THE STRANGE CAREER OF PRIVATE TAKINGS OF PRIVATE PROPERTY FOR PRIVATE USE

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Throughout the Intermountain West, an interesting and disconcerting trend is occurring in resort communities that are also world-class skiing meccas, such as Breckenridge, Aspen, Telluride in Colorado or Summit County in Utah. Wealthy second-home buyers, dubbed "amenity migrants," have driven up prices so much in these communities that virtually no one else can afford to either buy or rent homes there. Those who actually work in these resort communities—the police, firefighters, cooks, ski-lift operators, waitstaff and housekeepers—cannot afford to live there and instead must commute from more affordable locations, often hours away.[1]

In order to provide close-in housing for those who actually work in these communities, many of the resort areas have contemplated ways of providing affordable "workforce housing." Some local governments have adopted inclusionary housing ordinances, which require developers to make affordable a certain portion of new development. Other local governments have town or city housing authorities build their own affordable housing.[2] But would it be possible for state legislatures in states experiencing the amenity migrant phenomenon to instead delegate to a *private* housing developer the power to exercise eminent domain? Would a *private* developer constitutionally be able to condemn private land for the purpose of building *private* workforce housing? Would not such a delegation to a private party be contrary to the essential law of eminent domain, which seems to require that (1) only the sovereign—only a government—exercise that power,[3] and (2) private property may *not* be taken from one

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1. Jan G. Laitos & Heidi Ruckriegle, *The Problem of Amenity Migrants in North America and Europe*, 45 URB. LAW. 849 (2013).

2. Jonathan Thompson, *When Living Where You Work Is out of Reach*, THE DENVER POST (May 23, 2015, 5:00 PM), http://www.denverpost.com/perspective/ci_28170119.

3. The Fifth Amendment to the U.S. Constitution states in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

private party for the sole purpose of transferring it to another private party?[4]

With respect to the first question, *state* constitutions and legislative enactments in the Intermountain West have traditionally granted authority to private parties to exercise the power of eminent domain. This broad power has been delegated either to promote private development and use of coal, oil, gas, timber, water, and other natural resources[5] or to acquire land so private entities, as "common carriers," could build private pipelines, transmission lines, or railroads.[6] With respect to the second question, the United States Supreme Court has decided in several cases that if eminent domain has been exercised to take private property for the public purpose of private economic development, then the "public use" requirement of the Fifth Amendment is satisfied.[7] The transfer of property from one private party to another is constitutionally acceptable—even if the property will not be put into use by the public—if the transfer is for a "public purpose," such as promoting a community's economy.[8]

When a state or local government initiates eminent domain to take from A to give to B in order to support an area's economic growth, the public is implicated in this transaction because a government body is behind the condemnation.[9] But when a private natural resources company, or a private common carrier, has the power to take

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Although this Takings Clause is written in the passive voice, it is generally understood that it was added to the Bill of Rights to impose a federal constitutional limit on the new federal government's exercise of eminent domain.

4. *See generally* Kelo v. City of New London, 545 U.S. 469, 477 (2005).

5. Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. ECON. HISTORY 232, 244–45 (1973); Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651 (2008). Several states in the West have constitutions that permit private takings for private use in order to ensure that private parcels surrounded by other land are not landlocked and to allow diversion canals and ditches to be constructed across private land to perfect a water appropriation. *See, e.g.*, COLO. CONST., Art. II, § 14.

6. 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.05[3][a] (3d ed. 2007).

7. *Kelo*, 545 U.S. 469; Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

8. *Id.* at 479, 484.

9. Robert Dreher & John Echeverria, Kelo*'s Unanswered Questions: The Policy Debate over the Use of Eminent Domain for Economic Development*, GEORGETOWN ENVTL. L. AND POL'Y INST. REPORT (2006), http://www.gelpi.org/gelpi/current_research/documents/GELPIReport_Kelo.pdf; Klass, *supra* note 5, at 653.

property from a private party in order to secure a private economic gain, then the exercise of eminent domain power has become a "private taking of private property for private use." What follows below is a discussion and critique of this little-known, but commonly accepted, class of *private* taking.

Part I summarizes the two private entities that traditionally have been conferred the power to take private property for their own private use: (1) natural resource developers and (2) common carriers involved in, and responsible for, our country's transportation, storage, and distribution (TS&D) system for energy infrastructure—pipelines, electrical transmission lines, and rail lines. Part II considers the traditional rationale for those private takings, which typically relies on some version of the notion that the public at large may, or will, eventually benefit from this private exercise of eminent domain. Part III explores the four central problems associated with these kinds of private takings: (1) the potential for inefficiencies and abuses when state laws distrust normal private market allocations of resources and instead rely on private party condemnation decisions to create a public benefit; (2) the typical absence of meaningful judicial review; (3) the failure to take into account countervailing interests when authorizing private parties to determine the best use of another's private property; and (4) the inability of traditional calculations of "just compensation" to truly compensate a private party whose property has been taken by another private party. Part IV offers suggestions on how to reform this particular class of private takings.

