PIPELINES, ELECTRICAL LINES, AND LITTLE PINK HOUSES: DO ANY LIMITS ON "PUBLIC USE" REMAIN IN EMINENT DOMAIN LAW?

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INTRODUCTION

That property is more than mere dirt, brush, or rugged terrain is made obvious by the fervor with which individuals will defend their right to inhabit or use that property. Property can be valuable to individuals for myriad reasons, including an ancestral connection to the property;[1] "historic, religious, and cultural significance;"[2] or emotional attachment.[3] The desire to preserve the right to use property or to protect it from environmental harm can create atypical activists, such as the Sisters of Loretto in Kentucky.[4] The sisters opposed the construction of the pipeline across their pristine property and voiced their disapproval of the pipeline in community meetings[5] and in a petition to the Governor.[6]

The widely publicized protests against the construction of a pipeline designed to carry oil from North Dakota to an existing pipeline in Illinois (the "Dakota Access Pipeline") also demonstrate both the lengths to which individuals will go to protect their interest in or use of property and the complex

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[1] *See, e.g.*, Lynne Tuohy, *In Fort Trumbull, Holdouts Stick Together*, HARTFORD COURANT (Feb. 20, 2005), https://www.courant.com/news/connecticut/hc-xpm-2005-02-20-0502200026-story.html.

[2] *See, e.g.*, Memorandum in Support of Motion for Preliminary Injunction at 1, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 1:16-cv-1534-JEB).

[3] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 475 (2005) (describing the petitioners' emotional attachments to property).

[4] Cheryl Truman, *Nuns Protest Pipeline That Would Go Through Their Land in Marion County*, LEXINGTON HERALD LEADER (Sept. 1, 2013), http://www.kentucky.com/living/religion/article4444 2078.html. According to news media accounts, the nuns sang "Amazing Grace" at an open house held by representatives of the pipeline company to address community concerns until they were forced to stop. Jonathan Adams, *Spirited Spat: Pipeline Battle Rages on Kentucky's "Holy Land"*, NBC NEWS (Mar. 15, 2014), https://www.nbcnews.com/business/energy/spirited-spat-pipeline-battle-rages-kentuckys-holy-land-n46581; Stephen Lega, *Singing Nuns State Their Opposition to Pipeline Project; Citizens, Officials Attend Open House on Pipeline*, LEBANON ENTERPRISE (Aug. 14, 2013), https://www.lebanonenterprise.com/content/singing-nuns-state-their-opposition-pipeline-project.

[5] Truman, *supra* note 4.

[6] Lega, *supra* note 4.

relationship between individuals and property. From April 2016 until February 2017, members of the Standing Rock Sioux and the Cheyenne River Sioux and thousands of their supporters camped on United States Army Corps of Engineers property near the Cannonball and Missouri Rivers to protest the construction of the Dakota Access Pipeline.[7] Construction plans called for the pipeline to cross under Lake Oahe, which provides the drinking water for the tribes.[8] The tribes' concerns about the effect of the pipeline ran much deeper than the expected concerns about a drinking water supply that would accompany a crossing of any waterway.[9] Rather, the tribes challenged the construction because of its threat to sacred sites with archaeological, cultural, or historical significance[10] and because of the sacredness of the water itself.[11] According to the tribes, pure water is essential to their water-based ceremonies and rites, and "the mere presence of oil in the Dakota Access Pipeline will contaminate the lake's waters and render them unsuitable for use in [the tribes'] religious practices."[12] The tribes also feared the planned crossing of Lake Oahe because of a prophecy regarding "a Black Snake that would be coiled in the Tribe's homeland and . . . would harm . . . [and] devour the people."[13]

During the months-long protest, thousands of protesters camped in the area and staged protests and marches throughout the area, including the construction sites and the grounds of the North Dakota state capitol.[14] Numerous clashes with law enforcement occurred, and more than 700 protesters were arrested, including high-profile demonstrators such as Green Party candidate

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7 Kimberly Wynn, *Photos Tell Story of Dramatic Movement Birthed in North Dakota*, BISMARCK TRIB. (Feb. 25, 2017), https://bismarcktribune.com/news/state-and-regional/photos-tell-story-of-dramatic-movement-birthed-in-north-dakota/article_21c737c5-c484-5936-a048-6c9536698897.html. Protesters were forced to vacate the main camp on February 22, 2017, because of the threat of spring flooding. *Id.*

8 *Id.*

9 Memorandum in Support of Motion for Preliminary Injunction, *supra* note 2, at 1. The Standing Rock Sioux filed the initial petition for injunctive relief, which the Cheyenne River Sioux later joined. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 111 (D.D.C. 2017).

10 Memorandum in Support of Motion for Preliminary Injunction, *supra* note 2, at 1. Although the Army Corps of Engineers determined that the construction of the pipeline would not affect any archaeological sites, consultants for the tribes identified sites in the pipeline's path that needed further investigation as well as sites within a close proximity of the construction that could be negatively impacted. *Id.* at 11, 13.

11 Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 88 (D.D.C. 2017).

12 *Id.* at 89.

13 *Id.* at 90 (quoting the plaintiffs' motion to amend the complaint).

14 Wynn, *supra* note 7. The protests proved costly for taxpayers. The Corps of Engineers has estimated the cost of cleanup to exceed $1.1 million. *The Latest: Cleanup Finished at Pipeline Protest Camps*, ASSOCIATED PRESS (Mar. 13, 2017), https://www.apnews.com/2f8fb6de01bb423194b5719b4d8b72d8.

Jill Stein.[15] The protesters' cause received national support,[16] and coverage of the protests and clashes with law enforcement filled the news and social media.[17] In addition to the on-the-ground protests, lawyers for the tribes fought the issuance of the Corps of Engineers' grant of an easement for the construction in the federal courts.[18]

The sanctity of property rights, however, often collides with the state's power to take property through eminent domain. The power to acquire private property by eminent domain is "an inherent and necessary power"[19] of a sovereign. Perhaps because of the power's well-established necessity, the Fifth Amendment of the U.S. Constitution, for example, does not expressly grant the federal government the power of eminent domain.[20] Rather, the Takings Clause of the Fifth Amendment only limits it: "[N]or shall private property be taken for public use, without just compensation."[21] Under both state and federal constitutional law, the exercise of the power of eminent domain is subject to these two limitations: the exercise must be "for a public use," and the landowner must receive "just compensation" for the property.[22]

Concerns about an overly expansive interpretation of "public use" and resulting vulnerability of property rights entered the public spotlight in 2005 when the United States Supreme Court decided *Kelo v. City of New London*.[23] The Court ruled that the City of New London could take Susette Kelo's little pink house on the banks of the Thames River and the homes of her neighbors and redevelop the area into commercial properties that might generate more tax revenue and boost the local economy.[24] The Court's decision led to public outrage, and many state legislators scrambled to pass legislation to limit the use of eminent domain for economic redevelopment that the *Kelo* Court sanctioned. Post-*Kelo*, the concern was that an overly broad interpretation of

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15 Wynn, *supra* note 7.

16 *See, e.g.*, STAND WITH STANDING ROCK, http://standwithstandingrock.net/supporters (last visited Apr. 3, 2019).

17 *See, e.g.*, Standing Rock Sioux Tribe, FACEBOOK, https://www.facebook.com/StandingRockST/ (last visited Apr. 3, 2019).

18 *See* Memorandum in Support of Motion for Preliminary Injunction, *supra* note 2, at 1. Because the crossing of Lake Oahe would occur on property owned by the Corps of Engineers, the tribes did not have the opportunity to challenge the action in an eminent domain proceeding as happens in connection with the construction of an oil pipeline on private property. Rather, the tribes' only recourse was to challenge the application of Nationwide Permit 12 to the construction of the Dakota Access Pipeline and verifications made pursuant to the Clean Water Act and the Rivers and Harbors Act. *Id.*

19 William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559 (1972).

20 *Id.* at 560.

21 U.S. CONST. amend. V.

22 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.01[1] (rev. 3d ed. 2008). This Article does not analyze whether the requirement of "just compensation" is an effective limitation on the exercise of the power of eminent domain.

23 545 U.S. 469 (2005).

24 *Id.* at 483–90.

"public use" made any property owner vulnerable to losing his or her property to the government so that it could be converted into a more profitable (for the government) use.

In the years since *Kelo*, the search for renewable energy sources, new technologies for the development of existing energy sources, and an aging electrical transmission grid have brought a new and different focus to the reach of "public use" in eminent domain cases. The new focus arises in the context of a well-established use of that power and with the concern that a narrow interpretation of "public use" could hamper energy initiatives.[25] This Article argues that, despite the importance of these initiatives, courts should not further erode the "public use" limitation on the power of eminent domain by dispensing with the established requirement that a taking must benefit residents of the state in which it occurs.

Part I of this Article argues that the exercise of the power of eminent domain should be limited to takings that provide a benefit to in-state residents. The nature of the power of eminent domain; the disproportionate impact of eminent domain on racial and ethnic minorities, the elderly, and the poor; and the harm eminent domain can cause to the environment all require this. Part II of this Article discusses the "public use" limitation contained in the federal and most state constitutions. It describes the narrow and broad approaches to "public use" courts have taken, and it concludes that the majority of courts have either merged the two approaches or adopted the broader approach. It also discusses how courts have analyzed proposed takings that benefit residents of states other than the state in which the taking will occur. It concludes that although courts require that the residents of the state in which the taking occurs be the primary beneficiary of the taking, benefits to residents of other states will not change the character of the taking. Part III of this Article discusses the Court's opinion in *Kelo v. City of New London* regarding the "public use" limitation as well as the public and legislative backlash to that decision.

Part IV of this Article discusses a current "public use" dilemma: the extent to which states should consider benefits to the residents of other states in deciding whether to allow the exercise of eminent domain for electrical transmission lines and oil and gas pipelines. Part V concludes that courts need a consistent approach to takings that benefit residents of other states and proposes that courts follow an approach similar to the one set forth by the North Dakota Supreme Court in *Square Butte Electric Cooperative v. Hilken*.[26]

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25 *See* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 983 (2015).

26 244 N.W.2d 519 (N.D. 1976).

I. THE USE OF EMINENT DOMAIN SHOULD BE LIMITED

Even as early as the drafting of the U.S. Constitution, the protection of individual property rights has been a key aspect of American democracy.[27] The Framers were heavily influenced by the writings of John Locke, who proclaimed the preservation of liberty and property as the justification for individuals forming a government.[28] According to Locke, individuals were willing to subject themselves to government regulation only to gain greater protection of their natural rights, which included the right to property.[29] Thus, the protection of individual property rights is at the cornerstone of American constitutional values.[30]

The effect of eminent domain on individual property rights is reason enough to advocate only a limited use of the power. Even more troubling, however, is the disproportionate effect of eminent domain on minorities, the elderly, and the poor as well as the threats its use can pose to the environment.[31]

A. *Disproportionate Effect on Racial and Ethnic Minorities, the Poor, and the Elderly*

Critics of *Kelo* have lamented the decision's effect on the poor, minorities, the elderly, and any other landowner who is not using property for a use that would provide the highest tax revenue.[32] In her dissenting opinion, Justice O'Connor described the effect of *Kelo* as follows:

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[27] *Kelo*, 545 U.S. at 496–97 (O'Connor, J., dissenting) (stating that Alexander Hamilton identified the "security of the Property" as "one of the great obj[ects] of Gov[ernment]") (citation omitted).

[28] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 368 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

[29] Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 544–46 (2007).

[30] *See, e.g.*, City of Norwood v. Horney, 853 N.E.2d 1115, 1128–29 (Ohio 2006); Harris Cty. Flood Control Dist. v. Kerr, 499 S.W.3d 793, 804 (Tex. 2016).

[31] Ilya Somin & Jonathan H. Adler, *The Green Costs of* Kelo*: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 641–44 (2006); Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain*, INST. FOR JUST., Apr. 2003, at 102, 185; Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse*, INST. FOR JUST., June 2007, at 6–7.

[32] *See* Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108). In its amicus brief, the Becket Fund for Religious Liberty argued that allowing the exercise of eminent domain for economic redevelopment of property not subject to blight essentially puts "targets" on property held by religious entities because of their tax-exempt status. *Id.* at 2–3. According to the argument, almost any use of property would generate more tax revenue than a religious use. *Id.* Furthermore, forcing the relocation of a religious institution thwarts its mission given that religious institutions choose their locations specifically to serve a particular need or help a particular

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.[33]

And, according to Justice O'Connor, the "beneficiaries" of such an interpretation of eminent domain would "be those citizens with disproportionate influence and power in the political process," and the victims would be "those with fewer resources."[34]

Studies have confirmed that, as Justice O'Connor feared, racial minorities and the poor shoulder most of the negative impact of eminent domain.[35] In his dissenting opinion in *Kelo*, Justice Thomas cited statistics showing that from 1949 to 1963, sixty-three percent of the families displaced for an urban renewal project and for whom information about race was available were nonwhite.[36] According to Justice Thomas, urban renewal projects were also known as "Negro removal" because of their effect on African-Americans.[37]

The use of eminent domain to remove blighted areas necessarily displaces the poor and often nonwhite citizens who called those areas home.[38] The economic redevelopment of a formerly neglected area typically calls for the addition of commercial properties or middle-class neighborhoods; it almost never calls for affordable housing for the displaced residents.[39]

Much of the negative effect of eminent domain goes unnoticed because eminent domain's victims are not politically powerful or vocal.[40] In fact, that lack of political power or voice is what makes the poor, racial minorities, and the elderly the targets of eminent domain.[41] Condemning properties with owners who are unlikely to challenge the exercise of eminent domain speeds up and cheapens the process.[42] Tellingly, it was the use of eminent domain in

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population. *Id.* at 5. The brief also included specific examples of the condemnation of churches and other property owned by religious entities, such as the infamous Poletown condemnation in Michigan. *Id.* at 7.

