] *Hathcock* forbade economic development takings.[54] *Hathcock* and other decisions striking down the economic development rationale fall short, however, of a complete ban on private-to-private condemnations. In *Hathcock*, for example, the Michigan Supreme Court laid out three scenarios in which private-to-private takings will still be upheld:

> 1. where "public necessity of the extreme sort" requires collective action;
>
> 2. where the property remains subject to public oversight after transfer to a private entity; and
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> 3. where the property is selected because of "facts of independent public significance" rather than the interests of the private entity to which the property is eventually transferred.[55]

These three categories, especially the latter two, have been replicated in other states that forbid economic development takings.[56] Even more importantly, neither *Hathcock* nor other decisions limiting the use of eminent domain for economic development forbid condemnations where the property is to be transferred to government ownership or to a private owner—such as a public utility or common carrier—that is legally required to allow the public to access or use the property.[57] As a result, public officials in these states retain ample means of advancing conservation objectives, including the use of eminent domain. Prohibiting the use of eminent domain for economic development does not foreclose its use for other purposes, including environmental protection.

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and U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

53. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).

54. County of Wayne v. Hathcock, 684 N.W.2d 765, 779–86 (Mich. 2004).

55. *Hathcock*, 684 N.W.2d at 783 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478–80 (Ryan, J., dissenting)). The *Hathcock* court itself did not originate the three exceptions but consciously borrowed them from Justice Ryan's *Poletown* dissent. *See Hathcock*, 684 N.W.2d. at 780–83 (relying extensively on *Poletown*, 304 N.W.2d at 478–80 (Ryan, J., dissenting)).

56. *See* Somin, *Controlling*, *supra* note 3, at 85–88 (noting parallels in other states).

57. *See, e.g.*, *Hathcock*, 684 N.W.2d at 782 (noting that private-to-private takings are allowed if the property "will be devoted to the *use* of the public, *independent of the will of the corporation taking* it") (citations omitted).

B. Doctrinal Analysis

Straightforward doctrinal analysis readily shows why bans on economic development takings do not forbid condemnation proceedings or regulation undertaken for purposes of environmental protection and conservation. In other words, very few if any legitimate environmental uses of eminent domain are threatened by the *Hathcock* rule.

1. Government Ownership

Perhaps the most important reason why a rejection of *Kelo* would not imperil environmental protection is that a ban on economic development takings would not forbid condemnations that transfer property to government ownership. This point is universally acknowledged by state courts that ban economic development takings[58] and also by the U.S. Supreme Court dissenters in *Kelo*.[59] As Justice O'Connor notes in the lead dissent, the state's power to condemn "private property" in order to transfer it to "public ownership" is "relatively straightforward and uncontroversial."[60]

This long-established power encompasses the vast bulk of environmentally-related condemnations. If the government condemns land in order to establish a state or national park, create a wildlife refuge, preserve open space, or acquire valuable natural resources, such a condemnation could not be invalidated provided that the land was transferred to public ownership. Similarly, should a local government condemn a right-of-way for the construction of a government-owned mass transit line, public ownership of the right-of-way would authorize the use of eminent domain for such purposes. This fact should allay the most prominent environmental concerns about potential limits on eminent domain.

The same point applies to most, if not all, environmental regulatory takings. Even if one assumes that environmental regulations restricting development or potentially harmful land uses are tantamount to the seizure of private property, barring the use of eminent domain for economic development would not limit the state's regulatory power. So long as the rights condemned by the regulation are not transferred to other private

58. See cases cited in *supra* note 35, none of which extend the ban on economic development takings to takings for public ownership.

59. Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting).

60. *Id.*

parties, they are retained by the government—even if held in the public trust and not actually used—and therefore cannot be considered private-to-private takings. As with any other use of eminent domain, the government would have to compensate the landowner for the taking of the land, but this requirement is separate from the question of whether a given regulatory action constitutes a taking for "public use." For example, if the government restricts the development of private land in order to prevent environmental degradation, the aggrieved landowner may seek compensation for the "taking,"[61] but the action could not be challenged as a violation of state or federal public use clauses so long as the government did not transfer the development rights in question to another private owner. Some would contend that such regulations should not be considered takings at all,[62] but that issue is separate from the question of whether the regulations, assuming that they *are* takings, can be invalidated for lack of a "public use." Under the reasoning of *Hathcock* and the *Kelo* dissenters, they could not be.

2. Private Ownership with Legally Mandated Public Access

Bans on economic development takings still permit condemnations for transfer to government ownership and those that "transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium."[63] Even Justice Thomas's dissent in *Kelo*, which takes the most restrictive view of public use of any of the nine Supreme Court justices, acknowledges that private-to-private condemnations are constitutional if "the public has a legal right to use . . . the property."[64]

In the environmental context, this means that the government could use private-to-private condemnations to promote environmental goals so long as the new private owners are required to give the general public a legal right of access. For example, the government could condemn property for transfer to a privately owned park or nature preserve so long as the new owners are legally required to provide access to the public. The same reasoning would protect the use of eminent domain to facilitate the construction of privately run rail lines or other forms of environmentally

61. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

62. *See, e.g.*, *supra* note 26 and sources cited therein.

63. *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting); *id.* at 508 (Thomas, J., dissenting) (noting that private-to-private condemnations are acceptable if "the public has a legal right to use[] the property."); *see also* County of Wayne v. Hathcock, 684 N.W.2d 765, 782 (Mich. 2004) (same).

64. *Kelo*, 545 U.S. at 508 (Thomas, J., dissenting).

desirable transit infrastructure.[65] Such access would not have to be free of charge or restrictive conditions. As in the case of public utilities and common carriers, the owners of privately owned environmental amenities would merely have to guarantee access to all members of the public willing to pay a set fee and obey relevant rules.

3. *The* Hathcock *Exceptions*

The *Hathcock* decision outlined three additional exceptions to its ban on private-to-private takings: cases of "extreme public necessity," situations where the condemned property remained subject to "public control," and, most importantly, instances where the condemnation was justified by facts of "independent public significance."[66] In this last scenario, which includes cases of blight, "the act of condemnation *itself*, rather than the use to which the condemned land eventually would be put, . . . [is the] public use" justifying condemnation.[67] For that reason, the danger of abuse on behalf of private interest groups is reduced, because it allegedly does not matter what the new owners of the property do with it so long as the old, harmful uses of the condemned land are mitigated or eliminated. On this basis, it is likely that governments could condemn land to eliminate environmental harms.[68]

The paradigmatic example of this type of scenario is the removal of "urban blight for the sake of public health and safety."[69] Forty-six of the fifty states, including ten of the eleven that forbid economic development takings,[70] have statutes that permit condemnation of blighted property for redevelopment purposes.[71] The *Hathcock* justification of blight

65. Indeed, the *Kelo* dissenters acknowledged the legitimacy of using eminent domain to facilitate the operations of "common carriers" including railroads. *See Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

66. *Hathcock*, 684 N.W.2d at 783.

67. *Id.*

68. It is worth emphasizing that state and local governments retain many other means of addressing harmful land uses and blight beyond the exercise of eminent domain, including land-use regulations and public nuisance actions.

69. *Hathcock*, 684 N.W.2d at 783 (citing Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478–79 (Mich. 1981) (Ryan, J., dissenting)).

70. *See* cases cited in *supra* note 35.

71. Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 391 (2000); Somin, *Limits of Backlash*, *supra* note 3, at 30. The four exceptions are Utah, Florida, Nevada, and North Dakota, all of which recently forbade both blight and economic development condemnations by statute. *See* UTAH CODE ANN. § 1713-4-202 (Supp. 2005) (outlining powers of redevelopment agencies and omitting the power to use eminent domain for blight alleviation or development); FLA. STAT. § 73.014(2) (enacted 2006) (requiring that condemning authorities "may not exercise the power of eminent domain to take private property for the purpose of

condemnations was also endorsed by Justice O'Connor in the principal *Kelo* dissent.[72] As O'Connor explains, with blight condemnations, "a public purpose [is] realized when the harmful [blight is] eliminated. Because each taking *directly* achieve[s] a public benefit, it [does] not matter that the property was turned over to private use."[73] Justice Thomas's solo dissent in *Kelo* is the only noteworthy modern judicial opinion that even comes close to advocating judicial invalidation of blight condemnations.[74]

Condemnations that are intended to eliminate sources of pollution or to alleviate other kinds of environmental damage could easily be justified on exactly the same reasoning as blight condemnations; the sole difference between the two is that the latter seek to eliminate dangerous or dilapidated structures, while the former target environmental risks. In both situations "the act of condemnation *itself*, rather than the use to which the condemned land eventually would be put, [is the] public use" justifying condemnation.[75] Indeed, some of the harms used to justify blight condemnations are in fact environmental in nature, including the "spread [of] disease"[76] and "health hazards" such as "hazardous waste sites, trash, vermin, or fire hazards."[77] Similar rationales could be used to condemn abandoned industrial properties or urban brownfields in order to facilitate their containment or cleanup.[78]

Blight condemnations are hardly unproblematic. Historically, they have often been used to displace poor or minority populations for the benefit of white middle- or upper-class interests.[79] Since World War II, up to four

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preventing or eliminating slum or blight conditions"); *see also* Henry Lamb, *Utah Bans Eminent Domain Use by Redevelopment Agencies*, ENV'T & CLIMATE NEWS, June 1, 2005, http://www.heartland.org/article.cfm?artID=17162 (describing the politics behind the Utah law). For discussion of the Nevada and North Dakota laws, enacted by referendum initiatives in November 2006, see Somin, *Limits of Backlash*, *supra* note 3, at 30.

72. *See* Kelo v. City of New London, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting) (endorsing the Supreme Court's decision to allow blight condemnations in Berman v. Parker, 348 U.S. 26 (1954)).

73. *Id.*

74. *See id.* at 519–21 (Thomas, J., dissenting) (suggesting that *Berman* should perhaps be overruled).

75. County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004).

76. Berman v. Parker, 348 U.S. 26, 32 (1954).

77. Luce, *supra* note 71, at 395 (noting that fifty-two of fifty-four U.S. jurisdictions include such "health hazards" as part of the definition of blight).

78. *See* Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 ECOLOGY L.Q. 59, 69–70 (2003) (discussing use of eminent domain in brownfield redevelopment).

79. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) (providing extensive discussion of the history of blight condemnations and the harms they cause); Somin, *Controlling*, *supra* note 3, at 91–94

million people have been dispossessed in this way.[80] Postwar urban renewal condemnations were so notorious for targeting African-Americans that "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'"[81]

Furthermore, some states define blight so broadly that almost any property becomes vulnerable to condemnation as a result. Recent court decisions have upheld blight condemnations in such affluent areas as New York City's Times Square and downtown Las Vegas.[82] Even some defenders of eminent domain acknowledge that blight designations are subject to occasional abuse.[83] For present purposes, however, the point at issue is not the possibility that the blight exception is too broad and has the potential for abuse, but the potential danger that it is too narrow to allow for condemnations intended to eliminate environmental harms. Under present case law, any such concern is severely misplaced.

