California Law Review Circuit

VOL. 4 DECEMBER 2013

The Messy History of the Federal Eminent Domain Power: A Response to William Baude

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William Baude's recent article challenges us to rethink the federal eminent domain power, and, more broadly, the Necessary and Proper Clause.[1] Bucking a longstanding consensus, he argues that according to the Constitution's historical meaning, the federal government lacked power to condemn land within states.[2] From the Founding until the Civil War, legislators, commentators, and judges "refused to infer a federal eminent domain power" from Congress's enumerated powers, the Necessary and Proper Clause, or the Takings Clause.[3] The reason, Baude argues, is that they viewed eminent domain "as a 'great power'—one that was too important to be left to implication."[4] This understanding died only in 1875, when the Supreme Court created the federal eminent domain power in *Kohl v. United States*.[5]

Baude has undertaken a daring task. Nearly eighty years ago, Edward

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1. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013).
2. It had broader powers in the District of Columbia and the territories.
3. Baude, *supra* note 1, at 1738.
4. *Id.*
5. 91 U.S. 367 (1875); Baude, *supra* note 1, at 1786.

Corwin found it "exceedingly difficult to imagine" that anyone could meet the "heavy burden of proof" needed to question *Kohl*.[6] It is extremely impressive, then, that Baude has already started to shift opinion against such an established doctrine.[7] His argument has important consequences for several other areas of law. While the notion of "great powers" is well established—it originated in *McCulloch v. Maryland*,[8] and Chief Justice Roberts employed it in *National Federation of Independent Business v. Sebelius*[9]—Baude's boldly revisionist account calls us to employ the concept with greater historical specificity and analytical rigor. Moreover, he shows that a historically informed approach to great powers requires us to revisit our understanding of the federal government's roles in conscription, commandeering, sovereignty immunity, and freedom of the press.[10]

This Response critiques Baude's historical account. He is absolutely right that the "great powers" doctrine needs more sensitive historical treatment, and he has greatly advanced our understanding of that history by recovering the lost case against federal takings. But he takes his case too far in arguing that from the Founding to the Civil War, "the federal government was not understood to have the power to exercise eminent domain inside a state's borders."[11]

More generally, Baude, like his scholarly predecessors, errs in searching for a single historical understanding of federal takings.[12] Until the Supreme

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6. Edward S. Corwin, *Constitutional Aspects of Federal Housing*, 84 U. PA. L. REV. 131, 145 (1935).

7. *See, e.g.*, Andrew Koppelman, *"Necessary," "Proper," and Health Care Reform*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 105, 113 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) (citing Baude to argue that "[a]t the time of the framing and long after, it was taken for granted that eminent domain was a great power that the federal government could not exercise "); Ilya Somin, *Is There a Federal Eminent Domain Power?*, JOTWELL (Sept. 4, 2013), http://conlaw.jotwell.com/is-there-a-federal-eminent-domain-power ("[Baude's] article is likely to be the definitive analysis of the constitutionality of federal eminent domain power for some time to come.").

8. 17 U.S. (4 Wheat.) 316, 411, 421 (1819).

9. 132 S. Ct. 2566, 2592 (2012).

10. Baude, *supra* note 1, at 1814–23. For instance, Baude suggests that even in the absence of the First Amendment, Congress would have lacked "authority to regulate the press, because regulation of the press is a great power." *Id.* at 1822.

11. *Id.* at 1741.

12. *See id.* at 1742 n.5 (citing earlier literature); 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, 141 (2004) (noting early disagreement about the federal eminent domain power, but arguing that most eighteenth- and nineteenth-century judges embraced "the only sensible" reading of the Takings Clause, which implied a federal takings power). A few scholars have noted Founding-era uncertainty about the existence of a federal eminent domain power, but only in passing (and often only in footnotes). *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 270 n.8 (1993) ("As with the power to construct post roads not all persons in 1790 would have conceded that Congress could exercise a power to condemnation."); Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 282 (2011), http://yalelawjournal.org/2011/11/08/lawson&kopel.html (noting that "there was an open question for a century whether the federal government had a power of eminent domain," but not

Court settled the issue in *Kohl*, there was no consensus on the matter. Debate emerged in the 1780s and quickly became entangled with broader questions of federal power, slavery, and states' rights. Baude rightly argues that *Kohl* was the first case to declare definitively the federal government's power to take land within states. But *Kohl* did not "creat[e]" that power from nothing;[13] rather, it resolved a question that had been open for nearly ninety years.[14]

Parts I–III of this Response offer a revised history of the federal eminent domain power, using new sources that enable us to reconsider Baude's evidence. Part I shows that the first arguments in favor of federal eminent domain emerged as early as the 1780s, not "several decades" after Ratification.[15] Moreover, the United States actually used this power. By the 1840s, however, the idea of a federal eminent domain power was effectively dead. Part II shows that this outcome depended on political contingencies, not doctrinal consensus.[16] Opponents of a strong central government—Democrats suspicious of federal authority and Southerners[17] eager to protect slavery—objected to the existence of a federal eminent domain power as part of their broader campaign to protect states' rights. Whigs, Republicans, and Northerners may still have believed that Congress could take land within states, but they learned to sidestep the issue, much as they learned to sidestep slavery, to achieve other goals.[18] Accordingly, we should read *Pollard's Lessee v. Hagan*,[19] which denied the existence of a federal eminent domain power, as taking sides on a divisive issue, rather than expressing unchallenged constitutional orthodoxy.[20]

It is unsurprising, then, that the Civil War transformed the politics of federal eminent domain, as Part III shows. For more than a decade before *Kohl*, legislators, jurists, and judges increasingly defended Congress's authority to take land within states. This was not because they discovered a new

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exploring why that question was resolved); Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1086 n.18 (1999); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559 n.18 (1972). Even these works often present one side of the debate as clearly dominant (and right). *See, e.g.*, Lawson & Granger, *supra*, at 270 n.9.

13. *See* Baude, *supra* note 1, at 1786.

14. At other points in his article, Baude is quite attentive to constitutional and political debate. *See, e.g.*, *id.* at 1751–52 (discussing the National Bank). Thus, in a sense, my critique simply extends the methodology Baude employs for a few pages to the rest of his argument.

15. *Id.* at 1761.

16. *Contra id.* ("[T]here were some suggestions that the federal government had and should exercise such a power . . . but their views failed to persuade the majorities of their day."); *id.* at 1777.

17. I use "Southerners" as shorthand for white supporters of slavery in the South.

18. *Cf.* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 112–13 (1971) ("[T]he second American party system, the system of the Democratic and Whig parties, was artificial in that deeply divisive sectional issues were consciously kept out of politics.").

19. 44 U.S. (3 How.) 212 (1845).

20. *Contra* Baude, *supra* note 1, at 1772 (suggesting that *Pollard's Lessee* "reinforced the dominant view of eminent domain power").

"constitutional theory" of "inherent powers," as Baude argues.[21] Rather, the changing political and ideological context made preexisting theories of federal eminent domain—which had been available since the Founding—increasingly attractive. By 1875, when the Court decided *Kohl*, federal authority over land within states was well within the constitutional mainstream.

