A TALE OF TWO DELEGATIONS: SOME REFLECTIONS ON *PENNEAST*

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INTRODUCTION

In 2021, the U.S. Supreme Court decided *PennEast Pipeline Co. v. New Jersey*.[1] The case is often associated with a theory of private delegation—that is, that Congress can delegate its federal eminent domain authority to private companies to build natural gas pipeline projects on state land. But there is more to the story than that. The regulatory scheme that underlies the eminent domain authority at issue in *PennEast* is also one about public delegation: the delegation by Congress to a federal agency to decide when and where pipeline projects can occur, and when sovereign states will be forced to waive their sovereign immunity in the process. Viewed in this light, *PennEast* is a watershed case in energy and environmental law. At a time when environmental law is increasingly becoming infrastructure law—because staving off the worst effects of climate change will require the construction of enormous amounts of renewable energy infrastructure, especially high-voltage interstate transmission lines—the Supreme Court gave Congress significant leeway to design and implement infrastructure projects as it sees fit. *PennEast* thus offers a sharp contrast to the Court's decision in *West Virginia v. EPA*,[2] which has been widely interpreted as limiting the federal government's ability to respond to climate change.[3] Following *PennEast*, Congress's power to engage in infrastructure projects—

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[1] 141 S. Ct. 2244 (2021).

[2] 142 S. Ct. 2587 (2022).

[3] *See, e.g.*, Maxine Joselow, *Supreme Court's EPA Ruling Upends Biden's Environmental Agenda*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/climate-environment/2022/06/30/epa-supreme-court-west-virginia/; *The Supreme Court Curbed EPA's Power to Regulate Carbon Emissions from Power Plants. What Comes Next?*, HARV. T.H. CHAN SCH. PUB. HEALTH (July 19, 2022), https://www.hsph.harvard.edu/news/features/the-supreme-court-curbed-epas-power-to-regulate-carbon-emissions-from-power-plants-what-comes-next/ (statement of Charlotte Roscoe); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 2).

including by delegating much of infrastructure planning and execution to the discretion of a federal agency—has arguably only expanded.

PennEast involved a last-ditch attempt by New Jersey to forestall the construction of an interstate natural gas pipeline in the state's backyard. These pipelines are licensed by a federal regulator, the Federal Energy Regulatory Commission ("FERC"), pursuant to a federal statute known as the Natural Gas Act.[4] New Jersey—a state that has adopted aggressive targets to reduce its greenhouse gas emissions in order to combat climate change[5]—had opposed the licensing of the fossil fuel pipeline to no avail. So, the state threw a Hail Mary: when the pipeline company arrived in federal district court and sought to condemn state land for the construction of the pipeline, New Jersey claimed sovereign immunity.

New Jersey's sovereign immunity claim turned a dry condemnation proceeding into a juicy question of whether a private company can hale a state into federal court pursuant to congressionally delegated federal eminent domain authority. The Natural Gas Act gives FERC the authority to grant a license to private companies to construct and operate interstate natural gas pipelines.[6] The grant of such a license automatically conveys federal eminent domain authority to the private company to obtain the necessary rights-of-way.[7] As the case wound its way through the courts, the narrative around it became one of private delegations: Congress can clearly exercise federal eminent domain authority against states without triggering sovereign immunity concerns, but can it convey that power to private companies to engage in infrastructure development?

The Supreme Court ultimately resolved the issue in favor of PennEast.[8] According to a majority of the Court, states consented to the exercise of federal eminent domain authority against them at the Founding, including federal eminent domain authority exercised by a private company under a congressional delegation of power, and therefore states cannot claim sovereign immunity in condemnation proceedings brought by private entities pursuant to such authority.[9]

Many commentators discussed *PennEast* as a sovereign immunity case. But for those watching more closely, and for the fields of energy and environmental law, the more interesting part of the case was the story of public delegation that lurked beneath its surface. For the delegation of

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[4] *See* 15 U.S.C. § 717f(c), (e).

[5] N.J. REV. STAT. § 26:2C-38 (2019) (setting a target for the state to reduce its "greenhouse gas . . . emissions to 80 percent below the 2006 level by the year 2050").

[6] *See generally* 15 U.S.C. § 717f.

[7] *Id.* § 717f(h).

[8] *See* PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2251–52 (2021).

[9] *See id.* at 2258–63.

eminent domain authority to a private company represented only the tip of the delegation iceberg in *PennEast*. As mentioned, the initial delegation in the Natural Gas Act is from Congress to FERC. Under the Act, FERC is given two powers: (1) the authority to determine whether an interstate natural gas pipeline ought to be licensed in the first place,[10] and (2) the authority to convey federal eminent domain power to an interstate natural gas pipeline once the agency has decided that the pipeline ought to be built.[11] Additionally, a majority of the Supreme Court in *PennEast* added yet another delegation to FERC's hand: the authority to decide when states may be subjected to condemnation proceedings brought by private pipeline companies. Thus, what a majority of the Supreme Court was ultimately approving in *PennEast* was not just the exercise of federal eminent domain authority by a private entity, but the private entity's exercise of this power pursuant to an intricate scheme of infrastructure development planned and executed at the discretion of a federal agency.[12]

Importantly, the Natural Gas Act's permitting authority has had significant real-world impact. Over the last several years, FERC has used this authority to oversee the construction of thousands of miles of interstate natural gas pipelines in the United States.[13] FERC's approval of this infrastructure—and its ability to convey federal eminent domain authority to licensed pipelines—has facilitated a dramatic growth in natural gas consumption in the United States.[14]

By contrast, renewable energy infrastructure development in the United States—in particular, the construction of high-voltage interstate transmission lines—has lagged. Notably, FERC also has jurisdiction over such transmission lines under the other major federal statute that it implements, the Federal Power Act.[15] But aside from a narrow exception, FERC does not have the same ability to license the construction of interstate transmission lines that it does natural gas pipelines under the Natural Gas Act.[16] Likely in part because of this, we have seen much

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[10] 15 U.S.C. § 717f(c)–(e).
[11] *Id.* § 717f(h).
[12] *See infra* Part II.
[13] *See infra* Part III.
[14] *See infra* Part III.
[15] *See* 16 U.S.C. § 824.
[16] *See id.* § 824p(b). The mismatch between FERC's siting authority for interstate transmission lines under the Federal Power Act as compared to its authority to site interstate natural gas pipelines under the Natural Gas Act has been well-documented. *See, e.g.*, Alexandra Klass et al., *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 1042 (2022); Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1086 (2013); Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65

slower growth in the development of interstate transmission infrastructure in the United States than interstate natural gas infrastructure.

This imbalance in infrastructure development has important implications for ongoing efforts to combat climate change by decarbonizing the electricity grid. Most studies suggest that in order to reduce greenhouse gas emissions from the electricity sector, the United States will need to build out significant additional miles of high-voltage interstate transmission lines.[17] These interstate transmission lines will connect renewable generation in remote areas—like the wind corridors in the Midwest and the high solar-irradiance zones in the South—with population centers along the coasts. But FERC's inability broadly to permit these lines and grant federal eminent domain authority for their construction has posed a barrier to these infrastructure goals, and, in turn, the development of renewable generation.[18] Indeed, expanding FERC's authority to permit interstate transmission lines has become the focal point of recent congressional efforts to address climate change.[19]

In light of these ongoing debates around FERC's permitting authorities, this Essay makes two primary contributions. First, it teases out the twin stories of delegation that lie at the heart of the *PennEast* case: the story of private delegation and the story of public delegation. Both the courts and public commentary have focused on the first story. But the second story of public delegation reveals the much more intricate scheme of the allocation of federal power involved in the case. Looking closely at that public delegation, it becomes clear what the real holding of *PennEast* is: not that state sovereign immunity poses no bar to *congressionally* delegated federal eminent domain authority used in condemnation proceedings, but rather that state sovereign immunity poses no bar to *agency* delegated federal eminent domain authority used in condemnation proceedings. It was, ultimately, a public delegation that the Court approved in *PennEast*, not a private one.

