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## Does the Constitution Allow Private Companies to Use Eminent Domain Against a State? Penn East Pipeline Co., LLC v. New Jersey

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DOES THE CONSTITUTION ALLOW PRIVATE  
COMPANIES TO USE EMINENT DOMAIN  
AGAINST A STATE? *PENNEAST PIPELINE CO., LLC*  
*V. NEW JERSEY*

*Crystal Anthony*\*

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## ABSTRACT

*In 2021 the United States Supreme Court decided in the case PennEast Pipeline Co. v. New Jersey that Section 717(h) of the Natural Gas Act authorized the Federal Energy Regulatory Commission (FERC) to delegate the government's eminent domain power to private companies. The Court's decision allows a private company to condemn all "necessary rights-of-way," whether privately-owned or state-owned land. This case note explores the history of the government's eminent domain power and the states' Eleventh Amendment immunity from lawsuits. The majority opinion in PennEast reasoned that the states waived their sovereign immunity at the ratification of the Constitution. Thus, according to the majority PennEast's condemnation of New Jersey-owned land to build a pipeline does not offend state sovereignty. This Note provides the legal background for the claims at issue in PennEast and examines the case's procedural posture. Ultimately, this Note concludes that the United States Supreme Court decided the case incorrectly. The idea that a nongovernment party can take land from a nonconsenting state is contrary to state sovereignty and the Eleventh Amendment.*

## INTRODUCTION

For over 234 years, the principles laid out by the U.S. Constitution have guided the United States.<sup>1</sup> The Constitution has survived longer than any other written government charter in the world.<sup>2</sup> It is not just words written on a sheet of paper, but the declaration we live by in the United States.<sup>3</sup> The framers laid out the federal government's powers in the primary document and provided protections for citizens and states in the Bill of Rights and subsequent Amendments to the Constitution.<sup>4</sup> These Amendments guide the courts in the United States because of their importance to our system of government.<sup>5</sup> For example, the Due Process Clause of the Fifth<sup>6</sup> and Fourteenth Amendments<sup>7</sup> protects the fundamental right to own land. However, competing with the citizens' and states' right to own land is the government's constitutional right to take private land for public use by providing "just" compensation to the landowner.<sup>8</sup> Eminent domain is the power of the government to take private land for public use.<sup>9</sup> Federal and state governments exercised this power throughout American history to acquire land for transportation, natural resources, and to promote the economy and national defense.<sup>10</sup>

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1. U.S. CONST.

2. *Constitution of the United States*, U.S. SEN., [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm) [<https://perma.cc/7WVU-GP8L>] (last visited Apr. 5, 2022).

3. *Id.*

4. *Id.*

5. *Id.* (The founding fathers of the United States and the framers of the Constitution feared too much power in one place. An oppressive government had victimized the colonists with a monarch and a parliamentary system that did not allow them to live as they wanted. The framers of the Constitution created several guards to tyranny, including Separation of Powers, Checks and Balances, and Federalism. Federalism is a division of power between the state and federal governments. This was a way to protect the people from any one person or group gaining too much power and protect the rights of the people set out in the Bill of Rights.) See David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1242-45 (2020).

6. U.S. Const. amend. V; "Most Colonists owned property and saw 'life, liberty, and property' as 'the fundamental trinity of inalienable rights,' rights that 'individuals could never renounce,' unlike 'rights whose exercise was subject to the regulatory power of the state.'" Paul J. Larkin Jr., *The Original Understanding of Property in the Constitution*, 100 MARQ. L. REV. 1, 31 (2016).

7. U.S. CONST. amend. XIV, §1.

8. U.S. CONST. amend. V.

9. *History of the Federal Use of Eminent Domain*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/enrd/history-federal-use-eminant-domain> [<https://perma.cc/4L9N-YH66>] (last updated May 15, 2015).

10. *Id.*

However, the courts do not always agree about when to permit eminent domain power.<sup>11</sup>

While the government can take land from private landowners, it is less clear about private companies taking state-owned land.<sup>12</sup> In 1938, Congress passed the Natural Gas Act (NGA); this Act authorized private gas companies to take property through eminent domain, even though that power is a power of the federal government.<sup>13</sup> Eminent domain has traditionally been a power of the federal government as an inherent and essential attribute of sovereignty.<sup>14</sup> However, since the passage of the NGA, if a gas company gets certified, the government gives it the authorization to take private land for interstate pipelines because the transportation and sale of natural gas are by default in the public interest.<sup>15</sup>

Since the passage of the Act, gas companies have used the NGA to take land from private citizens, but in 2019, the state of New Jersey refused to give the gas company, PennEast Pipeline Co., state-owned land.<sup>16</sup> Instead, the state claimed sovereign immunity against the eminent domain action brought against the state, declaring that the state should be immune from such lawsuits by private companies.<sup>17</sup> New Jersey argued in the prior case, *In re PennEast Pipeline Co.*, “that the federal government cannot delegate its exemption from state sovereign immunity to private parties like PennEast and that, even if it could, the NGA is not a clear and unequivocal delegation of that exemption.”<sup>18</sup>

The United States District Court for the District of New Jersey denied New Jersey’s motion and granted PennEast’s condemnation order and preliminary injunctive relief.<sup>19</sup> New Jersey then timely appealed the

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11. *Id.*

12. *See id.*

13. 15 U.S.C. §§717-717z (2005).