Part IV concludes. While Baude has made clear the stakes of a federal eminent domain power, I suggest that this Response also has broader implications for originalist and other historicist scholarship.[22] Rather than single-mindedly digging for a historical consensus about the Constitution's meaning, we should remember that the past, no less than the present, was fraught with political disagreements that shaped constitutional interpretation.[23] Recovering the politics behind the Constitution's historical meanings will help us interpret the Constitution's text while offering a more robust understanding of how and why constitutional interpretations have changed over time.

I.
EARLY ARGUMENTS, 1783-C. 1840

The issue of eminent domain was essentially absent from the Constitutional Convention and Ratification debates.[24] But from the 1780s until the Civil War, several legislators and judges—including two authors of *The Federalist*—suggested that the federal government had at least a limited power to condemn property within states. Discussion centered on three areas: war and foreign affairs; internal improvements; and bankruptcy.

A. War and Foreign Affairs

The question of a federal eminent domain power emerged as early as the nation itself. In *Jones v. Walker*,[25] a federal court considered whether the Confederation Congress could annul the discharge of foreign debts pursuant to the Treaty of Paris (1783). Chief Justice Jay, sitting on circuit, reasoned that Congress's power to ratify treaties necessarily implied the power to take property to fulfill treaty obligations:

> No principle is better established, nor more generally acknowledged, than that *the right of eminent domain is inseparably attached to*

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21. *Id.* at 1743.

22. As Baude points out, many nonoriginalist theories of constitutional interpretation depend at least partly on recovering the Constitution's historical meaning.

23. *Cf.* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 365 (1996) (arguing that as early as the 1790s, appeals to original meaning were colored by "considerations of partisan advantage").

24. *See* Baude, *supra* note 1, at 1758.

25. 13 F. Cas. 1059, 1066–67 (C.C.D. Va. [1793]) (No. 7507) (Jay, Circuit J.). The Supreme Court would decide the case as *Ware v. Hylton*, 3 U.S. 199, 281 (1796) (Wilson, J.) (noting that Congress "clearly possessed the right of confiscation, as an incident of the powers of war and peace"). For the dating and procedural history of *Jones*, see 7 MAEVA MARCUS, THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 292 (2003).

> *national empire and sovereignty*, and that it accompanies the right of making peace . . . . The necessity of making a peace authorizes the sovereign to dispose of things even belonging to private persons, and the eminent domain gives him this right. . . . It would be useless to multiply authorities on a point so clear.[26]

This passage suggests (1) that eminent domain is an inherent power of the *national* government,[27] and (2) that the power of eminent domain can be inferred—in this case, from the power of making treaties.[28] Either point would seriously challenge Baude's argument.

Baude offers four explanations for this troublesome passage. First, he suggests that the Chief Justice might have believed in a national power to confiscate personal property, but not real property.[29] But while the personalty/realty distinction has a long history in Anglo-American law,[30] Jay declined to invoke it. In fact, he implicitly denied its relevance to *Jones* by referring to the hypothetical seizure of "a field or house or garden."[31] Second, Baude suggests that "to the extent the cancellation [of debts at issue in the case] had a physical location, it was probably not inside of a state."[32] But this, too, is a distinction the Chief Justice never invoked—perhaps because the litigants agreed that the annulment of debts had occurred in Virginia, pursuant to a Virginia statute.[33] Third, Baude reminds us that *Jones* "concerned the Articles of Confederation, so it did not directly speak to enumerated powers under the Constitution."[34] At best, this addresses whether eminent domain can be *inferred* from Congress's enumerated powers—though it also places Baude in the anomalous position of arguing that the Constitution gave the federal government *less* authority than the Confederation.[35] Moreover, this third explanation does not address Jay's argument that "that the right of eminent

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26. *Jones*, 13 F. Cas. at 1066–67 (emphasis added) (internal quotation marks omitted).

27. *Contra* Baude, *supra* note 1, at 1804–05 (denying this possibility).

28. *Contra id.* at 1742 (arguing that eminent domain is a power "too important to be left to implication").

29. *Id.* at 1798.

30. It is not clear that this distinction helps Baude's case: in some instances, the sovereign had *less* power over personalty than over realty. *See* Acland Giles, *The Acquisition of State Land by the Federal Authorities*, 5 COMMW. L. REV. 49, 49 (1907) ("An English subject may enjoy the absolute ownership of goods, but not of land."); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785 (1995) [hereinafter Treanor, *Original Understanding*] (noting that the 1641 Massachusetts Body of Liberties required compensation only for seizure of personal property).

31. *Jones*, 13 F. Cas. at 1067 (quoting Vattel).

32. Baude, *supra* note 1, at 1799 n.355.

33. *See Jones*, 13 F. Cas. at 1064.

34. Baude, *supra* note 1, at 1799 n.355.

35. *Cf.* McCulloch v. Maryland, 17 U.S. 316, 328 (1819) ("Is it supposed, that property of the United States is now subject to the power of the state governments, in a greater degree than under the confederation?"); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 28–29 (2005) (arguing that the Constitution's creation of a national sovereign was intended to solve the problem of excessive state sovereignty and insufficient national sovereignty).

domain is inseparably attached to *national* empire."[36] In other words, Jay claimed that eminent domain derived not from the particular structure of the Confederation, but from the nature of national government in general.

Baude's most convincing explanation for *Jones* is that Jay considered the treaty an exercise of Congress's war powers.[37] Here, there is much firmer evidence to support Baude's surmise. In the 1780s, two future authors of *The Federalist* argued that Congress possessed an eminent domain power as part of its authority to conduct and end wars. In a 1786 report to Congress, Jay, then Secretary for Foreign Affairs, argued that Congress (but not the states) had the power to seize British property.[38] Three years earlier, Alexander Hamilton, arguing the landmark case of *Rutgers v. Waddington*,[39] had insisted even more explicitly on a national power of eminent domain. The case asked whether the Treaty of Paris preempted a state law trespass action for damages related to the British occupation of New York. Hamilton argued that Congress could preempt state causes of action:

> [This power] results from this principle of all governments: the property of all the individuals of a state is the property of the state itself, in regard to other nations. . . . [O]ur external sovereignty existing in the union, the property of all the citizens in regard to foreign states belongs to the United States.[40]

With respect to treaties, the Confederation Congress had a plenary eminent domain power, even within the states—and even with respect to real property claims. (Congress also seized personalty for the Continental Army during the Revolutionary War.[41])

But if Baude's hypothesis about *Jones* is correct—that Chief Justice Jay

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36. *Jones*, 13 F. Cas. at 1066 (emphasis added).

37. Baude, *supra* note 1, at 1799 n.355.

38. Report of Secretary Jay on Mr. Adams's Letter of 4th March 1786, *in* 5 U.S. DEP'T OF STATE, THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA 23, 29–30 (Washington, D.C., Blair & Rives 1837).

39. Rutgers v. Waddington (N.Y. City Mayor's Ct. Aug. 27, 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 393 (Julius Goebel ed., 1964) [hereinafter LAW PRACTICE OF ALEXANDER HAMILTON].

40. 2 JOHN CHURCH HAMILTON, THE LIFE OF ALEXANDER HAMILTON 250 (New York, D. Appleton & Co. 1840); *see also* 1 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 39, at 356 (reprinting Hamilton's case notes). Hamilton's argument as an advocate aligned with his ideological commitments. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 210 (1997); Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 842, 845 (2006).

