

Fordham Environmental Law Review

Volume 29, Number 2

2017

Article 6

Eminent Domain and Oil Pipelines: A Slippery Path for Federal Regulation

Natalie M. Jensen*

*Fordham Law School, njensen2@fordham.edu

Copyright ©2017 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <https://ir.lawnet.fordham.edu/elr>

EMINENT DOMAIN AND OIL PIPELINES: A SLIPPERY PATH FOR FEDERAL REGULATION

*Natalie Jensen**

INTRODUCTION

Oil pipelines are controversial. The Keystone XL Pipeline, poised to be the largest oil pipeline in North America, has generated opposition from tens of thousands, including those who marched on the White House and even His Holiness the Dalai Lama, who urged President Obama to focus on renewable energy solutions instead.¹ Civil rights came under attack when the Dakota Access Pipeline, which is planned to run from North Dakota through South Dakota and Iowa to Illinois, demolished sacred Standing Rock Sioux Tribe sites.² Protests of the Dakota Access Pipeline became front-page news as law enforcement turned tear gas and water hoses on the crowds standing in solidarity with the Native Americans affected by the pipeline's construction.³ However, another source of controversy for oil pipelines that is becoming increasingly contentious is private oil companies' use of eminent domain to acquire land on which the pipelines will be built. Oddly enough, this controversy crosses political lines and creates unusual bedfellows. For example, those who are in favor of

* J.D., 2018, Fordham University School of Law; B.A., 2012, College of Charleston. I would like to thank Professor Sheila Foster and Professor Kimberly Diamond for their guidance and expertise. I would also like to thank the *Fordham Environmental Law Review* Editorial Board and staff, with a special thank you to Vincent Nguyen and Rebecca Susko. Lastly, I would like to thank my family and friends for their support and encouragement.

1. Ryan Harrigan, *Transcanada's Keystone XL Pipeline: Politics, Environmental Harm, & Eminent Domain Abuse*, 1 U. BALT. J. LAND & DEV. 207, 208 (2012).

2. Rebecca Hersher, *Key Moments in The Dakota Access Pipeline Fight*, NAT. PUB. RADIO (Feb. 22, 2017), <http://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> [<http://perma.cc/U5N4-A6UC>].

3. *Id.*

strengthening domestic energy production from traditional carbon-based sources often strongly oppose eminent domain as an overstep of governmental power.⁴ On the other end of the spectrum, those who generally support the use of eminent domain to redevelop blighted areas often do not want to expand domestic fuel production, choosing instead to focus on renewable energy sources.⁵

Oil pipeline siting is not federally regulated unless the pipeline is sited on land under federal jurisdiction.⁶ Therefore, state law governs oil pipeline siting.⁷ However, state laws conflict in their treatment of oil pipelines. To build oil pipelines, oil companies must receive easements from private landowners to build on their land. Depending on the state, oil companies may be subject to permitting and environmental review by state agencies in order to begin construction of the pipeline.⁸ Some landowners refuse to accept the oil pipeline company's compensation for their land and refuse to grant the pipeline company an easement for the pipeline. In most states, the oil company may then use eminent domain to take the land, circumventing the landowner's property rights.⁹ In such circumstances, landowners have sued, declaring an unconstitutional taking by a private company. This area of the law is largely unsettled due to a lack of consistency from state to state. Therefore, if a company intends to build an oil pipeline, like the Keystone XL Pipeline or the Dakota Access Pipeline, and landowners object, the company will be subject to the eminent domain laws of each state and municipality along the intended route. Overall, this suggests that the current landscape is untenable.

4. Phil McKenna, *Anti-Eminent Domain but Pro-Pipelines: A Republican Conundrum*, INSIDE CLIMATE NEWS (Mar. 4, 2016), <https://insideclimatenews.org/news/29022016/eminent-domain-oil-pipelines-keystone-xl-republican-donald-trump-ted-cruz> [<http://perma.cc/CZ9V-WTPW>].

5. *Id.*

6. *Student Corner: Regulating Energy – Oil*, FED. ENERGY REG. COMM'N, <https://www.ferc.gov/students/regulation/oil.asp> (“FERC does not regulate the oversight of oil pipeline construction. The authority rests with states and local jurisdictions.”).

7. *Id.*

8. Jeff D. Makhholm & Laura T. W. Olive, *The Politics of U.S. Oil Pipelines: The First Born Struggles to Learn from the Clever Younger Sibling*, 37 ENERGY L. J. 409, 423 (2016).

9. *Id.*

Many environmentalists oppose the use of eminent domain for the siting, or plan for construction and development of routes, for oil and natural gas pipelines, as these forms of energy are nonrenewable and therefore arguably not in the public's best interest.¹⁰ However, eminent domain may be the answer to promoting a transition to renewable energy sources, such as wind power, solar power, and hydropower.¹¹ Renewable resources such as solar power and wind power are usually built far away from population centers both because these resources are more abundant and because there is more land on which to site the generating source.¹² This is problematic, as the supply of electricity must be delivered to the population centers with high energy demand by a high-voltage transmission system, "which has become increasingly stressed in recent years as growing demand has outstripped capacity."¹³ As with oil pipelines, states have various regulating entities that focus on environmental aspects or economic aspects of a proposed transmission line or base permitting on voltages, length of the proposed transmission line, or benefit to the community.¹⁴ A one-regulation-fits-all approach does not seem ideal

10. Nives Dolsak et al., *The Big Fight Over the Dakota Access Pipeline, Explained*, WASH. POST (Sept. 20, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/20/this-is-why-environmentalists-are-targeting-energy-pipelines-like-the-north-dakota-project/?utm_term=.c007fd7d9dd7 [http://perma.cc/XD4X-XZTU].

11. Herman Trabish, *How New Transmission can Unlock 10 Times More Renewables for the Eastern U.S.*, AM. FOR A CLEAN ENERGY GRID (Nov. 8, 2016), <https://cleanenergygrid.org/how-new-transmission-can-unlock-10-times-more-renewables-for-the-eastern-u-s/> [http://perma.cc/9HA3-UDPW].

12. See Brad Plumer, *These Maps Show the Best Places to Put Solar and Wind Power. (It's Not Where You Think.)*, WASH. POST (July 15, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/15/these-maps-show-the-best-places-to-put-solar-and-wind-power-its-not-where-you-think/?utm_term=.ec6f4537a113 [http://perma.cc/TTJ5-D4H2].

13. THE NAT'L ACADEMY OF SCIENCES ET AL., *What You Need to Know About Energy* (last visited Nov. 27, 2017), <https://www.nap.edu/read/12204/#slide3>. This stress may cause disruptions in power services, as seen during the blackout in 2003 that affected 50 million people from Ohio to New York to Canada. *Id.*

14. See, e.g., A.R.S. §§ 40-360.06 -360.07(B) (Arizona statute requiring above-ground transmission lines with a capacity of 115,000 volts or more to meet numerous factors similar to those for a power plant construction); Florida Transmission Line Siting Act, §§403.52-5365, F.S., and Rule 62-17, F.A.C. (Florida law requiring transmission lines 230 kV or larger, cross a county line, or are greater than 15 miles

at first glance because both clean and dirty energy are regulated differently, which is understandable given the differences in the source of energy,¹⁵ safety concerns,¹⁶ and uses of energy.¹⁷ But, a centralized regulatory framework could advance a modern and innovative energy policy that advocates for renewable energy while considering the transition from nonrenewable sources.

