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## Georgia And South Carolina Are The Newest Battle Grounds For States' Eminent Domain Authority

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In 2005, the US Supreme Court held in *Kelo v. City of New London* that the city of New London, Connecticut could condemn 15 residential properties for a "public use" that entailed transferring the property to a new private owner. The majority opinion backstopped its expansive definition of "public use" by emphasizing that "nothing in [its] opinion precludes any State from placing further restrictions on its exercise of the takings power." In the resulting backlash, many states bolstered protections for property rights against government use of eminent domain.

New battles over eminent domain are bringing property owners and environmental activists together again. Last year, energy infrastructure company Kinder Morgan revealed its plan to construct a pipeline through parts of Georgia and South Carolina. In March, the company [announced](#) that it had suspended construction on the project after the Georgia legislature passed legislation placing a moratorium on pipeline construction. Georgia's legislature declared:

The vitally important issue of land use impacts associated with pipelines that are presently in use and being developed for future use merits a detailed study by elected officials and experts in this field to ensure that the exercise of eminent domain by pipeline companies is carried out in a prudent and responsible manner consistent with this state's essential public interest in establishing minimum standards for land use in order to protect and preserve its natural resources, environment, and vital areas.

Property rights advocates and environmental groups celebrated the decision. Georgia state representative Bill Hitchens (R), [explained](#): "Personal property rights are something that most people believe are as sacrosanct as all of the amendments to the Constitution."

After the company suspended construction, the South Carolina legislature passed a law similar to Georgia's. The South Carolina legislation [placed](#) a three-year hiatus on public "for-profit pipeline companies" exercising eminent domain power.

But those state-level legislative changes tell only part of the story. The interstate distribution of natural gas is governed by the Natural Gas Act (NGA), 15 U.S.C. § 717-717z, and the Natural Gas and Hazardous Materials Pipeline Safety Act (NGPSA), 49 U.S.C. §§ 60101-60125. The NGA provides a [carve out](#) that gives a natural gas company the power of eminent domain to construct natural gas pipelines and facilities. Additionally, Federal Rule of Civil Procedure 71.1(a) governs "proceedings to condemn real and personal property by eminent domain." Taken together, those provisions preempt most contrary state laws. Thus, pipeline companies who obtain a certificate from the Federal Energy Regulatory Commission (FERC) may be able to condemn property, despite the Georgia and South Carolina state laws to the contrary.

Just two years ago the US Court of Appeals for the Eighth Circuit addressed a similar issue in *Alliance Pipeline L.P. v. 4.360 Acres of Land*. In that case, the Smiths appealed a district court order condemning portions of their property for construction of a natural gas pipeline owned and operated by Alliance Pipeline, L.P. The Smiths argued that the pipeline violated "several state procedural rules in bringing this condemnation action." The

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Smiths noted that the NGA provides:

The practice and procedure [in a condemnation proceeding under this section] 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[.]

But, the court explained, that provision has been superseded by Rule 71.1(a). Thus, the Smiths could not use the more restrictive state laws to oppose the condemnation of their property for the natural gas pipeline. Other [courts](#) that have addressed the preemption issue in the condemnation context have reached a similar conclusion.

Energy companies facing opposition will likely consider federal condemnation proceedings to obtain property for pipeline construction. To benefit from such federal laws, energy companies may consider lobbying efforts to curtail the localized impact to blocking state legislation.

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