The implications of *Hathcock*'s other two exceptions for environmental takings are more difficult to determine because their scope remains unclear as of this writing.[84] The exception for "public necessity of the extreme sort"[85] could potentially be used to justify private-to-private condemnations that eliminate major environmental threats, especially if there is no other way to address them.[86] Similarly, the "public control" exception could be used to defend private-to-private environmental condemnations "where the property remains subject to public oversight,"[87] as might occur where eminent domain is used to condemn conservation easements or rights-of-way across private land. However, the scope of this exemption is difficult to predict because the *Hathcock* court failed to

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(same); Somin, *Overcoming* Poletown, *supra* note 7, at 1035–38 (citing sources and evidence).

80. Somin, *Overcoming* Poletown, *supra* note 7, at 1037.

81. Pritchett *supra* note 79, at 47.

82. Somin, *Overcoming* Poletown, *supra* note 7, at 1034 (discussing City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 12–15 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004); W. 41st St. Realty, LLC v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (N.Y. App. Div. 2002)); *see also* Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 33 (discussing use of extremely broad blight standards to condemn nondilapidated properties).

83. *See* INT'L ECON. DEV. COUNCIL, EMINENT DOMAIN RESOURCE KIT 8, http://www.iedconline.org/Downloads/Eminent_Domain_Kit.pdf.

84. *See* Somin, *Overcoming* Poletown, *supra* note 7, at 1028–33 (noting ambiguity and discussing possible conflicting interpretations).

85. County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004).

86. The *Hathcock* court suggests that this exception may only apply if the public project in question "requires collective action" through eminent domain in order to acquire the land necessary to carry it out. *Hathcock*, 684 N.W.2d at 783. In many, if not most, instances, local governments will have alternatives to the use of eminent domain to address blight and other nuisance-causing land conditions.

87. *Hathcock*, 684 N.W.2d at 783.

explain how much "public control" is enough to justify an otherwise invalid taking.[88]

Even if the first and second *Hathcock* exceptions turn out to provide little or no protection to environmental takings, this result would have very limited significance. Virtually any environmental taking or regulation could be justified by rules permitting takings for government ownership, for private entities that allow the public a legal right of access, and those intended to alleviate blight and analogous harms.

Some environmentalists and advocates of economic development takings contend that eminent domain can be used to advance environmental protection by encouraging infill and the redevelopment of older urban areas as an alternative to urban sprawl.[89] In some instances, eminent domain may be the easiest way to assemble the large, contiguous land parcels necessary to make dense urban redevelopment economically viable. In addition, some fear that limiting or prohibiting economic development takings would prevent the use of eminent domain for environmentally beneficial projects.

It is certainly possible that restricting the use of eminent domain for economic development could impede some environmentally desirable projects. In our view, however, such concerns are greatly overstated, if not completely unwarranted. First, many urban redevelopment projects could still proceed under one or more of the *Hathcock* exceptions. Much urban development is planned for areas that could qualify for a blight designation. In other instances, eminent domain might be permitted insofar as it addresses a public necessity of the extreme sort, beyond the potential economic value of the development itself.[90]

Where a project does not qualify under these exceptions, there is good reason to question the need for eminent domain at all. While eminent domain can be used to overcome holdout problems in the assembly of large land parcels, there are numerous private sector tools to overcome

88. *Hathcock*, 684 N.W.2d at 783–83; *see also* Somin, *Overcoming* Poletown, *supra* note 7, at 1031 (discussing this ambiguity).

89. *See, e.g.*, Harold Brodsky, *Land Development and the Expanding City*, 63 ANNALS ASS'N AM. GEOGRAPHERS 159, 163–66 (1973) (arguing that the power of eminent domain should be used to promote urban development, thereby preventing sprawl); Carothers, *supra* note 25; Echeverria & Lurman, *supra* note 26; Thomas W. Merrill, *The Misplaced Flight to Substance*, 19 PROB. & PROP. 16, 19–20 (2005) (arguing that economic development takings might be used to prevent "sprawl"); *cf.* Herman G. Berkman, *Decentralization and Blighted Vacant Land*, 32 LAND ECON. 270, 279–80 (1956) (arguing that the government should make more urban land available for development in order to prevent harmful sprawl); Charles Siemon, *Who Bears the Cost?* LAW & CONTEMP. PROBS., Winter 1987, at 115, 125–26 (same).

90. *Hathcock*, 684 N.W.2d at 783.

such problems without the use of eminent domain.[91] Where these are ineffective, it is highly likely that the reason for failure is the fact that the current uses of the property in question are more valuable to society than those planned by the developers who seek to acquire it.[92]

It is also important to separate the theoretical environmental benefits of the widespread use of eminent domain from the practical reality of how eminent domain is used by government agencies. Where government officials are authorized to condemn property for economic development, they become subject to substantial interest group pressures to approve projects that benefit parochial private interests, such as commercial developers, at the expense of the general public.[93] While it is theoretically possible that urban redevelopment projects would be undertaken with environmental values in mind, this does not appear to be the actual practice where private property is taken for economic development purposes.[94] For this reason, there are very few, if any, instances where economic development takings have significantly advanced environmental protection.[95] Even insofar as such examples exist, the environmental benefits of such projects must be weighed against the significant environmental risks posed by permitting economic development takings generally.[96] Moreover, in the rare cases where an economic development condemnation might create environmental benefits, it is likely that it could be justified under one of the rationales described above. Consequently, environmental benefits could be created without legitimizing the economic development rationale in the vast number of cases where condemnations either do not advance environmental values or actually cause environmental harms.

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91. *See, e.g.*, Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influences*, 92 Cornell L. Rev. 1, 18–30 (2006). (discussing effective private sector alternatives to eminent domain); Somin, *Controlling*, *supra* note 3, at 21–29 (same).

92. *See* Kelly, *supra* note 91; Somin, *Controlling*, *supra* note 3, at 24–27.

93. For a detailed discussion, see Somin, *Controlling*, *supra* note 3, at 8–23.

94. Even proponents of the use of eminent domain for economic development rarely highlight the land conservation or environmental benefits of eminent domain projects. *See, e.g.*, INT'L ECON. DEV. COUNCIL, *supra* note 83.

95. *See id.* at 29 (tangentially noting alleged environmental benefits of one of seven projects selected for case studies of the successful use of eminent domain).

96. *See infra* Part II.

C. *Empirical Evidence from States that Have Banned Economic Development Takings*

The conclusion drawn from the above doctrinal analysis is bolstered by empirical evidence from the eleven states whose supreme courts have banned economic development takings. Despite the lack of doctrinal support for the notion, a ban on economic development takings could theoretically lead to restrictions on environmental takings through some sort of slippery slope process.[97] In practice, any such possibility remains purely theoretical.

State supreme courts that ban economic development takings include Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, Ohio, Oklahoma, South Carolina, and Washington.[98] Two other state supreme courts, those of New Hampshire and Massachusetts, significantly restrict them without imposing a categorical ban.[99] While some of these decisions, including the 2004 *Hathcock* case, are recent,[100] others are of longstanding vintage. For example, Maine rejected the economic development rationale in 1957, Washington in 1959, Arkansas in 1967, Florida in 1975, South Carolina in 1978, and Kentucky in 1979.[101] More than enough time has

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97. *See generally* Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003). One possible slippery slope mechanism that could lead to restrictions on environmental takings might be an argument that some environmental condemnations only benefit specific private individuals rather than the general public. For example, neighboring property owners may benefit disproportionately from the condemnation of a conservation easement across another landowner's property.

98. *See infra* notes 100–01 and cases cited therein.

99. *See* Opinion of the Justices, 250 N.E.2d 547, 561 (Mass. 1969) (holding that economic benefits of a proposed stadium were not enough of a public use to justify condemnation); Merrill v. City of Manchester, 499 A.2d 216, 217–18 (N.H. 1985) (holding that condemnation for industrial park was not a public use where no harmful condition was being eliminated).

100. For example, Oklahoma only forbade economic development takings in 2006, Illinois in 2002, and Montana in 1995. *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 9–11 (Ill. 2002) (holding that a "contribut[ion] to economic growth in the region" is not a public use justifying condemnation); City of Bozeman v. Vaniman, 898 P.2d 1208, 1214 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project); Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 647–52 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma state constitution).

101. *See* City of Little Rock v. Raines, 411 S.W.2d 486, 494–95 (Ark. 1967) (holding that a private economic development project was not a public use); Baycol, Inc. v. Downtown Dev. Auth., 315 So.2d 451, 457 (Fla. 1975) (holding that "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); City of Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory."); Opinion of the Justices, 131 A.2d 904, 905–06 (Me. 1957) (holding that "industrial development" is not a public use); Karesh v. City of Charleston, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development);

passed to give courts in these states an opportunity to use the ban on economic development takings to restrict environmental condemnations or regulations, should they be so inclined. Strikingly, there is not even *one* published opinion in any of these states that has actually done so.[102] The same holds true for Massachusetts and New Hampshire, the two states whose high courts place major restrictions on economic development takings without completely banning them.

Only one published decision comes close to striking down an environmental taking on public use grounds in any of the states that ban or restrict the economic development rationale. In 1974, the Maine Supreme Court invalidated a taking intended to promote the scenic beauty of areas adjacent to state highways.[103] Yet the court acknowledged that "the restoration, preservation and enhancement of scenic beauty adjacent to public highways is a public use,"[104] and only invalidated the taking at issue because the condemnation in question was "unreasonable and an abuse of power" under the terms of the Maine statute in question, as interpreted in light of state constitutional requirements.[105] Whatever the merits of this decision, it had no connection to the state's ban on economic development takings. By contrast, at least one decision from the relevant states explicitly upheld private-to-private environmental takings against a public use challenge, even after the state supreme court had banned economic development takings.[106] Other decisions from these states have also noted that environmental protection is a recognized public use.[107]

It is noteworthy that the states analyzed here are ideologically and economically diverse. They include conservative states such as Kentucky and South Carolina, liberal states such as Washington and Michigan, and

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Hogue v. Port of Seattle, 341 P.2d 171, 187 (Wash. 1959) (denying condemnation of residential property when justification for condemnation was the government's desire to "devote it to what it considers a higher and better economic use").

102. There are also no unpublished opinions reaching such a conclusion in the Westlaw and Lexis databases for any of the eleven states. However, we cannot completely rule out the possibility that there are unpublished opinions that have not been recorded in an electronic database. Obviously, the precedential impact of any such opinions is likely to be extremely small at best.

103. Finks v. Me. State Highway Comm'n, 328 A.2d 791, 800 (Me. 1974).

104. *Id.* at 794 (quoting Wes Outdoor Adver. Co. v. Goldberg, 262 A.2d 199, 202 (N.J. 1970)).

105. *Id.* at 799–800.

106. *See* Hallauer v. Spectrum Props., Inc., 18 P.3d 540, 541 (Wash. 2001) (upholding private-to-private condemnation intended to divert water for purposes of "domestic use, and to ponds for fish propagation").