I. Examples of Constitutionally Acceptable Private Takings

In two settings, the significant power of eminent domain is used as a tool by private industry to promote private interests by taking land and property from other private parties—(1) when state constitutions and statutes give condemnation power to private *natural resource* developers, and (2) when statutes grant condemnation authority to so-called "common carriers," such as private power companies, pipelines, or railroads. In the former case, the private taking may at best produce a public use by contributing to the growth of the larger community economy. In the latter case, for common carriers

such as power utilities or railroads, the eventual transmission line or railroad freight car will eventually be for "use by the public," and should in theory provide services to the entire community. Also, common carriers are often subject to rate regulation by a public utility commission.[10]

Historically, it was quite common for states in the Intermountain West to have both state constitutions and statutory enactments that gave broad authority to private developers of natural resources to exercise the power of eminent domain to promote use of coal, oil, gas, hard rock mining, timber, and water. These provisions permitted private resource companies to file condemnation actions in state court to take existing private property in order to extract valuable mineral wealth; to produce energy from coal, oil, or gas; to engage in timber harvesting; and to build irrigation ditches to appropriate water. Some western states, such as Wyoming, grounded the right to condemn in the state constitution, in which case the private condemnor was not even required to show "public interest or necessity" when there was a private condemnation.[11] This extraordinary use of the eminent domain power for immediate private use was justified as a way for these states to develop their economies, which were, in the West, built largely on natural resources.[12]

The other way for private parties to exercise eminent domain is when a private entity is deemed a common carrier by state law. The condemnation rights of certain common carriers, such as petroleum pipeline companies, may be even greater than those of the gas and electric utilities, which are subject to regulation by the Public Service Commission.[13] To become a common carrier, a private company must show that it will deploy the eminent domain power and then use the

10. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1884 (2007).

11. ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION 67 (1993); Matt Micheli & Mike Smith, *The More Things Change, the More Things Stay the Same: A Practitioner's Guide to Recent Changes to Wyoming's Eminent Domain Act*, 8 WYO. L. REV. 1 (2008).

12. ERIC T. FREYFOGLE, NATURAL RESOURCES LAW: PRIVATE RIGHTS AND COLLECTIVE GOVERNANCE 583 (West 2007); Klass, *supra* note 5, at 661.

13. Julie A. Beberman, *Exercise of Power of Eminent Domain for Special Purposes: Provide Restrictions on Use of Eminent Domain Power by Petroleum Pipeline Companies*, 12 GA. ST. U. L. REV. 184, 186 (1995).

"taken" private land for a public use or public purpose.[14] In many states, common carrier status is conferred on pipeline companies, transmission lines, and railroads if the condemnation serves the "public interest and necessity."[15] States vary with respect to whether the common carrier seeking to condemn has the burden of demonstrating need and public use[16] or whether it is legislatively presumed that the exercise of eminent domain automatically serves the public interest.[17]

Pipelines are a particularly common and powerful type of common carrier that exercise eminent domain. This eminent domain power permits the private pipeline company to condemn land, rights-of-way, easements, and virtually any property from private parties.[18] Natural gas companies may also obtain a certificate of public convenience and necessity under the federal Natural Gas Act and thereby acquire private rights of eminent domain pursuant to that federal certificate.[19]

II. HOW CAN A PRIVATE TAKING BECOME A "PUBLIC USE"?

The text of the Fifth Amendment to the United States Constitution seems to declare that governments, particularly the federal

14. Cyrus Zarraby, *Regulating Carbon Capture and Sequestration: A Federal Regulatory Regime to Promote the Construction of a National Carbon Dioxide Pipeline Network*, 80 GEO. WASH. L. REV. 950, 967 (2012); Holly Bannerman, *Fracking, Eminent Domain, and the Need for Legal Reform in North Carolina: The Gap Left by the Clean Energy and Economic Security Act*, 14 N.C. J.L. & TECH. ONLINE 35, 55 (2012).

15. *See, e.g.*, Bridle Bit Ranch Co. v. Basin Elec. Power Coop., 118 P. 3d 996, 1014 (Wyo. 2005).

16. Brandon Gerstle, *Giving Landowners the Power: A Democratic Approach for Assembling Transmission Corridors*, 29 J. ENVTL. L. & LITIG. 535, 544 (2014); Gregory S. Ramirez, Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*: A Probability of Future Use by the Public as a Key to Exercising Eminent Domain*, 46 CREIGHTON L. REV. 89, 92 (2012).

17. Micheli & Smith, *supra* note 11, at 4; John Allen Chalk, Sr. & Sadie Harrison-Fincher, *Eminent Domain Power Granted to Private Pipeline Companies Meets with Greater Resistance from Property Owners in Urban Rather than Rural Areas*, 16 TEXAS WESLEYAN L. REV. 17, 18 (2009).

18. Laura A. Hanley, *Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, but by How Much*, 37 HOUS. L. REV. 125, 136 (2000); Amanda Niles, *Eminent Domain and Pipeline in Texas: It's as Easy as 1, 2, 3—Common Carriers, Gas Utilities, and Gas Corporations*, 16 TEXAS WESLEYAN L. REV. 271, 280–81 (2010).

19. Jim Behnke & Harold Dondis, *The* Sage *Approach to Immediate Entry by Private Entities Exercising Federal Eminent Domain Authority Under the Natural Gas Act and the Federal Power Act*, 27 ENERGY L. J. 499, 501–07 (2006).

government, may "take" private property so long as two conditions are met. First, the taking must be for a public use, and second, just compensation must be paid to the private property owner for the property that has been taken.[20] Most state constitutions contain a similar requirement that the taking be for a public use.[21] The question that arises is how this exacting constitutional standard for a *public* use is satisfied when the taking by a private entity seems to be for a *private* party, either a private natural resource developer or a private common carrier.

