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Rethinking the Federal Eminent Domain Power

ABSTRACT. It is black-letter law that the federal government has the power to take land through eminent domain. This modern understanding, however, is a complete departure from the Constitution's historical meaning.

From the Founding until the Civil War, the federal government was thought to have an eminent domain power only within the District of Columbia and the territories—but not within states. Politicians and judges (including in two Supreme Court decisions) repeatedly denied the existence of such a power, and when the federal government did need to take land, it relied on state cooperation to do so. People during this period refused to infer a federal eminent domain power from Congress's enumerated powers or the Necessary and Proper Clause because they viewed it as a "great power"—one that was too important to be left to implication. And they refused to infer it from the Takings Clause either, because the Clause was not intended to expand Congress's power beyond the District and territories.

Eminent domain aside, the notion of great powers is increasingly relevant after *National Federation of Independent Business v. Sebelius*, in which Chief Justice Roberts invoked a theory of great powers to argue that the Necessary and Proper Clause could not justify the individual mandate. While his application of the theory is questionable, there are many other areas of law—such as commandeering, sovereign immunity, conscription, and the freedom of the press—where the great powers idea may rightfully have more bearing.

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INTRODUCTION

It is black-letter law that the federal government has the power to take land through eminent domain, so long as it pays compensation. The Supreme Court first established the existence of this power in the 1875 case of *Kohl v. United States*,[1] and it is now taken for granted. Many people can no longer imagine that the power was ever controversial. The modern conventional wisdom, however, is a complete departure from the historical understanding.

At the Founding, the federal government was not understood to have the power to exercise eminent domain inside a state's borders. This understanding was reflected in seventy-five years of subsequent practice and precedent. The federal government sometimes needed land—for roads, lighthouses, etc.—but it did not use eminent domain to get it. Instead, it repeatedly relied on the states to condemn the land it needed. During this period, federal practice, congressional debates, and even two Supreme Court opinions all indicated a lack of any general federal power of eminent domain.

Most of this has been forgotten. Some scholars mention the original practice in passing, but they treat it as an oddity, with no suggestion that it had a sensible constitutional justification.[2] Major works on the early development of the nation do not discuss the lack of federal eminent domain at all.[3] Even scholars broadly critical of the uses to which federal eminent domain has been put do not challenge its historical legitimacy.[4] The few scholars who do discuss the federal power of condemnation simply do not discuss (or misinterpret)

1. 91 U.S. 367 (1875).

2. *See, e.g.*, David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 297-98 n.54 (1976); Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2081 n.132 (2004); Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis*, 39 NAT. RESOURCES J. 649, 703-04 (1999); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 709 n.78 (1985); D. Zachary Hudson, Note, *Eminent Domain Due Process*, 119 YALE L.J. 1280, 1293-95 (2010).

3. *E.g.*, DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848 (2007); 1 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 262 (2012) (claiming in passing that eminent domain "had been . . . conceded to the federal government by the Fifth Amendment").

4. Ilya Somin, *Eminent Domain Battle over Flight 93 Memorial Continues*, VOLOKH CONSPIRACY (June 1, 2009, 1:27 PM), http://volokh.com/2009/06/01/eminent-domain-battle-over-flight-93-memorial-continues. Professor Somin informs me that the historical evidence has since induced him to change his mind.

much of the historical evidence.[5]

The original view was that the federal government had eminent domain power only in the District of Columbia and the territories, where the Constitution expressly granted it plenary power. Eminent domain could not be inferred from Congress's enumerated powers or the Necessary and Proper Clause because it was a great power, too important to be left to implication. As mentioned above, this understanding was reflected in uniform, widespread practice. While there certainly were expressions of the contrary view, especially several decades after the Founding, those views were not actually reflected in any judicial holding or federal practice until the Civil War. Meanwhile, during this period the Supreme Court declared—in a surprisingly neglected decision—that outside of the District and the territories "the United States have no constitutional capacity to exercise . . . eminent domain."[6]

One might think that a broad eminent domain power was either created or presupposed by the Takings Clause, but this is also not the case. As for creation: the Clause merely creates a right to compensation, and such a right ought not imply an extension of federal power. Indeed, the Ninth Amendment was written in order to forbid precisely this sort of implication—that the presence of rights in the Constitution implied that the federal government would otherwise have had the power to infringe them. As for presupposition: it is far more likely that the Clause was meant to deal with the District and the territories, the latter of which had been governed by a predecessor of the Takings Clause in the Northwest Ordinance. In any event, inference from the enactment of the Takings Clause can be perilous—unlike any other clause in the Bill of Rights, ratifying states did not request it in any form, and it was proposed and ratified with little comment. If anything, the silence suggests that the Clause does not reflect any serious fear of a federal eminent domain power.

The Supreme Court's eventual decision in *Kohl* was not consistent with the best understandings of the enumerated powers or the Takings Clause, and it

5. Adam S. Grace, *From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent That Broadened the Commerce Clause, Shrunk the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 ALB. L. REV. 97, 139-48 (2004); Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 280-82 (2011), http://yalelawjournal.org/2011/11/08/lawson&kopel.html. The late David Currie also discussed the issue in passing in DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 276-77, 312 n.188 (2001). I discuss these arguments in the text accompanying *infra* notes 148-164, 177-179, 317 (Grace); 155, 180-184 (Currie); and 383-386 (Lawson and Kopel).

6. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845).

gave remarkably short shrift to many decades of practice and precedent. The decision appears to have been motivated instead by a constitutional theory that came to prominence after the Civil War. Courts also relied on this theory of inherent powers (unconnected to the enumerated powers) in contemporaneous cases finding inherent power over immigration, governance of the Indian tribes, and other issues. *Kohl* further drew on another contemporaneous theory—that federal and state sovereignty occupied separate spheres, forbidding any constitutional rule that would make one dependent on the other. Both the inherent powers and separate spheres theories were important breaks from the past, and they have recently come under strong criticism. That skepticism should be extended to federal eminent domain.

If the federal government was originally thought to lack the power of eminent domain, there remains the question of what relevance that history possesses today. Its implications depend on one's interpretive methodology. For originalists, the direct implications for constitutional meaning are fairly straightforward. Yet nonoriginalists should also find the argument relevant. Original meaning is an important ingredient in many nonoriginalist interpretive theories,[7] especially when borne out by widespread post-ratification practice.[8]

Federal eminent domain has become a widespread and largely unquestioned part of the federal government's land-acquisition practice. In 1978 and 1979, the General Accounting Office (GAO) reported between seven and eight thousand new federal condemnations each year.[9] The normalization of the federal eminent domain power may be exacerbated by the current statutory authorization for taking land, which categorically allows any officer who is authorized to buy land to initiate an eminent domain proceeding without further specific authorization.[10]

7. *See, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 10 & n.21 (2009) (describing as nearly universal the view that "the proper originalist object (whatever it may be) should count among the data that interpreters treat as relevant"); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) ("[V]irtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.").

8. Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1654-55 (1997); H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1297-98 (1985) (book review).

9. U.S. GEN. ACCOUNTING OFFICE, CED-80-54, FEDERAL LAND ACQUISITIONS BY CONDEMNATION—OPPORTUNITIES TO REDUCE DELAYS AND COSTS 2 (1980).

10. 40 U.S.C. § 3113 (2006) ("An officer of the Federal Government authorized to acquire real estate for the erection of a public building or for other public uses may acquire the real estate

At the same time, there are at least some hints of change in the modern practice. Another GAO report (in 1979) suggested that the federal government should curtail its use of eminent domain, arguing that eminent domain was "time-consuming and expensive," and that the government already had plenty of land.[11] And while there have been no comprehensive accounts of federal eminent domain since 1978, responses to Freedom of Information Act (FOIA) requests suggest that it may be declining. One agency reported that it has used eminent domain infrequently in recent years because the agency has already obtained most of the property it needs.[12] Other agencies report that they only perform "friendly" condemnations; for example, the Postal Service reports only a single condemnation since 2000—a "friendly" one designed to circumvent laws that prevent members of Congress from benefiting from federal contracts.[13]

In *National Federation of Independent Business v. Sebelius*,[14] for example, understanding federal eminent domain is also of relevance to federalism more broadly. Chief Justice Roberts invoked a theory of great powers to argue that the Necessary and Proper Clause could not justify the individual mandate.[15] At the same time, the example of eminent domain may not support his use of the theory: the historical evidence that imposing mandates is a great power is not comparable to the evidence that eminent domain was. Even though imposing mandates may not be a great power, there are other contemporary questions—such as commandeering, sovereign immunity, conscription, and the freedom of the press—where the great powers idea may rightfully have more bearing.

The Article will proceed as follows. The Supreme Court's 1875 decision in *Kohl* invoked three interpretive arguments for recognizing an implicit federal power of eminent domain—enumerated powers, the Takings Clause, and inherent authority based in constitutional structure. Parts I through IV take those arguments as their organizing principle, providing historical background

for the Government by condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so.").

11. U.S. GEN. ACCOUNTING OFFICE, CED-80-14, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED 9 (1979).

12. Telephone Interview with Kim Winn, Freedom of Information Act (FOIA) specialist, Bonneville Power Admin. (Aug. 15, 2012).

13. Letter from Jim Allen, Program Analyst, U.S. Postal Serv., to author (Sept. 24, 2012) (on file with author); Telephone Interview with Janet Bruner, Fish & Wildlife Serv. (Sept. 7, 2012).

14. 132 S. Ct. 2566 (2012).

15. *Id.* at 2591-93 (opinion of Roberts, C.J.); *see also id.* at 2626-28 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (criticizing this holding).

to show why they were not widely thought persuasive until shortly before *Kohl*. Part I discusses whether a takings power could have been deduced from the enumerated powers and the Necessary and Proper Clause; it also introduces the concept of great powers. Part II details the subsequent practice of eminent domain, relevant especially to the enumerated powers argument, but ultimately to all three. Part III discusses whether such a power would have been thought to be implied or presupposed by the Takings Clause of the Fifth Amendment. Part IV discusses a set of structural arguments for an eminent domain power that do not hinge on any provision of the Constitution's text. Part V applies the insights of the first four Parts to contemporary issues.

Finally, a preliminary note on methodology. My recovery here of the history of eminent domain has both descriptive and normative purposes. The historical discussion in Parts I to IV aims to recover how eminent domain and the enumerated powers were conceptualized and practiced at and after the Founding. Generally, any readers interested in the history should be able to read those Parts without regard to whether they share my normative commitments about the relevance of that history. Part V introduces my own views about the relevance of that history for the Constitution's meaning under a version of originalism to which I subscribe; but one need not subscribe to that methodology in order to find the history relevant.

I. ENUMERATED POWERS

> When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned.
>
> —*Kohl v. United States*[16]

Eminent domain is the sovereign's power to take property—paradigmatically land—without its owner's consent.[17] Conventional histories

16. 91 U.S. 367, 372 (1875).

17. Under some conceptions, the power of eminent domain may have extended to all property, but other sources treated realty as special—including in disputes about federal authority. *See infra* Subsection I.C.2 & Section III.D. This Article will focus on the paradigm case of the

trace the term itself back to Hugo Grotius,[18] and other political theorists discussed it, too.[19] The power was known in Britain by the time of the Founding,[20] but the Constitution itself does not mention it explicitly.

The Constitution delegates to Congress a list of certain enumerated powers. Article I includes some important items, like declaring war and raising armies and collecting taxes.[21] It also includes some things that have become powers of secondary importance, like regulating the value of foreign coin and establishing post roads.[22] But taking private property is not on the list. Article IV does give Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"[23] but it makes no mention of any power to dispose of or regulate property that still belongs to others, whether within those territories or within the states. The question is what to make of this omission.

A. The Puzzle of Implied Powers

Many federal powers exist only by implication. The Constitution does not explicitly mention that Congress can create corporations or cabinet-level offices to administer the law. It does not explicitly say that Congress can create civil and criminal liability for those who infringe most federal laws. Indeed, the Constitution does not explicitly say much about how Congress may go about effectuating most of its granted powers. These powers must either be implicit in the grant of some other power, or (and this will turn out to be much the

power to take land; whichever side personalty falls on, it affects the scope of the argument at the periphery, not the strength at the core.

18. 2 HUGO GROTIUS, THE LAW OF WAR AND PEACE 164 (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625); *see* SUSAN REYNOLDS, BEFORE EMINENT DOMAIN: TOWARD A HISTORY OF EXPROPRIATION OF LAND FOR THE COMMON GOOD 2-3, 94-100 (2010).

19. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559-60 (1972). Other discussions include SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 166-67 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673); 2 SAMUEL PUFENDORF, ON THE LAW OF NATURE AND NATIONS 1285-86 (C.H. Oldfather & W.A. Oldfather trans., Oxford Univ. Press 1934) (1688); EMER DE VATTEL, THE LAW OF NATIONS § 244, at 232-33 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758); 2 CORNELIUS VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI 218 (Tenney Frank trans., Oxford Univ. Press 1930) (1737).

20. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *139.

21. U.S. CONST. art. I, § 8, cl. 1, 11-12.

22. *Id.* art. I, § 8, cl. 5, 7.

23. *Id.* art. IV, § 3, cl. 2.

same thing) encompassed by the sweeping Clause empowering Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."[24]

Similarly, a federal eminent domain power—to whatever extent it exists—must be found by implication. After all, the government does not ordinarily take property simply for its own sake. It takes it as a means to do something else, such as building a fort or a lighthouse or a road. If Congress has power to build those things,[25] it might also have the implied power to condemn land to do it.

The Court has defended an implied power of eminent domain along exactly these lines. In *Kohl v. United States*, the Court first upheld this implied power, saying that "the power to establish post-offices and to create courts within the States . . . included in it . . . authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate," such as eminent domain.[26] A later case, *United States v. Gettysburg Electric Railway Co.*, invoked the Necessary and Proper Clause explicitly: "The right to condemn at all is not [expressly] given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers."[27] Or as Charles Black put it: "Since the Constitution grants specific powers to the federal government to maintain armies and build courthouses and post offices, it is axiomatic that a right of eminent domain accompanies these powers as a necessary tool to effectuate them."[28]

The same could be said for many other federal powers, such as the power to create a corporation, the power to imprison people for violating the law, or the power to force states into court against their will. The Constitution does not expressly mention these powers or grant them to Congress, but they seem implicit in the grant of other powers. If Congress can create a bank, why can't that bank be a corporation? If Congress can create laws, why can't it enforce them through criminal sanctions for private persons and coercive suits for

24. *Id.* art. I, § 8, cl. 18.

25. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 225 n.150 (1997) (discussing the controversy over federal road construction); *id.* at 69-70 (discussing the same for lighthouses).

26. 91 U.S. 367, 372 (1875).

27. 160 U.S. 668, 681 (1896) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

28. Charles Black, *The Forest and the Trees in Constitutional Law*, 7 PACE L. REV. 475, 484 n.22 (1987) (citing *Kohl*, 91 U.S. at 371); *see also* CURRIE, *supra* note 5, at 277 (relying on the Necessary and Proper Clause).

states?

Yet the implied powers doctrine has not, in practice, proceeded quite that automatically. At the Founding and during the early days of the country, for example, there were serious arguments that Congress did not have the power to charter corporations.[29] While the very first Congress created federal crimes,[30] there were a few early constitutional objections to an implied criminalization power.[31] And, as we will see, there was a widespread view that the federal government could not exercise eminent domain when acquiring land for a federal purpose.

Even today, the Court does not always allow the Necessary and Proper Clause to sustain an implied federal power, even when that power is useful to carrying out a concededly permissible end. For example, the Court has not allowed Congress to "commandeer" unwilling state officers into enforcing federal law.[32] The Court has not allowed Congress to abrogate a state's traditional immunity from compulsory legal process, even to enforce a valid federal law.[33] And just last term, in *National Federation of Independent Business v. Sebelius*, five Justices separately suggested that Congress could not force all individuals to purchase health insurance, even in an attempt to make more efficient a concededly permissible federal regulatory scheme.[34]

The exact rationale for the modern cases is obscure. *Printz* suggested that commandeering could be "necessary" but not "proper."[35] Some sovereign immunity cases seemed to rely on an implied prohibition by the Eleventh Amendment.[36] Later cases said instead that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself," and (invoking *Printz*) that an attempt to abrogate that

29. *See infra* notes 49-64 and accompanying text.

30. *See, e.g.*, Act of Apr. 30, 1790 (Crimes Act), 1 Stat. 112 (1790).

31. *See* Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540, 540 (Jonathan Elliot ed., Washington D.C., 2d ed. 1836); 8 ANNALS OF CONG. 2151-52 (1798) (statement of Rep. Nathaniel Macon).

32. Printz v. United States, 521 U.S. 898 (1997).

33. Alden v. Maine, 527 U.S. 706, 730-54 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 57-73 (1996). The Court has held exercises of power under the Bankruptcy Clause and the Fourteenth Amendment to be exceptions. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 377-78 (2006); Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976).

34. 132 S. Ct. 2566, 2591-93 (2012) (opinion of Roberts, C.J.); *id.* at 2641-47 (joint dissent).

35. *Printz*, 521 U.S. at 923-35.

36. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 54.

immunity is not "proper" under the Necessary and Proper Clause.[37] The Chief Justice's opinion in *Sebelius* suggested similar limitations on the Necessary and Proper Clause.[38]

Each of these rationales depends on an implicit limit to the powers implied by the Necessary and Proper Clause. But the decisions are vague about what kind of limit this is, or where it comes from. There are hints that the modern limits are derived from history. The Chief Justice's opinion in the *Sebelius*, for example, quoted *McCulloch v. Maryland* in arguing that while "the Clause gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution,' it does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated."[39] But he did not explain the provenance or implications of that statement.

As it turns out, there is an old, established line of thinking about the implicit limitations on Congress's enumerated powers—a line of thinking that ultimately underlies the original arguments against federal eminent domain, among others.

B. The Idea of Great Powers

The basic idea was this: not all constitutional powers are equally amenable to being found by implication. When a minor power is incidentally necessary to effectuating some explicit constitutional power, it could be implied. But some powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, *even if* they might help effectuate an enumerated power. These powers, sometimes called "great powers," are the kinds of powers we would expect the Constitution to mention if they were granted.[40]

The structure of the U.S. government was somewhat novel. The federal government had limited powers, and it had a written Constitution which purported to enumerate those powers. Much of the doctrine for implementing this new Constitution had to be worked out in the early years of the Republic. But there were historical antecedents to the Constitution's legal structure. As Mary Bilder has shown, for example, judicial review of laws "repugnant" to the

37. *Alden*, 527 U.S. at 728; *id.* at 732-33 (quoting *Printz*, 521 U.S. at 923-24).

38. *Sebelius*, 132 S. Ct. at 2592 (Roberts, C.J.).

39. *Id.* at 2591 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411, 421 (1819)).

40. As will become apparent, I use the term "great powers" because it is a point of commonality between several important formulations of the idea.

Constitution had roots in the pre-Revolutionary review of municipal and corporate charters.[41]

Others have amplified a connection between American constitutionalism and British administrative law in a way that is relevant for present purposes. For example, when one person delegated authority to another, courts frequently had to decide whether the granted authority implicitly gave additional authority to help carry out the grant. The doctrine generally provided that a "principal" power carried with it "incidental" powers, even if they were not enumerated.[42] Incidental powers were of lesser stature, in some sense, than principal powers.[43] And unlike incidental powers, principal powers had to be expressly enumerated.

It makes sense for these basic principles of implied powers to carry over to construing the government's delegated power under the Constitution. As an abstract matter, the Constitution was like these other delegations, since it was a grant of authority from the people to the institutions of federal government.[44] Indeed, both before and after ratification, commentators repeatedly described the Necessary and Proper Clause as confirming established principles of implicit or incidental powers. Alexander Hamilton said in *The Federalist* that the Clause was "only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."[45] Madison later reminded people that the Clause was "in fact, merely declaratory of what would have resulted . . . as the appropriate, as it were, technical means of executing those powers. In this sense it had been explained, by the friends of the constitution, and ratified by the State conventions."[46] Lawyers would thus

41. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006).

42. Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, *in* THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 60 (Gary Lawson et al. eds., 2010).

43. *Id.* at 61-63.

44. U.S. CONST. pmbl.

45. THE FEDERALIST NO. 33, at 158 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

46. James Madison, Speech on Feb. 2, 1791, *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 39, 42 (photo. reprint 2008) (1832) [hereinafter HISTORY OF THE BANK]; *see also* THE FEDERALIST NO. 44, *supra* note 45, at 234-35 (James Madison) (arguing that without the Clause, the same powers would have been implied); ALEXANDER HAMILTON, ON THE CONSTITUTIONALITY OF A NATIONAL BANK (1791), *reprinted in* HISTORY OF THE BANK, *supra*, at 95, 99 (arguing that the Clause "gives an explicit sanction to the doctrine of implied powers"); Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 7-10 (1998) (arguing that the Clause was clarifying, but redundant).

have understood the words "necessary and proper" to invoke the "incidental powers" doctrine that had developed under existing principles of law.[47]

It is not clear that actual practice reflected every detail of the "incidental powers" doctrine.[48] But practice confirmed the general idea that certain "great" powers were not implied by the Necessary and Proper Clause. Indeed, the early debate about the constitutionality of the Bank of the United States was conducted in just these terms. The proposed bill created the Bank as a corporation. There was no explicit clause in the Constitution granting the power to create corporations and some arguments going either way. The Continental Congress had created a bank; but it was questionable whether it had acted lawfully in doing so.[49] The Convention had rejected a proposal to give Congress the explicit power to charter corporations for canals or other purposes,[50] but the proceedings were off the record and therefore arguably not dispositive.[51] So when Congress and President Washington deliberated over the constitutionality of the Bank bill, they were forced to work from first principles.

In the House of Representatives, Madison argued against the bill and laid out his view of the "preliminaries to a right interpretation" of the Constitution.[52] Congress possessed implied powers that were necessary and proper to its expressly enumerated ones, and there were two considerations relevant to identifying them: "In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction."[53] In other words,

47. Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, *in* THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 42, at 84, 85; *see also* John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1122 (2011) (book review) (concluding that on this issue "the authors [in *The Origins of the Necessary and Proper Clause*] make a strong case"); John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1371 (2012) (book review) ("I have no problem concluding that the Necessary and Proper Clause is an incidental powers clause.").

