

Eminent Domain

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Outline

- ▶ United States Constitution Takings Clause of the Fifth Amendment
- ▶ Early History
- ▶ Public Use v. Purpose: *Kelo v. City of New London*, 545 U.S. 469 (2005)
- ▶ Article I Section 11 of the Virginia Constitution
- ▶ Public Service Companies
 - ▶ Case Study: Atlantic Coast Pipeline

United States Constitution

Takings Clause of the Fifth Amendment

- ▶ 1791 Bill of Rights
- ▶ "[N]or shall private property be taken for public use, without just compensation."
- ▶ Applies to state governments through the 14th Amendment
- ▶ Power (or limitation on) of the government to "take" private property for public use
 - ▶ **Public Use Clause:** Definition of "public use"?

Early History of 5th Amendment

- ▶ *Kohl v. United States*, 91 U.S. 367, 371 (1875): condemnation power for use of property for customs house and post office in OH
- ▶ Creation of national parks (Rock Creek and Shenandoah) and battlefields (Gettysburg)
- ▶ String of cases for transportation, water supply, public buildings projects and acquisitions
- ▶ WWII: national defense

Public Use vs. Purpose

- ▶ *Berman v. Parker*, 348 US 26 (1954): DC statute allowing redevelopment
- ▶ *Hawaii Housing Authority v. Midkiff* 467 US 229 (1984): HI Act allowing condemnation of property and transfer ownership to lessees
- ▶ *Kelo v. City of New London* 545 US 469 (2005)
 - ▶ CT authorized bonds to New London Development Corporation (private body) to revitalize an area with an “integrated development plan” and to condemn neighborhood: 90 different Fort Trumbull landowners
 - ▶ No claim of blight
 - ▶ 9 landowners refused to sell: many with deep roots in the community
 - ▶ Connecticut Supreme Court upheld all takings

Kelo cont'd

U.S. Supreme Court upheld the takings in 5-4 ruling

- ▶ Public use interpreted as serving a “public purpose” negating the need for immediate use by the public and broadening the term
 - ▶ Economic rejuvenation, private development
Increasing tax base as public purpose
 - ▶ Did not benefit a particular class of individuals
- ▶ Economic rejuvenation and private development as public purpose
- ▶ Deference to legislative bodies' decisions on public use definition
- ▶ And today.....