107. *See, e.g.*, Pfeifer v. City of Little Rock, 57 S.W.3d 714, 716 (Ark. 2001) (affirming condemnation of private property for creation of a park associated with the Clinton Presidential Library); *In re* City of Long Beach, 82 P.3d 259, 263 (Wash. Ct. App. 2004) (upholding condemnation of private property for recreational trail).

more centrist states such as Florida and Illinois. Further, they include both agricultural states, such as Montana and Kentucky, and more industrialized ones such as Michigan and Illinois. However, none of these states' courts have reached the sorts of results that environmentalists might fear. While we cannot prove with absolute certainty that there would be no restrictions on environmental regulation or various conservation measures if a ban on economic development takings were adopted by other states or by the United States Supreme Court, the available evidence suggests that any such restrictions are highly unlikely.

II. HOW ECONOMIC DEVELOPMENT TAKINGS THREATEN ENVIRONMENTAL HARM

Prohibitions on the use of eminent domain for economic development do not hamper environmental protection efforts. Allowing such use of eminent domain, on the other hand, poses significant environmental risks, particularly to private land conservation. If state and local governments are allowed to use eminent domain to promote development, facilitate private industry, and expand the local tax base, it is likely that some condemnations will target conservation land and open space, including property owned by land trusts or otherwise protected with conservation easements.[108] Insofar as eminent domain is used to subsidize industrial or commercial development, it further threatens environmental harm, particularly where such development displaces land uses that have less intense environmental impacts. Encouraging inefficient land uses and excessive development has the potential to increase the environmental impacts of economic activity.

Limiting the use of eminent domain for economic development will not end all environmentally harmful uses of eminent domain. Such a rule would still allow governments to condemn conservation lands for publicly owned projects,[109] and would not prevent the use of overbroad blight designations to condemn undeveloped land.[110] Eminent domain would also

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108. *See infra* Part II.A.

109. For example, in December 2005, officials in Willacy County, Texas, announced plans to condemn a 1500-acre nature preserve on South Padre Island owned by The Nature Conservancy to construct a ferry landing. *See* James Pinkerton, *Nature Area's Future Shaky*, HOUSTON CHRON., Dec. 18, 2005; *see also* Carter Smith, *South Padre Island Preserve Deserves Our Protection*, HOUSTON CHRON., Dec. 27, 2005. The proposed use of the land, a public ferry landing designed to increase public access to the beaches on South Padre Island, would likely remain permissible if economic development takings were prohibited.

110. *See, e.g.*, Jim Herron Zamora, *Lockyer Challenges Seizure of Land for Private Project*, S.F. CHRON., July 27, 2005, at B8; *see also* Somin, *Controlling*, *supra* note 3, at 89–91 (discussing

remain available for the construction of roads and infrastructure that facilitate the development of previously undeveloped lands. Nonetheless, the proposed rule can still do much to limit the environmental costs of eminent domain, even if it cannot completely eliminate them.

A. The Threat to Private Land Conservation

Private conservation efforts in the United States date back over one hundred years.[111] Environmental organizations, such as the National Audubon Society, trace their roots to early efforts to protect species habitat and other resources through the use of private property rights.[112] Today, private conservation plays an ever-increasing and indispensable role in environmental protection.[113] "Leaving rural land protection in the hands of counties and states would consign most of the wildlife habitat in the nation to oblivion," warns Dana Beach of the South Carolina Coastal Conservation League.[114] Land trusts and other private organizations "promote a level of innovation and experimentation in private land conservation efforts that typically is not found in government controlled land conservation programs."[115] Insofar as eminent domain can be used to force the development of previously undeveloped land, it poses a threat to the vitality of such conservation efforts, particularly those undertaken by nonprofits or politically unpopular organizations. The former are

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increasing use of very broad definitions of blight that could encompass almost any property).

111. Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 486 (2004) (citing Gordon Abbot, Jr., *Historic Origins*, *in* PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION 150, 150–52 (Barbara Rushmore et al. eds., 1982)).

112. *See generally* FRANK GRAHAM JR., THE AUDUBON ARK: A HISTORY OF THE NATIONAL AUDUBON SOCIETY (1990).

113. *See* Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10,223, 10,231 (2004) (noting that conservation easements "regularly result[] in a level of land use control that private landowners would never tolerate through regulation"); Adam E. Draper, Comment, *Conservation Easements: Now More than Ever—Overcoming Obstacles to Protect Private Lands*, 34 ENVTL. L. 247, 252 (2004) ("Protecting and conserving private land has become increasingly important as a rural lifestyle supported by an urban income has become the new American dream."); Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 459 (2002) [hereinafter *Role of Land Trusts*] (noting the "increasing recognition of the need for non-regulatory approaches to private land conservation"); *see also* Council on Environmental Quality, *Special Report: The Public Benefits of Private Conservation*, *in* ENVIRONMENTAL QUALITY 363 (1984) (documenting importance of private conservation).

114. Dana Beach, *Create More Incentives for Easements*, OPEN SPACE, Summer 2004, at 13.

115. Cheever & McLaughlin, *supra* note 113, at 10,233; *see also* Barton H. Thompson, Jr., *Providing Biodiversity Through Policy Diversity*, 38 IDAHO L. REV. 355, 376 (2002).

vulnerable to economic development takings because they do not produce tax revenue, and the latter because of their political weakness.

1. Private Land Conservation and Economic Development Takings

Economic development takings pose a particular threat to privately owned undeveloped lands. Such lands rarely generate significant tax revenue, nor are they sources of job growth. Large, undeveloped land parcels may also be particularly appealing to developers and local government officials,[116] which makes conservation lands frequent targets of eminent domain.[117] Palm Springs, California, for example, used eminent domain to take thirty acres of land bequeathed as a wildlife preserve in order to build a golf course.[118] The city even sought to avoid paying for the land, but lost in court and was forced to pay $1.2 million.[119] In New Jersey, Citgo Petroleum offered to give Petty's Island in the Delaware River to the state as a nature preserve.[120] The site was once used by the company, but is now home to many animal species, including herons, egrets, and at least one pair of nesting bald eagles.[121] The regional office of the United States Fish and Wildlife Service supported the move,[122] but Pennsauken Township had other ideas. It sought to condemn the property and turn it over to residential development.[123]

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116. An important part of the appeal of larger, undeveloped parcels is that, other things being equal, the transaction costs of assembling a large lot for redevelopment will be lower the smaller the number of parcels that need to be acquired. Moreover, fewer parcels mean fewer landowners with whom developers must negotiate or against whom local governments must initiate eminent domain proceedings.

117. *See, e.g.*, Johnston v. Sonoma County Agric. & Open Space Dist., 123 Cal. Rptr. 2d 226, 238–39 (Cal. Ct. App. 2002) (easement for wastewater pipeline across land protected by conservation easement was obtained involuntarily through threat of eminent domain); Christian Berthelsen, *Group Battles Toll Road with Prayer*, LOS ANGELES TIMES, May 21, 2006, at B3 (conservation easement threatened by proposed highway expansion); Carter Smith, Editorial, *South Padre Island Faces Eminent Threat*, SAN ANTONIO EXPRESS-NEWS, Dec. 31, 2005, at 11B (eminent domain sought against 1500-acre nature preserve); Debbie Swartz, *100 Residents Attend Hearing on Gas Pipeline*, PRESS & SUN-BULL. (Binghamton, N.Y.), Apr. 5, 2006, at 1B (eminent domain proposed for construction of natural gas pipeline through nature preserve).

118. Marie Leech, *$1.2 Million Agreement Ends 10-Year Land Feud*, DESERT SUN (Palm Springs, Cal.), Sept. 30, 2001, at 1B.

119. *See* City of Palm Springs v. Living Desert Reserve, 82 Cal. Rptr. 2d 859 (Cal. Ct. App. 1999); Leech, *supra* note 118, at 1B.

120. Bernie Mixon, *Petty's Island Tug of War Looms*, COURIER-POST (Cherry Hill, N.J.), June 30, 2004, *available at* http://www.courierpostonline.com/pennsaukenpromise/m063004y.htm.

121. *Id.*

122. Elisa Ung, *Let Petty's Be a Park, U.S. Urges*, PHILA. INQUIRER, Mar. 10, 2006, at B5.

123. Stacie Babula, *New Jersey Politics Flare in Scuffle Over Delaware River Island*, BLOOMBERG NEWS SERVICE, July 28, 2005; Mixon, *supra* note 120.

Agricultural land is also threatened. In the wake of the *Kelo* decision, American Farmland Trust President Ralph Grossi warned, "[w]ith so much farmland on the urban edge and near cities still in steep decline, ex-urban towns could be tempted by this ruling to make farmland available for subdivisions."[124] The American Farm Bureau Federation contends that the "sparsely developed lands of farmers and ranchers are particularly vulnerable" to the use of eminent domain for economic development purposes, such as increasing the local tax base.[125] As the Federation explained in its amicus curiae brief in *Kelo*, "it will often be the case that more intense development by other private individuals or entities for other private purposes would yield greater tax revenue to local government."[126]

Local governments frequently seek to use eminent domain to facilitate the industrial development of farmland. Bristol, Connecticut, for example, condemned a thirty-two-acre tree farm for the creation of an industrial park, an action Connecticut courts upheld as a "public use."[127] In Kingston, Tennessee, Roane County officials sought to condemn seven farms covering 655 acres for an industrial park.[128] Hartford, Connecticut, used eminent domain to take a mostly wooded parcel of land in an effort to keep a local manufacturing facility.[129] In New York, the Onondaga County Industrial Development Authority sought to obtain 245 acres of farmland for residential, commercial, and industrial growth, including semiconductor fabrication plants, and was willing to use eminent domain if necessary to assemble the lots for development.[130] In Greene County, Missouri, local officials sought to condemn a dairy farm in order to create a new industrial park.[131] The condemnation was justified by the city

124. *See* Supreme Court Ruling Has Implications for Private Landowners, *supra* note 21.

125. Brief for American Farm Bureau Federation et al. as Amici Curiae Supporting Petitioners, at 3, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108).

126. *See id.*

127. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 46 (2003); *see also* Bugryn v. City of Bristol, 774 A.2d 1042 (Conn. App. Ct. 2001).

128. Randy Kenner, *'It's My Home,' Roane Landowner Says: County Wants Property for Industrial Park*, KNOXVILLE NEWS-SENTINEL, July 25, 1999, at B1. When challenged in court, the condemnation was declared a "public use," but was overturned on other legal grounds. *See* Roane County v. Christmas Lumber Co., No. E1999-00370-COA-R9-CV, 2000 Tenn. App. LEXIS 493 (Tenn. Ct. App. July 27, 2000).

129. Maryellen Fillo, *Fighting for the Land: Family Battle for Farm Ownership*, HARTFORD COURANT, Oct. 17, 1999, at B1.

130. John Doherty, *Clay, Cicero Parcels Tempt Developers: Route 31 Between Morgan Road and Route 11 is Seen as County's Next Big Thing*, POST-STANDARD (Syracuse, N.Y.), July 7, 2002, at B1.