48. Manning, *supra* note 47, at 1374-75.

49. Madison, *supra* note 46, at 41 ("That was known . . . to have been the child of necessity. It never could be justified by the regular powers of the articles of confederation.").

50. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615-16 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS].

51. For early arguments about the relevance of the Convention's proceedings, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 914-21 (1985).

52. Madison, *supra* note 46, at 40.

53. *Id.*

the fact that a power was useful for executing an enumerated power was relevant, but not dispositive. If the power was important enough, it was one that the Constitution would be expected to grant explicitly, if at all.

Madison elaborated. Without such a rule, many of the enumerated powers did not make sense. Calling out the militia and raising armies were useful to declaring war, for example, but they had been expressly added. This principle could be taken too far, for "not . . . every insertion or omission in the constitution is the effect of systematic attention"[54]—but history and logic nonetheless produced a sensible rule of interpretation. "They condemn the exercise of any power, particularly a *great and important power*, which is not evidently and necessarily involved in an express power."[55] Creating the Bank, Madison argued, was "an important power," and hence could not be implied.[56]

The framework was not just Madison's. The bill passed over his objection, and President Washington called for opinions about whether to sign it.[57] Attorney General Edmund Randolph also thought the bill unconstitutional and took a similar view of implied powers. He wrote that "[t]o be necessary is to be incidental,"[58] and in analyzing the overlap between the other enumerated powers, he noted each power was "either incidental, or substantive, that is, independent."[59] If incidental, they could be implied. If they "be substantive and independent," then their enumeration "bestow[ed] an independent power, where it would not otherwise have existed."[60]

Hamilton defended the bill, but he admitted the principle and disputed only the application. He "deemed admissible" Randolph's theory that "'[t]o be necessary, is to be *incidental*,'"[61] but accused the Bank's critics of a "strange fallacy": "An incorporation seems to have been regarded as some great independent substantive thing; as a political engine, and of peculiar magnitude

54. *Id.* at 43.

55. *Id.* (emphasis added).

56. *Id.*; *see also* James Madison, Speech in the House of Representatives (Feb. 7, 1791), *reprinted in* HISTORY OF THE BANK, *supra* note 46, at 82, 82 ("The power of granting charters . . . is a great and important power . . . .").

57. Powell, *supra* note 51, at 914.

58. Memorandum from Edmund Randolph, Att'y Gen. of the U.S., to George Washington, President of the U.S. (Feb. 12, 1791), *reprinted in* HISTORY OF THE BANK, *supra* note 46, at 86, 89.

59. Memorandum from Edmund Randolph, Att'y Gen. of the U.S., to George Washington, President of the U.S. (Feb. 12, 1791), *reprinted in* HISTORY OF THE BANK, *supra* note 46, at 89, 90.

60. *Id.*

61. HAMILTON, *supra* note 46, at 99 (quoting Randolph, *supra* note 58).

and moment . . . ."[62] He went on, emphasizing Roman and British precedents, to show "[t]hat the importance of the power of incorporation has been exaggerated, leading to erroneous conclusions."[63] Thus, Hamilton summarized, "the power to erect corporations, is not to be considered as an independent and substantive power, but as an incidental and auxiliary one; and was, therefore, more properly left to implication, than expressly granted."[64]

This theory was endorsed in *McCulloch* even as the Supreme Court concluded that the Bank was constitutional. Chief Justice Marshall affirmed the power to create the Bank, and in doing so laid out a framework for assessing the government's implied powers. After discussing the great ends of the state, Marshall wrote: "It is not denied, that the powers given to the government imply the ordinary means of execution."[65] He added that "those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."[66] Marshall also conceded, however, that there was a type of power for which that burden could be met, and an exception established. He explained that "[t]he power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, *a great substantive and independent power*, which cannot be implied as incidental to other powers, or used as a means of executing them."[67]

After this discussion, *McCulloch* makes its first mention of the Necessary and Proper Clause, noting that the Constitution "has not left the right of Congress to employ the necessary means . . . to general reasoning,"[68] suggesting that the Chief Justice endorsed the common view that the Clause confirmed the doctrine of implied powers. He then devoted several famous pages to challenging Luther Martin's argument that the Clause was "really restrictive of the general right, which might otherwise be implied, of selecting

62. *Id.* at 97.

63. *Id*.

64. *Id.* at 105.

65. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 409 (1819).

66. *Id*. at 410.

67. *Id*. at 411 (emphasis added); *see also id.* at 373-74 (argument of counsel for Maryland) (arguing that incorporation is one of the great powers); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1639-43 (2002) (drawing attention to this passage).

68. *McCulloch*, 17 U.S. (4 Wheat.) at 411.

means for executing the enumerated powers."[69] On Marshall's understanding of the Necessary and Proper Clause, Congress had incidental powers in addition to the enumerated ones. When a governmental power is merely "incidental," it can be implied, but there are other powers that are so great that they cannot be found in the Necessary and Proper Clause.[70]

The great powers framework also makes a great deal of sense. The framework helps us understand, for example, why the Constitution specifically and separately enumerates Congress's power to "lay and collect Taxes."[71] If it were not for the idea of great powers, taxes would not need to be enumerated. Imagine that an unqualified means-ends rule were correct: Congress needs money to pay officials, hire troops, create courts, and otherwise carry out its many powers and duties. If Congress has all powers, great and small, that are helpful to carrying out its other powers, then surely it would implicitly have a general power to tax already. There would be no need to enumerate it.

The great powers doctrine explains why the separate enumeration of the taxing power was not redundant.[72] Inadequate taxing power had been one of the major defects of government under the Articles of Confederation.[73] If the new Constitution had made no mention of changing the tax power present under the failed Articles, few people would have assumed that the problem had secretly been solved by implication. That is because, as Marshall put it, "levying taxes" is "a great substantive and independent power."[74] It was therefore entirely reasonable to expect that power to be dealt with on its own terms.[75] (This is not to say that *every* explicitly enumerated power is a great one

69. *Id*. at 412.

70. *See* John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE (D.C.), July 1, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 161, 162-63 (Gerald Gunther ed., 1969) ("I am perfectly willing to admit" that "*fairly incidental* [is] in other words . . . necessary and proper.").

71. U.S. CONST. art. I, § 8, cl. 1.

72. *See McCulloch*, 17 U.S. (4 Wheat.) at 373-74 (argument of counsel for Maryland).

73. *See, e.g.*, James Madison, *Preface to Debates in the Convention of 1787*, *reprinted in* 3 RECORDS, *supra* note 50, at 539, 547 (recording earlier drafts).

74. *McCulloch*, 17 U.S. (4 Wheat.) at 411.

75. Some readers have suggested that the tax power is specifically enumerated so as to make it possible to contain specific limitations, like the separate requirement that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census." U.S. CONST. art. I, § 9, cl. 4. Yet in other places the Constitution contains limitations on powers that it grants *only by implication*, such as the restrictions on granting titles of nobility, *id*. cl. 8, or on suspending habeas, *id*. cl. 2; *see* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 664-65 (2009) ("[T]he Clause is framed in the negative and therefore merely implies that [suspension] is permitted [in some cases]."). So the restrictions on the tax

that could not otherwise be implied—just that the great powers concept helps to explain some of the enumerations.[76])

Indeed, the great powers idea may explain Hamilton's otherwise baffling suggestion that the Federal Constitution needed no Bill of Rights because Congress hadn't been given any rights-infringing powers. In *The Federalist*, Hamilton asked: "Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"[77] Hamilton's claim seems ridiculous to modern eyes.[78] One can see how the government might argue that the power to suppress speech is helpful to carrying out one's governing agenda,[79] or that general warrants are helpful for laying and collecting taxes.[80] So it is hard to see what Hamilton was talking about. But within the great powers framework Hamilton's argument makes more sense. Perhaps Hamilton meant that the power to regulate the press, or the power to authorize general immunity from state trespass law, was a great power, like the power to raise armies or lay taxes.[81]

C. Eminent Domain as a Great Power

To understand the complexity of the federal eminent domain power will require us to look at history, especially the seventy-five years in which Congress was widely thought to lack a general power of eminent domain.[82] Indeed, I will argue that that history helped to settle any ambiguity about the scope of the eminent domain power.[83] But even before that practice, other

power do not explain why the tax power, unlike the suspension power, is explicitly enumerated.

76. *Accord* Madison, *supra* note 46, at 43 ("It is not pretended, that every insertion or omission in the constitution is the effect of systematic attention. . . . The example cited, with others that might be added, sufficiently inculcate, nevertheless, a rule of [great powers].").

77. THE FEDERALIST NO. 84, *supra* note 45, at 445 (Alexander Hamilton).

78. Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1, 7 (2010) (calling this argument "clearly wrong—even if Hamilton did make it").

79. As George Mason warned. *See* George Mason, Speech at the Virginia Ratifying Convention (June 14, 1788), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 650 (Neil H. Cogan ed., 1997).

80. As James Madison warned. 1 ANNALS OF CONG. 438 (1789) (Joseph Gales ed., 1834).

81. For further explanation, see *infra* Subsection V.B.1.d. The ultimate passage of the Bill of Rights does not necessarily reflect a rejection of this theory, but rather the need for "greater caution," as Madison's draft put it. *See infra* Section III.C.

82. *See infra* Part II.

83. *See infra* Subsection V.A.1.

background principles provided some indication that eminent domain might be a great power.

1. The Taxation Analogy

In Britain, Parliament could authorize the taking of private property, perhaps subject to a requirement of compensation. The power was also subject to a type of nondelegation rule. Under British practice, the King could exercise powers that were "incidental" to his core powers or to the powers granted him by statute. But one power that was never considered "incidental" was the power of eminent domain. It had to be granted explicitly by Parliament, not carried through by implication.[84] In this respect, the power to condemn was like the power to tax. The power to tax was similarly Parliament's, and could be exercised only by legislation actually saying so.[85]

Under one possible view of "great powers," the British treatment of eminent domain would establish it to be a "great power." This view would be that any power that had to be explicitly granted to the King by Parliament under British law would have to be explicitly granted to the federal government by the Constitution under American law. The idea would be that in Britain, Parliament was a representative body of the people with plenary legislative power, and that the analogous body here is the people acting in ratifying conventions.[86] On the other hand, there are many ways in which the two structures could be distinguished, and it is not at all clear that the powers that were thought of as "great" consistently mapped onto powers that had similar status under British law. I mention this possibility only because it might be one useful aspect in understanding the nature of a power.

More revealing, however, is that historically the powers to tax and to condemn were conceptually linked. Vattel's discussion of the two was

84. *See* Stoebuck, *supra* note 19, at 562-66; *see also* REYNOLDS, *supra* note 18, at 41-42 (discussing the evolution of the rule that Parliament must authorize eminent domain). The same rule did not necessarily obtain in the colonies, where there was much debate about how to translate principles of English law. *See* MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 31-50 (2004); P.J. Marshall, *Parliament and Property Rights in the Late Eighteenth-Century British Empire*, *in* EARLY MODERN CONCEPTIONS OF PROPERTY 530, 531, 539 (John Brewer & Susan Staves eds., 1995).

85. Stoebuck, *supra* note 19, at 568.

86. *E.g.*, Gary Lawson & Guy I. Seidman, *Necessity, Properity, and Reasonableness*, *in* THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 42, at 120, 121-25, 134-36 (pursuing this analogy).

interrelated,[87] and some readers believe that he used the phrase "eminent domain" to include both taxation and condemnation together.[88] Similarly, Locke grouped them together when arguing that deprivations of property required popular consent—hence, parliamentary approval.[89]

As noted above, we do have some reason to believe that taxation was a great power. For one thing, Chief Justice Marshall—no foe of federal power—said so.[90] For another, the power to tax is explicitly enumerated, which would be unnecessary were it not a great power.[91] If eminent domain and taxation were conceptually linked, then maybe eminent domain is also best seen as a great power. Like the tax power, it involves a deprivation of property without individualized consent. Like the tax power, it was considered a great, nonincidental power under British practice. So perhaps the fact that taxation is enumerated but eminent domain is not is because the federal government has the former power but not the latter.[92]

To be sure, eminent domain, after the passage of the Takings Clause of the Fifth Amendment, is compensated. And it is possible that the power would have been understood to be compensated even in the absence of the Clause.[93] Nonetheless, it still amounts to an abrogation of property rights that is permissible only because of special sovereign power. It comes into play only when the government cannot purchase the land voluntarily—precisely because the landowner wants more money than he is offered or prefers the land to any price.

87. VATTEL, *supra* note 19, at 232.

88. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 & n.7 (1985) (acknowledging that "eminent domain" later came to mean condemnation specifically).

89. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 360-61 (Peter Laslett ed., 1988) (1690). For further discussion of the link, see LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 121-23 (1957); and Stoebuck, *supra* note 19, at 571-72.

90. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819).

91. *See supra* notes 72-75 and accompanying text.

92. Again, one might argue that the power to tax is enumerated in order to impose limitations like uniformity and apportionment on it. But there is no connection between enumeration and limitation. The Suspension Clause limits the habeas power, even though the power is granted only by implication, and the Takings Clause, of course, limits the power to take even though it is not expressly granted. *See supra* note 75.

93. *See infra* notes 307-312 and accompanying text (discussing whether takings were compensated in the absence of an express constitutional requirement).

2. Real Property

Ratification of the Constitution also included specific discussion about state power over real property. Supporters of the Constitution repeatedly stressed certain subjects as beyond Congress's powers – among them "the right of altering the laws of . . . titles of lands."[94] Tench Coxe, a Federalist who wrote a series of essays defending the Constitution, made the most grandiose statement: "The lordship of the soil is one of the most valuable and powerful appendages of sovereignty – This remains *in full perfection* with every state. From them must grants flow . . . . To them also, as original and rightful proprietaries and *lords of the soil*, will the estates of extinct families revert."[95] There were many others; as one scholar has summarized it, "Federalists depicted the Constitution as leaving regulation of real property outside the national authority."[96] Eminent domain (at least for land) is ultimately an exercise of sovereign power over the laws of real property. So it might have been a natural implication of these statements that the power of eminent domain should also be reserved to the states.

To be sure, these statements did not explicitly refer to eminent domain as such, and some of them may simply have meant that the regulation of real property would not be sufficiently related to the federal power. That may be the best way, for example, to understand Alexander Hamilton's statement in *The Federalist* that it would be "absurd . . . to believe, that a right to enact laws necessary and proper for the imposition and collection of taxes, would involve that of varying the rules of descent, and of the alienation of landed property."[97] Moreover, to the extent that this line of sources is thought dispositive, it might suggest that there could be a federal power to condemn personal property, even if not land.[98]

94. Alexander White, *Strictures on the Address and Reasons of Dissent of the Minority of the Pennsylvania Convention*, WINCHESTER VA. GAZETTE (Feb. 22, 1788), *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 401, 404 (John P. Kaminski et al. eds., 1988) [hereinafter DOCUMENTARY HISTORY].

95. [Tench Coxe], *A Freeman III*, PA. GAZETTE (Feb. 6, 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 94, at 49, 51.

96. Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 481 (2003) (collecting sources).

97. THE FEDERALIST NO. 29, *supra* note 45, at 141 (Alexander Hamilton).

98. *See infra* Section III.D (exploring this possibility further).

3. The Enclaves Clause

Before discussing the practice of early takings for federal projects, it may also be helpful to understand one piece of structural background—the Constitution's Enclaves Clause. The Clause is located in Article I and gives Congress the power to exercise "exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[99]

It makes perfect sense for the federal government to have exclusive control over its own forts and arsenals, especially given that states have limited authority to keep troops or wage war on their own.[100] Yet the Clause imposes an important condition on that exclusive federal control—that the land must be "purchased by the Consent of the Legislature of the State."[101]

It is plausible that the word "purchased" could be construed to encompass condemnations via eminent domain.[102] That is not the only plausible construction: early cases sometimes referred to the powers of "purchase" as distinct from "condemnation" or "eminent domain."[103] But Blackstone had conceptualized eminent domain as a forced sale,[104] and English law soon came to refer to eminent domain as a compulsory "purchase."[105] Noah Webster, similarly, said that the "primary and legal sense" of "purchase" included any means of obtaining property except descent.[106]

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99. U.S. CONST. art. I, § 8.

100. *Id.* art. I, § 10.

101. *Id.* art. I, § 8.

102. *See* Francis W. Laurent, *Federal Areas Within the Exterior Boundaries of the States*, 17 TENN. L. REV. 328, 331 (1942) (endorsing this reading).

103. Chesapeake & Ohio Canal Co. v. Balt. & Ohio R.R. Co., 4 G. & J. 1, 3 (Md. 1832); *accord* Kohl v. United States, 91 U.S. 367, 374 (1875) ("[G]enerally, in statutes as in common use, the word ["purchase"] is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference."); *see also* Lessee of Overmeyer v. Williams, 15 Ohio 26, 33 (1846) (differentiating a corporation's power to "make the necessary acquisitions of property, by purchase," from "the other means conferred upon them, to wit, the exercise of the delegated right of eminent domain").

104. 1 BLACKSTONE, *supra* note 20, at *135 ("All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price . . . .").

105. Land Consolidation Act of 1845, 8 & 9 Vict., c. 18, § 15, 123; *see also* Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 602-05 (1942) (tracing the "compulsory purchase" concept to Montesquieu as well as Blackstone).

106. 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (unpaginated entry for "purchase").

But even assuming that the federal government may acquire enclaves via condemnation, the requirement of state consent puts that power in an interesting context. The Enclaves Clause deals with some of the most important buildings—those necessary for the national defense. It explicitly references "Forts, Magazines, Arsenals," and "dock-Yards," at least three of which have a decidedly military character.[107] It also extends to "other needful buildings," which would have included buildings that satisfied a similar military need.[108] Joseph Story explained that exclusive jurisdiction was justified because, among other things, "the nature of the military duties, which may be required there . . . demand, that they should be exempted from state authority."[109]

The whole point of the Enclaves Clause is to oust any state jurisdiction, yet even so, that power can only be exercised with state consent. This certainly does not prove that state consent—actually, state legislative authority—was required to condemn the land in the first place. But it does suggest that the constitutional design anticipated state involvement in federal land acquisitions and building projects.

Finally, it is worth noting that some interpreters have suggested that the Enclaves Clause should be read more strongly: to forbid the government from buying land in any manner (even consensually) unless it gets permission from the state legislature.[110] The idea is *expressio unius est exclusio alterius*—that the Enclaves Clause describes the exclusive federal power to obtain land. Even Madison suggested this at one point during the Bank debate.[111] On its face, however, the Enclaves Clause speaks to obtaining jurisdiction, not to obtaining title. So perhaps Madison was recalling his original draft of the Clause, which gave Congress the power "[t]o authorize the Executive to procure and hold for

107. U.S. CONST. art. I, § 8.

108. *Id.*

109. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1219, at 46 (Boston, Hillard, Gray & Co. 1833); *accord* James v. Dravo Contracting Co., 302 U.S. 134, 142 (1937) ("[I]t may be that the thought of such 'strongholds' was uppermost in the minds of the framers."). Subsequent cases have expanded the Clause to include "whatever structures are found to be necessary in the performance of the functions of the Federal Government," *James*, 302 U.S. at 143, but if that is correct, it only expands the importance of the set.

110. *See, e.g.*, ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 73 (1987); David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083, 1150 (1992); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 60 (1950).

111. Madison, *supra* note 46, at 43 ("Congress could not purchase lands within a State, 'without the consent of its legislature.'").

the use of the U.S. landed property for the erection of Forts, Magazines, and other necessary buildings."[112] But the convention had transformed the power from one about procuring *property* to one about obtaining exclusive *jurisdiction* (shortly before the state consent clause was added).[113] And Congress generally did not follow Madison's suggestion: in 1790, it purchased the site for West Point (with the owner's consent) without waiting for state approval,[114] and early cases describe other federal land that was held without invoking the Enclaves Clause.[115]

II. THE HISTORY OF FEDERAL TAKINGS

The history of federal eminent domain is dominated by two important facts. First, for the first seventy-five years of the Republic—at least until an obscure 1864 taking statute affecting Rock Island, Illinois—there had never been a purely federal taking inside a state. And even the few takings authorized between 1864 and the 1875 decision in *Kohl* were sporadic and apparently did not make much of an impression; it is not even clear that most of them were performed. *Kohl* itself conceded (perhaps inaccurately) that there had never before been a federal taking.[116] Now, it is true enough, as *Kohl* also said, that "the non-user of a power does not disprove its existence,"[117] which brings us to the second point. Throughout this period, a federal takings power was explicitly denied—including by the Supreme Court, which declared that "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain," except in the District and territories.[118] After several decades, there were some suggestions that the federal government had and should exercise such a power (including by prominent thinkers like Henry Clay and Joseph Story), but their views failed to persuade the majorities of their day.

Moreover, the history reveals an entirely different way of executing federal

112. 2 RECORDS, *supra* note 50, at 325.

113. *Id.* at 505, 509-10.

114. CURRIE, *supra* note 25, at 84 n.236.

115. *See, e.g.*, People v. Godfrey, 17 Johns. 225 (N.Y. 1819); Commonwealth v. Young (Pa. 1818), *reprinted in* 1 J. Jurisprudence 47 (Pa. 1821).

116. Kohl v. United States, 91 U.S. 367, 373 (1875) ("It is true, this power of the Federal government has not heretofore been exercised adversely.").

117. *Id.* "Non-user" meant "failure to use." 2 WEBSTER, *supra* note 106, at 181.

118. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 222-23 (1845). For more discussion of the case, see *infra* notes 188-195 and accompanying text.

building projects. It is not as if the federal government never needed private land before 1864 or 1875. Nor did the federal government always find itself willing to pay what the owner wanted. But when the government needed land for federal projects, it did not take it. Instead, it relied on the state's condemnation authority—either by having the state condemn the land and then transfer it to the federal government, or by having federal agents proceed as plaintiffs under state condemnation law. The lack of federal eminent domain authority was not simply the oversight of an earlier time, but rather the result of a well-functioning regime of cooperative federalism.

