

THE CONTROVERSY OVER ENERGY TAKINGS: A TALE OF PIPELINES AND EMINENT DOMAIN

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INTRODUCTION

Pipelines are certainly in the news. The prolonged dispute, and accompanying litigation, over the proposed Keystone XL oil pipeline from Canada is only the most visible tip of the iceberg. In New York in May of 2019 Governor Andrew Cuomo rejected a project for a natural gas pipeline linking New York City with shale gas fields in Pennsylvania. Nor is the controversy confined to the United States, as both Canada and Mexico have experienced sharp conflicts over pipeline construction.¹

It seems apparent that much of the opposition to pipelines is grounded on broad environmental arguments and not the niceties of eminent domain law.² The fundamental goal of opponents is to curtail reliance on fossil fuels by hampering the transportation of oil and natural gas to markets.³ Even the replacement of existing pipelines prone to corrosion has aroused political opposition. I recognize that

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1. Robert Whelan, *Legal Fight Stalls Mexican Gas Pipeline*, WALL ST. J., Aug. 20, 2019, at A16; Paul Vieira, *Canada to Proceed with Controversial Pipeline Expansion*, WALL ST. J., June 19, 2019, at A9; Paul Viera, *Canadian Rail Blockages Snarl Supply Chains*, WALL ST. J., Feb. 21, 2020 (protestors seeking to prevent construction of natural gas pipeline in British Columbia temporarily blocked railroad lines). For an analysis of the exercise of eminent domain in various nations, see EMINENT DOMAIN: A COMPARATIVE PERSPECTIVE (Iljoong Kim, Hojun Le & Ilya Somin eds., 2017).

2. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 851 (Iowa 2019), *cert. denied*, 140 S. Ct. 1243 (Mem) (2020) (“We recognize that a serious and warranted concern about climate change underlies some of the opposition to the Dakota Access pipeline.”).

3. Alexandra B. Klass, *Eminent Domain Law as Climate Policy*, 2020 WIS. L. REV. (forthcoming 2020) [hereinafter Klass, *Eminent Domain Law as Climate Policy*] (“[T]he reason environmental groups have focused time, money, and effort on these challenges is that addressing climate change requires preventing the construction of the new fossil fuel infrastructure that will ‘lock up’ continued use of climate warming energy resources for many decades.”).

challenges to the exercise of eminent domain for the purposes of pipeline acquisition is only one front in the battle against fossil fuel energy. Although the issues posed by pipeline construction are multifaceted,⁴ I will confine my remarks to the question of whether energy takings by non-governmental entities satisfy the “public use” requirement in state condemnation statutes or as a constitutional norm.

I. TAKINGS BY PRIVATE PARTIES

In assessing the acquisition of land by pipeline companies, it is important to bear in mind that the taking of property by private parties is hardly novel. Indeed, lawmakers delegated the power of eminent domain to private parties in the colonial era.⁵ The most conspicuous example of this was the widespread adoption of mill acts. During the eighteenth and early nineteenth centuries the harnessing of water-power was a crucial source of energy. Under the mill acts the proprietor of a grist mill was authorized, upon payment of compensation, to erect a dam across a creek and flood a portion of the land of a neighboring riparian owner to create a mill pond. As treatise writer John Lewis explained in 1888:

Prior to the Revolution, and, consequently, long before the courts of this country were called upon to adjudicate upon the question of public use, it had been the practice to permit the erection of dams for water power and to provide for a statutory adjustment of the damages to property overflowed. After the Revolution and the adoption of State constitutions containing the eminent domain provision in question, this practice continued, no question being made for some time as to the constitutionality of such proceedings.⁶

This time-honored practice went unchallenged for decades, and courts were later disinclined to question it. Moreover, the charges of

4. See, for example, *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, 2020 WL 3146692 (S. Ct. 2020) (Thomas, J.) (upholding grant of special use permit by the Forest Service for an easement to construct natural gas pipeline passing under the Appalachian Trail).

5. James W. Ely, Jr., “*That Due Satisfaction May Be Made: The Fifth Amendment and the Origins of the Compensation Principle*,” 36 AM. J. LEGAL HIST. 1, 12–13 (1992).

6. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 245 (1888).

grist mills were regulated and the mills were obligated to serve all customers.⁷ Thus, grist mills functioned as a kind of early public utility.⁸ With these considerations in mind, Lewis had no difficulty in affirming that “[s]aw-mills and grist-mills, carding and fulling-mills, cotton gins and other mills, which are regulated by law and obliged to serve the public, are undoubtedly a public use.”⁹

Yet eminent domain is among the most intrusive powers of government because it compels owners to relinquish their property. Following the Revolution, therefore, constitutional provisions expressly limited the exercise of eminent domain in two respects. The Fifth Amendment to the Constitution, adopted in 1791, provided in part: “nor shall private property be taken for public use, without just compensation.”¹⁰ State constitutions generally adopted similar provisions. In *Barron v. Baltimore* (1833), the Supreme Court determined that the Bill of Rights, including the Fifth Amendment, restricted the federal government but did not apply to the states.¹¹ The upshot was that state courts took the lead in establishing the scope of the “public use” restriction on eminent domain under state constitutions.

Against this background, courts experienced difficulty in dealing with mills that generated waterpower for manufacturing. Some upheld the acquisition of private property to generate power for manufacturing purposes, although the judicial reasoning varied and gave weight to long-established usage.¹² Others insisted that such

7. HENRY W. FARNHAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860 94–100 (1938).

8. *Harding v. Goodlett*, 11 Tenn. 40, 52–53 (1832) (affirming the exercise of eminent domain to acquire land for a grist mill, and observing: “It is emphatically a public use for which it is required, and to which it is appropriated. The grist-mill is a public mill. The miller is a public servant.”); *Crenshaw & Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 266 (1828) (Green, J., concurring) (“Mills have always been treated as public establishments, subject to public controls in various ways; and the building of them has been encouraged by condemning the property of others, for the use of one wishing to build, and allowing him to overflow the lands of others, upon making just compensation.”); see also RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 172 (1985).

9. LEWIS, *supra* note 6, at 253.

10. U.S. CONST. amend. V.

11. *Barron v. Baltimore*, 32 U.S. 243, 250–51 (1833).

12. LEWIS, *supra* note 6, at 245–55 (surveying judicial decisions considering constitutionality of mill acts in connection with generating waterpower for manufacturing purposes). In *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 20–21 (1885), the Supreme Court upheld a statute authorizing the acquisition of mills to encourage manufacturing but evaded addressing the “public use” requirement.

takings did not constitute public use within the meaning of the state constitution.¹³

Any controversy over mills, however, was soon dwarfed by the onset of the transportation revolution.¹⁴ The widespread desire to improve transportation facilities in the late eighteenth and early nineteenth centuries triggered frequent delegation of eminent domain power to privately owned corporations. "A novel development of nineteenth-century public policy," James Willard Hurst observed, "was the delegation of the power of eminent domain to private corporations, generally in the field of communications or water power development."¹⁵ As early as the 1780s, states created corporations to construct canals and improve river navigation, granting such corporations the authority to take private property.¹⁶ Frequently these corporations were empowered to acquire both land and needed building materials, upon payment of compensation. Viewing canals as water highways, courts readily upheld the exercise of eminent domain by private canal companies.¹⁷ Similarly, courts raised no objection to grants of eminent domain power to private turnpike companies.¹⁸

Yet it was the delegation of eminent domain power to railroads that forced courts to give systematic attention to what amounted to "public use" in the context of large-scale government-sponsored projects carried out by private enterprise. Originally granted in individual railroad charters, the power of eminent domain to acquire land for the construction of rail lines was commonly conferred on all carriers by general railroad laws.¹⁹ As with canals, this authority was sometimes

13. *E.g.*, *Sadler v. Langham*, 34 Ala. 311, 333–34 (1859); *Ryerson v. Brown*, 35 Mich. 333, 338–39 (1877) (Cooley, J.); *Harding v. Goodlett*, 11 Tenn. 40, 52–54 (1832).

14. See GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION 1815–1860* (1951). See also DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848* 525–69 (2007) (detailing the impact of the transportation revolution on American society).

15. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 63 (1956).

16. Ely, *supra* note 5, at 14–15.

17. See, *e.g.*, *Tide Water Canal Co. v. Archer*, 9 G & J 479, 482–83 (Md. 1839) (affirming exercise of eminent domain by canal company); *In re Townsend*, 39 N.Y. 171, 174–75 (1868) (sustaining use of eminent domain to erect a dam and create a reservoir to feed canal); see also LEWIS, *supra* note 6, at 235 ("Canals to be used as highways by water are a public use.").