VAND. L. REV. 1801, 1859–60 (2012); Richard J. Pierce, Jr., *The State of the Transition to Competitive Markets in Natural Gas and Electricity*, 15 ENERGY L.J. 323, 333–34 (1994).

[17] *See infra* Part III.

[18] *See, e.g.*, Klass et al., *Grid Reliability Through Clean Energy*, *supra* note 16, at 1022–43; Klass, *Takings and Transmission*, *supra* note 16, at 1134–47; Klass & Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, *supra* note 16, at 1857–68.

[19] In the recent Infrastructure and Jobs Act of 2021, Congress amended the Federal Power Act to expand FERC's authority to permit interstate transmission lines. *See infra* Part III. These amendments were arguably minor, however, and more aggressive proposals to expand FERC's transmission line permitting authority were not adopted by the full Congress. *See infra* Part III. Nonetheless, it is likely that we will continue to see efforts to amend FERC's permitting authority in the 118th Congress.

Second, this Essay argues that if this public delegation story is correct, then under *PennEast*, Congress has a significant amount of discretion to enact legislation to support the construction of renewable energy infrastructure. In particular, Congress can delegate authority to FERC or another federal agency to engage in interstate transmission line planning and execution. By making this observation, I do not intend to argue that Congress should simply grant FERC the same authority to permit interstate transmission lines that it currently possesses in the natural gas context. FERC's exercise of its permitting authority in the natural gas pipeline context has been subject to substantial criticism,[20] including by me.[21] Simply replicating that model in the electricity context is likely not the best solution to the existing imbalance in authorities. But that normative analysis goes beyond the scope of this piece. The point here is simply to observe that, when it comes to infrastructure development, the boundaries of Congress's authority are primarily normative ones, not legal ones. Under *PennEast*, it is not the courts, but Congress, who has the power to decide the country's infrastructure policies.

I. THE PRIVATE DELEGATION STORY

The conventional view of *PennEast* is as a case about private delegation: whether Congress can delegate to private entities the ability to exercise federal eminent domain authority against states in condemnation proceedings brought in federal court.

PennEast involved an effort by a natural gas company to condemn land owned by the state of New Jersey pursuant to a federal license authorizing the company to construct an interstate natural gas pipeline. The PennEast Pipeline Company ("PennEast"), a Delaware limited liability company, sought to construct a 116-mile interstate natural gas pipeline running through Pennsylvania and New Jersey to supply natural gas to markets in

[20] *See, e.g.*, Paul Sabin et al., *Seven Reactions to the "Permitting Reform" Debate*, LPE PROJECT (Dec. 21, 2022), https://lpeproject.org/blog/seven-reactions-to-the-permitting-reform-debate/; Gillian Giannetti, *Reform Is Long Overdue for FERC's Gas Pipeline Reviews*, SUSTAINABLE FERC PROJECT (Nov. 19, 2019), https://sustainableferc.org/reform-is-long-overdue-for-fercs-gas-pipeline-reviews/; Natural Resources Defense Council et al., Supplemental Comments of Public Interest Organizations (May 24, 2021), https://sustainableferc.org/wp-content/uploads/2021/05/PL18-1-NOI-PIO-Comments-FINAL.pdf; PAUL W. PARFOMAK, CONG. RSCH. SERV., R45239, INTERSTATE NATURAL GAS PIPELINE SITING: FERC POLICY AND ISSUES FOR CONGRESS 9–17 (2022), https://sgp.fas.org/crs/misc/R45239.pdf; Alexandra B. Klass, *Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts*, 39 YALE J. ON REG. 658, 661–64 (2022).

[21] Alison Gocke, *Pipelines and Politics*, HARV. ENV'T L. REV. (forthcoming 2023).

New Jersey, Pennsylvania, and New York.[22] To build the pipeline, PennEast first had to receive a federal license, known as a "certificate of public convenience and necessity," from FERC.[23] In FERC's proceedings assessing PennEast's application, representatives from the state, state agencies, and local governments of New Jersey protested the granting of the license.[24] They argued, *inter alia*, that there was no evidence that the pipeline was actually needed to supply natural gas to its proposed markets; that the assessment of the pipeline's impact on the environment was insufficient and failed to consider serious risks to the state's natural resources, including climate-related risks; and that granting federal eminent domain authority to this pipeline was inappropriate given that PennEast had not established that the pipeline would actually serve a public purpose.[25]

FERC ultimately granted PennEast its requested certificate.[26] Consistent with the specifications of the Natural Gas Act, FERC's certificate authorized PennEast to obtain by federal eminent domain authority any land or rights-of-way necessary to construct the pipeline in condemnation proceedings in federal district court.[27]

A month after PennEast received its FERC certificate, the company commenced condemnation proceedings against several landowners in federal district court in New Jersey.[28] These landowners included the state of New Jersey and several state agencies, which held a mix of possessory interests in and conservation easements on around forty parcels of land that PennEast sought to condemn.[29] Still opposed to the construction of the pipeline, New Jersey moved to dismiss PennEast's complaint, arguing that the state was immune from suit under the Eleventh Amendment.[30] According to New Jersey, the Eleventh Amendment prohibits suits by private citizens against sovereign states,[31] and while PennEast was exercising federal eminent domain authority

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[22] PennEast Pipeline Co., LLC, 162 FERC ¶ 61053, 2018 WL 487260, at *1 (Jan. 19, 2018).

[23] *See* 15 U.S.C. § 717f(c)(1)(A) (prohibiting anyone from constructing or operating an interstate natural gas pipeline without first receiving approval from FERC); *id.* § 717f(c)(1)(B), (d), (e) (specifying the procedures for FERC to issue approvals for interstate natural gas pipelines).

[24] *See* PennEast Pipeline Co., *supra* note 22, at *3.

[25] *Id.* at *5–10, *21–55.

[26] *Id.* at *1.

[27] *Id.* at *10, *57; 15 U.S.C. § 717f(h).

[28] *In re* PennEast Pipeline Co., LLC, No. 18-1585, 2018 WL 6584893, at *6 (D.N.J. Dec. 14, 2018).

[29] *Id.* at *7; Respondents' Brief at 6, PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244 (2021) (No. 19-1039).

[30] *See In re PennEast Pipeline Co.*, 2018 WL 6584893, at *12.

