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2020]

ENERGY ECONOMICS: JUST COMPENSATION UNDER STATE
LAW IN *TENNESSEE GAS PIPELINE COMPANY V.*
PERMANENT EASEMENT FOR 7.053 ACRES

I. NATURAL GAS, PIPELINES, AND EMINENT DOMAIN:
AN INTRODUCTION

Natural gas is one of the most prevalent power sources produced in the United States.¹ The domestic supply of natural gas has substantially increased in recent years due to the advent of fracking, resulting in a price decrease.² Natural gas is also an abundant resource and cleaner to burn than other energy sources.³ The United States has quickly become the world's largest producer of natural gas and is a net exporter of the resource.⁴

After being withdrawn from oil wells, natural gas is processed and distributed through various forms of pipelines.⁵ The United States' pipeline network is tremendously important because it transports fuels that are vital to the operation of daily life.⁶ Despite the

1. See Carolyn Elefant & Jennifer Flint, *Summary of New Challenges to FERC Interstate Pipelines*, THE AM. LAW INST. CONTINUING LEGAL EDUC. (Jan. 24-26, 2019) (explaining emergence of natural gas as dominant energy source); *U.S. energy facts explained*, U.S. ENERGY INFO. ADMIN. (Aug. 28, 2019), <https://www.eia.gov/energyexplained/us-energy-facts/> (providing statistics regarding primary energy consumption in United States).

2. See Elefant, *supra* note 1 (describing economic benefits of natural gas).

3. See Troutman Sanders Pipeline Practice, *Global Energy Change: Increased Use of Natural Gas and LNG*, TROUTMAN SANDERS (June 28, 2018), <https://www.pipelaws.com/2018/06/global-energy-change-increased-use-natural-gas-lng/> (describing non-economic benefits of natural gas). For example, the "increased use of natural gas in China is driven more by national goals to improve air quality than for market reasons." *Id.* (providing specific example of non-economic benefit of natural gas).

4. See *id.* (analyzing U.S. production of natural gas); *Natural gas imports and exports*, U.S. ENERGY INFO. ADMIN. (Apr. 30, 2019), <https://www.eia.gov/energyexplained/natural-gas/imports-and-exports.php> (providing import and export statistics of natural gas).

5. See *Natural gas explained*, U.S. ENERGY INFO. ADMIN. (Dec. 6, 2019), <https://www.eia.gov/energyexplained/natural-gas/> (explaining production and delivery of natural gas). The United States' natural gas pipeline network has approximately "[three] million miles of mainline and other pipelines that link natural gas production areas and storage facilities with consumers." See *Natural gas pipelines*, U.S. ENERGY INFO. ADMIN. (Dec. 5, 2019), <https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php> (providing information regarding the United States' pipeline network).

6. See Pipeline & Hazardous Materials Safety Administration, *Pipeline Basics*, U.S. DEP'T OF TRANSP., <https://primis.phmsa.dot.gov/comm/PipelineBasics.htm?nnocach=7029> (last visited Feb. 12, 2020) (explaining role of pipelines in daily life).

benefits of natural gas and the importance of energy distribution, pipelines garner significant controversy.⁷ Notably, pipelines are inherently dangerous because they transport volatile fuels.⁸ They also pose numerous environmental implications.⁹

In *Tennessee Gas Pipeline Company v. Permanent Easement for 7.053 Acres*,¹⁰ the Third Circuit explores a related issue regarding pipeline construction: the delegation of the federal government's eminent domain power under the Natural Gas Act (NGA).¹¹ Per *Tennessee Gas*, state law governs the substantive determination of just compensation when private entities exercise eminent domain under the

7. See *id.* (explaining importance of energy distribution). See, e.g., Keith Goldberg, *3rd Circ. Says PennEast Can't Take NJ Land For Pipeline*, LAW360 (Sept. 10, 2019, 4:13 PM), <https://www.law360.com/articles/1197303/3rd-circ-says-penn-east-can-t-take-nj-land-for-pipeline> (illustrating controversy where Natural Gas Act conflicts with state constitution); Keith Goldberg, *FERC Outlines Enviro Harms From \$45B Alaska LNG Project*, LAW360 (July 1, 2019, 3:54 PM), <https://www.law360.com/articles/1174496/ferc-outlines-enviro-harms-from-45b-alaska-lng-project> (illustrating controversy relating to environmental impacts of pipelines); Cynthia L. Taub et al., *New Executive Orders Aim to Reduce Federal and State Permitting Obstacles for Pipeline and Energy Projects*, STEPTOE & JOHNSON (Apr. 11, 2019), <https://www.steptoelaw.com/en/news-publications/new-executive-orders-aim-to-reduce-federal-and-state-permitting-obstacles-for-pipeline-and-energy-projects.html> (illustrating political controversy related to pipeline construction). For a further discussion of the controversy surrounding pipelines, see *infra* notes 127-140 and accompanying text.

8. See Thomas G. Godfrey, *Preparation for and Trial of a Gas Pipeline Leak and Explosion Case*, 25 AM. JUR. TRIALS 415 (Feb. 6, 2020) (describing explosive nature of gas and related fuels). See, e.g., Jacey Fortin, *After Gas Explosions in Massachusetts, Gas Company Settles for \$80 Million*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/us/massachusetts-gas-explosion-settlement.html> (describing pipeline explosion in Massachusetts). The pressure gauges on a Columbia Gas pipeline were improperly disabled, which caused high pressure within the pipeline and lead to an explosion. *Id.* (exemplifying inherent danger of pipelines). At least one death and twenty injuries resulted. *Id.* (indicating possible consequence of pipeline explosion).

9. See, e.g., Megan O'Rourke, Comment, *The Keystone XL Pipeline: Charting the Course to Energy Security or Environmental Jeopardy?*, 24 VILL. ENVTL. L.J. 149, 158-65 (2013) (discussing potential oil spills, water contamination, damage to wildlife, and greenhouse gas emissions from Keystone XL pipeline); Goldberg, *supra* note 7 (stating Alaskan pipeline project would affect wildlife, "permafrost, wetlands[,] and forest"). Oil spills related to pipeline failures pose dangers to wildlife and water sources. See Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, NAT'L GEOGRAPHIC (Jan. 25, 2017), <https://www.nationalgeographic.com/news/2017/01/impact-keystone-dakota-access-pipeline-environment-global-warming-oil-health/> (explaining environmental implications of pipelines). Additionally, the use of pipelines may increase societal reliance on fossil fuels, which could "delay investment in more renewable technologies." See *id.* (proposing additional implication of pipelines).

10. 931 F.3d 237 (3d Cir. 2019) (introducing subject case of this Note).

11. See *id.* at 242-43 (explaining delegation of eminent domain power under NGA). See also Natural Gas Act, 15 U.S.C. § 717w (2005) (providing short title of legislation).

NGA.¹² But some state laws, such as Pennsylvania law, factor consequential damages into just compensation.¹³ The Third Circuit's holding, therefore, exposes natural gas companies to significant financial liability in states that permit condemnees to recover consequential damages.¹⁴ Considering the inherent controversy surrounding pipelines, consequential damages are a formidable cost for natural gas companies.¹⁵

This Note examines the Third Circuit's decision in *Tennessee Gas* and its effect on condemnation proceedings brought by natural gas companies.¹⁶ Likewise, this Note analyzes how pipeline implications may influence the determination of just compensation.¹⁷ Section II sets out the facts and procedural framework underlying *Tennessee Gas*.¹⁸ Section III provides background information that is relevant to the legal dispute in this case.¹⁹ In light of this background, Section IV parses the Third Circuit's rationale and briefly discusses Judge Chagares's dissenting opinion.²⁰ Section V offers a critical analysis of the Third Circuit's opinion.²¹ Lastly, Section VI discusses how this decision will impact the financial feasibility of pipeline construction.²²

12. *Tenn. Gas Pipeline*, 931 F.3d at 255 (stating holding of *Tennessee Gas*).

13. See Marisa Fegan, Notes & Comments, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 293-94 (2007) (noting states that have embraced statutory reform to rectify "injustices of traditional just compensation law"). See, e.g., *Tenn. Gas Pipeline*, 931 F.3d at 242, 244-45 (stating Pennsylvania law permits recovery of consequential damages in condemnation proceedings).

14. See *Tenn. Gas Pipeline*, 931 F.3d at 253 (identifying how various state laws may impose additional condemnation costs).

15. For a discussion of how the controversy inherent to pipelines may impact consequential damages, see *infra* notes 253-257 and accompanying text.

16. For a discussion of the Third Circuit's holding in *Tennessee Gas* and its impact on condemnation proceedings brought by private entities under the NGA, see *infra* notes 141-180, 247-264 and accompanying text. For the purposes of clarity throughout this Note, condemnation refers to the exercise of eminent domain. See *Condemnation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing definition of condemnation).

17. For a discussion of pipeline implications influencing just compensation, see *infra* notes 253-258 and accompanying text.

18. For a discussion of the facts of *Tennessee Gas*, see *infra* notes 23-50 and accompanying text.

19. For a discussion of the legal background underpinning *Tennessee Gas*, see *infra* notes 51-140 and accompanying text.

20. For a discussion of the Third Circuit's legal analysis in *Tennessee Gas*, see *infra* notes 141-185 and accompanying text.

21. For a critical analysis of the Third Circuit's reasoning in *Tennessee Gas*, see *infra* notes 186-246 and accompanying text.

22. For discussion of the potential impact of *Tennessee Gas*, see *infra* notes 247-264 and accompanying text.

II. CASHING OUT: FACTS OF *TENNESSEE GAS*

The Tennessee Gas Pipeline Company (Tennessee Gas) develops natural gas pipelines across large expanses of land.²³ Tennessee Gas is permitted to develop pipelines because it holds the requisite “certificate of public convenience and necessity from the Federal Energy Regulatory Commission” (FERC).²⁴ In the present case, Tennessee Gas sought to develop a pipeline traversing “a 975-acre tract of land in Pike County, Pennsylvania.”²⁵ King Arthur Estates (King Arthur), however, owned the land, and Tennessee Gas failed to purchase easements to construct its pipeline.²⁶ Accordingly, Tennessee Gas filed a condemnation action to obtain property rights to King Arthur’s land.²⁷ Tennessee Gas may bring condemnation actions under the NGA, which authorizes gas companies “to acquire private property by eminent domain to construct, operate, and maintain natural gas pipelines.”²⁸

Just compensation must be provided when exercising the federal government’s eminent domain power.²⁹ Tennessee Gas and King Arthur agreed that the tract of land could be rightfully condemned for pipeline construction and subsequently estimated appropriate compensation.³⁰ Tennessee Gas calculated just compensation under federal law, which does not permit recovery of

23. *See* *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 241, 248-49 (3d Cir. 2019) (referencing general business activities of Tennessee Gas).

