SEPARATION OF POWERS: A FORGOTTEN PROTECTION IN THE CONTEXT OF EMINENT DOMAIN AND THE NATURAL GAS ACT

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I. INTRODUCTION

Unbeknownst to many Americans, at Congress's direction, the federal government can take immediate possession of an owner's private property through the use of its eminent domain power.[1] Now the courts have taken it upon themselves to give this power to private entities, such as private gas companies that seek property for pecuniary gain. In so doing, the courts improperly usurp legislative power, not only threatening private property, but also undermining America's constitutional structure of government.

The United States Constitution establishes a government with three coordinate branches, each possessing separate powers. This structure of government is known as the doctrine of separation of powers.[2] The Framers constructed this separation of powers to insulate

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[1] The government simply deposits into court, for the owner's benefit, an amount it unilaterally estimates to be the value of the property. *See, e.g.*, 40 U.S.C. § 3114 (2003). The government can then force the owner to vacate and seize possession of the property. This power is known as the "quick-take" power of eminent domain. *See infra* note 10 and Part II.E.2 and accompanying text. The owner will eventually obtain a trial, but it may take years. In addition, owners deprived of their property pursuant to the power of eminent domain have no constitutional or statutory right to a jury in federal court. *See* United States v. Keller, 142 F.3d 718, 720-23 (4th Cir. 1998); *see also* United States v. Reynolds, 397 U.S. 14, 19 (1970); Bauman v. Ross, 167 U.S. 548, 593 (1897).

[2] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 17 (1985).

> This idea [of separation of powers] was hinted at by Locke, who found reason to separate legislature from executive, but it received its most famous and influential articulation in Montesquieu's *The Spirit of Laws*, which coined the phrase "separation of powers" and justified the doctrine. . . . [T]he system helped to guarantee the liberties of the individual.

Id.

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individual rights and liberties from government encroachment.[3] In eminent domain proceedings involving the Natural Gas Act,[4] however, district courts have completely disregarded the constitutional structure of government and its attendant doctrine of separation of powers.

The power of eminent domain is one of the most invasive powers the government possesses. Recognizing the inherent dangers in exercising this power, courts have called the power of eminent domain "arbitrary in character and subversive of the right of private property,"[5] "in derogation of general right,"[6] and "one of the most harsh proceedings known to the law."[7] Two distinct strands of this power exist: the "normal" condemnation[8] power (the condemnor[9] takes title to and possession of property only after payment of the amount judicially determined to be just compensation), and the "quick-take" condemnation power (the condemnor takes title to and possession of property immediately upon filing certain documents and depositing with the court an amount the condemnor determines to be just compensation).[10] The quick-take power,

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[3] *Id.*; *see also* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (stating "the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power"); Bowsher v. Synar, 478 U.S. 714, 721-22 (1986) (stating that the purpose of separation of powers is to "diffuse power the better to secure liberty"); United States v. Brown, 381 U.S. 437, 442-43 (1965) (stating that the constitutional structure of separation of powers is designed to be "a bulwark against tyranny").

[4] 15 U.S.C. § 717f(h) (2003).

[5] United States v. W. Va. Power Co., 33 F. Supp. 756, 759 (S.D. W. Va. 1940).

[6] United States v. Chichester, 283 F. 650, 654 (W.D. Va. 1922) (quoting 20 C.J. 882-84); Tenn. Gas Pipeline Co. v. 104 Acres, 749 F. Supp. 427, 432 (D.R.I. 1990) (quoting Del., Lackawanna & W. R.R. v. Morristown, 276 U.S. 182, 192 (1928) ("'[T]he taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed.' This is so because exercise of the power of eminent domain is in derogation of property rights and may be subject to abuse.")).

[7] Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 (Fla. 1975). As one court noted, the power of eminent domain permits the government to strip citizens of "private ownership and possession of property [which] was one of the great rights preserved in our Constitution and for which our forefathers fought and died." *Id.* The power is harsh because property owners subjected to eminent domain are involuntary parties to proceedings in which they are forced to relinquish their property, as well as any benefits flowing from the use of that property. The property is taken against the owner's will. In many cases the owner is forced to shoulder the burden of litigation expenses if he rejects the condemnor's offer and seeks a trial to determine just compensation.

[8] Condemnation is "the exercise of eminent domain." BLACK'S LAW DICTIONARY 287 (7th ed. 1999).

[9] The concepts of condemnation or eminent domain typically conjure up images of a taking by a governmental entity, but through statutory delegations of the power of eminent domain, some private entities may also exercise this power. Accordingly, throughout this article, the term "condemnor" denotes any governmental body or other entity that maintains the power of eminent domain and has authority to take property pursuant to such power.

[10] For a discussion of the differences between the two types of powers, see United States v. 640.00 Acres of Land, 756 F.2d 842, 844 (11th Cir. 1985). When a condemnor

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which is a distinct and additional power of eminent domain,[11] is harsher and more intrusive than the exercise of the normal power of eminent domain.[12]

In enacting the Natural Gas Act (the Act), Congress delegated to private gas companies the power of eminent domain, enabling these companies to take private property. The language of the Act conspicuously omits a grant of the quick-take power to private gas companies. A comprehensive reading of federal eminent domain statutes reveals that Congress deliberately chose to withhold the quick-take power.[13]

Despite this omission, the overwhelming majority of federal district courts grant the quick-take power to private gas companies, notwithstanding the absence of legal authority.[14] Courts justify their grant of quick-take power to private gas companies by invoking their "inherent equitable powers." But these inherent equitable powers do not permit the judiciary to unilaterally grant governmental powers that belong exclusively to the legislature.[15] Such judicial action upsets the constitutional structure of government.

This article focuses on the protection of private property stemming from the structure of government created by the Framers, namely, the separation of powers in the context of eminent domain proceedings involving the Act. This article demonstrates that courts are improperly using equity to usurp legislative power and are thereby undermining the constitutional structure of government. Part II describes the background principles of eminent domain in order to give the reader a general knowledge of the standard principles applicable to all eminent domain proceedings. Part III summarizes the doctrine of separation of powers.

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exercises the normal power of eminent domain, the condemnor cannot take possession of or title to an owner's property until the condemnor pays the owner just compensation, which is determined at a trial or is agreed to in a settlement. In contrast, an exercise of the quick-take power allows the condemnor to immediately take possession of and title to an owner's property. The condemnor must simply file an appropriate document with the court and deposit a sum of money into the court—a sum the condemnor unilaterally determines to be the value of the property taken. Upon the filing of this document and deposit of funds, the condemnor immediately takes title and ownership of the property. The condemnor may also take possession of the property and force the owner to vacate. *See infra* Part II.E.

[11] *See infra* notes 58-59 and accompanying text.

[12] *See supra* note 10 and accompanying text.

[13] *See infra* notes 77-80 and accompanying text; *see also* N. Border Pipeline Co. v. 127.79 Acres of Land, 520 F. Supp. 170, 171-72 (D.N.D. 1981) (acknowledging that neither FED. R. CIV. P. 71A nor 15 U.S.C. § 717f(h) gives private gas companies the quick-take power).

[14] *See infra* notes 119-120 and accompanying text.

[15] *See infra* Part III. The delegation of legislative powers is for the legislature alone. If Congress has not granted a private gas company the quick-take power, the courts cannot grant the power.

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Part IV discusses the language of the Act and the variety of approaches federal courts[16] have taken with respect to the quick-take power. Part V explains how the courts' actions pose a serious threat to the constitutional structure of separation of powers, and consequently, to individual rights.

II. BACKGROUND PRINCIPLES OF EMINENT DOMAIN

A. The Nature and Source of the Power of Eminent Domain

"Eminent domain is the claim to sovereignty by the state over all the property within the state, and it is the assertion of the right[17] to appropriate all or any part thereof to any public or state use deemed necessary by the state."[18] Simply stated, the power of eminent domain is "the power of the sovereign to take [private] property for public use without the owner's consent."[19] American courts have long held that the power of eminent domain is an inherent and exclusive power of the sovereign.[20] Courts have also affirmed that the power of eminent domain is an attribute of sovereignty and requires no constitutional

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[16] The Natural Gas Act allows gas companies to bring suit in state or federal court. 15 U.S.C. § 717f(h) (2003). This article focuses on proceedings in federal courts.

[17] Referring to eminent domain as a "right" is somewhat of a misnomer. Eminent domain is a power of the sovereign. Governments do not possess rights; they possess powers. The people possess rights. *See, e.g.*, U.S. CONST. amend. IX (referring to the rights of the people); U.S. CONST. amend. X (referring to powers of the government).

[18] ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 499 (1973); *see also* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 535 (1848) (describing eminent domain as the sovereign's right to resume possession of property within its jurisdiction).

[19] 1 NICHOLS ON EMINENT DOMAIN § 1.11 (rev. 3d ed. 2003). Eminent domain may also be defined as "[t]he superior right of property subsisting in a sovereignty by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner." *Id.* (citations and internal quotations omitted).

> The origin of the concept of eminent domain is lost in history, but the sovereign's right of eminent domain has long been acknowledged. The first recorded condemnation action occurred in 871 B.C. The condemnor, King Ahab, attempted to acquire Naboth's vineyard. Naboth refused to sell the vineyard voluntarily, and King Ahab exercised the right of eminent domain. Jezebel became, in effect, the trier of fact. The decision at the end of the trial was that King Ahab did, in fact, have the right of eminent domain and title to the vineyard was transferred to him. By way of compensation for the taking, Naboth was stoned to death for his refusal to sell the land voluntarily. There was no appeal.

J.D. EATON, REAL ESTATE VALUATION IN LITIGATION 14 (2d ed. 1995) (footnote omitted) (referring to 1 *Kings* 21:1-16); *see also* 1 *Chronicles* 21:22-26 (recognizing that justice and equity require compensation for property taken by the king).

[20] Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); *see also* Bauman v. Ross, 167 U.S. 548, 574 (1897) ("The right of eminent domain . . . is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law.").

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recognition.[21] Thus, courts have held that the Fifth Amendment's[22] requirement of paying just compensation for property taken is a *limitation* on the exercise of the power of eminent domain, not a grant of the power.[23] Similarly, the Fifth Amendment's mandate that property may be taken only for a public use is also a limitation on the power of eminent domain.[24]

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21 *See* United States v. Jones, 109 U.S. 513, 518-19 (1883). *But cf.* RUSHDOONY, *supra* note 18, at 499-502 (arguing that only the Lord God is sovereign, and therefore it is a sham to claim that the state maintains "sovereign powers"). Rushdoony contends that "the assertion of the sovereignty of the state [is] a humanistic concept" that is absent in the American Constitution. *Id.* at 502. It may also be argued that any claim to "inherent or sovereign" powers by the state is inconsistent with the concept of a government possessing limited and enumerated powers. *But see* United States v. Certain Lands in Louisville, 78 F.2d 684, 686 (6th Cir. 1935) (stating that although the federal government is one of delegated powers and the power of eminent domain is not delegated to it, the government possesses the power of eminent domain as an attribute of sovereignty).

22 "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." U.S. CONST. amend. V. Prior to the enactment of the Fourteenth Amendment, the Fifth Amendment was not a limitation on the states. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176-77 (1871). The Fifth Amendment has been incorporated through the Fourteenth Amendment and does apply to the states. Chi. Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 238-39 (1897).

23 *Jones*, 109 U.S. at 518; *see also* United States v. A Certain Tract or Parcel of Land, 44 F. Supp. 712, 715 (S.D. Ga. 1942) (explaining that the Fifth Amendment recognizes this sovereign right and places a limitation on its use but does not actually grant the power to the sovereign).

> "[T]his power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principles." . . . And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.
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> But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 324-25 (1893) (citations omitted).

24 Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985).

As "a general and fundamental principle, the exercise of the sovereign right of eminent domain is within the legislative power."[25] Congress is the only branch possessing the authority to delegate the power or authorize the exercise of the power.[26] Congress determines who will exercise this power, prescribes the procedures governing the exercise of this power, and directs the manner in which the power may be exercised.[27] As one legal encyclopedia describes:

> The decision to exercise the power of eminent domain is a legislative function, for the legislature alone to determine. Under the separation of governmental powers into the executive, legislative, and judicial branches, the right to authorize the exercise of the power is legislative, and there can be no taking of private property for public use against

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[25] O'Brien v. United States, 392 F.2d 949, 950-51 (5th Cir. 1968); *see also* Byrd v. Blue Ridge Rural Elec. Coop., 215 F.2d 542, 545 (4th Cir. 1954) (noting that the grant of the right of eminent domain is a "constitutional exercise of legislative power"); United States v. 2,005.32 Acres, 160 F. Supp. 193, 196 (N.D.S.D. 1958) ("The right to authorize the exercise of eminent domain lies only in the Congress, and an agency or officer of the United States may take property only to the extent of the Congressional authorization.").

[26] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *see also* United States v. Parcel of Land, 100 F. Supp. 498, 504 (D.D.C. 1951) ("[A] court, in condemnation proceedings, may only direct the taking of possession of the property sought to be condemned in accordance with legislative authority."); 1A NICHOLS ON EMINENT DOMAIN § 3.03 (rev. 3d ed. 2003).

> Under the customary division of governmental power into three branches, *i.e.*, executive, legislative, and judicial, the right to authorize the exercise of eminent domain is legislative. In the absence of direct authority from a legislature, there can be no taking of private property . . . [unless] the owner consents to the taking. The power of eminent domain lies dormant until legislative action is employed, pointing out the occasions, modes, agencies, and conditions for its exercise.

Id.

[27] *See Youngstown Sheet & Tube Co.*, 343 U.S. 579; *see also* United States v. 9.94 Acres, 51 F. Supp. 478, 480-81 (E.D.S.C. 1943) (stating that Congress determines by whom, when, and how the power of eminent domain will be exercised).