131. Sylvester Ron, *Farm's Plight Raises Uproar*, SPRINGFIELD NEWS-LEADER (MO.), Oct. 14, 1999, at 1A.

manager as "protecting the tax base" and keeping "development closer into the city."[132] The plan was later scrapped due to public opposition.[133]

While agriculture can have significant environmental effects,[134] farmland is important for the preservation of biodiversity and maintenance of open space. As areas once dominated by agriculture are developed, farmland is increasingly important for migratory species.[135] Such land can serve as wildlife "corridors" that offer "opportunities for emigration to populate new patches of habitat."[136] Farmland's contribution to biological diversity is different from that of truly undeveloped land. Nonetheless, "some agricultural areas with trees may protect as much biodiversity as neighboring forests and provide other benefits necessary for proper ecosystem functioning."[137] Due to a range of government incentive programs and private conservation efforts, an increasing portion of agricultural land is explicitly devoted to conservation purposes.[138]

Identifying the extent to which eminent domain has been used against forest land, farmland, or open space is difficult. There is no comprehensive data on the use, let alone threatened use, of eminent domain. According to one recent study, only a small fraction of government uses of eminent domain are reported.[139] Nonetheless, eminent domain has regularly been

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132. *Id.*

133. Snyder Carmel Perez, *Farm Bills Filter Through Legislature*, SPRINGFIELD NEWS-LEADER (Mo.), May 21, 2000, at 1B.

134. *See* Ralph E. Heimlich & William D. Anderson, *Development at the Urban Fringe and Beyond: Impacts on Agriculture and Rural Land*, *in* AGRIC. ECON. REP. 803, at 3 (U.S. Dep't of Agric., 2001) (noting that environmental impacts of agriculture are "generally less severe than those from urban development"); DAN IMHOFF, HABITAT AND FARMLANDS, http://www.biodiversitypartners.org/habconser/farm/03c.shtml ("massive-scale, industrial agriculture and development" has led to "significant losses" for flora and fauna). This is not meant to minimize the potential environmental impacts of agriculture, which are typically greatest with so-called "factory farms" and large-scale, intensive agricultural enterprises. *See generally* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263 (2000).

135. KAREN BASSLER ET AL., BIODIVERSITY PROJECT, FARMLAND LOSS AT A GLANCE, http://www.biodiversityproject.org/mediakit/Sprawl_1B_farmland_loss.pdf (last visited Nov. 2, 2006).

136. *Id.*

137. Peter Bichier, *Agroforestry and the Maintenance of Biodiversity*, ACTIONBIOSCIENCE.ORG, Apr. 2006, http://www.actionbioscience.org/biodiversity/bichier.html.

138. *See* Roger Claasen, *Emphasis Shifts in U.S. Agri-Environmental Policy*, AMBER WAVES, Nov. 2003, http://www.ers.usda.gov/AmberWaves/November03/pdf/emphasis.pdf (summarizing federal incentive programs); U.S. Dep't of Agric., Land Use, Value and Management: Farmland Protection (Feb. 28, 2006), http://www.ers.usda.gov/Briefing/LandUse/farmlandprotchapter.htm (summarizing public and private farmland protection programs).

139. *See* Dana Berliner, *supra* note 127, at 2 ("Many, if not most, private condemnations go entirely unreported in public sources . . . ."). Connecticut is the only state that keeps records of the use of eminent domain for redevelopment purposes. According to the Berliner study, fewer than six percent of the uses of eminent domain were reported in news sources searchable through LexisNexis. *Id.* at 8. Of course, it is possible that media coverage of proposed and actual condemnations will

used or threatened as a means to promote economic development at the expense of agricultural lands, conservation lands, and open space.[140] More importantly, there are reasons to believe that the frequency of such takings will increase in the future as metropolitan areas and their suburbs expand into the surrounding countryside and local governments look for new ways to create jobs and increase their tax base.[141]

The economic development rationale could be used to justify condemnation of almost any property.[142] Property owned by nonprofit institutions is at special risk, however. Since nonprofit institutions do not pay property taxes, the condemning authority can always argue that tax revenue will increase if their property is transferred to a for-profit business. Moreover, many nonprofit institutions are likely to employ fewer people and generate less economic activity than do profit-making enterprises, further exacerbating their vulnerability. Economic development takings may also come at the expense of historic preservation if historic buildings are located in areas targeted for condemnation.[143]

Environmental trusts are particularly disadvantaged. Since these organizations generally seek to keep their property in its pristine natural state, they are unlikely to use their land to employ significant numbers of people or engage in productive economic activity. Even prior to the *Kelo* decision—and the resulting media attention to the issue—land trusts identified eminent domain as a threat to private land conservation. In a December 2004 survey conducted by the Land Trust Alliance, eminent domain and condemnation were cited as reasons why land currently conserved by land trusts might not be protected in the future.[144] As one park board member observed, "if you put a conservation easement on the land and you prevent development on the property, there's nothing to

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increase as a result of the controversy generated by the *Kelo* decision. However, it seems unlikely that any such increase in media attention will be permanent, as both the public and reporters are likely to move on to other issues as time goes on.

140. *See supra* notes 117–33 and accompanying text.

141. *See infra* notes 166–73 and accompanying text.

142. *See* Somin, *Overcoming* Poletown, *supra* note 7, at 1009–10, 1021–22.

143. *See* Berliner, *supra* note 127, at 83–84 (discussing controversy over use of eminent domain to condemn historic Lyric Theater in Lexington, Kentucky); Danielle McNamara, *Council OKs Redeveloping Downtown Pittsburg*, CONTRA COSTA TIMES, Nov. 8, 2005, at A03 (historic building to be condemned as part of downtown eminent domain plan); Christine Pelisek, *Blight Makes Right?*, L.A. WEEKLY, July 1, 2005, at 15 (eminent domain threatened against several historic businesses).

144. LAND TRUST ALLIANCE, LAND TRUST RESPONSE QUESTIONNAIRE: SURVEY OF LAND TRUSTS CONDUCTED FROM DECEMBER 2, 2004—JANUARY 14, 2005 (Feb. 24, 2005), http://www.lta.org/sp/survey_results.htm.

prevent a future county commission . . . from reclaiming that property through eminent domain."[145]

The risk to environmental conservation on private land is significant, particularly due to the extent of such conservation. Since the creation of the first land trusts over 100 years ago, environmental trusts have purchased land, easements, or other property interests to protect the land from development or overuse.[146] As both the demand for environmental conservation and pressures for development on environmentally sensitive lands have increased, so too has the use of environmental trusts.[147] The number of land trusts in the United States rose from under sixty in 1950 to over 1200 in 2000.[148] In 2004, the Land Trust Alliance reported that there were some 1500 local and regional land trusts around the country.[149] This growth in land trust activity has been fueled by an increased demand for environmental conservation and legal developments that facilitate and encourage the purchase of conservation easements.[150]

The 2003 Land Trust Census conducted by the Land Trust Alliance found that local and regional land trusts own some 1.4 million acres of land and conserved an additional five million acres through conservation easements and other voluntary agreements.[151] From 1998 to 2003, the amount of land protected by conservation easements more than tripled.[152] These figures exclude lands protected by national conservation organizations, such as Ducks Unlimited and The Nature Conservancy.[153]

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145. Jody Callahan, *Should Shelby Farms Be a Cash Cow? Debate Rages on Use of Property Along Germantown Parkway*, COMMERCIAL APPEAL, Sept. 22, 2002, at A1 (quoting Ron Terry, board member of Shelby Farms Park who proposed adoption of conservation easements to protect the park from development).

146. Parker, *supra* note 111, at 486. *See also* RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA (2003).

147. McLaughlin, *Role of Land Trusts*, *supra* note 113, at 453 ("Over the past two decades there has been an explosion in both the use of conservation easements as a private land conservation tool and the number of private nonprofit organizations, typically referred to as 'land trusts,' that acquire easements.").

148. Parker, *supra* note 111, at 487–89; Barton H. Thompson, Jr., *Conservation Options: Toward a Greater Private Role*, 21 VA. ENVTL. L.J. 245, 254 (2002) (citing Land Trust Alliance 1998 Conservation Directory listing over 1200 land trusts).

149. *See* LAND TRUST ALLIANCE, NATIONAL LAND TRUST CENSUS (Aug. 9, 2006), http://www.lta.org/census/ [hereinafter LAND TRUST CENSUS].

150. Parker, *supra* note 111, at 489–96.

151. *See* LAND TRUST CENSUS, *supra* note 149. An additional 2.8 million acres were protected by transferring the land to government entities, or protected through ownership or a conservation easement. *Id.*

152. *Id.*

153. Parker, *supra* note 111, at 487 n.22. Some estimates place the total amount of land protected by private conservation organizations at over 15 million acres nationwide. *See* MARY GRAHAM, THE MORNING AFTER EARTH DAY: PRACTICAL ENVIRONMENTAL POLITICS 99 (1999) (citing estimates of

In some states, the amount of land protected is quite substantial. The Vermont Land Trust, for example, protects over seven percent of the land in the entire state of Vermont, mostly through conservation easements.[154]

To fully measure the extent of private land conservation, and to identify all those lands potentially threatened by eminent domain, one would also have to account for the remaining privately owned, currently undeveloped land.[155] For example, nearly sixty percent of America's forests are privately owned,[156] and much of this land is managed, at least in part, for conservation purposes.[157]

Private land conservation is particularly important for wildlife conservation. A significant portion of wildlife habitat is owned by farmers and ranchers and is used for agricultural production.[158] Over three-fourths of those species currently listed as threatened or endangered under the Endangered Species Act[159] rely upon private land for some or all of their habitat.[160] As John Turner, President of the Conservation Fund, observed, "[n]o strategy to preserve the nation's overall biodiversity can hope to succeed without the willing participation of private landowners."[161]

The biodiversity so prevalent on private land is often located in areas under significant pressure for development. While popular discussions of biological diversity may focus on wilderness areas and habitats in far-flung locales, the greatest threats to biodiversity occur where habitat

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13 and 4.7 million acres conserved by national and local organizations, respectively).

154. *See* David B. Ottaway & Joe Stephens, *Land-Trust Boom a Boon for Habitat*, WASH. POST, Dec. 21, 2003, at A20.

155. *See* McLaughlin, *Role of Land Trusts*, *supra* note 113, at 466 ("Although lacking the 'flash and glamour' associated with the protection of large parcels that have undeniable scenic or habitat value, the ordinary parcels protected by land trusts constitute a significant portion of the national landscape."); *see also* JOHN RANDOLPH, ENVIRONMENTAL LAND USE PLANNING AND MANAGEMENT 103 (2004) ("One of the most important categories of private land stewardship is those large blocks of roadless, natural land not currently in resource production. These are a de facto part of our nation's conservation lands, but they are not permanently protected.").

156. CONSTANCE BEST & LAURIE A. WAYBURN, AMERICA'S PRIVATE FORESTS: STATUS AND STEWARDSHIP 3 (2001).

157. Substantial amounts of private timber land are managed for conservation purposes during long cutting rotations. *See, e.g.*, TERRY L. ANDERSON & DONALD R. LEAL, ENVIRO-CAPITALISTS: DOING GOOD WHILE DOING WELL 4–8 (1997) (describing efforts to improve wildlife habitat and recreation opportunities on land owned by International Paper).

158. *See* J. BISHOP GREWELL & CLAY J. LANDRY, ECOLOGICAL AGRARIAN: AGRICULTURE'S FIRST EVOLUTION IN 10,000 YEARS 92 (2003) ("Three-quarters of the wildlife in the U.S. live on farm and ranch lands.").

159. 16 U.S.C. §§ 1531–1544.

