

***PENNEAST PIPELINE CO. V. NEW JERSEY: RIGHT OF  
PRIVATE CORPORATION TO TAKE STATE LAND  
UPHELD UNDER THE NATURAL GAS ACT***

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I. INTRODUCTION

In *PennEast Pipeline Co., v. New Jersey*, the United States Supreme Court reversed the United States Court of Appeals for the Third Circuit<sup>1</sup> holding that the power of eminent domain conferred under Section 7 of the Natural Gas Act (“NGA”) to private parties that have been granted certificates of public convenience and necessity by the Federal Energy Regulatory Commission (“FERC”) includes the power to sue states in condemnation proceedings. This is so because

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1. *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244 (2021).

the states consented to federal eminent domain power in the “plan of the convention”<sup>2</sup> and the “power is complete” to include the ability to undertake condemnation proceedings to enforce the right.<sup>3</sup> The majority held further that the federal eminent domain power can be exercised by the government or delegated to private entities.<sup>4</sup> Therefore, since FERC granted PennEast Pipeline Company (“PennEast”) a certificate, the Court held that PennEast is able to exercise the federal eminent domain power under the Natural Gas Act to institute condemnation proceedings to acquire property—including property either owned by the state of New Jersey, or in which New Jersey held a property interest—for a 116-mile natural gas project that FERC approved in January 2018.<sup>5</sup> The Court also rejected a contention under Section 19 of the NGA that the Third Circuit lacked jurisdiction to hear the disputes below.<sup>6</sup>

In contrast, the primary dissent authored by Justice Barrett and joined by Justices Gorsuch, Thomas, and Kagan raised a fundamental dispute with the majority.<sup>7</sup> The dissenters were not convinced that the federal eminent domain power was so solidified or encompassing at the time of ratification of the Constitution.<sup>8</sup> Rather, the dissenters would have held that the proceeding below—essentially a legal action to take state land by the PennEast pipeline—would simply have been barred by the Eleventh Amendment’s prohibition on hearing in any federal court “any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>9</sup>

Before discussing the majority and dissenting opinions, this Note provides below some potentially helpful background on eminent domain and sovereign immunity as well as on the development of the Natural Gas Act and its later amendment to allow certificate holders the right of eminent domain.

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2. This term, according to the *PennEast* majority, “is shorthand for ‘the structure of the original Constitution itself.’” *Id.* at 2258. The Federalist Papers written following the Constitutional Convention in 1781 use the term “plan of the convention;” however the term is not well-defined there either. Cf. THE FEDERALIST No. 2 (John Jay) (“They who promote the idea of substituting a number of distinct confederacies in the room of the *plan of the convention*, seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy.”) (emphasis added); THE FEDERALIST No. 81 (Alexander Hamilton) (“I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the *plan of the convention*, but from the general theory of a limited Constitution[.]”) (emphasis added). While “plan of the convention” may extend beyond simply the “structure of the original Constitution,” the *PennEast* decision treats it as meaning the essential bases and assumptions, stated or otherwise, upon which the Constitution rests. *PennEast Pipeline Co.*, 141 S.Ct. at 2258.

3. *Id.* at 2259.

4. *Id.* at 2263.

5. *Id.* at 2253, 2263.

6. *PennEast Pipeline Co.*, 141 S.Ct. at 2244.

7. *Id.*

8. *Id.* at 2259.

9. *Id.* at 2264; see U.S. CONST. amend. XI.

## II. BACKGROUND

### A. *Eminent Domain in the United States*

Debate over the use of eminent domain—i.e., the power to secure property rights for the use of the sovereign—in the United States dates to the country’s inception<sup>10</sup> but was not reflected in the Constitution until adoption of the Fifth Amendment in the Bill of Rights following founders’ concerns, including those of Thomas Jefferson, that the federal government could grow too powerful.<sup>11</sup> The Fifth Amendment’s Takings Clause states “nor shall private property be taken for public use, without just compensation.”<sup>12</sup> In 1833, the Supreme Court held in *Barron v. Mayor and City Council of Baltimore* that the Fifth Amendment only applied to the federal government and did not offer relief to citizens who were aggrieved by alleged takings by the state or local governments.<sup>13</sup> Eventually, the incorporation doctrine made eminent domain along with most of the Bill of Rights applicable to the states and local governments through the development of the 14<sup>th</sup> Amendment due process jurisprudence.<sup>14</sup>

### B. *State Sovereign Immunity*

#### 1. History of State Sovereign Immunity

As with eminent domain, state sovereign immunity is derived from the English feudal common law system.<sup>15</sup> Discussing these origins in *Nevada v. Hall*, for instance, the Supreme Court said no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord.<sup>16</sup> Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued.<sup>17</sup> The King’s immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong.<sup>18</sup>

The framers considered including sovereign immunity in the Constitution.<sup>19</sup> However, the notion did not achieve constitutional status until after the Supreme

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10. However, the powers of eminent domain can be traced at least as far back as the English Magna Carta of 1215. See Edward J. Sullivan, *A Brief History of the Takings Clause*, [https://landuselaw.wustl.edu/articles/brief\\_hx\\_taking.htm](https://landuselaw.wustl.edu/articles/brief_hx_taking.htm).