14. *Kohl v. United States*, 91 U.S. 367, 371-72 (1875). “Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or any other authority, can prevent the acquisition of the means or instruments by which governmental functions can be performed alone. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States . . . The right is the offspring of political necessity; and it is inseparable from sovereignty unless denied to it by its fundamental law.” *Id.*

15. *See* 15 U.S.C. §717.

16. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2253 (2021).

17. *Id.*

18. *In re PennEast Pipeline Co.*, 938 F.3d 96, 104 (3d Cir. 2019), *as amended* (Sept. 11, 2019), *as amended* (Sept. 19, 2019), *cert. granted sub nom.* *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 1289, 209 L. Ed. 2d 22 (2021), and *rev’d and remanded sub nom.* *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021).

19. *Id.* at 102.

District Court's decision, arguing that the District Court did not have subject matter jurisdiction over the suit.<sup>20</sup> They appealed the decision to the Third Circuit, which has jurisdiction to hear the case under 28 U.S.C. §1291.<sup>21</sup> The Third Circuit vacated the District Court decision, reasoning that the federal government's ability to condemn state-owned land required two separate powers, the eminent domain power and the ability to sue non-consenting states.<sup>22</sup> The Third Circuit acknowledged that the federal government could delegate its eminent domain power to private companies but doubted that it could delegate its exemption from state sovereign immunity.<sup>23</sup> The Third Circuit stated that the federal government could not abrogate state sovereign immunity without unmistakably clear language that it intended to do so.<sup>24</sup> Therefore, it did not authorize PennEast to condemn state-owned property from a non-consenting state.<sup>25</sup> Following the Third Circuit's decision, PennEast appealed to the United States Supreme Court.<sup>26</sup> In June 2021, the United States Supreme Court held in a 5-4 decision that "[a]lthough nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution."<sup>27</sup> In the case of *PennEast Pipeline Co., LLC v. New Jersey* (2021), the majority wrote that if a natural gas company has a certificate under Section 717f(h)<sup>28</sup> of the Natural Gas Act of 1938, then the company has the authorization to condemn all necessary rights-of-ways on either state or privately-owned land.<sup>29</sup>

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20. *Id.* at 103.

21. *Id.*

22. *PennEast*, 141 S. Ct. at 2253.

23. *Id.*

24. *Id.* at 2254.

25. *Id.*

26. *Id.*

27. *Id.* at 2251–52.

28. "When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property . . . 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, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000." 15 U.S.C. § 717f (h).

29. *PennEast*, 141 S. Ct. at 2263.

This note will address the decision of the Supreme Court to assert the validity of Congress delegating eminent domain power to a non-governmental body and abrogating the state's Eleventh Amendment immunity. Furthermore, this note will discuss how the Court's result was incorrect because the Court's interpretation of the case appears to be at odds with the Constitution. While the Court cites precedent for allowing private companies to use eminent domain to condemn state-owned land, the majority opinion was misguided because the majority was attempting to make the decision fit even though it was contrary to the intent of the Constitution.

## I. PENNEAST AND THE CONSTITUTION

### *A. The Government's Power of Eminent Domain and Public Use*

Even though the ability to delegate the power of eminent domain has been questioned, the U.S. generally accepts that the federal government has this power.<sup>30</sup> Eminent domain is the power of a sovereign, such as the United States government, to take privately owned property for public use.<sup>31</sup> This power is in the Fifth Amendment to the Constitution, which states, "nor shall private property be taken for public use, without just compensation."<sup>32</sup> In 1875, the Supreme Court held that eminent domain was an essential element of the government's existence and independence.<sup>33</sup> Initially, the delegation of eminent domain powers was to promote the country's economic expansion even though there was minimal economic surplus.<sup>34</sup> In fact, in the early to mid-nineteenth century, the government delegated eminent domain power to expand interstate transportation to railroads.<sup>35</sup> Courts generally accepted the delegation of eminent domain power to private transportation companies and manufacturers because they considered interstate transportation and economic growth valid public uses.<sup>36</sup> Courts did not want an individual landowner to hinder the expansion of the economy and development of the nation, so the government granted railroads eminent domain powers.<sup>37</sup> The

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30. *History of the Federal Use of Eminent Domain*, *supra* note 9.