A. The First Twenty Years

During the first twenty years of the federal government, Congress built quite a few things and sometimes needed eminent domain. But a federal condemnation power was not proposed at all during this period, so far as one can tell; the use of state power was uniform and unquestioned.

For example, when the federal government wanted to build lighthouses on Baker's Island and Cape Cod in Massachusetts, the state passed a statute authorizing the federal government to "purchase or take as hereinafter is provided, any tracts of Land which shall be found necessary and convenient."[119] The statute authorized a federal agent to apply to state court, where "three Freeholders, impartial men" would "determine a just equivalent to the Owner or Owners of such Land," to be paid by the United States.[120] It did the same for a later federal lighthouse on Wigwam Point.[121] The state also passed a very similar statute authorizing the United States to take land on Governor's Island in Boston Harbor for "forts, magazines, arsenals, dock-yards, and other needful buildings," subject to state compensation procedure.[122]

The same occurred in Rhode Island. The legislature passed a statute for the fortification of Newport which consented to the sale of land to the United States, and added that if the federal government and an individual owner could not agree "on the Value thereof," the Governor could "appoint three suitable Persons to appraise the said Lands" and force a transfer at that price.[123]

119. Act of June 18, 1796, 1796 Mass. Acts 22.

120. *Id.* at 23.

121. Act of June 12, 1800, 1800 Mass. Acts 109.

122. Act of June 25, 1798, ch. 16, 1798 Mass. Acts 217.

123. Act of Mar. 1794, 1794 R.I. Acts & Resolves 11, 12. The forced sale is my inference from the following: "[U]pon Payment of the Value thereof, at such Appraisement, or upon the

New York passed a statute in 1790 ceding a lighthouse in Sandy Hook to the United States. The land was partly owned by the state, but was also partly owned by the estates of two dead men, Philip Livingston and William Bayard. The trustees of their estates were "directed and required to grant release and convey all their estate right title and interest . . . to the United States."[124] New Jersey also passed a statute at the same time ceding its jurisdiction over the land.[125] A later New Jersey statute authorized the government to take more land near the Sandy Hook lighthouse to erect a beacon, with compensation determined by a New Jersey special jury.[126]

Other state statutes simply ceded land to the federal government that the state already owned—for lighthouses[127] or forts,[128] for example. (I have not determined which of these parcels the state acquired via eminent domain, though some may have been.)

A few years later came the National Road—a new kind of federal project that was treated the same way. Roads are a canonical example of the need for eminent domain.[129] There are a limited number of practical ways to connect the destinations, and each individual right-of-way is valuable only if it can be coupled with enough others to complete the road. Eminent domain can be important to deal with holdouts. But when the federal government turned to road building in the early years, it did so without relying on a federal eminent domain power.

The National Road was one of the first major roads, and the first federally constructed portion of it was known as the Cumberland Road, designed to run west from Maryland to Vandalia, Illinois, and potentially to St. Louis or beyond.[130] From the beginning, the road was built only with state consent. The

Tender thereof being refused, the Fee and Property of such Lands shall vest in the United States." *Id*. at 12.

124. Act of Feb. 3, 1790, ch. 3, 1790 N.Y. Laws 106, 107.

125. Act of Nov. 16, 1790, ch. 321, 1790 N.J. Laws 669. The property was located in New Jersey. 1790 N.Y. Laws at 106 (locating the land "in the then Province now State of New Jersey").

126. Act of Mar. 1, 1804, 1803 N.J. Laws 352.

127. Act of Feb. 14, 1791, 1791 N.H. Laws 374; An Act Granting to the United States of America the Public Light-House Within This State, 1793 R.I. Pub. Laws 519.

128. *See, e.g.*, Act of Apr. 18, 1795, 1794 Pa. Acts 757, 759 (giving title to the United States to several hundred acres of land at the harbor of Presque Isle for "erect[ing] . . . and maintain[ing] . . . forts, magazines, arsenals and dock-yards . . . thereon").

129. *See, e.g.*, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 787 ("[R]oad-building [was] the most common occasion in colonial America for the exercise of the eminent domain power.").

130. *See* JEREMIAH SIMEON YOUNG, A POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD 20-30 (1904).

bill authorizing construction of the Cumberland Road told President Jefferson "to obtain consent for making the road, of the state or states, through which the same has been laid out," and authorized him to have the road built only once he had done so.[131] Maryland, Pennsylvania (after some debate about the road's path), and Virginia—the first three states along the road—all ultimately consented.[132]

The federal legislation authorizing the road had not included any eminent domain authority. But in the course of consenting to the road, the states specifically authorized the road builders to use eminent domain under state law. Pennsylvania authorized the President to open the road and gave the road builders "full power and authority to enter upon the lands through which the same may pass" and to take building materials from nearby lands, so long as they compensated the owners according to state law.[133] Virginia authorized the road "to be cut out" and similarly gave the builders "full power and authority" to lay down the road and take building materials under state law.[134] Maryland's permission was more general, consenting "to the opening and improving the same" and authorizing the President "to cause the said road to be laid out, opened and improved, in such way and manner as by the before recited act of [C]ongress is required and directed."[135] When it was needed,[136] federal construction of the road proceeded using the *state's* eminent domain power.

A different practice obtained, however, when building roads in the District of Columbia. The Constitution gave the power "to exercise exclusive Legislation in all Cases whatsoever" over the District,[137] and to "make all

131. Act of Mar. 29, 1806, ch. 19, 2 Stat. 357, 358-59 (1806). Treasury Secretary Albert Gallatin would later declare it "evident that the United States cannot, under the constitution, open any road or canal, without the consent of the State through which such road or canal must pass." ALBERT GALLATIN, TREASURY DEP'T, ROADS AND CANALS, S. Misc. Doc. 10-250 (1808), *reprinted in* 1 MISCELLANEOUS AMERICAN STATE PAPERS: MISCELLANEOUS 724, 741 (Wash., D.C., Gales & Seaton 1834). One study interprets Gallatin as "den[ying] any right of eminent domain inhering in the United States." LINDSAY ROGERS, THE POSTAL POWER OF CONGRESS: A STUDY IN CONSTITUTIONAL EXPANSION 66 (1916).

132. ARCHER BUTLER HULBERT, THE CUMBERLAND ROAD 53-54 (1904). On Pennsylvania's dithering, see LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829, at 485 (1951); and YOUNG, *supra* note 130, at 40-41.

133. Act of Mar. 29, 1806, 1806 Pa. Laws 185, 185-86.

134. Act of Jan. 12, 1807, ch. 93, 1806 Va. Acts 36-37.

135. Act of Jan. 4, 1807, 1806 Md. Laws 39; *see* YOUNG, *supra* note 130, at 41 (characterizing Maryland's law, without citing it, as "of the same character" as Pennsylvania's).

136. It often was not needed. Many landowners were "eager to do everything in their power to assist in the construction of this improvement." YOUNG, *supra* note 130, at 43.

137. U.S. CONST. art. I, § 8, cl. 17.

needful Rules and Regulations respecting the Territory . . . belonging to the United States."[138] The normal principle of enumerated powers gave way.

Indeed, the early Congress did authorize eminent domain in the District of Columbia on a few occasions. In 1809, Congress passed a statute authorizing the construction of a turnpike in Alexandria, which was then in the District of Columbia.[139] The statute authorized the turnpike company "to agree with the owners of any ground to be occupied by the road," or, "in case of disagreement," to condemn the road before a judge and twenty-four jurors who would assess just compensation.[140] Congress later authorized takings in the District for the Chesapeake and Ohio Canal[141] and for portions of the Washington Aqueduct.[142]

We also know that at least one such condemnation actually occurred. In 1809, G.W.P. Custis came before the D.C. Circuit Court, asking it to review a three-thousand-dollar award for his land that had been condemned for the turnpike.[143] (Presumably he thought the figure was too low.) Apparently believing that some of the jurors were biased, the court agreed to quash the inquisition, only to be unanimously reversed by the Supreme Court.[144]

Early federal takings in the territories appear to have been spottier, perhaps because the federal government started out in possession of so much land. The Indian tribes, of course, did have a prior claim to the land, but the dubious combination of conquest and quasi-purchase[145] may have been conceptually different from eminent domain. Territorial legislatures did authorize eminent

138. *Id.* art. IV, § 3, cl. 2.

139. Act of Mar. 3, 1809, 2 Stat. 539.

140. *Id.* § 7, 2 Stat. at 541.

141. Chesapeake & Ohio Canal Co. v. Union Bank of Georgetown, 5 F. Cas. 570, 572 (C.C.D.D.C. 1830).

142. Act of Apr. 8, 1858, ch. 14, 11 Stat. 263.

143. Georgetown Tpk. Rd. Co. v. Custis, 10 F. Cas. 238, 238 (C.C.D.D.C. 1809), *rev'd sub nom.* Custiss v. Georgetown & Alexandria Tpk. Co., 10 U.S. (6 Cranch) 233. Judging by his initials and the location of the case, G.W.P. Custis may have been George Washington Parke Custis, the grandson of Martha (Custis) Washington and the father-in-law of Robert E. Lee. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 447 (2005). If so, he was also the owner of the estate eventually at issue in the now-canonical case of *United States v. Lee*, 106 U.S. 196, 198 (1882).

144. *Custiss*, 10 U.S. (6 Cranch) at 237.

145. *See generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005) (exploring the precise mechanisms by which the United States acquired Indian land).

domain for various projects during the antebellum period,[146] and Congress did later during the construction of the transcontinental railroad.[147] Such takings are unsurprising under the great powers theory.

Finally, it is worth noting how existing scholarship has misperceived the early history. The author of the most substantial defense of federal eminent domain, Adam Grace, contends that some members of the federal government believed in a federal condemnation power during these early years, even if it was not exercised. Grace focuses on Tench Coxe, then the Treasury's Commissioner of Revenue, who bought the land for the federal lighthouse at Baker's Island, where (as we have seen) state law authorized him to use eminent domain.[148] Grace relies on a letter Coxe wrote in 1797, in the course of planning federal acquisition of a lighthouse in Newport, Rhode Island. Coxe's primary plan was to purchase the lighthouse—even if he had to pay "a liberal price."[149] But at one point Coxe wrote to one of his subordinates that a backup plan would be "taking measures to procure the land upon a just valuation of a Jury under the authority of law, in that manner which is understood to be called 'condemning land' in the Eastern states."[150] Grace claims that "there was no Rhode Island statute authorizing or consenting to a condemnation proceeding by the United States"[151] and infers from that that "Coxe did not view state consent as a prerequisite to federal exercise of eminent domain power."[152]

Whatever weight one gives to a couple of private letters, Grace's view of Coxe's actions is mistaken. There *was* a Rhode Island statute authorizing condemnation proceedings in Newport, if the United States offered the appraised value of the land and "upon the Tender thereof being refused."[153] Granted, the statute applied only to "such Lands as shall be deemed necessary

146. *See, e.g.*, Ryerson v. Brown, 35 Mich. 332, 344 (1877) (discussing territorial history); Newcomb v. Smith, 2 Pin. 131, 132-35 (Wis. 1849) (same).

147. *See infra* notes 234-247, 272-277 and accompanying text.

148. Grace, *supra* note 5, at 144-45. Coxe had promised that states would retain "lordship of the soil." Coxe, *supra* note 95, at 51.

149. Grace, *supra* note 5, at 146 n.167 (quoting Letter from Tench Coxe to William Ellery (Feb. 28, 1797) (on file with Nat'l Archives & Records Admin.)).

150. *Id.* at 145 (quoting Letter from Tench Coxe to William Ellery, *supra* note 149).

151. *Id.* at 146. Grace quotes similar statements by Coxe's successor, William Miller, at least one of which is a reference to New Jersey's use of eminent domain, discussed *supra* note 126. Grace, *supra* note 5, at 146-47.

152. *Id.* at 146.

153. Act of Mar. 1794, 1794 R.I. Acts & Resolves 11, 12; *see supra* note 123 (discussing this law).

to erect Fortifications upon,"[154] which might not include the land that already held the Newport Lighthouse, but the statute shows how the Rhode Island legislature could have transferred the Newport Lighthouse as well. Indeed, Coxe's reference to the procedure "in the 'Eastern States'" seems to hint at state procedures. So by "taking measures," Coxe may well have meant procuring the passage of another condemnation statute; after all, at the time there was no existing *federal* statutory authority for a condemnation either.

Similar ambiguity—at best—attends a late message from President Jefferson to Congress which Grace relies on.[155] In March 1808, Jefferson lamented that sometimes "the sites most advantageous" for fortifying the country's harbors belonged to minors, to people who refused to sell, or to people who "demand a compensation far beyond the liberal justice allowable in such cases."[156] Noting the need for "defense of our seaboard," Jefferson declared:

> I submit the case to the consideration of Congress, who, estimating its importance and reviewing the powers vested in them by the Constitution, combined with the amendment providing that private property shall not be taken for public use without just compensation, will decide on the course most proper to be pursued.[157]

Grace suggests that, in this message, "Jefferson pointed [Congress] to [its] power to take property with just compensation," but the message is really quite equivocal.[158] Jefferson poses the problem as something for Congress to figure out the answer to, but he does not say what that answer might be. Maybe upon constitutional reflection the solution would have been special legislation for contracting with legally incompetent property holders, or further use of state condemnations, or just larger appropriations. The most we can say is that Jefferson asked Congress to consider whether there was such a power, and to use it if there was. For what it is worth, Congress did not propose eminent domain; the message was referred to a Senate committee and seems to have

154. 1794 R.I. Acts & Resolves 11.

155. *See* Grace, *supra* note 5, at 147 n.171; *see also* CURRIE, *supra* note 5, at 122 n.254 (citing this message).

156. Thomas Jefferson, To the Senate and House of Representative of the United States, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 435, 435 (James D. Richardson ed., Bureau of Nat'l Literature, Inc. [c. 1908]) (1897).

157. *Id.*

158. Grace, *supra* note 5, at 147 n.171.

died there.[159] The next year Jefferson sent Congress a report on his progress in fortifying the harbors, including Georgia, where he had "obtained with great difficulty" private property near Savannah.[160] Yet this time, the report only asked for money.

Finally, Grace argues that conceptually these state takings ought to be seen as federal takings, at least where the taking proceeded by authorizing the federal government or agents to proceed rather than taking the land itself and then transferring it.[161] Grace's characterization, however, is anachronistic and mistaken. There is no evidence that the form of the taking for federal purposes was thought relevant. When states authorized private corporations to take land for public uses, for example, that was ultimately an exercise of *state* power.[162] So this is not an example, as Grace puts it, of states' "consensually expand[ing] the federal government's powers under the Constitution,"[163] but rather of a federal plaintiff pursuing a nonfederal cause of action.[164]

B. Roads, Again

The possibility of using *federal* eminent domain was explicitly floated, and ultimately rejected, when Congress returned to dealing with the Cumberland Road in 1818.[165] Speaker of the House Henry Clay, a strong proponent of federal development of internal improvements, argued that Congress had the power "to fell the oak of the mountain, to gather the stone which has slept for centuries useless in its bosom, and therewith construct roads—with the qualification . . . that, when the Government takes private property, it is bound to make compensation therefor."[166] This seems to have been a claim to federal

159. *See* 17 ANNALS OF CONG. 175 (1808).

160. Report of Henry Dearborn *enclosed in* Thomas Jefferson, Fortifications (Jan. 6, 1809), *reprinted in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 236, 237 (Wash., D.C., Gales & Seaton 1832).

161. Grace, *supra* note 5, at 151, 153 n.194.

162. *See, e.g.*, Gilmer v. Lime Point, 18 Cal. 229, 251 (1861) (collecting earlier sources).

163. Grace, *supra* note 5, at 153 n.194.

164. *See, e.g.*, Bank of the U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904 (1824) (suit by federal entity upon nonfederal claim).

165. Jeremiah Young attributed the new arguments in favor of eminent domain to "the nationalizing tendencies which followed the War of 1812." YOUNG, *supra* note 130, at 41. *McCulloch v. Maryland* was argued and decided the following year.

166. 31 ANNALS OF CONG. 1169 (1818).

eminent domain.[167]

While Clay was an aggressive advocate, there were forceful responses. Opponents argued that the federal government had no such power, questioning whether "any of the framers of the Constitution could ever have imagined . . . that the power to . . . lay open the enclosures of individuals for roads, from one end of the State to the other, without their consent . . . passed into the hands of Congress by implication,"[168] and proclaiming that "the appropriation of the soil . . . belong[s] exclusively to the States."[169] Ultimately, the nays had it. Eminent domain was not used in the later extensions of the road, and Congress declined a proposal that it explicitly affirm the existence of the eminent domain power.[170]

The naysayers were reaffirmed again a few years later, when President Monroe vetoed a bill to establish tollgates on the road.[171] There are several constitutional puzzles in the veto message. Monroe argued that Congress had no power to establish internal improvements but also wanted a theory that could justify the Cumberland Road, since it already existed and he apparently regarded it as a sort of precedent.[172] Monroe came up with a broad theory of the spending power. But what is interesting for our purposes is what he said in the course of explaining that theory. Monroe insisted that, while Congress could appropriate money for "many very important natural purposes," the "condemnation of the land, if the proprietors should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the State."[173] Congress had not attempted to exercise

167. *See id.* at 1207 (statement of Rep. Archibald Austin) (characterizing as Clay's argument that it was "in the power of the Postmaster General . . . to take possession of any house or lot of land, in town or country, for the post office, and that, contrary to the will of the owner, as being an incidental power necessary to the Post Office Establishment").

168. 32 *id*. at 1351-52 (1818) (statement of Rep. James Pindall); *see also* 31 *id.* at 1209-10 (1818) (statement of Rep. Archibald Austin).

169. 40 *id.* at 709 (1823) (statement of Rep. Silas Wood).

170. *See* YOUNG, *supra* note 130, at 42.

171. *See* WHITE, *supra* note 3, at 253-54 (discussing the trend of tollgates on the National Road and elsewhere).

172. *See* CURRIE, *supra* note 5, at 280-81 (explaining Monroe's attempt to distinguish the Cumberland Road and contrasting him with Madison, who regarded it as "sui generis or unconstitutional").

173. James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 713, 736-37 (James D. Richardson ed., 1897) [hereinafter COMPILATION]. The "views" were an addendum to his brief veto message for the Cumberland Road. James Monroe, Veto Message (May 4, 1822), *in* 2 COMPILATION, *supra*, 711, 711-12. Monroe

eminent domain in the bill.

The same pattern of using state eminent domain for federal projects recurred after Monroe's veto message, when Maryland authorized a slight change in the path of the road. The Maryland legislature explicitly authorized federal agents to move the road, and "to condemn, if refused, by the course of proceedings provided" by state law.[174] As the National Road went further west, "it reached states in which the United States owned land," acquired back when the states were territories.[175] Less attention was paid to other road projects, but they seem to have followed the same pattern.[176] Ultimately, federal eminent domain was rejected during this period.

Again, the existing scholarship misperceives what happened here. Grace states that there was "a single instance of a federal taking involving a property owner affected by construction of the Cumberland Road."[177] But this is wrong; there were none. Grace is referring to the repeated petitions of John Good, whose land was taken for the road by *Virginia*, not the federal government.[178] (Good, incidentally, was upset that he was not paid compensation, but that was because appraisers had concluded that the road increased his property value, and Good had skipped out on the hearing where he could have contested that conclusion.[179])

David Currie also briefly discusses the eminent domain issue in one of his books on constitutional debate in Congress. He suggests that Clay's arguments were correct even though they did not carry the day.[180] But Currie does not discuss earlier views of the Necessary and Proper Clause—including the arguments under which eminent domain might have been thought not to be an implicit power—nor the following decades of historical practice. Currie also remarks on a one-paragraph House report issued a decade later which declined to recommend any legislation on takings as "inexpedient."[181] Currie describes this report as "implicitly recognizing the existence of federal power to condemn

apparently sent it to the Justices of the Supreme Court. Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398, 1455 (2004).

174. YOUNG, *supra* note 130, at 43 (quoting 1832 Md. Laws, at lxvii).

175. *Id.*

176. *Id.* at 44-45.

177. Grace, *supra* note 5, at 150 (citing 40 ANNALS OF CONG. 620 (1823)).

178. *See* 40 ANNALS OF CONG. 620 (1823) ("A gentleman, his name, I think, was Good . . . ."); H.R. REP. NO. 19-140, at 2-3 (1826) (detailing Good's petitions).

179. H.R. REP. NO. 19-140, at 3 ("The petitioner was duly notified of the time and place of the meeting of these persons thus appointed, and declined to attend . . . .").

180. CURRIE, *supra* note 5, at 277.

181. H.R. REP. NO. 20-90 (1828).

property."[182] But the heading of the report asked "under what rules and regulations private property (*if to be taken at all*) shall be taken for public use."[183] In other words, the report can be read as agnostic about the existence of a federal power—and especially as to whether that power would be exercised outside of the District and territories, and without state authorization.[184]

C. The Supreme Court

A decade after these debates over internal improvements, there continued to be occasional comments in favor of a general federal eminent domain power—but in addition to being quite late, those comments were not actually put into practice or judicial holding. For example, in discussing the Enclaves Clause in his 1833 *Commentaries on the Constitution of the United States*, Joseph Story asked:

> Suppose a state should prohibit a sale of any of the lands within its boundaries by its own citizens, for any public purposes indispensable for the Union, either military or civil, would not congress possess a constitutional right to demand, and appropriate land within the state for such purposes, making a just compensation?[185]

Another mention of federal power was an 1838 dictum by the Kentucky Supreme Court, in a case about whether a contractor carrying the U.S. mail was thereby exempted from tolls on a Kentucky road. No, said the court, adding that "[Congress] can not appropriate private property to public use without either the consent of the owner, or the payment of a just compensation for the property, or for the use of it."[186] But this broad view was not taken by somebody with the power to do anything about it.[187]

When the Supreme Court did finally confront the issue, in the 1845

182. CURRIE, *supra* note 5, at 312 n.188.

183. H.R. REP. NO. 20-90 (emphasis added).

184. The failed bill to authorize federal eminent domain some thirty years later, for example, still required the consent of the state. *See infra* notes 224-232 and accompanying text.