11. *Id.*

12. U.S. CONST. amend. V.

13. Sullivan, *supra* note 10. See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833).

14. Sullivan, *supra* note 10. See *Chicago Burlington and Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

15. Miles McCann, *State Sovereign Immunity*, NAT’L ASS’N OF ATTORNEYS GEN. (Nov. 11, 2017), <https://www.naag.org/attorney-general-journal/state-sovereign-immunity/#fn9>. See *Nevada v. Hall*, 440 U.S. 410 (1979).

16. *Hall*, 440 U.S. at 414-15 (citing 1 F. Pollock & F. Maitland, *History of English Law* 518 (2d ed. 1899); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 2-5 (1972)).

17. *Id.* at 415.

18. *Id.*

19. See McCann, *supra* note 15.

Court decision in *Chisolm v. Georgia*.<sup>20</sup> In *Chisolm*, a citizen of South Carolina sued the state of Georgia to recover a Revolutionary War debt, and the Court held that there was no protection for the state of Georgia when sued by a citizen of another state.<sup>21</sup> Shortly after this opinion, Congress realized the need for state sovereign immunity and ratified the Eleventh Amendment almost unanimously.<sup>22</sup> The Eleventh Amendment states, “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>23</sup> Courts have generally recognized the doctrine of sovereign immunity was a presumed power to the new federal government created by the Constitution.<sup>24</sup> However, the Eleventh Amendment is subject to multiple interpretations,<sup>25</sup> also providing ample basis for debate in the *PennEast* decision.

### C. Natural Gas Act

#### 1. A Need for Regulation

When natural gas distribution networks grew across state lines, state governments could no longer effectively regulate natural gas pipelines and prices.<sup>26</sup> In the Supreme Court case *Missouri v. Kan. Nat. Gas Co.*, the Court ruled that the Commerce Clause prohibited state regulation of interstate pipelines, and, should Congress choose to do so, that they would have to be regulated by the federal government and not states.<sup>27</sup> Thus, coming out of the 1920s, no federal law governed interstate sales and transportation of natural gas;<sup>28</sup> yet, despite being neither regulated by state or federal laws, concerns remained. Two years before the passage of the Natural Gas Act of 1938, the Federal Trade Commission issued a report on the natural gas pipelines and the “ineffective regulation of pipeline construction.”<sup>29</sup> This report highlighting the monopolistic tendencies of interstate pipelines to charge higher prices was among several bases leading to the passage of the Natural Gas Act of 1938.<sup>30</sup>

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20. *Id.*; see *Chisolm v. Georgia*, 2 U.S. 419 (1793).

21. 2 U.S. at 419.

22. See McCann, *supra* note 15.

23. U.S. CONST. amend. XI.

24. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 443-44 (2005).

25. See generally *PennEast*, 141 S.Ct. 2244; McCann, *supra* note 15.

26. *The History of Regulation*, NATURALGAS.ORG (2013), <http://naturalgas.org/regulation/history/>.

27. *Missouri v. Kan. Nat. Gas Co.*, 265 U.S. 298, 309-10 (1924). See Robert Christin et al., *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 ENERGY L.J. 115, 118 (2017).

28. Christin et al., *supra* note 27, at 117.

29. *Id.*

30. *Id.*; see NATURALGAS.ORG, *supra* note 26.

## 2. The Regulatory Impact of the Natural Gas Act of 1938

The Natural Gas Act of 1938 gave the Federal Power Commission (now FERC) jurisdiction to regulate the transportation and sale of natural gas in interstate commerce.<sup>31</sup> Specifically, the NGA states, “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”<sup>32</sup> According to the congressional committee reports accompanying the legislation that became the NGA, the purpose of the NGA was to regulate what the states were barred from regulating by the Supreme Court’s rulings<sup>33</sup> in *Missouri v. Kansas Natural Gas Co.* as well as in *Pub. Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*<sup>34</sup>