24. *Id.* at 241 (explaining why Tennessee Gas is permitted to construct pipelines in Pennsylvania and New Jersey). Natural gas companies must hold certificates of public convenience and necessity in order to rightfully take lands for pipeline construction. *See id.* at 241, 243 (describing why FERC issues certificates of public convenience and necessity). The purpose of utilizing pipelines is to “augment . . . natural gas delivery capacity.” *Id.* (noting rationale for pipeline development).

25. *Id.* at 241 (describing Tennessee Gas’s objective for bringing suit).

26. *Id.* (explaining Tennessee Gas’s actions prior to commencing condemnation action).

27. *See id.* (demonstrating Tennessee Gas may exercise eminent domain power if unable to obtain rights to land via easement).

28. *Tenn. Gas Pipeline*, 931 F.3d at 242-43 (citing 15 U.S.C.A. § 717f(h) (Westlaw through Pub. L. No. 116-56)) (providing Tennessee Gas with authority to exercise Federal Government’s eminent domain power). For additional information regarding the NGA, see *infra* notes 55-62 and accompanying text.

29. *Id.* at 243-44 (explaining concept of just compensation and its origin in Fifth Amendment).

30. *Id.* at 241 (utilizing experts to determine various costs related to just compensation). When deciding appropriate compensation, both parties considered “the value of the land before and after the taking, the value of the timber removed from the land, professional fees, development costs, and timber replacement and reforestation costs.” *Id.* (noting factors influencing determination of just compensation). Tennessee Gas then moved for summary judgment on the issue of com-

consequential damages in eminent domain proceedings.³¹ Conversely, King Arthur relied on Pennsylvania law, which does permit recovery of consequential damages in eminent domain proceedings.³²

Conflict arose because the NGA is silent on which law governs just compensation.³³ The parties were concerned with the governing law because the distinction resulted in a one-million dollar difference in compensation.³⁴ Tennessee Gas then moved for summary judgment on the issue of compensation.³⁵ To support its motion, Tennessee Gas argued that condemnation proceedings are a federal matter because eminent domain is a federal power grounded in the Constitution.³⁶ Tennessee Gas also noted that “[j]ust compensation is measured by the fair market value of the property interest taken, not by the value of the interest to the owner or condemnor.”³⁷ King Arthur filed a brief opposing Tennessee Gas’s motion, arguing that a jury should consider consequential damages.³⁸

pensation. *Id.* at 241-42. (indicating procedural step after calculation of just compensation).

31. *See id.* at 241-42 (explaining District Court found federal law ruled substantive determination of just compensation). The District Court granted Tennessee Gas’s partial motion for summary judgment as to the issue of just compensation. *See id.* at 242. (agreeing with Tennessee Gas’s application of federal law).

32. *See id.* at 242 (noting King Arthur appealed district court’s ruling that federal law governs substantive determination of just compensation in present dispute); *id.* at 244-45 (describing inclusion of consequential damages under Pennsylvania state law).

33. *Tenn. Gas Pipeline*, 931 F.3d at 243 (summarizing NGA does not speak to “remedies available in the condemnation proceedings it allows”).

34. *See id.* at 253 (noting difference in compensation between state and federal law). The Third Circuit summarizes the contention between the parties by stating that “Pennsylvania law allows private property owners within the state to obtain more money from condemners than they could under federal law.” *Id.* at 245 (describing parties’ main source of disagreement).

35. *Id.* at 241-42 (recounting case’s procedural history).

36. *See* *Tenn. Gas Pipeline Co.’s Memorandum of Law in Support of its Motion for Partial Summary Judgment as to Certain of Def. King Arthur Estates, L.P.’s Claims for Damages* at 7-9, *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237 (3d Cir. 2019) (No. 3:12-cv-01477-ARC), 2016 WL 11219056 (citing cases where Third Circuit applied federal law to determine just compensation in accordance with *United States v. Miller*). For a further discussion of *Miller*, see *infra* notes 84-91 and accompanying text.

37. *Tenn. Gas Pipeline Co.’s Memorandum of Law in Support of its Motion for Partial Summary Judgment*, *supra* note 36, at 6 (citing *United States v. 15.3 Acres of Land*, 15 F. Supp. 770, 784 (M.D. Pa. 1957) and *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946)) (employing narrow interpretation of fair market value).

38. Brief of King Arthur Estates, L.P. in Opposition to Plaintiff’s Motion for Partial Summary Judgment at 34-35, *Tenn. Gas Pipeline Co. v. Permanent Easement*.

In addition to other arguments evidencing the applicability of state law, King Arthur's brief discussed a report from Dr. Steven Vitale.³⁹ Dr. Vitale's report identified the environmental consequences that would result if there was a pipeline explosion on King Arthur's property.⁴⁰ Dr. Vitale calculated that the thermal radiation from a pipeline explosion on King Arthur's property would have a potential impact radius of 896 feet.⁴¹ Additionally, Dr. Vitale utilized a software created by the Environmental Protection Agency's (EPA) Office of Emergency Management to discern "the effects of thermal radiation in the event of pipeline ruptures."⁴² Among other consequences, Dr. Vitale determined "there is [a] potential for death from thermal radiation within 60 seconds within 1461 feet" of Tennessee Gas's pipeline, also known as the "threat zone."⁴³

King Arthur specifically petitioned for consequential damages to reflect the decreased marketability of its property resulting from potential hazards.⁴⁴ Moreover, King Arthur's brief referenced that a property naturally faces a "diminution in value" because of fear associated with pipelines.⁴⁵ King Arthur's appraisal expert agreed that Dr. Vitale's findings quantify how a pipeline may affect the market value of real estate.⁴⁶ Neighboring properties within the threat zone may similarly face property value issues.⁴⁷

ment for 7.053 Acres, 931 F.3d 237 (3d Cir. 2019) (No. 3:12-CV-01477-ARC), 2016 WL 11219058 (summarizing King Arthur's argument against Tennessee Gas's motion).

39. *Id.* at 31-34 (identifying one of King Arthur's primary arguments opposing Tennessee Gas's motion).

40. *Id.* at 32-34 (identifying specific hazards associated with pipelines).

41. *Id.* at 31-32 (describing Dr. Vitale's report and stating potential impact radius is measured from pipeline's point of rupture).

42. *Id.* at 32-33 (describing software used to identify effects of thermal radiation). The EPA's Office of Emergency Management created its software in collaboration with the National Oceanic and Atmosphere Administration. *Id.* at 32 (naming creators of thermal energy software).

43. *See* Brief of King Arthur Estates, *supra* note 38, at 32-33 (detailing consequences of thermal radiation resulting from pipeline explosion). Dr. Vitale's report also determined that "[w]here the 1955 24" pipeline and the new 30" pipeline co-exist, the potentially lethal distance is 1944 feet," while thermal radiation would create even broader threat zones for second-degree burns and pain. *Id.* at 32-33 (noting danger of thermal radiation resulting from pipeline explosion).

44. *See id.* at 33-34 (associating property values with danger posed by pipelines).

45. *Id.* at 34 (explaining fears expressed by purchasers and owners of land affected by pipelines).

46. *Id.* at 33 (referencing John McChesney's opinion on value of King Arthur's property).

47. *See id.* at 33 (speculating public awareness of pipeline would negatively impact King Arthur's land and neighboring properties alike).

The U.S. District Court for the Middle District of Pennsylvania granted Tennessee Gas's motion for summary judgment.⁴⁸ On interlocutory appeal, the Third Circuit reversed the district court's decision and held that state law governed the substantive determination of just compensation in this case.⁴⁹ Circuit Judge Chagares wrote a dissenting opinion in which he argued for the applicability of federal law.⁵⁰

III. MAKING CENTS: A LEGAL BACKGROUND

The facts of *Tennessee Gas* compelled the Third Circuit to resolve the NGA's silence on which law governs just compensation.⁵¹ This section begins with a discussion of the NGA, eminent domain, and consequential damages.⁵² Next, this section will examine a variety of case law relevant to the issue presented by *Tennessee Gas*.⁵³ This section will then conclude with a general overview of pipelines that addresses the controversy and opposition surrounding them.⁵⁴

A. Natural Gas Act

Congress enacted the NGA upon finding that the transportation and sale of natural gas affect the public interest.⁵⁵ The NGA delegates regulation of such matters to an authoritative body.⁵⁶ Congress currently vests regulatory authority of the transportation

48. *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 242 (3d Cir. 2019) (recalling district court's order regarding just compensation). By granting part of Tennessee Gas's motion, the district court denied state law governed the substantive determination of just compensation in this case, thus preventing King Arthur from receiving consequential damages. *Id.* (discussing district court's holding); *see also* Brief of King Arthur Estates, *supra* note 38, at 31-34 (requesting consequential damages to account for environmental and economic implications of pipelines).

49. *Tenn. Gas Pipeline*, 931 F.3d at 242, 255 (recalling case's procedural history and Third Circuit's holding).

50. *Id.* at 255-59 (Chagares, J., dissenting) (arguing federal substantive law applied in determining just compensation).

51. *See id.* at 242-47 (discussing legal principles relating to NGA, just compensation, federal common lawmaking, and persuasive case law). *See also id.* at 247-55 (applying relevant law to facts of case).

52. For further discussion of the Natural Gas Act and related topics, see *infra* notes 55-74 and accompanying text.

53. For further discussion of case law relevant to the issue presented by *Tenn. Gas*, see *infra* notes 75-126 and accompanying text.

54. For further discussion of pipeline opposition and related controversy, see *infra* notes 127-140 and accompanying text.

55. Natural Gas Act of 1938, 15 U.S.C. § 717(a) (2018) (explaining federal regulation is necessary where business affects public interest).

56. *See id.* § 717b (imposing restrictions on transportation and sale of natural gas).

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and sale of natural gas in the FERC.⁵⁷ Among other functions, the FERC may issue certificates of public convenience and necessity to natural gas companies.⁵⁸

Under the NGA, natural gas companies must obtain certificates of public convenience and necessity to condemn property for pipeline construction.⁵⁹ Likewise, natural gas companies must have attempted to obtain property through contract or other methods before exercising eminent domain.⁶⁰ Natural gas companies may bring condemnation actions because Congress has the authority to delegate the federal government's eminent domain power to private entities through the NGA.⁶¹ The NGA is notably silent on the issue of just compensation for condemnation actions.⁶²

1. *Eminent Domain and Just Compensation*

Eminent domain refers to the government's power to convert private property for public use.⁶³ The Takings Clause of the Fifth Amendment instructs that the federal government must provide just compensation when taking private property.⁶⁴ Under federal law, just compensation is strictly determined by "the fair market value of the property on the date it is appropriated" and nothing more.⁶⁵ Where property is only partially condemned, federal law

57. 42 U.S.C. § 7171 (2018) (establishing FERC as independent regulatory commission); *see also* *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 243 (3d Cir. 2019) (explaining regulatory authority delegated by NGA).