41. *See, e.g.*, Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) ("Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident . . ."). While Chief Justice McKean seemed confident that Congress had the necessary authority, he also noted that in the case at bar, it had acted "in conjunction with the Pennsylvania Board of War." *Id.* at 357. St. George Tucker even suggested that the Fifth Amendment had been originally intended to ensure compensation for these sorts of military requisitions. Treanor, *Original Understanding*, *supra* note 30, at 791–92.

inferred a takings power from Congress's authority over war and foreign affairs—it undercuts the rest of his argument. If we can infer an eminent domain power in foreign affairs or war, why not from the Commerce Clause or the Necessary and Proper Clause—or indeed, the taxing power?[42] (Of course, there are cases in which the treaty power gives Congress an implicit authority it would otherwise lack, though the scope of such authority remains contested.[43] My point is that nothing in Baude's theory—or, as far as I have seen, the historical record—explicitly makes such a distinction with respect to eminent domain.)

Congress's eminent domain power with respect to foreign affairs was never uncontested. At least through the 1820s, politicians and commentators repeatedly questioned that power's limits—for instance, whether it applied to all American property, or only in "cases occurring under the Law of Nations and special treaties;"[44] whether Congress could exercise the power as a matter of course or only from true "necessity;"[45] or whether takings via a treaty were takings at all.[46] Nonetheless, since the 1780s Congress claimed—and actually exercised—a power of eminent domain, even within the states, as part of its treaty-making authority.

B. Internal Improvements

Debate over the federal eminent domain power broadened in the 1810s, when Congress began to consider funding internal improvements. Members of Congress differed as to whether the federal government could take land for roads and other projects within the states.[47] As with the internal improvements

42. *Cf.* Corwin, *supra* note 6, at 143 (arguing that the federal eminent domain power must derive from each of the "postal, war and commerce powers, as well as the spending power," or from none of them at all).

43. *See, e.g.*, Brief for Petitioner at i, Bond v. United States, 133 S. Ct. 978 (May 8, 2013) (No. 12-158); *see also* Missouri v. Holland, 252 U.S. 416, 432 (1920) ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."); Will Baude, *"Great" Powers and Federal Power Over Treaties*, VOLOKH CONSPIRACY (Nov. 7, 2013, 1:15 AM), http://www.volokh.com/2013/11/07/great-powers-federal-power-treaties (suggesting that the great powers concept "helps to illuminate the relationship between the treaty power and the Necessary and Proper Clause").

44. *E.g.*, *Spanish Claims & Florida Treaty*, TIMES & HARTFORD ADVERTISER (July 29, 1823), at 2.

45. 37 ANNALS OF CONG. 1485 (1821) (memorial of Richard W. Meade).

46. For instance, in a treaty signed in 1800, the United States released France from the claims of American citizens whose property it had seized. The United States resisted the claimants' argument that this constituted a taking—until the Court of Claims held otherwise eighty-five years later. Gray v. United States, 21 Ct. Cl. 340, 393 (1886); Robert B. Ely III, *A Hidden Hole in the Fifth Amendment: Treaty Power Versus Property Rights: A Substitute for the Bricker Amendment*, 59 DICK. L. REV. 299, 301 (1954). The government's position seems to have been a matter of financial expediency, not principle. *See* Ely, *supra*, at 314 n.68.

47. Grace, *supra* note 12, at 149. One author suggests that the reason for the growing support for federal takings was growing nationalism after the War of 1812. JEREMIAH SIMEON YOUNG, A POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD 41 (1902).

issue more generally, the issue broke along party lines: Whigs like Henry Clay, who strongly supported internal improvements, generally backed Congress's eminent domain power. Their Democratic opponents, who were more suspicious of national authority, disagreed.[48]

Nationalist jurists sided with their congressional counterparts. In 1838, for instance, Kentucky's highest court found in *Dickey v. Maysville, Washington, Paris and Lexington Turnpike Road Co.* that Congress lacked the authority to use a state road as a post road without the state's consent "[u]nless Congress shall elect to exert its right of eminent domain."[49] The author of the opinion, Chief Justice George Robertson, was a future Whig legislator[50] and Clay's former law student.[51] Similarly, Chancellor James Kent of New York, who approvingly cited *Dickey* as an "important decision . . . well supported by sound reasoning,"[52] was an "arch-Federalist."[53] Justice Story, whose 1833 *Commentaries on the Constitution of the United States* endorsed a broad federal eminent domain power, was also a nationalist.[54]

Though proponents of federal eminent domain included the Speaker of the House and some of the nation's leading jurists, they faced potent opposition, and the issue remained unsettled into the early 1840s. For instance, in 1841 Congress debated how to erect a fort on Pea Patch Island, which was claimed by Delaware and New Jersey. Representative Brown of Pennsylvania suggested solving the jurisdictional dispute by seizing the land "under the sovereign power which belonged to the United States."[55] Others replied that Congress had no such authority. Ultimately the House was unable to come to any resolution, and the whole question of appropriations for acquiring the island was struck from the bill.[56]

I am not arguing that constitutional interpretation was merely a dependent variable of party politics. One does not have to be a militant legal realist to

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48. YOUNG, *supra* note 47, at 30; *cf.* Baude, *supra* note 1, at 1768 (suggesting that Henry Clay supported a federal eminent domain power because he was "a strong proponent of federal development of internal improvements").

49. Dickey v. Maysville, Washington, Paris & Lexington Tpk. Co., 37 Ky. (7 Dana) 113 (1838). The dating of *Dickey* is uncertain. The reporter lists the case as decided in 1838, but its author, Justice Robertson, left the court in 1834. *See Robertson, George, (1790-1874)*, BIOGRAPHICAL DICTIONARY OF THE U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000322 (last visited Nov. 11, 2013).

50. Id.

51. DAVID S. HEIDLER & JEANNE T. HEIDLER, HENRY CLAY: THE ESSENTIAL AMERICAN 43 (2010).

52. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 268 n.(a) (Boston, Little, Brown & Co., O.W. Holmes, Jr. ed., 12th ed. 1873) (1830).

53. *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1082 (2010).

54. *See* Baude, *supra* note 1, at 1771. For Story as a nationalist, see, for example, Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1176 (2013).

55. CONG. GLOBE, 27th Cong., 1st Sess. 202 (1841).

56. *Id.* The real difficulty may have been the uncertainty of the land's title, which would have been relevant regardless of a federal eminent domain power. *See Report of the Secretary of War* (Dec. 14, 1837), *reprinted in* 5 ARMY & NAVY CHRON. 370, 373 (Benjamin Homans ed., 1838).

understand that broader political questions can shape constitutional theories.[57] In the case of eminent domain, competing visions of the national government led to two prominent, well-defended views of whether the United States could take land without state consent. That does not mean that there was no right answer; but it does mean that, to the extent that we look to post-Ratification practice as an interpretative guide, we need to understand that the fate of the federal eminent domain power depended not only on constitutional theories, but also on the broader politics of federalism.