33 *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

34 *Id.* at 505.

35 Carpenter & Ross, *supra* note 31, at 6–7.

36 *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

37 *Id.*; *see also* Brief for NAACP et al. as Amici Curiae Supporting Petitioners at 7–9, *Kelo*, 545 U.S. 469 (No. 04-108); Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of Olech's Class of One*, 55 LOY. L. REV. 697, 702–05 (2009). According to the amicus brief filed by the NAACP in *Kelo*, the use of eminent domain to remove or isolate ethnic or racial minorities was not limited to just economic redevelopment. Brief for NAACP et al. as Amici Curiae Supporting Petitioners, *supra*, at 8. Rather, the same discriminatory use of eminent domain occurred in highway projects. *Id.*

38 David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 378–80.

39 *Id.*; *see also* Brief for NAACP et al. as Amici Curiae Supporting Petitioners, *supra* note 37, at 13–14.

40 Brief for NAACP et al. as Amici Curiae Supporting Petitioners, *supra* note 37, at 12–15.

41 *Id.* at 11–12.

42 *Id.*

a middle-class neighborhood in *Kelo* that precipitated the call for reform.[43] *Kelo*'s approval of the use of eminent domain for economic development was but a small logical step from the Supreme Court's decision in *Berman v. Parker*.[44] In that 1954 case, the Court sanctioned the use of eminent domain to redevelop a blighted area of Washington D.C. where many poor African-American families lived.[45] *Berman*, however, did not attract the widespread outrage of *Kelo*.[46]

Takings for electrical transmission lines or oil or gas pipelines raise the same concerns about targeting underrepresented groups as takings of fee simple interests for economic development, even though these typically involve the acquisition of only an easement over a portion of property rather than the fee simple interest.[47] The poor, racial and ethnic minorities, and the elderly are still more likely to be targeted by eminent domain for easements because of the cheaper cost for the land and the decreased likelihood of litigation.[48]

B. *Threats to the Environment*

Farmland and conservation land are particularly vulnerable to the exercise of eminent domain because these lands are frequently less expensive; their size makes it easier to assemble the quantity of land needed for the planned industrial park, electrical transmission line, or pipeline; and their undeveloped state makes the dislocation of residents less likely.[49] Allowing the unlimited use of eminent domain threatens the environment by eliminating valuable open spaces and agricultural lands, and by exposing the soil and groundwater to pollutants. Residents of a state should not be expected to "subsidize"[50] development or other activities that harm the environment in

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43 Dana, *supra* note 38, at 365–66.

44 348 U.S. 26 (1954); Dana, *supra* note 38, at 366.

45 *Berman*, 348 U.S. at 30. The Court noted in its opinion that 97.5% of the residents of the blighted area were African-American. *Id.*

46 Dana, *supra* note 38, at 366.

47 *See, e.g.*, John Bardo, *Mountain Valley Pipeline: Approve, but Be Vigilant*, GEO. ENVTL. L. REV. ONLINE (Feb. 24, 2017), https://gelr.org/2017/02/24/mountain-valley-pipeline-approve-but-be-vigilant (expressing concern that Southern Appalachian landowners affected by a natural gas pipeline "cannot afford legal representation that would allow them to obtain the best deal possible" because of severe poverty in the region). Professor Klass has suggested that takings for transmission lines are "less likely to involve eminent domain abuse that disrupts entire communities, since the lines are most needed to bring remote sources of energy through relatively undeveloped areas to population centers." Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1087 (2013). That a taking targets a smaller number of the poor, racial minorities, or the elderly does not make the taking not abusive. Furthermore, the fact that targets of the eminent domain would not have the support and resources of an entire community in opposing it makes the potential for abuse even more problematic.

48 Brief for NAACP et al. as Amici Curiae Supporting Petitioners, *supra* note 37, at 12.

49 Somin & Adler, *supra* note 31, at 649–50.

50 *Id.* at 658–59. Professors Somin and Adler have explained their "subsidy" theory as follows:

their state, especially when that state derives no benefit from the use of the property.

Protecting agricultural lands is important for maintaining a way of life for the farming communities who inhabit and work those lands and for the "preservation of biodiversity and maintenance of open space."[51] The clearing associated with either economic redevelopment or electrical transmission lines destroys the natural habitat of the wildlife residents[52] and can threaten endangered plants and animals.[53]

In its pre-*Kelo* decision striking down a provision in the Kentucky Local Industrial Authority Act that authorized the use of eminent domain to acquire any property needed for industrial sites, parks, or subdivisions, the Kentucky Supreme Court expressed concern about the potential loss of productive agricultural land if takings for economic development were allowed.[54] The court approvingly quoted an excerpt from a treatise that decried the use of eminent domain to prefer one occupation (perhaps industry) over another (perhaps agriculture):

> The discrimination by the state between different classes of occupations and the favoring of one at the expense of the rest, whether that one is farming, banking, merchandising, milling, printing, or mining, is not legitimate legislation and is an invasion of that equality of right and privilege which is a maxim of every free government.[55]

In addition to the loss of open space or agricultural land, easements for pipelines conveying petroleum products or gas pose significant risks for soil

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> Such takings represent a subsidy to development because, other things being equal, the use of eminent domain reduces the costs of proceeding with a given development project for developers. Absent the use of eminent domain, developers would have to pay a higher price to obtain desired properties, if they are able to acquire such properties at all.

Id. at 659.

51 *Id.* at 645.

52 *Emerging Issues*, LAND TRUST ALLIANCE, https://www.landtrustalliance.org/emerging-issues (last visited Apr. 3, 2019).

53 Somin & Adler, *supra* note 31, at 643–49.

54 City of Owensboro v. McCormick, 581 S.W.2d 3, 6 (Ky. 1979). The urban sprawl that accompanies development for tax revenue is a particular threat to agricultural communities, particularly those in rural counties that border urban areas. Joy Powell, *Staking Claim to More Taxes; Justices to Rule on Seizure of Private Land for Commercial Use*, STAR TRIBUNE, Dec. 18, 2004, at 1D. On the other hand, prohibiting the use of eminent domain for economic redevelopment in urban areas perhaps provides its own threat to agricultural lands; without the ability to redevelop urban areas, developers are more likely to target rural areas. *See* Somin & Adler, *supra* note 31, at 655–58. According to Professors Somin and Adler, even if redevelopment of urban areas protects open space, the dense urban areas contribute to pollution, and nothing would prevent the use of eminent domain in the open space too. *Id.* at 657–58.

55 *City of Owensboro*, 581 S.W.2d at 7 (quoting 26 AM. JUR. 2D *Eminent Domain* § 34, at 684–85 (1966)).

and groundwater contamination.[56] For example, on April 2, 2016, TransCanada discovered that 16,800 gallons of oil had leaked into the ground from its pipeline in South Dakota.[57] Such spills are dangerous because of potential impacts on both soil and groundwater.[58] Spills along the TransCanada line are particularly threatening to the environment because tar sands accompany oil from Canada or North Dakota.[59] Tar sands are harder to clean up because of their thickness and stickiness.[60]

Because of these threats to the environment in the state where the taking occurs, the "public use" requirement should be read narrowly to require that the residents of that state be the primary beneficiaries of the taking.

II. THE PUBLIC USE REQUIREMENT

The U.S. and state constitutions allow the exercise of the power of eminent domain, but only for public use and only when the landowner is paid just compensation for the property.[61] In determining whether a proposed use is a public one, courts have considered two important questions: First, what is a public use? Does it require that the public actually be able to use the property? Second, who is the public? Specifically, does "public" include residents of other states?

A. *Public Use Versus Public Benefit*

Although the U.S. Constitution and almost all state constitutions include the same requirement of a "public use," courts have defined that term differently. In particular, two lines of authority have developed regarding the definition of a "public use."[62] Some courts have interpreted it as requiring an actual right to use of the property by the public,[63] while other courts have

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56 Megan O'Rourke, Comment, *The Keystone XL Pipeline: Charting the Course to Energy Security or Environmental Jeopardy?*, 24 VILL. ENVTL. L.J. 149, 159-61 (2013); *see also Emerging Issues*, *supra* note 52.

57 Matt Egan, *Keystone Pipeline Has Reopened*, CNN MONEY (Apr. 11, 2016), http://money.cnn.com/2016/04/07/news/keystone-oil-spill-south-dakota/index.html. According to the article, a 2013 leak from a pipeline in North Dakota resulted in the release of 840,000 gallons of oil onto a wheat field. *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 SACKMAN, *supra* note 22, at § 7.01[1].

62 *Id.* § 7.02[1].

63 *See, e.g.*, City & Cty. of San Francisco v. Ross, 279 P.2d 529, 533 (Cal. 1955) (determining that a taking of property for transfer to a private party to develop a parking lot was not a public purpose because the city did not maintain control over the parking lot); Blanchard v. Dep't of Transp., 798 A.2d 1119, 1126 (Me. 2002) ("As a general rule, property is devoted to a public use only when the general public, or some portion of it (as opposed to particular individuals), in its organized capacity and upon occasion to

adopted a broader interpretation. The latter have found any benefit to the public from the taking sufficient to satisfy the constitutional requirement.[64] Over time, most states have migrated toward the broader interpretation.

According to some courts, the narrow interpretation of "public use" strengthens property rights because it imposes stronger limits on the right to eminent domain. For example, in *City of Owensboro v. McCormick*,[65] the Kentucky Supreme Court considered the constitutionality of a provision in the Kentucky Local Industrial Authority Act that authorized the use of eminent domain to acquire private property necessary to develop industrial sites, parks, or subdivisions.[66] The Act did not limit the property subject to eminent domain to blighted property, but rather allowed the acquisition of "any" property deemed necessary for the proposed project.[67] In finding that the Act authorized an unconstitutional exercise of the power of eminent domain, the court rejected the argument that a "public benefit" or "public purpose" would satisfy the Kentucky Constitution's requirement of a "public use" for eminent domain.[68] The court found that, with the exception of cases involving blighted or otherwise unusable property, Kentucky's highest court had consistently rejected the use of eminent domain that would provide only an incidental benefit to the public.[69] The court quoted its prior explanation for adhering to the narrow interpretation as better for protecting property rights:

> If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public . . . there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.[70]

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do so, has a right to demand and share in the use."); Threlkeld v. Third Judicial Dist. Court, 15 P.2d 671, 673 (N.M. 1932) ("[W]e think it the orthodox view that 'public use' is not, in the constitutional sense, mere 'public benefit.'") (citations omitted); Borden v. Trespalacios Rice & Irrigation Co., 86 S.W. 11, 14 (Tex. 1905) ("[W]e agree that property is taken for public use as intended by the Constitution only when there results to the public some definite right or use in the business or undertaking to which the property is devoted."), *aff'd*, 204 U.S. 667 (1907).

64 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 479–80 (2005) ("Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'") (citation omitted); Brammer v. Hous. Auth. of Birmingham Dist., 195 So. 256, 258 (Ala. 1940) (stating that weight of authority and prior precedent supported "an elastic or liberal interpretation . . . wherein public use and public benefit were held to be synonymous").

65 581 S.W.2d 3 (Ky. 1979).

66 *Id.* at 4.

67 *Id.* at 6.

68 *Id.* at 5–6.

69 *Id.* at 6.

70 *Id.* (quoting Chesapeake Stone Co. v. Moreland, 104 S.W. 762, 765 (Ky. 1907)).

It concluded that because the Act authorized the sale of property acquired by eminent domain to private entities for development, it violated the Kentucky Constitution.[71]

According to Justice Thomas in his dissent in *Kelo v. City of New London*, the narrower reading of "public use" is more consistent with "[t]he most natural reading of the [Public Use] Clause."[72] First, he pointed out that requiring that the public have the ability to use the property is more consistent with the common definition of "use."[73] Second, he noted that the Constitution uses a different term—"general Welfare"—when referring to actions that benefit the public.[74] Third, he described nuisance law as an alternative way to remedy the use of land that negatively affects the public.[75] Finally, he theorized that interpreting the Public Use Clause to simply require a benefit to the public would render it surplusage, because the Necessary and Proper Clause already requires a valid public purpose for legislation.[76]

The United States Supreme Court and many state courts have adopted the broader interpretation of public use that equates "public use" with "public benefit." At least as early as 1906, the Court expressed its preference for a broader interpretation of "public use."[77] In *Strickley v. Highland Boy Gold Mining Co.*,[78] the Court considered whether a mining company could "condemn a right of way for an aerial bucket line" to carry ore from mines located in a mountainous region to the railway station.[79] In ruling that the Utah statute permitting such lines did not violate the Constitution, the Court noted that it had previously "recognized the inadequacy of use by the general public as a universal test."[80] In a later case, the Court explained that the narrower interpretation of public use had "eroded over time," in part because of the difficulty in applying the definition, and in part because of changing "needs of society."[81]

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71 *McCormick*, 581 S.W.2d at 7–8. The court noted that the Kentucky Local Industrial Development Authority Act included a legislative declaration that property acquired pursuant to the Act was acquired for a "public purpose." *Id.* at 4–5.

