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Private Delegations and Eminent Domain

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Courts and scholars generally view delegations of legislative power as unconstitutional to the extent they are to self-interested parties and no government oversight exists. Yet, delegations of one important legislative power—the eminent domain power—to private parties are generally viewed as posing no constitutional problem even if the delegation is to a self-interested party and government oversight is lacking. In fact, delegations of the eminent domain power have become commonplace as states undertake large energy and transportation infrastructure projects involving pipeline development, carbon capture and storage, transmission lines for wind and solar power, and high-speed rail.

This Article is the first to explore why private delegations of the eminent domain power have received such different treatment from other private delegations of legislative power and to critically analyze these delegations under the Supreme Court's modern due process, separation-of-powers, and takings jurisprudence. It ultimately concludes that these delegations generally should be viewed as presumptively invalid absent meaningful government oversight over the exercise of the power. These delegations implicate a host of social, environmental, and safety factors and ultimately hinge on the question of what is in the public interest. Oversight over exercises of the eminent domain power allows states to continue to utilize private delegations in planning and building new infrastructure projects. This oversight also ensures that landowners' and local communities' voices are considered in the process and that these critical decisions are not being made based on private companies' interests alone.

INTRODUCTION

In *Carter v. Carter Coal Co.*, the U.S. Supreme Court held unconstitutional a federal statute delegating legislative power to producers of coal and mine workers, making clear that a delegation to "private persons" was a "legislative delegation in its most obnoxious form."[1] The Court decided the case in 1936 and has not struck down a delegation to a private party since that time. This is largely because the Court's subsequent cases suggest such delegations pose no constitutional problem provided some level of government oversight exists over the private party's exercise of legislative power.[2] Members of the Court, however, have recently indicated their interest in reinvigorating limits on private delegations,[3] and debate rages in the privatization scholarship as to what those limits should be.[4]

Largely ignored by the Court and scholars are private delegations of the eminent domain power (a legislative power allowing government to take private property).[5] When delegations of the eminent domain

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1 Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

2 The delegation at issue in *Carter Coal* did not involve government oversight. *See id.*; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397, 399–400 (1940) (upholding delegation to a government commission to set maximum prices for coal when "in the public interest," but making private industry into advisers to the commission); *see also* Currin v. Wallace, 306 U.S. 1, 5–7, 18 (1939) (upholding delegation to private market participants as to whether to be regulated by standards promulgated by the Secretary of Agriculture).

3 Recently, the Court denied the petition for certiorari filed in *Texas v. Commissioner*, 142 S. Ct. 1308 (2022), which involved a private nondelegation issue. Although no justice voted to hear the case, Justice Alito, joined by Justices Thomas and Gorsuch, stated that, if the case would have been heard, the Court would have reached the question regarding the limits on the federal government's authority to delegate its powers to private actors. *Id.* (Alito, J., concurring). This perhaps should not be too surprising in light of the Court's renewed interest in the related public nondelegation doctrine that generally requires delegations to the executive branch to be accompanied with intelligible standards to survive constitutional scrutiny.

4 *See, e.g.*, Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 940, 955 (2014); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1440–41 (2003); Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1722 (2016). The discussion regarding limits on private delegations extends to the debate regarding occupational licensing, which often involves private parties regulating private industries. *See* Paul Larkin, *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 319 (2016).

5 Professor Asmara Tekle Johnson is one of the few scholars to argue for limits on private delegations of the eminent domain power, but her arguments are based on the Texas private nondelegation doctrine, as opposed to any limits arising from the U.S. Constitution. *See generally* Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455 (2007).

power to private parties are addressed, it is to note that such delegations are widely accepted to pose no issue—even those where no meaningful government oversight exists.[6] The time has come to revisit these delegations and push back on the hands-off approach thus far taken by courts and scholars.

Delegations of the eminent domain power are common, and some have their roots in statutes enacted decades ago.[7] Recent challenges by landowners of delegations of the eminent domain power to companies to build pipelines to transport fossil fuels have all failed, with the Fifth Circuit observing such challenges face an uphill battle.[8] Thus, any constitutional concern regarding such delegations seems a foregone conclusion.[9]

Yet not all private delegations are structured the same. The delegations at issue in the recent challenges are structured such that no legislative or executive oversight exists over the company's decision to exercise the delegated power.[10] I refer to these delegations as "direct"

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6 As one scholar observed:

> Courts tend to agree that the eminent domain power is an intrinsic "attribute of sovereignty." Courts, we might think, should then look upon delegations of the eminent domain power with special suspicion. This is not the case, however. Based on the cases that deal with delegation of the eminent domain power—mainly to private entities—courts appear to have coalesced around the understanding that the Takings Clause imposes sufficient restrictions on the eminent domain power such that it can be delegated with little concern, even to private entities.

Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1253 (2022); *see* Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 675–76 (2008) (noting that delegations of the eminent domain power to private parties "is rarely, if ever, questioned" despite other efforts to reconceptualize the "public use" requirement of the Takings Clause).

7 *See, e.g.*, PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2252 (2021) (recognizing that Congress delegated the eminent domain power to private entities under the Natural Gas Act in 1947).

8 *See, e.g.*, Boerschig v. Trans-Pecos Pipeline, L.L.C., 872 F.3d 701, 706–07 (5th Cir. 2017); Cox v. State, No. 3:16CV1826, 2016 WL 4507779, at *1–2 (N.D. Ohio Aug. 29, 2016); Bayou Bridge Pipeline, L.L.C. v. 38.00 Acres, 304 So. 3d 529, 543 (La. Ct. App. 2020).

9 James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 661–62 (2019) (observing that, although multiple states have implemented reforms to limit takings for economic development purposes, these reforms largely ignored delegations of the eminent domain power to energy companies and private utilities, despite the benefits to private parties being (in some cases) even more direct than those at issue in an economic development taking).

10 *See generally Boerschig*, 872 F.3d 701; *Cox*, 2016 WL 4507779; *Bayou Bridge Pipeline*, 304 So. 3d 529. Limited judicial review is available of these delegations, but courts thus far have generally accorded significant deference to the private parties' decision-making processes. This judicial review is thus insufficient to provide any real check on

delegations, as the companies themselves directly make the decision as to when and where to exercise the power, often in boardrooms closed to the public. I distinguish these from "indirect" delegations, where oversight by an agency or similar body exists (such as by requiring a company to obtain a certificate of public convenience and necessity prior to exercising the power).

I argue that the Court should view takings pursuant to direct delegations as presumptively invalid under the Takings Clause. First, although two early twentieth-century cases upheld as constitutional direct delegations of the eminent domain power, these cases are in tension with subsequent due process cases involving private delegations of other legislative powers. I closely analyze *Carter Coal*, the Court's landmark case limiting when legislative power can be delegated to private parties, as well as related cases that address due process challenges to state delegations of the police power (a legislative power) to private landowners. These cases suggest that private delegations of legislative power generally violate due process where a private party can exercise legislative power based on their self-interest as opposed to the public interest. The Court's later due process cases thus undermine the Court's earlier cases upholding direct delegations of the eminent domain power.

Second, direct delegations of the eminent domain power are in tension with the Court's modern takings jurisprudence. The Court is highly deferential with respect to state and local governments' public use determinations, but that deference is justified due to the underlying decisions being made pursuant to a public process by politically accountable government officials. Deference seems less warranted, however, when takings are pursuant to direct delegations. Although many of these takings pursuant to direct delegations may have a public use, the Court's presumption of validity for these takings fails to root out any takings that primarily serve private interests with only incidental benefits to the public. The Court should instead presume such takings invalid under the Takings Clause (with, perhaps, an opportunity for the company to rebut the presumption). This approach would result in delegations of the eminent domain power being treated similarly to other delegations of legislative power and thus resolve the tension between the Court's takings and due process jurisprudence.

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ensuring private companies are exercising the eminent domain power to further the public interest, as opposed to self-interest.

In arguing for a presumption of invalidity as to direct delegations of the eminent domain power, I build on the current energy and environmental scholarship recognizing the crucial role eminent domain, including private delegations of the eminent domain power, plays with respect to transitioning to renewable and clean energies.[11] Questions about how these delegations are structured, however, cannot be ignored without the risk of private energy companies making sensitive decisions regarding pipeline and other infrastructure placement based on private interest alone. Further, requiring government oversight over such delegations fosters a greater opportunity for local government involvement and public participation in critical infrastructure decisions.

This Article proceeds in four parts. Part I provides background on the Court's takings and due process doctrines generally (when no delegation is involved). It then sets forth how the federal government and states have structured these private delegations of the eminent domain power historically. I also provide a descriptive account of how the federal government and states currently structure these delegations and explore recent challenges to direct delegations of the eminent domain power.

Part II examines the limits due process (applicable both to the federal government and states) and structural separation-of-powers provisions (applicable to the federal government) impose on private delegations of legislative power generally. Direct delegations of the eminent domain power seem to flout these limits such that these delegations seem to be violative of the Court's jurisprudence governing delegations of legislative power generally.

Part III closely analyzes the Court's takings jurisprudence as it applies to delegations of the eminent domain power. I argue that takings by private parties pursuant to direct delegations should be presumed invalid. This is because the decision-making process leading to the taking was private and no safeguards exist to ensure that the taking was for public use, as opposed to self-interest. This approach would result in delegations of the eminent domain power being treated similarly to delegations of other legislative power.

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[11] *See* Shelley Ross Saxer, *The Aftermath of Takings*, 70 AM. U. L. REV. 589, 602 (2020) ("[E]mpirical studies show that private entities are able to provide public services more efficiently. In light of our need to increase the use of renewable energy and grid reliability, private taking authority may be the most efficient and necessary pathway to undertaking new transmission projects to achieve these goals.").

Finally, in Part IV, I discuss how my arguments regarding private delegations affect new infrastructure projects and considerations relevant to public use determinations. This Article thus concludes that, although eliminating direct delegations may result in inefficiencies, ensuring government review of exercises of the eminent domain power ensures that factors relating to the affected communities, individual landowners, and the environment are considered.

I
BACKGROUND

Both the federal government and states possess the power of eminent domain.[12] This power is principally limited by the Fifth Amendment's Takings Clause, providing that "nor shall private property be taken for public use, without just compensation."[13] In evaluating whether a violation of the Takings Clause has occurred, the Supreme Court has accorded great deference to legislative and executive determinations that a taking is for "public use." Such heavy deference seems far less warranted when a private entity, acting pursuant to delegated authority, exercises the eminent domain power without executive or legislative oversight.

The Due Process Clauses of the Fifth and Fourteenth Amendments would also seem to limit the eminent domain power as they protect against deprivations of property without due process of law. The Court, however, has largely foreclosed any substantive due process claim in

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12 *PennEast Pipeline Co.*, 141 S. Ct. at 2251. *See generally* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013) (arguing the Court did not recognize the federal eminent domain power until after the Civil War).

13 U.S. CONST. amend. V. Today, the Supreme Court takes the view that the Fifth Amendment was incorporated against the states through the Fourteenth Amendment in 1897 in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897). *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 122 (1978) (citing 166 U.S. at 239). *Burlington & Quincy Railroad*, however, says nothing about the Fifth Amendment Takings Clause and instead is a Fourteenth Amendment due process case. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle*,*"* 90 MINN. L. REV. 826, 829–30, 844 (2006). Bradley Karkkainen and others argue that the Court did not fully incorporate the Takings Clause against the states until *Penn Central*—in 1978. *See id.* at 844, 877–78; *see also* William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 832 (1998). Relatedly, it should be noted that, throughout the nineteenth and early twentieth centuries, challenges to state action infringing upon private property rights were decided under the Fourteenth Amendment's Due Process Clause—not the Takings Clause as incorporated against the states.

the eminent domain context.[14] Procedural due process still applies, but its scope is somewhat unclear.[15]

Although the federal government and most states have generally had some level of legislative or executive oversight over delegations of the eminent domain power, some historic exceptions exist. For example, in two early twentieth-century cases, the Court rejected constitutional challenges to two direct delegations of the eminent domain power. Today, multiple states use a direct delegation framework with respect to energy infrastructure. Recent constitutional challenges to these direct delegations have generally failed. These decisions, however, reveal courts' confusion over the limits of states' authority to delegate to private parties.

A. The Takings Clause

The Takings Clause prohibits the taking of private property unless it is for "public use," which the Court has interpreted in a series of cases to mean that a taking must serve a "public purpose" sufficient to justify an exercise of a state's police powers and does not require literal use by the public.[16] The Court is highly deferential to legislative and administrative determinations that a taking constitutes a "public use," such that most takings by government (as opposed to private parties) pose no constitutional issue provided just compensation is paid.[17]

Berman v. Parker, decided in 1954, is one of the key cases illustrating the Court's deferential approach to the Takings Clause's public use requirement.[18] The case involved a challenge by landowners to an act seeking to eliminate blight in D.C. pursuant to a comprehensive redevelopment plan.[19] The Court started its inquiry by asking whether

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[14] *See infra* Section I.B.1.

[15] *See infra* Section I.B.2.

[16] Kelo v. City of New London, 545 U.S. 469, 479–80 (2005). Multiple scholars have provided in-depth historical accounts of the public use requirement generally. *See* ILYA SOMIN, THE GRASPING HAND 35–72 (2015); Klass, *supra* note 6, at 655–69. Scholars generally agree that decisions were mixed: some supported a narrow interpretation of "public use" (that is—literally—use by the public) while others supported a broader interpretation equating "public use" with "public welfare." *See* SOMIN, *supra*, at 35 (noting that, although "relatively narrow interpretations of 'public use' predominated . . . opinion was far from unanimous").

[17] *Kelo*, 545 U.S. at 482–83.

[18] Berman v. Parker, 348 U.S. 26 (1954). Even prior to *Berman*, the Court had indicated that it would afford significant deference to state legislatures' public use determinations. *See infra* Section I.C.1.

[19] Berman, 348 U.S. at 28–29.

elimination of blight was within a state's police power.[20] Exercises of the police power generally must satisfy substantive due process, which requires that a state's action be reasonably related to the public welfare—a rational basis test.[21] The Court easily determined elimination of blight satisfied this test, noting that "[t]he concept of the public welfare is broad and inclusive," and that the legislature had the power to determine that a community should be "beautiful as well as healthy . . . spacious as well as clean."[22] According to the Court, "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear [because] the power of eminent domain is merely the means to the end."[23] Notably, the case did not involve any private delegation of the eminent domain power, as a state agency was charged with acquiring the property at issue.[24]

In *Hawaii Housing Authority v. Midkiff*, the Court continued its deferential approach in rejecting a takings challenge to a scheme whereby Hawaii condemned property owned by lessors and transferred the property to lessees to reduce the concentration of land ownership in just a few owners.[25] According to the Court, it would uphold an exercise of the eminent domain power as long as it is "rationally related to a conceivable public purpose."[26] The Court's review of a legislature's judgment as to what constitutes a public use was "extremely narrow."[27] The Court determined that reducing land concentration constituted a public purpose, noting "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."[28] Like *Berman*, *Midkiff* did not involve any private delegation. Although a tenant could initiate the condemnation process, a state agency determined whether any particular taking would further various public purposes, and the state itself actually condemned the property.[29]

Finally, in *Kelo v. City of New London*, the Court infamously upheld the use of eminent domain to transfer land from one private owner to

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20 *Id.* at 32.

21 *Id.*; Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 716–17 (2006).

22 *Berman*, 348 U.S. at 33.

23 *Id.*

24 *Id.* at 29.

25 Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231–32, 245 (1984).

26 *Id.* at 241.

27 *Id.* at 240.

28 *Id.*

29 *Id.* at 233–34.

another for economic development purposes.[30] The Court rejected applying a presumption of invalidity for economic development takings in general and seemingly reaffirmed *Midkiff* in observing that it would invalidate a taking only if its purpose were illegitimate or the means irrational.[31] Although the decision has been characterized as one of the most controversial Supreme Court decisions of all time, the decision rested in large part on *Berman* and *Midkiff*.[32]

Yet, in *Kelo*, the Court moved away from a rational basis test, at least somewhat, in that it closely examined both the content of the redevelopment plan and the process leading to its creation. Thus, *Kelo*, in a sense, was a retreat from *Berman* and *Midkiff* and suggested that courts should apply some level of scrutiny that is stricter than rational basis review.[33] Thus, although the Court has at times equated the eminent domain power to the police power, *Kelo* indicates its review of exercises of the eminent domain power differs from exercises of the police power.[34]

Nevertheless, the Court's review of exercises of the eminent domain power remains deferential and most government action is upheld. In interpreting the Takings Clause, the Court has "eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[35] The Court thus emphasizes the "great respect" that it affords state legislatures and state courts in discerning local public needs.[36] As

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30 Kelo v. City of New London, 545 U.S. 469, 472, 490 (2005).

31 *Id.* at 484–88.