C. Bankruptcy

Debate over federal power to dispose of land within states also emerged with respect to bankruptcy law. Article I, Section 8 gave Congress power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[58] Though bankruptcy, like eminent domain, received "scant attention" at the Constitutional Convention, it became more controversial during Ratification, and especially during the 1790s.[59] Debates over bankruptcy combined a number of sensitive issues—tensions between proponents of agricultural and commercial political economies; the changing morality of debt; opposing interests of debtors and creditors[60]—but one especially salient issue was whether federal courts should be allowed to seize debtors' land.[61]

Contemporaries understood that the proper scope of federal bankruptcy legislation depended on the existence or nonexistence of a federal eminent domain power. In 1792, for instance, Thomas Jefferson expressed reservations about a proposed bankruptcy bill because "[i]t assume[d] a [federal] right of seizing and selling lands," and he "had imagined the general government could not meddle with the title to lands."[62] In contrast, Federalists like Alexander Hamilton insisted on the constitutionality of allowing federal courts to seize debtors' land on behalf of creditors.[63] In 1800, the Federalists won, securing

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57. *Cf.* Jack N. Rakove, *The Super-Legality of the Constitution, or, A Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 YALE L.J. 1931 (1999) ("Constitutional positions are rarely adopted for disinterested or abstract reasons . . . . But there must be other occasions when political actors make a good faith effort to ask, What does the Constitution mean or require?"). For a critique of explaining constitutional change exclusively through partisan politics, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

58. U.S. CONST. art I, § 8.

59. *See* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 169 (2002).

60. *See generally id.* (discussing transformations in bankruptcy during the early Republic).

61. Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 453 (2006). As this Section makes clear, I disagree with Baude's argument that there was a Founding-era consensus that regulating land title was entirely "beyond Congress's powers." Baude, *supra* note 1, at 1758.

62. Letter from Thomas Jefferson, U.S. Sec'y of State, to Thomas Mann Randolph, Jr. (Dec. 21, 1792), *in* THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION (Barbara B. Oberg & J. Jefferson Looney eds., 2008), *available at* http://rotunda.upress.virginia.edu/founders/TSJN-01-24-02-0754.

63. *E.g.*, Alexander Hamilton, Draft of an Opinion on the Constitutionality of an Act To

passage of bankruptcy legislation that empowered federal courts to execute against debtors' land, just as Jefferson had feared.[64] Debtors' land title, once a state matter, became subject to a "uniform federal rule."[65] In other words, a majority of Congress and the President of the United States agreed in 1800 that the federal government had the implicit power to alter land title within states. As the Supreme Court later clarified, this power necessarily invokes eminent domain.[66]

The Federalist victory was short-lived. Jeffersonians repealed the statute in 1803. In fact, Congress's failure throughout the nineteenth century to enact lasting bankruptcy legislation was largely a product of tensions over exemptions for real property.[67] But the first federal bankruptcy legislation suggests that in the early Republic, it was well within the political mainstream to believe that the federal government could seize property within states. And if such a power could be inferred with respect to bankruptcy and foreign affairs, it is unclear why it could not be inferred more broadly.[68]

II.
THE SUSPENSION OF FEDERAL EMINENT DOMAIN, C. 1840-1861

By the early nineteenth century, several Framers, politicians, and jurists had argued that the United States possessed eminent domain over property within states. Congress actually exercised that power with respect to foreign affairs and bankruptcy. Nonetheless, from the internal improvement debates of

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Establish a Bank (1792), *in* THE PAPERS OF ALEXANDER HAMILTON DIGITAL EDITION (Harold C. Syrett ed., 2011), *available at* http://rotunda.upress.virginia.edu/founders/ARHN-01-08-02-0060-0002 (noting that the federal bankruptcy power "necessarily involves . . . cases that affect real property"); *see also* MANN, *supra* note 59, at 208 (discussing Federalist support for a federal bankruptcy power that extended to debtors' lands).

64. Priest, *supra* note 61, at 453–54.

65. Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 43 (1983).

66. The Supreme Court has held that whenever Congress redistributes property under the Bankruptcy Clause, it must do so via its power of eminent domain and provide compensation under the Takings Clause. *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601 (1935); *see also In re* Smith, 22 F. Cas. 399, 401 (N.D. Ga. 1873) (No. 12,986), *aff'd,* 22 F. Cas. 413 (C.C.N.D. Ga. 1876) (No. 12,996) (suggesting that the power to regulate bankruptcies and the power of eminent domain are both attributes of national sovereignty).

67. Priest, *supra* note 61, at 454; *see also* Koffler, *supra* note 65, at 43 ("The objections of Jefferson and other Virginians to a federal law permitting the creditors to seize debtors' land established a tradition of fierce opposition to federal bankruptcy legislation.").

68. Again, I do not claim that the foreign affairs and bankruptcy powers are typical enumerated powers. Indeed, they may be exceptionally potent in terms of providing inherent congressional authority. *See* Baude, *supra* note 1, at 1748 & n.33 (noting that "exercises of power under the Bankruptcy Clause and the Fourteenth Amendment" are exceptions to the normal rule that Congress has no implicit power to "abrogate a state's traditional immunity from compulsory legal process"); *supra* note 42. My point is that Baude's account does not permit us to infer a "great power" from *any* enumerated power; thus in light of the bankruptcy and foreign affairs examples, we must conclude either that eminent domain is not a great power, or that we need a refined "great powers" theory that creates exceptions for certain enumerated powers like bankruptcy, and which explains why those exceptions exist.

the 1810s until the Civil War, Congress never condemned land within a state without that state's cooperation.[69] Why?

Existing scholarship offers three possibilities. First, Baude suggests that the federal eminent domain power was born from "a constitutional theory that came to prominence after the Civil War"—the doctrine of "inherent powers."[70] Because that theory did not exist (or was at best marginal) before the 1860s, Baude argues, politicians and judges could not justify direct federal takings. But this explanation does not correspond to the actual chronology of federal eminent domain. The "inherent powers" rationale circulated in the contexts of foreign affairs and bankruptcy as early as the 1780s, and prominent constitutional interpreters including Alexander Hamilton and John Jay argued for a federal eminent domain power well before any post-Civil War doctrinal revolution.[71]

A second possibility is cost.[72] While the Fifth Amendment required that any *federal* takings be fully compensated, the principle of just compensation emerged more slowly in many states.[73] Federal administrators, eager to minimize the expense of acquiring land,[74] may have wanted to take advantage of less-generous state eminent domain laws. But like Baude, I have found no evidence that this was an explicit factor in the formation of federal policy.

The third possibility, raised by Adam Grace, is "the Enclave Clause's requirement that the federal government obtain state consent before exercising exclusive jurisdiction over federal lands."[75] Congress generally wanted to acquire exclusive federal jurisdiction along with ownership. Since the former

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69. *See* YOUNG, *supra* note 47, at 40; Baude, *supra* note 1, at 1761. In *Great Falls Manufacturing Co. v. United States*, 16 Ct. Cl. 160, 181 (1880), *aff'd,* 112 U.S. 645 (1884), the claimant's counsel suggested that the United States took land in Maryland without that state's aid; but secondary literature suggests otherwise, and the Supreme Court's opinion is ambiguous. *Compare Great Falls Mfg. Co.,* 112 U.S. at 656 (suggesting that the claimant might "elect[] to regard the action of the [federal] government as a taking under its sovereign right of eminent domain"), *with id.* at 647 (noting Maryland's "assent" to the federal project).

70. Baude, *supra* note 1, at 1743.

71. *See supra* Sections I.A & I.C.

