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FRACKING, EMINENT DOMAIN, AND THE NEED FOR LEGAL REFORM IN NORTH CAROLINA: THE GAP LEFT BY THE CLEAN ENERGY AND ECONOMIC SECURITY ACT

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Following months of polarized debates, the North Carolina legislature has legalized hydraulic fracturing and horizontal drilling through the enactment of the Clean Energy and Economic Security Act. Public discourse has primarily tracked concerns over energy security, environmental protection, and public health. What the dialogue has failed to adequately consider is the extent to which private property rights may be threatened should hydraulic fracturing and horizontal drilling activities commence. North Carolina's current eminent domain regime grants natural gas producers broad authority to take private property, particularly for the construction of pipelines. However, it is unclear whether such authority will extend to other hydraulic fracturing and horizontal drilling infrastructure. Therefore, North Carolina should amend its constitution and its takings laws to both clarify and limit a private condemnor's ability to exercise eminent domain, especially when the primary purpose is private gain.

I. INTRODUCTION

In the summer of 2012, while beachgoers basked in the sun and kids enjoyed homework-free nights, the North Carolina General Assembly wrestled with the question, "to frack, or not to frack"?[1] On July 2, 2012, the legislature answered "frack" when it voted to override the Governor's veto,[2] thus legalizing hydraulic fracturing

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[1] Elizabeth Turgeon, Recent Development, *"Goin' to Carolina in My Mind:" Prospects and Perils for Natural Gas Drilling in North Carolina*, 13 N.C. J.L. & TECH. 147, 147 (2011), *available at* http://www.ncjolt.org/sites/default/files/RD_Turgeon_147_182.pdf.

[2] Press Release, State of N.C. Office of Governor Bev Perdue, Gov. Perdue Vetoes Senate Bill 820 (July 1, 2012), *available at* http://www.governor.

and horizontal drilling ("fracking").[3] The passage of the Clean Energy and Economic Security Act ("the Act" or "Senate Bill 820") reversed North Carolina's ("the State") decades-old prohibition against the use of horizontal drilling and the injection of toxic chemicals into underground wells.[4] Although fracking is now legal in the State, the Act places a moratorium on the issuance of permits for such drilling activities until an oil and gas regulatory program has been fully established and the General Assembly takes further legislative action.[5]

The debate over fracking has largely polarized the State. Proponents argue that the undiscovered natural gas reserves[6] will

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state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemid=2494 ("This bill does not do enough to ensure that adequate protections for our drinking water, landowners, county and municipal governments, and the health and safety of our families will be in place before fracking begins.").

[3] *See* Clean Energy and Economic Security Act, ch.143, 2012-2 N.C. Adv. Legis. Serv. 581, 582 (LexisNexis) ("[I]t is the intent of the General Assembly to authorize oil and gas exploration and development activities using the processes of horizontal drilling and hydraulic fracturing . . . .").

[4] *Id.* § 3(a)–(b) (to be codified as amended at N.C. GEN. STAT. § 113-393(d) and N.C. GEN. STAT. § 113-214.2) (providing exemptions for "wells drilled for the purpose of exploration or development of natural gas through use of horizontal drilling in conjunction with hydraulic fracturing treatments" and for "injection of hydraulic fracturing fluid for the exploration or development of natural gas resources"); Michelle Nowlin, *Fracking: The Role of Eminent Domain*, NEWS & OBSERVER (June 7, 2012, 10:27 AM), http://www.newsobserver.com/2012/06/07/2118985/fracking-the-role-of-eminent-domain.html; *see also* N.C. GEN. STAT. § 143-214(b) (repealed 2012) (prohibiting injection wells used for disposal of wastes).

[5] Clean Energy and Economic Security Act pt. I (prohibiting the issuance of permits for hydraulic fracturing and horizontal drilling activities until "the General Assembly has determined that a modern regulatory program for the management of oil and gas exploration and development in the State and the use of horizontal drilling and hydraulic fracturing for that purpose has been fully established and takes legislative action to allow the issuance of permits").

[6] *See* U.S. GEOLOGICAL SURVEY, ASSESSMENT OF UNDISCOVERED OIL AND GAS RESOURCES OF THE EAST COAST MESOZOIC BASINS OF THE PIEDMONT, BLUE RIDGE THRUST BELT, ATLANTIC COASTAL PLAIN, AND NEW ENGLAND PROVINCES, 2011 (2012), *available at* http://pubs.usgs.gov/fs/2012/3075/fs2012-3075.pdf; *see also* Press Release, N.C. Dep't of Env't and Natural Res., Statement on Release of U.S. Geological Survey Assessment of North Carolina Oil and Gas Resources (June 6, 2012) ("[T]he USGS estimates that the mean

play a vital role in the State's clean energy future, thus making the legalization of fracking a step in the right direction for energy and job security.[7] Opponents, on the other hand, insist that such activities will be disastrous for the environment and public health.[8]

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undiscovered natural gas resources in the Deep River Basin in North Carolina to be 1,660 billion cubic feet of gas and 83 million barrels of natural gas liquids. Based on the 2010 average daily natural gas consumption volume in North Carolina of 811 million cubic feet per day, the USGS mean estimate of 1.66 trillion cubic feet could meet the state's natural gas demand for 5.6 years."). These estimates were released as the Bill was making its way through the House and Senate.

[7] *See, e.g.*, Turgeon, *supra* note 1, at 150–54 (discussing fracking as a clean, green, and domestic energy source); Elaine Chiosso, *An Unrelenting Focus on Fracking*, NEWS & OBSERVER (July 16, 2012, 8:00 PM), http://www.newsobserver.com/2012/07/16/2202066/an-unrelenting-focus-on-fracking.html (discussing the estimate that fracking will bring 387 new jobs to North Carolina); John Wall, *State Discusses Fracking Future*, TECHINICIANONLINE.COM (Sept. 12, 2012), http://www.technicianonline.com/news/state-discusses-fracking-future-1.2760972?pagereq=1#.UHl4Vfk-ujJ ("Stephen Davis, plant manager at Shamrock Environmental Corporation based in Greensboro, N.C., has drilling crews in the northeast [and said] 'I can't hire enough people' . . . ."). *See generally* Office of the Press Secretary, *Fact Sheet: President Obama's Blueprint to Make the Most of America's Energy Resources*, THE WHITE HOUSE (Jan. 26, 2012), http://www.whitehouse.gov/the-press-office/2012/01/26/fact-sheet-president-obama-s-blueprint-make-most-america-s-energy-resour. In his State of the Union Address, President Obama stated that, according to "independent estimates," by the end of the decade, shale gas development will support more than 600,000 jobs. *Id.*

[8] *See, e.g.*, INT'L ENERGY AGENCY, GOLDEN RULES FOR A GOLDEN AGE OF GAS 20–38 (2012), *available at* http://www.worldenergyoutlook.org/media/weowebsite/2012/goldenrules/WEO2012_GoldenRulesReport.pdf (discussing the environmental impact of unconventional gas production including water pollution and use, as well as methane and other air emissions); Valerie J. Brown, *Industry Issues: Putting the Heat on Gas*, 115 ENVTL. HEALTH PERSP. A76 (2007), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817691/pdf/ehp0115-a00076.pdf (discussing the various environmental and health concerns of gas production, such as how fracking chemicals, which may contain volatile organic compounds, can migrate into aquifers used for drinking water); Turgeon, *supra* note 1, at 155–64 (discussing environmental and health risks posed by natural gas development in general and fracking in particular); Jim Polson & Jim Efstathiou, Jr., *Fracking Wells' Air Emissions Pose Health Risks, Study Finds*, BLOOMBERG NEWS (Mar. 19, 2012), http://www.businessweek.com/news/2012-03-19/fracking-wells-air-emissions-

The Act's energy security, environmental protection, and public health provisions signal that these concerns are the State's professed priorities and should be adequately addressed in the development of an oil and gas regulatory program.[9] However, the statewide discourse has failed to give sufficient attention to the impending threats to the private property owners who have opted out of negotiating outright with gas producers.[10] The protections afforded to landowners in the Act are primarily triggered during the lease-drafting process and after a lease has been signed.[11] The Act does not expressly recognize situations in which a private property owner is not willing to sell over his interest in the land, nor does it acknowledge that such objections can be overcome—by both public and private entities—pursuant to the State's current

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pose-health-risks-study-finds (finding that chemicals released into the air when natural gas is produced by hydraulic fracturing may pose health risk to those living nearby).

[9] *See, e.g.*, Clean Energy and Economic Security Act pt. I ("[I]t is the intent of the General Assembly to establish a modern regulatory program based on the recommendations of the final report and the following principles: (1) Protection of public health and safety[;] (2) Protection of public and private property[;] (3) Protection and conservation of the State's air, water, and other natural resources[;] (4) Promotion of economic development and expanded employment opportunities[; and] (5) Productive and efficient development of the State's oil and gas resources . . . .").

