The Right Pipeline for All the Wrong Reasons

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I. INTRODUCTION

The U.S. District Court for the Southern District of New York vacated Purdue Pharma's settlement plan that the Bankruptcy Court had approved because the plan included a release of liability in existing and potential future opioid related civil cases for individuals that are not parties to the bankruptcy proceeding. The court found that there is no existing statutory authority to allow bankruptcy courts to authorize such third-party releases for non-debtors. Allowing such releases provides for an escape of liability for knowingly bad acts—a purpose outside of what the bankruptcy system is intended to doI. Introduction

Most American energy commodities are moved through pipelines in the United States.[1] Notwithstanding the more than two million miles of distribution pipelines, more than 500,000 miles of gathering and transmission pipelines exist for various petroleum products ranging from natural gas to crude oil.[2] Even so, sighting and approving this vital infrastructure is no easy task.[3] Pipelines are an imperfect system that sometimes poses health and environmental risks whenever they leak,[4] leading to many "not-in-my-backyard" ("NIMBY") fights.[5] And pipeline companies must acquire the necessary land or easements to facilitate the construction of the pipelines.[6]

Like electrical transmission lines, most petroleum pipelines rely on individual state eminent domain powers to acquire the necessary land and building rights.[7] But natural gas is unique because the Federal Energy Regulatory Commission ("FERC") is authorized by statute to delegate federal eminent domain powers to facilitate the construction of interstate natural gas pipelines.[8] Since FERC was congressionally authorized to delegate this power to pipeline builders in 1947, individual states have not

1. *See Pipeline and Hazardous Materials Safety Administration*, U.S. DEP'T TRANSP., https://www.phmsa.dot.gov/ [https://perma.cc/32H4-ZXHM] (last visited Oct. 7, 2022).

2. E. Allison & B. Mandler, *Transportation of Oil, Gas, & Refined Products*, AM. GEOSCIENCES INST. (2018) https://www.americangeosciences.org/sites/default/files/AGI_PE_Transportation_web_final.pdf [https://perma.cc/Z9AU-CTDL].

3. *Cf.* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 1006–09 (2015) (explaining the lengthy process required to site and approve a new natural gas pipeline).

4. *See* Allison & Mandler, *supra* note 2; *see also* LINCOLN L. DAVIES, ALEXANDRA B. KLASS, HARI M. OSOFSKY, JOSEPH P. TOMAIN, & ELIZABETH J. WILSON, ENERGY LAW AND POLICY, 667–68 (2d. ed. 2018).

5. *See* Klass & Meinhardt, *supra* note 3, at 988–89 (explaining some of the reasons for opposition to pipeline infrastructure); *cf.* DAVIES ET AL., *supra* note 4 at 651 (discussing NIMBY fights in the context of electrical transmission lines).

6. *See* Klass & Meinhardt, *supra* note 3, at 996–98 (discussing the history of how states and landowners have blocked the construction of pipelines).

7. DAVIES ET AL., *supra* note 4, at 651.

8. *Id.* at 627, 637.

seriously challenged as sovereigns the acquisition of State property for the construction of such pipelines.[9]

This Comment explores New Jersey's recent effort to challenge FERC's constitutional authority to delegate federal eminent domain power to private entities. New Jersey, unhappy with the FERC's approved natural gas pipeline that will traverse some state-owned lands, asserted Eleventh Amendment sovereign immunity to impede the PennEast Pipeline Company ("PennEast") from using the federal courts to exercise its FERC-authorized eminent domain powers over the state.[10] Although the Supreme Court correctly ruled that 15 U.S.C. § 717f(h) delegates to private entities the federal government's eminent domain authority over state-owned lands, the Court did so for the wrong reasons.[11] The Court should have focused its reasoning on concluding, as the district court did, that a private entity can stand in the stead of the federal sovereign.[12] Regardless, this decision yields two important lessons: (1) Congress can potentially delegate any power the federal government holds; and (2) States should focus their legal efforts using the congressionally-created remedial mechanisms for challenging administrative decisions like certificates of public convenience and necessity.[13]