> The right to take or damage private property for a public use is wholly statutory. It is in derogation of the common law, seriously affects the rights of private citizens, and can only be exercised for the purpose, to the extent, and in the manner provided by law. . . . The power to exercise the right resides in the Legislature, as the representative of the people, but may be delegated by it to appropriate subordinate agencies. . . . It may prescribe what shall be done, and how, and may designate the order in which the various steps are to be taken. It may place its own limitations on the extent to which the power will be granted and the manner of its exercise, and when it does so its mandate must be obeyed. . . . The powers conferred cannot be enlarged, nor the restraints imposed minimized by construction of the courts. The legislature is the sole judge of the propriety of granting the power, and the extent and manner of its exercise. . . . With this the courts have no concern, nor can they refuse to enforce restraints simply because they regard them as unreasonable, or are unable to ascertain what, if any, reason actuated the Legislature in imposing them.

Richmond v. Childrey, 103 S.E. 630, 631 (Va. 1920) (citations omitted).

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> the will of the owner without direct authority from the legislature. Subject to constitutional limitations, it is the province of the legislature to prescribe how and by whom the power of eminent domain is to be exercised, and the discretion to exercise the sovereign power of eminent domain is in the legislature and those to whom it delegates such function by statute. The executive branch of the government cannot, without the authority of some statute, proceed to condemn property for its own uses. Where, therefore, the constitution is wholly silent on the subject, the power of eminent domain rests entirely with the legislature and lies dormant until the legislature sets it in motion.[28]

No entity or person, not even the executive or judicial branch, may exercise the power of eminent domain or take property without specific legislative authorization.[29]

B. Limitations on the Power of Eminent Domain

The Takings Clause of the United States Constitution contains two express limitations on the power of eminent domain. The constitutional structure of government creates another important, but often overlooked, limitation on this power.[30] First, a condemnor taking property pursuant to the power of eminent domain may take property only for a "public use."[31] Any taking that is for a private use is

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[28] 26 AM. JUR. 2D *Eminent Domain* § 5 (1996) (collecting cases); *see also 9.94 Acres*, 51 F. Supp. at 480-81.

[29] *Youngstown Sheet & Tube Co.*, 343 U.S. at 585-89 (prohibiting the President of the United States from seizing immediate possession of property without legislative authorization, even in times of war and crisis); *Parcel of Land*, 100 F. Supp. at 501-04 (explaining that "a court, in condemnation proceedings, may only direct the taking of possession of the property sought to be condemned in accordance with legislative authority").

[30] These express limitations are contained in most state constitutions as well. *See* U.S. CONST. amend. V; *compare* N.Y. CONST. art. I, § 7 (prescribing limitations on the power of eminent domain), *with* N.C. CONST. (containing no explicit limitations on the power of eminent domain). North Carolina's Constitution does provide, however, "No person shall be . . . disseized of his freehold . . . or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19. Despite the absence of a constitutional provision mandating compensation, North Carolina courts 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." Lea Co. v. N.C. Bd. of Transp., 304 S.E.2d 164, 170-71 (N.C. 1983) (quoting Long v. Charlotte, 293 S.E.2d 101, 107-08 (N.C. 1982)). Thus, North Carolina courts interpret the "law of the land" to guarantee that just compensation be paid for land taken for a public purpose. *Id.* (citing *Long*, 293 S.E.2d at 107-08); *see also* De Bruhl v. State Highway & Pub. Works Comm'n, 102 S.E.2d 229, 232-33 (N.C. 1958).

[31] U.S. CONST. amend. V.

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unconstitutional.[32] Second, any condemnor who takes property must provide the owner with "just compensation."[33]

Third, private property is protected by the constitutional structure of government. Neither the judiciary nor the executive may delegate powers of eminent domain or take private property without legislative authorization.[34] Only the legislature, the elected representatives of the people, may take private property or delegate the power to take private property.[35] In describing the legislative nature of the power of eminent domain, the preeminent jurist William Blackstone noted that in taking property

> the *legislature alone* can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an

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[32] Due to the broad judicial interpretation of "public" use, much debate exists as to what constitutes a public versus a private use. *See, e.g.*, DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2003) (examining eminent domain abuses in the fifty states and Washington, D.C.). The difference between public and private use is beyond the scope of this article.

[33] U.S. CONST. amend. V. In most cases, "just compensation" means the fair market value of the subject property on the date of the take. United States v. 564.54 Acres of Land, 441 U.S. 506, 511-13 (1979); United States v. Miller, 317 U.S. 369, 373 (1943) ("[C]ompensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."). Fair market value, however, is not synonymous with just compensation. Courts use methods other than fair market value to determine just compensation "when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public." United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950). The Supreme Court's

> prior decisions have variously defined the "just compensation" that the Fifth Amendment requires to be made when the Government exercises its power of eminent domain. The owner is entitled to fair market value, but that term is not an absolute standard nor an exclusive method of valuation. The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law.

United States v. Fuller, 409 U.S. 488, 490 (1973) (citations and quotations omitted).

Courts have determined that the just compensation clause does not require a condemnor to provide an owner with compensation at the time of the taking as long as an adequate procedure exists by which the owner is guaranteed compensation at a later date. Williams v. Parker, 188 U.S. 491, 502-03 (1903); *see also* United States v. Dow, 357 U.S. 17, 21 (1958) ("[T]he Government may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land, or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained." (citations omitted)); *infra* Part IV.B.1.b.

[34] *See supra* notes 25-29 and accompanying text.

[35] *See supra* notes 25-29 and accompanying text.

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exchange. All the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which *nothing but the legislature can perform.*

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence [sic] of the realm or the support of the government, but such as are imposed *by his own consent, or that of his representatives in parliament.*[36]

C. Delegations of the Power of Eminent Domain: The Public-Private Distinction

Eminent domain proceedings are creatures of statute and are regulated entirely by the statutes under which they are brought.[37] Two types of statutes delegating the power of eminent domain exist. The first type authorizes a governmental agency or other arm of the sovereign to take property on behalf of or in the name of the sovereign.[38] The second type delegates the power of eminent domain to private entities, such as utility companies, to take property in their own name and on their own behalf.[39]

The first type of statute involves the exercise of the sovereign's full powers, as it is a taking by or for the sovereign. For example, the secretary of a military department or a federal agency may take property in the name of the United States.[40]

> A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, *grants of limited powers*. They do not include sovereign powers greater than those expressed or necessarily implied.[41]

Whether the condemnor is a public or private entity bears greatly upon the powers it possesses.[42] For example, under federal law,

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36 1 WILLIAM BLACKSTONE, COMMENTARIES *139-40 (emphasis added).

37 United States v. Meyer, 113 F.2d 387, 394 (7th Cir. 1940); *see also* United States v. 5.324 Acres of Land, 79 F. Supp. 748, 761 n.8 (S.D. Cal. 1948) (stating that condemnation proceedings are "purely statutory" and "special" proceedings).

38 *See, e.g.*, 10 U.S.C. § 2663 (2003) (authorizing the secretary of a military department to bring suit in the name of the United States to acquire property by condemnation).

39 *See, e.g.*, 15 U.S.C. § 717f(h) (2003) (delegating limited powers of eminent domain to private gas companies).

40 *See supra* note 38 and accompanying text.

41 United States v. Carmack, 329 U.S. 230, 243 n.13 (1946) (emphasis added).

42 The rationale behind the different treatment likely stems from two considerations. First, the sovereign is backed by the full faith and credit of the federal treasury so that owners are guaranteed to receive just compensation. *See* Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1320 (4th Cir. 1983) (observing

> the *Government* may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land [*i.e.*, normal condemnation power], or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained [*i.e.*, quick-take power].[43]

Conversely, when Congress delegates the power of eminent domain to a private party, that party does not assume the full powers of the sovereign, but only those powers that Congress specifically delegates to it.[44] A private condemnor, then, may exercise the quick-take power under federal law only if the legislature has specifically granted such power.[45] Consequently, unlike the federal government, which possesses the

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that the requirement of just compensation is satisfied "when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge") (quoting Joslin Mfg. Co. v. Providence, 262 U.S. 668, 677 (1923)). A private party, on the other hand, may become insolvent after commencing a project. Second, presumably the motivation of government is the good of the people or community, while the motivation of private businesses is corporate profit and pecuniary gain.

[43] United States v. Dow, 357 U.S. 17, 21 (1958) (citations omitted) (emphasis added).

[44] *See* N. Border Pipeline Co. v. 127.79 Acres of Land, 520 F. Supp. 170, 172 (D.N.D. 1981). The court stated:

> No statutory authority exists which would authorize a private party, such as the plaintiff, to take immediate possession of the real property prior to the condemnation proceeding. Similarly, the authority to take immediate possession of the property cannot be implied in the mere grant to the plaintiff of the right to eminent domain because the language of Title 15 U.S.C. § 717f(h) is unequivocal. In addition, if an ambiguity were found in the statute the result would not change because statutes conferring the right of eminent domain are strictly construed to exclude those rights not expressly granted.

Id.; *see also* USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816, 825 (E.D. Tenn. 1998) (recognizing that congressional delegation of the normal power of eminent domain to a private gas company does not cloak the company with the quick-take power).

[45] *Wash. Metro. Area Transit Auth.*, 706 F.2d at 1319 (holding that the Transit Authority possessed the quick-take power because the statute granting it the power of eminent domain also granted the quick-take power). In *Washington Metropolitan Area Transit Authority*, the Fourth Circuit recognized that the grant of the ordinary power of eminent domain does not automatically confer the additional quick-take power. *Id.*; *see also* N. Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469, 471-72 (7th Cir. 1998) (declaring that the gas company had no right or power to seize possession of the owner's property until after the "conclusion of the normal eminent domain process" and therefore the "district court had no authority to enter a preliminary injunction awarding immediate possession"); Nat'l Fuel Gas Supply Corp. v. 138 Acres, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000) (quoting language from *86.72 Acres of Land* and denying a right of immediate possession to gas companies); Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276, 1281 (D. Kan. 1999) (stating that the language of the Natural Gas Act unequivocally grants private gas companies only the normal power of eminent domain, and even if ambiguities were present in the statute, strict construction would require the court to "exclude those rights not expressly granted").

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sovereign's full powers of eminent domain, a private gas company's "only authority to condemn property is grounded in § 717f(h)" of the Natural Gas Act.[46]

D. Rules of Statutory Construction of Delegations of Eminent Domain Power

"Statutes conferring the power of eminent domain are subject to strict construction against the one exercising the power and in favor of the landowner, because the power of eminent domain is one of the most harsh proceedings known to the law."[47] Moreover, courts may not enlarge a statute's grant of the power of eminent domain by implicating or inferring a broader grant than that contained in the plain language of the statute.[48]

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46 *127.79 Acres of Land*, 520 F. Supp. at 172.

47 26 AM. JUR. 2D *Eminent Domain* § 20 (2002) (citing Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 (Fla. 1975)); *see also* United States v. 2,005.32 Acres, 160 F. Supp. 193, 200-01 (N.D.S.D. 1958) (citing Del., Lackawanna & W. R.R. v. Morristown, 276 U.S. 182 (1928)); 1A NICHOLS ON EMINENT DOMAIN § 3.03 [6][b-e], [9][a] (rev. 3d ed. 2003); *cf. id.* § 3.03 [6][e] ("Statutory provisions in favor of an owner, such as provisions regulating the remedies of such owner and the compensation to be paid him, are to be *liberally construed* in his favor.") (emphasis added).

48 1A NICHOLS ON EMINENT DOMAIN § 3.03 [6][a] (rev. 3d ed. 2003); *see also* Tenn. Gas Pipeline Co. v. 104 Acres, 749 F. Supp. 427, 431-32 (D.R.I. 1990) (instructing that the scope of a condemnor's power "is to be construed narrowly against the party exercising the power"); 26 AM. JUR. 2D *Eminent Domain* § 20 (2002) ("Such statutes are not to be extended or broadened by inference or implication or by judicial construction."). The American Jurisprudence legal encyclopedia specifies:

> A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; and when the power is granted, *the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.* . . . [W]hen the matter is doubtful, it must be resolved in favor of the property owner.

Id. (emphasis added). When Congress grants the power of eminent domain,

> the terms of the grant must be strictly construed. When the matter is in doubt it must be resolved in favor of the property owner. These principles are firmly established.
>
> . . . There is no rule more familiar or better settled than this: that grants of corporate power, being in derogation of common rights, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain—one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property.

Pontiac Improvement Co. v. Bd. of Comm'rs, 135 N.E. 635, 637 (Ohio 1922) (internal quotations omitted).

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In claiming any powers of eminent domain, the condemnor must show affirmative legislative authorization.[49] "[U]nless both the spirit and letter of the statute clearly confer the power," courts should interpret that power as withheld by the legislature.[50] If the legislature is silent with regard to a certain power, the court should construe the power as being withheld because every doubt in construction is to be resolved against the granting of powers of eminent domain.[51]

Accordingly, these statutes are narrowly construed against the condemnor so as to exclude those powers not expressly granted.[52] The Supreme Court of Virginia summarized the principles of statutory construction in eminent domain cases:

> The taking of private property . . . is a matter of serious import, and is not to be permitted except where the right is plainly conferred and the manner of its exercise has been strictly followed. There must be no doubt or uncertainty about the existence of the power. *If it is not plainly conferred, it does not exist.* The state may grant the power generally to condemn any property for a public use, or it may place such restrictions upon the power, the manner of its exercise, or the character of the property that may or may not be taken as it pleases, and when such restrictions are imposed they must be obeyed. *If the limitations or restrictions imposed involve public convenience, or retard the progress of public improvements, the remedy is an appeal to the Legislature. They cannot be removed by judicial construction. The courts cannot enlarge a power which the Legislature has restricted.* It is said that, *in the construction of statutes conferring the power of eminent domain, every reasonable doubt is to be solved adversely to the right*; that the affirmative must be shown, as *silence is negation*; and that *unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised.*[53]

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[49] City of Richmond v. Carneal, 106 S.E. 403, 406-07 (Va. 1921); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952); United States v. Parcel of Land, 100 F. Supp. 498, 501-04 (D.D.C. 1951).