[31] *See* 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.").

delegated to it by the federal government, because PennEast *itself* was a private entity (a citizen of the state of Delaware), its condemnation proceeding against New Jersey was constitutionally barred.[32]

On appeal, the U.S. Court of Appeals for the Third Circuit agreed that the delegation of federal eminent domain authority to a private entity was troubling in the context of a condemnation proceeding brought against a state.[33] As the Third Circuit conceived of it, the authority delegated to a certificate holder under the Natural Gas Act is twofold: the first is the authority to exercise federal eminent domain authority, and the second is the federal government's exemption from Eleventh Amendment immunity.[34] While the court agreed that Congress could delegate its federal eminent domain power to a private actor, it was skeptical that Congress could similarly delegate its exemption from Eleventh Amendment immunity.[35]

By the time the Supreme Court took up the case, it, too, embraced the framing of the issue as one involving the exercise of delegated eminent domain authority by private companies against states—although the Justices split as to how to understand the nature of the private delegation itself. A five-Justice majority concluded that Congress can delegate to private actors the ability to exercise federal eminent domain authority against states in condemnation proceedings because states consented to such proceedings in the "plan of the Convention."[36] A four-Justice dissent—composed of Justices Barrett, Kagan, Gorsuch, and Alito—disagreed and would have found PennEast's condemnation suit barred by the Eleventh Amendment.[37]

The majority based its conclusion on a particular reading of historical practice. First, according to the majority, since the Founding, the federal government has had the authority to exercise federal eminent domain

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[32] *See In re PennEast Pipeline Co.*, 2018 WL 6584893, at *12. The district court was not persuaded by this argument. The court pointed out that New Jersey conceded that if the federal government had brought the suit, the state would not be able to claim Eleventh Amendment immunity, and because the Natural Gas Act "vested" PennEast "with the federal government's eminent domain powers," PennEast stood "in the shoes of the sovereign," and thus the Eleventh Amendment was "inapplicable" to the condemnation proceeding. *Id.*

[33] *See In re* PennEast Pipeline Co., LLC, 938 F.3d 96, 105 (3d Cir. 2019) (expressing "doubt" that "the United States can delegate the federal government's exemption from" Eleventh Amendment immunity to private parties).

[34] *Id.* at 104.

[35] *Id.* at 105–07.

[36] PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 2258 (2021) (quoting Alden v. Maine, 527 U.S. 706, 728 (1999)).

[37] *Id.* at 2265 (Barrett, J., dissenting). Justices Gorsuch and Thomas also wrote a separate dissent expressing disagreement with the Court's sovereign immunity precedents. *See id.* at 2263–65 (Gorsuch, J., dissenting).

power to condemn both private and state land.[38] Additionally, the federal government has delegated that federal eminent domain authority to private parties, often in the context of authorizing private corporations to engage in infrastructure projects.[39] And, historically, private delegatees exercised that federal eminent domain authority against property falling within state boundaries.[40] Thus, the majority concluded, the Natural Gas Act's certificate procedure was "unexceptional"[41]: it "follows [the standard] path" of a congressional delegation of federal eminent domain authority to a private corporation to engage in an infrastructure project.[42]

Moreover, the majority determined that the private pipeline company's condemnation proceeding against a state posed no Eleventh Amendment problem because states consented to the use of federal eminent domain authority against them in the plan of the Convention.[43] The majority explained that states may be subject to suit in "limited circumstances": (1) the state consents to the suit; (2) Congress abrogates state sovereign immunity; or (3) the state has "agreed to suit in the 'plan of the Convention.'"[44] As the majority saw it, PennEast's attempt to sue New Jersey fell into the third category. The history of federal eminent domain established that the "plan of the Convention contemplated that States' eminent domain power would yield to that of the Federal Government . . . ."[45] That was true regardless of whether the federal eminent domain authority was wielded directly by the federal government or indirectly "through a [private] corporation created for that object."[46] And because the federal "eminent domain power is inextricably intertwined with the ability to condemn," a plan of the Convention that contemplated states yielding to federal eminent domain authority exercised by private corporations necessarily also included a plan that states would not be able to assert sovereign immunity against condemnation proceedings.[47] Thus, so long as the federal government could delegate its federal eminent domain authority to a private company—a proposition that no party in the case disputed[48]—then states

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[38] *Id.* at 2254–55 (majority opinion).
[39] *Id.* at 2255–56.
[40] *Id.* at 2256.
[41] *Id.* at 2254.
[42] *Id.* at 2257.
[43] *Id.* at 2259.
[44] *Id.* at 2258 (quoting Alden v. Maine, 527 U.S. 706, 728 (1999)) (citing Sossamon v. Texas, 563 U.S. 277, 284 (2011); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).
[45] *Id.* at 2259.
[46] *Id.* (quoting Luxton v. N. River Bridge Co., 153 U.S. 525, 530 (1894)).
[47] *Id.* at 2260.
[48] *Id.* at 2259–60.

consented to that private party initiating condemnation proceedings against them.

The dissent disagreed with the majority's historical interpretation, but it still understood the issue to be one of the delegation of eminent domain authority to a private company. From the dissent's perspective, the majority's consent-at-the-plan-of-the-Convention approach had no historical evidence to support it.[49] As the dissenting Justices explained it, the history of the use of federal eminent domain at the Founding is complicated: for the first seventy-five years of the nation's history, Congress exercised federal eminent domain authority only with respect to lands that fell within federal jurisdiction.[50] It was not until the 1870s that the Supreme Court recognized that Congress could exercise federal eminent domain authority against private lands held within state boundaries.[51] And it was not until the 1940s that the Court recognized that Congress could exercise federal eminent domain authority against state-owned property.[52] While it was clear at the Founding that governments could delegate their eminent domain authority to private companies for the construction of infrastructure projects, it was not at all clear that Congress could use that authority against land that was owned by the states.[53] With that lack of clarity, the dissent argued, it could not be the case that states consented to the use of federal eminent domain authority against them in the context of a private condemnation suit.[54]

Instead, the dissent argued that PennEast's condemnation suit was properly thought of as falling into the second category of the Court's sovereign immunity precedents: an (unlawful) congressional attempt to abrogate state sovereign immunity.[55] According to the dissent, federal eminent domain authority is a method by which Congress may exercise its power pursuant to other enumerated powers; it is not a freestanding power on its own.[56] In this context—the creation of a federal licensing regime for interstate natural gas pipelines under the Natural Gas Act—Congress was acting pursuant to its Commerce Clause power.[57] But "Congress cannot authorize private suits against a nonconsenting State pursuant to its Commerce Clause power."[58] Thus, Congress could not

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[49] *Id.* at 2268 (Barrett, J., dissenting).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 2265–67.
[56] *Id.* at 2266.
[57] *Id.* at 2267.
[58] *Id.*

abrogate New Jersey's sovereign immunity in PennEast's condemnation proceeding against it.[59]

Importantly, the dissent's disagreement with PennEast's suit focused on Congress's delegation of eminent domain authority to a private entity. As the dissent explained, there would be no issue with Congress *itself* exercising federal eminent domain authority against New Jersey to build the interstate natural gas pipeline.[60] The problem was the method Congress chose to achieve the construction of the pipeline—the delegation of authority to a private company.[61] The federal government is "supreme within its realm," and therefore can legislate to create a regime of interstate natural gas pipelines, but "the Constitution limits the means by which the Federal Government can impose its will on the States."[62]

In sum, in the conventional telling, *PennEast* involved a dispute around the congressional delegation of federal eminent domain authority to a private entity.