The NGA also provides natural gas companies the ability to apply for and receive certificates of public convenience and necessity from FERC to construct facilities for the interstate transportation of natural gas.<sup>35</sup> Further, the NGA provides that the FERC shall grant the application for a certificate of public convenience if the proposed project “is or will be required by the present or future public convenience and necessity.”<sup>36</sup>

## 3. The 1947 Amendment to the Natural Gas Act

Even though the NGA enabled the FPC to issue certificates of public convenience, there was no mechanism in the Act for companies to secure property rights along routes of proposed projects.<sup>37</sup> Thus, at least from the inception of the NGA, pipeline companies were left to either attempt to negotiate with property owners or were at the mercy of each individual state’s eminent domain procedures.<sup>38</sup> In many cases, pipeline projects were illusory due to the strict applications of eminent domain.<sup>39</sup> For example, some states allowed the exercise of their state eminent domain power only if the pipeline would benefit its residents, whereas others wholly barred companies from using eminent domain because their “statutory or

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31. *A Brief History of Natural Gas*, AM. PUB. GAS ASS’N, <https://www.apga.org/apgamainsite/aboutus/facts/history-of-natural-gas>. The Federal Power Commission is now known as the Federal Energy Regulation Commission due to the passage of the Department of Energy Organization Act of 1977. *Id.*

32. 15 U.S.C. § 717(a) (1988).

33. Christin et al., *supra* note 27, at 118; see *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) (Frankfurter, J., concurring) (citing H.R. Rep. No. 709, 75<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1-2; S. Rep. No. 1162, 75<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1-2).

34. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); see *Pub. Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). This restriction arises from what has been called the “dormant Commerce Clause.” See, e.g., Brief for Respondent, *PJM Power Providers Grp. v. FERC*, No. 21-3068 (3d Cir. 2021).

35. 15 U.S.C. § 717 (c)(1)(A) (1988). See Christin et al., *supra* note 27, at 118.

36. See Christin et al., *supra* note 27, at 118. See 15 U.S.C. § 717f(e) (1988).

37. *PennEast Pipeline Co.*, 141 S.Ct. at 2252.

38. *Id.*

39. *Id.*

state constitutional provisions denied state eminent domain power to corporations from other States.”<sup>40</sup>

In response to this patchwork regime, Congress amended the Natural Gas Act in 1947<sup>41</sup> to authorize certificate holders to exercise the federal eminent domain power.<sup>42</sup> As a result of the amendment, Section 7(h) of the NGA now states:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner to compensation to be paid for . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located.<sup>43</sup>

While Congress may have sought to set to put to rest the question of whether certificated pipelines had full authority to obtain all land rights necessary for the construction of the pipeline, the *PennEast* case demonstrated there remains some room for interpretation of this provision. Thus, the case would present a question of which of these doctrines adopted during the Constitutional Convention did Congress intend to prevail, when it modified that Natural Gas Act more than 70 years ago.

### III. ANALYSIS

In 2015, PennEast Pipeline Company (hereinafter “PennEast”) filed an application with FERC for a certificate of public convenience and necessity to build a 116-mile natural gas pipeline.<sup>44</sup> FERC then published the notice of PennEast’s application in the Federal Register.<sup>45</sup> The published notice received thousands of comments in writing as well as at public hearings.<sup>46</sup> Then, FERC drafted an environmental impact statement, which also received a multitude of comments.<sup>47</sup> PennEast considered the comments and finalized the adjustment of the pipeline route.<sup>48</sup> In 2018, FERC approved the certificate of public convenience and necessity for PennEast’s pipeline project.<sup>49</sup>

Shortly thereafter, PennEast filed various complaints in the federal district court in New Jersey<sup>50</sup> seeking orders of condemnation as well as orders granting preliminary injunctive relief under the federal power of eminent domain according to the Natural Gas Act.<sup>51</sup> Ultimately, the District Court granted PennEast’s requested relief, over several objections, including a request for dismissal based on

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40. *Id.*; see S. Rep. No. 429, 80th Cong., 1st Sess., 2-3 (1947).

41. *PennEast Pipeline Co.*, 141 S.Ct. at 2252.

42. *Id.*

43. *Id.*

44. *Id.* at 2253.

45. *PennEast Pipeline Co.*, 141 S.Ct. at 2253.

46. *Id.*

47. *Id.*

48. *Id.*

49. *PennEast Pipeline Co.*, 141 S.Ct. at 2253.