72 Kelo v. City of New London, 545 U.S. 469, 506–510 (2005) (Thomas, J., dissenting).

73 *Id.* at 508–09. According to Justice Thomas, the term "use" typically means "to employ." *Id.*

74 *Id.* at 509.

75 *Id.* at 510.

76 *Id.* at 511.

77 Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906).

78 200 U.S. 527 (1906).

79 *Id.* at 529.

80 *Id.* at 531 (discussing Clark v. Nash, 198 U.S. 361 (1905)); *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) ("The Court long ago rejected any literal requirement that condemned property be put into use for the general public.").

81 *Kelo*, 545 U.S. at 479.

Most state courts have expressed a preference for the broader interpretation of "public use."[82] For example, in *Montana Power Co. v. Bokma*,[83] a public utility sought to acquire by eminent domain an easement for an electric power transmission line to a pumping station.[84] At the time of construction, the transmission line would serve only one company, but service was available along the line for other customers if needed.[85] In deciding that the proposed exercise of eminent domain was for a public use, the Montana Supreme Court noted that Montana had adopted the broader interpretation and defined public use as "one which confers some benefit or advantage to the public."[86] The court noted that it and many other western states' courts followed that interpretation "presumably to promote general economic development."[87]

After its early decisions indicating a broad interpretation of "public use," the U.S. Supreme Court extended the "public use" requirement even further. In deciding in *Berman v. Parker* that the District of Columbia could exercise the power of eminent domain to condemn and redevelop "slums" or "blighted" areas, the Court found that the District of Columbia could exercise the power of eminent domain for any purpose that fell within its police powers.[88] In describing the broad power to exercise eminent domain for police power purposes, the Court stated:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[89]

The line between the two definitions of public use is not always clearly demarcated because even courts that require a narrow view of "public use" do not require that every member of the public use the property. For example, in *Ohio Oil Co. v. Fowler*,[90] an oil company[91] sought to use the power of eminent domain to construct a pipeline to connect two oil fields to a new

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82 *See, e.g.*, Missouri *ex rel.* Jackson v. Dolan, 398 S.W.3d 472, 476 (Mo. 2013) (en banc) ("Missouri long ago abandoned an interpretation of 'public use' that required actual use or occupation by the public. This Court instead has embraced a much broader interpretation of 'public use.'").

83 457 P.2d 769 (Mont. 1969).

84 *Id.* at 771.

85 *Id.* at 772–73.

86 *Id.* at 772–74.

87 *Id.* at 772.

88 Berman v. Parker, 348 U.S. 26, 32–34 (1954); *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239–41 (1984).

89 *Berman*, 348 U.S. at 33 (citation omitted).

90 100 So. 2d 128 (Miss. 1958).

91 The oil fields were subject to unitization agreements, and the Ohio Oil Company was the operator of the units. *Id.* at 130.

refinery that had agreed to purchase all the condensate from the oil fields.[92] At a hearing to determine whether the proposed exercise of eminent domain would be for a public purpose, the general superintendent for the oil company testified that the company "was building the line as a common carrier for anyone desiring to ship materials through it under the tariff . . . but at the present time there [was] only one purchaser for the condensate to go through the line."[93] The Supreme Court of Mississippi decided that the intended use was a public one because the pipeline would be open to any member of the public who wanted to ship condensate in it, explaining that "[t]he use is not rendered a private one by the fact that only a few persons will be served at the time the property is sought to be taken."[94] Interestingly, in *Bokma*, the court considered similar facts and reached a similar conclusion, even though it applied the broader interpretation of public use. The *Bokma* court described its interpretation of "public use" as follows:

> Thus, in Montana a public use is one which confers some benefit or advantage to the public. Such public use is not confined to actual use by the public, but is measured in terms of the right of the public to use the proposed facilities for which condemnation is sought. As long as the public has the right of use, whether exercised by one or many members of the public, a 'public advantage' or 'public benefit' accrues sufficient to constitute a public use.[95]

Similarly, in *Blanchard v. Department of Transportation*,[96] the Maine Supreme Judicial Court decided that the taking of property for use as a parking lot for users of a ferry operated by a for-profit company was for a public use, even though members of the public could not use the parking lot on identical terms.[97] The ferry service provided access from the mainland and a neighboring island to a small island community.[98] Although some parking was available in the lot without a permit, permits were available for overnight use on a need-based priority system, with first priority going to year-round

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92 *Id.* at 129–30; *see also* Calor Oil & Gas Co. v. Franzell, 109 S.W. 328, 332 (Ky. 1908) (stating that the fact that gas company sold all gas to one company did not affect ability to use eminent domain); Mustang Fuel Corp. v. Bd. of Cty. Comm'rs, 527 P.2d 838, 840 (Okla. 1974) ("The constitutional requirement that condemnation be only for public purposes is satisfied by a gas pipeline company which acts as an intermediary or carrier for a public utility.").

93 *Ohio Oil*, 100 So. 2d at 130.

94 *Id.* at 131.

95 Mont. Power Co. v. Bokma, 457 P.2d 769, 772–73 (Mont. 1969).

96 798 A.2d 1119 (Me. 2002).

97 *Id.* at 1122–23. Similarly, in *Williams Telecommunications Co. v. Gragg*, 750 P.2d 398, 402–03 (Kan. 1988), the Kansas Supreme Court decided that condemnation of an easement for an interstate fiber-optic telephone cable was a "public use." The landowner had argued that the easement was not for a "public use" because it benefitted only some members of the public. *Id.* The court, however, rejected the idea that all members of the public had to use the property for it to constitute a "public use": "There has never been a requirement for eminent domain purposes that the taking directly benefit a sizeable and identifiable segment of the public." *Id.* at 403.

98 *Blanchard*, 798 A.2d at 1122.

residents of the island who needed to use the ferry service for work purposes and second priority going to any other year-round resident.[99] Although the court made clear that "public use" required that "[t]he public has to be able to be served by the use as a matter of right, not as a matter of grace of any private party,"[100] the court found that the use of the parking lot was a public use. In deciding that the use was a public one, the court emphasized that not every member of the public need have access to the property. The court found that prioritizing the use of the parking lot to year-round residents of the island did not offend the "public use" clause because the residents were members of a community, not just a group of preferred individuals, and because the parking lot was part of a larger transportation system that benefitted the entirety of the public.[101]

Therefore, even though state court decisions may reference competing definitions of "public use," states have consistently allowed the exercise of the power of eminent domain, even when the property being acquired is not readily available for use by members of the general public.

B. *In-State Versus Out-of-State Interests*

A second question that courts have considered in connection with the requirement of a "public use" is "who is the public?" Specifically, courts have considered whether the exercise of eminent domain must be solely for the benefit of residents of the state in which the taking will occur and whether a taking that benefits residents of other states is still for a "public use."

Courts have refused to grant the power of eminent domain when the taking does not benefit residents of the state in which it would occur, even

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99 *Id.* at 1123.

100 *Id.* at 1126.

101 *Id.* at 1127–28; Similarly, in *Lee v. Leslie Cty. Fiscal Court*, No. 2010–CA–000867–MR, 2012 WL 3046315, at *3–4 (Ky. Ct. App. July 27, 2012), the Kentucky Court of Appeals articulated the narrow approach to "public use," but also explained its reasoning regarding the benefit that the cemetery provided to the public. Specifically, the court considered whether a veteran's cemetery constituted a public use of property. *Id.* at *2. In that case, the court distinguished between the "public use" of property and the use of property for a "public purpose," finding the latter term a much broader concept that would provide no limits on the exercise of eminent domain. *Id.* To constitute a "public use," the property must be both "under the control of public authorities and open to public use." *Id.* at *3. In ruling that the use of the property as a veteran's cemetery was a "public use," the court found that the public would have access to the cemetery, even though only veterans could be buried there:

> Although it is true that burial in a veterans' cemetery is reserved only to those that [sic] have served this country in our armed services, the property remains open to the public to visit, remember and pay respect to those buried. Additionally, veterans' cemeteries serve a unique public interest. A veterans' cemetery is not unlike a veterans' monument or memorial constructed with public funds.

Id. at *3–4.

when the residents might derive some incidental benefit from the taking.[102] In *Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*,[103] the Wyoming Supreme Court considered whether the construction of an irrigation system and diversion of water from a creek in Wyoming to irrigate 10 thousand acres of land in Colorado was a "public use."[104] Because of the topography and soil conditions along the creek banks in Colorado, the headgate for the irrigation system and diversion of the creek had to be located in Wyoming, approximately 7 hundred feet from the state line.[105] In support of its petition to exercise the power of eminent domain, Lovella Ditch, Reservoir & Irrigation Company ("Lovella") submitted documentation showing that the proposed diversion did not negatively affect any existing diversion of water from the creek or that it precluded any new diversion of water that could be used to benefit property in Wyoming.[106]

Although the proposed diversion did not injure any property interests in Wyoming and even though the reclamation of the Colorado property could spark development in Wyoming,[107] the Wyoming Supreme Court found that Lovella could not exercise the power of eminent domain because the diversion of water from the creek was not for a "public use."[108] The court explained that although the fact that a taking of property benefits out-of-state interests in addition to in-state interests does not change the character of the use, the benefit to residents of the state in which the property is acquired cannot be incidental.[109] Rather, the taking itself must "have some substantial relation to a public purpose and the public interest and welfare of the state wherein the land to be taken is located."[110] Because the diversion of the water in the creek would not result in the application of any water to land in Wyoming, and thus residents of Wyoming would not reap any of the benefits of reclaiming arid lands, the court concluded that the "public use" would be only in and for the benefit of Colorado.[111]

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102 Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. Dist. Ct. App. 1967); Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 108–10 (Miss. 1984); Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43, 53 (Wyo. 1913).

103 131 P. 43 (Wyo. 1913).

104 *Id.* at 52–62. The Lovella Ditch, Reservoir & Irrigation Company based its power of eminent domain on a grant of authority from the Colorado State Engineer to "divert and appropriate water from Crow creek for the purpose of irrigating" the land. *Id.* at 52.

105 *Id.* at 52.

106 *Id.* at 52–53.

107 *Id.* at 56.

108 *Id.* at 60–62.

109 *Grover Irrigation*, 131 P. at 59.

110 *Id.* at 54. The court summarized the authorities as follows: "[T]he inquiry in that respect has been confined to the interest and welfare of the state or sovereignty within whose limits or jurisdiction the land sought to be condemned is located. This does not mean the interest or welfare dependent upon or affected by development or growth in another state." *Id.* at 55.

111 *Id.* at 59–61.

Courts have, however, permitted the exercise of eminent domain when both residents of the state in which the taking occurs and residents of another state benefit from the taking. For example, in *Adams v. Greenwich Water Co.*,[112] a water company that provided water in both Connecticut and New York sought to dam a river to ensure that the water company would have a sufficient supply of water to meet its customers' needs.[113] After the riparian owners filed suit contesting the water company's rights to pump water from the river, the water company sought a declaratory judgment that it had the authority to condemn the plaintiffs' rights as riparian owners.[114] Under Connecticut law, a water company's authority to use the power of eminent domain so that it could supply water to the public was clear; the key question for the court to decide was whether the fact that some of the users of the water were New York residents changed the character of the use.[115] After reviewing historical data regarding the water company's water supply and projections regarding water demand in the future, the court determined that the damming of the river and construction of the reservoir were necessary to meet the future water needs of the water company's Connecticut customers.[116] The court recited the "universally held" principle "that if a taking of property by eminent domain is for a public use within the state authorizing it, such a taking is not to be prevented because it will also serve a public use in another jurisdiction."[117] Because the legislature had determined that allowing the water company to sell water in New York provided a benefit in Connecticut and because the riparian owners had not offered any proof that the capacity of the reservoir would greatly exceed the needs of the Connecticut customers, the court concluded that the construction of the reservoir was a public use.[118]

Therefore, the "public" who must be able to "use" the property being acquired by eminent domain or benefit from the taking relates to the residents of the state in which the taking will occur. Additional benefits to the residents of other states will not render the taking invalid, but those benefits are not sufficient in and of themselves. Rather, courts require some real use by or benefit to the residents of the state in which the taking occurs.

III. *KELO V. CITY OF NEW LONDON*

Although it did not mark a significant departure from precedent, the Court's decision in *Kelo v. City of New London* rocked the nation and incited a wave of legislation, amendments to state constitutions, and judicial

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112 83 A.2d 177 (Conn. 1951).

