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COMPANIES CAN CONDEMN WHOSE PROPERTY? A DISCUSSION OF *PENNEAST PIPELINE CO., LLC v. NEW JERSEY*

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I. Introduction

The Fifth Amendment's Takings Clause permits the federal government to condemn property for public use—this is known as eminent domain.[1] The federal government can employ the power of eminent domain to take private or state-owned property, typically through condemnation proceedings.[2] A condemnation proceeding is a type of lawsuit that enables property to be taken; so, it is a means by which eminent domain is actually exercised.[3] Another doctrine, sovereign immunity, generally bars private parties from suing states in federal court.[4] Because a condemnation proceeding is a lawsuit, private parties could not sue states to condemn state-owned land due to sovereign immunity. However, unlike private entities, the federal government can sue states[5] and condemn state-owned

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1. U.S. Const. amend. V.

2. *Kohl v. United State*s, 91 U.S. 367, 371 (1875); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co*., 313 U.S. 508, 534 (1941).

3. *See condemnation proceeding*. Black's Law Dictionary (11th ed. 2019) ("A statutorily authorized lawsuit for the taking of private property for public use without the owner's consent.); *see also condemnation, taking*. Black's Law Dictionary (11th ed. 2019).

4. U.S. Const. amend XI.

5. *United States v. Tex*as, 143 U.S. 621, 646 (1892); *Blatchford v. Native Vill. of Noatak & Circle Vill*., 501 U.S. 775 (1991).

land.[6] But what happens when the federal government delegates its power of eminent domain to a private company that wants to condemn state-owned property?

After *PennEast Pipeline Co., LLC v. New Jersey*, a private company can squeeze past state sovereign immunity and initiate condemnation proceedings against a nonconsenting state.[7] In *PennEast*, the Supreme Court decided the federal government could delegate its eminent domain power to PennEast, a natural gas pipeline company, enabling it to condemn property in which New Jersey had an interest.[8] In other words, the Court held a private company can sue a state in a condemnation proceeding to take state-owned property.[9] The Court reasoned that when the federal government delegates the power of eminent domain, it delegates *all* of the characteristics that accompany that power, including the federal government's exception to state sovereign immunity.[10] This Note examines the Supreme Court's decision in *PennEast* and how this decision broadens the power of eminent domain and affects sovereign immunity.

Section II provides an overview of the history of eminent domain and sovereign immunity. Section III discusses *Sabine Pipe Line*,[11] which is the only case that directly examines the issue of a private party condemning state-owned land other than *PennEast*. Section IV summarizes the circumstances that gave rise to *PennEast*, the issue, and procedural history. Section V describes and analyzes the majority opinion and Justice Barrett's dissent. Section VI discusses the Court's use and debatable interpretation of history as well as the Court's rebuttals to counterarguments. Finally, Section VII briefly concludes this Note with an overview of the issues discussed.

II. Historical Background

A. Eminent Domain

The Fifth Amendment's Takings Clause states "nor shall any private property be taken for public use, without just compensation."[12] In the mid-

6. *Oklahoma ex rel. Phillips*, 313 U.S. at 534.
7. 141 S. Ct. 2244, 2252 (2021).
8. *Id*. at 2252, 2257.
9. *Id*.
10. *Id*. at 2257 ("The delegation is categorical.").
11. *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cnty., Texas*, 327 F.R.D. 131, 135–36 (E.D. Tex. 2017).
12. U.S. Const. amend. V.

1800s, there was opposition to federal eminent domain power.[13] Senators, congressional committees, and proposed legislation went back and forth on whether the federal government had this power; and if it did, whether takings should require state consent.[14] These discussions centered around principles of federalism and proper interpretation of the Constitution.[15] In 1845, the Court in *Pollard v. Hagan* held the United States had no "constitutional capacity" to exercise eminent domain within a state unless that power is expressly granted, and it was not.[16] Rather, this was a power the United States exercised only temporarily until a state became a state.[17] The *Pollard* Court went so far to explain that allowing the United States to exercise eminent domain power over state land would be "placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty . . . ."[18]

But in the 1875 landmark case of *Kohl v. United States*, the Supreme Court changed its tune and held the Takings Clause contains an "implied" assertion that the government may take land.[19] *Kohl* established that the federal government could employ the inherent power of eminent domain.[20] Only 20 years later, in 1895, the Court expanded this newly recognized power in *Luxton v. North River Bridge* by holding that the government could delegate the power of eminent domain to private entities.[21] This is still true today.[22] These cases established that the federal government *and* delegatees, including private entities, could exercise the power of eminent domain.

The question of who could utilize this power was seemingly settled, but whose land was subject to eminent domain still needed to be answered. Despite the text of the Fifth Amendment plainly stating, "nor shall *private*

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13. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1777–78 (2013).

14. *Id*.

15. *Id*. at 1751–52.

16. 44 U.S. 212, 223 (1845); Baude, *supra* note 13, at 1773.

17. Baude, *supra* note 13, at 1172–74.

18. *Pollard*, 44 U.S. at 230.

19. *Kohl*, 91 U.S. at 372–73 ("The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?").

20. *Id*.

21. *Luxton v. North River Bridge*, 153 U.S. 525, 530 (1894); *see* Bernard Bell, *Delegation of Eminent Domain Powers to Private Entities: In Re PennEast Pipeline Co.*, Notice & Comment, Yale J. Reg. (Jan. 2022).

22. Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 519 (2009).

property . . . ," the Court has since determined both privately owned land and state-owned land is subject to the exercise of eminent domain.[23] In *Kohl*, the Court decided property in Cincinnati, Ohio, could be taken to construct a federal building, which confirmed private property could be condemned.[24] Condemnation of private property has continued since the Court recognized the power of eminent domain in *Kohl*.

However, there are relatively few cases where the Court has held state-owned land is also subject to the federal government's eminent domain power. In *Stockton v. N.Y.R. Co.*, the Circuit Court for the District of New Jersey explained that the federal government did not need a state's consent to exercise eminent domain.[25] The *Stockton* Court explained that requiring consent would ignore that the Constitution, and the powers it vests, is the supreme law of the land.[26] Over half a century later, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, the Court explicitly stated, "[t]he fact that land is owned by a state is no barrier to its condemnation by the United States."[27]

The Court's opinion in *Kohl* put eminent domain on the map and marked the beginning of how courts interpret that power today. After the cases discussed above, the federal government has the authority to delegate its power of eminent domain, which includes the ability to condemn private or state-owned property. And there it is! That is the entirety of how eminent domain works—right? Of course not. How this delegated power can be employed is still being debated—*PennEast* being a prime example.

B. Sovereign Immunity

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."[28] Broadly,

23. *Kohl*, 91 U.S. at 371; *Oklahoma ex rel. Phillips*, 313 U.S. at 534.

24. *Kohl*, 91 U.S. at 371.

25. 32 F. 9, 17 (C.C.D.N.J. 1887).

26. *Id*. at 18–19 ("[I]t is denied that the land of the state can be taken at all without voluntary cession, or consent of the state legislature. If this is so, we are brought back to the dilemma of requiring the consent of the state in almost every case of an interstate line of communication by railroad . . . . It overlooks the fundamental principle that the constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a state is necessary, such state may always, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the constitution.").

27. *Oklahoma ex rel. Phillips*, 313 U.S. at 534 (1941).

28. U.S. Const. amend. XI.

sovereign immunity means that a government cannot be sued without its consent.[29] Today, sovereign immunity is interpreted as "prohibit[ing] suits in federal courts against state governments in law, equity, or admiralty, by a state's own citizens," or "by citizens of another state."[30] But like most constitutional provisions, the scope and meaning of sovereign immunity was debated at the founding of our country, and this debate continues now.

Implications of the Eleventh Amendment's text on state sovereignty was highly debated during its ratification.[31] The majority view of this issue believes that the Eleventh Amendment was originally understood to bar private suits against nonconsenting states.[32] This view looks to leading Founders—like Hamilton, Madison, and Marshall—who wanted to make clear that the drafted version of the Constitution preserved states' immunity from private suits.[33] However, quickly after ratification, the Court handed down *Chisholm v. Georgia*, which held that a private citizen of another state could sue Georgia without its consent.[34] Despite *Chisolm*, the Supreme Court later explained that the holding in that case was a "shock of surprise" and contrary to the original understanding of the Constitution.[35] Modern caselaw accepts that the Eleventh Amendment was meant to protect states' sovereign immunity.[36]

The minority view on this issue questions whether this was the intent of the Eleventh Amendment.[37] Professor Susan Randall argues that the history does not support the conclusion that the Constitution was meant to protect states' sovereign immunity.[38] Specifically, statements often cited as support for this position from Founders like Hamilton, Madison, and Marshall are

29. *Sovereign immunity*. Black's Law Dictionary (11th ed. 2019) ("A government's immunity from being sued in its own courts without its consent.").

30. Erwin Chemerinsky, *Constitutional Law Principles and Policies* §2.10, 195 (6th ed. 2019).

31. *Id*. at §2.10.3.

32. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 Okla. L. Rev. 439, 443 (2005); Ann K. Wooster, Annotation, *Immunity of State from Civil Suits Under Eleventh Amendment—Supreme Court Cases*, 187 A.L.R. Fed. 175, §2(a) (2003); *Alden v. Maine*, 527 U.S. 706, 717 (1999).

33. Wooster, *supra* note 32; Sisk *supra* note 29, at 443–44.

34. 2 U.S. 419, 420 (1793).

35. Wooster, *supra* note 32; *Hans v. Louisiana*, 134 U.S. 1, 11–12 (1890); *Seminole Tribe of Florida. v. Florida,* 517 U.S. 44, 55 (1996).

36. Sisk, *supra* note 32, at 443; *Alden*, 527 U.S. at 717; *Welch v. Texas Dep't of Highways & Pub. Transp*., 483 U.S. 468, 483 (1987).

37. Sisk, *supra* note 29, at 444.

38. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 10–11 (2002).

contradicted by the Founders' own later statements as well as interpretations made by their contemporaries.[39] Further, Randall explains that discussions during ratification do not clearly support the Court's current view of history; rather, debates in state conventions tend to show that states understood they did not have complete sovereign immunity in the courts.[40] Notably, in cases involving the issue of state sovereign immunity, dissenters like Justice Stevens[41] and Justice Souter[42] similarly view the history as not being on the majority view's side.[43]

The different interpretations of what the predominant view was during the ratification of the Eleventh Amendment informs the debate about the scope of sovereign immunity. Sovereign immunity does not bar *all* suits against a state; several exceptions to state sovereign immunity exist. A state can be sued by another state or the federal government.[44] Moreover, Congress can abrogate state immunity in limited circumstances. Generally, Congress can limit immunity by enforcing rights under the Fourteenth Amendment,[45] but cannot abrogate immunity pursuant to its Article I powers.[46] A state can also consent to being sued or waive its immunity from suits.[47]

A significant point of divergence in *PennEast* between the majority's opinion and Justice Barrett's dissent is whether states implicitly waived their sovereign immunity to these specific suits involving eminent domain in the plan of the Convention.[48] Like most constitutional provisions, there are typically several layers to different interpretations. There are many ways to interpret the text of the Constitution, many ways to interpret the

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39. *Id*. at 13.

