5-13-2020

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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After being withdrawn from oil wells, natural gas is processed and distributed through various forms of pipelines.5 The United States’ pipeline network is tremendously important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


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).


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


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

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

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 facts of *Tennessee Gas*, see infra notes 23-50 and accompanying text.
17. For a discussion of the legal background underpinning *Tennessee Gas*, see infra notes 51-140 and accompanying text.
18. For a discussion of the Third Circuit’s legal analysis in *Tennessee Gas*, see infra notes 141-185 and accompanying text.
19. For a discussion of the legal basis for the dissenting意见, see infra notes 186-246 and accompanying text.
20. 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


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).


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-
Conversely, King Arthur relied on Pennsylvania law, which does permit recovery of consequential damages in eminent domain proceedings.\textsuperscript{32}

Conflict arose because the NGA is silent on which law governs just compensation.\textsuperscript{33} The parties were concerned with the governing law because the distinction resulted in a one-million dollar difference in compensation.\textsuperscript{34} Tennessee Gas then moved for summary judgment on the issue of compensation.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{37} King Arthur filed a brief opposing Tennessee Gas’s motion, arguing that a jury should consider consequential damages.\textsuperscript{38}
In addition to other arguments evidencing the applicability of state law, King Arthur’s brief discussed a report from Dr. Steven Vitale. Dr. Vitale’s report identified the environmental consequences that would result if there was a pipeline explosion on King Arthur’s property. 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. 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.” 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.”

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

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. 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. Circuit Judge Chagares wrote a dissenting opinion in which he argued for the applicability of federal law.

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. This section begins with a discussion of the NGA, eminent domain, and consequential damages. Next, this section will examine a variety of case law relevant to the issue presented by Tennessee Gas. This section will then conclude with a general overview of pipelines that addresses the controversy and opposition surrounding them.

A. Natural Gas Act

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


56. See id. § 717b (imposing restrictions on transportation and sale of natural gas).
and sale of natural gas in the FERC. Among other functions, the FERC may issue certificates of public convenience and necessity to natural gas companies.

Under the NGA, natural gas companies must obtain certificates of public convenience and necessity to condemn property for pipeline construction. Likewise, natural gas companies must have attempted to obtain property through contract or other methods before exercising eminent domain. 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. The NGA is notably silent on the issue of just compensation for condemnation actions.

1. Eminent Domain and Just Compensation

Eminent domain refers to the government’s power to convert private property for public use. The Takings Clause of the Fifth Amendment instructs that the federal government must provide just compensation when taking private property. 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. Where property is only partially condemned, federal law


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).


62. Tenn. Gas Pipeline, 931 F.3d at 243 (noting NGA does not speak to just compensation despite permitting 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. Pennsylvania law also calculates just compensation by comparing the fair market value of property before and after the taking. Unlike federal law, however, Pennsylvania law permits just compensation to include recovery of consequential damages and professional fees. Pennsylvania law broadens the definition of “fair market value” to reflect modern appraisal theory, which considers all evidentiary matters properly relating to value. Pennsylvania’s inclusive approach to just compensation, therefore, requires condemners to pay more than under federal law when exercising eminent domain over private property.

2. Consequential Damages

Consequential damages are awarded for “[l]osses that do not flow directly and immediately from an injurious act.” In eminent domain proceedings, typical examples of consequential damages include “lost future profits, lost business goodwill . . . , moving expenses, and attorneys [sic] fees.” 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).


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

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73. Christopher Serkin, Article, The Meaning of Value: Assessing Just Compensation for Regulatory Takings, 99 NW. L. Rv. 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”).


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”).


79. See Kimbell Foods, 440 U.S. at 718 (explaining Court’s holding).
of a uniform federal rule. The courts must consider how applying state law would affect relevant governmental interests.

The first Kimbell Foods factor addresses whether there is a need for a “nationally uniform body of law.” 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. The second Kimbell Foods factor considers whether “application of state law would frustrate specific objectives of the federal programs.” 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. Lastly, the third Kimbell Foods factor questions the extent to which a uniform federal law would affect “commercial relationships predicated on state law.” The Court firmly held that imposing federal doctrines could impact the stability engendered by state law. Altogether, the Court’s reasoning in Kimbell Foods demonstrates the severe implications of fashioning a uniform federal rule to resolve incomplete federal statutes.

