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This Land Is Your Land? Survey Delegation Laws as a Compensable Taking

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I. Introduction

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.[1]

These words are no less true today than when James Madison wrote them for the *National Gazette* in 1792, as concerns over ownership and property occupy a central place in our jurisprudence.[2] Property rights are some of the most foundational known to the law, both providing a major impetus to its historical development and creating many of the most familiar interactions that a citizen will have with the legal system.[3] The protection of property rights was an animating factor behind the creation of the Bill of Rights, with the Fifth Amendment to the United States Constitution directly protecting the right to property.[4] This constitutional protection has given rise to innumerable legal assertions of property rights by American citizens over the centuries since its passage.

While the body of property rights involves nuanced common, constitutional, and statutory legal interactions, many of the most insightful jurists have highlighted the dispositive importance of the right to exclude as a central factor behind the law's approach to property.[5] The significance of the right to exclude takes on a particular importance in matters of real property for both cultural and historical reasons, and volumes of scholarship have been

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1. James Madison, *For the National Gazette, 27 March 1792*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Madison/01-14-02-0238 (last visited Feb. 1, 2019) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

2. *See* Paul Turner & Sam Kalen, *Takings and Beyond: Implications for Regulation*, 19 ENERGY L.J. 25, 46 (1998) (discussing the importance of property rights in the development of American federal constitutional jurisprudence).

3. *See id.* (describing the importance of property rights as a dominant theme during the founding and throughout America's federal constitutional jurisprudence).

4. *See* U.S. CONST. amend. V (containing the Takings Clause: "nor shall private property be taken for public use, without just compensation").

5. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (describing the central role that the right to exclude holds in defining property).

produced on issues pertaining to the importance of that right when placed in conflict with harms almost entirely of a symbolic nature.[6]

A. Virginia and the Atlantic Coast Pipeline

Of all the modern legal battlegrounds between eminent domain authority and real property rights, one of the most noteworthy is occasioned by the development of utilities, most significantly in the context of energy development.[7] Publicized and protracted battles between landowners and utility companies have erupted across the nation, as pipeline and power line construction continues to require the use of private land for public benefit.[8] The construction of new pipelines has pitted pro-development business and political interests against anti-pipeline landowners and environmentalists, creating a charged atmosphere in which takings jurisprudence occupies a central role.[9] As a logical result of this context, statutory authority for private entities to perform surveys—a limitation on the landowner's right to exclude that is

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6. *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 995 (2004) (stating that recovery is possible under the common law in cases of trespass to real property even without actual harm).

7. *See generally* Peter G. Guthrie, Annotation, *Eminent Domain: Right to Enter Land for Preliminary Survey or Examination*, 29 A.L.R.3d 1104 (1970) (outlining the arguments for and against the practice of delegating eminent domain authority for surveying purposes).

8. *See* Keith Schneider, *Nebraska Regulators Approve Keystone XL Pipeline After Years of Controversy*, L.A. TIMES (Nov. 20, 2017, 12:15 PM), http://www.latimes.com/nation/la-na-nebraska-keystone-20171120-story.html (describing the legal conflict surrounding construction of the Keystone XL Pipeline) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Blake Nicholson, *Lawsuit Filed by Dakota Access Protesters to Proceed*, ASSOCIATED PRESS (Nov. 14, 2017), https://www.apnews.com/a0bf90f2e1854218832a39ab22ba50a9 (detailing a lawsuit filed by Dakota Access Pipeline protesters in North Dakota alleging civil rights violations) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

9. *See* Michael Martz, *Dominion to Withdraw Lawsuits Against Landowners Over Pipeline Surveys—and Start Over*, DAILY PROGRESS (Apr. 7, 2015), http://www.dailyprogress.com/news/local/dominion-to-withdraw-lawsuits-against-landowners-over-pipeline-surveys-and/article_02d78830-dd81-11e4-9fd4-833eaaf2afc1.html (reporting on Dominion Transmission Inc.'s legal battles with landowners over construction of the Atlantic Coast Pipeline) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

itself a harbinger of future takings—has become a flash point in the larger eminent domain conflict.[10]

This conflict has taken on a particular recent importance in Virginia, where construction of the Atlantic Coast Pipeline has engendered significant legal pushback by landowners.[11] The Atlantic Coast Pipeline (ACP) is a proposed 600-mile natural gas transmission pipeline to be built in the states of West Virginia, Virginia, and North Carolina.[12] The pipeline is to be built and operated by Atlantic, a company created by utility corporations Dominion Energy, Duke Energy, Piedmont Natural Gas, and Southern Company Gas.[13] The controversial pipeline was approved by the Federal Energy Regulatory Commission in October of 2017, and preliminary tree-felling work commenced January 2018.[14]

The project continued to face stiff opposition in its first year, with the most serious challenges stemming from an ongoing series of legal actions.[15] In December 2018, the Fourth Circuit Court of

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10. *See id.* (detailing the resistance of property owners to legal surveys conducted by natural gas companies).

11. *See id.* (referencing multiple lawsuits filed by both landowners and the Atlantic Coast Pipeline consortium).

12. *Atlantic Coast Pipeline*, DOMINION ENERGY, https://www.dominionenergy.com/about-us/natural-gas-projects/atlantic-coast-pipeline (last visited Feb. 1, 2019) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

13. *See id.* (describing the origins of the Atlantic Coast Pipeline).

14. *See* Emily Brown, *Nelson Residents React to Federal Approval of Atlantic Coast Pipeline,* NEWS & ADVANCE (Oct 14, 2017), http://www.newsadvance.com/news/local/nelson-residents-react-to-federal-approval-ofatlantic-coast-pipeline/article_a56dd0ef-14c6-5389-b5d6-138a0600566f.html ("[T]he three members of the Federal Energy Regulatory Commission issued a certificate of public convenience and necessity authorizing ACP to construct and operate the $5 billion, 600-mile project . . . .") (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Lowell Rose, *Dominion Energy Introduces Interactive Map for Atlantic Coast Pipeline*, NBC (Feb. 16, 2018, 5:08 PM), http://www.nbc29.com/story/37526947/dominion-energy-introduces-interactive-map-for-atlantic-coast-pipeline (referencing an interactive map illustrating the construction and timeline of the Atlantic Coast Pipeline) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

15. *See* Gregory Schneider, *As Court Challenges Pile Up, Gas Pipeline Falls Behind*, WASH. POST (Dec. 31. 2018), https://www.washingtonpost.com/local/virginia-politics/as-court-challenges-pile-up-gas-pipeline-falls-behind/2018/12/29/8637dbd2-0549-11e9-b5df-5d3874f1ac36story.html?noredirect=on&utm_term=.2008d55d32d3 ("Protesters banging drums may get more attention, but what has really damaged the controversial Atlantic Coast Pipeline in 2018 has been quiet

Appeals vacated U.S. Forest permits that allowed the pipeline to cross protected lands and stayed the granting of new permits related to endangered species until ongoing environmental litigation has been resolved.[16] Attempts by the ACP to narrow the scope of the stay have proved unsuccessful.[17] In the same month, Nelson County denied floodplain crossing requests, which has forced the Pipeline to bring suit requesting federal preemption.[18] As of January 2019, construction has stalled on the ACP, and the project faces an uncertain future in the courts.[19]

Proponents of the Atlantic Coast Pipeline claim that its construction will create jobs in the communities that it passes through, while also generating revenue for the three states in the form of additional taxes, and aiding consumers through projected energy savings.[20] The ACP website additionally claims to have

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action taking place in courtrooms.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

16. *See id*. ("The judges were particularly harsh, finding that Forest Service staffers had raised serious questions about the permits but then made a sharp, unexplained turnaround and approved them. The court called the decision 'mysterious.'"); *see also* Carl Surran, *Atlantic Coast Pipeline Halted Again by U.S. Circuit Court*, SEEKING ALPHA (Dec. 7, 2018, 7:10 PM), https://seekingalpha.com/news/3415460-atlantic-coast-pipeline-halted-u-s-circuit-court ("The Fourth U.S. Circuit Court of Appeals has stayed new permits related to vulnerable species for the 600-mile, 1.5B cf/day Atlantic Coast Pipeline project.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