40. *Id*. at 9, 54–55.

41. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 92 (2000) (Stevens, J., dissenting in part, concurring in part); *Seminole Tribe of Florida*, 517 U.S. at 76 (Stevens, J., dissenting).

42. *Seminole Tribe of Florida*, 517 U.S. at 100 (Souter, J., dissenting); *Alden*, 527 U.S. at 760 (Souter, J., dissenting).

43. Randall, *supra* note 38, at 10; Sisk *supra* note 30, at 444.

44. *Blatchford*, 501 U.S. at 782 ("We have hitherto found a surrender of immunity against particular litigants in only two contexts: suits by sister States, . . . and suits by the United States.").

45. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

46. *Seminole Tribe of Florida*, 517 U.S. at 73.

47. *Clark v. Barnard*, 108 U.S. 436, 448 (1883) ("The immunity from suit belonging to a state, . . . is a personal privilege which it may waive at pleasure."); *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 382 (1998).

48. *PennEast*, 141 S. Ct. at 2257; *id*. at 2267 (Barrett, J., dissenting).

cases that interpreted the Constitution, and so on. This Note explains the Court's differing opinions on this issue in Section V.

III. Current Caselaw

Two previous judicial opinions discuss the interplay between state sovereign immunity and eminent domain exercised by a private party. The first is the United States District Court for the Eastern District of Texas's decision in *Sabine Pipe Line*. The second is the Third Circuit's decision regarding the case at issue,[49] which this Note discusses in the procedural history portion of Section V. Both of these decisions held that sovereign immunity bars condemnation of state-owned land because parties cannot sue a state in federal court.

At the district level, courts have determined that a private company cannot be sued in federal court to condemn state-owned land. In *Sabine Pipe Line*, the natural gas company had a prior right-of-way agreement ("ROA") over three parcels of land.[50] But when the land was sold, the new owner of one of the parcels, the Texas Parks and Wildlife Department ("TPWD"), refused to renew the ROA.[51] The natural gas company filed a complaint for condemnation seeking to exercise eminent domain granted to it by the Natural Gas Act ("NGA"),[52] and TPWD filed a motion to dismiss asserting the Eleventh Amendment barred the action.[53]

The *Sabine Pipe Line* court explained the power of eminent domain is distinct from the federal government's ability to sue nonconsenting states.[54] Eminent domain powers may be delegated because the federal government has the inherent power to do so.[55] However, the federal government does not have the inherent power to sue nonconsenting states; rather, the federal government "enjoys a special exemption from the Eleventh Amendment."[56] States granted permission to be sued by the federal government when they ratified the Constitution.[57] For these reasons, the court held the natural gas

49. *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019), *as amended* (Sept. 11, 2019), *as amended* (Sept. 19, 2019), *rev'd and remanded sub nom. PennEast Pipeline Co., LLC*, 141 S. Ct. 2244, (2021).

50. *Sabine Pipe Line*, 327 F.R.D. at 135.

51. *Id*. at 135–36.

52. 15 U.S.C.A. §§ 717–717w (West).

53. 327 F.R.D. at 135–36.

54. *Id.* at 140–41.

55. *Id*. at 139–40.

56. *Id*. at 140.

57. *Id*.

company did not acquire the right to sue TPWD simply because it had been delegated the federal government's eminent domain power.[58]

IV. Statement of the Case

A. Natural Gas Act

The NGA[59] delegates the right to exercise eminent domain to private companies.[60] Under § 717f(c)(1)(A), a company that would like to condemn property must apply for a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC").[61] The company must also demonstrate that it could not negotiate a deal with the property owner and that the value of the property exceeds $3,000.[62] If and when the FERC issues the certificate, the holder "may exercise eminent domain against any holdouts in acquiring property rights necessary to complete the pipeline."[63] This means certificate holders can initiate eminent domain proceedings (a condemnation proceeding) in federal court. This is the process PennEast used.[64]

B. Facts

PennEast is a natural gas company that applied to the FERC for a certificate of public convenience and necessity to build a 116-mile pipeline from Pennsylvania to New Jersey.[65] In January 2018, the FERC granted PennEast the certificate to construct the pipeline.[66] PennEast wanted to exercise federal eminent domain power under § 717f of the NGA to obtain rights-of-way along the pipeline.[67] PennEast filed complaints in the United States District Court for the District of New Jersey seeking to condemn several parcels of land in which New Jersey claimed to have a possessory interest in as well as conservation easements, and other parcels in which the

58. *Id*. at 141.
59. §§ 717–717w.
60. *Id.* at § 717f (h).
61. *Id.*; *Env't Def. Fund v. Fed. Energy Regul. Comm'n*, 2 F.4th 953, 961 (D.C. Cir. 2021).
62. § 717f(h).
63. *Id*.
64. *PennEast*, 141 S. Ct. at 2253.
65. *Id*.
66. *Id*.
67. *Id*.

