STRUCTURING TAKINGS FOR FUTURE INFRASTRUCTURE

Shelley Ross Saxer*

INTRODUCTION

We will be facing monumental challenges to our nation's infrastructure as we confront crumbling infrastructure, new technologies, and climate change adaptation. Eminent domain is a powerful tool that necessarily impacts local communities when used for infrastructure such as roads, mass transit, pipelines, the electrical grid, and border walls. We will likely need to rely on both public and private eminent domain to redevelop neighborhoods and make our communities more resilient to climate change by adapting land uses to rising sea levels, drought, wildfires, and severe weather events.

In late 2018, the United States government issued its most dire warning yet about the impact climate change will have on U.S. health, economics, environment, and infrastructure.[1] Thirteen federal agencies, with the National Oceanic and Atmospheric Administration (NOAA) serving as the administrative lead agency to prepare this report, issued Volume II of the National Climate Assessment (NCA4) 2018, a major scientific report mandated by Congress every four years beginning in 1990.[2] "Volume II draws on the foundational science described in Volume I, the Climate Science

* Author's note.

[1] Coral Davenport and Kendra Pierre-Louis, U.S. Climate Report Warns of Damaged Environment and Shrinking Economy, The New York Times (Nov. 23, 2018).

[2] USGCRP, 2018: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II: Report-in-Brief [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 186 pp.

Special Report (CSSR) [3] and "focuses on the human welfare, societal, and environmental elements of climate change and variability for 10 regions and 18 national topics, with particular attention paid to observed and projected risks, impacts, consideration of risk reduction, and implications under different mitigation pathways."[4] The report estimates that by the end of the century, the U.S. economy will shrink by 10 percent due to a loss of "$141 billion from heat-related deaths, $118 billion from sea level rise and $32 billion from infrastructure damage . . . among others."[5]

The NCA4 identifies twelve summary findings that synthesize at a high level the material contained in the underlying report.[6] While some of these twelve findings specifically mention infrastructure, Summary Finding 10. Infrastructure states:

> Our Nation's aging and deteriorating infrastructure is further stressed by increases in heavy precipitation events, coastal flooding, heat, wildfires, and other extreme events, as well as changes to average precipitation and temperature. Without adaptation, climate change will continue to degrade infrastructure performance over the rest of the century, with the potential for cascading impacts that threaten our economy, national security, essential services, and health and well-being.[7]

We will need to employ both public and private eminent domain as we face these infrastructure challenges all at once, rather than as we historically experienced the successions of infrastructure developments from canals to

---

[3] The first volume of NCA4, the Climate Science Special Report (CSSR), was published in 2017 (science2017.globalchange.gov) and "provides a detailed analysis of how climate change is affecting the physical earth system across the United States and provides the foundational physical science upon which much of the assessment of impacts in this report is based." *See* USGCRP, 2018: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II: Report-in-Brief [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 186 pp.

[4] USGCRP, 2018, supra note 2.

[5] U.S. Climate Report Warns of Damaged Environment and Shrinking Economy, The New York Times (Nov. 23, 2018).

[6] USGCRP, 2018, supra note 2, pg. 12.

[7] USGCRP, 2018, supra note 2, pg. 17.

trains to highways and airways or from pipelines to transmission lines to cyberspace. The goal of this paper is to view our nation's history of dealing with the aftermath of eminent domain to develop an approach addressing the changing dynamics of infrastructure needs in a responsive and flexible model that also protects long-term property rights.

Part I. presents an overview of federal and state takings clauses under the Fifth and Fourteenth Amendments, including the Court's most recent definition of "public use" in *Kelo v. City of New London*.[8] It also discusses the aftermath of this decision as states reacted to the broad definition and narrowed the ability of state and local governments to use their eminent domain power for redevelopment projects.[9] In addition to challenges to the claim of public use and the legitimacy of a blight designation, Part I. explores challenges to the eminent domain power based on a lack of statutory authority, "pretextual takings, no reasonable assurances of public use, a lack of necessity, procedural due process, and improper delegation."[10]

Part II focuses on delegating eminent domain authority to private entities to act for the public good for infrastructure needs, not for redevelopment. As noted above, states have made legislative and constitutional amendments to define public use in the wake of *Kelo*. State judicial opinions in Delaware, Ohio, Michigan, and Mississippi have also strengthened the defense to condemnations by applying heightened scrutiny to government claims of public use.[11] However, most of the state reform was directed to private entity

---

[8] Kelo citation.

[9] Use citation from text.