[50] *Carneal*, 106 S.E. at 407 (quoting Sch. Bd. v. Alexander, 101 S.E. 349, 351 (Va. 1919)).

[51] *Id.* at 406-07. The general principle, "[w]hatever is not plainly given is to be construed as withheld" would thus apply. *See also* 1A NICHOLS ON EMINENT DOMAIN § 3.03 [6][b] (rev. 3d ed. 2003).

[52] *See* Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276, 1281-82 (D. Kan. 1999); N. Border Pipeline Co. v. 127.79 Acres, 520 F. Supp. 170, 172 (D.N.D. 1981) (citing 1 NICHOLS ON EMINENT DOMAIN § 3.213(2) (3d ed. 1980)). Ironically, in *127.79 Acres of Land*, the court recognized the appropriate rules of statutory construction, concluded that it could not imply quick-take power under the Natural Gas Act, but decided to grant the quick-take power anyway under its "inherent" equitable powers because the company would "be subjected to great delay and expense if immediate possession [was] not granted." *127.79 Acres of Land*, 520 F. Supp. at 172-73.

[53] *Carneal*, 106 S.E. at 406-07 (citing Fertilizing Co. v. Hyde Park, 97 U.S. 659, 666 (1878)) (internal citations omitted) (emphasis added).

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A condemnor must also strictly comply with the statutes conferring and governing the power of eminent domain.[54] When the "power [of eminent domain] is delegated, it can be exercised only in the manner authorized."[55] Such statutes "must be strictly complied with, and the statutory authority be strictly pursued, and every condition or other prerequisite to the exercise of jurisdiction be observed, especially every requisite of the statute having the semblance of benefit to the landowner."[56]

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[54] Cincinnati v. Vester, 281 U.S. 439, 448 (1930); *see also* United States v. 2.4 Acres, 138 F.2d 295, 298 (7th Cir. 1943); City of Des Moines v. Geller Glass & Upholstery, Inc., 319 N.W.2d 239, 242 (Iowa 1982) ("The statutory provisions regulating the exercise of the power of eminent domain must be strictly complied with and they are construed strictly to protect the constitutional property rights of the owner."); Schmidt v. Richmond, 142 S.E.2d 573, 577 (Va. 1965) (explaining "in eminent domain proceedings, the jurisdiction of courts is wholly statutory, and the statutes must be strictly construed and followed").

> The courts everywhere hold that acts conferring the power of eminent domain shall be strictly construed against the grant, and that one claiming the power must bring himself strictly within the grant, both as to the extent and manner of its exercise. . . . There must be a close, straightforward, and honest compliance with every substantial requirement of the law. The requirement of the law must be fulfilled whether reasonable or unreasonable. . . . [T]he power conferred must be strictly construed and the manner of executing it carefully observed; . . . grants of power, especially the [power] of eminent domain, are to be strictly construed. . . . These principles have been applied in cases too numerous to be cited.

City of Richmond v. Childrey, 103 S.E. 630, 631 (Va. 1920) (citations and internal quotations omitted).

[55] Comm'rs of Highways v. United States, 466 F. Supp. 745, 761 (N.D. Ill. 1979) (citation omitted), *rev'd in part on other grounds*, 653 F.2d 292 (7th Cir. 1981); United States v. Holmes, 414 F. Supp. 831, 839-40 (D. Md. 1976); United States v. 9.94 Acres of Land, 51 F. Supp. 478, 481 (E.D.S.C. 1943); Tosohatchee Game Pres., Inc. v. Cent. & S. Fla. Flood Control Dist., 265 So. 2d 681, 683 (Fla. 1972) ("Although an agency of the State has general power to condemn, it may do so only in compliance with the statute giving it such power.").

[56] United States v. Chichester, 283 F. 650, 654 (W.D. Va. 1922) (citing 20 C.J. 882-84). As the Supreme Court of Ohio explained,

> The general rule requiring grants of this nature to be strictly construed is, in our opinion, the only safe one, and it should be adhered to with unyielding tenacity. . . . It is the duty of the court in such a case, to keep them strictly within their granted powers; and if the necessity of the case requires an enlarged power, to force them to seek it at the hands of the legislature. . . . All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other. An act of this sort . . . deserves no favor; to construe it liberally would be sinning against the rights of property.

Pontiac Improvement Co. v. Bd. of Comm'rs, 135 N.E. 635, 637 (Ohio 1922) (internal quotations and citations omitted).

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E. Distinctions Between the Normal Power of Eminent Domain and the Quick-Take Power of Eminent Domain

When the legislature grants the power of eminent domain, it may grant two distinct types of eminent domain power: (1) the normal condemnation power, and (2) the quick-take power. As noted, critical distinctions exist between these two different powers. The United States Court of Appeals for the Eleventh Circuit explained some of the most significant differences between the two powers as follows:

> Of the various methods of condemnation available to the federal government, two are most common. The more expeditious of these two methods is that prescribed by the Declaration of Taking Act, [40 U.S.C. § 3114].[57] Under this statute, the government obtains immediate title to the land upon the filing of a declaration of taking and the deposit into the court registry of the estimated just compensation. If just compensation as judicially determined is found to be greater than the deposit, the government must deposit the difference, with interest on the difference from the date of possession. The more frequently invoked method, however, is the so-called "straight condemnation" method [i.e., the normal condemnation power], prescribed by [40 U.S.C. § 3113]. Under this statute, the government simply files a complaint in condemnation. Title does not pass at that time and no money is deposited into the court. Once the complaint is filed, the matter proceeds to trial to determine the amount of compensation due the landowner. Upon resolution of the compensation issue, the government has the option of either purchasing the property at the adjudicated price or dismissing the condemnation action.[58]

Private gas companies undeniably possess the power of eminent domain, but they possess only the normal condemnation power and not the quick-take power. A delegation of normal condemnation powers does not automatically confer the delegation of quick-take powers.[59] A

[57] The Declaration of Taking Act gives the quick-take power to condemnors who take "by and in the name of the United States." 40 U.S.C. § 3114(a) (2003).

[58] United States v. 640.00 Acres of Land, 756 F.2d 842, 844 (11th Cir. 1985).

[59] *See* Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312 (4th Cir. 1983) (allowing Transit Authority to use the quick-take power because the compact creating the Transit Authority allowed it to use any federal law to accomplish condemnation, including the quick-take power typically reserved to the federal government); *see also* 40 U.S.C. § 3118 (2003) ("The right to take possession and title in advance of final judgment in condemnation proceedings as provided by [the Declaration of Taking Act] . . . is *in addition* to any right, power, or authority conferred by [other] laws." (emphasis added)).

All courts specifically recognize that the Natural Gas Act does not confer the quick-take power of eminent domain. *See, e.g.*, Nat'l Fuel Gas Supply Corp. v. 138 Acres, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000); *cf.* USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816, 825 (E.D. Tenn. 1998); N. Border Pipeline Co. v. 127.79 Acres of Land, 520 F. Supp. 170, 171-72 (D.N.D. 1981).

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condemnor does not possess the quick-take power unless the legislature specifically grants such power.[60]

1. The Normal Power of Eminent Domain

Under the normal power of eminent domain, the condemnor may not take title to or seize possession of property until after a trial for the determination of just compensation.[61] Title does not pass until the condemnor pays into court the amount determined at trial to be just compensation.[62] Until such payment, the condemnor maintains no authority to seize possession of the property and may abandon its efforts to take the property.[63] Once judicially determined compensation is paid, however, the taking is final, and the parties are bound.[64] The condemnor may then seize possession of the property.[65]

In sum, under the normal power of eminent domain, the condemnor cannot seize possession of property until it obtains title. It does not obtain title until it pays the owner the amount determined at trial to be just compensation.[66]

2. The Quick-Take Power of Eminent Domain

Separate from the normal power of eminent domain is the additional quick-take power that Congress may grant certain

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[60] *See infra* note 68 and accompanying text.

[61] 40 U.S.C. § 3113 (2003). The condemnor "obtains neither possession nor title until there is a final judgment in the case in favor of the government establishing the right to condemn and the [amount of] compensation to be paid to the property owner, and the amount is paid. Then only is there a 'taking.'" United States v. Certain Parcels of Land, 61 F. Supp. 164, 168-69 (D. Md. 1945) (acknowledging the difference between the normal power of eminent domain and the quick-take power).

[62] United States v. Certain Lands, 46 F. Supp. 386, 387 (S.D.N.Y. 1942).

[63] If the condemnor abandons its efforts to take property after forcing the owner to incur the litigation expenses, certain statutes grant the owner the right to recover his costs incurred as a result of the condemnation proceedings. *See, e.g.*, Uniform Relocation Act, 42 U.S.C. § 4654 (2003).

[64] As one court observed,

> The taking in this proceeding is accomplished when payment of the award is made, and until then, the Government may discontinue or abandon its effort. The award is no more than an offer subject to acceptance by the Government, and gives it the opportunity to determine whether the valuation fixed [at the trial] is within its resources or acceptable. In other words, condemnation is a means by which the Government may find out what any piece of property will cost. No title passes until the compensation is paid.

Certain Lands, 46 F. Supp. at 387 (citing Danforth v. United States, 308 U.S. 271, 284 (1939)).

[65] *Id.*

[66] *Id.*; *see also* United States v. 1060.92 Acres of Land, 215 F. Supp. 811, 814 (W.D. Ark. 1963); United States v. 125.71 Acres of Land, 54 F. Supp. 193, 195 (W.D. Pa. 1944).

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condemnors.[67] The quick-take power authorizes a condemnor to seize possession of property prior to the condemnation trial and prior to paying the owner judicially determined just compensation. The condemnor simply files a document, titled a "Declaration of Taking," and deposits in court what it unilaterally determines to be the monetary value of the property taken.[68] After completing these formalities, the condemnor immediately takes title to the property and may seize possession of the property.[69] Unlike the exercise of the normal power of eminent domain, once the condemnor files the certificate, it is bound to purchase the property regardless of the determination of value.[70]

Congress alone possesses authority to grant quick-take power.[71] "It is within the power of Congress, consistent with the mandates of the Constitution, to provide the method through which the Federal Government is to exercise its power of eminent domain."[72] Congress determines what powers it will grant to private entities when it delegates the power of eminent domain.[73] Unless Congress grants the quick-take power to a private condemnor, that condemnor may not exercise such power.[74] In addition, whenever Congress grants the power to seize possession of property prior to trial and payment of compensation, Congress must first establish a "reasonable, certain and adequate provision . . . for obtaining just compensation."[75] This requirement exists regardless of whether Congress delegates the power to a private or public condemnor.[76] The quick-take power is extremely

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[67] *See supra* note 59 and accompanying text.

[68] 40 U.S.C. § 3114 (2003).

[69] *Id.* § 3114(b).

[70] *See supra* note 58 and accompanying text.

[71] *See supra* notes 26-27 and accompanying text; *see also* Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1319 (4th Cir. 1983) (holding that the Transit Authority possessed the quick-take power because the statute granting it the power of eminent domain also granted it the quick-take power by authorizing the Authority to use 40 U.S.C. § 3114); United States v. Parcel of Land, 100 F. Supp. 498, 501-04 (D.D.C. 1951) (explaining that the power to take property through the normal condemnation process does not confer the additional power to take immediate possession unless the latter power is expressly authorized by the legislature).

[72] United States v. Holmes, 414 F. Supp. 831, 839 (D. Md. 1976).

[73] United States v. Eight Tracts of Land, 270 F. Supp. 160, 163 (E.D.N.Y. 1967).

[74] *See generally Wash. Metro. Area Transit Auth.*, 706 F.2d 1312; *Parcel of Land*, 100 F. Supp. at 501-03 (explaining that the power to take property through the normal condemnation process does not confer the additional power to take immediate possession unless the latter power is expressly authorized by the legislature).

[75] Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923) (citation omitted); *see infra* Part IV.B.1.b.

[76] *See Hanson Lumber Co.*, 261 U.S. 581; *infra* Part IV.B.1.b.

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harsh and intrusive. Congress, recognizing the power's severity, grants it rarely.[77]

Other congressional acts, and the legislative history underlying some of those acts, reveal that when Congress has desired a condemnor to have quick-take power, Congress has affirmatively granted the power to seize immediate possession of property.[78] Unlike other statutes in which Congress has granted condemnors the quick-take power, Congress did not give private gas companies this immense power in the Natural Gas Act.[79] Furthermore, in enacting the general quick-take statute, Title 40 U.S.C. § 3114, Congress specifically reserved quick-take power to the United States. No doubt because of its severity and intrusiveness, Congress has chosen to grant the quick-take power only in limited cases and has generally refused to grant this power to private entities.[80]

III. GOVERNMENTAL SEPARATION OF POWERS

Unlike some state constitutions,[81] the United States Constitution makes no express mention of the words "separation of powers"; even so, the Constitution created a structure of government that is undeniably grounded upon this concept.[82] The Framers feared centralized power.

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[77] *See generally Parcel of Land*, 100 F. Supp. at 498 (examining various statutes). Evidence of congressional reluctance to grant this power can be readily seen in a report of the Committee on the Judiciary of the House of Representatives. *Id.* at 503 (quoting H.R. REP. NO. 79-1282 (1945)). Due to the exigencies of World War II, Congress granted the power of immediate possession in Title II of the Second War Powers Act of 1942. *Id.* at 502-03. After the war, Congress amended the Act:

> while the shooting part of the war was on, the Congress of necessity had to grant extraordinary powers [i.e., the power to take immediate possession]. . . . Now that we have won back much of our safety and peace, it is the determination of Congress to recapture those powers as speedily as may be wise, for the people, so that they may be again exercised in accordance with the slower but more desirable processes of democracy.