17. *See* Carl Surran, *Atlantic Coast Pipeline Bid to Ease Stay Rejected by Appeals Court*, SEEKING ALPHA (Jan. 14, 2019 10:27 AM), https://seekingalpha.com/news/3422749-atlantic-coast-pipeline-bid-ease-stay-rejected-appeals-court ("The Fourth U.S. Circuit Court of Appeals said Friday it will not ease its stay on a permit for the Atlantic Coast Pipeline, increasing prospects for a delay . . . .") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

18. *See* Emily Brown, *Atlantic Coast Pipeline Sues Nelson County over Zoning Decision*, NEWS & ADVANCE (Dec. 17, 2018), https://www.newsadvance.com/news/local/atlantic-coast-pipeline-sues-nelson-county-over-zoning-decision/article_47164c00-6573-5f1c-9c86-fa41462048d7.html ("The lawsuit . . . is seeking a judgment stating the Natural Gas Act 'preempts' the requirements of Nelson's floodplain ordinance, which would include 'obtaining any zoning permits for any of the floodplain crossings.'") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

19. *See* Surran, *supra* note 17 (stating that the Fourth Circuit's stay could cause a significant delay in the construction of the pipeline).

20. *See About ACP*, ATLANTIC COAST PIPELINE, https://atlanticcoastpipeline.com/about/default.aspx (last visited Feb. 1, 2019)

made extensive revisions to the planned route in order to accommodate the concerns of environmentalists and landowners.[21] The opposition to the ACP is mostly composed of these residential landowners and environmentalists in areas surrounding the projected path.[22] Environmental opposition groups like the Southern Environmental Law Center view the ACP as destructive and unnecessary, and they argue that the disruption that construction would cause is unwarranted.[23] Landowners have challenged the use of eminent domain powers in the initial stages of the ACP's construction as well, most significantly in the form of survey delegation powers.[24] They argue that eminent domain powers are being misused by the ACP's surveys, and some have stated their intent to withhold their permission for surveys of their land until compelled by the courts.[25]

The construction of the Atlantic Coast Pipeline is but one example of the expansion of pipeline construction facing states like

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("[T]he pipeline will help the region lower emissions, improve air quality, grow local economies and create thousands of new jobs in manufacturing and other industries.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

21. *See id*. ("[M]ore than 300 additional route adjustments were made to avoid environmentally sensitive areas and address individual landowner concerns . . . .").

22. *See* Martz, *supra* note 9 (providing examples of environmentalists and landowners opposed to the construction of the pipeline).

23. *See Risky and Unnecessary Natural Gas Pipelines Threaten Our Region*, SOUTHERN ENVTL. L. CTR, https://www.southernenvironment.org/cases-and-projects/proposed-natural-gas-pipeline-threatens-scenic-western-virginia (last visited Feb. 3, 2019) ("This unnecessary pipeline will not only harm the mountains, forests and waterways in it's [sic] path—it will also disrupt the lives of the people living and working along its 600 mile long route and lock a new generation into decades more of fossil fuel consumption.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

24. *See* Michael Martz, *Va. Supreme Court Upholds Gas Survey Law on Entering Private Property, but Requires Specific Notice to Landowners*, DAILY PROGRESS (Jul. 13, 2017), http://www.dailyprogress.com/realestate/articles/va-supreme-court-upholds-gas-survey-law-on-entering-private/article_5ed00238-67f5-11e7-8f71-d77187416f70.html (describing the results of a recent Virginia Supreme Court case upholding surveying laws) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

25. *See id*. ("'Eminent domain is supposed to be reserved for those cases in which the public good outweighs the public harm,' said [the] president of Friends of Nelson, one of six groups that presented the governor's office . . . with petitions with more than 5,000 signatures of people opposed to the pipeline.").

Virginia. A second construction project is underway in Virginia, as the Mountain Valley Pipeline (MVP) will wind through the state as well.[26] This project has engendered a particularly passionate opposition from local landowners, as a federal judge has had to order an eminent domain seizure of private land over the objections of almost 300 property owners.[27] In a scene illustrative of the human impact of eminent domain seizures, a landowner was described as having stood "as close as she could to the pipeline's right of way, marked by blue-and-white flagged stakes, and dared the men with chainsaws to keep coming."[28] This opposition has, as in the case of the Atlantic Coast Pipeline, succeeded in delaying and potentially even ending construction through the use of environmental challenges and vocal activism.[29]

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26. *See Overview*, MOUNTAIN VALLEY PIPELINE, https://www.mountainvalleypipeline.info/ (last visited Jan. 16, 2018) (listing the Virginian counties along the proposed MVP route) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

27. *See* Laurence Hammack, *Judge Allows Mountain Valley Pipeline Work To Proceed on Private Property*, ROANOKE TIMES (Mar. 5, 2018), http://www.richmond.com/news/virginia/judge-allows-mountain-valley-pipeline-work-to-proceed-on-private/article_c352fd47-2e15-59c9-9459-ebee94260015.html ("A federal judge on Friday granted Mountain Valley Pipeline immediate possession of the parcels, which it gained through the laws of eminent domain after nearly 300 landowners refused the company's offers to purchase easements through which the pipeline will pass.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

28. Heather Rousseau, *As Tree-Cutting Continues for the Mountain Valley Pipeline, So Do the Protests*, ROANOKE TIMES (Apr. 15, 2018), http://www.roanoke.com/news/local/giles_county/as-tree-cutting-continues-for-the-mountain-valley-pipeline-so/article_8b07005a-3ff3-11e8-a908-a3db8fb38cec.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

29. *See* Tommy Lopez, *Mountain Valley Pipeline Says Projects May Never Be Finished*, WSLS 10 (Dec. 18, 2018), https://www.wsls.com/news/virginia/mountain-valley-pipeline-says-projects-may-never-be-finished ("Recent decisions by regulatory and judicial authorities in pending proceedings could impact our or the MVP Joint Venture's ability to obtain all approvals and authorizations necessary to complete certain projects on the projected time frame or at all or our ability to achieve the expected investment return . . . .") (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Laurence Hammack, *Mountain Valley Pipeline Files Response To State's Lawsuit*, ROANOKE TIMES (Jan. 11, 2019), https://www.roanoke.com/business/news/mountain-valley-pipeline-files-response-to-state-s-lawsuit/article_96db0fec-5350-5822-b027-83b535423217.html ("The legal action is based on dozens of inspections conducted by DEQ officials and employees of MBP, a private company hired by the state to assist in monitoring construction

While every state in the Union has a statute delegating in some form surveying authority to private entities, the practice has been especially visible and controversial due to pipeline construction in the Commonwealth of Virginia.[30] A major point of contention in pipeline development has centered upon the ability of private companies to use delegated eminent domain powers to survey land for possible future development.[31] While recent decisions by both a federal Virginia District Court and the state's Supreme Court have upheld the state's surveying delegation law from landowner challenges, the issue is far from resolved.[32] Virginia therefore provides an ideal base for an examination of survey delegation laws in the modern context of utilities development.

B. Questions Presented

Delegation of eminent domain authority to private entities in the context of surveying for utilities development has become a topic of controversy in an era of ever-increasing economic development;[33] and as such, a detailed look at the practice's origins

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of the largest natural gas pipeline ever proposed for Southwest Virginia.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

30. *See* Duncan Adams, *Virginia Supreme Court Ruling Upholds Surveying Law; Challenges Still Possible*, ROANOKE TIMES (July 13, 2017), https://www.roanoke.com/townnews/law/virginia-supreme-court-ruling-upholds-pipeline-surveying-law-challenges-still/article_305a7461-38aa-5234-b168-c240232b774d.html ("The Virginia Supreme Court issued a unanimous ruling Thursday that upheld a controversial state law allowing gas companies to survey private property for a possible pipeline route without an owner's consent.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

31. *See* Martz, *supra* note 24 ("The two decisions, both written by Justice William C. Mims, represents the high court's first judgments on a 2004 law that has become a flash point in the bitter battles between property owners and the developers of two natural gas pipelines proposed across hundreds of miles of Virginia.").