[10] Id. For a case discussing pretextual takings see Goldstein v. Pataki, 516 F.3d 50, 63 (2d Cir. 2008) (refusing to read "*Kelo*'s reference to 'pretext' as demanding . . . a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns"). See also, Daniel B. Kelly, *Pretextual Takings: of Private Developers, Local Governments, and Impermissible Favoritism*, 17 Sup. Ct. Econ. Rev. 173 (2009).

[11] See Dana Berliner, Matthew Fellerhoff, and Janet Bush Handy, Challenging the Right-To-Take: A Whirlwind Tour of Cases and Issues, SW019/SW020 ALI-CLE 837 (2015)

redevelopment, not to the private entity use of eminent domain to address infrastructure needs.

Finally, Part III. addresses our checkered experience with the aftermath of private eminent domain efforts such as converting abandoned railroad lines to hiking trails. It reviews current and future potential infrastructure needs and proposes that future eminent domain actions for pipelines, drone air rights, mass transit, redevelopment projects, border walls, climate change adaptation, and other needed infrastructure take the form of express easements rather than fee simple acquisitions.

I. FEDERAL AND STATE TAKINGS CLAUSES AND REDEVELOPMENT

A. The Kelo Decision and the State Aftermath

The Fifth Amendment Takings Clause is enforceable against the states through the Fourteenth Amendment. It provides "nor shall private property be taken for public use without just compensation." Most states have a similar takings clause in their constitutions[12] and "[f]ederal and state takings clauses are generally interpreted the same way."[13] For eminent domain actions, the two primary issues are whether the taking is for a public use and whether just compensation has been awarded.

(citing *Wilmington Parking Auth. v. Land with Improvements,* 521 A.2d 227 (Del. 1986); *City of Norwood v. Horney,* 853 N.E.2d 1115 (Ohio 2006); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown Neighborhood Council v. City of Detroit,* 304 N.W.2d 455, 459-60 (Mich. 1981), but not clear that it overruled heightened scrutiny); *Miss. Power & Light Co. v. Conerly,* 460 So.2d 107 (Miss. 1984) (implicitly applying heightened scrutiny)). See also, Marc Mihaly & Turner Smith, Kelo*'s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 Ecology L.Q. 703, 729 (2011) (concluding that after five years there is "little substantive limitation on states' eminent domain authority, thus permitting most states to condemn property in the context of economic development projects or to cure blight").

[12] Michael B. Kent, Jr., Public Pension Reform and the Takings Clause, 4 Belmont L. Rev. 1, 4 (2017).

[13] Thomas Merrill at page 1631 Anticipatory Takings

The eminent domain power is an aspect of sovereignty that allows federal or state governments to condemn property for public use so long as they pay just compensation.[14] The state holds the right of eminent domain, which it may delegate by statute to counties, municipalities, or public service corporations. There is a hierarchy among public entities, with the state at the top, as to when they may use eminent domain to condemn land for incompatible public uses.[15] The legislature may constitutionally delegate the eminent domain power to a private development corporation if a public purpose is advanced and the benefit is available to the public.

The question as to whether the taking is for a public use is guided by the *Kelo v. City of New London*[16] decision, which affirmed a broad reading of public use for the federal Constitution, but encouraged states to define the term more narrowly if they so desired.[17] In *Kelo*, the city of New London approved a private development plan to revitalize the city and proposed to assemble the land needed for the project through voluntary purchase and the use of eminent domain. Nine of the condemnees, including Susette Kelo, challenged the city's action claiming that the taking would violate the "public use" restriction. The Court held that based on its precedential cases of *Berman v. Parker*[18] and *Hawaii Housing Authority v. Midkiff*,[19] "using eminent domain to promote economic development" is "for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution."[20]

---

[14] Id.

[15] 26 Am. Jur. 2d Eminent Domain §23.

[16] 545 U.S. 469 (2005).

[17] Id. at ___ noting that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."

[18] 348 U.S. 26, 33 (1954) (upholding redevelopment plan that targeted a blighted area in Washington, D.C., even though not all of the properties condemned were blighted).

[19] 467 U.S. 229, 241-242 (1984) (upholding Hawaii statute that transferred fee title from lessors and to lessees to reduce the concentration of land ownership.).

[20] Id. at ___.

