

Winter 2011

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Michael L. Stokes

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Recommended Citation

Michael L. Stokes, *Moving the Lines: The Common Law of Utility Relocation*, 45 Val. U. L. Rev. 457 (2011).
Available at: <https://scholar.valpo.edu/vulr/vol45/iss2/2>

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MOVING THE LINES: THE COMMON LAW OF UTILITY RELOCATION

Michael L. Stokes *

The system of streets and roads serving the United States is over four million miles long and occupies about one percent of the country's total land mass—an area roughly the size of South Carolina.¹ The most obvious users of this intricate network are the cars and trucks that log over 990 billion miles a year in vehicle-miles traveled.² Less noticeable are the utility lines, often located to the side of the pavement or underground, that use these transportation corridors for tasks ranging from transmission of fiber optic data to collection of sewage.

If a road is widened to allow for more traffic, or a city street is rerouted for construction of a convention center, the utility lines may have to be moved. This can be an expensive undertaking. During construction of the Westpark Tollway in Houston, for example, the cost to relocate electric and gas utilities exceeded \$10 million.³ Telephone line relocation for the same project cost another \$1.5 million.⁴

Determining who has to pay these costs is a frequent source of litigation, sometimes with inconsistent results. For example, in one 2006 decision resulting from the Westpark Tollway project, the Court of Appeals for the Fifth Circuit decided that Texas statutory law would require the government to pay for relocating electric and gas lines being displaced by the new road.⁵ But three years later, in another case arising from the same project, the Texas Supreme Court held that the Fifth Circuit's "Erie guess about Texas law" was wrong, deciding that the telephone company had to pay to move its own lines as required by longstanding Texas common law.⁶

"Under the traditional common-law rule," reaffirmed by the U.S. Supreme Court in 1983 and recognized by the Court as far back as 1905, "utilities have been required to bear the entire cost of relocating from a

* J.D., Ohio State University (1995); M.A., Industrial Relations, Wayne State University (1983); B.A., Economics and Political Science, University of Michigan–Dearborn (1981). Mr. Stokes is an attorney practicing in Toledo, Ohio.

¹ *Distance to Nearest Road in the Coterminous United States*, U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, available at <http://www.fort.usgs.gov/products/publications/21426/21426.pdf>.

² *Functional System Travel-2008*, FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., available at <http://www.fhwa.dot.gov/policyinformation/statistics/2008/pdf/vm2.pdf>.

³ *Centerpoint Energy Hous. Elec., L.L.C. v. Harris Cnty. Toll Rd. Auth.*, 436 F.3d 541, 542 (5th Cir. 2006).

⁴ *Harris Cnty. Toll Rd. Auth. v. Sw. Bell Tel., L.P.*, 263 S.W.3d 48, 54 (Tex. App. 2006).

⁵ *Centerpoint Energy*, 436 F.3d at 551.

⁶ *Sw. Bell Tel., L.P. v. Harris Cnty. Toll Rd. Auth.*, 282 S.W.3d 59, 63–65 (Tex. 2009).

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public right-of-way whenever requested to do so by state or local authorities.”⁷ But affected utilities, facing large and unwanted expenditures, have persistently found ways to argue around or against this rule, and courts have sometimes been reluctant to apply it.

The abundance of litigation related to government-mandated utility relocation is not surprising. When a government agency requires a utility company to move its equipment from the right-of-way and disclaims any responsibility to pay for it, the order might *seem* like an uncompensated taking, and this argument commonly arises in utility relocation cases.⁸ Moreover, utilities often have government-granted franchises, dating to the late 1800s or before, that authorize them to put equipment in the streets but say nothing about relocation.⁹ And because utility companies are subject to a host of state and federal regulations, they may urge that the common law rule is no longer valid because state regulation has displaced it¹⁰ or federal law has preempted it.¹¹ Finally, given the amount of money at stake, it is predictable that utilities resist uncompensated relocation and try to put the burden on the governmental agency to justify it.¹²

This Article will begin by examining how the common law rule developed as utilities began to use the streets and highways for gas and water service and street railways, and then how the rule was affected by the massive growth of the country’s federally-funded highway system. Second, we will look at the various arguments made against application of the common law rule and how they have fared. Third, we will consider the particular issues that arise when private development and government actions are intertwined in the project that made the relocation necessary. Finally, this Article will suggest that a “clear statement rule” would help sort out the legal complexities in this area:

⁷ *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (quoting *New Orleans Gaslight Co. v. Drainage Comm’n of New Orleans*, 197 U.S. 453, 462 (1905)).

⁸ *See, e.g., Qwest Corp. v. City of Chandler*, 217 P.3d 424, 426–27 (Ariz. App. 2009); *City of Perrysburg v. Toledo Edison Co.*, 870 N.E.2d 189, 191 (Ohio App. 2007); *Sw. Bell*, 282 S.W.3d at 60–61.

⁹ *See, e.g., Qwest Corp.*, 217 P.3d at 427; *Nw. Natural Gas Co. v. City of Portland*, 711 P.2d 119, 128–30 (Or. 1985).

¹⁰ *See, e.g., City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1166 (9th Cir. 2001) (noting Qwest’s argument that state public utilities regulations displaced the common law rule).

¹¹ *See, e.g., Sw. Bell Tel., LP v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008) (rejecting the argument that Federal Telecommunications Act of 1996 preempted the common law rule).

¹² *See, e.g., Metro. Gov’t of Nashville & Davidson Cnty. v. Bellsouth Telecomm., Inc.*, 502 F. Supp. 2d 747, 760–62 (M.D. Tenn. 2007); *Complaint by Wis. Pub. Serv. Corp. against the City of Manitowoc*, 2008 Wisc. PUC LEXIS 239, *9 (Pub. Serv. Comm’n of Wisc. Apr. 18, 2008).

because the common law “utility pays” rule is so well-established, it should be applied unless a state statute clearly requires otherwise.

I. DEVELOPMENT OF THE COMMON LAW RULE

A. *The Early Cases*

Building and maintaining municipal streets and roads between population centers is one of the “ancient purposes of organized government.”¹³ For much of history, these ways were traveled by foot, either human or animal. By the mid-1800s, however, street railway systems began to operate, some horse-drawn and others powered by electrical or steam engines. Unlike transient carriages or wagons, street railways required fixed, permanent tracks, and the laying of these tracks also laid the potential for conflicts with other uses of the road. Yet from the earliest days, courts regularly determined that it was the secondary user of the street, and not the organized government, that had to yield.

In 1863, for example, the Kentucky legislature authorized the city of Louisville to contract for the construction of street railroads, and in 1864, the legislature incorporated the Louisville City Railway Company to build and operate street railways at locations authorized by the city council.¹⁴ After agreeing with the city to the terms of a contract, this privately-owned railway company laid over twenty-four miles of track—costing nearly \$400,000—and began operations.¹⁵

Soon afterward, however, the city decided to begin using different pavement on some of its streets, notifying the company that it would have to remove and replace 1280 yards of track on Jefferson Street as the new paving progressed.¹⁶ The company did the work under protest and sued to challenge the city’s action. On review, the Kentucky Court of Appeals first had to determine whether the city could even require the company to remove its tracks from the street. If so, the court would then have to decide whether the city or the company should pay for it. To answer the first question the court looked at the legislature’s 1863 enabling act, which required the “[city] council to reserve the right to

¹³ *Hendricks v. Covington & Cincinnati Bridge Co.*, 6 S.W.2d 1050, 1052 (Ky. 1928); *see also Bester v. Chi. Transit Auth.*, 676 F. Supp. 833, 838 (N.D. Ill. 1987). “One of the most ancient and habitually exercised functions of government for centuries has been providing of roads and streets for use by the public and keeping them free from obstructions, regulating traffic over and upon them, so that the public might get the maximum of safe use thereof.” *Superior Laundry & Towel Supply Co. v. Cincinnati*, 168 N.E.2d 447, 448 (Ohio App. 1959).

¹⁴ *Louisville City Ry. Co. v. City of Louisville*, 71 Ky. (8 Bush) 415, 417 (1871).

¹⁵ *Id.* at 418.

¹⁶ *Id.* at 418–19.

regulate and control” the railroad.¹⁷ That reserved right, the court decided, was broad enough to encompass the repaving project. As the court put it, “the municipal government may, in the exercise of a sound discretion, make reasonable and proper regulations, prescribing the manner in which this right of way shall be enjoyed.”¹⁸ And while the city’s powers to regulate were expressly reserved in this instance, the court also noted the “fundamental principle that these powers are impliedly reserved . . . in all its grants of property to private individuals.”¹⁹

Turning to the second question, the court held that the company must bear the cost of relocating its tracks. The court based this decision on a fundamental principle:

[just as the city] council could not by contract deprive itself of the power to regulate the reconstruction of railways made necessary by changes in the character of pavements used upon the streets of the city, neither could it embarrass or clog its right to exercise such power by undertaking, either expressly or by implication, to pay the expenses necessarily incurred by the company in complying with the reasonable and proper regulations made by the city upon this subject.²⁰

Furthermore, the court declared that it would presume that the city acted reasonably in exercising its legislative power.²¹

The Kentucky court’s decision also involved sub-surface rights: specifically, the city of Louisville’s power to require the company to remove its tracks (and replace them at its own cost) for a sewer project. That relocation, too, was an exercise of the city’s inherent and inalienable power to control the streets for the public benefit. As the court put it, “we are of [the] opinion that the city did not and could not surrender its right to construct sewers in such portions of its limits as might require them, and that the railway company holds its right of way subject to this power.”²²

¹⁷ *Id.* at 421.

¹⁸ *Id.* at 421–22.

¹⁹ *Id.* at 422.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 423. The Alabama Supreme Court followed *Louisville City Railway* in an 1890 case ordering a water company to remove and lower pipes that conflicted with a city sewer, even though the pipes allegedly were located as the city’s engineer had directed. *City Council of Montgomery v. Capital City Water Co.*, 9 So. 339 (Ala. 1890). Due to the fact that liability for cost was not relevant to the mandamus action, the Alabama court

During this same time period, courts in several other jurisdictions used similar reasoning to determine that, franchise rights notwithstanding, the government could order a utility to relocate at its own cost whatever facilities it put in or under the public highways. In 1873, the Supreme Court of Massachusetts decided that the county commissioners could authorize a steam railroad to lay its tracks across the tracks of a horse railroad when both occupied the same highway, for both railroads “hold their rights to use [the highway] in subordination to the power of the public authorities to determine what other use of it is demanded by public necessity.”²³

In 1883, one year after Thomas Edison installed his first small-scale electricity distribution network in part of Manhattan,²⁴ the New York Court of Appeals held in *In re Deering* that the city of New York could not assess property taxes to reimburse a gas company for expenses incurred in removing and replacing an illuminating gas line that had to be moved when the grade of the street was changed. Even though an 1848 act of the state legislature authorized the gas company to lay its pipes under the public streets, the court held that “the company took the risk of their location and should be required to make such changes as public convenience or security requires, and at its own cost and charge.”²⁵

deferred ruling on whether the city was “under a moral or legal obligation to pay [the] expense [of relocating the pipes],” but it signaled that the answer would probably be no. *Id.* at 341. Quoting the Kentucky court’s opinion, the Alabama court indicated its approval of the general principle that a city could not “embarrass or clog its right to exercise” police power over the streets by undertaking to pay to relocate utilities using the public right-of-way. *Id.*

²³ *Lynn & Bos. R.R. Co. v. Bos. & Lowell R.R. Corp.*, 114 Mass. 88, 91 (1873).

²⁴ PHILLIP F. SCHEWE, *THE GRID* 29–39 (2007).

²⁵ *In re Deering*, 93 N.Y. 361, 362 (1883). In 1892, the Supreme Court of Virginia followed *Deering* and *Louisville City Railway* and refused to enjoin the city of Roanoke from lowering the grade of a street, even though it meant that gas lines would have to be relocated. *Roanoke Gas Co. v. City of Roanoke*, 88 Va. 810 (1892). The Virginia court suggested that the utility had no valid claim for damages, for it accepted its franchise contract “with full knowledge not only that the city retained the power to change the grade of its streets as in its judgment and discretion the public welfare might require, but also of a probability of such change in a new city such as Roanoke.” *Id.* at 818.

The Florida Supreme Court reached a similar result when it decided that a public contract for a sewer system was void because the task of relocating utilities was included in the description of the work being bid. *Anderson v. Fuller*, 41 So. 684, 688 (Fla. 1906). Thus, [t]he city of Tampa was, therefore, not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing of the water pipes, gas pipes, telegraph, telephone and electric light poles, drains, or conduits, or railway tracks that might necessarily have been interfered with in laying its sewers in the streets.

Id.