II. BACKGROUND

A. PennEast Pipeline Company, LLC v. New Jersey

PennEast is a joint venture between several energy companies created to build pipelines and it was granted a certificate of public convenience and necessity by FERC for a 116-mile pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey.[14] Before awarding the certificate, FERC published notice, held the requisite public hearings, and went through another round of comments after issuing an environmental impact statement.[15] To address various concerns during the hearing and

9. *See* PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 2270 (2021) (Barrett, J., dissenting) (stating that states have complied with condemnation actions predicated on certificates of public convenience and necessity up until this case); *see also* Robert L. Byer, George J. Kroculick, David Amerikaner & Leah Mintz, *Pipeline Developers Beware: Third Circuit Disallows Eminent Domain Over State Lands Under Natural Gas Act*, DUANE MORRIS (Sept. 25, 2019), https://www.duanemorris.com/alerts/pipeline_developers_beware_third_circuit_disallows_eminent_domain_state_lands_0919.html [https://perma.cc/7Z7A-BLK8] (stating that the Third Circuit was the first circuit to ever address the issue).

10. *See PennEast*, 141 S. Ct. at 2253–54.

11. *See infra* Section IV.

12. *Id.*

13. *Id.*

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

15. *Id.*

comment period, PennEast modified the proposed route of the pipeline.[16] Ultimately, the route traversed properties that included two parcels of state-owned land and forty more parcels of land in which New Jersey had some nonpossessory interest, including conservation easements.[17] However, parties opposed to the pipeline requested a rehearing from FERC, which FERC denied, prompting the State of New Jersey among other parties, to petition the D.C. Circuit to review the FERC order.[18]

After receiving the certificate of convenience and necessity, PennEast quickly began filing complaints in the District of New Jersey to exercise federal eminent domain power along the pipeline route.[19] In response, the State of New Jersey challenged the complaints by asserting an Eleventh Amendment sovereign immunity defense in motions to dismiss.[20] The District Court was unconvinced by New Jersey's argument[21] and granted PennEast's condemnation requests.[22] The Third Circuit, however, reversed the district court's decision.[23] The Third Circuit reasoned that while the federal government can delegate to private parties its eminent domain power, it doubted that it could delegate its ability to sue the nonconsenting states in federal court.[24] It also concluded that without explicit instruction by Congress in the statute, sovereign immunity could not be eroded.[25]

The Supreme Court heard oral arguments on the case in April 2021 and decided the case on June 29, 2021.[26]

B. Legal Background

The effect of the *PennEast* decision should be assessed as a threading of the needle between constitutional restrictions limiting private suits against state sovereigns and the federal government's complete power over

16. *Id.*
17. *Id.*
18. *Id.* There remains an ongoing challenge to the FERC decision in the D.C. Circuit. *See* N.J. Dep't of Env't. Prot. v. FERC, Doc. No. 18-01256 (D.C. Cir. Sept. 18, 2018); *see also* N.J. Conservation Found. v. FERC, Doc. No. 18-01225 (D.C. Cir. Aug. 21, 2018).
19. *PennEast*, 141 S. Ct. at 2253.
20. *Id.*
21. *In re* PennEast Pipeline Co., LLC, 938 F.3d 96, 101 (3d Cir. 2019), *as amended* (Sept. 11, 2019), *as amended* (Sept. 19, 2019), *cert. granted sub nom.*, *PennEast*, 141 S. Ct. 1289, *rev'd sub nom.*, *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021).
22. *Id.* at 101–02.
23. *Id.* at 113.
24. *Id.* at 100, 105–11.
25. *Id.* at 111–13.
26. *PennEast*, 141 S. Ct. at 2244.

states in specific contexts. Eminent domain is one of those contexts.[27] But natural gas pipelines are unique where eminent domain powers are delegated to private parties which leads to state sovereign immunity concerns.[28] Despite the Court's rigorous application of sovereign immunity doctrine for over a century,[29] the Court has only selectively departed from this jurisprudence to adapt to specific constitutional conflicts.[30] While the Court has remained consistent in defining when sovereign immunity can be abrogated by Congress,[31] there are circumstances where sovereign immunity does not apply.[32]