In the years following the *Kelo* decision, at least forty-four states have either amended their constitutions or enacted legislation to address the "public use" concerns expressed by Justice O'Connor's dissent.[21] These actions have varied, but mostly they focus on restricting the use of eminent domain actions for economic development and requiring a finding of blight.[22] For example, Virginia's legislature jumped into *Kelo* reform in 2006 by introducing several bills to define public use for eminent domain actions. These efforts continued until Virginia Code § 1-219-1 was enacted in 2007 to comprehensively define public use and the voters approved an amendment to the state constitution in 2013.[23] Nevertheless, these actions did not "profoundly change eminent domain law in Virginia" because deciding what constitutes public use is "one for ultimate decision by the courts."[24]

The Virginia Supreme Court has long supported the right to private property as a fundamental right. The state constitutional amendment only helps to remind Virginia that its "just compensation clause has never been in the past and cannot be in the future construed to endorse the use of eminent domain for economic development purposes in the broad manner approved in the *Kelo* decision."[25]

B. Challenging Eminent Domain for Redevelopment

At the state level, challenging public use is a developing area of law in terms of whether an entity may use eminent domain for economic

---

[21] Callies, Freilich, & Saxer, Land Use Cases and Materials, pg. 340 (West Academic 7th ed.)

[22] David L. Callies, Kelo v. City of New London: Of Planning, Federalism and a Switch in Time, 28 U.Haw.L.Rev. 327, 344-345 (2006)

[23] See James J. Knicely & Francis A. Cherry, *Eminent Domain Reform: The "Virginia Way,"* 45 Real Est. L.J. 290, 298-319 (2016).

[24] Id. at 367.

[25] Id. at 368-369.

development or when negotiations for a lease or purchase fail.[26] In approximately forty states, it is illegal to use eminent domain for economic development.[27] Several cases have also held that using eminent domain to condemn property was not proper when "a government entity has been unhappy with lease or purchase negotiations and then uses eminent domain to get the deal it wanted."[28] Using eminent domain for redevelopment or blight removal continues to be an active and demanding area of litigation.

Prior to the *Kelo* case and subsequent state legislation narrowing the concept of public use, the Commonwealth Court of Pennsylvania in a condemnation brought pursuant to the Urban Redevelopment Law (URL) held that the agreements entered into by the private developer and the redevelopment authority constituted an unlawful delegation of eminent domain powers.[29]

The Pennsylvania court reviewed the various agreements, which required that the private developer provide written consent before the redevelopment authority could file a condemnation action and conferred upon the developer the power to determine when to initiate condemnation proceedings against the private property owners.[30] Although the URL granted the power of eminent domain to the redevelopment authority, it cannot "impair its ability to exercise this power through contract or agreement" and "any agreement which purportedly transfers such power to a private individual must be deemed to be void and unenforceable."[31]

---

[26] See Dana Berliner, Matthew Fellerhoff, and Janet Bush Handy, Challenging the Right-To-Take: A Whirlwind Tour of Cases and Issues, SW019/SW020 ALI-CLE 837 (2015).

[27] Id. (discussing cases holding that economic development is not a public use).

[28] Id. (discussing cases rejecting and upholding condemnations used for such purposes).

[29] *Condemnation of 110 Washington Street, Borough of Conshohocken, Pennsylvania, By the Redevelopment Authority of the County of Montgomery, for Urban Renewal Purposes*, 767 A.2d 1154, 1160-1161 (2001).

[30] Id. at 1160-1161.

[31] Id. at 1160.

In *Reading Area Water Authority v. Schuylkill River Greenway Ass'n*, the Supreme Court of Pennsylvania reviewed state legislation enacted in reaction to the *Kelo* decision, The Property Rights Protection Act (PRPA), which prohibits the taking of private property "in order to use it for private enterprise."[32] The court addressed the issue of whether a municipal authority could condemn an easement over private property in order to install sewer drainage facilities to allow a private developer to build a residential subdivision.[33] Although there was an exception in the legislation for takings by regulated public utilities, such as water and sewer companies, the municipal authority asserting condemnation power was not a public utility and thus the exception did not apply. Therefore, the court held that the municipal authority's condemnation of the drainage easement for the benefit of the private developer was in violation of PRPA.[34]

Blight challenges typically involve two kinds of issues. First, does the blight designation meet the legal interpretation of the blight factors? Second, is it appropriate to apply the law to the blighted area or property based on the validity of blighting conditions?[35] For example, in *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, the New Jersey Supreme Court interpreted its state constitution to reject the Borough of Paulsboro's condemnation of vacant land for economic development based on an assertion that "a piece of land is 'not fully productive.'"[36] The court stated

> a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met. Because a redevelopment designation carries serious implications for property

[32] Id. at 374.

[33] 627 Pa. 357, 360 (2014).

[34] Id. at 376-377. Cf. Wymberley Sanitary Works v. Batliner, 904 N.E.2d 326, 334 (Ind. App. 2009) ("mere fact that the sewer line extension will enhance the value of the subdivision to the developer does not alter the fact that there is a public benefit as well").

[35] Dana Berliner, supra note 27.