32 *See* Charles E. Cohen, *Eminent Domain after* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 497–98 (2006) ("The *Kelo* decision was well grounded in history and case law, right or wrong . . . .").

33 Julia D. Mahoney, Kelo*'s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 116 (noting that nowhere in the majority opinion does the Court state that rational basis review applies to public use determinations and that the Court's opinion closely "examines in detail both the content of the redevelopment plan and the circumstances of its creation").

34 The eminent domain power is distinct and more limited than the police power. I have argued elsewhere that the eminent domain power generally involves the transfer of the right to use one's property to another, as opposed to a restriction on the right to use. Jessica Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 BYU L. REV. 809, 854–55 (2022). Any taking of the right to use must be accompanied with just compensation to be valid. The fact that the taking also furthers the public interest does not somehow negate the compensation requirement.

35 *Kelo*, 545 U.S. at 483.

36 *Id.* at 482 ("[T]hese needs were likely to vary depending on a State's 'resources, the capacity of the soil, the relative importance of industries to the general public welfare, and

a practical result, "the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts."[37]

The Court does not require any "reasonable certainty" that the expected public benefits flowing from a taking will actually accrue.[38] Instead, "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[39] Similarly, the Court refuses to "second-guess" a government's decisions regarding what parcel of land and how much land it needs for a public project.[40]

Despite affirming the continued applicability of deferential review to takings, the Court in *Kelo* left room for future challenges where the primary purpose of a taking was to benefit a private party. The *Kelo* majority recognized that, although courts should presume that economic development takings are valid, landowners were not foreclosed from raising a claim that a particular exercise of the power was for private purposes rather than a public use.[41] Justice Kennedy stressed that the Court's deferential review did not "alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits" were forbidden.[42] As Professor Ilya Somin has recognized, the future significance of Kennedy's opinion was uncertain, but "le[ft] open the door for a retreat from judicial deference on public use issues."[43]

B. Due Process and Eminent Domain

The Due Process Clauses of both the Fifth and Fourteenth Amendments prohibit deprivations of property without due process of law. Due process generally consists of two separate doctrines: (1) substantive due process and (2) procedural due process. Substantive

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the long-established methods and habits of the people.'" (quoting Hairston v. Danville & Western Ry. Co., 208 U.S. 598, 606–07 (1908))).

37 Goldstein v. Pataki, 516 F.3d 50, 57 (2d Cir. 2008).

38 *Kelo*, 545 U.S. at 487–88.

39 *Id.* at 488 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984)).

40 *Id.* at 488–89.

41 *Id.* at 483, 487 & n.17.

42 *Id.* at 490.

43 Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 231 (2007).

due process generally does not provide a separate basis for challenging a taking, but procedural due process protections do still apply to takings.[44]

1. Substantive Due Process

Substantive due process requires that a state's action be reasonably related to the public welfare—a rational basis test. Based on *Berman* and its progeny, the Takings Clause effectively imports the substantive due process inquiry into the public use determination (with the exception that the Court's scrutiny of a taking may have a bit more "bite").[45] Thus, where government seeks to exercise the power of eminent domain for arbitrary or irrational purposes, the public use requirement of the Takings Clause would forbid it—not substantive due process, which also prohibits arbitrary actions.[46] The Court has not yet held that substantive due process is never available to challenge an exercise of the eminent domain power.[47] However, Justice Scalia forcefully argued against having substantive due process "do the work of the Takings Clause," and other Justices have signaled their agreement with him.[48] As a practical matter, because the Takings

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[44] *See* D. Zachary Hudson, Note, *Eminent Domain Due Process*, 119 YALE L.J. 1280, 1293 (2010) ("[S]urprisingly, courts have not uniformly decided, and the Supreme Court has never definitively addressed, what due process demands when a state initiates an eminent domain action."); *see also* Gideon Kanner, *"Unequal Justice Under the Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1085–86 (2007) (arguing that the Takings Clause only provides substantive takings criteria while its procedural aspects are subject to due process constraints).

[45] *See supra* Section I.A.

[46] A fundamental purpose of the Due Process Clause generally is to prevent arbitrariness. *See* Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 RUTGERS L. REV. 451, 472 (2005).

[47] Some have argued that the Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), demonstrates that a formal exercise of the eminent domain power may be subject to a substantive due process challenge, but that is not entirely clear, as *Lingle* involved an alleged regulatory taking, as opposed to an outright exercise of the eminent domain power. *See* Hudson, *supra* note 44, at 1304.

[48] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 721–22 (2010) (plurality opinion) (noting that takings must be analyzed under the Takings Clause and not under substantive due process because "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994))); *cf.* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 200 (2003) (Scalia, J., concurring) ("It would be absurd to think that all 'arbitrary and capricious' government action violates substantive due process. . . . Those who claim

Clause has largely subsumed substantive due process into the public use question, the question is moot in many cases.[49]

By contrast, resort to substantive due process may be available to challenge invalid exercises of the police power that infringe upon property rights. However, that discussion is outside the scope of this Article.[50]

2. Procedural Due Process

Procedural due process requires that the state provide constitutionally adequate process prior to any deprivation of a property interest. To establish a procedural due process violation, a plaintiff must show (1) a protected property interest, (2) that the plaintiff was deprived of the interest, and (3) that the state provided inadequate process in depriving the plaintiff of the interest.[51] Although difficult questions exist as to whether regulations infringing upon property ownership deprive a person of a constitutionally protected property interest, a landowner is deprived of a property interest when government takes property pursuant to formal exercises of the eminent domain power.[52]

'arbitrary' deprivations of nonfundamental liberty interests must look to the Equal Protection Clause.").

[49] *See* Miller v. Campbell Cnty., 945 F.2d 348, 352 (10th Cir. 1991) ("Because the Just Compensation Clause of the Fifth Amendment imposes very specific obligations upon the government when it seeks to take private property, we are reluctant in the context of a factual situation that falls squarely within that clause to impose new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause. It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause.").

[50] *But see* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 948–49, 954–58 (arguing that the Court should adopt a substantive due process test for regulations infringing upon property interests and observing that the circuits are split as to the availability of substantive due process with respect to government action infringing upon property rights); J. Peter Byrne, *Due Process Land Use Claims After* Lingle, 34 ECOLOGY L.Q. 471, 479–80 (2007) (noting that "*Cuyahoga* suggests that the Supreme Court is sympathetic to the lower federal courts' aversion to substantive due process land use cases, notwithstanding the possibilities left open in *Lingle*").

[51] *See, e.g.*, Daily Servs., L.L.C. v. Valentino, 756 F.3d 893, 904 (6th Cir. 2014). Procedural due process applies only to individualized deprivations of life, liberty, or property, whereas policy-based deprivations affecting whole classes of individuals generally does not. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). This is not to say that due process plays no role in the rulemaking context, but the applicable standards and relevant cases differ significantly. *See* Daniel B. Rodriguez, *Whither the Neutral Agency? Rethinking Bias in Regulatory Administration*, 69 BUFF. L. REV. 375, 396–97 (2021).

[52] 1A NICHOLS ON EMINENT DOMAIN § 4.3 (2022).

The central focus of procedural due process is fairness, and inadequate process occurs when the process is unfair.[53] The Court has recognized that a neutral decision maker is essential to fairness.[54] "[T]he principal concern that the procedural element of the due process approach seeks to meet is a traditional one . . . . The concern reflects the fundamental proposition that those who make coercive, governmental-style decisions—whether adjudicating, licensing, making an arrest, or whatever—should be more or less disinterested."[55] This means that "[t]hey should be neither personally biased against the identifiable individual on whom the decision operates nor biased because of the decision's effect on their own private interests."[56]

Generally, a presumption of neutrality exists as to those serving as decision makers.[57] The Court has acknowledged only two cases where something less than actual bias violates due process: (1) the decision maker had a "pecuniary interest in the outcome," or (2) the decision maker was the "target of personal abuse or criticism from the party before him."[58] As to takings by government, generally no procedural due process claim exists because the decision maker is presumed neutral.[59] The Court has not specifically addressed whether procedural due process could limit direct delegations to private entities.

C. The Different Structures of Eminent Domain Delegations

The federal government and states have long exercised their eminent domain authority through the use of private delegations in the areas of transportation and energy infrastructure, and the Supreme Court has long observed and approved of that practice.[60] These delegations

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53 *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.8(g), at 143 (5th ed. 2012).

54 *In re* Murchison, 349 U.S. 133, 136 (1955) (noting that a "fair trial in a fair tribunal is a basic requirement of due process"); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457, 481 (1986) ("Regardless of what other procedural safeguards are employed, the values of due process cannot be realized absent this core element. Thus, the participation of an independent adjudicator is at least a *necessary* condition, and may even constitute a *sufficient* condition, for satisfying the requirements of due process.").

55 David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 682 (1986).

56 *Id.*

57 Withrow v. Larkin, 421 U.S. 35, 47 (1975).

58 *See id.*

59 Cobb v. Yeutter, 889 F.2d 724, 731 (6th Cir. 1989) (citing *Withrow*, 421 U.S. at 47).

60 Coleman & Klass, *supra* note 9, at 670–71. As Coleman and Klass note, "Virtually all states grant statutory eminent domain authority to oil and gas companies to build oil and gas

generally are subject to legislative or executive oversight and accompanied with standards that restrain the private party's discretion. These are thus "indirect" delegations of eminent domain authority. However, not all delegations are subject to such oversight: some states allow private entities to exercise the power of eminent domain with no administrative oversight, subject only to the same deferential judicial review applicable to governmental exercises of the eminent domain power. Such delegations constitute "direct" delegations of eminent domain authority.

The Supreme Court has not recently explored the limits of private eminent domain delegations. Rather, the Court's modern takings cases involving the public use requirement (*Berman*, *Midkiff*, and *Kelo*) have involved exercises of the power of eminent domain by public entities—albeit exercises of the power that benefitted private parties. Courts have recently addressed constitutional challenges to direct delegations, but thus far have rejected these challenges.

This Section first explores private delegations from a historical perspective. It then explores private delegations that exist today with respect to energy and railroad infrastructure.

1. Private Delegations Historically

States have used both indirect and direct private delegations for a variety of purposes, including allowing private entities to condemn land to build mills, railroads, irrigation ditches, aerial tramways, and pipelines. Despite a private company ultimately using the taken property, courts have generally found that these delegations satisfy the public use requirement with some limited exceptions.

Prior to the Fourteenth Amendment's existence (and thus applicability to the states), states frequently delegated the eminent domain power to private parties, as demonstrated in part by states' mill acts.[61] The mill acts permitted the owner of a grist mill (which grinds grain into flour) to construct dams for water power and flood neighboring properties with payment for damages.[62] State constitutions

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pipelines and associated infrastructure, and to electric utilities to build electric transmission lines." *Id.* at 671.

61 *See* James W. Ely, Jr., *The Controversy Over Energy Takings: A Tale of Pipelines and Eminent Domain*, 9 BRIGHAM-KANNER PROP. RTS. J. 173, 174 (2020) (noting that the taking of property by private parties is "hardly novel"); David Schultz, *What's Yours Can be Mine: Are There Any Private Takings After* Kelo v. City of New London*?*, 24 UCLA J. ENV'T L. & POL'Y 195, 201 (2006).

62 Ely, *supra* note 61, at 174–75.

generally had provisions similar to the Takings Clause, but state courts generally upheld such takings because grist mills were common carriers: they were required to serve all customers at a set price.[63] By contrast, courts were split with respect to whether mills that generated waterpower for manufacturing constituted a public use; as such, mills were generally not open to the public.[64]

Other early cases involving delegations of the eminent domain power involved railroads—also common carriers.[65] Most of the property used for railroad infrastructure was acquired by voluntary purchase, prescription, and gifts, as condemnation proceedings were both expensive and lengthy.[66] Yet, when landowners challenged railroad condemnations, state courts generally rejected such arguments, finding the railroads were carrying out a public purpose by improving transportation.[67] Exceptions existed, however, as demonstrated by Thomas Cooley, a Justice on the Michigan Supreme Court, who referred to the exercise of eminent domain by railroads as "a convenient fiction, which treats a corporation managing its own property for its own profit, as merely a public convenience and agency."[68]

Some state delegations of eminent domain power to railroads were direct whereas others involved ongoing oversight. For example, in 1849, Illinois enacted a law requiring a railroad to obtain legislative approval before exercising the eminent domain power, and the purpose of this limitation was for the legislature "to reserve that power until it could judge for itself whether the proposed road would be of sufficient public utility to justify the use of this high prerogative."[69] However, Illinois repealed that law in 1872 after it found it impracticable.[70]

One of the earliest cases cited for the proposition that a private company can exercise the federal eminent domain power (provided just compensation is paid) is *Cherokee Nation v. Southern Kansas Railway Co.*[71] Although the Court upheld the delegation, it took pains to recognize that the legislature had specifically authorized the company

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63 *Id.*; SOMIN, *supra* note 16, at 40.

64 Ely, *supra* note 61, at 175–76, 176 n.13.

65 SOMIN, *supra* note 16, at 44–45.

66 JOHN W. ELY, RAILROADS AND AMERICAN LAW 37–38, 195 (2001).

67 *Id.* at 35–56.

68 *Id.* at 36; *see also* Ely, *supra* note 61, at 180 (noting the existence of "skeptical voices questioning whether private railroad companies were in fact effectuating a 'public use'").

69 ELY, *supra* note 66, at 37.

70 *Id.*

71 Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 657–58 (1890).

to locate, construct, and operate a railway; provided specific, detailed standards as to its location; and prescribed the width of the right-of-way.[72] The Act specified that the exact location of the railroad would be "approved by the Secretary of the Interior in sections of twenty-five miles before construction of any such section shall be begun."[73] Other cases involving delegations of the federal power of eminent domain for transportation projects involved similar oversight.[74]

Following the ratification of the Fourteenth Amendment, the U.S. Supreme Court reviewed two challenges to state delegations of the eminent domain power to private parties and upheld them both. The first case, *Clark v. Nash*, involved a Utah statute that permitted a private party to condemn the land of another for irrigation purposes to further the state's declared policy.[75] The Court held the condemnation had a public use despite the purpose being only to irrigate the condemnor's property without any common or public right to use the water.[76] In doing so, the Court emphasized the deference it would accord state courts in determining that a use constitutes a public use, as what constitutes a public use may differ from state to state, and state courts were best positioned to make such determinations.[77] The Court based

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[72] The Act stated that the line should be:

> [T]hrough the Indian Territory, beginning at a point on the northern line of the Territory, where an extension of the Southern Kansas Railway from Winfield in a southerly direction would strike that line, running thence south in the direction of Dennison, Texas, on the most practicable route, to a point at or near where the Washita River empties into the Red River, with a branch constructed from a point at or near where the main line crosses the northern line of the Territory, westwardly along or near that line to a point at or near where Medicine Lodge Creek crosses the northern line of the Territory, and from that point in a southwesterly direction, crossing Beaver Creek at or near Camp Supply, and reaching the west line of the Indian Territory at or near where Wolf Creek crosses the same, with the right to construct, use and maintain such tracks, turnouts and sidings as the company might deem it to their interest to construct along and upon the right of way and depot ground by that act granted.

Id. at 642–43.

[73] *Id.* at 645 (quoting Act of July 4, 1884, § 6, 23 Stat. 73, 75).

[74] *See, e.g.*, California v. Cent. Pac. R.R., 127 U.S. 1, 35–36 (1888) (noting previous findings that the corporation was formed for the purpose of constructing a specific line and that the construction would be "under the legislative supervision and authority of the government of the United States"); Luxton v. N. River Bridge Co., 153 U.S. 525, 529, 534 (1894) (upholding constitutionality of statute that permitted private corporation to use the federal eminent domain power to construct "the North River Bridge" between two states to facilitate interstate commerce).

[75] Clark v. Nash, 198 U.S. 361, 369 (1905).

[76] *Id.* at 369–70.

[77] *Id.*

its decision on water being "absolutely necessary to enable [the condemning party] to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."[78] The Court stressed, however, that it was not "approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."[79]

Shortly after, in *Strickley v. Highland Boy Gold Mining Co.*,[80] Justice Holmes upheld another Utah statute that permitted a mining company to condemn private property for an aerial bucket line.[81] The Court deferred to the state's determination of public use, noting "the public welfare of that State [as determined by the state legislature and state supreme court] demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below" should not be frustrated by a private landowner's refusal to sell the disputed property.[82] In doing so, the Court relied upon *Clark*, noting it had emphasized there the "great caution necessary to be shown," but had nevertheless found that "there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation."[83]

Clark and *Strickley* did not involve challenges to the delegations themselves but rather whether the takings by the private parties satisfied the public use requirement. These cases suggest that the public use requirement is satisfied by a broad legislative declaration that takings for a particular use related to natural resource development (e.g., irrigation, aerial bucket lines, or pipelines) further the public welfare of that state. No further inquiry into whether a particular taking does, in fact, further the public welfare of that state is required. Thus, the Court treated these natural resource development takings as involving "per se public use[s]."[84] These takings for natural resource development differ from economic development takings by government (like the takings at issue in *Kelo*), which "must go through a comprehensive process prior to [government] exercising

78 *Id.* at 370.