New Jersey Conservation Foundation had an interest.[68] New Jersey moved to dismiss PennEast's complaints on sovereign immunity grounds.[69]

C. Procedural History and Issue

The district court addressed New Jersey's objections regarding sovereign immunity and whether the court had jurisdiction to hear the case.[70] The district court found that because PennEast held a certificate of compliance from the FERC it stood "in the shoes of the sovereign," which made the Eleventh Amendment inapplicable.[71] The district court granted PennEast's application for orders of condemnation so it could begin construction.[72]

The Third Circuit vacated the district court's orders of condemnation and remanded the case for dismissal of the claims against New Jersey.[73] The Third Circuit found that a private party does not acquire the government's exemption from the Eleventh Amendment simply because it was delegated the government's power of eminent domain.[74] The court reasoned that the power of eminent domain is separate from the power to hale states to federal court.[75] The Third Circuit explained its view that the federal government can exercise eminent domain over states not because it inherently has the right to do so but because it "enjoys a special exemption."[76]

The court held it was unlikely this special exemption could be delegated for three reasons.[77] First, there was no caselaw to support the conclusion that the government's exemption from the Eleventh Amendment could be delegated.[78] The court noted that the Supreme Court expressed doubt that the exemption could be delegated in *Blatchford v. Native Village of Noatak*.[79] In *Blatchford*, a Native American tribe sued a state official

68. *Id*.

69. *Id*.

70. *In re Penneast Pipeline Co., LLC*, No. CV 18-1585, 2018 WL 6584893, at 8. (D.N.J. Dec. 14, 2018), *vacated and remanded sub nom. In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019)

71. *Id*. at 12.

72. *Id*. at 25–26.

73. *In re PennEast Pipeline Co., LLC*, 938 F.3d at 99.

74. *Id*. at 104.

75. *Id*. at 100.

76. *Id*. at 104.

77. *Id*. at 100.

78. *Id*. at 105.

79. *Id*. at 105 (citing *Blatchford v. Native Vill. of Noatak & Circle Vill*., 501 U.S. 775, 777 (1991)).

seeking payment they believed was owed to them under a state revenue-sharing statute.[80] The tribe argued the suit was proper because Congress had delegated it the federal government's exemption from sovereign immunity.[81] Justice Scalia, writing for the majority, wrote, "we doubt . . . that [the] sovereign immunity exemption *can* be delegated."[82] The *Blatchford* Court explained that "[t]he consent, 'inherent in the convention,' to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select . . . ."[83] Justice Scalia further characterized this theory of delegation as "a creature of [its] own invention."[84] The Third Circuit concluded that not only was there "no authority for PennEast's delegation theory of sovereign immunity," but caselaw actually suggested the government cannot delegate its exemption from sovereign immunity.[85]

Second, there is a significant difference between the United States bringing a suit against a state and a suit brought by a private entity.[86] The court highlighted that unlike for-profit, private parties, the federal government has constitutional duties as well as political responsibilities it must consider when acting.[87] Given that these considerations are "not insignificant," the court felt not being able to delegate an exception to sovereign immunity made sense.[88]

Third, allowing delegation of this exemption would "undermine" limits on abrogating state immunity.[89] The court explained the Supreme Court has outlined exacting requirements for Congress to be able to abrogate state immunity.[90] Congressional action must be "unmistakably clear."[91] This is a "high bar" that must be met without "nontextual arguments,"[92] and reference to legislative history should be unnecessary.[93] Further, Congress cannot abrogate state sovereignty pursuant to its Commerce Clause

80. *Blatchford*, 501 U.S. at 775.
81. *Id*. at 785.
82. *Id*.
83. *Id*.
84. *Id*. at 786.
85. *In re PennEast Pipeline Co., LLC,* 938 F.3d at 106–07.
86. *Id*. at 107.
87. *Id*.
88. *Id*.
89. *Id*. at 105.
90. *Id*. at 107–08.
91. *Id*. at 107 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989)).
92. *Id*. at 107.
93. *Dellmuth*, 491 U.S. at 230.

powers.[94] These are exacting requirements because abrogating "sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine."[95] With this in mind, the Third Circuit concluded that accepting PennEast's argument that the federal government's exemption from sovereign immunity can be delegated would allow Congress to skirt the Eleventh Amendment through legislation—making the Eleventh Amendment's protections meaningless.[96]

The Third Circuit explained that even if the government's exemption could be delegated, the NGA would not be a valid congressional abrogation of sovereign immunity because it is not sufficiently clear.[97] The court found the NGA does not indicate that it is intended to delegate the government's exception to the Eleventh Amendment; it does not mention the Eleventh Amendment or sovereign immunity at all.[98] Because the NGA's text has no indication it meant to abrogate state sovereign immunity, the Third Circuit refused to interpret it to allow delegation of the federal government's exemption from state sovereign immunity.[99] This is especially so because that interpretation would "upend a fundamental aspect of our constitutional design."[100] The court therefore vacated the district court's order allowing PennEast to condemn New Jersey's property interests.[101]

The Supreme Court granted certiorari to decide whether the NGA authorizes certificate holders to condemn land in which a state claims an interest.[102]

V. Decision

A. Majority Opinion

A 5-4 majority of the Court found PennEast could initiate condemnation proceedings against state property pursuant to the NGA's grant of eminent

94. *In re PennEast Pipeline Co., LLC,* 938 F.3d at 108; *Seminole Tribe of Fla.*, 517 U.S. at 59.

95. *In re PennEast Pipeline Co., LLC,* 938 F.3d at 107 (quoting *Dellmuth*, 491 U.S. at 227).

96. *Id*. at 109 n.15.

97. *Id*. at 105, 108.

98. *Id*. at 110.

99. *Id*. at 112.

100. *Id*.

101. *Id*. at 113.