18. *Whiteman v. Wilmington & Susquehanna R.R. Co.*, 2 Del. (1. Harr.) 514, 522 (1839) (declaring that roads constructed by private turnpike companies were public roads even if tolls were charged).

19. JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 35–36 (2001) (discussing delegation of eminent domain power to railroad companies).

extended to encompass the acquisition of timber, stone, or gravel from adjacent lands.²⁰ This set the stage for a potential collision between two classes of property owners—entrepreneurs and landowners. Both federal and state courts regularly sustained laws empowering railroads to take private property and in so doing determined that taking of property for railroad purposes constituted “public use.”²¹ They reasoned that railroad companies were carrying out a public use by improving transportation. They also stressed that railroads, as common carriers, had public responsibilities and a legal duty to serve all comers. Moreover, railroads had to construct their lines on feasible routes and could not readily detour around a parcel whose owner declined to sell. Hurst explained that the power of eminent domain “was particularly essential to completing the purchase of a right of way without hindrance or blackmail by individual property owners.”²² Courts therefore expressed concern that a single recalcitrant landowner could block desired public improvements.²³ Some

20. See, e.g., *An Act to Incorporate the Florida, Atlantic, and Gulf Central Rail Road Company*, 1850 Fla. Laws 37 (“such timber, stone, or any materials”); *An Act Regulating Railroad Companies*, 1849 Pa. Laws 79 (land and “any stone, gravel, clay, sand, earth, wood, or other suitable material”).

21. See, e.g., *Whiteman*, 2 Del. (1. Harr.) at 521–23; *Stewart v. Bd. of Supervisors*, 30 Iowa 9, 20–21 (1870) (“The right of the legislature to exercise the power of eminent domain in behalf of railroads has always been upheld by the courts on the grounds that the *use was a public one*. Indeed this is elementary and unquestionable.”); *Swan v. Williams*, 2 Mich. 427 (1852); *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451, 469–70 (1837); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 73–76 (N.Y. Ch. 1831).

22. HURST, *supra* note 15, at 9.

23. *People ex rel. Detroit & Howell R.R. Co. v. Twp. Bd. of Salem*, 20 Mich. 452, 482 (1870) (Cooley, J.) (“Eminent Domain only recognizes and enforces the superior right of the community against the selfishness of individuals in a similar way. . . . A railroad cannot go around the farm of every unwilling person, and the business of transporting persons and property for long distances by rail, which has been found so essential to the general enjoyment and welfare could never have existed if it were in the power of any unwilling person to stop the road at his boundary, or to demand unreasonable terms as a condition of passing him.”); see also *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (Holmes, J.) (sustaining exercise of eminent domain to obtain right of way for aerial bucket line, and commenting: “In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railroads in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong.”); *Newcomb v. Smith*, 2 Pin. 131, 140 (Wis. 1849) (upholding validity of mill act for generating waterpower, and observing: “No tyranny has been found more odious in the older states than is sometimes exhibited in the pernicious obstinacy of one man, who pursues his common-law right of resisting the occupation of his land, perhaps of some small and insignificant but indispensable portion, for the purpose of a mill.”).

state legislatures facilitated this use of eminent domain by passing laws declaring that property taken by railroads was deemed to be for public use.²⁴ Further, courts occasionally muddled their analysis by conflating “public use” with the more expansive notions of “public interest” or “public purpose.”²⁵ Railroads continue to the present to exercise the power of eminent domain.²⁶

By the mid-nineteenth century, courts regarded the delegation of eminent domain power to corporations to be a settled matter. In 1854, the Supreme Court of Wisconsin observed: “The time has gone by, when it is proper to discuss or question, judicially, the power of the legislature to exercise the right of eminent domain resting in the sovereignty of the state, by delegation to incorporated companies.”²⁷ Likewise, the New York Court of Appeals in 1868 sweepingly concluded:

It is far too late in the history of legislation and of adjudication, in this country and in this State, to claim that private property may not be taken for what are in common parlance called public improvements, such as railroads and canals, with their incidental and reasonable conveniences and appurtenances, notwithstanding the work is done by individuals or a corporation, who are to derive a pecuniary benefit therefrom, if the legislature deem it for the public interest.²⁸

These actions by lawmakers and judges clearly established a cardinal principal—that “public use” was not synonymous with public ownership. It was irrelevant that legislators sought to achieve “public

24. *E.g.*, An Act to Provide for the Incorporation of Railroad Companies, 1855 Mich. Pub. Acts 153; An Act to Authorize the Formation of Railroad Corporations, 1850 N.Y. Laws 211; *see also* Buffalo & N.Y.C. R.R. v. Brainard, 9 N.Y. 100, 110 (1853) (Legislature “may without doubt lawfully declare that all lands taken for the construction of their roads shall be deemed taken for public use.”).

25. *E.g.*, Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45, 73–76 (N.Y. Ch. 1831) (“But if the public interest can be in any way prompted by the taking of private property, it must rest in the wisdom of the Legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain”); *see also* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 55 (2015) (“The terms ‘public use’ and ‘public purpose’ were sometimes used interchangeably even in the nineteenth century.”).

26. *See* BNSF Ry. Co. v. Grohne, 2019 IL 180063 (Ill. App. Ct. 2019) (upholding exercise of eminent domain by railroad to acquire land for an intermodal facility and additional track), *perm. app. denied*, 135 N.E.3d 577 (Ill. 2019).

27. Pratt v. Brown, 3 Wis. 603, 610 (1854).

28. *In re Townsend*, 39 N.Y. 171, 173 (1868).

use” through a profit-seeking corporate body that charged for its services. The New York Court of Appeals explained that “there is no constitutional inhibition which restrains our legislature from exercising the right of eminent domain, and condemning land to the public use, and employing, as an instrument to carry the appropriation to the public use into effect, an individual or a copartnership of individuals”²⁹ Once the element of “public use” was established, courts took the position that the legislature had wide discretion to decide what instrumentalities should be employed to effectuate such use and could select either state agencies or private corporations to take private property.³⁰

Indeed, it is important to bear in mind that throughout the nineteenth century eminent domain was more frequently employed by private enterprise than by government at all levels. Not until 1875 did the Supreme Court establish that the federal government had eminent domain power as an inherent aspect of sovereignty.³¹ State governments were hobbled by tight budgets and the inability to raise substantial revenue through taxation. “More often than not,” Lawrence M. Friedman observed, “in the first half of the nineteenth century it was not the state itself that used the power.”³² This picture changed in the twentieth century as government undertook a broad range of activities. Eminent domain was increasingly used by government itself for more complex projects. For example, there was a sharp increase in urban renewal programs to eliminate blighted conditions, schemes that necessitated the acquisition of large amounts of land.³³

29. *Id.* at 175.

30. *Newcomb v. Smith*, 2 Pin. 131, 135–36 (Wis. 1849) (“Modern states, however, have found it more convenient to devolve upon private individuals and corporate bodies the exercise of this useful if not indispensable power.”).

31. In *Kohl v. United States*, 91 U.S. 367 (1876), the Supreme Court sustained the exercise of eminent domain to acquire land for a post office, noted that such power had not been previously utilized by the federal government, and observed that historically the states had condemned land for use by the federal government. See William Baude, *Rethinking the Eminent Domain Power*, 122 YALE L.J. 1738 (2013) (maintaining that the federal government was not originally understood to have any general eminent domain power and that historically the federal government relied on the states to condemn needed land).

32. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 124 (3d ed. 2005).

33. Wendell E. Pritchett, *The ‘Public Menace of Private Blight’: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 31 (2003) (“The use of eminent domain was not new to post-war America, but the urban renewal scheme was nonetheless novel, both in form and scope.”). See generally Steven J. Eagle, *Does Blight Really Justify*

To be sure, there were skeptical voices questioning whether private railroad companies were in fact effectuating a “public use.” Prominent among them was Thomas M. Cooley, a leading jurist and treatise writer. Cooley advocated a strict reading of “public use” to protect private property, and rejected any notion that a legislative determination of “public use” was conclusive on the courts.³⁴ Accordingly, Cooley, on the Michigan Supreme Court, struck down the exercise of eminent domain by a private party to erect a mill for the purpose of generating waterpower for manufacturing.³⁵ He grappled at length with the delegation of eminent domain to railroads, asserting that the conferral of such authority was made “under the guise of a convenient fiction, which treats a corporation managing its own property for its own profit, as merely a public convenience and agency.”³⁶ But Cooley also acknowledged that railroads might be a special situation, given public supervision and common carrier duties.