32. *See* John Murawski, *Atlantic Coast Pipeline to Take Landowners to Court to Clear Way for 600-Mile Project*, CHARLOTTE OBSERVER (Nov. 16, 2017, 3:45 PM), http://www.charlotteobserver.com/news/business/article185036078.html (reporting on the legal conflicts surrounding the Atlantic Coast Pipeline's expansion into North Carolina) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

33. *See* Martz, *supra* note 24 (describing the outcomes of two cases before the Supreme Court of Virginia involving "bitter battles between property owners and

and its current situation in the United States is warranted in order to formulate potential solutions. It is an issue that involves significant questions that define what amounts to a government taking and explores the extent to which a landowner has authority over his or her property. As a result, the issue potentially affects a massive portion of our society.[34] In examining the practice of survey delegation, this note will attempt to answer four related questions: Do modern survey delegation laws find support in historical uses of eminent domain?[35] Does surveying amount to a taking, especially in the wake of post-*Kelo*[36] legal developments?[37] If it does amount to a taking, should compensation be made?[38] What method of compensation is to be used?[39] Through analyses of these questions this note will argue that the current surveying delegation laws should be viewed as giving rise to a taking, and they should be compensable by either a nominal sum or one reached as part of a wider takings calculus.[40]

II. Survey Delegation and Virginia

A. § 56-49.01[41]

The planning of the Atlantic Coast Pipeline has engendered a particularly noteworthy legal response in Virginia, as the recent decisions of the federal District Court in *Klemic*[42] and the Supreme

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[natural gas pipeline] developers").

34. *See* Murawski, *supra* note 32 (explaining that the Atlantic Coast Pipeline from West Virginia to North Carolina will cross through the property of approximately 2,900 landowners', twenty percent of whom have not signed voluntary agreements to allow for the use of their land).

35. *See infra* discussion Part III.

36. *See* Kelo v. City of New London, 545 U.S. 469, 484 (2005) (ruling that the city's proposed condemnations of private properties served a public purpose and satisfied the public use requirement of the Fifth Amendment).

37. *See infra* discussion Part IV.

38. *See infra* discussion Part V.

39. *See infra* discussion Part VI.

40. *See infra* discussion Part VII.

41. *See* VA. CODE ANN. § 56-49.01 (2018) (granting natural gas companies the right to inspect and enter any property without permission of the owner in certain circumstances).

42. *See* Klemic v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 690

Court of Virginia in *Palmer*[43] illustrated the modern controversy over survey delegation laws. While surveys may at first appear to be a relatively minor facet of wider eminent domain issues, these cases reveal the foundational rights at issue in landowner challenges at both levels of the American legal system.[44]

At the heart of both cases is a challenge to Virginia's survey delegation statute, § 56-49.01 (Natural gas companies; right of entry upon property).[45] The first element of the statute is directly relevant to the analysis of this note, as it grants private entities surveying powers.[46] The language of this element warrants inclusion in its entirety:

> Any firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, may make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works as are necessary (i) to satisfy any regulatory requirements and (ii) for the selection of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities, and for such purposes, by its duly authorized officers, agents, or employees, may enter upon any property without the written permission of its owner if (a) the natural gas company has requested the owner's permission to inspect the property as provided in subsection B, (b) the owner's written permission is

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(W.D. Va. 2015) ("[I]t is clear that the common law recognizes, and state and federal courts have consistently upheld, the privilege to enter private property for survey purposes before exercising eminent domain authority and that Virginia law is fully in accord with the common law.").

43. *See* Palmer v. Atl. Coast Pipeline, LLC, 801 S.E.2d 414, 419 (Va. 2017) ("In sum, Palmer's right to exclude others is not absolute. The common law has long recognized the privilege of an entity exercising eminent domain power to enter private property to conduct surveys.").

44. *See infra* Part II.B–C.

45. *See Klemic*, 138 F. Supp. 3d at 679 ("In an attempt to stop ACP or any other company from entering their properties for this purpose, plaintiffs filed this action, alleging that the statute, on its face and as applied, violates the United States and Virginia Constitutions, and is thus void and unenforceable."); *see also Palmer*, 801 S.E.2d at 416 (describing appellant's arguments that the statute authorizing entry-for-survey powers only applies to domestic public service companies, and more pertinently, that the statute is unconstitutional "because it impermissibly burdens a fundamental right").

46. *See* VA. CODE ANN. § 56-49.01(A) (noting the requirements for proper entry by a natural gas company to survey2018).

> not received prior to the date entry is proposed, and (c) the natural gas company has given the owner notice of intent to enter as provided in subsection C. A natural gas company may use motor vehicles, self-propelled machinery, and power equipment on property only after receiving the permission of the landowner or his agent.[47]

This statute has been utilized in the initial planning and surveying stages of the Atlantic Coast Pipeline, and as a result, the normally unremarkable Virginian law has taken center stage in a heated legal conflict.[48]

B. Palmer

In *Palmer*, the Supreme Court of Virginia considered a declaratory judgement requested by the Atlantic Coast Pipeline.[49] Atlantic, an out-of-state utilities corporation, sought to enter the appellant's property for surveying purposes under Virginia's survey delegation statute, and was denied entry.[50] The appellee then filed for a declaratory judgement requesting a declaration of its surveying rights.[51] The circuit court found for the Pipeline, and the property owner appealed.[52] The Supreme Court of Virginia considered whether an out-of-state corporation could make use of Virginia's survey delegation law, and whether the law itself infringed on post-*Kelo* provisions of the Constitution of Virginia.[53] The Court found that the Pipeline could make use of the statute.[54]

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47. *Id.* § 56-49.01(A).

48. *See* Martz, *supra* note 24 (articulating the use of the statute regarding the preparations for the pipeline and the different responses to the Virginia Supreme Court's holding) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also id.* ("The Virginia Supreme Court has upheld, for the third time, a hotly debated state law allowing natural gas companies to enter private property without landowner permission to survey possible routes for new pipelines.").

49. *See Palmer*, 801 S.E.2d at 416 (detailing the procedural posture of the case).

50. *Id.* at 415–16.

51. *Id.* at 416.

52. *Id.*

53. *Id.* at 415.

54. *Id.* at 417.

The Court, however, found that it was limited to only addressing one prong of the Appellant's demurrer:

> Palmer's demurrer argued that Code § 56–49.01 violated Article I, § 11 by (1) authorizing "a taking or damaging of private property for private use," (2) authorizing 'a taking or damaging of private property without just compensation," and (3) "impermissibly burden[ing] a fundamental right." However, her second assignment of error is restricted to the third claim of her demurrer. In fact, she expressly stated in her reply brief that she is not making a "takings" argument on appeal.[55]

The exclusion of the first and second arguments of Palmer on appeal have left open the possibility that Virginia's survey delegation statute may be analyzed as a taking by the state's highest court in the future.[56] The Supreme Court of Virginia went on to find that the survey law did not impermissibly burden a fundamental right under the Virginia Constitution.[57] While the *Palmer* Court found for the defendant utilities company, it did so without involving a takings-based paradigm.

C. Klemic

In *Klemic*, a United States District Court in Virginia considered an action brought by landowners in Virginia against natural gas companies, arguing that Virginia's survey delegation law was unconstitutional.[58] The plaintiffs principally argued that the statute was facially unconstitutional because: (a) the statute violated the Fifth Amendment; (b) the statute violated the Fourth Amendment; (c) the statute violated the Virginia Constitution; and

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55. *Id*. at 418.