This Note attempts to address the patchwork of state pipeline regulation and proceeds in three parts. First, Section I describes why private companies are allowed to use eminent domain. This section tracks how private companies acting in specific contexts are considered “public uses.” Such contexts include when companies act as common carriers, public utilities like electric transmission lines or natural gas pipelines, and private companies involved in economic developments. Next, Section II explains the conflicting state eminent domain laws that treat oil pipelines differently to either grant or deny the oil companies the right to build their pipelines. Finally, Section III proposes a “cooperative federalism” model that would allow state autonomy under a federal regulatory framework. In such an arrangement, states could elect to treat oil companies as private companies and deny them the right of eminent domain or adhere to the baseline national standards for eminent domain, which would include a clear showing of “public use” or necessity before the pipeline

in length to receive approval by the Department of Environmental Protection, state and local governments, and a final decision by the Governor and Cabinet sitting at the Siting Board). Edison Electric Institute, *State Generation & Transmission Siting Directory: Agencies, Contacts, and Regulations* 5, 26-28 (Oct. 2013) http://www.eei.org/issuesandpolicy/transmission/Documents/State_Generation_Transmission_Siting_Directory.pdf.

15. See Energy Sources, ENERGY.GOV, <https://energy.gov/science-innovation/energy-sources> (last visited Nov. 27, 2017). Water, photovoltaic rays, oil, and wind (all sources of energy) have different physical qualities and are regulated differently at the federal and state level. *Compare* What FERC Does, FERC (May 24, 2016), <https://www.ferc.gov/about/ferc-does.asp> *with* What FERC Does Not Do, FERC (May 24, 2016), <https://www.ferc.gov/about/ferc-does.asp>.

16. See Elisa Wood, *The Dangers of Energy Generation*, RENEWABLE ENERGY WORLD (May 25, 2011), <http://www.renewableenergyworld.com/articles/print/volume-14/issue-3/solar-energy/the-dangers-of-energy-generation.html> [<http://perma.cc/XC4H-62NK>].

17. See generally THE NAT'L ACADEMY OF SCIENCES ET AL., *What You Need to Know About Energy* (last visited Nov. 27, 2017), <https://www.nap.edu/read/12204/#slide1>.

company could use eminent domain. Ultimately, this model would create a framework that is inclusive of both state preferences and the renewable energy sector.

I. EMINENT DOMAIN

The Fifth Amendment gives the government the right to take private land for a public use with just compensation to the landowner, commonly referred to as the power of eminent domain.¹⁸ According to scholars, no legislative history exists to indicate the drafters' interpretation of "public use" in the Fifth Amendment.¹⁹ Although no "public use" provision exists in English laws either, historically, the government's exercise of eminent domain was uncontested for public highways or mills that had wide-spread benefits.²⁰ However, with the industrial expansion of the nineteenth century, landowners began seeking legal remedy for what they believed to be unconstitutional takings for uses such as government buildings or railroad expansion.²¹ The Supreme Court was forced to decide whether "public use" would narrowly apply only to land actually used by the public, or whether it would apply broadly to land that was for a more general public purpose.²² The Court decided on a broad view of "public use" that encompasses a public purpose generally, but the Court also granted deference to the states to decide the more tailored purposes for their constituents.²³

The federal government has "power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions."²⁴ The power of eminent domain has enabled the

18. U.S. CONST. amend. V. While the definition of "just compensation" has been an area of contention, this Note focuses on the definition of "public use."

19. See William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 591-95 (1972); MICHAEL WOLF ALLEN, POWELL ON REAL PROPERTY § 79F.03 (2017).

20. POWELL ON REAL PROPERTY § 79F.03.

21. *Id.*

22. *Id.*

23. *Clark v. Nash*, 198 U.S. 361, 367-68 (1905); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916) (citing *Clark*, 198 U.S. at 367-68).

24. *Kohl v. United States*, 91 U.S. 367, 371 (1875) (holding the government had the right to take land for the construction of a customs building and post office).

government to provide transportation routes, water supply, national parks, naval bases, and large infrastructure projects to citizens as those public needs arose.²⁵ This implied power is conferred onto states through the Fourteenth Amendment and through state constitutions that also condition government takings on the premise of a “public use” and on payment of just compensation to the landowner.²⁶ Over time, the legal confines of eminent domain that once theoretically protected landowners from unconstitutional takings have been broadened as the definition of what qualifies as a “public use” has expanded. The definition of “public use” has evolved to include uses that arguably only benefit private actors, but within a broad scope could possibly affect the public. The definition of “public use” is important in determining whether an oil pipeline should qualify as a public use, as a broad definition may allow or exclude private oil companies.

This section examines how the Court’s definition of “public use” intertwines with private entities seeking to use eminent domain. When analyzing the private benefit from governmental power of eminent domain, it is important to look at the legal history surrounding three areas where private entities have the power of eminent domain. First, common carriers’ use of eminent domain is explained, showing how private actors were given the right of eminent domain for large infrastructure transportation projects, and how federal regulations shaped the landscape of common carriers’ operation. Next, the relationship between electric utilities’ use of eminent domain and state and local government is explained. While utility companies are regulated differently based upon the type of energy transmitted, virtually all traditional types of energy have the power of eminent domain, either through federal or state governments. Lastly, the general “public use” doctrine is explained, showing the development

25. *See History of the Federal Use of Eminent Domain*, DEPT. OF JUST. ENVT. & NAT. RESOURCES DIV. <https://www.justice.gov/enrd/history-federal-use-eminent-domain>; *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884) (holding the government had the right to acquire property from landowner, with just compensation, to provide drinking water to a city via aqueducts); *Shoemaker v. United States*, 147 U.S. 282 (1893) (holding Congress had the right to acquire property from landowners, with just compensation, for the designation of land as a national park).

26. U.S. CONST. amend. XIV; *see, e.g.*, TEX. CONST. art. I, § 17.

of economic uses that allow the government to transfer land from one private landowner to another.

A. Eminent Domain for Common Carriers

Railroad companies have the power of eminent domain in their capacity as common carriers.²⁷ Rooted in common law, the rights, privileges, duties, and liabilities of common carriers differ with those of private carriers, also called contract carriers.²⁸ A common carrier “must hold himself out as ready to engage in the transportation of goods for hire as a business. . . .”²⁹ Furthermore, designation as a common carrier depends “not . . . upon whether its charter declares it to be such, . . . but upon what it does.”³⁰ Factors that determine a common carrier designation include: regular service, unpredictable and changeable customers, business solicited from the general public, and the carrier’s responsibilities defined by regulations.³¹ Factors that determine a private carrier include: occasional service, identifiable and stable clientele, targeted business solicitation, and responsibilities defined by contract.³² One of the most important duties railroads have as common carriers is a duty to provide nondiscriminatory service.³³

The railroad industry was the first federally-regulated private industry. Seeking to take a stand against monopolies, in 1887 Congress enacted the Interstate Commerce Act (“ICA”).³⁴ The ICA established the Interstate Commerce Commission (“ICC”), which set reasonable rates for the railroad industry.³⁵ At that time, most states allowed

27. *See, e.g.*, 49 U.S.C. § 24311 (2014) (“Amtrak may acquire by eminent domain . . . interests in property necessary for intercity rail passenger transportation.”).

28. Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, The Columbia Institute for Tele-Information, Telecommunications Policy (1994).

29. *Fish v. Chapman & Ross*, 2 Ga. 349 (1847).

30. *United States v. Brooklyn E. Dist. Terminal*, 249 U.S. 296, 304 (1919).

31. Noam, *supra* note 28.

32. *Id.*

33. Kevin M. Sheys, *Strategies to Facilitate Acquisition and Use of Railroad Right of Way by Transit Providers*, *Transit Cooperative Research Program*, TRANSP. RESEARCH BOARD, LEGAL RESEARCH DIGEST, 3 (Sept. 1994).