[10] Nowlin, *supra* note 4; *see* Claire Hermann, *Three Ways That S 820 Allows Private Companies to Infringe on Your Private Property Rights*, RURAL ADVANCEMENT FOUND. INT'L (June 13, 2012), http://www.rafiusa.org/blog/three-ways-that-s-820-violates-your-private-property-rights. *See generally* Clean Energy and Economic Security Act § 4(a)–(i) (discussing landowner and public protections but including nothing about landowners who refuse to negotiate over their land).

[11] *See, e.g.*, Clean Energy and Economic Security Act §§ 2(c), 4(a)–(i) (section 2(c) to be codified at N.C. GEN. STAT. § 113-391(a3)(2)) (proscribing that the Environmental Management Commission and the Mining and Energy Commission are to assess emissions from fracking activities in order to "determine the adequacy of the State's current air toxics programs to protect landowners who lease their property to drilling operations"). The landowner and public protections afforded by the Act apply only to those property owners who are in the process of negotiating lease terms or who have already signed an agreement. *Id.* § 4(a)–(i). None of the provisions address eminent domain powers generally or protections against condemnation proceedings specifically. *See id.*

eminent domain framework.[12] Before further legislative action is taken, the General Assembly should consider the following: To what extent will the State privilege private natural gas producers at the expense of landowners?

This Recent Development argues that while North Carolina's current eminent domain laws and takings jurisprudence grant private gas producers broad authority to condemn land for natural gas pipelines, it is unclear whether such authority will extend to other fracking infrastructure.[13] In order to fill this gap, the State legislature needs to take steps to clarify where the line between property rights and rights to property should be drawn. Part II briefly summarizes the evolution of hydraulic fracturing and horizontal drilling, and discusses the processes and infrastructure involved in the exploration, extraction, and production of shale gas. Part III outlines North Carolina's current eminent domain regime, emphasizing the shift to, and broad scope of, the "public purpose" requirement. Part IV proposes state constitutional and statutory amendments that limit the extent to which eminent domain authority can be used by private condemnors or by government on behalf of private entities. Finally, Part V encourages the Mining and Energy Commission ("MEC") to survey eminent domain laws throughout the United States, particularly those states engaged in fracking, to assess what provisions are adequately protecting landowners and which are proving to be ineffective. The study will serve two functions. First, the findings will aid the State legislature in making a well-informed decision about how to proceed in drafting effective amendments. Second, the findings can be incorporated into the State's comprehensive oil and gas regulatory program being developed by the MEC[14] to the extent necessary and appropriate.

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[12] *See infra* Part III.B (describing eminent domain law and jurisprudence in North Carolina in-depth).

[13] *See* Hermann, *supra* note 10 (acknowledging that, depending on how eminent domain laws are interpreted, private companies may be able to take land for various fracking infrastructure).

[14] *See infra* Part V (discussing the MEC and the oil and gas regulatory program it has been charged with developing).

II. FRACKING 101: A QUICK LESSON IN THE HISTORY AND MECHANICS OF HYDRAULIC FRACTURING AND HORIZONTAL DRILLING

Conventional gas reservoirs are created when natural gas migrates into a highly permeable reservoir rock and an overlying layer of impermeable rock traps it.[15] To recover the gas, vertical wells are drilled into the area where the gas has collected, allowing it to flow to the surface and into wells.[16] This process dates back to the 1860s and was first used by the natural gas industry in 1947.[17] In contrast, "unconventional gases,"[18] such as shale gas,[19] form in

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[15] *Natural Gas Trapped in Its Source Rock*, TOTAL, http://www.total.com/en/special-reports/shale-gas/an-abundant-source-of-natural-gas/-trapped-in-rock-201953.html (last visited Oct. 13, 2012); *What Is Shale Gas?*, GEOLOGY.COM, http://geology.com/energy/shale-gas/ (last visited Oct. 13, 2012); *What Is Shale Gas and Why Is It Important?*, EIA, http://www.eia.gov/energy_in_brief/about_shale_gas.cfm (last updated Dec. 5, 2012).

[16] *Natural Gas Trapped in Its Source Rock*, *supra* note 15; *What Is Shale Gas?*, *supra* note 15; *What Is Shale Gas and Why Is It Important?*, *supra* note 15.

[17] Carl T. Montgomery & Michael B. Smith, *Hydraulic Fracturing: History of an Enduring Technology*, J. PETROLEUM TECH., Dec. 2012, at 26, 27, *available at* http://www.spe.org/jpt/print/archives/2010/12/10Hydraulic.pdf; David Hines, *How Long Has Hydrofracking Been Practiced?*, INST. FOR ENERGY & ENVTL. RES. FOR NORTHEASTERN PENNSYLVANIA (Mar. 15, 2011), http://energy.wilkes.edu/pages/203.asp ("Hydrofracking was first used by the natural gas industry in 1947, when the Stanolind Oil and Gas Corporation experimented with the technique in the Hugoton field in Kansas. The following year, the Haliburton Oil Well Cementing Company received a patent for the 'hydrafrac' process, which they first used in March 1949 on wells in Texas and Oklahoma.").

[18] GROUND WATER PROT. COUNCIL & ALL CONSULTING, U.S. DEPT. OF ENERGY AND THE NAT. ENERGY TECH. LAB., MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER, at ES-1 (2009), *available at* http://www.fossil.energy.gov/programs/oilgas/publications/naturalgas_general/Shale_Gas_Primer_2009.pdf. The three basic types of unconventional gas resources include tight gas, coal bed methane, and shale gas. *Id.*

[19] *Id.* Shale gas is natural gas produced from shale formations that typically function as both the reservoir and source for the natural gas. *Id.* In terms of its chemical makeup, shale gas is typically comprised of at least 90% of methane. *Id.* at 14.

more impermeable shale formations,[20] preventing the gas from being able to migrate to and collect in more accessible permeable reservoir rocks. Therefore, the shale gas remains trapped in hard-to-reach shale formations.[21] To recover these unconventional gases, drillers break the impermeable reservoir rocks to create additional permeability.[22] For shale gas, the preferred method is hydraulic fracturing.[23] Hydraulic fracturing is a process that involves the pumping of fracturing fluid, typically made up of water, chemical additives, and proppants,[24] at high pressures into a shale formation.[25] Once the pressure exceeds the rock strength, the fluids cause the formation to crack or fracture, enabling the gas to flow into wells and up to the surface.[26] These cracks can extend several feet away from the well.[27] The farther the fracture extends, the more shale gas can be recovered. The proppants in the fluid—most commonly sand—are used in the process to prevent the

[20] GROUND WATER PROT. COUNCIL & ALL CONSULTING, *supra* note 18, at 14; *Three Main Sources of Unconventional Gas*, TOTAL, http://www.total.com/en/our-energies/natural-gas-/exploration-and-production/our-skills-and-expertise/unconventional-gas/presentation/specific-fields-201900.html (last visited Nov. 14, 2012). Shale gas is extracted from "source rock," or clay-rich sedimentary rock, which has naturally low permeability. *See* GROUND WATER PROT. COUNCIL & ALL CONSULTING, *supra* note 18, at 14.

[21] GROUND WATER PROT. COUNCIL & ALL CONSULTING, *supra* note 18, at 14. As sediment such as clay grains and other organic debris are deposited they tend to lie flat, accumulating additional layers of sediment, which, over time, eventually solidifies into thinly layered shale rock. *Id.* The resulting rock has limited horizontal permeability and extremely limited vertical permeability. *Id.*

[22] *Id.* at 15.

[23] *Id.*

[24] *See Hydraulic Fracturing of Oil & Gas Wells Drilled in Shales*, GEOLOGY.COM, http://geology.com/articles/hydraulic-fracturing (last visited Nov. 14, 2012). A variety of proppants, including sand, aluminum beads, and ceramic beads, are used in hydraulic fracturing. *Id.* More than one million pounds of proppants may be used during the fracturing of just one well. *Id.*

[25] *See* GROUND WATER PROT. COUNCIL & ALL CONSULTING, *supra* note 18, at ES-4; *Hydraulic Fracturing Background Information*, EPA, http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (last visited Oct. 15, 2012) (describing the process through which these additives are pumped into vertical drills, allowing for the breaking of the rock).

[26] *Hydraulic Fracturing Background Information*, *supra* note 25.