56. *See id.* (waiving the "takings" arguments in *Palmer* due to pleading issues).

57. *See id*. at 420 ("The unambiguous language of Code § 56-49.01 establishes the General Assembly's intent that the entry-for-survey privilege be available to foreign natural gas companies that do business within the Commonwealth . . . . Palmer's fundamental property rights do not include the right to exclude ACP . . . . [W]e affirm the circuit court's judgment.").

58. *See* Klemic v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 678 (W.D. Va. 2015) (outlining Plaintiff's position "alleging that the statute [Virginia Code § 56-49.01], on its face and as applied, violates the United States and Virginia Constitutions, and is thus void and unenforceable.").

(d) the statute violated the Fourteenth Amendment.[59] In a memorandum opinion, the Court rejected each of these arguments.[60] Most importantly for the purpose of this note, the Court specifically rejected an argument that the survey delegation law at issue could give rise to a compensable taking, finding that:

> In sum, the court concludes that a landowner does not have a constitutionally protected property right to exclude an authorized utility from entering his property for survey purposes and that, even if he did, § 56–49.01, on its face, does not effect a compensable taking of that right. The court thus holds that plaintiffs fail to allege a facial challenge to the statute under the Takings Clause.[61]

The *Klemic* decision additionally rejected the Plaintiff's claims that the Virginia delegation statute violated the Fourth and Fourteenth Amendments.[62] An appeal of the decision followed.[63] This case is illustrative of the principal arguments against consideration of survey delegation as a compensable taking, and it includes a wide-ranging consideration of the issue from its historical basis to the present controversy.[64]

The *Klemic* decision highlighted the importance of a takings paradigm when considering survey delegation statutes,[65] while *Palmer* left open the possibility of a future revaluation of Virginia's

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59. *Id*. at 687–97.

60. *See id*. at 678 ("[T]he court concludes that plaintiffs' facial challenges to the statute fail because the statute does not deprive a landowner of a constitutionally protected property right, and that plaintiffs' as-applied challenges fail because they are not ripe. The court will therefore grant defendants' motion and dismiss plaintiffs' complaint.").

61. *Id*. at 694.

62. *See id*. at 688, 698 ("For the foregoing reasons, the court concludes that plaintiffs' facial challenges to Virginia Code § 56–49.01 fail because the statute does not deprive a landowner of a constitutionally protected property right . . . .").

63. *See James Klemic v. Dominion Transmission, Inc.*, JUSTIA, https://dockets.justia.com/docket/circuit-courts/ca4/15-2338 (last visited February 8, 2019) (providing docket information about the appeal filed in the Fourth Circuit on October 30, 2015) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

64. *See id.* (addressing how the First and Fourteenth Amendments relate to Taking Clause claims).

65. *See id.* at 691 ("Even assuming the existence of a right to exclude here, the court would still conclude that § 56–49.01 is facially constitutional under the Takings Clause because it does not effect a compensable taking of that right.").

statute by its highest court.[66] While Virginia has recently become an epicenter for survey delegation-related litigation as a result of ACP preparations, the questions examined in these cases are of importance to all American jurisdictions. This is especially true in light of the seminal *Kelo v. New London* decision by the Supreme Court of the United States, and the developments in the field of eminent domain that have followed it.

D. Kelo *and Eminent Domain Reform*

Although well-recognized and defined, property protections in American jurisprudence are not absolute, and they often come into conflict with the ability of the state to take property though the use of eminent domain.[67] The right to property is both protected and controlled by the state, and governmental authority to impose on property rights has been a key issue dating to the formation of our nation.[68] The state's ability to impose upon the right to exclude through eminent domain authority has given rise to protracted legal debates, especially in the aftermath of the seminal *Kelo v. City of New London* decision.[69]

In *Kelo*, the Supreme Court considered a challenge to a Connecticut city's use of eminent domain power as not being for a sufficiently public use.[70] The case had been granted certiorari after

66. *See* Palmer v. Atl. Coast Pipeline, LLC, 801 S.E.2d 414, 419 (Va. 2017) (failing to rule on the Taking Clause issue at hand).

67. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005) ("As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" (quoting First E*nglish Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 314 (1987))).

68. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process or law; nor shall private property be taken for public use, without just compensation.").

69. *See* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (ruling that the City of New London's "proposed condemnations" were for "public use" within the meaning of the Takings Clause).

70. *See id*. at 472 ("In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation.").

the state supreme court had upheld the eminent domain use.[71] The stated reason for the taking was economic development, and the property at issue was a home that had been in the family of one appellant for her entire life.[72] "The question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution."[73] The Court did not find the taking to violate the Takings Clause and upheld the use of eminent domain authority.[74] In the majority opinion, however, Justice Stevens did explicitly leave open the possibility of states passing additional restrictions on their own eminent domain powers.[75]

The *Kelo* decision greatly strengthened the base of eminent domain powers while also leaving ample room for states to pass laws controlling their own takings powers.[76] Many states have taken Justice Stevens' advice to pass additional restrictions on the use of eminent domain authority, including the Commonwealth of Virginia.[77] The *Kelo* decision—and the reactions to it—have returned taking issues to the forefront of modern public and legal debates, ushering in a new era of taking jurisprudence in the midst of the passage of numerous statutes and constitutional amendments.

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71. *Id.* at 476.

72. *Id.* at 474–75.

73. *Id.* at 472.

74. *Id.* at 490.

75. *Id.* at 489 ("[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline . . . established as a matter of state constitutional law . . . [or] in state eminent domain statutes . . . . ").

76. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2171 (2009) (describing the legal and public reactions to the *Kelo* decision and detailing the need for future research on the various state reactions to the decision).

77. *See* Palmer v. Atl. Coast Pipeline, LLC, 801 S.E.2d 414, 420 (Va. 2017) ("The 2012 amendment to Article I, § 11 accepted this invitation to place further restrictions on the takings power.").

III. Eminent Domain

A. History of Eminent Domain

For the purposes of this note, it will be useful to briefly outline the development of eminent domain and takings jurisprudence. Eminent domain authority originates in the basis of the sovereign as possessing, at a fundamental level, real property within its jurisdiction:

> Simply stated, eminent domain is an exercise of the inherent power of the sovereign. The power of eminent domain refers to the right of the sovereign, or of those to whom the power has been delegated, to condemn private property for public use, and to appropriate the ownership and possession thereof for such use upon paying the owner a due compensation.[78]

Eminent domain laws, although based on legislative powers under English common law, are largely an American innovation:

> To be sure, the English and American colonial practices are the main ancestors of modern American eminent domain, but the writings of several Continental civil law jurisprudential writers also influenced the American law in its formative stage . . . . [i]n American law the subject has been raised to jurisprudential and theoretical levels that do not exist in English law.[79]

The first eminent domain laws passed in the future United States were the "mill acts" of the Thirteen Colonies, allowing for the flooding of private land in order to construct mills.[80] The colonial Massachusetts legislature enacted the first mill law in 1713, and from that origin, state takings powers progressed to encompass successively "railroads (mid-to-late 19th century), mining in the Rocky Mountain West (late 19th century), urban renewal (mid-20th century), [to] *Kelo*-style economic development

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78. Rhode Island Econ. Dev. Corp. v. Parking Co., L.P., 892 A.2d 87, 96 (R.I. 2006).

79. William B. Stoebuck & John W. Weaver, *Eminent Domain: Overview*, 17 WASH. PRAC., REAL EST. § 9.1 (2d ed.) (2018).

80. *See* Robert K. Fleck & F. Andrew Hanssen, *Repeated Adjustment of Delegated Powers and the History of Eminent Domain*, 30 INT'L REV. L. & ECON. 99, 104 (2010) (detailing the first iterations of colonial eminent domain takings in mill acts involving the flooding of land).