C. United States v. Miller

Conversely, the Supreme Court has also held that federal law may govern the substantive determination of just compensation. In United States v. Miller, 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).
Railroad. Expectedly, the property owners disagreed with the government’s estimation of just compensation. 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.

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

D. Kelo v. City of New London

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

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

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

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

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


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).


See id. at 483-90 (providing Court’s analysis).

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

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

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).


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).


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.\textsuperscript{101} The City appointed the New London Development Corporation (NLDC), a private entity, as its “development agent” in charge of the revitalization plan.\textsuperscript{102} To effectuate its plan, the City authorized the NLDC “to acquire property by exercising eminent domain in the City’s name.”\textsuperscript{103} The NLDC, however, faced opposition when it condemned residential properties lying within the development area.\textsuperscript{104} Specifically, the residents argued that economic redevelopment does not constitute a “public use” under the Takings Clause.\textsuperscript{105} The Court granted certiorari and found that economic development fits within the broad definition of “public purpose.”\textsuperscript{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.\textsuperscript{107} In \textit{Georgia Power Company v. Sanders},\textsuperscript{108} the Fifth Circuit encountered a statutory gap which prompted analysis of Supreme Court precedent.\textsuperscript{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.”\textsuperscript{110} This presumption in favor of state law reflects a trend among Supreme Court precedent, which exemplified that a public purpose may exist absent public use, to support its conclusion. \textit{See id.} at 480 (citing Strickley v. Highland Boy Gold Min. Co., 200 U.S. 527, 531 (1906)) (referencing relevant precedent).

\begin{itemize}
\item \textsuperscript{101} \textit{Id.} at 473-75 (providing factual basis relevant to present discussion).
\item \textsuperscript{102} \textit{Kelo}, 545 U.S. at 473-75 (introducing NLDC as party).
\item \textsuperscript{103} \textit{Id.} at 475 (explaining New London’s delegation of eminent domain power).
\item \textsuperscript{104} \textit{Id.} at 475-76 (summarizing Susette Kelo and Wilhelmina Dery’s stories).
\item \textsuperscript{105} \textit{Id.} at 475-77 (explaining basis of lawsuit and procedural posture of case).
\item \textsuperscript{106} \textit{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. \textit{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)).
\item \textsuperscript{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).
\item \textsuperscript{108} 617 F.2d 1112 (5th Cir. 1980) (en banc) (deciding whether federal or state law should be implemented as federal rule).
\item \textsuperscript{109} \textit{Id.} at 1128 (Fay, J., concurring) (noting judiciary’s role to fill legislative gaps).
\item \textsuperscript{110} \textit{Id.} at 1115-16 (citing Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)) (explaining court’s general reasoning).
\end{itemize}
preme Court precedent illustrating “a growing desire to minimize displacement of state law.”

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. This case is persuasive because the relevant statute’s text is similar to the NGA.

In Columbia Gas Transmission Corporation v. Exclusive Natural Gas Storage Easement, the Sixth Circuit evaluated a case where a natural gas company exercised its eminent domain power in Ohio. 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. 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.” Accordingly, the Sixth Circuit implemented state law as the federal rule. The court found the reasoning in Georgia Power to be instructive and supported its holding with analysis of the Kimbell Foods factors. 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).


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 uni-
form federal law instead of state law. 122 In *National Railroad Passen-
erg* , 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 fed-
eral standard would have notably forced Amtrak to apply for nu-
merous zoning ordinances. 125 The Second Circuit subsequently
decided to affirm the district court’s decision to implement a uni-
form federal law. 126

F. Pipeline Opposition and Controversy

Opposition to pipelines has amplified in recent years. 127 Ac-
ccordingly, 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 imple-
menting 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 distinguisha-
able 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 condemna-
tion 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 require-
ment). 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 con-
demned. *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 oppo-
nents 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 Net-
construction of pipeline did not violate residential zoning ordinance); *Preemption/
Pipeline—Opponents say pipeline construction in residential districts in township violate
Landowners have specifically attempted to challenge the ability of natural gas companies to exercise eminent domain.  