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Another illustrative decision—made by a federal court—arose in Kansas City, Missouri, where a city sewer dug in 1884 displaced a water line laid just one year before by the National Water-Works Company. The water company contended that, because it had laid its water line in the street “in the place and manner directed by the city,” it had acquired “a vested property right in an undisturbed location and possession.”²⁶ But the court disagreed, stating that under well-established law no city could make a contract that abridged its full control of matters affecting the public health.²⁷ This rule governed the contract between the city and the utility, which “took its right to lay its pipes in the streets of the city subject to the paramount and inalienable right of the city to construct sewers therein whenever and wherever, in its judgment, the public interest demand.”²⁸

By the end of the nineteenth century multiple utility lines in the streets had become commonplace and so had the recognition that governments could order those lines to be relocated at the cost of the companies that owned them. As the Ohio Supreme Court’s 1893 *Columbus Gaslight & Coke* opinion held, any easement or other right that a utility might have to use the streets “must give way to the paramount duty of the city to care for the streets, and keep them open, in repair, and convenient for the general public.”²⁹ And so long as the city’s action was not wanton or negligent, the utility would have to pay to move its lines.³⁰ The court reasoned,

[t]his duty would be seriously interfered with if the city could not change the grade of its streets save upon the condition that it should make compensation to every gas company, and water company, and telephone company, and electric light company, and street-railway company, for inconvenience and expense thereby occasioned. All such agencies must be held to take their grants from the city upon the condition, implied where not expressed, that the city reserves the full and unconditional power to make any reasonable change of grade or other improvement in its streets.³¹

²⁶ Nat’l Water-Works Co. v. City of Kansas, 28 F. 921, 921, 922 (W.D. Mo. 1886).

²⁷ *Id.* at 923.

²⁸ *Id.*

²⁹ Columbus Gaslight & Coke Co. v. City of Columbus, 33 N.E. 292, 294 (Ohio 1893).

³⁰ *Id.* at 294.

³¹ *Id.*

Nor were conflicts between multiple users of the road strictly an urban phenomenon. In 1903, the commissioners of Sandusky County, Ohio ordered a telegraph company to move its poles from the center of a rural highway to the edge because heavily loaded farm wagons had to dodge between them to avoid traffic on a recently installed electric interurban railway.³² Because this highway was a federally funded post road, the telegraph company asked the federal court to enjoin the order, arguing that the federal statute deprived the commissioners of authority to require it to move the lines—foreshadowing preemption arguments made a century later. But then, as now, the federal government deferred to local control of public road rights-of-way; the Court of Appeals for the Sixth Circuit held that the statute authorizing telegraph lines on federal post roads “was not intended by its passage to interfere with the proper control and regulation of such highways by the states, counties, or municipalities, which had them in charge.”³³

Alternatively, the telegraph company argued that because it had paid the county for the right to use the highway and installed its poles where it had been authorized to put them, it had “a right to maintain its poles and wires where they are indefinitely.”³⁴ But the federal appeals court was not persuaded:

It is enough to say in reply to this, that the county commissioners had no power to grant such a right or franchise. Their power was limited. They had a right to permit the telegraph company to maintain its poles and wires in the road, provided they should not incommode the public in its use, but that was the extent of their power.³⁵

Moreover, there was no guarantee that the poles could stay where they were first installed. “A location not inconvenient when made, may become so because of changed conditions; and whether it has or not, must be ascertained by the commissioners in office when the inquiry is made. No board has power to determine for all time just how a highway shall be used.”³⁶

Thus, by the beginning of the twentieth century, two well-recognized principles governed how utilities could use the public rights-of-way. First, the utility’s right to be there was a subordinate one, so the

³² Ganz v. Ohio Postal Tel. Cable Co., 140 F. 692, 694 (6th Cir. 1905).

³³ *Id.* at 695.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

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government authority responsible for maintaining the street or road could order the utility to relocate its facilities. Second, this relocation would be at the utility's cost. To hold otherwise would "embarrass or clog" public control of the roads and hamper the government's ability to respond to future public needs by making change too costly.³⁷ And this result was a fair one, because by using the public right-of-way the utility company saved the time and money it would otherwise have spent acquiring easements for its lines. The utility company took the risk of locating its lines in the streets; therefore, it must also bear the cost of moving them when the government required it.

It was against this background that the U.S. Supreme Court decided *New Orleans Gaslight*, which has come to be considered a seminal decision on the subject.

B. The Supreme Court's 1905 New Orleans Gaslight Decision

The dawn of the nineteenth century saw some halting attempts at providing water to the public through pipes laid in the streets,³⁸ but the first prototypical "utilities" were companies that produced and distributed coal gas for illuminating streets and buildings.³⁹ One of these was New Orleans Gaslight and Banking Company, which was created in 1835 and given the right, for a term of years, to use the streets of New Orleans as the city's exclusive vendor of illuminating gas.⁴⁰

The Gaslight Company first came before the Supreme Court in 1885 seeking to defend its exclusive rights against a legislatively sanctioned competitor. The Court began its decision in that case by finding that the grant of a monopoly was not improper because the company was not in competition with ordinary citizens:

³⁷ *Supra* note 22.

³⁸ See ROBERT DALEY, *THE WORLD BENEATH THE CITY* 28 (1959) (stating that in 1799 the Manhattan Company, headed by Aaron Burr, obtained legislative authority to provide water to the city of New York). Moreover,

Burr and the Manhattan Company negotiated for the site of Christopher Colles' old well and reservoir adjacent to Collect Pond, ordered thousands of feet of log pipe bored, and sent laborers into the principal streets to break up the pavement. When the log pipes were ready they were buried five feet down, two feet from the curb. For the first time, New York City, like any growing organism, had pushed roots down into the earth.

Id.

³⁹ See *id.* at 116 (stating that New York City's original gas charter was granted in the spring of 1823).

⁴⁰ *New Orleans Gas-Light Co. v. La. Light Co.*, 115 U.S. 650, 651-52 (1885).

No one has the right to dig up the streets, and lay down gas-pipes, erect lamp-posts, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the state, and, in the exercise of the police power, the state could carry on the business itself or select one or several agents to do so.⁴¹

But once it was built out, the utility franchise became a right; without the assurance of an exclusive privilege for a fixed time, no private company would have undertaken the risk of building a gas-works and laying the distribution lines.⁴² Therefore, if the state legislature later decided that such grants of monopoly power were a bad idea, it could revoke the exclusive privilege. However, it could not revoke it under the guise of the police power, for “the exclusiveness of a grant has no relation whatever to the public health, or to the public safety.”⁴³ Instead, it would have to take the company’s exclusive right by eminent domain and pay it just compensation in return.⁴⁴

Having once successfully defended its rights against governmental action, the Company probably felt it could do so again when a state-created drainage commission ordered it to relocate some of its gas pipes. So in the 1905 *New Orleans Gaslight* case, the Company argued that

having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes.⁴⁵

But the Supreme Court drew an important distinction between the franchise itself, in which the company had a compensable right, and the particular location of its pipes in the streets, in which it did not. Unlike the decision to disavow a state-chartered monopoly, the decision to install a drainage system *was* an exercise of the police power, and that

⁴¹ *Id.* at 659–60 (quoting *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138, 147 (1875)).

⁴² *Id.* at 670.

⁴³ *Id.* at 672.

⁴⁴ *Id.* at 673.

⁴⁵ *New Orleans Gaslight Co. v. Drainage Comm’n of New Orleans*, 197 U.S. 453, 458 (1905).

power, "in so far as its exercise is essential to the health of the community, . . . cannot be contracted away."⁴⁶ As the Court put it

[i]t would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made.⁴⁷

This paramount public right, moreover, extended beyond the surface of the streets to the ground below because the public needed systems for supplying water and light and removing sewage and storm-water. Furthermore, "every reason of public policy requires that grants of rights in [the] subsurface shall be held subject to such reasonable regulation as the public health and safety may require."⁴⁸ Thus, "whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare."⁴⁹ This view of the company's right, from the Supreme Court's perspective, was "amply sustained by the authorities."⁵⁰

In other words, "[t]he gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets."⁵¹ So the drainage commission's relocation order was not a taking of property; rather, it was an exercise of the police power, and the expense the company incurred gave no basis for a legal claim. The company had to move its pipes to accommodate the drainage commission's new public work, and "[i]n complying with this requirement at its own expense,

⁴⁶ *Id.* at 460.

⁴⁷ *Id.* at 461.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 462.

none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.⁵²

In the years that followed, the Supreme Court adhered to the position it marked off in *New Orleans Gaslight*, distinguishing a utility's property right in its franchise from the permissive use of any given location in the street. Thus, it was improper for the city of Louisville, in a dispute over quality of a telephone company's service, to repeal the ordinance authorizing the company to install its lines in the streets, for that would destroy the company's franchise.⁵³ Conversely, it would be a proper exercise of the police power for a city to compel a railroad company to move its tracks from one part of the street to another, because "the franchise, and not the particular location, [is] the essence of the contract" and though a franchise may not be destroyed under color of the police power, its use may be regulated in the public interest.⁵⁴

C. *Utility Relocations and the Growth of the Highway Network*

1. Highway Expansion Before World War II

The number of automobiles in use in the United States increased from four experimental vehicles in 1895 to 55,290 cars and trucks in 1904.⁵⁵ By 1910, the number of registered motor vehicles increased to 468,500, and by 1920, it jumped to 9,239,161.⁵⁶ Between 1915 and 1925, automobile ownership went from one car per every sixty families to one car per eight families.⁵⁷

This increased use of automobiles brought with it an increased demand for better roads and more involvement by the federal government in the highway building process. In 1916, a federal highway law was enacted that "provided substantial road funding to all States

⁵² *Id.* The Latin phrase means "[l]oss, hurt, or harm without injury in the legal sense," in other words, "[a] loss or injury which does not give rise to an action for damages against the person causing it." BLACK'S LAW DICTIONARY 393 (6th ed. 1990).

⁵³ *City of Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649, 652, 663-64 (1912).

⁵⁴ *Grand Trunk W. R.R. Co. v. City of South Bend*, 227 U.S. 544, 553 (1913). Notably, Justice Lamar was the author of both the *Grand Trunk* and the *Cumberland* opinion. Although the Supreme Court of this era was famously protective of contract rights, it nonetheless recognized that the police power could not be contracted away and that even major changes, such as the raising or lowering of a track, could be required. "[T]he municipality had ample authority to make regulations necessitating changes of a nature which could not have been compelled if the grant had been from it as a private proprietor." *Id.*

⁵⁵ Spencer Miller, Jr., *History of the Modern Highway in the United States*, in HIGHWAYS IN OUR NATIONAL LIFE 88, 95 (1950).

⁵⁶ *Id.*

⁵⁷ See SCHEWE, *supra* note 24, at 78.

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with highway departments. States without highway departments quickly formed them."⁵⁸ This legislation was followed in 1921 by an act creating a primary road system consisting of seven percent of the rural highways in each State, which were eligible for federal-aid funding.⁵⁹ Federal-aid was confined to highway construction in rural areas; therefore, these projects "generally had little or no effect on existing utility facilities."⁶⁰

When the New York legislature decided in 1936 to authorize construction of a tunnel from Queens to midtown Manhattan, it elected to create a Tunnel Authority to build the project with toll-financed bonds⁶¹ because federal highway funds could not be used to build roads in cities.⁶² Consolidated Edison spent over \$535,000 to comply with the Tunnel Authority's order to relocate its facilities in public streets near the tunnel approaches and then sued to recover the cost. Arguing that the tunnel was not really a governmental function but a proprietary one, where the Tunnel Authority was competing in a realm traditionally occupied by private enterprise, Edison convinced a lower appeals court that the Tunnel Authority should bear the relocation costs.⁶³

This argument had some force to it, for since colonial days public improvement projects traditionally were "carried out by private companies or individuals designated by governments to serve the public interest."⁶⁴ Toll roads and toll bridges, built and operated by private companies under government charter, were a common feature of the American landscape.⁶⁵ As time went by, however, governments began providing services such as water, sewer, electricity, and public transportation, and the line between governmental and non-governmental functions became ever more indistinct.⁶⁶

To the New York Court of Appeals, it was not a close case; the Authority was an agent of the State and the tunnel project was clearly a

⁵⁸ FED. HIGHWAY ADMIN., U.S. DEP'T TRANSP., PUBLICATION NO. FHWA-SA-93-049, HIGHWAY/UTILITY GUIDE 6 (1993) [hereinafter HIGHWAY/UTILITY GUIDE].

⁵⁹ *Id.*

⁶⁰ FED. HIGHWAY ADMIN., U.S. DEP'T TRANSP., UTILITY RELOCATION AND ACCOMMODATION: A HISTORY OF FEDERAL POLICY UNDER THE FEDERAL-AID HIGHWAY PROGRAM 2 (1980) [hereinafter UTILITY RELOCATION AND ACCOMMODATION].

⁶¹ *N.Y.C. Tunnel Auth. v. Consol. Edison Co.*, 295 N.Y. 467, 472, 476 (1946).

⁶² See HIGHWAY/UTILITY GUIDE, *supra* note 58, at 6 (explaining that federal-aid highway funds could not be spent for construction inside cities with a population of 2500 or more).

⁶³ *N.Y.C. Tunnel Auth.*, 295 N.Y. at 473.

⁶⁴ ANDREW R.L. CAYTON, OHIO: THE HISTORY OF A PEOPLE 49 (2002).

⁶⁵ See, e.g., *W. River Bridge Co. v. Dix*, 47 U.S. 507 (1848) (toll bridge); *Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. 233 (1810) (toll road).