1. Federal Eminent Domain Power

Federal eminent domain power is traced to the Fifth Amendment's Takings Clause, which permits private property to be taken for public use if just compensation is given.[33] In 1875, the Court's decision in *Kohl v. United States* established that the consent of a state is not a precondition for federal eminent domain power, and that power "can neither be enlarged nor diminished by a State."[34] Later, the Court held in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Company* that state ownership of land was not enough to protect the state from federal eminent domain power.[35] The Court in *Luxton v. North River Bridge Company* held that federal eminent domain power can also be delegated to a corporation and used to condemn private property.[36]

2. Certificates of Public Convenience and Necessity and Eminent Domain

In 1938, Congress passed the Natural Gas Act ("NGA") empowering what is now FERC[37] to authorize and site the construction of interstate

27. *See infra* Part II.B.1.

28. *See infra* Part II.B.2–3.

29. *See* Seminole Tribe v. Florida, 517 U.S. 44, 54 n.7 (1996) *superseded by statute*, Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA") (amended 1998), 38 U.S.C. § 4323 (collecting cases where the Court has reaffirmed the principle that the Constitution did not consider federal jurisdiction over nonconsenting states).

30. *See infra* notes 51–52 and accompanying text.

31. *See, e.g.*, *Seminole Tribe*, 517 U.S. 44 (affirming the two-part test asking (1) whether Congress explicitly intended to abrogate immunity, and (2) whether Congress did so with a "valid exercise of power" (citing Green v. Mansour, 474 U.S. 64, 68, (1985))); *cf. PennEast*, 141 S. Ct. at 2257, 2259 (holding that Congress delegated its power and did not abrogate sovereign immunity).

32. *See infra* notes 48–50 and accompanying text.

33. 1 NICHOLS ON EMINENT DOMAIN § 1.3 (2022); *see also* Kohl v. United States, 91 U.S. 367, 372 (1875) (holding that the federal government's Fifth Amendment eminent domain powers extend to lands within state boundaries as well).

34. *Kohl*, 91 U.S. at 372, 374.

35. Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941).

36. Luxton v. N. River Bridge Co., 153 U.S. 525, 530 (1894).

37. When the law was passed in 1938, it applied to the Federal Power Commission. DAVIES ET AL., *supra* note 4, at 637. The Federal Power Commission has since been renamed Federal Energy Regulatory Commission ("FERC"). *Id.*

natural gas pipelines.[38] The Act requires FERC to issue a certificate of public convenience and necessity after FERC has ascertained there is a public need for such a pipeline.[39] FERC is usually obliged to investigate an application for a certificate of public convenience and necessity by holding hearings and receiving public comment.[40]

However, the NGA did not initially stimulate the kind of pipeline construction that was needed to move natural gas across the country because pipeline companies were unable to convince states to exercise their eminent domain powers in instances where states would receive no public benefit from pipelines traversing their boundaries.[41] Congress remedied the inability to execute a certificate of public convenience and necessity by amending the NGA in 1947, now codified as 15 U.S.C. § 717f(h), to provide federal eminent domain powers to a certificate holder against the "owner of [the] property."[42] As it stands, the absolute authority to site and approve interstate pipelines is vested in FERC.[43]

3. Eleventh Amendment Sovereign Immunity

When the United States was founded, it was generally understood that the states enjoyed immunity from suit as separate sovereigns regardless of their incorporation into the federal system.[44] However, in 1793, the Court held in *Chisholm v. Georgia* that states could be sued by individual citizens of other states.[45] This precipitated a swift reaction leading to the ratification

38. Klass & Meinhardt, *supra* note 3, at 995.

39. 15 U.S.C. § 717f(e); *see also PennEast*, 141 S. Ct. at 2252.

40. 15 U.S.C. § 717f(c)(1)(b). There are instances where emergencies permit temporary certificates absent the required hearings. *Id.*

41. Klass & Meinhardt, *supra* note 3, at 997–98; *PennEast*, 141 S. Ct. at 2252.

42. 15 U.S.C. § 717f(h).

> 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, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, 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.

Id.