50. *Id.*

51. *In re Penneast Pipeline Co.*, 2018 WL 6584893 (D.N.J. Dec. 14, 2018) (“2018 Condemnation Order”).

the Eleventh Amendment.<sup>52</sup> New Jersey timely appealed, moving to stay the District Court's order and to expedite the appeal.<sup>53</sup> Before the Third Circuit, New Jersey renewed its Eleventh Amendment argument that the District Court did not have subject-matter jurisdiction to hear PennEast's complaints.<sup>54</sup>

The United States Court of Appeals for the Third Circuit held the delegation of the federal government's power of eminent domain and its power to hale sovereign states into federal court are separate and distinct.<sup>55</sup> The Court of Appeals avoided the specific question of whether the federal government can delegate its power to override a state's Eleventh Amendment immunity.<sup>56</sup> Instead, it pointed to the fact that the text of the NGA does not suggest that Congress intended the NGA to confer the power to override a state's Eleventh Amendment immunity.<sup>57</sup> The Court of Appeals vacated the District Court's order and remanded the matter for the dismissal of any claims against New Jersey.<sup>58</sup> The Supreme Court then granted certiorari to determine whether the NGA authorizes certificate holders to condemn land in which a state claims an interest.<sup>59</sup>

#### A. *This Case Does Not Present Any Jurisdictional Issues*

The United States filed an *amicus* brief raising the issue of jurisdiction relating to the Third Circuit's ability to review FERC's certificate order.<sup>60</sup> The United States argued that the Third Circuit lacked jurisdiction to decide the question under 15 U.S.C. § 717r(b),<sup>61</sup> which gives the reviewing court exclusive jurisdiction to "affirm, modify, or set aside such order."<sup>62</sup> The United States argued that the court with exclusive jurisdiction to hear the condemnation issues was the D.C. Circuit because it was the court responsible for reviewing the underlying certificate order.<sup>63</sup> However, both PennEast and New Jersey agreed that New Jersey did not seek to modify the FERC order, but instead raised a defense against the condemnation proceedings initiated by PennEast.<sup>64</sup> The Court agreed with PennEast and

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52. *Id.*

53. *In re PennEast Pipeline Co.*, 938 F.3d 96, 102 (3d Cir. 2019).

54. *Id.* at 102-03.

55. *Id.* at 99-100. See Jackson Bowker, Note, *The Issues of Condemning State-Owned Property Pursuant to the Natural Gas Act: In Re PennEast*, 41 ENERGY L.J. 403 (2020).

56. *Id.* at 100. See generally Bowker, *supra* note 55.

57. *PennEast Pipeline Co.*, 938 F.3d at 100.

58. *Id.*

59. *PennEast Pipeline Co.*, 141 S.Ct. at 2254.

60. *Id.*

61. *Id.*

62. *Id.*

63. Brief for the United States as Amicus Curiae Supporting Petitioner, *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244, 2252 (2021) (No. 19-1039), 2021 WL 930156, at \*4, 15.

64. *PennEast Pipeline Co.*, 141 S.Ct. at 2254.

New Jersey and held that § 717r(b)<sup>65</sup> did not present a jurisdictional bar to the Third Circuit's decision.<sup>66</sup>

*B. The NGA Inherently Authorizes Condemnation Suits through the Federal Eminent Domain Power*

As discussed in more detail below, whereas the Third Circuit held that the Natural Gas Act did not convey to private parties the authority to exercise the federal right of eminent domain as against state property interests, the Supreme Court's decision to reverse the Third Circuit pivots on the concept of a "complete" power of eminent domain. First, the majority set out to establish the existence of a broad federal power of eminent domain, including powers to take state land. Second, the opinion demonstrates these eminent domain powers have been delegated to private entities for the purpose of taking state land. The reason for this is the majority's assertion that the power of eminent domain is "complete in itself" and therefore includes the fundamental consent of states to be sued that was part of the assumptions on which the Constitution was based. Thus, when the NGA was amended in 1947 it conferred the federal eminent domain power onto private entities that had obtained certificates of public convenience and necessity pursuant to Section 7 of the NGA from the FPC,<sup>67</sup> including the power to levy condemnation proceedings against another state for pipeline construction.

1. The Federal Eminent Domain Power is Rooted in American History

Establishing the broader federal power of eminent domain, the majority provided a historic overview of eminent domain, first noting that eminent domain has been established for thousands of years dating back possibly even to biblical times<sup>68</sup> and was later termed as such by a Dutch lawyer named Hugo Grotius.<sup>69</sup> Later in England and its colonies, the Crown passed statutes allowing the use of the eminent domain power to construct roads, bridges, river improvements, and other projects.<sup>70</sup> The opinion noted that neither the Constitution nor the Bill of Rights included the words "eminent domain."<sup>71</sup> However, the power was recognized in the Takings Clause of the Fifth Amendment.<sup>72</sup> Quickly noting examples of federal authorization of eminent domain powers in areas of exclusive federal jurisdiction,<sup>73</sup> the majority then explored precedent at the end of the second half

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65. *Id.*; see 15 U.S.C. § 717r(b) (2005).