113 *Id.* at 181.

114 *Id.* at 179.

115 *Id.* at 181–82.

116 *Id.* at 182–83.

117 *Id.* at 182.

118 *Adams*, 83 A.2d at 182–83.

decisions purporting to limit the exercise of eminent domain. Specifically, the Court's ruling in *Kelo* that a municipality could take unblighted residential property for the purpose of economic redevelopment sparked the fear that all privately owned property was vulnerable to eminent domain. Because of that fear, legislators across the country passed legislation or constitutional amendments to limit eminent domain.

A. *Eminent Domain for Economic Development*

In 1998, high unemployment rates, population decline,[119] and an announcement that pharmaceutical company Pfizer Inc. would be building a research facility in the area prompted the City of New London, Connecticut, to task the New London Development Corporation ("NLDC") with creating a development plan for an area along the waterfront and near the research facility.[120] The NLDC ultimately formulated a development plan that included a waterfront hotel and conference center, marinas, a park, a museum, office space, commercial areas with shops and restaurants, and new residential areas.[121] The NLDC's purpose in creating the development plan was to use the new research facility to attract additional jobs to the area, to generate tax revenue, and to make the area more attractive.[122] To carry out the development plan, the New London City Council authorized the NLDC to acquire the necessary property, either by purchase or by eminent domain.[123]

Although the NLDC was able to purchase many of the properties needed for the project, it was unable to negotiate the purchase of fifteen of the properties.[124] The owners of those properties brought suit against the NLDC, arguing that the use of eminent domain to acquire property for use in the City

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119 Kelo v. City of New London, 545 U.S. 469, 473 (2005). New London was one of the poorest cities and had some of the lowest reading scores in Connecticut at the time when Pfizer announced that it would expand its facilities. Carrie Budoff, *A Battle Against Eminent Domain: Gritty Dispute in New London*, HARTFORD COURANT (Jan. 1, 2001), https://www.courant.com/news/connecticut/hc-xpm-2001-01-01-0101010379-story.html. Because of its small size (5.5 square miles), limited open spaces, and significant property holdings by tax-exempt entities, finding physical space for economic redevelopment in New London was a challenge. *Id.*; *see also* Eleanor Charles, *Eminent Domain Challenged in New London Project*, N.Y. TIMES (Apr. 1, 2001), https://www.nytimes.com/2001/04/01/realestate/in-the-region-connecticut-eminent-domain-challenged-in-new-london-project.html.

120 *Kelo*, 545 U.S. at 473–74.

121 *Id.* at 474.

122 *Id.* at 474–75.

123 *Id.* at 475.

124 *Id.* The owners of those fifteen properties offered compelling sentimental reasons why they should be allowed to keep their properties. *Id.* For example, the group included Wilhelmina Dery, who had been living in her home since she was born in 1918 and whose family owned four properties in the area. *Id.*; *see also* Tuohy, *supra* note 1 (describing "holdouts" in Fort Trumbull and why they refused to sell property).

of New London's development plan violated the Fifth Amendment[125] because it was not a taking for a "public use."[126] The case eventually made its way to the United States Supreme Court, which stated the issue involved in the case as follows: "We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[127]

At the outset of its analysis, the Court restated the fundamental principle of eminent domain law that the government could "not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."[128] The Court stated that the requirement of a "public use" for the property did not necessitate use of the property by the public.[129] Rather, the Court noted that it had interpreted the requirement much more broadly and had required a showing of a "public purpose."[130] Based on its decisions in *Berman v. Parker, Hawaii Housing Authority v. Midkiff*,[131] and *Ruckelshaus v. Monsanto Co.*,[132] the Court explained that in determining whether a proffered use of property serves a "public purpose," the Court defers to the judgment of the legislature.[133]

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125 *Kelo*, 545 U.S. at 475. Included in the list of liberties protected by the Fifth Amendment is the following language: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. According to the United States Supreme Court, this language, commonly known as the Takings Clause, includes two important limitations on the government. Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32, 232 n.6 (2003). The government may acquire property only for a "public use," and it must pay "just compensation" for any property taken. *Id.* at 231–32.

126 *Kelo*, 545 U.S. at 475.

127 *Id.* at 477. When the Court heard arguments in *Kelo*, eight states (Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, South Carolina, and Washington) prohibited the use of eminent domain for economic benefit, and courts in six states (Connecticut, Kansas, Maryland, Minnesota, New York, and North Dakota) had explicitly authorized it. Warren Richey, *Public Use, Property Rights and the Courts*, CHRISTIAN SCI. MONITOR (Feb. 22, 2005), https://www.csmonitor.com/2005/0222/p03s01-usju.html; *cf.* City of Owensboro v. McCormick, 581 S.W.2d 3, 7 (Ky. 1979); Cty. of Wayne v. Hathcock, 684 N.W.2d 765, 784 (Mich. 2004).

128 *Kelo*, 545 U.S. at 477; *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (including "a law that takes property from A, and gives it to B" in acts that would be "contrary to the great first principles of the social compact" (emphasis omitted)).

129 *Kelo*, 545 U.S. at 479.

130 *Id.* at 479–80.

131 467 U.S. 229 (1984).

132 467 U.S. 986 (1984).

133 *Kelo*, 545 U.S. at 480–83. That meant, for example, that in *Berman v. Parker*, the Court refused to analyze whether the redevelopment plan approved for a blighted area of Washington, D.C. "[was] or [was] not desirable." Berman v. Parker, 348 U.S. 26, 33 (1954). The Court also refused to entertain the landowner's argument that the proposed redevelopment plan was not a valid public use with respect to his property because his property was not blighted. *Id.* at 34–35. The Court refused to consider the component pieces of the redevelopment plan, insisting that the plan must be evaluated as a whole. *Id.*

In accordance with that precedent, the Court deferred to the City of New London's determination that the redevelopment plan would further economic growth in the area,[134] even though the properties impacted by the plan were not blighted, and ruled that the taking was for a "public use." The Court rejected the petitioner's argument that economic benefit should not be sufficient alone to justify eminent domain, because it noted that many of the prior cases in which it had sanctioned the use of eminent domain had involved economic benefit. The Court also expressed a lack of concern for the benefit that would inure to private parties as a result of the Court's ruling: "Quite simply, the government's pursuit of a public purpose will often benefit individual private parties."

In their dissenting opinions, Justices O'Connor and Thomas decried the effect of the majority's opinion. According to Justice O'Connor, "[i]t holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure."[135] According to the dissenters, equating a "public use" with a "public benefit" rendered the Public Use Clause surplusage,[136] and deferring to the legislative decision

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134 *Kelo*, 545 U.S. at 483–84. The Court's deference to the city's decision that the NLDC's urban development plan would benefit the local economy ultimately proved unwise. The city's developer was unable to obtain financing for the project and, although the city spent millions to acquire the necessary properties and demolish or remove any improvements, the properties remain vacant even today. Harriet Jones, *'Little Pink House' Hits the Big Screen, Reviving New London Eminent Domain Saga*, CONN. PUB. RADIO (Apr. 24, 2018), https://www.wnpr.org/post/little-pink-house-hits-big-screen-reviving-new-london-eminent-domain-saga. Even worse, in 2009, Pfizer, the impetus for the urban development plan, announced that it was closing its New London facility. Eric Gershon, *The Pfizer Headquarters: Lost Hope for New London*, HARTFORD COURANT (Dec. 30, 2009), http://articles.courant.com/2009-12-30/news/09123012528916_1_fort-trumbull-pfizer-headquarters-research-and-development-headquarters; Lee Howard, Kelo*: Pfizer Forever Linked with Eminent Domain 'Theft': Plaintiff Says Company Was Involved from Beginning*, DAY (New London) (Nov. 14, 2009), https://www.theday.com/article/20091114/BIZ02/311149924.

135 *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting). Answers that the NLDC's counsel gave to questions at oral argument demonstrated that Justice O'Connor's concern was not an unsubstantiated one. For example, the NLDC's counsel responded "yes" when Justice O'Connor asked at oral argument "whether it would be 'okay' for a city to replace a Motel 6 with a Ritz-Carlton 'if the city felt Ritz-Carlton could pay more tax.'" Charles Lane, *Defining Limits of Eminent Domain: High Court Weighs City's Claim to Land*, WASH. POST (Feb. 23, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062300840.html; *see also* Cty. of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004) (stating that allowing eminent domain for purposes of economic benefit would make all property owners vulnerable to "expansion plans of any large discount retailer, 'megastore,' or the like").

136 *Kelo*, 545 U.S. at 507 (Thomas, J., dissenting).

regarding whether a taking was for a "public use" eliminated any check on the legislature's use of the power of eminent domain.[137]

In his dissenting opinion, Justice Thomas analyzed the language of the Takings Clause and the intent of the Framers of the Constitution and concluded that the Public Use Clause limits the government's ability to take private property.[138] According to Justice Thomas, the Public Use Clause expressly permits the exercise of eminent domain only when "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."[139] Requiring the public to have the right to use the property, rather than just benefit from its use, was more consistent with the generally accepted definition of "use."[140] Also, according to Justice Thomas, "[t]he Framers would have used some such broader term" such as "general welfare" had they intended to equate "public use" and "public benefit."[141] Justice Thomas lamented the consequences of the Court's overly broad interpretation of the Public Use Clause: the displacement of individuals with nonmonetary attachment to their property and the disproportionate use of eminent domain on poor communities, particularly communities of color.[142]

B. *Legislative Reaction*

Although the Court's decision in *Kelo* was not a sharp break from the Court's public-use jurisprudence,[143] the public reaction to the decision was swift and furious, leading some to call *Kelo* one of the Court's most

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137 *Id.* at 497 (O'Connor, J., dissenting).

138 *Id.* at 505–11 (Thomas, J., dissenting).

139 *Id.* at 508. According to Justice Thomas, the Court reached its overly broad interpretation of the Public Use Clause by relying on the faulty reasoning of the Court in *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*, cases that relied on dicta in prior cases that spoke broadly of the government's power to take property for the benefit of the public and of the court's duty to defer to legislative pronouncements regarding public benefit. *Id.* at 514–21.

140 *Id.* at 508–09.

141 *Id.* at 509.

142 *Kelo*, 545 U.S. at 521–22 (Thomas, J., dissenting).

143 Even Justice Thomas in his dissent seemed to concede that the Court's decision was not a surprise: "Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning." *Id.* at 506. Justice O'Connor, however, maintained that the Court's conclusion in *Kelo* was based on a misinterpretation of *Berman* and *Midkiff*, the two key "public use" cases that the Court relied on. *Id.* at 500–01 (O'Connor, J., dissenting) ("In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use.").

unpopular decisions.[144] The Court's decision spawned grassroots activism[145] that led to the introduction of bills and constitutional amendments limiting eminent domain in state legislatures across the country[146] and empowered landowners to challenge the taking of their land.[147]

Perhaps anticipating the firestorm that would surround the announcement of the Court's decision, the Court made clear that its decision did not preclude states from limiting the power of eminent domain:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. . . . As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution.[148]

Forty-three states accepted the Court's invitation and either enacted legislation or passed constitutional amendments purporting to limit the exercise of eminent domain.[149] For example, most states passed legislation that,

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144 *See, e.g.*, Alberto B. Lopez, *Revisiting* Kelo *and Eminent Domain's "Summer of Scrutiny"*, 59 ALA. L. REV. 561, 561–62 (2008); Kenneth Harney, *High-Court Seizure Decision Sparks Uprising*, BALT. SUN (July 24, 2005), http://articles.baltimoresun.com/2005-07-24/business/0507220023_1_eminent-domain-seizures-economic-development ("To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision of the highest court of the land would be more accurate."). Justice Stevens, the author of the majority opinion in *Kelo*, even described it as his "most unpopular opinion." Jess Bravin, *US Justice Stevens Defends His 'Most Unpopular Opinion'*, WALL ST. J. (Nov. 11, 2011), https://www.wsj.com/articles/SB10001424052970204358004577032071046475782. Justice Scalia even went so far as to liken the Court's decision in *Kelo* to its decisions in *Dred Scott* and *Roe v. Wade*. *Id.*

145 *See, e.g.*, Kenneth R. Harney, *Court Ruling Leaves Poor at Greatest Risk*, WASH. POST (July 2, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100990.html. In the days following the announcement of the Court's decision in *Kelo*, grassroots groups such as Castle Coalition began organizing to educate property owners and legislators about eminent domain law. *Id.*

146 *See, e.g.*, Adam Karlin, *Property Seizure Backlash*, CHRISTIAN SCI. MONITOR (July 6, 2005), https://www.csmonitor.com/2005/0706/p01s03-uspo.html ("[T]he . . . decision is fueling a nationwide backlash—rippling into homeowner outrage and legislative action."). In his article, Karlin referenced an unscientific poll on the MSNBC website in which ninety-eight percent of participants responded that they disapproved of the Court's decision in *Kelo*. *Id.* For a helpful discussion of the public reaction to the Court's decision in *Kelo* and analysis of the varying eminent domain reforms enacted by the state legislatures following *Kelo*, see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009).