Id. at 503 (quoting H.R. REP. NO. 79-1282, at 2 (1945)).

[78] *See id.* (examining a series of statutes in which Congress expressly granted the power of immediate possession and concluding that Congress does not grant such power by implication); *see, e.g.*, 10 U.S.C. §§ 2538, 2663 (2000); 16 U.S.C. §§ 425a, 430k (2000); 33 U.S.C. § 594 (2000); 40 U.S.C. § 3114 (2003); 42 U.S.C. § 5196 (2000); 50 U.S.C. § 82 (2000); 50 U.S.C. app. § 468 (2000).

[79] The canon of statutory construction, *expressio unius est exclusio alterius*, directs courts to interpret that which is left out of a statute by the legislature to be interpreted as consciously withheld by the legislature. *See, e.g.*, United States v. McHan, 101 F.3d 1027, 1040 (4th Cir. 1996). This canon strengthens the argument that Congress does not intend for private gas companies to have the quick-take power.

[80] *See* 40 U.S.C. § 3114 (2003) (reserving the quick-take power to the United States government).

[81] *See, e.g.*, MASS. CONST. art. XXX; N.H. CONST. art. 37; VA. CONST. art. I, § 1; VA. CONST. art. III.

[82] 1 THE FOUNDERS' CONSTITUTION 311 (Philip B. Kurland & Ralph Lerner eds., 1987).

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James Madison articulated these sentiments when he declared, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[83]

The Framers were well aware of the fallen nature of man.[84] In *Federalist 51*, Madison observed that human nature requires constraints on power:

> It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[85]

George Mason, a leading Anti-Federalist, echoed these concerns: "From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the contrary we know they will always when they can rather increase it."[86] In their attempt to craft a government of limited powers, the Framers heeded Lord Acton's warning that "power tends to corrupt and absolute power corrupts absolutely."[87]

Based on their concerns about the potential for governmental corruption, the Framers fashioned a government designed to counteract man's selfish ambitions and natural struggle for power. Thus, the Constitution creates a government that divides power between three coordinate branches.[88] Each branch possesses distinct powers designed to diffuse power and to enable that branch to act as a check on the others. As one court described:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought

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83 THE FEDERALIST NO. 47 (James Madison).

84 THE FEDERALIST NO. 51 (James Madison).

85 *Id.*

86 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 266 (Ohio Univ. Press 1984) (1840).

87 *See* Dunn v. Air Line Pilots Ass'n, 193 F.3d 1185, 1207 n.14 (11th Cir. 1999) (citing JOHN BARTLETT, FAMILIAR QUOTATIONS 615 (15th ed. 1980)).

88 "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

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before the courts. . . . [N]either department may invade the province of the other.[89]

The judiciary's role is to interpret the laws and to declare their meaning.[90] These powers have commonly been referred to as "negative powers."[91] In interpreting laws and presiding over controversies involving executive actions, the judiciary maintains the power to negate legislation or executive acts that are repugnant to the Constitution.[92] In addition, the judiciary cannot exercise any power until the parties bring a justiciable case or controversy, with its attendant issues, properly before the court.[93]

Even in adjudicating matters brought before it, the judiciary possesses the power only to interpret the law and declare its meaning—

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89 Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

90 *Id.* As Chief Justice Marshall articulated early in the Court's history, "it is emphatically the duty and province of the judicial department to say what the law *is*." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added); *see also* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000); Young v. United States, 481 U.S. 787, 815-26 (1987) (Scalia, J., concurring). Scalia notes, "The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy." *Id.* at 816.

91 The judiciary's powers have at times been referred to as negative powers because the judiciary maintains the power to negate and declare void those legislative acts or executive actions that are repugnant to the Constitution. *See, e.g.*, Chicago v. Morales, 527 U.S. 41, 76 (1999) (Scalia, J., dissenting) (quoting *Mellon*, 262 U.S. at 488).

When a court strikes a law as void or repugnant to the Constitution or interprets legislation, it is truly exercising a *judicial* function. When a court grants legislative powers that the court admits Congress has undeniably withheld, it transcends the constitutional role of the judiciary and invades the province of the legislature.

92 *See Marbury*, 5 U.S. (1 Cranch) at 177-78; *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) (Courts "can take no active resolution whatever. [They] may truly be said to have neither Force nor Will but merely judgment.").

93 *Marbury*, 5 U.S. (1 Cranch) at 177-78. The Court's doctrines relating to whether a case is properly before the court (i.e., justiciability) include mootness, ripeness, standing, and the political question doctrine. These limits on the judiciary's jurisdiction preclude the Supreme Court, for example, from issuing advisory opinions. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 94-101 (1968) (explaining that courts will refrain from giving advisory opinions and will act only upon "cases" or "controversies" that an injured party properly brings before the court). Justiciability encompasses the limitation that "federal courts may adjudicate only actual, ongoing cases or controversies." Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990); *see also* U.S. CONST. art. III, § 2, cl. 1. For instance, a court will not hear a case that is moot, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam). Additionally, the separation of powers doctrine has led courts to refrain from deciding political questions that are considered nonjusticiable because they are committed by the Constitution to another branch. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962). "The power conferred on th[e] court[s] is exclusively judicial, and [they] cannot be required or authorized to exercise any other. . . . Judicial power . . . is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Muskrat v. United States, 219 U.S. 346, 355-56 (1911) (internal quotation omitted).

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"to say what the law *is*"[94]—not to fashion what it should be or create entirely new law. As Alexander Hamilton professed in *Federalist 78*, "courts must declare the sense of the law."[95] Courts must not "exercise WILL instead of JUDGMENT."[96] A court cannot simply substitute its will for that of the legislature. Such judicial action is "a notion foreign to our constitutional system."[97]

Implicit in the court's designated role of interpreting laws and declaring their meaning is the clear restriction that courts may not affirmatively grant governmental powers.[98] As Hamilton explained in defending the existence of an independent judiciary, "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[99] Hamilton certainly did not imagine the independent judiciary affirmatively granting or delegating the powers of government at the expense of citizens' rights and liberties.

The pervasiveness of the separation of powers doctrine has been repeatedly affirmed by numerous courts,[100] and the doctrine is necessary to preserve liberty.[101] The Supreme Court has expounded on the pervasiveness of the separation of powers doctrine:

> The necessity of a distinct and separate existence of the three great departments of government . . . had been proclaimed . . . [by] Blackstone, Jefferson and Madison, [and] sanctioned by the people of

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94 *Marbury*, 5 U.S. (1 Cranch) at 177 (emphasis added).

95 THE FEDERALIST NO. 78 (Alexander Hamilton).

96 *Id.*

97 Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 202 (1912).

98 *See Muskrat*, 219 U.S. at 352-58 (declaring courts should "carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [the courts] by the Constitution"). "It is therefore apparent that from its earliest history [the United States Supreme Court] has consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Id.* at 356. The Constitution divides government into three distinct and independent branches, and "it is the duty of each to abstain from, and to oppose, encroachments on either." *Id.* at 352. "The Constitution's division of power among three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." New York v. United States, 505 U.S. 144, 182 (1992).

99 THE FEDERALIST NO. 78 (Alexander Hamilton). "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)). "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued." Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946).

100 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) ("[T]he doctrine of separation of powers was not mere theory; it was a felt necessity."); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590 (1949) (The separation "is fundamental in our system.").

101 *See supra* note 3 and accompanying text.

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the United States, by being adopted in terms more or less explicit, into all their written constitutions.[102]

As long as each branch is confined within its constitutional boundaries and exercises only those powers the Constitution bestows upon it, no branch will become so powerful as to pose a threat to liberty.[103] This division of powers in the Constitution and the limitations inherent in it serve as safeguards of individual freedom and protect against government encroachment upon individual rights and liberties.[104] Unfortunately, this structural bulwark against government intrusion has not been preserved in the context of private property rights.[105]

One of the greatest arguments against the adoption of the Constitution was the fear that the federal judiciary would enlarge the powers of the federal government and extend its jurisdiction in a manner inconsistent with liberty and limited government.[106] Many opponents feared that the federal courts would wield unbridled equitable powers, maintain excessive discretion, and enable "judges to decide as their conscience, their opinions, their caprice, or their politics might dictate."[107] This immense power would enable the federal judiciary to subvert the entire structure of government, including the separation of

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[102] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 224 (1995) (quoting Bates v. Kimball, 2 D. Chip. 77, 84 (Vt. 1824)).

[103] INS v. Chadha, 462 U.S. 919, 957-58 (1983) ("To preserve . . . and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."); *see also* Meriwether v. Garrett, 102 U.S. 472, 515 (1880) (explaining, "a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration").

[104] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995) (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). In expounding on what it labeled "first principles," the Court articulated that the

> constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Id. (quoting *Gregory*, 501 U.S. at 458); *see supra* note 3 and accompanying text; *see also* Loan Ass'n v. Topeka, 87 U.S. 655, 662-63 (1874).

[105] *See* Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) (acknowledging that private property rights have been "relegated to the status of a poor relation" with other constitutional rights expressed in the Bill of Rights).

[106] Missouri v. Jenkins, 515 U.S. 70, 126-35 (1995) (Thomas, J., concurring) (discussing concerns that were raised during the drafting and ratification of the Constitution regarding the federal judiciary's power).

[107] *Id.* at 128 (quoting 2 THE COMPLETE ANTI-FEDERALIST 332 (Herbert J. Storing ed., 1981)).

powers and federalism.[108] Essentially, these opponents feared that any notion of the rule of law would be replaced by the rule of man as judges effectuated their conscience through equity. As the Anti-Federalists identified and the Federal Farmer[109] cautioned, "if the law restrain him, [the judge] is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate."[110] Robert Yates, an opponent of the Constitution, worried that courts exercising equitable powers would "not confine themselves to any fixed or established rules."[111]

While equity gives courts great flexibility to fashion remedies, courts of equity also operate within certain confines. "[T]he discretion of a court of equity is not unbridled. It is controlled and regulated by established equitable principles."[112] Even in equity, "[t]o avoid an arbitrary [and dangerous] discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[113] Unfortunately, in the context of the Natural Gas Act, courts have freed themselves from any principles governing or restricting the exercise of their equitable powers and have thereby eschewed any limit on those powers.

The Anti-Federalists feared that "one adjudication w[ould] form a precedent to the next, and this to a following one. These cases w[ould] immediately affect individuals only; so that a series of determinations w[ould] probably take place before even the people w[ould] be informed of them."[114] These sentiments have become all too prophetic to persons subject to the power of eminent domain under the Act. Courts have done exactly what those during the founding era feared they might. Courts have invoked unfettered powers of equity to substitute their conscience

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108 *Id.* at 129 (quoting 2 THE COMPLETE ANTI-FEDERALIST 332 (Herbert J. Storing ed., 1981)).

109 The Federal Farmer is commonly believed to have been Richard Henry Lee of Virginia. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 271 (1985) (Brennan, J., dissenting).

110 *Federal Farmer No. 3, Oct. 10, 1787, reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 107, at 244.

111 THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 295 (Ralph Ketcham ed., 1986).

112 Cameron v. Benson, 664 P.2d 412, 416 (Or. 1983); *see also* Connor v. Mooney, Chancery No. 144783, 1998 Va. Cir. LEXIS 558, at *7 (Va. Cir. Ct. Oct. 28, 1998) ("There have to be restrictions on that authority [of equity] or we would have not rule of law but rule of men.").

113 Missouri v. Jenkins, 515 U.S. 70, 129 (1995) (Thomas, J., concurring) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)). Hamilton made this comment in an attempt to assure the public that the federal courts' equitable powers would be limited.

114 THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 111, at 308.

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for the decisions of the people's elected representatives. Courts have thereby trampled upon the structural protections the Framers so carefully placed on our government.

The Supreme Court has acknowledged "[i]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."[115] If courts do not follow general principles of equity, which delineate the limits of the courts' equitable powers, then equity becomes a dangerous tool by which the courts can usurp legislative power and undermine the very structure of constitutional government. If such judicial action creeps into other areas of the law, expansion of government will have only the limit of the judge's conscience, and no right will be immune from the judiciary.

IV. THE POWER OF EMINENT DOMAIN UNDER THE NATURAL GAS ACT

A. The Natural Gas Act

Congress delegated the power of eminent domain to private gas companies through the Natural Gas Act. The relevant portion of the Act states:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of . . . stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.[116]

The statute grants private gas companies the authority to exercise the normal power of eminent domain, but noticeably absent in this grant of authority is any mention of—much less an express grant of—the quick-take power.

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[115] Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

[116] 15 U.S.C. § 717f(h) (2003). The Act also provides certain jurisdictional and procedural directions:

> The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Id.

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B. The Courts' Treatment of Quick-Take Power Under the Natural Gas Act

1. Most District Courts Grant Quick-Take Power

Courts uniformly agree that the Act fails to delegate private gas companies the quick-take power.[117] Moreover, all courts facing this issue correctly conclude that a comprehensive reading of all federal eminent domain statutes reveals that Congress has not granted private gas companies the quick-take power. As one court admitted, "No statutory authority exists which would authorize a private party, such as [a private gas company], to take immediate possession of the real property prior to the condemnation proceeding."[118]

Notwithstanding this fact, almost every district court to consider the issue has granted the intrusive quick-take power to private gas companies.[119] Courts commonly invoke their inherent equitable powers

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[117] *See, e.g.*, Nat'l Fuel Gas Supply Corp. v. 138 Acres, 84 F. Supp. 2d 405, 415-16 (W.D.N.Y. 2000); Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276, 1281 (D. Kan. 1999); N. Border Pipeline Co. v. 127.79 Acres of Land, 520 F. Supp. 170, 172 (D.N.D. 1981).