[36] 924 A.2d 447, 460 (N.J. 2007).

> owners, the net opinion of an expert is simply too slender a reed on which to rest that determination.[37]

Interpreting blight factors as related to public use requires that there is a legitimate determination of blight as the basis for using the eminent domain power. A litigant might also employ other factors in certain circumstances to challenge an eminent domain action targeting blight. These factors include "the notion of governmental or developer created blight, the age (or continued validity) of the blight study, the particular municipality's lack of authority to condemn for blight, the argument that the blight has already been cured, gerrymandering of the supposedly blighted district, and whether the plan addresses the blight identified."[38]

C. Other Challenges to Delegating Eminent Domain Power

Challenging redevelopment requires consulting the relevant statutes, recognizing what may be restrictive state procedures for bringing such challenges, and building a fact-intensive record.[39] An Arizona court applied strict statutory interpretation to the delegation of eminent domain authority from the state to local governments in *City of Phoenix v. Harnish*.[40] It found that although the Arizona legislature authorized the city to establish parks using its eminent domain power, the legislature did not specifically grant the city the authority to use eminent domain outside its municipal boundaries.[41] Strictly construing the legislative language against the condemnor, the court concluded that the Arizona legislature granted municipalities the authority to condemn land outside their boundaries only if done for the purpose of

---

[37] Id. at 465.

[38] Dana Berliner, Matthew Fellerhoff, and Janet Bush Handy, Challenging the Right-To-Take: A Whirlwind Tour of Cases and Issues, SW019/SW020 ALI-CLE 837 (2015).

[39] Id.

[40] 214 Ariz. 158 (Az. App. 2006).

[41] Id. at 161-162.

locating utilities and allowing the concurrent use of the land for a public park.[42] It found that the reference in the statute to "public park purposes" did not "constitute a stand-alone grant of authority to condemn extraterritorial property solely for park purposes."[43]

Courts have also continued to support the delegation of eminent domain powers to entities performing a public purpose. In *City and County of Honolulu v. Sherman*, the Hawai`i Supreme Court held that the City's delegation of eminent domain power to the Department of Community Services (DCS) was proper pursuant to the statutory authority governing eminent domain acquisitions.[44] The Residential Condominium, Cooperative Housing and Residential Planned Development Leasehold Conversion (Revised Ordinances of Honolulu (ROH) Chapter 38 (1991) authorized the City of Honolulu (City) to file eminent domain actions for a lease-to-fee conversion of certain leased-fee interests.[45] DCS designated a condominium complex owned by a church that qualified for conversion from leaseholds and the Honolulu City Council then "properly exercised its power of eminent domain in determining that the designation effectuated a public purpose."[46] The church argued that the City interpreted ROH § 38 as legally mandating the City to condemn the property after the DCS designation.[47] However, the court interpreted ROH § 38–2.2 "to empower the DCS to designate land for acquisition by the City, which 'merely facilitates the City's acquisition of the land subject to the decision of the City, through its City Council, actually to

---

[42] Id. at 164.

[43] Id. at 163.

[44] 110 Hawai`i 39 (2006). See also *Gyrodyne Co. of America, Inc. v. State University of New York at Stony Brook*, 794 N.Y.S.2d 87, 89 (2005) (holding that university had "sufficient statutory jurisdiction and authorization" to acquire property contiguous to existing campus to construct a new educational project and the Board of Trustees did not improperly delegate the eminent domain power by authorizing the Chancellor to effect the acquisition of title).

[45] Id. at 42.

[46] Id. at 73.

[47] Id. at 69.

exercise the power of eminent domain.'"[48]

> [T]he department may *designate* all or that portion of a development containing residential condominium land for acquisition, and *facilitate* the acquisition of the applicable leased fee interests in that land by the city through the *exercise* of the power of eminent domain or by purchase under the threat of eminent domain[.]

The Hawai`i Supreme Court noted that this section "does not mandate that the City condemn the designated property."[49]

Legislators cannot delegate condemnation power for decisions that require sensitive policy decisions involving political questions such as whether or not the condemnation is necessary or proper. For example, the Forest Preserve District of Du Page County, Illinois (District) filed suit condemning private land after negotiations with the landowners, the Browns, failed.[50] The Browns contended that the condemnation was unauthorized because the District "unlawfully delegated legislative power to its staff."[51] The trial court decided in favor of the Browns, but the appellate court reviewed the legislation and found that the challenged ordinance was lawful as it directed "the District's staff to acquire the Brown's property either through negotiation or condemnation."[52]

The appellate court in *Brown Family Trust* agreed that "the District could not permissibly have delegated to its staff the sensitive policy decision of whether a particular parcel of property should be seized under the power of eminent domain" because the legislature must determine as a

---

[48] Id. at 70.

