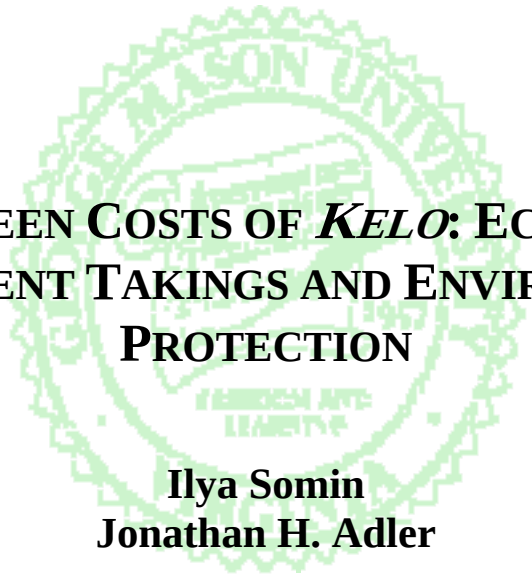
GEORGE MASON UNIVERSITY SCHOOL OF LAW



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

Ilya Somin
Jonathan H. Adler

06-10

GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES

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

Ilya Somin and Jonathan H. Adler

Case Research Paper Series in Legal Studies
Working Paper 06-07
June 2006

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

ILYA SOMIN[*]
JONATHAN H. ADLER[**]

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 commentators on both the right and the left, environmentalists have been notably absent among *Kelo*'s critics. Some 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 more generally. It contends that environmentalist support for economic development takings is misguided. 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, possibly even prohibiting, the use of eminent domain for economic development.[3]

---

[*] Assistant Professor of Law, George Mason University School of Law; B.A., Amherst College, 1995; J.D., Yale Law School, 2001; M.A. Harvard University Department of Government, 1997; Ph.D. expected. Coauthor of amicus curiae brief on behalf of the Institute for Justice and the Mackinac Center for Public Policy in *County of Wayne v. Hathcock*; author of amicus curiae brief on behalf of Jane Jacobs in *Kelo v. City of New London.*

[**] Professor of Law and Co-Director, Center for Business Law and Regulation, Case Western Reserve University School of Law; Visiting Senior Scholar, Mercatus Center; B.A., Yale College 1991; J.D., George Mason University School of Law, 2000.

For helpful suggestions and comments we would like to thank Susan Dudley, Steve Eagle, James Ely, Jonathan Entin, Andrew Morriss, Erich Rassbach, J.B. Ruhl, David Schnare, and Lior Strahilevitz. Sharon Kim and Andrew Samtoy provided invaluable research assistance.

[1] Kelo v. City of New London, 125 S.Ct. 2655 (2005).

[2] *See infra* notes 19-21, 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 below, ten state supreme courts have already banned economic development takings under state constitutional law. In the wake of *Kelo*, many state legislatures 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 Citizens Get Meaningful Eminent Domain Reform?* Mich. St. L. Rev. (forthcoming 2006) (suggesting that eminent legislative reform efforts face serious obstacles); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 14 SUP. CT. ECON. REV. (forthcoming), at 65-84, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874865 (visited Mar. 11, 2006) (same)

Kelo's holding that economic development is a legitimate "public use" under the Fifth Amendment's Takings Clause followed soon after *County of Wayne v. Hathcock*,[4] in which the Michigan Supreme Court overruled *Poletown Neighborhood Council v. City of Detroit*,[5] the most famous earlier decision justifying economic development takings.[6] While it was not the first decision upholding so-called "economic development" takings,[7] *Poletown* was by far the most widely publicized and notorious. Public attention focused on the massive scale of Detroit's use of eminent domain: destroying an entire neighborhood and condemning the homes of 4,200 people, as well as numerous businesses, churches, and schools, so the land could be transferred to General Motors for the construction of a new factory.[8]

Like *Poletown* before it, *Kelo* was met with public outrage, despite the fact that it arguably made few changes to existing federal Takings Clause jurisprudence.[9] A striking feature of the reaction to *Kelo*, *Poletown*, and *Hathcock* was the unusual political coalitions it fostered. It is not surprising that *Kelo* was condemned 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. But observers unfamiliar with the history of economic development condemnations might be more surprised to learn that a joint amicus brief supporting the property owners in *Kelo* was also filed by the NAACP, the AARP, and the Southern Christian Leadership Conference.[10] 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.[11] Nader had also been a prominent opponent of the original *Poletown* condemnations in 1981.[12]

---

[4] County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

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

[6] For a detailed discussion of *Hathcock* 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 (symposium on *County of Wayne v. Hathcock*) (hereinafter, "Somin, *Overcoming* Poletown").

[7] *See, e.g.*, Prince George's County v. Collington Crossroads, 339 A.2d 278, 287 (Md. 1975) (1975 Maryland supreme court decision holding that "industrial development" qualifies as a legitimate public use).

[8] *See* Ilya Somin, *Michigan Should Alter Property Grab Rules*, DETROIT NEWS, Jan 8, 2004, at 11 (brief description of the facts and background of *Poletown*); Somin, Overcoming Poletown, at 1016-22 (discussing the impact of the Poletown takings).

[9] For detailed discussions of both Kelo's relationship to precedent and the public backlash to the decision, see Somin,*supra* note __ at 42-84. *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, 498 (2006) ("the 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, 283-84 (2006) ("The 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 __.

While *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 (reporting on apparent increase in use of eminent domain).

[10] Kelo v. City of New London, Amicus Br. of NAACP, AARP, & SCLC, 2004 WL 2811057.

[11] County of Wayne v. Hathcock, Amicus Br. of Ralph Roust, Ralph Nader & Alan Hirsch, available at http://www.courts.michigan.gov/supremecourt/Clerk/04-04/124070-78/124070-124078-Amicus.pdf ; Id., Amicus Br. of Pacific Legal Foundation & ACLU Fund of Michigan 2004 WL 687839T2.

[12] *See* JEANNIE WYLIE, POLETOWN: COMMUNITY BETRAYED ch. 6 (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).

One of the present coauthors filed an amicus brief in support of the property owners in *Kelo* on behalf of Jane Jacobs, a prominent urban development theorist normally associated with the political left.[13]

Many left of center scholars and activists oppose economic development takings because of their tendency to inflict disproportionate harm on the poor and ethnic minorities, often for the benefit of corporate development interests.[14] After the *Kelo* decision was announced, it was condemned by numerous liberal political leaders including former President Bill Clinton,[15] Democratic National Committee Chair Howard Dean (who blamed the result on a "Republican-appointed Supreme Court"),[16] and prominent African-American politician, California Representative Maxine Waters.[17]

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.[18] Most other environmental groups stayed on the sidelines. 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.[19] 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 associations.[20] 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."[21]

Environmentalists have been suspicious of judicial protection of property rights under the Takings Clause because of the fear that it might impede environmental regulation.[22] They also

---

[13] Kelo v. City of New London, Amicus Br. of Jane Jacobs, 2004 WL 2803191.

[14] For more detailed discussion and citations, see Somin, *Overcoming* Poletown at 1005-07; Somin, *supra* note __ at 18, 65.

[15] *See* Eric Kriss, *More Seek Curbs on Eminent Domain*, SYRACUSE POST-STANDARD, Jul. 31, 2005 at A16 (noting Clinton's opposition to the ruling).

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

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

[18] *See* "Supreme Court Ruling Has Implications for Private Landowners," American Farmland Trust, *available at* http://www.farmland.org/policy/fed_policy_0706.htm.

[19] *See* Amicus Brief of the American Planning Association, et al., Kelo v. City of New London, *available at* http://www.planning.org/amicusbriefs/pdf/kelo.pdf.