(late 20th century to present)."[81] This evolution in takings jurisprudence gradually moved away from origins based in necessary community benefit to use for economic purposes, a shift that is nowhere better illustrated than in the modern context of natural gas pipeline development.

The original ownership of the sovereign in real property allows the state to override the property rights that a landowner has in his or her ownership, but from the earliest days of American legal development limitations have been imposed on the scope of eminent domain powers at all levels of government.[82] The text of the Fifth Amendment to the United States Constitution requires that "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[83] The nebulous nature of this early constitutional prohibition on the uncompensated taking of private property has subsequently given rise to a massive body of takings law.[84] Private land has often been taken through eminent domain powers for the purpose of developing resources beneficial to the public, such as in the case of a road or power line.[85]

American takings law has gradually evolved to include private companies engaged in public infrastructure development as "public carriers," allowing for the inherently public eminent domain powers to be exercised by private entities.[86] As a part of the development of infrastructure through eminent domain surveys frequently must be commissioned, in order to plan the route of the road or utility. As the entities involved in utilities development tend to be private in the context of pipeline constructions, the surveys are generally taken by the same private

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81. *Id.* at 103–104.

82. *See id.* at 103–06 (detailing the ways in which eminent domain power was restricted).

83. U.S. CONST. amend. V.

84. *See* Fleck & Hanssen, *supra* note 80 (arguing that takings of almost any kind are permissible if a broad definition of constitutional limitations on eminent domain is taken).

85. *See id.* at 100 n.5 (providing examples of the "myriad" ways eminent domain powers have been applied).

86. *See* VA. CONST. ART. I, § 11 ("A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services.").

companies that will be developing the land.[87] This intersection between the temporary nature of surveying and the nuances of takings jurisprudence has given rise to a body of law surrounding the delegation of eminent domain authority to private surveying groups.

B. Common Law and Statutory Basis of Survey Delegation

Private delegation of surveying authority is both historically well-grounded and currently widespread. The practice has grown from origins in the earliest American laws to the present, where all fifty states possess a version of a survey delegation statute.[88] Jurists have explored early versions of delegation statutes from the earliest days of American jurisprudence, with one early Virginian law allowing a turnpike company to have "full power and authority to enter upon all lands and tenements through which they may

87. *See* Martz, *supra* note 9 (discussing Dominion Power's role in the survey controversy caused by the ACP).

88. *See* ALA. CODE § 18–1A–50; (1985); ALASKA STAT. ANN. § 09.55.280; (1962); ARIZ. REV. STAT. ANN. § 12–1115; (1955); ARK. CODE ANN. § 18–15–1302; (1947); CAL. CIV. PROC. CODE § 1245.010; (1976); COLO. REV. STAT. ANN. §§ 18–4–515 and (2004); 37–3–113; (1963); CONN. GEN. STAT. ANN. § 48–13; (1967); DEL. CODE ANN. tit. 2 § 704; (1953); FLA. STAT. ANN. § 163.370; (2007); GA. CODE ANN. § 22–3–85(c) and (d); HAW. REV. STAT. § 101–8; (1955); IDAHO CODE ANN. § 7–705; (1881); 70 ILL. COMP. STAT. ANN. 5/22.3; (2007); IND. CODE ANN. § 32–24–1–3; (2016); IOWA CODE ANN. § 314.9; (1996); KAN. STAT. ANN. § 26–512; (1964); KY. REV. STAT. ANN. § 175B.050; (2009); LA. REV. STAT. ANN. § 48:217; (2003); ME. REV. STAT. ANN. tit. 32 § 18231; (2013); MD. CODE ANN. REAL PROP. § 12–111; (2006); MASS. GEN. LAWS ANN. ch. 164 § 72A; (1968); MICH. COMP. LAWS ANN. § 213.54; (1996); MINN. STAT. ANN. § 117.041; (2008); MISS. CODE ANN. § 11–27–39; (1972); MO. ANN. STAT. § 99.420; (West 1982); MONT. CODE ANN. § 70–30–110; (2013); NEB. REV. STAT. ANN. § 15–229; (LexisNexis 1967); NEV. REV. STAT. ANN. § 37.050; (LexisNexis 1995); N.H. REV. STAT. ANN. § 371:2–a; (1951); N.J. STAT. ANN. § 20:3–16; (West 1971); N.M. STAT. ANN. § 42A–1–8; (1981); N.Y. EM. DOM. PROC. LAW § 404; (LexisNexis 1982); N.C. GEN. STAT. ANN. § 40A–11; (West 1981); N.D. CENT. CODE ANN. § 32–15–06; (West 1985); OHIO REV. CODE ANN. § 163.03; (LexisNexis 1966); OKLA. STAT. ANN. tit. 11 § 22–114; (West 1984); OR. REV. STAT. ANN. § 35.220; (West 2003); 26 PA. CONS. STAT. Ann. § 309; (2006); R.I. GEN. LAWS ANN. § 24–12–9; (West 2016); S.C. CODE ANN. § 28–2–70; (1987); S.D. CODIFIED LAWS § 49–33–6; (1939); TENN. CODE ANN. § 29–16–121; (1932); TEX. NAT. RES. CODE ANN. § 111.019; (West 1993); UTAH CODE ANN. § 78B–6–506; (LexisNexis 2008); VT. STAT. ANN. tit. 5, § 3518; (1947); VA. CODE ANN. §§ 25.1–203, (2005); 56–49, (2004), and 56–49.01; (2004); WASH. REV. CODE ANN. § 47.01–170; (West 1984); W.Va. Code Ann. § 54–1–3; (LexisNexis 1923); WIS. STAT. ANN. § 182.38; (2000); WYO. STAT. ANN. § 1–26–506. (2007).

judge it necessary to make said road; and to lay out the same according to their pleasure."[89] Successive laws passed in the Commonwealth of Virginia strengthened and expanded survey delegation authority: In 1782 Virginia empowered private surveyors for public roads to enter private land, in 1860 Virginia granted the authority to companies engaging in "internal improvement," and in 1904 the power was extended to any company empowered with eminent domain delegation.[90]

Virginia is somewhat atypical of state jurisdictions in its modern versions of these historic statutes, mostly due to its modern inclusion of notice requirements and its prohibition on the use of motor vehicles without owner permission.[91] Other versions of surveying delegation statutes often place limitations on the extent of the authority given to private companies and may explicitly hold them liable for any damages, and beyond liability some jurisdictions also require the private entity to notify the landowner prior to surveying.[92] As Virginia possesses both one of the more restrictive statutes of this type[93] and is one of the foremost states involved in current pipeline disputes with the construction of the Atlantic Coast Pipeline, it provides an ideal example of the development of survey delegation jurisprudence.

Delegation of surveying authority is indeed the main iteration of private delegation of eminent domain powers, with the Restatement (2d) of Torts stating that:

> The privilege of entry for the purpose of performance or exercise of such duty or authority may be specifically given, as where an employee of a public utility is in terms authorized to enter upon privately owned land for the purpose of making surveys preliminary to instituting a proceeding for taking by eminent domain.[94]

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89. 2 VA. REV. CODE ch. 234, § 7 (1819).

90. *See Palmer*, 801 S.E.2d at 419 (outlining the history of survey delegation statutes in the Commonwealth); *see also* VA. CODE ANN. tit. 17, ch. 56 § 4 (1860); VA. CODE ANN. § 1105f(3) (1904).

91. *See* statutes cited *supra* note 88 (codifying survey delegation statutes for each of the fifty states).

92. *See generally id*.

93. *See generally* VA. CODE ANN. § 56-49.01 (codifying Virginia property law for right of entry upon land for Natural Gas companies).