31. *Kohl v. United States*, 91 U.S. 367, 373-74 (1875).

32. U.S. CONST. amend. V.

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

34. Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. Rev. 651, 655 (2008).

35. *Id.*

36. *Id.* at 654.

37. *Id.* at 659 n.27.

majority stated in the *PennEast* decision that the United States had delegated authority to private parties before and after the founding.<sup>38</sup>

For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties. It was commonplace before and after the founding for the Colonies and then the States to authorize the private condemnation of land for a variety of public works.<sup>39</sup>

However, even though courts allowed railroads to use eminent domain to acquire land for a public purpose, the Supreme Court did not establish that eminent domain was a form of the government's sovereign powers until 1875.<sup>40</sup>

In the decades preceding the Supreme Court's decision in *Kohl v. United States*, the federal government often relied on cooperative federalism with the states helping the federal government obtain land.<sup>41</sup> However, even after the federal government established its authority to take the land as a form of power, states have been involved in takings in many circumstances.<sup>42</sup> For example, since the early 20<sup>th</sup> century, state legislatures and state constitutions have given developers broad authority to exercise eminent domain's power to exploit and transport natural resources.<sup>43</sup> Governments have given these developers broad discretion to use the power of eminent domain primarily to promote the acquisition of natural resources for use by persons in the United States.<sup>44</sup> The use of "natural resource development takings" is similar to "economic development takings" because "[b]oth types of takings grant the condemnor the right to displace private property interests in the name of economic development that will benefit the public at large."<sup>45</sup>

The U.S. Constitution prohibits the government from taking private property to give to a private party; however, states can include that provision in their constitutions if the purpose is to develop natural resources.<sup>46</sup> The issue about natural resource development as a valid public

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38. *PennEast Pipeline Co., v. New Jersey*, 141 S. Ct. 2244, 2255 (2021).

39. *Id.*

40. *Kohl v. United States*, 91 U.S. 367, 372 (1875).

41. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* 1738, 1762 (2013).

42. *Id.* at 1787.

43. Klass, *supra* note 34, at 652.

44. *Id.*

45. *Id.*

46. *Id.* at 654.

use has split courts in different parts of the country.<sup>47</sup> In the Midwest, states have sided with natural resource development as a critical aspect of industrialized society.<sup>48</sup> These midwestern states argue that the private exploitation of natural resources like timber, oil, minerals, and water is essential for society.<sup>49</sup> On the other hand, eastern states have just as vehemently taken a different stance and argued for the sanctity of private land ownership.<sup>50</sup>

The government has used eminent domain in various ways to acquire natural resources. For example, the government-delegated oil companies used eminent domain powers in the 1860s to transport oil across state lines.<sup>51</sup> This allowed oil companies to construct pipelines connecting states and reinforce the ease of oil transportation.<sup>52</sup> The Supreme Court of Appeals of West Virginia ruled in 1872 that the use of pipelines was similar to other forms of transportation, such as the railroad, and approved of the use of eminent domain by oil companies.<sup>53</sup> This recognition of oil pipelines as a form of transportation was further strengthened in 1906, when Congress declared that oil pipelines that travel across interstate lines were common carriers and placed under the supervision of the Interstate Commerce Commission.<sup>54</sup> During World War II, Congress allowed oil and natural gas companies to use eminent domain for national defense.<sup>55</sup>

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47. *Id.*

48. *Id.* at 655; *see also* *Johnston v. Ala. Pub. Serv. Comm'n*, 252 So. 2d 75 (Ala. 1971) (*holding* that a statute granting a right-of-way condemnation authority to mining, manufacturing, power and quarrying operations does not violate the state constitution); *Jones v. Mahaska County Coal Co.*, 47 Iowa 35 (1877) (*holding* that a coal company can condemn land for a road but only if it allows the public and other industry to use the road); *Indianapolis Oolitic Stone Co. v. Alexander King Stone Co.*, 206 Ind. 412 (1934) (*holding* that the business of mining or quarrying is a “public use” and affected with public interest).

49. Klass, *supra* note 34, at 654.

50. *Id.* E.g., *Boyd v. C.L. Ritter Lumber Co.*, 89 S.E. 273 (Va. 1916) (*invalidating* state statute allowing lumber company to condemn right-of-way over neighbor’s property to haul lumber even where the company would enable the public to use the right-of-way); *Hench v. Pritt*, 57 S.E. 808 (W. Va. 1907) (*invalidating* as unconstitutional statute allowing sawmill to condemn land for railroad connection to transport product).