185. 3 STORY, *supra* note 109, § 1141, at 46.

186. Dickey v. Maysville, Wash., Paris & Lexington Tpk. Rd. Co., 37 Ky. (7 Dana) 113, 113-14 (1838); *see also id.* at 113, 113 editor's note ("*[U]nless Congress shall elect to exert its right of eminent domain, and buy a State road*, or make one or help to make or repair it, the constitution gives no authority to use it as a post road, without the consent of the State, or owner or without making a just compensation for the use." (emphasis added)).

187. *See* ROGERS, *supra* note 131, at 87 ("Here was acknowledgment of an authority more far reaching than even the more liberal contemporary opinion gave to Congress.").

submerged-lands case of *Pollard's Lessee v. Hagan*, it reinforced the dominant view of eminent domain power. The Court was asked to determine the ownership of a riverfront plot of land in Mobile, Alabama.[188] Congress had purported to grant the land to the Pollards, but the grant was after Alabama's admission as a state, and the land was arguably underwater. This thrust the Court into the cessions and ordinances that had resulted in Alabama's statehood, as well as into the principles of federal land governance. As the Court put it, "To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands."[189]

The Court then explained the federal government's eminent domain power: "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the *eminent domain*."[190] And that power necessarily fell to Alabama:

> When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in

188. For background on the land, see *City of Mobile v. Emanuel*, 42 U.S. (1 How.) 95 (1843). For attempts to summarize the extensive litigation, see 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64, at 751-53 (Paul A. Freund ed., 1974); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 72-73 (2007); and Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1312-15 (2009).

189. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 222 (1845).

190. *Id.* at 223.

which it is expressly granted.[191]

That last clause ("expressly granted") might seem a little puzzling, and the Court went on to explain it in the next paragraph. It noted that the Constitution—in the District Clause—*did* grant the federal government "the national and municipal powers of government, of every description," but that this Clause and that of the "temporary territorial governments" were "the only cases, within the United States, in which all the powers of government are united in a single government."[192] In other words, eminent domain was a power that had to be "expressly granted" by the Constitution, not found by implication, and the District and Territories Clauses were the only places the Constitution expressly granted the power.

Interestingly, Justice Story, then in his last year of service,[193] did not dissent, even though he had speculated in his *Commentaries on the Constitution* that the federal government might have an eminent domain power.[194] Justice Catron dissented; but he did not seem to object to the eminent domain ruling, so much as the facts of Pollard's title itself. Justice Catron pointed out that in previous litigation about the same grant, he had written a unanimous opinion concluding that Pollard's title had been reserved and confirmed by an 1836 Act of Congress.[195] The previous decisions, however, had "decided interstitial questions without reaching the question of constitutional power."[196]

In any event, Justice Catron did not object when the Court reaffirmed its view of eminent domain five years later in yet another case in the same saga, *Goodtitle v. Kibbe*.[197] Once more, the Court explained, the United States could not "grant or confirm a title to land when the sovereignty and dominion over it

191. *Id.*

192. *Id.* at 223-34.

193. The Court decided *Pollard's Lessee* in January 1845. 44 U.S. (3 How.) at 213. Justice Story died on September 10, 1845. *See* Fed. Judicial Ctr., *Story, Joseph*, BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2302 (last visited Dec. 2, 2012); *Proceedings of Court Had upon the Death of Judge Story*, *in* 45 U.S. (4 How.) at v. His son reports that Justice Story remained quite able until early September, when he finished writing his last circuit court opinions. *See* 2 LIFE AND LETTERS OF JOSEPH STORY 546 (William W. Story ed., Boston, Little Brown 1851) ("No judgments delivered by him, are more clear, able, and elaborate than these . . . .").

194. *See supra* note 185 and accompanying text.

195. *See Pollard's Lessee*, 44 U.S. (3 How.) at 230-31 (Catron, J., dissenting) (citing Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353 (1840); Pollard v. Files, 43 U.S. (2 How.) 591 (1844)); *see also* Whittington, *supra* note 188, at 1313-14 (summarizing *Pollard* and *Pollard's Lessee*).

196. SWISHER, *supra* note 188, at 751.

197. 50 U.S. (9 How.) 471 (1850).

had become vested in the State."[198]

At least one treatise writer agreed with this approach. Isaac Redfield, the Chief Justice of Vermont and "the nation's leading authority on railroad law,"[199] denied the federal eminent domain power in his treatise on railways:

> [I]t would seem, that notwithstanding this right of sovereignty may reside in the United States, as the paramount sovereign, so far as the territories are concerned, in reference to internal communication, by highways and railways, and notwithstanding the ownership of the soil of a portion of the lands, by the United States, in many of the States, as well as territories, still when any of the territories are admitted into the Union, as independent States, the general rights of eminent domain are vested exclusively in the State sovereignty.[200]

Thus, in 1845, the Supreme Court had laid out exactly the theory of eminent domain advanced in this Article. For nearly thirty years, not only political practice, but also judicial precedent, made clear that the federal government could use eminent domain only in places where it had the powers of a local government. In the states, the federal government needed state cooperation.

D. Continuing Cooperative Takings

The traditional pattern continued for decades more. States continued to condemn land for federal projects, and the federal government continued not to even attempt any federal condemnations. This was true even as the joint takings scheme became quite complicated, and was no more convenient than a direct federal taking would have been.

One mid-century case that gives a good sense of the complications is that of the Washington Aqueduct. In 1852, the relatively new city of Washington was thirsty.[201] Congress passed a pair of statutes appropriating a hefty sum (more

198. *Id*. at 478.

199. David M. Gold, *Redfield, Railroads, and the Roots of "Laissez-Faire Constitutionalism*," 27 AM. J. LEGAL HIST. 254, 257 (1983).

200. 1 ISAAC F. REDFIELD, A PRACTICAL TREATISE UPON THE LAW OF RAILWAYS 113 (Boston, Little Brown & Co. 185[7]). The discussion is quoted in *Gilmer v. Lime Point*, 18 Cal. 229, 252 (1861), discussed *infra* notes 212-215 and accompanying text. Thomas Cooley also acknowledged the Court's holding in his 1868 treatise, although he seemed to disagree with it. *See infra* note 285.

201. *See generally* HARRY C. WAYS, THE WASHINGTON AQUEDUCT, 1852-1992 [1996] (providing background on the need for and construction of the aqueduct).

than one hundred thousand dollars) to the President to figure out how to obtain "an unfailing and abundant supply of good and wholesome water."[202] The solution was an aqueduct, drawing water from the neighboring state of Maryland. The federal government did not own the land or buy it from the private owners, and "[n]early all of the property had to be condemned."[203] As had become traditional, Maryland condemned the land, and then offered it all up to the federal government.[204]

Legal wrangling ensued. Attorney General Caleb Cushing had signed off on the project, concluding that it likely satisfied both federal and state law.[205] But the owner challenged the taking in the Maryland courts, where attorney John Tyson complained that "this little State" was "[s]o eager . . . to surrender to 'The Monster Republic' her precious right of eminent domain."[206]

The issues were not obvious. First, there were questions of Maryland law: the appellant's principal state-law argument was that Maryland could take land through eminent domain "only for the uses of the *public of Maryland*,"[207] not to give or to sell to the Capital. There was also a wrinkle having to do with the municipal structure of the District. At the time, the City of Washington was only one of several cities inside the District of Columbia, and the appellant complained that the water would go only to locals in the City of Washington rather than to the District as a whole.[208]

Then there was federal law: Tyson argued that Congress had no enumerated "power to purchase lands or water power in another State, for the construction of an *aqueduct* for the use of the city of Washington."[209] Now, in the end, all was well for the aqueduct. The Maryland courts found the taking perfectly lawful under state and federal law,[210] and the Supreme Court dismissed the ensuing appeal for lack of jurisdiction.[211] But the state-law arguments were not frivolous, and if the federal government had an eminent domain power, the whole scheme was extremely roundabout.

202. Act of Aug. 31, 1852, ch. 108, 10 Stat. 76, 92; *see* Act of Mar. 3, 1853, ch. 97, 10 Stat. 189, 206.

203. WAYS, *supra* note 201, at 16.

204. Act of May 3, 1853, 1853 Md. Laws 208, 209.

205. *See* Washington Aqueduct, 7 Op. Att'y Gen. 114, 118, 122 (1855).

206. Reddall v. Bryan, 14 Md. 444, 451 (1859) (argument of appellant).

207. *See id.* at 472.

208. *Id.* at 455.

209. *Id.* at 456.

210. *See id.* at 478-79 (opinion).

211. Reddall v. Bryan, 65 U.S. (24 How.) 420, 422-23 (1860) (noting both that the appeal was interlocutory and that it lacked any claim of federal right).

Yet despite the legal challenges that it entailed, the roundabout scheme was relatively common. In 1859, the State of California passed a statute authorizing *federal* agents to seize "any tract of land, and the right of way thereto . . . for the erection of a light-house, beacon light, range-light, fortifications, navy-yard, or other military or naval purposes" from anybody who could not or would not sell them.[212] Once more, the owner challenged the statute as a subversion of state and federal principles of public use. The California Supreme Court upheld the statute. It first explained that the statute relied on *California's* eminent domain power, and it then explained the reason for this roundabout process: "When any of the Territories are admitted into the Union as independent States, the general rights of eminent domain are vested exclusively in the State sovereignty."[213]

As with the Washington Aqueduct, the taking was challenged for lack of a public use under the state's constitution. The state's "power . . . to take being unquestionable, and the State being, as the local sovereign, the proper authority by whom this power is to be usually exercised, it devolves upon the respondents to show that the particular case made by this record is an exception to the general power."[214] And the landowners could show no such "exception." It was hard to dispute that a fort was a public use, leaving the landowners holding on to the argument that the taking was unconstitutional because it was a public use for the entire country, and not just for the citizens of California. That argument was rejected just as it had been in Maryland.[215]

There are other examples throughout the prewar period. In 1856, the United States wished to acquire a lighthouse from one Colonel Seabrook, who "refuse[d] to sell" it.[216] South Carolina passed a law taking the property from him and selling it to the federal government. Attorney General Cushing concluded that the exercise of eminent domain was valid.[217] In 1847, the New York legislature authorized the taking of land near Long Island for the United States to build a lighthouse.[218]

212. Act of Feb. 14, 1859, 1859 Cal. Stat. 26.

213. Gilmer v. Lime Point, 18 Cal. 229, 252 (1861) (quoting REDFIELD, *supra* note 200, at 112-13). Later on, the court professed to "express no opinion" on the question of federal power. 18 Cal. at 259.

214. *Id.* at 254.

215. *See id.* at 255.

216. *See* Eminent Domain—State Jurisdiction, 8 Op. Att'y Gen. 30, 31 (1856).

217. *Id.* at 32-33. He separately questioned the state's attempt to reserve jurisdiction over the land. *Id.* at 33.

218. *See* United States v. Dumplin Island, 1 Barb. 24 (N.Y. Sup. Ct. 1847) (citing Act of May 5, 1847, 1847 Pa. Laws 189).

The lack of a federal condemnation power also came up in the discussion of land titles. When Cushing endorsed the federal-state takings partnership for the Washington Aqueduct, he had not squarely addressed the federal government's power of eminent domain. But on another occasion, he did, when asked whether the federal government could use eminent domain to clear up a tangle of land titles in the part of Texas that would become Fort Brown. Cushing said no: "[S]uch a sovereign right, if existing, would belong to the new sovereign power of the country, namely the State of Texas, not the United States."[219] When Texas was admitted to the Union, it held "[t]he right of eminent domain . . . by title anterior to, and of course independent of, its accession to the Union."[220] And even if Texas had been a territory—and therefore temporarily subject to plenary federal power—"still the [right of] eminent domain of its own territory would pass to it on its admission into the Union, in virtue of the inherent equality of the several States."[221]

E. The 1860s

Accounts differ as to exactly when the first federal takings began. *Kohl* itself declared that "[i]t is true, this power of the Federal government has not heretofore been exercised adversely,"[222] and most sources take it at its word. A few scattered sources purport to have identified examples of federal eminent domain during the 1860s, though not always the same ones.[223] Ultimately, the results were mixed. At the beginning of the decade, and even after the Southern states seceded and left Congress, there was still a decisive opposition to a federal eminent domain power. By the end of the 1860s, Congress had authorized the first few federal condemnations in Civil War-related contexts, but it is not clear whether all of these condemnations were performed or if the land was sometimes obtained voluntarily. And even as these condemnations were authorized, Congress continued to demonstrate doubts about the power. The decade thus marked the beginning of a change in the previously uniform federal practice, but not the full culmination of that change. Let us see how

219. Eminent Domain of Texas, 8 Op. Att'y Gen. 333, 334 (1857).

220. *Id.*

221. *Id.* (citing 7 Op. Att'y Gen. 571 (1855)).

222. Kohl v. United States, 91 U.S. 367, 373 (1875).

223. *See, e.g.*, LANDS Div., U.S. DEP'T OF JUSTICE, FEDERAL EMINENT DOMAIN 1-3 (1940); Paxton Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 HARV. L. REV. 29, 37 (1927); CONG. RESEARCH SERV., RS22884, DELEGATION OF THE FEDERAL POWER OF EMINENT DOMAIN TO NONFEDERAL ENTITIES 4 (2008), http://assets.opencrs.com/rpts/RS22884_20080520.pdf.

things began and ended.

In 1860, the Senate Judiciary Committee reported a proposed statute to exercise federal eminent domain. It had gone nowhere two years earlier,[224] but its proponents made the case. All takings would require state consent, which was "exceedingly well guarded," in the words of one of the bill's proponents.[225] "That is a very necessary point, and I am glad it is guarded," agreed Jefferson Davis, a skeptic of the bill, but it was not enough for him—takings ought to be done "under a law enacted by the State," he said, which was what the Framers had anticipated ("Hence the expressions of the Constitution are very guarded.").[226] Davis also acknowledged that the Takings Clause appeared to presuppose some form of eminent domain power, but speculated that it was for personal property ("such as a transport ship"), not "real estate within the limits of a State."[227]

The discussion continued, with the proponents insisting repeatedly that the state consent clause "fully guarded" states' interests.[228] (One of the bill's authors was Judah Benjamin, Jefferson Davis's future Attorney General and Secretary of War and State.[229]) But others complained that that was not enough: Louis Wigfall of Texas gave a long speech against the "extraordinary" contention that the federal government had an eminent domain power, recalling that President Monroe had argued against it[230] and that "from that time to this I have understood that to be the known and well-settled doctrine of the Republican party."[231] James Mason of Virginia agreed, arguing that while the Necessary and Proper Clause gave the federal government "incidental powers" to obtain land, it "must go into the States as an ordinary purchaser."[232] Even the state consent clause was not enough for the skeptics. The bill was held over, and died later that session.[233]

224. *See* CONG. GLOBE, 35th Cong., 1st Sess. 2228 (1858) (report of Sen. Judah P. Benjamin).

225. *Id.*, 36th Cong., 1st Sess. 1790 (1860) (statement of Sen. James A. Bayard).

226. *Id.* at 1791. The word "guarded" is used at least seven times during this brief exchange.

227. *Id.*

228. *Id.* at 1790.

229. For Benjamin's authorship, see *id.* For his future offices under the Confederacy, see David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861-1865*, 90 VA. L. REV. 1257, 1275-76, 1299 (2004).

230. *See supra* note 173 and accompanying text.

231. CONG. GLOBE, 36th Cong., 1st Sess. 1791-92 (1860).

232. *Id.* at 1792.

233. Senators Wigfall, Mason, and Davis all left Congress in the exodus of 1861. RICHARD D. HUPMAN, SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1789 TO 1960, S. DOC. NO. 87-71, at 27-28 (1962).

Nor was it only Southerners who expressed reservations about federal eminent domain during this period. Indeed, even after secession, members of the Union Congress displayed the same concerns, beginning with a railroad bill. Railroad construction in the states had so far proceeded using *state*-chartered corporations, which possessed eminent domain as a matter of state law,[234] with the federal government sometimes involved through federal land grants.[235]

In 1862, Congress confronted a bill to move this process to the federal level—creating a *federal* railroad corporation to build parts of the transcontinental railroad. As first proposed, the bill would have authorized the Union Pacific to build the railroad from Kansas to California. Though the Southerners were gone by this point, Representative Thaddeus Stevens (really!) raised federalism objections in the House: "I do not desire that this corporation shall have the power of locating the road the whole way through the States."[236] Stevens proposed an amendment that limited the federal charter and federal powers to the territories. Doing so, Stevens said, "avoids that difficulty by authorizing certain companies incorporated by the States to make the road through those States, and then the company itself is to make the road through the Territories, through the public lands."[237]

The amendment was motivated by constitutional concerns. "I do not know," Stevens said, "that I share in the doubt as to the constitutionality of the United States incorporating companies to make railroads through the States; but I know that it is entertained by a large number of people."[238] Limiting the bill to the territories would "do away with the constitutional objection to this bill, which, I admit, is a serious one, and may affect many minds unless we forget all our old lessons."[239]

David Currie puzzles over this objection, wondering why Stevens—or anybody—would have questioned the constitutionality of a federal corporation, which as "Chief Justice Marshall had patiently explained in *McCulloch v Maryland*, was a perfectly ordinary, necessary, and proper means of carrying out the various powers granted to Congress."[240] After *McCulloch*, Currie notes,

234. JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 35 (2001); GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1815-1860, at 89 (1951).

235. ELY, *supra* note 234, at 52.

236. CONG. GLOBE, 37th Cong., 2d Sess. 1889 (1862).

237. *Id.*

238. *Id.*

239. *Id.* at 1890.

240. David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1146 (2006).

"the ostensible constitutional question was not serious after all. But Congress for some reason remained skittish."[241] Currie misunderstands Stevens's objections, which were not about the corporate form as such. They were about a *railroad* corporation, and the eminent domain issue explains why: railroad corporations had the power to take and build roads through private property, which had previously been exercised by the states.

A later colloquy about the bill makes it even clearer that the objection was based on eminent domain. Senator Trumbull explained that he, too, supported the territorial limitation: "I think it is a very serious question whether the Government of the United States has authority to charter a company to build a railroad in a State of this Union."[242] Why? Because,

> if the United States have a right to charter a company to build a road in Kansas, they have a right to condemn the lands there, and they may take possession of all our railroads. If the Government of the United States may do this, they may, under their paramount right of eminent domain, go into the State of New York and condemn the New York Central railroad, and make it a Government road; and so with any other railroad in the United States.[243]

Senator Lot Morrill of Maine had the same objection. The bill could not extend to land "in sovereign and independent States, over which, of course, the United States has no power and no right to grant a right of way."[244] In state territory, "whatever legislation Congress may propose, must be proposed in conjunction with the legislation of those States."[245] ("Over the Territories, of course, Congress has jurisdiction and may grant the right of way," Morrill allowed.[246]) The Union Pacific bill was signed into law by President Lincoln, limited to the territories.[247]

Things started to change, a little, in 1864. Two years earlier, Congress had passed a bill providing for a federal arsenal in Rock Island, Illinois.[248] A local petition had urged the federal government to pick the site, noting an "important consideration in favor of Rock Island . . . is that the government

241. *Id.*

242. CONG. GLOBE, 37th Cong., 2d Sess. 2679 (1862).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Act of July 1, 1862, 12 Stat. 489.

248. Act of July 11, 1862, ch. 148, 12 Stat. 537.

owns the site."[249] There had been a few squatters, but they had since been prosecuted, and an Illinois official certified that the land was clear.[250] Apparently that was not quite true, however. Congress had granted two gentlemen minor land interests,[251] and in 1864 Vice President Johnson came before Congress to ask that the Secretary of War be authorized to purchase—or else condemn—their claims.[252]

Senator Hale of New Hampshire called a halt. The bill "involves a new principle in the practice of this Government . . . . I think there has been no instance of an attempt on the part of this Government to take private property in a State for public uses against the consent of the owner."[253] He asked Senator Howard ("who I know is a profound lawyer") to speak to the question.[254]

Senator Howard said not to worry. First of all, "it is a small island," which except for one hundred ninety acres "belongs entirely to the United States . . . and no controversy can arise so far as is now seen under this bill, except as to that portion of the land which is now owned by private persons, those persons being only two in number."[255] And in any case, said Howard, the bill was constitutional. Interestingly, he did not refer to the Necessary and Proper Clause but rather to the Fifth Amendment:

> [T]he Constitution, by the plainest implication, authorizes the Government of the United States, whenever they shall see fit to take private property for the public use, to do so upon making just compensation. This is in one of the amendments to the Constitution adopted after the main body of the Constitution had been in operation for several years.[256]

249. AN APPEAL TO CONGRESS BY THE CITIZENS OF ROCK ISLAND AND MOLINE, ILLINOIS, AND DAVENPORT, IOWA: IN FAVOR OF A NATIONAL ARMORY ON THE SITE OF FORT ARMSTRONG, ON THE ISLAND OF ROCK ISLAND, IN THE STATE OF ILLINOIS 5 (Rock Island, Ill., Daily Argus Book & Job Printing Office 1861) [hereinafter APPEAL TO CONGRESS].

250. *Id.*; *id.* at 5, app.

251. Letter from William Whiting, Solicitor of the War Dep't, to Edward Stanton, Sec'y of War, at 2-3 (Feb. 3, 1864), *in* S. MISC. DOC. NO. 38-74 (1864). The two men, George Davenport and D.B. Sears, were respectively the founder of and an early developer of the town of Rock Island. *See* BENTON MCADAMS, REBELS AT ROCK ISLAND: THE STORY OF A CIVIL WAR PRISON 16 (2000).

252. CONG. GLOBE, 38th Cong., 1st Sess. 1477-78 (1864).

253. *Id.* at 1478.

254. *Id.*

255. *Id.*

256. *Id.* For evaluation of this argument, see *infra* Part III.