A. Public Use Satisfied When the Taking Is by a Private Resource Developer or Energy Company

In the nineteenth century, legislatures in Midwestern and Intermountain West states delegated eminent domain authority to private resource developers, energy providers, and transportation companies in order to help these states create their economies.[22] Since private economic development was seen as the primary driver of community or statewide economic growth, private company use of eminent domain power for resource, energy, or transportation development was thought to bring about a larger public benefit rather than a private purpose.[23] When these delegations of eminent domain power to private parties were challenged in court, they were upheld on the grounds that since the needs of communities were furthered by economic growth, private company takings that furthered economic expansion were for a public goal and therefore a public use.[24]

Several other rationales have been used to convert what appears to be private takings of private property for private benefit into private takings of private property that work, in effect, as a public use.

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20. *See supra* note 3 and accompanying text.

21. *See, e.g.*, VA. CONST. art. I (Bill of Rights), § II: "No private property shall be . . . taken for public use without just compensation to the owner thereof." *Compare* COLO. CONST., art. II (Bill of Rights), § 15: "private property shall not be taken . . . for public or private use, without just compensation."

22. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 259–62 (1977); Klass, *supra* note 5, at 655, 657.

23. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); Klass, *supra* note 5, at 675.

24. Potlatch Lumber Co. v. Peterson, 88 P. 426 (Idaho 1906); Hand Gold Mining Co. v. Parker, 59 Ga. 419 (1877).

In the case of a power line constructed to serve a private company, the private power company's exercise of eminent domain has been justified as a public use because other members of the public would have the same right to use the new line as the private company.[25] Some state legislatures have permitted private entities to exercise eminent domain authority for *either* the "public use" *or* the much broader "public benefit."[26] Private takings which result in some general benefit or advantage to the public then may satisfy the public use requirement. But the most important development involving public use has been the gradual judicial acceptance of the *broad definition* of the phrase that encompasses public advantage, public utility, or general (and often amorphous) "public purpose." The United States Supreme Court's 2005 decision in *Kelo v. City of New London*[27] signaled that the Fifth Amendment's public use requirement was largely coterminous with public purpose even when eminent domain ultimately benefits private entities.[28]

B. Public Use Satisfied When Private Condemnor Is a Common Carrier

It has long been assumed that the nation's important TS&D system for energy infrastructure—pipelines, power lines, and railroad lines—would require private energy service providers to exercise eminent domain. Indeed, as hydrofracturing increases domestic oil and gas supplies and makes the United States more energy independent, demand is growing for transportation, storage, and distribution systems; pipelines, power lines, and rail lines are needed to move, store, and deliver both clean energy fuel (e.g., oil and gas) and electricity from even cleaner energy sources (e.g., from wind, solar, and hydro).[29]

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25. Pub. Serv. Co. v. Shaklee, 784 P.2d 314 (Colo. 1989); Montana Power Co. v. Bokma, 457 P.2d 769 (Mont. 1969).

26. *See* Bannerman, *supra* note 14, at 54–56.

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

28. *See, e.g.*, *id.* at 479–80; Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

29. Rob Garver, *Review Finds US Energy Infrastructure in Desperate Shape*, FISCAL TIMES (Apr. 21, 2015), http://www.msn.com/en-us/money/markets/review-finds-us-energy-infrastructure-in-desperate-shape/ar-AAbsrsE; Jeremy Miller, *Trains Carrying Oil Raise Tough Questions*

The private companies that typically provide these TS&D services, especially for energy infrastructure, are often conferred special status by state law—the status of being a common carrier.

When a private entity is designated as a common carrier, it may enter on and condemn the land, rights-of-way, easements and property of private parties.[30] A private company, such as a pipeline company or a company that owns a power line, may become a common carrier if it qualifies under various conditions set forth in state law.[31] Often, state law establishes that the private common carrier is authorized to condemn property but only if the condemnation either serves "the public interest and necessity"[32] or if the taking is for a public use.[33]

In states where common carriers can exercise eminent domain when the condemnation serves the public interest and necessity, the private condemnor need only show a reasonable necessity for the project, which often means "reasonably convenient or useful to the public."[34] In other states, the common carrier's decision that a public need exists is conclusive and not subject to review.[35] More commonly, statutes across America granting condemnation power to common carriers presume that the project that is the reason for the exercise of eminent domain will be destined for eventual use by the public, thereby satisfying the public use requirement.[36] Or, states may convey eminent domain authority to private common carriers by simply statutorily defining pipelines, transmission lines, and rail lines as a public use under state law.[37] In all of these states, public use does

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in Northwest, HIGH COUNTRY NEWS, Nov. 24, 2014, at 5, *available at* http://www.hcn.org/issues/46.20/trains-carrying-oil-raise-tough-questions-in-pacific-northwest.

30. Hanley, *supra* note 18, at 134–36; TEXAS NAT. RES. CODE ANN. § 111.019 (granting common carriers the right of eminent domain).

31. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 111.002 ("a person is a common carrier if it . . . owns or manages a pipeline for the transportation of crude petroleum").

32. *See, e.g.*, WYO. STAT. ANN. § 1-26-801-815.

33. Daniel B. Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499 (1966).

34. Bd. of Cnty. Comm'rs of Johnson Cnty. v. Atter, 734 P. 2d 549, 553 (Wyo. 1987).

35. Saunders v. Titus Cnty. Fresh Water Supply Dist. No. 1, 847 S.W.2d 424, 427 (Tex. App. 1993); *but see* Texas Rice Land Partners v. Denbury Green Pipeline-Texas, 363 S.W.3d 192 (Tex. 2012) (merely registering as a common carrier does not bar property owners contesting in court whether a planned exercise of eminent domain meets statutory requirements for a common carrier).