⁶⁶ *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring).

public highway improvement.⁶⁷ The mere fact that a toll was charged did not make the tunnel a business enterprise. Instead, the imposition of tolls created “a new class of taxpayers thought to be more justly charged with the cost of the new improvement.”⁶⁸ Accordingly, the court saw no reason to depart from its then eighty-three year-old *Deering* precedent, reiterating that the “fundamental common law right applicable to franchises in streets’ is that a utility company must relocate its facilities . . . when changes are required by public necessity.”⁶⁹

2. The 1944 Highway Act and Urban Expressways

Remarkably, despite economic depression and war, traffic volume and the weight and speed of vehicles continued to increase throughout the 1930s and 1940s.⁷⁰ By 1941, some 34,472,000 motor vehicles were registered in the United States.⁷¹ Responding to this growth, the Federal-Aid Highway Act of 1944 significantly increased the amount of federal highway funds to be used for the federal-aid primary system (including the newly authorized National System of Interstate Highways); authorized the creation of a federally-aided system of secondary highways; and for the first time allowed these highway systems to be extended into cities.⁷²

This significant expansion of the federal-aid highway system increased the number and size of utility relocations, which led the Federal Public Roads Administration to issue its first comprehensive policy on using federal funds to pay for that work.⁷³ Because utilities occupy public rights-of-way pursuant to state law, the Administration decided to leave it up to the states to determine if a utility had a right to

⁶⁷ *N.Y.C. Tunnel Auth.*, 295 N.Y. at 475–76.

⁶⁸ *Id.* at 476.

⁶⁹ *Id.* at 474–75. The Illinois Supreme Court reached a similar result when asked to determine whether the Chicago subway system was “governmental” or “proprietary.” *Peoples Gas Light & Coke Co. v. City of Chicago*, 109 N.E.2d 777 (Ill. 1952). The court concluded that providing ways for travel below the surface of the streets was a proper street use and that the same rules governing use of the surface applied below ground: “[t]he rights of the public remain paramount, and other owners, including utilities, occupying such subsurface space do so subject to those rights.” *Id.* at 784. Citing *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 197 U.S. 453 (1905), the Illinois court came to the same conclusion: under the franchise agreement the gas company was “subject at all times to the resolutions and ordinances of the common council of the city of Chicago” and “[i]t had no vested right to have its facilities remain where they were.” *Peoples Gas Light*, 109 N.E.2d. at 786.

⁷⁰ HIGHWAY/UTILITY GUIDE, *supra* note 58, at 6.

⁷¹ Miller, Jr., *supra* note 55, at 96.

⁷² UTILITY RELOCATION AND ACCOMMODATION, *supra* note 60, at 2.

⁷³ *Id.* at 2–3.

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be reimbursed for relocation costs. In its 1946 policy memorandum, the Administration required each state to “make a formal finding as to the extent that such utility company is obligated, or is relieved of the obligation, by law or otherwise to move or to change its facilities at its own expense.”⁷⁴

Under this federal policy, the state first had to look to its statutes and applicable franchise agreements or other contracts. If one of those documents specifically reserved to the government the power to require a utility to move at its own expense, then it would have to exercise that power for the project to receive federal funding.⁷⁵

If the relocation-cost issue was not specifically addressed by statute or agreement, then federal highway policy indicated the state’s common law rule would govern. Only if the common law did not require the utility to pay its own relocation costs did the federal policy allow reimbursement, and then only to the state government for “the cost of such work actually paid by the State or its subdivisions.”⁷⁶

Working within this framework, the Commonwealth of Kentucky and Southern Bell Telephone submitted to the court a set of agreed facts about a new urban freeway in Louisville: the Watterson Expressway.⁷⁷ Southern Bell contended that Kentucky should pay its relocation costs. Its 1886 state-wide franchise required the company to construct and maintain its lines and poles “so as not to obstruct” the highways and streets, and Southern Bell argued that it fulfilled this requirement by properly locating its facilities when they were originally installed.⁷⁸

The Kentucky Court of Appeals disagreed. In its 1954 decision, the court reasoned that if Southern Bell’s interpretation of its franchise was correct, then the state would have been required to design its highways to avoid the company’s facilities rather than for the safety and convenience of the traveling public.⁷⁹ To the court, this result made no sense, especially because state-paid relocation would amount to an unconstitutional grant of the state’s credit to a corporation: accordingly, the “not to obstruct” requirement must relate to new or improved highways as well as completed ones.⁸⁰

⁷⁴ FED. WORKS AGENCY, U.S. PUB. RDS. ADMIN., GEN. ADMIN. MEMO. NO. 300, REIMBURSEMENT OF COSTS OF CHANGES TO UTIL. FACILITIES, P-3819 (1946) (reprinted in *UTILITY RELOCATION AND ACCOMMODATION*, *supra* note 60, at 3).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *S. Bell Tel. & Tel. Co. v. Commonwealth*, 266 S.W.2d 308, 309–10 (Ky. 1954).

⁷⁸ *Id.* at 310.

⁷⁹ *Id.*

⁸⁰ *Id.*

Express language aside, the court determined that Southern Bell's franchise necessarily included an implied duty to relocate. Citing *New York City Tunnel Authority* and its own 1871 *Louisville City Railway* decision, the court stated, "we think there is a clearly implied condition that [Southern Bell] may be required to remove and relocate its facilities when such removal and relocation are in the interest of public convenience or safety."⁸¹

3. Highway Legislation During the 1950s

Utility companies continued to press Congress for action, and extensive hearings were held in connection with the 1952 and 1954 Federal-Aid Highway Acts.⁸² After the 1954 hearings, however, the Senate Committee on Public Works expressed reluctance to alter the existing common law pattern. Instead, it "tentatively concluded that, since the question was governed by long-established state law, it was 'neither feasible nor desirable for the Federal Government to give direction to those local relationships by force of application of Federal funds.'"⁸³

The utilities also lobbied the states. In 1955, for example, the Maine legislature enacted a statute requiring the Maine Turnpike Authority to pay to acquire or relocate utilities on parts of the Turnpike that were then under construction.⁸⁴ But a group of bondholders sued to invalidate the statute, arguing that it unlawfully changed the terms of the Turnpike bonds they had purchased in 1953.⁸⁵

Before reaching that argument, however, the Maine Supreme Court had to determine whether funds could have been used for that purpose under the original bonding arrangement. After a thorough review, it agreed that "[t]he 'fundamental common law right applicable to franchises in streets' is that a utility company must relocate its facilities in the public streets when changes are required by public necessities."⁸⁶ As the Maine court explained:

[c]harters, franchises, statutory grants and permits
affording the use of public ways to utility locations are

⁸¹ *Id.* at 310-11.

⁸² UTILITY RELOCATION AND ACCOMMODATION, *supra* note 60, at 4.

⁸³ *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 39 (1983) (quoting S. REP. NO. 1093, at 13 (1954)).

⁸⁴ *First Nat'l Bank of Bos. v. Me. Tpk. Auth.*, 136 A.2d 699, 717 (Me. 1957).

⁸⁵ *Id.* at 717-22.

⁸⁶ *Id.* at 710 (quoting *N.Y.C. Tunnel Auth. v. Consol. Edison Co.*, 295 N.Y. 467, 474 (1946)).

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subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense, a common law liability unless abrogated by the clear import of the language used in a particular instance.⁸⁷

The court then considered Turnpike Authority's powers:

Because of the state of the law authoritatively expressed, without an affirmative grant from the legislature, the defendant utilities when submitting to the police power had no right to reimbursement for relocation of their facilities installed in the public ways or for abandonment of them. Conversely the Authority had no right to reimburse the utilities without such legislative sanction.⁸⁸

Turning to the Authority's enabling act, the court concluded that it neither stated nor implied that the Authority may or must pay utility relocation costs.⁸⁹

Having determined that the common law rule prohibited the Turnpike Authority from paying relocation costs, and having found that the Authority's enabling act did not change this rule, the court then considered the 1955 amendment to the enabling act. That amendment, the court determined, was unconstitutional because payment of the utilities' relocation costs "could be made only by diversion from moneys" that had been pledged to pay off the bonds.⁹⁰

In 1956, while the Maine litigation was still ongoing, Congress enacted section 111 of the Federal-Aid Highway Act. That statute, now codified at 23 U.S.C. § 123, was patterned on the existing practice of reimbursing the States for money lawfully spent on utility relocation. As a House committee report explained, that practice was being authorized by statute "in order that there [would] be no question of the propriety of so using Federal funds where a State under its own laws or practices pays such costs on Federal-aid highway projects."⁹¹ But as the report was careful to point out, "[t]here is no requirement in this section, either

⁸⁷ *Id.* at 711.

⁸⁸ *Id.* at 715.

⁸⁹ *Id.* at 716.

⁹⁰ *Id.* at 720.

⁹¹ UTILITY RELOCATION AND ACCOMMODATION, *supra* note 60, at 5 (quoting H.R. REP. No. 84-2022 (1956)).

expressed or implied, that a State must pay all or any part of utility relocation costs."⁹²

In addition, section 111 got rid of the requirement that states make formal findings about how their existing laws would affect utilities relocating from public rights-of-way. Instead, it stated that whenever a state paid to relocate utilities for a federal-aid highway project, federal funds could be used to reimburse it, unless "the payment to the utility violates the law of the State or violates a legal contract between the utility and the State."⁹³

This new provision resulted in a cascade of state legislation designed to obtain federal dollars for utility relocation. Before passage of the 1956 act, only eight states had statutes authorizing payment of utility relocation costs under certain circumstances.⁹⁴ During 1956 and 1957, however, bills providing for payment of relocation costs were introduced in forty states, although only sixteen actually became law.⁹⁵ Significantly, only one of these new laws authorized payment of relocation costs on all state-maintained highways regardless of federal funding.⁹⁶ Five states limited reimbursement to federal-aid highway projects, and the remaining ten limited it to projects on the Interstate System, where federal reimbursement was at least ninety percent of the total cost.⁹⁷

In a 1958 report, "[t]he Senate Committee on Public Works expressed concern over 'this drastic change in existing practices,' noting that 'the use of Federal funds for reimbursement to the States for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.'"⁹⁸ The Committee considered capping the funds available to states for reimbursement for utility relocations, but the final bill backed away from this limitation, instead providing that "reimbursement be made 'only after evidence satisfactory to the Secretary [of Commerce] shall have been presented to him substantiating the fact that the State has paid such cost from its own funds.'"⁹⁹

⁹² *Id.*

⁹³ *Id.* at 6 (quoting Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 111, 70 Stat. 383 (1956)).

⁹⁴ *Id.* at 8. The states were California, Connecticut, Hawaii, Missouri, New York, New Jersey, Pennsylvania, and Vermont. *Id.*

⁹⁵ *Id.* at 6.

⁹⁶ *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 40 n.17 (1983) (quoting S. REP. NO. 85-1407, at 28 (1958)).

⁹⁷ *Id.*

⁹⁸ *Id.* at 40 (quoting S. REP. NO. 85-1407, at 28 (1958)).

⁹⁹ *Id.* (quoting Federal-Aid Highway Act of 1958, Pub. L. 85-381, 72 Stat. 94-95 (1958)).

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So after a decade of study and deliberation, “the relations between utilities and the States were left, once again, to state law. No *federal* right to reimbursement was ever granted to utilities, although pro rata federal reimbursement remained available to the States if state law required reimbursement of utilities.”¹⁰⁰

D. The Uniform Relocation Act and the 1983 Norfolk Redevelopment Decision

The continued expansion of federally funded highways in urban areas, together with the development of federal housing and urban renewal projects, led to an increasing number of people and businesses that had to relocate, sometimes with little if any assistance.¹⁰¹ Responding to this problem, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, commonly called the Uniform Relocation Act.¹⁰² This legislation applied to federal agencies only, but state agencies had to provide equivalent relocation assistance to qualify for federal funding, so many states adopted legislation modeled on the Federal Act.¹⁰³

Since the Act provided relocation assistance to displaced businesses and included reimbursement of expenses in moving business property, utilities began to seek payment for relocating their facilities from public rights-of-way.¹⁰⁴ When federally assisted highway projects were involved, some courts held that specific utility relocation provisions of the 1956 Federal-Aid Highway Act prevailed over the general relocation assistance statutes.¹⁰⁵ For other types of projects, most courts held that the common law rule still took precedence because the broad general

¹⁰⁰ *Id.* States stood to lose out if they erred in deciding whether state law required reimbursement. *Arizona v. United States*, 494 F.2d 1285, 1287-88 (Ct. Cl. 1974). When Arizona built an interstate highway through the Kaibab National Forest, it displaced a natural gas pipeline that was installed pursuant to a terminable license from the U.S. Forest Service. *Id.* at 1285. The Federal Highway Administration had previously approved Arizona’s utility agreement with the pipeline company, in which the state undertook to pay for the relocation. *Id.* at 1286. But the government later denied Arizona’s claim for reimbursement, contending that under 23 U.S.C. § 123 the state had no legal obligation to pay relocation costs. *Id.* at 1287. The Federal Court of Claims disagreed, noting that although the Forest Service had the power to terminate the license and thereby cause the pipeline company to remove its equipment for free, Arizona did not. *Id.* at 1288.

¹⁰¹ *Norfolk Redevelopment*, 464 U.S. at 36-37.

¹⁰² *Id.* at 32, 36-37.

¹⁰³ *Id.* at 32.

¹⁰⁴ *Id.* at 34-35.