This record of utilizing eminent domain to promote transportation and commerce readily dovetailed with the nineteenth-century emphasis on the productive potential of property. “We were concerned with protecting private property,” James Willard Hurst perceptively observed, “chiefly for what it could do.”³⁷ Protection of a passive rentier class was never the primary goal. Instead, as Hurst famously remarked: “Dynamic rather than static property, property in motion or at risk rather than property secure and at rest, engaged our principal interest.”³⁸ In this light eminent domain was seen as a vehicle to bring about economic growth.

II. EARLY HISTORY OF ENERGY TAKINGS

Like other transportation companies, pipeline operators generally sought to secure easements in a corridor rather than fee simple title. It bears emphasis that pipeline companies are often able to obtain needed easements through voluntary transactions with landowners.³⁹

Condemnation?, 39 URB. LAW. 833 (2007) (questioning whether the elimination of blight constitutes a “public use” justifying the exercise of eminent domain).

34. James W. Ely, Jr., *Thomas Cooley, “Public Use,” and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845, 846–49 (2004).

35. *Ryerson v. Brown*, 35 Mich. 333, 338–41 (1877).

36. *People ex rel. Detroit & Howell R.R. Co. v. Twp. Bd. of Salem*, 20 Mich. 452, 480 (1870).

37. HURST, *supra* note 15, at 24.

38. *Id.*

39. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 839 (Iowa 2019), *cert. denied*, 140 S.

Nonetheless, the potential to invoke eminent domain would certainly be a background factor in such negotiations.

Building upon the experience with highways, canals, and railroads, the use of eminent domain for energy purposes has a long history. States started chartering pipeline companies to transport oil during the 1860s, and despite railroad opposition, soon conferred eminent domain power upon such enterprises.⁴⁰ Courts compared oil pipelines to other modes of transportation and sustained such grants of eminent domain.⁴¹ In 1888, Lewis easily concluded that “lines of tubing for the conveyance of petroleum” constituted a “public use” for “general use and subject to public regulation.”⁴² By the early twentieth century several states had enacted laws placing common carrier obligations on oil pipelines.⁴³ Following suit, Congress in the Hepburn Act of 1906 declared interstate oil pipelines to be common carriers and placed such enterprises under the supervision of the Interstate Commerce Commission.⁴⁴ During World War II, Congress granted federal eminent domain authority for oil pipelines if deemed necessary for national defense. When this measure expired, pipelines companies again needed to rely of a patchwork of state laws in order to exercise eminent domain power. States have different permitting requirements and different rules governing the exercise of eminent domain. Moreover, a pipeline company must secure permits from each state through which the line passes.⁴⁵

The history of natural gas pipelines has followed a somewhat different path. Natural gas operators, unlike oil producers who can ship by rail or water, are heavily dependent upon pipelines to transport

Ct. 1243 (Mem) (2020) (“It is noteworthy that most property owners along the route chose to make voluntary easement agreements with Dakota Access to allow the pipeline to go underneath their farmland.”).

40. ARTHUR MENZIES JOHNSON, *THE DEVELOPMENT OF AMERICAN PETROLEUM PIPELINES: A STUDY IN PRIVATE ENTERPRISE AND PUBLIC POLICY, 1862–1906* 114–22 (1956) (discussing enactment of an 1883 Pennsylvania law granting statewide eminent domain authority to oil pipeline companies); PAUL H. GIDDENS, *THE BIRTH OF THE OIL INDUSTRY* 141–49 (1938); Alexandra B. Klass & Daniel Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 955–57 (2015).

41. *W. Va. Transp. Co. v. Volcanic Oil & Coal Co.*, 5 W. Va. 382 (1872).

42. LEWIS, *supra* note 6, at 241–42.

43. *E.g.*, 1905 Kan. Sess. Laws 526, at § 1; N.Y. Laws 1136, at § 50; 1872 Ohio Laws 194; 1890 1891 W. Va. Acts 337.

44. JOHNSON, *supra* note 40, at 219–42.

45. James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport*, 80 OHIO ST. L.J. 263, 280–81 (2019).

their product. Since the 1870s some states empowered such pipeline companies to acquire property by eminent domain. In 1886, the Supreme Court of Pennsylvania remarked “It is a curious objection to set up against [the act conferring eminent domain power on natural gas companies], in light of the present consumption of natural gas, that its use is not a public one.”⁴⁶ The court added that “the piping of it is necessary to its use, the means so used for its transportation must be of prime importance to the public and directly affect its welfare.”⁴⁷ Congress did not regulate natural gas pipelines in the Hepburn Act nor impose common carrier status on them. In the Natural Gas Act of 1938, however, Congress declared that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest” and that federal regulation “in matters related to the transportation of natural gas and the sale thereof in interstate commerce and foreign commerce is necessary in the public interest.”⁴⁸ When some states, influenced by energy rivals such as the coal and railroad industries, blocked the expansion of natural gas pipelines following World War II, Congress amended the Natural Gas Act in 1947 to establish federal eminent domain authority for interstate natural gas pipelines holding “a certificate of public convenience and necessity” from the Federal Power Commission.⁴⁹ A natural gas pipeline company must obtain this certificate before it can build a new pipeline. The result was an unusual division of eminent domain authority with respect to pipelines. In contrast to oil pipelines, the taking of property by natural gas pipelines is governed by federal—not state—law.⁵⁰

For decades after World War II, the acquisition of land for pipelines was not particularly controversial and few doubted that pipelines constituted “public use.” For example, federal courts regularly sustained the award of natural gas pipeline easements pursuant to

46. *Johnston’s Appeal*, 7 A. 167, 168 (Pa. 1886).

47. *Id.*

48. An Act to Regulate the Transportation and Sale of Natural Gas in Interstate Commerce, 15 U.S.C. § 717(a) (1938).

49. An Act to Amend the Natural Gas Act, Pub. L. 80-245, 61 Stat. 459 (1947) (codified as amended 15 U.S.C. § 717 (2019)). In 1977 the FPC was renamed the Federal Energy Regulatory Commission, with authority to supervise interstate natural gas pipelines. *See generally* the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified as amended at 15 U.S.C. §§ 3301–3432 (2019)).

50. *Klass & Meinhardt*, *supra* note 40, at 990–99.

the Natural Gas Act.⁵¹ This picture changed, however, in recent years, in part a result of new technologies such as hydraulic fracturing. As oil and gas production soared, so did a need for expansion of the pipeline infrastructure. This in turn triggered mounting environmental concerns, and landowner opposition, driven in part by pipeline spills. Consequently, matters once settled were reopened. Among other objections to pipelines, critics maintained that takings for pipelines were not for “public use” and therefore unconstitutional. In assessing these challenges, it is useful to review the diminished place of “public use” in contemporary takings jurisprudence.

III. EROSION OF “PUBLIC USE” NORM

Although there was some variation among jurisdictions in the nineteenth century, most state courts adhered to the view that eminent domain was limited to acquisitions by the government or private entities under a legal obligation to serve the public.⁵² The Supreme Judicial Court of Maine articulated the prevailing view:

Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well defined rights to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad and the like. But when it is so appropriated that the public have no rights to its use secured, it is difficult to perceive how such appropriation can be denominated a public use.⁵³

Starting in the late nineteenth century, however, both state and federal courts began to adopt a broader reading of the power to take private property. The evolving nature of “public use” was expressed by the Supreme Judicial Court of Massachusetts in 1899:

51. JON W. BRUCE & JAMES W. ELY JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 6:6 at 448 (rev. ed. Spring 2020); *see also* Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, 947 F.3d 1362, 1364 (11th Cir. 2020) (“The federal Natural Gas Act . . . allows natural gas companies to acquire through eminent domain private property on which to construct and operate natural gas pipelines.”).

52. SOMIN, *supra* note 25, at 35–73; James W. Ely, Jr., “The Sacredness of Private Property”: *State Constitutional Law and the Protection of Economic Rights Before the Civil War*, 9 N.Y.U. J.L. & LIBERTY 620, 636–42 (2015).

53. *Jordan v. Woodward*, 40 Me. 317, 324 (1855).