51. ARTHUR MENZIES JOHNSON, *THE DEVELOPMENT OF AMERICAN PETROLEUM PIPELINES: A STUDY IN PRIVATE ENTERPRISE AND PUBLIC POLICY, 1862–1906*, 114–22 (1956).

52. *Cf.* Klass, *supra* note 34, at 664.

53. *W. Va. Transp. Co. v. Volcanic Oil & Coal Co.*, 5 W. Va. 382, 387 (1872).

54. United States Statutes At Large, Ch. 3591 Stat. 584 (1906).

55. *See* ERIC N. HOLMES, CONG. RSCH. SERV., LSB10359, *THIS LAND IS YOUR LAND? EMINENT DOMAIN UNDER THE NATURAL GAS ACT AND STATE SOVEREIGN IMMUNITY* (2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10359> [<https://perma.cc/4C9Y-JSBR>].

Following World War II, some states attempted to prevent natural gas companies from acquiring land through eminent domain, so Congress passed the Natural Gas Act (NGA) in 1938, declaring that natural gas transportation and sale affected the public interest.<sup>56</sup> They later amended the NGA in 1947 to establish that natural gas companies that hold a certificate from the Federal Power Commission had the authorization to use eminent domain power.<sup>57</sup>

Under section one of the NGA, Congress declared that the transportation and sale of natural gas affect the public interest and that the regulation of the industry is necessary for the public's interest.<sup>58</sup> This is a way of incorporating the language of the Fifth Amendment into the Act.<sup>59</sup> It is an accepted interpretation of the Taking Clause that the Constitution gives the federal government the power of eminent domain as long as they compensate the landowners.<sup>60</sup> The argument is that the way Congress worded the NGA indicates that Congress intended to delegate certain federal powers, namely the power of an eminent domain, to third parties.<sup>61</sup>

For a natural gas company to gain the federal government's power, the Federal Energy Regulatory Commission (FERC)<sup>62</sup> must approve the project.<sup>63</sup> Then, the private companies receive a certificate that explicitly authorizes the use of eminent domain to acquire any necessary rights-of-way for constructing a pipeline.<sup>64</sup> Of course, the company must first attempt to purchase the land, but if the landowner refuses to sell the land, the company may begin eminent domain proceedings.<sup>65</sup> However, the facts

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56. *Id.*

57. An Act to Amend the Natural Gas Act, 15 U.S.C. §717 (2019).

58. HOLMES, *supra* note 55.

59. U.S. CONST. amend. V. (“nor shall private property be taken for **public use**, without just compensation.”) (emphasis added); HOLMES, *supra* note 55.

60. HOLMES, *supra* note 55.

61. *Id.* (Congress amended section 7 of the Act to explicitly allow natural gas companies in possession of a permit to exercise eminent domain to obtain the land when negotiations fail).

62. FERC is an independent commission made up of five commissioners appointed by the president and confirmed by the Senate. The Commissioners serve five-year terms. There is limited governmental oversight, and a simple majority can allow the construction of a pipeline. *About FERC*, FEDERAL ENERGY REGULATORY COMMISSION, <https://www.ferc.gov/what-ferc> [<https://perma.cc/Y5RC-7APK>] (last updated Aug. 19, 2021).

63. *Id.*

64. *Id.*

65. 15 U.S.C § 717.

of the *PennEast Pipeline* decision bring in another constitutional provision that is a concern: the use of eminent domain against a state party.<sup>66</sup>

*B. Can a State Be an Unwilling Party to a Suit?*

Even if the NGA authorizes Congress to delegate eminent domain powers to the states, there remains the issue of taking state-owned land without their consent. The Constitution provides in the Eleventh Amendment, “[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>67</sup> Thus, the Eleventh Amendment limits the ability of people to bring suit against a state in federal court.<sup>68</sup> Even though the language of the Eleventh Amendment “speaks only of suits by citizens from other states, the Supreme Court has consistently interpreted it to preclude all suits against a state in federal court.”<sup>69</sup> Moreover, courts have continually upheld the proposition that the Eleventh Amendment immunity protects states from more than just lawsuits from citizens of other states.<sup>70</sup> The Supreme Court previously stated in *Alden v. Maine* that federalism provides states a level of sovereignty that needs to be respected:

[T]he Constitution’s structure and history and this Court’s authoritative interpretations make clear that the States’ immunity from suit is a fundamental aspect of the sovereignty they enjoyed before the Constitution’s ratification and retain today except as altered by the plan of the Convention or certain constitutional Amendments . . . Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.<sup>71</sup>

The Court wanted unmistakable clarity in Congress’s wording to subject a state to suit, because the United States was founded on the notion that individual states enjoy their own sovereignty and are not merely subservient to the federal government.<sup>72</sup>

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66. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2247 (2021).