160. U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS (1994).

161. John F. Turner and Jason C. Rylander, *The Private Lands Challenge: Integrating Biodiversity Conservation and Private Property*, *in* PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT: SAVING HABITATS, PROTECTING HOMES 92, 116 (Jason Shogren ed., 1998).

disruption and modification is most prevalent. In fact, the number of endangered species tends to be greatest near human development and other activities.[162] Approximately sixty percent of imperiled plants and animals[163] are found in metropolitan areas, and thirty-one percent of those are found *exclusively* in such locations.[164] Indeed, there is increasing recognition of the importance of biodiversity and ecological resources in and around urban areas.[165]

As private land conservation continues to increase and metropolitan areas grow, the potential for conflict will increase. Much land targeted by land trusts and other conservation groups for protection is located near expanding metropolitan areas and sprawling suburbs. Nearly one-third of the land protected by local and regional land trusts lies in the densely populated Northeast.[166] In many cases, the reason for obtaining a conservation easement is to prevent or limit anticipated development. These lands are likely to be among the first targeted by government officials seeking to create room for suburban expansion or development projects.

There are additional economic reasons why conservation land, farmland, and other open spaces may be particularly attractive to developers. This land will often be less expensive than other property, especially as compared to areas that are already developed. Property set aside for agricultural use may also be assessed at a lower value for tax purposes.[167] Thus, taking such land for economic development purposes could provide a greater boost to local tax revenues than other available parcels.[168]

Because many conservation areas, farms, and the like are located on larger land parcels, it will often be much easier to assemble large lots to

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162. V. C. Radeloff et al., *The Wildland-Urban Interface in the United States*, 15 ECOLOGICAL APPLICATIONS 799, 803 (2005) ("[T]he number of endangered species tends to be higher where human activities are more prevalent.").

163. REID EWING ET AL., NAT'L WILDLIFE FED'N, ENDANGERED BY SPRAWL: HOW RUNAWAY DEVELOPMENT THREATENS AMERICA'S WILDLIFE 13 (2005). NatureServe identifies approximately 6400 U.S. species as imperiled or critically threatened; the U.S. Government's list of threatened or endangered species numbers 1265.

164. *Id.* at 13.

165. *See* Alexander Stille, *Wild Cities: It's a Jungle Out There*, N.Y. TIMES, Nov. 23, 2002, at B7.

166. *See* LAND TRUST ALLIANCE, 2003 NATIONAL LAND TRUST CENSUS TABLES (NOV. 18, 2004), http://www.lta.org/census/census_tables.htm.

167. In Pennsylvania, for example, agricultural land may be assessed for agricultural purposes rather than at market value.

168. If land is assessed at a lower value for a given use, such as agriculture, transferring that land to another use with a higher tax assessment can increase tax revenue.

facilitate larger development projects on such land.[169] The economic and political costs of condemning a few farms will often be less than those of seeking to relocate scores of homeowners from an inner-ring suburb. Indeed, this is one of the reasons that some states have enacted statutes imposing specific limits on the use of eminent domain against farmland.[170] The federal government also places additional administrative hurdles on the taking of parks through eminent domain out of the recognition that there are substantial incentives to use such land for many types of development.[171] As the Supreme Court observed in *Citizens of Overton Park v. Volpe*, governments seeking to assemble large parcels will often prefer parkland to available alternatives.[172] Among other things, "since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business."[173] The same can be said of much privately owned, undeveloped land.

Conservation easements, when acting alone, do not protect lands from eminent domain; they can be extinguished by the use of eminent domain.[174] In some jurisdictions, however, there are explicit limitations on the use of eminent domain to take farmland or other properties covered by conservation easements.[175] Where such statutory protections do not exist, the existence of a conservation easement may actually make some properties more vulnerable to economic development takings[176] by lowering the assessed value of a land parcel, reducing the local tax base, and making the parcel less expensive to acquire.[177] At the same time, the

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169. *See supra* note 116.

170. *See Much Ado About* Kelo*: Eminent Domain and Farmland Protection*, *E-News* (Am. Farmland Trust, Washington, D.C.), Dec. 2005, http://www.farmlandinfo.org/documents/30393/Kelo.pdf [hereinafter *Much Ado About* Kelo].

171. *See* 23 U.S.C. § 138 (2000) (limiting the use of parkland and other open space for federally funded highway projects).

172. 401 U.S. 402 (1971).

173. *Id.* at 412.

174. Draper, *supra* note 113, at 266 ("Eminent domain is always a threat to the protective capacity of a conservation easement."); Rebekah Helen Pugh, *Conservation Easements as an Effective Growth Management Technique*, 35 ENVTL. L. REP. 10,556, 10,564 (2005) (conservation easements are extinguished by eminent domain); AMERICAN FARMLAND TRUST, FACT SHEET: AGRICULTURAL CONSERVATION EASEMENTS, Oct. 2006, http://www.farmlandinfo.org/documents/27762/ACE_06-10.pdf (same). Some commentators argue that it should be easier to extinguish conservation easements when it is in the public interest. *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 466 (1984).

175. *See Much Ado About* Kelo, *supra* note 170, at 2 (noting twelve states have laws limiting the use of eminent domain against farmlands enrolled in agricultural districts).

176. *See id.* at 5.

177. *Id.* at 5 ("[E]asements could make land more vulnerable by reducing its value."); AMERICAN FARMLAND TRUST, *supra* note 174 (same).

holder of the conservation easement is likely to place a high subjective value on keeping land in an undeveloped state. This suggests that the owners of conservation lands may be less willing to negotiate the sale of development rights, and more likely to be the sort of "holdouts" often used to justify the use of eminent domain in the first place. This also suggests that the owners of conservation easements are likely to feel undercompensated when their property is taken, as it is likely that they place a higher subjective value on the land than the average owner of an equivalent plot of land.

Even if one concludes that the condemnation of conservation lands for economic development has been relatively rare to date, there are reasons to expect that the rate of such takings will increase in the future. Defenders of eminent domain acknowledge that conservation easements "are already under challenge in many places, and the social and legal pressure to remove or modify easement restrictions will only increase as decades and centuries pass."[178] In some communities with substantial amounts of conservation activity, opposition to easements appears to be increasing.[179] Some communities dependent on resource extraction are also hostile to land trust activity.[180]

The proliferation of land trusts and conservation easements is a relatively recent phenomenon. While the first private land trust was established in 1891,[181] state statutes authorizing conservation easements did not become common until almost a century later.[182] Moreover, a large percentage of the land protected by conservation easements is located in or near densely populated areas where there is significant urban expansion. This is no coincidence, as the threat of approaching development often provides the impetus for the creation of a conservation easement, if not the outright purchase of land by a local trust. As suburban boundaries expand,

178. John D. Echeverria, *Revive the Legacy of Land Use Controls*, OPEN SPACE, Summer 2004, at 12. To Echeverria, the potential threat to the permanence of conservation easements is a reason to rely more on government regulation. The authors, on the other hand, would prefer to reduce the threat by limiting the use of eminent domain.

179. *See, e.g.*, Massiel Ladron de Guevara, *Colton Moves to Ease Fly-Habitat Constraints*, PRESS-ENTERPRISE (Riverside, Cal.), Jan. 18, 2006, at B2.

180. For an illustration of this hostility, see Tim Findley, *"Nature's Landlord": The Story of the World's Most Powerful Environmental Group, The Nature Conservancy*, RANGE, Spring 2003, at TNC 1 (characterizing The Nature Conservancy as a "runaway predator" and a "monster").

181. Cheever & McLaughlin, *supra* note 113, at 10224 (referring to the Trustees of Reservations land trust, founded by Charles Norton Eliot in 1891).

182. The National Conference of Commissioners on Uniform State Laws did not draft the Uniform Conservation Easement Act (UCEA) until 1981. Pugh, *supra* note 174, at 10,559; *see also id.* at 10,558 (noting conservation easements have become popular since the 1980s).

the pressure to develop the surrounding countryside will only increase.[183] Thus, in those states in which economic development takings are permitted, conservation lands and open space will be under relatively greater threat.

2. Lessons from the Experiences of Religious Institutions

The vulnerability of property owned by nonprofits to economic development takings is best documented in cases involving religious institutions such as churches. Sixteen churches were destroyed as a result of the notorious 1981 Poletown condemnations, which leveled a Detroit neighborhood for the purpose of building a new General Motors factory.[184] More recent examples of economic development takings targeting religious property include the attempted condemnation of a church in order to build a Costco in Cypress, California;[185] condemnation of an Illinois mosque for the purpose of building private rental housing;[186] and the taking of an Indiana church for "redevelopment" by new private owners.[187] Even in the aftermath of *Kelo*, which has focused public attention on eminent domain abuse, authorities in a small city near Tulsa are proceeding with plans to condemn a small Baptist church in order to "make way for superstores like . . . Home Depot."[188] Similarly, the Hawaii Supreme Court recently upheld the condemnation of church property in Honolulu for the purpose of benefiting private condominium owners.[189]

The Becket Fund for Religious Liberty, a public interest law firm, has compiled a list of numerous other recent cases where economic development condemnations have been used or threatened against religious institutions.[190] As the Becket Fund amicus brief in *Kelo* argues:

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183. *See generally* AMERICAN FARMLAND TRUST, FARMING ON THE EDGE: SPRAWLING DEVELOPMENT THREATENS AMERICA'S BEST FARMLAND (2002), http://farmland.org/documents/29393/Farming_On_The_Edge_2002.pdf.

184. ARMOND COHEN, POLETOWN, DETROIT: A CASE STUDY IN 'PUBLIC USE' AND REINDUSTRIALIZATION 4 (1982).

185. Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1225–29 (C.D. Cal. 2002).

186. Southwest Ill. Dev. Auth. v. Al-Muhajinum, 744 N.E.2d 308 (Ill. App. Ct. 2001).

187. City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001).

188. Ralph Blumenthal, *Humble Church is at Center of Debate on Eminent Domain*, N.Y. TIMES, Jan. 25, 2006, at A14.

189. City and County of Honolulu v. Sherman, 129 P.3d 542 (Haw. 2006).

190. Brief for Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2787141. The list of cases cited here and in the Becket Fund brief probably understates the true extent of the phenomenon because it is based upon published decisions and press reports. Many condemnation actions do not result in a published decision and/or are not covered by the press.

> Because religious institutions are overwhelmingly non-profit and tax-exempt, they will generate less in tax revenues than virtually *any* proposed commercial or residential use. Accordingly, when a municipality considers what properties should be included under condemnation plans designed to increase for-profit development and increase taxable properties, the non-profit, tax-exempt property of religious institutions will by definition *always* qualify and *always* be vulnerable to seizure.[191]

The Becket Fund's point applies with equal, if not greater, force to environmental nonprofits. They also generate less tax revenue than almost any "commercial or residential use" properties and will "always be vulnerable to seizure" on economic development grounds.[192] In many, if not most, instances, local and regional land trusts will lack the political power that sometimes protects churches with large congregations against the threat of eminent domain.[193] Whereas churches and other religious institutions often have local congregations to protect their interests, land trusts often lack an equivalent base of popular support. This may be particularly true in the case of larger land trusts that lack local memberships, some of which may be viewed as "absentee landlords" by local residents. Many lands protected today, such as Hawk Mountain in Pennsylvania, would not have been preserved if they were dependent upon local political support.[194]

3. The Possibility of Circumvention

One possible objection to our argument is that in most instances where eminent domain is used to take undeveloped land, the condemnation would be able to proceed under our proposed rule because it would satisfy the requirements outlined by the Michigan Supreme Court in *Hathcock*.[195]

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191. *Id.* at 11.