34. *Interstate Commerce Act*, OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=false&doc=49>.

35. *Id.*

railroad companies the same power of eminent domain given to state governments, but some states limited railroads' use of eminent domain by requiring landowner consent in certain circumstances.³⁶ Most aid for building the railroad infrastructure in the United States came from private investors, but the government did provide assistance through land grants,³⁷ loans, and states' transfer of eminent domain power.³⁸ The ICA was reversed by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), which transferred regulatory power of railroad siting and construction to the Surface Transportation Board ("STB").³⁹ The ICCTA preempts state and local laws that manage or govern rail transportation,⁴⁰ specifically, the "construction, acquisition, operation, abandonment, or discontinuance of rail tracks."⁴¹ Accordingly, siting of railroads, including eminent domain proceedings, are regulated by the STB and not the state.⁴²

Under the ICA railroads and oil pipelines shared a distinction as common carriers after passage of the 1906 "Hepburn Amendment."⁴³ Oil pipeline regulation was based on railroad regulation, even though

36. See Larry W. Thomas, *Railroad Legal Issues and Resources*, TRANSP. RESEARCH BOARD, LEGAL RESEARCH DIGEST 2 at 435 (2015); see also *Hairston v. Danville & W. R. Co.*, 208 U.S. 598, 608 (1908) (holding railroad's condemnation of property for conducting railroad business lawful); *Buck v. District Court for Kiowa County*, 199 Colo. 344, 348, 608 P.2d 350, 351-52 (1980) (holding railroad's condemnation of property adjoining railroad lawful); ME. REV. STAT. ANN. tit. 23 § 6005 (2014) (granting eminent domain to railroads but prohibiting takings of dwellings, meetinghouses, or burial grounds without consent).

37. See *Landmark Legislation: Pacific Railway Act of 1862*, U.S. SENATE HISTORICAL OFFICE, <https://www.senate.gov/artandhistory/history/common/generic/PacificRailwayActof1862.htm>.

38. Clarence Carson, *Throttling the Railroads 2: Aiding the Railroads: 1830 – 1871* FOUNDATION FOR ECONOMIC EDUCATION (June 1, 1970), <https://fee.org/articles/throttling-the-railroads-2-aiding-the-railroads-1830-1871/>.

39. 49 U.S.C. §§ 10101-16106 (2014).

40. *The Federal Laws Applicable to Railroads*, THE ALBEMARLE COUNTY LAND USE LAW HANDBOOK, Ch. 33 (March 2012), (quoting *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010)).

41. 49 U.S.C. § 10501(b) (2014).

42. See *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (holding a Vermont environmental land use statute that could deny a railroad's construction was preempted by ICCTA).

43. Jeff D. Makhholm & Laura T. W. Olive, *The Politics of U.S. Oil Pipelines: The First Born Struggles to Learn from the Clever Younger Sibling*, 37 ENERGY L. J. 409, 410 (2016).

they served vastly different purposes.⁴⁴ In *The Pipe Line Cases*, the Court made a distinction between oil pipelines as common carriers and private carriers by defining private carriers as pipelines “serving the sole purpose of moving the owner’s oil from its own wells to its own refinery, even if the movement crossed state boundaries.”⁴⁵ However, the purpose of the ICA’s designation of oil pipelines as common carriers was to regulate oil rates, not to determine other liabilities and rights as a common carrier, such as the right of eminent domain.⁴⁶ In a case determining the ICC’s right to request information from a pipeline, Justice Jackson stated that while the pipeline would be subject the ICC’s request, the oil pipeline was “not a common carrier in the sense of the common law carrier for hire.”⁴⁷ In interpreting the legislative history of the ICA the Supreme Court reasoned,

[t]here is little doubt, from the legislative history, that the Act was passed to eliminate the competitive advantage which existing or future integrated companies might possess from exclusive ownership of a pipe line. This evil could not have been reached by bringing within the coverage of the Act only those pipe lines who were common carriers for hire in the common-law sense. . . . Hence the bill as finally enacted was clearly intended “to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price.”⁴⁸

44. *Id.* at 411.

45. 70 FERC P61,035 at 61,111(quoting *The Pipe Line Cases*, 234 U.S. 548 (1914)).

46. 21 FERC P61,260 (1982). “[The ICC] fashioned a special system for oil pipelines. That system differed materially from and was far more indulgent to the regulatees than the agency’s railroad and motor-carrier methodologies. The salient feature of the ICC’s oil pipeline jurisprudence was its permissiveness.” *Id.* at 61583.

47. *Champlin Refining Co. v. United States*, 329 U.S. 29, 33 (1946) (holding that the ICC can order oil pipeline company to provide rates, treating the oil pipeline as a common carrier without deciding on the common carrier status.)

48. *United States v. Champlin Refining Co.*, 341 U.S. 290, 297-98 (quoting *The Pipe Line Cases*, 234 U.S. 548, 560 (1914)).

This analysis of why the ICA coined all oil pipelines common carriers shows that the ICA's designation of oil pipelines as common carriers should not have any bearing on whether an oil pipeline is a common carrier for purposes of eminent domain.

While oil pipeline rate regulation is now handled by the Federal Energy Regulatory Commission ("FERC"), there has been a shift to opening contract carriage, or private carriage, to new pipelines and limiting the common carrier obligations, as pipelines are often essentially used by a single company.⁴⁹ These long-term private contracts bypass the notion of a common carrier for hire, which is the original reason some states allow siting of oil pipelines, and the reason some states allow oil pipelines the power of eminent domain as a "public use."⁵⁰

B. *Eminent Domain for Electric Utility Companies*

Like common carriers, electric utility companies have the power of eminent domain as they provide an essential public use. In the early 1900s, many municipalities vied for the ownership of utility companies to provide lower rates to their constituents. However, in the 1920s just sixteen private companies controlled more than 75% of power generation in the United States.⁵¹ The structure of energy transmission was mostly regional, with transmission lines often crossing state lines.⁵² This led the Supreme Court to hold that states' regulation of interstate electricity sales violated the Commerce Clause.⁵³ Soon after, Congress enacted the Federal Power Act ("FPA")

49. Jeff D. Makhholm & Laura T. W. Olive, *The Politics of U.S. Oil Pipelines: The First Born Struggles to Learn from the Clever Younger Sibling*, 37 ENERGY L. J. 409, 425-26 (2016).

50. *Id.* at 426. See also Oxy Midstream Strategic Development, LLC 141 FERC P61,005 at P8 (2012), Kinder Morgan Pony Express Pipeline LLC, 141 FERC P61,249 at P10 (2012).

51. Alexandra Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1914 (2015).

52. *Failure to Act: The Economic Impact of Current Investment Trends in Electricity*, AM. SOC'Y OF CIVIL ENGINEERS, 4 (2011), http://www.asce.org/uploadedFiles/Issues_and_Advocacy/Our_Initiatives/Infrastructure/Content_Pieces/failure-to-act-electricity-report.pdf.