94. RESTATEMENT (SECOND) OF TORTS § 211 (AM. LAW INST. 1965).

This granting of a privilege of entry is at the heart of Virginia's delegation statute, and delegation in this way has broadly been upheld by courts. "Indeed, it appears that no court has declared a statute expressly giving a utility the right to enter private property for survey purposes before exercising eminent domain authority facially unconstitutional."[95] Delegation laws are both widespread and well established in American jurisprudence.[96]

IV. Survey Delegation Laws as a Taking

A. Survey Delegation and Pipeline Construction

While the basis of statutory delegation in the legal history of Virginia and the wider United States is difficult to dispute, modern delegation laws are often used for divergent purposes when compared with their historic counterparts.[97] Early delegation and eminent domain laws tended to focus on takings that benefitted the community in some way, such as the Massachusetts 1713 mill law or Virginia's 1782 public road construction surveying statute.[98] It is telling that early manifestations of surveying delegation laws almost uniformly deal with surveys taken for the construction of mills, roads, canals, or other utilities of benefit to the immediate community: Every early court cited to explore the purpose for surveying by the *Klemic* Court is explicitly directed to the construction of a road or railway.[99]

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95. *Klemic*, 138 F. Supp. 3d at 690.

96. *See* statutes cited *supra* note 88 (listing examples of state-level survey delegation laws).

97. *See* Fleck & Hanssen, *supra* note 80, at 100 (describing the evolution of eminent domain law from its inception to the present.).

98. *See id.* (stating that "[t]he justification for these constitutional provisions was that grist mills were "public necessities" (unground grain had little value) and were required by law to serve all comers at regulated prices"); *see also Palmer*, 801 S.E.2d 414 at 419 ("Virginia statutory law has done so for 235 years. In 1782, a law permitted authorized surveyors to enter private land to survey the location of public roads and made it unlawful for anyone to 'stop, oppose, or hinder' them.").

99. *See Klemic*, 138 F. Supp. 3d at 688–89 (discussing the common law privilege to enter land for surveyor purposes, specifically for the construction of a road or railway).

While takings law has evolved to encompass modern utilities with no analogue in early law,[100] this is nonetheless a critical distinction, as the animating impulse behind these early laws is often at odds with the uses to which their modern counterparts are put to.[101] A road, canal, or railway provides an immediate benefit by providing access to the community it is constructed in.[102] The almost sole concern of early eminent domain laws with mills, roads, and railways is illustrative of this need, as nearly every community required these necessities—often only able to be constructed through public use of private property—to survive. A pipeline, however, is generally only of benefit when viewed from a wider state or national paradigm and will provide little to no benefit to many of the communities that it passes through on its course.

Pipelines like the Atlantic Coast Pipeline may pass through entire states in their path from the point of origin to coastal ports. Even in areas in which the pipeline does create jobs and stimulate economic growth, such benefits are born of a very different nature than the necessity-based early examples in takings jurisprudence.[103] As a result, the policy behind the early laws and cases cited in *Klemic* and *Palmer*—to survey for public improvements of immediate benefit to landowners in the community—is absent in the modern controversies surrounding pipeline construction. Reliance on common law and historic statutory support for delegation laws in the context of pipeline surveying is therefore problematic, and there is a need for a reevaluation of the current definition of a private survey as not representing a taking.

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100. *See* Fleck & Hanssen, *supra* note 80, at 104 (discussing colonial eminent domain takings).

101. *See id.* at 100 ("We focus on five episodes of eminent domain use, involving mill dams (early-to-mid 19th century), railroads (mid-to-late 19th century), mining in the Rocky Mountain West (late 19th century), urban renewal (mid-20th century), and *Kelo*-style economic development (late 20th century to present).").

102. *See id.* at 105 ("All six of the Rocky Mountain states that entered the Union in the latter part of the 19th century enacted constitutional provisions allowing miners and mining companies to employ eminent domain directly to build access roads, dump tailings, dig tunnels, and so forth.").

103. *See id.* (juxtaposing the rationale behind early takings necessary for community development with later economic rationales).

B. § 56-49.01 after Kelo

Surveying delegation laws have been especially susceptible to the wider controversies over takings powers centered upon the divisive *Kelo* decision. Virginia is one of many states to have passed statutory and constitutional property safeguards in the aftermath of *Kelo* that have raised new taking issues.[104] Challenges centered upon these protections have been brought against Virginia's delegation statute, and represent a new strategy for landowners to resist eminent domain use.[105] The amended Article 11 of the Virginia Constitution reads in pertinent part:

> That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services.[106]

Virginia's post-*Kelo* amendment illustrates the tensions at the heart of surveying delegation.[107] The amendment strengthens property rights while still explicitly allowing for the delegation of eminent domain powers to private companies.[108] While modern

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104. *See* Palmer v. Atl. Coast Pipeline, LLC, 801 S.E.2d 414, 420 (Va. 2017) (defining the 2012 amendment to Article I, § 11 of the Virginia Constitution as an acceptance of the Supreme Court's offer to state governments in *Kelo*).

105. *See id.* at 418 (considering Plaintiff's arguments that Virginia's post-*Kelo* constitutional amendment is unconstitutionally infringed upon by Virginia's delegation statute).

106. VA. CONST. art. I, § 11.8686

107. *See Palmer*, 801 S.E.2d at 420 ("[The amendment] . . . limited the parameters within which eminent domain may be exercised to affect these rights and expanded the compensation to be paid.").

108. *See id.* (explaining that, while Article 11 of the Virginia Constitution does allow private companies to assert eminent domain power, it also strengthens the rights of individuals by limiting the definition of "public use" and expanding the definition of "just compensation").

classification of utilities as a public service are ubiquitous, constitutional protections of private property, especially in the form of required compensation for a taking, are equally prevalent.[109] Article 11 not only limits takings authority to the least restrictive public use, but it additionally requires just compensation to be made for any taking, including losses in profits and access.[110]

This definition reflects a robust view of private property rights, not only protecting against actual confiscations but also against any other harms—even if largely symbolic, such as access—that may be caused by the state's use of eminent domain. The *Klemic* decision avoids this issue by defining survey delegation laws as a limitation on the right to exclude and not as a taking:

> Although the Takings Clause protects property rights, including the right to exclude, it does not itself create them; "such property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" To determine whether a landowner has a constitutionally protected property right to exclude an authorized utility from entering his property for survey purposes, then, the court must look outside the Takings Clause.[111]

The dismissal of the Takings Clause in this instance does not properly account for the evolution of takings law in response to *Kelo*, as evidenced by Virginia's post-*Kelo* constitutional amendment.[112] This consideration is significant in the definition of surveying delegation laws: If delegation authority is found to be based upon the state's power of eminent domain, and if the Constitution of Virginia requires just compensation to be made for *any* losses suffered as a result of eminent domain use,[113] then there

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109. *See id.* (explaining that Article II of the Virginia Constitution does not abrogate extensive common law privileges catalogued by the First Restatement of Torts and recognized in Virginia statutory law).

110. *See id.* (establishing a limited definition of "public use" expanded definition of "just compensation").

111. Klemic v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 687 (W.D. Va. 2015) (internal citations omitted).

112. *See Palmer*, 801 S.E.2d at 420 ("The 2012 amendment to Article I, § 11 accepted this invitation to place further restrictions on the takings power.").

113. *See id.* ("The amendment also expands the definition of 'just compensation' to be 'no less than the value of the property taken, lost profits and

is a strong argument to be made that surveys like the type discussed in this note amount to a taking.

While the *Palmer* decision reached by the Supreme Court of Virginia rejected the argument that post-*Kelo* amendments to Article 11 were violated by the existence of Virginia's surveying delegation law, this takings argument was not considered.[114] Redefining surveying delegation to constitute a taking would add protections to affected landowners while allowing for the continued use of delegated eminent domain power, and such a definition would not upset the arguments made by the Supreme Court of Virginia that "[t]he common law has long recognized the privilege of an entity exercising eminent domain power to enter private property to conduct surveys [and that] [t]his same privilege has a well-established historical pedigree in our statutory law."[115] Consideration of private use of surveying powers as a public taking comports with both the legal legitimacy of surveying delegation laws and the protections to private property rights passed in the wake of *Kelo*.