The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement.⁵⁴

As judicial review of the exercise of eminent domain became increasingly feeble, the significance of the “public use” restraint steadily declined.⁵⁵

The Progressive movement of the early twentieth century laid the intellectual groundwork for a jurisprudence that substantially stripped property of constitutional protection.⁵⁶ The political triumph of the New Deal in the 1930s brought this trend to fruition, inaugurating a profound shift in the constitutional protection afforded private property. New Deal constitutionalism distinguished between the rights of property owners and other personal liberties. Henceforth private property received a greatly reduced level of constitutional protection. Since the new constitutional orthodoxy strengthened governmental authority over private property, a shriveled “public use” clause was just one manifestation of the larger jurisprudential change. Unsurprisingly, in 1949 one commentator insisted that the “public use” restraint on eminent domain was virtually dead.⁵⁷

As if to underscore that point, in a line of subsequent decisions the Supreme Court virtually eviscerated the “public use” norm of the Fifth Amendment. At issue in *Berman v. Parker* (1954) was the taking of a non-blighted property within an urban redevelopment area for transfer to a private agency as part of an urban renewal plan.⁵⁸ Writing for the Court, Justice William O. Douglas sustained the project

54. *Att’y Gen. v. Williams*, 55 N.E. 77, 78 (Mass. 1899) (upholding statute limiting height of building around public park upon payment of compensation to affected landowners).

55. Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204–25 (1978).

56. James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL’Y 255 (2012).

57. Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949); see also Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 626–33 (1940) (tracing the decline of the strict view of “public use” and commenting: “Under the present judicial technique the requirement of public use is still in the Constitution, but as it relates to underlying purpose rather than intended land use, it is not a part of the law of eminent domain, and will become of minor importance in eminent domain cases.”).

58. *Berman v. Parker*, 348 U.S. 26 (1954).

and likened the eminent domain power to the police power. With regard to the police power, he maintained that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”⁵⁹ Douglas added: “This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.”⁶⁰

The judicial endorsement of increasingly aggressive exercises of eminent domain was affirmed in subsequent Supreme Court decisions. In *Hawaii Housing Authority v. Midkiff* (1984), for example, the Justices sustained a land redistribution scheme that entailed the transfer of fee simple title from certain landlords to tenants in order to overcome a perceived problem of land oligopoly in Hawaii.⁶¹ Highly deferential to legislative determination of “public use,” Justice Sandra Day O’Connor, speaking for a unanimous bench, declared that the Court would approve any use of eminent domain “rationally related to a conceivable public purpose.”⁶² Almost any taking of property would satisfy such an open-ended standard.

This trend culminated in the controversial decision of *Kelo v. City of New London* (2005).⁶³ In *Kelo*, the Court considered a redevelopment plan designed to revitalize economically distressed areas in New London, Connecticut. Some residential owners challenged the taking of their property pursuant to this plan as a violation of the “public use” restraint in the Fifth Amendment. Rejecting this contention, a 5 to 4 majority of the Court upheld the exercise of eminent domain to acquire land for transfer to private developers for the goal of economic development because the plan served a “public purpose.” Stressing deference to legislative judgments regarding the resort to eminent domain, the majority argued that “our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the eminent domain power.”⁶⁴ The

59. *Id.* at 32.

60. *Id.*; see Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 907–09 (picturing *Berman* as an expression of Progressive ideology that sought to downplay claims of individual property rights).

61. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

62. *Id.* at 241.

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

64. *Id.* at 483.

Court majority made plain, however, that the ruling did not prevent “any State from placing further restrictions on its exercise of the takings power.”⁶⁵

Justice O’Connor, speaking for the four dissenters, maintained that the majority opinion “significantly expands the meaning of public use,” and as a practical matter placed no limitation on eminent domain. She denied that incidental public benefits potentially arising from a development project constituted “public use” and insisted that the majority had effectively deleted “public use” from the Fifth Amendment.⁶⁶ In a separate dissenting opinion Justice Clarence Thomas endorsed the narrow construction of “public use” that generally prevailed in the nineteenth century. He maintained that the government could take property by eminent domain only if “the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.”⁶⁷

Kelo did not squarely address takings for energy projects. Yet the public outcry over the decision influenced the debate over the exercise of eminent domain by pipelines in two respects. First, it triggered the enactment of legislation or the amendment of state constitutions to bar or limit the resort to eminent domain for economic development purposes. These measures do not target pipeline takings and the efficacy of such restrictions appears to vary widely between states. Nonetheless, they do provide another avenue to challenge pipeline acquisitions. Second, and ultimately perhaps most important, the controversy over *Kelo* produced heightened public awareness of eminent domain and property rights. Parties became more willing to challenge the exercise of eminent domain of “public use” grounds.⁶⁸

Absent a fundamental rethinking of this question by the Supreme Court, there is little prospect for any meaningful judicial review of the “public use” clause of the Fifth Amendment at the federal level. Lower federal courts have seen *Kelo* as virtually barring any room for a “public use” challenge. Today, in fact, almost no takings of property

65. *Id.* at 489.

66. *Id.* at 494–501. For an analysis of O’Connor’s views about “public use” and *Kelo*, see James W. Ely, Jr., *Two Cheers for Justice O’Connor*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 149, 169–74 (2012).

67. *Kelo*, 545 U.S. at 508.

68. See generally James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127 (2009).

are invalidated in federal court.⁶⁹ The picture is somewhat more promising for property owners at the state level. Some state courts have been more receptive to challenges to eminent domain grounded on the “public use” provisions in state constitutions. For example, a number of state courts have struck down the taking of property for economic development purposes by private parties.⁷⁰ Moreover, several state courts have specifically rejected *Kelo* as a guide to interpreting state constitutional limits on eminent domain.⁷¹ On the other hand, many state courts have adhered to the highly deferential approach of the Supreme Court and broadly sustained the taking of private property.⁷²

IV. CONTEMPORARY CHALLENGES TO ENERGY TAKINGS

A. Statutes Authorizing Eminent Domain

Some states impose only minimal oversight of oil pipeline construction. Many states require approval by an administrative agency before an oil pipeline company can exercise eminent domain authority. Pipeline opponents have increasingly challenged the approval of proposed projects on statutory grounds.

Litigants have enjoyed some success in questioning whether state laws governing the delegation of eminent domain power encompassed oil pipeline companies. Some of these cases raise “public use” issues, but in a statutory rather than a constitutional context. Two state court opinions illustrate this point. A divided Supreme Court of Colorado, invoking the doctrine that statutes conferring eminent

69. *Goldstein v. Pataki*, 516 F.3d 50, 57 (2d Cir. 2008) (upholding the acquisition of property as part of a redevelopment project and declaring that federal courts leave “to legislatures to determine, in all but the most extreme cases, whether a taking fulfills the public-use requirement”), *cert. denied*, 554 U.S. 930 (2008).

70. *E.g.*, *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003); *Sw. Ill. Dev. Auth. v. Nat’l City Envtl., LLC*, 768 N.E.2d 1 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002); *Cty. of Wayne v. Hathcock*, 684 N.W.2d 1115 (Mich. 2006).

71. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 848 (Iowa 2019), *cert. denied*, 140 S. Ct. 1243 (Mem) (2020) (“we find that Justice O’Connor’s dissent provided a more sound interpretation of the public use requirement”); *City of Norwood v. Hornet*, 853 N.E.2d 1118 (Ohio 2006); *Bd. of Cty. Commissioners v. Lowery*, 136 P.3d 639 (Okla. 2006).

72. *Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 10–12 (Nev. 2003) (stressing deference to legislative determinations and declaring: “Historically, this court has also broadly interpreted ‘public use’ to include public utility, benefit, and advantage.”); *In re Goldstein*, 921 N.E.2d 164, 172 (N.Y. 2009).

domain authority upon private entities must be strictly construed, determined that the state legislation did not include petroleum pipelines.⁷³ In what appears to be an exceptionally crabbed reading of the eminent domain statute, the court majority found that the statute only authorized eminent domain for the construction of pipelines involved in delivering electric power. The three dissenting judges argued that the majority's reasoning was unpersuasive and nullified the statutory grant to oil pipelines. They insisted that: "[T]he plain language of the statute and its legislative and political history compel the conclusion that the statute does grant oil pipeline companies eminent domain power."⁷⁴ In sync with earlier judicial comments concerning the unique importance of eminent domain to transportation undertakings, the dissenters also pointed out: "Pipelines are linear projects that necessarily involve condemnation when the threshold attempt to negotiate agreements with intervening landowners is unavailing. Odd angle turns to avoid non-consenting landowners can make conveyance of the raw material or product impossible, infeasible, and/or extraordinarily expensive."⁷⁵

Similarly, in *Bluegrass Pipeline Company v. Kentuckians United to Restrain Eminent Domain, Inc.* (2015), a Kentucky appellate court narrowly construed a state statute and held that, on the facts presented, a pipeline company did not have the right to rely on eminent domain.⁷⁶ The company proposed to construct a pipeline to transport natural gas liquids, a mixture of pentane, propane, butane, and ethane, from other states to the Gulf of Mexico.⁷⁷ The court raised two objections. First, it ruled that, unlike oil or gas pipelines regulated by the Public Service Commission, the statute conferring eminent domain authority did not extend to transportation of natural gas liquids which were not so regulated. Second, it stressed that the liquid natural gas was only being transported through Kentucky and the

73. *Larson v. Sinclair Transp. Co.*, 284 P.3d 42 (Colo. 2012).