In any case, Howard added, an aggrieved party had the right to appeal to the circuit courts and then to the Supreme Court, "so that I am not able to see any objection to the bill growing out of the suspicion of injustice being done to any private person."[257]

A few moments of debate began. There was confusion about whether Illinois had consented to the acquisition ("I do not know how that is," Howard answered).[258] There was confusion about whether Illinois's consent was relevant to the taking or only to the Enclaves Clause.[259] And there was confusion about the power to take: Senator Johnson argued that even without the Fifth Amendment, the eminent domain power was "an incident of sovereignty," and that the power had been exercised before, referring to the Lime Point taking,[260] though another senator correctly pointed out that those "proceedings were in a State court under a State law."[261] Johnson and Howard replied again, but before things could proceed much further, Senator Trumbull and Senator Foot, the presiding officer, intervened. It was apparent that the Rock Island bill was "to lead to discussion," but it was after 1:00 PM, and it was time for "the special order of the day" (an urgent military funding bill).[262]

If further discussion about the Rock Island bill ever came, though, it was not recorded in the pages of the *Globe*. Late in the morning three days later, Senator Howard pushed for a vote again, but Senator Fessenden objected that they did not have time: "Of course there will be debate on that. There was the other day," overriding Howard's claim that it would "be but a very short debate."[263] Three days later, the bill was considered again, and passed. But if there was a discussion, the *Globe* does not disclose it.[264] President Lincoln signed the bill on April 22, 1864, thus ushering in the first official authorization of federal eminent domain.[265] It is not clear whether the taking ever

257. CONG. GLOBE, 38th Cong., 1st Sess. 1478 (1864).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* (statement of Sen. Collamer). For discussion of *Gilmer v. Lime Point*, see *supra* notes 212-215 and accompanying text.

262. CONG. GLOBE, 38th Cong., 1st Sess. 1478-79 (1864).

263. *Id.* at 1522.

264. The *Globe* reports simply: "[T]he senate resumed the consideration of the bill (H.R. No. 206) in addition to an act for the establishment of certain arsenals. The amendments were ordered to be engrossed, and the bill to be read a third time. It was read the third time, and passed." *Id.* at 1617 (paragraph break omitted).

265. Act of Apr. 19, 1864, ch. 60, 13 Stat. 50; CONG. GLOBE, 38th Cong., 1st Sess. 1802 (1864).

happened.[266]

But things still remained unsettled after that, as the Senate turned back to railroads. The bulk of the debate centered on amendments to the Union Pacific Railroad bill, whose charter was (recall) limited to the territories.[267] Howard, once again, was the one to push for an extension of the power into the states. Senator Pomeroy objected that "under the decision that we made in the last Congress . . . Congress could not incorporate a company that should run one foot of road in a State except by the permission of the laws of that State or the consent of the Legislature of that State."[268] Harlan noted that the position had been "insisted here by some of the best lawyers in the country, two years ago," and that "a question that has been thus settled after long and protracted discussion in both branches of Congress ought to remain so," evidently not thinking that the Rock Island arsenal bill had unsettled the railroad question.[269]

Senator Howard insisted, as he had days before, that there was a general federal eminent domain power:

> I hold, and I think there can be no dissent from that principle, that the United States has the same power of eminent domain over the lands lying within a State for the purpose of constructing a railroad in order to carry out the objects of a corporation as is possessed by the State, and I have in my mind not the slightest difficulty as to the power of the Government to seize and to condemn the lands of private persons lying within a State for such a purpose.[270]

This time, however, there was dissent, and his amendment to extend the federal takings power into the states was defeated.[271] The final Union Pacific Bill did not alter the territorial limitation of the original legislation.[272]

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266. The following March, Secretary Stanton reported that the federal government had already secured the land in Rock Island, and that construction was "in progress." 1865 SEC'Y WAR ANNUAL REP. 6. While Stanton did not specify whether the land had been condemned or purchased, given that speed and the extensive appeals process provided in the condemnation bill, Act of Apr. 19, 1864 §§ 5, 7, 13 Stat. at 51-52, purchase may be more likely.

267. In 1864 there was some confusion about whether the original charter really had been limited to the territories, evidently because it was unclear exactly where the Platte River was. CONG. GLOBE, 38th Cong., 1st Sess. 2378-79 (1864).

268. *Id*. at 2377.

269. *Id*.

270. *Id*. at 2379.

271. *Id*. at 2379-80.

272. *See* Act of July 2, 1864, ch. 216, 13 Stat. 356.

There was another railroad bill before the Thirty-Eighth Congress, which dealt with a line from Lake Superior (through the states of Minnesota or Wisconsin) west to Puget Sound. The first draft of the bill apparently "involve[d] nothing more than a grant of lands,"[273] and steamed through without much recorded discussion.[274] At some point, though, the federal company did gain eminent domain powers.[275] In light of the fact that the company was to build a route through at least one state, this seems inconsistent with the treatment of the Union Railroad. It is possible, however, that eminent domain was needed only for the territorial portion of the route, since there were adequate land grants in the states. While the bill does not quite say this, the section dealing with eminent domain refers to adjudication by a "court of record in any of the *territories* in which the lands or premises to be taken lie."[276] The bill also required the company to "obtain the consent of the legislature of any state through which any portion of said railroad line may pass, previous to commencing the construction thereof," which may have been intended to cure the problem.[277] Or maybe, after Rock Island, nobody was being too careful.

On balance it is not clear whether either 1864 railroad bill authorized federal eminent domain in the states, but the Rock Island bill did, even if it is not quite clear why. Over the next few years, there were a few other sporadic authorizations of the power. For example, an 1866 bill authorized eminent domain for a federal railroad company to build a route from Missouri to the Pacific, though as with the Puget Sound bill, there were textual clues that the takings may have been targeted for the territories.[278] An 1867 bill authorized the Secretary of War to purchase or condemn land for national cemeteries,[279] and it may have been used at least once a few years later.[280] But the federal

273. CONG. GLOBE, 38th Cong., 1st Sess. 2664 (1864) (statement of Sen. James McDougall).

274. What little there is can be found at *id*. at 3290-91. *See also id*. at 3360, 3459, 3482 (noting, though not reporting, a conference with the House over amendments).

275. Act of July 2, 1864, ch. 217, § 7, 13 Stat. 365, 369-70.

276. *Id.* (emphasis added); *see also id*. (referring to "persons residing without the territory within which the lands to be taken lie").

277. *Id.* § 18; *accord* ROGERS, *supra* note 131, at 91.

278. Act of July 27, 1866, ch. 278, 14 Stat. 292.

279. Act of Feb. 22, 1867, ch. 61, § 5, 14 Stat. 399, 400. The bill was originally limited to the District and "the States lately in rebellion," CONG. GLOBE, 39th Cong., 2d Sess. 540 (1867), but was expanded nationwide without discussion of the constitutional question.

280. *See* Nat'l Cemetery at Grafton, 14 Op. Att'y Gen. 27 (1872) (noting that land was appraised by a district court, though the "appraisal seemed to the War Department exorbitant" and was under dispute).

power was not used consistently. In 1868, for example, Congress passed a bill for construction near rapids on the Mississippi River, and authorized federal officers to take land only under the existing state law procedures.[281] A few years later, the issue once again reached the courts, and this time they took a decidedly different view than they had in *Pollard's Lessee*.

F. The Growth of Modern Doctrine

The sporadic authorization of federal takings for an arsenal and for military cemeteries did not change the law by itself, of course. Even after those statutes, Congress still frequently relied on the old system.[282] But judicial decisions soon thereafter endorsed a federal eminent domain power.

One blow to the old system was the Michigan Supreme Court's 1871 decision in *Trombley v. Humphrey*. Writing for the court, Justice Cooley held that a state taking for a federal project was not a taking for a "public use" under that state's constitution.[283] This was the objection that had been made by the challengers to the Washington Aqueduct and the other projects—that a state can take private property only for the use of the state's own people, not for the government generally. Justice Cooley may have been motivated by a narrow construction of the public use doctrine—his writings on the subject have been celebrated by modern critics who favor a revival of limits on the public use doctrine[284]—but he had also endorsed federal eminent domain in a confusing passage in his famous treatise a few years earlier.[285]

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281. Act of Feb. 22, 1867, ch. 184, 15 Stat. 124 (1868). One of the bill's proponents explained that its purpose was "merely to enable the officers . . . to avail themselves of the benefit of the laws of Iowa and Illinois." CONG. GLOBE, 40th Cong., 2d Sess. 692 (1868) (statement of Rep. James Wilson).

282. In addition to the discussion *supra* Section II.E, see, for example, Act of Mar. 3, 1878, ch. 311, 17 Stat. 621; *Burt v. Merchants' Insurance Co.*, 106 Mass. 356, 358-59 (1871); *Orr v. Quimby*, 54 N.H. 590, 591 (1874); and *In re League Island*, 1 Brewster's Reports 524, 524-25 (Pa. Ct. Com. Pl. 1868).

283. People *ex rel.* Trombley v. Humphrey, 23 Mich. 471, 481 (1871).

284. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 513 n.2 (2005) (Thomas, J., dissenting); Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 789-91, 797-98 (Mich. 2004) (Weaver, J., concurring in part and dissenting in part); James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845, 857. *But see* Richard A. Epstein, *The Public Use, Public Trust & Public Benefit: Could Both Cooley &* Kelo *Be Wrong?*, 9 GREEN BAG 2d 125, 131 (2006) ("Cooley was wrong, I think, but principled.").

285. Justice Cooley declared that "eminent domain . . . itself, it would seem, must pertain to [the states], rather than to the government of the nation; and such has been the decision of the courts." THOMAS M. COOLEY, ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 525 (Boston, Little Brown

The result in *Trombley* is not inherently inconsistent with the original theory of federal eminent domain. The federal government was required to rely on the states to take, but the states did not have to cooperate. And if a state wanted to categorically refuse to take land for federal projects in its own constitution, that was a question of state law. To be sure, nearly every state had a public use requirement, and if every state had always followed the *Trombley* rule, the scheme of relying on states would not have worked. But *Trombley* was an unusual decision, and most states had not interpreted their constitutions in the same way.

The true creation of the federal eminent domain power came when the Supreme Court's decision in *Kohl* upheld a federal taking power for the first time. Yet the process leading to *Kohl* also reflects the ambiguity attending federal eminent domain in this period. While Congress had occasionally authorized eminent domain before *Kohl*, it had done so only recently and infrequently, and it did not actually do so (or need to do so) in *Kohl* itself. At the same time, once the Court manufactured the issue during litigation, the parties did not firmly resist it either. The federal eminent domain power had not yet become a firm part of national practice, yet understandings around it were rapidly changing.

The lack of statutory authorization can be discerned from the tangle of federal and state statutes in the case. In March 1872, Congress passed a statute "authoriz[ing] and direct[ing]" the Secretary of the Treasury "to purchase a central and suitable site in the city of Cincinnati, Ohio" for a federal building.[286] The bill also provided that no money could be spent for the purchase until Ohio consented to federal jurisdiction over the land. As usual, Congress did not grant any condemnation authority. Also as usual, the state did.

The first state statute in aid of the project, passed in April 1872, provided that the state would cede jurisdiction when "the United States shall have acquired the title to the said land or lands by purchase or grant, or by lawful

& Co. 1868) (citing Pollard's Lessee, 44 U.S. (3 How.) 212 (1845)). But he then went on to add that

> [s]o far, however, as it may be necessary to appropriate lands or other property for its own purposes . . . the general government may still exercise the right within the States, and for the same reasons on which the right rests in any case, namely, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be subject to be controlled or defeated by the want of consent of private parties, or of any other authority.

Id. at 526.

286. Act of Mar. 12, 1872, ch. 45, 17 Stat. 39, 39.

appropriation under the right of eminent domain" (without specifying who would authorize any eminent domain proceeding).[287] A few days later the state passed a general reform of its eminent domain procedures.[288] That June, Congress repeated the state's passive reference to eminent domain, appropriating money "for the purchase, at private sale, or by condemnation, of ground for" the new building.[289] The following February, in 1873, Ohio finally clearly provided the condemnation authority in a statute authorizing the United States to "acquire . . . land by appropriation" under the terms of its recently reformed general eminent domain statute, which required the United States to pay owners the adjudicated value of their parcels.[290]

In July 1873, the United States finally initiated the condemnation in federal court. In its application, the United States expressly relied on the *state* eminent domain power. The government represented that it "was authorized to acquire the land . . . by appropriation" by the "act of the general assembly of the State of Ohi[o]."[291] It mentioned the federal statutes as well, but never suggested that they were the source of the condemnation power.[292] The case thus began as an ordinary federal-state taking, where there was no need to invoke federal eminent domain.

There was a state-law wrinkle, to be sure—the Kohls owned a leasehold in the property, and somebody else owned the rest of the estate. Both of those property interests were put to trial in a single proceeding,[293] even though under Ohio law, "the owner or owners of each separate parcel shall be entitled to a separate trial, verdict and judgment."[294] The Kohls maintained that their leasehold and their landlord's reversion were "separate parcels" under the law, and that their trials had been illegally combined, "put[ting] these parties into antagonism with each other before the jury."[295] But as the United States dismissively suggested in its appellate brief, the Ohio statute did not grant separate trials "to every *interest* in each parcel."[296] And the Supreme Court

287. Act of Apr. 20, 1872, § 4, 1872 Ohio Laws 81, 82.

288. Act of Apr. 23, 1872, 1872 Ohio Laws 88.

289. Act of June 10, 1872, ch. 415, 17 Stat. 347, 353.

290. Act of Feb. 15, 1873, § 1, 1873 Ohio Laws 36, 36.

291. Transcript of Record at 1, Kohl v. United States, 91 U.S. 367 (1875) (No. 144).

292. *Id.* at 1-2.

293. *See* Brief for the Petitioner at 13, *Kohl*, 91 U.S. 367.

294. *Id.* at 13; *see* Act of June 1, 1872, 17 Stat. 522. The Ohio statute authorizing federal takings expressly incorporated these procedures. § 1, 1873 Ohio Laws 36, 36.

295. Brief for the Petitioner at 13, *supra* note 293.

296. Brief for the Respondent at 6, *Kohl*, 91 U.S. 367 (emphasis added).

agreed that the lease and reversion could be tried together under Ohio law.[297] So nothing would have stopped the condemnation from going forward in the traditional manner. Instead of resting on these state law grounds, however, the United States devoted the bulk of its argument to the claim that state law did not matter, because the federal government had its own eminent domain power and did not need the state's.[298]

This brings us to the second odd thing about the *Kohl* litigation: the Kohls did not actually contest the existence of a federal eminent domain power. Below, one lawyer had argued "that the government did not possess the right of eminent domain."[299] But E.W. Kitteredge, who represented the Kohls, focused on statutory arguments—the federal government had not complied with the Ohio law, and there was no federal statute that authorized federal eminent domain.

And Kitteredge had a very good point. The first federal statute did not mention condemnation at all. The second, which was an appropriations statute, did, but there was no reason to think that the money was intended for a federal condemnation rather than the usual state condemnation. As the Kohls' appellate brief put it:

> [I]n view of the uniform policy of the Government, when land was to be acquired by condemnation, to obtain it under the authority of the State Government, as the agent of the State in the exercise of its power of eminent domain, doubtless this mode of acquiring the property was in the contemplation of Congress.[300]

The statutory argument was good enough for Justice Field, who dissented. He, like the Kohls, "assum[ed] that the majority are correct . . . that the right of eminent domain within the States . . . belongs to the Federal government."[301] But, he argued, "the provision for the exercise of the right must first be made by legislation," and Congress had not done so.[302] It had not

297. *Kohl*, 91 U.S. at 377-78 (finding that the statute gives "all the owners of a parcel . . . a trial separate from . . . the owners of other parcels," and that "[i]t hath this extent; no more").

298. Brief for Appellee at 1-6, *Kohl*, 91 U.S. 367.

299. United States v. Inlots, 26 F. Cas. 482, 483 (S.D. Ohio 1873). Though it is not recorded that way in Westlaw, this was the decision on appeal in *Kohl*. *See* Transcript of Record at 16, *supra* note 291.

300. Brief for the Petitioner at 8, *supra* note 293.

301. *Kohl*, 91 U.S. at 378 (Field, J., dissenting).

302. *Id.*

vested the federal courts with jurisdiction over such claims,[303] and it had not given the Treasury Secretary the authority to condemn the land either.[304] (The jurisdictional and substantive points were intertwined; in finding jurisdiction, the majority had relied on the statutory "investment of the Secretary of the Treasury with power to obtain the land by condemnation."[305]) But it did not carry the day with the Court.

The opinion in *Kohl* was the product of strange circumstances. The constitutional question did not have to be decided. It was not fully joined by the parties, it was not invoked by Congress, and it was irrelevant because of the state statute. And the Court did not rely, as it might have, on the recent authorizations of eminent domain for the Rock Island arsenal or the Civil War cemeteries. Instead, it held that the uniform practice of the first seventy-five years had been mistaken, and in doing so made no reference to its prior statements in *Pollard's Lessee* or *Goodtitle*, where it had said exactly the opposite.[306]

G. Conclusion

The basic arc of this history should be striking. Congress's early practice was not to use federal eminent domain when it needed land for federal projects. The alternative path of relying on state takings began remarkably early, and with little to no criticism. The dissenters were late and relatively few. They began nearly thirty years after the Founding, and their arguments for the use of federal eminent domain repeatedly failed to carry the day. Even more than fifty years after the Founding, the Supreme Court still confirmed the absence of a federal eminent domain power.

To be sure, part of this history may reflect the actions of those motivated by politics or convenience rather than constitutional thought. For example, some might wonder whether the federal government relied on the state eminent

303. *Id.* at 378-79.

304. *Id.* at 379 ("Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation.").

305. *Id.* at 375 (majority opinion).

306. *Cf.* HENRY EDMUND MILLS, A TREATISE UPON THE LAW OF EMINENT DOMAIN 363 (St. Louis, F.H. Thomas 1879) (noting the inconsistency); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 833 n.10 (1989) (same). The lower court acknowledged *Pollard's Lessee* and its sequels, and distinguished them as limited to "general public uses," not the enumerated powers. United States v. Inlots, 26 F. Cas. 482, 486 (S.D. Ohio 1873) (citing COOLEY, *supra* note 285) ("We have not overlooked the decisions in 3, 9, and 13 Howard . . . referred to by counsel for the defense.").

domain power out of economic convenience rather than constitutional need. Recall that federal takings would have been governed by the Takings Clause, whereas some scholars have argued that state takings during this time period were frequently uncompensated.[307]

I have not surveyed all of the compensation paid in state takings for federal projects throughout this period, but I can provide several reasons to think that the economic hypothesis is overstated. For one thing, even though many states did not initially have takings clauses, compensation was often paid nonetheless.[308] And at least some early authorities thought that eminent domain inherently required compensation.[309] Moreover, federal projects continued to rely on state takings even later into the nineteenth century. This was after many states had adopted takings clauses,[310] and at least some states provided quite generous compensation.[311] And it was after the state takings were growing legally cumbersome, mired in complicated issues of state constitutional law.[312] Most importantly, though, the historical materials surveyed simply do not reveal any discussion of the federal fisc as a reason for avoiding federal eminent domain—they reveal constitutional objections.

I do not mean to understate the importance of practical and ideological considerations to the eminent domain arguments throughout this period. The constitutional arguments against federal eminent domain might have been abandoned much earlier if the resulting system had proved totally unworkable.

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307. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 63-66 (1977); Treanor, *supra* note 129, at 785 (noting uncompensated colonial takings).

308. *See* James W. Ely, Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 4-13 (1992). Indeed, Treanor acknowledges that "compensation was the *usual* practice" even if not "the inviolable rule," Treanor, *supra* note 129, at 788 n.28, and Horwitz acknowledges that "by 1820 . . . statutory provisions for compensation had become standard practice in every state except South Carolina," HORWITZ, *supra* note 307, at 64.

309. Gardner v. Trustees of Newburgh, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816) (Kent, Ch.) ("[P]rovision for compensation is an indispensable attendant . . . ."); J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71-81 (1930) (collecting sources).

310. Grant, *supra* note 309, at 70.

311. For example, compensation under the Maryland statute authorizing the Washington aqueduct apparently tended to be higher than the United States would have liked. *See* United States v. Great Falls Mfg. Co., 112 U.S. 645, 658 (1884) (noting a condemnation proceeding abandoned "perhaps [because] in the judgment of the officers of the United States, a fair assessment of damages could not be had in the mode prescribed by the Maryland statute"); *see also* WAYS, *supra* note 201, at 16 (noting that Maryland required a twelve-person jury to determine damages).

312. *See supra* Section II.D.

They also may well have endured for so long in part because they were consistent with the broader desires of lawmakers and judges. But that is a general truth about constitutional arguments, not a special charge against the constitutional arguments opposing federal eminent domain.

III. THE TAKINGS CLAUSE

> The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?
>
> —*Kohl v. United States*[313]

But what about the Fifth Amendment? It says that "private property" shall not "be taken for public use, without just compensation."[314] We all know that the Fifth Amendment was not intended to restrain the states.[315] It seems to follow that it was intended to restrain the federal government's eminent domain power, and hence that the federal government must have one in the first place.

This is the argument Senator Howard relied upon when urging the Rock Island arsenal statute, and it was one of the arguments made by the Court in *Kohl*.[316] It is still made today—by Grace, for example, who argues that "the only sensible reading of the clause" is "as an implicit recognition of federal eminent domain power."[317] Viewed in its original context, however, the

313. 91 U.S. 367, 372-73 (1875).

314. U.S. CONST. amend. V.

315. *See* Barron v. Mayor of Balt., 32 U.S. 243, 250-51 (1833) (holding that the Takings Clause is inapplicable to the states). To be sure, a sizable minority of respectable lawyers once thought otherwise. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 145-56 (1998) (discussing the "*Barron* contrarians").

316. *Kohl*, 91 U.S. at 372; CONG. GLOBE, 38th Cong., 1st Sess. 1478 (1864).

317. Grace, *supra* note 5, at 141; *see also, e.g.*, Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 525 (2009) (making the same argument). Currie eschews this argument. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 435 n.43 (1985) (discussing how this part of *Kohl* "[is] questionable in light of the ninth amendment"); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 327 (2005) ("[R]eaders should not infer from the language of the Fifth Amendment just-compensation clause that Congress enjoyed a general power of eminent

Takings Clause provides no support for a general federal power of eminent domain.