53. See *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927).

to grant authority to the federal government⁵⁴ to regulate interstate energy rates.⁵⁵ Nevertheless, States retain power over the siting of transmission lines – including interstate transmission lines – that consists of the power to grant electric utility companies a designation as a “public use” for eminent domain authority.⁵⁶

One exception to the state-regulated siting of electric utilities is for natural gas pipelines. As with electrical transmission lines, the industry operated largely unregulated and unchecked so multiple states attempted to exert jurisdiction over interstate natural gas pipelines.⁵⁷ The natural gas industry eventually fell under Federal Trade Commission’s (“FTC”) scrutiny because of the potential to monopolize on a public utility.⁵⁸ Around the same time, the Supreme Court thwarted state attempts at self-regulation, again holding that interstate rate regulation by the states violated the Commerce Clause.⁵⁹ Under the Natural Gas Act (“NGA”) enacted in 1938, FERC was tasked with the regulation of natural gas as a utility and not as a common carrier. The Act passed even though natural gas pipeline companies lobbied against it.⁶⁰ The NGA gives eminent domain power to natural gas pipelines that receive a certificate of public convenience from FERC.⁶¹ States may intervene in the certification process through National Environmental Policy Act (“NEPA”) reviews. The Environmental Protection Agency (“EPA”) often delegates NEPA review to the relevant state environmental authorities. Because natural

54. When enacted in 1935, the Federal Power Act (“FPA”) created the Federal Power Commission (“FPC”), which later became the Federal Energy Regulatory Commission (“FERC”). Klass, *supra* note 51, at 1914.

55. 16 U.S.C. §§ 824-825r (2014), “Federal Power Act.”

56. Klass, *supra* note 51, at 1916.

57. Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 25 ENERGY L. J. 57, 61 (2004).

58. *Id.*

59. *See* Missouri ex rel. Barrett v. Kan. Natural Gas Co., 265 U.S. 298, 307 (1924) (holding that transportation of natural gas from one state to another is interstate commerce and therefore not local to either state); *see also* Pennsylvania v. West Virginia, 262 U.S. 553, 597 (1923) (holding that it is unconstitutional for a state producing natural gas to prefer consumers in its state than consumers in another state).

60. 15 U.S.C. §§ 717-717w (2014); *see also* Alexandra B. Klass & Daniella Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 995 (2015).

61. 15 U.S.C. § 717f (2014).

gas pipelines must comply with NEPA before receiving a certificate of public convenience, the NEPA process affords states an opportunity to participate.⁶²

C. *Public Use Doctrine as Applied to Public-Private Takings*

A different, more controversial, jurisprudence exists for government-sanctioned projects that transfer property from one private party to another private party when neither party is a common carrier or utility company. The government cannot take property from one private landowner and transfer it to another private party without a public purpose.⁶³ However, governments have granted land to private entities for the economic redevelopment of blighted areas and other large infrastructure projects that benefit the public in a tangential way, even though such projects directly benefit the private entity that ultimately gains control of the land.⁶⁴

The landmark 2005 decision, *Kelo v. City of New London*, marked the Supreme Court's determination that "public use" should be defined broadly. Yet, the decision was not a complete change in judicial interpretation.⁶⁵ As early as 1954, the Supreme Court signaled a broad understanding of the term "public use" in *Berman v. Parker*.⁶⁶ In *Berman*, the Court held that Congress' decision to redevelop a blighted area in Washington, D.C. constituted a public use.⁶⁷ Illustrating that eminent domain was merely a means to an end, the Court defined the "concept of public welfare [as] broad and inclusive."⁶⁸ In 1984, *Hawaii Housing Authority v. Midkiff* again signaled the Court's broadening interpretation of public use when the Court sanctioned the use of eminent domain to give land from the monopolizing landowners to renters, essentially transferring the land from one private landowner

62. 15 U.S.C. §§ 717b-1, 717f(c) (2014).

63. U.S. CONST. amend V. See *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

64. See, e.g., N.R. Kleinfeld, *Opponents of Atlantic Yards are Exhausted by a Long, Losing Battle*, N.Y. Times (Nov. 25, 2012), <http://www.nytimes.com/2012/11/26/nyregion/exhausted-from-an-angry-and-losing-battle-against-barclays-center.html>.

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

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

67. *Id.*

68. *Id.* at 33.

to another.⁶⁹ In a majority opinion authored by Justice Sandra Day O'Connor, the Court expanded the limits of "public use," writing "it is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement in order for it to constitute a public use."⁷⁰ These cases adopted a rational basis standard of review, meaning the court defers to the legislative determination "until it is shown to involve an impossibility."⁷¹

State courts followed the Supreme Court's broad interpretation of "public use," deferring to state legislative determinations. For example, in *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court held a sufficient "public use" existed for General Motors to construct a new manufacturing facility in place of a neighborhood because of the economic benefits it would bring to the community.⁷² Scholars concluded that in deferring to the government and finding a "public use" in most circumstances, courts were "effectively imposing no check on the use of the eminent domain power."⁷³ In 2004, the Michigan Supreme court overturned the 1981 *Poletown* decision that permitted General Motors to use eminent domain, instead announcing that granting a private company eminent domain power violated the state constitution.⁷⁴

The protection awarded to Michigan landowners against takings by a private company gave hope to other concerned landowners, as the Supreme Court granted certiorari in *Kelo* later that same year. However, when the Supreme Court announced the *Kelo* decision in 2005, it did not extend the same protections to landowners as the Michigan Supreme Court did in 2004. In a 5-4 decision, the Supreme Court allowed the taking of private land for an economic development project, which was ultimately sold to other private entities.⁷⁵ The Court

69. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

70. *Id.* at 244, (quoting *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923)).

71. *Midkiff*, 467 U.S. at 240, (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

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

73. Charles E. Cohen, *Eminent Domain after Kelo v. City of New London*, 29 HARV. J.L. & PUB. POL'Y 491, 495 (2006).

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

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

leaned heavily on its earlier decisions in *Berman* and *Midkiff*, announcing again that deference should be given to government determinations of “public use.”⁷⁶ In this case, the “public use” was an increase in tax revenue and job creation through the development of a generally blighted area.⁷⁷ The majority held the “public use” did not have to be literal, that public purpose was to be understood broadly.⁷⁸ The holding of the case does not mean that every possible taking by a private party can be justified. Indeed, the Court stated some private transfers may “risk . . . undetected impermissible favoritism of private parties” where a presumption of invalidity could be warranted.⁷⁹

In her dissenting opinion, Justice O’Conner warned, “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 another owner who will use it in a way that the legislature deems more beneficial to the public – in the process.”⁸⁰ Justice O’Connor wrote that the decision stands in contrast to Court’s prior holdings that “a purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”⁸¹ She concluded that the majority’s decision has “delete[d] the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”⁸²

After the Supreme Court’s decision in *Kelo*, many state legislatures altered the definition of “public use” to limit the scope of constitutional takings, thereby protecting landowners in their state from takings by private parties.⁸³ In contrast, some states have used economic development as a “public use” to virtually create new cities out of blighted areas, using eminent domain to fashion new urban

76. *Id.* at 480-82.

77. *Id.* at 474.

78. *Id.* at 480.

79. *Id.* at 493 (Kennedy J., concurring).

80. *Id.* at 494.

81. *Id.* at 500 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984)).

82. *Id.* at 494.

83. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2120 (2009); see, e.g., Ala. Const. § 23 (prohibiting eminent domain for purposes of generating tax revenue or for “forced subscription” to corporations).

accomplishments.⁸⁴ Because eminent domain for oil pipelines is regulated on a state-by-state basis, an individual state's legislation that restricts the scope of "public use" would apply rather than the broad federal definition. While some states limited the scope of "public use" through legislation, many state legislatures either did not address the definition of "public use" or did not contemplate whether oil pipeline siting could qualify as an exception, and as Section III addresses a proposed federal regulation for siting oil pipelines, the federal definition of "public use" could determine the power, or lack thereof, of oil pipelines to use eminent domain in those states.⁸⁵

II. CONFLICT OF EMINENT DOMAIN UNDER STATE LAWS

As private entities, oil companies' use of eminent domain is not regulated by federal statute. To obtain land to build oil pipelines, companies must either contract privately with landowners or receive designation as a common carrier or energy utility by a state, enabling them to use eminent domain. States differ in their approach to granting oil pipelines the power of eminent domain. Some states heavily regulate the siting process, some allow oil companies nearly unlimited access to land, and others refuse to allow oil companies the use of eminent domain to build pipelines. Because the federal government only regulates the rates of oil transported by pipeline and not the siting process, state-specific laws conflict. This causes uncertainty for landowners seeking a remedy to the threat of an oil company taking their land.