67. U.S. CONST. amend. XI.

68. *Id.*

69. F.J. “Rick” Dindinger, *Seminole Tribe’s Impact on Environmental Suits Against States in Federal Court*, 26-SEP COLO. LAW. 105, 105 (1997).

70. *Id.*

71. *Alden v. Maine*, 527 U.S. 706, 748 (1999).

72. *Id.*

The ratification of the Eleventh Amendment in 1795 was a reaction to a controversial Supreme Court decision, *Chisholm v. Georgia*.<sup>73</sup> In *Chisholm*, the Court held that federal courts could hear disputes between private citizens and states.<sup>74</sup> Additionally, the Court ruled in favor of a citizen suing the state of Georgia for payment of goods supplied during the Revolutionary War.<sup>75</sup> The Court's decision was seen as an intrusion into the sovereignty of the states and caused states to fear being sued by citizens of other states.<sup>76</sup> Congress acted swiftly to draft and ratify an amendment to overturn the Supreme Court's decision in *Chisholm* and prevent citizens from suing states for war debts.<sup>77</sup> The early Congress wanted to protect states' rights and sovereignty.<sup>78</sup>

However, the Supreme Court has held that the Eleventh Amendment immunity is not absolute.<sup>79</sup> Instead, there are limitations under section five of the Fourteenth Amendment.<sup>80</sup> Justice Rehnquist wrote, "we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of [section] 5 of the Fourteenth Amendment."<sup>81</sup> The Court later decided in 1989 that Congress could abrogate the Eleventh Amendment immunity pursuant to its Article I powers, as long as it provided sufficient clarity.<sup>82</sup> However, this decision was overruled seven years later by *Seminole Tribe of Florida v. Florida*.<sup>83</sup> The Court explained that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."<sup>84</sup>

The Supreme Court upheld the concept that the Eleventh Amendment protects the sovereignty of all states in *Seminole Tribe of Florida v. Florida* and that such sovereignty inherently implies that a state cannot be

73. *History of the Federal Use of Eminent Domain*, *supra* note 9.

74. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

75. *Id.*

76. CONG. RSCH. SERV., LIBRARY OF CONGRESS, NO. 112-9, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, 1789 (2017).

77. *Id.*

78. Cong. Rsch. Serv., *Amdt 11.1.1 Eleventh Amendment: Early Doctrine*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt11\\_1\\_1/](https://constitution.congress.gov/browse/essay/amdt11_1_1/) [<https://perma.cc/7JE5-WYMJ>] (last visited Oct. 22, 2021).

79. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

80. *Id.*

81. *Id.* (emphasis added).

82. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled* by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

83. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

84. *Id.* at 72-73.

sued without its consent.<sup>85</sup> The Court held that for Congress to abrogate a state's immunity from suit, there is a two-step analysis for the Court to evaluate the Act of Congress.<sup>86</sup> The first step is for the Court to determine "whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity.'"<sup>87</sup> The second step is for the Court to determine whether Congress has acted "pursuant to a valid exercise of power."<sup>88</sup> The Court discussed these steps at length in the *PennEast* decisions from the Third Circuit and Supreme Court. The Supreme Court held that instead, the state agreed to suit by ratifying the Constitution at the founding.<sup>89</sup>

### C. *PennEast* Fact History

The present case, *PennEast Pipeline Co., LLC v. New Jersey*, began after New Jersey resisted PennEast Pipeline's effort to use eminent domain to acquire state-owned land for the pipeline in 2018.<sup>90</sup> New Jersey argued that the Eleventh Amendment grants states sovereign immunity, prohibiting condemnation proceedings against a state.<sup>91</sup> However, the Supreme Court noted that states do not have sovereign immunity from eminent domain lawsuits that private gas companies bring under the Act.<sup>92</sup> The Court further pointed out that Congress can delegate the eminent domain power to private third parties and it can still be an exercise of the federal eminent domain power.<sup>93</sup>

In 2018, the Federal Energy Regulatory Commission (FERC) issued PennEast a certificate to construct and operate the PennEast pipeline system.<sup>94</sup> The project consisted of a 116-mile natural gas pipeline that would run from Luzerne County, Pennsylvania, to Mercer County, New Jersey.<sup>95</sup> PennEast obtained the necessary land required for the pipeline using federal eminent domain powers through the NGA.<sup>96</sup> PennEast attempted multiple times to condemn state and privately owned land in

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85. *Seminole Tribe*, 517 U.S. at 44.

86. *Id.* at 55.

87. *Id.* (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

88. *Id.*

89. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2247 (2021).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *PennEast Pipeline Co., LLC*, 162 FERC 61053 (2018).