72. Baude, *supra* note 1, at 1789–90, briefly considers and rejects this possibility.

73. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 63-66 (1977); Treanor, *Original Understanding*, *supra* note 30, at 887 & n.28; William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694, 714 (1985). *But see* James W. Ely, *"That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1 (1992) (arguing that the just compensation principle emerged much earlier); Daniel J. Hulsebosch, *The Anti-Federalist Tradition in Nineteenth-Century Takings Jurisprudence*, 1 N.Y.U. J.L. & LIBERTY 967, 977 (2005) (noting that even though New York state's first constitution lacked a takings clause, "the state legislature usually compensated landowners" who suffered damage from government projects).

74. *Cf.* Grace, *supra* note 12, at 144 ("[Treasury official Tench] Coxe was always anxious to keep costs down, including acquiring lands by gift if at all possible.").

75. *Id.* at 149; *see* U.S. CONST. art I, § 8, cl. 17 (giving Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia and "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"). Grace also cites Congress's "fear of antagonizing private citizens." Grace, *supra* note 12, at 146.

definitely required state consent,[76] Congress found it convenient to pursue both together. Though Grace's hypothesis is plausible, he does not try to prove it conclusively.[77] And it is difficult to see why this administrative calculus would have changed after the Civil War, when the federal government would still have wanted to obtain exclusive jurisdiction, but nonetheless shifted toward direct exercise of its eminent domain power.[78]

This Part develops a new hypothesis: Congress did not take land without state consent because doing so was politically impossible. In particular, exercising the federal eminent domain power within states would have ignited a broader sectional and partisan debate about states' rights. While this issue was present in early debates about internal improvements,[79] it became more salient in the 1840s, as slavery became increasingly prominent and divisive.[80]

Debates over federal eminent domain took on a regional flavor as early as the 1820s. The Northwest Ordinance of 1787 had stipulated that states carved out of the Northwest Territory could "never interfere with the primary disposal of the soil by the United States."[81] Some eastern commentators took this to mean that in new states, the federal government not only possessed eminent

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76. U.S. CONST. art I, § 8, cl. 17.

77. Grace, *supra* note 12, at 142 ("It is beyond the scope of this article to identify the reasons that some nineteenth century politicians either doubted federal eminent domain authority, or simply refrained from exercising it . . . without state involvement.").

78. Gordon Wood suggests that in the early Republic, *all* eminent domain—federal or state—was suspect. But this concern seems to have faded by Ratification. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 404 (1998) (noting arguments in the 1770s and 1780s that legislatures were not "authorized to ascertain the value of the property of individuals, and to decide on what terms (except by equal taxation) they shall part with it").

79. *See supra* Section I.B.

80. This possibility is suggested by Timothy Sandefur, *Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of Public Use*, 32 SW. U. L. REV. 569, 618 n.267 (2003), who raises the possibility "that, before the Civil War, the question of the federal government's authority to condemn property within a state had been limited by Congress in an attempt to avoid the troublesome matter of whether Congress could free the slaves within a state by purchasing them through eminent domain." But Sandefur never substantiates his perceptive assertion. He cites only HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 298 (1994), who actually argues that "[u]nder the antebellum Constitution, *the federal government had no power* whatever to free slaves in the slave states or compensate their owners." In other words, Sandefur's only source argues that Congress had a constitutional, not political, objection to federal eminent domain—the opposite of what I argue here. The connection between slavery and *Pollard's Lessee* is also noted briefly by Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1314 (2009). Finally, David Currie briefly argues that "Southern opposition to federal roads and canals during and after the 1820s" was from fear that "[i]f Congress [could] build roads and canals, it [could] emancipate slaves." DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 347–48 (2001). Currie, however, suggests that this fear was about unenumerated powers in general, not eminent domain in particular. *Id.* I differ from Currie in two other respects. First, he suggests that endorsement of internal improvements "lent no colorable support" to the Southern argument, which adopted "an absurdly narrow interpretation of federal authority." *Id.* But as Baude shows, there were plausible reasons to doubt the constitutionality of federal eminent domain. Second, as I show in this Part, Southerners were far from "[p]aranoid" in worrying about a connection between eminent domain and abolition. *See id.*

81. Northwest Ordinance of 1787, art. IV, 1 Stat.50.

domain, but retained it to the exclusion of the states themselves[82]—a position strenuously denied by westerners like Senators Thomas Hart Benton of Missouri[83] and John McKinley of Alabama, the future author of *Pollard's Lessee*.[84]

A different regional divide emerged when federal eminent domain intersected with slavery.[85] Commentators had considered abolition a species of eminent domain since before the American Revolution,[86] as did many leading American statesmen, including James Madison and John Marshall, who both supported federally funded compensated emancipation.[87] (Indeed, William Treanor argues that Madison drafted the Takings Clause primarily to protect slave property.[88]) Nineteenth-century judges also linked governmental power over slaves to eminent domain.[89]

As slavery came to dominate national politics, the link between eminent domain and abolition transformed the politics of federal takings. While a few Southern legislators supported federal eminent domain in the early nineteenth century,[90] by the late 1820s the issue had become too partisan to permit such flexibility.[91] For instance, in 1828 Congress considered whether to compensate a Louisianan for a slave killed during the Battle of New Orleans. In the course of a long argument against reimbursement, Representative Charles Miner of Pennsylvania, "probably the most outspoken critic of slavery in Congress,"[92]

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82. *E.g.*, 1 KENT, *supra* note 52, at *260.

83. 2 REG. DEB. 1729 (1826).

84. 4 REG. DEB. 510 (1828).

85. The Takings Clause may have been motivated partly by a desire to protect property in slaves. Baude, *supra* note 1, at 1793 & nn.323–24.

86. *See, e.g.*, [EDWARD LONG], CANDID REFLECTIONS UPON THE JUDGEMENT LATELY AWARDED BY THE COURT OF KING'S BENCH ON WHAT IS COMMONLY CALLED THE NEGROE-CAUSE, BY A PLANTER 38–39 (London, T. Lowndes 1772) (arguing that if England emancipates slaves, "it ought to recompense [the master] for the loss he is compelled to sustain").

87. Letter from James Madison to Robert J. Evans (June 15, 1819), *in* THE PAPERS OF JAMES MADISON DIGITAL EDITION (J.C.A. Stagg ed., 2010), *available at* http://rotunda.upress.virginia.edu/founders/JSMN-04-01-02-0421 (adding that a constitutional amendment may be required to empower Congress to execute such a plan); G. Randal Hornaday, *The Forgotten Empire: Pre-Civil War Southern Imperialism*, 36 CONN. L. REV. 225, 247-48 (2003) (discussing Marshall); *see also* Betty L. Fladeland, *Compensated Emancipation: A Rejected Alternative*, 42 J. S. HIST. 169, 171 (1976) (noting Elbridge Gerry's assertion in 1790 that Congress had the power to enact a compensated emancipation bill). Most plans for compensated emancipation relied on funding from the sale of federal lands. Fladeland, *supra*, at 172-73.

88. Treanor, *Original Understanding*, *supra* note 30, at 819.

89. *See, e.g.*, State v. Jim, 48 N.C. (3 Jones) 348, 352 (1856) (describing the execution of a slave as eminent domain); *see also* Walker v. Gatlin, 12 Fla. 9, 17 (1867) (describing emancipation as eminent domain); Claudia Dale Goldin, *The Economics of Emancipation*, 33 J. ECON. HIST. 66, 66 (1973) ("Some forms of compensated emancipation can also be viewed as early precedents for the doctrine of eminent domain.").