[27] *Id.*

fractures from closing after the pressure subsides.[28] Historically, large-scale production of shale gas was not economically viable.[29] Today, gas producers have been able to reach undiscovered shale gas reservoirs by combining horizontal drilling techniques[30] with hydraulic fracturing.[31]

The hydraulic fracturing process begins by drilling wells vertically, hitting the shale formations at depths typically ranging from 6,000 to more than 14,000 feet.[32] Before the vertical well reaches its target depth, the well deviates horizontally in a direction designed to maximize the number of shale fractures it intersects.[33] Typically, these horizontal wellbore[34] sections are lined with metal casing[35] before hydraulic fracturing commences.[36]

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[28] *Id.*; *Hydraulic Fracturing of Oil & Gas Wells Drilled in Shales*, *supra* note 24. The proppants, which are typically small crush-resistant particles, are distributed throughout the fractures by the fluid. *Hydraulic Fracturing of Oil & Gas Wells Drilled in Shales*, *supra* note 24. When the pumps are turned off, and the pressure subsides, the proppants are able to hold the crack open, allowing natural gas to travel through open pore space into the well. *Id.*

[29] GROUND WATER PROT. COUNCIL & ALL CONSULTING, *supra* note 18, at 9; *What Is Shale Gas and Why Is It Important?*, *supra* note 15.

[30] *See generally* Travis Hudson, *Hydraulic Fracturing and Shale Gas Production*, AMER. GEOSCIENCES INST., http://www.agiweb.org/environment/earthnotes/note.html?PublicID=4 (last visited Oct. 13, 2012) (providing animation to discover the process of horizontal drilling). Horizontal drilling technology now enables wells to curve and advance horizontally, allowing a single well to penetrate thousands of feet of the reservoir. *Id.*

[31] *See generally* NAT'L ENERGY TECH. LAB. & U.S. DEP'T OF ENERGY, SHALE GAS: APPLYING TECHNOLOGY TO SOLVE AMERICA'S ENERGY CHALLENGES 3 (2011), *available at* http://www.netl.doe.gov/technologies/oil-gas/publications/brochures/Shale_Gas_March_2011.pdf (estimating that about 2 billion cubic feet of gas per day are produced from United States shales).

[32] *Id.* at 5; *see Hydraulic Fracturing Background Information*, *supra* note 25.

[33] NAT'L ENERGY TECH. LAB. & U.S. DEP'T OF ENERGY, *supra* note 31, at 5.

[34] Horizontal wellbores within the shale formations can be hundreds of feet thick. *Id.*

[35] *Id.* Well casing, an important part of the drilling and extraction process, is a series of metal tubes placed in the drilled hole in order to strengthen the well hole so that no oil or natural gas escapes the hole as it goes toward the surface. *Well Completion*, NATURALGAS.ORG, http://naturalgas.org/naturalgas/well_completion.asp (last visited Oct. 14, 2012).

[36] NAT'L ENERGY TECH. LAB. & U.S. DEP'T OF ENERGY, *supra* note 31, at 5.

Once the shale gas is extracted, it moves on to the production phase. The natural gas that is delivered to homes is almost entirely methane,[37] primarily because the natural gas transported through pipelines must meet certain purity specifications.[38] Usually, underground shale gas is only approximately 90 percent methane;[39] the remaining 10 percent is commonly comprised of other trace compounds and gases, as well as oil and water.[40] Therefore, the impurities from the "raw" natural gas must be removed.[41] This process is typically done in a plant near the well.[42] Once processing is completed, the natural gas must be transported from the production region to the consumption region.[43] A network of pipelines, each serving a different function,[44] is needed to take the natural gas from the wellhead to the ultimate end-user.[45] Once a

[37] *Processing Natural Gas*, NATURALGAS.ORG, http://naturalgas.org/naturalgas/processing_ng.asp (last visited Oct. 14, 2012).

[38] *See* FRED F. LYLE, SW. RESEARCH INST., EVALUATION OF THE EFFECTS OF NATURAL GAS CONTAMINANTS ON CORROSION IN COMPRESSED NATURAL GAS STORAGE SYSTEMS—PHASE II 7 (1989), *available at* http://www.fischer-tropsch.org/DOE/DOE_reports/SUB-85-22025-1/SUB-85-22025-1.pdf (stating that generally gases "entering the interstate transmission pipeline system are treated to meet gas-quality specifications of individual pipeline companies"); MICHELLE MICHOT FOSS, CTR. FOR ENERGY ECON., INTERSTATE NATURAL GAS—QUALITY SPECIFICATIONS & INTERCHANGEABILITY 18 (2004), *available at* http://www.beg.utexas.edu/energyecon/lng/documents/CEE_Interstate_Natural_Gas_Quality_Specifications_and_Interchangeability.pdf (discussing how quality specifications often vary depending on the pipeline and/or the company responsible for the transmission of the natural gas); *see also Processing Natural Gas*, *supra* note 37 (describing that "raw natural gas from different regions may have different compositions and separation requirements").

[39] GROUND WATER PROT. COUNCIL & ALL CONSULTING, *supra* note 18, at 14.

[40] *See Processing Natural Gas*, *supra* note 37.

[41] *Id.* In order to process and transport the natural gas, it must be separated from the oil and gas in which it dissolved. *Id.*; *Well Completion*, *supra* note 35.

[42] *Processing Natural Gas*, *supra* note 37.

[43] *The Transportation of Natural Gas*, NATURALGAS.ORG, http://naturalgas.org/naturalgas/transport.asp (last visited Oct. 14, 2012).

[44] There are three major types of pipelines along the transportation route: the gathering system, the interstate/intrastate pipeline system, and the distribution system. *Id.* The gathering system consists of low pressure, small diameter pipelines that transport raw natural gas from the wellhead to the processing plant. *Id.*

[45] *Id.*

pipeline path is selected, it is cleared of all obstructions, including trees, boulders, brush, or any other impediments restricting construction.[46] The pipes are then laid in place and trenches are dug alongside.[47] Regulations generally require that pipes be at least thirty inches below the surface.[48] Because there is not always an immediate demand for natural gas, as it is a seasonal fuel,[49] the recovered supply will often need to be stored.[50] Natural gas is usually stored underground in large storage reservoirs.[51] While storage facilities were originally used only to ensure that an adequate supply was available during peak seasons and to hold over reserves between transportation and distribution, industry participants now use storage for commercial reasons.[52]

The fracturing fluid used in the extraction process requires a substantial amount of water,[53] much of which returns to the surface

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[46] *Id.*

[47] *Id.*

[48] *Id.* The Department of Transportation requires the top of the pipe to be buried a minimum of thirty inches below the ground surface and deeper at stream and road crossings. *Clearing and Grading for Pipeline Construction*, INGAA, http://www.ingaa.org/Topics/Pipelines101/65/67.aspx (last visited Nov. 15, 2012).

[49] *Storage of Natural Gas*, NATURALGAS.ORG, http://naturalgas.org/naturalgas/storage.asp (last visited Oct. 13, 2012) ("Demand for natural gas is usually higher during the winter months, partly because it is used for heat in residential and commercial settings.").

[50] *Id.*

[51] *Id.* ("Natural gas is injected into the formation, building up pressure as more natural gas is added. In this sense, the underground formation becomes a sort of pressurized natural gas container. As with newly drilled wells, the higher the pressure in the storage facility, the more readily gas may be extracted.").

[52] *Id.* Commercial reasons include storing gas when prices are low, and withdrawing and selling it when prices are high. *Id.*

[53] *See* GROUND WATER PROT. COUNCIL & ALL CONSULTING, *supra* note 18, at ES-4 (estimating that around two to four million gallons of water is used to drill and fracture, depending on the basin and formation characteristics); *Hydraulic Fracturing 101*, EARTHWORKS, http://www.earthworksaction.org/issues/detail/hydraulic_fracturing_101 (last visited Oct. 15, 2012) (estimating that fracturing in a deeper horizontal shale wells can use anywhere from two to ten million gallons of water).

as contaminated wastewater.[54] Once the fluids reach the surface, they are typically stored in tanks or pits.[55] This water must either be disposed of or treated for reuse.[56] Therefore, wastewater treatment facilities capable of dealing with the complexities inherent in treating some of the hazardous chemicals present in fracturing fluids are required.[57]

The infrastructure required for hydraulic fracturing and horizontal drilling is extensive and elaborate, and this section does not provide an exhaustive description of all the technological requirements.[58] Regardless of the exact production methods employed, this section illustrates that a significant amount of infrastructure, all of which have land use implications, is needed to extract, produce, and transport shale gas. In North Carolina, it is unclear whether shale gas producers, or government on their behalf, will be able to exercise eminent domain for the purpose of constructing the facilities needed for each step of the process.

III. "GIVE IT BACK!" THE EXPANSION OF EMINENT DOMAIN AND CONSTITUTIONAL "TAKINGS" JURISPRUDENCE

Fracking is only possible when the gas company has access—through leases or ownership—to mineral-rich land.[59] Public dialogue seems to focus on gas exploration and the private rights implicated by the drilling of wells,[60] but the extraction of shale gas is only the first event in a multi-step process involving extensive

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[54] *Hydraulic Fracturing Background Information*, *supra* note 25. After fracturing is completed, the internal pressure of the geologic formation causes the injected fracturing fluids to rise to the surface. *Id.*

[55] *Hydraulic Fracturing 101*, *supra* note 53.