102. *PennEast*, 141 S. Ct. at 2254.

domain power.[103] The Court reached its conclusion by establishing premises that, if taken as true, allow the inference to be made that PennEast's exercise of eminent domain includes the right to sue a state in a condemnation proceeding. Chief Justice Roberts began the majority opinion by discussing the government's eminent domain power and explaining that it includes the authority to condemn private and state-owned land.[104] Next, the Court established that the power to condemn private and state-owned land can be delegated to private entities and that the NGA does just that.[105] The Court then explained that sovereign immunity does not bar PennEast from exercising eminent domain because states consented to such suits when they ratified the Constitution.[106]

1. History of the Power of Eminent Domain

The majority opinion found that the Fifth Amendment recognized the power of eminent domain and then looked to caselaw to establish that this power includes the right to take land within the federal government's jurisdiction, private property, and state-owned property.[107] The Court begins by positing that the history of eminent domain dates back to Biblical times and was exercised in England and the Colonies.[108] According to the majority's view, this age-old power was recognized in the Fifth Amendment's Takings Clause.[109] The Court noted that this power was affirmed soon after ratification in a congressional act from 1809, which authorized a turnpike road to be built in the District of Columbia.[110] This act supports the argument that the federal government exercised eminent domain over property within its exclusive federal jurisdiction.[111]

Turning to caselaw, the Court noted *Kohl v. United States* affirmed the existence of the inherent power of eminent domain and held this power could be exercised over private property.[112] The majority then explained this power is not exclusive to private property.[113] The Court cites *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, which states "[t]he fact that land is

103. *Id*. at 2252.
104. *Id*. at 2254.
105. *Id*. at 2257.
106. *Id*. at 2259.
107. *Id*. at 2254–55.
108. *Id*. at 2255.
109. *Id*.
110. *Id.*
111. *Id*.
112. *Id*.
113. *Id*.

owned by a state is no barrier to its condemnation by the United States."[114] The Court concluded that not only can eminent domain be exercised over private land, but state-owned land as well.[115]

2. Delegation of the Power of Eminent Domain to Private Parties

The next section of the opinion seeks to establish that the power of eminent domain, which can be exercised over private and state-owned land, can be delegated to private parties.[116] The Court explains that delegating this power to private parties was "commonplace before and after the founding of the Colonies and then the State to authorize private condemnation of land for a variety of public works."[117] In *Stockton v. N.Y.R. Co.*, Justice Bradley held a New York corporation could take New Jersey's land to build a bridge.[118] In *Cherokee Nation v. Southern Kansas Ry. Co.*, the Court held a congressional act could authorize a railroad company to condemn Cherokee-owned land.[119] The *Cherokee Nation* Court reasoned it had already been established that eminent domain could be exercised over state land, so it follows that it can also be exercised "in a Territory occupied by an Indian nation or tribe."[120] In reliance on this caselaw, Chief Justice Roberts concluded, "eminent domain power may be exercised—whether by the Government or its delegatees—within state boundaries, including against state property."[121] In other words, a private entity is delegated *all* the government's power of eminent domain, not authority to exercise eminent domain over this and not that.[122]

The Court further explained § 717f(h) was specifically passed to deal with the issue of whether eminent domain may be used by private companies.[123] States were impeding pipelines by not allowing companies to use their eminent domain procedures, which effectively halts the condemnation.[124] Section 717f resolved this by affirming that when the power of eminent domain is delegated to a company it includes the right to

114. *Id*. (quoting *State of Oklahoma ex rel. Phillips*, 313 U.S. at 534).
115. *Id*. at 2254.
116. *Id*. at 2255.
117. *Id*.
118. 32 F. at. 17, 21.
119. 135 U.S. 641 (1890).
120. *Id*. at 656–57; *PennEast*, 141 S. Ct. at 2256.
121. *PennEast*, 141 S. Ct. at 2257.
122. *Id*. ("The delegation is categorical.").
123. *Id.*
124. *Id*.

exercise it over state-owned land, just as the federal government does.[125] Therefore, PennEast has the power to condemn state-owned land.[126]

3. States Consented to Eminent Domain Suits in the Plan of the Convention

The majority opinion then addressed the issue of whether sovereign immunity bars private companies from initiating condemnation proceedings against states.[127] Meaning, the Court discussed whether a private entity was barred by sovereign immunity from suing a state in court to initiate the process of condemning state-owned land; this is also known as the power to condemn. The Court held sovereign immunity does not bar condemnation proceedings because the power of eminent domain cannot be divorced from the power to condemn.[128]

The Court begins by agreeing with Justice Barrett's dissent that immunity cannot be abrogated through Congress's use of its commerce power.[129] However, the Court explained a state's immunity can be abrogated in another way—states can be "sued if they have consented to the suit in the plan of the Convention."[130] The majority argues that states implicitly consented to suits by the federal government with regard to eminent domain because it was "contemplated that States' eminent domain power would yield to" the federal government's.[131] Because of the concept of federal supremacy, when states consented "in the plan of the Convention to the exercise of federal eminent domain power," they waived their sovereign immunity to the federal government exercising eminent domain.[132] As noted above, the federal government delegates the *entire* power of eminent domain, which means that power carries with it the implicit consent to these suits. Accordingly, when PennEast exercises that delegated power, it includes states' implicit consent. A condemnation suit against New Jersey therefore "falls comfortably within the class of suits to which States consented under the plan of the Convention."[133] PennEast may

125. *Id*. ("By its terms, §717f(h) delegates to certificate holders the power to condemn any necessary rights-of-way, including land in which a State holds an interest.)

126. *Id.*

127. *Id.* at 2257–58.

128. *Id*. at 2260, 2263.

129. *Id*. at 2259.

130. *Id.* at 2259; *Alden v. Maine*, 527 U.S. 706, 755, (1999).