90. *See* Grace, *supra* note 12, at 149 n.176.

91. *See* David W. Blight, *Perceptions of Southern Intransigence and the Rise of Radical Antislavery Thought, 1816-1830*, 3 J. EARLY REPUBLIC 139, 141 (1983).

92. DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 7 (2001).

insisted that the federal government had the power to take slaves by eminent domain.[93] This view became increasingly mainstream in abolitionist circles, so that by 1862, the Harvard-educated lawyer and congressman William Whiting could argue (perhaps disingenuously) that "the right of the United States to take private property for public use" was "no longer open to question, if it ever was questioned." (Of course, he added, this power permitted Congress to emancipate slaves and to conscript soldiers for the war effort.[94]) Southerners took an equally strong stance,[95] opposing the federal government's power to emancipate slaves—even with compensation—until the Civil War.[96]

Debates over slavery attained a new pitch in the 1840s,[97] just as federal eminent domain reached the Supreme Court in *Pollard's Lessee*.[98] The opinion fell to Justice McKinley, an Alabaman and "firm supporter" of slavery[99] who had insisted on the Senate floor that eminent domain was a state issue.[100] McKinley maintained the same doctrine from the bench, writing that the federal government lacked any power of eminent domain within the states "except in the cases in which it is expressly granted."[101]

McKinley's opinion proved useful to defenders of slavery. Its first Supreme Court citation was in *Strader v. Graham*, which used *Pollard's Lessee* to find that federal courts lacked jurisdiction to decide a slave's legal status.[102] Justice Campbell twice quoted *Pollard's Lessee* in his concurrence to *Dred Scott*,[103] in which he argued that the absence of a federal eminent domain

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93. 4 (Part 1) REG.DEB. 1463 (1828).

94. WILLIAM WHITING, THE WAR POWERS OF THE PRESIDENT, AND THE LEGISLATIVE POWER OF CONGRESS, IN RELATION TO REBELLION, TREASON AND SLAVERY 18 (Boston, J.L. Shorey, 2d ed. 1862). MARK E. NEELY, LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR 110–11 (2011), finds Whiting's argument "bizarre," but it makes sense in the broader context of linked debates over slavery and federal eminent domain. John Quincy Adams had also suggested that Congress's war powers and power to emancipate derived from the same source. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861, at 18 (2007). For the connection between eminent domain and conscription, see Baude, *supra* note 1, at 1818–21.

95. *See supra* note 86.

96. Blight, *supra* note 91, at 142 n.6 (noting that by 1825, Southerners treated even compensated emancipation as a fundamental attack on their identity); Fladeland, *supra* note 87, at 182, 185 (noting that proslavery forces had "effectively killed" compensated emancipation by 1832, and that President Lincoln unsuccessfully tried to persuade border states to accept compensated emancipation in 1862). This stands in sharp contrast to the British Empire, where compensated emancipation ended slavery in 1833. It is possible that slave owners also believed that compensation would be inadequate. *See* CURRIE, *supra* note 94, at 17; Goldin, *supra* note 89, at 73 n.15 (noting that emancipation in the District of Columbia during the Civil War paid owners less than half of slaves' market value).

97. *See, e.g.*, FONER, *supra* note 18, at 82.

98. 44 U.S. (3 How.) 212, 223 (1845).

99. Paul Finkelman, *You Can't Always Get What You Want . . . : Presidential Elections and Supreme Court Appointments*, 35 TULSA L.J. 473, 479 (2000).

100. *See supra* note 86 and accompanying text.

101. *Pollard's Lessee*, 44 U.S. (3 How.) at 223.

102. 51 U.S. 82, 95 (1850).

103. Dred Scott v. Sandford, 60 U.S. 393, 508–09, 513 (1856) (Campbell, J., concurring).

power "is a necessary consequence, resulting from the nature of the Federal Constitution"; that attempts to limit slavery in Missouri violated this "consequence"; and that Congress's power to regulate property (including slaves) was limited even in the territories. *Pollard's Lessee* also played an important role in Scott's state court suit, in which opposing counsel cited that case and *Strader* to deny Scott's right to sue in Missouri courts.[104]

Pollard's Lessee also shaped congressional debates on slavery. Senator Pierre Soulé discussed it at length during the debate on the Compromise of 1850;[105] Senators Pearce of Maryland and Cass of Mississippi debated its holding;[106] Senator R.M.T. Hunter of Virginia cited it in his argument for slaveholders' rights in Kansas; Senator George Pugh of Ohio quoted it during two different debates on Kansas statehood;[107] and Representative William Boyce of South Carolina combined Justice Campbell's concurrence in *Dred Scott* with *Pollard's Lessee* to argue that limitations on the admission of slave states were unconstitutional.[108] The staunchly pro-Southern Attorney General Caleb Cushing[109] added his imprimatur, issuing two opinions in the 1850s that affirmed states' exclusive control of eminent domain.[110] One of them, which linked *Pollard's Lessee* to state control over slavery, has been read as a prelude to *Dred Scott*.[111]

None of this proves that Justice McKinley wrote *Pollard's Lessee* specifically to bolster slavery.[112] But by the 1840s, defenders of slavery had a clear stake in defending McKinley's denial of federal eminent domain, and the strongest arguments in Congress against a federal eminent domain power came

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Campbell would resign from the Court to join the Confederacy as assistant secretary of war.

104. Scott v. Emerson, 15 Mo. 576, 579 (1852) (argument of counsel).

105. CONG. GLOBE APP'X, 31st Cong., 1st Sess. 1001 (1850).

106. CONG. GLOBE, 33d Cong., 1st Sess. 1819 (1854).

107. CONG. GLOBE APP'X, 34th Cong., 1st Sess. 612 (1856); CONG. GLOBE APP'X, 34th Cong., 3d Sess. at 58 (1857).

108. CONG. GLOBE, 35th Cong., 1st Sess. 1358–60 (1858).

109. For Cushing as a defender of slavery and states' rights, see David Chang, *A Critique of Judicial Supremacy*, 36 VILL. L. REV. 281, 399 n.63 (1991); and Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087, 1101 (1993).

110. Eminent Domain of Tex., 8 Op. Att'y Gen. 333 (1857) ("The right of eminent domain belongs to [Texas] by title anterior to, and of course independent of, its accession to the Union. And were it not so, still the 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."); Eminent Domain of the States—Equality of the States, 7 Op. Att'y Gen. 571 (1855) ("The United States never held any municipal sovereignty, jurisdiction, or right of soil in the territory of which any of the new States are formed except for temporary purposes "). Cushing also emphasized the constitutionality of cooperative takings. *See* Eminent Domain—State Jurisdiction, 8 Op. Att'y Gen. 30 (1856). Baude notes Cushing's opinions but describes them as evidencing a national consensus. *See* Baude, *supra* note 1, at 1775–77.

111. *See* Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 283 & n.49 (1997).