58. 42 U.S.C. § 7172(a)(1) (2018) (vesting FERC with various regulatory powers).

59. 15 U.S.C. § 717f(c) (2018) (discussing circumstances under which FERC issues certificates of public convenience and necessity); *see also* *Tenn. Gas Pipeline*, 931 F.3d at 243 (stating "natural gas company must first successfully obtain" requisite certificate).

60. *See* 15 U.S.C. § 717f(h) (2018) (listing necessary step before commencing condemnation action).

61. *Tenn. Gas Pipeline*, 931 F.3d at 242 (explaining Tennessee Gas's authority to condemn private property). Indeed, Congress may delegate the Federal Government's eminent domain power to any private entity through its legislation. *See generally* *Berman v. Parker*, 348 U.S. 26, 33 (1954) (affirming Congress may delegate its eminent domain power).

62. *Tenn. Gas Pipeline*, 931 F.3d at 243 (noting NGA does not speak to just compensation despite permitting eminent domain).

63. *Eminent Domain*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining eminent domain).

64. *Tenn. Gas Pipeline*, 931 F.3d at 243-44 (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9 (1984)) (explaining origin of just compensation).

65. *Id.* at 244 (quoting *Kirby Forest*, 467 U.S. at 10) (explaining how just compensation is calculated under federal law).

calculates just compensation by comparing the market value of property before and after the partial taking.⁶⁶

Pennsylvania law also calculates just compensation by comparing the fair market value of property before and after the taking.⁶⁷ Unlike federal law, however, Pennsylvania law permits just compensation to include recovery of consequential damages and professional fees.⁶⁸ Pennsylvania law broadens the definition of “fair market value” to reflect modern appraisal theory, which considers all evidentiary matters properly relating to value.⁶⁹ Pennsylvania’s inclusive approach to just compensation, therefore, requires condemnors to pay more than under federal law when exercising eminent domain over private property.⁷⁰

2. Consequential Damages

Consequential damages are awarded for “[l]osses that do not flow directly and immediately from an injurious act.”⁷¹ In eminent domain proceedings, typical examples of consequential damages include “lost future profits, lost business goodwill . . . , moving expenses, and attorneys [sic] fees.”⁷² Calculation of fair market value excludes indemnification of consequential damages unless state law

66. *See id.* at 244 (quoting *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 n.3 (3d Cir. 1990)) (clarifying how federal law determines just compensation when property is partially condemned). Pipeline construction may constitute a partial taking. *Id.* (describing procedure for partial takings). Consistent with the formula set forth by federal law, any benefits to property from partial takings may offset total compensation. *See id.* (describing various scenarios related to compensation for partial takings).

67. *Id.* (citing 26 PA. CONS. STAT. § 702(a) (2006)) (explaining Pennsylvania’s own “remedial scheme” for condemnation proceedings within its borders). Pennsylvania law is the applicable state law, as King Arthur’s tract of land lies in Pike County, Pennsylvania. *See id.* at 241, 244 (describing applicability of Pennsylvania state law).

68. *Id.* at 244-45 (citing 26 PA. CONS. STAT. §§ 703, 710 (2006)) (demonstrating Pennsylvania law allows greater recovery than federal law).

69. *See* 26 PA. STAT. AND CONS. STAT. ANN. § 706 (JT. ST. GOVT. COMM. eds.) (West, Westlaw through 2019 Reg. Sess. Act 91) (noting legislative intent underlying each clause of Section 703). The Editors’ Notes to Section 703 express their intention to “enlarge the traditional definition of fair market value.” *See id.* (explaining factors influencing fair market value).

70. *Tenn. Gas Pipeline*, 931 F.3d at 245 (highlighting consequence of Pennsylvania’s inclusive approach to just compensation). “On the whole, then, Pennsylvania state law allows private property owners within the state to obtain more money from condemnors than they could under federal law.” *Id.* (describing additional costs that Pennsylvania law imposes on condemnors).

71. *Damages, Consequential Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019) (providing definition of consequential damages).

72. Thomas W. Merrill, Colloquium Article, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 118 (2002) (listing examples of consequential damages).

requires otherwise.⁷³ Although legal scholars have studied the various approaches to valuation for the purposes of just compensation, it is still difficult to value abstract costs that may influence consequential damages.⁷⁴

B. *Kimbell Foods*: Federal Law or State Law?

Federal courts interpret “the interstices of federal legislation ‘according to their own standards.’”⁷⁵ The product of this interpretation, known as “federal common law,” obliges the court to create a uniform federal law or adopt the relevant state law.⁷⁶ Determining whether to implement federal or state law is a function of the following three factors proposed by *United States v. Kimbell Foods, Inc.*:⁷⁷ “(1) whether the federal program, by its very nature, require[s] uniformity[,] (2) whether application of state law would frustrate specific objectives of the federal program[,] and (3) whether application of uniform federal law would disrupt existing commercial relationships predicated on state law.”⁷⁸

In *Kimbell Foods*, although the U.S. Supreme Court held that federal law governed the relevant controversy, the Court still adopted state law as the federal standard because a nationwide federal rule was unnecessary.⁷⁹ The Court reasoned that controversies related to federal programs do not automatically require adoption

73. Christopher Serkin, Article, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. L. REV. 677, 678-79 (2005) (explaining traditional fair market value calculation excludes “whole categories of damages”). The fair market value standard is generally criticized for providing inadequate compensation. See *id.* (highlighting fair market value overlooks “real but subjective harms”). As a result, several states require just compensation to reflect consequential damages. See *id.* at 742 n.47 (listing case law supporting inclusion of consequential damages). See also Fegan, *supra* note 13, at 296 (noting instances of state law permitting recovery of consequential damages).

74. See Serkin, *supra* note 73, at 688 (noting benefits of environmental and land use regulation are difficult to value but “no less real”).

75. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)) (outlining federal procedure when Congress is silent or unclear).

76. *Id.* at 718 (defining two approaches to federal gap-filling); *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 245-46 (3d Cir. 2019) (explaining “federal common law”).

77. 440 U.S. 715 (1979) (introducing factors proposed by *Kimbell Foods*).

78. *Tenn. Gas Pipeline*, 931 F.3d at 245-46 (citing *Kimbell Foods*, 440 U.S. at 728-29) (summarizing three factors balanced in *Kimbell Foods*). See, e.g., *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1198-99 (6th Cir. 1992) (analyzing facts using *Kimbell Foods* factors).

79. See *Kimbell Foods*, 440 U.S. at 718 (explaining Court’s holding).

of a uniform federal rule.⁸⁰ Rather, courts must consider how applying state law would affect relevant governmental interests.⁸¹

The first *Kimbell Foods* factor addresses whether there is a need for a “nationally uniform body of law.”⁸² The Court reasoned that existing state laws sufficiently protected the federal interest in *Kimbell Foods* and, further, that uniformity was not essential to the administration of federal programs.⁸³ The second *Kimbell Foods* factor considers whether “application of state law would frustrate specific objectives of the federal programs.”⁸⁴ Although the government argued that state law was an insufficient safeguard in *Kimbell Foods*, the Court disagreed and held that state law did not frustrate the government’s objectives.⁸⁵ Lastly, the third *Kimbell Foods* factor questions the extent to which a uniform federal law would affect “commercial relationships predicated on state law.”⁸⁶ The Court firmly held that imposing federal doctrines could impact the stability engendered by state law.⁸⁷ Altogether, the Court’s reasoning in *Kimbell Foods* demonstrates the severe implications of fashioning a uniform federal rule to resolve incomplete federal statutes.⁸⁸

C. *United States v. Miller*

Conversely, the Supreme Court has also held that federal law may govern the substantive determination of just compensation.⁸⁹ In *United States v. Miller*,⁹⁰ the United States condemned private land to relocate and construct railroad tracks for the Central Pacific

80. *Id.* at 727-28 (prefacing why Court did not automatically create uniform federal rule).

81. *Id.* at 728 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947)) (explaining how courts decide whether to use state or federal law as federal common law).

82. *Id.* (explaining Court’s first consideration).

83. *See id.* at 729-33 (illustrating federal program does not require uniformity).

84. *Kimbell Foods*, 440 U.S. at 728 (explaining Court’s second consideration).

85. *Id.* at 733-38 (clarifying why application of state law would not frustrate government’s objectives).

86. *Id.* at 728-29 (explaining Court’s third consideration).

87. *Id.* at 739-40 (illustrating how uniform federal law could substantially impact existing commercial relationships).

88. *See id.* at 729-40 (explaining why implementation of state law is sufficient to resolve incomplete federal statutes); *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 245-46 (3d Cir. 2019) (summarizing holding in *Kimbell Foods*).

89. *Tenn. Gas Pipeline*, 931 F.3d at 247 (stating holding in *United States v. Miller*).

90. 317 U.S. 369 (1943) (holding federal law governs substantive determination of just compensation in eminent domain actions brought by Federal Government).

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Railroad.⁹¹ Expectedly, the property owners disagreed with the government's estimation of just compensation.⁹² The property owners appealed the case to the Supreme Court, which determined state law "could not[] affect questions of substantive right . . . such as the measure of compensation" in condemnation proceedings.⁹³

Further, the federal statutes relevant to the issue in *Miller* only required the Court to implement state procedural law.⁹⁴ It is essential to note that the Court's holding in *Miller* applies to eminent domain proceedings specifically exercised by the federal government.⁹⁵ *Miller*, therefore, is only instructive when determining "the amount of compensation due an owner of land condemned by the United States."⁹⁶

D. *Kelo v. City of New London*

In *Kelo v. City of New London*,⁹⁷ the U.S. Supreme Court determined whether economic development qualifies as a "public purpose" under the Fifth Amendment's Takings Clause.⁹⁸ The Takings Clause sets forth that "private property [shall not] be taken for public use, without just compensation."⁹⁹ Although the Takings Clause expressly states "public use," the *Kelo* Court reasoned that "public purpose" is a more practical metric.¹⁰⁰

91. *Id.* at 370-71 (providing relevant facts of *Miller*).

92. *Id.* at 371-72 (noting respondents provided evidence as to proper fair market value to oppose government's estimation).

93. *Id.* at 380 (denying application of state law to substantive determination of just compensation).

94. *Id.* at 379-80 (explaining only purpose of state law in substantive determination).