Kohl invoked the Takings Clause to support the eminent domain power "beyond what may justly be implied from the express grants,"[318] so this Part will proceed on the assumption that Parts I and II have been persuasive. The goal here is to show that if I am right that conventional enumerated-powers analysis did not justify the eminent domain power, then the Takings Clause did not add to it. Wherever the takings power was in 1789, the Bill of Rights left it where it found it in 1791.

A. District and Territories

Let us start out by supposing that the Takings Clause must have had some field of intended operation in 1791. That is, let us assume that the Takings Clause is evidence of some kind of federal eminent domain power. Even so, the enumerated power to take in the District and the territories could explain the Takings Clause.

To the modern eye, this may seem implausible—takings in the District and territories seem like a relatively minor issue, not the sort of thing that would have inspired one of the grand phrases in the Bill of Rights. But we know that rights in the District were invoked by George Mason, who had warned that without a Bill of Rights, Congress might bring sedition trials "within the ten miles square."[319] The issue is not hypothetical either—recall the fight over compensation when Congress authorized the Alexandria Turnpike in the District.

The power of eminent domain in the territories might have been important as well. Recall that in 1791, the United States already governed the vast Northwest Territory, which would later form part or all of six sizable states. It also governed territory ceded by Virginia that would later become the state of Tennessee, and it would soon acquire much vaster territorial holdings. The Clause's likely purpose should be evaluated in that light.[320]

domain. Rather, eminent-domain power, like all other powers, had to be deduced from the Constitution's earlier enumerations of governmental authority.").

318. *Kohl*, 91 U.S. at 372.

319. Mason, *supra* note 79, at 650.

320. I am assuming, as most then assumed, that the Takings Clause applied in such territories. Early on, Congress generally extended the Bill of Rights to the territories by statute, creating an ambiguity about whether statutory extension was required. *See* Christina Duffy Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 824-27 (2005).

The connection between the Takings Clause and the territories is not just one of magnitude. One of the few predecessors to the Federal Takings Clause was a similar clause in the Northwest Ordinance.[321] While the Northwest Ordinance's takings clause was worded somewhat differently, Ryan Williams has noted that the Ordinance, like Madison's proposal for the Fifth Amendment, "similarly bundled a law-of-the-land provision with protections for defendants in criminal cases and a prohibition on uncompensated takings of private property," and was "most likely" the "immediate inspiration" for the Takings Clause.[322] This makes sense. If the federal government's grant of eminent domain authority was mostly limited to the territories, it is not that surprising that the Bill of Rights would contain the same limitations that applied by statute in the vast majority of then-existing federal territory.

Finally, eminent domain in the District and the territories would have been an important issue to anybody anticipating federal emancipation of slaves. Some recent scholarship has suggested that protecting the economic position of slaveholders was a key motivation for the Takings Clause.[323] If so, this is especially consistent with the focus on the territories and the District. There were few serious proposals to emancipate slaves in the *states* before the Civil War. But the territories were very much up for grabs, and slavery in the District of Columbia was a question of recurring controversy. Indeed, when Congress did emancipate all of the slaves in the District, the Takings Clause forced it to appropriate a million dollars to do it.[324]

B. The Purpose of the Clause

There is scant specific evidence about the purpose of the Takings Clause, but what little exists is consistent with a very limited federal power of eminent domain. Nearly all of the Bill of Rights was promulgated in response to requests from state legislatures or groups of Anti-Federalists. Amendment

321. It read: "[S]hould the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be paid for the same." Northwest Ordinance of 1787, *reprinted in* U.S.C. at lv, lvi; *see also* Treanor, *supra* note 129, at 831-34 (discussing the origin and possible purpose of this provision).

322. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 446 n.156 (2010).

323. *See* Stephen Stohler, Slavery and the Political Origins of the Fifth Amendment's Takings Clause (Oct. 6, 2010) (unpublished manuscript), http://www.sas.upenn.edu/dcc/workshops/documents/StohlerDCC.pdf.

324. Compensated Emancipation Act, ch. 54, § 4, 12 Stat. 376, 377 (1862).

proponents apparently feared that the new federal government might abuse some of its granted powers, and requested amendments to protect against them. The Takings Clause, however, is the one exception. It is the one clause in the entire Bill of Rights that no state or Anti-Federalist group requested.[325]

Then-Representative James Madison was the one to sift through the many proposed amendments and propose a slate of them. (A few of his proposed amendments were not approved by Congress, and a few that were approved by Congress were not ratified, but the Amendments that became the Bill of Rights strongly resemble the slate that he originally proposed.) When he put forth his draft of what became the Fifth Amendment, the Takings Clause was there, tacked on to the end of some criminal procedure rights and the Due Process Clause.[326]

Madison did not specifically discuss the Takings Clause at all. A committee later made minor changes to the Clause's wording (also without recorded explanation). That version passed the House and Senate, and still there was almost no recorded discussion about the Clause's purpose.[327]

There were a few historical precedents for the Clause. As noted above, the Northwest Ordinance contained a just-compensation requirement. Two colonial charters (Massachusetts and the Carolinas[328]) and two state constitutions (Massachusetts and Vermont[329]) had a just-compensation

325. AMAR, *supra* note 315, at 78 ("[U]nlike every other clause in the First Congress's proposed Bill, the just-compensation restriction was not put forth in any form by any of the state ratifying conventions."). Madison also proposed an amendment granting additional rights against states which (naturally) was not requested by the states, but that proposal did not make it out of Congress. *Id*. at 22, 78.

326. It read,

> No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* JAMES MADISON, WRITINGS 437, 442-43 (Jack N. Rakove ed., 1999).

327. Treanor, *supra* note 129, at 835-36.

328. Fundamental Constitutions of Carolina, art. XLIV (1669), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2772 (Francis Newton Thorpe ed., 1909); Massachusetts Body of Liberties § 8 (1641), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 148 (Richard L. Perry ed., 1952).

329. MASS. CONST. of 1780, art. X; VT. DECLARATION OF RIGHTS of 1777, art. II.

requirement. Other states sometimes provided just compensation by custom or due process.[330] One or more of those clauses may well have been the specific inspiration for the federal amendment.[331]

The only other specific clue about the purpose of the Clause is a later comment by Henry St. George Tucker, who opined that it was "probably" designed to provide compensation for the taking of personal property by the military.[332] Maybe Tucker was right, maybe he was wrong; we will get to that later.[333] But what is most striking is the thinness of the historical record. Indeed, the thinness of the record may provide additional reason to be skeptical about a general federal takings power. After all, the states requested a *lot* of potential amendments, including plenty that were never proposed for ratification. They requested, for example, "the liberty to fowl and hunt in seasonable times";[334] a rule forbidding public offices from being hereditary;[335] and a rule clarifying that states had the right to create congressional districts.[336] If there was a widespread belief that the federal government had a broad power to take land, it is at least somewhat strange that no state or Anti-Federalist group suggested that it would be wise to limit that power.

Another possible purpose of the Clause derives from Madison's belief in the educative power of constitutional text. Madison said when proposing the Bill of Rights that even "paper barriers" had "a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community."[337] In other words, he thought that entrenching rights in the Constitution would help to reinforce their

330. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1759-62 (2012).

331. AMAR, *supra* note 315, at 79; Treanor, *supra* note 129, at 825-31.

332. 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. at 305-06 (Phila., Birch & Small 1803). For discussions of this claim, see AMAR, *supra* note 315, at 79-80; DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 11-13 (2002); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1122-23 (1992); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 58 (1964); and Treanor, *supra* note 129, at 835-36.

333. *See infra* Section III.D (considering two justifications for Tucker's claim).

334. THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA TO THEIR CONSTITUENTS (Dec. 18, 1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 94, at 13, 19.

335. VIRGINIA CONVENTION AMENDMENTS (1788), *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 94, at 199, 201.

336. *Recommendatory Amendments*, POUGHKEEPSIE COUNTRY J., Aug. 12, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 94, at 301, 305.

337. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* MADISON, *supra* note 326, at 437, 446-47.

importance in the public mind.[338] William Treanor has suggested that the Takings Clause in particular had an educative aspect: Madison may have "trusted that the educative aspect of the clause" would help to limit *state* incursions on property rights, even though the Clause did not formally apply to the states.[339] This, too, might explain why Madison proposed a Takings Clause even in the absence of a broad takings power.

C. The Ninth Amendment

Suppose that a reader is not fully convinced by the possibility of takings in the District and the territories, nor by the origins of the Takings Clause, and continues to suspect that the Clause augurs a broader federal power. Another element of the Bill of Rights should give us further reason not to use the Takings Clause as a justification for a federal power: the interpretive principles underlying the Ninth Amendment.

One of the chief objections to including a bill of rights in the original Constitution was that it would be dangerous. Saying "the Federal government cannot do *x*" can create an inference that it can do everything up to the limit of *x*. Similarly, saying "the Federal government cannot do *x* if *y*" might well cause sensible readers to infer that it *can* do *x* so long as *y* is not true. That is precisely the form the Takings Clause takes (no taking without compensation), and that is precisely the inference that *Kohl* and its supporters make (takings with compensation are authorized).

Thus, Hamilton warned that a bill of rights "would contain various exceptions to powers not granted; and, on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do?" He went on: "They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given . . . ."[340] Similarly, James Wilson cautioned that if rights were enumerated, "everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied

338. For more on this aspect of Madison's thought, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 335-36 (1996); and Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 255-56 (1990).

339. Treanor, *supra* note 129, at 843 n.308.

340. THE FEDERALIST NO. 84, *supra* note 45, at 445-46 (Alexander Hamilton).

power into the scale of the government."[341]

In 1791, when Congress decided to propose a bill of rights nonetheless, the Ninth Amendment was designed to answer this objection. James Madison acknowledged that "one of the most plausible arguments [he had] ever heard urged against the admission of a bill of rights," was that it would imply "that those rights which were not singled out, were intended to be assigned into the hands of the general government."[342] But, he went on, "it may be guarded against" by something like the Ninth Amendment.[343] Those who use the compensation right as legal support for a federal takings power are doing precisely what Hamilton feared, and what the Ninth Amendment was designed to forbid.

Let's see how the Ninth Amendment accomplishes this. *Kohl* improperly used the enumeration of a right to justify the inference of a power. Madison's original draft of the Ninth Amendment had explicitly referred to government power, stating that "[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, *shall not be so construed . . . as to enlarge the powers* delegated by the constitution."[344]

This language was ultimately removed, however, and the ratified text instead says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[345] But when the changed phrasing was pointed out during the Virginia ratification debates, Madison explained that the final text carried the same meaning: "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended."[346] The Bill of Rights

341. The Pennsylvania Convention (Nov. 28, 1787), *in* 2 DOCUMENTARY HISTORY, *supra* note 94, at 387, 388. On the importance of Hamilton's and Wilson's statements, and for other examples, see Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1248-54 (1990).

342. Madison, *supra* note 337, at 448-49.

343. *Id*. at 449.

344. *Id*. at 443 (emphasis added).

345. U.S. CONST. amend. IX.

346. Letter from James Madison to George Washington (Dec. 5, 1789), *in* 12 THE PAPERS OF JAMES MADISON (Charles F. Hobson & Robert A. Rutland eds., 1979). For more background and support, see KURT LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 55-59 (2009); and McAffee, *supra* note 341, at 1287-93. *But see* DANIEL FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 43, 205 (2007) (arguing that the omission changed the Amendment's meaning); Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty*, 60 STAN. L. REV. 937,

and the limited enumeration of powers were effectively two sides of the same coin.[347] Indeed, putting aside the earlier draft of the Amendment, one can state *Kohl*'s error in terms of rights instead: *Kohl* used the enumeration of the right to compensation to deny the distinct right not to have property (in a state) taken in the first place.

Madison's draft of the Ninth Amendment suggested that some rights were enumerated "merely for greater caution."[348] If that is true of the Takings Clause, Madison was prophetic. Even if Madison thought there was no eminent domain power, it is possible that he foresaw that others might disagree.[349] Not much later, Madison saw a power to incorporate a bank recognized over his objections. Similarly, the Supreme Court has now recognized a federal takings power, and the Takings Clause is the only thing that really restrains it.

D. Other Possible Roles for the Takings Clause

It is possible that there are other ways in which the federal government might have taken property outside of the eminent domain power. Both of these possibilities are speculative, but there are two potential additional contexts in which the federal government may have had the power to take some property, either of which might explain Tucker's comment about the taking of "supplies for the army."[350]

One possibility is that the government may confiscate *personal* property, even if not real property. Land has long been viewed as something special. William Stoebuck reports that the King had many prerogative powers to invade property rights, but that the "[o]ne thing the king could never do under his prerogative powers was to take a possessory estate in land."[351] Apparently

940-67 (2008) (arguing that the Ninth Amendment also authorizes judicial protection of unenumerated rights).

347. For further support for Madison's claim, see AMAR, *supra* note 315, at 123-24; McAffee, *supra* note 341, at 1225, 1238-48; and Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 513 (2011) ("[T]o the Founding generation, the two concepts were closely linked, as a denial of power to one body was often viewed as equivalent to a grant of a right to those against whom such power might otherwise have been exercised.").

348. Madison, *supra* note 337, at 443.

349. *See* Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1650-51 (2009) (noting fears that structural protection for rights would be inadequate).

350. TUCKER, *supra* note 332, at 305.

351. Stoebuck, *supra* note 19, at 564.

this was part of the key difference between "prerogative power" (which was "necessary and proper" to the King's other granted powers) and "eminent domain" (which was not).[352] Similarly, Christopher Tiedeman's nineteenth-century treatise suggested that the government's claim to eminent domain over land was different than its claim over personal property,[353] and land retains a special character even today.[354] Under this view, at least some confiscations of personal property might well have been "incidental" to genuinely enumerated powers, even if the eminent domain power to seize *real* property was not.[355]

An alternative possibility—also consistent with Tucker's theory of the Takings Clause—is that *wartime* confiscations were seen as separate from the eminent domain power. Courts and others sometimes suggested that the laws of war were an alternative body of law that applied in place of normal constitutional principles in the appropriate theater.[356] Some historians have described the power of military confiscation as a "belligerent right," entirely distinct from the government's normal "sovereign capacity," where it is limited to its enumerated powers.[357] A few years before *Kohl*, the Court upheld the temporary commandeering (subject to compensation) of three steamboats for

352. *Id*. at 563, 564.

353. CHRISTOPHER G. TIEDEMAN, TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 370-72 (Hein Online 2001) (1886); *see also supra* note 227 and accompanying text (discussing a similar distinction made by Senator Davis).

354. *See, e.g.*, Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1353-54 (1993); Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1143 (1996) ("There is just something about land that makes you think that when you own it, it is really, really yours."). *But see* Eduardo Moisés Peñalver, *Is Land Special?*, 31 ECOLOGY L.Q. 227 (2004) (suggesting not).

355. This view might also explain Chief Justice Jay's opinion in *Jones v. Walker*, which concluded that the Confederation Congress had the power to cancel foreign debt claims as part of a peace treaty, invoking "the right of eminent domain" that "accompanies the right of making peace." 13 F. Cas. 1059, 1066-67 (C.C.D. Va. 1793) (Jay, Circuit J.). Of course, Chief Justice Jay's opinion might also be explained in other ways: (1) Jay thought the treaty was part of the war, *id*. at 1062; (2) it concerned the Articles of Confederation, so it did not directly speak to enumerated powers under the Constitution; and (3) to the extent the cancellation had a physical location, it was probably not inside of a state, *see Ware v. Hylton*, 3 U.S. 199, 220 (1796) (argument of counsel). For what it is worth, the opinion was also incredibly obscure, and "first appeared in print in 1860, sixty-seven years after being issued." David A. Schnitzer, Note, *Into Justice Jackson's Twilight: A Constitutional and Historical Analysis of Treaty Termination*, 101 GEO. L.J. 243, 258 n.83 (2012). There is no evidence of its being cited during the pre-*Kohl* period.

356. *See* Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1846-47 (2010).

357. STEPHEN C. NEFF, JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR 4-5, 19-20, 113 (2010).

use during the war effort, relying explicitly on the exceptional nature of war: "[I]t is the emergency . . . that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified."[358] In contrast, when wartime confiscation was upheld under the Confederate Constitution, the Supreme Court of Georgia upheld the power as a "necessary implication" of the enumerated powers, a much more conventional rationale.[359]

It would take further historical and conceptual analysis into the realty/personalty distinction and the nature of the war powers to see exactly how these might have been seen as separate from Congress's general lack of an eminent domain power. Or perhaps an exception arose at the *intersection* of these two—i.e., the government could confiscate only personal property under martial law. But to the extent that either or both is true, they might provide a further field of operation for Madison's theory of the Takings Clause—and to the extent that either one *might* have been true, they would have provided some reason to adopt the Takings Clause.

IV. CONSTITUTIONAL STRUCTURE

> Such an authority is essential to its independent existence and perpetuity. . . . The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.
>
> —*Kohl v. United States*[360]

Aside from the Necessary and Proper Clause and the Takings Clause, *Kohl* offered a third argument for a federal eminent domain power—that it was "a right belonging to a sovereignty" that was inherent and need not be enumerated at all.[361] This is subtly different from the implicit power theory; under the inherent power theory, eminent domain was not linked to *any* granted power. The inherent powers rationale was repeated in many subsequent cases, which said that eminent domain "is essential to the

358. United States v. Russell, 80 U.S. 623, 628 (1871); *see also* Mitchell v. Harmony, 54 U.S. 115, 134 (1851) (describing, in dicta, military impressment of property in "emergency" situations in the absence of "civil authority").

359. Cox v. Cummings, 33 Ga. 549, 553-54 (1863). The court also referred to the inherent authority theory, discussed *infra* Part IV. *Cox*, 33 Ga. at 554 ("This is nothing more nor less than the law of self-preservation, applied to nations.").

360. 91 U.S. 367, 371-72 (1875).

361. *Id.* at 373-74.

independent existence and perpetuity of the United States"[362] and "requires no constitutional recognition."[363] These arguments mark the greatest departure from the original constitutional scheme.

A. Inherent Power

The idea of inherent power is at odds with the basic idea of enumeration. The Constitution contains a list of powers, and while several of the powers are open-ended, none provides a reason to think the list is not complete. Indeed, Article I says that the legislature has the powers "herein granted."[364] Articles II and III, by contrast, just grant the executive and judiciary "[t]he executive power" and "[t]he judicial power" without that additional limitation.[365] There may be some basis for thinking that those branches have powers beyond those enumerated,[366] but there is certainly no indication in the text that Congress does.

Finally, the Tenth Amendment repeats that "[t]he powers not delegated to the United States by the Constitution" are "reserved to the States respectively, or to the people."[367] The Tenth Amendment has often been derided as a truism, but that is so only if the inherent powers doctrine is seen to be false. Inherent federal power is also at odds with the great powers doctrine. The insight of the latter doctrine is that a power's importance does not imply that it automatically belongs to Congress. It is thus unsurprising that several seemingly inherent powers, like war and taxation, are enumerated.

One can certainly imagine unenumerated powers that do seem like they must belong to the government. But that does not imply that the power must belong to the federal government (i.e., the states *collectively*) rather than to the "States *respectively*."[368] The power to prosecute ordinary violent crime or to regulate intestate descent certainly seem like inherent government powers, but we have gotten by just fine by placing those powers in the states rather than

362. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 656 (1890).

363. United States v. Jones, 109 U.S. 513, 518 (1883).

364. U.S. CONST. art. I, § 1.

365. *Id.* art. II, § 1; *id.* art. III, § 1.

366. *See, e.g.*, Alexander Hamilton, *Pacificus No. 1*, GAZETTE OF THE UNITED STATES (Phila.) (June 29, 1793), *in* 15 PAPERS OF ALEXANDER HAMILTON 33, 39 (Harold C. Syrett ed., 1969) (arguing for inherent presidential authority by relying on the absence of "herein granted" from Article II).

367. U.S. CONST. amend. X.

368. *Id.* (emphasis added).

the federal government.

The inherent power argument is particularly uncompelling in the case of eminent domain. As for the assertion that eminent domain is "essential," even *Kohl* acknowledged that the government can choose to proceed without it, and restrict or eliminate it by law.[369] And, in any case, the question should not be whether the power is essential in the abstract. The question is whether it is essential that the power reside specifically in the federal government. The uniform early practice strongly suggests that it is not essentially federal.

Kohl's invocation of this notion of inherent powers (and its expansion in later cases) has very little support in the text, structure, or early history of the Constitution itself. It is instead a creature of a late-nineteenth- and early-twentieth-century jurisprudential trend. As Sarah Cleveland has chronicled, "In the period between 1886 and 1903, the Supreme Court embraced an inherent powers theory to uphold broad federal authority in a series of cases over Indians, aliens, and territories."[370] Cleveland's fine article, however, does not do full justice to the spread of the inherent authority doctrine. She argues that "[w]ithin the boundaries of the organized states, and with respect to full-fledged citizens, constitutional constraints of federalism, separation of powers, and individual rights were fully operative."[371] Indeed, she claims that in those areas the Court was "focused on enforcing a formalistic vision of the federal government and strictly applied concepts of federalism and separation of powers to constrain national authority."[372]

In fact, some of the Court's domestic cases from the era—cases "within the boundaries of the organized states, and with respect to full-fledged citizens"—bear the marks of the inherent powers doctrine as well. The eminent domain cases are the most significant examples. Similar language appears in the 1870 opinion in the *Legal Tender Cases*,[373] written (like the opinion in *Kohl*) by Justice Strong. Congress's power to create paper money that is legal tender is arguably grounded in several of its enumerated powers. Some have suggested that it is part of the power to "coin money," because those words have not always been limited to metallic currency.[374] Others suggested that it was

369. Kohl v. United States, 91 U.S. 367, 374-75 (1875).

370. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 250 (2002).

371. *Id.*

372. *Id.* at 251.

373. 79 U.S. (12 Wall.) 457 (1870).

374. Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J. L. & PUB. POL'Y 1017, 1061-79 (2008).

necessary and proper (assuming that it is not a great power) to borrowing money,[375] or to raising and maintaining an army and navy.[376] When the Court upheld the constitutionality of paper tender, it endorsed some of these theories. But it also declared that even without an enumerated power, federal paper money would be constitutional: "[I]n the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted."[377]

The era in which *Kohl* arose helps to explain a little bit about how the Court went astray. But that explanation does not necessarily provide reason to retain it. Even as federal power has grown far beyond what it was understood to be in the nineteenth century, legal scholars are increasingly skeptical of the Court's assertions of inherent federal authority,[378] and with some justification. Theoretically, one can subscribe to a view of "inherent" power that is still very limited in scope. But in practice, the inherent powers doctrine has quickly spread from one area to another, and once the constitutional text and history are surpassed, it is hard to keep the doctrine anchored. To say that federal power is inherent, rather than simply vast, is thus perilously close to saying that it need not be justified in traditional constitutional terms at all.

The recognition of this kind of spreading inherent power has effects throughout the constitutional system. Arguments for inherent power can slide toward arguments for unlimited power. Once a court has concluded that the enumerated powers do not limit Congress, it is easy enough for it to conclude that individual rights do not limit it either.[379] What can be done to structural norms can be done to liberty norms.

Moreover, even for those who believe that politics, not judicial review, is the primary safeguard of federalism, a Court-sanctioned inherent powers doctrine ought to be problematic. These scholars argue that the courts should defer to the political branches' views about the constitutional authority for

375. Currie, *supra* note 240, at 1184-85.

376. *Id*. at 1181-82.

377. 79 U.S. (12 Wall.) at 535; *see also* NEFF, *supra* note 357, at 51 (noting that the Court "emphasized the legal-tender power as an inherent attribute of sovereignty" and connecting it to a similar doctrine in foreign affairs).

378. *E.g.*, CURRIE, *supra* note 317, at 432-34; Cleveland, *supra* note 370, at 277-84.

379. Cleveland, *supra* note 370, at 67-68 (describing this progression in Indian law); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 310 n.118 (2008) (suggesting the same relationship in immigration law).

federal action.[380] But by abandoning the very idea of limited congressional authority, the Court is not just *deferring* to congressional judgment that a given law is within its constitutional powers. It is suggesting that the constitutional limits do not matter at all. In other words, there is nothing left for political safeguards to safeguard.

Finally, even if some more limited version of the inherent powers doctrine is to be maintained, it is far from clear that eminent domain should be part of it. The main places where the Court has sometimes found inherent federal authority have something important in common—they are areas where the Constitution disables state power to some degree. For example, courts have found that states have limited authority to regulate immigration or Indian tribes.[381] Article I, Section 10 prevents states from creating paper money, or from keeping troops or waging war without congressional consent.[382] But as we have seen, federal law did not prevent states from exercising eminent domain where necessary for federal projects—the norm was cooperation, not exclusivity.

B. Sovereignty

A different, more limited, way of putting the inherent power argument might be to say that there are *a few specific powers* that are traditionally considered "incidental" for all sovereign governments. Gary Lawson and David Kopel, for example, concede that the "inherent rights" argument that "the power did not need to be traced to any particular constitutional source" is "inconsistent with first principles of the Federal Constitution."[383] At the same time, they argue:

> The 1876-1883 cases suggesting an inherent federal power of eminent domain were, however, correct in one limited respect . . . : eminent domain has always been a traditional aspect of sovereign power. Indeed, one might fairly say that, as "a right belonging to a sovereignty," eminent domain has been an *incident* of sovereign power

380. *E.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 287-93 (2000).

381. Cleveland, *supra* note 370, at 61-62, 106-08.

382. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts."); *id.* cl. 3 ("No State shall, without the Consent of Congress . . . keep Troops . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

383. Lawson & Kopel, *supra* note 5, at 281.

> by custom. That alone would not necessarily confer it on a government of limited and enumerated powers (since agency instruments, such as constitutions, can always exclude incidental powers altogether or limit them more strictly than the common law baseline), but it does provide good reason to construe the Necessary and Proper Clause to include a power so closely and intimately tied to the very nature of sovereignty.[384]

It is true that there are some rules of sovereignty that seemed to adhere in both federal and state governments without being expressly stated. For example, both the federal and state governments were widely thought to have sovereign immunity, whatever its scope may be.[385] The rule against legislative entrenchment (i.e., the rule that the current legislature has a sovereignty that the past legislature cannot give away) might be another example of such a rule.

But inherent *powers* present a different problem, in light of the explicit decision to enumerate and thus limit the powers of the federal government. More importantly, it is simply not the case that eminent domain has always "been an *incident* of sovereign power by custom."[386] For a very long time after the Founding, the specific custom in the United States was to the contrary.

These kinds of conceptual arguments from sovereignty are particularly slippery in the context of the federal system. While it is certainly true that both the federal and state governments can be seen as "dual sovereigns" in some respects, in another sense sovereignty in the federal system is *divided* between two partial sovereigns. To determine whether a given power belongs to one or both of the sovereign governments in the United States requires a more particular inquiry into how the Constitution treats the power. If the great powers theory and subsequent history are convincing, then the sovereignty of the federal government provides no reason to be unconvinced.

C. Separate Spheres

The Court's opinion in *Kohl* did address the then-established tradition of federal reliance on state takings, although it did not do justice to the tradition's depth. Rather, the Court suggested that the tradition was actually unconstitutional.

The Court conceded that the states had "[i]n some instances" condemned land for federal use, but declared that Justice Cooley's opinion in *Trombley v.*

384. *Id.* at 281-82 (quoting Kohl v. United States, 91 U.S. 367, 373-74 (1875)).

385. Nelson, *supra* note 67, at 1584 & n.116 (federal), 1608 & n.235 (state).

386. Lawson & Kopel, *supra* note 5, at 282.

Humphrey, invalidating such takings, was "founded . . . upon better reason."[387] According to the Court, "[t]he proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another."[388] The Court described a vision of "separate sovereignties" or "spheres," under which neither the federal nor state government could ever be "under the necessity of applying to the other for permission to exercise its lawful powers."[389] Rather, any federal power "must be complete in itself. . . . The consent of a State can never be a condition precedent to its enjoyment."[390]

As a categorical description of the federal structure, this isn't true. Under the text of the Constitution, both the federal and state governments must sometimes "apply . . . to the other for permission to exercise [their] lawful powers."[391] States must apply for federal permission to exercise a range of military and commercial powers.[392] Similarly, the Enclaves Clause requires the federal government to apply for state permission before altering the state's boarders or taking exclusive jurisdiction over a federal enclave.[393] It is not unthinkable that the federal government might also have to seek state permission for another aspect of federal enclave construction.

In a sense, the Court's claim is inconsistent with *any* limitations on the means available under the Necessary and Proper Clause. If there are any potential means for executing a power that are not provided to the federal government, it follows that the federal government must "apply" to the states for help if it wishes to execute it in that way. And as we have seen, there is much evidence suggesting that at least a few means were not delegated to Congress.

To be sure, there are some other judicial decisions from that time that endorse such a "separate spheres" approach to federalism, suggesting that neither federal nor state government ever has a role in checking the power of the other. *Kohl* relied, for example, on *Ableman v. Booth*, an opinion by Chief Justice Taney holding that it is unconstitutional for state officers to issue writs

387. *Kohl*, 91 U.S. at 373 (citing People *ex rel.* Trombley v. Humphrey, 23 Mich. 471, 472 (1871)); *see supra* notes 283-285 and accompanying text.

388. *Kohl*, 91 U.S. at 373-74.

389. *Id.* at 372.

390. *Id.* at 374.

391. *Id.* at 372.

392. U.S. CONST. art. I, § 10.

393. *Id.* § 8, cl. 17; *id.* art. IV.

of habeas corpus to those unlawfully held by federal authorities.[394] Another contemporary case employing the same logic was *Kentucky v. Dennison*, which had held that federal courts could not enforce the Constitution's Extradition Clause against a state officer, under similar reasoning about separate sovereignties.[395]

But history has not treated this version of the separate spheres theory well. Scholars now regard the reasoning of *Ableman* (and its sequel, *Tarble's Case*[396]) as reflecting a deep misunderstanding of the Constitution.[397] And when the Court overruled *Kentucky v. Dennison* in 1987, it unanimously condemned it as "the product of another time."[398] That characterization was accurate, but it is also ironic. The separate spheres model does date to "another time," but that time is not really the Founding—it is the period several generations after the Founding, when decisions like *Kohl* began to construct a new regime of national power.[399]

V. IMPLICATIONS AND FURTHER DIRECTIONS

History is ultimately only worth what we decide it to be. So rethinking the foundations of the federal power of eminent domain does not automatically carry with it any one particular set of normative implications. As H. Jefferson Powell has put it, "history itself will not prove anything nonhistorical" and "never obviates the necessity of choice."[400]

This makes it difficult to provide one set of normative implications for all

394. Ableman v. Booth, 62 U.S. (21 How.) 506, 514-17 (1859).

395. 65 U.S. (24 How.) 66, 106-08 (1860), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987).

396. 80 U.S. (13 Wall.) 397, 411-12 (1871).

397. *See, e.g.*, Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 265 (2005) ("There is no shortage of scholars who reject *Tarble's Case* or who seek to cabin it."); *id.* at 265-68 (citing sources); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2567 (1998) ("I would hesitate to make a constitutional argument dependent on the continuing force of a constitutional reading of [*Tarble's Case*]."). Many argue that the result in *Tarble's Case* can be justified on statutory grounds, though *Ableman* was decided before the Habeas Corpus Act of 1867, and hence may be harder to justify. *See* Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 279 (2008).

398. *Branstad*, 483 U.S. at 230.

399. For further discussion of separate spheres sovereignty as a post-Civil War construction, see DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT 31-40 (Beard Books 2006) (1975).

400. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662, 691 (1987).

readers. The implications of the historical recovery will depend in part on the interpretive framework one brings to it. A full-blown defense of one's interpretive framework, or an exploration of each of the competing frameworks, would be a separate substantial project in itself.

Nonetheless, I think it important to stress several ways in which the inquiry is likely relevant under some major interpretive theories, and perhaps to understanding some modern disputes. Most transparently, the history should be of great importance to any originalist understanding of Congress's eminent domain power—although there remain a series of questions about vagueness, constitutional change, reliance, and so on, which I will discuss but not try to definitively resolve. That goes as well for those many interpreters who think original meaning is relevant but nondispositive.[401] Additionally, however, the history may illuminate some broader interpretive questions about federalism and Congress's enumerated powers. This, too, is partly originalist. But since current federalism doctrine relies in part on original history—such as in construing the Necessary and Proper Clause—even nonoriginalists may feel more compelled to give some heed to the history.

A. Interpretive Problems

The Framing-era understanding and early history of eminent domain are relevant to forms of originalist interpretation. Under these theories, the Constitution's terms, and thus the scope of its grants of authority, are understood with the scope they had when originally enacted. And while originalists subdivide on questions like the comparative importance of original intent versus original meaning, the inquiry does not seem to be that different in this context. The Necessary and Proper Clause *meant* that many powers, but not every power, were implied, but the details of this meaning are apparent from some of the specific examples of powers that were thought to be included and excluded. As I will discuss below, the relative indeterminacy of the Clause and the idea of great powers it incorporated lend themselves to a historical inquiry focused on concrete practices.

1. Vagueness and Liquidation

The idea of great powers potentially helps us to understand a great deal

401. See the examples cited *supra* notes 7-8. As I've put it before, for those who think originalism relevant but nondispositive, "methodological objections should go to weight, not admissibility." William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 305 (2011).

about the limitations of the Necessary and Proper Clause and how sensible people could have thought eminent domain to lie outside the federal government's powers under the Clause. At the same time, it is hard to get a clear sense of the precise boundaries of the idea. Even the terminology was fluid. Madison referred to "great and important" powers; Marshall referred to "great substantive and independent" powers. Many others spoke in terms of "incidental" powers as the opposite of great ones. These ideas were employed to argue that a given power was or was not beyond the scope of the Necessary and Proper Clause, but it is hard to find a crisp statement of the principle beyond the general idea that more important powers are less likely to have been left to implication.

There are reasons to believe that eminent domain, specifically, was treated as a great power. But once one tries to look at the issue abstractly, it is hard to explain why certain powers were thought to be great and others were not. Why is creating a corporation not a great power, exactly? In *McCulloch*, Marshall said that it was because "[t]he power of creating a corporation is never used for its own sake, but for the purpose of effecting something else."[402] But the same could be said about the tax power, which Marshall conceded—in the same paragraph—to be a great power, suggesting that there is more to the distinction.

Or to take another example, why isn't imposing criminal punishment a great power? After all, the Constitution expressly enumerates Congress's ability to punish a few crimes—federal counterfeiting, offenses on the high seas or against the law of nations, and treason[403]—but it does not explicitly give any other authority to criminally punish. And if the goal is just to look at the magnitude of the power in some abstract sense, isn't being subject to criminal punishment (including death, as many crimes were then punished) a "great" consequence? Indeed, Thomas Jefferson made this argument as one of his contentions that the Sedition Act was unconstitutional,[404] though his view seems to have been an outlier.

This is a fair criticism, and potentially a serious problem for those who wish to make use of the doctrine.[405] One of the best criticisms of the existing

402. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819).

403. U.S. CONST. art. I, § 8, cl. 6, 10; *id.* art. III, § 3, cl. 2.

404. Kentucky Resolutions of 1798 and 1799, *supra* note 31, at 540.

405. For more criticism along these lines, see *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2627-28 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); and Andrew Koppelman, *"Necessary," "Proper," and Health Care Reform*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS (Nathaniel Persily et al. eds., forthcoming 2013) (manuscript at 8-12),

work in this area is that we do not have anything approaching a clear test for deciding whether each particular unenumerated power is incidental or great or somewhere in between. But this does not mean that we are entirely at sea, for the "great powers" idea remains useful in two distinct respects.

First, it provides a *framework*—or at the very least, a *vocabulary*—for articulating a limiting principle for the Necessary and Proper Clause. Whatever one thinks about some of the specific examples discussed throughout this Article, many people can imagine some laws genuinely designed to implement Congress's powers that nonetheless seem deeply inconsistent with the structure of the Constitution—perhaps a law requiring governors in every state to be subject to Senate confirmation before taking office, or something even more farfetched. The great powers idea articulates what is wrong with such laws.

Similarly, the doctrine helps make sense of specific historical assertions and practices that otherwise seem nonsensical. Modern readers may wonder how abrogating state sovereign immunity, or commandeering state legislatures, or condemning land for federal purposes, could ever have been thought to be outside the scope of the Necessary and Proper Clause—even when faced with overwhelming evidence that early interpreters thought that way. The "great powers" idea is part of the interpretive answer.

Going forward, even if the idea is too vague to be consistently applied by judges, because we cannot know for certain what is in and what is out—and I will get to judges in a moment—it can be useful in nonjudicial constitutional interpretation. Congress and the President (at least theoretically, and sometimes actually) are supposed to decide whether the laws they pass and implement are constitutionally permissible.[406] In making such decisions, they need not restrict themselves to doctrines that judges can articulate at a satisfactory level of specificity.

Second, I do believe that judges can also use the doctrine, in a more minimal way. While we may lack a good formulation for why a power was great in the abstract, we do have some specific evidence about powers that seem to have been thought great, either at the Founding or in post-ratification thought and practice. So even if courts cannot reason deductively about whether each power satisfies the "great powers" test, they can reason inductively. We do have particular examples of powers that were discussed as

http://ssrn.com/abstract=2010192. I discuss the mandate specifically—and my basic sympathy with Koppelman and Justice Ginsburg on the vagueness point—*infra* Subsection V.B.1.b.

406. The standard reference is Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

being great, and further scholarship may soon catalog more fully what powers were so considered and why. In other words, if there is a sufficiently strong historical case as to a *particular* practice, judges can still conclude that it is a "great power" (and hence, as the Court is now inclined to put it, the law is not "proper" even if it is "necessary").[407]

Much of this particularistic evidence is based on post-ratification practice. That provides a separate puzzle for originalists, because it is not clear why subsequent beliefs about the greatness of a power are relevant to establishing whether it was great at the Founding. Originalists ought to think the post-ratification practice relevant, however, for two reasons. The first is simply that post-ratification practice can frequently be indirect evidence of Founding-era thought. It is reflected light, to be sure, but light nonetheless.

But the second, and perhaps more important, reason is that post-ratification practice can serve to give concrete meaning to a constitutional provision even if it was vague as an original matter. While it may seem slightly counterintuitive, this is consistent with an originalist theory of constitutional construction, so long as the Constitution was intended to allow subsequent interpreters to render it more concrete.

Madison's term for this practice was "liquidation." In *The Federalist* he had observed that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[408] In other writings, he would also refer to the "liquidat[ion]" of constitutional ambiguities.[409] Others

407. I bracket the suggestion that the Necessary and Proper Clause and the great powers doctrine were themselves intended to evolve with the times, *see* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1179 (2013), although this is possible in principle, *see* JACK M. BALKIN, LIVING ORIGINALISM 3-34, 277-319 (2011). I will note that it is more difficult to derive a determinate meaning of the Clause under such a theory, and liquidation may prove the more viable alternative. Moreover, the arguments supporting a broad and evolving concept of necessity may actually bolster the case for a more fixed concept of propriety through the "great powers" doctrine.

408. THE FEDERALIST NO. 37, *supra* note 45, at 183 (James Madison).

409. *E.g.*, Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (Philadelphia, J.B. Lippincott 1867) ("It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them."); *see also* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10-14 (2001) (noting that Madison emphasized that "a regular course of practice" could "liquidate and settle the meaning" of those written laws that were ambiguous in a dispute); Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L.

invoked the same concept in slightly different terms, such as *McCulloch*'s reliance on "the practice of the government" and "[a]n exposition of the constitution, deliberately established by legislative acts."[410] The most sensible approach for judges to take to the concept of great powers is to treat the concept as sufficiently ambiguous that it often will not justify invalidating an act of Congress, but as one that can be *made* clear by subsequent practice that adequately liquidates its meaning.[411]

2. *The Civil War and Constitutional Change*

Even once a text's meaning has been "liquidated," though, history has a way of carrying on. As we have seen, eminent domain practice and theory changed during and after the Civil War. This might prompt one to argue that the Civil War changed the constitutionality of the eminent domain power. Even if Congress did not have it before the war, the argument might go, Congress got it afterward. The Court's opinion in *Kohl* never attempted to justify its holding on these ground of Civil War-era constitutional change, nor has any subsequent scholarship. If such an argument could be made, it would be a little more complicated than that.

It is important to separate descriptive and normative constitutional change. Not everything that happened during the Civil War changed the meaning of the Constitution going forward. The Civil War certainly did yield many valid changes to constitutional federalism. For example, the Reconstruction Amendments grant many new rights against state governments, and Congress has expanded powers to enforce those rights. At the same time, the Civil War did not change *everything* about federalism. The Constitution was not abolished and replaced; it was amended.[412]

REV. (forthcoming) (manuscript at 15-17) (discussing the original convention of liquidation).

410. 17 U.S. (4 Wheat.) 316, 401 (1819). *See generally* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525-29 (2003) (noting that Madison's contemporaries "made repeated references to the role of practice in 'fixing' the Constitution's meaning").

411. *Accord* Manning, *supra* note 47, at 1375 ("[T]he most important factor in assessing the [Necessary and Proper C]lause's present meaning may be, in Madison's words, the way it came to be 'liquidated' over time.").

412. *See* Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681, 1709 (2006) ("It would be extravagant to claim that events of the 1860s erased *all* of that previous system. Nobody thinks that the Civil War and Reconstruction cast doubt on whether Presidents should serve four-year terms."); *see also* HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 546 (1973)

Indeed, for the Civil War's victors, legal continuity was generally a key part of the narrative of the Civil War and Reconstruction. President Lincoln had justified the war by arguing that the states had never left the Union.[413] Even the Reconstruction governments preserved a fiction of legal continuity with future and subsequent regimes. To be sure, there were plenty of radicals who argued that secession justified a major break in the legal order, but their views were frequently marginalized in practice, for better or worse.[414] There is thus a case for seeing Civil War-era constitutional change strictly in formal or technical terms.

Perhaps some broader theories, however, under which the Civil War produced important nontextual constitutional change, could justify the expansion. Not all of them would. Akhil Amar, for example, has recently argued that the enactment of the Reconstruction Amendments fundamentally changed certain constitutional structures—like the Republican Guarantee Clause or the national army—that were embodied in the very amendment process.[415] But eminent domain did not play a role in the enactment of the Amendments. It is not even clear that it played an important role in the Civil War itself.[416] The emancipation of slaves by the Thirteenth Amendment may resemble eminent domain in a sense, but the taking was uncompensated and accomplished through explicit constitutional amendment.

Richard Primus has argued that "we can understand the Civil War and Reconstruction as having nullified aspects of the prior legal order that harmed African Americans."[417] Beyond the Reconstruction Amendments themselves is "a social meaning that speaks to the changed status of black Americans and says more than the Amendments say on their own. On such a reading, the constitutional rupture is most pronounced when the status of black Americans is at issue."[418] This understanding would also not justify the modern federal eminent domain power, which is not generally seen as a tool of racial justice or

("Despite the persistent contrary tradition that a vast centralization resulted from the War and Reconstruction, it is difficult today to substantiate the thesis.").

413. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 215, 218 (Don E. Fehrenbacher ed., 1989).

414. *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 390-93 (2001) (canvassing views).

415. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 79-94 (2012).

416. *See supra* Section II.E.

417. Primus, *supra* note 412, at 1709.

418. *Id.* at 1710.

a vindication of the rights of African Americans.[419] But perhaps it could justify an expanded eminent domain power in limited circumstances, where it is used to vindicate the rights of racial minorities.

Bruce Ackerman's theory of constitutional moments might be more conducive to justifying a general federal eminent domain power, however. For Ackerman, the core implication of the constitutional politics of the period was to legitimate the otherwise vulnerable Reconstruction process and the amendments it produced.[420] Yet Ackerman also hints that the constitutional moment may have had a broader nationalist penumbra—for example, when he suggests that it legitimated the high-salience *Legal Tender Cases*.[421] Ackerman does not suggest that the transformation extended to other federal powers, such as eminent domain. But perhaps he could. Justice Strong, a staunch unionist who fought for the constitutionality of the draft as a Pennsylvania Supreme Court justice, was the author of both *Kohl* and the *Legal Tender Cases*, and both cases employ some of the same rhetoric of inherent national power.