112. Though I am not opposed to the idea. As I showed in Part I, federal eminent domain was a hard case, with reputable arguments on both sides; and as Michael Klarman has argued, judges are mostly likely to make politically motivated decisions in hard cases. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

from Southerners. As a result, legislators hoping to get bills through Congress learned to avoid the question of a federal eminent domain power, just as they learned to avoid slavery—as did jurists who wanted to convince a national audience about anything else.[113]

Despite its vigorous promotion by Cushing and others, *Pollard's Lessee* failed to settle the issue of a federal eminent domain power. Cushing himself admitted as much in 1855 when he wrote that the federal government's authority to condemn land in Maryland without the state's consent "*might possibly* be a matter of controversy," but that the issue had not been decided.[114] Similar confusion emerged under Cushing's successor. In 1858, employees of the U.S. Coast Survey had occupied private property in New York in order to take astronomical measurements. When the property's corporate owner asked the federal officers to leave, Attorney General Jeremiah Black had to decide "whether the Government can maintain the Coast Survey in its present position against the will of the corporation whose property it is on."[115] It turned out that the Coast Survey officers had acted without authorization, so Black could sidestep any debate over federal power. But he noted in passing that it was "doubtful if the United States can exercise the right of eminent domain for such a purpose."[116] Even after *Pollard's Lessee*, the U.S. Attorney General declined to say categorically that the United States lacked the power to occupy land within states.[117]

III.
THE REBIRTH OF THE FEDERAL EMINENT DOMAIN POWER, 1861-1875

Federal eminent domain practice changed dramatically during the 1860s. Congress, which had previously depended on state legislatures' cooperation to condemn land, took it directly for an arsenal in Illinois (1864)[118] and a federal cemetery in West Virginia (1867)[119]; Congress also began delegating eminent

113. For instance, in his seminal work on international law, Henry Wheaton seems almost deliberately ambiguous about the federal government's eminent domain authority. Following Vattel and others, he noted that "[a] general power to make treaties of peace necessarily implies a power [to cede] . . . private property included in the eminent domain annexed to the national sovereignty"—which would seem to align him with Hamilton and Jay. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE 294 (London, B. Fellowes 1836); *see supra* Section I.A. But Wheaton then limited his claim to situations where "there be no limitation expressed in the fundamental laws of the state, or necessarily implied from the distribution of its constitutional authorities." *Id.* at 294–95; *see also id.* at 281 ("If then there be no limitation expressed in the fundamental laws of the state or . . . its constitutional authorities on the treatymaking power . . . , it necessarily extends to the alienation of public and private property "). Wheaton never clarified what limitations actually existed in the United States.

114. Wash. Aqueduct, 7 Op. Att'y Gen. 114 (1855) (emphasis added).

115. Dudley Observatory, 9 Op. Att'y Gen. 280(1859).

116. Id.

117. Black's ambiguity is remarkable in light of his proslavery inclinations. *See* Mark A. Graber, Dred Scott *As a Centrist Decision*, 83 N.C. L. REV. 1229, 1237 (2005).

118. *See infra* note 123 and accompanying text.

119. *See infra* note 134 and accompanying text.

domain authority to railroads.[120] This Part explains why. Section III.A describes the ideological and political developments that led a growing number of jurists and politicians to embrace a federal eminent domain power. Section III.B shows that this shift became apparent in judicial and legal opinions starting in the 1860s, so that by the time the Supreme Court definitively found a federal takings power in *Kohl v. United States*,[121] the decision was well within the mainstream of American legal thought.

A. Why Congress Began Exercising Eminent Domain Directly

The most important explanation for Congress's change in practice is that many of the strongest opponents of federal eminent domain seceded. As Part II showed, many Southerners had resisted a federal takings power because of its potential implications for slavery; in 1861 the issue became moot. But Southern secession alone does not explain the change. Slave owners and states'-rights advocates remained in the Union, and even some Republicans expressed doubts about federal takings without state consent (though it is unclear whether their qualms were constitutional or tactical).[122] This Section argues that three additional considerations helped to transform the federal eminent domain power from a marginal doctrine into a dominant one.

First, a federal eminent domain power proved useful to the broader wartime push to expand federal power. Just as slavery debates had rendered federal takings politically inconvenient, war made them politically convenient. It is no accident that Congress's first exercise of direct eminent domain was for a federal arsenal.[123] Accordingly, authors like William Whiting, who argued that the Constitution gave President Lincoln extensive wartime powers, insisted on the existence of a federal takings power as a way of fleshing out their case for a strong national government.[124]

Second, the existence of a federal eminent domain power played a useful ideological role in critiquing the Confederacy. Secessionists tried to minimize the extent of the federal government's power, arguing that the United States was merely a compact that preserved in full each state's sovereignty—including, of course, states' power of eminent domain. In response, constitutional theorists who denied a right of secession searched for ways in which the Constitution gave the federal government powers that were incompatible with complete state sovereignty. Joel Parker, a Harvard law

120. Act of July 27, 1866, § 7, 14 Stat. 296; Act of July 2, 1864, 13 Stat. 369; Act of July 2, 1864, 13 Stat. 357; Act of July 1, 1862, § 3, 12 Stat. 489; Baude, *supra* note 1, at 1780, 1783–84.

121. 91 U.S. 367 (1875).

122. *See* Baude, *supra* note 1, at 1779. Baude suggests, for instance, that Representative Thaddeus Stevens "raised federalism objections" to a bill giving eminent domain authority within the states to a federally chartered railroad. But Stevens framed his objections as reflecting the doubts "entertained by a large number of people," and he himself never took a firm stand on the matter. *See id.* (quoting CONG. GLOBE, 37th Cong., 2d Sess. 1889 (1862)).

123. Baude, *supra* note 1, at 1780–81.

124. WHITING, *supra* note 94, at 17–18.

professor and former chief justice of New Hampshire, could find no better example than eminent domain. In a critique of Jefferson Davis's first message to the Confederate Congress, Parker insisted that the Constitution is more than a compact, and that it "confers" on "the United States" "a power of *eminent domain;* a right to take lands for forts, arsenals, navy yards, military roads, and other public uses; a right of occupation within the waters of each State by a naval force when necessary."[125] As Parker's use of italics suggests, he believed the reality of constitutional union depended especially on the federal government's right to take property within states.

Parker's argument is especially remarkable because he was generally skeptical of federal power. This leads to the third reason that a federal eminent domain power became so widely accepted during and after the Civil War: authors who wanted to constrain the federal government began to emphasize the breadth of the government's prewar authority—including its takings power—to counter claims that the war justified a stronger national government. By asserting a federal eminent domain power, authors like Parker could illustrate the potency of the antebellum Constitution, even as they reinforced the boundary between a vigorous national government and an unlimited one:

> [T]he government of the United States has jurisdiction over all the States—rights of eminent domain there—rights to hold courts and enforce judicial proceedings; is under a duty to protect the State not only against foreign powers but against its own citizens; and guarantees to each as a State a republican form of government.[126]

These broad rights, Parker continued, gave the federal government power "to suppress the insurrection," but not to "conquer" the Confederacy and "reduce it to a territorial condition."[127] If the federal government had always had the power to commandeer property within states, then the North's conquest of the South could give it no additional rights over Southern property.

In Parker's hands, the federal eminent domain power became an eminently conservative doctrine. If the United States had a broad takings power before the war, then the war could not expand that power. For instance, Parker insisted that the Ratification debates had revealed a broad consensus in favor of a federal eminent domain power—and an equally broad consensus that such a power did not encompass emancipation.[128]

Parker's chief target was William Whiting, whose treatise on war powers had used the federal eminent domain power to draw precisely the opposite

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125. JOEL PARKER, THE RIGHT OF SECESSION 14, 33–34 (Cambridge, Mass., Welch, Bigelow & Co. 1861).