192. *Id.* at 11 (emphasis omitted).

193. Some argue that churches are often able to protect themselves through the political process. *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 115–19. However, this is likely to be true only of churches with substantial influence over local politics. *Cf. id.* at 115–17 (describing how the wealthy and locally powerful Catholic Church was able to prevent some of its churches from being condemned in Chicago at a time when Catholics were a majority of Chicago voters and "both majoritarian and minoritarian forces favored church preservation"). Religious institutions affiliated with poor or politically weak denominations are unlikely to be equally successful.

194. *See* Council on Environmental Quality, *supra* note 113, at 387–94 (discussing the history of Hawk Mountain).

195. 684 N.W.2d 765 (Mich. 2004).

A ban on economic development takings can often be circumvented through expansive interpretations of blight or other legal maneuvers.[196] For example, when California City took several thousand acres of land in the Mojave Desert for the construction of a Hyundai facility and test track, it did so by designating the property as blighted, even though it is difficult to explain why an ecologically valuable desert should be considered blighted.[197] The project, labeled a "poster child" for eminent domain abuse by California's Attorney General, harmed local desert tortoise and Mojave ground squirrel populations.[198] Similarly, a proposed landfill that threatened the taking of portions of Duke Forest would likely have qualified as a "public use," even though it threatened a precious natural resource.[199] In jurisdictions that prohibit pure economic development takings, there is pressure to generate blight designations that will pave the way for other uses of eminent domain.[200]

To be sure, a prohibition on economic development takings will not bar all environmentally harmful uses of eminent domain. Environmentally harmful takings which transfer land to government ownership would not be prohibited.[201] In addition, a ban on economic development takings is unlikely to be fully effective unless it is coupled with restrictions on the definition of blight which prevent blight designations from being applied to virtually any property.[202] However, a ban on economic development takings is almost certainly a necessary prerequisite to any judicial or legislative effort to limit the definition of blight. Property owners will have little incentive to challenge expansive definitions of blight, and

196. *See infra* notes 197–200 and accompanying text.

197. *See* Paul Shigley, *Lawmakers Threaten to Diminish Eminent Domain Authority*, CAL. PLAN. & DEV. REP., Sept. 2005, at 5; Robert McClure, *Displaced by Automobile Test Facility in California*, SEATTLE POST-INTELLIGENCER, May 3, 2005, at W; Jim Herron Zamora, *Lockyer Challenges Seizure of Land for Private Project*, S.F. CHRON., July 27, 2005, at B8.

198. McClure, *supra* note 197, at W.

199. Monte Basgall, *Seeing the Forest for the Trees*, DUKE RESEARCH (2000–2001), *available at* http://www.dukeresearch.duke.edu/database/pagemaker.cgi?992633500. In order to prevent the use of eminent domain to take portions of Duke Forest, Duke entered into an agreement with the National Aeronautics and Space Administration that effectively preempted the pending condemnation. *Id.*

200. One of the most notorious recent examples of this sort of "blight abuse" occurred in Lakewood, Ohio. In preparation to use eminent domain to clear a neighborhood for an upscale mixed-use development, local officials commissioned a blight study relying upon blight criteria broad enough to encompass approximately ninety percent of all the homes in the city (including the home of the then-mayor). *See* Samuel R. Staley & John P. Blair, *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis*, POL'Y STUDY 331 (Reason Public Policy Institute, Los Angeles, Cal.), Feb. 2005, *available at* http://www.reason.org/ps331.pdf.

201. *See supra* Part I.B.1 (explaining that a ban on economic development takings would not prohibit condemnations that transfer property to public ownership).

202. Somin, *Controlling*, *supra* note 3, at 89–91.

judges little reason to strike them down, if the condemnation in question could just as easily be defended using an economic development rationale.

Even without additional reforms, a ban on economic development takings will prevent at least some exercises of eminent domain that are likely to have negative environmental effects. Not all states have expansive definitions of blight,[203] and a ban on the economic development rationale will have a larger impact in states with narrower blight statutes.[204] Furthermore, requiring developers and local governments to obtain a blight designation before condemning environmentally valuable land might increase the transaction costs of condemnation and thereby deter some uses of eminent domain.[205] It is also possible that some erroneous blight designations could be challenged successfully in court.[206] Finally, although the issue has not yet been litigated, it is possible that some of the more extreme definitions of blight—such as those that define it as essentially coextensive with supposedly insufficient economic development[207]—could be struck down as inconsistent with state constitutional bans on economic development takings. Without any comprehensive data on the use, and threatened use, of eminent domain, it is impossible to determine exactly how much protection a ban on economic development takings would provide. It is clear, however, that such a ban would provide greater protection for environmental values than what exists in its absence.

4. Eminent Domain and Urban Sprawl

Some environmental analysts and urban planners claim that eminent domain is a powerful tool which can be used to protect conservation lands

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203. *See* Luce, *supra* note 71 (surveying legal definitions of blight in every state).

204. Several states have narrowed their definitions of blight in the aftermath of *Kelo*. *See* Somin, *Limits of Backlash*, *supra* note 3, at 21–24.

205. For a more detailed discussion of such procedural constraints on eminent domain and their limitations, see Somin, *Controlling*, *supra* note 3, at 37–40. For arguments that procedural protections can have a major impact in limiting eminent domain abuse, see, e.g., Merrill, *supra* note 89, at 18; David J. Barron & Gerald E. Frug, *Make Eminent Domain Fair for All*, BOSTON GLOBE, Aug. 12, 2005, at A14.

206. *See, e.g.*, Sweetwater Valley Civic Ass'n v. Nat'l City, 555 P.2d 1099, 1103 (Cal. 1976) (holding that property could not be taken under California's blight condemnation law merely because "the area is not being put to its optimum use, or that the land is more valuable for other uses").

207. *See, e.g.*, Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 13 (Nev. 2003) ("Economic blight involves downward trends in the business community, relocation of existing businesses outside of the community, business failures, and loss of sales or visitor volumes."). Obviously, virtually all communities occasionally experience "downward trends in the business community" and "business failures." *Id.* at 13.

and combat urban sprawl.[208] Jeff Finkle of the International Economic Development Council, for example, warns that if cities cannot use eminent domain for redevelopment, "the only land that will be developed is green space on the edge of cities."[209] The fear is that if the transactions costs of assembling large lots for development are too high in urbanized areas, developers will focus their efforts on rural lands.[210]

There is some irony in the argument that eminent domain is a defense against sprawl, as historically eminent domain has been used to promote sprawl far more than to control it.[211] Many of the highways and transportation projects that have facilitated the geographic expansion of metropolitan areas and their suburbs were facilitated by condemnation.[212] Today eminent domain is more often used to limit suburban development, but most of those takings do not rely upon the economic development rationale.[213] As noted above, the limitations we propose do not prevent the use of eminent domain to preserve open space or address environmental contamination.[214] Therefore, the only remaining environmental objection is that barring economic development takings would prevent the use of eminent domain for projects that would discourage sprawl by redeveloping and densifying urban areas, *and* that such projects can be expected to yield net environmental benefits in excess of the expected environmental costs of economic development takings. Yet for the reasons discussed earlier, it

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208. *See supra* note 89 and sources cited therein.

209. Quoted in Staley & Blair, *supra* note 200, at 8.

210. *See* Thomas W. Merrill, *The Goods, the Bads, and the Ugly*, LEGAL AFFAIRS, Jan./Feb. 2005, at 18 ("It is much easier to acquire large tracts of land by buying up green fields at the outer fringes of urban areas.").

211. This tendency prompted the federal government to limit the use of parkland for federally funded highway projects. *See infra* notes 172–73 and accompanying text.

212. *See, e.g.*, Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 952 (2003) (noting the construction of the interstate highway system was "characterized by a massive exercise of the power of eminent domain that resulted in . . . overconsumption of private land"); Terry J. Tondro, *Sprawl and Its Enemies: An Introductory Discussion of Two Cities' Efforts to Control Sprawl*, 34 CONN. L. REV. 511, 514 (2002) (noting the construction of highway networks is one of the "usual suspects" blamed for sprawl because highways "open up wide areas of open space to development").

Highways and roads themselves have direct environmental impacts, including habitat fragmentation. *See, e.g.*, Richard T.T. Forman, *Estimate of the Area Affected Ecologically by the Road System in the United States*, 14 CONSERVATION BIOLOGY 31 (2000) (discussing environmental effects of roads); Stephen C. Trombulak & Christopher A. Frissell, *Review of Ecological Effects of Roads on Terrestrial and Aquatic Communities*, 14 CONSERVATION BIOLOGY 18 (2000) (same).

213. As noted *supra* Part I, limiting the use of eminent domain for economic development does not prevent the use of eminent domain for the creation of parks, the preservation of open space, or the adoption of zoning or other land-use controls.

214. *See supra* Part I.

is questionable that even the most well-intended projects will produce such results.[215]

One potential use of eminent domain, which could limit urban sprawl, would be to utilize it to promote denser redevelopment. Denser urban development can produce significant environmental benefits by reducing the footprint of human development on the countryside, among other things. However, increased density can also produce environmental costs, particularly if it results in more intensive land use or the loss of open space. Replacing a low-density residential community along the Atlantic Coast with a high-density commercial development, as has been proposed in Florida's Riviera Beach, for example, is likely to have a significant impact on the coastal environment.[216] Recent research shows that open space within urban areas provides substantial public benefits, as reflected in local property values.[217] Using eminent domain to increase density at the expense of such open space would not benefit many communities.

Theoretically, increased population density in urban settings should reduce traffic congestion and air pollution.[218] In practice, however, the exact opposite appears to occur. As population density increases, so too do vehicle miles traveled and urban traffic congestion.[219] As a result, those areas with the highest population densities have the worst urban air pollution.[220] One reason for this is that increasing population density

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215. *See supra* Part I.

216. *See, e.g.*, Pat Beall, *Eminent Domain Case Draws National Spotlight*, PALM BEACH POST, Dec. 11, 2005, at 1A; Joyce Howard Price, *Florida City Considers Eminent Domain: Posh Project Would Displace 6,000*, WASH. TIMES, Oct. 3, 2005, at A01.

217. *See* Vicki Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values* (N.Y.U., Law and Economics Research Paper Series, Paper No. 06-09, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=889113.

218. *See, e.g.*, Kim Krisberg, *Poor Air Quality, Pollution, Endanger Health of Children: Designing Healthier Communities for Kids*, NATION'S HEALTH, Mar. 1, 2006, *available at* http://www.apha.org/tnh/index.cfm?fa=Print&id=2627.