95. *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 248 (3d Cir. 2019) (noting limitation on Court's holding). "Indeed, *Miller* itself only concerned a condemnation by the [F]ederal [G]overnment." *Id.* (narrowing breadth of *Miller*).

96. *Id.* (quoting *United States v. Certain Parcels of Land in Phila.*, 144 F.2d 626, 629 (3d Cir. 1944) (emphasis added)) (noting how *Miller* is distinguishable from *Tenn. Gas Pipeline*).

97. 545 U.S. 469 (2005) (holding economic development qualifies as "public use" under Takings Clause).

98. *See id.* at 483-90 (providing Court's analysis).

99. *Id.* at 496 (O'Connor, J., dissenting) (quoting U.S. CONST. amend. V) (referencing relevant clause of Fifth Amendment).

100. *Id.* at 477-80 (interpreting "public use" requirement of Fifth Amendment to mean "public purpose"). The Court refused to narrowly construe the meaning of "public use" under the Takings Clause of the Fifth Amendment. *See id.* at 480 (stating Court has employed broader meaning of "public use" since 19th century). Condemned property can be taken for a public purpose without actually being used by the public. *See id.* at 479-80 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984)) (rejecting "any literal requirement that condemned property be put into use for the general public"). The Court referenced its own

The City of New London was targeted for redevelopment after facing years of economic hardship.¹⁰¹ The City appointed the New London Development Corporation (NLDC), a private entity, as its “development agent” in charge of the revitalization plan.¹⁰² To effectuate its plan, the City authorized the NLDC “to acquire property by exercising eminent domain in the City’s name.”¹⁰³ The NLDC, however, faced opposition when it condemned residential properties lying within the development area.¹⁰⁴ Specifically, the residents argued that economic redevelopment does not constitute a “public use” under the Takings Clause.¹⁰⁵ The Court granted certiorari and found that economic development fits within the broad definition of “public purpose.”¹⁰⁶

E. Persuasive Precedent

The Fifth and Sixth Circuits have both held that state law should govern the determination of just compensation in condemnation proceedings brought by private entities.¹⁰⁷ In *Georgia Power Company v. Sanders*,¹⁰⁸ the Fifth Circuit encountered a statutory gap which prompted analysis of Supreme Court precedent.¹⁰⁹ The Fifth Circuit premised its analysis on the idea that “state law should supply the federal rule unless there is an expression of legislative intent to the contrary, or . . . a showing that state law conflicts significantly with any federal interests or policies present in [a] case.”¹¹⁰ This presumption in favor of state law reflects a trend among Su-

precedent, which exemplified that a public purpose may exist absent public use, to support its conclusion. *See id.* at 480 (citing *Strickley v. Highland Boy Gold Min. Co.*, 200 U.S. 527, 531 (1906)) (referencing relevant precedent).

101. *Id.* at 473-75 (providing factual basis relevant to present discussion).

102. *Kelo*, 545 U.S. at 473-75 (introducing NLDC as party).

103. *Id.* at 475 (explaining New London’s delegation of eminent domain power).

104. *Id.* at 475-76 (summarizing Susette Kelo and Wilhelmina Dery’s stories).

105. *Id.* at 475-77 (explaining basis of lawsuit and procedural posture of case).

106. *Id.* at 477, 484 (stating relevant case law is largely deferential to legislative judgment). To support its holding, the Court discussed an array of case law. *See generally id.* at 480-82 (citing *Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)).

107. *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 246-47 (3d Cir. 2019) (referencing persuasive precedent from Fifth and Sixth Circuits).

108. 617 F.2d 1112 (5th Cir. 1980) (en banc) (deciding whether federal or state law should be implemented as federal rule).

109. *Id.* at 1128 (Fay, J., concurring) (noting judiciary’s role to fill legislative gaps).

110. *Id.* at 1115-16 (citing *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)) (explaining court’s general reasoning).

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preme Court precedent illustrating “a growing desire to minimize displacement of state law.”¹¹¹ Although *Georgia Power* discusses the present issue in terms of waterways rather than pipelines, the Fifth Circuit still holds that imposing state law as the federal rule does not jeopardize the United States’ interests.¹¹² This case is persuasive because the relevant statute’s text is similar to the NGA.¹¹³

In *Columbia Gas Transmission Corporation v. Exclusive Natural Gas Storage Easement*,¹¹⁴ the Sixth Circuit evaluated a case where a natural gas company exercised its eminent domain power in Ohio.¹¹⁵ The company commenced its condemnation action under the NGA, leading to the same issue in *Tennessee Gas*: whether a uniform federal law or existing state law should govern the statutory gap regarding just compensation under the NGA.¹¹⁶ Considering prior precedent, the Sixth Circuit noted “an inclination to adopt state law as the federal standard where a private party brings a federal cause of action implicating areas of traditionally state concern.”¹¹⁷ Accordingly, the Sixth Circuit implemented state law as the federal rule.¹¹⁸ The court found the reasoning in *Georgia Power* to be instructive and supported its holding with analysis of the *Kimbell Foods* factors.¹¹⁹ The Sixth Circuit also noted that property rights

111. *See id.* at 1118 (quoting *Ga. Power Co. v. 54.20 Acres of Land*, 563 F.2d 1178, 1189 (5th Cir. 1977)) (supporting Fifth Circuit’s decision to impose state law as federal rule). The Fifth Circuit analyzed multiple Supreme Court cases, including *Kimbell Foods*, to support its conclusion. *See id.* at 1116-18 (demonstrating other circuit courts have utilized *Kimbell Foods* analysis).

112. *See id.* at 1118, 1124 (providing Fifth Circuit’s holding). *Georgia Power* discusses the present issue in terms of the Federal Power Act. *See id.* (noting distinction between *Tennessee Gas* and *Georgia Power*).

113. *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 246 (3d Cir. 2019) (explaining similarities between Federal Power Act and NGA).

114. 962 F.2d 1192 (6th Cir. 1992) (incorporating state law as federal standard).

115. *Id.* at 1193 (providing facts of case).

116. *See id.* at 1193-94 (explaining issue before Sixth Circuit).

117. *Id.* at 1196 (summarizing Sixth Circuit’s typical approach to resolving this general issue).

118. *Id.* at 1194-96, 1198-99 (supplying Sixth Circuit’s reasoning for its holding).

119. *Columbia Gas*, 962 F.2d at 1198 (explaining Sixth Circuit’s reliance on *Georgia Power*). Specifically analyzing the *Kimbell Foods* factors, the Sixth Circuit found “that (1) it is unnecessary to fashion a nationally uniform rule of compensation for private parties condemning land under the NGA, (2) incorporating state law as the federal standard would not frustrate the specific objectives of the NGA, and (3) property rights have traditionally been defined by the state law.” *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 246-47 (3d Cir. 2019) (summarizing Sixth Circuit’s analysis of *Kimbell Foods* factors in *Columbia Gas*).

have “traditionally been . . . defined in substantial part by state law.”¹²⁰

Conversely, the Second Circuit decided in *National Railroad Passenger Corporation v. Two Parcels of Land*¹²¹ to implement a uniform federal law instead of state law.¹²² In *National Railroad Passenger*, a railroad corporation (Amtrak) partially condemned private property in Connecticut.¹²³ Unlike *Tennessee Gas*, determining just compensation under state law in *National Railroad Passenger* caused the condemnor to face other statutory obstacles in addition to higher condemnation costs.¹²⁴ Incorporating state law as the federal standard would have notably forced Amtrak to apply for numerous zoning ordinances.¹²⁵ The Second Circuit subsequently decided to affirm the district court’s decision to implement a uniform federal law.¹²⁶

F. Pipeline Opposition and Controversy

Opposition to pipelines has amplified in recent years.¹²⁷ Accordingly, pipeline opponents have sought new ways to generally challenge the approval and construction of natural gas pipelines.¹²⁸

120. *Columbia Gas*, 962 F.2d at 1198 (explaining how uniform federal rule would affect traditional property rights). The Sixth Circuit considers that implementing a uniform federal rule could negatively impact “well-developed state property regime[s].” *See id.* (stating court’s position regarding danger of uniform federal rule).

121. 822 F.2d 1261 (2d Cir. 1987) (deciding to fashion uniform federal rule).

122. *Id.* at 1267 (noting facts of *National Railroad Passenger* were distinguishable from *Georgia Power*).

123. *Id.* at 1262-64 (providing facts of similar case).

124. *Id.* at 1267 (summarizing other statutory obligations faced by condemnor).

125. *Id.* (evidencing one statutory obstacle in addition to higher condemnation costs). “Under Connecticut law, a partial taking rendering excess property nonconforming under local zoning laws requires the condemnor to apply for a variance prior to the taking” *Id.* (illustrating Connecticut zoning law requirement). If Amtrak was unable to obtain the requisite zoning ordinances, it would have been forced to pay for entire parcels regardless of the amount of land condemned. *Id.* (stating consequence under Connecticut law).

126. *National Railroad Passenger*, 822 F.2d at 1267 (providing case’s holding).

127. *See generally* Elefant, *supra* note 1 (summarizing recent response to pipelines).

128. *See id.* (stating various strategies by which opponents challenge natural gas pipelines). Pipeline challenges cover a wide range of legal action and opponents have attempted to challenge pipelines under a variety of legal theories. *See id.* (categorizing types of pipeline challenges). Opponents have even resorted to challenging pipelines on the basis of zoning. *See generally* Del. Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670, 699 (Pa. Commw. Ct. 2018) (holding construction of pipeline did not violate residential zoning ordinance); *Preemption/Pipeline—Opponents say pipeline construction in residential districts in township violate*

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Landowners have specifically attempted to challenge the ability of natural gas companies to exercise eminent domain.¹²⁹

Upon filing a condemnation complaint, most pipeline companies seek immediate possession of land by filing a partial motion for summary judgment.¹³⁰ Although it is difficult to stop the immediate taking at the trial court level, landowners have recently employed the following arguments to challenge condemnation proceedings: (1) separation of powers, (2) failure to satisfy factors for injunctive relief, (3) lack of good faith negotiation, (4) no substantive right due to lack of permits, and (5) petitions to vacate injunction.¹³¹ Further, landowners have asserted two categories of environmental challenges to condemnation proceedings: (1) National Environmental Policy Act challenges to certificates of public convenience and necessity issued by the FERC and (2) challenges to federally mandated environmental authorizations.¹³²

The motivation for landowners to challenge pipeline construction is situational; some landowners may simply have a sentimental connection to their land.¹³³ Other landowners may be concerned by the potential danger and environmental risks pipelines pose.¹³⁴ As pipelines often traverse large expanses of land across multiple states, their length amplifies these risks.¹³⁵ Likewise, the expansive nature of pipeline construction projects may lead to numerous condemnation proceedings throughout the course of a single project.¹³⁶

township's zoning ordinance, 12 No. 8 QUINLAN, ZONING BULL. NL 2 (Apr. 25, 2018) (explaining decision in *Del. Riverkeeper*).