43. DAVIES ET AL., *supra* note 4, at 637.

44. *See* Alden v. Maine, 527 U.S. 706, 713 (1999); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

45. Alexander Schultz, *Sovereign Immunity, and the Two Tiers of Article III*, 29 GEO. MASON L. REV. 287, 295 (2021); *see generally* Chisholm v. Georgia, 2 U.S. 419(1793) (holding that a citizen of another state could sue and hold the state of Georgia liable for a revolutionary war debt).

of the Eleventh Amendment within two years of the Court's *Chisholm* decision.[46] The Eleventh Amendment secured state sovereign immunity against suits by private citizens in federal court.[47]

There are a few limitations on sovereign immunity the Court has recognized where it does not protect a state from suit. First, a state may unambiguously consent to a suit.[48] Suits by other states and the federal government also fall outside of the protections of sovereign immunity.[49] Additionally, states may be subject to suit if they consented to a suit in the "plan of the Convention" where the act of ratifying the Constitution manifested a consent to being sued in certain circumstances.[50] Finally, there are circumstances where sovereign immunity may be abrogated if (1) Congress has clearly expressed that it is abrogating immunity, and (2) Congress used a "valid exercise of power" in doing so.[51] The only valid exercises of power the Court has thus far identified are those done through the Fourteenth Amendment.[52]

In general, the Court has rebuked efforts to find that Article I powers are a valid exercise of congressional power capable of abrogating state sovereign immunity. Both the Commerce Clause and the Intellectual Property Clause have been found as inadequate bases for permitting private suits against states.[53] However, on the issue of whether or not Congress can delegate its power to sue the states to private parties rather than abrogate immunity, the Court has only speculated on it in the past. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens* and *Blatchford v. Native Village of Noatak*, the Court concluded that Congress did not intend to delegate its power to sue the states.[54] Yet, in both cases, Justice

46. Schultz, *supra* note 45, at 329.

47. *See id.* at 335–37; *see also* U.S. CONST. amend. XI ("The 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.").

48. *See, e.g.*, Sossamon v. Texas, 563 U.S. 277, 284 (2011).

49. *See* United States v. Texas 143 U.S. 621, 646 (1892) (holding that the federal government can sue states); South Dakota v. North Carolina 192 U.S. 286, 318 (1904) (holding that states can sue each other).

50. *See Alden*, 527 U.S. at 729. The only example of this waiver based on the plan of the Convention has been under the Bankruptcy Clause. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006). The Court also distinguished bankruptcy from other actions because of its *in rem* nature; the state is not a true party to the suit. *Id.*

51. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 55 (citing *Green*, 474 U.S. at 68).

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

53. *Seminole Tribe*, 517 U.S. at 66–72 (holding that the Commerce Clause is not a valid exercise of power); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs Bank, 527 U.S. 627, 630 (1999) (holding that Congress could not abrogate state immunity for patent infringement); Allen v. Cooper, 140 S. Ct. 994, 1007 (2020) (holding that Congress could not abrogate state immunity for copyright infringement).

54. *Blatchford*, 501 U.S. at 786–88 (finding that Congress did not intend to impinge on state sovereign immunity); Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 783–84 (2000) (holding that Congress limited jurisdiction to persons and states were not persons as defined by the statute obviating the need to fully address sovereign immunity).

Scalia, writing for those majorities, speculated that Congress probably lacked the ability to delegate such authority even though the question was not formally addressed.[55]

III. THE COURT'S DECISION

In *PennEast*, the Supreme Court concluded that Congress could delegate the federal government's eminent domain power over individual states to a private entity.[56] The Court first observed that federal eminent domain powers stemmed from the Takings Clause of the Fifth Amendment and had a long history of applicability to the states as interpreted by the Court.[57] The Court explained that if the federal government's power of eminent domain cannot be expanded or limited by the states, then the government must be able to delegate its power.[58] The Court premised its conclusion on the idea that the states consented to suits by private delegatees exercising eminent domain powers as part of the plan of the convention or ratification of the Constitution.[59]