[118] *127.79 Acres of Land*, 520 F. Supp. at 172.

[119] *See, e.g.*, Williston Basin Interstate Pipeline Co. v. Easement & Right-of-Way Across 152 Acres of Land, No. A1-03-66, 2003 U.S. Dist. LEXIS 11163, *7 (D.N.D. June 30, 2003); Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002); Northwest Pipeline Corp. v. 20' x 1,340' Pipeline Right of Way, 197 F. Supp. 2d 1241, 1246 (E.D. Wash. 2002); N. Border Pipeline Co. v. 64.111 Acres of Land, 125 F. Supp. 2d 299 (N.D. Ill. 2000); Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F. Supp. 2d 102, 104 (D. Mass. 1998); Portland Natural Gas Transmission Sys. v. 4.83 Acres of Land, 26 F. Supp. 2d 332, 336 (D.N.H. 1998); USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816, 825 (E.D. Tenn. 1998); Kern River Gas Transmission Co. v. Clark County, 757 F. Supp 1110, 1117 (D. Nev. 1990); *127.79 Acres of Land*, 520 F. Supp. at 172. *But see Nat'l Fuel Gas Supply Corp.*, 84 F. Supp. 2d at 415 (denying immediate possession because condemnation proceeding was adequate legal remedy and gas company did not show irreparable harm).

For example, the United States District Court for the District of North Dakota expressly recognized that no statutory authority exists for granting quick-take power to a private gas company:

> Although the [gas company] possesses the authority pursuant to Title 15 U.S.C. § 717f(h) to exercise the right of eminent domain [i.e., the normal condemnation power], this right is not in itself sufficient to authorize the taking of immediate possession prior to the condemnation proceeding itself [i.e., the quick-take power]. The authority to take immediate possession conferred by the Declaration of Taking Act [40 U.S.C. § 3114] and similar statutes which confer the authority to take immediate possession is reserved to the United States. No statutory authority exists which would authorize a private party, such as [a private gas company], to take immediate possession of the real property prior to the condemnation proceeding. Similarly, the authority to take immediate possession of the property cannot be implied in the mere grant to the plaintiff of the right to eminent domain because the language of Title 15 U.S.C. § 717f(h) is unequivocal. In addition, if an ambiguity were found in the statute the

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to justify their authority to grant the quick-take power to private gas companies.[120] They typically do so by balancing the equities and ultimately determining that the private gas company needs the property more than the owner.[121] Pragmatically speaking, the gas company strongly desires immediate possession of the subject property so as to minimize its costs and maximize its profits in constructing the gas pipeline.[122] Quick-take power also helps them meet construction deadlines.[123] On the other hand, for the owner, the immediate deprivation of the use of the property results in a variety of harms ranging from mere inconvenience to shutting down a business or farm operation.[124] Once the court gives the gas company possession of the property, the company begins construction upon the property and interferes with the owners' use of their property. The company thus seizes possession of the property and uses it long before the condemnation trial and long before it pays the owner judicially determined just compensation.[125] In addition to stripping the owners of their property and their "right to exclude all others," a right the Supreme Court has deemed "one of the most essential sticks in the bundle of rights that are commonly characterized as property,"[126] the courts' actions have eviscerated the notion of separation of powers.

> result would not change because statutes conferring the right of eminent domain are strictly construed to exclude those rights not expressly granted.

127.79 Acres of Land, 520 F. Supp. at 172. Despite this clear and correct statement of the law, the court proceeded to grant the quick-take power under its so-called "inherent [equitable] powers." *Id.* at 173.

[120] *See, e.g.*, Vector Pipeline, L.P. v. 68.55 Acres of Land, 157 F. Supp. 2d 949, 951 (N.D. Ill. 2001); *64.111 Acres of Land*, 125 F. Supp. 2d at 301; *Tenn. Gas Pipeline*, 6 F. Supp. 2d at 104; *Portland Natural Gas Transmission Sys.*, 26 F. Supp. 2d at 335; *USG Pipeline Co.*, 1 F. Supp. 2d at 826; *Kern River Gas Transmission Co.*, 757 F. Supp. at 1117.

[121] *See supra* notes 119-120 and accompanying text; *see also infra* note 192 and accompanying text.

[122] *See, e.g.*, *USG Pipeline Co.*, 1 F. Supp. 2d at 825 (discussing the economic impact on private gas companies).

[123] *See, e.g.*, *Tenn. Gas Pipeline Co.*, 6 F. Supp. 2d at 104; *USG Pipeline Co.*, 1 F. Supp. 2d at 825.

[124] Some of the owners suffer irreparable harm and losses that are non-compensable as a matter of law. *See, e.g.*, United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 282-83 (1943) (explaining that when a condemnor takes an owner's property, the owner cannot recover business losses); Mitchell v. United States, 267 U.S. 341 (1925) (same). Courts overlook these and other harms suffered by the owner.

[125] *See supra* note 42.

[126] Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

a. District courts' futile attempt to justify and to find authority for their actions

Courts cite no adequate authority for granting quick-take power to private gas companies.[127] The reason for the courts' omission of any authoritative support is that none exists. The courts' best rationale is merely concocted from a string of district court opinions, all of which are contrary to the only court of appeals' opinion that has been rendered on this issue.[128]

(1) Invoking the courts' inherent equitable powers

A common thread among all the courts granting the quick-take power is their reliance on inherent equitable powers.[129] In attempting to find authority for invoking these inherent powers to summarily grant powers of eminent domain, a few courts have cited *ITT Community Development Corp. v. Barton*.[130] The courts' reliance on this case and the notion of inherent judicial powers, however, is greatly misplaced.[131]

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[127] As Brutus and the Anti-Federalists feared, "one adjudication will form a precedent to the next, and this to a following one" until the federal courts become omnipotent. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 111, at 308.

[128] *See supra* notes 119-120 and accompanying text; *see also* Part IV.B.2.

[129] *See supra* notes 119-120 and accompanying text; *see also* Part IV.B.2.

[130] ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351 (5th Cir. 1978); *see, e.g.*, N. Border Pipeline Co. v. 127.79 Acres, 520 F. Supp. 170, 172 (D.N.D. 1981); *see also* USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816, 825 (E.D. Tenn. 1998) (noting the gas company attempted in its brief to use the case as support for the grant of immediate possession).

[131] In *ITT Community Development Corp.*, the court vacated the trial court's order of civil contempt. *ITT Cmty. Dev. Corp.*, 569 F.2d at 1361. The appellate court determined the underlying order on which the contempt order was based was invalid. *Id.* Before reaching its ultimate conclusion regarding the invalidity of the underlying order, the court analyzed whether the district court could have issued the underlying order under (1) Florida substantive law; (2) the All Writs Act, 28 U.S.C. § 1652 (2003), "which empowers a federal court to issue 'all writs necessary or appropriate in aid of' the jurisdiction being exercised by the court; or (3) the inherent power of a trial court efficiently to process to a conclusion the litigation pending before it." *ITT Cmty. Dev. Corp.*, 569 F.2d at 1357.

In discussing the All Writs Act and the inherent powers doctrine, the court explained that both "provide a federal court with various common law equity devices to be used incidental to the authority conferred on the court by rule or statute." *Id.* at 1359. The All Writs Act allows a federal court to issue "those writs necessary to the preservation or exercise of its subject matter jurisdiction." *Id.* Thus, under the All Writs Act, a federal court may enjoin conduct that is detrimental to the court's jurisdiction. *Id.*

> The inherent powers doctrine, however, does not derive from a statutory base. Instead, the doctrine is rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.

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The courts' inherent powers are those "necessary to permit the courts to function."[132] These powers enable the court "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[133] Courts have long exercised inherent powers, which are grounded in the Constitution's grant of the judicial powers to the courts.[134]

Every court has the inherent power, *inter alia*:

Id. (citing *Ex parte* Peterson, 253 U.S. 300, 312-14 (1920)). It "provides a federal court with appropriate instruments required for the performance of [its] duties and essential to the administration of justice." *Id.* at 1360 (quoting *Ex parte Peterson*, 253 U.S. at 312). "Although inherent powers are often referred to as 'incidental' powers, they are not sources for mere orders of convenience. Action taken by a federal court in reliance on its inherent powers must somehow be indispensable to reaching a disposition of the case." *Id.* at n.20 (citing Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the "Sweeping Clause,"* 36 OHIO ST. L.J. 788 (1975)).

The court went on to explain that a court should limit its discretion to invoke these inherent powers, and it pointed to the specific facts in *Ex parte Peterson*:

> [There], the issue was whether, absent explicit authority under rule or statute, the district court had the power to refer the performance of certain accounting to an auditor. Because it was apparent that neither the district judge nor the jury could achieve an intelligent resolution of the issues in the case without the referral to the auditor, the referral was held to fall within the court's inherent power.

Id.

Courts that cite *ITT Community Development Corp.* as if it supports the use of inherent powers to grant immediate possession to a private gas company are misguided. They apparently focus only on the language they like, namely, "the inherent power of a trial court efficiently to process to a conclusion the litigation pending before it." *Id.* at 1357. As the court in *ITT Community Development Corp.* recognized, however, a court's use of inherent powers is tightly bound within equitable principles. *Id.* at 1359. As discussed later in this article, equitable principles forbid courts to use their inherent powers in order to grant a power that Congress has specifically withheld. *See infra* Part V. In fact, these courts misuse the inherent powers doctrine to issue "mere orders of convenience." *See ITT Cmty. Dev. Corp.*, 569 F.2d at 1360 n.20. Moreover, granting quick-take power to a private gas company is not "indispensable to reaching a disposition of the case." *See id.* Condemnors do not need the quick-take power in order to obtain an owner's property. They are authorized to, and legally may, take the property in the manner prescribed by Congress.

[132] Young v. United States, 481 U.S. 787, 820 (1987) (Scalia, J., concurring); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

[133] Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)).

[134] United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

> Certain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . To fine for contempt—imprisonment for contumacy—inforce [sic] the observance of order, [etc.,] are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute.

Id.

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1) "to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates";[135]
2) to "control admission to its bar and to discipline attorneys";[136]
3) to "punish for contempts";[137]
4) to "vacate its own judgment upon proof that a fraud has been perpetrated upon the court";[138]
5) to "bar from the courtroom a [person] . . . who disrupts a trial";[139]
6) to "dismiss an action on grounds of *forum non conveniens*";[140]
7) to "act *sua sponte* to dismiss a suit for failure to prosecute";[141]
8) "to fashion an appropriate sanction for conduct which abuses the judicial process";[142] and
9) "to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties."[143]

These powers all relate to the court's ability to carry out its essential functions and to manage its own affairs.

Only in recent years have courts attempted to use their inherent powers as a means to make legislative decisions. The courts' inherent powers are not boundless.[144] Courts must exercise these powers "with great caution."[145] Granting powers that constitutionally belong to the

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[135] *Chambers*, 501 U.S. at 43.

[136] *Id.* at 44.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 44-45.

[143] Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962).

[144] The United States Supreme Court has recognized that, as with all inherent or implied powers, courts must exercise these powers with "restraint," "discretion," and "caution." *Chambers*, 501 U.S. at 50 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764, 767 (1980)). "Inherent powers are the exception, not the rule, and their assertion requires special justification in each case. . . . [Such powers] 'are those which are necessary to the exercise of all others.'" *Id.* at 64 (Kennedy, J., dissenting).

[145] *Id.* at 65 (Kennedy, J., dissenting) (citing *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824)).

> Federal courts have limited jurisdiction, and they are not omnipotent. They draw their jurisdiction from the powers specifically granted by Congress, and the Constitution, Article III, Section 2, Clause 1. Thus, with the exception of certain powers which truly fit the rubric of 'inherent power,' such as the powers to determine their own jurisdiction and to manage their own dockets, federal courts cannot act in the absence of statutory authority.

United States v. Hardage, 58 F.3d 569, 574 (10th Cir. 1995) (citations omitted).

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legislature is certainly beyond the purview of the courts' inherent powers. Just as "[p]rosecution of individuals . . . is not an exercise of the judicial power of the United States,"[146] so also granting legislative powers is not an exercise of the judicial power.[147]

If the courts' inherent powers enable them to grant legislative powers or to substitute an individual judge's conscience for a deliberative decision of the people's elected representatives, the judiciary would eventually subsume the other branches. Consequently, the judiciary would have few limits other than those imposed on itself and by the burdensome process of impeachment. It is incumbent upon the judiciary to avoid trampling over the other branches' authority and to refrain from overstepping its constitutional boundaries.[148]

(2) Relying upon cases in which the courts grant post-trial possession

In seeking authority for granting the quick-take power to private gas companies, a few district courts have relied upon appellate court cases in which the appellate court granted a condemnor possession of property after trial and after payment of compensation.[149] These appellate courts permitted condemnors to take possession of an owner's property pending an appeal from the condemnation trial.[150] The courts' actions are thus in strict conformance with the normal condemnation power because the courts permitted the condemnor to take possession of the owner's property subsequent to trial and payment of just compensation.

A few of the district courts that have granted private gas companies the quick-take power have improperly relied on *Atlantic Seaboard Corp.*

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146 Young v. United States, 481 U.S. 787, 815 (1987) (Scalia, J., concurring) (quoting the U.S. CONST. art. III, §§ 1, 2). "[T]he prosecution of law violators is part of the implementation of the laws." *Id.* at 816. The Constitution vests the implementation, execution, and prosecution of the laws, all of which involve executive power, in the executive branch. *Id.* at 816-17.

147 The Constitution vests only "judicial" powers in the federal courts, and, as such, federal courts may exercise only judicial powers. *Id.* at 815-16.

148 "[B]y the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and [] it is the duty of each to abstain from, and to oppose, encroachments on either." Muskrat v. United States, 219 U.S. 346, 352 (1911).