[20] *See* Amicus Brief of National League of Cities, et al., Kelo v. City of New London, *available at* http://www.communityrights.org/PDFs/Briefs/Kelo.pdf. 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." "Outrage of the Month," *Community Rights Report*, Vol. VI, No. 4, April 2006.

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

[22] *See, e.g.*, FRANK BOSSELMAN ET AL., THE TAKING ISSUE: A STUDY OF CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS iv (1973) ("attempts 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."); *see also* John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife*

fear restrictions on 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,[23] we contend that it has virtually no relevance to judicial bans on "economic development" takings. 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 in any way. Nor does such a ban threaten the use of eminent domain for legitimate conservation purposes. The doctrinal rules advocated by the *Kelo* dissenters and adopted by courts in the ten states that ban economic development takings leave ample room for the use of eminent domain to advance environmental goals. This doctrinal point is buttressed by empirical evidence indicating that none of the ten states with *Hathcock*-like bans on economic development takings have ever used this rule to block condemnation of property for environmental or conservation purposes.

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. 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. 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. 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 ten states whose supreme courts have forbidden the economic development rationale.[24] None of these states have had any successful challenges to

---

Protection and the Takings Clause, 16 TUL. ENVTL. L.J. 331 (2003); Glenn P. Sugameli, *Takings Bills Threaten Private Property, People and the Environment*, 8 FORDHAM ENVTL. L.J. 521 (1997); Joseph L. Sax, *Property Rights and the Economy of Nature*, 45 STAN. L. REV. 1433 (1993); J. Peter Byrne, *Green Property*, 7 CONST. COMM. 239 (1990); Patrick C. McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. 10369 (1987); Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 YALE L. J. 149 (1971).

[23] 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 986 (forthcoming 2006).

[24] The ten states are Arkansas, Florida, Illinois, Kentucky, Maine Michigan, Montana, Oklahoma, South Carolina, and Washington. *See* 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); Board of County Com'rs of Muskogee County v. Lowery, 2006 WL 1233934 at *4-7 (Okla. May 9, 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma state constitution); In re Petition of Seattle, 638

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

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 that sought to transfer the property to private developers.[25] None of the properties in question were alleged to be "blighted or otherwise in poor condition."[26] The condemnations were initiated under a plan prepared by the New London Development Corporation (NLDC), a "private nonprofit entity established . . . to assist the City in planning economic development."[27] The city claimed the project would "provide appreciable benefits to the community, including pp but by no means limited to – new jobs and increased tax revenue."[28] 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.[29] The constitutionality of the takings was upheld by the Supreme Court of Connecticut in a 4-3 decision.[30] The U.S. Supreme Court affirmed in an unexpectedly close 5-4 decision.[31]

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.[32] It refused to accept the property owners' argument that the transfer of their property to private developers rather than

---

P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); 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"); Karesh v. City of Charleston, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development); City of Little Rock v. Raines, 411 S.W.2d 486, 495 (Ark. 1967) (private economic development project not a public use); Hogue v. Port of Seattle, 341 P.2d 171, 181-191 (Wash. 1959) (denying condemnation of residential property so that agency could "devote it to what it considers a higher and better economic use," id. at 187); Opinion of the Justices, 131 A.2d 904, 905-06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); 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); 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"); Southwestern Ill. Dev. Auth. v. National City Env., 768 N.E.2d 1, 9-11 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (holding that a "contribu[tion] to economic growth in the region" is not a public use justifying condemnation). 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, 2006 WL 1233934 at *7 (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*).

[25] Kelo v. City of New London, 125 S.Ct. 2655, 2658-60 (2005).

[26] *Id.* at 2660. For a discussion of the significance of "blight" designations for condemnation, see infra, § I.B.3.

[27] *Id.* at 2659.

[28] *Id.* at

[29] U.S. CONST. AMEND. V.

[30] Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd* 125 S.Ct. 2655 (2005).

[31] 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, supra note ___ at 42-55 and works cited in note 9.

[32] Kelo v. City of New London, 125 S.Ct. at 2663.

to a public body required any heightened degree of judicial scrutiny.[33] It also refused to require the City to provide any evidence that the takings were likely to actually achieve the claimed economic benefits that provided their justification in the first place.[34] On all these matters, the *Kelo* majority chose not to "second-guess the City's considered judgments about the efficacy of the development plan."[35] Thus, the *Kelo* Court would uphold almost any economic development condemnation that arises from "an integrated development plan."[36] This approach, while slightly less deferential than earlier Supreme Court Public Use decisions,[37] still provides little protection for property owners. Virtually any condemnation can be legitimized by a plan of some kind – especially if the Court holds to its refusal to "second-guess" the plan's rationale and efficacy.[38]

The Michigan Supreme Court's decision in *County of Wayne v. Hathcock* addressed the same issue as *Kelo*, but under the Michigan State Constitution's takings clause rather than the federal one.[39] Overruling *Poletown*, *Hathcock* forbade economic development takings.[40] *Hathcock* and other decisions striking down the economic development rationale fall short of a complete ban on private-to-private condemnations, however. 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.

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.[41]

These three categories, especially the latter two, have been replicated in other states that forbid economic development takings.[42] 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

---

[33] *Id.* at 2666.
[34] *Id.* at 2667-68.
[35] *Id*. at 2668.
[36] *Id*. at 2667.
[37] *See* Somin, *supra* note __ (explaining why Kelo is 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))
[38] *Kelo*, 125 S.Ct. at 2668.
[39] 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") and U.S. CONST. AMEND. V ("nor shall private property be taken for public use, without just compensation").
[40] County of Wayne v. Hathcock, 684 N.W. 2d 765, 779-86 (Mich. 2004).
[41] *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 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 id*. at 780-83 (relying extensively on Poletown, 304 N.W.2d at 478-80 (Ryan, J., dissenting)).
[42] *See* Somin, supra note ___ at 85-88 (noting parallels in other states).

property.[43] 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.

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 or conservation. In other words, most, if not all, legitimate environmental uses of eminent domain are not threatened by the *Hathcock* rule.

1. Government ownership.

Perhaps the most important reason is that bans on economic development takings do not forbid condemnations that transfer property to government ownership. This point is universally acknowledged by state courts that ban economic development takings,[44] and also by the U.S. Supreme Court dissenters in *Kelo*.[45] 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."[46]

This long-established rule encompasses the vast bulk of environmentally-related condemnations. If 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 so long as 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 parties, they are retained by the government (even if held in the "public trust" and not 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 her 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 forces a private landowner to restrict development of his land in order to prevent environmental degradation, the aggrieved landowner may seek compensation for the "taking" of his land,[47] but the action could not be challenged as a violation of state or federal

[43] *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).
[44] See cases cited in note _____, none of which extend the ban on economic development takings to takings for public ownership.
[45] *Kelo*, 125 S.Ct. at 2673 (O'Connor, J., dissenting).
[46] *Id.*
[47] See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

Public Use Clauses so long as the government did not transfer the development rights in question to another private owner. Obviously, some would contend that such regulations should not be considered takings at all.[48] 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 condemnations still permit not only condemnations for transfer to government ownership but also 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."[49] Even Justice Thomas' *Kelo* dissent, 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."[50]

In the environmental context, this means that government could use private-to-private condemnations to promote environmental goals so long as the new private owners were required to give the general public a legal right of access. For example, 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 desirable transit infrastructure.[51] Such access would not have to be free of charge or of 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 when the condemned property remained subject to "public control," and most importantly instances where the condemnation was justified by facts of "independent public significance," such as the existence of "blight," rather than by the future uses of the condemned property by its new owners.[52] In this latter scenario, "the act of condemnation *itself*, rather than the use to which the land would eventually be put, [is the] public use" justifying condemnation.[53] For that reason, the danger of abuse on behalf of private interest groups is reduced because it supposedly 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

---

[48] *See infra* note 22, and sources cited therein.,

[49] Kelo, 125 S.Ct. at 2673 (O'Connor, J., dissenting); id. at 2679 (Thomas, J., dissenting) (noting that private-to-private condemnations are acceptable if "the public has a legal right to use the property"); *see also* Hathcock, 684 N.W.2d at 782 (same).