II. THE PUBLIC DELEGATION STORY

There is another way to tell the *PennEast* story, however, and that is one of congressional delegation of authority to a public agency. For the delegation of eminent domain authority to a private company represented only the tip of the delegation iceberg in *PennEast*. In the Natural Gas Act, the first delegation is from Congress to FERC, and it gives the agency the authority to determine *whether* a particular interstate natural gas pipeline project is "required by the present or future public convenience and necessity" in the first place.[63] Only if FERC concludes that a pipeline project is so required can it grant the private company a certificate of public convenience and necessity to construct the project.[64] The second delegation in the Act is also from Congress to FERC, and again it gives the agency discretion to determine whether a particular interstate natural gas pipeline project constitutes a "*public use*"—the requirement for eminent domain authority under the Takings Clause. If the agency so determines, then the agency grants federal eminent domain authority to the private company.[65] Thus, the congressional delegation of federal

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[59] *Id.*
[60] *Id.* at 2269.
[61] *See id.*
[62] *Id.*
[63] 15 U.S.C. § 717f(e).
[64] *Id.*
[65] *Id.* § 717f(h).

eminent domain authority to a private company that so concerned the courts in *PennEast* is not a direct delegation, but an indirect one, routed first through a federal agency.

Moreover, there are two features of the Natural Gas Act that serve to concentrate the congressional delegation of authority within FERC. The first is the substantive standard of the certificate of public convenience and necessity. Under the Natural Gas Act, FERC is authorized to grant private pipeline companies this certificate only if it finds that the proposed pipeline project "is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."[66] Although that language is broad, it is not unbounded. As I discuss in another paper,[67] the certificate of public convenience and necessity in the Natural Gas Act is defined by both the certificate's roots in traditional state public utility regulation and the particular historical context in which the Act's certificate provision was enacted and amended. Nonetheless, FERC is given a significant amount of discretion in its determination of whether a proposed project satisfies the "public convenience and necessity" standard. Indeed, the D.C. Circuit has said that the "grant or denial of a [Natural Gas Act] certificate of public convenience and necessity is a matter 'peculiarly within the discretion of the Commission,'"[68] and courts will "not 'substitute [their] judgment for that of the Commission.'"[69] As a result, FERC is uniquely empowered to decide whether a particular pipeline project ought to be certificated under the Natural Gas Act.

In addition, because of the way the Natural Gas Act is written, the certificate of public convenience and necessity standard is simultaneously the standard for whether a proposed pipeline project serves a "public use" under the Fifth Amendment.[70] The Natural Gas Act states that "[w]hen 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," the certificate holder "may acquire the same by the exercise of the right of eminent domain" in federal or state court.[71] This provision makes the conveyance of federal eminent domain authority automatic with FERC's grant of a certificate of public

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[66] *Id.* § 717f(e).

[67] Gocke, *supra* note 21.

[68] Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (quoting Okla. Nat. Gas Co. v. Fed. Power Comm'n, 257 F.2d 634, 639 (D.C. Cir. 1958)).

[69] *Id.* (quoting Nat'l Comm. for the New River v. FERC, 373 F.3d 1323, 1327 (D.C. Cir. 2004)).

[70] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[71] 15 U.S.C. § 717f(h).

convenience and necessity.[72] Thus, the only standard FERC applies to decide whether a private pipeline company can exercise federal eminent domain authority is the same standard that FERC applies to decide whether the pipeline project can be constructed in the first place: whether the pipeline is required by the present or future public convenience and necessity.

The perfect overlap between these two delegations became clear in a recent decision by the D.C. Circuit in *City of Oberlin v. FERC*.[73] The case involved the question of whether FERC can grant a certificate for the construction of an interstate natural gas pipeline when the gas shipped along the pipeline is intended for export abroad.[74] In a prior decision in the case, the D.C. Circuit had expressed some doubt as to whether a pipeline whose gas is intended for export can satisfy the "public use" clause in the Fifth Amendment because the gas would not be serving the American public.[75] On remand, FERC explained that export pipelines can satisfy the public convenience and necessity standard because they can provide benefits to the American public beyond the consumption of natural gas.[76] On appeal the second time, the D.C. Circuit concluded that FERC's explanation with respect to the certificate of public convenience and necessity standard was sufficient to satisfy the Fifth Amendment's Takings Clause as well.[77] As the court explained, the Natural Gas Act's eminent domain provision indicates that "Congress determined that natural gas pipelines that are duly certified as being in the public convenience and necessity serve a public purpose" under the Fifth Amendment.[78] What matters, then, for the public use standard is simply whether a pipeline was lawfully found to be required by the public convenience and necessity.[79] And because FERC, according to the court, had reasonably found that export pipelines can be required by the public convenience and necessity, FERC's conclusion was sufficient for the Fifth Amendment as well.[80]

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[72] *Id. See also* Allegheny Def. Project v. FERC, 964 F.3d 1, 4 (D.C. Cir. 2020) (en banc); Transcon. Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 729 (3d Cir. 2018).

[73] *See* City of Oberlin v. FERC (*Oberlin II*), 39 F.4th 719, 728 (D.C. Cir. 2022).

[74] *Id.* at 721.

[75] *See* City of Oberlin v. FERC (*Oberlin I*), 937 F.3d 599, 607–08 (D.C. Cir. 2019).

[76] *Oberlin II*, 39 F.4th at 725, 727 (listing as other benefits the support for the production and sale of domestic gas, which "contributes to the growth of the economy and supports domestic jobs").

[77] *Id.* at 728.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 727–29.

The second feature of the Natural Gas Act that serves to concentrate the congressional delegation of authority within FERC is the procedure by which FERC's certificates are granted and can subsequently be challenged. Under the Natural Gas Act, the grant of a certificate of convenience and necessity automatically conveys federal eminent domain authority to the certificate holder. As a result, following FERC's grant of a certificate, a pipeline company can immediately begin condemnation proceedings to obtain the necessary land to construct the pipeline.[81] Meanwhile, under the Act's judicial review provisions, opponents of FERC's certificate decision may seek to appeal the decision to a federal court of appeals (although they will first have to exhaust their administrative remedies by seeking a rehearing before FERC).[82] But, by the plain terms of the Natural Gas Act, a challenge to a FERC certificate decision, either administratively or judicially, does not automatically stay the effect of the certificate.[83] As a result, a pipeline company can initiate condemnation proceedings while a challenge to FERC's certificate

[81] *See* Allegheny Def. Project v. FERC, 964 F.3d 1, 7–8 (D.C. Cir. 2020) (en banc).

[82] *See* 15 U.S.C. § 717r(a), (b). Under the Natural Gas Act's judicial review and administrative exhaustion provisions, any party who is "aggrieved" by an order issued by FERC may request a rehearing from FERC. *Id.* § 717r(a). FERC can "grant or deny rehearing" in response to such a request or "abrogate or modify its order without further hearing." *Id.* If FERC fails to act upon the request within thirty days after it is filed, the request is "deemed to have been denied." *Id.* Once—but only once—FERC has taken one of the specified actions (granting or denying rehearing, abrogating or modifying its order without further hearing, or failing to act on the rehearing request for thirty days), the party may appeal FERC's order "in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . ." *Id.* § 717r(b). A party cannot seek judicial review of FERC's decision without first exhausting the rehearing process within FERC. *Id. See Allegheny Def. Project*, 964 F.3d at 3–4. In addition, the Natural Gas Act requires parties challenging FERC's decision to have first raised the specific "objection" for which they seek judicial review in their application for rehearing before FERC. 15 U.S.C. § 717r(b).