74. *Id.* at 57.

75. *Id.* Colorado appears to be the only state in which oil pipeline companies do not have eminent domain power.

76. *Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386 (Ky. Ct. App. 2015), *cert. denied* (Feb. 10, 2016).

77. Pipelines carrying natural gas liquids are treated as oil pipelines, and therefore are subject to state regulations and eminent domain laws rather than federal authority under the Natural Gas Act. James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 681 n.119 (2019).

proposed pipeline had no on- or off-ramps in the state. Thus, it concluded that the product was not benefiting Kentucky consumers and was not “in public service.”⁷⁸ This problematic reasoning ignored the highly interconnected nature of the national energy market and the fact that Kentucky benefited from energy products shipped from elsewhere reaching Kentucky consumers.

To this point the Colorado decision, based on state law, does not appear to have attracted any support in other jurisdictions. A West Virginia ruling, discussed below, has cited *Bluegrass Pipeline* as influential in supporting the proposition that “public use” means benefit for the people of the state authorizing eminent domain.⁷⁹

Yet not all states have moved to confine energy takings on statutory grounds. For example, a number of courts have declined to follow *Bluegrass Pipeline*. Indeed, both federal and state courts have found that proposed pipeline construction satisfies state statutory requirements to exercise the power of eminent domain. A federal district court in Kentucky distinguished *Bluegrass Pipeline* and validated a property taking in connection with a natural gas pipeline. It pointed out that the pipeline was regulated by the Public Service Commission and served customers in Kentucky. The court also stressed that a Kentucky law declared that the transportation of natural gas through pipelines was a “public use.”⁸⁰

Likewise, an Ohio appellate court emphatically rejected objections to an interstate pipeline taking based on the scope of the statutory authorization for common carriers to appropriate land.⁸¹ First, the court ruled that propane and butane constituted petroleum for the purpose of the eminent domain statute. Second, the court readily found that the pipeline company was a common carrier organized to transport petroleum products. Third, the court determined that the proposed pipeline satisfied the statutory requirement that the appropriation was “necessary and for a public use.”⁸² Focusing primarily on

78. *Bluegrass Pipeline*, 478 S.W.3d at 391–92. For an analysis of *Bluegrass Pipeline*, see Kristin J. Hazelwood, *Pipelines, Electric Lines, and Little Pink Houses: Do Any Limits on “Public Use” Remain in Eminent Domain Law?*, 25 GEO. MASON L. REV. 711, 743–45 (2018).

79. *Mountain Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850, 862 (W. Va. 2016).

80. *K. Petroleum, Inc. v. Prop. Tax Map No. 7 Parcel 12*, 2016 WL 937329 (E.D. Ky. 2016); see also *Atl. Coast Pipeline, LLC v. Avery*, 92 Va. Cir. 387 (Cir. Ct. Va. Nelson County 2016) (finding *Bluegrass Pipeline* inapplicable as based on Kentucky law).

81. *Sunoco Pipeline L.P. v. Teter*, 63 N.E.3d 160 (Ohio Ct. App. 2016), *appeal dismissed*, 81 N.E.3d 1267 (2017).

82. Baldwin’s Ohio Revised Code Annotated § 163.021(A) (West 2019) provides: “No

the “public use” element, it gave weight to the interstate energy market. The court reasoned that some products containing Ohio propane and butane would return to be consumed in the state. It sweepingly added that:

[C]ommon carriers, as defined by statute, provide our citizens with necessities such as electricity and water. The products, propane and butane, are being transported to heat homes and as an additive to gasoline. Propane and butane are also used in the production of many products our society uses every day. Thus, the transportation of propane and butane provides more than economic benefit to Ohio, it provides some of the necessities of life.⁸³

Fourth, the court found no merit in the contention that the statutory authority to appropriate land was confined to intrastate projects. Lastly, the court distinguished *Bluegrass Pipeline* on grounds that the pipeline in this case served as a means to deliver Ohio resources to market.⁸⁴

Similarly, at issue in *Enbridge Energy (Illinois) L.L.C. v. Kuerth* (2018) was a grant by the Illinois Commerce Commission of a certificate of public convenience and necessity for the acquisition of property by an oil pipeline operator.⁸⁵ This action by the Commission raised a rebuttable presumption of public use and necessity.⁸⁶ Landowners sought to rebut this presumption. The opinion turned upon construction of the Illinois eminent domain statute. The court tellingly pointed out: “Oil, natural gas, and other energy sources are essential to modern American life and must be transported from production facilities to refineries and ultimately to consumers. Pipelines are necessary for this transportation and are often safer and more

agency shall appropriate real property except as necessary and for a public use. In any appropriation, the taking agency shall show by a preponderance of the evidence that the taking is necessary and for a public use.”

83. *Sunoco Pipeline*, 63 N.E.3d at 174.

84. *Id.* at 175.

85. *Enbridge Energy (Ill.) L.L.C. v. Kuerth*, 2018 IL App (4th) 150519, 99 N.E.3d 210 (Ill. App. Ct. 2018).

86. The Illinois eminent domain law provides in part that the Illinois Commerce Commission’s grant of a certificate of public convenience and necessity “creates a rebuttable presumption that such acquisition of that property (or right or interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose.” 735 ILL. COMP. STAT. ANN. 30/5-5-5 (c) (West 2019).

efficient than transportation by train or truck.”⁸⁷ It added that “the legislature has determined that pipelines are in the public interest and that it is efficient for private companies, rather than government, to construct and maintain these pipelines.”⁸⁸ The court concluded that the landowners failed to introduce evidence to rebut the presumption of public use and necessity.

B. New Laws

In response to the growing controversy over oil pipelines, some states have recently enacted new laws governing siting approval and the exercise of eminent domain. In 2011, Nebraska, in the wake of the Keystone XL pipeline proposal, enacted the Major Oil Pipeline Siting Act.⁸⁹ This measure declared that “the construction of major pipelines in Nebraska is in the public interest of Nebraska.”⁹⁰ It further required any major oil pipeline to secure routing approval from the Public Service Commission or the governor before exercising eminent domain power. The Public Service Commission granted the Keystone XL pipeline’s application for approval of the proposed route and eminent domain authority. It found that the proposal was in the public interest. In 2019, the Supreme Court of Nebraska, stressing deference to agency findings, upheld the Commission’s determination.⁹¹

Lawmakers in other states have also taken steps to restrain the exercise of eminent domain by oil pipeline companies by enacting temporary moratoria and new procedural hurdles. In 2016, the South Carolina legislature declared that the power of eminent domain does not apply to “private, for profit pipeline companies.”⁹² In 2018 this measure was extended until November of 2020.⁹³ The Georgia legislature mandated in 2017 that no new oil pipeline construction could occur until a state-issued permit was obtained. In addition, it

87. *Enbridge Energy*, 99 N.E.3d at 218.

88. *Id.* at 220. *See also* *Montana-Dakota Util. Co. v. Behm*, 927 N.W.2d 865 (N.D. 2019), *cert. denied*, 140 S. Ct. 521 (Mem) (2019) (holding that acquisition of pipeline for natural gas by utility to service railroad switch was for a “public use” under North Dakota Code, and stressing deference to legislative declaration defining pipelines as “public uses”).

89. NEB. REV. STAT. §§ 57-1401 to 57-1413 (Supp. 2018).

90. *Id.* § 57-1101.

91. *TransCanada Keystone Pipeline, LP v. Dunavan* (*In re* Application No. OP-0003), 932 N.W.2d 653 (Neb. 2019).

92. Act of June 3, 2016, No. 205, 2016 S.C. Acts 1494.

93. Act of Apr. 17, 2018, No. 165, 2018 S.C. Acts 1407.

provided that an oil pipeline company could not use eminent domain to build a new pipeline until “a certificate of public convenience and necessity” was issued by the Commissioner of Transportation.⁹⁴ This law does not bar resort to eminent domain but establishes an administrative review process not unlike that in other states. The extent to which these measures limit the exercise of eminent domain remains unresolved as of this writing.

C. “Public Use”

In addition to legislative limits on eminent domain, its exercise may be checked by constitutional restraints. As noted above, both state and federal constitutions mandate that private property must be taken for “public use.” Critics have questioned whether an oil pipeline advances a valid “public use.” Yet parties attacking the exercise of eminent domain by pipeline companies on “public use” grounds face a steep uphill climb. For better or worse, the “public use” requirement has been diluted and takings are rarely invalidated on that basis.