[50] Kelo, 125 S.Ct. at 2679 (Thomas, J., dissenting).

[51] Indeed, the *Kelo* dissenters acknowledged the legitimacy of using eminent domain to facilitate the operations of "common carriers" including "railroads." *See* Kelo, 125 S.Ct. at 2673 (O'Connor, J., dissenting).

[52] Hathcock, 684 N.W.2d at 783.

[53] Hathcock, 684 N.W.2d at 783.

mitigated or eliminated. On this basis, it is likely that government could condemn land to eliminate environmental harms.[54]

The paradigmatic example of this type of scenario is the removal of "urban blight for the sake of public health and safety."[55] This view is shared by courts around the country. Forty-nine of fifty states, including all ten that forbid economic development takings, have statutes that permit condemnation of "blighted" property for redevelopment purposes.[56] The same reasoning was endorsed by Justice O'Connor in the principal *Kelo* dissent.[57] As O'Connor explains, in 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."[58] Justice Thomas' solo dissent in *Kelo* is the only noteworthy modern judicial opinion that even comes close to advocating judicial invalidation of blight condemnations.[59]

Condemnations 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. In both situations "the act of condemnation *itself*, rather than the use to which the land would eventually be put, [is the] public use" justifying condemnation.[60] Indeed, some of the harms used to justify blight condemnations are in fact environmental in nature, including the "spread [of] disease,"[61] and "health hazards" such as "hazardous waste sites, trash, vermin, or fire hazards."[62] Similar rationales could be used to condemn abandoned industrial properties or urban brownfields to facilitate their containment or cleanup.[63]

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.[64] Since World War II, over three million people have been dispossessed in this

---

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

[55] *Id*. (citing Poletown, 304 N.W.2d at 478-79 (Ryan, J., dissenting)).

[56] Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROPERTY, PROBATE & TRUST J. 389, 391 (2000). The one exception is the state of Utah, which recently forbid both blight and economic development condemnations by statute. See Utah Code § 17B-202-4 (amended Mar. 21, 2005 by Utah Sen. Bill 184) (outlining powers of redevelopment agencies and omitting the power to use eminent domain for blight alleviation or development); *see also* Henry Lamb, *Utah Bans Eminent Domain Use by Redevelopment Agencies*, ENV. NEWS, June 1, 2005, available at http://www.heartland.org/article.cfm?artID=17162 (visited Dec. 12, 2005). (describing the politics behind the Utah law).

[57] *See Kelo*, 125 S.Ct. at 2674 (O'Connor, J., dissenting) (endorsing the Supreme Court's decision to allow blight condemnations in Berman v. Parker, 348 U.S. 26 (1954)).

[58] *Id*.

[59] *Id*. at 2685-86 (Thomas, J., dissenting) (suggesting that Berman should perhaps be overruled).

[60] *Hathcock*, 684 N.W.2d at 783.

[61] Berman v. Parker, 348 U.S. 26, 32 (1954).

[62] Luce, *supra* note __, at 395 (noting that 52 of 54 U.S. jurisdictions include such "health hazards" as part of the definition of blight).

[63] *See* Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 ECOL. L.Q. 59, 69-70 (2003) (discussing use of eminent domain in brownfield redevelopment).

[64] *See* Somin, *Overcoming* Poletown, *supra* note __, at 1035-38 (citing sources and evidence); Somin, supra note _____ at 91-94 (same); . 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).).

way.[65] 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.'"[66]

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.[67] Even some defenders of eminent domain acknowledge that blight designations are subject to occasional abuse.[68] 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 difficult to determine at this point because their scope remains unclear as of this writing.[69] The exception for "public necessity of the extreme sort"[70] 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.[71] Similarly, the "public control" exception could be used to defend private-to-private environmental condemnations where "the property remains subject to public oversight,"[72] as might occur were eminent domain 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 explain how much "public control" is enough to justify an otherwise invalid taking.[73]

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

Some environmentalists and advocates of the use of eminent domain for economic development 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.[74]

---

[65] Somin, *Overcoming* Poletown, *supra* note __, at 1037.
[66] Pritchett *supra* note ___ at 47.
[67] *Id*. 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) and *In re* W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (N.Y. App. Div. 2002), *cert. denied*, 123 S.Ct. 1271 (2003)).
[68] INTERNATIONAL ECONOMIC DEVELOPMENT COUNCIL, EMINENT DOMAIN RESOURCE KIT, AT 8.
[69] *See* Somin, *Overcoming* Poletown at 1028-33 (noting their ambiguity and discussing possible conflicting interpretations).
[70] *Hathcock*, 684 N.W.2d at 783.
[71] The *Hathcock* court suggests that this exception may only apply if "collective action through eminent domain is the only way to implement the public project in question." Somin, Overcoming Poletown at 1028-29. 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.
[72] Hathcock, 684 N.W.2d at 783.
[73] *See* Somin, *Overcoming* Poletown, *supra* note __, at 1031 (discussing this ambiguity).
[74] *See, e.g.*, Carothers, *supra* note 21; *See, e.g.*, Echeverria, *supra* note __; Merrill, supra note ___ at 19-20 (arguing that economic development takings might be used to prevent "sprawl"); Harold Brodsky, *Land Development and the Expanding City*, 63 Annals of the Association of American Geographers 159, 163-66 (1973) (arguing that the power of eminent domain should be used to promote urban development, thereby preventing sprawl); cf. Herman G. Berkman, *Decentralization and Blighted Vacant Land*, 32 LAND ECON. 270, 279-80 (1956) (arguing that the

In some instances, eminent domain may be the easiest way to assemble the large, contiguous parcels necessary to make dense urban redevelopment economically viable. Limiting or prohibiting the use of eminent domain for economic development purposes, they fear, would prevent the use of eminent domain for such environmentally beneficial projects.

It is possible that restricting the use of eminent domain for economic development could impede some environmentally desirable projects. In our view, however, such concerns are 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 they address an "extreme public necessity" beyond the potential economic value of the development itself.[75]

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 such problems without the use of eminent domain.[76] 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.[77]

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.[78] 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. For this reason, there are very few if any instances where economic development takings have significantly advanced environmental protection. 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.[79] 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 without legitimizing the economic development rationale in the vast number of cases where such condemnations either do not advance environmental values or actually cause environmental harms.

C. Empirical Evidence From States That Have Banned Economic Development Takings.

---

government should make more urban land available for development in order to prevent harmful sprawl); Charles Siemon, *Who Bears the Cost?* 50 LAND & CONTEMPORARY PROBLEMS 115, 125-126 (1987) (same).

[75] *Hathcock*, 684 N.W.2d at 783.

[76] *See, e.g.*, Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influences*, John M. Olin Center, Harvard Law School, July 2005, *available at* http://www.law.harvard.edu/programs/olin_center/fellows_papers/5_Kelly.php (discussing effective private sector alternatives to eminent domain); Somin, supra note ___ at 21-28 (same).

[77] Kelly, *supra* note __;Somin, *supra* note ___ at 24-28.

[78] For detailed discussion, see Somin, *supra* note ___ at 8-23.

[79] *See infra* Part II.

The conclusion drawn from the above doctrinal analysis is bolstered by empirical evidence from the ten states whose supreme courts have banned economic development takings. Despite the lack of doctrinal support, a ban on economic development takings could theoretically lead to restrictions on environmental takings through some sort of slippery slope process.[80] In practice, any such possibility remains purely theoretical.