95. Jessica Gresko, *Supreme Court Won't Sidetrack Plans for Natural Gas Pipeline*, ABC News (June 29, 2021), <https://abcnews.go.com/Politics/wireStory/supreme-court-sidetrack-plans-natural-gas-pipeline-78557037> [<https://perma.cc/745Z-7X5K>].

96. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2253 (2021).

New Jersey by using the eminent domain power in the United States District Court for the District of New Jersey.<sup>97</sup> The state of New Jersey and state agencies listed as defendants in the case argued that the Eleventh Amendment entitled them to immunity from such action.<sup>98</sup> However, the District Court ruled that the Eleventh Amendment was not applicable because PennEast held a certification from FERC, allowing PennEast to exercise federal powers of eminent domain under the NGA.<sup>99</sup> The state defendants appealed the District Court's decision to the Third Circuit Court of Appeals, which reversed the lower court decision holding that the NGA did not abrogate New Jersey's sovereign immunity under the Eleventh Amendment.<sup>100</sup> PennEast appealed the Third Circuit's decision to the United States Supreme Court.<sup>101</sup>

In the *PennEast Pipeline* case, New Jersey argued that the Eleventh Amendment provides sovereign immunity from the suit.<sup>102</sup> The Third Circuit agreed with New Jersey's position.<sup>103</sup> The Third Circuit stated, "[l]ike the Supreme Court, our sister circuits, and the district court in *Sabine*, we are thus left in **deep doubt** that the United States can delegate its exemption from state sovereign immunity to private parties."<sup>104</sup> If Congress intended to delegate such power, it would have clearly stated that intention in the NGA.<sup>105</sup> New Jersey said that the Eleventh Amendment prevents private parties from suing a state in federal court, and this prohibition includes condemnation suits.<sup>106</sup> New Jersey further argued that, historically, there was an absence of condemnation suits by private parties involving state-owned land.<sup>107</sup> The state used this argument to try and undermine PennEast's assertion that the framers allowed private parties to exercise eminent domain against the states.<sup>108</sup>

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97. *In re PennEast Pipeline Co.*, No. CV 18-1585, 2018 WL 6584893 \*6-\*8 (D.N.J. Dec. 14, 2018).

98. *Id.* at \*8.

99. *Id.* at \*12.

100. *In re PennEast Pipeline Co.*, 938 F.3d 96, 99 (3d Cir. 2019).

101. *PennEast*, 141 S. Ct. at 2253-54.

102. *Id.*

103. *In re PennEast Pipeline Co.*, 938 F.3d at 113.

104. *Id.* at 111 (emphasis added).

105. *Id.*

106. *PennEast*, 141 S. Ct. at 2253-54.

107. *Id.* at 2261.

108. *Cf. id.*

## II. PENNEAST AND UNCONSTITUTIONAL TAKING OF STATE LAND BY A THIRD-PARTY DELEGATEE

The Court's interpretation of the case is at odds with the Constitution. The courts at various levels have disagreed over this issue, and the Supreme Court got it wrong.

The District Court ruled in favor of PennEast, stating that the Eleventh Amendment did not protect states from the federal government's power.<sup>109</sup> The federal government delegated the power to PennEast, and a suit by PennEast would act the same way as a suit by the U.S. government.<sup>110</sup> The U.S. Court of Appeals for the Third Circuit reversed the District Court's ruling and stated there is no case law to support the concept that the federal government can delegate its power to sue states.<sup>111</sup> Before the Third Circuit ruling on *PennEast*, the United States District Court for the Eastern District of Texas held similar to the Third Circuit that the NGA did not abrogate the state's sovereign immunity under the Eleventh Amendment, and the certificate given to natural gas companies does not delegate the federal government's exemption to private actors.<sup>112</sup> The Fifth Circuit held that the Eleventh Amendment covers a suit against state officials or departments acting as an arm of the state.<sup>113</sup>

In 2021, the U.S. Supreme Court reversed the Third Circuit's ruling in *PennEast Pipeline Co. v. New Jersey*, holding that Congress could delegate its powers and a third party could use eminent domain to sue a state in federal court if negotiations fail.<sup>114</sup> The Court held that states consented at the nation's founding to the exercise of the federal power of eminent domain.<sup>115</sup> The Court explained that it does not matter if the Federal Government or private delegates exercise the power.<sup>116</sup> The majority decided not to follow the analysis set out in *Seminole Tribe of Florida v. Florida*.<sup>117</sup> Instead, the Court avoided the issue and stated that the state consented to suit when it ratified the Constitution.<sup>118</sup> Chief Justice Roberts wrote, "the States consented in the plan of the Convention to the

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109. *Id.* at 2253.