Particularly instructive in this regard is a recent decision by the Supreme Court of Iowa in *Puntenney v. Iowa Utilities Board* (2019).⁹⁵ At issue was a challenge to the use of eminent domain to condemn easements for the Dakota Access oil pipeline. The court first sustained determinations by the Iowa Utilities Board that the pipeline would promote the “public convenience and necessity” and qualified as a common carrier. Addressing “the most significant issue in the case” it then held that the Dakota Pipeline constituted a valid “public use.”⁹⁶ Significantly, the court rejected the reasoning of the Supreme Court in the controversial *Kelo* case, and adopted the dissenting opinion of Justice O’Connor as a guide to interpreting the Iowa Constitution. “In sum,” it observed, “because we do not follow the *Kelo* majority under the Iowa Constitution, we find that trickle-down benefits of economic development are not enough to constitute a public use.”⁹⁷ Nonetheless, even under a heightened standard of review, the Iowa court reasoned that the pipeline provided public benefits “in the form of cheaper and safer transportation of oil,” which potentially benefited

94. Act of May 9, 2017, No. 263, 2017 Ga. Laws 744.

95. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829 (Iowa 2019), *cert. denied*, 140 S. Ct. 1243 (Mem) (2020).

96. *Id.*

97. *Id.* at 848–49.

all consumers of petroleum products.⁹⁸ It was unimpressed with the “formalistic” argument that the pipeline did not pick up or drop off oil within the state, noting that Iowa agriculture depended upon petroleum products from other states.⁹⁹ The court explained: “We do not believe a common carrier of a raw material that is essential to Iowa’s economy but isn’t produced or processed in Iowa is prohibited from exercising eminent domain when so authorized by the general assembly. The public use concept is not that restrictive.”¹⁰⁰

As suggested in *Puntenney*, opponents have turned in recent years to arguing that a “public use” should be understood as requiring that the residents of the state authorizing eminent domain must substantially benefit from any taking. They contend that advantages to residents of other states, standing alone, does not constitute “public use.” This line of reasoning raises the question of who is the “public” for purposes of determining “public use.” In other words, to what extent must the residents of the authorizing state gain from the exercise of eminent domain? To what extent should courts consider regional energy needs in assessing “public use?”

Although one scholar has maintained that “the exercise of the power of eminent domain should be limited to takings that provide a benefit to in-state residents,”¹⁰¹ this position is unworkable and would frustrate national energy policy. It ignores the interconnectedness of the national energy infrastructure. It would require a judicial determination of whether in-state benefits were small or substantial, not an obvious task for courts. As Alexandra B. Klass and Jim Rossi have cogently explained:

Such a myopic analysis of benefits in defining ‘public use’ not only interferes with federal policies regarding interstate lines; it also allows existing monopolies, such as incumbent state utilities to extract monopoly rents because, in effect, the law limits the ability of competing transmission operators (which are often not based in that state) to obtain reciprocal access to eminent domain.¹⁰²

98. *Id.* at 849.

99. *Id.*

100. *Id.* at 851. One judge dissented, arguing that the pipeline was not a common carrier “because the Iowa public cannot use and does not derive a direct benefit from it.” *Id.* at 854.

101. Coleman, *supra* note 45, at 714.

102. Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129, 188 (2015).

This question of in-state benefits has been vigorously pressed in connection with suits against the construction of interstate pipelines. It has figured prominently in attacks against preliminary survey laws. Virtually every state empowers parties holding eminent domain authority to enter land without the owner's permission in order to conduct a preliminary survey of locations for proposed lines prior to instituting eminent domain proceedings.¹⁰³ Such pre-condemnation measures have been in existence for more than 100 years, and their constitutionality was endorsed by Thomas Cooley in 1868.¹⁰⁴ They were widely employed by railroads during the nineteenth century. Lately, however, they have been challenged on a variety of grounds including failure to satisfy the "public use" norm.

This contention has occasionally found judicial endorsement. At issue in *Mountain Valley Pipeline, LLC v. McCurdy* (2016) was an action by a landowner against a pipeline company to bar entry upon his property to conduct a survey.¹⁰⁵ The proposed pipeline was to transport natural gas produced in West Virginia to markets outside the state. It appeared that the pipeline would not provide service to any customers in West Virginia. The Supreme Court of West Virginia ruled that a company may enter and preliminarily survey private land only when it has the power of eminent domain, and the purpose of the entry is for a "public use" within the state. Citing *Bluegrass Pipeline*, the court concluded that the proposed pipeline would not serve any West Virginia customers and therefore was not in "public use."¹⁰⁶ It gave remarkably little weight to the fact that the gas would be produced in the state, giving direct benefit to numerous landowners and well workers. In addition, it gave no attention to the interconnected nature of the national energy market.

Chief Justice Ketchum, in a forceful dissent, stressed the economic advantages of the pipeline. He observed:

103. For a comprehensive list of state statutes authorizing pre-condemnation surveys, see *Palmer v. Atl. Coast Pipeline, LLC*, 801 S.E.2d 414, 418 n.2 (Va. 2017).

104. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 560 (1868) ("No constitutional principle, however, is violated by a statute which allows private property to be entered upon and temporarily occupied for the purpose of a survey and other incipient proceedings, with a view to judging and determining whether the public needs require the appropriation or not, and, if so, what the proper location shall be; and the party acting under this statutory would neither be bound to make compensation for the temporary possession, nor be liable to action of trespass.").

105. *Mountain Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850 (W. Va. 2016).

106. *Id.* at 854–63.

The gas pipeline will transport two billion cubic feet of West Virginia natural gas a day to market. Not only will many, many landowners benefit, the gas pipeline will also benefit West Virginia's gas well drillers and workers in the gas fields. Additionally, it will allow the State to collect large amounts of severance tax on natural gas that is extracted from West Virginia land.¹⁰⁷

Ketchum added: "There is no doubt that the natural gas transportation pipeline will enlarge West Virginia resources, increase industrial energies, and promote productive power in West Virginia."¹⁰⁸ This dissent highlights the extent to which the majority's analysis is particularly problematic. Even assuming that the test for "public use" should be confined to in-state usage, the facts in *Mountain Valley* demonstrate substantial advantage for residents of the state.

In contrast, other courts have rejected challenges to pre-condemnation survey laws. In 2015 a federal district court, pointing to the congressional language in the Natural Gas Act, concluded that the Virginia survey statute facilitated the transportation of natural gas and thereby served a public purpose.¹⁰⁹ A year later a Virginia circuit court likewise held that pre-condemnation surveys authorized by state law "satisfy the public use requirement, as they prevent the unnecessary expense and pointless condemnation of land that is not suitable for the pipeline."¹¹⁰ It reasoned that the survey was necessary to gather data that would be relevant as part of the Federal Energy Regulatory Commission's approval process for an interstate natural gas pipeline.¹¹¹

D. Common Carriers Revisited

As we have seen, critics have also charged that some pipelines are not in fact genuine common carriers and serve only the interests of their owners.¹¹² This issue was explored in a pair of decisions by the

107. *Id.* at 863.

108. *Id.* at 864.

109. *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 693 (W.D. Va. 2015).

110. *Atl. Coast Pipeline, LLC v. Avery*, 92 Va. Cir. 387, 394 (Va. Cir. Ct. 2016).

111. *Id.*; see also *Palmer v. Atl. Coast Pipeline, LLC*, 801 S.E.2d 414 (Va. 2017) (upholding authority of natural gas pipeline to utilize statutory right-to-survey privilege, and finding that "fundamental" property rights under Virginia's Constitution do not include right of landowner to exclude pipeline survey). See generally *Barr v. Atl. Coast Pipeline, LLC*, 815 S.E.2d 783 (Va. 2018) (holding that pipeline company satisfied statutory requirements to conduct pre-condemnation survey).

112. ILYA SOMIN, *Preface to the Paperback Edition of THE GRASPING HAND: KELO V. CITY OF*

Texas Supreme Court that highlight the issue of property rights embedded in pipeline construction disputes. In addition, the court addressed the necessity of striking a balance between the concerns of property owners and the energy needs of the public.

At issue in *Texas Rice Land Partners v. Denbury Green Pipeline-Texas, LLC* (2012) was an application for common carrier designation by a pipeline company seeking to transport carbon dioxide from out-of-state sources to oil wells in Texas.¹¹³ Under Texas law, common carriers of CO₂ have the power of eminent domain. The Texas Railroad Commission granted the company a permit to operate as a common carrier. A landowner along the proposed route of the pipeline easement challenged the common carrier designation.