Upon filing a condemnation complaint, most pipeline companies seek immediate possession of land by filing a partial motion for summary judgment. 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. 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.  

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

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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. Consequently, the United States’ pipeline network is overbuilt because pipeline projects draw a surplus of capital. As natural gas companies compete to create better pipeline networks, any financial risk associated with overbuilding can be pushed to their “captive rate-payers.” It is possible, however, that overbuilding may eventually challenge the profitability and financial feasibility of pipeline projects.

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.” 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. To resolve this gap, the Third Circuit had


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

The court next observed that “the NGA contemplates state participation in multiple ways. . . .”\textsuperscript{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.\textsuperscript{155} The NGA also permits condemnors to file eminent domain actions in state court.\textsuperscript{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.\textsuperscript{157} Lastly, the Third Circuit reasoned that any inequity borne from applying divergent state law is irrelevant to the present determination.\textsuperscript{158} Fairness is not the objective of the first \textit{Kimbell Foods} factor.\textsuperscript{159} Based on this reasoning, the Third Circuit concluded the first factor in the \textit{Kimbell Foods} analysis weighed in favor of incorporating state law.\textsuperscript{160}

2. \textit{Kimbell Foods} Factor #2

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

\textsuperscript{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).

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

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

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

\textsuperscript{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).

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

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

\textsuperscript{158} Id. at 252 (rebuttering Tennessee Gas’s primary argument regarding first \textit{Kimbell Foods} factor).

\textsuperscript{159} See id. (reinforcing first \textit{Kimbell Foods} factor is solely concerned with uniformity).

\textsuperscript{160} Id. (stating Third Circuit’s conclusion as to first \textit{Kimbell Foods} factor).
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.” The Third Circuit stated that protecting the financial interests of natural gas companies is not an NGA objective. Increased condemnation costs for Tennessee Gas were the only effects of applying state law in the present case. 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.

The Third Circuit distinguished National Railroad Passenger to support its conclusion. Specifically, the Third Circuit noted incorporating state law in National Railroad Passenger would have instituted statutory obligations beyond higher condemnation costs. 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.”

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


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.” Reasoning that property rights are typically a matter of state law, the Third Circuit held related commercial relationships are rightfully grounded therein. The Third Circuit, however, acknowledged the federal body of law regarding just compensation. So although property generally invokes state law, parties to commercial relationships involving property are still “on notice of the potential application of federal law.” 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.’”

B. Distinguishing Miller

The Third Circuit applied the Kimbell Foods analysis after determining Miller was distinguishable. 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. 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. 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 condemnor. See id. (distinguishing Tennessee Gas from prior case law). Tennessee Gas attempted to cite cases to the contrary, but only provided examples where the condemnor 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).
ment is weak relative to other essential functions of the federal
government, such as “naval aviation activities.” As to the second
reason, the federal government is only concerned with “the spend-
ing of federal dollars” in eminent domain proceedings. Con-
demnation costs incurred by private entities are immaterial to the
federal government.  

C. Judge Chagares’s Dissent

The majority’s opinion drew a dissent from Circuit Judge
Chagares. The dissent’s interpretation of Miller was its principal
divergence from the majority. Judge Chagares argued Miller
bound the Third Circuit to determine just compensation under
federal law. 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.
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.

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) (disagree-
ing 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. Su-
preme 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 compen-
sation 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 condem-
nation 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 Kimbell 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 infra 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.


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).

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-


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.