36. Kelo v. City of New London, 545 U.S. 469 (2005); Klass, *supra* note 5, at 659.

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

not mean that the public must have the right to actually *use* the property that is taken.[38]

III. THE PROBLEM WITH PRIVATE TAKINGS

The legitimacy of private takings was threatened in the wake of the *Kelo* case, when nearly half of the states adopted statutory or constitutional restrictions on the use of eminent domain to transfer land to private developers.[39] Although much of this post-*Kelo* legislation was "largely symbolic in nature,"[40] what was perhaps most notable about this flurry of legislation is that it did not put restrictions on the private exercise of eminent domain authority for private projects associated with electric transmission lines, oil and gas pipelines, and the development of natural resources.[41] Nor did any of this post-*Kelo* legislation alter the states' tradition of giving eminent domain power to private entities deemed to be common carriers.[42] The power of private entities to exercise the power of eminent domain for private ends is still largely intact. What problems arise when eminent domain is used by private parties to reallocate private property?

A. Inefficiencies and the Potential for Abuse

A truly private taking—when a private party "takes" the private property of another for some private use that theoretically has some public purpose—is an acknowledgment by the state that is authorizing the taking that the private party vested with eminent domain authority is better able than the original owner to decide the use of the land being taken. The state has in effect preferred A's use of the land (where A is granted eminent domain) over B's use, where B is the owner of the land being taken by A. The state's distrust of the private market as an allocative mechanism may be warranted when there

38. Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co., 35 So.3d 192, 198–99 (La. 2010).

39. KATHLEEN SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 579 (18th ed. Foundation Press 2013).

40. 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, 708 (2011).

41. Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1094 (2013); Micheli & Smith, *supra* note 11, at 4–5.

42. Klass & Meinhardt, *supra* note 37, at 983–84.

is market failure or private holdouts preventing coherent, benign development patterns.[43] On the other hand, expropriating property from "unoffending" private owners and transferring their land to more "favored" developers (i.e., those authorized to exercise eminent domain) has been likened by some commentators as a form of "reverse Robin Hoodery."[44]

Indeed, in many ways a private taking has all the characteristics of a classic lose-lose situation. From the perspective of A, the private party conferred the power of eminent domain, the projected public benefits may be speculative and subject to unfounded exaggeration compared to the magnitude of purely private benefits enjoyed by A.[45] From the perspective of B, the private party whose land is taken, there follows a loss of individual autonomy that results when there is unwilling property dispossession.[46] And there is always the risk that those dispossessed by eminent domain will be unfairly undercompensated for their loss.

If state agencies overseeing the private takings are deferential, and if there is little effective judicial review, then the rationale for private takings—to achieve some larger public purpose—may be seriously undermined.[47] It is difficult to determine whether a transfer from A to B is more private than public.[48] Nor does a public purpose test give guidance on how much "public" is necessary for a purely private transfer of private property to become a public use. Moreover, state laws authorizing private takings do not necessarily require a plan as a precondition to A taking B's property; nor do these laws usually explicitly require of A, or impose an obligation on A, to accomplish some specific social welfare goal.[49] As a result, a private

43. George Lefcoe, *Redevelopment Takings After* Kelo*: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 805 (2008).

44. Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry About That, Justice Stevens*, 39 URB. LAW. 529, 531 (2007).

45. Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 183 (2009).

46. Jeffrey Kleeger, Kelo*'s Influence on Keystone Pipeline Asks "Where's the Public Purpose?"*, 44 URB. LAW. 719, 720 (2012).

47. Kelo v. City of New London, 545 U.S. 469, 485 (2005) (private economic development is a public use because it should, or may, bring about the legitimate public purpose of economic growth).

48. Lefcoe, *supra* note 43, at 851.

49. Kleeger, *supra* note 46, at 721–23.

taking not only legitimizes private expropriation of private property, it also may cloak ulterior motives such as rent-seeking.[50]

B. The Absence of Meaningful Judicial Review

When state legislatures and constitutions delegate eminent domain authority to private natural resource development interests, or private energy TS&D entities, the operating premise for this extraordinary grant of condemnation power is that the private party granted the power will exercise it for a public use. If an owner's property was being taken by another private party pursuant to these state laws, the challenge was usually based on the claim that the property taken would not in fact be for a public use but rather for a private gain. However, reviewing courts rarely disturbed the private taking on those grounds. These courts developed several theories that permitted them to defer to the private taking and to conclude that the taking was indeed for a public use.

For transmission lines and pipelines, where after the eminent domain power had been exercised property ownership would reside in a private party, courts still could find a public use if the public had the ability to use the private electrical lines or gas/oil that flowed in the private pipeline.[51] Many state courts broadened the "public use" definition to require only that the taking yield some public benefit or advantage, a view which equated public use with "public interest" or even "public purpose."[52] The United States Supreme Court eventually adopted a construction of public use that defined the phrase as furthering public advantage or public utility.[53] The *Kelo* case rejected an interpretation of public use that meant the property would actually be used by the public.[54] *Kelo* held that public use was coterminous with public purpose, where courts should defer to legislative determinations as to what constituted a public purpose.[55]

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50. Kelly, *supra* note 45, at 176.