¹⁰⁵ *See, e.g., Artesian Water Co. v. State of Del., Dep’t of Highways & Transp.*, 330 A.2d 432, 439 (Del. Super. Ct. 1974).

definitions used in the relocation assistance statutes were not specific enough to abrogate it.¹⁰⁶

Other courts, however, believed that the federal and state relocation assistance statutes signaled a shift away from the common law “utility pays” rule. Arkansas, which had already limited the scope of its common law rule to take advantage of federal reimbursement, truncated it still further.¹⁰⁷ And the Court of Appeals for the Fourth Circuit, applying the Uniform Relocation Act, found arguments against utility relocation payments based on the common law unconvincing, declaring that “[t]he Act was intended to create rights that were not recognized at common law.”¹⁰⁸

The U.S. Supreme Court, however, determined that the common law rule still governed. In its 1983 decision in *Norfolk Redevelopment*, it reversed the Fourth Circuit, unanimously holding that the Uniform Relocation Act did not give businesses a new federal right to reimbursement for expenses incurred in relocating utility lines in public streets.¹⁰⁹

The Court started with the common law rule, under which “utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities.”¹¹⁰ This rule had a long pedigree with the Court; it was recognized and accepted beginning with *New Orleans Gaslight* in 1905.¹¹¹

Next, the Court invoked “a well-established principle of statutory construction” by which “[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.”¹¹² This principle had even more weight in the case before it, for “the elements of the federal law of eminent domain are largely derived from the common law.”¹¹³

After laying this groundwork, the Court then turned to the Relocation Act itself, observing that the provisions at issue were

¹⁰⁶ See, e.g., *Consumers Power Co. v. Costle*, 615 F.2d 1147, 1148-50 (6th Cir. 1980); *Pac. Tel. & Tel. Co. v. Redevelopment Agency of Glendale*, 87 Cal. App. 3d 296, 299-301 (Cal. Ct. App. 1978); *Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency*, 607 P.2d 1084, 1088-90 (Idaho 1980).

¹⁰⁷ *Sw. Bell Tel. Co. v. City of Fayetteville*, 609 S.W.2d 914, 916-18 (Ark. 1980). One justice thought the decision discarded the common law rule and should not have. *Id.* at 918-19 (Stroud, J., dissenting).

¹⁰⁸ *Chesapeake & Potomac Tel. Co. of Va. v. Landrieu*, 674 F.2d 298, 300 (4th Cir. 1982).

¹⁰⁹ *Norfolk Redevelopment*, 464 U.S. at 33, 43.

¹¹⁰ *Id.* at 35.

¹¹¹ *Id.*

¹¹² *Id.* at 35-36 (quoting *Fairfax’s Devisee v. Hunter’s Lessee*, 7 Cranch 603, 623 (1813)) (alteration and omission in original).

¹¹³ *Id.* at 36.

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modeled after the 1968 Federal-Aid Highway Act.¹¹⁴ Critically, however, the utility's reimbursement claims under the Relocation Act "would not have been countenanced under the 1968 Highway Act. Utility relocation costs necessitated by federally funded highway projects were already specifically governed by a separate provision, 23 U.S.C. § 123, which predated and was left intact by the 1968 Act."¹¹⁵ That earlier law, adopted as section 111 of the Federal-Aid Highway Act of 1956, was the product of much legislative consideration, and it did not create any federal right to reimbursement of utility relocation costs.¹¹⁶ Instead, it allowed pro rata federal reimbursement "to the States if state law required reimbursement of utilities."¹¹⁷

Subsequent federal highway legislation, including the model 1968 Act that first provided for relocation assistance to displaced persons, did nothing to change the utility-relocation policy embodied in 23 U.S.C. § 123. This history, in the Court's view, showed "that Congress considered utility relocation costs and the expenses incurred by 'displaced persons' to be separate and distinct problems calling for separate and distinct solutions."¹¹⁸ Thus, "Congress showed that it was aware of the common law rule that utilities must bear their own relocation expenses, and it proved unwilling, after extensive consideration and debate, to federalize the relations between utilities and state and local governments."¹¹⁹

Significantly, too, the Relocation Act repealed sections of prior law that had been superseded but left 23 U.S.C. § 123 intact. This fact confirmed to the Court that Congress did not intend to change existing law with regard to utilities. The highway-related utility reimbursement statute "was neither contradicted nor rendered superfluous because it addressed a problem outside the scope of the Relocation Act."¹²⁰

Finally, the Court returned to the common law, noting that "Virginia has continuously recognized the common law rule that a utility forced to relocate from a public right-of-way must do so at its own expense."¹²¹ Notably, too, the utility company "has always in the past borne all costs of relocation and has included those expenses as part of its operating expenses within the rate structure approved by the State Corporation

¹¹⁴ *Id.* at 37.

¹¹⁵ *Id.* at 38.

¹¹⁶ *Id.* at 39-40.

¹¹⁷ *Id.* at 40.

¹¹⁸ *Id.* at 41.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 42.

¹²¹ *Id.* (citing Potomac Elec. Power Co. v. Fugate, 180 S.E.2d 657, 658-59 (Va. 1971)).

Commission.”¹²² These established practices underscored the Court’s conclusion that the Relocation Act “did not grant utilities . . . a new, federal right to reimbursement for expenses of the sort incurred here.”¹²³

E. Consideration of the Developed Common Law Rule

The common law rule requiring utilities using a public right-of-way to pay for their own relocation, upon request by the governmental authority responsible for the road, developed along with the growth of the utilities themselves. It is important to note that this rule applies only to utilities in a *public* right-of-way. If the utility had obtained its own easement, and a public project required relocation from that *private* right-of-way, the government would pay to move or accommodate the facilities.¹²⁴

But if the utility chose to use an existing public right-of-way to avoid the time and expense of acquiring its own,¹²⁵ then it must accept the risk

¹²² *Id.* at 42-43.

¹²³ *Id.* at 43. In 1987, Congress enacted the Surface Transportation and Uniform Relocation Assistance Act (“STURAA”). OFFICE OF PROGRAM ADMIN., FED. HIGHWAY ADMIN., PROGRAM GUIDE: UTILITY RELOCATION AND ACCOMMODATION ON FEDERAL-AID HIGHWAY PROJECTS, B-14 (6th ed. 2003), available at <http://www.fhwa.dot.gov/reports/utilguid/if03014.pdf>. Section 405 of that Act amended the Relocation Act to allow for payment of certain utility relocation expenses for facilities located on public property. Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, 249-51 (1987). This amendment, however, was limited to utility relocations “[e]xcept as otherwise provided by Federal law.” *Id.* According to the Federal Highway Administration, the “otherwise provided” exception means that 23 U.S.C. § 123 is still controlling for federal-aid highways. *Id.*

¹²⁴ See, e.g., *Panhandle E. Pipe Line Co. v. State Highway Comm’n*, 294 U.S. 613, 623 (1935) (involving a gas transmission line within its own private right-of-way); *City of Grand Prairie v. Am. Tel. & Tel. Co.*, 405 F.2d 1144, 1146 (5th Cir. 1969) (stating that the common law rule does not apply to telephone facilities “located in a private easement acquired long prior to the planning, laying out and construction of the street”); *Tennessee v. United States*, 256 F.2d 244, 263-64 (6th Cir. 1958) (explaining that government reimbursement is required for relocation of thirty-eight utility poles installed on private land, and there is no reimbursement for five poles installed within county road right-of-way). But see *Wis. Elec. Power Co. v. Outagamie Cnty.*, 752 N.W.2d 388 (Wis. Ct. App. 2008) (enforcing ordinance requiring utility that was replaced within zoning setback to pay for relocation, even though the utility had its own easement).

Safety concerns might mean the utility had to pay for relocation, even if it had its own easement. As the *Panhandle Eastern* Court noted, an existing utility will be required to accommodate a new road at its own cost if its operation poses a danger to the public. *Panhandle E.*, 294 U.S. at 619, 622; see also *Erie R.R. Co. v. Bd. of Pub. Util. Comm’rs*, 254 U.S. 394, 409-12 (1921). In *Panhandle Eastern*, there was no safety issue; the state highway commission had to pay for the accommodation because the buried gas line posed no danger to traffic on the road. *Panhandle E.*, 294 U.S. at 619.

¹²⁵ The acquisition of a right-of-way can be quite costly. By way of illustration, Federal Highway Administration data showed that during 2005 states spent over \$1,750,000,000 to

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that it might be required to relocate its facilities for some other public use. As the New York Court of Appeals summarized it: “the company took the risk of their location and should be required to make such changes as public convenience or security requires, and at its own cost and charge.”¹²⁶

The other possibility—requiring the government to pay for relocation when the public right-of-way is needed for some other purpose—would have been unworkable for several reasons. First, as the Ohio Supreme Court noted in its 1893 *Columbus Gaslight & Coke* decision, street improvements would become impossibly expensive if each utility using the right-of-way had to be compensated for the changes made to its lines.¹²⁷

Second, governments need to respond to changed conditions. Although a utility line might have been unobtrusive when first installed, it could become an obstruction with changes in the use of the right-of-way. As the Court of Appeals for the Sixth Circuit recognized in 1905, “[a] location not inconvenient when made, may become so because of changed conditions; and whether it has or not, must be ascertained by the commissioners in office when the inquiry is made. No board has power to determine for all time just how a highway shall be used.”¹²⁸ If the public had to pay for relocation, it would impede the government’s ability to respond to new conditions by modifying how the public right-of-way is used.

Third, the need for flexibility is so important that, even if some shortsighted or improperly influenced governmental body did purport to “determine for all time” how the public right-of-way would be used, courts will not allow it. So, for example, although a city government might agree to let a street railway company lay rails in the public ways, it cannot contract away its power to change the pavement on those streets or “embarrass or clog its right to exercise such power by undertaking, either expressly or by implication, to pay the expenses necessarily incurred by the company in complying with the reasonable and proper regulations made by the city upon this subject.”¹²⁹

acquire right-of-way for highway projects. NAT’L COOPERATIVE HIGHWAY RESEARCH PROGRAM, TRANSP. RES. BD., NCHRP REP. No. 625, PROCEDURES GUIDE FOR RIGHT-OF-WAY COST ESTIMATION AND COST MANAGEMENT 7 (2009).

¹²⁶ *In re Deering*, 93 N.Y. 361, 362 (1883).

¹²⁷ *Columbus Gaslight & Coke Co. v. City of Columbus*, 33 N.E. 292, 294 (Ohio 1893).

¹²⁸ *Ganz v. Ohio Postal Tel. Cable Co.*, 140 F. 692, 695 (6th Cir. 1905).

¹²⁹ *Louisville City Ry. Co. v. City of Louisville*, 71 Ky. 415, 422 (Ky. Ct. App. 1871). As noted above, a utility company might have long-term franchise rights that could not be abrogated by the government without payment of just compensation, but courts distinguish between the franchise to use the streets and the particular location of the

Fourth, allowing a utility to have preemptive rights in the location of its facilities within the public right-of-way contradicts the very concept of a street or highway. One nineteenth century Texas appellate decision aptly described it as follows:

the fundamental idea of a street is that it is public. . . . [T]hough private persons and corporations are permitted to lay street-railway tracks, water, gas, and steam pipes, as well as electric wires, in the streets, because they so far contribute to the convenience and accommodation of the public as to acquire a quasi public character, yet these secondary, quasi public uses of the street are, and of necessity must be, subordinate to the other strictly public and primary uses of the street, and, with a view to maintaining that subordination, a license must be obtained from the municipal authorities (the custodians of the street) before any such special and quasi public use can be made of the street; and such licensees can acquire no rights which are inconsistent with this subordination.¹³⁰

As courts have often observed, however, “[t]he strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs.”¹³¹ Not surprisingly, utilities have continued to urge courts to limit or adapt the common law rule to better conform to their interests. In the next section of this Article, we will examine those arguments.

II. EFFORTS TO AVOID THE COMMON LAW RULE

Since the U.S. Supreme Court’s 1983 *Norfolk Redevelopment* decision affirming the common law rule, utilities have marshaled a number of different arguments in an effort to avoid it. Those arguments fall into several broad categories.

First, utilities argue that the project by which the utility is being displaced is not “governmental” but “proprietary”—in other words, an entry by the government into an area traditionally occupied by private enterprise. Second, they contend that because the utility’s rates are regulated by a specialized state agency and relocation costs affect rates,

company’s facilities in the streets, which can be changed by government order. *Grand Trunk W. Ry. Co. v. City of South Bend*, 227 U.S. 544, 553 (1913).

¹³⁰ *City of San Antonio v. San Antonio St. Ry. Co.*, 39 S.W. 136, 138 (Tex. App. 1896).

¹³¹ *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972).

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the common law has been abrogated. Third, utilities also argue that the utility's franchise statute or some other statute has preempted or supplanted the common law rule. Fourth, utilities assert that there has been a "taking."

There is a fifth category, too, in which utilities contend that the governmental action is being undertaken largely to benefit some private entity, such as a developer. Because this category of cases raises some unique and complex issues, it is treated in a section of its own.

A. *Governmental/Proprietary Activity Cases*

The idea of drawing a distinction between government activities undertaken in a truly governmental capacity, as opposed to "proprietary" activities, originated in tort law, where actions deemed to be proprietary would not be shielded by sovereign immunity.¹³² In one early case, for example, a court determined that when the city of New York, acting pursuant to state legislation, built a dam on the Croton River to supply clean drinking water to its residents, it was not immune from liability for the resulting flooding because such dam-building was typically done by private companies.¹³³ The court reasoned that because the activity was a proprietary one, the city stood "on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."¹³⁴

Even at that early date, however, the court confessed that the line was hard to draw. For example, the Chief Judge explained, "there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other . . . [b]ut the distinction is quite clear and well settled, and the process of separation practicable."¹³⁵ Later, this distinction was adopted in other legal contexts, where it proved to be equally difficult to apply.¹³⁶ Like Justice Stewart's famous "I know it when I see it" test for obscenity,¹³⁷ however, the governmental/proprietary distinction has persisted. Yet modern courts have rejected it in utility relocation cases.