State supreme courts that ban economic development takings include Arkansas, Florida, Illinois, Kentucky, Michigan, Maine, Montana, Oklahoma, South Carolina, and Washington.[81] Two other state supreme courts, New Hampshire and Massachusetts, significantly restrict them without imposing a categorical ban.[82] While some of these decisions, including the 2004 *Hathcock* case, are recent,[83] others are of longstanding vintage. For example, Maine banned the economic development rationale in 1957, Washington in 1959, Arkansas in 1967, Florida in 1975, South Carolina in 1978, and Kentucky in 1979.[84] More than enough time has 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.[85] 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 "scenic beauty" in areas adjacent to state highways.[86] Yet the Maine Court acknowledged that "the restoration,

---

[80] *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 takings only benefit specific private individuals rather than the general public.

[81] See *infra* note __, and cases cited therein.

[82] *See* Merrill v. City of Manchester, 499 A.2d 216, 217-18 (N.H. 1985) (condemnation for industrial park not a public use where no harmful condition was being eliminated); Opinion of the Justices, 250 Ne.2d 547, 558 (Mass. 1969) (holding that economic benefits of a proposed stadium were not enough of a public use to justify condemnation).

[83] For example, Oklahoma only forbade economic development takings in 2006, Illinois in 2002, and Montana in 1995. *See* 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); Board of County Com'rs of Muskogee County v. Lowery, 2006 WL 1233934 at *4-7 (Okla. May 9, 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma state constitution); Southwestern Ill. Dev. Auth. v. National City Env., 768 N.E.2d 1, 9-11 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (holding that a "contribu[tion] to economic growth in the region" is not a public use justifying condemnation).

[84] *See* 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"); 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"); Karesh v. City of Charleston, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development); City of Little Rock v. Raines, 411 S.W.2d 486, 495 (Ark. 1967) (private economic development project not a public use); Hogue v. Port of Seattle, 341 P.2d 171, 181-191 (Wash. 1959) (denying condemnation of residential property so that agency could "devote it to what it considers a higher and better economic use," id. at 187); Opinion of the Justices, 131 A.2d 904, 905-06 (Me. 1957)

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

[86] Finks v. Maine State Highway Comm'n, 328 A.2d 791, 800 (Me. 1974).

preservation and enhancement of scenic beauty adjacent to public highways is a public use,"[87] 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.[88] Whatever the merits of this Maine 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 public use challenges, even after the state supreme court had banned economic development takings.[89] Other decisions from these states have also noted that environmental protection is a recognized public use.[90]

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 more centrist states such as Florida and Illinois. Similarly, they include both agricultural states such as Montana and Kentucky and more industrialized ones, including Michigan and Illinois. Yet 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. Allowing such uses 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. 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 imapcts. 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,[91] and would not prevent the use of

---

[87] *Id.* at 793.
[88] *Id*. at 799-800.
[89] *See* Hallauer v. Spectrum Properties, 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").
[90] *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* Petition of City of Long Beach, 82 P.3d 259, 263 (Wash. 2004) (upholding condemnation of private property for recreational trail).
[91] In December 2005, officials in Willacy County, Texas, announced plans to condemn a 1,500-acre nature preserve on South Padre Island owned by The Nature Conservancy to construct a ferry landing. *See* James Pinkerton, *Nature Preserve Faces Condemnation*, 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 ferry landing designed to increase public access to the beaches on South Padre Island, would still be permitted were economic development takings prohibited.

dubious "blight" designations to condemn undeveloped land.[92] Eminent domain would also remain available for the construction of roads and infrastructure that facilitates the development of previously undeveloped lands. Nonetheless, such a rule would limit the environmental costs of eminent domain.

A. The Threat to Private Land Conservation.

Private conservation efforts in the United States date back over one hundred years. [93] 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.[94] Today, private conservation plays an ever-increasing and indispensable role in environmental protection.[95] "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.[96] 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."[97] 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.

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. This makes conservation lands frequent targets of eminent domain.[98]

---

[92] *Se,e..g* Jim Herron Zamora, *Lockyer Challenges Seizure of Land for Private Project*, SAN FRAN. CHRON., July 27, 2005; *see also* Somin, *supra* note ___ at 89-91 (discussing increasing use of very broad definitions of blight that could encompass almost any property).

[93] Parker, *supra* note at 486.(*citing* Gordon Abbot, Jr., *Historic Origins*, *in* PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION 150–52 (Barbara Rushmore et al. eds. 1982)).

[94] *See generally* FRANK GRAHAM JR., THE AUDUBON ARK (1990).

[95] Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 459 (2002) (noting the "increasing recognition of the need for non-regulatory approaches to private land conservation"); Federico Cheever & Nancy A. McLaughln, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10231 (2004) (conservation easements "regularly results in a level of land use conrol that private landowners would never tolerate through regulation"); Adam E. Draper, *Comment: Conservation Easements: Now More than Ever*, 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"); *see also* Council on Environmental Quality, *Special Report: The Public Benefits of Private Conservation*, *in* ENVIRONMENTAL QUALITY 1984 (1984) (documenting importance of private conservation).

[96] Dana Beach, *Create More Incentives for Easements*, OPEN SPACE (Summer 2004), at 13.

[97] Cheever & McLaughlin, *supra* note __, at 10233; *see also* Barton H. Thompson Jr., *Providing Biodiversity through Policy Diversity*, 38 IDAHO L. REV. 355, 376 (2002).

[98] *See* Carter Smith, *South Padre Island Faces Eminent Threat*, SAN-ANTONIO EXPRESS-NEWS, Dec. 31, 2005 at 11B (eminent domain sought against 1,500-acre nature preserve); Debbie Swartz, *100 Residents Attend Hearing on Gas Pipeline*, PRESS & SUN BULLETIN, Apr. 5, 2006, at 1b (eminent domain proposed for construction of natural gas pipeline through nature preserve); Christian Berthelsen, *Group Battles Toll Road with Prayer*, LOS ANGELES TIMES,

Palm Springs, California, for example, used eminent domain to take 30 acres of land bequeathed as a wildlife preserve in order to build a golf course.[99] The city even sought to avoid paying for the land, but lost in court and was forced to pay $1.2 million.[100] In New Jersey, Citgo Petroleum offered to give Petty's Island in the Delaware River to the state as a nature preserve.[101] The site was one used by the company, but is now home to many animal species, including herons, egrets, and at least one nesting pair of bald eagles.[102] The regional office of the U.S. Fish & Wildlife Service supported the move,[103] but Pennsauken Township had other ideas. It sought to condemn the property and turn it over to residential development.[104]

Agricultural land is also threatened. In the wake of the *Kelo* decision American Farmland Trust President Ralph Grossi warned: "With 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." [105] 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. [106] 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."[107]

Local governments frequently seek to use eminent domain to facilitate the industrial development of farmland. Bristol, Connecticut, for example, condemned a 32-acre tree farm for the creation of an industrial park, an action Connecticut courts upheld as a "public use."[108] In Kingston, Tennessee, Roane County officials sought to condemn seven farms covering 655 acres for an industrial park. [109] Hartford, Connecticut used eminent domain to take a mostly wooded parcel of land in an effort to keep a local manufacturing facility.[110] Onondaga County, New York, officials sought to obtain 130 acres of farmland for residential, commercial and industrial growth, including semiconductor fabrication plants.[111] In Greene County, Missouri, local

---

May 21, 2006, at B3 (conservation easement threatened by proposed highway expansion); Johnston v. Sonoma County Agricultural and Open Space Dist., 100 Cal. App. 4th 973 (2002) (easement for wastewater pipeline across land protected by conservation easement was obtained involuntarily through threat of eminent domain).

[99] Marie Leech, *$1.2 Million Agreement Ends 10-Year Land Feud*, DESERT SUN, Sept. 30, 2001, at 1B.

[100] *See id.*; City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613 (1999).