131. *PennEast*, at 2259.

132. *Id*.

133. *Id*.

exercise eminent domain because it is outside the protection of New Jersey's sovereign immunity.

The majority then addressed New Jersey and the dissent's argument that there is no evidence of these kind of suits at the time of the founding so states could not have understood ratifying the Constitution as consenting to being sued by a private party, like the suit at hand.[134] The Court explained that a lack of private suits against states does not cast doubt on the ability to exercise eminent domain within states.[135] *Kohl* resolved the issue by concluding the government can exercise eminent domain over state-owned land and that this was "known and appropriate" at the founding.[136]

Further, the Court believes New Jersey and the dissent frame the issue incorrectly.[137] It is not about a private entity's ability to sue a state, but whether the exercise of eminent domain *includes* the ability to sue the state, which the Court answers in the affirmative.[138] The power of eminent domain is "inextricably intertwined with the ability to condemn."[139] The power of eminent domain cannot be separated from the power to condemn because without the ability to condemn (sue the state for the land), the only way to exercise eminent domain is to take the land and force the state to sue for compensation.[140] The Court explained that eminent domain necessarily has to include the power to condemn, otherwise delegatees must take land from a state without first going to court, which is antithetical to principles of state sovereignty.[141]

Lastly, the majority briefly addressed New Jersey's argument, and the Third Circuit's position, that the NGA does not authorize these suits because it lacks the requisite clarity to do so. The Court explained that this again mischaracterizes the issue.[142] It is not whether the federal government can delegate its exception to sovereign immunity to sue a state, but whether the government can delegate its eminent domain powers to a private entity.[143] New Jersey agreed § 717f(h) delegates the power to condemn property with "sufficient clarity," but argued the statute did not clearly

134. *Id*. at 2260.
135. *Id*. at 2261.
136. *Id*. (quoting *Kohl*, 91 U.S. at 372).
137. *Id*. at 2260.
138. *Id*.
139. *Id*.
140. *Id*.
141. *Id*
142. *Id*. at 2662.
143. *Id*.

delegate the power to condemn *state* property.[144] The Court explained that the power of eminent domain is delegated "in its entirety" and states consented to this during the ratification of the Constitution.[145] Because the states consented to the entire power of eminent domain, which includes the power to condemn, the NGA's delegation of eminent domain power creates no sovereign immunity issues.[146]

The Court reversed the Third Circuit's decision and concluded that the NGA "fits well within [the] tradition" of the federal government delegating to private corporations the ability to take or condemn against private or state-owned land.[147] Because PennEast had the appropriate FERC certificate, it was permitted to condemn all necessary rights-of-ways regardless of whether it is privately owned or state-owned.[148]

B. Justice Barrett's Dissent

Joined by Justice Thomas, Justice Kagan, and Justice Gorsuch, Justice Barrett's dissenting opinion reasoned that precedent should have easily decided this case, but she continued her opinion beyond this issue to highlight several problems with the majority's reasoning.[149] Justice Barrett found the majority's conclusion, which holds that states "surrendered their immunity to private condemnation suits in the 'plan of the Convention,'"[150] is not supported by the structure of the Constitution, caselaw, or history.[151] Because there was no implicit waiver of sovereign immunity to these kinds of suits, the majority's inquiry into the scope of the eminent domain power frames the issue in this case incorrectly.[152] The relevant question is whether the NGA can enable a private party to sue a nonconsenting state.[153] Justice Barrett found the NGA is not an appropriate way to abrogate states' sovereign immunity.[154] Finally, Justice Barrett addressed the majority's argument that the power of eminent domain must necessarily include the ability to sue nonconsenting states.[155]

144. *Id*. at 2263.
145. *Id*.
146. *Id*.
147. *Id*.
148. *Id*.
149. *PennEast*, 141 S. Ct. at 2265 (Barrett, J., dissenting).
150. *Id*. at 2266 (quoting the majority at 2259).
151. *Id*.
152. *Id*. at 2267.
153. *Id*.
154. *Id*.
155. *Id*. at 2269

In order to conclude that states have relinquished their sovereign immunity, there must be compelling evidence that the surrender was inherent in the constitutional design.[156] There are two reasons Justice Barrett believes our constitutional structure does not permit private parties to condemn state-owned property. First, unlike the majority, Justice Barrett interprets the power of eminent domain as not being a "stand-alone" power.[157] Meaning, the Takings Clause is a *limitation* on "Government power, not a grant of it," so any exercise of eminent domain is through other constitutional provisions.[158] For example, when Congress permits condemnation through the NGA, Congress is choosing "a means by which to carry out" its Commerce Clause Power.[159]

Second, it is an incorrect assumption that the federal government can exercise eminent domain over state-owned land *because* they ratified the Constitution.[160] The federal government can exercise eminent domain over state land not because states specifically consented to it, but because states have no immunity against *any* suits by the federal government, *Oklahoma ex rel. Phillips* is an example of this.[161] In other words, there is no implicit consent needed for the federal government to condemn state-owned land.

Because eminent domain is exercised through other constitutional provisions and states did not implicitly waive their immunity to private suits, the pertinent question for Justice Barrett is whether the NGA abrogated New Jersey's sovereign immunity so that PennEast was not barred from condemning state-owned land.[162] Congress passed the NGA pursuant to its Article I Commerce Clause power.[163] The Supreme Court has consistently held Congress cannot abrogate states' sovereign immunity pursuant to its Article I powers.[164] Because Congress passed the NGA pursuant to its Commerce Clause power and is barred from abrogating states' sovereign immunity in this manner, § 717f(h) cannot authorize these

156. *Id*. at 2266 (citing *Blatchford*, 501 U.S at 781).