In *Northwest Natural Gas Co. v. City of Portland*,¹³⁸ for example, a group of utility companies argued that Portland had no legal authority

¹³² *City & Cnty. of Denver v. Mountain States Tel. & Tel. Co.*, 754 P.2d 1172, 1173 (Colo. 1988).

¹³³ *Bailey v. Mayor of N.Y.C.*, 3 Hill 531, 539 (N.Y. Sup. Ct. 1842).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *City & Cnty. of Denver*, 754 P.2d at 1174-75.

¹³⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹³⁸ 711 P.2d 119 (Or. 1985).

to compel them to relocate their facilities to accommodate construction of a light rail transit system.¹³⁹ The utilities “strenuously” urged that mass transit was a proprietary function, and that by entering this field the city put itself on the same footing as any other public utility – meaning that it was not entitled to cost-free relocation.¹⁴⁰

The Oregon Supreme Court, however, found the purported distinction to be useless. First, while some courts said that “governmental” functions were those that are essential or necessary for the government to perform (evidently in contrast to functions that are optional luxuries), no court had ever found a governmental act that failed this test.¹⁴¹ Second, other courts considered “governmental” functions to be those that are traditional for the government to perform, but changes in the economy and new public demands “change which activities are traditionally and customarily engaged in by government.”¹⁴² These weaknesses led the Oregon court to reject the governmental/proprietary distinction, concluding that it was “unworkable, untenable and unhelpful in deciding mass transit/utility relocation cases.”¹⁴³

The Colorado Supreme Court reached the same conclusion in its 1988 *City and County of Denver v. Mountain States Telephone & Telegraph Co.* decision, which dealt with telephone lines under a city street that were displaced by a sanitary sewer.¹⁴⁴ Because the sewer benefited a newly annexed subdivision and Denver had agreed to bear the cost of installing it despite municipal regulations to the contrary, the phone company argued that Denver was acting in a proprietary capacity and should pay for the relocation.¹⁴⁵ The lower appellate court was persuaded by this argument,¹⁴⁶ but the state’s high court was not, concluding that the governmental/proprietary distinction was “analytically unsound because it assumes that functions which were once relegated to the private sector could not later be undertaken by municipalities in support of the health, safety and welfare of its citizens.”¹⁴⁷ Thus, the Colorado Supreme Court concluded that “the

¹³⁹ *Id.*

¹⁴⁰ *Nw. Natural Gas Co. v. City of Portland*, 690 P.2d 1099, 1103–05 (Or. Ct. App. 1984).

¹⁴¹ *Nw. Natural Gas Co. v. City of Portland*, 711 P.2d 119, 125 (Or. 1985).

¹⁴² *Id.* at 126.

¹⁴³ *Id.*

¹⁴⁴ 754 P.2d 1172, 1173 (Colo. 1988).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1175.

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governmental/proprietary distinction has no continuing validity in the context of utilities relocation law.”¹⁴⁸

Consideration of the principal opinion on which the utilities relied shows why the governmental/proprietary distinction is unsound. In 1917, the city of Los Angeles decided to begin lighting its own streets. Instead of just putting up its own street-lights, it decided to “clear a ‘space’” by ordering the incumbent franchisee to move its lights to other locations.¹⁴⁹ As it happened, the value of the franchisee’s right to light the streets during the remaining term of the franchise was about \$4000 while the cost to relocate its equipment exceeded \$50,000.¹⁵⁰ Since the city was not attempting to revoke the franchise outright, its action arguably came within the scope of the police power.¹⁵¹ As the U.S. Supreme Court noted, however, the federal district court could not find any reason to exercise that power. The Court opined

[i]n what way the public peace or health or safety was imperiled by the lighting system of the corporation or relieved by its removal or change, the court was unable to see and it is certainly not apparent. The court pointed out that there were several lighting systems in existence and occupying the streets and that there was no contest, or disorder or overcharge of rates or peril, or defect of any kind, and therefore concluded that the conditions demonstrated that while the city might install its own system there was no real “public necessity” arising from consideration of public health, peace or safety requiring the city to engage in the business of furnishing light.¹⁵²

The Supreme Court also noted that the proper scope of the police power “may be exceeded and so far as wrongful be restrained.”¹⁵³ Well-established law already gave courts the power to stop arbitrary or unreasonable acts by the government.¹⁵⁴ Thus, whether Los Angeles’s

¹⁴⁸ *Id.* at 1176.

¹⁴⁹ *City of Los Angeles v. L.A. Gas & Elec. Corp.*, 251 U.S. 32, 37 (1919).

¹⁵⁰ *Id.*

¹⁵¹ Compare *id.* at 36 (stating that the ordinance did not attempt “absolute displacement” of the franchised utility), with *City of Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649, 663–64 (1912) (noting that the ordinance in question effectively revoked the utility’s franchise).

¹⁵² *City of Los Angeles*, 251 U.S. at 38.

¹⁵³ *Id.*

¹⁵⁴ *E.g.*, *Atl. Coast Line. R.R. Co. v. Goldsboro*, 232 U.S. 548, 559 (1914). In *Atlantic Coast Line*, the Supreme Court stated the following:

entry into the field of street-lighting was “proprietary” or “governmental” added nothing to the analysis. Even if the act was governmental, using the police power to muscle a franchisee out of the way, absent any demonstrable public necessity, was an unreasonable act that could be enjoined.

And that is exactly the conclusion reached by the Colorado Supreme Court.¹⁵⁵ Instead of struggling to decide whether a particular public improvement was “governmental” (and therefore properly supported by use of the police power) or “proprietary” (meaning the government should stand on the same footing as a private actor), the court decided the proper test was one of reasonableness.¹⁵⁶ Accordingly, it held that “a municipality may compel public utilities to relocate their facilities from the public right-of-way whenever such relocation is necessitated by the municipality’s *reasonable* exercise of police power to regulate the health, safety, or welfare of its citizens.”¹⁵⁷

B. “Regulated Utility” Cases

Since utility service in any particular area tends, by virtue of its costly infrastructure, to be monopolistic in nature, utility companies have long been subject to public regulation.¹⁵⁸ Typically utilities obtain approval of their rates, terms of service, and other business practices through tariffs filed with the state regulatory agency. These documents are massive,¹⁵⁹ and the level of detail can be exacting. In 1916, for

[I]f it appear[s] that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power.

Id. Moreover, in *National Water-Works Co. v. City of Kansas*, the Western District of Missouri stated that “it may be that any malicious or unreasonable action by the city in the exercise of the right to construct sewers . . . may be the foundation of a claim for damages.” 28 F. 921, 922 (W.D. Mo. 1886).

¹⁵⁵ *City & Cnty. of Denver v. Mountain States Tel. & Tel. Co.*, 754 P.2d 1172, 1176 (Colo. 1988).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ See SCHEWE, *supra* note 24, at 69 (stating that in 1898, Samuel Insull, the head of Chicago Edison and recently-elected president of the National Electric Light Association, advocated public regulation of privately-owned utilities precisely because utilities tended to operate as monopolies).

¹⁵⁹ See DUKE ENERGY OHIO, P.U.C.O. NO. 19: SCHEDULE OF RATES, CLASSIFICATIONS RULES AND REGULATIONS FOR RETAIL ELECTRIC SERVICE OF DUKE ENERGY OHIO, 1 (2010), available at <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/Duke%20Energy>

example, the Michigan Public Service Commission approved a tariff filed by the Detroit Edison Company that included a company program of supplying free replacement light bulbs to its customers.¹⁶⁰ Because this program was part of an approved tariff, the company could not discontinue it before filing a new tariff and getting Commission approval.¹⁶¹

Since the cost of relocating utility lines may ultimately affect the rates charged to customers, utility companies have argued that their approved tariffs must preclude efforts to force them to relocate equipment in the public rights-of-way. In typical relocations, where the utility is simply required to move its facilities, the tariff-based argument has failed. But when the government has required the utility, as part of the relocation process, to change the design of its facilities from aerial to underground lines, the utilities have had somewhat greater success—at least in requiring the government to pay the increased expense of underground construction.

1. “Like Kind” Relocations

A typical example of how a utility tariff might address the relocation of facilities came up in a 1997 case involving the Maryland Stadium Authority. Bell Atlantic-Maryland obtained approval of a tariff that included the following terms: “[w]hen the Telephone Company is requested to move or change existing construction, the customer or other party requiring the move or change is required to pay the entire cost . . . attributable to such relocation.”¹⁶² The Stadium Authority, which was created by state statute to build and expand various public venues, ordered Bell Atlantic-Maryland to move its equipment from under streets that would be closed to expand Baltimore’s convention center.¹⁶³ Bell Atlantic-Maryland later sued to recover \$110,000 in relocation costs, claiming that its approved tariff took precedence over the common law “utility pays” rule.¹⁶⁴

The court rejected this claim for two reasons. First, even though the Public Service Commission of Maryland had adopted the tariff, it was “not the equivalent of the type of legislative act required to alter the

%20Ohio/PUCO%2019,%20Retail.%20Electric%20Tariff.pdf (showing that the Duke Energy Ohio filing with the Public Utilities Commission of Ohio in 2006 was 259 pages long).

¹⁶⁰ Cantor v. Detroit Edison Co., 428 U.S. 579, 583 (1976).

¹⁶¹ *Id.* at 585.

¹⁶² Bell Atl.-Md., Inc. v. Md. Stadium Auth., 688 A.2d 545, 552 (Md. 1997).

¹⁶³ *Id.* at 547, 550.

¹⁶⁴ *Id.* at 548, 551–52.

common law rule.”¹⁶⁵ Second, “even if the Tariff could be considered a legislative directive,” its language did not “reverse[] the common law rule because it contains no clear language demonstrating that it applies to the government.”¹⁶⁶

A similar result occurred in *City of Auburn v. Qwest Corp.*¹⁶⁷ Qwest filed a tariff that contained a statement that “[w]hen relocation or aerial to underground conversion of existing facilities is requested or required by law, the cost of constructing the new and removing the old facilities will be borne by the customer or others requesting the relocation or conversion.”¹⁶⁸ Relying on this language, Qwest refused to relocate its facilities, which in one instance resulted in a “telephone pole standing in the middle of a newly-widened road.”¹⁶⁹

The State of Washington, however, had a statute that allowed telecommunications companies to use public rights-of-way “in such manner and at such points as not to incommode the public use of the . . . highway.”¹⁷⁰ Resolving the case on the narrowest ground, the Ninth Circuit Court of Appeals did not have to decide whether the tariff had the force of law or whether its ambiguous terms really did purport to change the common law rule. Instead, the appeals court relied on the principle that a tariff cannot supersede a statute, holding that “Qwest’s tariff did not alter the long-established and unbroken rule established at common law and in [the statute] that the utility company must pay relocation costs.”¹⁷¹

2. The Special Problem of “Undergrounding”

As the Ninth Circuit observed in *City of Auburn*, city governments have been encouraging utilities with overhead lines (such as telephone and electricity providers) to locate their facilities underground “for aesthetic and safety reasons.”¹⁷² Utilities have resisted this trend in their tariff filings, contending that underground lines are much more expensive and that, if a utility has to bear this cost (and pass it through to its customers) then “a customer in one city would be paying more because some other city requires underground construction.”¹⁷³

¹⁶⁵ *Id.* at 552.

¹⁶⁶ *Id.*

¹⁶⁷ 260 F.3d 1160 (9th Cir. 2001).

¹⁶⁸ *Id.* at 1166.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1167.

¹⁷¹ *Id.* at 1170.

¹⁷² *Id.* at 1168.

¹⁷³ *State ex rel. Columbus S. Power Co. v. Fais*, 884 N.E.2d 1, 2–3 (Ohio 2008).

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Accordingly, courts have had to decide conflicts between approved tariffs, municipal ordinances, and the common law relocation rule. The results have been mixed.

The city of Longmont, Colorado decided to put its own municipal electric lines underground, and in 1993, it enacted an ordinance requiring other users of its street utility poles to put their lines underground as well.¹⁷⁴ U.S. West, however, had an approved tariff requiring the customer or “person requesting relocation” to pay for undergrounding, and it contended that its tariff had the force of a statute, trumping the contrary ordinance.¹⁷⁵ The Colorado Supreme Court did not agree that the tariff was equivalent to a statute, holding that “[o]nly when some future contract, franchise agreement, or state statute . . . specifically provides that the municipality must bear the financial burden of relocating the facilities does the . . . exception to the general common law rule requiring the utility company to pay for relocation arise.”¹⁷⁶

The court then went on to decide that the Colorado public utility commission’s powers did not preempt municipal power to regulate streets and determine when utility relocation is required.¹⁷⁷ Finally, the court said that although municipalities had to be reasonable in exercising their power to order utilities to relocate, a reviewing court would apply a presumption of reasonableness—and the facts in this case indicated that the city ordinance was reasonable.¹⁷⁸

The New Mexico Supreme Court came to a similar conclusion in its 2003 decision in *City of Albuquerque v. New Mexico Public Regulation Commission*.¹⁷⁹ In that case, a group of cities appealed the state utility commission’s approval of a tariff allowing a utility to recover costs incurred in complying with local undergrounding ordinances.¹⁸⁰ In a nod to the utility commission, the court remarked that a local improvement project based on aesthetics rather than public health and safety concerns would “not trigger the common law rule of requiring utilities to bear the expense of relocation.”¹⁸¹ Because the tariff applied to all undergrounding projects, however, and did not exclude those required by the interests of health and safety, the court held that it “violate[d] the common law principle of permitting municipalities to

¹⁷⁴ U.S. W. Commc’ns., Inc. v. City of Longmont, 948 P.2d 509, 513 (Colo. 1997).