[101] Bernie Mixon, *Petty's Island Tug of War Looms*, COURIER-POST, June 20, 2004.

[102] *Id.*

[103] Elisa Ung, *Let Petty's Be a Park, U.S. Urges*, PHILA. INQ., Mar 10, 2006.

[104] Stacie Babula, *New Jersey Politics Falre in Scuffle Over Delaware River Island*, Bloomberg News service, July 28, 2005; Mixon, *supra* note 101.

[105] *See* "Supreme Court Ruling Has Implications for Private Landowners," American Farmland Trust, *available at* http://www.farmland.org/policy/fed_policy_0706.htm.

[106] Brief Amici Curiae of the American Farm Bureau Federation, et al., in Support of Petitioners, Kelo v. City of New London, at 3.

[107] *See* Brief Amici Curiae of the American Farm Bureau Federation, et al., in Support of Petitioners, Kelo v. City of New London, at 2

[108] Berliner, *supra* note __, at 46; Bugryn v. City of Bristol, 774 A.2d 1042 (Conn. App. 2001).

[109] 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., 2000 Tenn. App. LEXIS 493 (Tenn. App. 2000).

[110] Maryellen Fillo, *Fighting for the land*, Hartford Courant, Oct. 17, 1999, at B1.

[111] John Doherty, *Clay, Cicero parcels tempt developers route 31 between Morgan Road and Route 11 is seen as county's next big thing*, The Post-Standard, July 7, 2002, at B1.

officials sought to condemn a dairy farm in order to create a new industrial park. The condemnation was justified by the city manager as "protecting the tax base" and keeping "development closer into the city."[112] The plan was later scrapped due to public opposition.[113]

While agriculture can have significant environmental effects,[114] 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.[115] Such land can serve as wildlife "corridors" that offer "opportunities for emigration to populate new patches of habitat."[116] 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."[117] Due to a range of government incentive programs and private conservation efforts, an increasing portion of agricultural land is explicitly devoted to conservation purposes.

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.[118] Nonetheless, eminent domain has regularly been used or threatened to promote economic development at the expense of agricultural lands, conservation lands or, and open space. 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.

The economic development rationale could be used to justify condemnation of almost any property.[119] 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

---

[112] Sylvester Ron, *Farm's plight raises uproar*, Springfield News-Leader, Oct. 14, 1999, at 1A.
[113] Snyder Carmel Perez, *Farm bills filter through legislature Springfield News-Leader*, Springfield News-Leader, May 21, 2000, at 1B.
[114] *See* Ralph E. Heimlich & William D. Anderson, *Development at the Urban Fringe and Beyond: Impacts on Agriculture and Rural Land*, AGRIC. ECON. REP. AER803 (June 2001), at 3 (noting that environmental impacts of agriculture are "generally less severe than those from urban development"); Defenders of Wildlife: 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 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).
[115] Karen Bassler et al, *Farmland Loss at a Glance*, Biodiversity Project, available at www.biodiversity.org.
[116] *Id* at 1.
[117] Bichier, *supra* note __, at 3.
[118] *See* Dana Berliner, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), 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 uses of eminent domain were reported in news sources searchable through Lexis/Nexis. *Id*; *see also id*. at 8 (explaining study methodology). Of course, it is possible that media coverage of proposed and actual condemnations will 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.
[119] See Somin, *Overcoming Poletown* at 1009-10, 1021-22.

do profit-making enterprises. These facts further exacerbate their vulnerability. Economic development takings may also come at the expense of historic preservation if older historic buildings are located in areas targeted for condemnation.[120]

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.[121] 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 prevent a future county commission . . . from reclaiming that property through eminent domain."[122]

The risk to environmental conservation on private land is significant in no small part because of 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 them from development or overuse.[123] As both the demand for environmental conservation and development pressures on environmentally sensitive lands have increased, so has this type of land conservation.[124] The number of land trusts in the United States rose from under 60 in 1950 to over 1,200 in 2000.[125] In 2004, the Land Trust Alliance reported that there were some 1,500 local and regional land trusts around the country.[126] This growth in land trust activity has been fueled by increased demand for environmental conservation and legal developments that facilitate and encourage the purchase of conservation easements.[127]

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

---

[120] *See* Berliner, *supra* note __ 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 (historic building to be condemned as part of downtown eminent domain plan); Christine Pelisek, *Blight Makes Right?*, L.A. WEEKLY, July 1, 2005 (eminent domain threatened against several historic businesses).

[121] Land Trust Alliance, Land Trust Response Questionnaire, Survey of land trusts conducted from December 2, 2004 – January 14, 2005, *available at* http://www.lta.org/sp/survey_results.htm.

[122] 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 park from development).

[123] Dominic 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 150–52 (Barbara Rushmore et al. eds. 1982)); *See also* RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA (2003).

[124] Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 453 (2002) ("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.").

[125] Parker, *supra* note ___ 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).

[126] *See* Land Trust Alliance, National Land Trust Census, *available at* http://www.lta.org/census/.

[127] Parker, *supra* note , at 489–96.

acres through conservation easements and other voluntary agreements.[128] From 1998 to 2003, the amount of land protected by conservation easements more than tripled.[129] These figures exclude lands protected by national conservation organizations, such as Ducks Unlimited and The Nature Conservancy.[130] 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.[131]

To fully measure the extent of private land conservation, and identify all those lands potentially threatened by eminent domain, one would also have to account for the remaining privately owned, currently undeveloped land.[132] For example, nearly 60 percent of America's forests are privately owned,[133] and much of this land is managed, at least in part, for conservation purposes.[134] Private land conservation is increasing and is also essential for many environmental goals, notably wildlife conservation. Much wildlife habitat is owned by farmers and ranchers and used for agricultural production.[135] Over three-fourths of those species currently listed as threatened or endangered under the Endangered Species Act rely upon private land for some or all of their habitat.[136] As John Turner, President of the Conservation Fund, has observed, "No strategy to preserve the nation's overall biodiversity can hope to succeed without the willing participation of private landowners."[137]

Not only is there much biodiversity on private land, it is also prevalent in many 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 disruption and modification is most prevalent. In fact, the number of endangered species tends to be greatest near human development and other

---

[128] *See* Land Trust Alliance, National Land Trust Census, *available at* http://www.lta.org/census/. An additional 2.8 million acres were protected by transferring the land to government entities or protected through ownership or a conservation easement. *Id.*

[129] *Id.*

[130] Parker, *supra* note, 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 13 and 4.7 million acres conserved by national and local organizations respectively).

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

[132] *See, e.g.*, MIKE MCQUEEN & ED MCMAHON, LAND CONSERVATION FINANCING 103 (2003)("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."); McLaughlin, *supra* note ___, 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.").

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

[134] 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).

[135] *See* J. BISHOP GREWELL & CLAY 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.").

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

[137] 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 116 (Jason Shogren ed. 1998).

activities.[138] Approximately 60 percent of imperiled plants and animals[139] are found in metropolitan areas, and 31 percent of these are found *exclusively* in such locations.[140] Indeed, there is increasing recognition of the importance of biodiversity and ecological resources in and around urban areas.[141]

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.[142] 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 space may be particularly attractive to developers. Such land will often be less expensive than other property, particularly areas that are already developed. Property set aside for agricultural use may also be assessed at a lower value for tax purposes.[143] Thus, taking such land for economic development purposes could provide a greater boost to local tax revenues than other available parcels.

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 facilitate larger development projects on such land. 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.[144] 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.[145] 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.[146] 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."[147] The same can be said of much privately owned, undeveloped land.