[49] Id. at 70 (discussing precedential decision of *Richardson v. City and County of Honolulu,* 76 Hawai'i 46, 57-59 (1994) which interpreted ROH §38 similarly) (emphases added by court).

[50] Forest Preserve District of Du Page County v. Brown Family Trust, 323 Ill.App.3d 686, 689-690 (2001)

[51] Id. at 691.

[52] Id. at 692-693.

political question "the necessity or propriety of exercising the right of eminent domain."[53] However, the court determined that "[b]y the time the District staff was given the power to institute condemnation proceedings, the District had already determined the political propriety of exercising the power of eminent domain against the Browns' property."[54] Even though the District gave the staff discretion to immediately condemn the property or negotiate further, this negotiating discretion was guided by "a maximum price it could offer as well as specific requirements concerning the acceptance of an offer of less than a fee simple conveyance," for example, a conservation easement.[55]

The *Brown Family Trust* court concluded the challenged ordinance "did not improperly delegate the power of eminent domain to the District's staff" because the ordinance did not give power to determine the political propriety of whether to condemn the property.[56] Instead, the ordinance "merely authorized the staff to effectuate an already approved condemnation action or to negotiate further with the Browns within definite guidelines set by the District."[57] Proper delegation requires that the legislative body retain the authority to decide whether or not condemnation is required and provide meaningful guidelines for staff members to negotiate with the property owner and complete the authorized condemnation.

II. DELEGATING EMINENT DOMAIN POWER TO PRIVATE ACTORS FOR INFRASTRUCTURE NEEDS

[53] Id. at694-695.
[54] Id. at 695.
[55] Id. at 695
[56] Id. at 698.
[57] Id. at 698.

A. Background

Beginning in the eighteenth and nineteenth centuries, federal and state governments delegated the power of eminent domain to private actors, including "turnpike, bridge, canal, and railroad companies," as well as to mill owners who could use eminent domain to "dam watercourses and flood neighboring land in order to power mills."[58] For example, federal law granted railroads the right to take private lands along the intended railway route and mill owners could erect mills that flooded neighboring riparian properties so long as they paid compensation.[59] States have historically delegated the eminent domain power to public utilities, including those that are private entities, and courts in the past have upheld this authority as a public use.[60] While state law usually governs oil pipeline development and grants the power of eminent domain to these projects, when the pipeline crosses a border with a foreign country the federal executive branch must grant a permit from after finding that the pipeline will "serve the national interest."[61] Private entities building power lines, highways, and other common carriers exercise eminent domain authority for public infrastructure without much objection.[62]

Granting a private taking power may be appropriate in situations where a private owner is preferable for justice or efficiency reasons and where there are strategic problems in the marketplace that "block the efficient or just transfer of property rights."[63] In such situations, private takings should be the

---

[58] Abraham Bell, Private Takings, 76 U. Chi. L. Rev. 517, 545 (2009).

[59] Bell, Private Takings at 519.

[60] *Takings and Transmission*, supra note 69 at 1105.

[61] Transcanada's Keystone XL Pipeline, 1 U. Balt. J. Land & Dev. 207, 210 (2012) (arguing that the Keystone XL Pipeline should not be constructed because "[t]he Framers of the Constitution did not intend for the eminent domain power to be exercised as it has been in the construction of Keystone XL").

[62] Takings and Transmission, supra note 69 at 1095-1096.

[63] See Bell, Private Takings at 558-559 (proposing three keys to determine when and to

method chosen to achieve the goals a public taking would bring about.[64]

Critics of private takings have alleged "that the government is more likely than private actors to make decisions for the benefit of the public and that the public benefit is more likely to be served when taken property is held by the government than when held by private actors."[65] However, there are empirical studies showing that outsourcing to private providers is more efficient than public services and the "current trend in public administration is toward privatization of public functions" including "hospitals, landfills, nursing homes, public transport, sewage, stadiums, fire protection, airports, water supply, and electric and gas utilities."[66]

State law gradually reduced the delegation of eminent domain power throughout the late nineteenth and early twentieth centuries although "many states continue to permit railroads and utilities to undertake more limited private condemnations today."[67] A few states have even delegated power to miners, loggers, and transporters of water or irrigation.[68] The legislature may also grant the power to exercise eminent domain to private individuals and corporations that are under no obligation to serve the public.[69] For example, railroads are private corporations but the state may give statutory authority to use eminent domain to acquire land or an easement to construct and operate a railway. Other public service corporations such as telephone companies, electricity providers, and oil and gas companies have received the power of

---

whom the government should delegate the private taking power: 1) "likelihood of strategic barriers blocking efficient transfers"; 2) "some reliable mechanism for determining that the taking effectuates a transfer to a desirable owner" (just compensation is a basic requirement); and 3) "the pliability rule created by the private taking power should be superior to alternative pliability rules, or government mediation").