79 *Id.* at 369.

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

81 *Id.* at 531–32.

82 *Id.* at 531.

83 *Id.*

84 Klass, *supra* note 6, at 691.

condemnation authority for economic development purposes."[85] Professor Klass has argued that it is time to revisit the reasoning underlying these cases, observing that "[w]hile this broad authority for private industry may have made sense at the dawn of the twentieth century, it is not as clear that every natural development taking is always a 'public use' today when balanced against a community's other economic, environmental, and social interests."[86]

Although *Clark* and *Strickley* involved natural resource development, the *Kelo* majority relied upon these two cases in support for its holding that state and local governments are entitled to significant deference as to their public use determinations in the context of economic development takings.[87] Scholars generally agree that these two cases were the precursors to *Berman* and its progeny.[88] As Professor Kanner has observed, these cases were the first step "down the slippery slope," resulting in the "public use" requirement becoming "transmogrified into 'public benefit' said to arise indirectly from conferring the power of eminent domain on private parties avowedly acting for their own financial gain, but prognosticating regional prosperity on a trickle-down theory."[89]

Professor Somin has forcefully argued that *Clark* and *Strickley* should have no bearing on the interpretation of the Fifth Amendment's public use requirement.[90] He observes that, following *Kelo*, Justice Stevens acknowledged that *Clark* and *Strickley* are due process cases decided under the Fourteenth Amendment (and not takings cases decided under the Fifth Amendment as incorporated against the states), as neither case cited the Fifth Amendment, and the Court had not yet held that the Fourteenth Amendment incorporated the Fifth Amendment.[91]

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85 *Id.* at 693.

86 *Id.* at 693–94.

87 Kelo v. City of New London, 545 U.S. 469, 480 & n.9 (2005).

88 *See* Klass, *supra* note 6, at 669 ("[T]here is a direct line from these early natural resource development cases to the current Supreme Court view that takings for economic development purposes can be a public use consistent with the Fifth Amendment."); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 350–51 (2006).

89 Kanner, *supra* note 88.

90 SOMIN, *supra* note 16, at 123–26.

91 John Paul Stevens, *Fall 2011 Albritton Lecture:* Kelo*, Popularity, and Substantive Due Process*, SUP. CT. U.S. 16–20 (Nov. 16, 2011), https://www.supremecourt.gov/publicinfo/speeches/1.pdf [https://perma.cc/MGY3-XXLS].

Nevertheless, the Court, at that time, interpreted the Fourteenth Amendment's Due Process Clause to require just compensation for takings of private property for "public use."[92] Further, the Court frequently looks to early twentieth-century cases concerning takings under the Fourteenth Amendment for guidance in interpreting the Takings Clause today, at least insofar as it pertains to exercises of a state's eminent domain power.[93] Thus, these cases should not be ignored solely because their reasoning is rooted in the Fourteenth Amendment's Due Process Clause.

These two cases' significance is somewhat limited, however, as the Court interpreted the "public use" requirement as applicable against the states differently than the "public use" requirement applicable to the federal government.[94] Moreover, as I argue in Section III.A below, subsequent Supreme Court precedent and changes to society more generally have undermined the cases' reasoning, such that the Court should revisit whether takings by private companies for natural resource development satisfy the public use requirement as a per se matter, without a project-by-project inquiry.

2. Private Delegations and Pipeline Construction

Delegations of the eminent domain power to private companies are common in the areas of energy and transportation infrastructure. The Natural Gas Act (NGA) delegates eminent domain authority to private

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92 Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896) (noting that, under the Fourteenth Amendment Due Process Clause, "the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal Government"); *see* Karkkainen, *supra* note 13, at 847 (noting that the Court recognized that the Court interpreted the Fourteenth Amendment to, like the Fifth Amendment, require that a taking be for "public use").

93 *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994). For example, Justice Stevens has found "nothing problematic" about relying on early twentieth-century cases involving the Fourteenth Amendment's Due Process Clause to interpret the Fifth Amendment's Takings Clause as applied against the states where the state action "involved the actual physical invasion of private property." *Id.* at 406 (Stevens, J., dissenting).

94 Karkkainen, *supra* note 13, at 847 (arguing that "the Court regarded the Fifth Amendment 'public use' and the Fourteenth Amendment due process-based 'public use' requirements as independent and parallel, not interdependent or identical requirements" and that the Court interpreted "the precise contours of 'public use'" to vary from state to state, "suggesting that the due process-based 'public use' limitation had to embrace federalism principles—the Court would not impose identical constraints everywhere, nor would it equate the state and federal 'public use' requirements"); *cf.* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004) (arguing that federal courts should be more deferential with respect to state regulatory takings than federal regulatory takings due to federalism principles).

entities to build natural gas pipelines, but a pipeline company can exercise that authority only if the Federal Energy Regulatory Commission (FERC) has first approved of the pipeline.[95] States have authority over the siting of pipelines transporting oil, carbon, hydrogen, and related resources (as well as over the siting of utility lines and energy storage facilities).[96] Each state has its own framework regarding when such infrastructure can be built and whether private companies can exercise the eminent domain power.[97]

These frameworks are varied, but generally delegate the power of eminent domain to municipal and private entities.[98] Many states have frameworks similar to the NGA in that they delegate eminent domain power only indirectly. "Frequently statutes require private condemnors to secure the approval of a state agency before initiating the condemnation action, and the agency may investigate the particular project quite closely to assure that it furthers the public interest."[99]

In light of *Clark* and *Strickley*, however, some states allow direct exercises of the eminent domain power, which entails allowing condemnation without any legislative or executive oversight. Landowners have recently challenged these delegations as violating the private nondelegation doctrine and due process, but courts have thus far rejected these challenges.

a. Delegations Under the NGA

In 1938, Congress enacted the NGA to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices,"[100] to "protect consumers against exploitation at the hands of natural gas companies,"[101] and for other "subsidiary purposes . . . includ[ing] 'conservation, environmental, and antitrust' issues."[102] The

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95 Coleman & Klass, *supra* note 9, at 681.

96 *Id.*; Tara K. Righetti, *Siting Carbon Dioxide Pipelines*, 3 OIL & GAS, NAT. RES., & ENERGY J. 907, 927 (2017).

97 Coleman & Klass, *supra* note 9, at 681.

98 *See* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947 app. (2015) (surveying each state's laws "pertaining to eminent domain authority, certificate of need determinations, and the siting process for oil pipelines," but excluding any state laws relating to gathering lines).

99 Lawrence, *supra* note 55, at 686.

100 NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669–70 (1976).

101 Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 610 (1944).

102 Pub. Utils. Comm'n of Cal. v. Fed. Energy Regul. Comm'n, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP*, 425 U.S. at 670 n.6).

NGA granted what is now FERC the authority to regulate the transportation and sale of natural gas in interstate commerce.[103]

The NGA requires a natural gas company to obtain a certificate of public convenience and necessity from FERC prior to "undertak[ing] the construction or extension" of any pipeline that will transport natural gas through interstate commerce.[104] Notably, the NGA excludes from its scope pipelines involved solely in the local distribution of natural gas, such that states do still play a small role with respect to the siting of natural gas pipelines.[105] Once a company has a certificate in hand, the company can exercise the federal power of eminent domain to obtain any easements necessary for construction of the pipeline.[106]

FERC issues certificates upon finding that "the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service" and "construction . . . is or will be required by the present or future public convenience and necessity."[107] FERC determines whether the requisite "public convenience and necessity" exists by first examining whether the company could construct the pipeline without raising prices on existing customers.[108] By allowing the market to decide which projects can be built, FERC ensures that landowners are not "subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace."[109] FERC then determines "whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have," including any adverse effects on "landowners and communities affected by the route of the new pipeline."[110] Landowner and community interests include "avoid[ing] unnecessary

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103 15 U.S.C. § 717c; *see* Righetti, *supra* note 96, at 929.

104 15 U.S.C. § 717f(c)(1)(A).

105 *See id.* § 717(b); *see also* Tex. Pipeline Ass'n v. Fed. Energy Regul. Comm'n, 661 F.3d 258, 262 (2011) (holding that FERC's jurisdiction does not extend to purely intrastate pipelines).

106 15 U.S.C. § 717f(c) (requiring a natural-gas company to obtain a certificate of public convenience and necessity); *id.* § 717f(h) (granting acquisition of an easement through eminent domain). As originally enacted, the NGA did not expressly provide that certificate holders could exercise the federal power of eminent domain to build pipelines. PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2251 (2021). In 1947, Congress amended the NGA to authorize certificate holders to exercise the federal eminent domain power. *Id.*

107 15 U.S.C. § 717f(e).

108 Certification of New Interstate Natural Gas Pipeline Facilities ("1999 Certification Policy"), 88 FERC ¶ 61,227, at 18–19 (Sept. 15, 1999).

109 *Id.* at 20.

110 *Id.* at 18.

construction[] and any adverse effects on their property associated with a permanent right-of-way."[111]

Where adverse effects exist, FERC balances the public benefits against the adverse effects of the project and approves the project if the public benefits of the project outweigh the project's adverse effects.[112] The types of public benefits that can support new construction include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives."[113]

In balancing the interests, FERC recognizes "[t]he more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact."[114] Where the company minimizes the impact on landowners by acquiring as much right-of-way as possible through voluntary negotiations, the public interest the company must show becomes less than where the eminent domain power is necessary to acquire most of the needed project land.[115] FERC also completes an independent environmental review of projects even when eminent domain is not used.[116] "[I]f a balancing of all public interest factors weighs against authorization of the proposed project," FERC denies a certificate.[117] In addition, FERC has the authority to impose conditions on the certificate that would minimize or eliminate the adverse effects.[118]

As a practical matter, however, FERC generally will issue a certificate whenever the pipeline developers can show they have precedent agreements—contracts to transport market gas on behalf of non-affiliates or affiliate companies (including a parent or subsidiary

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111 *Id.* at 24.

112 *Id.* at 19; Minisink Residents for Env't Pres. & Safety v. Fed. Energy Regul. Comm'n, 762 F.3d 97, 101–02 (D.C. Cir. 2014).

113 1999 Certification Policy, 88 FERC ¶ 61,227, at 25.

114 *Id.* at 26.

115 *Id.* at 26–27.

116 *Id.* at 27.

117 *See* Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider "all factors bearing on the public interest"); Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 17 (1961) (explaining that the Commission "can only exercise a veto power over proposed transportation . . . when a balance of all the circumstances weighs against certification").

118 *See* Murray Energy Corp. v. Fed. Energy Regul. Comm'n, 629 F.3d 231, 234 (D.C. Cir. 2011).

of the applicant company).[119] FERC only rarely denies requests for certification.[120] Thus, although government oversight exists, it is not necessarily meaningful.

In 2022, FERC proposed an updated policy regarding approval of natural gas pipelines.[121] The draft policy reaffirms its earlier policy, but proposes giving robust consideration of the impact on landowners and environmental justice communities in its decision-making process.[122] The draft also proposes that, in showing evidence of a need for a pipeline, companies will need to show more than simply a precedent agreement to show why a project is necessary.[123] Uncertainties exist as to whether the proposed policy will be adopted and how it will affect future natural gas pipeline approval.[124]

Federal courts have generally recognized that FERC's issuance of a certificate of public convenience and necessity operates as a finding that the underlying pipeline has a public use sufficient to allow the company to exercise the federal power of eminent domain.[125] This certificate process is generally "designed to provide transparency, opportunities for public comment, and coordination between stakeholders" and "facilitates consideration of local and national needs and impacts to either customers or the environment."[126]

b. Delegations of States' Eminent Domain Power

States utilizing the direct delegation framework for energy infrastructure differ from the process under the NGA, in that administrative and legislative oversight over a delegation to a private party is largely nonexistent. Texas is one state that utilizes such a framework.

Texas statutes provide that pipelines transporting crude oil, coal, carbon dioxide, or hydrogen are "common carriers" and can utilize

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119 *See* Coleman & Klass, *supra* note 9, at 682–83, 683 n.129.

120 *Id.* at 683.

121 *Fact Sheet – Updated Pipeline Certificate Policy Statement (PL18-1-000)*, FERC (Feb. 17, 2022), https://www.ferc.gov/news-events/news/fact-sheet-updated-pipeline-certificate-policy-statement-pl18-1-000 [https://perma.cc/WQQ8-9S9J].

122 *Id.*

123 *Id.*

124 *Id.*

125 City of Oberline v. Fed. Energy Regul. Comm'n, 39 F.4th 719, 728 (D.C. Cir. 2022) ("Congress determined that natural gas pipelines that are duly certified as being in the public convenience and necessity serve a public purpose.").

126 Righetti, *supra* note 96, at 927.

eminent domain in constructing the pipelines.[127] Pipelines transporting oil products, gas, salt brine, fuller's earth, sand, clay, liquefied minerals, or any other mineral solutions also are considered common carriers that have the power of eminent domain.[128] These direct delegations have been described as involving the "most controversial uses of eminent domain in Texas."[129]

The Texas Supreme Court has held that, to be a common carrier, a reasonable probability must exist that the company will—at some point after construction—serve the public by transporting the resource for one or more customers who will either retain ownership of the resource or sell it to parties other than the carrier.[130] Texas statutes also delegate the eminent domain power to natural gas companies for the construction of intrastate pipelines.[131] However, the Texas Supreme Court has not yet decided as to whether a public use for such an intrastate pipeline taking is satisfied by common carrier status or whether the public use is based on the existence of benefits to the public.[132]

The Texas Railroad Commission has authority over intrastate pipelines for pipeline safety and pipeline rate regulation.[133] However, as the Commission's website states, it "does not have any authority over a common carrier pipeline's exercise of its statutory right of eminent domain" and also "has no authority over the routing or siting of intrastate or interstate pipelines," as the pipeline route "is determined by the pipeline's owner/operator."[134]

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127 TEX. BUS. ORGS. CODE § 2.105 (2006).

128 Hlavinka v. HSC Pipeline P'ship, L.L.C., 650 S.W.3d 483, 493–94 (Tex. 2022).

129 *See* TIFFANY DOWELL LASHMET, EMINENT DOMAIN IN TEXAS: A LANDOWNER'S GUIDE 2 (2020), https://agrilife.org/texasaglaw/files/2020/03/Eminent-Domain-in-Texas.pdf [https://perma.cc/67VW-G5GA].

130 Denbury Green Pipeline-Tex., L.L.C. v. Tex. Rice Land Partners, Ltd. (*Texas Rice II*), 510 S.W.3d 909, 916 (Tex. 2017).

131 *See* TEX. UTIL. CODE § 181.004 (2021).

132 The Texas Supreme Court has not yet determined what evidence demonstrates a public use for gas pipelines constructed by gas utilities. *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., L.L.C. (*Texas Rice I*), 363 S.W.3d 192, 202 n.28 (Tex. 2012). One carrier has argued that the legislature's decree that gas utilities are "affected with a public interest" forecloses any judicial inquiry into public use, but a Texas appellate court rejected this argument. *In re* DeRuiter Ranch, L.L.C., No. 13-21-00001-CV, 2021 Tex. App. LEXIS 7941, at *13 (Tex. App. Sept. 28, 2021).

133 *Pipeline Eminent Domain & Condemnation*, R.R. COMM'N TEX., https://www.rrc.texas.gov/about-us/faqs/pipeline-safety-faq/pipeline-eminent-domain-and-condemnation/ [https://perma.cc/ED8N-9ADU] (choose the "What is the role of the Railroad Commission in regard to pipelines in Texas?" prompt).

134 *Texas Rice I*, 363 S.W.3d at 199.

Pipeline operators are required to file an application for a T-4 permit with the Commission, but a T-4 permit is "not a determination of whether a pipeline is or is not a common carrier."[135] The Commission does not hold a hearing as to T-4 permits and the process is one of registration (a clerical act) and not a judicial-type act.[136] Indeed, as the Texas Supreme Court has recognized, the Commission has *never* denied a T-4 permit and grants them explicitly for "administrative purposes."[137] The permitting procedure does not provide interested parties with an opportunity to challenge the pipeline's status as a common carrier.[138]

To exercise the Texas eminent domain power for common carrier or natural gas pipelines, companies must make a finding that a taking is necessary for public use.[139] This finding is generally made during a board meeting closed to the public and memorialized in a board resolution. The board's determination is "conclusive, absent fraud, bad faith, abuse of discretion, or arbitrary or capricious action."[140] This process contrasts sharply with FERC's review process under the NGA, which involves indirect delegations.[141]

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135 *Pipeline Eminent Domain & Condemnation*, *supra* note 133 (choose the "I've heard that all a company has to do to get eminent domain status is to check a box on a Railroad Commission T-4 permit. What is a T-4 permit?" prompt).