This Section describes the legal structure at the state level surrounding the use of eminent domain for siting oil pipelines. This Section first discusses states that regulate oil pipelines as common carriers. Next, this Section turns to states that regulate oil pipelines as public utilities. Finally, this Section considers states that either do not allow oil pipelines to use eminent domain or have created a hybrid structure for regulating oil pipelines.

84. *See, e.g.*, DETERMINATION AND FINDINGS BY THE CITY OF NEW YORK PURSUANT TO EDPL SECTION 204 WITH RESPECT TO CERTAIN PROPERTY TO BE ACQUIRED IN CONNECTION WITH THE NO. 7 SUBWAY EXTENSION – HUDSON YARDS REZONING AND DEVELOPMENT PROGRAM.

85. *See infra*, § III.C.

A. States Granting Eminent Domain to Oil Pipelines as a Common Carrier

Texas is most well-known for its connection to the oil business and its laws are relatively broad to facilitate its booming oil industry. Prior to 2012, pipeline companies were able to appropriate land through eminent domain by receiving a Railroad Commission permit and filing a tariff setting rates, proving the company was a common carrier.⁸⁶ In 2011, the state amended the Texas Property Code to further protect property owners from unconstitutional takings.⁸⁷ The condemning party must have first made a “bona fide offer” to the landowners that gave a 30-day period for the landowner to accept, followed by a final written offer that includes the Landowner’s Bill of Rights and the appraisal report to support the compensation offered.⁸⁸ The 2012 *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* became a landmark decision for Texas wherein the Texas Supreme Court held that more was required of pipeline companies to prove common carrier status as a matter of law.⁸⁹ This decision responded to the Railroad Commission’s “rubber stamp” policy, which approved all oil pipelines in Texas without a thorough review to ensure that they fit within the state’s definition of a common carrier.⁹⁰

In Nebraska, landowners protested the TransCanada Keystone XL Oil Pipeline’s use of eminent domain through their state and sued, alleging a state law allowing eminent domain for “major oil pipelines” was unconstitutional.⁹¹ This law, L.B. 1161, allowed the Keystone XL pipeline to use eminent domain upon approval by the Governor, an approval usually made by the Public Service Commission, which has jurisdiction over common carriers. According to Nebraska common law, a common carrier’s offering of services to the general public is “not always relevant to determining whether it is a common carrier.”⁹²

86. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 381 S.W.3d 465, 465-67 (Tex. 2012) (addressing the common-carrier status of oil pipelines while resolving a question of carbon dioxide pipelines).

87. TEX. PROP. CODE ANN. § 21.0113 (2011).

88. *Id.*

89. *Id.* See Thomas J. Forestier, Jamie Lavergne Bryan, & Larence M. “Trey” Lansford III, *Feature: What’s in the Pipeline?*, 79 TEX. B.J. 218, 219 (2016).

90. See Forestier et al., *supra* note 89.

91. *Thompson v. Heineman*, 289 Neb. 798 (2015).

92. *Id.* at 835.

The court held that per the definition of common carrier in Nebraska, “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 its transportation services.”⁹³ The majority wrote that “[u]nder the Nebraska Constitution’s limitation on the power of eminent domain, pipeline carriers can take private property only for a public use.”⁹⁴ They warned that under L.B. 1161, the Governor could potentially approve a project that was instead for private use, which would be unconstitutional.⁹⁵

Although the court found L.B. 1161 unconstitutional because it allowed the Governor to approve the pipeline route, the law was not struck down. Nebraska’s constitution requires a supermajority vote for constitutional challenges to a statute, and because only four judges signed onto the majority opinion, the requirement was not met.⁹⁶ The majority also found that the Governor’s approval of the Keystone XL Pipeline was unconstitutional, but the future of Keystone XL in Nebraska remains unclear.⁹⁷ The court’s holding exposes the problems inherent in regulating oil pipelines as a common carrier: the pipeline company may receive the eminent domain power of a common carrier while in reality providing no public use.

B. States Granting Eminent Domain to Oil Pipelines as a Utility

In Iowa, oil pipelines are granted the right of eminent domain to “promote the public convenience and necessity” under Iowa Code Section 479B.9.⁹⁸ Iowa was one of the last states to rule on the Dakota Access Pipeline’s route, when landowners challenged Dakota Access,

93. *Id.*

94. *Id.* at 845.

95. *Id.*

96. *Id.* at 847-48. See NEB. CONST. art. V, § 2. Four judges signed onto the majority opinion, one judge did not participate, and three judges dissented in part and concurred in the result.

97. See Mitch Smith, *Risen from the Grave, Keystone XL Pipeline Again Divides Nebraska*, N.Y. TIMES (Apr. 17, 2017). Because the Keystone XL Pipeline required a Presidential Permit and was denied under the Obama administration, TransCanada had to re-submit for approval by the Nebraska PSC when President Trump granted a Presidential Permit for the same pipeline. *Id.*

98. IOWA CODE § 479B.9 (2017); *Lamb v. Iowa Utilities Board*, No. CVCV051997 *17 (Iowa District Court for Polk County 2017)

LLC's ("Dakota") authority to use eminent domain. Landowners brought multiple claims alleging that: (1) there was no public necessity, (2) economic impact should not be a factor in deciding the proposed pipeline, and (3) Dakota showed no "service to public" in Iowa.⁹⁹ Because the Dakota Access Pipeline was sited to run through Iowa with no "on ramp" or "off ramp," the landowners argued that Iowa should not grant Dakota the power of eminent domain, as the public would not be granted any use.¹⁰⁰ The court did not agree and deferred to the Iowa Utilities Board, which stated the economic and safety benefits of the pipeline outweighed the cost to the landowners.¹⁰¹

Michigan also regulates pipelines as public utilities, allowing oil pipelines "the right to condemn property by eminent domain . . . to transport crude oil or petroleum [or] to locate, lay, construct, maintain, and operate pipelines."¹⁰² The Michigan Public Service Commission approves construction of new pipelines, and Michigan courts recognize that oil pipelines are a public utility, qualifying as a public use.¹⁰³ In *Lakehead Pipe Line Co. v. Dehn*, the Michigan Supreme Court held that an oil pipeline was a public use, whether or not the oil company constructing the pipeline conducted its business in Michigan.¹⁰⁴ The Court found that "the private benefit, if such there is, is merely incidental to the main purpose."¹⁰⁵

C. States Denying Eminent Domain to Oil Pipelines

Colorado does not grant the power of eminent domain to oil pipelines. In a landowner suit against Sinclair Oil Company, the Supreme Court of Colorado held that a Colorado statute that conveys

99. *Lamb v. Iowa Utilities Board* at *17-18.

100. *Id.* An "on-ramp" or "off-ramp" is a section of the pipeline that would receive oil from or distribute oil to the state.

101. Steve Davies, *Iowa Farmers to Appeal After Losing Dakota Access Pipeline Challenge*, AGRIPULSE (Feb. 22, 2017), <https://www.agri-pulse.com/articles/8946-iowa-farmers-to-appeal-after-losing-dakota-access-pipeline-challenge>. The Iowa Utilities Board found that approximately 25 long term jobs would result from the Dakota Access Pipeline, directly or indirectly. *Id.* at 20.