[64] Id. at 585.

[65] Id at 575.

[66] Id. at 576.

[67] Bell, Private Takings at 545.

[68] Bell, Private Takings at 545-546.

[69] 26 Am. Jur. 2d Eminent Domain §28.

eminent domain to secure rights-of-way.[70]

Private taking authority may be the most efficient and necessary pathway to increasing the use of renewable energy by encouraging private companies entering the transmission market to undertake new transmission projects to increase renewable energy and maintain grid reliability.[71] These projects will most likely require using eminent domain, but if courts view them as not sufficiently public to authorize a private taking, it may be more difficult to "meet the nation's energy needs."[72]

There is a growing call for "democratizing" energy law and citizen participation in "the field might better inject Americans' preferences and goals into decisions over energy policy."[73] We will need grid-wide changes to supply energy in the U.S. and, unfortunately, the structure governing electric energy is a dense bureaucracy involving "federal, regional, state, and local oversight of for-profit, not-for-profit, and cooperatively owned ventures that manage the production, generation, transmission, transportation, and distribution of electricity."[74]

In the 1990s, the Federal Energy Regulatory Commission (FERC) fundamentally restructured its electricity regulations to allow wholesale markets rather than utilities to determine prices.[75] Not-for-profit "regional transmission organizations" (RTOs) or "independent system operators" (ISOs) manage these markets and participating utility transmission assets. The federal government has "pushed" the eminent domain power to these

---

[70] See Shelley Ross Saxer, *Government Power Unleashed: Using Eminent Domain to Acquire a Public Utility or Ongoing Business Enterprise*, 38 Ind. L. Rev. 55, 81-85 (2005) (discussing state statutory and constitutional limitations on the eminent domain power).

[71] Klass, Taking for Transmissions (2013) at 1115.

[72] Id. at 1114-1115 (arguing for a broad interpretation of "the public" to include out-of-state electricity users as well as in-state users).

[73] Shelley Welton, Grasping for Energy Democracy, 116 Mich. L. Rev. 581 (2018).

[74] Id. at ____.

[75] Need citation.

private regional entities, which serve approximately two-thirds of U.S. customers, although some states have retained "full control over electricity generation, transmission, and distribution."[76]

As discussed briefly in Part II. B., the public, state legislatures, and state courts reacted quickly to the *Kelo* decision to narrow the scope of what constitutes a public use. However, states directed their efforts to restricting the economic development takings that the Court found to be constitutional in *Kelo,* rather than addressing other types of private takings for private gain, such as "takings by railroads, oil and gas companies, and coal companies to condemn private property for mineral access."[77] In particular, Western states like Wyoming and Idaho encourage "takings by oil and gas companies to aid the efficient extraction of natural resources."[78] Perhaps, such natural resource development should not automatically constitute a "public use" and thus limit the authority of private entities to exercise eminent domain.[79]

B. Challenges to Eminent Domain Delegation

Property owners have successfully challenged the use of eminent domain power by private entities arguing that the delegation of power is improper in light of the Fifth Amendment command that taking private property requires a public use.[80] This section will discuss challenges to delegating eminent

---

[76] Id. at 595-596 (noting that for purposes of energy democracy, this regulatory scheme is "complicated, multilayered, and immensely technical").

[77] Alexandra B. Klass, The Frontier of Eminent Domain, 79 U. Colo. L. Rev. 651, 673-675 (2008).

[78] Id. at 675.

[79] Id. at 700 (asserting that "it is time to consider the creation of a public forum at the state or local government level to weigh the needs of natural resource development interests against other economic, environmental, and social interests in making public use determinations").

[80] See Daniel B. Kelly, Pretextual Takings: of Private Developers, Local Governments, and Impermissible Favoritism, 17 Sup. Ct. Econ. Rev. 173, 174 (2009) (arguing that the *Kelo*

domain to private owners of oil and gas pipelines, electrical grids, mass transportation projects, and to other nongovernmental entities. The need to reexamine federal and state statutory delegations to private entities has grown as our nation again faces the necessity to build or rebuild infrastructure for transportation, the electrical grid, pipelines, and other major land assembly projects. As private property owners and communities increase their objections to the building of infrastructure required for new demands such as transmitting renewable energy from remote locations to urban areas, questions as to whether these projects serve a "public use" will continue to arise.[81]