51. Pub. Serv. Co. v. Shaklee, 784 P.2d 314, 318–19 (Colo. 1989); Montana Power Co. v. Bokma, 457 P.2d 769, 772–73 (Mont. 1969).

52. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 196 (2002).

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

54. Kelo v. City of New London, 545 U.S. 469, 479–80 (2005).

55. *Id.* at 488–89; City of Norwood v. Horney, 853 N.E.2d 1115, 1132–33 (Ohio 2006).

Lack of meaningful judicial review means that states are defaulting to those private parties that have been delegated the eminent domain power. One court found that a pipeline company's decision that a public need existed is conclusive and not subject to review.[56] A state legislator concluded that a petroleum pipeline company enjoyed an "unfettered" power of eminent domain.[57] When private parties not only have eminent domain power but the ability to wield this power without a meaningful judicial check, the potential exists for private takings to have far more private than public benefit.

When statutes confer common carrier status on private parties, courts are even more deferential when it comes to these parties exercising eminent domain. Challenges based on a taking being for an unconstitutional "private" use are typically rejected when a common carrier is doing the taking.[58] Commentators have concluded that the standard for courts to overturn a company's designation as a common carrier exercising eminent domain is "almost insurmountable and essentially unreviewable."[59] A similar, largely unreviewable situation arises when a gas utility or gas pipeline exercises eminent domain in states whose legislatures grant the power of condemnation to private gas TS&D companies.[60]

C. Failure to Broaden the Limited Scope of Public Use

One persistent issue with private entities deploying eminent domain is a stubborn insistence on the part of courts to assume that public use and public purpose may be satisfied only if narrowly defined *economic* benefits might result. Courts reviewing private takings have been content to sustain private exercises of eminent domain as constitutional public uses so long as the public experiences some plausible

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56. Saunders v. Titus Cnty. Fresh Water Supply Dist. No. 1, 847 S.W.2d 424, 427 (Tex. App. 1993).

57. *Lawmakers '95* (GPTV broadcast, Jan. 24, 1995) (remarks by Senator Hooks, Senate Dist. No. 14, cosponsor of SB 24).

58. Linder v. Ark. Midstream Gas Servs. Corp., 362 S.W.3d 889 (Ark. 2010); Smith v. Ark. Midstream Gas Servs. Corp., 377 S.W.3d 199 (Ark. 2010). *See also* MONT. CODE ANN. §§ 70-30-103; 69-13-104.

59. Niles, *supra* note 18, at 292.

60. Thatcher v. Tenn. Gas Transmission Co., 180 F.2d 644, 648 (5th Cir. 1950); Valero Eastex Pipeline Co. v. Jarvis, 990 S.W.2d 852, 856 (Tex. App. 1999); *id.* at 284–85.

traditional economic gain. Courts will rarely, if ever, consider whether any countervailing non-traditional economic benefits, or the achievement of non-economic values, might be a better "use" of the power of eminent domain.[61]

Prior to the *Kelo* case, the United States Supreme Court had decided only two public use cases in the previous forty years—*Berman v. Parker* (1954)[62] and *Hawaii Housing Authority v. Midkiff* (1984).[63] *Berman* upheld as a public use the taking of private property for the purpose of redeveloping blighted urban neighborhoods, and *Midkiff* sustained the use of eminent domain to solve the problem of concentrated land ownership. Both cases rejected the argument that private property taken outright by eminent domain is a private purpose when the property is transferred to private beneficiaries. Rather, since urban blight (*Berman*) and land oligopoly (*Midkiff*) were economic problems involving land ownership in the land market, it would be a legitimate public use for eminent domain to be exercised to solve these economic problems.

The *Kelo* case built upon the *Berman-Midkiff* rule by declaring that "[p]romoting economic development is a traditional and long accepted function of government."[64] Indeed, *Kelo* explicitly recognized that economic development takings were a traditional and acceptable public use, as were private takings related to natural resources and energy development.[65] But *Kelo* did not discuss or consider whether there might be other economic drivers besides the extraction of natural resources, the development of energy resources, or the removal of urban blight and excessive concentrated land ownership.

By the twenty-first century, land development other than natural resources and mineral development, and land uses quite different than urban renewal and the construction of shopping malls, are increasingly important to the economies of states and local communities. Particularly in the Intermountain West, recreation, tourism, hunting,

61. Klass, *supra* note 5, at 666.

62. 348 U.S. 26 (1954).

63. 467 U.S. 229 (1984).

64. Kelo v. City of New London, 545 U.S. 469, 484 (2005).

65. *Id.* (*Kelo* acknowledged the "importance of [natural resources] industries to the [economic welfare of the states] . . . .").

and fishing have become the foundations for the economy.[66] In these states, the best public use of private property targeted for a private taking might not be for natural resource extraction or for urban renewal but instead for uses involving recreation or tourism.[67] However, these more modern uses of natural resources have historically not yet been granted "public use" designation by legislatures or courts. A public use typically requires there to be a traditional land transfer from one private party to another private party who will mine or reconfigure the land for standard economic growth purposes.[68]

The public use designation required for acceptable private takings is almost always locked into some type of economic use or benefit. In other words, acceptable public uses have entailed that the private condemnor not only "take" the private property of another but also *use* that property somehow for some economic purpose enjoyed by the public. However, there is another value inherent in land and property that should be able to compete with private land transfers that only entail *use*. And that is the value that follows when land and property are preserved and *not used*. Eminent domain use should be able to be exercised by private parties where the end use is, in fact, no use. Open space, wilderness, and land trusts for preservationist non-use purposes should be considered as a countervailing, equally valuable public use.[69]

D. An Unjust Measure of Just Compensation

When private takings occur, it is generally a formidable uphill battle for the party whose property is being taken to argue that the private party doing the taking will violate the constitutional public use requirement. As noted above, most state courts have concluded that natural resource-related takings benefit the public, and state

66. *See generally* THOMAS MICHAEL POWER & RICHARD N. BARRETT, POST-COWBOY ECONOMICS: PAY AND PROSPERITY IN THE NEW AMERICAN WEST (2001).