102. 1929 Mich. Pub. Acts 16 (codified at MICH. COMP. LAWS § 438.2(1) (2014)).

103. *See Lakehead Pipe Line Co. v. Dehn*, 64 N.W.2d 903 (Mich. 1954).

104. *Id.* at 911.

105. *Id.*

the authority of eminent domain to any “pipeline company,” did not apply to oil pipelines.¹⁰⁶ The court found that other sections granting the power of eminent domain for pipeline maintenance specifically referred to pipeline used for “the transmission of power, water, air or gas.”¹⁰⁷ Therefore, the court reasoned that the General Assembly “intended to authorize eminent domain power for the construction of electric power infrastructure.” Because the legislature did not “expressly or by clear implication” grant oil pipelines the power of eminent domain, oil pipelines did not possess that power.¹⁰⁸

In Georgia, the Department of Transportation Commissioner denied a request for a certificate of public necessity from Kinder Morgan, an oil pipeline company proposing a \$1 billion oil pipeline through Georgia and South Carolina.¹⁰⁹ Kinder Morgan challenged the decision, but the Commissioner’s decision was upheld in state court.¹¹⁰ The court held that the Commissioner’s finding that “the proposed pipeline would not serve a public convenience and a public necessity” was supported by a downward trend in fuel consumption and the possibility for a decrease in competition in the area.¹¹¹ The Georgia General Assembly then passed a bill preventing pipeline companies from exercising eminent domain until 2017, allowing the General Assembly time to consider recommendations from a study.¹¹² Representative Don Parsons authored House Bill 413, which is a compromise between environmentally conscious or property protective landowners and oil pipelines. The Bill creates a two-step process for surveying and acquiring land through eminent domain proceedings.¹¹³ First, oil companies apply for a certificate of need from

106. COLO. REV. STAT. § 38-5-105 (2013); *Larson v. Sinclair Transp. Co.*, 284 P.3d 42, 45 (Co. 2012).

107. COLO. REV. STAT. § 38-4-102 (2013).

108. *Larson v. Sinclair Transportation Co.*, 284 P.3d 42, 45 (Co. 2012).

109. Keith Goldberg, *Kinder Morgan Halts \$1B Ga. Pipeline Amid Land Grab Ban*, LAW 360 (Mar. 31, 2016).

110. *Palmetto Products Pipe Line LLC v. Ga. Dep’t of Transp.*, Civil Action File No. 2015CV262194 (Super Ct. of Fulton Cty. State of Ga. 2016).

111. *Id.* at *6.

112. O.C.G.A. § 22-3-85 (2016).

113. 2017 Ga. Laws 263.

the Georgia Department of Transportation.¹¹⁴ Second, Georgia's Environmental Protection Division must grant a permit for the oil pipeline.¹¹⁵ This compromise allows Georgia to deny a pipeline the right of eminent domain from two perspectives: economic and environmental. First, the economic or public necessity of an additional pipeline can be dispelled through a showing of declining oil usage. Alternatively, the environmental harm can be shown by the potential for oil spills to pollute water, natural resources, and wildlife.

In South Carolina, the state legislature passed a similar bill to Georgia's General Assembly bill, placing a three-year moratorium on "for-profit pipeline companies" exercising eminent domain power.¹¹⁶ South Carolina historically conferred the same duties and responsibilities of telegraph and telephone companies onto pipeline companies.¹¹⁷ Prior to the enactment of the bill, South Carolina Attorney General Alan Wilson's office issued an opinion stating his "substantial doubt" that the legislature intended to extend to private petroleum or oil companies the power of eminent domain.¹¹⁸ The bill excludes oil pipelines from "public utility" companies, distinguishing oil pipelines from natural gas pipelines and water pipelines.¹¹⁹

While both bills were only temporary stays on the oil companies' power of eminent domain, the combined actions of the Georgia and South Carolina legislatures led Kinder Morgan to halt its planned project completely.¹²⁰ Even now that Georgia's compromise bill has passed,¹²¹ opening the conversation to state legislatures proved a useful tool for protecting Georgia's preferences. Indeed, it was enough to stop Kinder Morgan, which explained that the project was halted

114. Mary Landers, *Georgia Lawmakers Pass Compromise Pipeline Bill*, SAVANNAH NOW (Mar. 31, 2017), <http://savannahnow.com/news/2017-03-31/georgia-lawmakers-pass-compromise-pipeline-bill>.

115. GA. CODE ANN. § 12-2-2 (2016).

116. 2016 Act No. 205, § 2; see Brent Owen, *Ga. and SC are Newest Battlegrounds for Eminent Domain*, LAW 360 (October 13, 2016).

117. S.C. CODE §58-7-10 (2016).

118. See 2016 Act No. 205, pmb1.

119. *Id.*

120. Owen, *supra* note 116.

121. Landers, *supra* note 114.

due to “unfavorable action by the Georgia Legislature regarding eminent domain authority and permitting restrictions.”¹²²

III. A SOLUTION TO OIL PIPELINE SITING REGULATION

The conflicting laws surrounding oil pipeline companies’ use of eminent domain are inefficient. Landowners, environmentalists, state and local regulators, and even oil pipeline companies struggle to understand with any certainty whether a pipeline siting will be approved or denied and whether private land will be taken through eminent domain. While some states approve nearly every pipeline siting,¹²³ other states regulate heavily, which can deter pipelines from siting in that state.¹²⁴ Environmentalists opposing new pipelines may support existing state-by-state regulation because in heavily-regulated states, oil pipeline companies are less eager to develop new pipelines. There are, however, two major drawbacks. First, in states with hardly any checks on oil companies’ power, private land is subject to taking by eminent domain and the potential for environmental harm is increased. Second, the patchwork of conflicting state laws disincentives the use eminent domain for more justified public uses such as renewable energy sources. This is so because states with strict regulations on eminent domain block both oil pipeline companies and renewable energy companies.¹²⁵

This Section first explains why the federal government should regulate oil pipeline companies’ use of eminent domain. Next, this Section explores why the “public use” doctrine should be limited as applied to oil pipeline. Specifically, this Section argues that oil pipelines should be regulated differently than common carriers or public utilities. Moreover, although oil pipeline companies could

122. Robert Walton, *Kinder Morgan halts Palmetto Pipeline project over Georgia proposed pipeline moratorium*, UTILITY DIVE (Apr. 1, 2016), <https://www.utilitydive.com/news/kinder-morgan-halts-palmetto-pipeline-project-over-georgia-proposed-pipeline/416682> [<http://perma.cc/J53N-R7D7>].

123. Jeff Mosier, *Latest Ruling on Eminent Domain Eases Fears of Texas Pipeline Builders*, DALLAS NEWS (Jan. 11, 2017), <https://www.dallasnews.com/business/energy/2017/01/11/latest-ruling-eminent-domain-eases-fears-texas-pipeline-builders> [<http://perma.cc/BKG7-56KQ>].

124. Landers, *supra* note 114.

125. See Alexandra Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1914 (2015).

arguably qualify as a “public use” under *Kelo*, this Section suggests that this judicial solution is inadequate because it does not address important underlying issues such as possible environmental degradation, property rights, and the need for a shift to renewable energy. Finally, this Section proposes an alternative option for federal oil pipeline regulation: new legislation that gives a federal agency authority to regulate oil pipeline siting under a two-step permitting process. This cooperative federalism solution would mandate state-level environmental permits and a clear showing of public need at the federal level prior to an oil companies’ use of eminent domain. Ultimately, such a process would allow states to deny an oil pipeline siting if warranted while retaining the ability to grant eminent domain to those energy projects found to produce real public benefit. At the very least, this solution would allow a baseline of environmental protection, and the clear showing of public necessity would best balance the needs of the nation, of the states, and of individual landowners.