66. *PennEast Pipeline Co.*, 141 S.Ct. at 2254; *PennEast Pipeline Co.*, 938 F.3d at 96. See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958)).

67. *PennEast Pipeline Co.*, 141 S.Ct. at 2244.

68. *Id.* at 2254-55; see Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 524-25 (2009).

69. *PennEast Pipeline Co.*, 144 S.Ct. at 2255; see 2 *De Jure Belli ac Pacis* 807 (1646 ed., F. Kelsey transl. 1925).

70. *PennEast Pipeline Co.*, 144 S.Ct. at 2255; see William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 561-562 (1972).

71. *PennEast Pipeline Co.*, 144 S.Ct. at 2255.

72. *Id.*

73. *Id.*; see Act of Mar. 3, 1809, 2 Stat. 539 (1809).



of the 19<sup>th</sup> century, where the Supreme Court developed the federal eminent domain power case law to include property strictly located within a state's boundaries.<sup>74</sup> *Kohl* held that the Constitution provided the federal government with the power to condemn private lands within a state, and that power "can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised."<sup>75</sup> Seventy years later in *Oklahoma ex rel. Phillips*, the Supreme Court recognized the federal eminent domain power to include state-owned land.<sup>76</sup> In that case, the Supreme Court reasoned that just because the land is owned by the state, state ownership is "no barrier to its condemnation by the United States."<sup>77</sup> However, because the question before the Court involved PennEast's delegated use of eminent domain under the Natural Gas Act, not the exercise of eminent domain by the federal government itself, the issue was not yet fully resolved.

## 2. Even the Delegation of the Federal Eminent Domain Power is Rooted in American History

To address the next issue of whether a private entity may exercise delegated federal eminent domain power, the majority pointed to examples of private delegation as common practice from the early years of the United States.<sup>78</sup> For instance, the Court cited examples of the federal government authorizing private parties to exercise the power of eminent domain through direct condemnation proceedings as early as 1809.<sup>79</sup> Then, 20 years after *Kohl*, in *Luxton*, the Court extended the ability of private delegates to exercise the federal eminent domain power within state boundaries.<sup>80</sup> In *Luxton*, the Court reasoned that Congress "may, at its discretion, use its sovereign powers, directly or through a corporation created for that object."<sup>81</sup>

Crucial to the decision, the majority then discussed a federal circuit case arising in New Jersey, where New Jersey sought an injunction to stop construction of a bridge on state-owned lands.<sup>82</sup> In *Stockton*, Supreme Court Justice Bradley, riding circuit, reasoned that if Congress chose a proper corporation, "whether of the state or out of the state," that corporation is proper for the completion of a project.<sup>83</sup> Also, Justice Bradley recognized that if the state's argument were to have prevailed, then every time interstate lines were to be crossed, the state would have to give consent and that would be impracticable because some state-owned land

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74. *PennEast Pipeline Co.*, 144 S.Ct. at 2255.

75. *Id.* (quoting *Kohl v. United States*, 91 S.Ct. 367, 374 (1876)).

76. *Id.* (citing *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941)).

77. *PennEast Pipeline Co.*, 144 S.Ct. at 2255 (citing *Oklahoma ex rel. Phillips*, 313 U.S. at 534).

78. *Id.*

79. *Id.* at 2256; see John F. Hart, *The Maryland Mill Act, 1669-1766*, 39 AM. J. LEGAL HIST. 1 (1995); see also Act of Mar. 3, 1809, 2 Stat. 539; see also Act of Mar. 2, 1831, 4 Stat. 477.

80. *PennEast Pipeline Co.*, 144 S.Ct. at 2256. See *Luxton v. North River Bridge Co.*, 153 U.S. 525 (1894).

81. *PennEast Pipeline Co.*, 144 S.Ct. at 2256 (citing *Luxton*, 153 U.S. at 530).

82. *Id.*; see *Stockton v. Baltimore & N. Y. R. Co.*, 32 F. 9 (C.C.N.J. 1887).