IV. COMMENTARY

Chief Justice Robert's majority opinion dismissed the dissenting Justices' most cogent point that the Commerce Clause cannot abrogate the Eleventh Amendment's grant of state sovereign immunity against private parties.[60] The opinion essentially bootstraps the Court's conclusion by reasoning that the states consented to suits by private parties exercising federal eminent domain power via the plan of the Constitution.[61] While the dissent does not disagree with the majority that the states consented to suits brought by the federal government as part of the plan of the Convention,[62] it reasonably asserts that it is a considerable leap to imagine that the

55. *Blatchford*, 501 U.S. at 785 (expressing doubt that Congress has the authority to delegate its ability to sue on behalf of Indian Tribes to the Tribes themselves); *Stevens*, 529 U.S. at 787 (passing on the question whether a "*qui tam* relator against a State" would rub against the Eleventh Amendment, yet expressing doubt that it is constitutional).

56. *See PennEast*, 141 S. Ct. at 2260–62.

57. *Id.* at 2255.

58. *Id.* at 2260.

59. *Id.* at 2259, 2262.

60. *Id.* at 2266–67 (Barrett, J., dissenting); *see also Seminole Tribe*, 517 U.S. at 66–73 (overruling *Pennsylvania v. Union Gas Co.* and unequivocally stating that Article I Commerce Clause powers are insufficient to abrogate state sovereign immunity).

61. *See PennEast*, 141 S. Ct. at 2259–62.

62. *Compare id.* at 2255, 2259. *with id.* at 2267 (Barrett, J., dissenting).

founders understood that constitutional ratification would have opened the states to private condemnation suits.[63] Instead of challenging the veracity of a delegation of authority argument, dissenting Justices Barrett and Gorsuch focused on whether the states waived their sovereign immunity.[64] Others have also interpreted the *PennEast* decision as an abrogation of state sovereign immunity.[65]

A. Viewing Condemnation Suits Based on a Certificate of Public Convenience and Necessity as a Qui Tam Action Makes More Sense

While Chief Justice Robert's opinion does call § 717f(h)'s language a delegation of federal authority, he did not firmly and consistently frame his reasoning as such.[66] The opinion only supports the idea that it is a delegation in passing.[67] Rather than make the circuitous connection that the states consented to condemnation suits in the plan of the Convention, the Court should have solely focused on the reality that PennEast was acting as an agent of the Federal Government. Condemnation suits based on a certificate of public convenience and necessity are something more akin to a *qui tam* action like the one discussed in *Stevens*.[68] Under that rationale, a state would not be sued by a private entity. Instead, it would be sued indirectly by the federal government, thereby eliminating Eleventh Amendment applicability.

As the Court made clear in *Guy F. Atkinson*, the federal government has the authority to exercise eminent domain over state-owned lands.[69] Furthermore, the majority, the dissent, and the parties all agreed that FERC could have the authority to engage in the condemnation of property against a state.[70] It then stands to reason that the government should be able to delegate a third party to act on its behalf against a state.[71] In principle, it is not PennEast suing New Jersey; it is PennEast suing New Jersey on behalf of the United States. The district court understood the nexus between FERC's power and § 717f(h)'s authorization of eminent domain power

63. *Id.* at 2268–69 (Barrett, J., dissenting).

64. *See generally id.* at 2263–71 (Gorsuch, J., & Barrett, J., dissenting).

65. *See, e.g.*, Schultz, *supra* note 45, at 358–59 (viewing the *PennEast* decision as an abrogation of state immunity not a delegation of federal authority).

66. *See PennEast*, 141 S. Ct. at 2254–63.

67. *See id.* at 2260 (arguing that state power cannot diminish federal power and that federal power being complete in itself is delegable to a party of the government's choosing).

68. *Stevens*, 529 U.S. at 768–69 (explaining that *qui tam* action created under the False Claims Act is one where a private party initiates a suit on behalf of the United States government).

69. *Guy F. Atkinson*, 313 U.S. at 534.

70. *See PennEast*, 141 S. Ct. at 2260 n.* ("[A]ll agree that Congress could authorize FERC itself to condemn the exact same property interests, pursuant to the exact same certificate of public convenience and necessity, and then transfer those interests to PennEast following a legal proceeding in which the Government would presumably act in concert with PennEast.").

71. Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L. J. 1, 61–67 (2021) (discussing how the government can delegate its authority in other contexts).

when the court said, "PennEast has been vested with the federal government's eminent domain powers *and stands in the shoes* of the sovereign."[72] Where FERC issues a certificate of public convenience and necessity, a legal fiction is created whereby the certificate holder is acting as the federal government in its condemnation actions.[73]

Had the majority opinion focused on this logic, it could have better distinguished the decision from past precedent and more convincingly addressed the dissenting Justices' concerns. This case was an excellent vehicle for establishing this precedent because of the process used to issue these certificates. By finding that a lawsuit initiated by a private party against a state under the direction and approval of a federal agency is not a violation of state sovereignty, the Court did not open the states up to a flood of unforeseen litigation. This is unlike the decisions of *Allen v. Cooper*, *Pennsylvania v. Union Gas Co.*, and to some extent *Blatchford*, where plaintiffs were all trying to enforce a private right created by Congress against a state.[74] While it is true that PennEast materially benefits from the condemnation action, it, as a certificate holder, was engaged in enforcing *public* rights created to facilitate the construction of *public* infrastructure deemed necessary by a duly authorized federal agency.[75] Also unlike *Allen*, *Union Gas*, or *Stevens*, where a state could suddenly find itself in court defending a private lawsuit because of a state employee's misconduct or mistake, here, states have notice and the opportunity to preemptively contest the taking directly with FERC during the hearing period leading up to the issuance of a certificate.[76] The statute even offers alternative remedies to states in the form of FERC rehearing and appeals in response to the federal government's decision.[77]

Furthermore, *PennEast* is distinguishable from other precedent because Congress was not delegating a federal power the government

72. *In re* Penneast Pipeline Co., LLC, No. 3:18-cv-1585-BRM-DEA, 2018 U.S. Dist. LEXIS 210754, at *33 (D.N.J. Dec. 14, 2018) (emphasis added).

73. *See supra* notes 69-72 and accompanying text.

74. *Allen*, 140 S. Ct. at 999 (explaining that Congress expressly tried to abrogate the Eleventh Amendment with the Copyright Remedy Clarification Act allowing infringed copyright holders to sue states); Pennsylvania v. Union Gas Co., 491 U.S. 1, 6 (1989) *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act permitted individuals to sue States); *Blatchford*, 501 U.S. at 786–88 (finding that 28 U.S.C. § 1362 had not expressly extended the rights of the federal government to sue the states to Indian Tribes).

75. *See* 15 U.S.C. § 717f; *see also* Klass & Meinhardt, *supra* note 3, at 1006–09.

76. *See* 15 U.S.C. § 717f; *see also* Klass & Meinhardt, *supra* note 3, at 1006–09; *see also PennEast*, 141 S. Ct. at 2253.

77. *See* 15 U.S.C. § 717 *et seq*.

exercised.[78] In *Allen*, *Union Gas*, and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, Congress created actions permitting private entities to enforce federal law.[79] However, in all of those cases, the federal government either lacked a prescribed mechanism to enforce those laws against the states on behalf of the public or did not delegate the use of that mechanism.[80] Also, while Congress had attempted to abrogate or had implied an abrogation of state sovereign immunity, it did not delegate its own power to a private entity to exercise for the benefit of the United States.[81]

Additionally, certificate holder condemnation actions are nothing more than the process of determining just compensation for the taking of the property when parties fail to agree on compensation.[82] Considering the absolute authority the federal government holds in taking lands, the issuance of the certificate makes it a forgone conclusion that a state landowner will have to sell the property—whether to a private entity or to FERC.[83] It is wholly unnecessary to force FERC into the role of middleman to obviate a technicality hill the dissent wants to die on. While the same anti-pragmatic argument made by the dissent remains contrary to this part of the analysis, rewarding state intransigence does not make the sense the dissent believes it does.[84] Every example offered by the dissent as an illustration of a state making mischief through immunity is also an example of a state exercising immunity to successfully escape federal jurisdiction entirely.[85]