147 Michael Corkery & Ryan Chittum, *Eminent-Domain Uproar Imperils Projects*, WALL ST. J. (Aug. 3, 2005), https://www.wsj.com/articles/SB112301915571102998.

148 *Kelo*, 545 U.S. at 489–90 (footnote omitted).

149 CASTLE COALITION, *Enacted Legislation Since Kelo*, http://castlecoalition.org/enacted-legislation-since-kelo (last visited Apr. 13, 2019); *see also* Missouri *ex rel.* Jackson v. Dolan, 398 S.W.3d 472, 478 (Mo. 2013) (en banc) (noting that the legislature "made the policy decision to enact § 523.271 to rein in the 'public use' of economic development approved in *Kelo*"); Reading Area Water Auth. v. Schuylkill

typically with an exception for blighted properties,[150] prohibits the use of eminent domain for "economic benefit" alone[151] or defines "public use" to explicitly exclude "economic benefit."[152] Other states adopted more comprehensive reform that limited the use of eminent domain for economic benefit and altered the requirements relating to "just compensation"[153] or required that property deemed unnecessary for the project be returned to the original owner.[154] In addition to legislative reform, other states limited the exercise of eminent domain by constitutional amendment.[155] Finally, some state supreme

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River Greenway Ass'n., 100 A.3d 572, 583 (Pa. 2014) (explaining that the legislature passed the Property Rights Protection Act to curtail the use of eminent domain for economic development post-*Kelo*).

150 Given the typical exception for blight and broad definition of blight in most of the statutes, some commentators have questioned whether many of the reforms limit eminent domain in a meaningful way. *See* Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931, 1933 (2007); Somin, *supra* note 146, at 2121–22. Another commentator has argued that by limiting economic development takings to blighted properties or slums, post-*Kelo* reforms unfairly privilege middle-class households. *See* David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 365 (2007) ("My argument is that, in substantial part, this reform movement privileges the stability of middle-class households relative to the stability of poor households and, in so doing, expresses the view that the interests and needs of poor households are relatively unimportant."). Analyzing the effectiveness of the post-*Kelo* reforms in limiting the use of eminent domain for economic development is beyond the scope of this Article.

151 *E.g.*, ALA. CODE § 11-47-170(b) (2015) ("[A] municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; primarily for enhancement of tax revenue; [or] for transfer to a person . . . or other business entity."); KY. REV. STAT. ANN. § 416.675(b) (West 2018) ("No provision in the law of the Commonwealth shall be construed to authorize the condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly, such as by increasing the tax base, tax revenues, or employment, or by promoting the general economic health of the community."); NEB. REV. STAT. ANN. § 76-710.04(1) (West 2017) ("A condemnor may not take property through the use of eminent domain . . . if the taking is primarily for an economic development purpose."); TEX. GOV'T CODE ANN. § 2206.001(b)(3) (West 2017) ("A governmental or private entity may not take private party through the use of eminent domain if the taking . . . is for economic development purposes, unless the economic development is a secondary purpose resulting from . . . development or . . . activities to eliminate an existing affirmative harm on society from slum or blighted areas.").

152 *E.g.*, MINN. STAT. ANN. § 117.025(11)(b) (West 2019) ("The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose."); N.H. REV. STAT. ANN. § 498-A:2(VII)(b) (2017) ("[P]ublic use shall not include the public benefits resulting from private economic development and private commercial enterprise.").

153 *E.g.*, Property Rights Protection Act, 26 PA. STAT. AND CONS. STAT. ANN. §§ 201–207 (West 2017).

154 *E.g.*, Landowner's Bill of Rights and Private Property Protection Act, 2006 Ga. Laws 444.

155 *E.g.*, LA. CONST. ANN. art. 1 (2018) ("Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose."); MICH. CONST. art. 10, § 2 ("'Public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."); S.C. CONST. art. I, § 13(A) ("Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.").

courts interpreted their state constitutions as providing a more limited exercise of eminent domain than that of the Federal Constitution and ruled that a taking for purely economic benefit was not for a "public use" under the state constitution.[156]

III. POST-*KELO* PRESSURE TO EVEN FURTHER EXPAND THE DEFINITION OF "PUBLIC USE"

The "public use" discussion among legal scholars has shifted from takings to promote economic development to takings to meet the country's growing and changing energy needs. Because of the location of energy sources,[157] the interconnectedness of the country's electrical transmission grid, and the restructuring of the energy industry,[158] traditional "public use" analysis that focuses on the right of residents of the state in which the taking occurs to use the acquired property, or even to benefit from the taking, can frustrate energy initiatives. The potential for state eminent domain law to impede energy initiatives has led some scholars to call for change, such as continued expansion of the definition of "public use," federalization of transmission line siting, and review of state court actions under the dormant Commerce Clause.

A. *Electrical Transmission Lines*

The exercise of eminent domain for purposes of constructing electrical power transmission lines is well established, particularly when the entity constructing the power line is a public utility.[159] The need to expand and upgrade the interconnected networks of transmission lines that carry electricity across the country, however, has complicated this use of the power of eminent

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156 *E.g.*, City of Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006) ("We hold that although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public use requirement of Section 19, Article I of the Ohio Constitution."); Bd. of Cty. Comm'rs v. Lowery, 136 P.3d 639, 650 (Okla. 2006) ("[W]e hold that economic development alone does not constitute a public purpose and therefore, does not constitutionally justify the County's exercise of eminent domain.").

157 *See* Klass & Meinhardt, *supra* note 25, at 949–50; Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1807 (2012).

158 *See* Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the "Public Interest" in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705, 707–08 (2010); Klass, *supra* note 47, at 1083.

159 SACKMAN, *supra* note 22, at § 7.05[4][a]–[b]; Klass, *supra* note 47, at 1105.

domain.[160] These expansions and upgrades have proved particularly vexing for courts when the power supply and demand for the power are in different states.[161]

Since the early 1900s, public utilities have been able to exercise the power of eminent domain for the purpose of acquiring easements for transmission lines.[162] This exercise of eminent domain was seen as necessary because of the difficulty inherent in amassing contiguous properties for the lines without government involvement and because the utility provided a necessary service to the public.[163]

In deciding whether to allow the exercise of eminent domain for electrical transmission lines that are part of an interconnected regional grid, courts have typically allowed the exercise of eminent domain even when the primary purpose for the new line was to supply power to another state. For example, in *Gralapp v. Mississippi Power Co.*,[164] the Alabama Supreme Court considered whether the Mississippi Power Company, an entity qualified to do business in Alabama but not an Alabama public utility, could exercise eminent domain in Alabama with respect to a transmission line it sought to build from a plant in Alabama to the Mississippi state line.[165] The Mississippi Power Company, a public utility in Mississippi, was controlled by the Southern Company, which also controlled public utilities in Alabama, Florida, and Georgia.[166] The four public utilities operated an interconnected system, which meant that the utilities were unified for purposes of generating and transmitting electricity.[167] The landowners challenged the Mississippi Power Company's ability to use the power of eminent domain in Alabama because the Alabama Public Service Commission did not regulate the Mississippi Power Company, and because the primary purpose of the transmission line was to provide power to Mississippi, which the evidence indicated

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160 Klass, *supra* note 47, at 1084–86. The entry of private companies into the electricity market also complicates the use of eminent domain, especially post-*Kelo*, because of the traditional prohibition on using the power of eminent domain to benefit a private person or actor. *Id.* at 1121, 1123. This Article focuses on the incorporation of out-of-state interests into the "public use" analysis.

161 For example, states with renewable energy sources such as wind farms export power to states that either do not generate sufficient power in-state or who need to obtain a certain percentage of their power from renewable sources under state or federal law. *Id.* at 1129.

162 *Id.* at 1105–06.

163 *Id.* at 1104.

164 194 So. 2d 527 (Ala. 1967).

165 *Id.* at 528–530.

166 *Id.* at 528–529.

167 *Id.* at 529. According to the court, this coordination between utilities meant that the utilities acted "as a power pool in order to more effectively use transmission lines, generating plants, and storage reservoirs." *Id.* "The system is devised so that electrical power will flow from an area where there is an excess of generating ability at a particular time as compared with load or demand for electricity toward an area where there is (or there is a tendency to be) a deficiency of generating capacity as compared with the existing load in such deficiency area." *Id.*

was "substantially deficient in power."[168] The Alabama Supreme Court rejected these arguments.[169] It found that the construction of the transmission line was a public use in Alabama because power on the transmission line could flow both into and out of Alabama and because the coordination with the other utilities provided a backup power source, lowered costs for customers, and allowed each utility to maintain a smaller reserve capacity.[170]

At least one court has allowed the exercise of eminent domain when the residents of the state in which the taking occurred could not even use the power to be transmitted on the new line, but residents of the state reaped benefits from the improved reliability of the grid.[171] In *Square Butte Electric Cooperative v. Hilken*, the North Dakota Supreme Court considered whether an electric cooperative could exercise the power of eminent domain in North Dakota to construct a generating plant and transmission line that would be used to sell power to Minnesota Power & Light, which provided power only in Minnesota.[172] Importantly for the landowners who challenged the right of eminent domain, the transmission line would be a direct current line, meaning that the power could not be used along the line but only at its terminus in Minnesota, where it would be converted to an alternating current line.[173] Despite the inability to use the power transmitted at the plant or along the line in North Dakota, the North Dakota Supreme Court found that the construction of the plant and transmission line served a public use.

After reviewing case law from other jurisdictions regarding whether a taking is a public use when it affords benefits to out-of-state interests, the court articulated the following three-part test:

> First, the public must have either a right to benefit guaranteed by regulatory control through a public service commission (Bokma) or an actual benefit (Gralapp). Second, although other states may also be benefited, the public in the state which authorizes the taking must derive a substantial and direct benefit (Greenwich Water), something greater than an indirect advantage (Grover Irrigation). Third, the public benefit, while not confined exclusively to the state authorizing the use of the power (Greenwich Water), is nonetheless inextricably attached to the territorial limits of the state because the state's sovereignty is also so constrained (Clark and Grover Irrigation).[174]

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168 *Id.* at 529–31.

169 *Id.* at 531.

170 *Gralapp*, 194 So. 2d at 529, 531. The court summarily dismissed the argument that the Alabama Public Service Commission's lack of jurisdiction over the Mississippi Power Company affected its ability to exercise the power of eminent domain: "[W]e do not think it imperative that the Alabama Public Service Commission have regulatory powers over the operation of the line in question." *Id.* at 531.

171 Square Butte Elec. Co-op. v. Hilken, 244 N.W.2d 519, 527 (N.D. 1976).

172 *Id.* at 522.

173 *Id.*

174 *Id.* at 525; *see also* United Power Ass'n v. Mund, 267 N.W.2d 825, 827 (N.D. 1978) (saying that the trial court's decision that a taking was for "public use" was not erroneous under the test developed in *Square Butte Elec. Co-op.*).

Although it stated that none would be sufficient alone, the court found multiple benefits to North Dakota from the construction of the generating plant and transmission line. Namely, it noted the increase in reserve and emergency power, the increased reliability of the existing system because of the new direct current line, the lower cost of power for customers, the option to purchase power from the plant for use in North Dakota after a certain period of years, and other incidental benefits.[175] Because of those benefits, the court ruled that the electric cooperative could exercise the power of eminent domain.[176]

Courts have denied eminent domain for the construction of electrical transmission lines only when the record is devoid of any benefit to the residents of the state in which the taking occurs. In both *Clark v. Gulf Power Co.*[177] and *Mississippi Power & Light Co. v. Conerly*,[178] the courts considered whether the construction of a one-way transmission line from an in-state generating plant to a neighboring state constituted a public use.[179] In *Clark*, the Florida Supreme Court held that the construction of the transmission line was not a public use because the record did not contain any evidence of a benefit inuring to Florida from its construction.[180] Although the record in *Conerly* indicated a possible future benefit to some Mississippi consumers,[181] the court said it was too speculative to constitute a public use and noted that the Mississippi Public Service Commission did not have jurisdiction over any rates set for the electricity because it did not have jurisdiction over the interstate sale of electricity.[182]

Other states have refused to sanction the construction of electrical transmission lines that would benefit the residents of another state at the expense of residents of the state considering the use of eminent domain. In 2007, the Arizona Corporation Commissioners considered a request by Southern California Edison to construct a transmission line between Arizona and

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175 *Square Butte Elec. Co-op.*, 244 N.W.2d at 525–28.

176 *Id.* at 530–31.

177 198 So. 2d 368 (Fla. Dist. Ct. App. 1967).

178 460 So. 2d 107 (Miss. 1984).

179 *Id.* at 108; *Clark*, 198 So. 2d at 370.