110. HOLMES, *supra* note 55.

111. *Id.*

112. Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cnty., Tex., 327 F.R.D. 131, 141 (E.D. Tex. 2017).

113. *See generally* Baker Farms Inc. v. Hulse, 54 F. App'x 404 (5th Cir. 2002).

114. *PennEast*, 141 S. Ct. at 2263.

115. *Id.*

116. *Id.* at 2261.

117. *See id.*

118. *Id.* at 2259.

exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates.”<sup>119</sup>

This holding seems to be inconsistent with the Eleventh Amendment to the Constitution. The Eleventh Amendment protects states against federal court lawsuits when the state does not consent to the action.<sup>120</sup> The swift action of Congress after the Court’s decision in *Chisholm* shows the strong disapproval of state sovereignty being attacked.<sup>121</sup> The Supreme Court has gone back and forth about how extensive that sovereign immunity is, but they generally accept that states are sovereign in their own right.<sup>122</sup> The founders formed the United States on the concept that the states had a level of sovereignty that could not be denied.<sup>123</sup> Alexander Hamilton stated in Federalist No. 32 that “the State governments would clearly retain all the rights of sovereignty which they before had, and which were not . . . exclusively delegated to the United States.”

Furthermore, James Madison stated that “the States will retain under the proposed Constitution a very extensive portion of active sovereignty”<sup>124</sup> and that the federal government’s “jurisdiction extends to certain enumerated objects only.”<sup>125</sup> Madison continued by explaining that the states would continue to possess “a residuary and inviolable sovereignty over all other objects.”<sup>126</sup> Madison maintained that the Constitution enumerated very few express powers to the federal government while express powers of the state were “numerous and indefinite.”<sup>127</sup> The Constitution does not expressly state the powers retained by the states. However, the Tenth Amendment is a catch-all; it states, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>128</sup>

While early Americans believed that the states were sovereign, creating a strong national government was necessary because the Articles

119. *Id.*

120. U.S. CONST. amend. XI.

121. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996).

122. *Id.*

123. Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019).

124. THE FEDERALIST NO. 45, at 293-94 (James Madison) (Isaac Kramnick ed., 1987).

125. THE FEDERALIST NO. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987).

126. *Id.*

127. Dave Roos, *When the Founding Fathers Settled States’ vs. Federal Rights—And Saved the Nation*, HISTORY, <https://www.history.com/news/federalism-constitution-founding-fathers-states-rights> [<https://perma.cc/DU5H-UW87>] (last updated Apr. 30, 2020).

128. *Id.*

of Confederation failed.<sup>129</sup> Even at the time of the ratification of the Constitution, the country still believed in state sovereignty and states' rights.<sup>130</sup> The framers created a government with the separation of powers between the federal and state governments and allowed the federal government to intervene in the national interest.<sup>131</sup> Even though states can pass laws within their borders, under the supremacy clause of Article VI, federal laws supersede state law.<sup>132</sup> Congress gave itself the power to abrogate a state's immunity when its intentions are "unmistakably clear."<sup>133</sup>

The framers believed that states should maintain their own sovereignty in addition to the power and sovereignty of the federal government.<sup>134</sup> In fact, in the concurrence for *United States Term Limits v. Thornton*, Justice Kennedy explained the importance of federalism:

The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one State and one Federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.<sup>135</sup>

The states are sovereign in a system of federalism. "As a result of the [E]leventh [A]mendment, Congress may render the states amenable to suit only when exercising certain of its legislative powers, only if it expresses its intent in conformity with a stringent standard of statutory clarity, and only if there is "congruence and proportionality" between the injury to be prevented or remedied and the means adopted to that end."<sup>136</sup> It was stated that "[i]n the absence of such a clear and appropriate expression of congressional intent to authorize actions against the states, even a state

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129. *Articles of Confederation, 1777–1781*, OFF. OF THE HISTORIAN, FOREIGN SERV. INST. U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1776-1783/articles> [<https://perma.cc/C42V-7JTB>] (last visited Feb. 18, 2022).

130. Roos, *supra* note 127.

131. *Id.*

132. *Id.*

133. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 44 (1996).

134. Roos, *supra* note 127.

135. *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995).