---

[138] V. C. Radeloff, et al., *The Wildland-Urban Interface in the United States*, 15 ECOLOGICAL APPLICATIONS 799, 803 (2005)(" the number of endangered species tends to be higher where human activities are more prevalent").
[139] NatureServe identifies approximately 6,400 U.S. Species as imperiled or critically threatened; the US Government's list of threatened or endangered species numbers 1,265. Reid Ewing et al., *Endangered by Sprawl: How Runaway Development Threatens America's Wildlife*, at 13 (National Wildlife Federation, Smart Growth America and NatureServe, 2005)
[140] *Id*. at 13.
[141] *See* Alexander Stille, *Wild Cities: It's a Jungle Out There*, N.Y. TIMES, Nov. 23, 2002, at B6.
[142] *See* Land Trust Alliance, 2003 National Land Trust Census Tables, *available at* http://www.lta.org/census/census_tables.htm.
[143] In Pennsylvania, for example, agricultural land may be assessed for agricultural purposes rather than at market value.
[144] *See* "Much Ado About Kelo: Eminent Domain and Farmland Protection," American Farmland Trust E-News, December 2005, *available at* http://www.farmlandinfo.org/documents/30393/Kelo.pdf.
[145] *See*23 U.S.C. § 138.
[146] 401 U.S. 402 (1971).
[147] *Id.* at 412.

Conservation easements do not in themselves protect lands from eminent domain. To the contrary, easements can be extinguished by the use of eminent domain.[148] In some jurisdictions, however, there are explicit limitations on the use of eminent domain to take farmland or other properties covered by conservation easements.[149] Where such statutory protections do not exist, the existence of a conservation easement may actually make some properties more vulnerable to economic development takings.[150] A conservation easement may lower the assessed value of a given land parcel, reducing the local tax base and making the parcel less expensive to acquire.[151] At the same time, the 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 to sell 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 be 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."[152] In some communities with substantial amounts of conservation activity, opposition to easements appears to be increasing.[153] Some communities dependent on resource extraction are also hostile to land trust activity.[154]

The proliferation of land trusts and conservation easements is a relatively recent phenomenon. While the first private land trust was established in 1891,[155] state statutes authorizing conservation easements did not become common until almost a century later.[156]

---

[148] Rebekah Alan Pugh, *Conservation Easements as an Effective Growth Management Technique*, 35 ENVTL. L. REP. 10556, 10564 (2005) (conservation easements are extinguished by eminent domain); American Farmland Trust, *Fact Sheet: Agricultural Conservation Easements*, November 2001 (same); Draper, *supra* note __, at 266 ("Eminent domain is always a threat to the protective capacity of a conservation easement"). 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).

[149] *See* "Much Ado About Kelo," *supra* note __ (noting 12 states have laws limiting the use of eminent domain against farmlands enrolled in agricultural districts).

[150] *See id.*

[151] *Id.* ("easements could make land more vulnerable by reducing its value"); American Farmland Trust, *Fact Sheet: Agricultural Conservation Easements*, November 2001 (same).

[152] 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.

[153] *See, e.g.*, Massiel Ladron de Guevara, *Colton Moves to Ease Fly-Habitat Constraints*, PRESS-ENTERPRISE, Jan 18,2006, at B2.

[154] 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 (characterizing The Nature Conservancy as a "runaway predator" and a "monster").

[155] Federico Cheever & Nancy A. McLaughln, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10224 (2004) (citing the Trustees of Reservations, founded by Charles Norton Eliot in 1891).

[156] The National conference of Commissioners on Uniform State Laws did not draft the Uniform Conservation Easement Act (UCEA) until 1981. Rebekah Helen Pugh, *conservation Easements as an Effective Growth*

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, the pressure to develop the surrounding countryside will only increase.[157] 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 Experience of Religious Institutions.

The vulnerability of property owned by nonprofits to economic development takings is best documented in the case of religious institutions such as churches. Sixteen churches were destroyed as a result of the notorious 1981 *Poletown* condemnations, which condemned a Detroit neighborhood for the purpose of building a new General Motors factory.[158] More recent examples of economic development takings targeting church property include the attempted condemnation of a church in order to build a Costco in Cypress, California,[159] condemnation of an Illinois mosque for the purpose of building private rental housing,[160] and the taking of an Indiana church for "redevelopment" by new private owners.[161] 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."[162] Similarly, the Hawaii Supreme Court recently upheld the condemnation of church property in Honolulu for the purpose of benefiting private condominium owners.[163] 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.[164] As the Becket Fund amicus brief in *Kelo* argues:

> 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

---

Management Technique, 35 ENVTL L. REP. 10556, 10559 (2005); *see also id.* at 10558 (noting conservation easements have become popular "since the 1980s").

[157] *See generally* American Farmland Trust, *Farming on the Edge: Sprawling Development Threatens America's Best Farmland* (2002), *available at* http://www.farmland.org/farmingontheedge/index.htm.

[158] ARMAND COHEN, POLETOWN, DETROIT: A CASE STUDY IN 'PUBLIC USE' AND REINDUSTRIALIZATION 4 (Lincoln Land Institute, 1982).

[159] Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1225-29 (C.D. Cal. 2002).

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

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

[162] Ralph Blumenthal, *Humble Church is at Center of Debate on Eminent Domain*, N.Y. Times, Jan. 25, 2006.

[163] See.e.g., City and County of Honolulu v. Sherman, 129 P.3d 542 (2006) (condemnation of church for the purpose of building privately owned condominiums).

[164] Kelo v. City of New London, Amicus Br. of Becket Fund for Religious Liberty, 2004 WL 2787141 at 8 n.20. The list of cases cited here and in the Becket Fund brief probably understates the true extent of the phenomenon because it is based on published decisions and press reports. Many condemnation actions do not result in a published decision and are not covered by the press.

properties, the non-profit, tax-exempt property of religious institutions will by definition always qualify and always be vulnerable to seizure.[165]

The Becket Fund's point applies with equal, if not even greater, force to environmental nonprofits. They too generate less tax revenue than almost any "commercial or residential use" and they too will "always be vulnerable to seizure" on economic development grounds.[166] In many, if not most, instances, local and regional land trusts will also lack the political power that may sometimes protect churches with large congregations against the threat of eminent domain.[167] Whereas churches and other religious institutions often have local congregations to protect their interests, land trusts and are unlikely to have the same kind of political clout. 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.[168]

3. The Possibility of Circumvention.

One possible objection to our argument is that in most instances in which eminent domain is used to take undeveloped land, it may be for a project that would satisfy the requirements outlined by the Michigan Supreme Court in *Hathcock*. A ban on economic development takings can often be circumvented through expansive interpretations of "blight" or other legal maneuvers.[169] 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 "blighted" ecologically valuable desert should be considered "blighted."[170] The project, labeled a "poster child" for eminent domain abuse by the state's Attorney General, harmed local desert tortoise and Mojave Ground squirrel populations.[171] 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.[172] In jurisdictions that prohibit pure economic

---

[165] *Id.* at 11.
[166] Kelo v. City of New London, Amicus Br. of Becket Fund for Religious Liberty, 2004 WL 2787141 at 11.
[167] 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*, Mich. L. Rev. (forthcoming), at 12-21, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875412 (visited Mar. 10, 2006). However, this is likely to be true only of churches with substantial influence over local politics. cf. id., at 17-19 (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 "both majoritarian and minoritarian forces favored church preservation" id. at 18). Religious institutions affiliated with poor or politically weak denominations are unlikely to be equally successful.
[168] *See* Council on Environmental Quality, *supra* note __, at 387-94 (discussing the history of Hawk Mountain).
[169] *See infra* notes __, and accompanying text.
[170] *See* Paul Shigley, *Lawmakers Threaten to Diminish Eminent Domain Authority*, CALIF. PLANNING & DEVELOPMENT REPORT, Sept. 1, 2005; Jim Herron Zamora, *Lockyer Challenges Seizure of Land for Private Project*, SAN FRAN. CHRON., July 27, 2005; Robert McClure, *Displaced by Automobile Test Facility in California*, SEATTLE POST-INTELLIGENCER, May 3, 2005.
[171] Robert McClure, *Displace by Automobile Test Facility in California*, SEATTLE POST-INTELLIGENCER, May 3, 2005.
[172] Monte Basgall, *Seeing the Forest for the Trees*, DUKE RESEARCH, undated, *available at* http://www.dukeresearch.duke.edu/database/pagemaker.cgi?992633500. In order to prevent the use of eminent

development takings, there is pressure to generate blight designations that will pave the way for other uses of eminent domain.[173]