67. Jan G. Laitos & Rachael B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENVTL. L. 1091 (2004); Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140 (1999).

68. Klass, *supra* note 5, at 677–80.

69. Jan G. Laitos & Catherine M. H. Keske, *The Right of Nonuse*, 25 J. ENVTL. L. & LITIG. 303 (2010); *see generally* JAN G. LAITOS, THE RIGHT OF NONUSE (Oxford Univ. Press 2012).

statutes and constitutions often expressly provide that private TS&D entities exercising eminent domain for energy infrastructure are a per se public use. The only remaining argument then is that the landowner may not be receiving a fair measure of constitutionally required "just compensation."

Although the definition of just compensation varies between states,[70] most courts generally rely on the property's "fair market value" to determine the actual calculation of what is just.[71] This fair market value standard is intended to replicate the price that would otherwise be reached in a normal arm's-length market transaction between a willing, but unobligated, buyer and seller.[72] Two common considerations, or formulae, are used when deriving fair market value in condemnation situations. "Highest and best use" not only considers the property's value in its present use but also its value in a reasonably probable use that results in the highest economic value.[73] The "before and after" test is used when the condemning party, such as a TS&D energy company building a pipeline, takes only a portion of the landowner's parcel. This test ascertains the difference between the fair market value of the entire parcel and the fair market value of what remains after the condemnation.[74]

Increasingly, scholars and commentators have criticized these taking valuations, especially when the taking is a private taking.[75] The concern is that the standard just compensation model tends to *undercompensate* landowners.[76] There are several reasons why the use of fair market value results in an undue share of condemnation costs borne by the landowner whose property is being taken by another private party. Perhaps the most important failure of the fair

70. JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS, Ch. 17 (Aspen 2014).

71. Douglas Ayer, *Allocating the Costs of Determining "Just Compensation"*, 21 STAN. L. REV. 693, 696 (1969).

72. Boyce v. Soundview Tech. Group, Inc., 464 F.3d 376, 3876 (2d Cir. 2006).

73. Baston v. Cnty. of Kenton ex rel Kenton Cnty. Airport Bd., 319 S.W.3d 401, 406 (Ky. 2010).

74. Hanley, *supra* note 18, at 160.

75. Kelianne Chamberlain, *Unjust Compensation: Allowing a Revenue-Based Approach to Pipeline Takings*, 14 WYO. L. REV. 77, 87–90 (2014); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 767 (1973).

76. Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593 (2013); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1479–80 (2008).

market value test is that it denies compensation for what has been termed "real but subjective values."[77] One must remember that the owner of property in a private taking has not *voluntarily* chosen to sell it to the private party taking it. It follows then that the landowner values the land at a price *higher than* its fair market value, because otherwise the owner would have accepted this market price and sold the land.[78]

There are two other reasons why the standard just compensation model tends to undercompensate landowners experiencing a private taking. First, most states do not permit the value of the project for which the property is being taken (e.g., a pipeline, or transmission line) to affect the fair market value of the property.[79] If the land after the private taking will enhance the value, that positive change in value cannot be included in the just compensation calculation.[80] Second, fair market value usually fails to consider what have been termed "dignitary harms," which is the perception of being unfairly targeted for condemnation.[81] Such resentment can be very real, especially if, as noted in Part III.A above, the private taking becomes a form of "reverse Robin Hoodery" where politically powerful private parties can condemn private land regardless of the landowner's wishes.[82]

IV. AN AGENDA FOR REFORMING PRIVATE TAKINGS

In light of the many issues and problems that have arisen due to private takings of private property, it would seem that states should consider how they might change the laws that presently allow

77. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 183 (1985); Yun-Chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation Is Efficient?*, 20 SUP. CT. ECON. REV. 35, 36–37 (2012).

78. THOMAS J. MICELI, THE ECONOMIC THEORY OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE 153 (2011), Chamberlain, *supra* note 75, at 94–95; Gerstle, *supra* note 16, at 541 ("the just compensation model tends to undercompensate landowners because it ignores individuals' anthropocentric valuation").

79. State Dept. of Health v. The Mill, 887 P.2d 993, 1003 (Colo. 1994).

80. Matthew C. Williams, *Restitution, Eminent Domain, and Economic Development: Moving to a Gains-Based Conception of the Takings Clause*, 41 URB. LAW. 183, 190 (2009).

81. Chamberlain, *supra* note 75, at 95.

82. *See* Kanner, *supra* note 44; Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. OF EMPIRICAL LEGAL STUD. 13, 721–22 (2008).

a private party to condemn private land for private gain. Any such "reform" legislation should track the deficiencies in current "economic development takings law" that have been summarized in Part III above. Three structural changes seem necessary: (1) improved procedures to govern interactions between the private party exercising eminent domain and the party whose land is being taken; (2) meaningful judicial review; and (3) adequate and realistic just compensation.