136. 1 Civil Rights Actions ¶ 2.01 (2021).

willing to waive its eleventh amendment immunity cannot be sued on the basis of federal law.”<sup>137</sup>

The principle of state sovereign immunity seems to be at odds with the notion that Congress can abrogate this protection and impose liability on nonconsenting states.<sup>138</sup> Instead, sovereign immunity would indicate that the state’s protection from litigation by a third party is absolute but can be waived by the state itself.<sup>139</sup> “Only in limited instances can the state itself be sued against its will and even the doctrine’s many wrinkles tend to favor of the state as sovereign.”<sup>140</sup> For Congress to abrogate state sovereign immunity, it must meet two conditions.<sup>141</sup> First, Congress must have unequivocally expressed its intent to abrogate the state’s immunity by a clear legislative statement, and second, Congress must act pursuant to a valid exercise of power.<sup>142</sup> According to the Court, the alternative is for the state to have agreed to suit at the ratification of the Constitution.<sup>143</sup>

The *PennEast* case held that a state in some cases agreed to suit in the plan of the Constitution and all states implicitly consented at the founding.<sup>144</sup> The Court stated, “when the States entered the federal system, they renounced their right to the “highest dominion in the lands comprised within their limits” . . . *PennEast*’s condemnation action to give effect to the federal eminent domain power falls comfortably within the class of suits to which States consented under the plan of the convention.”<sup>145</sup> The Court argued that New Jersey consented merely by being a part of the United States.<sup>146</sup> The Court explained that it has determined that they agreed on certain cases at the founding, including bankruptcy proceedings, suits by other States, and suits by the Federal Government.<sup>147</sup> However, the proposition that the states consented in the plan of the convention to suit by the federal government was not established until 1892, over a hundred years after the ratification of the Constitution.<sup>148</sup> The majority then avoided the issue of whether the federal government could delegate

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137. *Id.* at 1.

138. *Id.* at 6.

139. *Id.*

140. Miles McCann, *State Sovereign Immunity*, NAT’L ASS’N OF ATT’YS GEN. (Nov. 11, 2017), <https://www.naag.org/attorney-general-journal/state-sovereign-immunity/> [<https://perma.cc/P6C2-4WWQ>].

141. *Id.*

142. *Id.*

143. *Id.*

144. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258 (2021).

145. *Id.* at 2259.

146. *Id.*

147. *Id.* at 2258

148. *Id.* at 2259.

its exemption from state sovereign immunity.<sup>149</sup> “Regardless whether the Federal Government must speak with unmistakable clarity when delegating its freestanding exemption from state sovereign immunity (assuming such a delegation is even permissible . . . ) there is no similar requirement when the Federal Government authorizes a private party to exercise its eminent domain power.”<sup>150</sup>

It seems unlikely that the states implicitly consented at the founding because “[t]he original view was that the federal government had eminent domain power only in the District of Columbia and the territories, where the Constitution expressly granted it plenary power.”<sup>151</sup> This would imply that the states did not reasonably believe that the federal government would take their land or that it could delegate such power.<sup>152</sup> In fact, in the first seventy-five years of the nation’s history, there had “never been a purely federal taking inside a state.”<sup>153</sup> The government relied primarily on the state’s condemnation authority involving the state condemning the land and transferring it to the federal government.<sup>154</sup> Alternatively, the federal government would use federal agents to “proceed as plaintiffs under state condemnation law.”<sup>155</sup> Thus, it can be argued that “the lack of federal eminent domain authority was not simply the oversight of an earlier time, but rather the result of a well-functioning regime of cooperative federalism.”<sup>156</sup> To say that the state consented at the founding when that was not a consideration seems unlikely. Moreover, the state’s sovereign immunity laid out in the Constitution would preclude a private actor from taking state-owned land without the state’s consent.<sup>157</sup>

For the reasons discussed above, applying a decision made well after the founding of the United States to the time of the Constitution’s ratification is illogical. The states and early Congress did not want states to be subject to lawsuits without their consent.<sup>158</sup> The Eleventh Amendment was a swift response to an unpopular decision by the Supreme Court to allow a lawsuit against an unwilling state.<sup>159</sup> If Congress intended to give delegates the ability to take from nonconsenting states, it should

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149. *Id.* at 2262-63.

150. *Id.*

151. Baude, *supra* note 41, at 1742.

152. *Id.*

153. *Id.* at 1761.

154. *Id.* at 1762.

155. *Id.*

156. *Id.* at 1762.

157. *Id.* at 1745.

158. *Id.* at 1769.

159. *Id.*

have clearly laid it out in the NGA. However, Congress did not do that and, therefore, *PennEast* was decided incorrectly.

#### CONCLUSION

Going back to the founding, states' rights and state sovereignty were of great importance. Congress meant for the federal government to be strong but also have powers that the Constitution limited. The government has expanded these limited powers over time. However, even though the federal government can use eminent domain against a state, giving that power to a third party is problematic. This note contends that the NGA does not authorize delegates to sue nonconsenting states in federal court and take state-owned land. Furthermore, it is not realistic to say that the states consented to an idea at the founding that was not established until around a hundred years after the ratification of the Constitution. Ultimately, the idea that a nongovernment party can take land from a nonconsenting state is contrary to state sovereignty and the Eleventh Amendment.