149 *See, e.g.*, Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002); USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816, 825 (E.D. Tenn. 1998).

150 *See, e.g.*, Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890) (granting possession after trial and award of compensation as determined before a three referee panel appointed by the President to determine compensation); Atl. Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455 (4th Cir. 1963) (granting "post judgment" possession of the property after the condemnation trial); Commercial Station Post Office v. United States, 48 F.2d 183 (8th Cir. 1931) (granting possession after the award of compensation by the commissioners).

v. Van Sterkenburg[151] for support.[152] In *Atlantic Seaboard*, the Fourth Circuit held that courts have the inherent equitable power to authorize immediate entry by a condemnor "[after] payment of the amount of the award" issued at the trial.[153] The court in that case properly exercised its equitable powers. Thus, in conformity with the normal condemnation power, a court may enable a condemnor to take possession of an owner's property after the trial because the condemnor's right to take possession of the property vests after the trial and payment of compensation. Here, the condemnor had a legal right to seize and possess the property. The court simply permitted the condemnor to take possession of the property after trial while the case was pending on appeal.

Significantly, the court in *Atlantic Seaboard* did not grant, and the condemnor did not exercise, the quick-take power. A condemnation trial was conducted, and just compensation was judicially determined and provided to the owners before the condemnor was permitted to seize the owner's property.[154] This result is entirely consistent with the condemnor's right to exercise the normal condemnation power.

Similarly, in *Cherokee Nation v. Southern Kansas Railway Co.*,[155] the Supreme Court permitted a condemnor to take possession of an owner's property after a condemnation trial. As in *Atlantic Seaboard*, a trial occurred, and the condemnor paid the owner just compensation as determined at the trial. Only then did the court permit the condemnor to seize possession of the owner's property. Consistent with the normal power of eminent domain, the court did not permit the condemnor to strip the owner of his property until after trial and payment of compensation.

At least one district court has cited *Commercial Station Post Office v. United States*[156] in an attempt to support its decision to grant quick-take power to private gas companies.[157] The district court's reliance on *Commercial Station*, however, was misplaced. First, the United States—not a private company—was taking property in that case. Unlike a private gas company that possesses a delegation of limited powers, the United States possesses the full powers of the sovereign when it takes property. Second, a close reading of the case reveals that the court

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[151] *Atl. Seaboard Corp.*, 318 F.2d 455.

[152] *See, e.g.*, *Guardian Pipeline, L.L.C.*, 210 F. Supp. 2d at 979; *USG Pipeline Co.*, 1 F. Supp. 2d at 825.

[153] *Atl. Seaboard Corp.*, 318 F.2d at 460.

[154] *Id.* (concluding, "the Court had the authority, after judgment, to permit the plaintiff to pay into the Court the amount of the award and, thereupon, immediately to enter upon the land and to construct and lay its pipe line").

[155] *Cherokee Nation*, 135 U.S. 641.

[156] Commercial Station Post Office v. United States, 48 F.2d 183 (8th Cir. 1931).

[157] *Guardian Pipeline, L.L.C.*, 210 F. Supp. 2d at 979.

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allowed the condemnor to take possession of the property after the condemnation trial, after payment of compensation, and "after the award by the commissioners."[158] The court simply permitted the federal government to take possession of the property pending appeal from the condemnation trial.[159]

While the types of condemnation trials varied in these cases, the result was the same.[160] None of these courts permitted the condemnor to take possession of the owner's property until after the condemnation trial and after the condemnor paid the owner just compensation as determined at the trial. None of these courts granted the quick-take power, which authorizes a condemnor to take possession of property prior to the condemnation trial and prior to payment of compensation as determined therein.[161]

b. Congress, not the courts, may grant possession prior to trial and prior to payment of compensation

Courts have long held that the Fifth Amendment does not require a condemnor to pay just compensation in advance of or even contemporaneously with the taking of private property.[162] If, at the time

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[158] *Commercial Station Post Office*, 48 F.2d at 184.

[159] *Id.*

[160] *Compare* Atl. Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455 (4th Cir. 1963) (the condemnor obtained possession pending appeal from a trial before a jury) *and Commercial Station Post Office*, 48 F.2d 183 (the condemnor obtained possession pending appeal from commissioners' award), *with Cherokee Nation*, 135 U.S. 641 (the condemnor obtained possession pending an appeal from a trial before a panel consisting of three disinterested referees appointed by the President).

[161] Nevertheless, some judges misinterpret these cases as precedent for judicially granting the quick-take power. *See, e.g., Guardian Pipeline, L.L.C.*, 210 F. Supp. 2d at 979; USG Pipeline Co. v. 1.74 Acres, 1 F. Supp. 2d 816, 825 (E.D. Tenn. 1998).

[162] *See, e.g.*, Sweet v. Rechel, 159 U.S. 380 (1895); *Cherokee Nation*, 135 U.S. 641; Kennedy v. Indianapolis, 103 U.S. 599 (1880). While these and other cases establish that the Fifth Amendment does not require payment prior to or contemporaneous with the taking of possession of property, language from other cases seems to conflict. *See* United States v. Russell, 80 U.S. (13 Wall.) 623, 627 (1871) (internal citations omitted).

> Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent.

Id.; *see also* Bauman v. Ross, 167 U.S. 548, 598 (1897).

> Under the Constitution, . . . the United States are not entitled to possession of the land until the damages have been assessed and *actually paid*. The payment of the damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous. The Constitution does not

the condemnor takes possession of an owner's property, the legislature has provided a "reasonable, certain, and adequate provision for obtaining compensation," the Fifth Amendment is satisfied.[163] As the Supreme Court stated in *Sweet v. Rechel*,[164] the Fifth Amendment does not "require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision before his occupancy is disturbed."[165]

Such cases clearly stand for the proposition that the legislature, pursuant to its authority to delegate the power of eminent domain and prescribe the manner in which it is exercised, may authorize a condemnor to take possession of property prior to trial and payment of judicially determined compensation.[166] "[I]t is a condition precedent to the exercise of [the] power [of] eminent domain that the statute[s granting the power] make provision for reasonable compensation to the owner."[167]

In each of the cases cited, the legislature, not the courts, authorized a condemnor to seize possession of an owner's property prior to trial and prior to providing judicially determined just compensation.[168] "It is within the power of Congress, consistent with the mandate of the Constitution, to provide the method through which the Federal Government is to exercise its power of eminent domain."[169] As the Court noted in *Sweet*, "it is competent for the legislature, in the exercise of . . . its power to appropriate private property for public uses, to authorize the city to take the fee in the lands . . . prior to making compensation."[170]

> require the damages to be actually paid at any earlier time; nor is the owner of the land entitled to interest pending the proceedings.

Id. at 598 (emphasis added).

163 *Cherokee Nation*, 135 U.S. at 659.

164 Sweet v. Rechel, 159 U.S. 380 (1895).

165 *Id.* at 403 (quoting *Cherokee Nation*, 135 U.S. at 659).

166 *See, e.g.*, *id.*; *Cherokee Nation*, 135 U.S. 641; *Kennedy*, 103 U.S. 599.

167 *Sweet*, 159 U.S. at 399.

168 *See, e.g.*, *id.* at 380 (the legislature authorized the city to take immediate possession of property); *Kennedy*, 103 U.S. at 599-600 (the legislature "authorized . . . the [condemnor] to enter upon, take possession of, and use any lands necessary for the prosecution and completion of the work"); *Cherokee Nation*, 135 U.S. at 659 (the legislature authorized the condemnor to take possession of the property pending appeal from the condemnation trial before the referees). In each case, the legislature, not the courts, authorized the condemnor to take possession prior to the condemnation trial and prior to paying compensation as determined therein.

169 United States v. Holmes, 414 F. Supp. 831, 839 (D. Md. 1976).

170 *Sweet*, 159 U.S. at 407; *see also Kennedy*, 103 U.S. 599 (1880). *Kennedy* was "a suit in equity brought by the appellants to quiet title to certain lands in the city of Indianapolis." *Id.* at 599. The Indiana legislature, "by an Act of the General Assembly" specifically authorized a "board of internal improvements" to exercise quick-take power in

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The legislature must, however, make "certain and adequate" provision for compensating the owner.[171]

Congress alone has authority to grant the quick-take power in statutes and provisions delegating and governing the power of eminent domain. When Congress does grant a condemnor the power to take possession of property prior to trial and payment of compensation, the courts' proper role is to ensure that the legislature provides "adequate provision" to assure the owner that he will receive the just compensation the Constitution guarantees.[172] As the Court noted in *Cherokee Nation*, determining "[w]hether a particular provision [is] sufficient to secure the compensation to which . . . [an owner] is entitled is sometimes a question of difficulty."[173]

A close reading of these cases and their progeny reveals nothing more than the basic principle that the legislature, when it chooses, may grant a condemnor the power to take possession of property prior to paying for it. These cases do not support the proposition that courts may unilaterally authorize condemnors to take possession of property prior to paying for it or that courts may grant condemnors the quick-take power.

2. Courts of Appeal and the Quick-Take Power

Despite the overwhelming number of district courts that have granted the quick-take power to private gas companies, the only court of appeals to have rendered a published opinion on this issue is the Seventh Circuit.[174] In *Northern Border Pipeline Co. v. 86.72 Acres*,[175] the Seventh Circuit held that a private gas company is not entitled to quick-take power and denied the company's request to take possession of the subject property prior to trial.[176]

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making improvements in the city of Indianapolis. *Id.* Because the legislature had granted the quick-take power in the statute, the United States Supreme Court permitted the exercise of quick-take power. *See id.* at 605.

[171] *Sweet*, 159 U.S. at 407.

[172] As discussed, the courts must also ensure that the condemnor follows the mode of the delegation of eminent domain power granted to him. *See supra* note 169 and accompanying text; *see also supra* Part II.D.

[173] *Cherokee Nation*, 135 U.S. at 659.

[174] At the time of publication, this issue had also been argued before the United States Court of Appeals for the Fourth Circuit in *East Tennessee Natural Gas Co. v. Sage*; that court's decision is still pending. E. Tenn. Natural Gas Co. v. Sage, No. 03-1708L (consolidated) (4th Cir. argued Sept. 25, 2003).

[175] N. Border Pipeline Co. v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998).

[176] *Id.* at 472. Following that decision, however, two district courts in the Seventh Circuit have failed to follow the appellate court's ruling. *See* Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002); N. Border Pipeline Co. v. 64.111 Acres of Land, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000). Neither case was appealed to the Seventh Circuit Court of Appeals. Both district court decisions held the court could grant immediate possession once the court issued an order of condemnation. This

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The court properly distinguished the quick-take power, and its concomitant authority to take possession of property prior to trial, from the normal condemnation power. The court recognized that the gas company had a legal right to take and possess the property *after* trial and payment of compensation but found that the company had no legal right to seize and possess the property *prior* to those events.[177] The court acknowledged that the Act grants private gas companies the normal condemnation power but does not grant them the additional quick-take power.[178]

After establishing that the company had no legal right or entitlement to seize property prior to trial and payment of just compensation, the court simply applied general principles of equity. Declaring that "a preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought,"[179] the court refused to use its equitable powers to ratify the district court's grant of immediate possession. The court reasoned that the gas company had no substantive right or entitlement to seize possession of the property until after the "conclusion of the normal eminent domain process."[180] The court found that the gas company was "not eligible for the [equitable] relief it seeks . . . [and] the district court had no authority to enter a preliminary injunction awarding immediate possession."[181] Unlike many of the district courts, the Seventh Circuit properly exercised its judicial power.

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reasoning is flawed because it fails to distinguish between the normal condemnation power and the quick-take power, which Congress has not delegated to private gas companies.

The district court opinions are flawed for two additional reasons. First, the opinions fly in the face of the Seventh Circuit's ruling that a gas company's right to possession does not arise until "the conclusion of the normal eminent domain process." The conclusion of the eminent domain process is the trial to determine just compensation, not the initial order of condemnation. An order of condemnation merely confirms a condemnor's general right to exercise the normal power of eminent domain in accordance with the powers granted to it. Such an order does not judicially bestow the additional quick-take power upon a condemnor. Second, the district court opinions ignore the principle that the legislature, not the judiciary, has the power to delegate the quick-take power. *See, e.g.*, Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1319 (4th Cir. 1983) (recognizing Congress granted the quick-take power to the Transit Authority); United States v. Parcel of Land, 100 F. Supp. 498 (D.D.C. 1951) (explaining that the power of eminent domain lies dormant until legislative action is employed, pointing out the occasions, modes, and conditions of the exercise of such power).

[177] *86.72 Acres of Land*, 144 F.3d at 471.

[178] *Id.* at 471-72.

[179] *Id.* at 471.

[180] *Id.* The court denied the private gas company's request for immediate possession because the company had no "entitlement to the defendants' land *right now*, rather than an entitlement that will arise at the conclusion of the normal eminent domain process." *Id.* (emphasis added).

[181] *Id.* at 471-72.

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V. THE COURTS' IMPROPER USE OF EQUITY AND VIOLATION OF SEPARATION OF POWERS IN EMINENT DOMAIN CASES INVOLVING THE NATURAL GAS ACT

In deciding eminent domain cases under the Act, district courts across the country have taken unbelievable action. They have interpreted the Act and found that neither the Act nor any other federal law gives private gas companies the quick-take power of eminent domain. They have also acknowledged that Congress has withheld such power and that private gas companies have no legal right or entitlement to quick-take power. Amazingly, these same courts then invoke their "inherent equitable powers" to grant private gas companies the quick-take power that Congress specifically chose to withhold.[182]

These courts grant the quick-take power of eminent domain to private gas companies by issuing mandatory preliminary injunctions.[183] Ironically, courts generally deem preliminary injunctions to be one of the most severe forms of judicial relief[184] and consider mandatory preliminary injunctions to be all the more extreme.[185] Moreover, courts describe eminent domain as one of the harshest proceedings known to

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[182] *See supra* notes 119-120 and accompanying text.