¹⁷⁵ *Id.* at 514–18.

¹⁷⁶ *Id.* at 518.

¹⁷⁷ *Id.* at 520.

¹⁷⁸ *Id.* at 521–22.

¹⁷⁹ 79 P.3d 297 (N.M. 2003).

¹⁸⁰ *Id.* at 299.

¹⁸¹ *Id.* at 301.

require the utility to bear its own relocation expenses.”¹⁸² As in Colorado, the New Mexico court also concluded that because the statute creating its state utility commission “specifically provided that municipalities and counties have the power to regulate the use of public ways” and did not clearly abrogate the common law rule, the commission lacked authority to modify it absent a finding of unreasonableness.¹⁸³

In a recent Michigan case, however, the balance between municipalities and the regulatory agency tilted the other way. Although Michigan’s constitution reserves to local governments a power of “reasonable control” of highways and streets, this control cannot be exercised inconsistently with “general State law.”¹⁸⁴ That general body of law includes the legislatively-created Michigan Public Service Commission (“MPSC”), which has “complete power and jurisdiction to regulate all public utilities in the state except . . . as otherwise restricted by law.”¹⁸⁵ One of the MPSC’s rules requires the utility to bear the cost of undergrounding “when required by local ordinances in congested areas.”¹⁸⁶

So when the City of Taylor, Michigan enacted an ordinance requiring Detroit Edison to relocate its facilities underground during the reconstruction of Telegraph Road—a major arterial highway—and the utility disclaimed any obligation to pay, the courts had to decide what effect to give to the MPSC regulation. Since local governments had constitutional power to regulate streets (except as inconsistent with general law) and the MPSC had statutory power to regulate utilities (except as restricted by law), the dispute fell into an uncharted area. Did the local governments’ power over streets trump an inconsistent rule by the MPSC, or did the MPSC’s power to regulate utilities trump an inconsistent city ordinance?

The lower courts held for the city, reasoning that the state had not completely occupied “the field regarding a municipality’s authority over the location of power lines, or the allocation of related costs.”¹⁸⁷ But the

¹⁸² *Id.* at 304–05.

¹⁸³ *Id.* at 308; *see also* Complaint by Wis. Pub. Serv. Corp. against the City of Manitowoc, 2008 Wisc. PUC LEXIS 239, *9 (Pub. Serv. Comm’n of Wisc. Apr. 18, 2008) (explaining that state utility commission had jurisdiction to review city ordinance that effectively required utility to relocate facilities in public street, but the ordinance was presumptively reasonable and the burden was on the utility to show otherwise).

¹⁸⁴ MICH. CONST. art. 8, § 28; *City of Taylor v. Detroit Edison Co.*, 715 N.W.2d 28, 32–33 (Mich. 2006) (citing *People v. McGraw*, 150 N.W. 836, 837 (Mich. 1915)).

¹⁸⁵ *City of Taylor*, 715 N.W.2d. at 33.

¹⁸⁶ *In re City of Taylor*, Mich. Pub. Serv. Comm’n Case No. U-15234, 2008 Mich PSC LEXIS 15, *19.

¹⁸⁷ *City of Taylor v. Detroit Edison Co.*, 689 N.W.2d 482, 486 (Mich. App. 2004).

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Michigan Supreme Court disagreed, holding that it was up to the MPSC, not the courts, to decide if there was a conflict between the rule and the ordinance. If there was a conflict, the rule would prevail.¹⁸⁸

In the end, the MPSC decided that its rule “entirely supplanted local control over undergrounding electrical facilities” and the provision allowing for local undergrounding ordinances in congested areas was a “narrow exception.”¹⁸⁹ It then remanded the matter to the administrative law judge for factual findings as to whether the affected stretch of road was a congested area within the rule’s meaning.¹⁹⁰

3. The Results of the “Regulated Utility” Cases

Courts have rejected utilities’ efforts to use their tariffs to shift relocation costs to the government in contravention of the longstanding common law rule *when the relocation is of like kind*. This result makes sense. As noted in Section I.E., when a telephone or electric utility gets to use the public right-of-way at little or no cost, the *quid pro quo* is that the utility must move its facilities as required to accommodate other public needs.

In the *City of Taylor* case, for example, there would have been no conflict with MPSC rules had the city required Detroit Edison to replace its aerial lines with other aerial lines in a different location to allow for widening of the road. If there were a like-kind relocation order and the utility invoked some vaguely-worded tariff to resist it, the outcome probably would have paralleled the Ninth Circuit’s *City of Auburn* decision.¹⁹¹ The tariff cannot be ambiguous; it must clearly state that it will apply to government-ordered relocation of facilities in the public right-of-way. That clear statement would put everyone on notice that the utility meant to change the rules, thereby permitting public debate of the issue and an informed decision by the state regulatory agency. Only if the agency approved this clearly disclosed change would a court have to decide whether the agency had the power to alter the common or statutory law on the subject.

When the government orders a utility to put aerial wires underground, however, a different issue arises. This order is not just a simple relocation—it directs the use of a different (and more expensive) kind of facility. If aerial lines were acceptable before, why are they not acceptable now? The change might be needed for safety reasons, and if

¹⁸⁸ *City of Taylor*, 715 N.W. 2d at 33.

¹⁸⁹ *In re City of Taylor*, 2008 Mich PSC LEXIS at *19.

¹⁹⁰ *Id.* at *34.

¹⁹¹ *See supra* notes 167–71 and accompanying text (discussing the *City of Auburn* decision).

so, it would be within the scope of governmental police power. But if the change is for aesthetic reasons, the governmental agency likely will have to pay for it.¹⁹²

C. *Statutory Abrogation Cases*

Statutes can, of course, displace the common law, but courts ordinarily hold that the legislative intent to do so must be clearly expressed or necessarily implied.¹⁹³ Statute-based challenges to the common law rule on utility relocation typically come in two forms, predicated on either the original franchise statute under which the company laid its lines or a statute allowing payment of relocation costs.¹⁹⁴

In the first category, *Qwest Corp. v. City of Chandler* is representative.¹⁹⁵ As it happened, Qwest had telephone facilities on public roadways in Arizona pursuant to a territorial statute, enacted in 1877, that allowed it to build and maintain equipment “from point to point, upon and along any of the public roads or highways.”¹⁹⁶ Based on this statute, Qwest convinced the trial court that its “pre-statehood franchise granted it a property right and that it was not required to pay its own relocation costs.”¹⁹⁷ The appeals court disagreed, for three main reasons.

¹⁹² This issue is still being litigated in various jurisdictions. The city of Reynoldsburg, Ohio, for example, adopted an ordinance requiring utilities to pay for undergrounding their lines as part of a project to revamp its main commercial corridor. *State ex rel. Columbus S. Power Co. v. Fais*, 884 N.E.2d 1, 1-5 (Ohio 2008). This ordinance conflicted with an approved tariff which specified that if a public authority ordered undergrounding, it would have to pay the portion of the cost that exceeded construction of standard facilities. *Id.* The city challenged this tariff in court, arguing that its cost-shifting provision violated a state statute by being “in excess of that allowed by law.” *Id.* at 5. But the Ohio Supreme Court held that the utilities commission, not the court, had jurisdiction to decide the matter. *Id.* The case is currently pending before Ohio’s utilities commission. *City of Reynoldsburg v. Columbus S. Power Co.*, PUCO, No. 08-0846-EL-CSS, 2008 WL 5069035, at *1 (Ohio Pub. Util. Comm’n, Nov. 24, 2008).

¹⁹³ See, e.g., *Do v. Am. Family Mut. Ins. Co.*, 779 N.W.2d 853, 859 (Minn. 2010) (quoting *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (“[I]f a statute abrogates the common law, the abrogation must be by express wording or necessary implication.”)).

¹⁹⁴ See, e.g., *Sw. Bell Tel. LP v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008) (explaining that utilities have also argued that the Federal Telecommunications Act of 1996 preempted state regulation of relocation costs). Since that statute includes a “safe-harbor provision” that preserves “the authority of a State or local government to manage the public rights-of-way,” challenges based on this statute have been unsuccessful. *Id.*

¹⁹⁵ 217 P.3d 424 (Ariz. Ct. App. 2009).

¹⁹⁶ *Id.* at 427.

¹⁹⁷ *Id.*

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First, although the franchise statute allowed it to maintain lines from point to point, this language did not clearly manifest an intention to abrogate the common law.¹⁹⁸ Instead, the court said that the “great weight of authority” supported a rule that,

[i]n the absence of an express and definite provision to the contrary, a utility company maintains its structures and rights in a public street subject to the paramount right of the city to use its streets for all proper governmental purposes. A grant, franchise, easement or other right . . . is at all times subject to the police power of the sovereign, and *unless expressly agreed otherwise in the franchise, the company must, at its own expense, make such changes as the public convenience and necessity require . . . if the franchise is silent as to payment of the cost of relocation of utilities, made necessary by public improvements, the cost must be borne by the franchise holder.*¹⁹⁹

Second, the franchise statute specified that the utility equipment “shall not in any instance be so constructed as to incommode the public in the use of said roads or highways and bridges.”²⁰⁰ Qwest said this requirement applied to the original installation only; if the “incommoding” arose because of changes the government made to the road, then the government should pay for the relocation. The appeals court, however, rejected this argument, as courts uniformly do, holding that the duty was a continuing one.²⁰¹

Third, the court noted that “when the Arizona Legislature wants to compensate utilities for their relocation costs, it has done so in unmistakable terms,” giving as an example a statute that specifically required a light rail project to reimburse a utility for relocation costs.²⁰² Fortunately for the appeals court in *City of Chandler*, Arizona’s relocation-cost statute for the light rail project was a model of clarity. But that is not always so. In the Houston-area Westpark Tollway cases described at the beginning of this Article, courts had to grapple with a statute that required counties to pay for relocating “an eligible utility” facility as part of the expense of acquiring right-of-way for the highway

¹⁹⁸ *Id.* at 432.

¹⁹⁹ *Id.* at 432 (quoting *Wash. Natural Gas Co. v. City of Seattle*, 373 P.2d 133, 135 (Wash. 1962)).

²⁰⁰ *Id.* at 427.

²⁰¹ *Id.* at 432–34.

²⁰² *Id.* at 434.

project, without defining what “eligible” meant.²⁰³ The federal court, trying to determine what Texas law would be, examined some statutes and concluded that the word “eligible” referred to costs.²⁰⁴ So, for example, if the utility company installed better equipment in the new location, the *added* cost of that betterment would not be eligible, but the cost of the basic replacement would be.

In a later case, though, the Texas Supreme Court decided otherwise.²⁰⁵ It held that the word “eligible” simply signaled that in some situations relocation costs might be paid by the county, but if so, the duty would appear in other statutes that “clearly speak to the subject.”²⁰⁶ One such statute, the court noted, was enacted in 1957 to take advantage of federal cost reimbursement for utility relocation on Interstate highway projects.²⁰⁷ But that statute’s scope was limited to Interstate highways and, as the court was careful to point out, none of the relocation cost would be paid by the state “if the relocation is not eligible for Federal participation.”²⁰⁸

As the Texas court emphasized, “when the Legislature has determined that the government should pay a utility’s relocation costs, the statutes clearly delineate classes of relocations that are eligible for reimbursement.”²⁰⁹ So although the county road law did indicate that some facilities might be “eligible” for county-paid relocation, the Tollway project was not part of the interstate system, and the utility could not show any other clear statutory exception to the common law

²⁰³ See *supra* notes 3–6 and accompanying text (discussing the Houston-area Westpark Tollway cases).

²⁰⁴ *Centerpoint Energy Hous. Elec. LLC v. Harris Cnty. Toll Rd. Auth.*, 436 F.3d 541, 547–50 (5th Cir. 2006).

²⁰⁵ *Sw. Bell Tel., L.P. v. Harris Cnty. Toll Rd. Auth.*, 282 S.W.3d 59 (Tex. 2009).

²⁰⁶ *Id.* at 66–67. Southwestern Bell tried to turn this argument around, contending that because some statutes explicitly required utilities to pay relocation costs but the telephone franchise statute did not, then the government should pay for the relocation. *Id.* at 63. The court disagreed, explaining that “the statute’s silence on relocation costs would mean that the common law rule applied, not that the county was responsible for relocation costs.” *Id.*; cf. *S. Cal. Gas Co. v. City of Los Angeles*, 329 P.2d 289, 291–92 (Cal. 1958) (explaining that because the county franchise specifying gas company’s duty to relocate pipes in the event of a grade change was not a restriction, pipes had to be relocated for sewer project pursuant to common law rule).

²⁰⁷ See *supra* Part I.C.3 (providing a discussion on highway legislation during the 1950s).

