

H O N O R A B L E M E N T I O N

# EMINENT DOMAIN LAW AS CLIMATE POLICY

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In 2019 and 2020, several states adopted aggressive clean energy laws and other states are poised to do the same. These policies require electric utilities to secure all of the electricity they sell to customers from carbon-free energy resources by a specified date, and many also require the state to significantly reduce carbon emissions from the transportation sector, increase energy efficiency in buildings, and otherwise decarbonize their economies. In order to meet these mandates, states must transform the physical infrastructure used to create and transport energy. This will require building new power plants that run on carbon-free energy resources like wind, solar, hydropower, or nuclear energy; constructing the electric transmission lines and other infrastructure needed to deliver these energy resources to consumers; setting standards and mandates for new buildings, vehicles, and transportation infrastructure that will reduce carbon emissions; and providing direct funding, tax incentives, new permitting processes, and staff to support the public and private actors that will implement these changes. These needs are becoming well-documented. What remains unexplored, however, is the potential for state property law reform—most notably eminent domain law—to limit the development of fossil fuels and promote the growth of alternative energy to support these new clean energy policies.

This Article contends that states should consider limiting eminent domain rights for fossil fuel projects and extending eminent domain rights for certain clean energy projects as part of their state climate policies. If fossil fuel industries were already on the decline as a matter of eco-

nomics, then perhaps support for clean energy resources would be enough to meet state policy goals, and fossil fuel resources would fade quickly on their own. At the present time, however, that is not the case. The current abundance of low-cost shale oil and natural gas resources made available through hydraulic fracturing and directional drilling technologies means that these resources will remain a major part of the U.S. economy in the absence of countervailing state or federal policies. While tax incentives, streamlined permitting, and other support for renewable energy projects is extremely important, policymakers should not ignore the power of state property law to help meet climate goals. Thus, state legislatures should develop policies that ensure private actors that build clean energy projects will be supported not solely through financial incentives and the work of new state committees and councils, but also through property incentives like enhanced eminent domain rights. Policymakers can also simultaneously limit or eliminate the ability of fossil fuel developers to use existing rights of eminent domain under state law to build projects that are not consistent with the state's climate policies. Notably, each state's approach to eminent domain reform may differ based on the current energy mix in the state as well as the potential for technological development. These policy conversations regarding the use of eminent domain for energy projects are critical to developing robust state clean energy laws. They also can provide a useful template for the U.S. Congress if, in the future, it moves forward with comprehensive federal climate policy.

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