83. *PennEast Pipeline Co.*, 144 S.Ct. at 2256; see *Stockton*, 32 F. at 14.

would be crossed.<sup>84</sup> The majority then noted that three years later, in *Cherokee Nation*, the Supreme Court fully adopted Justice Bradley's reasoning and extended it to include "Indian Nations or tribe[s]."<sup>85</sup>

Thus, the majority concluded, it had been common practice for the federal government to invoke eminent domain as well as to delegate it to private parties since its inception, within state boundaries, including against state property.<sup>86</sup>

The Court next explained there are two ways that the United States can take property under its eminent domain power: (1) the United States can enter into the physical possession of property without authority of a court order and award compensation later, or (2) the United States can institute condemnation proceedings under various acts of Congress providing authority for such takings.<sup>87</sup> The Court stated that 15 U.S.C. §717f(h) follows this path by allowing the government to initiate takings if no agreement is reached with landowners or in the alternative, to initiate condemnation proceedings.<sup>88</sup>

The Court found that when Congress amended the NGA, there was no dispute that §717f(h) was designed to solve the issue of "[s]tates impeding interstate pipeline development by withholding access to their own eminent domain procedures."<sup>89</sup> Due to the newly amended NGA, at that time and in the decades that followed, it was "understood . . . that State's property interest would be subject to condemnation."<sup>90</sup> Following the path already established by the Court, it concluded that by its terms, NGA §7f (h) delegates to certificate holders the power to condemn any necessary rights-of-way, including land in which a state holds an interest.<sup>91</sup>

### 3. New Jersey's and the Dissenters' Arguments That Sovereign Immunity Protections Should Have Prevented PennEast's Actions Fail to Achieve a Majority

The majority used the remainder of the opinion to address New Jersey's claim (that was also shared by the principal dissenters) that sovereign immunity would have barred PennEast's condemnation action, and New Jersey's separate claim that the NGA did not speak with the sufficient clarity to authorize PennEast's condemnation actions.<sup>92</sup> The majority held that these claims fell to the proposition

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84. *PennEast Pipeline Co.*, 144 S.Ct. at 2256; see *Stockton*, 32 F. at 17.

85. *PennEast Pipeline Co.*, 144 S.Ct. at 2255-56; see *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641 (1890).

86. *PennEast Pipeline Co.*, 144 S.Ct at 2257.

87. *Id.*; see *United States v. Dow*, 357 S.Ct. 17, 21 (1958).

88. *PennEast Pipeline Co.*, 144 S.Ct at 2257.

89. *Id.* (citing S. Rep. No. 429, at 2-4).

90. *Id.* (citing *Natural Gas Act: Hearing on S. 734 Before the S. Comm. On Interstate and Foreign Commerce*, 80<sup>th</sup> Cong. 105 (1947)).

91. *Id.* at 2257.

92. *PennEast Pipeline Co.*, 141 S.Ct. at 2244.

that the eminent domain power, as agreed at the “Plan of the Convention,” was “complete.”<sup>93</sup>

With respect to the contention that sovereign immunity bars condemnation suits against nonconsenting states, the majority disagreed on the following logical progression: states may be subject to suit under various circumstances, including if they consented in the “plan of the convention;” and the states consented to the exercise of the federal eminent domain power in the “plan of the convention,” including in condemnation proceedings brought by private delegates. Thus, Justice Barrett and her joining dissenters erroneously would “divorce the eminent domain power from the power to bring condemnation actions.”<sup>94</sup> And for the same reasons, the majority asserted, the argument advanced by Justice Gorsuch, joined by Justice Thomas, that the Eleventh Amendment divests federal courts of subject-matter jurisdiction over suits like those filed by PennEast falls to the fact that consent to eminent domain proceedings is “inherent in the constitutional plan.”<sup>95</sup>

Lastly, the majority addressed New Jersey’s argument that the Natural Gas Act did not unequivocally delegate the federal government’s exemption from state sovereign immunity to PennEast.<sup>96</sup> However, the majority stated the issue again is controlled by “whether the United States can delegate its eminent domain power to private parties”<sup>97</sup> and held that, regardless of whether the federal government must speak with “unmistakable clarity when delegating its freestanding exemption from state sovereign immunity,” there is no equivalent requirement when the federal government authorizes a private entity to exercise its eminent domain power i.e., “[s]tates thus have no immunity left to waive or abrogate when it comes to condemnation suits by the Federal Government and its delegates.”<sup>98</sup> Therefore, the Supreme Court held that condemnation actions such as those pursuant to 15 U.S.C. § 717f(h) do not offend state sovereign immunity because states consented to the federal eminent domain power at the Convention.<sup>99</sup>

#### 4. Focusing on the Dissenters’ Point of View

The Court split in this case was a 5-4 decision, with the opinion of the Court written by Chief Justice Roberts.<sup>100</sup> Justices Breyer, Alito, Sotomayor, and Kavanaugh joined the majority, while Justices Gorsuch<sup>101</sup> and Barrett<sup>102</sup> wrote dissenting opinions.