A. Procedural Reforms

New and more informative protocols should be established between condemning parties and landowners. Initially, companies and entities should notify landowners of their rights prior to initiating the eminent domain process.[83] This type of provision could protect landowners who may not have any knowledge of their legal rights prior to or during the condemnation process.[84] These legal rights derive from both constitutional and statutory law.

Next, the condemnor should be expected to make reasonable efforts to acquire the property by purchasing it after good faith negotiation. This negotiation should entail at least one bona fide offer by the condemning authority. A bona fide offer requirement shifts some of the power away from the condemning authority and towards the landowner.[85] Some states, like Texas, require the condemnor to make at least two separate offers before resorting to eminent domain.[86]

But the most important procedural change would be some constitutional or statutory obligation to create an administrative record that allows for meaningful judicial review of whether the private taking is really for a public use. This "record" should entail a written account of a process—a public process—where the merits of the taking have been considered and perhaps even debated.[87] The condemnor

83. Beberman, *supra* note 13, at 192–94.

84. Malcolm Means, *Private Pipeline, Public Use?:* Linder v. Arkansas Midstream Gas Services Corp., Smith v. Arkansas Midstream Gas Services Corp.*, and Arkansas's Eminent Domain Jurisprudence*, 64 ARK. L. REV. 809, 835–37 (2011).

85. Micheli & Smith, *supra* note 11, at 8–9.

86. *Compare* State v. Dowd, 867 S.W.2d 781 (Texas 1993) (only one offer needed), *with* TEX. UTIL. CODE ANN. § 21.0113 (b)(1)–(2) (two written offers needed).

87. Klass, *supra* note 5, at 695.

should have the burden of making a case to some administrative body that the private taking will result in a truly *public* use. The individual landowners affected, along with other environmental or public interests, should be afforded the opportunity to argue that the taking will be for some private benefit. If the relevant administrative authority concurs that the taking, albeit by a private party, is for public use, that determination can be the basis for some future judicial appeal.

The Texas Supreme Court has seemed to acknowledge the need to affirmatively demonstrate the presence of a public use when there are private takings by common carriers and other TS&D entities. In *Texas Rice Land Partners* v. *Denbury Green Pipeline-Texas* (2012),[88] the Court found that "[m]erely registering as a common carrier does not . . . ban [landowners] from contesting in court whether a planned pipeline meets the statutory requirements [for a public use]. Nothing . . . leaves landowners so vulnerable to unconstitutional private takings."[89] The Court thereby rejected the otherwise irrefutable presumption that simply proclaiming that one is a common carrier is sufficient to confer the power of eminent domain.[90]

While the *Denbury* case is limited to Texas law and common carriers there, some of its central holdings have instructive potential regarding other examples of private takings elsewhere. First, the private condemnor should have to demonstrate a reasonable probability that members of the public other than the condemnor (or its customers) would experience some benefit after the private exercise of eminent domain.[91] Second, there is no presumption that the private taking will yield a public use; the burden of demonstrating public use is on the private entity seeking to use eminent domain.[92] These two changes help level the playing field between the private condemnor and the landowner.

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88. 363 S.W.3d 192 (Tex. 2012).

89. *Id.* at 195.

90. Megan James, *Checking the Box Is Not Enough: The Impact of* Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC *and Texas's Eminent Domain Reforms on the Common Carrier Application Process*, 45 TEX. TECH. L. REV. 959, 987–89 (2013); John Gray, *The Door Opens to Challenge Some Pipeline Claims of Eminent Domain*, 50 HOUSTON LAW. 43 (2012).

91. Ramirez, *supra* note 16, at 90–92.

92. 362 S.W.3d at 202 (mere fiats by the Legislature do not make a private use a public one).

B. The Opportunity for Meaningful Judicial Review

As noted above in Part III, the absence of "meaningful" judicial review is one of the primary reasons private takings have been so dominated by the private condemnor, whose power to assume ownership of private property has seemed limitless. The reason why this power has been exercised so brutally is because there has been no effective check on whether the condemnation has been for a truly *public* use or whether the condemnation's end use is preferable to other competing uses of the land. The former issue goes to the question of whether the taking yields a private or public benefit. The latter issue assumes that some public benefit will ensue but asks whether the taken land might be put to some *better* public use.

The most frequently debated and litigated question addresses whether the private taking of private land will actually result in some larger public good instead of simply enhancing the economic wealth of the condemnor.[93] Most courts have taken their lead from the United States Supreme Court and simply assumed that if private economic development will result from the private taking, this economic end use satisfies the public use requirement.[94] Private economic development seems to be an acceptable end use and public purpose if the private taking also yields land reform,[95] economic growth,[96] or natural resources development.[97]

But meaningful judicial review will not occur until courts have the ability to review a record that reveals whether competing environmental or preservationist interests might, or should, be preferred to standard, traditional interests involving economic growth or development. As noted above in Part III.C, land uses for recreation, tourism, and even nonuse preservationist purposes are increasingly becoming more important than shopping malls and gas pipelines to local communities.[98] Courts should be able to hear evidence about, and to decide, whether private takings for natural resource development or TS&D energy systems are as conducive to achieving a public