[183] A mandatory injunction is one that upsets the status quo. Tom Doherty Assoc., Inc. v. Saban Entmt., Inc., 60 F.3d 27, 34 (2d Cir. 1995) ("The typical preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits. A mandatory injunction, in contrast, is said to alter the status quo by commanding some positive act.") (citation omitted); Tiffany v. Forbes Custom Boats, Inc., No. 91-3001, 1992 U.S. App. LEXIS 6268, at **19-21 (4th Cir. 1992). Furthermore, "[a] heightened standard has also been applied where an injunction—whether or not mandatory—will provide the movant with substantially 'all the relief that is sought.'" *Tom Doherty Assoc., Inc.*, 60 F.3d at 34 (citation omitted).

[184] MicroStrategy, Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001) (explaining that preliminary injunctions should only be granted "sparingly and in limited circumstances"); Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1992) (Injunctive relief is an "extraordinary remedy involving the exercise of very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it."); Syngenta Crop Prot., Inc. v. EPA, 202 F. Supp. 2d 437, 448 (M.D.N.C. 2002) (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)) ("Preliminary injunctions are an extraordinary remedy only to be granted in exceptional circumstances."); Hennon v. Kirklands, Inc., 870 F. Supp. 118, 120 (W.D. Va. 1994) ("[P]reliminary injunctive relief should be the exception, not the rule.").

[185] *In re* Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003) (quoting Communist Party v. Whitcomb, 409 U.S. 1235 (1972)) (explaining that courts should issue "relief in the form of a mandatory injunction . . . only in the most unusual case"); *Tiffany*, 1992 U.S. App. LEXIS 6268, at **19-21 (clarifying that mandatory injunctions are "not favored unless the facts and law clearly support the moving party" because of a change in the status quo). Furthermore, as a general rule, equity will not be used to take property out of the possession of one party and put it into the possession of another. *See, e.g.*, Lacassagne v. Chapuis, 144 U.S. 119 (1892); Hutton v. Sch. City of Hammond, 142 N.E. 427 (Ind. 1924).

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law,[186] yet these same courts proceed to grant the quick-take power, which is substantially more severe than the normal power of eminent domain.

These district courts have disregarded the principles governing their equitable powers and, in doing so, have completely undermined the doctrine of separation of powers. They have attempted to justify their "judicial delegation" of purely legislative power by claiming their inherent equitable powers authorize them to grant these powers of eminent domain. In point of fact, the courts' actions infringe upon the province of the legislature, unconstitutionally aggrandize the power of the judiciary, violate the constitutional structure of separation of powers, and threaten liberty.

Courts invoking equitable powers must remain ever-cognizant of the constitutional structure of government and must be careful not to encroach upon the duties and powers of the other branches. "Principles of federalism and separation of powers impose stringent limitations on the equitable power of federal courts."[187] Courts must avoid invoking their equitable powers in a manner that usurps legislative or executive powers, misapplies the judiciary's power, or alters the policy decisions that constitutionally belong to Congress.[188] These inherent equitable powers are wielded by life-tenured, unelected officials, and, as such, must be exercised with extreme caution. Equity is not intended to be a tool by which the judiciary can escape the "constraints and dictates of the law and legal rules."[189]

Early in this nation's history, Justice Johnson warned, "The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions."[190] Courts granting the quick-take power to private gas companies disregard "first principles." In their haste to scrutinize these cases under the prevailing judicial tests of equity,[191] courts overlook the constitutional doctrine of separation of powers and fail to confine themselves to their proper role. Examining

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[186] Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 (Fla. 1975) ("The power of eminent domain is one of the most harsh proceedings known to the law.").

[187] Lewis v. Casey, 518 U.S. 343, 385 (1996) (Thomas, J., concurring).

[188] Nat'l Fuel Gas Supply Corp. v. 138 Acres, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000) ("Courts must exercise inherent powers [such as equitable powers] with great restraint because such powers are shielded from direct democratic controls.").

[189] Missouri v. Jenkins, 515 U.S. 70, 133 (1995) (Thomas, J., concurring).

[190] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J., dissenting).

[191] The most common tests of equity involve the so-called balancing of the equities, including an inquiry into whether the party demonstrates irreparable harm and lack of an adequate legal remedy.

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first principles reveals that courts should never even reach the point of analyzing and applying the judicial tests of equity.[192]

The Act grants private gas companies only the normal condemnation power; therefore, courts violate several bedrock principles of equitable jurisprudence when they unilaterally grant the quick-take power. Specifically, courts are using equity to create rights without authority, to grant powers that do not exist at law, to escape the law, and to substitute the courts' own will for that of the legislature. These courts' unrestrained exercise of equitable powers, coupled with their disregard for the rule of law, impermissibly encroach upon the province of the legislature and erode the separation of powers.

A. Using Equity to Create Rights or Grant Powers That Do Not Exist at Law Violates Separation of Powers

Courts sitting in equity have broad powers to craft remedies for petitioners who have no adequate legal remedy; however, their powers are not limitless.[193] Equity is a forum for fashioning remedies for *existing* rights when no adequate legal remedy exists; it is not a forum for creating rights that do not exist.[194] "No court is ever justified in invoking

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[192] "When there is a danger of a federal court exceeding its limited authority, constitutional principles of separation of powers, not a subjective assessment of the relative equities, should control a court's decision whether to resolve a controversy." Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1550 n.10 (D.D.C. 1984) (Tamm, J., dissenting). When courts focus on balancing the equities, they overlook the more fundamental reason (separation of powers within the constitutional structure of government) why they may not grant the quick-take power. The judiciary does not possess the broad fact-finding capabilities that a legislative body maintains, and the decision of a single judge lacks the deliberation and debate generally accompanying legislative policy decisions. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180, 195 (1997).

[193] Cameron v. Benson, 664 P.2d 412, 416 (Or. 1983) ("[T]he discretion of a court in equity is not unbridled. It is controlled and regulated by established equitable principles."); Tex. Consol. Oils v. Vann, 258 P.2d 679, 689 (Okla. 1953) ("A court of equity does not have unbridled authority under the guise of justice and equity to substitute its judgment in opposition to the law. Equity follows the law.").

[194] Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 122 (1874) (declaring that instead of creating new rights, equity provides remedies for existing substantive rights or entitlements when there is no adequate legal remedy for those rights); *see also* 27A AM. JUR. 2D *Equity* § 2 (2002) ("[A] court of equity cannot create rights; rather, it is limited to determining what rights the parties have, and whether, or in what manner, it is just and proper to enforce them.").

Moreover, "[i]t is axiomatic that equity follows the law." United States v. Lomas Mortgage, Inc., 742 F. Supp. 936, 939 (W.D. Va. 1990).

> [E]quity follows the law . . . [and] wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.
>
> Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal and then

the maxim of equity for the purpose of destroying legal rights or of establishing rights that do not exist."[195]

Despite this foundational equitable principle, district courts use equity to grant private gas companies the quick-take power when these companies have no right to such power.[196] The companies' right to possession under the Act vests only after trial and payment of just compensation. Private gas companies seek equitable relief precisely because they have no legal right or authority to exercise the quick-take power. The courts acknowledge this fact but neglect the overarching principle that equity must follow the law. As there is no legal basis to grant the quick-take power, however, equity must not be used to create one.

The requirement that a petitioner seeking equitable relief must possess the right to relief could not be more clear.[197] Countless courts

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> enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof.

Hedges v. Dixon County, 150 U.S. 182, 192 (1893) (quotations omitted); *see also* GIAC Leasing Corp. v. Perper, No. 90-1115, 1991 U.S. App. LEXIS 13101, at **6-7 (4th Cir. 1991) (holding that "[w]here the law does not provide for the conversion of the tenancy by the entireties into some other form of tenancy, the equitable doctrines sought to be invoked by the appellants simply do not come into play").

[195] York v. Trigg, 209 P. 417, 425 (Okla. 1922).

[196] Once again, it is axiomatic that statutes conferring the power of eminent domain are strictly construed to exclude those rights not expressly granted. *See supra* Part II.D. By using equity to grant the quick-take power, courts violate this judicial maxim of statutory construction, the equitable principle that courts of equity do not create rights that do not exist, and the doctrine of separation of powers.

[197] The requirement of an existing right is such a foundational principle that the dissenting opinions in *Bivens v. Six Unnamed FBI Agents*, 403 U.S. 388 (1971), criticized the majority for creating a damage *remedy* for violations of the Fourth Amendment by federal employees acting under color of law. All of the justices readily acknowledged that the plaintiffs possessed a legal right under the Fourth Amendment, but the Court debated whether it could create an equitable *remedy* that had not been spelled out in the Constitution or other federal legislation. Chief Justice Burger was particularly adamant that the Court could not

> create[] a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.

Bivens, 403 U.S. at 411-12 (Burger, C.J., dissenting). If members of the Supreme Court were so reticent to create a *remedy* for a right that clearly existed, members of the judiciary

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have affirmed the basic precept that a "court of equity may not create rights having no existence at law."[198] "[W]hether a court is sitting in law or equity, identifying a problem that needs a solution is just not enough; the court must first have authority to act."[199] In other words, a court of equity cannot act until the party seeking equitable relief demonstrates an existing right or entitlement upon which equity may act.[200] Consequently, courts cannot grant quick-take power to private gas companies because these companies do not have any right or entitlement upon which the court may act. The companies are simply asking the courts to create a right out of whole cloth and to grant a legislative power that Congress withheld. Courts are not authorized to oblige such a request, regardless of the balancing of the equities.

> [N]ot every perceived injustice is actionable in equity—only those violating a recognized legal right. A court of equity does not create rights, but rather determines whether legal rights exist and, if so, whether it is proper and just to enforce those rights. In short, a court may exert its equitable powers to grant appropriate relief only when a judicially cognizable right exists, and no adequate legal remedy is available.[201]

Moreover, the Supreme Court pronounced that courts of equity "can intervene only where legal rights are invaded or the law violated."[202]

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should be all the more constrained from using equity when the right clearly does not exist, as in the case of private gas companies and the invasive quick-take power.

[198] Smith v. Sprague, 143 F.2d 647, 650 (8th Cir. 1944). "[A]lthough equity may be invoked to protect an *existing* right, it is unavailable to create a right where none exists." Heritage Mfg. & Bldg. Supply, Inc. v. Abraham Dev. Co., Inc., 1992 U.S. App. LEXIS 20722, *20 (10th Cir. 1992) (emphasis added). "The cradle of equity is the power to afford adequate remedy where the law is impotent; [equity] does not create new rights, but affords a remedy for *existing* rights." Berdie v. Kurtz, 88 F.2d 158, 159 (9th Cir. 1937) (emphasis added).

[199] Pangilinan v. INS, 809 F.2d 1449, 1455 (9th Cir. 1987) (Kozinski, J, dissenting).

[200] *See* N. Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469, 471 (7th Cir. 1998). The court stated:

> A preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought. Because it disavows any claim that it has a substantive entitlement to the defendants' land right now, rather than an entitlement that will arise at the conclusion of the normal eminent domain process, Northern Border is not eligible for the relief it seeks.

Id.

[201] Titchenal v. Dexter, 693 A.2d 682, 684 (Vt. 1997) (citations omitted).

[202] Chapman v. Sheridan-Wyo. Coal Co., 338 U.S. 621, 631 (1950) (denying an injunction because there was no breach of any contract right, no invasion of a property right, and no violation of any law). The Seventh Circuit noted that "a preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought." *86.72 Acres of Land*, 144 F.3d at 471; *see also* Bldg. & Constr. Trades Dep't v. Derwinski, No. 89-20884, 1989 U.S. Dist. LEXIS 11658 (D.D.C. Sept. 29, 1989) (denying an injunction because the movant failed to demonstrate any substantive right that would be infringed by failure to grant a preliminary injunction).

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Courts may not use equity to create a remedy "without the authority of law."[203] Yet courts granting private gas companies the quick-take power are creating a right and granting governmental powers without authority of law. As explained, these courts freely admit that private gas companies have no legal right or authority to exercise the quick-take power, yet the courts use equity to grant private gas companies the quick-take power.

Equity is not a forum for creating rights or for usurping legislative powers that Congress chose to withhold. "The Constitution provides that the legislature makes laws, the executive enforces laws, and the judiciary interprets laws. It does not provide for government by injunction in which the courts and the Executive Branch can make law without regard to the action of Congress."[204]

The district courts' grant of quick-take power is tantamount to the impermissible usurpation of legislative powers by the judiciary. "Where the legislature delegates the power of eminent domain, it is the province of the courts to determine whether that power has been exercised within that grant."[205] The district courts that grant quick-take power to private gas companies blatantly violate this principle because they are granting such power when the gas companies possess no "judicially cognizable right"[206] to quick-take power.

B. Substituting the Court's Will for That of the Legislature Violates Separation of Powers

Given that Congress has withheld the quick-take power from private gas companies, courts are effectively substituting their will for that of the legislature. Equity is not, however, a mechanism by which a court can effect its own policy decisions.[207] Courts cannot grant private gas companies the quick-take power merely because they believe such power would be more efficient and expedient for carrying out a public project.[208] Courts have no authority to substitute their own policy decision for that of Congress.[209] One court articulated this principle:

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[203] Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 122 (1874).

[204] N.Y. Times Co. v. United States, 403 U.S. 713, 742 (1971) (Marshall, J., concurring) (citations omitted).

[205] The Forest Pres. Dist. v. W. Suburban Bank, 641 N.E.2d 493, 495 (Ill. 1994).

[206] *Titchenal*, 693 A.2d at 684.

[207] Roberts v. Canning, 455 P.2d 302, 305 (Okla. 1969) ("A court of equity does not have unbridled authority under the guise of justice and equity to substitute its judgment in opposition to the law. Equity follows the law.").