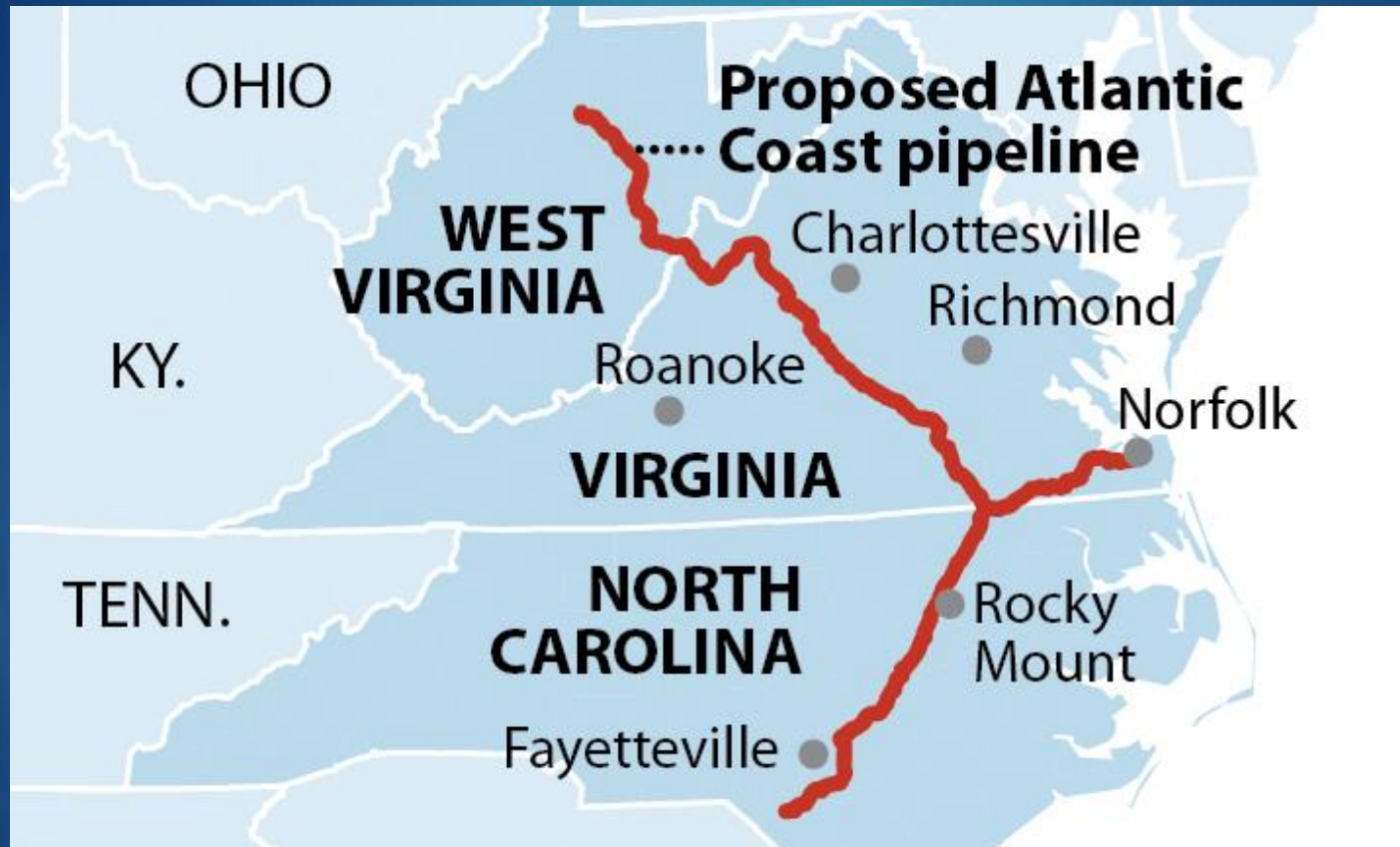
Constitution of Virginia

- ▶ In response to *Kelo*, Virginia amended its Constitution to state:
 - ▶ Article I Section 11: That the General Assembly shall pass no law whereby private property, **the right to which is fundamental**, shall be damaged or taken except for public use. No private property shall be **damaged** or taken for public use without just compensation to the owner thereof. **No more private property may be taken than necessary** to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms **"lost profits" and "lost access"** are to be defined by the General Assembly. **A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services.** In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The **condemnor bears the burden** of proving that the use is public, without a presumption that it is.
- ▶ Title 25.1 Definitions of lost access and lost profits

Public Service Companies: Case Study: Atlantic Coast Pipeline

- ▶ Atlantic Coast Pipeline
 - ▶ 600 miles Route: Northern West Virginia to eastern Virginia and North Carolina Status: 125 foot right-of-way, 11,755 acres of land—6136 acres of forest
 - ▶ project developed by four energy companies — Dominion Resources Inc., Duke Energy Corp., Piedmont Natural Gas Co. Inc. and Southern Company Gas — to deliver Mid-Atlantic shale gas to local markets in Virginia and North Carolina
 - ▶ Cost of project is passed down to customers

ACP Cont'd



ACP cont'd

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Photo Courtesy of Dominion Pipeline Monitoring Coalition—Giles County



- ▶ The Natural Gas Act 15 U.S.C. §§ 717 to 717Z
 - ▶ Provides that a natural gas company must obtain a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission which regulates construction of *interstate* pipelines
 - ▶ 15 U.S.C. § 717f(h) provides natural gas companies holding CPCNs condemnation powers to obtain easements for pipelines
- ▶ FERC: October 2017 issued CPCN for ACP
 - ▶ Commissioner LaFleur dissented

- ▶ In the Matter of Atlantic Coast Pipeline, LLC and Dominion Transmission Inc.
 - ▶ FERC Docket No. CP 15-554-000, 15-554-001, 15-554-002, 15-555-000, 15-555-001:
 1. Lack of substantial evidence demonstrating need → reliance on precedent agreements
 2. Deficient EIS: alleged violation of NEPA
 3. Violation of NGA: grant CPCN (and condemnation powers) when all state permits have not been obtained
 4. Other claims such as Due Process and constitutional challenges

ACP today...

- ▶ ACP is two years behind schedule and \$7.5 billion
- ▶ National Park Service—crossing the Blue Ridge Parkway **NPS REVOKED ITS PERMIT**
- ▶ U.S. Forest Service—crossing the Appalachian Trail, and the GW and Monongahela National Forests **VACATED**
- ▶ FERC Certificate—**CHALLENGED** - to be heard in the D.C. Circuit Court of Appeals—Fall 2019
- ▶ Compressor Station Permit—environmental justice and air quality concerns **CHALLENGED**

Thank you!

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