Under the NGA, the states have no ultimate remedy by flexing immunity, and New Jersey was only able to wield sovereign immunity as a speedbump, not a roadblock.[86] It was clear when Congress amended the NGA in 1947 that authority was delegated to prevent the very type of obstructionist behavior that New Jersey attempted in *PennEast* by using its powers to block federally-approved projects of public necessity.[87] The delegation of that authority preserves government resources and allows the certificate holder to litigate all matters against all parties in each state in the same courthouse.[88] This pragmatism is therefore animated by far more than

78. *Compare* PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021), *with supra* notes 76–77 and accompanying text.
79. *Allen*, 140 S. Ct. at 999; *Fla. Prepaid*, 527 U.S. at 630; *Union Gas Co.*, 491 U.S. at 6.
80. *See Allen*, 140 S. Ct. at 999; *Fla. Prepaid*, 527 U.S. at 630; *Union Gas Co.*, 491 U.S. at 6.
81. *See Allen*, 140 S. Ct. at 999; *Fla. Prepaid*, 527 U.S. at 630; *Union Gas Co.*, 491 U.S. at 6.
82. 15 U.S.C. § 717f(h).
83. *Id.*; *see PennEast*, 141 S. Ct. at 2260 n.*.
84. *See PennEast*, 141 S. Ct. at 2270 (Barrett, J., dissenting).
85. *Id.* (citing *Fla. Prepaid*, 527 U.S. at 630–34; *Allen*, 140 S. Ct. at 994).
86. *See supra* notes 69–70, 81–82 and accompanying text.
87. Klass & Meinhardt, *supra* note 3, at 997–98; *PennEast*, 141 S. Ct. at 2252.
88. *See* 15 U.S.C. § 717f(h).

convenience alone; it is animated by the conservation of public resources and even judicial economy.

The Court has not departed from its history of protecting state sovereign immunity from congressional encroachment, nor has the Court created a new category of immunity abrogation. The Court, albeit clumsily, has done little more than affirm federal authority to exercise eminent domain over state-owned property. However, it has acknowledged for the first time that the federal government can delegate power it holds to trump state sovereign immunity—at least in the limited context of agency authorizations for public necessities.[89]

B. Lessons Learned from PennEast Pipeline Company, LLC v. New Jersey

PennEast has also highlighted ambiguity in § 717f(h) and affirmed the importance of using statutory mechanisms to challenge administrative orders. Section 717f(h) creates some ambiguity by stating that a certificate holder cannot acquire property from "the owner" and "may acquire the same by the exercise of the right of eminent domain."[90] While the majority was able to distinguish the ambiguity as one that does not trigger the abrogation analysis because it is only a delegation, the ambiguity nonetheless created confusion.[91] In the future, it would be best if Congress were to use language like, "the owner of property *including state-owned property*" and "exercise the right of eminent domain *on behalf of the United States*." Such language will clearly telegraph congressional intent.

Finally, because the State of New Jersey could not ultimately attain relief by challenging the eminent domain authority of FERC, it is worth pointing out that this was likely an exceptional waste of state resources. Even though New Jersey did not go all-in on the hopes that sovereign immunity would ultimately block the pipeline,[92] there is good reason why states have complied with certificates of public convenience and necessity during condemnation. FERC's orders may be challenged both administratively and in court.[93] Considering the futility in preventing

89. *See supra* notes 69–72, 74 and accompanying text.

90. 15 U.S.C. § 717f(h); *see also PennEast*, 141 S. Ct. at 2257.

91. *PennEast*, 141 S. Ct. at 2262–63 (explaining that a delegation eliminates the immunity so that there is nothing left to abrogate).

92. *See supra* note 18 and accompanying text.

93. *See* 15 U.S.C. § 717 *et seq*.

condemnation of state lands, the best application of state resources is spent on challenging the certificates themselves.

V. CONCLUSION

By holding that Congress's delegation of federal eminent domain powers to private entities also carries with it the power to disregard state sovereign immunity, *PennEast* has opened the possibility of delegating other federal powers that would also avoid state sovereign immunity.[94] The holding has laid the foundation for what statutory language would best serve the purpose. However, it may be necessary for the Court to eventually readdress the issue to limit such delegations to actions where federal oversight is inextricably intertwined with the private use of federal authority such as it was in *PennEast*.[95]

94. *See supra* Section IV.A.
95. *See supra* Section IV.A.