Recent state court decisions have restricted delegating eminent domain power to private entities unless the purpose strictly complies with the state statute. For example, in *Clarke County Reservoir Commission v. Robins Revocable Trust*, the Iowa Supreme Court held that a public-private commission organized to locate, plan, and design a new reservoir for water supply, recreation, flood control, and erosion control did not have authority to exercise eminent domain to acquire private property.[82] The court utilized its "long-standing approach mandating strict compliance with statutory requirements in eminent domain proceedings."[83] It held that an entity created by a Joint Exercise of Governmental Powers agreement that included private members, not part of a state or local government in Iowa, did not have authority to exercise the power of eminent domain because "[n]o statute expressly allows a private entity to exercise the power of eminent domain

---

opinion "arguably is *more* protective of property rights than O'Connor's dissent in that the Court recognized "the possibility that a condemnation might violate the Public Use Clause of the Fifth Amendment if its purpose was pretextual") (emphasis in original)).

[81] See Alexandra B. Klass, Takings and Transmission, 91 N.C. L. Rev. 1079, 1083-1084 (2013).

[82] 862 N.W.2d 166, 168 (Iowa S.Ct. 2015).

[83] Id. at 172.

jointly through a 28E agreement."[84]

In the absence of statutory revisions to state or federal government delegations of the eminent domain power to private entities in areas other than private economic development, recent cases demonstrate that courts will strictly construe statutory authority to find that certain condemnations are not in compliance.[85] For example, in *Larson v. Sinclair Transp. Co*., the Colorado Supreme Court reviewed a challenge to a pipeline company's condemnation of easements over private land for purposes of running a second underground gasoline pipeline parallel to a prior pipeline for which it had owned an easement since 1963.[86] Viewing the issue as one of statutory interpretation, the court narrowly construed the statute that delegated condemnation power to private pipeline companies and concluded that the legislature intended to confer eminent domain power for constructing electric power infrastructure, not for laying pipelines to transport petroleum.[87]

Similarly, the Massachusetts Supreme Court in *Providence & Worchester R.R. Co. v. Energy Facilities Siting Bd*. strictly construed the eminent domain statute.[88] It determined the siting board had the "power to authorize an oil pipeline company to take land by eminent domain only for 'new' pipelines [and that] the board erred in claiming authority to exercise that power for the benefit of Mobil's existing pipeline, which is not 'new.'"[89] Courts have upheld the use of eminent domain by private entities so long as the state has delegated this power and the appropriate authority has found that the acquisition is primarily for the benefit, use, or enjoyment of the public and is

[84] Id. at 176 (referring to a 28E entity under Iowa Code § 28E.1.).

[85] Dana Berliner, Strict Construction in Eminent Domain Statutes, SZ005 ALI-CLE 287 (Jan. 2018).

[86] 284 P.3d 42, 43 (Colo. 2012).

[87] Id. at 45-46.

[88] 899 N.E.2d 829, 835-38 (Mass. 2009).

[89] Id.

necessary for a public purpose.[90]

Statutory procedure violations may also engender a challenge to eminent domain. For example, some states require that before a public entity is entitled to exercise the right to condemn, it must make a good faith attempt to negotiate a purchase from the landowner.[91] In *Wagler v. West Boggs Sewer Dist., Inc*., the Indiana Supreme Court reviewed a non-profit corporation's efforts to condemn easements for sewer lines to provide sewage disposal service in rural counties.[92] Some landowners donated easements and West Boggs sent letters offering to purchase easements, based upon an independent assessment of the easement values, from those who declined to donate. West Boggs brought condemnation proceedings against those who either ignored or refused its offer to purchase.

West Boggs sought easements in order to construct the necessary facilities.[93] The property owners challenged the condemnation first contending that sewer districts in Indiana do not have condemnation authority. After reviewing the two state statutes, one that granted condemnation authority "to public utilities engaged in, among other functions, 'collection, treatment, purification, and disposal in a sanitary manner of liquid and solid sewage,'" the court read the two statutes harmoniously to find that they allowed West Boggs to exercise condemnation authority.[94]

---

[90] See, e.g., Enbridge Energy (Illinois) LLC v. Kuerth, 2018 IL. App (4th) 150519-B (noting that state may delegate eminent domain power "to railroads, pipeline companies, and other entities as long as the public is the primary intended beneficiary" and that the property owner has the burden to rebut presumptions of public use when "the Commission grants a certificate or makes a finding of public convenience and necessity for the acquisition of property for private ownership or control").

[91] See, e.g. *Vill. of Memphis v. Frahm*, 843 N.W.2d 608, 617 (Neb. 2014) ("public entity does not have the right to condemn without a good faith attempt to negotiate").