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).
different 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).
argument regarding the federal interest by distinguishing *Kelo* in this respect.\footnote{213. See id. at 247-49 (using federal interest argument to distinguish *Miller*).}

The majority could have concomitantly strengthened its holding by analyzing eminent domain procedure.\footnote{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*).} In *Tennessee Gas*, the pipeline company itself commenced the condemnation action.\footnote{215. *Tenn. Gas Pipeline*, 931 F.3d at 241 (stating Tennessee Gas filed instant condemnation action).} The company held the power to exercise eminent domain through its certificate of public convenience and necessity.\footnote{216. For a discussion of the NGA’s delegation of the federal eminent domain power, see supra notes 56-61 and accompanying text.} In *Kelo*, however, the NLDC brought the condemnation action on behalf of the City of New London.\footnote{217. *Kelo*, 545 U.S. at 475 (stating NLDC initiated condemnation proceedings).} Indeed, New London delegated its eminent domain power to the NLDC.\footnote{218. Id. at 495 (O’Connor, J., dissenting) (explaining New London’s delegation of eminent domain power).} 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.\footnote{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.} Accordingly, there is a stronger governmental interest present in the *Kelo* condemnation action.\footnote{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).}

This procedural distinction between *Tennessee Gas* and *Kelo* may seem minor, but the holding of the present case rests on nuanced analysis.\footnote{221. See, e.g., *Tenn. Gas Pipeline*, 931 F.3d at 252 (noting how NGA subtly contemplates state law).} Distinguishing the eminent domain procedure in *Kelo* would also address an issue raised by the dissent in *Tennessee Gas*.\footnote{222. See id. at 255 (Chagares, J., dissenting) (critiquing majority’s standard for measuring just compensation).} The dissent argued there was no difference between “the Government or a Government-delegatee” exercising the eminent domain

\begin{footnotes}
\item[213.] See id. at 247-49 (using federal interest argument to distinguish *Miller*).
\item[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*).
\item[215.] *Tenn. Gas Pipeline*, 931 F.3d at 241 (stating Tennessee Gas filed instant condemnation action).
\item[216.] For a discussion of the NGA’s delegation of the federal eminent domain power, see supra notes 56-61 and accompanying text.
\item[217.] *Kelo*, 545 U.S. at 475 (stating NLDC initiated condemnation proceedings).
\item[218.] Id. at 495 (O’Connor, J., dissenting) (explaining New London’s delegation of eminent domain power).
\item[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.
\item[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).
\item[221.] See, e.g., *Tenn. Gas Pipeline*, 931 F.3d at 252 (noting how NGA subtly contemplates state law).
\item[222.] See id. at 255 (Chagares, J., dissenting) (critiquing majority’s standard for measuring just compensation).
\end{footnotes}
power, subsequently inferring that Tennessee Gas is a “Government-delegatee.” 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. Tennessee Gas is another step removed from the government by acting completely in its own interest. One must question how Judge Chagares would then categorize the NLDC in Kelo if he believed that Tennessee Gas was a “Government-delegatee.”

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.” The Sixth Circuit in Columbia Gas then built upon this idea by reasoning that property rights have traditionally been defined by state law. 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.” Although eminent domain is a federal power, the Third Circuit necessarily draws upon Columbia Gas to reason that state law should prevail. 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.

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.
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).
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 condemnors 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-

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232. *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 indesicion 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. 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. 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. The financial exposure of natural gas companies is particularly concerning because pipelines often extend across large expanses of land. As noted, Congress was unconcerned by natural gas companies’ profitability when delegating its eminent domain power through the NGA.

The Third Circuit’s decision in Tennessee Gas leads one to question the extent of consequential damages in this context. If courts permit consequential damages to reflect the danger and environmental implications of pipelines, then just compensation could become a substantial cost. Further, a natural gas company will inevitably face many condemnation proceedings over the course of a pipeline project. 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. It is then possible that Tennessee Gas could curb overbuilding of pipelines, which would significantly mitigate their environmental impact. Among other externalities, fewer pipelines would specifically reduce the risk of oil spills, water contamination, and damage to wetlands and wildlife.

The cost implications of Tennessee Gas could thereby instill a new sense of corporate responsibility in the natural gas industry. 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. Tennessee Gas, therefore, demonstrates a unique solution to the various implications of pipelines: accountability rather than prohibition. As pipeline energy transfer is crucial to the operation of society, it is imprudent to protest the existence of pipelines altogether. Rather, the energy industry may be compelled to self-regulate if faced with higher condemnation costs that reflect its commercial interests. 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.

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, 392 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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