129. See Elefant, *supra* note 1 (prefacing arguments used in recent years by pipeline opponents).

130. *Id.* (explaining typical procedure of pipeline companies in condemnation proceedings).

131. *Id.* (summarizing arguments that landowners typically employ to combat condemnation proceedings).

132. See *id.* (providing additional arguments utilized by pipeline opponents).

133. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) (noting one petitioner prized her home for its water view and another petitioner lived in her home for more than sixty years).

134. For a discussion of the danger and environmental hazards posed by pipelines, see *supra* notes 7-9 and accompanying text.

135. See, e.g., O'Rourke, *supra* note 9, at 152 (stating Keystone XL pipeline would extend through Montana, South Dakota, Nebraska, Oklahoma, and Texas); *Natural Gas Pipelines*, KINDER MORGAN, https://www.kindermorgan.com/pages/business/gas_pipelines/east/TGP/default.aspx (last visited Feb. 14, 2020) (stating, "Tennessee Gas Pipeline is an approximately 11,750-mile pipeline system that transports natural gas from Louisiana, the Gulf of Mexico and south Texas to the northeast section of the United States").

136. See, e.g., O'Rourke, *supra* note 9, at 168-69 (stating utility company building Keystone XL pipeline faced fifty-six eminent domain actions in just two states).

Despite the surrounding controversy, pipeline construction is an attractive investment for natural gas companies because pipelines reward a higher rate of return than other utilities.¹³⁷ Consequently, the United States' pipeline network is overbuilt because pipeline projects draw a surplus of capital.¹³⁸ As natural gas companies compete to create better pipeline networks, any financial risk associated with overbuilding can be pushed to their "captive ratepayers."¹³⁹ It is possible, however, that overbuilding may eventually challenge the profitability and financial feasibility of pipeline projects.¹⁴⁰

IV. PAY UP: THE THIRD CIRCUIT'S ANALYSIS

In this case, the Third Circuit resorted to common lawmaking because the NGA does not "provide a federal rule of decision as to the appropriate compensation owed to condemnees under the statute."¹⁴¹ Although exercising eminent domain is a matter of federal law, and "the NGA is a federal statute implementing a nationwide federal program," the judiciary must speak because there is a gap in the statutory scheme.¹⁴² To resolve this gap, the Third Circuit had

137. See Cathy Kunkel, *Two Pipeline Expansion Projects in Appalachia Indicate a Rush Toward Overbuilding*, INST. FOR ENERGY ECON. & FIN. ANALYSIS (Apr. 27, 2016), <http://ieefa.org/two-pipeline-expansion-projects-appalachia-indicate-rush-toward-overbuilding/> (comparing pipeline rates of return to other utilities).

138. See *id.* (indicating tendency toward overbuilding due to financial appeal of pipeline construction).

139. See *id.* (explaining further financial rationale for pipeline overbuilding).

140. See, e.g., Cathy Kunkel & Lorne Stockman, *The Vanishing Need for the Atlantic Coast Pipeline*, INST. FOR ENERGY ECON. & FIN. ANALYSIS (Jan. 2019), http://ieefa.org/wp-content/uploads/2019/01/Atlantic-Coast-Pipeline_January-2019.pdf (proposing consequence of overbuilding pipelines). Regulated utilities must have their utility costs approved by state commissions. *Id.* (indicating that utilities are regulated at state level). Although utility companies may be able to push the costs of pipeline overbuilding onto ratepayers, they will not be able to recover such costs if their rates are too high and, therefore, not approved by the state. See *id.* (balancing pipeline construction against consumer protection). The cost of a pipeline project may reach such an amount that it no longer represents good value to ratepayers. See *id.* (noting when state may not approve rates).

141. See *Tenn. Gas Pipeline Co. v. Permanent Easement for 7,053 Acres*, 931 F.3d 237, 245-46, 249-50 (3d Cir. 2019) (noting federal courts must gap-fill when Congress has not expressly spoken via statute). Common lawmaking permits federal courts to develop "legally binding federal rules" when a constitutional or statutory provision is unclear. *Id.* (describing common lawmaking). Federal courts may partake in common lawmaking because it is impossible for legislators to anticipate every application of a particular statutory provision. *Id.* at 245 (providing rationale for common lawmaking).

142. *Id.* at 247 (explaining inherent connection to federal law is not conclusive). "[W]here federal law governs a controversy but there is no federal rule of decision on a particular matter, a federal court must fill the void through common lawmaking . . ." *Id.* at 246 (referring to application of *Kimbell Foods*). The gap in

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two options in this dispute: (1) adopt the relevant state law or (2) create and impose a nationwide federal rule.¹⁴³

A. Application of *Kimbell Foods*

The Third Circuit prefaced its analysis by presuming state law should be incorporated as the federal rule “unless there is an expression of legislative intent to the contrary or a showing that state law significantly conflicts with the federal interest present.”¹⁴⁴ As incorporation of state law frustrated neither of these objectives, the Third Circuit presumed that state law should be the present standard.¹⁴⁵ Nonetheless, the court struggled with its determination because no binding case law existed with regard to private entities in this situation.¹⁴⁶ The Third Circuit weighed the three factors set forth by *Kimbell Foods* to confirm that state law should govern the substantive determination of just compensation in this case.¹⁴⁷

1. *Kimbell Foods* Factor #1

The first factor from *Kimbell Foods* questions whether the federal program requires uniformity.¹⁴⁸ The Third Circuit cited numerous reasons why a nationally uniform rule was unnecessary to resolve the issue in *Tennessee Gas*.¹⁴⁹ The court foremost noted the federal interest in a uniform rule was weak because the United States was not a party to the case.¹⁵⁰ As the present case was be-

the NGA’s statutory scheme is the operative fact in this case. *See id.* (noting precedential issue before Third Circuit). The court would not have to decide the governing law if there was not a gap in the statutory scheme. *See id.* at 247 (explaining why Third Circuit must “resort to the *Kimbell Foods* analysis”).

143. *Id.* at 245 (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)) (explaining how federal courts may proceed with common lawmaking). When determining federal common law, a federal court does not necessarily have to produce a uniform federal rule. *Id.* (clarifying federal courts may adopt state law).

144. *Id.* at 250 (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739 (1979)) (explaining general presumption that state law should typically be incorporated as federal standard).

145. *Id.* at 250-51 (providing Third Circuit’s perspective while applying *Kimbell Foods* analysis).

146. *See Tenn. Gas Pipeline*, 931 F.3d at 248 (discussing how present case differs from cases referenced by *Tennessee Gas*).

147. *See id.* at 250-55 (weighing three factors from *Kimbell Foods* to determine if federal or state law applies).

148. For a discussion of *Kimbell Foods* and its three-factor analysis, see *supra* notes 75-88 and accompanying text.

149. *Tenn. Gas Pipeline*, 931 F.3d at 251-52 (stating five reasons in opposition to nationally uniform rule).

150. *Id.* at 251 (noting absence of federal interest where United States acts through licensee).

tween two private entities, their dispute did “‘not touch the rights and duties of the United States’”¹⁵¹ Relatedly, the Supreme Court has held that federal law should not arrogate state law in cases involving transactions of local concern.¹⁵² The Third Circuit decided the federal interest was also faint because property rights are typically governed by state law.¹⁵³

The court next observed that “the NGA contemplates state participation in multiple ways. . . .”¹⁵⁴ For example, the NGA allows states to regulate environmental affairs related to natural gas facilities even if the facilities are part of interstate activities.¹⁵⁵ The NGA also permits condemnors to file eminent domain actions in state court.¹⁵⁶ Procedural uniformity among eminent domain actions is guaranteed by Federal Rule of Civil Procedure 71.1, which further indicates the redundancy of a nationwide federal rule.¹⁵⁷ Lastly, the Third Circuit reasoned that any inequity borne from applying divergent state law is irrelevant to the present determination.¹⁵⁸ Fairness is not the objective of the first *Kimbell Foods* factor.¹⁵⁹ Based on this reasoning, the Third Circuit concluded the first factor in the *Kimbell Foods* analysis weighed in favor of incorporating state law.¹⁶⁰

2. *Kimbell Foods* Factor #2

The second factor from *Kimbell Foods* considers whether applying state law would frustrate specific objectives of the federal pro-

151. *Id.* (quoting *Bank of Am. Nat’l Tr. & Sav. Ass’n v. Parnell*, 352 U.S. 29, 33-34 (1956)) (stating cases between private parties are remote from federal interest).

152. *See id.* (citing *Parnell*, 352 U.S. at 33-34) (drawing conclusion that dispute is of local concern if it does not affect duty of United States).

153. *Id.* at 251-52 (explaining federal rule would add unnecessary complexity to state property laws).

154. *Tenn. Gas Pipeline*, 931 F.3d at 252 (noting role of state law in NGA).

155. *Id.* (citing *Twp. Of Bordentown, N.J. v. FERC*, 903 F.3d 234, 268 (3d Cir. 2018)) (providing one example of state law’s role in NGA). *See also* Natural Gas Act, 15 U.S.C. § 717b(d) (2005) (excluding certain environmental laws from coverage of NGA).

156. *Tenn. Gas Pipeline*, 931 F.3d at 252 (providing an additional example of state law’s role in NGA).

157. *Id.* at 241, 252 (discussing sufficient procedural uniformity in eminent domain actions provided by Fed. R. Civ. P. 71.1).

158. *Id.* at 252 (rebutting Tennessee Gas’s primary argument regarding first *Kimbell Foods* factor).

159. *See id.* (reinforcing first *Kimbell Foods* factor is solely concerned with uniformity).

160. *Id.* (stating Third Circuit’s conclusion as to first *Kimbell Foods* factor).

gram.¹⁶¹ The Third Circuit began analyzing this factor by identifying the objectives of the NGA, which are “matters relating to the transportation of natural gas and the sale thereof.”¹⁶² The Third Circuit stated that protecting the financial interests of natural gas companies is not an NGA objective.¹⁶³ Increased condemnation costs for Tennessee Gas were the only effects of applying state law in the present case.¹⁶⁴ The Third Circuit reasoned that incorporating state law would not frustrate the NGA’s objectives because the NGA is unconcerned with Tennessee Gas’s financial interests.¹⁶⁵

The Third Circuit distinguished *National Railroad Passenger* to support its conclusion.¹⁶⁶ Specifically, the Third Circuit noted incorporating state law in *National Railroad Passenger* would have instituted statutory obligations beyond higher condemnation costs.¹⁶⁷ The Third Circuit reported Tennessee Gas could not provide any additional precedent evidencing state law “so far out of step with federal law as to create a significant conflict.”¹⁶⁸ The Third Circuit concluded the second factor weighed in favor of incorporating state law.¹⁶⁹

161. For a discussion of *Kimbell Foods* and its three-factor analysis, see *supra* notes 75-88 and accompanying text.

162. *Tenn. Gas Pipeline*, 931 F.3d at 253 (quoting 15 U.S.C. § 717(a)) (summarizing NGA’s objectives).