136 *Id.*

137 *Id.*

138 *Texas Rice I*, 363 S.W.3d at 200. ("However, as for the core constitutional concern —the pipeline's *public vs. private use*—the parties point to no regulation or enabling legislation directing the Commission to investigate and determine whether a pipeline will in fact serve the public. Given this scant legislative and administrative scheme, we cannot conceive that the Legislature intended the granting of a T-4 permit alone to prohibit a landowner—who was not a party to the Commission permitting process and had no notice of it—from challenging in court the eminent-domain power of a permit holder.").

139 *See* Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565 (Tex. App. 1998) (stating that, as to the "necessary" component, "the condemnor need only show that its board of directors determined that the taking was necessary); Morello v. Seaway Crude Pipeline Co., L.L.C., 585 S.W.3d 1, 14 (Tex. App. 2018) ("The condemnor's determination of necessity is presumptively correct and treated as conclusive, unless the landowner establishes an affirmative defense such as arbitrariness or bad faith.").

140 *See In re DeRuiter Ranch, L.L.C.*, 2021 Tex. App. LEXIS 7941, at *18.

141 Pipeline routing is not unregulated, as laws: (1) require permits for pipeline routing in waters of the United States, 33 U.S.C. § 1344; (2) impose limitations of routing in areas inhabited by endangered species, 16 U.S.C. §§ 1531–1544; (3) allow review by the Texas Historical Commission of pipeline routing that affects certain archeological sites and historic structures, TEX. NAT. RES. CODE ANN. § 191.0525(c) (West 2021); 54 U.S.C. § 306108; (4) require notice and a hearing for any taking of public land designated as a "park, recreation area, scientific area, wildlife refuge, or historic site," TEX. PARKS & WILD. CODE ANN § 26.001 (West 2021); (5) require a public hearing, mitigation efforts, and a determination that no feasible or prudent alternative exists before a public utility takes land

c. Recent Challenges to Direct Delegations

Landowners in Texas, Ohio, and Louisiana have recently challenged direct delegations of the eminent domain power and claimed that the delegations violate the private nondelegation doctrine. Thus far, all challenges have failed, but they raise questions as to the viability of the doctrine and the limits of such delegations.

In *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, the Fifth Circuit addressed a challenge to the Texas scheme delegating eminent domain authority to private pipeline companies.[142] Trans-Pecos Pipeline initiated condemnation proceedings to obtain a fifty-foot wide easement on John Boerschig's ranch to install a pipeline for transport of natural gas.[143] Boerschig sought to enjoin Trans-Pecos, arguing that Texas's delegation of the eminent domain power to Trans-Pecos violated due process.[144] The district court denied Boerschig's request for an injunction and the Fifth Circuit affirmed.[145]

The Fifth Circuit repeatedly characterized Boerschig's challenge as a "longshot" and stated the challenge involved a "steep climb" because Texas eminent domain laws were "longstanding" and had previously withstood legal challenges, although the court admitted this particular challenge had not previously been raised.[146] The court, describing the private nondelegation doctrine as "preventing governments from delegating too much power to private persons," acknowledged the private nondelegation doctrine's similarities to the public nondelegation doctrine, which prevented Congress from delegating too much power to agencies.[147] The court determined

encumbered by an agricultural conservation easement, *id.* § 84.007; and (6) permit the Texas Department of Transportation the right to review and approve the location of a pipeline crossing one of its right of ways, 43 TEX. ADMIN. CODE § 21.37 (2023). However, these laws do not involve any centralized review of the environmental impact of a pipeline (and certainly do not balance the public benefits against the interests affected) and instead address small problems in a piecemeal fashion. Scholars have recently criticized this approach as "fragmented and inflexible" and noted that "[t]reating individual environmental hazards in isolation and with voluminous and minutely technical regulations helps drive problems of 'regulatory accretion' and overaccumulation of laws." *See* Tara K. Righetti & Joseph A. Schremmer, *Waste and the Governance of Private and Public Property*, 93 U. COLO. L. REV. 609, 668–69 (2022).

142 Boerschig v. Trans-Pecos Pipeline, L.L.C., 872 F.3d 701 (5th Cir. 2017).

143 *Id.* at 702.

144 *Id.*

145 *Id.*

146 *Id.* at 706–07 (noting that no court had yet considered whether Texas's eminent domain scheme was an unconstitutional delegation of power to a private entity).

147 *Id.* at 707.

the statutes violated the doctrine when a delegation failed to be accompanied with a standard to guide the private parties in exercising discretion and no review of the private parties' decision existed.[148]

In applying the test, the court found the Texas scheme had a standard to guide public companies: the scheme required the board of the pipeline company to find "the taking is necessary for public use."[149] Further, the scheme provided for limited, deferential judicial review of the board's determination (as the court could review the "necessary for public use" determination and overturn it if it was made in bad faith or was otherwise fraudulent, arbitrary, or capricious).[150] Accordingly, the court found Boerschig was unlikely to prevail on his due process claim, and thus, he was not entitled to a preliminary injunction.[151] The Ohio and Louisiana challenges to similar direct delegations were rejected on essentially the same grounds.[152]

3. Private Delegations and Railroads

The Transportation Act of 1920 provides the Interstate Commerce Commission (now the Surface Transportation Board (STB)), with exclusive siting authority over new interstate rail lines and facilities.[153] Railroads seeking to build new lines or extend them must obtain a certificate of convenience and necessity from the STB before construction.[154] Generally, railroads are presumed to be in the public interest, but the STB has the authority to find otherwise.[155] To determine whether to approve the construction of rail lines, the STB has "historically asked whether there is a public demand or need for the

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148 *Id.* at 708.

149 *Id.*

150 *Id.* at 708–09.

151 *Id.* at 709.

152 *See* Cox v. Ohio, No. 3:16CV1826, 2016 WL 4507779, at *1–2 (N.D. Ohio Aug. 29, 2016); Bayou Bridge Pipeline v. 38.00 Acres, 304 So.3d 529, 543 (La. Ct. App. 2020).

153 *See* 49 U.S.C. § 10901(c) (noting that the board shall issue a certificate authorizing construction and operation of railroad lines "unless the Board finds that such activities are inconsistent with the public convenience and necessity"); 49 C.F.R. § 1150.4 (2023); *see also* Amy L. Stein, *The Tipping Point of Federalism*, 45 CONN. L. REV. 217, 233–37 (2012) (summarizing the history of railroad siting regimes). Limited federal control of railroad safety and rates began in 1862 with the Interstate Commerce Act, but the federal government did not have exclusive authority over siting until the enactment of the Transportation Act of 1920. *See id.* at 234–35; *see also* James W. Ely, Jr., *"The Railroad System Has Burst Through State Limits": Railroads and Interstate Commerce, 1830–1920*, 55 ARK. L. REV. 933, 966 (2003).

154 49 U.S.C. § 10901(c); 49 C.F.R. § 1150.1.

155 *See* Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 552 (8th Cir. 2003).

proposed service, whether the applicant is financially able to undertake the construction and provide service, and whether the proposal is in the public interest and would not unduly harm existing services."[156]

Currently, any STB approval of a line does not confer the railroad company with eminent domain authority.[157] Thus, today, whether a company has the power of eminent domain to construct or expand a railroad line is an issue of state law.[158] However, even when a railroad company exercises a state's eminent domain authority, the railroad's decision to build in the first place is subject to governmental oversight through the STB process similar to the FERC process discussed above. However, not all railroads fall under STB jurisdiction. For example, a proposal by a company (found to be an interurban electric railway company) to build a purely intrastate railway route in Texas was initially found to not fall within the jurisdiction of the STB.[159] The Texas Supreme Court recently found that the state legislature had delegated the eminent domain power to the company.[160] Thus, limited examples of direct delegations could potentially exist with respect to rail as well (to the extent the STB does not have jurisdiction).

II
THE TENSION BETWEEN DUE PROCESS AND DIRECT DELEGATIONS OF THE EMINENT DOMAIN POWER

Clark and *Strickley*, which upheld direct delegations of the eminent domain power,[161] are in tension with the Court's subsequent due process cases. The due process cases, however, have involved delegations of legislative rulemaking power—not the eminent domain power. Nevertheless, such cases demonstrate the Court's concern with parties acting out of self-interest rather than in the public interest and the Court's reluctance to accord any deference to actions taken by self-

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156 *Id.* at 533.

157 *See* Tongue River R.R. Co. (*Tongue River III*), No. 30186 (Sub-No. 3), 2007 STB LEXIS 584, at *31 n.50 (STB Oct. 5, 2007) ("Eminent domain proceedings are governed by state law. In rail construction cases, the Board determines whether the proposed line is consistent with the [public convenience and necessity]. The applicant is responsible for acquiring the land necessary to build the line."); Dakota, Minn. & E. R.R. v. South Dakota, 236 F. Supp. 2d 989, 1009 (D. S.D. 2002), *aff'd in part*, *vacated in part*, 362 F.3d 512 (8th Cir. 2004) (stating that STB approval does not confer any federal power to take land).

158 *See* Tex. Cent. R.R. & Infrastructure, Inc. v. Miles, 635 S.W.3d 684, 690 (Tex. App. 2020).

159 Miles v. Tex. Cent. R.R. & Infrastructure, Inc., 647 S.W.3d 613, 619 (Tex. 2022).

160 *Id.* at 629–30.

161 *See supra* Section I.C.1.

interested parties absent government oversight. As I argue in Part III, *infra*, viewing takings pursuant to direct delegations as presumptively invalid under the Takings Clause would remedy the Court's differential treatment of delegations of the eminent domain power as compared to other delegations of legislative power.

Separate and apart from due process concerns, direct delegations of the eminent domain power may run afoul of the private nondelegation doctrine, which is rooted in separation-of-powers provisions.[162] However, the private nondelegation doctrine applies only to the extent the federal government delegates the eminent domain power, as opposed to the states, and the scope of the doctrine remains an unsettled murky issue.[163]

A. The Due Process Cases

Shortly after *Clark* and *Strickley* (upholding direct delegations of the eminent domain power), the Court decided a series of cases involving due process challenges to state delegations of the police power to private parties.[164] The delegations in the state cases involved ordinances delegating to landowners the power to decide whether to allow narrow, predefined land uses in the nearby vicinity.[165] The cases suggest that a delegation violates due process when the private party's self-interest and the public interest are not aligned, no government oversight exists, and the self-interested action interferes with property interests. This understanding of the state land use cases is reinforced by *Carter Coal*, which scholars generally recognize as the foundational case limiting Congress's power to delegate legislative authority to private parties.[166] *Carter Coal* involved a federal delegation of legislative power but relied upon the earlier state delegation cases.

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[162] For analytical clarity, I refer only to limits imposed on private delegations by structural concerns as the private nondelegation doctrine.

[163] Confusion over the scope of the doctrine has long persisted. *See* James O. Freedman, Review, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 331 (1976) ("The Supreme Court has yet to state a satisfactory theory of the principles governing the delegation of power to private parties.").

[164] *See* Eubank v. City of Richmond, 226 U.S. 137 (1912); Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917); Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

[165] These types of delegations were quite common and had frequently been challenged in the state courts with mixed results. *See* Howard Lee McBain, *Law-Making by Property Owners*, 36 POLITICAL SCI. Q. 617, 620–34 (1921) (detailing different land use ordinances that delegated to a majority of landowners the right to decide whether to allow certain structures, including livery stables, wood buildings, and public garages).

[166] *See* Hammond, *supra* note 4, at 1722.

1. Eubank *and Its Progeny*

The Court addressed a series of challenges to state delegations of legislative power in the land use context at the beginning of the twentieth century. These cases seem to have both substantive and procedural components as the Court is concerned with the arbitrariness of the action (substantive) as well as self-interest (procedural).

In 1912, the Court decided *Eubank*, which involved a landowner's challenge to a fine imposed for violating a city ordinance regarding building lines.[167] The ordinance provided that the committee on streets shall establish a building line (between five and thirty feet from the street line) when two-thirds of the owners of property abutting any street request the committee on streets to establish a building line.[168] The Supreme Court held that the ordinance violated due process because it failed to promote "public comfort," "convenience," and "public health."[169] Instead, due to the lack of any standard restraining the property owners' discretion, they could establish the line "for their own interest, or even capriciously."[170] The Court further found it significant that no governmental oversight over the landowners existed, such that their decision was final, as the committee on streets had "no discretion . . . as to whether the street line shall or shall not be established in a given case."[171]

Five years later, the Court decided *Cusack*, and this time, upheld a similar ordinance banning billboard construction on public streets with residences unless a majority of the residence owners on a particular street consented.[172] The Court distinguished *Eubank*, stating the ordinance at issue there permitted lot owners "to *impose* restrictions upon the other property in the block," whereas the instant ordinance permitted "lot owners to *remove* a restriction from the other property owners."[173] The Court found that the public interest would be furthered by a blanket prohibition against the erection of billboards in largely

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167 *Eubank*, 226 U.S. at 140.

168 *Id.* at 141.

169 *Id.* at 144. Even prior to *Eubank*, the Court recognized since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the due process clause "places limits on the manner and extent to which a state legislature may delegate to others powers which the legislature might admittedly exercise itself." McGautha v. California, 402 U.S. 183, 272 n.22 (1971) (Brennan, J., dissenting). *Yick Wo*, however, involved a delegation to a public body, as opposed to a private party.

170 *Eubank*, 226 U.S. at 144.

171 *Id.* at 143.

172 Thomas Cusack Co. v. Chicago, 242 U.S. 526, 527–28 (1917).

173 *Id.* at 531 (emphasis added).

residential neighborhoods, as evidence from state court proceedings showed billboards shielded immoral and criminal activities, and combustible material tended to gather beneath them, posing a fire hazard.[174] Because a blanket prohibition could be upheld, the law's provision allowing for a waiver of the restriction did not deprive the billboard operator of any property.[175]

Finally, *Roberge* involved a challenge to an ordinance that did not allow a philanthropic group home in a zoning district unless two-thirds of the owners of the property nearby consented.[176] The trustee of an elderly group home sought a permit to renovate and expand the size of the home, but the superintendent denied the permit due to the trustee's failure to first obtain consent in compliance with the ordinance.[177] The Court held the ordinance's "delegation of power to owners of adjoining land" was "repugnant to the due process clause" as applied to the trustee.[178] Like in *Eubank*, no governmental oversight over the delegation existed.[179] The Court distinguished *Cusack* by observing that the home for the elderly was not a nuisance unlike billboards.[180]

2. The Eubank *Puzzle*

The holdings of the *Eubank* trilogy are somewhat contradictory and difficult to reconcile.[181] However, when considered in light of similar cases involving land use issues (but no delegations), their holdings become clearer. Specifically, these cases suggest the Court's unwillingness to defer to actions undertaken by self-interested parties unless their self-interest is adequately constrained and aligned with the public interest. This unwillingness is present even if the Court would defer to a public official who undertakes the same action.

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174 *Id.* at 529.

175 *Id.* at 530.

176 Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 117–18 (1928).

177 *Id.* at 119.

178 *Id.* at 120, 123.

179 *Id.* at 121.

180 *Id.* at 122.

181 *See, e.g.*, Kenneth A. Stahl, *Neighborhood Empowerment & the Future of the City*, 161 U. PA. L. REV. 939, 957–62 (2013) (describing *Eubank-Cusack-Roberge* as "cryptic," and observing that scholars have struggled to make sense of the doctrine emerging from the "[r]iddle" posed by the cases); Paul Larkin, *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 47 n.68 (2021) (observing that *Cusack* and *Roberge* point in "opposite directions, and it is difficult to reconcile them"); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 167 (1977) ("[T]he three cases form a puzzling triangle.").

Courts have generally interpreted the *Eubank* cases to mean that delegations to private parties pose no constitutional issue if structured to prohibit a disfavored use of property but allow a majority of citizens to waive that prohibition and consent to the use.[182] This explanation, however, is unduly formalistic (and easily manipulable)[183] and does not explain why this particular form, as opposed to another, poses no constitutional difficulties.[184]

Although differences in the formal structure of the ordinances and their subject matter exist, the cases involved the concern that state and local government officials delegated police power authority to decide how land could be used to private parties—rather than government. Generally, no issue arises when state and local government officials exercise legislative or executive power because the community expects them "to do so in a basically disinterested way. The community expects [them] to act from some conception of what is good for the community or according to standards that seek to further community interests, as opposed to acting to further [their own] narrow private interests."[185]

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[182] *See* Silverman v. Barry, 845 F.2d 1072, 1086 (D.C. Cir. 1988) (holding that, "for a legislative delegation to private citizens to survive a due process challenge, . . . the legislature's restriction must be in the form of a general prohibition, and the delegation must be in the form of permitting private citizens to waive the protection of that prohibition"); Ky Div., Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n, 20 F.3d 1406, 1416–17 (6th Cir. 1994) (upholding law because "the veto is merely a condition established by Congress upon the application of Congress' general prohibition of interstate off-track betting," and thus, "the Act merely affords the Horsemen a limited power to waive a restriction created by Congress, just as the ordinance in *Thomas Cusack* provided one-half of the property owners with the power to waive the billboard restriction," as opposed to actually delegating any legislative power).