180 *Clark*, 198 So. 2d at 371. Much of the problem with finding a public use in *Clark* seems to relate to deficiencies in the petition for condemnation: "There is a total absence of any allegation stating the actual use to be made of the Clark's property, or that the contemplated transmission line will be of any benefit to any resident of Florida, or that any 'public purpose' will be accomplished by the seizure of the Clark's property." *Id.* The court found no evidence in the record that power would flow into Florida from Georgia. *Id.*

181 According to the record, Mississippi Power & Light and two other utilities agreed to purchase energy from Middle South Energy's portion of the capacity at Grand Gulf Plant. *Conerly*, 460 So. 2d at 112. The record did not include any details regarding any transmission of energy from Louisiana into Mississippi. *Id.* Probably because Louisiana Power & Light was part of the Middle South Utility System and not the Southern Company like Mississippi Power & Light, the record did not analyze any possible benefits to Mississippi from reserve energy pools or stabilization. *Id.*

182 *Id.* at 112–13.

California.[183] In rejecting the request, the Arizona commissioners described the transmission line as a "230-mile extension cord" and expressed concern that the construction of the line would benefit Californians "at the expense of Arizona ratepayers, Arizona air quality, Arizona land, Arizona water and Arizona wildlife."[184]

Although the source of electricity flowing through the lines is different, the creation of new transmission lines raises the same legal questions regarding "public use." In recent years, the shift in the method of energy generation from coal-fired plants to renewable sources such as wind farms has created the need for new transmission lines.[185] For example, in *Oklahoma Gas & Electric Co. v. Beecher*,[186] the Oklahoma Gas & Electric Company ("OG&E"), an Oklahoma public utility, sought to exercise the power of eminent domain to acquire an easement for the construction of electrical transmission lines from wind farms in northwestern Oklahoma.[187] OG&E received permission from both Oklahoma Corporation Commission ("OCC") and the regional transmission organization, the Southwest Power Pool ("SPP"), to construct the line and to pass the costs of construction along to its customers, who were located in both Oklahoma and Arkansas.[188] OG&E explained that the transmission line was necessary because of the OCC's refusal to authorize the construction of a new coal-fired generating plant, growing demand, and possible future federal regulations that would require the use of renewable energy sources such as wind.[189] The new transmission lines would carry both the additional capacity needed for Oklahoma customers and additional capacity for other customers of SPP members.[190] The landowners argued that Oklahoma customers were not the primary beneficiaries of the line because they would use only twenty-two percent of the electricity carried on the line.[191] The court, however, found no proof that the remaining capacity would be used by out-of-state customers or that the amount used by Oklahoma customers would not increase in the future.[192] It stated that Oklahoma customers also benefitted from the regional control by the SPP.[193] Finally, the possibility

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183 Steven F. Greenwald & Jeffrey P. Gray, *Can FERC Deliver Transmission?*, POWER (Nov. 15, 2007), https://www.powermag.com/can-ferc-deliver-transmission/.

184 *Id.*

185 Okla. Gas & Elec. Co. v. Beecher, 256 P.3d 1008, 1010 (Okla. Civ. App. 2010).

186 256 P.3d 1008 (Okla. Civ. App. 2010).

187 *Id.* at 1009.

188 *Id.* at 1009–10.

189 *Id.* at 1010.

190 *Id.* According to the testimony of an OG&E official, SPP would control the line and charge for its use by the member public utilities or other electricity producers, although OG&E had proposed it, had chosen the route, and would own it. *Id.*

191 *Id.* at 1011.

192 *Beecher*, 256 P.3d at 1012.

193 *Id.* at 1014.

of a benefit to out-of-state interests through the SPP's control of the line was not a bar to OG&E's exercise of the power of eminent domain.[194]

Disputes regarding the use of the power of eminent domain to construct generating plants or electrical transmission lines are particularly pressing today.[195] For example, Professor Alexandra Klass, who has written extensively on the topic, discusses the need to increase the energy transmission grid to improve its reliability, to meet demand, and to incorporate renewable energy sources such as wind.[196] According to Professor Klass, public opposition to the use of eminent domain by a private company (rather than a public utility),[197] or for the benefit of out-of-state interests, threatens the success of energy initiatives, such as the use of cleaner energy sources.[198] To eliminate these concerns, she recommends either federal preemption of state eminent domain authority[199] or, recognizing the unlikeliness of that option, the amendment of state law to specifically allow the consideration of out-of-state interests[200] and the exercise of eminent domain for merchant (nonpublic utility) lines. Other articles have similarly discussed the federal preemption of state law[201] or the use of the dormant Commerce Clause to strike down state attempts to limit the exercise of eminent domain.

B. *Oil and Gas Pipelines*

The exercise of eminent domain for purposes of transporting oil and natural gas[202] is similarly well established. States have traditionally delegated

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194 *Id.*

195 *See, e.g.*, Brown & Rossi, *supra* note 158, at 770; Michael Diamond, *'Energized' Negotiations: Mediating Disputes over the Siting of Interstate Electric Transmission Lines*, 26 OHIO ST. J. ON DISP. RESOL. 217, 217–18 (2011); Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1899–900 (2015).

196 Klass, *supra* note 47, at 1117–20.

197 The decision of whether a private company can exercise the power of eminent domain for the construction of electrical transmission lines depends on the language of the state statute granting the power and typically not on the judicial construction of "public use." *Id.* at 1134. For that reason, this Article does not focus on this issue relating to the exercise of the power of eminent domain.

198 *Id.* at 1134–35; *see also* Klass & Wilson, *supra* note 157, at 1858; Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1021 (2009). According to Professor Klass, wind power is particularly challenging to transport because it cannot be stored, it can be transported only via transmission lines, and it is not generated near population centers. Klass & Wilson, *supra* note 47, at 1811–12.

199 Klass, *supra* note 47, at 1135–38.

200 *Id.* at 1138–47.

201 *See, e.g.*, Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129, 135–37 (2015); Rossi, *supra* note 198, at 1026–27.

202 Under the Natural Gas Act, the Federal Energy Regulatory Commission has jurisdiction over the siting and permitting of interstate natural gas pipelines. 15 U.S.C. § 717f(h) (2012). Since 1979 with the passage of the Hazardous Pipeline Safety Act, federal law preempts state law regarding pipeline safety. Thompson v. Heineman, 857 N.W.2d 731, 762 (2015). The states, however, have jurisdiction over the

the power of eminent domain to pipeline companies to transport oil when the company makes its pipeline available for the public to use. The development of new technologies for extracting oil and natural gas and the push to rely less on foreign oil sources have led to more interstate pipelines,[203] and to more landowner challenges of the use of eminent domain for the construction of pipelines for those lines, perhaps as part of the continued backlash to eminent domain post-*Kelo*.

Most states permit pipeline companies to exercise the power of eminent domain when engaging in public service, which typically means transporting oil or gas for the public as a common carrier.[204] Pipeline companies are considered common carriers when they offer to carry the petroleum or gas of the public at the published tariff rate.[205] In deciding whether a pipeline company is a common carrier, courts have considered whether the pipeline is available for use by the public and whether the pipeline company is subject to the jurisdiction of state regulators.[206] A review of the case law shows a lack of uniformity in the way that courts have answered these questions.[207]

Rather than rely on the pipeline company's characterization of its business as a common carrier, some courts have required pipeline companies to show that the pipeline is in fact available for use by the public.[208] Specifically, in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*,[209]

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siting and permitting of intrastate natural gas pipelines and pipelines carrying natural gas byproducts. Klass & Meinhardt, *supra* note 25, at 992–93.

203 Klass & Meinhardt, *supra* note 25, at 965. Specifically, new hydraulic fracturing technologies and directional drilling have made it possible to develop new sources of oil and gas. *Id.*

204 *See, e.g.*, ARK. CODE ANN. § 23-15-101 (West 2018); KY. REV. STAT. ANN. § 278.502 (West 2018); LA. STAT. ANN. § 45:254 (2017); N.D. CENT. CODE § 49-19-12 (2017); TEX. NAT. RESOURCES CODE ANN. § 111.019 (West 2017); *Thompson*, 857 N.W.2d at 765 (finding that Nebraska law permits pipeline companies to exercise the power of eminent domain when they are "providing a public service by offering to transport the commodities of others who could use its service, even if they are limited in number"); Klass & Meinhardt, *supra* note 25, at 982–83.

205 Ohio Oil Co. v. Fowler, 100 So. 2d 128, 130 (Miss. 1958).

206 *Id.*

207 Not only do states differ in terms of the way they define "public use" for purposes of exercising the power of eminent domain, they also differ in terms of the permitting process that pipeline companies must follow prior to the construction of a new pipeline. Klass & Meinhardt, *supra* note 25, at 982–84.

208 In *Robinson Township v. Commonwealth*, 147 A.3d 536 (Pa. 2016), the Supreme Court of Pennsylvania considered a facial challenge to a statute that authorized the condemnation of private property by any company "empowered to transport, sell, or store natural gas or manufactured gas in this Commonwealth" for the purposes of storage of natural or manufactured gas. *Id.* at 587. In ruling that the statute was not for a public use, the court noted that the statute did not limit the grant of eminent domain to public utilities but rather would include companies that did not sell gas directly to the public for consumption. *Id.* at 587–88. Importantly, the court rejected the argument proffered in support of the statute that the exercise of eminent domain was for the public use because it would "somehow advance the development of infrastructure in the Commonwealth." *Id.* at 588.

209 *(Texas Rice I)*, 363 S.W.3d 192 (Tex. 2012), *rev'd*, *(Texas Rice II)*, 510 S.W.3d 909 (Tex. 2017). In *Texas Rice II*, the Supreme Court of Texas reversed and held that the company was a common carrier

Denbury Green Pipeline-Texas, LLC ("Denbury") received a permit from the Railroad Commission to operate a pipeline in Texas.[210] The pipeline was a segment of a larger pipeline that would run from Denbury's carbon dioxide reserve in Mississippi across Louisiana and to Denbury's oil wells in Texas.[211] Some evidence in the record suggested that Denbury might purchase carbon dioxide from third parties and transport it in the pipeline as well.[212] After Denbury received the permit, it began surveying the land that would be subject to the pipeline easement.[213] Texas Rice Land Partners ("Texas Rice"), which owned two pieces of property along the proposed route, refused to give Denbury access to the property, and Denbury sued.[214]

At issue in the litigation was the effect of the Railroad Commission permit and the information Denbury provided in support of the permit. Specifically, the permit required the applicant to designate a pipeline as either "a common carrier" or "a private line."[215] It also required the applicant to state whether the transported gas would be "'[p]urchased from others,' '[o]wned by others, but transported for a fee,' or '[b]oth purchased and transported for others.'"[216] On its application, Denbury checked the boxes indicating that the pipeline would be a common carrier and that the gas would be "[o]wned by others, but transported for a fee."[217] Both the trial and intermediate appellate courts held that Denbury had the power of eminent domain because these representations gave it the status of a common carrier.[218] The intermediate appellate court held that the landowners could not "challenge in court whether the proposed pipeline will in fact be public rather than private."[219]

The Supreme Court of Texas refused to give the Railroad Commission permit preclusive effect as to Denbury's status as a common carrier.[220] The court found that nothing in the legislation or case law required courts to give the permit preclusive effect.[221] Furthermore, the Commission did not conduct an investigation or hearing, provide public notice to affected landowners, or

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based on additional evidence that the company had provided on remand. 510 S.W.3d at 515–17. The test and reasoning of *Texas Rice I* is still good law. *Id.* (applying the *Texas Rice I* test).

210 *Id.* at 195–96. For a helpful discussion of the Supreme Court of Texas's decision in this case, see Megan James, Comment, *Checking the Box Is Not Enough: The Impact of* Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC *and Texas's Eminent Domain Reforms on the Common Carrier Application Process*, 45 TEX. TECH L. REV. 959 (2013).

211 *Texas Rice I*, 363 S.W.3d at 195.

212 *Id.*

213 *Id.* at 196.

214 *Id.*

215 *Id.* at 195–96.

216 *Id.* at 196.

217 *Texas Rice I*, 363 S.W.3d at 196.

218 *Id.*

219 *Id.* at 195.

220 *Id.* at 198.

221 *Id.* at 198–99.

require any supporting documentation regarding common carrier status.[222] For these reasons, the court refused to consider the issuance of the Railroad Commission permit as preclusive regarding Denbury's status as a common carrier.[223] Looking at the facts of the case, the court concluded that Denbury was not a common carrier because it was the "the pipeline's only end user"; common carrier status requires that third parties would own some of the gas transported in the pipeline.[224] The court rejected Denbury's argument that its willingness to allow third parties to use the pipeline and its filing of a tariff were sufficient to confer common carrier status; common carrier status required a "reasonable probability . . . 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."[225] In concluding the lack of a reasonable probability of use by a third party, the court looked to the absence of potential customers, the absence of any other carbon dioxide suppliers on the route, and Denbury's own description of the pipeline on its website.[226]

The next year, however, the Texas Court of Appeals ruled that an interstate pipeline company could exercise the power of eminent domain even though the pipeline company was not subject to the Railroad Commission's rate-setting authority.[227] The court considered whether TransCanada Keystone Pipeline LP ("TransCanada") could acquire by eminent domain an easement for a pipeline that would convey crude petroleum across Texas based on the company's status as a common carrier.[228] The pipeline was part of the larger Keystone Pipeline System designed to convey crude petroleum from Canada to Cushing, Oklahoma, and then to Port Arthur, Texas.[229] The landowner argued that TransCanada was not a common carrier because it was involved in the interstate transmission of crude oil, and the Texas Railroad Commission did not have rate-setting powers for the crude oil.[230] First, the court found that nothing in the statutory scheme indicated that a pipeline

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222 *Id.* at 199–200. The court described the Railroad Commission's process as "one of registration, not of application." *Id.* at 199.