The Natural Gas Act's judicial review provision can be strict. But, as Judge Griffith described, it is strict for a reason: "[I]t's a consequence of the statutory text and sound circuit precedent. A different approach would subvert Congress's expectation that generalist judges will, in the ordinary course, consider complex pipeline cases only after expert review. '[M]andatory petition-for-rehearing requirement[s],' although 'virtually unheard-of' in other contexts, 'happen to exist in all three of the major statutes administered by FERC.' These provisions, including section 717r, are 'the product of an awareness that FERC's complex and multi-party proceedings would soon overwhelm the system if agreed-upon settlements and acquiesced-in agency dispositions were not the rule rather than the exception.'" *Allegheny Def. Project*, 964 F.3d at 21 (Griffith, J., concurring) (internal citations omitted) (quoting ASARCO, Inc. v. FERC, 777 F.2d 764, 774 (D.C. Cir. 1985)).

[83] 15 U.S.C. § 717r(c) ("The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.").

decision is still pending.[84] The effect of this statutory scheme is to bifurcate the legal proceedings that flow out of FERC's grant of a certificate.

Importantly, however, only one of those legal routes is open to a substantive challenge of FERC's certificate decision. That is, a certificate holder may begin condemnation proceedings in federal or state court, but landowners opposing those proceedings may *not* challenge the substance of FERC's certificate decision in that proceeding.[85] To do so would amount to what the courts have interpreted as a "collateral attack" on FERC's certificate decision, or, alternatively, a violation of the "exclusive" judicial review provision of the Natural Gas Act.[86] Rather, to challenge the substance of FERC's certificate decision, opponents first must seek rehearing of the decision within FERC. Once FERC has acted on that rehearing request and issued a final decision, opponents can appeal that decision to a court of appeals.[87]

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[84] *See* Transcon. Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres, 907 F.3d 725, 740 (3d Cir. 2018).

[85] *See id.*

[86] *See id.* ("In sum, the Hilltop/Hoffman Landowners are attacking the underlying FERC order, but review of the underlying FERC order is only properly brought to FERC on rehearing and then to an appropriate circuit court, as the Hilltop/Hoffman Landowners are pursuing. We lack jurisdiction to hear collateral attacks on the FERC certificate, which contained a finding that the project was for public use."). *See also* N.J. Conservation Found. v. FERC, 353 F. Supp. 3d 289, 296–300 (D.N.J. 2018) (providing a comprehensive explanation of the Natural Gas Act's "exclusive" judicial review provision and collecting cases explaining that this provision prohibits "collateral attacks" on FERC's decisions).

[87] Because rehearing requests and judicial appeals can take some time, it is possible for a landowner's property to have been condemned and construction work to have started before a court has the opportunity to hear substantive challenges to FERC's certificate decision. *See Allegheny Def. Project*, 964 F.3d at 10–11 (collecting examples in which land was condemned and a pipeline was built before either FERC or a court had reviewed the initial certificate decision). Indeed, this possibility was significantly more likely just two years ago, before the D.C. Circuit issued its en banc decision in *Allegheny Defense Project*. Prior to that decision, FERC typically issued "tolling orders" in response to parties' requests for rehearing. *Id.* at 3, 9. These tolling orders did not substantively respond to parties' requests for rehearing; they simply bought the agency more time to consider the rehearing request. *Id.* at 9. At the same time, the courts had interpreted these tolling orders to deprive them of jurisdiction to review FERC's decision because FERC "had not yet resolved the rehearing requests on the merits and so had not taken 'final agency action' on the Certificate Order." *Id.* at 7. The effect was to "split the atom of finality," as tolling orders were "not final enough for aggrieved parties to seek relief in court, but they [we]re final enough for private pipeline companies to go to court and take private property by eminent domain." *Id.* at 10. The en banc panel of the D.C. Circuit found these tolling orders expressly prohibited by the language of the Natural Gas Act. *Id.* at 12–18. Nonetheless, as Judge Griffith pointed out in his concurrence in *Allegheny Defense Project*, the tolling orders themselves were not the source of the problem, whereby land condemnation proceedings can proceed in parallel with rehearing requests or judicial review of FERC certificate orders. *Id.* at 20 (Griffith, J., concurring). This practice is allowed by the text of the Natural Gas Act itself. To resolve this "unfairness," Judge Griffith urged "our court, district courts, and the Commission itself" to use their discretionary powers to "guarantee fair proceedings." *Id.* at 20. *See also id.* at 20–22 (suggesting that courts of appeals should closely police

Together, the substantive deference to FERC's certificate decisions and the procedural strictures that funnel challenges to FERC's certificate decisions through a complex administrative and judicial review process mean that a pipeline opponent's best hope to avoid the consequences of a FERC certificate is to convince FERC not to grant the certificate in the first place. Put differently, when it comes to certificate decisions under the Natural Gas Act, the buck stops with FERC.

Indeed, the *PennEast* story told in a different light is precisely the story of a pipeline opponent attempting to resist the Natural Gas Act's concentration of authority within FERC. New Jersey did its best to convince FERC not to grant PennEast a certificate. It appeared in FERC's initial certificate proceeding, where its objections were ultimately dismissed. It filed a rehearing request before the agency, which was ultimately denied. It sought judicial review of FERC's decision in the D.C. Circuit, which was held in abeyance pending resolution of the *PennEast* case (although, given the courts' deference to FERC's certificate decisions, it was unlikely the D.C. Circuit was going to overturn FERC's decision). New Jersey's sovereign immunity claim was thus a last-ditch attempt by the state to avoid FERC's certificate decision.[88] And when a majority of the Supreme Court held that state sovereign immunity posed no bar to a FERC-granted certificate of public convenience and necessity, this attempt failed too.

With this public delegation story now clear, the Supreme Court's holding becomes apparent. The *PennEast* majority said that New Jersey could not claim state sovereign immunity in PennEast's condemnation proceedings because the states had consented at the plan of the Convention to Congress's use of federal eminent domain authority against them, whether directly by Congress or indirectly by Congress's appointment of a private corporation. But the scheme under the Natural Gas Act, strictly read, reflects *neither* of those conditions. Congress does

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FERC's rehearing requests and consider the possibility of mandamus relief if FERC does not appear to be reviewing rehearing requests promptly; approving of FERC's practice—adopted while *Allegheny Defense Project* was pending—to issue certificate orders precluding the construction of the pipeline while rehearing of the order is pending; and encouraging district courts to hold condemnation proceedings in abeyance while rehearing of a certificate order is pending).

[88] In fact, the United States Government, appearing as amicus curiae in *PennEast*, made this point by arguing that New Jersey's sovereign immunity claim amounted to precisely the kind of end-run around the Natural Gas Act's "exclusive" judicial review provision that prevented substantive challenges to FERC's certificate decisions in condemnation proceedings. Brief for the United States as Amicus Curiae Supporting Petitioner at 12–20, PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021) (No. 19-1039). The Supreme Court disagreed with this argument, holding that New Jersey's assertion of sovereign immunity was not a "collateral attack on the FERC order" but rather was a "defense against the condemnation proceedings initiated by PennEast" that was properly asserted in the district court. *PennEast Pipeline Co.*, 141 S. Ct. at 2254.

not itself exercise federal eminent domain authority to build interstate natural gas pipelines, nor does it appoint a private party to do so. Rather, it delegates to FERC the ability to appoint a private party to do so. Thus, what the Court ultimately upheld in *PennEast* was not *congressionally* delegated federal eminent domain authority wielded by a private party against a state, but *agency* delegated federal eminent domain authority wielded by a private party against a state.