[183] As one scholar has observed, "The *Cusack* Court's professed reason for upholding the Chicago scheme, while reaffirming disapproval of the Richmond one, seems an unconvincing triumph of form over substance." Michelman, *supra* note 181, at 167.

[184] Further, even when structured as a restriction that can be waived, the law's operation is still dependent upon the "judgment and will" of outside private parties (whether they will waive it). *See* McBain, *supra* note 165, at 640 ("A law is not a law if it is inoperative. In any specific instance the operation, the effectuation, of the prohibitions written into these ordinances is undeniably the joint act of the city council and a group of property owners. And no amount of legalistic metaphysics will make it otherwise.").

[185] Lawrence, *supra* note 55, at 659. The due process approach is not limited to private parties (even if the risk of self-interest is, perhaps, more pronounced). *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 578–79 (1973) (holding that due process is violated by allowing individuals on a government board to use government authority in an area where they have pecuniary interests); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (holding that due process is violated where mayor adjudicated traffic violations that were payable to the village); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (holding that due process is violated by a statutory scheme in which the mayor had a financial stake in the outcome of adjudications).

No such expectation arises, however, with respect to private parties' exercise of legislative or executive power. Private delegations pose a heightened risk that "governmental power—power coercive in nature—will be used to further the private interests of the private actor, as opposed to some different public interest."[186] Despite this risk, the Court upheld the *Cusack* ordinance whereas it struck down the *Eubank* ordinance and sustained an as-applied challenge to the *Roberge* ordinance.

Yet, in *Cusack*, the evidence was clear that the billboard restriction was in the public interest. The state court record was replete with evidence showing the potential harms posed by billboards in residential neighborhoods, and the state supreme court determined that a billboard ban advanced the public interest in light of this evidence.[187] Thus, if the landowners refused to waive the restriction, the public interest was furthered, even if the landowners were acting out of self-interest. In the event they voted to waive the restriction, the billboard owner benefitted, such that no due process violation occurred (as no deprivation of a property interest occurred).[188] Thus, no risk of legislative power being abused to serve merely private interests existed. As Professor Lawrence has recognized in discussing delegations generally:

> [I]f a delegation does not seem likely to involve conflicts between public and private interest, or does include protections against the domination of private interest, no deprivation without due process will have occurred, nor will have occurred the danger—the enhanced potential for illegitimate considerations to affect the exercise of public power—that causes us to worry about delegations in the first place.[189]

By contrast, in *Eubank*, the evidence was unclear as to whether establishing a building line would further the public interest. No evidence existed as to whether having building lines (or not having such lines) would further the public interest. Instead, the city had entrusted the decision as to the land use issue to the private parties to

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[186] Lawrence, *supra* note 55, at 659; *see also* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 402–03 (2006) ("[W]hen administrative discretion is delegated to private parties rather than to public regulators: the decisionmaker may be both self-aggrandizing and self-interested.").

[187] Thomas Cusack Co. v. Chicago, 242 U.S. 526, 529 (1917).

[188] *Id.* The court assumed a property interest existed and did not decide whether one did, in fact, exist. *Id.*

[189] Lawrence, *supra* note 55, at 661.

decide. The delegation thus created "the opportunity for private interest to dominate the use of governmental power," such that "those against whom the power is used may well have suffered deprivations without due process."[190] The Court refused to assume that the parties would act in the public interest and instead assumed they would act to further their own self-interest. The Court invalidated the delegation on this basis. This presumption of invalidity as to the private parties' decision-making is demonstrated by the difference in outcomes between *Eubank* and *Gorieb v. Fox*,[191] which the Court decided fifteen years after *Eubank* and involved an ordinance almost identical to *Eubank* except public officials (rather than private parties) had discretion to vary building lines.

In *Gorieb*, the ordinance set a building line that would be as far from the street as that occupied by sixty percent of the houses on the block but reserved to the city council the authority to make exceptions and permit buildings closer to the street.[192] Because of the structure of the ordinance, the lines on opposite sides of the street could differ, as well as differ from street to street, such that the lines would in no way be uniform.[193] The Court treated the city council's power to make exceptions quite differently from the private landowners' power in *Eubank*, as the Court refused to "assume in advance" that the power to make exceptions would "be exercised by the council capriciously, arbitrarily, or with inequality."[194]

Despite the ordinances being functionally the same, the Court easily found that the *Gorieb* ordinance advanced the public interest, noting that the setbacks would "afford room for lawns and trees, keep the dwellings farther from the dust, noise, and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and . . . reduce the fire hazard" by creating a greater distance between houses.[195] Further, "the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles."[196] These same interests were at play in *Eubank*, but the Court nevertheless found the

190 *Id.*

191 Gorieb v. Fox, 274 U.S. 603 (1927).

192 *Id.* at 604–05.

193 *Id.*

194 *Id.* at 607.

195 *Id.* at 609.

196 *Id.*

Eubank ordinance invalid due to the lack of uniformity between building lines that could arise.[197] The Court thus found it "hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed."[198] The same lack of uniformity could also arise with respect to the *Gorieb* ordinance due to the city council's ability to make exceptions, but the Court found that states and city councils "are better qualified than the courts to determine the necessity, character, and degree of regulation" of urban land use planning.[199]

Eubank and *Gorieb* thus demonstrate that, when private parties are exercising delegated governmental power, the Court will not accord any deference to their judgement when reviewing due process claims and will not assume they will act in the public interest—instead, it will presume they are acting for their own self-interest. Yet, when a public official exercises the exact same power, the Court will accord significant deference and assume the official is, in fact, acting in the public interest.

This does not explain where *Roberge* fits into the puzzle, as it, like *Cusack*, involved a restriction that could be waived, but, unlike *Cusack*, the Court held the *Roberge* ordinance invalid as applied. Some have accepted the *Roberge* Court's explanation that it is the distinction between nuisances (billboards) and non-nuisances (group homes) that matters.[200]

This explanation, however, does not withstand close scrutiny because it ignores the Court's landmark ruling in *Village of Euclid v. Ambler Realty Co.*,[201] decided just two years prior to *Roberge*. In *Euclid*, the Court held that a city's zoning authority extended to regulations that broadly protected the character of existing neighborhoods—not just nuisances.[202] Indeed, the Washington Supreme Court had upheld the *Roberge* ordinance as constitutional based on the reasoning in *Euclid*.[203] Moreover, "it seems far more sensible for a city to give neighbors a vote on whether to waive a land use prohibition where the offensiveness of the use to be prohibited is

197 Eubank v. City of Richmond, 226 U.S. 137, 144 (1912).

198 *Id.*

199 *Gorieb*, 274 U.S. at 608.

200 *See* Volokh, *supra* note 4, at 943.

201 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

202 *See id.*

203 State *ex rel.* Seattle Title Trust Co. v. Roberge, 144 Wash. 74, 83 (Wash. S. Ct. 1927), *rev'd*, 278 U.S. 116 (1928).

debatable (as in *Roberge*) than where the use is indisputably offensive (as in *Cusack*)."[204]

I believe *Roberge* is best explained as an early equal protection case and is not particularly helpful with respect to analyzing the private delegation issue. Although the *Roberge* ordinance restricted group homes (unless consent was obtained), it permitted sororities, fraternities, boarding houses, physician and dentist offices, and even public utility buildings—all without first obtaining consent of nearby landowners.[205] Thus, although restricting group homes in a single-family residential neighborhood unless consent is first obtained might be permissible, the issue in *Roberge* was that the zoning district at issue was in no way limited to single family homes (or similarly restricted), and group homes were thus treated disparately as compared to similar structures without any legitimate basis.[206]

Overall, the *Eubank* cases suggest that the Court will invalidate laws delegating to private parties legislative power except in cases where the parties are so restrained that their self-interest is aligned with the public interest (and, to the extent their self-interest is not aligned, their actions do not result in a deprivation of a property interest).[207]

3. Carter Coal *and Government Oversight*

The *Eubank* cases do not forbid private parties from playing a role with respect to legislative decision-making. Rather, where private parties play a role, government must have oversight over these delegations, as the Court recognized in *Eubank* in noting that the landowners (and not the committee on streets) had the final say.[208] This also is consistent with *Carter Coal* and its aftermath, which similarly indicates the importance of government oversight as to any delegations.

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204 Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 960 (2013).

205 *Roberge*, 278 U.S at 117–18.

206 *Id.* at 119–20; *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (confirming this understanding of *Roberge*, addressing an as-applied challenge to an ordinance almost identical to the one at issue in *Roberge*, and finding that the city violated equal protection, as the group home's exclusion rested on "irrational prejudice" against the disabled).

207 This fits neatly into a public-interest model whereby the legislature is the forum for identifying, defining, and acting to further the public good. *See* Michelman, *supra* note 181, at 149; *see also* Larkin, *supra* note 4 ("Handing government power over to private parties whose self-interests will distort their judgment is impermissible because that procedure is fundamentally unfair.").

208 Eubank v. City of Richmond, 226 U.S. 137, 143 (1912).

In *Carter Coal*, the Court addressed the constitutionality of multiple provisions of the Bituminous Coal Conservation Act of 1935, including a provision that delegated to coal producers and miners the power to fix the miners' maximum hours and wages of labor.[209] The delegation provision provided that, if the producers of more than two-thirds of the national coal produced and the representatives of more than one-half of the mine workers employed agreed in a contract negotiated between them as to the wages and hours of the miners, then *all* producers would be bound by those wage and hour standards.[210] This effectively meant that a minority of producers and miners would be subject to whatever a majority of producers and miners decided.[211] The Court found that the delegated power was in effect "the power to regulate the affairs of an unwilling minority," which constituted a "legislative delegation in its most obnoxious form."[212] Notably, the delegation was not to disinterested persons but to "private persons whose interests may be and often are adverse to the interests of others in the same business."[213] The Court concluded that a person "may not be intrusted with the power to regulate the business of another."[214] Indeed, "a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."[215] Thus, citing to *Eubank* and *Roberge* in support, the Court held that the delegation was "clearly arbitrary" and violated "due process."[216]

After the Court ruled the Bituminous Coal Act unconstitutional in *Carter Coal*, Congress enacted a new act similarly seeking to set reasonable prices for coal.[217] The act still involved private parties in the decision-making process as to what reasonable prices for bituminous coal should be.[218] However, in *Sunshine Anthracite Coal Co. v. Adkins*, the Court rejected a challenge to the delegation because the act gave the National Bituminous Coal Commission the final say as to what those prices should be, such that private parties were

209 Carter v. Carter Coal Co., 298 U.S. 238, 310 (1936).
210 *Id.* at 281–82, 284.
211 *Id.* at 311.
212 *Id.*
213 *Id.*
214 *Id.*
215 *Id.*
216 *Id.*
217 Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 387 (1940).
218 *Id.* at 397.

"subordinate[]" to a government agency.[219] *Carter Coal* coupled with *Adkins* thus demonstrates that delegations to private parties are permissible so long as government oversight exists.

Courts and scholars have debated the origins of *Carter Coal*. Like *Eubank*, which *Carter Coal* cites, I view *Carter Coal* as primarily a due process case with both procedural components relating to self-interest and substantive components relating to concerns of arbitrariness (as the Court will not presume that self-interested parties are acting in the public interest).[220]

Courts and scholars have generally recognized that the Supreme Court has never overruled *Eubank*, *Cusack*, or *Carter Coal*, but some have questioned the continued vitality of the decisions, including suggesting they are a relic of the *Lochner* era. The heightened scrutiny, I argue, that was applied in these cases, however, was not due to any economic fundamental rights being at issue (the hallmark of a *Lochner*-era case) but rather was triggered due to the private delegations themselves.

B. The Due Process Cases' Impact on Direct Delegations of the Eminent Domain Power

The *Eubank* line of cases cast doubt on the Court's earlier holdings in *Clark* and *Strickley* upholding direct delegations of the eminent domain power.[221] The Court has not subsequently revisited the constitutionality of direct delegations of the eminent domain power, and the delegations themselves are in tension with the *Eubank* cases. No compelling reason for treating delegations of the eminent domain power differently than other delegations of legislative power exists.

Clark and *Strickley* addressed statutes allowing self-interested private parties to condemn another's private property for natural

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219 *Id.* at 399.

220 Justice Scalia has indicated *Carter Coal* rests on substantive due process. *See* Synar v. United States, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) ("The Court [in *Carter Coal*] denounced that provision as 'legislative delegation in its most obnoxious form,' but the Court's holding appears to rest primarily upon denial of substantive due process rights." (quoting *Carter*, 298 U.S. at 311)). Some scholars have similarly classified *Carter Coal* as a substantive due process case. *See* Hammond, *supra* note 4, at 1723. Others have recognized its procedural due process aspects. *See* Craig Konnoth, *Privatization's Preemptive Effects*, 134 HARV. L. REV. 1939, 1980 (2021) (noting that "one might argue that the private nondelegation doctrine is based in procedural due process"); *see also* Volokh, *supra* note 4, at 943–44, 950 (suggesting *Eubank* and *Carter Coal* bar delegating authority to private parties without protection against self-interested decision-making).

221 *See supra* Section I.C.1.

resource development purposes without government oversight. The Court found a public use existed in each case based on the legislatures' declaration that such takings furthered important policy interests of the state.[222] The Court thus suggested that a legislature could declare a certain use a "per se" public use (irrigation in *Clark* and aerial bucket lines in *Strickley*) and avoid a case-by-case analysis of whether a public use exists as to each project.[223]

Clark and *Strickley* conflict with the *Eubank* cases, which suggest that no deference should be given to private parties' decisions that are made in their own self-interest, like decisions as to when and where to exercise the eminent domain power.[224] Courts, however, in reviewing takings pursuant to direct delegations, apply the same deferential standards applicable to takings by government or indirect delegations that have government oversight.

Cusack suggests that a Court can uphold a delegation to a private party where no conflict exists between the party's self-interest and the public interest, but that limited exception seems inapplicable to takings that occur via direct delegations, as significant differences between the cases exist.[225] First, in *Cusack*, landowners could either do nothing (in which case the legislature's billboard restriction would remain in place) or act to waive the restriction in which case billboards were permitted, causing no harm to billboard operators.[226] If private parties holding the delegated eminent domain power decide to act—by exercising the eminent domain power—then landowners are harmed as their property is taken.

Second, direct delegations of the eminent domain power confer wide-ranging discretion on the private parties simply not present in *Cusack*. In *Cusack*, landowners' discretion was limited in that they had the power to decide whether to waive the billboard restriction only on a particular street.[227] By contrast, a direct delegation allows private parties to decide when the exercise of the power is necessary for public use and where to exercise that power (and these questions all implicate

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222 *See* Klass, *supra* note 6, at 668–69 (citing Clark v. Nash, 198 U.S. 361 (1905), and Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906)).

223 *Id.*

224 *See supra* Section II.A.

225 *See supra* Section II.A.

226 *See supra* Section II.A.

227 *See supra* Section II.A.

environmental, social, economic, and safety issues).[228] Because no legislative or executive oversight exists, no weighing of the public benefits versus the interests affected by the taking occurs. It is not difficult to imagine a case involving a delegation of the eminent domain power to a private company that seeks to exercise the power to build a pipeline where the public benefits of the pipeline are small (in that only a few will use the pipeline and the resources transported will not be sold to the public) but the interests affected if the property is taken are significant (such as where numerous landowners and communities are affected). In such a case, the public interest would be better served by no pipeline being constructed (or by a new route being selected or by other means of transport, such as truck and rail, being used). The company does not have to consider the public interest, however, and can instead condemn the property needed for the pipeline based on its own self-interest.

Because direct delegations of the eminent domain power involve significant discretion and will result in takings of private property, how companies exercise their discretion triggers concerns about fairness and, correspondingly, their lack of neutrality. Relatedly, direct delegations seem to ignore the distinction the Court has repeatedly recognized between comprehensive land use plans in both the zoning and economic development takings context versus individualized decision-making. Thus, Professor Kanner has argued that *Clark* and *Strickley* were wrongly decided because:

> It is one thing to say that the government may regulate and even condemn water resources in order to allocate them under a rational, legislative plan, but it is quite another thing to countenance an unvarnished, private grab of a neighbor's land for the benefit of an individual who, for all the pretty words about dire necessity and public benefit, is responsible to no one, save only his own commercial self-interest and his own notions of where enlightened self-interest ends and greed begins.[229]

No compelling factual reason for treating delegations of the eminent domain power different from other delegations of legislative power thus exists, as they involve both harm to others (a deprivation of landowners' property interests) and involve significant discretion. Moreover, no historical evidence suggests eminent domain delegations should be treated differently than other delegations of legislative

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[228] Righetti, *supra* note 96, at 962–63 (noting how siting implicates "local concerns about safety, land use, and impacts to property and environment").