163. *Id.* (citing *Sunray Mid-continent Oil Co. v. Fed. Power Comm’n*, 364 U.S. 137, 147 (1960)) (addressing financial interests of natural gas companies). In fact, one of the NGA’s primary objectives is protecting consumers from exploitation by natural gas companies. *Id.* (explaining why financial interests of natural gas companies are not considered under NGA).

164. *Id.* (discussing effect of applying Pennsylvania law). For information regarding the financial difference between imposing federal and state law, see *supra* notes 64-70 and accompanying text.

165. *Id.* at 253 (quoting *In re Columbia Gas*, 997 F.2d 1039, 1058 (3d Cir. 1993)) (explaining condemnor’s financial burden is merely an “ancillary issue”).

166. *Id.* at 253-54 (distinguishing Second Circuit’s decision to implement uniform federal rule).

167. *Tenn. Gas Pipeline*, 931 F.3d at 254 (noting additional statutory obligations are non-existent in present case). For a discussion of the additional statutory obligations imposed by state law in *National Railroad Passenger*, see *supra* notes 124-125 and accompanying text.

168. *Id.* at 254 (indicating *National Railroad Passenger* was Tennessee Gas’s only viable argument under second *Kimbell Foods* factor). Additionally, the Third Circuit expressly clarified that Tennessee Gas could not provide “any further, concrete examples of significantly divergent state laws that could frustrate the NGA’s purpose of protecting the public interest.” *Id.* (inferring divergent state laws are uncommon).

169. *Id.* (stating Third Circuit’s conclusion as to second *Kimbell Foods* factor).

3. *Kimbell Foods* Factor #3

The third and final factor from *Kimbell Foods* considers whether “a uniform federal rule would upset commercial expectations founded on state law.”¹⁷⁰ Reasoning that property rights are typically a matter of state law, the Third Circuit held related commercial relationships are rightfully grounded therein.¹⁷¹ The Third Circuit, however, acknowledged the federal body of law regarding just compensation.¹⁷² So although property generally invokes state law, parties to commercial relationships involving property are still “on notice of the potential application of federal law.”¹⁷³ The Third Circuit concluded the third factor weighed in favor of state law because incorporating federal law could upset commercial expectations “based upon ‘the already well-developed state property regime.’”¹⁷⁴

B. Distinguishing *Miller*

The Third Circuit applied the *Kimbell Foods* analysis after determining *Miller* was distinguishable.¹⁷⁵ Although *Miller* is still binding precedent in eminent domain actions brought by the federal government, the Third Circuit refused to extend its reach to private entities in *Tennessee Gas*.¹⁷⁶ The Third Circuit relied on two reasons to support its decision: (1) developing natural gas pipelines is not a governmental function, and (2) private entities use private funding to pay just compensation in eminent domain proceedings.¹⁷⁷ Regarding the first reason, the federal interest in pipeline develop-

170. *Id.* (introducing third *Kimbell Foods* factor). For a discussion of *Kimbell Foods* and its three-factor analysis, see *supra* notes 75-88 and accompanying text.

171. *Id.* at 254 (noting property rights are traditionally left to states).

172. *Tenn. Gas Pipeline*, 931 F.3d (establishing omnipresence of federal law).

173. *Id.* (identifying position of federal precedent among state property law).

174. *Id.* at 254-55 (quoting *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1198 (6th Cir. 1992)) (stating Third Circuit’s conclusion as to third *Kimbell Foods* factor). When presenting its conclusion, the court noted the balance between federal and state law under this factor is close. *Id.* at 254 (describing court’s rationale).

175. *Id.* at 247-49 (explaining why Third Circuit conducted *Kimbell Foods* analysis).

176. *Tenn. Gas Pipeline*, 931 F.3d at 247-48 (holding *Miller* does not apply to private entities). The Third Circuit was not bound by precedent in *Tennessee Gas* because it had never heard an eminent domain case where a private entity was the condemner. *See id.* (distinguishing *Tennessee Gas* from prior case law). *Tennessee Gas* attempted to cite cases to the contrary, but only provided examples where the condemner was the Federal Government. *Id.* at 248 (explaining how Third Circuit could deny *Miller* as binding precedent).

177. *See id.* at 248-49 (providing rationale behind Third Circuit’s decision not to extend *Miller*).

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ment is weak relative to other essential functions of the federal government, such as “naval aviation activities.”¹⁷⁸ As to the second reason, the federal government is only concerned with “the spending of federal dollars” in eminent domain proceedings.¹⁷⁹ Condemnation costs incurred by private entities are immaterial to the federal government.¹⁸⁰

C. Judge Chagares’s Dissent

The majority’s opinion drew a dissent from Circuit Judge Chagares.¹⁸¹ The dissent’s interpretation of *Miller* was its principal divergence from the majority.¹⁸² Judge Chagares argued *Miller* bound the Third Circuit to determine just compensation under federal law.¹⁸³ According to Judge Chagares, *Miller* instructs that federal law should be used to determine just compensation because one’s right to just compensation is grounded in the Constitution.¹⁸⁴ The dissent further reasoned the right to just compensation relates to any exercise of the federal eminent domain power; the parties to a case are irrelevant to the substantive determination of just compensation.¹⁸⁵

V. BIG SPENDERS: A CRITICAL ANALYSIS

The majority acknowledged at the outset of its analysis that interpretation of the NGA “is naturally a matter of federal

178. *Id.* (explaining natural gas pipelines are developed by private entities).

179. *Id.* at 249 (noting Federal Government seeks to minimize its own costs from condemnation proceedings). The Federal Government’s concern about spending federal dollars is not translatable to private entities. *Id.* (distinguishing between condemnation proceedings brought by government and private entities).

180. *See id.* (reinforcing that *Miller* does not resolve this case).

181. *Tenn. Gas Pipeline*, 931 F.3d at 255-59 (Chagares, J., dissenting) (disagreeing with majority’s incorporation of state law as federal standard).

182. *Id.* at 255 (Chagares, J., dissenting) (asserting, “[R]esolution of the question here presented begins and ends with the *Miller* decision”). *See also id.* at 247-49 (expressing majority’s opinion that *Miller* does not resolve present case).

183. *Id.* at 256-57 (Chagares, J., dissenting) (citing *Miller* as binding U.S. Supreme Court precedent).

184. *Id.* (Chagares, J., dissenting) (explaining Judge Chagares’s overall reasoning).

185. *Id.* at 257-58 (Chagares, J., dissenting) (explaining right to just compensation is federal substantive right regardless of whom is exercising it). The dissent argues *Miller* does not limit its holding to condemnation actions brought by the Federal Government. *See id.* (discussing relevance of parties’ identities in condemnation proceedings). But to this end, the dissent recognizes that *Miller* does not expressly extend its holding to private entities. *See id.* at 257 (noting *Miller* does not discuss private entities).

law.”¹⁸⁶ But in order to resolve the NGA’s silence on which law governs just compensation, the majority had to consider the relevance of *Miller* before applying the *Kimble Foods* factors.¹⁸⁷ The examination of *Miller* necessarily led to distinguishing the interests of public and private entities.¹⁸⁸ This section examines the majority’s distinction and employs *Kelo* as a point of comparison.¹⁸⁹ Additionally, this section discusses the displacement of state property laws and the limited purview of the majority’s holding.¹⁹⁰

A. Conflicting Interests

In its appellate brief, Tennessee Gas stated that King Arthur’s argument “drive[s] an artificial wedge between federal condemnations brought by the United States and federal condemnations brought by private entities acting pursuant to congressionally delegated authority.”¹⁹¹ Although Tennessee Gas’s statement is technically correct, it is unnecessarily accusatory and reflects a limited understanding of the present case and its implications.¹⁹² The Third Circuit correctly adopts the *Kimble Foods* analysis from King Arthur’s appellate brief in order to distinguish between federal condemnations brought by the United States and federal condemnations brought by private entities.¹⁹³

186. *Tenn. Gas Pipeline*, 931 F.3d at 247 (prefacing gap in statutory scheme of NGA).

187. *Id.* at 243 (summarizing that NGA does not address “the remedies available in the condemnation proceedings it allows”). For a discussion of precedent considered by the majority’s opinion, see *supra* notes 53-62, 75-96, 107-126 and accompanying text.

188. See *Tenn. Gas Pipeline*, 931 F.3d at 247-49 (distinguishing *Miller*).

189. For further discussion of the majority’s distinction between the interests of public and private entities, see *infra* notes 191-198 and accompanying text. For further discussion of *Tennessee Gas* in the context of *Kelo*, see *infra* notes 199-226 and accompanying text.

190. For further discussion of the displacement of state property laws, see *infra* notes 227-232 and accompanying text. For further discussion of the breadth of the majority’s holding, see *infra* notes 233-246 and accompanying text.

191. Brief for Plaintiff-Appellee Tennessee Gas Pipeline Company, L.L.C. at 10, *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237 (3d Cir. 2019) (No. 17-3700), 2018 WL 2746214 (critiquing King Arthur’s incorporation of state law as federal standard).

192. See generally *Tenn. Gas Pipeline*, 931 F.3d at 247-55 (holding federal condemnations brought by United States distinguishable from federal condemnations brought by private entities acting pursuant to congressionally delegated authority).

193. See *id.* at 247, 250-55 (applying *Kimble Foods* factors to present case). See also Brief of Appellant and Appendix Volume 1 Pages 1-22 at 5, 7-11, *Tenn. Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*, 931 F.3d 237 (3d Cir. 2019) (No. 17-3700), 2018 WL 2138056 (explaining application of *Kimble Foods* factors in *Columbia Gas* was instructive).