As a result, the majority's opinion in *PennEast* upheld a much broader scheme than the private delegation story would suggest. First, the Court held that states consented to the use of federal eminent domain authority against them by private corporations acting at the behest of federal agencies, which in turn are acting at the behest of Congress. Second, as such, the Court must also have held that Congress can delegate its federal eminent domain authority to federal agencies. Finally, the Court upheld a private company's exercise of this authority subject to the discretionary judgment of a federal agency.[89]

Importantly, the Court appears to have never addressed these issues before. Historically, in state public utility regulation, the certificate of public convenience and necessity was often accompanied by state eminent domain authority.[90] But the same was not true at the federal level. The original version of the Interstate Commerce Act—the first federal statute to adopt the public utility regulation model—did not give the Interstate Commerce Commission the authority either to issue certificates of public convenience and necessity or to delegate federal eminent domain powers to private railroad companies.[91] The Commission was given certificate authority only after the 1920 amendment to the Act, and even then it did not include federal eminent domain authority.[92] The two other statutes that inspired the certificate provision in the Natural Gas Act, the Communications Act of 1934 and the Motor Carrier Act of 1935, also did not include federal eminent

[89] Admittedly, because no one challenged the scope of Congress's delegation to FERC in the certificate provision of the Natural Gas Act, it is not clear how much discretion the Court would find permissible in such a delegation.

[90] *See* Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1099–1102 (2020); William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426, 428, 437–38, 444, 455–56 (1979).

[91] *See generally* Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

[92] *See* Transportation Act, 66 Pub. L. No. 152, § 400(18), 41 Stat. 456, 477–78 (1920) (amending the Interstate Commerce Act to prohibit the extension or construction of new railroad lines "unless and until there shall first have been obtained from the [Interstate Commerce] Commission a certificate that the present or future public convenience and necessity require or will require" the extension or construction).

domain authority.[93] Even the original version of the Natural Gas Act did not include a certificate provision paired with federal eminent domain authority: federal eminent domain authority was added in a 1947 amendment to the Act.[94] Thus, the pairing of federal eminent domain authority with the authority to issue certificates of public convenience and necessity in the Natural Gas Act is rather unique; the United States government's brief in *PennEast* could point to only two examples of arguably similar authorities, both of which also involved FERC.[95] As a result, the Court's decision in *PennEast* appears to be the first one to hold that Congress can delegate federal eminent domain authority to a federal agency subject to the discretionary standard of the certificate of public convenience and necessity.

Thus, following *PennEast*, FERC exercises three different authorities under the Natural Gas Act: first, it decides when a natural gas pipeline is required by the public convenience and necessity; second, it decides when that pipeline constitutes a "public use" under the Fifth Amendment; and third, it decides when states may be subjected to condemnation proceedings brought by private pipeline companies.

III. UNEVEN PLAYING FIELDS

The concentration of decision-making authority within FERC has proven successful in furthering what the *PennEast* majority identified as one of the purposes of the Natural Gas Act's eminent domain provision: preventing others from "impeding interstate pipeline development . . . ."[96] Since 2004, more than 25,000 miles of interstate natural gas pipelines have been built in the United States pursuant to

[93] *See* Communications Act, 73 Pub. L. No. 416, § 214(a), 48 Stat. 1064, 1075 (1934); Motor Carrier Act, 74 Pub. L. No. 255, § 206, 49 Stat. 543, 551 (1935). *See also* H.R. Rep. No. 709, 75th Cong., 1st Sess., at 6 (1937) (identifying the certificate provisions in the Interstate Commerce Act, the Communications Act, and the Motor Carrier Act as inspiration for the certificate provision in the Natural Gas Act).

[94] *See* 80 Pub. L. No. 245, 61 Stat. 459, 459 (1947) (codified at 15 U.S.C. § 717f(h)).

[95] Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 88, at 12–13. The first example is FERC's authority to license interstate transmission lines under the Federal Power Act, which is discussed in more detail *infra*. FERC has also been given the authority to permit hydropower plant operators under the Federal Power Act. *See* 16 U.S.C. § 814. As with FERC's authority over interstate transmission lines, however, that authority is limited: it cannot be used to acquire state-owned lands that lie within a public park, recreation area, or wildlife refuge, "unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned." *Id.*

[96] PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2258 (2021).

certificates of public convenience and necessity granted by FERC.[97] These pipelines have enabled a rapid growth in natural gas consumption: natural gas comprises around a third of our primary energy consumption[98] and almost 40% of our utility-scale electricity generation.[99] Additionally, since 2017, "the United States has been an annual net exporter of natural gas . . . ."[100] For the first few months of 2022, around three-quarters of those exports have gone to Europe.[101] These exports likely would not be possible without the expanded natural gas infrastructure that FERC has overseen.

Meanwhile, we have not seen comparable growth in the construction of interstate transmission lines, the other major energy infrastructure that falls within FERC's regulatory jurisdiction. As the United States Government pointed out in its brief in *PennEast*, Congress has also delegated the authority to FERC to permit interstate transmission lines under the Federal Power Act.[102] But FERC's authority under the Federal Power Act is much more limited than its authority under the Natural Gas Act.[103] Under Section 216 of the Federal Power Act, FERC is authorized to permit and convey federal eminent domain authority to interstate transmission lines.[104] But FERC can do so only under specific circumstances (the scope of which was expanded in the recent Infrastructure Investment and Jobs Act of 2021[105]): (1) the transmission line must be located in an area that has been designated by the Secretary of Energy to be a "national interest electric transmission corridor[]";[106] (2) relevant state authorities must not be able to have permitted the transmission line or must have withheld their approval for the line, or denied it outright, within a specified period of time;[107] and (3) the transmission line must satisfy a variety of criteria specified in the Federal

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[97] PARFOMAK, *supra* note 20, at 3.

[98] *U.S. Energy Facts Explained: Consumption & Production*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/us-energy-facts/ (June 10, 2022).

[99] *Natural Gas Explained: Use of Natural Gas*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php (Nov. 16, 2022).

[100] *Natural Gas Explained: Imports and Exports*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/natural-gas/imports-and-exports.php (Dec. 16, 2022).

[101] Victoria Zaretskaya, *U.S. Liquefied Natural Gas Exports to Europe Increased During the First 4 Months of 2022*, U.S. ENERGY INFO. ADMIN. (June 7, 2022), https://www.eia.gov/todayinenergy/detail.php?id=52659.

[102] Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 88, at 12.

[103] *See* 16 U.S.C. § 824p.

[104] *See id.* § 824p(b), (e).

[105] *See infra* note 110.

[106] 16 U.S.C. § 824p(a).

[107] *Id.* § 824p(a)(1).

Power Act.[108] Additionally, FERC can convey federal eminent domain authority to seize only private land, not land "owned by the United States or a State."[109] No interstate transmission lines have yet been permitted and built pursuant to this authority, although this may change following the amendments from the Infrastructure Act.[110] For the most part, however, the authority to permit and convey eminent domain authority for transmission lines lies primarily with state and local government officials.[111]

Tellingly, the growth of interstate transmission lines has been notably slower. The United States constructed an average of about 1,800 miles of new high-voltage interstate transmission lines per year over the last decade.[112] Although there are a variety of factors that are likely slowing

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[108] *Id.* § 824p(a)(4). FERC recently issued a notice of proposed rulemaking setting forth its proposed approach to applications for permits to site electric transmission lines under Section 216. *See* Applications for Permits to Site Interstate Electric Transmission Facilities, 88 Fed. Reg. 2770 (Jan. 17, 2023) (noting that the notice of proposed rulemaking was issued on December 15, 2022).