A. A Federal, Rather than State, Solution under the Commerce Clause

Because states regularly deal with land use issues,¹²⁶ the federal government has largely left siting to the states. However, “energy policy relies heavily on the coordination of state and local governments.”¹²⁷ Because state and local governments are completely uncoordinated in the oil pipeline siting process, neither landowners nor oil companies can adequately prepare or anticipate consistency. In considering the Commerce Clause in connection with the Supremacy Clause, the issue of pipeline siting lends itself to federal regulation. Major pipelines often cross state boundaries, making them similar to railroads, which are federally regulated, or to natural gas, which is also federally regulated.¹²⁸ As the Supreme Court has noted, “[w]here the

126. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (“Regulation of land use . . . is a quintessential state and local power.”).

127. Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129, 130 (2015).

128. David A. Domina, *Pipelines and Energy Corridors: Valuation Perspectives – Holding Private Condemnors to the Line*, SX015 ALI-ABA 129, 18 (2016); see also U.S. CONST. art. I § 8, cl. 3, “Commerce Clause” (giving Congress the power to “regulate commerce with foreign nations, and among the several states, and with

[State] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹²⁹ With oil pipeline companies’ use of eminent domain, state statutes do not regulate evenly. Laws along any given pipeline may conflict with the regulation of siting. Furthermore, the effects on interstate commerce are not merely incidental.¹³⁰ As such, federal intervention is warranted.

There is a push from scholars to transition to a more regional approach for the United States energy grid. A regional approach would be more efficient and would also help facilitate a transition to renewable energy, which requires regional infrastructure to send energy from renewable resources to city centers.¹³¹ Such a transition could only be completed under a federal structure that facilitates cooperation between state governments and other competing interests. Federal regulation of oil pipeline siting would not only address the regional nature of oil pipeline infrastructure and routes, but also enable consideration of the national and regional economic benefits, rather than consideration of solely localized benefits. A broader focus on national and regional benefits could also open the door to increased renewable energy infrastructure.

B. Under Federal Regulation, Oil Companies’ Power of Eminent Domain under the “Public Use” Doctrine Should Be Limited

While state statutes give oil companies authority to use eminent domain to site oil pipelines, no federal agency is equipped to grant this same authority. Multiple federal agencies regulate pipelines for a variety reasons. For example, the Department of Transportation

the Indian tribes.”); and U.S. CONST. art. VI, “Supremacy Clause” (giving federal law superiority over state law in areas where the federal government legislates or regulates.).

129. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

130. See, e.g., *State Lines are Danger Zones for Gas Prices, Gasbuddy Finds*, GAS BUDDY (July 27, 2017), <https://business.gasbuddy.com/blog-overpaying-across-us-borders/> (noting towns bordering state lines experienced price spreads as high as \$1.70 per gallon).

131. See, e.g., Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1985 (2015).

regulates pipeline safety through the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) and FERC regulates the transportation of oil.¹³² Yet, neither of these agencies currently has the capacity or authority to regulate pipeline siting. Only through new legislation will consistent, predictable, and protective regulation of oil pipelines be accomplished.

1. Oil Pipelines Are Not Common Carriers

The nature of oil pipelines is very different from railroads. Although in both cases the common carrier designation is used as a mechanism of rate regulation to destroy monopolies, this designation should not necessarily also transfer eminent domain power.¹³³ As common carriers, railroads transport people and goods and must provide service upon reasonable request.¹³⁴ Oil pipelines, on the other hand, are cyclical in nature, with large integrated oil companies operating by “simply transferring money from one pocket to another.”¹³⁵ In the Williams Pipe Line Company adjudication, FERC analyzed the structure of oil companies with regard to pipeline usage, making observations that directly oppose oil pipelines’ designation as a common carrier. FERC found that “when it comes to transportation, the large integrated oil companies are their own best customers.” While this analysis is not binding, it highlights that as self-serving businesses, oil companies should not receive designation as common carriers to declare a public use for eminent domain purposes. Numerous investigations into large oil companies have shown no monopolization or anti-trust violations.¹³⁶ Yet, the public service provided by railroads starkly contrasts with the stable clientele of contracted pipeline users and operators, namely the oil companies themselves, which fits squarely within the definition of private

132. See PHMSA, DEP’T OF TRANSP., <https://www.phmsa.dot.gov/>; FERC, <https://www.ferc.gov/>.

133. See *supra* Section I.A.

134. 49 U.S.C. § 11101 (2015).

135. Williams Pipe Line Company, 21 FERC ¶61,260 at 61,570 (1982).

136. Timothy J. Muris & Bilal K. Sayyed, *100 Years of Standard Oil Antitrust Symposium: Article: The Long Shadow of Standard Oil: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843 (2012).

carriers.¹³⁷ Because oil pipelines do not provide a public service, they should not be classified as common carriers.

2. Oil Pipelines Are Not Public Utilities

Oil is undoubtedly a source of energy that many Americans, especially those who own or drive a car, depend upon. However, this does not entitle oil pipelines the same public utility designation as electric utilities or even natural gas pipelines. Gasoline is the main petroleum product consumed in the United States, and gasoline prices are not regulated by the federal government.¹³⁸ While gasoline is heavily used by the United States, it is sold on the free market to consumers.¹³⁹ In contrast, natural gas is more similar to electricity than oil in function, providing energy directly to homes and businesses. Natural gas is classified as a public utility at the state level as well as the federal level,¹⁴⁰ as “natural gas has long been the dominant choice for primary heating fuel in the residential sector.”¹⁴¹ Because oil is more similar to a commodity and not a utility, it should not be designated as a public utility.

137. Noam, *supra* note 20.

138. Jeff D. Makhholm & Laura T. W. Olive, *The Politics of U.S. Oil Pipelines: The First Born Struggles to Learn from the Clever Younger Sibling*, 37 ENERGY L. J. 409 (2016).

139. See Barry Nielsen, *Why You Can't Influence Gas Prices*, INVESTOPEDIA <http://www.investopedia.com/articles/economics/08/gas-price-emails.asp> [<http://perma.cc/9AKA-8MF3>]. In 2016, about 143.37 billion gallons (or about 3.41 billion barrels) of finished motor gasoline were consumed in the United States, a daily average of about 391.73 million gallons (or about 9.33 million barrels per day). This was the largest amount of annual motor gasoline consumption on record. *Frequently Asked Questions*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=23&t=10>.

140. See, e.g., *Energy and Natural Gas*, PUB. UTILITY COMM'N, http://www.puc.state.or.us/Pages/electric_gas/index.aspx; *Natural Gas Industry*, MASS.GOV, <http://www.mass.gov/natural-gas-industry>.

141. *Everywhere but Northeast, Fewer Homes Choose Natural Gas as Heating Fuel*, U.S. ENERGY INFO. ADMIN. (Sept. 25, 2014), <https://www.eia.gov/todayinenergy/detail.php?id=18131>.

3. Oil Pipelines Are Arguably a “Public Use”

In her dissent in *Kelo*, Justice O’Connor feared that distinguishing private from public takings would be impossible.¹⁴² Because the decision in *Kelo* neither required a literal definition of “public use” for a legitimate eminent domain purpose nor an actual “public benefit” other than economic revitalization, an oil pipeline regulated at the federal level would easily fit under this wide umbrella of “public uses” if such a question was litigated. However, litigation would not necessarily address important factors such as possible alternatives, weighing the costs and benefits, or determining if the community would actually benefit from a pipeline. Because no federal agency has the authority to regulate oil pipeline siting, this issue could only come about if legislation established that authority within an agency.