[229] Kanner, *supra* note 88, at 351.

power. The most that can be said is that the record is mixed, indicating that many delegations of the eminent domain power were indirect and that some direct delegations were viewed as unconstitutional.[230]

From a legal standpoint, however, it is significant that the *Eubank* line of cases involved delegations of the police power, not the eminent domain power. This matters due to the Takings Clause generally being the primary constitutional constraint, as opposed to the more generalized notions of due process directly at issue in the *Eubank* cases. Under the Court's modern Takings Clause jurisprudence, however, a strong argument exists for the invalidity of direct delegations. Thus, although I believe that direct delegations of the eminent domain power pose a procedural due process issue (in light of the self-interested decision-maker),[231] the validity of direct delegations are best viewed through the more specific lens of the Takings Clause discussed in Part III, below.

Finally, aside from due process concerns, subsequent case developments have shed doubt on the vitality of *Clark* and *Strickley*. First, these cases relied upon the delegations being justified based on a "dire necessity to prevent public harm."[232] Courts have not applied this dire necessity rationale in subsequent cases and it likely does not apply to pipelines and similar infrastructure.[233] Second, these cases did not involve interpreting the Takings Clause as incorporated through the Fourteenth Amendment but rather involved direct interpretation of the Fourteenth Amendment Due Process Clause.[234] Finally, as Professor Klass has argued, *Clark* and *Strickley* treat natural resource development takings as "per se public use[s]," but it may be time to revisit these holdings in light of the numerous other interests such takings implicate.[235]

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230 *See supra* Section I.C.1.

231 *See supra* Section I.B.2 (discussing procedural due process in the context of a self-interested decision-maker). No separate substantive due process claim would exist, however. *See supra* Section I.B.1.

232 Kanner, *supra* note 88, at 350.

233 *Id.* at 351–52.

234 *See* discussion *supra* Section I.C.1.

235 *See* Klass, *supra* note 6, at 677, 691 (observing that courts have treated natural resource development takings as a "per se public use" and arguing that it may be time for states to reconsider such designations in light of the other interests at play in Western states).

C. The Private Nondelegation Doctrine

I view *Carter Coal*, discussed above, primarily as a due process case, in light of its express invocation of due process and reliance on the *Eubank* cases. Some courts and scholars, however, view *Carter Coal* as a separation-of-power case that establishes a private nondelegation doctrine.[236] Under the private nondelegation doctrine, a delegation is invalid due to the delegate's private status (regardless of self-interest or arbitrariness) whereas a due process focus is on arbitrariness (substantive due process) and self-interest (procedural due process).[237] Further, because it is rooted in separation-of-powers provisions, the private nondelegation doctrine applies only to federal delegations—not state delegations.[238]

The existence of the private nondelegation doctrine (rooted in separation-of-powers principles) remains an unsettled, somewhat-murky issue. I do not seek to conclusively resolve the existence (or scope) of the doctrine in this Article but rather seek only to point out the thorny questions that exist regarding the doctrine and note how, if recognized, it would affect private delegations of the eminent domain power.

The question of limits on private delegations arose in the *Amtrak* case involving a challenge to Section 207 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), which delegated rulemaking authority to Amtrak and a federal agency jointly.[239] Although the Supreme Court did not address the private nondelegation

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[236] Some have treated *Carter Coal* as both a nondelegation and due process decision. *See, e.g.*, Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 422 (2006) ("The Court held the delegation arbitrary both under Article I of the Constitution and the Due Process Clause of the Fifth Amendment."). Similar debate exists regarding the public nondelegation doctrine applicable to delegations to agencies. Many have argued it should be rooted in due process as well, as opposed to separation-of-powers provisions. *See* Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REGUL. 279, 331 n.247 (2017) (summarizing the scholarship arguing that the Due Process Clause is "more active and useful than the nondelegation doctrine"). The Court, however, has not embraced due process as a limit to delegations to agencies.

[237] *See* Kiser v. Kamdar, 831 F.3d 784, 791 (6th Cir. 2016) (recognizing the private delegation doctrine as arising out of procedural due process); *see also* Konnoth, *supra* note 220 (noting that "one might argue that the private nondelegation doctrine is based in procedural due process").

[238] *See* Volokh, *supra* note 4, at 973–75.

[239] Ass'n of Am. R.R. v. U.S. Dep't of Transp., 721 F.3d 666, 668 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015).

doctrine (resolving the case on other grounds), two justices indicated they would invalidate the delegation due to the doctrine.[240]

Specifically, Justices Thomas and Alito each wrote separate concurrences, recognizing the private nondelegation doctrine and rooting it in separation-of-powers concerns (specifically, Article I's Vesting Clause)—not due process.[241] According to Justice Alito, private delegations of legislative power resulted in avoidance of the specific requirements that must be followed to enact a law and thereby circumvented "accountability checkpoints."[242] Justice Thomas similarly found that, because a private entity was not Congress, part of the Executive, or an Article III court, a private entity could not exercise legislative, executive, or judicial power.[243] On remand, the D.C. Circuit, however, invalidated the delegation to Amtrak on due process grounds (as opposed to embracing Justices Alito's and Thomas' separation-of-powers analysis).[244]

Since *Amtrak*, the Supreme Court has not further weighed in on the scope of the private nondelegation doctrine. Multiple questions regarding its existence and scope thus remain.

First, although Justices Alito and Thomas in *Amtrak I* centered the doctrine on the Vesting Clause (ignoring the due process language in *Carter Coal*), the Supreme Court has *never* expressly struck down a delegation to a private party based on the private nondelegation doctrine (as opposed to due process).[245] This has led Professor Volokh to argue that, to the extent a nondelegation doctrine applies to private parties, it is the same doctrine applicable to delegations to public parties, such that it is concerned only with whether Congress "has given up so much authority as to have abdicated its legislative power" and is "not about who receives that power."[246]

However, a basis for distinguishing between public and private delegations with respect to the nondelegation doctrine does exist: public parties are—in theory at least—politically accountable, whereas private parties are not. This lack of accountability seems to be one of

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240 *See generally* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43 (2015).

241 *See generally id.* at 56–66 (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring).

242 *Id.* at 61 (Alito, J., concurring).

243 *Id.* at 67–68 (Thomas, J., concurring).

244 Ass'n of Am. R.R. v. U.S. Dep't of Transp., 821 F.3d 19, 34 (D.C. Cir. 2016).

245 Alexander "Sasha" Volokh, *The Shadow Debate over Private Nondelegation in* DOT v. Association of American Railroads, 2014–2015 CATO SUP. CT. REV. 359, 369.

246 *Id.*

Justice Alito's primary concerns in his *Amtrak* concurrence.[247] As Professor Hammond has noted, "If a private actor can make law but is not subject to the structural protections of the Constitution—because the actor is not part of the constitutional scheme at all—the constitutional accountability of the actor is simply nonexistent."[248] If accountability is the concern, however, then it may be possible to structure a private delegation in such a way that the government retains authority over the private party, such that accountability remains.[249] This would mean that the private nondelegation doctrine would not bar all delegations to private parties, but rather only those where concerns about accountability exist.[250]

Relatedly, the distinction between rulemaking and adjudications may also have significance with respect to the private nondelegation doctrine. Some have argued that the public nondelegation doctrine should apply only to rulemaking or, more specifically, apply when Congress (1) allows the agent (the actor to whom authority is delegated) to issue general rules governing private conduct that carry the force of law and (2) makes the content or effectiveness of those rules dependent upon the agent's policy judgment, rather than upon a factual contingency—the determination of which could be subject to review by a court.[251] This argument has been subject to some criticism because even adjudicatory decisions shape the future conduct of government and private parties.[252]

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247 *See Ass'n of Am. R.R.*, 575 U.S. at 57 (Alito, J., concurring) ("When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern."); *see also* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 79 (1990) ("From a theoretical perspective delegations outside the federal government threaten the values of accountability and balance underlying our system of separated powers.").

248 Hammond, *supra* note 4, at 1725–26.

249 *Id.* at 1726.

250 *Id.*

251 *See* Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (characterizing nondelegation as a constitutional prohibition on delegations of power to establish "generally applicable rules . . . governing future actions"); *see also* Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 755 (2019) (suggesting a distinction between adjudications and rulemaking with respect to the nondelegation doctrine).

252 *See* Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 280 (2021) (arguing that adjudications should be treated just like rulemaking for nondelegation purposes because agencies' decisions can operate as a form of "adjudicatory precedent" that shapes the future conduct of the government and private parties).

Delineating the boundaries of the doctrine likely will be of interest to the Court in a future case. Indeed, on March 28, 2022, the Court denied certiorari in *Texas v. Commissioner of Internal Revenue*, which involved a private nondelegation issue.[253] Although none of the Justices voted to hear the case, Justice Alito (joined by Justices Thomas and Gorsuch) stated that, if the case would have been heard, the Court would have reached the question regarding the limits on the federal government's authority to delegate its powers to private actors.[254]

Although I largely focus on state delegations herein, the doctrine would pose limits as to how Congress or federal administrative agencies structure future delegations. Further, the doctrine may have implications with respect to FERC's blanket certificate regulations that provide that a certificate holder has the authority to engage in numerous acts (including relocating facilities and constructing new pipelines) and can exercise the federal eminent domain power in doing those acts without any review or approval by FERC, provided that each project does not exceed a set limit (the limit was $13.1 million for projects in 2022).[255]

The private nondelegation doctrine—as conceptualized by Justices Thomas and Alito in their concurring opinions in *Amtrak I*—cannot limit state delegations to private parties because structural separation-of-powers provisions do not apply to state action.[256] Due process, however, does clearly apply to the states. Moreover, many have recognized due process may be better suited than the private nondelegation doctrine in policing many private delegations. Due process addresses the primary concern underlying such delegations: that the party will act based on self-interest rather than in the public interest.[257] In any event, as to direct delegations of the eminent domain

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253 Texas v. Comm'r, 142 S. Ct. 1308 (2022).

254 *Id.* at 1309 (Alito, J., concurring).

255 *See generally* 18 C.F.R. § 157.208 (2023). Indeed, FERC's blanket authorization process has recently been challenged on these grounds. *See* Memorandum of Law in Support of Plaintiffs' Consolidated Response in Opposition to Defendants' Motion to Dismiss at 33–35, Bold Alliance v. Fed. Energy Regul. Comm'n, No. 1:17-cv-01822 (RJL), 2018 WL 4681004 (D.D.C. 2018) (arguing that granting blanket certificates that allow applicants to condemn property not specifically described in their existing applications violates constitutional separation of powers principles and the private nondelegation doctrine).

256 *See* Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902); *see also* Beary Landscaping, Inc. v. Costigan, 667 F.3d 947, 950 (7th Cir. 2012) (noting that, although separation of powers provisions are not applicable to the states, "an offshoot of the constitutional nondelegation doctrine that is appliable to the states" is due process constraints).

257 *See* Lawrence, *supra* note 55, at 694 (arguing that "due process is [the] most satisfactory" of the available mechanisms for oversight of private delegations "because due

power, the Takings Clause is applicable, and these delegations should be viewed as presumptively unconstitutional under the Court's modern takings jurisprudence.

III
THE TAKINGS CLAUSE AND DIRECT DELEGATIONS OF THE EMINENT DOMAIN POWER

Clark and *Strickley* are in tension with the Court's modern takings jurisprudence, which justifies its deferential approach to the public use requirement based on the underlying decision-making process involving accountable public officials and being fair. Because direct delegations do not involve a decision-making process involving public officials, I propose that takings that occur pursuant to direct delegations should be viewed as presumptively invalid under the Takings Clause. The direct delegations challenged in Texas, Louisiana, and Ohio would be presumptively invalid under this approach.

A. Kelo *and Private Delegations*

Although *Kelo* is generally viewed as affirming that federal courts should generally defer to state and local governments' public use determinations, it also justified such deference based on the decision-making process involving accountable officials and a public process. According deference to private entities' public use determinations is, in this respect, at odds with *Kelo*, and such a deferential test fails to recognize the heightened risk of direct delegation takings being for purely private purposes.[258] Thus, I argue that *Kelo* lays the foundation for limiting private delegations of the eminent domain power.[259]

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process traditionally includes a concern about the underlying problem with private delegation: the self-interested decisionmaker"); Volokh, *supra* note 4, at 940, 955 (noting that the "non-delegation doctrine seems to have much less bite than the Due Process Clause in potentially controlling private delegations of regulatory power"); *see also* Rodriguez, *supra* note 51, at 387–88 (criticizing the D.C. Circuit's reasoning in *Amtrak* as "inscrutable and inexplicable").

258 Douglas W. Kmiec, *2006 Templeton Lecture: Eminent Domain Post*-Kelo, 9 U. PA. J. CONST. L. 501, 527 (2006) (noting that *Kelo* involved "the question of which institutions in our society should decide what the proper limits of eminent domain are").

259 Professor Mahoney has similarly argued that the majority opinion together with Justice Kennedy's concurrence "can be read as signaling a willingness to enjoin condemnations in situations where there is convincing evidence of government favoritism or animus, or where there is no plausible claim that the overall public interest is being served." Mahoney, *supra* note 33, at 131.

In his majority opinion in *Kelo*, Justice Stevens held that courts should generally defer to state and local government determinations as to the public use requirement. He justified this deference based on the political process leading to the takings. Stevens observed that, as to the economic development taking at issue, neighborhood meetings on the proposed development were held to educate the public.[260] The city both reviewed and approved the specific plan for the economic development.[261] Stevens highlighted the "comprehensive character of the plan."[262] He also observed that the states were best positioned to determine local needs and had made "considered judgments about the efficacy of its development plan."[263] Accordingly, he declined to second-guess the city's decision that was the result of a public and comprehensive process.[264]

Likewise, Justice Kennedy also closely examined the process leading to the approval of the development plan. He observed that the city reviewed a variety of development plans and that the taking "occurred in the context of a comprehensive development plan meant to address a serious citywide depression."[265] He also noted that the "city complied with elaborate procedural requirements that facilitate[d] review of the record and inquiry into the city's purposes," such that deference to the city was warranted.[266]

The Court's decision, overall, demonstrates that state and local governments are entrusted with deciding what constitutes a public use. The Court will generally defer to a state or city's decision that a taking will further the public welfare if the decision-making process does not raise questions that the taking is actually for private purposes.

Thus, *Kelo* could be read as establishing, in part, a "who" rule that is structural in nature in that it seemingly requires a public decision-making process involving accountable government officials. Procedural

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260 Kelo v. City of New London, 545 U.S. 469, 473 (2005). Importantly, as the trial court opinion detailed, the plan was approved only following public hearings and opportunities for the public to comment and oppose the plan. Kelo v. City of New London, No. 557299, 2002 Conn. Super. LEXIS 789, *220 (Conn. Sup. Ct. March 13, 2002).

261 *Kelo*, 545 U.S. at 473. Indeed, multiple "state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the area, which varied in extensiveness and emphasis." *Id.* at 473 n.2.

262 *Id.* at 484.

263 *Id.* at 482, 488.

264 *Id.* at 488–89.

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

266 *Id.*

due process similarly focuses on *who* qualifies as a proper decision-maker and requires an impartial decision-maker in certain settings.[267] However, unlike procedural due process, which vindicates general fairness interests, a *Kelo* "who" rule would be calculated to ensure takings of property are for "public use," not private use.[268]

Such "who" rules are relatively prevalent in constitutional law and are in no way limited to the procedural due process context.[269] In crafting such rules, the Court has shifted decision-making implicating constitutional rights away from isolated nonaccountable public officials to accountable state legislatures,[270] as well as away from "potentially faction-dominated state legislatures to the presumably more temperate members of state judicial departments."[271] Such rules also are prevalent with respect to agency delegations and the Court can "divert constitutionally sensitive decisions from specialized policymakers to the more representative and accountable full membership of Congress without speaking the language of . . . 'nondelegation.'"[272] The Court accomplishes this by applying less deference to agency judgments than congressional judgments.[273]

Here, although the direct delegations at issue are to private parties rather than agencies, the Court can protect the values underlying the Fifth Amendment by applying a structural "who" rule that accords deference only where a taking is overseen by accountable public actors

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267 Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1773 (2001).

268 *Id.*

269 *Id.* at 1777.

270 For example, as Professor Coenen has noted, in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the Court determined that "broadly accountable state officials—rather than 'isolated' university authorities—should take responsibility for forging remedial race-conscious admissions programs." Professor Coenen has argued that the decision can be viewed as "'promot[ing] both democracy and deliberation' in the framing of government policy in a field of great constitutional delicacy." *Id.* at 1779 (quoting Cass R. Sunstein, *Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 48 (1996)).