[109] 16 U.S.C. § 824p(e)(1) ("In the case of a permit under subsection (b) for electric transmission facilities to be located on property other than property owned by the United States or a State, if the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify, and operate and maintain, the transmission facilities and, in the determination of the Commission, the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located.").

[110] Section 216 of the Federal Power Act was first added to the statute in the Energy Policy Act of 2005. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, Title XII, § 1221(a), 119 Stat. 594, 946. Shortly after its passage, several courts interpreted the provision narrowly, stymieing FERC's efforts to permit interstate transmission lines. *See* Piedmont Env't Council v. FERC, 558 F.3d 304, 313–15 (4th Cir. 2009) (interpreting FERC's permitting authority under the Federal Power Act not to apply in situations where states have outright denied permit approval for transmission lines); Cal. Wilderness Coal. V. U.S. Dep't of Energy, 631 F.3d 1072, 1085, 1095 (9th Cir. 2011) (requiring the Department of Energy to consult with the states prior to designating a national interest electric transmission corridor and vacating the Department's two designated transmission corridors). The Infrastructure Investment and Jobs Act of 2021 amended Section 216 to authorize FERC to permit transmission lines in cases where states have outright denied approval for the line (and the other statutory criteria are met), thus negating the decision in *Piedmont*. *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 40105(b)(C)(iii), 135 Stat. 429, 934 (2021). Congress also amended the Secretary of Energy's authority to designate national interest corridors. *See id.* § 40105(a). It remains to be seen what effect these amendments will have on the construction of high-voltage interstate transmission lines.

[111] *See* Klass, *Takings and Transmission*, *supra* note 16, at 1086 ("[T]he siting and permitting of electric transmission lines takes place almost exclusively at the state level and sometimes the local level . . . ."). As noted above, following the amendments made by the Bipartisan Infrastructure Bill of 2021, it is conceivable that this dynamic could change in the coming years. *See supra* note 110.

[112] AMERICAN CLEAN POWER, CLEAN POWER ANNUAL MARKET REPORT 2021: EXECUTIVE SUMMARY 8 (2021), https://cleanpower.org/wp-content/uploads/2022/05/2021-ACP-Annual-Report-Final_Public.pdf.

down the construction of interstate transmission lines in the United States, including problems of cost allocation and improper valuation of the benefits of high-voltage transmission lines,[113] the lack of a centralized permitter with federal eminent domain authority is an important one.[114]

This slow development of interstate transmission lines has important consequences for climate change. The construction of high-voltage interstate transmission lines is key for most proposals to decarbonize the United States' electricity grid.[115] That is because high-voltage interstate transmission lines are crucial for the construction of significant amounts of renewable generation. Renewable resources like wind and solar tend to be located in areas of the country where the population, and therefore electricity demand, is lowest. To transport that renewable generation to the areas of the country that need it most—primarily along the coastlines—requires the construction of new, high-voltage interstate transmission lines. These lines are also more efficient and would increase reliability on an electricity grid that is facing ever-greater stresses from extreme weather events.[116] Studies suggest that anywhere from a doubling[117] to a tripling[118] of high-voltage transmission lines in the United States is needed in order to decarbonize the electricity grid.

If the public delegation story of *PennEast* is correct, then Congress has a wide range of tools available to it to address this imbalance. Indeed, *PennEast* would suggest that Congress could go so far as to give FERC the authority to decide whether a particular interstate transmission line

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[113] *See, e.g.*, RICHARD J. CAMPBELL & ADAM VANN, CONG. RSCH. SERV., R41193, ELECTRICITY TRANSMISSION COST ALLOCATION (2012), https://crsreports.congress.gov/product/pdf/R/R41193/8.

[114] *See, e.g.*, FEDERAL ENERGY REGULATORY COMMISSION, REPORT ON BARRIERS AND OPPORTUNITIES FOR HIGH VOLTAGE TRANSMISSION 21–24 (2020), https://www.congress.gov/116/meeting/house/111020/documents/HHRG-116-II06-20200922-SD003.pdf (describing the problems with state- and local-level permitting processes).

[115] *See, e.g.*, NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, & MEDICINE, THE FUTURE OF ELECTRIC POWER IN THE UNITED STATES 7 (2021); Alexandra B. Klass, *Transmission, Distribution and Storage: Grid Integration*, *in* LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES 527, 529–31 (Michael B. Gerrard & John C. Dernbach eds., 2019); Klass et al., *Grid Reliability Through Clean Energy*, *supra* note 16, at 1022 ("An expanded, nationally interconnected transmission grid, or 'macrogrid,' is a prerequisite to a decarbonized, more reliable U.S. energy system.").

[116] Klass et al., *Grid Reliability Through Clean Energy*, *supra* note 16, at 1022–23.

[117] *See, e.g.*, Patrick R. Brown & Audun Botterud, *The Value of Inter-Regional Coordination and Transmission in Decarbonizing the U.S. Electricity System*, 5 JOULE 115, 130 (2021); Trieu Mai et al., *Envisioning a Renewable Electricity Future for the United States*, 65 ENERGY 374, 381 (2014).

[118] ERIC LARSEN ET AL., NET-ZERO AMERICA: POTENTIAL PATHWAYS, INFRASTRUCTURE, AND IMPACTS 1, 137 (2020), https://environmenthalfcentury.princeton.edu/sites/g/files/toruqf331/files/2020-12/Princeton_NZA_Interim_Report_15_Dec_2020_FINAL.pdf.

ought to be built, and to grant to successful transmission line developers federal eminent domain authority to secure the necessary rights-of-way for the construction of the line, including rights-of-way that are located on state lands.

Now, that is not to say that it would be a normatively good idea to grant FERC such authority in the transmission context. FERC's exercise of its permitting authority in the natural gas pipeline context has been subject to substantial criticism (including by me). Critics have raised concerns about whether FERC adequately considers and monitors the environmental impacts of the pipelines it approves; the relationship between environmental justice issues and pipeline infrastructure development; private pipeline companies' use of federal eminent domain authority; and the ability of the public to participate in pipeline siting decisions.[119] Most scholars who have recognized the need for more centralized permitting of interstate transmission lines have nonetheless declined to recommend wholesale expansion of FERC's authority akin to that in the natural gas context.[120]

Additionally, Congress's actions indicate that, at least as of now, it is not willing to adopt the dramatic solution of granting FERC full permitting authority in the interstate transmission line context to fix current transmission problems. Instead, Congress has taken more measured approaches to the expansion of FERC's authority. Most recently, in the Infrastructure and Jobs Act of 2021, Congress amended Section 216 in response to court decisions adopting a narrow interpretation of Section 216, thus incrementally expanding FERC's (and the Department of Energy's) authority in that provision.[121] More dramatic permitting reforms, which would have given FERC authority similar to that embodied in the Natural Gas Act's certificate provision, did not survive passage through Congress.[122]

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[119] *See, e.g.*, Giannetti, *supra* note 20; Natural Resources Defense Council et al., *supra* note 20, at 2; PARFOMAK, *supra* note 20, at 9–17; Klass, *supra* note 20, at 661–64; Gocke, *supra* note 21.