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93. *Id.*; see *Torres v. Texas Dep’t of Pub. Safety*, 142 S.Ct. 2455 (2022) (applying *PennEast* understanding of “complete” powers in decision allowing returning veterans to sue states to enforce federal right to reclaim prior jobs).

94. *Id.* at 2260.

95. *Id.* at 2263.

96. *PennEast Pipeline Co.*, 141 S.Ct. at 2262.

97. *Id.*

98. *Id.* at 2262-63.

99. *PennEast Pipeline Co.*, 141 S.Ct. at 2263.

100. See generally *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244 (2021).

101. *Id.* (joined by Justice Thomas).

102. *Id.* (joined by Justices Thomas, Gorsuch, and Kagan).

a. Should Federal Courts Have Heard this Case?

Justice Barrett's dissent targeted the notion that New Jersey surrendered its sovereign immunity to condemnation suits at the Convention.<sup>103</sup> The dissent began at the outset by declaring that neither the Indian Commerce Clause, Interstate Commerce Clause, nor the Intellectual Property Clause allow abrogation of immunity from suit.<sup>104</sup> She also contended that there is only one exception to the general rule that Congress cannot circumvent state sovereign immunity by resort to Article I, and that is under the Bankruptcy Clause.<sup>105</sup> Therefore, Justice Barrett argued, condemnation suits do not fall within this exception.<sup>106</sup>

Justice Barrett's dissent attacked the idea that states surrendered their sovereign immunity with respect to eminent domain at the Convention.<sup>107</sup> First, it stated "the Constitution enumerates no stand-alone eminent-domain power."<sup>108</sup> She argued that case precedent allows the federal government to exercise the right of eminent domain only "so far as is necessary to the enjoyment of powers conferred upon it by the Constitution."<sup>109</sup> The dissenters claimed the taking of property is an exercise of another Constitutional power, the Commerce Clause augmented by the Necessary and Proper Clause.<sup>110</sup> Therefore, when Congress allows a private party to take property in service of a federally authorized project, it is choosing a means by which to "carry an enumerated power into effect."<sup>111</sup>

Second, Justice Barrett's dissent stated that for a state to surrender immunity at the Convention implies that eminent domain occupies a unique place in the constitutional structure.<sup>112</sup> However, because a "taking is a garden-variety exercise of an enumerated power" like the Commerce Clause,<sup>113</sup> the dissenters argued, it is the federal government that has the power to take land – because "states have no sovereign immunity as against the Federal Government" – but this does not confer the same powers to a private entity to bring a condemnation suit against a nonconsenting state.<sup>114</sup>

The dissent also disagreed with the meaning of the cases cited by the majority. Where the majority said precedent fully supported a private party bringing a condemnation action against a state, Justice Barrett and the other dissenters claimed the majority could not "muster even a single decision involving a private condemnation suit against a State, let alone any decision holding that the States

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103. *PennEast Pipeline Co.*, 141 S.Ct. at 2265 (Barrett, J., Dissenting).

104. *Id.* at 2266.

105. *Id.*

106. *Id.*

107. *PennEast Pipeline Co.*, 141 S.Ct. at 2265 (Barrett, J., Dissenting).

108. *Id.* at 2265.

109. *Id.*; see *Kohl*, 91 U.S. at 372; see generally *McCulloch v. Maryland*, 17 U.S. 316 (1819).

110. *PennEast Pipeline Co.*, 141 S.Ct. at 2267 (Barrett, J., dissenting).

111. *Id.*

112. *Id.*

113. *Id.*

114. *PennEast Pipeline Co.*, 141 S.Ct. at 2267 (Barrett, J., Dissenting).

lack immunity from such suits.”<sup>115</sup> Rather, the dissenters contended, the precedents cited by the majority all involve suits brought by states, the United States, private parties against each other, and suits brought by Indian tribes against private parties, none of which truly implicate sovereign immunity.<sup>116</sup> The dissent also focused on the length of time between significant holdings in the development of eminent domain case law—long after the ratification of the Constitution—to assail the idea the history “unequivocally establishes that States surrendered their immunity to private condemnation suits in the plan of the convention.”<sup>117</sup> Rather, the dissenters concluded that since history is the only place left to evaluate evidence of states consenting to private condemnation suits, and no evidence of states consenting exists, the majority did not provide compelling evidence to show that “immunity to private condemnation suits” was surrendered at the Convention.<sup>118</sup>