Moreover, the Third Circuit's holding contemplates that the federal government and private entities fulfill conflicting interests by exercising eminent domain.¹⁹⁴ The government must pursue functions essential to the public interest on a budget funded by "federal dollars."¹⁹⁵ Conversely, private entities act in their own interest and pursue condemnation for the purpose of profit.¹⁹⁶ Private entities acting for-profit, therefore, are not necessarily entitled to the same metric of just compensation as the federal government acting in the public interest.¹⁹⁷ The Third Circuit correctly emphasizes this distinction between the public and private sectors in its analysis.¹⁹⁸

B. *Tennessee Gas* in the Context of *Kelo*

The majority could have used the U.S. Supreme Court's *Kelo* opinion to enhance its argument.¹⁹⁹ As a threshold matter, the factual dispute in *Kelo* is not particularly relevant to the issue in *Tennessee Gas*.²⁰⁰ Whereas *Kelo* discusses the "public use" component of the Takings Clause, *Tennessee Gas* instead focuses on just compensation.²⁰¹ Even though *Kelo* and *Tennessee Gas* ultimately address dif-

194. *See Tenn. Gas Pipeline*, 931 F.3d at 247-49 (differentiating between interests of private entities and Federal Government).

195. *Id.* at 249 (stating that Federal Government has strong interest in reducing condemnation costs). The government only exercises its eminent domain power to carry out "important governmental function[s]." *See id.* (explaining federal interest in condemnation proceedings).

196. *Id.* (noting private entities approach condemnation with different perspective than Federal Government).

197. *See id.* at 248-49 (reasoning *Miller* is distinguishable from present case).

198. *See id.* (distinguishing between objectives of Federal Government and private entities). The judiciary cannot concern itself with the profitability of private entities. *See id.* at 248-49, 253 (noting lack of federal interest in condemnation proceedings brought by private entities).

199. For a discussion of *Kelo v. City of New London*, see *supra* notes 97-106 and accompanying text.

200. Compare *Kelo v. City of New London*, 545 U.S. 469, 477-90 (2005) (determining whether economic development constitutes a public purpose) with *Tenn. Gas Pipeline*, 931 F.3d at 247-55 (analyzing whether state or federal law governs determination of just compensation).

201. *See id.* (describing difference between *Kelo* and *Tennessee Gas*). Indeed, the public use component of the Takings Clause is not at issue in *Tennessee Gas*. *See id.* (discussing main points of *Kelo* and *Tennessee Gas*). Through the NGA, Congress identifies that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest." *See Tenn. Gas Pipeline*, 931 F.3d at 242-43 (quoting Natural Gas Act, 15 U.S.C. § 717(a) (2005)) (establishing public purpose of natural gas pipelines). Accordingly, the Third Circuit in *Tennessee Gas* does not have to reason through the meaning of "public use" like the Supreme Court in *Kelo*. *See Kelo*, 545 U.S. at 477-90 (reasoning through meaning of "public use" under Takings Clause); *Tenn. Gas Pipeline*, 931 F.3d at 241-43 (summarizing *Tennessee Gas* could rightfully exercise eminent domain power).

ferent issues, their discussions necessarily overlap because they are rooted in the same subject matter: eminent domain.²⁰²

The majority in *Tennessee Gas* could have distinguished the facts of *Kelo* to support its distinction of public and private interests.²⁰³ *Kelo* instructs that economic development may constitute a “public use” for the purposes of the Takings Clause.²⁰⁴ Although the transfer of property in *Kelo* occurs between two private parties, that transfer relates to the federal interest because it promotes overall economic development.²⁰⁵ Conversely, the exercise of eminent domain in *Tennessee Gas* is only constitutional because the NGA presumes a public interest in the transfer and sale of natural gas.²⁰⁶ Neither the transfer nor sale of natural gas, however, serve some greater federal interest such as economic development.²⁰⁷ There is certainly an economic component to pipeline development, but it involves the profitability of a private enterprise.²⁰⁸

Stated differently, the majority could have held *Tennessee Gas* against *Kelo* to show the stark difference in objectives.²⁰⁹ *Kelo* demonstrates that the federal government may even have a strong interest in the dealings of private entities.²¹⁰ *Tennessee Gas* establishes no such relation to the federal interest.²¹¹ As *Tennessee Gas* fails to fit within the *Kelo* framework, it becomes even clearer that there is no federal interest in the development of natural gas pipelines.²¹² Consequently, the Third Circuit could have further supported its

202. See *Kelo*, 545 U.S. at 472 (noting issue in *Kelo* pertains to eminent domain); see also *Tenn. Gas Pipeline*, 931 F.3d at 241 (noting issue in *Tennessee Gas* pertains to eminent domain).

203. *Tenn. Gas Pipeline*, 931 F.3d at 248-49 (distinguishing between interests of government and private entities).

204. *Kelo*, 545 U.S. at 488-90 (stating Court’s holding).

205. See *id.* at 484 (stating, “Promoting economic development is a traditional and long-accepted function of government.”).

206. See *Tenn. Gas Pipeline*, 931 F.3d at 242-43 (explaining Congressional findings underpinning NGA).

207. See *id.* at 247-49 (explaining private interests differentiate present case from *Miller*).

208. See *id.* at 249 (noting economic interests in pipeline development belong solely to private entities).

209. Compare *Kelo*, 545 U.S. at 484-85 (explaining public purpose of economic development) with *Tenn. Gas Pipeline*, 931 F.3d at 249 (explaining natural gas companies pursue condemnation for profit).

210. *Kelo*, 545 U.S. at 485-86 (stating private entities can contribute to government’s pursuit of public purpose).

211. *Tenn. Gas Pipeline*, 931 F.3d at 248-49 (explaining minimal federal interest in pipeline development).

212. See *id.* at 249 (explaining minimal federal interest in pipeline development).

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argument regarding the federal interest by distinguishing *Kelo* in this respect.²¹³

The majority could have concomitantly strengthened its holding by analyzing eminent domain procedure.²¹⁴ In *Tennessee Gas*, the pipeline company itself commenced the condemnation action.²¹⁵ The company held the power to exercise eminent domain through its certificate of public convenience and necessity.²¹⁶ In *Kelo*, however, the NLDC brought the condemnation action on behalf of the City of New London.²¹⁷ Indeed, New London delegated its eminent domain power to the NLDC.²¹⁸ Even though the eminent domain power is delegated to private entities in both cases, *Kelo* infers that the NLDC is acting as an agent for the City of New London.²¹⁹ Accordingly, there is a stronger governmental interest present in the *Kelo* condemnation action.²²⁰

This procedural distinction between *Tennessee Gas* and *Kelo* may seem minor, but the holding of the present case rests on nuanced analysis.²²¹ Distinguishing the eminent domain procedure in *Kelo* would also address an issue raised by the dissent in *Tennessee Gas*.²²² The dissent argued there was no difference between “the Government or a Government-delegatee” exercising the eminent domain

213. *See id.* at 247-49 (using federal interest argument to distinguish *Miller*).

214. *See Kelo*, 545 U.S. at 475 (explaining eminent domain procedure in *Kelo*); *see also Tenn. Gas Pipeline*, 931 F.3d at 243 (explaining eminent domain procedure in *Tennessee Gas*).

215. *Tenn. Gas Pipeline*, 931 F.3d at 241 (stating *Tennessee Gas* filed instant condemnation action).

216. For a discussion of the NGA’s delegation of the federal eminent domain power, see *supra* notes 56-61 and accompanying text.

217. *Kelo*, 545 U.S. at 475 (stating NLDC initiated condemnation proceedings).

218. *Id.* at 495 (O’Connor, J., dissenting) (explaining New London’s delegation of eminent domain power).

219. *See id.* at 475 (stating, “[T]he NLDC initiated the condemnation proceedings that gave rise to this case.”). When stating that the NLDC initiated the condemnation proceedings, the Court added a footnote linking the City and NLDC. *See id.* at 523 n.3 (clarifying, “In the remainder of the opinion we will differentiate between the City [of New London] and the NLDC only where necessary.”). From thereon, the Court references the City in place of the NLDC. *See generally id.* at 475-90 (analyzing City’s economic development plan). By referencing the City in place of the NLDC, the Court suggests that the NLDC is an agent acting on behalf of the City. *See id.*

220. *See id.* at 484-85 (noting governmental interest in economic development); *see also Tenn. Gas Pipeline*, 931 F.3d at 249 (noting governmental interest when government is condemnor).

221. *See, e.g., Tenn. Gas Pipeline*, 931 F.3d at 252 (noting how NGA subtly contemplates state law).

222. *See id.* at 255 (Chagares, J., dissenting) (critiquing majority’s standard for measuring just compensation).

power, subsequently inferring that Tennessee Gas is a “Government-delegatee.”²²³ Yet the NLDC in *Kelo* appears to better exemplify the dissent’s vision of “Government-delegatee” because the NLDC acts as an agent for the government.²²⁴ Tennessee Gas is another step removed from the government by acting completely in its own interest.²²⁵ One must question how Judge Chagares would then categorize the NLDC in *Kelo* if he believed that Tennessee Gas was a “Government-delegatee.”²²⁶

C. Property Rights as a Matter of State Law

The Fifth Circuit in *Georgia Power* discussed that the Supreme Court is increasingly focused on “minimiz[ing] displacement of state law.”²²⁷ The Sixth Circuit in *Columbia Gas* then built upon this idea by reasoning that property rights have traditionally been defined by state law.²²⁸ The present case notably quotes the Sixth Circuit in *Columbia Gas*, stating a federal rule regarding just compensation “would at best merely superimpose a layer of property right allocation onto the already well-developed state property regime.”²²⁹ Although eminent domain is a federal power, the Third Circuit necessarily draws upon *Columbia Gas* to reason that state law should prevail.²³⁰ The present holding thus reflects that any uniform federal rule would be framed by state property law, indicating that creation of a uniform federal rule is redundant.²³¹

223. *See id.* (inferring that Tennessee Gas exercises eminent domain power as “Government-delegatee”).

224. *See Kelo*, 545 U.S. at 475 (stating NLDC was authorized to exercise eminent domain “in the City’s name”) (citing CONN. GEN. STAT. § 8-188 (2005)).

225. *See Tenn. Gas Pipeline*, 931 F.3d at 249 (explaining that condemnor is private entity in *Tennessee Gas*).

226. *See id.* at 255 (Chagares, J., dissenting) (noting eminent domain power can be exercised by government or “government-delegatee”).

227. For a discussion of the Fifth Circuit’s analysis in *Georgia Power*, see *supra* notes 108-113 and accompanying text.

228. *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1198 (6th Cir. 1992) (stating reason for adopting state law as federal standard for determining just compensation).

229. *Tenn. Gas Pipeline*, 931 F.3d at 251 (quoting *Columbia Gas*, 962 F.2d at 1198) (explaining federal rules regarding property rights would obscure state property regime).

230. *See id.* at 254 (implementing rationale from *Columbia Gas*). Further, the Third Circuit remarks that “when dealing with those powers left to the states, the courts should tread gingerly.” *Id.* at 254 (quoting *Ga. Power Co. v. Sanders*, 617 F.2d 1112, 1125 (5th Cir. 1980) (en banc) (Fay, J., concurring)) (commenting on powers left to states).