The Texas Supreme Court first emphasized that “the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts,” and that the Commission’s decision did not have “conclusive effect.”¹¹⁴ Moreover, it declared that the statute authorizing eminent domain was to be strictly construed in favor of the landowner. The court articulated a test for determining whether a CO₂ pipeline qualified as a common carrier: “[A] reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.”¹¹⁵ If such designation was challenged, the court placed the burden on the pipeline company to establish its bona fide status as a common carrier. In remanding the case, it recognized the tension between vital but sometimes conflicting interests: “Pipeline development is indisputably important given our State’s fast-growing energy needs, but economic dynamism—and more fundamentally, freedom itself—also demand strong protections for individual property rights.”¹¹⁶

NEW LONDON AND THE LIMITS OF EMINENT DOMAIN xiii–xiv (2016 ed.) (acknowledging that “some pipeline takings can be justified even under a narrow definition of ‘public use,’ because many pipelines are public utilities or common carriers that have a legal duty to serve the entire public,” but urging greater judicial steps “toward enforcing common carrier requirements more vigorously”).

113. *Tex. Rice Land Partners v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192 (Tex. 2012).

114. *Id.* at 198.

115. *Id.* at 202.

116. *Id.* at 204.

On review of subsequent proceedings in this case, the Texas Supreme Court found that the evidence established a “reasonable probability” that the carbon dioxide pipeline would serve the public. It was therefore qualified as a common carrier and satisfied the constitutional “public use” requirement to exercise eminent domain power.¹¹⁷ The Court explained that the recently formulated common carrier test “balances the property rights of Texas landowners with our state’s robust public policy interest in pipeline development, while also respecting the constitutional limitations placed on the oil and gas industry.”¹¹⁸ No longer in Texas could a carbon dioxide pipeline exercise eminent domain authority without demonstrating that its facility would transport for other customers. The decisions may prove a harbinger of heightened judicial scrutiny of common carrier designations, but they certainly stopped well short of shutting the door on the construction of pipelines.¹¹⁹

V. INTO THE FUTURE: ISSUES AND PERSPECTIVES

A. *The Wages of Kelo*

West Virginia Chief Justice Ketchum’s dissenting opinion in *Mountain Valley* highlights a dilemma that opponents of eminent domain for pipeline takings need to confront. He urged the West Virginia Supreme Court to adopt the “modern approach” to “public use” set forth in *Kelo*. It is difficult to perceive that, under this open-ended and deferential standard, attacks on pipeline takings on “public use” grounds are tenable. Pipelines fit easily within the broad

117. *Denbury Green Pipeline–Tex., LLC v. Tex. Rice Land Partners*, 510 S.W.3d 909, 915–17 (2017).

118. *Id.* at 915. For an assessment of the *Texas Rice* decisions, see Thomas Alan Zabel, *TX Rice v. Denbury*, 48 ST. MARY’S L.J. 787, 803–07 (2017) (pointing out that *Texas Rice* adopted a new and more searching analysis of whether eminent domain was being exercised for a public use, as well as a new test for determining the common carrier status of CO₂ pipelines).

119. In *TC & C Real Estate Holdings, Inc. v. ETC Katy Pipeline, LTD*, No. 10-16-00134-CV, 2017 WL 7048923 (Tex. App. Waco 2017), *reh’g denied* (May 24, 2019), the Texas Court of Appeals upheld the acquisition of a pipeline easement to transmit hydrocarbon natural gas by a gas utility as a valid “public use.” It noted that *Denbury Green* concerned a carbon dioxide pipeline and was inapplicable to this case, and further pointed out that in any event the pipeline at issue transported natural gas for a fee for all shippers. The court revealingly added: “The legislative declaration that a use is public and the delegation of power of eminent domain is to be given great weight by the court in reviewing a complaint that a particular use, sanctioned by the legislature is, in fact, private.” *Id.* at *3.

rubric of economic development. It therefore follows that in the federal courts and in the many states adhering to such a deferential doctrine, *Kelo* presents a formidable obstacle to successful pipelines challenges on the basis of “public use.” As we have seen, the Supreme Court has almost eliminated the “public use” restriction on takings under the Fifth Amendment. Recall that the condemnation of easements for natural gas pipelines are heard in federal courts under the Natural Gas Act. They are unlikely to disregard both the congressional directive in the Act as well as the relaxed notion of “public use” prevailing at the federal level and somehow adopt a more rigorous review just for natural gas pipelines.

The limited prospect of success in challenges to natural gas pipelines in federal court may well explain why opponents have sought to bar pre-condemnation surveys. This strategy can be seen as an indirect way of blocking the construction of such pipelines under state law before the proposed condemnation is presented to Federal Energy Regulatory Commission and the federal courts.

With regard to *Kelo*, two scholars have persuasively argued: “Economic development takings pose a significant threat to environmental quality, while providing few if any environmental benefits.”¹²⁰ One might therefore think that pipeline opponents would seek to overturn *Kelo*. That, however, has not been the case.¹²¹ On the contrary, environmentalists appear to treat any judicial decisions upholding property rights as a threat to environmental goals.

B. Heightened Scrutiny of “Public Use” Determinations

Of course, state courts, interpreting their state constitutions, are not obligated to follow the deferential federal standard and are free to fashion a more restrictive understanding of “public use.” As discussed above, some state courts have rejected *Kelo* as a guide to construing state constitutional provisions and have taken a harder look at whether property was in fact being acquired largely for private advantage. At first glance pipeline opponents would seem likely to fare better in such jurisdictions. But here as well pipeline critics

120. Ilya Somin & Jonathan H. Alder, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 WASH. L. REV. 623, 666 (2006).

121. Perhaps surprisingly, many environmentalists favored economic development takings. *Id.* at 626 (“Environmentalists have been notably absent among *Kelo*’s critics.”).

face a difficult path. First, there is the long history of courts finding pipelines to be common carriers and upholding the exercise of eminent domain to acquire pipeline easements. Second, most courts will almost certainly conclude that pipelines are an integral part of the national energy system, and thus satisfy the “public use” requirement. Third, as with railroads and canals in earlier time periods, pipelines are particularly vulnerable to the holdout problem. Without eminent domain, a single landowner could block a project of national significance.¹²² Such a result is simply unacceptable even in a property-conscious society.

Prominent property-rights scholar Richard A. Epstein, for instance, has urged that courts “keep a tight rein on public uses” in order to safeguard the rights of private owners.¹²³ Yet he aptly pointed out that:

[T]he classic conception of public use also permitted a restricted class of takings for *private* use in order to overcome a serious holdout problem that could arise if, for example, a newly discovered mine was cut off from the only rail connection by a tract of scrubland. In essence, state power was allowed when high transition costs of reassigning property rights blocked the sensible use or assembly of land resources.¹²⁴

Along the same lines, the Supreme Court of Michigan in *County of Wayne v. Hathcock* (2004) made a telling distinction between general economic development schemes, with merely conjectural benefits to the public, and the particular concerns of private entities in constructing instrumentalities of commerce.¹²⁵ Overruling prior authority,¹²⁶

122. Coleman, *supra* note 45, at 288 (observing that eminent domain “is particularly crucial for linear infrastructure such as roads, pipelines, and power-lines because, otherwise, each landowner along the proposed route can, in theory, hold out for a higher price to try to capture the entire economic value of the project.”); Klass, *Eminent Domain Law as Climate Policy*, *supra* note 3, at *23 (“[L]inear projects like highways, transmission lines, and pipelines have a particular need for eminent domain authority because of the difficulty of assembling numerous contiguous parcels, which can encourage landowners to ‘hold out’ for above-market value.”); see also sources cited *supra* note 23.

123. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 358 (2014).

124. *Id.* at 357–58; see also Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1709–10 (2007) (“To prevent each landowner along the path from gaining de facto monopoly power, governments often resorted to using their eminent domain powers.”).

125. *Cty. of Wayne v. Hathcock*, 648 N.W.2d 765 (Mich. 2004).

126. *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding

the court rejected economic development by private parties as a valid “public use” under the state constitution. In contrast, it stressed that instrumentalities of commerce must proceed in a more or less straight line and were therefore susceptible to unreasonable holdouts by individual property owners. Affirming its long-standing position, the court declared:

The likelihood that property owners will engage in this tactic makes the acquisition of property for railroads, gas lines, highways, and other such “instrumentalities of commerce” a logistical and practical nightmare. Accordingly, this Court has held that the exercise of eminent domain in such cases—for which collective action is needed to acquire land for vital instrumentalities of commerce—is consistent with the constitutional “public use” requirement.¹²⁷

I therefore predict that even in jurisdictions such as Michigan where courts more rigorously scrutinize “public use,” the majority will follow the lead of the Supreme Court of Iowa in *Puntenney* and uphold the exercise of eminent domain for pipelines.¹²⁸

C. Electric Transmission Lines

Although this Article has focused on the exercise of eminent domain for pipelines, similar complaints have been advanced against electric transmission lines.¹²⁹ “Thus,” one scholar has pointed out, “while oil pipelines grab the national headlines, power-lines across the country are being held up using the same legal arguments.”¹³⁰ Indeed, historically power lines have attracted more popular opposition

use of eminent domain to acquire tract of land for conveyance to private corporation as part of project for economic development).