Lastly, Justice Barrett’s dissent disputed the central notion of the majority’s opinion that the power of eminent domain is “complete in itself” and that immunity of states from suit would render invalid the federal power of eminent domain.<sup>119</sup> Rather, as an extension of the constitutional limits on the federal government, the Eleventh Amendment is part of the “constitutional design” in that it is strictly designed to make it difficult for Congress to set sovereign immunity aside and allow private condemnation suits.<sup>120</sup> Moreover, the dissenters said, the eminent domain power belongs to the United States not PennEast.<sup>121</sup> Ultimately, the dissent concluded that the states did not surrender their sovereign immunity to suits authorized by Congress’s Commerce Clause power and, therefore, the lack of historical evidence of private suits brought against nonconsenting states shows that state sovereign immunity is completely applicable in this case and should bar PennEast’s suits.<sup>122</sup>

Justice Gorsuch’s dissent asserted there are two types of immunities, one of which Chief Justice Roberts does not completely address, adding to the confusion of Eleventh Amendment precedent.<sup>123</sup> The first is known as “structural immunity,” which the dissent stated is based on the structure of the Constitution, so it applies to both federal and state tribunals, regardless of the plaintiff’s state citizenship or non-U.S. citizenship.<sup>124</sup> Also, Justice Gorsuch’s dissent stated that structural immunity relates to personal jurisdiction so the sovereign can waive the immunity by consent.<sup>125</sup> The second type, according to the dissent, is called “Elev-

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115. *Id.* at 2268.

116. *Id.*

117. *Id.* (stating it took 75 years for the Supreme Court to expand the eminent domain power to apply to private land within a state and another 77 years before it applied eminent domain to lands owned by a state).

118. *PennEast Pipeline Co.*, 141 S.Ct. at 2268-69 (Barrett, J., Dissenting).

119. *Id.* at 2269.

120. *Id.* at 2270.

121. *Id.* at 2244.

122. *PennEast Pipeline Co.*, 141 S.Ct. at 2271.

123. *Id.* at 2263 (Gorsuch, J., Dissenting).

124. *Id.* at 2264.

125. *Id.*; see *Franchise Tax Bd. of California v. Hyatt*, 139 S.Ct. 1485 (2019).

enth Amendment immunity,” which “sometimes does less than structural immunity” and “sometimes the amendment does more.”<sup>126</sup> The Gorsuch dissent stated the majority conflated the structural immunity definition with the definition of “Eleventh Amendment immunity.”<sup>127</sup> Citing the Eleventh Amendment, the Gorsuch dissent argued that “it eliminates federal judicial power over one set of cases: suits filed against states, in law or equity, by diverse plaintiffs.”<sup>128</sup> Therefore, it imposed an Article III subject matter jurisdiction barrier and admitted no waivers, abrogation, or exceptions.<sup>129</sup> When applying these standards and the text, Justice Gorsuch’s dissent reasoned that since PennEast, a citizen of another state, brought a suit of law or equity against New Jersey in a federal court, it triggered subject-matter jurisdiction and therefore federal courts should not entertain this suit.<sup>130</sup> However, the dissent did note that since neither party addressed this possibility, “there is no mandatory sequencing of jurisdictional issues.”<sup>131</sup> Nonetheless, Gorsuch’s dissent argued that the jurisdictional issue could be considered on remand in the lower courts before proceeding to the merits.<sup>132</sup> Justices Gorsuch and Thomas would have barred the suit from a federal court to begin with, instead of letting it journey up to the Supreme Court.<sup>133</sup>

#### IV. CONCLUSION

*PennEast Pipeline Co. v. New Jersey* may represent a safe haven for pipeline companies with certificates in-hand that are seeking to bring condemnation suits against states.<sup>134</sup> Although there is no certainty surrounding the future applications of this case, it could open the door to future condemnation suits by private companies against states.<sup>135</sup> Effectively, the Supreme Court has at once etched a strong power of eminent domain that can be exercised by private parties already holding the power, or delegated to private parties in the future by Congress, and at the same time, raised significant questions about the sources of and true extent of a state’s immunity from suit.

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126. *PennEast Pipeline Co.*, 141 S.Ct. at 2264 (Gorsuch, J., Dissenting).

127. *Id.* at 2263.

128. *Id.* at 2264 (Gorsuch, J., Dissenting); see William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 612 (2021).

129. *PennEast Pipeline Co.*, 141 S.Ct. at 2264-65 (Gorsuch, J., Dissenting).

130. *Id.* at 2265.

131. *Id.*; see *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007).

132. *PennEast Pipeline Co.*, 141 S.Ct. at 2265 (Gorsuch, J., Dissenting).

133. *Id.* at 2263-65.

134. Brief of Respondent New Jersey Conservation Foundation, *PennEast Pipeline Co., v. New Jersey*, 141 S.Ct. 2244 (2021) (No. 19-1039), 2021 WL 1255340, at \*22.

135. *Id.* at \*24-26.

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