231. *See id.* at 251-55 (drawing upon persuasive case law).

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The Third Circuit, therefore, properly interprets persuasive case law to support its holding.²³²

D. Circumscribed Holding

The Third Circuit does not set forth an unbounded holding in *Tennessee Gas*.²³³ The present decision is seemingly limited to situations where private condemners only face higher condemnation costs as a result of incorporating state law.²³⁴ By distinguishing *National Railroad Passenger* rather than overruling it, the Third Circuit acknowledges that state law could impose unreasonable conditions which would frustrate the NGA's objectives.²³⁵ Although *Tennessee Gas* was unable to provide other examples of burdensome state laws, the Third Circuit still limits its holding to condemnation costs.²³⁶

Importantly, the defined scope of the Third Circuit's holding undermines the dissent in *Tennessee Gas*.²³⁷ Relying on *Miller*, the dissent argues federal law should be used to calculate just compensation because "the right to compensation is based in the federal Constitution."²³⁸ But if higher condemnation costs are the only consequence of incorporating state law, the dissent's argument then suggests the Constitution protects the financial interests of private entities.²³⁹ In fact, the majority's emphasis on the "federal in-

232. *See id.* at 251-52, 254 (applying reasoning from *Columbia Gas*).

233. *Id.* at 253 (noting potential for state compensation laws to conflict with federal laws).

234. *See Tenn. Gas Pipeline*, 931 F.3d at 253-54 (explaining state law in present case only affects condemnation costs).

235. *See id.* (contemplating operative facts of *National Railroad Passenger*). The Third Circuit determines that *National Railroad Passenger* sets forth legitimate considerations that are inapposite to the present case. *See id.* (highlighting additional statutory obstacles in *National Railroad Passenger*). Pennsylvania law does not impose additional statutory obligations on parties bringing condemnation proceedings. *See id.* at 254 (distinguishing Pennsylvania law from state law applied in *National Railroad Passenger*).

236. *See id.* at 254 (identifying *National Railroad Passenger* as *Tennessee Gas*'s only viable argument regarding divergent state laws). The Third Circuit's holding is seemingly limited to condemnation costs even though the court is "unpersuaded by the theoretical possibility" that other divergent state laws exist. *See id.* (stating court's response to *Tennessee Gas*'s argument).

237. *See id.* at 257-58 (Chagares, J., dissenting) (advocating for federal law to determine just compensation). For a discussion of the scope of the holding in the present case, see *supra* notes 141-143 and accompanying text.

238. *Id.* at 256 (Chagares, J., dissenting) (applying Supreme Court's holding in *Miller* to present case).

239. *See generally Tenn. Gas Pipeline*, 931 F.3d at 255-59 (Chagares, J., dissenting) (concluding Constitution only permits federal law to govern substantive determination of just compensation). For a discussion of the consequences of incorporating state law, see *supra* notes 161-169 and accompanying text.

terest” in condemnation actions circumvents this very conclusion.²⁴⁰ By noting the minimal federal interest in condemnation actions brought by private entities, the majority restricts private entities from realizing unwarranted financial protection by the Constitution.²⁴¹

Judge Chagares’s dissent in *Tennessee Gas* also identifies that the U.S. Supreme Court neither extends *Miller* to private entities nor restricts *Miller* to the federal government.²⁴² Indeed, the breadth of *Miller*’s authority was left ambiguously open.²⁴³ The majority resolved *Miller*’s indecision through tempered analysis of the *Kimbell Foods* factors, but the dissent fails to cite any comparable authority.²⁴⁴ Rather, Judge Chagares refuses to consider the present issue beyond *Miller* and cites no case law in opposition to the majority’s discussion of public and private interests.²⁴⁵ The dissent, therefore, fails to adequately refute the majority’s limited holding.²⁴⁶

VI. MONEY TROUBLES FOR PRIVATE ENTITIES: A FINANCIAL IMPACT

“Nothing in the NGA suggests that Congress was particularly concerned with protecting natural gas companies from the additional costs that varying state laws may impose, or even with making natural gas companies’ transactions streamlined or efficient.”²⁴⁷

240. See *Tenn. Gas Pipeline*, 931 F.3d at 248-49 (considering federal interest in condemnation proceedings brought by private entities).

241. See *id.* (noting federal law is not default governing law because there is minimal federal interest in condemnation proceedings brought by private entities).

242. *Id.* at 257 (Chagares, J., dissenting) (explaining ambiguity of holding in *Miller*).

243. See *id.* at 247-49 (noting *Miller* was never applied to private entities in subsequent cases); *id.* at 257 (Chagares, J., dissenting) (noting lack of clarity in *Miller*).

244. For a discussion of the majority’s analysis of the *Kimbell Foods* factors, see *supra* notes 148-174 and accompanying text.

245. See *Tenn. Gas Pipeline*, 931 F.3d at 255-59 (Chagares, J., dissenting) (using *Miller* as basis of argument). Judge Chagares opines that the majority’s concern for the federal interest is not determinative. See *id.* (referencing majority’s emphasis of essentiality to government function and use of government funds). To support this conclusion, Judge Chagares only cites *Miller* and his own “view.” See *id.* at 258 (Chagares, J., dissenting) (stating, “But these concerns [regarding the federal interest] are not determinative, in my view.”).

246. See *id.* at 258 (Chagares, J., dissenting) (summarizing opposition to majority’s arguments).

247. *Id.* at 253 (summarizing that holding will increase costs for natural gas companies constructing pipelines).

Tennessee Gas sets forth substantial cost implications for private entities acting under the authority of the NGA.²⁴⁸ In the present case alone, Tennessee Gas's condemnation costs increased by approximately one-million dollars when the Third Circuit held state law governed the substantive determination of just compensation.²⁴⁹ As other circuits have also held state law should govern the determination of just compensation in condemnation proceedings brought by private entities, and multiple states have statutorily reformed various "injustices of traditional just compensation law," it seems *Tennessee Gas* will impose significant financial liability on natural gas companies.²⁵⁰ The financial exposure of natural gas companies is particularly concerning because pipelines often extend across large expanses of land.²⁵¹ As noted, Congress was unconcerned by natural gas companies' profitability when delegating its eminent domain power through the NGA.²⁵²

The Third Circuit's decision in *Tennessee Gas* leads one to question the extent of consequential damages in this context.²⁵³ If courts permit consequential damages to reflect the danger and environmental implications of pipelines, then just compensation could become a substantial cost.²⁵⁴ Further, a natural gas company will inevitably face many condemnation proceedings over the course of a pipeline project.²⁵⁵ If those proceedings occur in states with landowner-friendly laws, the financial consequences could be-

248. *Id.* at 242, 253 (incorporating state substantive law in present case increases condemnation costs by approximately one million dollars).

249. *See id.* at 253 (stating effect of incorporating state law).

250. *See Fegan, supra* note 13, at 293-94 (providing information regarding statutory reform of just compensation law at state level). For a discussion of other circuit court decisions to calculate just compensation under state law in condemnation proceedings brought by private entities, see *supra* notes 107-120 and accompanying text.

251. For a discussion of the expansive footprint of pipelines, see *supra* note 135 and accompanying text.

252. *See Tenn. Gas Pipeline*, 931 F.3d at 253 (referring to increased costs from imposition of state law). Moreover, the NGA was enacted to protect "the interests of the public, including consumers and property owners." *Id.* (relying on Supreme Court precedent).

253. *See id.* at 244-45 (providing example of matters covered by consequential damages). For additional examples of matters covered by consequential damages, see *supra* note 72 and accompanying text.

254. *See* Brief of King Arthur Estates, *supra* note 38, at 31-33 (describing environmental implications of pipeline explosion). For an explanation of consequential damages, see *supra* notes 71-74 and accompanying text.

255. *See* O'Rourke, *supra* note 9, at 168-69 (noting multiple condemnation actions in one phase of single pipeline project).

come unbounded.²⁵⁶ It is then possible that *Tennessee Gas* could curb overbuilding of pipelines, which would significantly mitigate their environmental impact.²⁵⁷ Among other externalities, fewer pipelines would specifically reduce the risk of oil spills, water contamination, and damage to wetlands and wildlife.²⁵⁸

The cost implications of *Tennessee Gas* could thereby instill a new sense of corporate responsibility in the natural gas industry.²⁵⁹ If consequential damages serve as a vehicle for the quantification of social costs, then just compensation would correct how natural gas companies internalize the weight of their business decisions.²⁶⁰ *Tennessee Gas*, therefore, demonstrates a unique solution to the various implications of pipelines: accountability rather than prohibition.²⁶¹ As pipeline energy transfer is crucial to the operation of society, it is imprudent to protest the existence of pipelines altogether.²⁶² Rather, the energy industry may be compelled to self-regulate if faced with higher condemnation costs that reflect its commercial interests.²⁶³ In conclusion, the financial ramifications of *Tennessee Gas* may prompt the natural gas industry to realize more of the social and environmental costs inherent to pipeline construction.²⁶⁴

*Spencer J. Miller**

256. See *Tenn. Gas Pipeline*, 931 F.3d at 244-45 (stating Pennsylvania law permits recovery of consequential damages); *id.* at 253 (noting incorporating state law in present case increases just compensation by approximately one million dollars).

257. For a discussion of the overbuilding of pipelines and its financial rationale, see *supra* notes 137-139 and accompanying text. For a discussion of the environmental impact of pipelines, see *supra* note 9 and accompanying text.

258. For a discussion of the specific environmental impacts of pipelines, see *supra* note 9.

259. See Kunkel, *supra* note 140 (illustrating lack of profitability threatens viability of pipeline projects).

260. See *id.* (analyzing that utility companies may not be able to recover all pipeline construction costs); Kunkel, *supra* note 137 (explaining typical business practice for natural gas companies to overbuild pipelines).

261. See *Tenn. Gas Pipeline*, 931 F.3d at 248-49 (indicating there is no federal interest in condemnation actions brought by private entities). The Third Circuit rationalizes that private entities can pay higher condemnation costs when there is no governmental interest in their action. See *id.* (quoting *Pub. Util. Dist. No. 1 of Pend Oreille City v. City of Seattle*, 382 F.2d 666, 670 (9th Cir. 1967)) (differentiating private entities that pursue condemnation “for purposes of profit”).

262. For a discussion of the importance of the United States’ pipeline network, see *supra* note 6 and accompanying text.

263. See *Tenn. Gas Pipeline*, 931 F.3d at 249 (distinguishing that private entities pursue condemnation for profit).

264. For information supporting this conclusion, see *supra* notes 247-263 and accompanying text.

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