[56] *Id.*

[57] *See id.* (stating that those treatment facilities may include hazardous waste landfills, incinerators, and sanitary landfills).

[58] *See The Transportation of Natural Gas*, *supra* note 43 (describing compressor stations, metering stations, and valves).

[59] *See* CORNELL UNIV. COOP. EXTENSION, GAS EXPLORATION AND LEASING ON PRIVATE LAND: TIPS AND GUIDANCE FOR NEW YORK LANDOWNERS 3 (2008), *available at* http://cce.cornell.edu/EnergyClimateChange/NaturalGasDev/Documents/PDFs/Gas%20Leasing%20on%20Private%20Land%20Tips.pdf ("Leasing is necessary for companies to drill wells.").

[60] *See, e.g.*, *id.*; Hermann, *supra* note 10; Nowlin, *supra* note 4.

amounts of technology, infrastructure, and land.[61] It is not just rural landowners with mineral rights that stand to lose property; it is any and all that sit along the path from extraction to distribution.[62] The current eminent domain regime in North Carolina not only places inadequate restrictions on a private gas producer's ability to condemn land, but also fails to explicitly prescribe how far such authority reaches.[63] The extent of such authority will be important if the moratorium of permits is lifted. Herein lies the gap.

The state regime is enabled by the broad power conferred on legislatures to approve the taking of private property through the U.S. Supreme Court's interpretation of the Fifth Amendment's[64] "takings" clause. As the Supreme Court has frequently noted, the constitutional takings doctrine "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."[65] Accordingly, federal, state,[66] and local governments may only "take" private property for "public use," and the owner of the taken property must receive "just compensation."[67] Traditionally, eminent domain was used for bona fide public uses, such as the construction of highways, railroads, and public

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[61] *See supra* Part II.

[62] *See supra* Part II; *see supra* note 13 and accompanying text.

[63] *See infra* Part III.B for an in-depth description of eminent domain law and jurisprudence in North Carolina.

[64] *See* U.S. CONST. amend. V (providing in relevant part that "[n]o 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").

[65] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005) (quoting First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 314 (1987)); *see, e.g.*, Williamson Cnty. Reg'l Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."); Hodel v. Va. Surface Mining & Reclamation Ass'n., 452 U.S. 264, 297 n. 40 (1981) ("[An] alleged taking is not unconstitutional unless just compensation is unavailable.").

[66] Chi., B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 233–35 (1897) (holding that the Fourteenth Amendment incorporates the Takings Clause as a limit on the states).

[67] *See* cases cited *supra* note 65; *see also* U.S. CONST. amend. V.

facilities.[68] Over the course of the last century, three major Supreme Court cases have come to signify that the public use requirement has shifted to a more deferential and inclusive "public purpose" requirement. These three cases, *Berman v. Parker*,[69] *Hawaii Housing Authority v. Midkiff*,[70] and *Kelo v. City of New London*,[71] reshaped eminent domain law throughout the United States, leading to a wave of reform in a majority of states.[72] While post-*Kelo* North Carolina has experienced some substantive reform, the current statutes are ineffective at significantly curbing eminent domain power in practice.[73] The State's statutory provisions[74] and "takings" jurisprudence[75] authorize public and private entities to condemn private land for a number of reasons, provided only that the use of their authority is not arbitrary and capricious or an abuse of discretion.[76] In the context of natural gas infrastructure, North Carolina clearly recognizes the right of private gas producers, or government on their behalf, to exercise eminent domain for the construction of pipelines.[77] What is less

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[68] *See, e.g.*, Kohl v. United States, 91 U.S. 367, 374 (1875) (holding that federal government could condemn land for use as a post office); Rindge Co. v. Los Angeles Cnty., 262 U.S. 700, 706 (1923) (holding that the federal government could use eminent domain power to take private land for the development of scenic highways). *See generally History of the Federal Use of Eminent Domain*, U.S. DEP'T OF JUSTICE (2012), *available at* http://www.justice.gov/enrd/History_of_the_Federal_Use_of_Eminent_Domain.html (last updated Nov. 2010) (discussing the history of the use of federal eminent domain).

[69] 348 U.S. 26 (1954).

[70] 467 U.S. 229 (1984).

[71] 545 U.S. 469 (2005).

[72] *See Kelo*, 545 U.S. at 488–90; *Midkiff*, 467 U.S. at 244; *Berman*, 348 U.S. at 35–36. *See generally* Ilya Somin, *Is Post*-Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931 (2007), *available at* http://www.law.northwestern.edu/lawreview/v101/n4/1931/LR101n4Somin.pdf.

[73] *See infra* Part III.A (discussing how the changes to eminent domain law post-*Kelo* are still broad and vague).

[74] *See infra* Part III.B.1.

[75] *See infra* Part III.B.2.

[76] *See infra* note 112 and accompanying text.

[77] *See infra* Part III.B.

clear, however, is whether such authority will extend to fracking infrastructure other than pipelines.

A. *From "Public Use" to "Public Purpose": Expansion of the Public Use Requirement at the Federal Level*

Up until the mid-nineteenth century, many state courts interpreted public use to be "use by the public."[78] But over time, the courts began to move away from this "difficult to administer" test.[79] The move from *Berman* to *Midkiff* to *Kelo* illustrates three major developments. First, the shift from public use to public purpose takes shape. Second, the notion that "the concept of public welfare is broad and inclusive"[80] gets reinforced. Finally, the deferential approach to legislative judgments in this field is solidified.[81]

In *Berman*, the Supreme Court unanimously held that the use of eminent domain power pursuant to the District of Columbia Redevelopment Act of 1945 did not violate the Constitution's public use requirement.[82] In 1945, Congress passed the District of Columbia Redevelopment Act in an effort to clean up the local slums and blighted areas.[83] In order to carry out the goal of ridding the area of "substandard housing" conditions that were "injurious

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[78] Kelo v. City of New London, 545 U.S. 469, 479 (2005).

[79] *Id.* ("Not only was the 'use by the public' test difficult to administer . . . but it proved to be impractical given the diverse and always evolving needs of society." (citation omitted)); *see* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014–15 (1984) ("This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public."); Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916) ("The inadequacy of use by the general public as a universal test is established.").

[80] *Kelo*, 545 U.S. at 481 (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)); *see* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (affirming the exercise of eminent domain power if it is "rationally related to the conceivable public purpose").

[81] *Kelo*, 545 U.S. at 482–83 ("For more than a century, our public use jurisprudence has wisely 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.").

[82] *Berman*, 348 U.S. at 32–36.

[83] *Id.* at 28.

to the public health and safety," Congress declared that the acquisition of real property to eliminate these housing conditions was a public use.[84] Writing for the Court, Justice Douglas avoided the public use language referring only to the public welfare,[85] the public interest,"[86] and the public purpose.[87] In upholding Congress' grant of eminent domain power, the majority stated, "the concept of the public welfare is broad and inclusive"[88] and the legislature is the "main guardian of the public needs."[89]

Thirty years later, the Supreme Court, in *Midkiff*, unanimously[90] upheld the Hawaii Housing Authority's condemnation scheme, which was developed for the purpose of regulating a land oligopoly.[91] The original settlers of the Hawaiian Islands operated under a feudal land tenure system, in which one island chief controlled all the land.[92] Beginning in the early 1800s, attempts were made to divide the land, but the efforts failed; in the mid-1960s, the Hawaii legislature discovered that forty-seven

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[84] *Id.* at 28–29; *see* D.C. Redevelopment Act of 1945, 60 Stat. 791 (1946) ("[T]he acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use.").

[85] *See, e.g.*, *Berman*, 348 U.S. at 33 ("The concept of the *public welfare* is broad and inclusive." (emphasis added)).

[86] *See, e.g.*, *id.* at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the *public interest* has been declared in terms well-nigh conclusive." (emphasis added)).

[87] *See, e.g.*, *id.* 32, 35–36 ("The role of the judiciary in determining whether that power is being exercised for a *public purpose* is an extremely narrow one. . . . Once the question of the *public purpose* has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." (emphasis added)).

[88] *Id.* at 33.

[89] *Id.* at 32.

[90] Justice Marshall took no part in the consideration or decisions of these cases. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

[91] *Id.* at 242–43 ("Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers. . . . Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power.").