219. *See* Randall G. Holcombe, *The New Urbanism Versus the Market Process*, 17 REV. OF AUSTRIAN ECON. 285, 290 (2004) ("If traffic congestion is a problem, increasing population density will add more traffic to already congested areas, making the problem worse."); *see also* Wendell Cox, *Coping with Traffic Congestion*, *in* A GUIDE TO SMART GROWTH: SHATTERING MYTHS, PROVIDING SOLUTIONS 41–42 (Jane S. Shaw & Ronald D. Utt eds., 2000) ("As urban density increases, so do vehicle miles traveled per square mile.").

220. *See* Kenneth Green, *Air Quality, Density, and Environmental Degradation*, *in* SMARTER GROWTH: MARKET-BASED STRATEGIES FOR LAND-USE PLANNING IN THE 21ST CENTURY 79 (Randall G. Holcombe & Samuel R. Staley eds., 2001) (citing data suggesting a correlation with density and ambient air pollution); Holcombe, *supra* note 219, at 287–88 ("[T]he higher the population density, the worse the environmental degradation in almost every dimension."); *id.* at 288 ("[P]ollution is the highest where population density is the highest."); Randal O'Toole, *ISTEA: A Poisonous Brew for American Cities*, CATO INSTITUTE POLICY ANALYSIS No. 287, Nov. 5, 1997, at 24 ("[I]n major U.S. cities and metropolitan areas, smog problems are strongly correlated with population density. . . . Cleaner air correlates with lower densities."); *see also* Heimlich & Anderson, *supra* note 134 (noting

increases the number of vehicles on the road, even where mass transit is available.[221] In addition, most vehicle emissions are higher when vehicles are traveling at lower speeds, as they are likely to do in urban traffic jams.[222] The point here is not to argue that dense redevelopment of city cores and inner-ring suburbs is, on the whole, environmentally harmful. Rather, the point is that dense urban redevelopment is not an unalloyed environmental good.[223]

Even if one assumes that most urban economic development projects that rely upon eminent domain will produce net environmental benefits, this does not mean that a legal rule allowing for economic development takings will likewise prove environmentally beneficial. If governments can use eminent domain for economic development purposes, then it can be used for both good and ill. If cities and inner-ring suburbs are allowed to use eminent domain to facilitate denser development, outlying communities can use it to pave the way for greater suburban growth. The same power which enables a city to redevelop an urban core enables a suburb to replace open space with an industrial park or a strip mall. In this way, eminent domain can be used to promote suburban sprawl and metropolitan deconcentration, with all of its attendant social costs.[224] In assessing the aggregate environmental impacts of economic development takings, one must consider both the positive and negative uses of that power. Barring the adoption of specific limits on the use of eminent domain in particular areas, the permissive approach embodied in the *Kelo* decision is likely to lead to greater environmental harm than the *Hathcock* alternative.

B. Other Environmental Harms of Economic Development Takings

Economic development takings can contribute to environmental degradation in less direct ways as well. Most clearly, they can be used to

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air quality improvements from "decentralizing population and employment").

221. *See* Cox, *supra* note 219, at 41–42.

222. *See* Cox, *supra* note 219, at 45. This is true for emissions of carbon monoxide and volatile organic compounds at speeds lower than fifty-five miles per hour. Nitrogen oxide emissions, on the other hand, increase once average vehicle speeds rise above twenty miles per hour. *Id.* at 44.

223. It is also worth noting that the per capita cost of providing many public services may actually *increase* with population density. *See* Helen F. Ladd, *Population Growth, Density and the Costs of Providing Public Services*, 29 URB. STUD. 273, 292–93 (1992).

224. *See generally* JOSEPH PERSKY & WIM WIEWEL, WHEN CORPORATIONS LEAVE TOWN: THE COSTS AND BENEFITS OF METROPOLITAN JOB SPRAWL (2000). Of course, some would argue that the environmental and social costs of sprawl are exaggerated. *See, e.g.*, A GUIDE TO SMART GROWTH: SHATTERING MYTHS, PROVIDING SOLUTIONS, *supra* note 219; WILLIAM T. BOGART, DON'T CALL IT SPRAWL (forthcoming); ROBERT BRUEGMANN, SPRAWL: A HISTORY (2005).

facilitate unsustainable economic development and the establishment of pollution-generating enterprises. Economic development takings operate as a subsidy for economic development generally, and often for politically powerful interest groups in particular. Such takings represent a subsidy to development because, other things being equal, the use of eminent domain reduces the costs of proceeding with a given development project for developers. Absent the use of eminent domain, developers would have to pay a higher price to obtain desired properties, if they are able to acquire such properties at all. If development is subsidized in this fashion, there will be more of it—and more of the resulting environmental effects, ranging from air pollution and congestion to habitat loss and non-point source water pollution.[225]

There is also a danger that economic development condemnations might damage environmental quality by undermining property rights, squandering public resources, and reducing communal wealth. Economic development takings often lead to the establishment of enterprises that could not have survived in a competitive market because they generate less economic value than did preexisting land uses.[226] Since wealth and income are among the strongest correlates of efforts to promote environmental quality, economic development takings paradoxically undermine environmental quality by dissipating wealth and reducing economic growth.

1. Interest Group Capture of the Eminent Domain Process

When eminent domain is used for economic development, it is rarely public-spirited redevelopment solely overseen by disinterested urban planners and "smart growth" advocates. The eminent domain process is highly vulnerable to "capture" by narrow interest groups.[227] Particularly in urban centers, redevelopment plans are the product of competing political and economic pressures, including the desires of powerful interest groups

225. *See generally* U.S. Environmental Protection Agency, About Smart Growth, http://www.epa.gov/dced/about_sg.htm (last visited Nov. 2, 2006) (describing environmental impacts of current development patterns).

226. As already noted, eminent domain operates as a subsidy for economic development. This means that the use of eminent domain will allow some projects to proceed that, otherwise, would not have. Perhaps the paradigmatic example of economic development projects that fail to generate net economic benefits are athletic arenas. *See generally* ROGER NOLL & ANDREW ZIMBALIST, SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (1997) (summarizing research demonstrating public subsidies for sports do not generate net economic benefits).

227. *See* Somin, *Controlling*, *supra* note 3, at 8–23; Somin, *Overcoming* Poletown, *supra* note 7, at 1010–24.

and the need to enhance local tax revenue. For a variety of reasons, the adoption of economic development takings is far more likely to be driven by the political power of beneficiaries than by the prospect of environmental or other public benefits.[228] Indeed, the bigger the project, the more likely it is to be affected by special-interest power. The inevitable political compromises limit the likelihood that redevelopment plans will meet some theoretical environmental ideal. In some instances, redevelopment plans are driven by the developers who will profit from the project, and public needs are, at best, an afterthought.[229]

2. *The Costs of Economic Development Takings are Likely to Exceed the Benefits*

Economic development projects rarely produce the economic gains, or any other gains for that matter, that their proponents allege. Therefore, it is unlikely that economic development takings will generate sufficient economic benefits to offset their environmental costs. The notorious *Poletown* condemnations, for example, may actually have destroyed more jobs than the development project created in its place.[230] The new GM factory built as a result of the condemnations created less than half the promised 6150 jobs, while the destruction of 150 to 600 businesses and numerous nonprofit organizations may well have led to the loss of an equal or greater number of positions.[231] When one factors in the $250 million in public funds expended on the project, and the economic cost of destroying numerous homes, churches, businesses, and schools, it is highly likely that the economic costs of the *Poletown* condemnations greatly outweighed any benefits.[232] The same is true of the *Kelo* condemnations, where some $80 billion in public funding has already been expended, with little, if any, prospect of commensurate gains.[233]

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228. For a detailed discussion of the reasons, see Somin, *Controlling*, *supra* note 3, at 8–23; Somin, *Overcoming* Poletown, *supra* note 7, at 1010–24.

229. *See* Somin, *Controlling*, *supra* note 3, at 8–23; Somin, *Overcoming* Poletown, *supra* note 7, at 1010–24.

230. *See* Nicole Gelinas, *They're Taking Away Your Property for* What?, CITY J., Autumn 2005, *available at* http://www.city-journal.org/html/15_4_eminent_domain.html; Somin, *Overcoming* Poletown, *supra* note 7, at 1012–13, 1017–18 (discussing conflicting estimates of job losses resulting from *Poletown*).

231. Somin, *Overcoming* Poletown, *supra* note 7, at 1017–18.

232. *Id.*

233. *See* Kelo v. City of New London, 843 A.2d 500, 596–600 (Conn. 2004) (Zarella, J., dissenting), *aff'd* 545 U.S. 469 (2005) (noting costs of project and low prospect of commensurate benefits); Kate Moran, *Developer Says Fort Trumbull Hotel Plan Not Viable Since 2002; Project Became Unrealistic Without Pfizer Commitment*, THE DAY (New London, Conn.), June 12, 2004, at

These results are not accidental. There are several systematic reasons why economic development takings are likely to generate costs that exceed their benefits. First, none of the states that permit economic development takings require the new owners of condemned property to actually produce the economic benefits that were used to justify condemnation in the first place.[234] This, combined with the refusal of courts in these states to consider the economic costs imposed by condemnation projects in their decisions,[235] gives local governments and developers strong incentives to oversell condemnation projects by using inflated estimates of their benefits. In other cases, local officials promise that projects will spur economic development without identifying what is to be developed.[236]

Second, the more economic development projects are subsidized through the use of eminent domain, the more likely it is that inefficient projects will proceed. As former Milwaukee mayor and president of the Congress for New Urbanism John Norquist argued in his *Kelo* amicus brief, "speculative over-use of eminent domain may actually have a chilling effect on the rigorous economic screening of projects naturally occurring in the private marketplace, and may result in an increased number of unsustainable development projects."[237] If large eminent domain projects fail to produce the job growth or tax revenues promised by their proponents, why should one expect them to generate promised environmental benefits?

Further, the costs and benefits of economic development takings are extremely difficult for voters to determine, which ensures that officials who approve inefficient development projects will rarely, if ever, be punished at the ballot box.[238] Even in cases where it is possible for voters

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C4 (discussing development project's lack of viability); William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1.

234. *See* Somin, *Controlling*, *supra* note 3, at 10–15.

235. *See Kelo*, 843 A.2d at 541 n.58 (refusing to consider costs imposed by condemnation because "the balancing of the benefits and social costs of a particular project is uniquely a legislative function"); Somin, *Controlling*, *supra* note 3, at 15–17 (describing failure to consider costs).

236. *See, e.g.*, Krauter v. Lower Big Blue Nat. Res. Dist., 259 N.W.2d 472, 475–76 (Neb. 1977) (striking down condemnation because there was no clear plan as to how the condemned property would be used).

237. Brief for John Norquist, President, Congress for New Urbanism, as Amicus Curiae Supporting Petitioners, at 3, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108), *available at* http://www.ij.org/pdf_folderprivate_property/kelo-norquist08.pdf; *see also* Gelinas, *supra* note 230 ("In the free market, a poorly designed project will fail and be replaced by a well-designed project—or just won't find private financing to get built. With government central planning, ill-designed projects last forever—and they retard natural growth around them.").

238. Somin, *Controlling*, *supra* note 3, at 19–21.

to determine the costs and benefits accurately, any such accounting is unlikely to be feasible until years after the fact, by which time many of the officials who approved the condemnation are likely to be out of office.[239] In any event, by that point public attention will have moved on to other issues.