V. Compensation for Survey-based Takings

A. Compensability

If private use of public eminent domain powers to survey is to be considered a taking, a question remains as to whether it is compensable. As noted by the *Klemic* Court, the Supreme Court of the United States has not ruled definitively on the question: "While 'permanence and absolute exclusivity of a physical occupation' *always* give rise to a compensable taking, 'temporary limitations on the right to exclude' do not."[116] Article 1 requires the government to compensate for takings, but the temporary nature

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lost access, and damages to the residue caused by the taking.'").

114. *See id.* 418–20 (stating that "[w]hile the amendment also explicitly states that the right to "private property" is "fundamental," nowhere does the amended language purport to modify existing property rights[,]" and that "Palmer expressly stated in her reply brief that she is not making a "takings" argument on appeal").

115. *Id.* at 419.

116. *Klemic*, 138 F. Supp. 3d 691 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982)).

of the taking clouds this issue.[117] While the *Palmer* decision did not examine a takings argument on procedural grounds, the *Klemic* court expressly rejected an argument that Virginia's surveying law creates a compensable taking.[118] Despite recognizing that the Supreme Court has left open the question of non-permanent compensable takings, the *Klemic* court stated that "a temporary, nonexclusive physical invasion that does not unreasonably impair a property's value or use is not a compensable taking."[119] This conclusion, far from a legal certainty, elides over an important distinction in the use of real property for residential purposes, which is the most visible type of property at issue in modern pipeline litigation.

The reasoning of the *Klemic* court was based in part on a rejection of the plaintiffs' attempt to distinguish the issue at hand from *PruneYard Shopping Ctr. v. Robins,*[120] which "offers an example of a limitation on the right to exclude that does not rise to a compensable taking."[121] In rejecting the distinction between

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117. *See* VA. CONST. ART. I, § 11 ("No private property shall be damaged or taken for public use without just compensation to the owner thereof . . . . Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking.").

118. *See Klemic*, 138 F. Supp. 3d at 691 ("Even assuming the existence of a right to exclude here, the court would still conclude that § 56-49.01 is facially constitutional under the Takings Clause because it does not effect a compensable taking of that right.").

119. *Id.* at 692.

120. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). In *PruneYard*, the Supreme Court of the United States heard a case involving whether the California constitution protected speech on the grounds of a privately-owned shopping center. *Id.* at 74. Appellees were soliciting signatures on the grounds of the shopping center when a private security officer asked them to leave, and they later filed suit to enjoin the center from prohibiting them from their activities. *Id.* The trial court and the California Court of Appeal held that the appellees had no constitutionally protected right to speech on the premises, and the Supreme Court of California reversed, finding that the right existed on the private grounds, and that the property rights of the owners were not infringed. *Id.* The Supreme Court found that although a violation of the right to exclude could amount to a taking, a test must first be applied that considered the character of the taking, its economic impact, and any interference with the reasonable investment-backed expectations. *Id.* at 83. The Court found that the commercial nature of the shopping center ensured that the taking did not unreasonably impair its value or use, especially considering that the public was invited onto the grounds of the private shopping center. *Id.* at 83–84.

121. *Klemic*, 138 F. Supp. 3d at 691.

PruneYard and a challenge to Virginia's surveying delegation laws, however, the *Klemic* court failed to properly recognize the key distinction between residential and commercial real property.[122]

In *PruneYard*, "a California law required a shopping mall to allow members of the public to leaflet on its property."[123] "The shopping mall claimed that the law effected a taking of its right to exclude without just compensation, in violation of the Takings Clause."[124] The Supreme Court of the United States found against the mall, ruling that "[h]ere the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause."[125] The commercial property at issue in *PruneYard*, however, is of a very different nature than the residential landholdings at issue in *Palmer* and *Klemic*.

The Supreme Court's reasoning in *PruneYard*—that a state law infringing on a mall's right to exclude without impairing the value of the property is not a compensable taking—is not applicable to the situation of a residential landowner, for whom the possession of the right to exclude may be one of the principal benefits derived from his or her investment in the real property.[126] A mall like the one at the heart of *PruneYard* functions as a public commercial space, and therefore infringements that do not affect the property's value are of a much less consequential nature than they are in the residential context.[127] In a concurrence to the

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122. *See id*. at 692 (rejecting plaintiffs' attempt to distinguish the case at hand from *PruneYard*). The majority stated:

> Plaintiffs attempt to distinguish *PruneYard*, arguing that, unlike a shopping mall, their properties are used as personal residences . . . . That is true enough, but it does not take away from the Supreme Court's holding that a temporary, nonexclusive physical invasion that does not unreasonably impair a property's value or use is not a compensable taking. *Id.*

123. *Id*. at 691 (citing *PruneYard*, 447 U.S. at 76–79).

124. *Id*. at 691 (citing *PruneYard*, 447 U.S. at 82).

125. *PruneYard*, 447 U.S. at 83.

126. *See id*. at 83 (determining that "[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center").

127. *See id.* (noting that "the PruneYard is a large commercial complex that

PruneYard decision, Justice Powell highlighted the importance of this distinction, writing that "[s]ignificantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises."[128] The purpose of a commercial center like the one at issue in *PruneYard* is to attract storefronts who will pay rent to the owner, an arrangement that only provides benefit to the merchants if the wider public is actively encouraged to the property.[129] In this context, the right to exclude is still present, but is a minor element of the value of the property in a commercial use.[130] For real property used for residential purposes, however, the reverse is true. The right to exclude is particularly important in a residential context, and a failure to distinguish between the nature of public commercial and private residential property will inevitably undermine the ownership rights of a vast number of Americans.

B. Recommendation

Our legal system is, and has been, willing to require compensation for purely symbolic harm in the form of the tort of trespass.[131] In the tort of trespass, the law allows for damages for a violation of the right to exclude even where the actual trespass

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covers several city blocks, contains numerous separate business establishments, and is open to the public at large").

128. *Id*. at 96.

129. *See id*. at 77 ("The PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments.").

130. *See id*. at 84 ("A State is, of course, bound by the Just Compensation Clause of the Fifth Amendment . . . but here appellants have failed to demonstrate that the "right to exclude others" is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a "taking.").

131. *See* RESTATEMENT (SECOND) OF TORTS: LIABILITY FOR INTENTIONAL INTRUSIONS ON LAND § 158 (Am. Law Inst. 1965) (recognizing when one is subject to liability for trespass). The Restatement (Second) of Torts states:

> ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally: (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to removed."). *Id.*

may have not affected the value of the property in any way.[132] The law of trespass recognizes that violation of the right to exclude that a landowner holds in his or her real property is significant regardless of the presence of physical damage,[133] and it is logical for takings law to likewise allow for compensation when the harm caused to the property owner is of a largely symbolic nature. This is especially true in the instance of residential real property, where homeowners may rightfully see survey crews as a harbinger of future loss of their homes and land. It is significant that the fourth section of Virginia's survey delegation law specifically states that the surveys do not constitute a trespass.[134] Implicit in the inclusion of such a statement is the assumption that without the explicitly protective language, such surveys might be considered to be trespassory. The principal distinction between an authorized survey and a trespass is the legitimization of the former under state takings powers, as opposed to the willingness of the landowner to have his or her property utilized in such a manner.

This wider understanding of eminent-domain based takings in light of trespass jurisprudence reflects considerations of both law and policy. The strong reactions of many state legislatures to *Kelo* represent a major shift in takings law, evincing a broader conception of legal protections of property that is necessarily accompanied by a narrower range of permissible eminent domain use without the need for compensation.[135] An understanding of compensable takings that accounts for symbolic takings fits well with the modern evolution of property rights at the state level, especially considering the rising prominence of survey delegation.[136] Policy concerns additionally lend support to this argument, as labeling the practice of surveying delegation as

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132. *See id*. (stating that one is subject to liability for trespass "irrespective of whether he thereby causes harm to any legally protected interest of the other").