To be sure, a prohibition on economic development takings will not bar all environmentally harmful uses of eminent domain. Environmentally harmful takings that transfer land to government ownership would not be prohibited.[174] 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" that prevent blight designations from being applied to virtually any property.[175] A ban on economic development takings is almost certainly a necessary prerequisite to any judicial or legislative effort to limit the definition of blight, however. Property owners will have little incentive to challenge expansive definitions of blight and 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 nearly certain to have negative environmental effects. Not all states have expansive definitions of blight,[176] and a ban on the economic development rationale will have a larger impact in those that do not. 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.[177] It is also possible that some erroneous blight designations could be challenged successfully in court.[178] 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[179] - 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

---

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.*

[173] 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 encompasss approximately 90 percent of all the homesin the city (including the home of the then-mayor). **CITE.** *See also* Staley & Blair, *supra* note __, at 30.

[174] *See* § I.B.1, *infra* (explaining that a ban on economic development takings would not prohibit condemnations that transfer property to public ownership).

[175] Somin, *supra* note ____ at 89-91.

[176] *See* Luce, *supra* note ___, surveying legal definitions of blight in every state.

[177] For a more detailed discussion of such procedural limits on eminent domain and their limitations, see Somin, *supra* note ____ at 37-40. For arguments that procedural protections can have a major impact in limiting eminent domain abuse, see, e.g., Thomas M. Merrill, *The Misplaced Flight to Substance*, 19 PROBATE & PROPERTY 16, 18 (2005); David J. Barron & Gerald E. Frug, *Make Eminent Domain Fair for All*, BOSTON GLOBE, Aug. 12, 2005, at A14.

[178] *See, e.g.*, Sweetwater Valley Civic Ass'n v. City of National 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").

[179] See, e.g., Pappas, 76 P.3d at 13 (holding that "[e]conomic 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 an community occasionally experiences "downward trends in the business community" and "business failures."

would provide. But it can surely provide greater protection for environmental values than would exist in its absence.

4. Eminent Domain and Urban Sprawl.

Some environmental analysts and urban planners claim that eminent domain is a powerful tool that can be used to protect conservation lands and combat urban sprawl. Jeff Finkle of the International Economic Development Council 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."[180] 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.[181]

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. Many of the highways and transportation projects that have facilitated the geographic expansion of metropolitan areas and their suburbs were facilitated by condemnation. Today eminent domain is more often used to limit suburban development, but most such takings do not rely on the economic development rationale. As noted above, the limitations we propose do not prevent the use of eminent domain to preserve open space or address environmental contamination.[182] 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 is questionable that even the best intended projects will produce such results.[183]

One potential use of eminent domain that could limit urban sprawl would be to promote denser redevelopment. Denser urban development can produce significant environmental benefits by, among other things, reducing the footprint of human development on the countryside. Yet 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.[184] Recent research shows that open space within urban areas provide substantial public benefits, as reflected in local property values.[185] Using eminent domain to increase density, at the expense of such open space, would not benefit many communities.

---

[180] Quoted in Staley and Blair, *supra* note __, at 8.

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

[182] *See infra ___.*

[183] *See infra ___.*

[184] *See, e.g.*, Pat Beall, *Riviera Beach Eminent Domain Case Draws National Spotlight*, PALM BEACH POST, Dec. 11, 2005; Joyce Howard Price, *Florida City Considers Eminent Domain*, WASH. TIMES, Oct. 3, 2005.

[185] *See* Vicki Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values*, NYU, Law and Economics Research Paper No. 06-09, March 2006, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=889113.

Theoretically, increased population density in urban settings should reduce traffic congestion and air pollution.[186] In practice, however, the exact opposite occurs. As population density increases, so too do vehicle miles traveled and urban traffic congestion.[187] As a result, those areas with the highest population densities have the worst urban air pollution.[188] One reason for this is that increasing population density increases the number of vehicles on the road, even where mass transit is available. In addition, most vehicle emissions are higher when vehicles are traveling at lower speeds, as they are likely to do in urban traffic jams.[189] The point here is not to argue that dense redevelopment of city cores and inner-ring suburbs is, on net, environmentally harmful. Rather, the point is that dense urban redevelopment is not an unalloyed environmental good.[190]

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 may use eminent domain for economic development purposes, then it can be used for either good or ill. If cities and inner-ring suburbs are allowed to use eminent domain to facilitate denser development, outlying communities can use the same power to pave the way for greater suburban growth. The same power that 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.[191] 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 facilitate unsustainable economic development

---

[186] *See, e.g.*, Kim Krisberg, *Poor Air Quality, Pollution, Endanger Health of Children*, NATION'S HEALTH, Mar. 1, 2006.

[187] *See* Randall G. Holcombe, *The New Urbanism Versus the Market Process*, 17 REV. OF AUSTRIAN ECON. 285, 289 (2004); Wendell Cox, *Coping with Traffic Congestion*, *in* A GUIDE TO SMART GROWTH: SHATTERING MYTHS, PROVIDING SOLUTIONS (Jane S. Shaw & Ronald D. Utt eds. 2000), at 41-42.

[188] *See* Ken Green, *air Quality, Density, and Environmental Regulation*, *in* SMARTER GROWTH: MARKET-BASED STRATEGIES FOR LAND-USE PLANNING IN THE 21ST CENTURY (Randall G. Holcombe & Samuel R. Staley eds. 2001); Randal O'Toole, *ISTEA: A Poisonous Brew for American Cities*, CATO INSTITUTE POLICY ANALYSIS No. 287, Nov. 5, 1997; Heimlich & Anderson, *supra* note __, at 3 (noting air quality improvements from "decentralizing population and employment").

[189] *See* Cox, *supra* note __, at 45. This is true for emissions of carbon monoxide and volatile organic compounds at speeds lower than 55 miles per hour. Nitrogen oxide emissions, on the other hand, increase once average vehicle speeds rise above 20 miles per hour. *Id.* at 44.

[190] 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 or Providing Public Services*, 29 URB. STUD. (1992), at 292-93.

[191] *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, *supra* note __; WILLIAM T. BOGART, DON'T CALL IT SPRAWL (forthcoming); ROBERT BRUEGMANN, SPRAWL: A HISTORY (2005).

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. Other things equal, eminent domain reduces the costs of proceeding with a given development project for developers. 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 nonpoint-source water pollution and habitat loss.[192]

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. 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. Particularly in urban centers, redevelopment plans are the product of competing political and economic pressures, including the desires of powerful interest groups and enhancing 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.[193] 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.

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

Economic development projects rarely produce the economic and other gains 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 they created.[194] 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

---

[192] *See generally*, U.S. Environmental Protection Agency, "About Smart Growth," *available at* http://www.epa.gov/dced/about_sg.htm (describing environmental impacts of current development patterns).

[193] For a detailed discussion of the reasons, see Somin, supra note ____ at 8-23; Somin, *Overcoming* Poletown, at 1010-24.