[92] 898 N.E.2d 815 (Ind. 2008).

[93] Id. at 817.

[94] Id. at 818-819.

The property owners' second contention was that the West Boggs' offers to purchase were not in good faith as required by state statute. The court reviewed the state requirements for filing a condemnation lawsuit[95] and found the fact that West Boggs sought land donations before making the offers to purchase did not "undermine its ability to establish good faith as a matter of law when it was unable to secure all the easements by donation."[96] Because West Boggs hired an independent appraiser and used that appraisal in a uniform form letter to property owners offering to purchase, the court held that as a matter of law, West Boggs met the requirement that it negotiate in good faith before using its condemnation authority.[97]

There are also conflicts in regards to the authority that private actors and government officials possess to use eminent domain. For example, federal authority under the Federal Energy Regulatory Commission (FERC) over the siting of interstate electric transmission lines may come into conflict with state jurisdiction over siting, local opposition to transmission line projects, and the use of eminent domain by government or private entities against landowners as we expand our transmission grid.[98] In addition, these conflicts among government units may result in condemnation of public property without the payment of just compensation as a superior government agency may acquire property from another governmental entity that already holds the property for the public use.[99]

Condemnations for pipelines have generated litigation as the fracking boom in the mid-2000s created the need for additional fossil fuel infrastructure. Installing a wall at the southern U.S. border will require that

---

[95] Id. at 819 (citations omitted).
[96] Id.
[97] Id. at 820.
[98] See Michael Diamond, *'Energized' Negotiations: Mediating Disputes Over the Siting of Interstate Electric Transmission Lines*, 26 Ohio St. J. on Disp. Resol. 217 (2011).
[99] Appropriation Under Eminent Domain, 4 Tiffany Real Prop. § 1252 (3d ed.).

the government use eminent domain to obtain the necessary property from private landowners and Native American tribes. Government agencies must choose between flooding downstream property to protect upstream property or vice versa when super storms produce substantial quantities of floodwater, often in a short amount of time. Electric utilities whose power lines cause wildfires and resulting floods face the prospect of compensating private landowners. Mass transportation efforts, such as the California Bullet Train, will require negotiation and condemnation of both private and public property. Finally, new technologies, such as drones that may occupy private airspace or satellite communications that support networks such as the Global Positioning System (GPA), will challenge our concepts of public and private property.[100]

III. STRUCTURING FUTURE TAKINGS FOR INFRASTRUCTURE RESILIENCE

As summarized in the NCA4 Report-in-Brief, the immediate and future challenges to our infrastructure from climate change are immense:

> Climate change and extreme weather events are expected to increasingly disrupt our Nation's energy and transportation systems, threatening more frequent and longer-lasting power outages, fuel shortages, and service disruptions, with cascading impacts on other critical sectors. Infrastructure currently designed for historical climate conditions is more vulnerable to future weather extremes and climate change. The continued increase in the frequency and extent of high-tide flooding due to sea level rise threatens America's trillion-dollar coastal property market and public infrastructure, with cascading impacts to the larger economy. In Alaska, rising temperatures and erosion are causing damage to buildings and coastal

[100] See, e.g., Roger D. Launius, *Historical Analogs for the Stimulation of Space Commerce*, Monographs in Aerospace History, no. 54 (NASA 2014) (using railroad development, telecommunications, and public works, among other projects, as case studies to encourage the involvement of the federal government in public-private efforts to support space commerce).

> infrastructure that will be costly to repair or replace, particularly in rural areas; these impacts are expected to grow without adaptation. Expected increases in the severity and frequency of heavy precipitation events will affect inland infrastructure in every region, including access to roads, the viability of bridges, and the safety of pipelines. Flooding from heavy rainfall, storm surge, and rising high tides is expected to compound existing issues with aging infrastructure in the Northeast. Increased drought risk will threaten oil and gas drilling and refining, as well as electricity generation from power plants that rely on surface water for cooling. Forward-looking infrastructure design, planning, and operational measures and standards can reduce exposure and vulnerability to the impacts of climate change and reduce energy use while providing additional near-term benefits, including reductions in greenhouse gas emissions.[101]

The United States and other parts of world will need to deal with the physical changes to our land caused by climate change, technological changes, and revitalization of our infrastructure. Public and private activities addressing these challenges will likely interfere with private property rights. Based on our experiences with some of the early infrastructure ventures such as railroads and hydrologic modifications such as dams, we should examine the methodologies used to address this interference with private property rights for the benefit of the public.

CONCLUSION

* * *

[101] NCA4 Report-in-Brief, supra note 2, page 17.