223 *Texas Rice I*, 363 S.W.3d at 200 ("Given this scant legislative and administrative scheme, we cannot conceive that the Legislature intended the granting of a T-4 permit alone to prohibit a landowner—who was not a party to the Commission permitting process and had no notice of it—from challenging in court the eminent-domain power of a permit holder.").

224 *Id.* at 200–01.

225 *Id.* at 202 (footnote omitted). According to the court, a contrary rule would allow "a gaming of the permitting process to allow a private carrier to wield the power of eminent domain." *Id.* at 201.

226 *Id.* at 202–03.

227 Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908, 916 (Tex. App. 2013).

228 *Id.* at 910–11.

229 *Id.* at 911.

230 *Id.* at 914–16. The Federal Energy Regulatory Commission ("FERC") has rate-setting authority over interstate oil pipelines. *Id.* at 916.

company had to be subject to all the requirements for common carriers to exercise the power of eminent domain.[231] Next, the court concluded that neither the statutory scheme nor its legislative history drew any distinctions between intrastate and interstate pipelines.[232] Applying the court's reasoning in *Denbury*, the court concluded that the taking was for a public use because the evidence demonstrated a reasonable probability that crude petroleum owners other than TransCanada would use the pipeline to ship their product on the terms in the tariff filed with the Federal Energy Regulatory Commission.[233] Therefore, the court concluded that TransCanada could exercise the power of eminent domain.[234]

On the other hand, at least one other court has found that the pipeline company's election to pursue the exercise of eminent domain as a common carrier imposes an obligation on it to allow members of the public to use that pipeline. For example, in *Linder v. Arkansas Midstream Gas Services Corp.*,[235] the Arkansas Supreme Court considered whether a state statute declaring "[a]ll pipeline companies operating in this state" to be common carriers, and granting them the power of eminent domain violated the Arkansas Constitution's requirement that eminent domain be used only for "public use."[236] In that case, the pipeline company sought to condemn property to construct a "gathering pipeline," which would transport natural gas from two production wells to the main trunk line.[237] The landowners argued that the line would not serve a public use but rather would be for the "exclusive use of a collection of individuals less than the public."[238] The court, however, rejected the landowner's challenge to the statute, stating that "the character of a taking, whether public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised."[239] The court held that the taking of the property in that case was a public use because the pipeline company had elected to operate the pipeline as a common carrier (as seen through its invocation of the common carrier's power of eminent

231 *Id.* at 916–17.

232 *Id.* at 917–19, 921.

233 *Crawford*, 409 S.W.3d at 923–24.

234 *Id.* at 924; *see also* Thompson v. Heineman, 857 N.W.2d 731, 759 (Neb. 2015) ("Under our definition of a common carrier, an oil pipeline carrier is a common carrier if it holds itself out as willing to transport oil products for a consideration to all oil producers in the area where it offers transportation services.").

235 362 S.W.3d 889 (Ark. 2010).

236 *Id.* at 890–91. Because the pipeline company was not a public utility, it was not required to obtain any approval from the Public Service Commission for the project. *Id.* at 891–92. For a helpful discussion of the court's decision in *Linder*, see Malcolm N. Means, Note, *Private Pipeline, Public Use?* Linder v. Arkansas Midstream Gas Services Corp., Smith v. Arkansas Midstream Gas Services Corp., *and Arkansas's Eminent Domain Jurisprudence*, 64 ARK. L. REV. 809 (2011).

237 *Linder*, 362 S.W.3d at 892.

238 *Id.* at 893.

239 *Id.* at 897. The court specifically rejected the landowner's "'public-use-in-fact' argument." *Id.* at 897–98 ("The distinction between public and private use is qualitative—not quantitative.").

domain) and because there were others that would use the pipeline upon its completion.[240]

Later that same year, the Arkansas Supreme Court made clear that a pipeline company's exercise of eminent domain under the statute constitutes a public use because, by proceeding under that statutory authority, the pipeline company elects to give the public the right to use the pipeline.[241] Because the record indicated that "multiple royalty owners and working-interest owners . . . will [use the pipeline and] pay the same rate," the pipeline company could be a common carrier.[242]

In a recent case, Kentucky courts grappled with both the lack of regulatory control over an interstate pipeline company and the availability of the pipeline for use by Kentucky producers. In 2013, the Williams Company, an Oklahoma company, announced its plan to partner with Boardwalk Pipeline Partners to construct an underground pipeline ("Bluegrass Pipeline") to transport natural gas liquids ("NGLs") from drilling areas in Ohio, Pennsylvania, and West Virginia to the Gulf Coast, where the liquids would be used in the production of plastics and other products.[243] Early plans for the pipeline indicated that it would traverse eighteen Kentucky counties before connecting with an existing pipeline in western Kentucky.[244] Although some landowners in the path of the proposed pipeline agreed to sell easements to the pipeline company, other landowners refused to negotiate with the pipeline company due to concerns about the safety and environmental impacts of the pipeline.[245] Specifically, some landowners were concerned about the lack of an environmental impact study given the plans for the pipeline to cross 750 waterways and the karst geology of central Kentucky.[246]

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240 *Id.* at 897.

241 Ralph Loyd Martin Revocable Trust Declaration Dated the First Day of Apr. 1994 v. Ark. Midstream Gas Servs. Corp., 377 S.W.3d 251, 258 (Ark. 2010) ("[W]hen Midstream elects to assert the power of eminent domain delegated in section 23-15-101, by operation of that statute, Midstream is a common carrier and is thereby subject to the public-use requirement expressed in article 2, section 22 of the Arkansas Constitution.").

242 *Id.* at 259.

243 James Bruggers, *Pipeline Plan Raises Questions*, COURIER-JOURNAL (Louisville), June 3, 2013.

244 *Id.*

245 *Id.* Vocal critics of the pipeline included members of local religious communities. *See* Adams, *supra* note 4. Those communities became involved in the conversations surrounding the pipeline because early plans for the pipeline caused it to traverse property owned by the Sisters of Loretto and the Abbey of Gethsemani, the site of the monastery where Thomas Merton lived. *Id.* After the sisters and monks refused to allow surveys of the land, the sisters orchestrated public meetings in which they urged landowners to protect the environment from the impacts of the pipeline. *Id.* Their efforts resulted in the delivery of a petition of over 36 thousand signatures to then-Kentucky governor Steve Beshear. Greg Kocher, *Citizens Petition Beshear to Oppose Eminent Domain for Proposed Pipeline*, LEXINGTON HERALD LEADER (Nov. 5, 2013, 4:14 PM) https://www.kentucky.com/news/politics-government/article44452263.html.

246 James Bruggers, *Bluegrass Pipeline Would Affect over 750 Waterways*, CINCINNATI ENQUIRER, Apr. 12, 2014.

Questions concerning Bluegrass Pipeline's ability to use eminent domain to acquire property from landowners who refused to sell their land rights to the pipeline company ultimately landed the pipeline project in court.[247] On December 5, 2013, the nonprofit group Kentuckians United to Restrain Eminent Domain ("KURED") brought a declaratory action against Bluegrass Pipeline.[248] It asked the Franklin Circuit Court to decide whether Bluegrass Pipeline could exercise the power of eminent domain under Kentucky Revised Statutes sections 278.502, 416.675, and 278.470 to acquire property for the construction of the pipeline.[249] KURED argued that Bluegrass Pipeline did not have the power of eminent domain because the pipeline served out-of-state interests, not Kentucky consumers and producers, and because the materials it would transport (NGLs) were neither "'oil or gas' nor 'oil or gas products' as prescribed by [Kentucky Revised Statutes section] 278.502."[250] Bluegrass Pipeline argued[251] that the potential for use of the pipeline by Kentucky manufacturers and producers was sufficient to satisfy the "in public service" requirement of the statute.[252]

The Franklin Circuit Court concluded that Bluegrass Pipeline did not have the power of eminent domain under Kentucky Revised Statutes section 278.502.[253] Specifically, the court ruled that section 278.470 extended the right of eminent domain only to utilities regulated by the Public Service Commission ("PSC") whose oil or natural gas wells or pipelines would be used "in public service."[254] Bluegrass Pipeline had admitted in its pleadings that it was not regulated by the PSC, and the court found that the pipeline would not be used "in public service" because it "[would] transport[] NGLs *through* Kentucky," and that "Bluegrass [Pipeline] is not serving Kentucky's consumers."[255]

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247 *Id.*

248 Kentuckians United to Restrain Eminent Domain, Inc. v. Bluegrass Pipeline Co., No. 13-CI-1402, 2014 WL 10246980, at *1 (Ky. Cir. Ct. Mar. 25, 2014), *aff'd*, 478 S.W.3d 386 (Ky. Ct. App. 2015).

249 *Id.*

250 *Id.* at *2.

251 Bluegrass Pipeline also argued that KURED lacked standing to bring the action and that the case did not present an actual case and controversy because Bluegrass Pipeline had not filed a condemnation action. *Id.* at *2–3. With respect to the standing challenge, the court ruled that Bluegrass Pipeline's prior efforts to acquire property from a member of KURED and the fluctuating path for the pipeline gave KURED standing to bring the claim. *Id.* at *3–4. The court also noted that any citizen or taxpayer could challenge a private corporation's use of the power of eminent domain for private interests. *Id.* at *4. With respect to justiciability, the court ruled that Bluegrass Pipeline's assertion of its ability to exercise the power of eminent domain created an actual case or controversy that was ripe for judicial review. *Id.* at *4–5. The court noted that Bluegrass Pipeline's ability to alter the course of the pipeline made the issue "capable of repetition yet evading review." *Id.* at *5.

252 *Id.* at *7.

253 *Id.*

254 *Kentuckians United*, 2014 WL 10246980, at *7.

255 *Id.* at *6–7.

The court also rejected Bluegrass Pipeline's argument that either Kentucky Revised Statutes section 416.675(2)(d) or section 278.470 authorized the use of eminent domain by an interstate common carrier.[256] Bluegrass Pipeline argued that, by defining "public use" to include "[t]he use of the property for the creation or operation of public utilities or common carriers," section 416.675(2)(d) included even interstate common carriers.[257] The court rejected this construction, finding that section 416.675(2)(d) was a limitation on the use of eminent domain.[258] The court also construed the class of common carriers that could exercise the power of eminent domain narrowly: it ruled that the statute granted the power of eminent domain only to PSC-regulated utilities with pipelines transporting oil or natural gas, which did not include NGLs, "in public service."[259]

Bluegrass Pipeline's arguments for the power of eminent domain did not fare any better in the Kentucky Court of Appeals, which agreed with the trial court that Kentucky Revised Statutes section 278.502 granted the power of eminent domain only to PSC-regulated utilities and that interstate transportation of NGLs was not "in public service."[260] The court stated, "If these NGLs are not reaching Kentucky consumers, then Bluegrass and its pipeline cannot be said to be in the public service of Kentucky."[261]

Just like the trial court, the Kentucky Court of Appeals did not focus on Bluegrass Pipeline's argument that the pipeline was "in public service" because a Kentucky manufacturer or producer could use the pipeline in the future. In response to KURED's motion for summary judgment, Bluegrass Pipeline submitted an affidavit from a Western Kentucky chemical corporation stating that it "may possibly, at some undefined time in the future, seek to interconnect with the pipeline."[262] In considering whether the pipeline would be "in public service," the court stated that "the only stated purpose of the pipeline is to transport NGLs to the Gulf Coast to be processed and sold in Louisiana; not to provide natural gas to Kentuckians."[263] Thus, the court gave no weight to the affidavit, but it did not articulate what showing would have been sufficient to show that the line was providing service to Kentuckians.

Analyzing the potential for Kentucky consumers or manufacturers to use the pipeline would have been consistent with prior Kentucky law. For

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256 *Id.* at *7.

257 *Id.*

258 *Id.*

259 *Id.* at *8.

260 Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc., 478 S.W.3d 386, 392 (Ky. Ct. App. 2015).

261 *Id.*

262 *Kentuckians United*, 2014 WL 10246980, at *2.