[92] *Id.* at 232.

percent of the its land was still in the hands of only seventy-two landowners.[93] The legislature decided to break the land up by enacting the Land Reform Act of 1967, which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing leases.[94] In analyzing the Land Reform Act's constitutionality, the Court relied on the principle laid down in *Berman*: The legislature is the "main guardian of the public needs," therefore, "when the legislature has spoken, the public interest has been declared in [conclusive] terms."[95] The Court further emphasized that a public use determination by state legislatures should be given the same deference as would be given to Congress.[96] In its opinion, the Court noted that private beneficiaries and government entities may take property by eminent domain, as it is only the purpose, and not the mechanics, of the taking that must pass scrutiny under the public use clause.[97] Therefore, just because the property taken by eminent domain is immediately transferred to private beneficiaries does not mean that the taking only had a private purpose.[98] Though the opinion uses public use language more frequently than the *Berman* Court, the decision is primarily grounded in a public purpose analysis.[99] And if there was doubt before as to where the

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[93] *Id.*

[94] *Id.* at 233.

[95] *Id.* at 239–40 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)). In the opinion, the *Midkiff* majority emphasized that, generally speaking, when the legislature has spoken, the public interest has been determined. *Id.* It is the legislature, not the judiciary, that "is the main guardian of the public needs to be served by social legislation." *Id.*

[96] *Id.* at 244 ("[T]he fact that a state legislature, and not Congress, made the public use determination does not mean that judicial deference is less appropriate.").

[97] *Id.*

[98] *Id.*

[99] *Id.* at 241, 244–45 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable *public purpose*, the Court has never held a compensated taking to be proscribed by the Public Use Clause. . . . Judicial deference is required because, in our system of government, legislatures are better able to assess what *public purposes* should be advanced by an exercise of the taking power . . . . The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain

Court stood on public use versus public purpose, Justice O'Connor, writing for the majority, made clear that, "[t]he Court long ago rejected any literal requirement that condemned property be put into use for the general public."[100]

Two decades after *Midkiff* came the landmark decision in *Kelo*.[101] In 2000, the city of New London, Connecticut ("the City") approved a development plan ("the plan")[102] intended to revitalize the distressed city.[103] The New London Development Corporation ("NLDC"),[104] a private nonprofit entity and one of the respondents, was designated as the agent in charge of implementation.[105] The city council authorized the NLDC to take property by eminent domain, and the exercise of that authority led to this case.[106] Although the Supreme Court conceded that the condemned land would not be open, at least not in its entirety, to "use by the general public,"[107] it affirmed NLDC's use of eminent domain to promote "economic development" in the City.[108] Writing for a five-justice majority,[109] Justice Stevens concluded that economic development

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perceived evils of concentrated property ownership in Hawaii—a legitimate *public purpose*." (emphasis added)).

[100] *Id.* at 245.

[101] *See* Kelo v. City of New London, 545 U.S. 469 (2005).

[102] *Id.* at 472 ("[The] development plan . . . was projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." (internal quotations omitted)).

[103] *Id.* at 473. In 1990, after decades of economic decline, a Connecticut state agency designated New London a "distressed municipality." *Id.*

[104] The NLDC had been established "years earlier to assist the City in planning economic development" and was reactivated to assist with the implementation of the plan. *Id.* at 473, 475.

[105] *Id.* at 475.

[106] *Id.*

[107] *Id.* at 478. The majority conceded that it was not a case in which the City planned on opening all of the condemned land for general use by the public or where the private lessees of the condemned land would operate like common carriers. *Id.*

[108] *Id.* at 489.

[109] *See id.* at 494. Justice O'Connor, Chief Justice Roberts, Justice Scalia, and Justice Thomas dissented, stating that, by upholding economic development takings, the majority leaves all private property vulnerable to being taken and given to another private owner so long as it may be "upgraded" (i.e., used "in a

cannot be distinguished from the other public purposes the Court has recognized.[110] Moving further away from a use by the public test, Justice Stevens also rejected the landowners-petitioners' proposed bright-line rule, which would require a showing that public benefits were "reasonably certain" to actually accrue.[111]

Public use jurisprudence has done more than just mark a subtle shift from a public use to a public purpose requirement. Throughout these cases, the Supreme Court has outright rejected the "use by the public test" and has instead adopted a "broad and inclusive" public purpose test.[112] In so doing, 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."[113] With this latitude, the *Kelo* Court emphasized that the states are permitted to place further restrictions on their eminent domain authority.[114]

B. *Eminent Domain Law and Jurisprudence in North Carolina*

In North Carolina, the courts determine whether a taking is for a public purpose, while the legislature decides the political question of the extent of the taking.[115] The courts cannot disturb such a decision unless the condemnee proves that the action is arbitrary and capricious[116] or an abuse of discretion.[117] In light of

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way the legislature deems more beneficial to the public"). *Id.* (O'Connor, J., dissenting).

[110] *Id.* at 484.

[111] *Id.* at 487–88. In rejecting a bright-line rule that would require a "reasonable certainty" test, the majority stated that "when the legislature's purpose is legitimate and its means are not irrational . . . debates over the wisdom of such takings are . . . not to be carried out in the federal courts." *Id.* at 488 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984)) (internal quotation marks omitted).

[112] *Id.* at 481 (internal quotations omitted).

[113] *Id.* at 483.

[114] *Id.* at 489.

[115] Transcon. Gas Pipe Line Corp. v. Calco Enters., 132 N.C. App. 237, 244, 511 S.E.2d 671, 676 (1999) (quoting City of Charlotte v. Cook, 348 N.C. 222, 225, 498 S.E.2d 605, 607–08 (1998)).

[116] *Id.* at 244, 511 S.E.2d at 677 ("The words 'arbitrary' and 'capricious' have similar meanings, generally referring to acts done without reason or in disregard

the fact that there is no state constitutional takings doctrine, that the statutory eminent domain provisions confer broad authority upon private gas producers, and that the courts have consistently held that condemning land for pipelines is for the public use, it is fair to say that the ability to take extends rather far—further than should be permitted in a fracking state.

1. *The State's Constitutional and Statutory Provisions*

The only provision in the North Carolina Constitution that resembles a takings clause is Article I, Section 19, which reads "no person shall be . . . deprived of his life, liberty, or property, but by the law of the land."[118] In *Long v. City of Charlotte*,[119] the North Carolina Supreme Court, recognizing that every state constitution, except North Carolina's, contains provisions prohibiting the taking of property for public use without just compensation, stated:

> We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of Article I, Section 19 of our State Constitution.[120]

Because *Kelo* has not been overruled, it is arguably "the law of the land."[121] To curb the implications of this inference, North Carolina enacted legislation to ban economic development takings. On

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of the facts." (quoting State *ex rel.* Utils. Comm'n v. Mackie, 79 N.C. App. 19, 28, 338 S.E.2d 888, 895 (1986)) (internal quotations omitted)).

[117] *City of Charlotte*, 348 N.C. at 225, 498 S.E.2d at 608; N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 470, 189 S.E.2d 272, 278 (1972); *see Transcon.*, 132 N.C. App. at 244, 511 S.E.2d at 676 (upholding Transco's taking as for a public purpose thereby concluding that it was neither arbitrary and capricious nor an abuse of discretion).

[118] N.C. CONST. art. I, § 19; *see* Richard J. Keshian & Matthew Chambers, *All for the Taking?*, THE LITIGATOR, Nov. 2007, at 5–6, *available at* http://www.kilpatricktownsend.com/~/media/Files/articles/AllfortheTaking.ashx.

[119] 306 N.C. 187, 293 S.E.2d 101 (1982).

[120] *Id.* at 196, 293 S.E.2d at 107–08.

[121] Keshian & Chambers, *supra* note 118.

August 10, 2006, House Bill 1965[122] was signed into law, prescribing that eminent domain shall not be used for economic development projects.[123] However, this same bill provides an exemption for eminent domain used for a "blighted parcel" of property.[124] Previously, property could be seized even if it was in pristine condition, as long as it was in a blighted area.[125] House Bill 1965 now demands that only property meeting this higher standard for a blighted parcel can be condemned.[126] However, the seemingly higher standard can be met even if blight is not a

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[122] Act of July 25, 2006, ch. 224, 2006 N.C. Sess. Laws 973, *available at* http://www.ncleg.net/Sessions/2005/Bills/House/PDF/H1965v6.pdf.

[123] *Id.* § 3 (codified as amended at N.C. GEN. STAT. § 159-83(a)(1) (2011)) ("[T]he authority to exercise the power of eminent domain granted in this subdivision shall not apply to economic development projects described in G.S. 159-81(3)m . . . ."). Economic development projects include the acquisition and development of industrial parks, the acquisition and resale of land suitable for industrial or commercial purposes, and the construction and lease or sale of shell buildings in order to provide employment opportunities for citizens of the municipality. N.C. GEN. STAT. § 159-81(3)(m) (2011).