157. *Compare PennEast*, 141 S. Ct. at 2266 (Barrett, J., dissenting) *with PennEast*, 141 S. Ct. at 2255 (majority opinion stating, "[t]he Takings Clause of the Fifth Amendment [] recognized the existence of such power.").

158. *PennEast*, 141 S. Ct. at 2267, n. 2.

159. *Id*. at 2267.

160. *Id*.

161. *Id*.; *West Virginia v. United States*, 479 U.S. 305, 311 (1987).

162. *PennEast*, 141 S. Ct. at 2267.

163. *Id*.

164. *Id*. at 2265–66; *Allen v. Cooper*, 140 S. Ct. 994, at 1002 (2020); *Seminole*, 517 U.S. at 72.

types of suits.[165] PennEast should not have been permitted to sue New Jersey in a condemnation proceeding.[166] Justice Barrett believes the inquiry should have stopped there.[167]

But even with that issue aside, the caselaw and history the majority relies on falls far short of compelling.[168] There is not a "*single* decision involving a private condemnation suit against a State, let alone any decision holding that the States lack immunity from such suits."[169] *Kohl* was a suit by the United States, *Oklahoma ex rel. Phillips* was a suit by the state of Oklahoma against a company in contract with the federal government, *Luxton* was a private company suing for privately owned land, and *Stockton* was a suit brought by the state of New Jersey.[170] Additionally, it was unsettled for 75 years after the founding "whether the federal government could even exercise eminent domain over *private land*" in a state.[171] *Oklahoma ex rel. Phillips*, which the majority relies on heavily, was not handed down until 1941.[172] Justice Barrett found the majority downplays "the historical absence of private condemnation suits"[173] and failed to demonstrate states waived their immunity to private condemnation suits in the plan of the Convention.[174] The majority's conclusion is unsupported by both history and caselaw.[175]

Finally, Justice Barrett found the majority's argument that eminent domain is inextricably linked with the ability to condemn to be unpersuasive.[176] The majority argues that if private parties cannot initiate condemnation proceedings against nonconsenting states there is no way to actually use that delegated power.[177] Justice Barrett explains that the power of eminent domain does not become worthless because one method of condemnation is taken off the table.[178] Eminent domain is the federal government's power, not PennEast's, and the United States can still take

165. *PennEast*, 141 S. Ct. at 2267.
166. *Id.* at 2265.
167. *Id*. at 2267.
168. *Id*. at 2268.
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*.
173. *Id*.
174. *Id*. at 2269.
175. *Id*. at 2268.
176. *Id*. at 2269.
177. *Id*. at 2269; *id*. at 2260 (majority opinion).
178. *Id*. at 2269.

New Jersey's property if it wants.[179] Simply because sovereign immunity makes Congress's ability to condemn land more difficult does not mean sovereign immunity should be set aside—it was designed that way on purpose.[180]

Justice Barrett diverges from the majority due to her interpretation of eminent domain's place within our constitutional structure, and because she found the precedent and history the majority offered to be insufficient.[181] In Justice Barrett's view, the Court did not muster the "compelling evidence" required to demonstrate states surrendered their immunity to private suits in the plan of the Convention.[182]

VI. Analysis

This decision's impact is not insignificant. *PennEast* not only narrows states' sovereign immunity but also broadens the already wide latitude private companies have to condemn property. This decision holds that a private entity can condemn state-owned land if it is employing the federal government's eminent domain power. And while this conclusion makes sense moving from one premise to the next, the Court does not persuasively address counterarguments and did not explain *why* it chose one historical interpretation over another.

As discussed in Section II of this Note, the original understanding of eminent domain and state sovereign immunity was highly debated at the ratification of the Constitution and Bill of Rights. The role of the Court often requires it to choose which version of history decides the issue at hand and is faithful to the meaning of the Constitution.[183] But deciding which historical facts are the most persuasive, or even deciding which are "correct," is not the issue here. Rather, the problem arises when the Court does not explain why its interpretation of the historical facts is more persuasive than another. Understandably, we cannot expect the justices of the Court to be historians, that is not their job. But when the understanding of a topic at the time of ratification weighs heavily on the outcome of a case, the history should not be glanced over. It is reasonable to expect this transparency from the Court.

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179. *Id*.

180. *Id*. at 2270.

181. *Id*. at 2266, 2269–70.

182. *Id*. at 2269.

183. Depending on interpretation methods used by the Court the question about history may be less significant.

Like Justice Barrett's dissent and the Third Circuit's opinion point out, there is no favorable caselaw to support the majority's conclusion that a private entity can sue a state to condemn state-owned land.[184] The only case directly on point with the issues of this case is *Sabine Pipe Line*, and the district court deciding this case held sovereign immunity barred the natural gas company from suing for state-owned property.[185] While a lack of caselaw does not prove that private entities cannot condemn state-owned land, it importantly highlights that the proposition that they can do so has no support in precedent.

Further, there is a lack of historical evidence to support the argument that states could have understood ratification of the Constitution and Bill of Rights as renouncing their right to assert any sovereign immunity defense to condemnation suits. The Court believes that, at the time of its ratification, the Fifth Amendment recognized the power of eminent domain.[186] By consenting via ratification, the Court believes states consented to condemnation proceedings initiated by the federal government as well as by any private delegatees.[187] The majority's opinion is reasonable if it is read in a vacuum. But the Court failed to address history that is unfavorable to its conclusion and treated the history it cited as dispositive.