133. *Id*.

134. *See* Klemic v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 679 (W.D. Va. 2015) ("Any entry authorized by this section shall not be deemed a trespass. The natural gas company shall make reimbursement for any actual damages resulting from such entry.").

135. *See generally* Somin, *supra* note 76.

136. *See* Martz, *supra* note 24 (providing an example of how survey delegation laws have gained prominence in the context of Virginian pipeline development).

compensable necessarily strengthens the property rights of landowners.

VI. Appropriate Compensation

If use of survey delegation statutes is to create a compensable taking of the landowner's property rights, a question remains as to the proper mode and level of compensation. Within the Fifth Amendment's requirement of just compensation, a great deal of room exists in the calculation and consideration of the compensation to be made to the deprived landowner.[137] There are therefore two major arguments for the proper level of compensation, either by a set nominal fee or through a calculation incorporated into the wider taking compensation.

A. Nominal Fee as Compensation

One potential solution to the issue of compensation for survey-based takings is to award a nominal fee for each survey conducted. Nominal fees are considered the appropriate remedy in similar trespass cases:

> A harmless trespass, while still an actionable trespass, only entitles the landowner to recover nominal damages. As one court explained, upon a trespass "[t]he law implies damage to the owner, and in the absence of proof as to the extent of the injury, he is entitled to recover nominal damages."[138]

Nominal fees are unlikely to have any substantial impact on the overall exercise of surveying delegation laws and would engender little negative economic effects on potential future pipeline projects. The purpose of such a fee, however, is less economic than it is symbolic. Defining delegated surveying authority as a compensable taking strengthens the position of the property owner regardless of the amount awarded for the taking.

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137. *See* U.S. CONST. amend. V (referring to the importance of property rights in the founding of the United States).

138. Daniel Harris Brean, *Ending Unreasonable Royalties: Why Nominal Damages Are Adequate to Compensate Patent Assertion Entities for Infringeme*nt, 39 VT. L. REV. 867 (quoting *Pfeiffer v. Grossman*, 15 Ill. 53, 54 (Ill. 1853)) at 917).

Even nominal fees recognize that an invasion of a residential landowner's right to exclude is worthy of compensation.[139]

As the state legislatures are the entities exercising eminent domain power through survey delegation statutes, it is appropriate for them to also set a level of compensation for the taking. This nominal cost could be easily passed to the private company seeking to make use of the stature to conduct surveys. Allowing each state to set a nominal fee would reflect the state-based nature of the survey delegation laws,[140] and requiring state legislatures to compensate landowners would accurately reflect the reality that surveying delegation laws stem from state takings powers.

B. Compensation as Part of the Takings Analysis

An alternative method for setting the just level of compensation for use of survey delegation laws incorporates the survey into the wider takings analysis of the property. The Supreme Court of the United States has stated from an early point that the market value of the taken property expressed in monetary value is the proper remuneration for use of eminent domain powers.[141] This approach would utilize the surveys conducted on a parcel of real property in calculating the market value owed to a landowner after eminent domain powers have been used. The principal advantage to varying the amount compensated based on the facts of the specific taking is one of flexibility, as the manner, impact, and duration of the surveys could all be considered in the evaluation of compensation. The main difficulty of this approach, however, will be in the determination of the fair market value of what in many cases will be symbolic takings with no subsequent permanent use of land.

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139. *See id*. ("Nominal damages are a reasonable result in cases of trespass where the owner is not substantially injured . . . [a] landowner does not receive a substantial 'toll' for right of passage due to a harmless and innocent trespass . . . .").

140. *See* statutes cited *supra* note 88 (evincing the state-based nature of survey delegation laws).

141. *See* Olson v. United States, 292 U.S. 246, 255 (1934) ("That equivalent is the market value of the property at the time of the taking contemporaneously paid in money.").

Allowing the courts to determine the proper level of compensation rather than the legislature would be logical in consideration of the similar role exercised by the judicial system in compensating permanent takings[142] and violations of the right to exclude like those found in tort law.[143] Judicial control would additionally recognize that just compensation for a violation of a landowner's right to exclude might not be met in all cases by the low level of a nominal sum. As the legislature is the font of the takings power condensed in survey delegation statutes, judicial control of compensation would also prevent a legislature from setting the level of compensation at an entirely insignificant level.

Compensation to landowners for the use of survey delegation laws properly recognizes the nature of the legal interaction taking place between the landowner, the state, and the surveying private company. Both possibilities of compensation as set at a nominal level by the legislature or considered as part of a wider analysis by the courts reflect the takings-based nature of the surveys conducted, and as such either would function as appropriate redress.

VII. Conclusion

As the construction of new energy infrastructure continues to give rise to heated conflicts in the courts, a need has developed for a legal evolution. Suits brought against the construction of pipelines in Virginia alone have succeeded in delaying and potentially derailing both the Atlantic Coast[144] and Mountain Valley[145] pipeline projects. These legal battles have united environmental interest groups with individual property owners and against utility developers, creating a shifting landscape of revoked permits and bitter suits.

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142. *See id.* (discussing how to ascertain just compensation for which petitioners are entitled for permanent takings).

143. *See generally* Brean, *supra* note 138.

144. *See* Surran, *supra* note 17 (discussing the delay to the Atlantic Coast Pipeline caused by the Fourth Circuit's stay).

145. *See* Lopez, *supra* note 29 ("Leaders behind the Mountain Valley Pipeline say the project may never get finished. A report the company filed with a federal agency said the difficulties with getting necessary approval could delay the project, make it too costly or cause it to not get built at all.").

This expansion of modern pipeline construction[146] has collided with resurgent state and federal-based property rights, and in this context survey delegation laws have gained a newfound prominence. The delegation of state eminent domain authority to private entities for surveying purposes is an established practice in American jurisprudence, although its modern use in pipeline construction diverges notably from its original purpose.[147] This discrepancy is made especially glaring by the widespread passage of laws and amendments designed to strengthen individual property rights in the wake of the *Kelo* decision.[148] There is therefore a need to reevaluate the legal categorization of survey delegation laws in the modern context. Delegation of eminent domain powers in the context of surveying should be considered a compensable taking, a position that both reflects the takings-based character of the delegation laws and comports with similar doctrines in tort law. Compensation by nominal fee would serve to bolster the rights of landowners while minimalizing judicial impact on economic development, while compensation as part of a larger takings analysis would allow for greater flexibility and recognition of the landowner's rights to exclude. Either method sufficiently recognizes that a takings-based violation of the landowner's right to exclude has occurred when survey delegation laws are exercised by private utility developers.

While this solution may not alleviate the ultimate taking of property in the development of pipelines, it represents a logical narrowing of takings authority that will benefit landowners nationwide. As energy infrastructure continues to grow it will become increasingly important to adequately protect the rights of property owners at every stage of the takings process. The legal evolution proposed in this Note, albeit a minor one in the grander body of takings jurisprudence, will be a positive step in that direction.

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146. *See generally Pending Natural Gas Pipeline Projects*, RBN ENERGY LLC, https://rbnenergy.com/midi/gas-projects (listing pending natural gas pipeline projects) (on file with the Washington & Lee Journal of Civil Rights & Social Justice) (last visited Feb. 8, 2019).

147. *See* Fleck & Hanssen, *supra* note 80 (discussing the origins of eminent domain law in mill and road construction as opposed to the economic development rationale articulated in *Kelo*).

148. *See* Somin, *supra* note 76 at 2102 ("Forty-three states have enacted post-Kelo reform legislation to curb eminent domain. The Kelo backlash probably resulted in more new state legislation than any other Supreme Court decision in history.") (citations omitted).