271 Similarly, Professor Coenen has argued that, in Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992), the Court created a "who" rule by holding all land use restrictions to be presumptively unconstitutional if they "deprive landowners of all economically beneficial or productive use of land." Coenen, *supra* note 267, at 1780. The Court also recognized, however, that "background principles of the state's law of property and nuisance could justify regulatory action that negated all such valuable use of one's property. *Id.* at 1780. Thus, "[i]n an area fraught with constitutional difficulty, it shifted power away from potentially faction-dominated state legislatures to the presumably more temperate members of state judicial departments." *Id.* at 1781.

272 *Id.* at 1785.

273 *Id.*

rather than private parties and the public actors closely scrutinize the proposed taking. However, such direct delegations do not involve any oversight. No state approval occurs following reasoned deliberation. No public participation is available. No comprehensive plan exists. Instead, these delegations involve legislatures declaring generally that a particular use constitutes a per se public purpose. As a result, no specific balancing of the public benefits versus the harms occurs for a particular project.

This lack of process creates concerns that the takings pursuant to direct delegations are, in fact, for private purposes.[274] And, both Stevens and Kennedy stress in *Kelo* that, despite broad deference generally being the rule, takings still cannot be for private purposes. If a taking were for a private purpose, the Court could strike it down "for its actual purpose even if the project will or could conceivably produce a legitimate public benefit"[275] because "legislation or other governmental policies are invalid if developed or applied for constitutionally illegitimate reasons."[276]

Indeed, Kennedy indicated his willingness to recognize a "more stringent standard of review" than rational basis review "for a more narrowly drawn category of takings."[277] He observed that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable

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274 Courts often distinguish between (1) procedural due process issues related to decision-maker bias and (2) procedural due process issues related to inadequate procedures more generally, noting they involve "two separate branches of jurisprudence." *See* United Retail & Wholesale Emps. Teamsters Union Loc. No. 115 Pension Plan v. Yahn & Mc Donnell, Inc., 787 F.2d 128, 137 (3d Cir. 1986). Thus, Sections III.A–B primarily address the issue of the self-interested decision-maker and bias (but not whether additional process is necessary). However, in addition to the issue of the biased decision-maker (the who), the lack of any governmental decision-making process also implicates *Mathews v. Eldridge*, 424 U.S. 319 (1974), establishing a three-part balancing test for determining when procedural due process is violated. The second prong of this test assesses the reliability and fairness of existing procedures, the likelihood of erroneous decision-making and deprivation, and the probative value of additional procedures at getting at the truth and the right decision. In light of the absence of procedures in place for private party takings (aside from highly deferential court review as to the public use determination), there is a high likelihood that the decision will be erroneous (i.e., made to promote private use) given the self-interests of the decision-maker and in addition to other various reasons. Thus, the concern underlying the *Mathews* test should additionally give rise to a presumption that a decision to condemn was made for private use, not public use.

275 Daniel Hafetz, Note, *Ferreting Out Favoritism: Bringing Pretext Claims After* Kelo, 77 FORDHAM L. REV. 3095, at 3158 (2009).

276 Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 71 (1997).

277 Kelo v. City of New London, 545 U.S. 469, 493 (2005).

or otherwise) of invalidity is warranted."[278] He suggested such cases could arise where the transfer was "suspicious," the procedures were "prone to abuse," or the "purported benefits" are "trivial or implausible," but refused to further engage in "conjecture as to what sort of cases might justify a more demanding standard" other than indicating that the taking at issue did not fall into that category.[279]

Professor Eagle has written that this narrow category should apply to transactions where the private entity "(i) initiated the condemnation or was hand-selected by officials ordering the taking; (ii) would benefit substantially from the taking; and (iii) benefited from a complex and perhaps opaque administrative process."[280] Direct delegations of the eminent domain power would, at least under this framing, fall into the narrow category. With respect to such delegations, companies can decide when and where to exercise the eminent domain power. They also benefit substantially from the taking, and decisions regarding public necessity are made in a board room by the private company itself and no administrative record to review exists.

Direct private delegations would not be the first case where the Court has applied heightened scrutiny where a high likelihood for abuse of process exists. Thus, in *Nollan v. California Coastal Commission*[281] and *Dolan v. City of Tigard*,[282] the Court rejected rational basis review and instead required a showing by the government that any exactions bear an essential nexus to the alleged police power purpose motivating the exaction.[283]

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278 *Id.*

279 *Id.*

280 Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023, 1061 (2011).

281 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

282 Dolan v. City of Tigard, 512 U.S. 374 (1994).

283 *See Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 386. If a nexus exists, the government must still satisfy a "rough proportionality" requirement and show the required dedication "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391; Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. 105, 122 ("The *Nollan*/*Dolan* test was developed to increase the scrutiny for physical exactions because of the unconstitutional conditions doctrine and the concern about individual permitting and the potential for governmental abuse of power."). Scholars have proposed heightened scrutiny for takings more generally (even where no improper private purpose is afoot), but the Court has generally signaled its commitment to a more deferential approach. *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 937 (2003); *see also* Somin, *supra* note 43, at 185 (arguing that "courts should forbid most if not all uses of the economic development rationale as inconsistent with the Public Use Clauses of the federal and state constitutions").

Ultimately, where takings by private entities are not overseen and scrutinized by accountable public officials, the Court should view them as presumptively invalid with the possible opportunity for a company to rebut the presumption. This approach not only helps to ensure a fair and accountable process but also ensures that all interests at play are considered, as discussed further in Part IV, below.

B. Direct Delegation Challenges

Because Texas (and other states) directly delegates the eminent domain power to private companies, takings pursuant to these delegations should be viewed as presumptively invalid under the Takings Clause. Nevertheless, the issue as to these delegations can easily be remedied by way of meaningful government oversight.

As discussed above in Section I.C.2, in Texas, a pipeline company can exercise the eminent domain power if they qualify as a "common carrier."[284] The Texas Supreme Court has held that a public use exists so long as the pipeline company is a "common carrier."[285] Yet, unlike railroads, which are viewed as the classic example of a common carrier (and also are often subject to legislative and executive oversight),[286] these pipelines generally do not serve the general public directly.[287] Rather, in Texas, a pipeline company can qualify as a common carrier if it shows a reasonable probability that the pipeline will be used to transport oil, hydrogen, or carbon owned by at least one other non-affiliate party other than the condemnor at some point in the future.[288]

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284 TEX. NAT. RES. CODE ANN. §§ 111.002(6), 111.019 (West 2021).

285 Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., L.L.C. (*Texas Rice I*), 363 S.W.3d 192, 200–02 (Tex. 2012).

286 Railroads were generally required to serve all persons wishing to travel on their lines. *See* Union Lime Co. v. Chicago & Nw. Ry., 233 U.S. 211, 220 (1914) (finding a public use "so long as the purpose of maintaining the track is to serve all persons who may desire it, and all can demand, as a right, to be served, without discrimination"); *see also* Johnson, *supra* note 5, at 466 (noting that "the profit-making interest of rail companies is almost inextricably linked with that of the public").

287 Professor Somin has argued that, with respect to pipeline condemnations, "in many cases the common carrier requirement is either ignored or only given lip service." Ilya Somin, *The Growing Battle Over the Use of Eminent Domain to Take Property for Pipelines*, THE WASH. POST (June 7, 2016, 2:45 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/07/the-growing-battle-over-the-use-of-eminent-domain-to-take-property-for-pipelines/ [https://perma.cc/BN52-5UAN]. Furthermore, "[e]ven pipeline takings that fully comply with public use restrictions still sometimes inflict harm on property owners and the environment that outweighs any likely benefits." *Id.*

288 Denbury Green Pipeline-Tex., L.L.C. v. Tex. Rice Land Partners, Ltd. (*Texas Rice II*), 510 S.W.3d 909 (Tex. 2017); TEX. BUS. ORGS. CODE ANN. § 2.105 (West 2021). In *Texas Rice II*, the Texas Supreme Court concluded that Denbury Green had established a

By treating common carrier status as creating a per se public use, other interests affected by a taking can be ignored. Rather, the company can make decisions based on self-interest alone. Thus, the risk exists that a company will condemn property for a pipeline even where the public benefits are outweighed by the impact on the landowners, community, and environment.

Texas also has delegated the decision as to which land is "necessary for 'public use'" to the pipeline company.[289] This determination is generally made during a private board meeting without any public input.[290] Counterintuitively, this allows pipeline companies to exercise the eminent domain power much more easily than their governmental counterparts. For example, when a governmental entity initiates a condemnation proceeding, it must "(1) authorize the initiation of the condemnation proceeding at a public meeting by a record vote; and (2) include in the notice for the public meeting . . . the consideration of the use of eminent domain to condemn property."[291]

After the board makes the "necessary for public use" determination, no administrative agency (or other legislative or executive body) reviews the company's decision (but a condemnee can later challenge the pipeline company's status as a common carrier in court). Importantly, the Texas Railroad Commission has no authority to prevent a pipeline company from exercising the power of eminent domain even if other interests were at play that outweigh the benefits to the public from the pipeline construction. The Texas scheme is thus similar to *Eubank* where the Court observed that the ordinance

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reasonable probability that the pipeline would serve the public at some point after construction. *Texas Rice II*, 510 S.W.3d at 916. The underlying evidence was a singular 2013 contract to transport carbon for another company, as well as the proximity of the pipeline to that company, as well as one other carbon company. *Id.*

289 *See* TEX. NAT. RES. CODE ANN. § 111.019 (noting a common carrier may condemn property "necessary for the construction, maintenance, or operation of the common carrier pipeline"); Boerschig v. Trans-Pecos Pipeline, L.L.C., 872 F.3d 701, 708 (5th Cir. 2017) (discussing the "necessary for 'public use'" requirement). Generally, the company's board must pass a resolution declaring the taking is necessary for a public use. *See* Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565 (Tex. App. 1998) (as to the "necessary" component, "the condemnor need only show that its board of directors determined that the taking was necessary"). The Texas courts find that the "legislative determination that a given exercise of eminent domain is for the public use creates a presumption in favor of the decision of the condemnor that the taking is necessary to accomplish the authorized purpose." Bevly v. Tenngasco Gas Gathering Co., 638 S.W.2d 118, 121 (Tex. App. 1982).

290 *See* TC&C Real Est. Holdings, Inc. v. ETC Katy Pipeline, Ltd., No. 10-16-00134-CV, 2017 Tex. App. LEXIS 11893, at *9 (Dec. 20, 2017) (addressing eminent domain power under Texas Utility Code).

291 TEX. GOV'T CODE ANN. § 2206.053(a)(1)–(2).

regarding setting the building line "leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case."[292]

Moreover, direct delegations differ from the Court's more recent cases upholding private delegations of legislative power. Specifically, direct delegations do not provide an agency with the "final say" over a company's decision to condemn property, whereas the frameworks the Court has approved did, in fact, give a public entity the "final say" over the disputed issue. For example, in *New Motor Vehicle Board v. Orrin W. Fox Co*., the Court rejected a due process challenge to a statute requiring a car manufacturer to obtain the approval of a state board before opening a retail car dealership within the market area of an existing franchisee *only if* the existing franchisee protested the opening of the new dealership.[293] Although a private party had discretion as to whether to protest, the state board (a neutral body) would hold a hearing as to whether to allow the new dealership to open.[294] Similarly, in *Midkiff*, the landowners argued in their brief that the statutory scheme allowing self-interested lessees to initiate the process to condemn the lessors' property violated due process.[295] After the process was initiated, a government agency held a public hearing to determine whether acquisition of the property would further the public purposes of the scheme.[296] The Court rejected the landowners' argument in a footnote, stating that "[t]he argument that due process prohibits allowing lessees to initiate the taking process was essentially rejected by this Court in *New Motor Vehicle Board v. Fox Co.*"[297] Thus, in both the *New Motor* and *Midkiff* cases, "[a] private party could initiate the process leading to a government official deciding whether and how to exercise governmental authority, but only a government official had the final say."[298]

In Texas, limited judicial review exists of the public use determination. Courts find the public use requirement satisfied,

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292 Eubank v. City of Richmond, 226 U.S. 137, 143 (1912).

293 New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 98–100 (1978).

294 *Id.* at 103.

295 *See* Brief for Appellees at 83, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (No. 83–141), 1984 WL 987633 ("[D]ue process forbids the state from delegating absolute, standardless authority over the right to invoke its eminent domain power to private parties, who are neither legally nor politically accountable to those over whom they may exercise authority or to the public for the criteria that guide their decisions.").

296 *Midkiff*, 467 U.S. at 234.

297 *Id.* at 243 n.6.

298 Larkin, *supra* note 181, at 51.

provided the company can prove its common carrier status. Courts do not engage in any further review of the public use question—no balancing of the other interests implicated by the taking occurs. Judicial review is also available of a private company's board resolution concluding the taking is necessary for public use, but the board's "determination is 'conclusive, absent fraud, bad faith, abuse of discretion, or arbitrary or capricious action.'"[299]

This judicial review is insufficient to remedy the bias present in the taking decision as it effectively rubberstamps the private company's decision.[300] Moreover, it is expensive, and many condemnees cannot afford judicial review because attorney's fees are typically not allowed in condemnation cases. Outside the eminent domain context, judicial review of a self-interested party's decision would likely provide adequate oversight for procedural due process purposes only if the court held a de novo hearing on the issue.[301] Importantly, such a hearing would be required regardless of the merits of the underlying claim, as it is a process-oriented requirement.[302] Federal courts,

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[299] Boerschig v. Trans-Pecos Pipeline, L.L.C., 872 F.3d 701, 703 (5th Cir. 2017) (quoting Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565 (Tex. App. 1998)); *see* Robert C. Bird, *Reviving Necessity in Eminent Domain*, 33 HARV. J.L. & PUB. POL'Y 239, 269–70 (2010) (criticizing application of an arbitrary and capricious standard to review of entities' decisions as to whether a taking is necessary).

[300] Where an initial decision was made by a biased decision-maker, procedural due process requires the claimant a subsequent opportunity to challenge the earlier determination in a full hearing that does not merely rubberstamp the earlier decision. *See* Locurto v. Safir, 264 F.3d 154, 174 (2d Cir. 2001).

[301] *See* McDaniels v. Flick, 59 F.3d 446, 460–61 (3d Cir. 1995) (noting that, even if the pre-termination decision-maker was biased, state statutes provided that a "a court may hold a *de novo* hearing 'in the event a full and complete record of the proceedings before the local agency was not made'" and a court could "modify or set aside an agency decision if it finds violations of the employee's constitutional rights, an error of law, or the necessary findings of fact were not supported by substantial evidence"); *see also* Chmielinski v. Mass. Office of the Comm'r of Prob., 513 F.3d 309, 317 n.6 (1st Cir. 2008) (observing that, even assuming bias of the pre-termination decision-maker, the post-termination procedures "were obviously adequate" and involved an administrative appeal before neutral decision-makers); McKinney v. Pate, 20 F.3d 1550, 1563 (11th Cir. 1994) (en banc) (finding no due process claim based on an initial decision by a biased decision-maker where the state provided judicial review of that decision and the review was "more of the nature of an original judicial proceeding (which it is) than of a classic appeal of a lower judicial tribunal," such that the court "'[r]eview[] the entire cause [and] consider[] . . . every aspect' of the case to determine whether due process was observed" (alteration in original) (quoting Seminole Cnty. Bd. of Cnty. Comm'rs v. Long, 422 So.2d 938, 941 n.2 (1982))).

[302] Allegheny Def. Project v. Fed. Energy Regul. Comm'n, 932 F.3d 940, 956 (D.C. Cir. 2019) (Millett, J., concurring) (the right to procedural due process "does not depend upon the merits of a claimant's substantive assertions" (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978))).

however, may be hesitant to interfere with state and local concerns by making the decisions regarding the exercise of power in the first instance. By presuming such takings to be invalid absent any meaningful oversight, the Court is enforcing the Takings Clause through a process-oriented structural approach, which ensures accountability over exercises of the eminent domain power, as well as the recognition of important federalism interests.[303]

IV
ENERGY PROJECTS AND PUBLIC USE

Eminent domain is essential to the success of new energy development projects, in part, because it allows projects to be more efficient.[304] However, these projects are not without controversy, with both property rights advocates and environmentalists claiming they do not satisfy the public use requirement.[305] This Article, however, does not seek to provide a comprehensive answer as to the precise boundaries of public use as applied to energy infrastructure projects. Instead, the focus of this Article is to argue that government must have some meaningful oversight over a private company's use of eminent domain. Ensuring government involvement in the public use determination furthers fairness considerations and provides opportunities for public participation. Ultimately, it results in a decision that accounts for multiple public interest factors, including the impact on landowners and their communities, as well as other social, environmental, and safety factors.