C. Proposed Legislation

Legislation transferring all regulatory authority of oil pipelines – from the siting process to the eventual decommissioning – to a federal agency would provide consistency and reliability. A two-part approval process would ensure baseline environmental protections, while also giving protection to landowners. First, the legislation transferring power to a federal agency would require a clear showing of public use before issuing eminent domain authority. This would give property owners more security, as all decisions could be appealed to the overseeing regulatory authority.¹⁴³ While this would, in theory, be less protective than state laws that do not currently give eminent domain authority to oil pipeline companies, the legislation’s second prong

142. *Kelo v. City of New London*, 545 U.S. 469, 494 (2005).

143. See Ilsa Somin, *The Growing Battle Over the Use of Eminent Domain to Take Property for Pipelines*, THE WASH. POST (June 7, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/07/the-growing-battle-over-the-use-of-eminent-domain-to-take-property-for-pipelines/?utm_term=.f47fd3576bb1 [http://perma.cc/6BFW-UZAT]. While public opinion may call for a clear showing of public use to provide security in land ownership, a similar process for natural gas pipeline siting through FERC arguably does not provide such security. See Joe Mahoney, *Lawsuit Claims FERC is Just Rubber Stamp for Pipelines*, CATSKILL MOUNTAINKEEPER (Mar. 7, 2016). Through the natural gas siting process, pipelines must receive a Certificate of Public Convenience and Necessity, which has never been denied by FERC since 1986. *Id.*

would allow for states to deny a pipeline siting on environmental and safety grounds.

Second, the legislation would impose an environmental permit for pipeline siting before allowing the oil company to acquire land through eminent domain. This permitting process could be delegated to each state's environmental protection agency as a form of "cooperative federalism." The cooperative federalism model is a collaboration between the federal agency and state agency that has been very successful in regulating polluters under the Clean Air Act and Clean Water Act.¹⁴⁴ Permitting at the state level would insulate states from federal agency "rubber stamping," as state reviews and regulations could be more protective than the baseline federal standards in the proposed legislation. The purpose of these environmental permits would be to prevent adverse impacts to state or federal land, water, or air quality. These permits would also provide more targeted regulations as compared to state or federal environmental assessments, which are not currently required for pipeline siting in most states.¹⁴⁵ Further, the environmental permitting process would act as an additional safety measure, as environmental aspects of pipeline safety currently occur only as reactive measures, for example, when a pipeline oil spill threatens surrounding rivers or lakes. While some states already implement state environmental assessments, the requirement for an environmental permit would provide a baseline level of protection for states that do not implement environmental reviews for oil pipeline siting.

Through such a cooperative federalism model where federal, state, and local governments work together and regulate equally rather than separately,¹⁴⁶ states would have a voice in the impact of oil pipeline

144. See Gabriel Pacyniak, *Making the Most of Cooperative Federalism: What the Clean Power Plan has Already Achieved*, 29 *GEO. ENVTL. L. REV.* 301 (2017). "Congress intended for cooperative federalism to be at the heart of the CWA." Alexandra Dapolito Dunn & Meghan Bolan, *Postcards From the Edge: Perspectives to Reinvigorate Clean Water Act Cooperative Federalism*, 4 *GEO. WASH. J. ENERGY & ENVTL. L.* 68, 81 (2013).

145. See, e.g., Mary Landers, *Georgia Lawmakers Pass Compromise Pipeline Bill*, SAVANNAH NOW (Mar. 31, 2017), <http://savannahnow.com/news/2017-03-31/georgia-lawmakers-pass-compromise-pipeline-bill> [<http://perma.cc/H7CA-64S2>].

146. See Cooperative Federalism, Legal Definitions (last visited Nov. 27, 2017), <https://definitions.uslegal.com/c/cooperative-federalism/>.

siting projects. Furthermore, such a model could easily be transferred to renewable energy sources, such as intrastate transmission lines that bring solar power and wind power to cities, improving the U.S. energy infrastructure. Indeed, some scholars note that “green infrastructure,” which encompasses renewable energy transmission lines, would be impossible without cooperative federalism.¹⁴⁷ Under this model state agencies could be more protective than the federal baseline for nonrenewable energy project siting, yet under the same structure states could streamline the process for siting if a renewable energy transmission line benefited the state’s constituents or economy. This second step of the approval process would also give states an important check against the federal government for circumstances where the federal plan would harm a state resource or disadvantage the state in some other way. Overall, the environmental permit process enables greater discussion of land use and energy alternatives. Indeed, the proposed legislation would also allow for public comment at both stages of the permitting process. The steps could occur simultaneously, as the oil pipeline would not gain the power of eminent domain until after it receives both permits, similar to the siting process in states such as in Iowa.¹⁴⁸

Finally, states could also employ a Cost-Benefit Analysis (“CBA”) of the public use and environmental impact of oil pipeline siting and/or transmission line siting projects. A CBA would weigh the costs of a project, including the use of eminent domain, environmental impacts, and the potential negative economic effects, against the benefits of a project, including economic stimulation of renewable energy development, creation of jobs, tax base increase, and less reliance on nonrenewable energy sources that contribute to climate change. CBAs give states the opportunity to directly compare giving an oil pipeline the power of eminent domain and giving a renewable energy transmission line the power of eminent domain. Incorporating CBA into this two-step permitting process may make states more willing to

147. See Roger Feldman, *Cooperative Federalism* (Apr. 2009), <http://www.retailenergy.com/feldman/0904flmn.htm>; see also ABA, *Cooperative Federalism and Green Infrastructure Development Program Overview*, ABA SECTION OF ENV'T, ENERGY & RESOURCES (March 31, 2009), https://www.americanbar.org/content/dam/aba/migrated/enviro/programs/teleconference/0809/CooperativeFederalism/Final_Flyer.authcheckdam.pdf.

148. See, e.g., Iowa, *supra* Part III.B.a.

grant the power of eminent domain to clean energy projects – where the benefits likely outweigh the costs¹⁴⁹ – as opposed to rejecting the use of eminent domain entirely, even in circumstances where it would be desirable. Under the proposed permitting process states can better tailor their grants of eminent domain power those projects that will actually advance national, regional, and local public purposes.

CONCLUSION

The controversy over oil pipelines extends beyond their potentially harmful environmental impacts and includes the large and contested area of law concerning oil companies' use of eminent domain to construct pipelines. While pipeline siting is left to the states to regulate, many states have conflicting laws that create uncertainty for both landowners and oil companies. Some states grant oil companies the power of eminent domain by regulating oil pipelines as public utilities, others regulate oil pipelines as common carriers, and some do not grant oil companies the power of eminent domain. Even though oil companies are private businesses, their use of eminent domain relies upon a government finding that oil pipelines qualify as a "public use." Because the "public use" doctrine is not limited in its application, there is a strong likelihood that an interstate oil pipeline would arguably have a "public use" under the expansive definition. Therefore, the most environmentally protective path forward includes federal regulation that utilizes state environmental permits in addition to federal siting permits, offering states a way to deny oil pipeline siting without losing the possibility of using eminent domain for those energy projects that actually do advance a public purpose. As technology changes the perception of energy, the legal framework surrounding energy development will also change. One day, pipelines may be obsolete and replaced with new alternative fuels and transportation methods; still, a federal regulatory structure would help pave the way forward for renewable energy transmission and siting, and give landowners consistency and notice, while offering environmental protection measures.

149. Union of Concerned Scientists, *Benefits of Renewable Energy Use* (Dec. 20, 2017), <https://www.ucsusa.org/clean-energy/renewable-energy/public-benefits-of-renewable-power#.Wp1uJZPwau4> [<http://perma.cc/T2AR-YP8J>].