[194] *See* Somin, *Overcoming* Poletown, *supra* note ___, at 1012-13, 1017-18 (discussing conflicting estimates of job losses resulting from *Poletown*); Nicole Gelinas, *They're Taking Away Your Property for* What*?*, CITY J. Autumn 2005.

nonprofit organizations may well have led to the loss of an equal or greater number of jobs.[195] When one factors in the $250 million in public funds expended on the project and the economic cost of destroying numerous churches, businesses, and schools, it is highly likely that the economic costs of the Poletown condemnations greatly outweighed any benefits.[196] The same is true of the *Kelo* condemnations, where some $80 billion in public funds has already been expended, with little if any prospect of commensurate gains.[197]

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.[198] This, combined with the refusal of courts in these states to take any account of the economic costs imposed by condemnation projects,[199] gives local governments and developers strong incentives to oversell condemnation projects 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.[200]

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."[201] 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?

Finally, the costs and benefits of economic development takings are extremely difficult for voters to determine, thereby ensuring that officials who approve inefficient development projects will rarely if ever be punished at the ballot box.[202] Even in cases where it is possible for voters 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

---

[195] Somin, *Overcoming* Poletown, *supra* note ___, at 1017-18.
[196] *Id.*
[197] *See* Kelo v. City of New London, 843 A.2d 500, 596-600 (Conn. 2004) (Zarella, J., dissenting), *aff'd* 125 S.Ct. 2655 (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, June 12, 2004, at C4 (discussing development project's lack of viability); *See* William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. Times, Nov. 21, 2005 (same).
[198] *See* Somin, *supra* note ____ at 10-15.
[199] *See id*. at 15-17 (describing failure to consider costs); Kelo, 843 A.2d. at 541 n.58 (refusing to consider costs imposed by condemnation "the balancing of the benefits and social costs of a particular project is uniquely a legislative function").
[200] 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);
[201] Brief Amicus Curiae of John Norquist, President, Congress for New Urbanism in Support of Petitioners, Kelo v. City of New London, at 3; *see also See* Nicole Gelinas, *They're Taking Away Your Property for* What*?*, CITY J. Autumn 2005. ("In a 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 las forever—and they retard natural growth around them.").
[202] Somin, *supra* note ___, at 19-21.

condemnation are likely to be out of office and, in any event, public attention will have moved on to other issues.[203]

Finally, the need to prevent "holdouts" – the standard rationale for economic development takings – can in most be cases be addressed without resort to eminent domain. If a private development project really will use property for purposes more valuable than those to which it is devoted at present, the developers can prevent holdouts from blocking the project by using secret purchases or precommitment strategies.[204] 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.[205]

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, whatever its other merits, less protective of property rights than that urged by the *Kelo* dissenters 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 if they are uncertain whether their investments will bear fruit.[206]

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 where property rights are poorly defined."[207] The security of property rights encourages owners to pursue the enhancement of their own subjective value preferences, including both commercial and non-commercial values.[208] Property rights enable

---

[203] *Id.*

[204] For detailed explanations of the reasons why this is true, see Somin, *supra* note ___ at 21-28; Kelly, *supra* note ____.

[205] *See* Somin, *supra* note ____at 23 (distinguishing strategic holdouts and sincere dissenters).

[206] *See* Samuel R. Staley & John P. Blair, *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis*, POL'Y STUDY 331 (Reason Pulbic Policy Institute, Feb,. 2005), at 2.

[207] 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 (Irving B. Harris Sch. Pub. Policy Studies, Working Paper No. 00.10, 2000), abstract available at http://www.harrisschool.uchicago.edu/wp/wp 00-10.html (finding that, across the board, greater government regulation of private activity correlates with higher levels of emissions and poorer public health indicators).

[208] *See* Louis De Alessi, *Gains from Private Property: The Empirical Evidence*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 108 (Terry L. Anderson & Fred S. McChesney eds. 2003); *see also* Harold Demsetz, *Toward a Theory of Property Rights* 57 AMER. ECON. REV. 347, 355 (1967); *id*. at 356 ("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.").

forest landowners to protect their investment in planting trees or enhancing forest growth.[209] They also protect the investments made by conservation groups in ecological protection and restoration. Conversely, the lack of property rights provides substantial incentives deplete valuable resources.[210] Where property rights are insecure, 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.[211] 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.[212] Such condemnations can increase the amount of development – such as by creating an industrial park, facilitating a given redevelopment project, and the like – 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 their negative environmental and other costs. Insofar as this is the case, using eminent domain for economic development squanders scarce economic 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.[213] Economic growth fuels technological advance and generates the resources

---

[209] *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).

[210] As Anthony Scott observes, "No 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 ovestatement to claim that "no one" will act in such a manner, the marginal effect should be indisputable.

[211] For the classic analysis, see Garrett Hardin, *The Tragedy of the Commons*, SCIENCE (1968).

[212] *See* § II.B.3 (explaining why the economic costs of development takings are likely to exceed the benefits); Nicole Gelinas, *They're Taking Away Your Property for* What*?*, CITY J. Autumn 2005. (citing New Haven, Connecticut, as an example of where redevelopment projects likely did more harm than good).

[213] *See* RICHARD L. STROUP, ECO-NOMICS: WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND THE ENVIRONMENT 13-14 (2003); Bruce Yandle et al., *The Environmental Kuznets Curve: A Review of Findings, Methods, and Policy Implications*, PERC RESEARCH STUDY 02-01 (April 2004) *available* at http://www.perc.org; *see also* 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."); Norton, *supra* note __, at 45 (noting that, insofar as environmental quality is viewed as a "good," "consumption" of environmental quality will increase as wealth increases); 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); 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 ENTVL. L. 705, 706 (1993) (noting that "the demand for improved environmental quality tends to rise with income.").

necessary to deploy new methods of meeting human needs efficiently and effectively.[214] Public support for environmental measures, both public and private, correlates with changes in personal income.[215] One consequence of this fact is that donors to environmental groups tend to have above average annual incomes.[216] Empirical evidence also suggests that wealthier communities are more likely to support governmental efforts to preserve open space, such as through bond issues and other local measures.[217] While the marginal effect of this phenomenon may be small in any given case, it 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 and 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 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.[218] Twenty-one states have already adopted post-Kelo reform laws.[219] Litigation over the constitutionality of economic development takings also continues in state courts.[220] These efforts are largely motivated by concerns about the equity and efficiency of eminent domain. 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. In addition, states should adopt measures to guard against the opportunistic use of "blight" designations and other efforts to circumvent limits on

---

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

[215] 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 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 generally true for charity in general. *See* RICHARD B. MCKENZIE, WHAT WENT RIGHT IN THE 1980s, 70 (1994) (noting that "higher incomes lead to increased giving").

[216] Stroup & Meiners, *supra* note ___, at (citing 1992 reader survey for *Sierra* magazine finding that members of the Sierra Club have an average household income more than double the U.S. average.).

[217] *See* Matthew J. Kotchen and Shawn M. Powers, *Explaining the Appearance and Success of Voter Referenda for Open-Space Conservation.* __ J. ENVTL. ECON. & MGMT. __ (forthcoming), *available at* http://www2.bren.ucsb.edu/~kotchen/links/ospace.pdf.

[218] *See* Sandefur, *supra* note __. For a detailed list of post-Kelo reforms adopted so far, see Castle Coalition, *Enacted Legislation*, available at http://www.castlecoalition.org/legislation/passed/index.html (visited July 3, 2006).

[219] Figure calculated from list at Castle Coalition, supra note 215. Unfortunately, most of the laws adopted so far are likely to be ineffective. See Somin, supra note ___ at 65-84; Sandefur, supra note _____.

[220] See, e.g., Board of County Com'rs of Muskogee County v. Lowery, 2006 WL 1233934 at *4-7 (Okla. May 9, 2006) (post-Kelo decision banning economic development takings under state constitutional law).

eminent domain abuse. A prohibition on economic development takings can only protect undeveloped lands from eminent domain if it is meaningfully enforced.

During the debate over the *Kelo*, few environmental advocates voiced concerns about the threat posed by economic development takings, and some actually 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.