263 *Id.* at *7.

example, just two years earlier in *EQT Gathering, LLC v. A Tract of Property Situated in Knott County, Kentucky*,[264] the United States District Court for the Eastern District of Kentucky rejected the argument that a natural gas pipeline was not used "in public service" because the pipeline was not "fully open to the public."[265] The court observed that "[h]ighly regulated pipelines that carry highly flammable materials need not be fully open to the public to be a public use."[266] Because the pipeline was accessible to other natural gas transportation companies, the court determined that the pipeline was available for use by the "public relevant here."[267]

Similarly, in *Milam v. Viking Energy Holdings, LLC*,[268] the Kentucky Court of Appeals considered whether a gathering line operator could exercise the power of eminent domain with respect to a natural gas pipeline that would transport natural gas from Richardsville, Kentucky, to its facilities in Bowling Green, Kentucky, for sale to Atmos Energy Marketing, LLC.[269] The court found that Kentucky Revised Statutes section 278.502 did not condition the power of eminent domain on the type of pipeline involved and ruled that the gathering line operator was acting "in public service," even though it was transporting the natural gas to a private company rather than to a Kentucky consumer.[270]

Questions like those that arose in Kentucky in connection with the Bluegrass Pipeline are likely to continue, especially given the publicity of the Standing Rock Sioux protests.[271] Because of new technologies such as hydraulic fracturing and directional drilling, oil and natural gas production in the United States has greatly increased in both areas that have been historical sources of oil and gas and areas that have not.[272] This increased production has put pressure on the pipeline infrastructure and resulted in the need for additional pipelines, particularly interstate pipelines, to be constructed across the United States.[273] Because many of these wells produce oil, natural gas,

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264 970 F. Supp. 2d 655 (E.D. Ky. 2013).

265 *Id.* at 662–63; *see also* K Petroleum Inc. v. Prop. Tax Map No. 7 Parcel 12, No. 6:14-201-DCR, 2016 WL 937329, at *3 (E.D. Ky. Mar. 10, 2016) (determining that a pipeline company that sold gas to Kentucky consumers living within the immediate vicinity of a producing well or gathering and to a natural gas utility for distribution to Kentucky consumers was a common carrier and met the public use requirement).

266 *EQT Gathering*, 970 F. Supp. 2d at 663.

267 *Id.*

268 370 S.W.3d 530 (Ky. Ct. App. 2012).

269 *Id.* at 533.

270 *Id.* at 535.

271 *See* Kris Maher, *Pipelines Encounter Stiffening Resistance*, WALL ST. J. (Mar. 31, 2017), https://www.wsj.com/articles/pipelines-encounter-stiffening-resistance-1490952608.

272 Klass & Meinhardt, *supra* note 25, at 965–66.

273 *Id.* at 968–69.

and NGLs, infrastructure is needed to transport all the products of the well to reduce the occurrence of gas flaring.[274]

Public opposition to the construction of additional pipelines, however, has complicated the expansion of the oil and gas infrastructure in some instances. For example, from 2008 until 2017, state and federal regulators dealt with opposition to the Keystone XL Pipeline, a pipeline intended to stretch from Canada to the Gulf Coast.[275] In Kentucky, public opposition to the Bluegrass Pipeline affected the construction of that pipeline.[276] As the efforts to expand the pipeline system continue, questions regarding whether a pipeline that passes through a state, rather than transporting oil or gas to or from residents of the state, will continue to plague the courts. The likelihood of these cases continuing to arise makes the lack of uniformity in the existing case law troublesome.

V. A WORKABLE STANDARD FOR DETERMINING WHETHER TAKINGS THAT BENEFIT RESIDENTS OF OTHER STATES ARE FOR A PUBLIC USE

The "public use" requirement serves a vital function in limiting the exercise of eminent domain. Further extending the definition of "public use" to require consideration of benefits to residents of other states or use of the property by residents of other states will further erode "public use" such that the power of eminent domain will be limitless. Because of the potential for abuse, the need to protect the environment, and the importance of the public benefitting from actions taken on its behalf, the "public use" requirement must not be rendered mere surplusage and must serve as an effective limitation on eminent domain.[277]

Federalization of issues relating to the construction of interstate transmission or pipelines would not necessarily bring the consistency and freedom from delay that scholars indicate it would. Both the Dakota Access Pipeline and Keystone XL Pipeline required federal approvals because the projects affected federal lands and, with respect to the Keystone XL Pipeline, crossed

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274 According to Professors Klass and Meinhardt, because of the climate, the industry practice regarding the construction of gathering lines, and the inability to exercise the power of eminent domain for gathering lines, significant gas flaring occurs at wells in North Dakota. *Id.* at 1009–10.

275 *Id.* at 988–89.

276 *See supra* notes 4–6, 243–63 and accompanying text.

277 Kelo v. City of New London, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting). Justice Thomas used the following language to describe the effect of the Court's interpretation of the "public use" requirement: "Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power." *Id.*

an international border.[278] As described above, the Dakota Access Pipeline resulted in litigation and months of protests. Regulators began considering the Keystone XL Pipeline in 2008, and President Trump signed an executive order in January 2017 designed to jumpstart the approval of the pipeline.[279] State regulators granted the permit in 2013, but President Obama denied a permit to cross the border in 2015.[280] The history of the Keystone XL Pipeline, therefore, has been one of delay and changed positions.

Lost in many discussions of the scope of the power of eminent domain is the source of that power and its inherent limitations. Because the power of eminent domain is inherent in the right of the sovereign, the exercise of that power is rightfully limited to actions that would benefit its residents.

In 1913, the Wyoming Supreme Court defined eminent domain as "the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare."[281] Because each state is sovereign, each state can exercise the power of eminent domain for the greater good of its own residents.[282] Individuals join together to form governments for their common good, and the sovereign's power to exercise the power of eminent domain is thus limited to purposes that would advance that common good.[283]

It is equally well established that a state's exercise of the power of eminent domain is limited by its territorial boundaries.[284] For example, in *County Court of Wayne County v. Louisa & Fort Gay Bridge Co.*,[285] the United States District Court for the Southern District of West Virginia considered whether the State of West Virginia could exercise the power of eminent domain with respect to a toll bridge that was located partly in West Virginia and partly in

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278 Khalea Ross Robinson, *Dakota Access and Keystone Pipelines Revived: Why Does It Matter?*, CBS NEWS (Feb. 3, 2017, 9:41 PM), https://www.cbsnews.com/news/dakota-access-and-keystone-pipelines-revived-why-does-it-matter.

279 Paul Hammel, *TransCanada Files for Approval of Nebraska Route for Keystone XL Pipeline; Foes Remobilizing*, OMAHA WORLD-HERALD (Feb. 17, 2017), https://www.omaha.com/news/nebraska/transcanada-files-for-approval-of-nebraska-route-for-keystone-xl/article_d25d229e-f464-11e6-9a2e-73e62185df5e.html. For a general discussion of the Keystone XL Pipeline, see O'Rourke, *supra* note 56.

280 Hammel, *supra* note 279.

281 Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43, 53 (Wyo. 1913); *see also* Adams v. Greenwich Water Co., 83 A.2d 177, 182 (Conn. 1951) ("It is true that no state is permitted to exercise or authorize the exercise of the power of eminent domain except for a public use within its own borders.").

282 *Grover Irrigation*, 131 P. at 53 ("It means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the greater necessities of the whole community." (quoting Bloodgood v. Mohawk & Hudson R.R. Co., 18 Wend. 9, 57 (N.Y. 1837))).

283 *Id.*; *see also* Stoebuck, *supra* note 19, at 566–69 (discussing the consent theory of government).

284 *Grover Irrigation*, 131 P. at 56 (determining that allowing an incidental benefit to in-state residents to justify the exercise of the power of eminent domain would "permit the exercise of eminent domain in [Wyoming] by the state of Colorado, or any other state, for its own uses and purposes").

285 46 F. Supp. 1 (S.D. W. Va. 1942).

Kentucky.[286] The court rejected the State's argument that principles of comity among the states allowed the exercise of eminent domain.[287] The court explained that "[t]he power of eminent domain is an attribute of sovereignty"[288] and advised as follows with respect to the exercise of that power:

> But no state can take or authorize the taking of property located in another state. Each state holds all the property within its territorial limits free from the eminent domain of all other states. To argue that the people of West Virginia have any inherent right to take property located in Kentucky from a citizen of that state, is to assert that the sovereignty of West Virginia extends to some extent over the soil of Kentucky.[289]

According to the court, comity did not require "that high and drastic power of condemnation."[290] Allowing an exercise of the power of eminent domain to benefit the residents of another state essentially would have the same practical effect as allowing the taking contemplated in *Fort Gay Bridge Co.*

Though the "public use" requirement of the federal and state constitutions should not be sacrificed to promote modern energy infrastructure needs, a standard that takes into account the interconnectedness of the country's energy infrastructure and the key principles of eminent domain law can serve as a compromise position. Specifically, in *Square Butte Electric Cooperative v. Hilken*, the North Dakota Supreme Court proposed a three-part test that would provide uniformity in this area of the law.[291]

First, the court required that the public "have either a right to benefit guaranteed by regulatory control through a public service commission . . . or an actual benefit."[292] This requirement that the party exercising the power of eminent domain makes that party accountable to the residents of the state[293]

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286 *Id.* at 2.

287 *Id.*

288 *Id.*

289 *Id.*

290 *Id.* at 3.

291 Square Butte Elec. Co-op. v. Hilken, 244 N.W.2d 519, 522 (N.D. 1976).

292 *Id.* at 525; *see also* Cox v. State, No. 3:16CV1826, 2016 WL 4507779, at *12 (N.D. Ohio Aug. 29, 2016).

293 *See* Cty. of Wayne v. Hathcock, 684 N.W.2d 765, 782 (Mich. 2004) (requiring that a private entity be subject to regulatory control so that the "public retain[s] a measure of control over the property"). In his dissent in the infamous *Poletown Neighborhood Council v. City of Detroit* decision, Justice Ryan discussed the requirement of continuing accountability to the public. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 479–80 (Mich. 1981) (Ryan, J., dissenting), *overruled by* Cty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). In that case, the majority found that Michigan's constitution permitted the use of the power of eminent domain to acquire property that would be transferred to General Motors for the construction of a facility that would help the economy by providing more jobs. *Id.* at 457–59 (per curiam decision). Justice Ryan, however, found that rationale for the use of eminent domain not to be compelling because employment decisions for the facility would be made by General Motors

and has been imposed by multiple courts.[294] This requirement is important because it protects the interests of the residents of the state from the eminent abuses discussed in Part I and ensures that the purpose for the taking is accomplished. Requiring the watchful eyes of a state regulatory commission also has the potential to give an otherwise lacking voice on behalf of the poor, racial and ethnic minorities, and the elderly.[295]

Second, the court required that the residents of the state in which the taking would occur "derive a substantial and direct benefit" from the taking.[296] In the context of a pipeline, residents of the state in which the taking would occur derive such a benefit when residents use the pipeline or there is a reasonable probability that residents will use the pipeline in the future. As the cases described above demonstrate, this requirement is not a strenuous one. Rather, courts across the country have found adequate proof of in-state benefit from a pipeline without evidence of significant instate use.[297] As discussed above, eminent domain carries with it significant environmental and personal costs for the residents who either own the land subject to the take or who live near it. Requiring that residents benefit from the take ensures that those costs are not extracted without incurring a corresponding benefit.

Third, the court recognized that the benefit of the taking need not be limited to just the residents of the state authorizing the use of eminent domain but that the benefit must be realized within the territorial boundaries of the state.[298] The interconnectedness of the nation's energy infrastructure demands that the benefits to residents of other states not preclude the exercise of eminent domain.

CONCLUSION

In its 2005 decision in *Kelo v. City of New London*, the United States Supreme Court ended any hope for a narrow reading of the "public use"

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corporate officers, who would necessarily be driven by the need to improve the profits of the facility, not by regional unemployment statistics. *Id.* at 480 (Ryan, J., dissenting).

294 *See, e.g.*, Linder v. Ark. Midstream Gas Servs., 362 S.W.3d 889, 897 (Ark. 2010); Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc., 478 S.W.3d 386, 392 (Ky. Ct. App. 2015); Tex. Rice Land Partners Ltd. v. Denbury Green Pipeline-Texas, 363 S.W.3d 192, 195 (Tex. 2012), *rev'd*, 510 S.W.3d 909 (Tex. 2017).

295 Somin & Adler, *supra* note 31, at 641–44; Berliner, *supra* note 31, at 102, 185; Carpenter & Ross, *supra* note 31, at 6–7. Some scholars have advocated the federalization of issues relating to the construction of interstate pipelines. *See, e.g.*, Klass & Meinhardt, *supra* note 25, at 951–52. However, the protests associated with the Dakota Access Pipeline demonstrate that involvement of the federal government does not adequately protect the interests of minorities. *See supra* notes 7–18 and accompanying text.

296 *Square Butte*, 244 N.W.2d at 525.

297 *See, e.g.*, EQT Gathering, LLC v. A Tract of Prop. Situated in Knott Cty., 970 F. Supp. 2d 655, 663 (E.D. Ky. 2013); Ralph Loyd Martin Revocable Trust Declaration Dated the First Day of Apr. 1994 v. Ark. Midstream Gas Servs., 377 S.W.3d 251, 258 (Ark. 2010); Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908, 922–24 (Tex. App. 2013).

298 *Square Butte*, 244 N.W.2d at 525.

requirement in the U.S. Constitution. The ability of states to require that the residents of their state benefit from the takings that they authorize is one of the few remaining limitations on the power of eminent domain. State courts should not sacrifice this limitation in the name of expansion of the energy infrastructure.