[124] *See* An Act of July 25, 2006 § 2.1 (codified as amended at N.C. GEN. STAT § 160A-503(2a) (2011)). The North Carolina General Assembly has defined "blighted parcel" as:

> [A]n area in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare; provided, no parcel shall be considered a blighted parcel nor subject to the power of eminent domain, within the meaning of this Article, unless it is determined by the planning commission that the parcel is blighted.

N.C. GEN. STAT. § 160A-503(2a).

[125] DAREN BAKST, JOHN LOCKE FOUND., EMINENT DOMAIN IN N.C.: THE CASE FOR REAL REFORM 5 (2007), *available at* http://www.johnlocke.org/acrobat/policyReports/eminentdomainnc.pdf.

[126] *Id.*

factor.[127] For instance, a parcel is blighted if, among other reasons, it "substantially impairs the sound growth of the community," if it is "conducive to ill health," or if it "is detrimental to morals."[128] Exempting "blight condemnations" from economic development takings may be a step in the right direction, but the law is still too broad, and in North Carolina, private gas producers have the statutory authority to use such overbroad laws.[129]

The North Carolina General Assembly has defined eminent domain as "the power to divest right, title or interest from the owner of property and vest it in the possessor of the power against the will of the owner upon the payment of just compensation for the right, title or interest divested."[130] This authority has been granted to local governments, who may exercise this power for the purpose of gas production, storage, transmission, and distribution systems.[131] Such "systems" include the purchase or lease of natural gas fields and natural gas reserves.[132] The power of eminent domain has also been granted to private pipeline companies.[133] The legislature has prescribed that, "for the public use or benefit," such private entities "shall have the power of eminent domain . . . for the construction of . . . pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals."[134] As a result of these statutory and constitutional provisions, and the deference given to the North Carolina legislature,[135] the State's courts have generally recognized the need to exercise eminent domain power to construct pipelines

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[127] *See* N.C. GEN. STAT. § 160A-503(2a) (2011).
[128] *Id.*
[129] *See id.* § 40A-3(a).
[130] *Id.* § 40A-2(3).
[131] *Id.* §§ 40A-3(b)(2), 160A-240.1, 311(4) (granting the governing body of a municipality or county authority to exercise the power of eminent domain to establish any of the public enterprises and defining public enterprise for cities to include gas production, storage, transmission, and distribution systems).
[132] *Id.* § 311(4).
[133] *Id.* §§ 40(a)(1), 62-190.
[134] *Id.* § 40A-3(a)(1).
[135] N.C. CONST. art. I, § 19.

and have affirmed the use of that authority in a number of cases.[136] The State's overbroad eminent domain regime and its deferential takings jurisprudence shed light on how condemnation of land for fracking's other infrastructure may be received.

2. *Eminent Domain Jurisprudence in the Context of Natural Gas*

The North Carolina Supreme Court has said that under the public use test, "the principal and dispositive determination is whether the general public has a right to a definite use of the property sought to be condemned."[137] The State's courts apply this test by evaluating "whether the general public, as opposed to a small group of persons or a single person or entity, has the right to use the property."[138] Though the courts may purport to follow a public use judicial test, the decisions more closely resemble a public purpose analysis. In the context of natural gas, condemning land for pipelines has been frequently litigated and the authority of producers to exercise this authority has been consistently upheld.

In *Transcontinental Gas Pipe Line Corp. v. Calco Enterprises*,[139] Transcontinental Gas Pipe Line Corporation ("Transco"), a gas pipeline company engaged in delivering natural gas via pipeline, wanted to expand its delivery point in Kernersville, North Carolina.[140] Pursuant to the eminent domain power granted to it by the State,[141] Transco filed a petition to condemn a parcel of respondent's land.[142] The court held that pursuant to section 62-190 of the North Carolina Code, Transco had the authority to condemn property for the transport of natural

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[136] M. GRAY STYERS, JR. & CHARLOTTE A. MITCHELL, LAND USE IMPLICATIONS OF "NEXT GENERATION" ENERGY PRODUCTION AND TRANSPORT 11 (2012), *available at* http://www.styerskemerait.com/wp-content/uploads/2012/05/Land-Use-Implications-of-Next-Generation-Energy-Production-and-Transport.pdf; *see infra* Part III.B.2.

[137] Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 430, 64 S.E.2d 399, 401 (1998).

[138] Town of Midland v. Morris, 209 N.C.App. 208, 219, 704 S.E.2d 329, 337 (2011).

[139] 132 N.C. App. 237, 511 S.E.2d 671 (1999).

[140] *Id.* at 239, 511 S.E.2d at 674.

[141] *See* N.C. GEN. STAT. §§ 40A, 62-190 (2011).

[142] *Transcon.*, 132 N.C. App. at 244, 511 S.E.2d at 676–77.

gas between states and the distribution of natural gas within the State.[143] Given this legislatively-prescribed authority, the court concluded that the taking was for a public purpose and was not arbitrary, capricious, or an abuse of discretion.[144]

More recently, in *Town of Midland v. Morris*,[145] the North Carolina Court of Appeals affirmed the right of the Town of Midland ("Midland" or "the town") to condemn right-of-way easements for a new transmission pipeline, even though it had no immediate plans to exercise its capacity rights on the new pipeline for its own natural gas distribution system.[146] Generally, to pass scrutiny under the public benefit test, condemnation must be for a use that would contribute to the general welfare and prosperity of the general public.[147] In this case, however, the court concluded that it was the "*availability* of natural gas that must contribute to the general welfare and prosperity of the public at large."[148]

This case raises two concerns moving forward. First, in affirming Midland's use of eminent domain authority, despite the lack of any immediate plans, the court essentially authorized the town's ability to take the property, simply to hold it. Second, stating that the "availability" of natural gas is relevant in the public use analysis only provides gas producers with another—judicially supported—justification for the use of eminent domain. Courts should be cautious in deciding how far to extend these precedents in the context of other fracking infrastructure. But, because the courts cannot disturb the legislature's determination of what the extent of the taking is, unless the condemnee proves the action is

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[143] *Id.* at 239, 511 S.E.2d at 674.

[144] *Id.*

[145] 209 N.C.App. 208, 704 S.E.2d 329 (2011).

[146] *Id.* at 217, 704 S.E.2d at 336. The court disagreed with the property owners' argument that because Midland neither currently provides natural gas services to its citizens, nor currently has any plans to provide natural gas to its citizens in the future, the condemnations were undertaken in violation of the statutes governing eminent domain. *See id.* at 216, 704 S.E.2d at 336; STYERS & MITCHELL, *supra* note 136, at 11–12.

[147] *Midland*, 209 N.C.App. at 219, 704 S.E.2d at 338 (quoting Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 432, 64 S.E.2d 399, 402).

[148] *Id.* at 219–20, 704 S.E.2d at 338 (emphasis added).

arbitrary and capricious or an abuse of discretion,[149] great deference has been afforded to gas producers through pipeline jurisprudence. Therefore, change needs to come from the General Assembly.

IV. TIME FOR A CHANGE: PROPOSED AMENDMENTS TO NORTH CAROLINA'S CONSTITUTION AND EMINENT DOMAIN LAWS

The current eminent domain regime in North Carolina illustrates an overarching point. Almost simultaneously, the State has seen a weakening of the Fifth Amendment's constitutional protections[150] and a strengthening of the eminent domain authority of private and public entities.[151] The current legal terrain upon which private gas producers may operate is broad, far-reaching, and absent any substantial restrictions.[152] Furthermore, the extent to which a private entity, or a public entity acting on behalf of a private entity, can take property for shale gas extraction, production, and transportation is not clear under the relevant framework.[153] Armed with the power to impose further restrictions on its eminent domain authority,[154] North Carolina needs to amend both its constitution and its statutory provisions to both strengthen property rights and prohibit a private condemnor's ability to take land, especially where it is primarily for private gain.

A. *The Constitutional Amendment*

North Carolina is the only state whose constitution does not contain a provision expressly prohibiting the taking of property for either public use or public purpose.[155] Immediately following

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[149] *See supra* notes 116–17.
[150] *See supra* Part III.A.
[151] *See supra* Part III.B.
[152] *See supra* Part III.
[153] *See supra* Part III.
[154] Kelo v. City of New London, 545 U.S 469, 489 (2005).
[155] Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982). For a survey of each state's constitutional "takings" provision, *see Current State Constitutional Provisions About Eminent Domain*, CASTLE COALITION, http://www.castlecoalition.org/legislativecenter/185?task=view (last visited Oct. 15, 2012).

Kelo, just in the southeast alone,[156] South Carolina,[157] Florida,[158] and Georgia[159] amended their state constitutions to include a takings provision. North Carolina experienced different results.

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[156] *See generally Current State Constitutional Provisions About Eminent Domain*, *supra* note 155 (giving a list of current state constitutional provisions about eminent domain).