[120] Instead, these scholars have recommended more limited expansion of FERC's authority or revisions to state law to make state and local permitting more responsive to modern electricity transmission needs. *See, e.g.*, Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1948–54 (2015); Klass, *Takings and Transmission*, *supra* note 16, at 1138–47; Klass & Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, *supra* note 16, at 1858–69; Klass et al., *Grid Reliability Through Clean Energy*, *supra* note 16, at 1039–43.

[121] *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 40105, 135 Stat. 429, 934 (2021).

[122] Senator Joe Manchin's proposed permitting reform bill would have authorized FERC to apply to the Department of Energy for the designation of a specific transmission line as "necessary in the national interest," thus bypassing some of the complexities of the national interest corridor approach. *See* Energy Independence and Security Act of 2022, § 22(c), https://www.energy.senate.gov/services/files/EAB527DC-FA23-4BA9-B3C6-6AB108626F02.

Nonetheless, it is a curious thing that Congress would appear to be able to take this action if it so chooses. The current Supreme Court is not widely considered to be friendly towards administrative agencies.[123] This Court has declared administrative agencies' designs to be unconstitutional;[124] has struck down administrative actions intended to address the COVID-19 health pandemic;[125] has adopted a new version of the major questions doctrine that could increase judicial control over agency rulemakings;[126] and includes a number of Justices who have repeatedly questioned the integrity of *Chevron* deference.[127] One might expect such a Court to be suspicious of a case involving a broad congressional delegation of authority to an agency—even more so a delegation that authorized the exercise of federal eminent domain against private landowners and sovereign states.

Yet the *PennEast* majority appeared to be generally unconcerned with the delegation at issue here. During oral argument, Chief Justice Roberts recognized that the Federal Power Act's delegation was "quite

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The bill also would have authorized FERC to issue permits for interstate transmission lines in national interest corridors designated by the Department of Energy without having to wait for a state to first deny or withhold approval for the line, again circumventing some of Section 216's procedural restrictions. *See id.* § 22(d). Perhaps most notably, the bill also would have expanded FERC's ability to convey federal eminent domain authority to interstate transmission lines to include the ability to seize state land. *See id.* § 22(e)(1). Several other provisions in the bill were intended to address some of the permitting and cost allocation issues associated with transmission line construction.

[123] *See, e.g.*, Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 77 (2022) ("Let us stipulate at the outset that . . . the Roberts Court also is more structurally formalist and more skeptical of agency action than any of its predecessors since at least the New Deal era."); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3 (2020) (describing the Roberts Court's "judicial skepticism of administrative government," which is characterized in part by "a deep distrust of bureaucracy, and a strong turn to the courts to protect individuals against administrative excess"); Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 373 (2022) ("The Supreme Court has the administrative state in its crosshairs.").

[124] *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

[125] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam); Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam). *See also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

[126] *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022). *See also* Sohoni, *supra* note 125, at 263–64.

[127] *See, e.g.*, Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1482 (2020) (Thomas, J., dissenting) (questioning the constitutionality of *Chevron* deference); *id.* at 1479 (Gorsuch, J., joining Justice Thomas's dissent); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–52 (2016) (calling *Chevron* an "atextual invention by courts" but suggesting some limited continued vitality for the doctrine). *See also* Nathan D. Richardson, *Deference Is Dead, Long Live* Chevron, 73 RUTGERS UNIV. L. REV. 441, 486–95 (2021) (documenting the declining use of *Chevron* deference in the U.S. Supreme Court).

extraordinary."[128] He acknowledged that the statute authorized the federal government to "delegate its powers to a private party and then the private party can exercise those . . . powers in a way that's inconsistent with state rights[.]"[129] But, ultimately, he observed that eminent domain is "unique."[130] And it is that uniqueness which arguably drove the majority's opinion in *PennEast*.[131] The majority appears to embrace the idea that although eminent domain embodies one of the government's most fundamental, raw powers, it is also one of the government's most flexible powers:

> Eminent domain is the power of the government to take property for public use without the consent of the owner. It can be exercised either by public officials or by private parties to whom the power has been delegated. And it can be exercised either through the initiation of legal proceedings or simply by taking possession up front, with compensation to follow. Since the founding, the United States has used its eminent domain authority to build a variety of infrastructure projects. It has done so on its own and through private delegatees, and it has relied on legal proceedings and upfront takings. It has also used its power against both private property and property owned by the States.[132]

In other words, eminent domain is "essential" to government, "inseparable from sovereignty," "complete in itself," and delegable to others.[133]

Thus, the delegation of federal eminent domain authority—from Congress to agencies, and from agencies to private parties—would appear to be an acceptable tool in Congress's policymaking toolbox to address the existing issues around the construction of interstate transmission lines.

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[128] Oral Argument at 03:16, PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021) (No. 19-1039), https://www.oyez.org/cases/2020/19-1039.

[129] *Id.* at 02:12.

[130] *Id.* at 03:09.

[131] *See* Ernest A. Young, *State Sovereign Immunity After the Revolution* (manuscript at 40), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350164 (observing that *PennEast* could be simply the precursor to a series of cases chipping away at the Court's current state sovereign immunity doctrine, although noting that *PennEast* reflects "federal interests" that were "particularly and distinctively strong" and "[i]t is hard to think of too many other obvious candidates" that would fall into this category).

[132] *PennEast*, 141 S. Ct. at 2251.

[133] Kohl v. United States, 91 U.S. 367, 368, 371–72, 374 (1875).

CONCLUSION

Whatever one may think of the Supreme Court's assessment of the federal government's eminent domain power, it creates an intriguing, and perhaps troubling, landscape for future governmental action on environmental regulation and the issue of climate change.

On the one hand, as the transmission example suggests, environmental law is increasingly infrastructure law.[134] Interstate transmission lines are not the only major infrastructure projects that will need to be built in the United States if we want to achieve our greenhouse gas emission reduction goals. Enormous increases in renewable energy capacity—including massive solar fields and large wind turbines—will be needed to replace our existing fossil fuel infrastructure and supply growing demand for electricity in a decarbonized world. It may be a positive development, then, that at precisely the moment the Supreme Court is reducing federal agencies' ability to engage in more traditional environmental regulation,[135] the Court has confirmed and perhaps even expanded Congress's ability to oversee infrastructure development, with seemingly few strings attached.

On the other hand, the federal eminent domain power, particularly as this Court understands it, is a powerful and possibly dangerous tool. The history of infrastructure projects in the United States has often been one of coercion, uneven distribution of benefits and burdens, and a lack of concern with democratic decision making.[136] If the worst effects of climate change are going to be avoided by engaging in infrastructure projects, and if those infrastructure projects are going to proceed—at least to some degree—with the backing of the eminent domain power, then the task for policymakers, scholars, and activists now is to figure out how to engage in such development without sacrificing core values of equity, participation, and justice in the process.

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[134] One need look no further than the Inflation Reduction Act for proof of this. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

[135] *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022) (restricting the EPA's ability to regulate greenhouse gas emissions from power plants).

[136] *See, e.g.*, Teal Arcadi, Remapping America: The Interstate Highway System and Infrastructural Governance in the Postwar United States (2022) (Ph.D. dissertation, Princeton University); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1992).