127. *Hathcock*, 304 N.W.2d at 781–82.

128. See Klass, *Eminent Domain Law as Climate Policy*, *supra* note 3 (maintaining that most pipeline projects will not be stopped by state court interpretations of the “public use” provisions in state eminent domain statutes or constitutions, particularly where the pipeline at issue provides service to the state or where the state courts recognizes national advantages of oil and natural gas transportation).

129. See *Montana-Dakota Utils. Co. v. Parkshill Farms, LLC*, 905 N.W.2d 334, 338–39 (S.D. 2017) (finding that acquisition by regulated public utility of easements for electric transmission lines amounted to “public use”).

130. Coleman, *supra* note 45, at 292.

than pipelines.¹³¹ To complicate matters, the existing interstate transmission infrastructure is fragile and overloaded. It is badly in need of an upgrade.¹³² Like oil pipelines, the exercise of eminent domain for transmission lines is largely governed by state law.

Opposition to new electric power lines by environmental advocates is ironic.¹³³ Locations for generating solar and wind power, favored forms of “green” energy, are usually distant from centers of consumption.¹³⁴ Therefore, enhanced transmission capability is essential to transport renewable electricity to population centers.¹³⁵ Antagonism to eminent domain for transmission lines by environmental groups is misplaced and seemingly reflects a rigid mindset adverse to any energy takings. In short, environmental advocates risk being hoisted by their own petard. It is difficult to envision a principled argument against pipelines that would not also apply to transmission lines.¹³⁶

D. *Strange Bedfellows*

It is an old adage that politics makes strange bedfellows. In several states affected landowners and environmental advocates have recently joined in an unlikely alliance to oppose approval of oil pipelines.¹³⁷ Such groups have little in common and often have quite

131. Klass & Rossi, *supra* note 102, at 151 (“Transmission lines remain extremely unpopular. Although everyone wants the grid to work and the lights to go on, few people want high-voltage transmission lines near their homes and businesses or, worse, on their properties.”).

132. Andrew P. Morris, Roy Brandys & Michael M. Barron, *Involuntary Cotenants: Eminent Domain and Energy and Communications Infrastructure Growth*, 3 LUS J. ENERGY L. & RESOURCES, 29, 36 (2014). See also DAVID E. NYE, WHEN THE LIGHTS WENT OUT: A HISTORY OF BLACKOUTS IN AMERICA 31 (2010) (“But by 2005 the grid was a patchwork of old and new elements that badly needed an overhaul.”).

133. Klass & Rossi, *supra* note 102, at 151 (“Indeed, even though environmental groups generally favor renewable energy, they have historically been the primary plaintiffs in lawsuits challenging transmission lines on environmental protection and aesthetic grounds.”).

134. Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1029 (2009).

135. *Id.* at 1042 (noting that “it is widely perceived that a large increase in renewable energy resources will not only require transmission lines in new locations of the United States, but also will require more transmission infrastructure than historically may have been necessary for fossil fuel sources of electricity.”).

136. Although professing support for “clean” energy, residents and communities in Oregon, New Mexico, and Wisconsin are battling the construction of electric power lines to transmit such energy and have instituted lawsuits to block projects. *Clean-Power Line Sparks Outcry*, WALL ST. J., Dec. 31, 2019, at A3.

137. Yet many property owners have voluntarily granted easements to pipeline companies. See *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 839 (Iowa 2019), *cert. denied*, 140 S. Ct.

different objectives. Owners are concerned about pipeline spillage, damage to drainage tile, and the impact of such infrastructure on the value of their land. Environmentalists, on the other hand, are broadly dismissive of property rights and favor extensive governmental action limiting the rights of individual owners.¹³⁸ For example, they are hostile to the doctrine of regulatory takings and, as noted above, demonstrate little interest in “public use” as a restraint on eminent domain except for pipelines.¹³⁹ Their goal is to diminish reliance on fossil fuels as a source of energy.

Given these sharply different agendas, I am skeptical that there is any realistic basis for a durable coalition protective of property rights. More likely, any alliance between landowners and environmentalists will prove tactical and fleeting.¹⁴⁰

E. Revitalizing Energy Transportation

Where do we go from here? The current hodge-podge of pipeline and transmission line approvals hardly seems adequate to address growing energy needs. Even where objections to pipeline and transmission line construction are denied, the resulting delay and additional expense discourage the building of needed infrastructure.¹⁴¹ Thus, environmental activists can, in a sense, prevail despite eventually losing on the merits in court. In fact, opposition to new pipelines

1243 (Mem) (2020); *see also* Montana-Dakota Utils. Co. v. Parkshill Farms, LLC, 905 N.W.2d 334, 336 (S.D. 2017) (utility negotiated “voluntary easements over 91% of the parcels along” proposed route of transmission line).

138. *See, e.g.*, J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239 (1990) (expressing concern that the Takings Clause of the Fifth Amendment could retard development of land use regulations protective of the environment and urging public control over private rights in land); John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351 (1997) (viewing property rights as an obstacle to environmental protection measures).

139. J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995) (warning that the regulatory takings doctrine inhibits environmental initiatives); *see also* Peter J. Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 760 (2017) (“Scalia’s regulatory takings jurisprudence creates a conceptual barrier against regulation of land use for environmental ends.”).

140. *See* Coleman & Klass, *supra* note 77, at 682 (pointing out that the objectives of environmental advocates seeking to promote governmental intervention to safeguard the environment differ sharply from property rights advocates working to restrain governmental power over private property, and stating that environmentalists “have strategically adopted many of the arguments of their libertarian predecessors despite the differences between their philosophies and ultimate objectives.”).

141. *See* Katherine Blunt, *Pipeline Cancelled Following Years of Delay*, WALL ST. J., July 6, 2020, at 1A (despite favorable court rulings, sponsors of the Atlantic Coast Pipeline have dropped the project in view of environmental opposition, regulatory delays, and mounting costs).

has produced rather curious results. For example, New England has imported liquified natural gas from Russia to supplement an inadequate pipeline capacity to carry cheaper domestic natural gas to the region.¹⁴² Moreover, lack of sufficient oil pipelines has caused a growing reliance on railroads to transport crude oil to refineries. This has raised difficult questions concerning which mode of transportation is better to handle safety and environmental concerns.¹⁴³

There have been a number of thoughtful proposals to address energy transportation needs. One suggestion is that Congress should establish a federal procedure for the exercise of eminent domain for interstate oil pipelines and transmission lines akin to that for natural gas pipelines under the Natural Gas Act of 1938.¹⁴⁴ Such a step would preempt state law and provide a uniform set of requirements. However, as of this writing congressional action seems improbable. Another proposal is for courts to invoke the dormant commerce power to prevent states from relying on a narrow reading of “public use” to bar the use of eminent domain to facilitate interstate projects. As Klass and Rossi have explained, “it is thus appropriate to apply the dormant Commerce Clause to the assessment of ‘public use’ by state courts, legislators, and regulators—especially in scenarios where there is reason to be concerned about adverse effects on interstate coordination.”¹⁴⁵ Klass has further suggested that state legislatures could overhaul eminent domain law to promote construction of infrastructure for “clean” energy and create a rebuttable presumption against new pipelines that would carry fossil fuels.¹⁴⁶ But absent a national energy disaster that captures public attention, none of these are likely to be adopted in the near future. I predict that the United States will muddle along without an overall policy concerning eminent domain and energy. One must hope that most courts will continue to construe “public use” to encompass the building of pipelines and transmission lines, or we will surely face a shortfall in the delivery of energy to consumers.

142. Coleman, *supra* note 45, at 294–95.

143. Alexandra B. Klass, *Future-Proofing Energy Transport Law*, 94 WASH. L. REV. 827, 835–48, 888–90 (2017); Coleman, *supra* note 45, at 279 (observing that “large volumes of oil are now traveling by rail as well. Transporting this oil by pipeline would be safer than rail, which can lead to explosions when trains derail.”).

144. Coleman, *supra* note 45, at 296.

145. Klass & Rossi, *supra* note 102, at 208.

146. Klass, *Eminent Domain Law as Climate Policy*, *supra* note 3, at *20–25.