[157] *See* S.C. CONST. art. I, § 13. On April 26, 2007, the South Carolina General Assembly voted to amend Article I of its constitution to include a takings provision, which reads:

> (A) Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.
>
> (B) For the limited purpose of the remedy of blight, the General Assembly may provide by law that private property constituting a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors may be condemned by eminent domain without the consent of the owner and put to a public use or private use if just compensation is first made for the property.

Id.

[158] *See* FLA. CONST. art. X, § 6. On June 20, 2006, the Florida General Assembly voted to amend Article X of its constitution to include a takings provision, which reads:

> (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
>
> (b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.
>
> (c) Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.

Id.

[159] *See* GA. CONST. art. I, § 3. On May 8, 2006, the Georgia General Assembly voted to amend Article I of its constitution to include a takings provision, which reads, "Except as otherwise provided in this Paragraph, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." *Id.*

On May 24, 2007, the House of Representatives passed House Bill 878.[160] This bill read into the North Carolina Constitution a takings clause prohibiting private property from being taken except for a public use.[161] Unfortunately, the draft bill never made it to the State Senate floor.[162] Though the need for a constitutional takings provision has never ceased, the legalization of fracking in the State has once again generated a sense of urgency; thus, the General Assembly must move quickly in taking the first step toward reform.[163] This time, however, both the House and the Senate need to make protecting property rights a priority.

The typical state constitutional takings provisions proscribe the taking of private property except for a public use.[164] But, as evidenced by federal and state takings jurisprudence, the more flexible public purpose analysis is often substituted for the traditional interpretation of the language of the Fifth Amendment.[165] Therefore, when and how a public use or public purpose test will be applied to a particular takings claim cannot be

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[160] H.R. 878, 2007 Leg., 2007–2008 Sess. (N.C. 2007), *available at* http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=H0878.

[161] *Id.* The Bill read into the state constitution a takings provision that stated:

> Private property shall not be taken except for a public use, including preservation for that use. Public use does not include the taking of property for the purpose of thereafter conveying an interest in the property to a third party for economic development. This paragraph does not apply to the taking of blighted properties as defined by general law, nor to takings for access by the owner to property. As used in this paragraph, blight includes only the physical condition of the property taken. Just compensation shall be paid and, if demanded by the owner, shall be determined by a jury.

Id.

[162] *Id.*

[163] *See* N.C. CONST. art. II, § 22(2) (requiring that a proposed amendment to the state constitution be voted on by the state's qualified voters after being read three times by both the House and the Senate and signed by the presiding officers of each respective branch).

[164] *See generally Current State Constitutional Provisions About Eminent Domain*, *supra* note 155 (showing that the public use language has been substituted for public purpose in 19 states).

[165] *See supra* Part III.

determined with rule-like precision. As a result, landowners are provided with very few, unreliable safeguards. To secure the property rights of its citizens, North Carolina should do more than adopt a generic public use provision. The General Assembly should follow Virginia's lead and draft amendment language that proscribes the exercise of eminent domain where the primary use is for private gain, private benefit, or private enterprise.[166]

On November 6, 2012, Virginia residents overwhelmingly approved an amendment to their state constitution that further restricts eminent domain power.[167] Section 11 of Article I of the Constitution of Virginia has been amended to require:

> (i) that eminent domain only be exercised where the property taken or damaged is for public use and, except for utilities or the elimination of a public nuisance, not where the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development; (ii) to define what is included in just compensation for such taking or damaging of property; and (iii) to prohibit the taking or damaging of more private property than is necessary for the public use.[168]

This constitutional amendment is markedly more restrictive than any other state's constitutional takings provision.[169] Such language notably restricts private gas producers' ability to condemn land for shale gas extraction, production, storage, and distribution, unless they can effectively prove that the condemned land's primary use is actually for the public. This language is designed to secure property rights by fixing them to the state constitution. The point of such a provision is to enshrine principles of property rights so fundamental that they should not be readily disregarded.[170] In a

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[166] VA. CONST. art. I, § 11.

[167] *See Unofficial Results—General Election—Nov. 6, 2012*, VIRGINIA.GOV, http://electionresults.virginia.gov/resultsSW.aspx?type=PRO&map=CTY (last visited Nov. 7, 2012) (reporting that the constitutional amendment was approved by nearly 75%, or approximately 2.5 million, of Virginia's voters).

[168] VA. CONST. art. I, § 11.

[169] *See generally Current State Constitutional Provisions About Eminent Domain*, *supra* note 155 (giving a list of current state constitutional eminent domain provisions).

[170] *See* Associated Press, *Eminent Domain, Veto Amendments Pass Overwhelmingly*, M.ROANOKE.COM (Nov. 7, 2012), http://m.roanoke.com/mapp/

state like North Carolina, where the takings powers of government and private entities are broad and ambiguous, landowners are not afforded property rights strong enough to withstand the exercise of eminent domain. The problem is not a new one, but it is one that needs to be rectified immediately. Virginia has adopted a solid solution, and North Carolina should follow suit.

In moving forward with such a proposed constitutional amendment, the North Carolina General Assembly is certain to find strong support from those opposed to fracking as well as from citizens who are pro-property rights. On the other hand, if Virginia's experience is any guide, the legislature may face opposition from local governments and businesses concerned that the restrictive provisions would hinder economic growth and the promotion of energy security.[171] For instance, the Virginia Municipal League responded to Virginia's proposed constitutional amendment by expressing concern that the amendment would harm the citizens of Virginia by drastically limiting local governments from being able to carry out projects that help

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story.aspx?arcID=316373 (discussing that the champions of the amendment have argued that "property rights are so fundamental, they should be enshrined in the Constitution").

[171] *See* VA. MUN. LEAGUE, FORGING A VIBRANT VIRGINIA (2012), *available at* http://www.vml.org/LEG/12LegProgram/12VMLLegProBro_Web.pdf; Memorandum from Bryan Pennington, Dir. of Intergovernmental Relations/Legislative Liason, to Norfolk City Council (Jan. 20, 2012) *available at* http://www.norfolk.gov/city_hall/meetings/2012/01-24-12/2012GAReport.pdf ("A number of prominent business groups have realized that the proposed constitutional amendment dealing with eminent domain will have an enormous negative effect on the building industry and the long-term economic health of Virginia."); Editorial Board, *Post's Endorsement: Vote No on Ballot Question 1 in Va.*, THE WASH. POST (Nov. 1, 2012), http://articles.washingtonpost.com/2012-11-01/opinions/35505708_1_business-owners-local-governments-corporate-welfare (discussing that some opponents of the Virginia constitutional amendment, such as the Washington Post, call the restrictions an act of "corporate welfare"); *see also* Kelo v. City of New London, 545 U.S 469, 488 ("A rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.").

improve life for the population of the Commonwealth.[172] However, despite any such opposition, evidence from other states, including Virginia, confirms that, overall, restrictions on eminent domain laws garner much bipartisan support.[173] While statutory reform is also needed, a binding constitutional amendment that fixes property rights into North Carolina's Constitution will more readily serve as a consistent, un-wavering safeguard for landowners.

B. *The Statutory Amendments*

Although the adoption of a state constitutional amendment would repeal any and all contrary statutory provisions, there are a few laws that may survive. Of primary concern is section 160A-503(2a) of the North Carolina General Statute, which provides that land may be condemned if the parcel is blighted.[174] The definition is ambiguous and broad. No parameters are set for any of the qualifying conditions[175] and, furthermore, under the statute, it is possible to have a well-kept and clean parcel deemed blighted if it "substantially impairs the sound growth of the community" or "is detrimental to morals."[176] While North Carolina's definition of blight is similar to what is found in other states' statutes,[177] its

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[172] VA. MUN. LEAGUE, *supra* note 171 ("The amendment is unnecessary and will harm Virginia's citizens by severely limiting the ability of local governments and the state to carry out projects that help improve life for the Commonwealth's population.").

[173] *See* Bakst, *supra* note 125, at 4; David Sherfinski, *Virginia Democratic panel Bucks Voters on Amendment*, THE WASH. TIMES (Oct. 7, 2012), http://www.washingtontimes.com/news/2012/oct/7/virginia-democratic-panel-bucks-voters-on-amendmen/?page=all (stating that the Virginia bill passed on a bipartisan vote); *Unofficial Results—General Election—Nov. 6, 2012*, *supra* note 167.

[174] N.C. GEN. STAT. § 160A-503(2a) (2011).