Then again, perhaps the cases are different. The legal tender issue was apparently so central to President Grant that he picked his nominees to the Court (like Justice Strong) because of how they would vote in the case.[422] Federal eminent domain did not have such salience. Whether or not such a case could be made, for present purposes it is enough to reiterate that the existing justifications for a federal eminent domain are problematic. If there is a Civil War-based justification, it is one that has not yet been put forward.

B. Doctrinal Implications

Deciding whether to overrule *Kohl*, or otherwise limit the federal power of eminent domain today, would require one to consider not just the interpretive questions discussed above, but issues like the force of precedent and reliance interests,[423] as well as the comparative roles of the President, Congress, and the

419. On the implications of eminent domain for racial minorities, see, for example, Brief for NAACP et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

420. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 186-252 (1998).

421. *Id*. at 239-41.

422. *See* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 746 (2009).

423. It is worth noting that in overruling some other subsequent precedents that it thought in conflict with *Pollard's Lessee*, the Court noted that it was "not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States. In cases such as this, considerations of *stare decisis* play a less important role than they do in cases involving substantive property law." Oregon *ex rel.*

courts.[424] And while one never knows, it may well be that it is simply too late to return to the original understanding of federal eminent domain.

But even if that is so, the history of federal eminent domain is also a key that may help us unlock some broader questions about federalism today. When adjudicating modern federalism cases, the Supreme Court increasingly invokes a version of the great powers argument, but without a thorough explanation (or even obvious awareness) of the roots of the idea it is invoking. In other realms of federalism, cooperative federalism is sometimes treated as if it were a modern innovation, inconsistent with the spirit of the Constitution as originally enacted. The historical context provided by the history of eminent domain may help us to better understand what is going on in both areas.

1. Necessary and Proper Clause

a. Commandeering and Sovereign Immunity

Some of the Court's most noted modern federalism cases concern topics like sovereign immunity and commandeering. But the cases have been criticized as both trivial and textually indefensible. Some scholars complain, for example, that commandeering and sovereign immunity are peripheral matters "with mostly symbolic impact."[425]

Others challenge the cases on textualist grounds. John Manning charges that in *Printz v. United States*, "[t]he Court made no real attempt to tie the anticommandeering principle to any explicit clause of the Constitution."[426] Similarly, he argues, *Alden v. Maine* "still places material reliance on the atextual, purposive technique that characterized . . . the anticommandeering cases. No clause of the Constitution supplied the source of this broad immunity from suit."[427] Mitch Berman makes a similar claim. After observing that the Necessary and Proper Clause is increasingly relevant to federalism disputes, he states that "[i]t is implausible that proper resolution of cases of

State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381 (1977). The same could be said of federal eminent domain.

424. Even if the Supreme Court refused to overrule *Kohl*, Congress might reconsider the sweeping condemnation authority given by 40 U.S.C. § 3113 (2006), or the President might consider increased reliance on state eminent domain.

425. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 159 (2001).

426. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2032 (2009).

427. *Id.* at 2036.

this sort will turn on the original public meaning of the word 'proper.'"[428]

Yet there *is* a textualist thread running through the anticommandeering and sovereign immunity cases. The opinions in these cases are full of historical and structural arguments, to be sure, but they also try to provide a textual home for these arguments by invoking the idea that a law that is "necessary" might not be "proper."[429] Recall the crucial paragraph in *Printz*, quoted again in *Alden*, arguing that

> [w]hen a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."[430]

The Court did not unpack this claim very much, but what it says is consistent with the great powers idea. Indeed, the Court might better have said that the reason that the Necessary and Proper Clause does not extend to laws that commandeer or that violate state sovereign immunity is that broaching the historical core of state sovereignty is something that one ought to expect the Constitution to have done explicitly. Hence, it cannot be done by implication and is in other words a great power.[431]

This is not necessarily to say that all of these cases read the history correctly. While Congress may have lacked the power to commandeer state legislatures, some scholars have called *Printz*'s analysis of executive commandeering into serious question.[432] Debates about the roots and understanding of sovereign immunity are well known. But the problem with these cases, if there is one, is in their historical particulars, not in their failure to account for the Constitution's text.

Moreover, the implicit invocation of great powers in these cases demonstrates the potential relevance of historical analysis of the Necessary and

428. Berman, *supra* note 7, at 17 n.38.

429. *See supra* notes 32-39 and accompanying text.

430. Printz v. United States, 521 U.S. 898, 923-24 (1997) (quoting THE FEDERALIST NO. 33 (Alexander Hamilton) (alterations in *Printz*)); *see also* Alden v. Maine, 527 U.S. 706, 732-33 (1999) (quoting this passage from *Printz*).

431. This qualified defense of *Alden* and *Printz* is not original to me; it owes much to an underappreciated section of Nelson, *supra* note 67, at 1638-52.

432. *See* Campbell, *supra* note 407, at 1153 (arguing that commandeering state officers was originally seen as *bolstering* state sovereignty).

Proper Clause. For all that has changed in constitutional doctrine since the Founding, some version of the great powers idea is, surprisingly, still good law. *Printz* and *Alden* invoke a version of it; and *McCulloch*'s reference to "great substantive and independent powers," while rarely cited, has never been overruled. It is worth exploring how that idea might apply in a few other contexts.

b. Mandates

To get a good sense of how the idea of great powers can and should work in the law today, it may be helpful to focus on a recent invocation of it. In arguing that the individual healthcare mandate exceeded the bounds of the Necessary and Proper Clause, some argued the case against the mandate in terms of "great" and "incidental" powers,[433] and that appears to be the distinction that the Chief Justice ultimately decided to employ, writing that while "the Clause gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution,' it does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated."[434]

This analysis ultimately turned out to be nondispositive, of course, because the Chief Justice also concluded that the individual mandate could be interpreted to impose a tax, rather than a legal command.[435] But scholars have already begun to analyze (and criticize) the opinion's reasoning on this point, wondering what kind of constitutional vision it portends in other cases.[436]

The example of the history of eminent domain may give us the vantage point to evaluate the Chief Justice's view. (It is worth noting that the Court seemed to think eminent domain was a relevant analogy—all three main opinions discussed the federal power of eminent domain, though none of them

433. Brief of Authors *of The Origins of the Necessary and Proper Clause* (Gary Lawson, Robert G. Natelson & Guy Seidman) and the Independence Institute as Amici Curiae Supporting Respondents, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398); Brief for State Respondents at 33-34, *Sebelius*, 132 S. Ct. 2566; Brief for Private Respondents at 58, *Sebelius*, 132 S. Ct. 2566.

434. 132 S. Ct. at 2591 (Roberts, C.J.) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411, 421 (1819)).

435. It is also possible, as the government and four Justices argued, that the Commerce Clause authorizes the mandate by itself, without need to reference implied powers. *Sebelius*, 132 S. Ct. at 2615-29 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

436. *E.g.*, Koppelman, *supra* note 405, at 12-13.

recognized the major historical change implemented by *Kohl*.[437])

On one hand, the Chief Justice was right to look to the idea of great powers in understanding the limiting principles to power under the Necessary and Proper Clause. On the other hand, however, comparison with the example of eminent domain may help to show that he ultimately invoked the idea improperly.

Recall that the first problem is the vagueness of the great powers formulation. It may well have been appropriate for members of Congress who voted on the Affordable Care Act to consider something like the idea of great powers in deciding whether the Act was constitutionally permissible. But once Congress decided that it was, the judiciary needed more precise reasoning to be able to set it aside. As Justice Ginsburg challenged:

> How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an "independent power," or merely a "derivative" one. Whether the power used is "substantive," or just "incidental"? The instruction the Chief Justice, in effect, provides lower courts: You will know it when you see it.[438]

Now, it is not that clarity is impossible to achieve; history can provide some guidance. And one might even argue that the compulsory purchase of something one does not want borders on being itself a taking. But on balance, I find that analogy strained, and I find the historical case that the mandate is a great power seems too weak to justify invalidating the Act. As the Chief Justice's opinion acknowledges, there *were* early individual mandates under the census and militia powers,[439] suggesting that there was no categorical exclusion of mandates from the Necessary and Proper Clause. Nor did a long string of practice or judicial decisions demonstrate any constitutional hostility to mandates. There is no clear historical practice mirroring the practice that produces the case against federal eminent domain.

c. Conscription

By contrast, history may reveal other powers that are more plausibly part of

437. *See Sebelius*, 132 S. Ct. at 2587 n.5 (Roberts, C.J.); *id.* at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2649 n.3 (joint dissent).

438. *Id.* at 2627-28 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

439. *Id.* at 2586 n.3 (Roberts, C.J.).

the extension of the idea of great powers. Take the draft. The Supreme Court has upheld it.[440] Leading scholars defend it.[441] There is a strong case to be made, however—a case that parallels the case against eminent domain—that Congress lacks the power to conscript troops.[442]

There is history: until the Civil War, the national army depended on volunteers.[443] President Madison proposed a draft during the War of 1812,[444] but it ultimately perished in the face of constitutional arguments by Daniel Webster, who charged that "in granting Congress the power to raise armies, the people have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the people themselves, and they have granted no others."[445]

As with eminent domain, that history may inform the best reading of the enumerated powers. As Chief Justice Taney put it in the draft of a never-issued opinion that would have invalidated federal conscription, "when the power to raise and support armies was delegated to Congress, the words of the grant necessarily implied that they were to be raised in the usual manner."[446] In

440. Selective Draft Law Cases, 245 U.S. 366, 377 (1918).

441. For some of the leading defenses, see AMAR, *supra* note 415, at 88-94; Currie, *supra* note 240, at 1196-1201; and Currie, *supra* note 229, at 1277-95.

442. A version of this argument was made by Harrop A. Freeman, *The Constitutionality of Direct Federal Military Conscription*, 46 IND. L.J. 333 (1971). Two recent draft papers make it more persuasively. *See* Robert Leider, Federalism and the Military Power of the United States (2012) (unpublished manuscript) (on file with author); Andrew Prout, The Constitution's Drafting Power (June 11, 2012) (unpublished manuscript) (on file with author). In earlier work, Amar also acknowledged the Founding-era case against the draft, AMAR, *supra* note 315, at 53-59, though he now suggests that the ratification of the Reconstruction Amendments transformed the understanding, AMAR, *supra* note 415, at 91-94.

443. For discussion of the rare (and controversial) exercises of a draft-like power in England, see Leider, *supra* note 442, at 43-44; and Prout, *supra* note 442, at 8-10.

444. CURRIE, *supra* note 5, at 172-75.

445. Daniel Webster, The Conscription Bill (Dec. 9, 1814), *in* 1 THE PAPERS OF DANIEL WEBSTER: SPEECHES AND FORMAL WRITINGS 19, 27 (Chalres H. Wiltse ed., 1986). I say "in the face of" so as to skirt the causation questions. *Cf.* AMAR, *supra* note 315, at 333 n.43 ("The precise degree to which constitutional scruples contributed to the bills' defeat is the subject of some dispute.").

446. Roger B. Taney, The Thoughts of Chief Justice Taney on the Federal Conscription Act, *printed in* 18 TYLER'S Q. HIST. & GENEALOGICAL MAG. 72, 81 (1936). There was a British tradition of impressment into the navy, and Taney conceded that in light of this history, the "general words 'to provide and maintain a navy' could with much more apparent plausibility be construed to authorize coercion when a sufficient number of volunteer seamen could not be obtained." *Id.* at 82. Some have suggested that the American government had special powers and duties with respect to "seamen." AMAR, *supra* note 315, at 330-31 n.28; Randy Barnett, *Phillip Hamburger on the Maritime Acts*, VOLOKH CONSPIRACY

Kneedler v. Lane, the Pennsylvania Supreme Court temporarily enjoined the Civil War draft under the same logic.[447] And if it is correct that the power to raise armies does not include the power of conscription, it seems improbable that the Necessary and Proper Clause encompasses conscription.[448]

As with eminent domain, the alternative to a federal draft is not giving up—it is a federal-state partnership. The government may sometimes need more soldiers than it can hire on the open market. But the militia can satisfy that need. Militia service, unlike federal army service, *was* traditionally compulsory, and the Constitution expressly gives the federal government power to force the state-organized militia into federal service. Congress can "provide for calling forth the militia,"[449] and "for organizing, arming, and disciplining" them.[450] And "when called into the actual Service of the United States," the President is their commander-in-chief.[451] The federal draft acts to circumvent the militia power, including the important constitutional limitations on the militia.[452]

Chief Justice Lowrie made the connection between conscription and condemnation explicit in *Kneedler*. In his opinion invalidating the draft he said:

> If Congress may institute the plan now under consideration, as a necessary and proper mode of exercising its power "to raise and support armies," then it seems to me to follow with more force that it may take a similar mode in the exercise of other powers, and may compel people to lend it their money; *take their houses for offices and courts*; their ships and steamboats for the navy; *their land for its fortresses* . . . . If we give the latitudinarian interpretation, as to mode, which this act requires, I

(Apr. 19, 2012, 8:46 AM), http://volokh.com/2012/04/19/phillip-hamburger-on-the-maritime-acts. A fuller exploration of the conscription power would have to be sensitive to these historical distinctions.

447. 45 Pa. 238 (1863); *see also id.* at 255 (Woodward, J., concurring) ("I infer that the power conferred on Congress was the power to raise armies by the ordinary English mode of voluntary enlistments."). The court split three to two, and reversed itself after Chief Justice Lowrie, the original author, left the bench and was replaced with a more nationalist justice. *Id.* at 325.

448. *Id.* at 242; *id.* at 257 (Woodward, J., concurring).

449. U.S. CONST. art. I, § 8, cl. 15.

450. *Id.* cl. 16.

451. *Id.* art. II, § 2, cl. 1.

452. The power to call forth the militia is limited to "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions." *Id.* art. I, § 8, cl. 15. The Constitution also "reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia." *Id.* cl. 16.

know not how to stop short of this.[453]

Chief Justice Lowrie thought that the validity of the draft would imply the validity of federal eminent domain. If he was right about the connection, then the invalidity of federal eminent domain could also imply the invalidity of the draft. He was not the only member of the Pennsylvania Supreme Court who might have seen a connection, by the way. The Pennsylvania Justice who wrote the second opinion upholding the draft was William Strong, the future author of *Kohl*.[454]

Of course, figuring out whether nonmilitia conscription is indeed unconstitutional is an issue deserving separate, thorough examination of the "raise . . . armies" and militia clauses, of any changes wrought by the Civil War Amendments,[455] and of any normative and reliance issues that might be raised by twentieth-century experience. I raise this example only to show what kinds of issues might be illuminated by seeing eminent domain as a great power.

d. Other Areas

The great powers idea might help us understand a variety of other structural claims, as well as claims about the Bill of Rights. I will here mention only one more possibility. Recall that Alexander Hamilton insisted that the Constitution did not need a Press Clause because "no power is given by which restrictions may be imposed."[456] So did many others, not just in public,[457] but also at the Philadelphia Convention, whose records were secret.[458] Nowadays, all of this is widely regarded as obviously wrong.[459] But the structure of the argument against eminent domain helps to show how it could have been right.

453. Kneedler v. Lane, 45 Pa. 238, 248 (1863) (emphasis added).

454. *Id*. at 274 (Strong, J.).

455. *See* AMAR, *supra* note 415, at 91-94.

456. THE FEDERALIST NO. 84, *supra* note 45, at 417 (Alexander Hamilton).

457. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 318 (1993) (collecting public statements from Edmund Randolph, Charles Cotesworth Pinckney, James Iredell, Roger Sherman, and Hugh Williamson).

458. 2 RECORDS, *supra* note 50, at 617-18; *see also* Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 82, 87 (Eugene W. Hickok, Jr. ed., 1991) ("[T]hat the federal government would have no power over speech and the press was a stated position and a repeated one, and perhaps it was believed by some.").

459. *See*, *e.g.*, Brubaker, *supra* note 458, at 87 ("At least with hindsight, the Federalist claim appears patently defective.").

Perhaps the First Amendment is merely a confirmation of the broader, structural principle that Congress lacks any implied authority to regulate the press, because regulation of the press is a great power. Under a great powers theory, Congress might still be able to restrict the press when regulating under its expressly enumerated powers.[460] Copyright laws restrict one's ability to publish the thoughts of others without their consent. Hamilton acknowledged that the power to tax included the power to tax books.[461] And as George Mason pointed out, there was the question of the District.[462] So the First Amendment's Press Clause would not have been unnecessary, but even without it, perhaps the idea was that Congress could not use its implied powers and the Necessary and Proper Clause to regulate the press.

After Congress passed the Sedition Act, the Kentucky legislature passed a resolution (first drafted by Thomas Jefferson) declaring the Act unconstitutional because "no power over the . . . freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, . . . all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people."[463] The resolution argued that this meant the states, not Congress, had the power to determine when there were exceptions to these freedoms. The Constitution "manifested" the states' "determination to retain to themselves the right of judging how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed."[464] Jefferson's theory deserves study in future work.

460. This might explain, incidentally, why "participants in this debate, both critics and proponents, wrote and spoke as though this was a question to be answered by an analysis of the powers granted and the definition of the powers set forth in the Constitution," not just the Necessary and Proper Clause. Thomas B. McAffee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 83 (1998); *see also* CURRIE, *supra* note 25, at 262 n.201 ("Attractive as this position may appear at first glance, the copyright and seat-of-government clauses . . . cut against it.").

461. THE FEDERALIST NO. 84, *supra* note 45, at 446 n.* (Alexander Hamilton).

462. Mason, *supra* note 79, at 650.

463. Kentucky Resolutions of 1798 and 1799, *supra* note 31; *see also* Michael P. Downey, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L.Q. 683, 695 (1998) (emphasizing that Jefferson's principal objection was based on federalism, not free expression generally).

464. Kentucky Resolutions of 1798 and 1799, *supra* note 31, at 540-41. The Resolutions also argued that Congress could criminalize only treason, counterfeiting, piracy, and crimes on the high seas and against the law of nations. *Id.* at 540.

2. *Interactive Federalism*

The original takings scheme may also provide insight into modern debates and understandings of "interactive federalism." (I use that term to embrace what is often called cooperative federalism—having states implement federal policy—while acknowledging that there is another side—empowering the states to protect local interests, community groups, or individual rights.)

Some subject cooperative federalism to "benign neglect."[465] Even now, laments Heather Gerken, "scholars often write as if cooperative federalism does not exist."[466] To the extent that interaction between state and federal government in carrying out a single program is seen as unusual, it may blind us to sensible institutional solutions. To the extent it is seen as comparatively novel, it may cause us to assume that the past has little to teach us about today's federalism, or cause us to misinterpret that past.

Others criticize cooperative federalism as a twentieth-century perversion of our constitutional scheme. Michael Greve, for example, writes that

> [n]otwithstanding a famous (but unpersuasive) argument that American federalism was cooperative *ab ovo*, and notwithstanding a handful of "cooperative" policies in the 19th century (such as land grants), cooperative federalism was largely an invention of the Progressives, who attempted to reconcile their nationalist ambitions with their affection for local government.[467]

The early pattern of takings for federal projects is at least one more data point against Greve's thesis.

A single historical doctrine does not a constitutional theory make, and a wide-lens view of interactive federalism would be a separate, extensive project. That said, here are two examples of how we might learn from a more historically oriented sympathy toward interactive federalism.

One example is in the area of constitutional remedies. It is famously difficult, under current and evolving doctrine, for many victims to get a remedy for federal wrongdoing. There are judicially and congressionally created remedies, ranging from lawsuits under *Bivens* to invocations of the

465. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1562 (2012).

466. *Id.*

467. Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 576 (2000). Greve also marshals social scientific arguments against cooperative federalism, most recently in MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 250-53 (2012). My point is limited to the historical claims that frame that critique.

exclusionary rule, to administrative remedies and criminal prosecutions under 18 U.S.C. § 242.[468] But what Congress and the courts create, they can also control, and each of these remedies has been subject to many (and perhaps increasing) limits on recovery.[469] In the original constitutional scheme, states had a much more important role in providing remedies for federal abuses; as Akhil Amar, for example, has documented, the original vision relied heavily upon common law suits against federal officers in state courts.[470] In a variety of ways, however, current law and attitudes resist giving state law its traditional role in checking federal power.

In these and other scenarios, there is a view of federal law that goes beyond supremacy, to exclusivity. Whatever problems there may be in determining the scope of federal power and in finding principled lines to limit that power or remedies to enforce those limits, state law is presumed to have little or nothing of relevance to say. It is possible that upon reflection and choice, we would decide that federal exclusivity is better than any state role in limiting or enforcing federal law. But we should not forget that that attitude toward the states is a *choice*, and that history illustrates a different one we might make.

CONCLUSION

Conventional wisdom about the meaning of the Constitution has changed a lot since the Founding. Sometimes we are anxious about the change, sometimes we are glad of it. Most of the time, we are at least aware of it. But sometimes we forget.

For seventy-five years, federal eminent domain was generally thought unconstitutional, because eminent domain was too great of a power to be granted only by implication. That understanding was borne out in a widespread practice that has now nearly passed from constitutional memory. Modern debates over federalism continue to claim authority from the past, though sometimes without a firm grip of what that past was.

Indeed, if we have forgotten the case against federal eminent domain, there may be a great deal more about modern federalism that bears reexamination. It may be that Congress's powers were intended to preserve a substantial space for state autonomy, even perhaps in implementing (or frustrating) legitimate federal projects. It may also be that constitutional rights have a more

468. I will expand these points in William Baude, Original Remedies (work in progress on file with author).

469. *Id.*

470. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-10 (1987).

pronounced structural dimension than is currently thought. The doctrine that produces cases like *Printz* and *Alden* is not limited to core government autonomy but includes topics that we currently treat as restricted only by the Bill of Rights. But the Bill of Rights was the second line of defense for those who tried to create a federal government that was powerful but limited. It may be time to give more attention to the first.