Experts of the history of eminent domain continue to debate whether the federal government believed that the power of eminent domain existed in the late 18th-century.[188] There is evidence that in the early 19th century the federal government relied on state cooperation to build things like lighthouses and roads.[189] Rather than the federal government taking state land, states would pass legislation allowing the federal government to purchase the land for these various projects.[190] In the mid-19th century, the Supreme Court in *Pollard* explained that the power of eminent domain was not expressly granted in the Constitution.[191] Further, the *Pollard* Court stated it is "repugnant to the Constitution" to hold that the United States can exercise this sovereign power over state land after that property was ceded to the state.[192] But in 1875, *Kohl* overturned *Pollard* and held that the

184. *PennEast*, 141 S. Ct. at 2268; *In re PennEast Pipeline Co., LLC*, 938 F.3d at 105.
185. 327 F.R.D. at 141.
186. *PennEast*, 141 S. Ct. at 2255.
187. *Id*. at 2259.
188. *See* Baude, *supra* note 13, at 1766.
189. Baude, *supra* note 13, at 1762.
190. *Id*.
191. *Pollard*, 44 U.S. at 223; Baude, *supra* note 13, at 1773.
192. *Pollard*, 44 U.S. at 225.

federal power of eminent domain existed.[193] It was not until 1941 that the Court held state ownership of land is not a barrier to the federal exercise of eminent domain.[194]

It is not clear that the power of eminent domain had been practiced "since its inception."[195] If it is questionable whether states could have understood ratification as consenting to suits by the *government*, then it is difficult to argue that states could have also understood they were consenting to condemnation suits by *private parties*. The existence of a federal eminent domain power was questioned until 1875 and there are no cases from that period where a private party was delegated the power of eminent domain and then condemned state-owned land.

The majority addressed this particular objection by citing the *Kohl* opinion where the Court held the exercise of the eminent domain power was "'known and appropriate' at the time of the founding" and the "non-use[] of a power does not disprove its existence."[196] This response misses the point. The objection is not only about the non-use of the power, but also the fact that until *Kohl*, it was questioned whether a federal eminent domain power existed at all. Regardless of whether *Kohl* resolves that issue, it is problematic that the majority skips over a large portion of the history of eminent domain in our country and then claims the history and caselaw it cites leads to the Court's conclusion.

Even if eminent domain has been exercised since the federal government's inception and states consented to it, why must it follow that states consented to eminent domain used by private delegatees? The majority viewpoint of the Eleventh Amendment's meaning at the time of its ratification is that it was originally understood to bar private suits against nonconsenting states.[197] Similar to the history of eminent domain, the Court does not discuss this issue.

But a more obvious incongruence in the majority's opinion is its argument that the delegated power of eminent domain would be toothless if

193. *Kohl*, 91 U.S. at 372–73.

194. *Oklahoma ex rel. Phillips*, 313 U.S. at 534; *PennEast*, 141 S. Ct. at 2268 (Barrett, J., dissent).

195. *See PennEast*, 141 S. Ct. at 2275 ("Since its inception, the Federal Government has wielded the power of eminent domain . . . .").

196. *Id*. at 2262; *Kohl*, 91 U.S. at 372.

197. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 Okla. L. Rev. 439, 443 (2005); Ann K. Wooster, Annotation, *Immunity of State from Civil Suits Under Eleventh Amendment—Supreme Court Cases*, 187 A.L.R. Fed. 175, §2(a) (2003); *Alden v. Maine*, 527 U.S. 706, 717 (1999).

it did not have a mechanism (condemnation) to use it.[198] The majority even goes as far to say that if private entities could not initiate condemnation proceedings, the only option to employ the delegated power of eminent domain would be to have the federal government, rather than the private entity, take the property now and pay later.[199] But the majority believes this does not "vindicate principles underlying state sovereign immunity."[200] That is inconsistent with the Court's reasoning. If we buy into the majority's reasoning that states consented to federal supremacy and eminent domain at the Convention, then the federal government exercising this power in these circumstances would not offend the "fundamental postulates implicit in the constitutional design," which includes principles of federalism. It is odd that the Court maintains that the federal government exercising eminent domain, which it believes has already been consented to, would offend federalism, but a private delegatee suing a state would not.

History is rarely dispositive of constitutional issues, even when the Court acts as if it is. Interpretations of what happened in our history are almost always debatable and experts often have differing opinions as to what "the" understanding was. Given how important the historical understanding of what eminent domain meant at the time of our founding is to the Court's opinion, the Court should have done more to explain why its historical take is the better one.

VII. Conclusion

Even though *PennEast* is not a decision that makes attorneys grasp their pearls in shock and run to write a scathing op-ed, it is still significant. *PennEast* allows private entities to condemn state-owned land. The Court reached its decision by arguing that this has been the case since ratification of the Constitution and Bill of Rights. The majority concluded states surrendered immunity from the federal government's power of eminent domain in the plan of the Convention.[201] At the time, it was understood that the power of eminent domain could be delegated to private entities; so, when states ratified the Constitution and Bill of Rights, they consented to eminent domain exercised by the federal government or a delegatee.[202] States therefore do not have immunity to invoke and PennEast may

198. *PennEast*, 141 S. Ct. at 2260.
199. *Id*.
200. *Id*.
201. *Id*. at 2266 (Justice Barrett's summary of the majority's conclusions).
202. *Id*.

condemn state-owned land.[203] Even though the history the Court uses in its argument is not conclusive, this decision ultimately concludes state sovereign immunity is not as robust as states might prefer.

203. *Id*.