93. *See* James and Gray, *supra* note 90; *Denbury*, 363 S.W.3d 192 (Tex. 2012).
94. Kelo v. City of New London, 545 U.S. 469 (2005).
95. *See supra* note 63 and accompanying text.
96. *Kelo*, 545 U.S. 469 (2005).
97. Klass, *supra* note 5, at 655–66.
98. *See* Laitos & Carr, *supra* note 67; Laitos, *supra* note 69.

use as some recreational or nonuse purpose. Even a private taking that protects natural capital or ecosystem services should be able to be considered by reviewing courts to be a countervailing acceptable (and perhaps preferred) public use of private land.[99]

C. Making Compensation More Just

When there is a private taking, there is little the landowner can do other than to argue that the taking is for a private use or that the compensation is unjust. Reviewing courts either presume that a private energy or natural resources-related taking is a public use because of the economic benefit accruing to the public or uphold statutory declarations that takings by TS&D common carriers are an acceptable categorical taking. Therefore, the only real battle to be waged involves how much the landowner will receive in compensation for the private taking.

Commentators, and landowners, increasingly argue that current compensation valuation methodologies for private taking fail to fully compensate unwilling landowners and are therefore unjust.[100] Scholars have suggested various reforms. If fair market value continues as the standard, then rural landowners should be able to use comparable sales of easements and other property interests to define this value.[101] The idea of fair market value should perhaps also include the worth of the use to which the private condemnor is planning to put the property.[102] Such a "project influence rule" would permit the value of the extracted natural resource, or TS&D facility, to influence the value of the landowner's property.[103]

Other commentators have suggested that the value for just compensation, to be just, should attempt to capture the landowner's subjective values for the land, which otherwise remain private.[104] Each

99. *See generally* DIETER HELM, NATURAL CAPITAL: VALUING THE PLANET (2015); J.B. RUHL, STEVEN E. KRAFT & CHRISTOPHER L. LANT, THE LAW AND POLICY OF ECOSYSTEM SERVICES (2007).

100. Douglas Ayer, *Allocating the Costs of Determining "Just Compensation"*, 21 STAN. L. REV. 693, 714 (1969); Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721 (1993); Lee, *supra* note 76.

101. Klass, *supra* note 5, at 683.

102. Williams, *supra* note 80, at 192.

103. Most states disallow use of the project influence rule. *See* State Dept. of Health v. The Mill, 887 P.2d 993, 1003 (Colo. 1994); ALA. CODE § 18-1A-173(a). Micheli & Smith, *supra* note 11, at 18–19.

104. Gerstle, *supra* note 16, at 550.

landowner whose property is about to be taken by a private party holds a subjective land valuation for the land, which is unique to that landowner. To assess this valuation, the just compensation calculation should consider how the affected landowner may perceive the property differently than a hypothetical seller. Relevant inquiries would involve ascertaining the factors that are subjective—duration of land occupancy, nature of use by that landowner, future plans for the land by that landowner, method by which the landowner came to own the property (for example, by inheritance).[105]

Another model for just compensation largely abandons the fair market value standard because it tends to undercompensate landowners whose property is being condemned against their will[106] and instead embraces a system which better compensates landowners by (1) permitting them to share in the value their land contributes to the eventual end use, (2) approximating the benefits of in-kind redress, and (3) accounting for landowners' lost opportunities regarding their condemned land.[107] Two related just compensation calculations that accomplish these three goals are a "revenue-based approach"[108] and a "rental formula."[109]

A revenue-based payment for private takings would ensure that the just compensation valuation would not undervalue the actual cost of the taking, which tends to subsidize private development and over-incentivize such takings by private companies.[110] Revenue-based payments also provide more efficient use of land by fixing a price for the taking of the land that will affect the private demand for the taking.[111] Similarly, a rental formula reflects the fact that most private takings for natural resource development or TS&D facilities will generate a private profit for the private condemnor.[112] The measure of damages should therefore be a measurement of periodic rent. A

105. Nadler & Seidman, *supra* note 82, at 713.

106. Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post*-Kelo, 41 WAKE FOREST L. REV. 237, 292 (2006).

107. MICELI, *supra* note 78, at 71; Williams, *supra* note 80, at 184; *id.* at 292.

108. Chamberlain, *supra* note 75, at 77.

109. David A. Domina, *Eminent Domain & For-Profit Energy Companies: Avoiding Unrest with Landowners*, THE NEBRASKA LAWYER 19 (Jan/Feb. 2015).

110. Miceli, *supra* note 78, at 69, 71.

111. Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999); Chamberlain, *supra* note 75, at 99.

112. Domina, *supra* note 109, at 20.

rental formula may thereby leave the property owner "subjectively indifferent to the taking."[113]

Consider the case of a private power company's transmission line, or a private gas company's pipeline, that needs to stretch across rural countryside that is privately owned farmland. Both of these private parties (two TS&D entities) wish to exercise eminent domain across private farms for the transmission lines or pipeline. Since the electricity and gas will surely be perceived as an eventual public use, the only question for the farmers is the measure of just compensation due for the private taking. If the private condemnor is taking an easement across private property, this private taking will interfere with yearly agricultural use. The appropriate calculation of damages, which is an alternative measure to fair market value, could be either a revenue-based compensation[114] or a rental calculation.[115] Either method seems more "just" than a simple fair market value calculation.

113. Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 259 (2007).

114. Revenue-based payments approximate the landowners' lost opportunity costs. Chamberlain, *supra* note 75, at 103.

115. Rental payments allow a jury to set, as compensation, annual rent payments for the use of the property. Domina, *supra* note 109, at 21.