Finally, the need to prevent "holdouts"—the standard rationale for economic development takings—can in most cases be addressed without resort to eminent domain. If a private development project really will use the property for purposes more valuable than those to which it is currently devoted, the developers can prevent holdouts from blocking the project by using secret purchases or precommitment strategies.[240] Of course, where conservation groups, or others, place a high subjective value on maintaining given lands in an undeveloped state, they should not be considered holdouts. Such landowners are not engaged in strategic behavior in order to maximize their compensation, but are rather "sincere dissenters" from the merits of the development project who genuinely value the current uses of the land more than the developer values his or her own projected uses.[241]

3. *Endangering the Environmental Benefits of Property Rights*

Eminent domain is generally viewed as a threat to property rights, as evidenced by the strong negative reaction to the *Kelo* decision by various groups representing property owners. The rule ratified in *Kelo* is, regardless of its other merits, less protective of property rights than that urged by the *Kelo* dissenters and also adopted by the Michigan Supreme Court in *Hathcock*. This, too, could have negative environmental consequences insofar as it undermines the security of property rights on the margin. Individuals are less likely to make investments in the long-term conservation of environmental resources on private land when they are uncertain if their investments will bear fruit.[242]

International studies of economic and environmental trends demonstrate that "environmental quality and economic growth rates are greater in regimes where property rights are well defined than in regimes

239. *Id.*

240. For detailed explanations of the reasons why this is true, see Kelly, *supra* note 91; Somin, *Controlling*, *supra* note 3, at 21–28.

241. *See* Somin, *Controlling*, *supra* note 3, at 23 (distinguishing strategic holdouts and sincere dissenters).

242. *See* Staley & Blair, *supra* note 200, at 2.

where property rights are poorly defined."[243] The security of property rights encourages owners to pursue the enhancement of their own subjective value preferences, including both commercial and non-commercial values.[244] Property rights enable forest landowners to protect their investment in planting trees or otherwise enhancing forest growth;[245] investments made by conservation groups in ecological protection and restoration are also protected.[246] Conversely, a lack of property rights provides substantial incentives to deplete valuable resources.[247] Where property rights are not secure, owners are less likely to invest in improving or protecting a resource, and are more likely to consume it as quickly as possible in a "tragedy of the commons" scenario.[248] On the margin, the more purposes for which government authorities may exercise eminent domain, the less secure private property rights will be.

4. Endangering the Environment by Reducing Societal Wealth

The history of condemnation for economic development raises further concerns. As discussed above, economic development takings are more likely to retard economic growth than enhance it.[249] Condemnations can

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243. Seth W. Norton, *Property Rights, the Environment, and Economic Well-Being*, *in* WHO OWNS THE ENVIRONMENT? 37, 51 (Peter J. Hill & Roger E. Meiners eds., 1998); *see also* Don Coursey & Christopher Hartwell, *Environmental and Public Health Outcomes: An International and Historical Comparison* (Harris Sch. Pub. Policy, Working Paper No. 00.10, 2000), *available at* http://www.harrisschool.uchicago.edu/about/publications/working-papers/pdf/wp_00-10.pdf (finding that, across the board, greater governmental regulation of private activity correlates with higher levels of emissions and worse public health indicators).

244. *See* Louis De Alessi, *Gains from Private Property: The Empirical Evidence*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 90, 108 (Terry L. Anderson & Fred S. McChesney eds., 2003); *see also* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967) ("The development of private rights permits the owner to economize on the use of those resources from which he has the right to exclude others."); Robert J. Smith, *Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife*, 1 CATO J. 439, 456 (1981) ("Wherever we have exclusive private ownership, whether it is organized around a profit-seeking or nonprofit undertaking, there are incentives for the private owners to preserve the resource.").

245. *See* Jonathan H. Adler, *Poplar Front: The Rebirth of America's Forests*, *in* ECOLOGY, LIBERTY & PROPERTY 65, 71–72 (Jonathan H. Adler ed., 2000) (noting higher rates of forest growth on private land than on federally owned forest land).

246. *See* Smith, *supra* note 244, at 456 (private ownership protects both for-profit and nonprofit undertakings).

247. As Anthony Scott observes, "[n]o one will take the trouble to husband and maintain a resource unless he has a reasonable certainty of receiving some portion of the product of his management; that is, unless he has some property right in the yield." Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116, 116 (1955). While it may be an overstatement to claim that "no one" will act in such a manner, the marginal effect should be indisputable. *Id.*

248. For the classic analysis, see Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243.

249. *See supra* Part II.B.2 (explaining why the economic costs of development takings are likely

increase the amount of development—for instance by creating an industrial park or facilitating a given redevelopment project—but this is not the same thing as increasing economic growth and societal wealth. In some cases, economic development condemnations may provide the worst of both worlds by increasing the amount of environmentally harmful development while simultaneously retarding overall economic growth.

Economic development takings are unlikely to provide economic benefits sufficient to offset the costs, environmental and otherwise. Insofar as this is the case, using eminent domain for economic development squanders scarce resources and retards the accumulation of societal wealth. This, too, can have negative environmental effects of its own. Wealthier societies have both the means and the desire to address a wider array of environmental concerns.[250] Economic growth fuels technological advances and generates the resources necessary to deploy new methods for meeting human needs efficiently and effectively.[251] Public support for environmental measures, both public and private, is correlated with changes in personal income.[252] This is evidenced by the fact that donors to environmental groups tend to have above-average incomes.[253] Empirical

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to exceed the benefits); *see also* Gelinas, *supra* note 230 (discussing New Haven, Connecticut, as an example of where redevelopment projects likely did more harm than good); Thomas Garrett & Paul Rothstein, *The Taking of Prosperity*: Kelo v. New London *and the Economics of Eminent Domain*, REGIONAL ECONOMIST, Jan. 2007, at 4 (summarizing reasons why economic development takings are likely to diminish prosperity rather than increase it).

250. *See* RICHARD L. STROUP, ECO-NOMICS: WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND THE ENVIRONMENT 13–14 (2003); Jason Scott Johnston, *On the Market for Ecosystem Control*, 21 VA. ENVTL. L.J. 129, 146 (2002) ("There is abundant evidence that the demand for outdoor recreation and environmental amenities increases with national income."); Matthew E. Kahn & John G. Matsusaka, *Demand for Environmental Goods: Evidence from Voting Patterns on California Initiatives*, 40 J.L. & ECON. 137 (1997) (noting that most environmental goods are normal goods for which demand rises with income); Patrick Low, *Trade and the Environment: What Worries the Developing Countries?*, 23 ENVTL. L. 705, 706 (1993) ("[T]he demand for improved environmental quality tends to rise with income."); Kenneth E. McConnell, *Income and the Demand for Environmental Quality*, 2 ENVTL. & DEV. ECON. 383, 385–86 (1997) (reporting on empirical evidence on environmental Kuznets curve); Norton, *supra* note 243, at 45 (noting that, insofar as environmental quality is viewed as a "good," consumption of environmental quality will increase as wealth increases); Bruce Yandle et al., *The Environmental Kuznets Curve: A Review of Findings, Methods, and Policy Implications*, PERC RES. STUD., Apr. 2004), http://www.perc.org/pdf/rs02_1a.pdf.

251. *See, e.g.*, AARON WILDAVSKY, SEARCHING FOR SAFETY (1988) (providing extensive arguments and evidence showing that increasing societal wealth produces environmental and safety benefits).

252. Richard L. Stroup & Roger E. Meiners, *Introduction: The Toxic Liability Problem: Why Is It Too Large?*, *in* CUTTING GREEN TAPE: TOXIC POLLUTANTS, ENVIRONMENTAL REGULATION AND THE LAW 1, 15 (Richard L. Stroup & Roger E. Meiners eds., 2000) ("Willingness to pay for environmental measures . . . is highly elastic with respect to income."). This is also true for charity in general. *See* RICHARD B. MCKENZIE, WHAT WENT RIGHT IN THE 1980S 70 (1994) (noting that "[h]igher incomes lead to increased giving").

253. Stroup & Meiners, *supra* note 252, at 15 (discussing 1992 reader survey for *Sierra* magazine

evidence also suggests that wealthier communities are more likely to support governmental efforts to preserve open space through the use of bond issues and other local measures.[254] While the marginal effects of this phenomenon may be small in any given case, the loss of societal wealth is yet another negative environmental consequence that must be added to the ledger when assessing the environmental impact of using eminent domain for economic development.

CONCLUSION

From an environmental perspective, eminent domain is a two-edged sword. It can be used to provide environmental public goods and preserve undeveloped land. At the same time, however, it can also be used to condemn farms, extinguish conservation easements, subsidize unsound development, and pave the way for suburban expansion into the countryside. Whatever the overall impact of eminent domain on the environment, it is clear that its use for economic development has considerable environmental costs and few, if any, environmental benefits. The economic development rationale is not needed to justify the use of eminent domain for environmental protection. On the other hand, it can be, and has been, used to justify condemnations that inflict environmental harms. For this reason, the rule embodied by *Kelo* will result in environmental harm.

As this Article goes to press, legislatures and local communities around the country are considering efforts to reform or limit the use of eminent domain.[255] Some thirty-five states have already adopted post-*Kelo* reform laws.[256] Litigation over the constitutionality of economic development takings also continues in state courts.[257] These efforts are largely motivated by concerns about the equity and efficiency of eminent domain.

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finding that members of the Sierra Club have an average household income more than double the U.S. average).

254. *See* Matthew J. Kotchen & Shawn M. Powers, *Explaining the Appearance and Success of Voter Referenda for Open-Space Conservation*, 52 J. ENVTL. ECON. & MGMT. 373 (2006).

255. For a detailed list of post-*Kelo* reforms adopted so far, see Castle Coalition, Enacted Legislation, http://www.castlecoalition.org/legislation/passed/index.html (last visited Feb. 11, 2007); see also Somin, *Limits of Backlash*, *supra* note 3, at 10–11.

256. Somin, *Limits of Backlash*, *supra* note 3 (discussing reform in thirty-five states); CASTLE COALITION, LEGISLATIVE ACTION SINCE *KELO* 1 (2007), http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (listing thirty-four states, but not counting reform enacted in Nevada). Unfortunately, most of the laws adopted so far are likely to be ineffective. *See Sandefur*, *supra* note 3; Somin, *Limits of Backlash*, *supra* note 3, at 11–22.

257. *See, e.g.*, Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 642 (Okla. 2006) (post-*Kelo* decision banning economic development takings under state constitutional law).

But the potential environmental consequences of eminent domain should also be considered in these efforts. Prohibiting economic development takings, as some states have already done, will not hamper ongoing efforts to conserve environmental values. Similarly, states should adopt measures to guard against the opportunistic use of blight designations and other methods of circumventing the limits on eminent domain abuse; a prohibition on economic development takings can only protect undeveloped lands from eminent domain if it is diligently enforced.

During the debate over *Kelo*, few environmental advocates voiced concerns about the threat posed by economic development takings, and some even claimed that the decision would advance the cause of environmental protection. This is regrettable. Economic development takings pose a significant threat to environmental quality, while providing few if any environmental benefits.