[208] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 127-28 (1995) (Thomas, J., concurring). Justice Thomas states:

> [C]ourts of equity must be governed by rules and precedents no less than the courts of law. If a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might

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> [T]he total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief. Such relief as is consistent with the general law of the land, and authorized by the principles and practices of the courts of equity, will, under such circumstances, be administered. But the hardship of the case, and the failure of the mode of procedure established by law, is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles.[210]

A district court cannot alter the undisputed legal rights of the parties merely because it believes that Congress has not chosen the most practical means for condemnation under the Act. As the Supreme Court has clearly pronounced,

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> entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. If their remedial discretion had not been cabined, Blackstone warned, equity courts would have undermined the rule of law and produced arbitrary government. The judiciary's powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will.

Id. (Thomas, J., concurring) (internal quotations, citations, and alterations omitted). An earlier Court articulated:

> [The Court's] individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . .
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> . . . .
>
> . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978).

[209] Congress is better equipped for making policy decisions. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999). "Economic exigencies . . . do not grant the courts a license to rewrite a statute no matter how desirable the purpose or result might be . . . . The appropriate forum to resolve this complex and controversial issue is not the courts but the congress." W. Va. Div. of Izaak Walton League v. Butz, 522 F.2d 945, 955 (4th Cir. 1975).

[210] Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655, 658 (1874); *see* Md. Dep't of Human Res. v. U.S. Dep't of Agric., 976 F.2d 1462, 1480 (4th Cir. 1992) (quoting Thomas v. Whalen, 962 F.2d 358, 363 (4th Cir. 1992)) ("A federal court, whether in law or in equity, has no authority to depart from the clear command of a statute in order to effect a result that it believes to be [or even one that would in fact be] dictated by general principles of fairness."); City of Richmond v. Carneal, 106 S.E. 403, 406-07 (Va. 1921) (quoting Sch. Bd. v. Alexander, 101 S.E. 349, 412-13 (Va. 1919)) ("If the limitations or restrictions imposed involve public convenience, or retard the progress of public improvements, the remedy is an appeal to the Legislature. . . . [C]ourts cannot enlarge a power which the Legislature has restricted.").

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> the Constitution . . . did not provide for government by injunction in which the courts . . . can "make law" without regard to the action of Congress. . . . [C]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.[211]

Any court's grant of possession prior to the valuation hearing amounts to the court's substitution of its own will for that of Congress. Such judicial fiat transcends the judicial power and invades the prerogative of Congress. Rather than interpreting and applying the law consistent with the negative powers[212] enjoyed by the judicial branch, the courts have affirmatively granted legislative powers. Rather than directing an aggrieved party to his proper remedy (an appeal to the legislature[213]), courts have deemed it appropriate to grant the quick-take power on a case-by-case basis through their inherent equitable powers.

Granting private gas companies the quick-take power may be a more expedient means of completing pipeline projects under the Act. At times, it may even appear to be necessary to help the companies meet impending construction deadlines. Such conveniences or necessities do not, however, provide courts with the authority to grant the quick-take power. Just as the executive may not appropriate funds for its operations, courts may not assume legislative power by granting the quick-take power, regardless of the courts' intentions.[214] Even if the courts do not prefer Congress's policy decisions, they must refrain from substituting their own policy choice for that chosen by Congress.[215]

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[211] N.Y. Times Co. v. United States, 403 U.S. 713, 742-43 (1971) (per curiam).

[212] *See supra* note 91 and accompanying text.

[213] *Carneal*, 106 S.E. at 407.

[214] *See* Young v. United States, 481 U.S. 787, 817-18 (1987) (Scalia, J., concurring). Justice Scalia noted,

> The Executive . . . cannot perform its function of enforcing the laws if Congress declines to appropriate the necessary funds for that purpose; or if the courts decline to entertain its valid prosecutions. Yet no one suggests that some doctrine of necessity authorizes the Executive to raise money for its operations without congressional appropriation, or to jail malefactors without conviction by a court of law. Why, one must wonder, are the courts alone immune from this interdependence?

Id.

[215] When a court strikes a law as void or repugnant to the Constitution, or interprets a law and declares its meaning, it is truly exercising a *judicial* function. When a court grants legislative powers that the court admits Congress has undeniably withheld, however, it transcends the constitutional role of the judiciary and invades the province of the legislature. Meriwether v. Garrett, 102 U.S. 472, 515 (1880); New York v. United States, 505 U.S. 144, 182 (1992).

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C. Wielding Unlimited and Boundless Discretion in Equity Violates Separation of Powers

The Framers were legitimately concerned that vesting equitable power in the federal courts would lend excessive discretion to the judiciary and undermine the separation of powers, which was considered a safeguard against governmental power and abuse.[216] These concerns are all too familiar to property owners suffering a taking of their property under the Act. In granting quick-take powers to private gas companies, district courts improperly expand the unambiguous language of the Act and include what Congress purposefully omitted from the statute.[217] The people's elected representatives have chosen not to subject property owners to quick-take powers wielded by private companies seeking property for their own pecuniary gain; yet, unelected, life-tenured judges have decided differently.

Courts may not use their discretion in equity to contravene the law or to escape positive rules.[218] "While trial courts have some measure of discretion . . . in all cases governed by equitable principles, it is not an unbridled discretion to decide cases as they might deem proper, without

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[216] While the Framers felt the judiciary needed equitable powers, many feared the federal judiciary's equitable powers. *See* Missouri v. Jenkins, 515 U.S. 70, 126-35 (1995) (Thomas, J., concurring). Thomas Jefferson cautioned, "Relieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into it's [sic] equity, and the whole legal system becomes incertain." *Id.* at 128. The Anti-Federalists prophetically contended that equity gave federal courts excessive discretion by which the courts could subvert the other branches of the federal government and the powers of the states. *Id.* at 126-29. They feared that equity jurisdiction would "lodge an arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate." *Id.* at 129. The Federalists, proponents of the newly formed Constitution, met this charge by assuring that the Constitution did not endow federal courts with unfettered discretion. *Id.* at 129-31.

[217] *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991) (citing Iselin v. United States, 270 U.S. 245, 250-51 (1926)). In *Iselin*, the Court interpreted a statute with "plain and unambiguous" language. "What the Government ask[ed] [wa]s not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted [by Congress], presumably by inadvertence, may be included within its scope. [The Court declared:] To supply omissions transcends the judicial function." *Iselin*, 270 U.S. at 250-51. The gas companies ask the courts to expand the unambiguous language of the Natural Gas Act. As the Court declared in *Iselin*, to supply the quick-take power, when Congress omitted or withheld it, would transcend the judicial function. *Id.*

[218] *See, e.g.*, Knight v. Town of Glocester, 831 F.2d 30, 32 (1st Cir. 1987) (quoting Greene v. Keene, 14 R.I. 388, 395 (1884)).

> The maxims, that every right has a remedy, and that where the law does not give redress equity will afford relief, however just in theory, are subordinate to positive institutions, and cannot be applied either to subvert established rules of law, or to give the courts a jurisdiction hitherto unknown.

Id.

reference to any guiding rule or principle."[219] In this setting, the guiding rules and principles are clear: only Congress can grant legislative powers of eminent domain.[220] Because "statutes conferring the right of eminent domain are strictly construed to exclude those rights not expressly granted,"[221] courts are impermissibly exercising an unbounded discretion in equity when they grant quick-take power.

The courts' inherent equitable power is not a blank check authorizing judicial legislation and allowing courts to escape the dictates of the law.[222] Just as principles of federalism dictate that courts must not use "inherent equitable power to undertake a basic state regulatory function,"[223] district courts should not use equity to undertake a basic legislative function (i.e., granting a legislative power of eminent domain) because it violates the constitutional structure. Equitable powers must have restrictions placed on them or "we would have not rule of law but rule of men."[224] The Supreme Court has recognized that the United States is a "government of laws, not of men."[225]

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[219] Moody & Tips Lumber Co. v. S. Dallas Bank & Trust Co., 246 S.W.2d 263, 265 (Tex. Civ. App. 1952); *see also In re* Econ. Enter., Inc., 44 B.R. 230, 232 (Bankr. D. Conn. 1984) ("[E]quity jurisdiction is as well defined and limited as that of a court of law. It is not an unbridled or unfettered license to fashion relief as seems appropriate to the Chancellor.") (citations omitted); Ind. Lawrence Bank v. PSB Credit Serv., Inc., 724 N.E.2d 1091, 1093 (Ind. 2000) (Sullivan, J., dissenting) ("Although equity involves some flexibility, it is not an unbridled free-for-all.").

[220] "The Founders of this nation entrusted the lawmaking power to the Congress alone." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952).

> While it is emphatically the province and duty of the judicial department to say what the law is, . . . it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation.

Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publ'g Co., 839 F.2d 1147, 1158 (6th Cir. 1988) (citations and internal quotations omitted).

[221] N. Border Pipeline Co. v. 127.79 Acres, 520 F. Supp. 170, 172 (D.N.D. 1981) (citing 1 NICHOLS ON EMINENT DOMAIN § 3.213(2) (3rd ed. 1980)) ("Although the plaintiff possesses the authority pursuant to Title 15 U.S.C. § 717f(h) to exercise the right of eminent domain, this right is not in itself sufficient to authorize the taking of immediate possession prior to the condemnation proceeding."); *see also* Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land, 84 F. Supp. 2d 405 (W.D.N.Y. 2000); *supra* Part II.D.

[222] Johnson v. Collins Entm't Co., 204 F.3d 573, 575 (4th Cir. 2000) (Wilkinson, C.J., concurring) [hereinafter *Johnson II*]; Johnson v. Collins Entm't Co., 199 F.3d 710, 726-27 (4th Cir. 1999) [hereinafter *Johnson I*].

[223] *Johnson II,* 204 F.2d at 575.

[224] Connor v. Mooney, Chancery No. 144783, 1998 Va. Cir. LEXIS 559, at *7 (Va. Cir. Ct. 1998). One judge has elucidated the danger of the rule of men in the judiciary:

> If equity empowers a court to do this, no principle of law is safe from judges bent on reaching a result they deem just.
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> This, in my view, is the most pernicious aspect of the panel's opinion. By invoking the powers of equity, on a highly tenuous basis I would submit, the panel has freed itself of the need to even consider the controlling legal

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As the Fourth Circuit Court of Appeals observed in *Johnson v. Collins Entertainment Co.*,

> Inherent power wielded by life-tenured judges without authorization in statute over the basic functions of a sovereign state simply goes too far. (Equity jurisdiction does not vest federal courts with "a general power to grant relief whenever legal remedies are not practical and efficient" because it would literally place the whole rights and property of the community under the arbitrary will of the judge. . . .).[226]

"Legal constraints cannot yield even to the noblest of intentions, for judicial visions of the social good will differ from issue to issue and from judge to judge, and will, if allowed to run unchecked, thwart the expression of the democratic will."[227]

VI. CONCLUSION

In the context of the Natural Gas Act, courts must be mindful of separation of powers concerns and must constrain themselves from misusing equity to reach the result they prefer. Upon determining that Congress has not granted private gas companies the quick-take power, they should proceed no further. Just as courts refuse to give advisory

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> principles that bear on the issue. If a federal court can so easily sidestep precedent, including explicit directives from the Supreme Court, every federal judge becomes a law unto himself and cases will turn entirely on who happens to be hearing them.
>
> In the final analysis, the panel's action is based on its conclusion that it has identified a problem and that it alone can provide an effective remedy. But whether a court is sitting in law or equity, identifying a problem that needs a solution is just not enough; the court must first have authority to act.

Pangilinan v. INS, 809 F.2d 1449, 1454-55 (9th Cir. 1987) (Kozinski, J, dissenting).

[225] Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 321 (1999). Another court explained,

> The Supreme Court has rejected the expansive view that equity jurisdiction vests federal courts with a general power to grant relief whenever legal remedies are not practical and efficient. . . . Indeed, the unbounded exercise of equitable powers would be the most formidable instrument of arbitrary power[] that could well be devised.

Johnson I, 199 F.3d at 727 (citing *Grupo Mexicano de Desarrollo*, 527 U.S. 308) (internal citations and quotations omitted).

[226] *Johnson II*, 204 F.3d at 575 (citing *Grupo Mexicano de Desarrollo*, 527 U.S. 308) (quotations omitted) (holding that a statutory scheme cannot be contravened or varied by the interposition of equity).

[227] *Johnson I*, 199 F.3d at 726. Courts do not "thwart the expression of the democratic will" when they properly exercise their power of judicial "*review*," which involves a negative power. The court *reviews* a law, declares its meaning, and determines the constitutionality of the law. By exercising judicial review, courts check the powers of the other branches and safeguard individuals' constitutional rights. Where courts affirmatively grant governmental powers, however, they expand the powers of government and eviscerate individual and constitutional rights. With this said, the proper scope of judicial review is beyond the purview of this article.

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opinions[228] or to adjudicate non-justiciable political questions,[229] they must also refrain from granting legislative powers.

Courts' inherent equitable powers do not include the authority to give legislative power. If Congress wants to grant the quick-take power, it will amend the Act or pass some other provision of law to do so. It is because courts interpret federal law as withholding the quick-take power from natural gas companies that they must not grant such power and thereby substitute their personal will for that of the legislature. Such judicial action places the people's rights and liberties at the whim of the court and sweeps away any notion of limited government. If courts are permitted to use equity to grant legislative powers as they see fit, there will be "no logical stopping point,"[230] and no right will be secure.

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228 *See generally* U.S. Nat'l Bank v. Indep. Ins. Agents, 508 U.S. 439 (1993).
229 *See generally* Baker v. Carr, 369 U.S. 186 (1962).
230 *Johnson II*, 204 F.3d at 575.

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