[175] *See id.*

[176] *Id.*

[177] *See* Nathan Koppel, *There Goes the Neighborhood: A Fight over Defining 'Blight*,*'* WALL ST. J. (April 30, 2009), http://online.wsj.com/article/SB124105581784671561.html. *See generally* ROBINSON & COLE, URBAN BLIGHT: AN ANALYSIS OF STATE BLIGHT STATUTES AND THEIR IMPLICATIONS FOR EMINENT DOMAIN REFORM (2007), *available at* http://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=NARBlight.html (analyzing blight statutes in the

vague and ambiguous language leaves room for abuse. Such abuse is made easier given that all but five states[178] base a positive determination of blight on the presence of a single blighting factor.[179] To prevent misuse, the legislature needs to amend the definition of blighted parcel to require that the condemnor have the burden of proving, by clear and convincing evidence, that more than one of the blight conditions are met.

The fact that the State's current statutory definition of blighted parcel is commonplace[180] is not a compelling argument for maintaining the status quo. The vagueness of these statutes hinders their ability to adequately protect property owners, especially in a state such as North Carolina that has exempted blight condemnations from economic development takings.[181] Defining a blighted parcel broadly and then requiring that only one relevant factor be satisfied, effectively weakens the protections afforded to landowners by House Bill 1965, thereby creating the need for a statutory amendment that leaves no room for faulty interpretations and requires a higher showing of blight. When a right so fundamental as ownership of property is at stake, the condemnor's burden of proof should be high. The authority of a private gas producer to take private property should require more than an unsubstantiated or reaching showing of one broad blight factor. Therefore, the General Assembly should pass legislation requiring that private gas producers, seeking a blight condemnation exemption, prove by clear and convincing evidence that "the taking of the property is necessary for the eradication of blight" and is "for the purpose of eradicating blight." Placing this burden of proof upon private gas producers would change the current

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United States focusing, in part, on the factors that cause blight and the conditions that are the effect of blight).

[178] Martin E. Gold and Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119, 1126 (2010) (emphasis omitted), *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2376&context=ulj. The five states that require positive findings of more than one factor are Colorado, Kansas, Nebraska, South Carolina, and Utah. *Id.* at 1126 n.27.

[179] *Id.* at 1126.

[180] *See supra* note 177 and accompanying text.

[181] N.C. GEN. STAT § 159-83(a)(1) (2011).

deferential standard of review and would alleviate the property owners' burden.[182] This standard has been adopted in a handful of states, including Michigan,[183] Colorado,[184] and Arizona.[185]

Although opponents of this proposed amendment might argue it will hinder a local government's ability to condemn harmful property or properties, it is unlikely that any new restrictions will have such an effect. Truly blighted areas will have little trouble meeting the new standards; it is the attempted exercise of this authority on clean and well-kept properties otherwise protected from condemnation that will fail. Designating an area blighted in the interest of public health, safety, or the environment is a valid governmental function. However, when such authority is improperly used as a means to circumvent traditional restrictions on the ability to condemn land, the purpose for which the statute was enacted is thwarted. Requiring a greater showing of blight conditions helps ensure that exercise of condemnation for valid community interests actually does justify taking a landowners' interest in their property. The blight exception should not act as a loophole.

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[182] Rose Willis, *Back to the Future: Returning to Traditional Notions of Blight as a Way to Enforce a Ban on Kelo-Type Takings*, DIGITAL COMMONS AT MICH. STATE UNIV. COLL. OF LAW, Jan. 1, 2006, at 30, *available at* http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1110&context=king.

[183] MICH. COMP. LAWS ANN. § 213.23(4) (West Supp. 2012) ("[If] the condemnation action involves a taking of private property because the property is blighted . . . the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.").

[184] COLO. REV. STAT. § 38-1-101(2)(b) (2012) ("[If] the condemnation action involves a taking for the eradication of blight . . . the burden of proof is on the condemning entity to demonstrate, by clear and convincing evidence, that the taking of the property is necessary for the eradication of blight.").

[185] ARIZ. REV. STAT. ANN. § 12-1132(B) (West Supp. 2012) ("In any eminent domain action for the purpose of slum clearance and redevelopment, this state or a political subdivision of this state shall establish by clear and convincing evidence that each parcel is necessary to eliminate a direct threat to public health or safety caused by the property in its current condition . . . .").

V. CALLING THE MEC: THE ROLE OF THE MEC IN RESHAPING EMINENT DOMAIN LAW IN NORTH CAROLINA

Under the Clean Energy and Economic Security Act, the MEC[186] has been tasked with developing an oil and gas regulatory program for the State.[187] To ensure that the program is comprehensive, the Act prescribes that the MEC undertake various studies. Several of these provisions can be construed as compelling, or at least authorizing, the MEC to survey, specifically, the eminent domain framework of other states to track what statutes and amendments are working to protect property rights, which have led to litigation, and which have simply failed. A report on these findings will allow the legislature to make an informed decision about how to best protect our citizens' property rights.

While nothing in the Act expressly requires the MEC to perform this particular task, such a study falls under several of the mandatory and discretionary provisions. Most notably, the Act prescribes that the MEC "shall study the state's current law on the issue of integration or compulsory pooling and other states' laws on the matter."[188] Although compulsory pooling[189] is outside of the scope of this Recent Development, the issue is analogous to one in which a private gas producer uses eminent domain to take property against the landowner's wishes. Therefore, "the matter" could easily be interpreted to include any acts to take property without the owner's permission thus prescribing that the MEC undertake this survey. Other provisions of the Act could indirectly push the

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[186] *See* Clean Energy and Economic Security Act, ch.143, pt. II, 2012-2 N.C. Adv. Legis. Serv. 581, 583–86 (LexisNexis) (reconstituting the Mining Commission as the Mining and Energy Commission).

[187] *Id.* § 2(c) (requiring the MEC and other regulatory agencies to "establish a modern regulatory program for the management of oil and gas exploration and development in the State and the use of horizontal drilling and hydraulic fracturing treatments for that purpose").

[188] *Id.* § 2(l).

[189] Compulsory pooling (or "forced pooling") compels holdout landowners to join gas-leasing agreements with their neighbors. Maria C. Baca, *Forced Pooling: When Landowners Can't Say No to Drilling*, PROPUBLICA (May 18, 2011, 10:01 PM), http://www.propublica.org/article/forced-pooling-when-landowners-cant-say-no-to-drilling.

MEC to act. For example, the MEC "shall identify changes required to all existing rules and statutes necessary for the implementation of the Act, including repeal or modification of rules and statutes."[190] Similarly, the MEC "shall adopt rules" for the purpose of "any other matter [it] deems necessary for implementation of a modern regulatory program for the management of oil and gas exploration and development in the State . . . ."[191] Implementation of a comprehensive and streamlined oil and gas regulatory program should be all-inclusive, addressing environmental, public health, energy, and job security concerns as well as landowner protections. Accordingly, calling on the MEC to play a role in reshaping North Carolina's eminent domain laws is both timely and appropriate. Should the need to protect our state's private property owners not be enough to prompt the MEC to get involved, the introduction to the Clean Energy and Economic Security Act provides that the enactment of its provisions is meant to "enhance landowner and public protections related to horizontal drilling and hydraulic fracturing."[192] Providing the General Assembly with a report on national eminent domain laws serves this purpose.

VI. CONCLUSION

The State is long overdue for the adoption of a takings provision. The eminent domain regime in North Carolina elucidates several notable points, all of which stand to accelerate threats to property rights should the legislature act to issue drilling permits. First, North Carolina has explicitly equipped private entities with statutory eminent domain powers, and the courts have consistently upheld the use of such authority in the context of natural gas pipelines. Secondly, at both the state and federal level, condemnors are now required only to pass scrutiny under the more flexible and encompassing public purpose test. No longer does the property taken have to be actually used by the public for the

[190] Clean Energy and Economic Security Act § 2(m).

[191] *Id.* § 2(c)(14) (to be codified as amended at N.C. GEN. STAT. § 113-391(a)(14)).

[192] *Id.* at pt. I ¶ 1.

exercise of eminent domain to be permitted. Moreover, Supreme Court precedent has affirmed the ability of a government to take property by eminent domain and immediately transfer it to private beneficiaries without disrupting the public purpose requirement. Finally, post-*Kelo* reform in the State has been elusive and has done little in the way of securing property rights. Despite the weakness of the reform, the General Assembly has taken no notable steps towards reform. What is worse, the legalization of fracking has not prompted the State to consider, let alone address, how lifting the moratorium on hydraulic fracturing and horizontal drilling activities could amplify the standing threat to private property rights. Before the courts have to decide this issue on an ad hoc basis, the legislature needs to be proactive in considering the relationship between fracking and eminent domain. More specifically, the State needs to ask itself, to what degree should its legal terrain privilege private gas producers at the expense of landowners? The taking of private property for pipelines is one thing. The taking of private property for wastewater facilities, storage tanks, drill wells, and the like is quite another. North Carolina prides itself on protecting property rights; however, if constitutional and statutory reform does not occur now, the State legislature will effectively be signaling that it is willing to line the pockets of gas producers at the expense of its citizens.