²⁰⁸ *Sw. Bell.*, 282 S.W.3d. at 65–66; cf. *Artesian Water Co. v. Delaware*, 330 A.2d 432, 436–37 (Del. Sup. 1974) (the common law rule controls absent a statute to the contrary). Under Delaware law, the state is obligated to pay for utility relocation costs only when they are incurred as a result of a federal-aid project in which the federal share is at least ninety percent. *Id.* On the project in question, the federal share was only fifty percent so the state was “prohibited under the statute from defraying Artesian’s relocation expenses.” *Id.*

²⁰⁹ *Sw. Bell*, 282 S.W.3d at 67.

rule making its facilities eligible.²¹⁰ Accordingly, the court concluded that the common law rule applied.²¹¹

D. "Takings" Cases

Despite more than a century of case law holding that a utility does not have a compensable property right in the particular locations where its facilities are installed,²¹² utilities routinely advance a takings argument and courts routinely reject it.²¹³ As discussed in Section I.B., there is an important difference between a utility's franchise rights and the location of its facilities within the public right-of-way. If a utility has franchise rights, they cannot be taken without just compensation, but the actions it takes in exercising those rights, such as the location of its facilities, can be regulated under the police power.

Sometimes, however, a utility does have a compensable property interest in an easement that predates the public right-of-way. A good illustration of this circumstance arose when telephone lines had to be relocated for the construction of a scenic parkway leading to the Great Smoky Mountains National Park. A total of forty-three utility poles and the associated lines had to be relocated and of these, five had been installed within a county highway right-of-way.²¹⁴ With regard to those five poles the utility had no right to compensation, for

the law is well established that a statutory, permissive right of use of public highways by public utilities is subordinate to the rights of the public; that the original location of poles or other facilities in a public highway does not create an irrevocable right to have such poles and facilities remain forever in the same place; and that a utility company may be required to relocate its lines at its own expense when such relocation is demanded by public necessity and for public safety and welfare.²¹⁵

²¹⁰ *Id.*

²¹¹ *Id.* at 67.

²¹² *See, e.g.,* *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 461 (1905) (holding that "[t]he gas company did not acquire any specific location in the streets" by virtue of its franchise to use the streets to lay gas pipes).

²¹³ *See, e.g.,* *Qwest Corp. v. City of Chandler*, 217 P.3d 424, 437 (Ariz. Ct. App. 2009) (quoting *New Orleans Gaslight* to negate utility's contention that it had suffered a taking when compelled to pay its own relocation costs).

²¹⁴ *Tennessee v. United States*, 256 F.2d 244, 263-64 (6th Cir. 1958).

²¹⁵ *Id.* at 258.

The right of the state to order relocation, moreover, was not affected by its conveyance of the highway land to the federal government, for there was no “sound reason why the state’s police power should not be exercised in conjunction with the [federal] government’s right of eminent domain.”²¹⁶

With regard to the other thirty-eight poles, however, the utility was entitled to reimbursement, because they were installed on private land two years before the county acquired a wider and longer right-of-way that included most of them.²¹⁷ So while the state could order these facilities to be moved, it did have to pay for the relocation.²¹⁸

III. THE DIFFICULT NEXUS BETWEEN GOVERNMENT ACTION AND PRIVATE DEVELOPMENT

In years past, governments all too often handled infrastructure needs on a reactive basis. A developer, for example, might open up a large housing subdivision on what had been a quiet rural road. As more and more houses were built in the subdivision, traffic on the road would increase. Eventually, there would be demands to improve the road to handle the increased traffic, and the city or county would respond by widening the road, adding turn lanes and signals, and improving the intersections. If utilities occupying the existing road right-of-way had to move, it would be at their cost.

As time went on, however, governments became more proactive. Instead of waiting for the road to bog down in traffic, a local government might first require the developer to study what off-site infrastructure improvements would be needed as the development built out. Then, it might require the developer to pay for or make those off-site improvements as a condition to getting needed governmental approval for the subdivision.²¹⁹ This practice of assessing impact fees or exactions as a condition of land-use permitting has been the focus of much litigation, the discussion of which is beyond the scope of this Article. For

²¹⁶ *Id.* at 257.

²¹⁷ *Id.* at 262–64. If the highway easement was there first, and the utility later acquired its own easement in the same area, the common law rule should still apply because the utility easement would be subordinate. *City of Perrysburg v. Toledo Edison Co.*, 870 N.E.2d 189, 196 (Ohio Ct. App. 2007).

²¹⁸ *Tennessee*, 256 F.2d at 262–64.

²¹⁹ See, e.g., David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 353–55 (2007); Laurie Reynolds and Carlos A. Ball, *The Law & Politics of Local Governance, Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 464 (2005); Nicole M. Lugo, Comment, *Dolan v. City of Tigard: Paving New Bicycle Paths Through the Thickets of the Fifth Amendment’s Takings Clause*, 48 ARK. L. REV. 823, 831 (1995).

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our purposes, it is sufficient to note that governments sometimes require developers to undertake or finance upgrades to nearby roads and other infrastructure that will be impacted by their developments.²²⁰ And when this happens, utilities within the existing public right-of-way may be forced to relocate, raising a potentially difficult question: who should pay for the relocation, the utility or the developer?

A. *Road Widening as a Condition of a Development Permit*

In the early 1980s, Dame Construction Company applied for approval to develop 715 homes on a 417-acre site in Contra Costa County, California. The county board of supervisors approved the application with several conditions, one of which required Dame to widen the portion of San Ramon Valley Boulevard next to the development site.²²¹ This widening project would require Pacific Gas and Electric ("PG&E") to relocate a distribution line on that road, which PG&E declined to do without Dame's promise to pay for it. Dame refused to promise anything and went ahead with construction, leaving PG&E's poles and lines in the middle of the newly paved road.²²² At that point, PG&E moved its poles and sued Dame to recover the cost.²²³

Dame advanced three reasons why the common law utility rule should apply and require PG&E to pay for the relocation. First, Dame said that even though it undertook and paid for the road widening, the project had to be treated as a "governmental act" because it was a condition imposed by the county government. As Dame contended, "it is a common practice for local governments to impose conditions on developers requiring various work to be done as a means of obtaining public improvements at private expense."²²⁴ Even so, however, the court found that Dame's development "contributed to the need for widening . . . the road, and the work was performed and paid for by Dame, not the county."²²⁵ Accordingly, it did not consider Dame's work to be a governmental act.

Second, Dame argued that because the county would have had to widen the road eventually, it should "therefore stand in the shoes of the

²²⁰ See, e.g., *McClung v. City of Sumner*, 545 F.3d 803 (9th Cir. 2008) (upholding city ordinance requiring new, permitted developments to upgrade size of storm water drains).

²²¹ *Pac. Gas & Elec. Co. v. Dame Constr. Co., Inc.*, 236 Cal. Rptr. 351, 352-53 (Cal. Ct. App. 1987).

²²² *Id.*

²²³ The county would not have been liable in any event, as its subdivision development agreement with Dame required Dame to pay "all costs of the work, including inspections thereof and relocating existing utilities required thereby." *Id.* at 357 (emphasis omitted).

²²⁴ *Id.* at 354.

²²⁵ *Id.*

government, which does not have to bear the costs of utility location."²²⁶ But the court put the burden back on Dame, finding that its "private development at least accelerated the need for the public improvement, thereby providing the nexus which justified imposition of all of the costs thereof on the developer."²²⁷

Finally, Dame emphasized that it was the county that asked PG&E to move the poles, arguing that under the common law rule, a utility must pay for relocation whenever requested to do so by the government agency that controls the road.²²⁸ In fact, the county did send a set of plans for the road-widening project to PG&E and asked the company to "make arrangements" to relocate its poles accordingly.²²⁹ But the county's letter said nothing about who should pay for the relocation, and that fact, to the court, was at least as important as the fact that the county had directed its request to PG&E.²³⁰

Based on these findings, the court concluded that the common law rule did not apply. To craft a solution, it turned to an economic analysis for guidance. Should the relocation cost be borne by PG&E's ratepayers generally, or should it be borne by Dame, whose subdivision residents will most directly benefit from the road-widening project?²³¹ It decided that allocating the cost to the beneficiary of the project would be the most equitable solution, "regardless whether the beneficiary is deemed to be the developer or a segment of the public."²³²

To begin with, the court felt that although the general public would benefit from the road widening, the primary beneficiary was the developer, "which would not have been permitted to develop its land without agreeing to widen the adjacent boulevard. Since Dame presumably enjoys the economic opportunity that the development represents, it seems proper that it should also bear the attendant costs."²³³ And while Dame argued that the county planned to widen the road anyway, the evidence did not indicate that the road project would have been done had Dame's subdivision not been approved.²³⁴

But even if the general public was the main beneficiary of the improvement, the court still felt justified in allocating the cost to Dame. As the court explained:

²²⁶ *Id.* at 354–55.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 353.

²³⁰ *Id.* at 354–55.

²³¹ *Id.* at 354–56.

²³² *Id.* at 355–56.

²³³ *Id.* at 356.

²³⁴ *Id.*

[t]he members of the public who will benefit most from the road widening will be those who reside closest to it and most regularly contribute to traffic upon the widened segment. As it appears most of these persons will be living in houses purchased from Dame, Dame is able to and almost certainly will pass on the costs of the improvement, including the expense of relocating the poles, to these residual beneficiaries.²³⁵

The Maryland Court of Appeals faced a similar situation when Montgomery County required a developer to widen an adjacent road as a condition of approval for a residential development.²³⁶ According to the court, the common law utility relocation rule normally “involved situations in which the relocation is required because of changes in the right-of-way made necessary by public works projects of one kind or another and the utility seeks compensation *from the public authority* for the cost of relocation.”²³⁷ In the case before it, by contrast, the relocation was required for a private development and would work to the economic benefit of a private developer.²³⁸ After considering *Dame Construction* and other cases, the Maryland court concluded that

[w]hether we adopt a benefit analysis as the California court did or simply hold . . . that, where the relocation is triggered and made necessary by a private development, the common law rule does not apply and the developer must pay the cost of the relocation, is not likely to make much difference. The end result under either approach will, in almost all instances, be the same. The automatic rule is the easier to apply and avoids the prospect of extensive litigation and endless discovery over who, among any number of possible parties, may be the principal beneficiary of particular road improvements occasioned by a private development. Largely for that reason, we shall adopt [the automatic rule] We find no legal basis, and certainly no equitable one, for requiring a utility’s rate-paying customers to bear a cost triggered and made necessary by a private developer’s

²³⁵ *Id.*

²³⁶ *Potomac Elec. Power Co. v. Classic Cmty. Corp.*, 856 A.2d 660, 662 (Md. 2004).

²³⁷ *Id.* at 667.

²³⁸ *Id.* at 668.

project and thus, in effect, to subsidize the cost of the development.²³⁹

More recently, the Court of Appeals for the Eighth Circuit essentially adopted the Maryland court's "triggering" approach, holding that a road improvement project—undertaken by a private developer as a condition of governmental approval of a multi-use development in Little Rock—was outside the scope of the common law rule.²⁴⁰ As the court noted, the road was needed to accommodate increased traffic from a commercial development and the private developers were the driving force behind the development.²⁴¹ Although the developers argued that the road project was "dictated by the city for the benefit of the public," the city had no imminent plan for construction and, significantly, the city had actually changed its long-term plan for the road location to accommodate the developers' wishes.²⁴² While the road project might have accomplished a governmental *purpose*, it was not a governmental *act*, leading the court to decide that the common law utility relocation rule did not apply.²⁴³

B. Road Widening Mandated by Legislation

Unlike the development-permit cases, a "governmental act" will be found when the road project has been mandated by a legislative act. The City of Bridgeton, Missouri wanted to improve Taussig Road for many years but lacked the funding to do it.²⁴⁴ An opportunity came with the development of an industrial park in a neighboring community. The industrial park needed a highway interchange, part of which would be in Bridgeton, and the Missouri Department of Transportation required the park's developer to get approval of the interchange from all the municipalities that would be affected by it. Bridgeton agreed to give its approval in return for the developer's agreement to help pay for the Taussig Road project.²⁴⁵ Four years later, when the Taussig Road project was ready for construction, a dispute arose regarding relocation of water lines belonging to the Missouri-American Water Company.

The first legal problem was the expiration of the utility's franchise to maintain its lines in the public right-of-way. Both sides, however, had

²³⁹ *Id.* at 669.

²⁴⁰ *Whisenhunt v. Sw. Bell Tel.*, 573 F.3d 565, 568–69 (8th Cir. 2009).

²⁴¹ *Id.* at 568.

²⁴² *Id.* at 568–69.

²⁴³ *Id.*

²⁴⁴ *City of Bridgeton v. Mo.-Am. Water Co.*, 219 S.W.3d 226, 229 (Mo. 2007).