A. The Role of Private Delegations and Energy Infrastructure

Private delegations of the eminent domain power have proven particularly crucial to energy infrastructure development. Although companies build pipelines to profit, the pipelines also transport energy

303 *Cf.* Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881, 911, 913–14 (2016) (arguing the absence of public accountability (either through the courts or political branches of government) "likely renders private-sector rulemaking unconstitutional").

304 As Professor Epstein has observed, "It would indeed be a social disaster of major proportions if no private business could enter either the transportation or the power industry" because they were unable to utilize the state's eminent domain power to construct the necessary energy infrastructure. Richard Epstein, *The Classical Liberal Constitution: Vindicated*, 8 N.Y.U. J.L. & LIBERTY 743, 783 (2014).

305 *See* Coleman & Klass, *supra* note 9, at 662–63 (noting "these projects remain controversial among landowners and some local environmental groups who claim they are not a 'public use'").

sources necessary for our modern economy.[306] Thus, allowing private companies to exercise the eminent domain power results in saving state and local governments "time and money" and, potentially, results in lower energy costs.[307] Nevertheless, especially in the midst of transitioning from fossil fuels to clean and renewable energies, it is essential that meaningful government oversight remains over exercises of the eminent domain power with respect to pipelines, transmission lines, and similar infrastructure.

Use of the eminent domain power for energy infrastructure is generally justified on efficiency grounds and is necessary for a successful transition to clean and renewable energies.[308] The need may be particularly acute because, compared with economic development projects, energy transport companies may face more severe "holdout" problems due to the linear nature of the projects.[309] Without the availability of eminent domain, one landowner on the pipeline route could seek compensation in an amount that makes the project not viable, or the landowner could simply outright refuse to sell.[310]

The building of new infrastructure for renewable energy will likely raise new questions regarding the boundaries of the public use requirement.[311] Professors Coleman and Klass have argued that such projects have a public use based, in part, on these projects resulting in lower energy costs to the public. Yet, there may be instances where any benefits in costs to customers are simply too attenuated to justify a

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306 *Id.*

307 Johnson, *supra* note 5, at 466 (arguing that allowing railroad companies to exercise the eminent domain power aligns with the public interest from an efficiency standpoint).

308 Saxer, *supra* note 11, at 600, 651–52 ("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 that increase renewable energy and maintain grid reliability.").

309 Coleman & Klass, *supra* note 9, at 716–17 (noting the holdout problem with respect to energy infrastructure and how it "is exacerbated in the case of linear projects like highways, transmission lines, and pipelines, where the condemning authority must assemble easements across potentially hundreds of parcels of land, multiplying the potential for holdouts").

310 Klass & Meinhardt, *supra* note 98, at 983 ("While most pipeline companies are able to obtain necessary easements through voluntary transactions with landowners, the power of eminent domain is an important tool for pipeline companies in their negotiations, and a significant disincentive for landowners to demand excessive compensation for easements or otherwise attempt to oppose the pipeline.").

311 Saxer, *supra* note 11, at 603 ("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.").

project being for "public use" or any incremental decreases in cost may be outweighed by other factors. Similarly, pipelines, transmission lines, and similar infrastructure is essential to ensuring the public is able to access fossil fuels and renewable energies, as opposed to it simply remaining where it is extracted or produced.[312] Those projects too may be outweighed by concerns about their long-term viability, as well as involve delicate line drawing between these projects and other projects (like sports stadiums) that may not justify private use of eminent domain.

A public use also may exist where it benefits multiple customers.[313] "[T]ricky questions" are presented by such an interpretation, including "[s]hould a project's benefits be determined by how many companies use a particular facility? Or should it count consumers and producers that are incidentally benefited? Could a pipeline built for public use become a non-public use if a single company suddenly purchased a number of upstream producers?"[314]

Despite these potential questions, Professors Coleman and Klass have urged for reconsideration of "the role of *Kelo*-style arguments in the context of energy transport projects," as they may result in laws making it more difficult to move toward clean energies.[315] Instead, they argue for reforms that "will allow the construction of critical energy projects in a manner that more fully embraces impacted communities and can provide additional procedural rights and compensation for landowners."[316]

Requiring meaningful government oversight over direct delegations (due to the interpretation of *Kelo* argued for herein) provides opportunities for affected communities to be involved in the process and would likely result in additional procedural rights for affected landowners to be involved in the process. Yet, such oversight will also likely result in inefficiencies with respect to some energy projects. I do not seek herein to wade into any debate regarding the exact boundaries of the public use doctrine with respect to energy infrastructure. However, constitutional protections should not somehow apply with lessened force simply for efficiency's sake. The protections of the Fifth Amendment often "tend[] to collapse during times of political and

312 Coleman & Klass, *supra* note 9, at 662.

313 *Id.* at 718.

314 *Id.*

315 *Id.* at 663–64.

316 *Id.* at 664.

fiscal exigency."[317] The result of these protections failing can have significant costs for vulnerable populations, as discussed more in Section IV.B, *infra*. The approach to direct delegations advocated for herein seeks to ensure that other interests that bear on the public use question are considered by governmental entities so that important decisions regarding public use are not being made by self-interested companies alone. In states that currently allow direct delegations, the approach argued for herein will likely result in increased litigation.[318] And, litigation ultimately can delay construction, increase overall costs, and potentially result in the abandonment of the project.[319] Recent successes with respect to challenges against pipelines have already led some to observe that "the processes associated with the expansion and construction of these new pipelines have become more expensive, more time-consuming, and more uncertain in every respect."[320]

Yet, as states transition away from fossil fuels and toward renewables, ensuring government oversight over these projects is essential to ensure that government—not a private energy company—is undertaking the delicate balancing of public interest factors required.[321] Just as with economic development takings, numerous other interests are at play that may outweigh the benefits to the public from the use of eminent domain, including the impact on landowners

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317 Hudson, *supra* note 44, at 1305 n.106.

318 As technology and science related to renewables continues to advance, states' eminent domain and related regulatory regimes will have to evolve to keep pace. To the extent the Court is affording such private delegations some sort of special historical treatment, the Court should recognize that schemes allowing private parties to exercise eminent domain authority without governmental oversight are in no way the norm. *See id.* at 1319 (arguing that "that eminent domain actions should [not] be excused from modern due process standards based on some asserted history or tradition"); *see also* Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.").

319 Chloe J. Marie & Ross H. Pifer, *Survey on Oil & Gas: Federal Legal and Regulatory Developments Relating to the U.S. Pipeline Industry*, 7 TEX. A&M J. PROP. L. 495, 510 (2021).

320 *Id.* at 511.

321 Saxer, *supra* note 11, at 602–03 ("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.").

and communities, as well as other social, safety, and environmental factors. Relatedly, such projects may be approved despite close consideration of the viability or long-term needs of these projects. Abandoned infrastructure also raises unique environmental and social challenges.[322]

States have leeway as to how to structure oversight over delegations. States could require energy companies to obtain a certificate of public convenience and necessity prior to condemning property similar to the FERC process under the NGA. Indeed, Texas has already adopted such an approach with respect to exercises of eminent domain by the Texas Public Utility Commission.[323] Such oversight should not be simply perfunctory or function merely as an on-off switch,[324] however, but rather should be sufficient to guard against decisions being made based on self-interest alone.[325]

B. Public Use Considerations

Requiring meaningful oversight over private delegations of the eminent domain power allows for important factors bearing on the public interest to be considered, including the impact on landowners, communities, and the environment, before companies condemn property for large infrastructure projects. Furthermore, the approach advocated herein increases the likelihood that local governments and the public are involved in the decision-making process.

"Few powers of government have as immediate and intrusive an impact on the lives of citizens as the power of eminent domain."[326] Landowners interests are varied, as "[p]roperty can be valuable to individuals for myriad reasons, including an ancestral connection to the property; 'historic, religious, and cultural significance;' or emotional

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322 *See generally id.* (discussing the impact of abandoned infrastructure).

323 TEX. UTIL. CODE ANN. § 37.056 (2021).

324 Metzger, *supra* note 4, at 1440–41 ("Yet while *Carter*'s constitutional prohibition on private delegations thus remains alive in theory, it is all but dead in practice. Almost all private delegations are upheld. Courts are satisfied by formal provision for government ratification, however perfunctory. The private delegations that have been sustained often involve substantial direct control over third parties; even seemingly limited delegations that simply grant private entities the power to trigger government action, such as the ability to force an administrative hearing or commence a civil penalty action, can be quite significant.").

325 *See* Hammond, *supra* note 4, at 1728 (arguing that oversight should not function merely as an "on-off" switch, but rather should be structured to guard against arbitrariness).

326 Goldstein v. Pataki, 516 F.3d 50, 52 (2d Cir. 2008).

attachment."[327] In short, land "is more than mere dirt, brush, or rugged terrain," as demonstrated "by the fervor with which individuals will defend their right to inhabit or use that property."[328]

Compensation to landowners does not necessarily make them whole, especially when the value they attach to land is not economic in nature. Use of eminent domain also can result in transfers to private companies at below market rates, and thus, results in inefficient transactions as well.[329] This can be particularly severe where a private party is the condemnor.[330]

One way to view requiring meaningful governmental oversight over direct delegations is by establishing "multiple veto points" before the use of a state's eminent domain power rearranges property rights.[331] Requiring government bodies to "sign off" on a private party's exercise of the eminent domain power makes exercises of the eminent domain power more difficult, which ultimately reduces when it will be used.[332] This knowledge, in turn, may "make property owners feel less vulnerable to dislocations and more in control of their destinies."[333]

The approach argued for herein also makes it less likely that new infrastructure projects disproportionately affect marginalized communities. In his dissent in *Kelo*, Justice Thomas recognized that the deferential "public use" standard the Court adopted was "deeply perverse," as it "encourages 'those citizens with disproportionate

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327 Kristin J. Hazelwood, *Pipelines, Electrical Lines, and Little Pink Houses: Do Any Limits on "Public Use" Remain in Eminent Domain Law?*, 25 GEO. MASON L. REV. 711, 711 (2018) (footnotes omitted); *see* Emilio R. Longoria, *Properly Construing the Just Compensation Clause*, 64 B.C. L. REV. (forthcoming 2023) (manuscript at 15) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4251809 [https://perma.cc/Z5A7-DA48]) ("Indeed, Alexander Hamilton once described the 'security of property' as 'one of the great objects of Government.' Not just because property is essential to our daily routines, but because of the ways that property influences our 'community, economic opportunity, and identity.' Property often 'communicates' intimate messages about its owner's 'importance, social position, and worth to others.' Which makes its unconstitutional confiscation that much more devastating to its victim and why it is so important to protect.").

328 *Id.*

329 SOMIN, supra note 16, at 205–09.

330 Ilya Somin, *A Supreme Court Eminent Domain Case Both Sides Deserve to Lose*, REASON: THE VOLOKH CONSPIRACY (Apr. 30, 2021, 5:55 PM), https://reason.com/volokh/2021/04/30/a-supreme-court-eminent-domain-case-both-sides-deserve-to-lose/ [https://perma.cc/TQ3Z-PBC8].

331 *Cf.* Mahoney, *supra* note 33, at 129–31 (arguing that requiring judicial oversight over exercises of the eminent domain power "increases the number of government actors who have to agree in order for rearrangements of property rights to occur" and thus ensures the state does not "expropriat[e] the wealth of their citizenry").

332 *Id.* at 129–30.

333 *Id.* at 130–31.

influence and power in the political process, including large corporations and development firms' to victimize the weak."[334] He observed that, with respect to the development project upheld in *Berman*, "[o]ver 97 percent of the individuals forcibly removed from their homes . . . were black."[335] Indeed, multiple urban planning projects have resulted in the displacement of minority populations and disproportionality fall on low-income communities and the least politically powerful.[336] Justice Thomas's concern becomes even more heightened when such decisions are removed from government oversight altogether.

Relatedly, providing government oversight over delegations of the eminent domain power ensures that local governments have an opportunity to be involved in the decision-making process. State statutes directly delegating eminent domain power to private companies have the effect of preempting local governments from making important decisions regarding infrastructure projects in their communities. Professors Davidson and Mulvaney have observed that local governments, as compared to state governments, are generally viewed as offering more meaningful opportunities for civic participation, can respond quickly to urgent challenges, and provide the opportunity for both innovation and experimentation.[337] Thus, they argue that states should generally avoid preempting local governments from making decisions that respond to "local preferences and innovate in the face of changing conditions" and urge greater recognition of the important role that local government plays in takings law.[338] Rather, states should "protect space for local authority and input."[339]

By creating a public and open process related to various projects, local governments have an opportunity to more fully participate in the decision-making process and ensure that the siting decisions account for the interests of their community. Indeed, one of the recent challenges to a private delegation of the eminent domain power in

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334 Kelo v. City of New London, 545 U.S. 469, 522 (Thomas, J., dissenting) (quoting *id.* at 505 (O'Connor, J., dissenting)).

335 *Id.*

336 *Id.* at 521; *see* Garnett, *supra* note 283, at 952–53 (discussing the negative policy consequences flowing from urban renewal projects and the highway system both of which relied heavily on the use of eminent domain to assemble large pieces of land).

337 Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 266 (2021).

338 *Id.* at 221–22.

339 *Id.* at 272.

Texas was brought by two local government entities, which argued that they were left out of the decision-making process.[340]

Relatedly, direct delegations remove the more general ability of public participation with respect to important infrastructure decisions. By requiring government oversight, important decisions regarding takings are taken outside the boardroom and into the public eye. This allows an opportunity for public participation and for different interest groups to present their arguments both in favor and against such projects.[341]

Finally, in the context of direct delegations, environmental concerns are largely ignored with respect to such important project decisions. The impacts of energy and transportation infrastructure projects on the environment are well-documented and will be only briefly restated here. From an environmental perspective, routing determinations can fragment open space and working lands, destroy wildlife habitats, destroy centuries-old forests, and eliminate scenic landscapes.[342] They also can affect water quality and groundwater resources, as well as affect agricultural operations.[343] Further, pipelines carrying gases or liquids pose significant safety risks if leakages or spills occur and can damage drinking water and the environment overall.[344] By ensuring government oversight over delegations of the eminent domain power, the myriad of interests implicated by energy and transportation infrastructure can be considered in deciding whether a public use exists.

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340 *See* Appellants' Brief at 11–13, Sansom v. Tex. R.R. Comm'n, No. 03-19-00469-CV, 2021 WL 2006312 (Tex. App. May 20, 2021), 2020 WL 906851.

341 *See* Marianne Engelman Lado & Kenneth Rumelt, *Pipeline Struggles: Case Studies in Ground Up Lawyering*, 45 HARV. ENV'T L. REV. 377, 389–95 (2021) (arguing for community-driven lawyering to further environmental justice goals and noting the importance of "open[ing] a process for public participation" and to "create space for community voices in the political process").

342 *See* Uma Outka, *Renewable Energy Siting for the Critical Decade*, 69 U. KAN. L. REV. 857, 862–74 (2021) (observing how decisions regarding siting of critical infrastructure can affect the environment); *see also* Brief of Amicus Curiae Tex. Land Tr. Council at 17, Sansom, 2021 WL 2006312 (No. 03-19-00469-CV).

343 Hannah J. Wiseman, *Taxing Local Energy Externalities*, 96 NOTRE DAME L. REV. 563, 578, 582 (2020) (noting that pipelines, as well as renewable energy infrastructure have multiple negative effects, including leading to soil erosion polluting streams and other waterbodies, as well as fragmenting habits and killing wildlife).

344 Sara Gosman, *Planning for Failure: Pipelines, Risk, and the Energy Revolution*, 81 OHIO ST. L.J. 349, 352–53 (2020) (noting that current pipeline siting "defers largely to the pipeline company and its chosen route" and fail to consider safety with respect to siting decisions); *id.* at 370 (noting that "[w]hen a pipeline system releases gases or liquids, it can damage natural resources, harm human health, and injure or kill members of the public").

CONCLUSION

Delegations of the eminent domain power have largely gone unquestioned despite the Supreme Court and scholars having recently expressed increased interest as to the limits of delegations of other legislative power. Yet, no compelling argument for these delegations' differential treatment exists. Rather, to the extent delegations are structured to allow companies to exercise the eminent domain power without government oversight, the resulting takings should be viewed as presumptively invalid under the Takings Clause. Such an outcome would be consistent with *Kelo*, which rests heavily on decisions to take private property being made by politically accountable government officials pursuant to a public process. It also would resolve the tension between direct delegations of the eminent domain power and the Court's modern due process jurisprudence. The importance of the structure of these delegations is becoming increasingly important as new energy and transportation projects continue to be proposed. Requiring legislative or executive oversight over such projects involving private delegations of the eminent domain power would ensure that exercises of the power are based on the public interest and not self-interest.