²⁴⁵ *Id.*

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continued to act as if the franchise was still in force. Accordingly, the court decided that the parties were operating under an implied contract, having the same terms as the original franchise and terminable upon reasonable notice.²⁴⁶

The court then turned to relocation costs and, since the original franchise said nothing about it, decided that the common law rule would govern.²⁴⁷ The water company emphasized the role that private development was playing, arguing that the industrial park developer had agreed to pay for the Taussig Road project four years before the city council legislatively declared the project to be a public purpose.²⁴⁸ To the Missouri Supreme Court, however, the timing was irrelevant:

The purpose of the Taussig Road project was for the legislative body to determine. The Court respects that authority and normally does not look behind such legislative determinations. There is no evidence in the record that could establish any arbitrary and unreasonable acts on the part of Bridgeton sufficient to constitute abuse of the legislative process.²⁴⁹

And since the city council had established by resolution that public necessity required relocating the water company's facilities in the Taussig Road right-of-way, the court held that the company had to do the work at its own expense.²⁵⁰

In reaching this decision, the Missouri Supreme Court expressed no opinion on the validity of an earlier Missouri appellate decision that required developers to pay to relocate utilities when improving roads under governmentally-imposed conditions on land-use permits.²⁵¹ The court distinguished that decision, however, because in the earlier case "there was no legislative determination that the primary purpose of the project was a public one."²⁵² Ironically, the industrial park development would add little traffic to Taussig Road.²⁵³ While that fact would have given the industrial park developer a solid basis to contest the Taussig

²⁴⁶ *Id.* at 232.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 233.

²⁴⁹ *Id.* (citations omitted).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 233 n.3 (citing *Home Builders Ass'n of Greater St. Louis v. St. Louis Cnty. Water Co.*, 784 S.W.2d 287 (Mo. Ct. App. 1989)).

²⁵² *Id.*

²⁵³ *Id.* at 239.

Road project had it been imposed as a permit condition,²⁵⁴ in the Missouri Supreme Court's view it also served to distinguish the earlier appellate case where "the actions of private developers triggered the need for the road improvements."²⁵⁵

C. *Considering the Issues Raised by the "Private Development" Cases*

Dame Construction Company made a valid point: once there was enough new development in the area, the county would have had to widen San Ramon Valley Boulevard anyway. The court's response—that Dame's development "at least accelerated the need for the public improvement"—was not really an answer.²⁵⁶ Any new development that generated traffic would have accelerated the need to widen the road. And because Dame was standing in the county's shoes for purposes of widening the road, why should it not also stand in the county's shoes for purposes of utility relocation?

But PG&E also had a valid point. If its electric lines had been on private land, Dame would have had to pay to relocate them. Since the relocation is part and parcel of a private development project, why should the outcome be any different for the lines that PG&E had been allowed to install on public right-of-way? Why should one private business (Dame) get the benefit of the state's police power to order relocation at the expense of another private business (PG&E)? Similar concerns lay underneath the argument about "proprietary" government activities²⁵⁷ and the negative reaction to use of eminent domain power to acquire property for private development.²⁵⁸

Neither the "benefit" nor the "triggering event" approach, however, provides a satisfactory way to distinguish privately motivated projects from truly public works. As the Maryland Court of Appeals pointed out,

²⁵⁴ See *Home Builders Ass'n of Greater St. Louis*, 784 S.W.2d at 289 ("[The government agencies] have taken the position that an exaction requiring each of the Developers to construct these right-of-way improvements is justified because they are reasonably related to each Developer's project. No Developer has objected that such exaction was unlawful."). The Taussig Road project was not a permit-related exaction, however; the city gave its support for a highway interchange in return for the developer's agreement to fund the road project. *Id.*

²⁵⁵ *City of Bridgeton*, 219 S.W.3d at 233 n.3.

²⁵⁶ *Pac. Gas & Elec. Co. v. Dame Constr. Co., Inc.*, 236 Cal. Rptr. 351, 354 (Cal. Ct. App. 1987).

²⁵⁷ See, e.g., *Potomac Elec. Power Co. v. Classic Cmty. Corp.*, 856 A.2d 660, 667–69 (Md. 2004) (likening a relocation that is made necessary by the actions of a private developer to one caused by a municipality acting in a proprietary capacity).

²⁵⁸ See, e.g., Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny"*, 59 ALA. L. REV. 561, 562–64 (2008) (discussing the public and legislative backlash against the Supreme Court's June 2005 decision in *Kelo v. City of New London*, 545 U.S. 469 (2005)).

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it is difficult to quantify who benefits how much from a road project. Focusing on the benefit to the development that set the project in motion ignores future benefits. After the road is widened, every existing and subsequent development along the road will receive the benefit of the project, and property owners on intersecting roads might benefit, too. In addition, the “benefit” approach can reach projects directly undertaken by the government.²⁵⁹ Furthermore, while someone on the other side of the county may not benefit directly from a particular road, it is equally true that someone without children may not benefit directly from a public school. Yet both road and school systems are legitimate public works projects.

The “triggering event” approach is equally unhelpful. Most of the real estate development in this country is private, and it is this private activity that generates the traffic that needs the roads. In the *Dame Construction* case, the proposed subdivision was fairly large, involving 715 homes. So, the traffic it produced on its own might have exceeded the design capacity of the existing road. But a series of small developments could have produced the same result, even though each of them, taken individually, might not have added enough traffic to justify the widening project or produced enough revenue for the developer to afford it. It is almost always private development, individually or in the aggregate, that triggers the need for a road project, but if a single development is large enough and the traffic impact great enough, the government might require the developer to pay for or undertake the project now instead of using tax money to pay for it later.

Perhaps the better test is the one used by the Missouri Supreme Court in *City of Bridgeton*.²⁶⁰ The Missouri court focused on the role that Bridgeton’s city council played in the project, both presuming that the council acted regularly and using an abuse of discretion standard to review its actions. The following is a more general application of the test used in *City of Bridgeton*.

If the government authority responsible for the road has, by legislation or equivalent administrative act, mandated that the project be built or declared that it is undertaken for a public purpose, then the project should be considered a governmental one for relocation-cost purposes. Accordingly, the utility would have to pay to relocate the

²⁵⁹ See, e.g., Complaint by Wis. Pub. Serv. Corp. against the City of Manitowoc, 2008 Wisc. PUC LEXIS 239, *3–4, *10 (Pub. Serv. Comm’n of Wisc. Apr. 18, 2008) (“The record amply demonstrates that the City was engaged in legitimate city improvement projects that reasonably required WPSC to permanently relocate. In addition, WPSC has not demonstrated that the Paul Road improvement project was substantially for the benefit of a third party.”).

²⁶⁰ See *supra* Part III.B (discussing *City of Bridgeton*).

facilities it had installed in the public right-of-way, unless it can show that the government abused its discretion by undertaking or legislatively supporting the project.

Alternatively, if the government has not taken such affirmative steps in support of the project, and has simply made it a prerequisite to approval of a private development, then its concern is primarily with the development's impact on infrastructure. In that setting, the officially expressed public interest in the project is attenuated, so it could properly be considered a private action in which utility relocation costs should be paid by the developer.

IV. THE USE OF A "CLEAR STATEMENT" REQUIREMENT IN DECIDING CHALLENGES TO THE COMMON LAW RELOCATION RULE

As the foregoing analysis has shown, the common law rule that "utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities" is remarkably well-established.²⁶¹ The U.S. Supreme Court approved it in 1905, reaffirmed it in 1983, and almost every state in the nation has adopted it.²⁶²

This nearly universal support is not surprising, for the rule is founded on a significant public policy consideration: governments have a paramount right and duty to use their police powers to control the public's vital assets—its streets and highways—for the public good. Allowing utilities to put poles, wires, and pipes in the public ways is an important and valuable use, but those secondary purposes cannot displace public control. If the rule is not followed, and the government has to pay to relocate those subordinate occupants of the public space, it would undermine public control and directly affect the government's ability to improve roads or develop other public uses. Accordingly, any departure from the common law rule should not be lightly inferred.

When the Supreme Court considered the relocation-cost issue in *Norfolk Redevelopment*, it began with a clear statement rule: that a common law principle "ought not to be deemed to be repealed, unless

²⁶¹ *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983).

²⁶² *N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1053 (8th Cir. 2004) (calling the common law utility-relocation rule "undisputed precedent"); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1167 (9th Cir. 2001) (noting that the rule has been followed in virtually every jurisdiction except, possibly, Arkansas); BETH A. BUDAY & DENNIS JENSEN, *MCQUILLIN ON MUNICIPAL CORPORATIONS* § 34.74.10 (3d ed. 1995).

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the language of a statute be clear and explicit for this purpose.”²⁶³ The Court noted that while this often-invoked canon of statutory construction is not always given much weight, it had greater force in the context of utility relocation because federal eminent domain law is largely derived from the common law.²⁶⁴

We have also seen that the purpose of the common law utility-relocation rule is to avoid inadvertently blocking or impeding a state or local government’s exercise of the police power over the streets and public ways. It is not just an ordinary part of the common law; it is a rule that conserves the government’s fundamental power over public assets. To be sure, a state government can decide to cede some of that power by paying to relocate utilities using the public right-of-way. But because the common law rule is so broadly recognized, and is founded on such important public policy considerations, there is no room for doubt. A court must be convinced that the legislature really meant to shift responsibility for relocation costs from the utility to the public. Accordingly, the common law rule should be given strong presumptive weight, similar to the presumption in favor of the constitutionality of statutes,²⁶⁵ so that the statute would be read narrowly to avoid any conflict with it.²⁶⁶

²⁶³ *Norfolk Redevelopment*, 464 U.S. at 35–36 (quoting *Fairfax’s Devisee v. Hunter’s Lessee*, 7 Cranch 603, 623 (1813)).

²⁶⁴ *Id.* at 36.

²⁶⁵ See, e.g., *Honulik v. Town of Greenwich*, 980 A.2d 845, 849–50 (Conn. 2009) (citing *State v. Indrisano*, 640 A.2d 986, 992 (Conn. 1994)) (“[W]e begin with a strong presumption of constitutionality. . . . we read the statute narrowly in order to save its constitutionality, rather than broadly in order to destroy it. We will indulge in every presumption in favor of the statute’s constitutionality.”).

²⁶⁶ The New Jersey Supreme Court gave a narrow construction to that state’s relocation-cost statute in the context of a road widening undertaken by a private developer. The statute requires the state to pay for utility relocations on any “highway project,” which is defined as a project “administered and contracted for” by the state’s Commissioner of Transportation. *Pine Belt Chevrolet, Inc. v. Jersey Cent. Power & Light Co.*, 626 A.2d 434, 436 (N.J. 1993) (quoting N.J. STAT. ANN. § 27:7 (West 1984)). New Jersey Department of Transportation (“DOT”) made Pine Belt Chevrolet widen part of a public highway as a condition of a driveway permit, and this widening displaced some utility poles. Jersey Central Power contended that the statute had entirely abrogated the common law rule. But the court, carefully analyzing the statute’s terms, concluded that it applied only to projects that the DOT contracted for and administered. Since the DOT ordered (but did not itself undertake) the widening project, the court held that common law rule still applied. *Id.* at 443.

The court also concluded that the cost should not be shifted to the Chevrolet dealership. In this regard, it noted that New Jersey’s highway access management regulations categorized the road widening as a capacity improvement benefiting the entire motoring public rather than an improvement benefiting the permit applicant only (like a dedicated turn lane or traffic signal). *Id.* at 445. This administrative classification convinced the court that the widening project had a public purpose. The court then

When construing an act by a local government, such as a local franchise agreement with a utility, the inquiry would take on a second step. First, did the local government clearly assume responsibility for relocation costs? Second, did the state legislature clearly allow the local government to do this?²⁶⁷ In the regulatory context, assuming a state's utility commission has the power to enact regulations or approve tariffs contrary to local legislation, the same question should be asked. Does this tariff (or regulation) on utility relocation expressly state that it applies to governments? If it does, then a court can be assured that, after the appropriate notice and public comment process, the utility commission knowingly decided to shift the burden of relocation costs to the local government.

Had the Fifth Circuit used a clear statement rule, it would have avoided a ten million dollar mistake about the meaning of Texas law in the Westpark Tollway case.²⁶⁸ Once it determined that the utility was claiming reimbursement for relocation costs under a statute that was ambiguous,²⁶⁹ the inquiry would have ended, and the court would have applied the common law rule as the Texas Supreme Court later did.²⁷⁰ Instead, the court decided to "look to other sources"²⁷¹ to find the meaning, and those sources gave it the wrong answer.

This Article began with the observation that courts are sometimes reluctant to apply the common law utility relocation rule, perhaps because it seems like an outdated historical artifact or an uncompensated taking of private property. But as we have seen, the public policy

concluded that "[l]iability for the costs of relocations necessitated by highway improvements that further the public welfare is a risk the utility companies run and a price they must pay for the privilege of locating within a public right-of-way." *Id.*

²⁶⁷ *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273 (1908). The Supreme Court stated that

the State may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power.

Id. (citations omitted).

²⁶⁸ *Centerpoint Energy Hous. Elec. LLC v. Harris Cnty. Toll Rd. Auth.*, 436 F.3d 541, 542 (5th Cir. 2006).

²⁶⁹ *See id.* at 545 ("[W]e have examined the statute, as noted above, and find that the words 'eligible utility facility' remain ambiguous.").

²⁷⁰ *Sw. Bell Tel., L.P. v. Harris Cnty. Toll Rd. Auth.*, 282 S.W.3d 59, 63–65 (Tex. 2009).

²⁷¹ *Centerpoint Energy*, 436 F.3d at 545.

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concerns on which the rule is based are no less significant now than they were in the late nineteenth century, and over a century of legal precedents have consistently affirmed that a utility does not gain a property right in the public places where it installs its equipment. Instead, the utility accepts the benefit of using the public right-of-way in return for undertaking the duty to move its equipment upon request by the government.