126. JOEL PARKER, CONSTITUTIONAL LAW: WITH REFERENCE TO THE PRESENT CONDITION OF THE UNITED STATES 26–27 (Cambridge, Mass., Welch, Bigelow & Co. 1862).

127. Id. at 27.

128. JOEL PARKER, THE WAR POWERS OF CONGRESS, AND THE PRESIDENT: AN ADDRESS DELIVERED BEFORE THE NATIONAL CLUB OF SALEM, MARCH 13, 1863, at 15–20 (Cambridge, Mass., H.O. Houghton 1863).

conclusions.[129] In other words, both sides in the Union's debates over abolition and wartime powers found federal eminent domain to be a useful rhetorical and doctrinal tool. Politics had cleared the road for the emergence of a federal eminent domain doctrine that had mostly been dormant since the 1820s.

B. The Road to Kohl

Starting in the 1860s, lawyers and jurists could once again advance the argument that the federal government could directly take property within states. They did not rely on any doctrinal revolution: *Pollard's Lessee* was still good law, and their claims were remarkably similar to those in the early Republic. The federal government still seemed to prefer cooperative takings, but this was on prudential, not constitutional, grounds.[130] For instance, in 1867, Attorney General Henry Stanbery considered the best way to acquire land in Ohio. The United States had tried to proceed via Ohio's eminent domain statute, but part of the tract in question was state-owned, and Ohio's statute did not permit the condemnation of its own land. Stanbery proposed two solutions: either the Ohio legislature could pass a special act conveying the land; "or, if that cannot be obtained," Congress could "exercise the proper eminent domain power of the United States, authorizing a proceeding to condemn all this property to the use of the United States, and providing the means for fixing a just compensation."[131] Though Stanbery treated federal condemnation as second-best, he expressed no doubts about its constitutionality. (At the same time, he appreciated the practice's novelty, and he assured the Secretary of the Treasury that Congress had employed "[s]uch special legislation . . . more than once . . . for the acquisition of land in a State."[132]) Later that year, Stanbery authored an opinion in which he assumed the federal government's power to take land for an armory in West Virginia.[133] By the end of the decade, attorneys general treated direct federal takings as a matter of course.[134]

Courts soon reached the same conclusion. In 1868, a federal district court found that "[i]t is an incident to the sovereignty of the United States, and a right recognized in the [Takings Clause] . . . that it may take private property for public use" within the State of Michigan.[135] Another federal court remarked a few years later (in a bankruptcy case[136]) that "the paramount right of eminent domain" was "an attribute of sovereignty in the nation."[137] State courts also

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129. *See supra* notes 94 & 124 and accompanying text.

130. *Cf.* Baude, *supra* note 1, at 1785 & nn. 281–82 (discussing the persistence of cooperative takings).

131. Acquisition of Prop. for Pub. Use, 12 Op. Att'y Gen. 173 (1867).

132. Id.

133. Harper's Ferry Prop., 12 Op. Att'y Gen. 329, 330 (1867).

134. *See, e.g.*, Nat'l Cemeteries, 13 Op. Att'y Gen. 131, 134 (1869).

135. Avery v. Fox, 2 F. Cas. 245, 247 (C.C.W.D. Mich. 1868) (No. 674).

136. For eminent domain and bankruptcy regulation, see *supra* Section I.C.

137. *In re* Smith, 22 F. Cas. 399, 401 (N.D. Ga. 1873) (No. 12,986), *aff'd,* 22 F. Cas. 413 (C.C.N.D. Ga. 1876) (No. 12,996).

showed growing acceptance of federal takings. In 1865, Justice Robertson of Kentucky—who, as the author of *Dickey*,[138] had been an early advocate for a federal eminent domain power—once again penned an opinion assuming the federal government's authority to take property (in this case, a slave) within the states.[139] A few years later, Justice Thomas Cooley of Michigan added his support, first in his landmark legal treatise[140] and then from the bench.[141]

The federal eminent domain power did not immediately gain universal acceptance, especially during the Civil War.[142] The author of the first treatise on eminent domain rightly noted that the doctrine remained "in doubt" until *Kohl*.[143] The confusion was evident in a New Hampshire case decided the year before *Kohl*. The majority of the state supreme court was "not prepared" to say whether the United States had an eminent domain power, while a dissent insisted that it did.[144]

Thus, in 1875, when the Supreme Court took up *Kohl*, it played a typical institutional role: it resolved uncertainty among lower courts. In doing so, it worked no "major historical change,"[145] nor did it rely on any new postwar "constitutional theory."[146] Rather, it settled a constitutional question that had been debated since the Founding. Indeed, some contemporaries treated *Kohl* as relatively unimportant.[147] In arguing one of the first post-*Kohl* cases regarding

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138. Dickey v. Maysville, Washington, Paris & Lexington Tpk. Co., 37 Ky. (7 Dana) 113 (1838); *see supra* note 49 and accompanying text.

139. Hughes v. Todd, 63 Ky. 188, 192 (1865). Justice Robertson of Kentucky considered the circumstances of the recent war "altogether immaterial" to his support of federal eminent domain, suggesting that he saw himself as merely confirming his earlier opinion in *Dickey*. *See id.* at 191.

140. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 525–26 (Boston, Little, Brown & Co. 1868). Cooley expressed the idea even more strongly in the second edition of his treatise: "The authority of the general government to appropriate private property for its needs is unquestionable " THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 578 n.2 (Boston, Little, Brown & Co., 2d ed. 1871).

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

142. *See, e.g.*, Baude, *supra* note 1, at 1781–85 (discussing congressional debates over this issue during the war).

143. HENRY EDMUND MILLS, A TREATISE UPON THE LAW OF EMINENT DOMAIN 363 (St. Louis, F.H. Thomas 1879); *see also* Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 18 (1877) (Field, J., dissenting) ("It was for a long time a debated question whether the United States could exercise the right of eminent domain within a State. It has been decided, only within the past two years . . . .").

144. Orr v. Quimby, 54 N.H. 590, 593 (1874); *id.* at 603 (Doe, J., dissenting).

145. Baude, *supra* note 1, at 1818.

146. *Cf. id.* at 1743 (making this argument).

147. A few nineteenth-century observers argued that there was a sharp break between *Pollard's Lessee* and *Kohl*. *See* State *ex rel.* Corwin v. Indiana & Ohio Oil, Gas & Mining Co., 22 N.E. 778, 780 (Ind. 1889) ("It was at one time held by the supreme court of the United States that the general government could not exercise the right [of eminent domain] within the territorial limits of a state. . . . But this doctrine was denied in *Kohl* "); *supra* note 143. But many jurists treated *Kohl* as a continuation of earlier doctrine, and some even found *Pollard's Lessee* and *Kohl* to be fully compatible. They suggested that *Pollard's Lessee* gave the states *ownership* of public lands (such as the shores of navigable waters), but that the federal government still possessed eminent domain. *See,*

eminent domain, the attorney for the United States cited *Dickey* as the primary authority for the proposition that "[t]he consent of a State was not indispensable to the exercise of the national right" of eminent domain. He relegated *Kohl* to "see also."[148]

CONCLUSION

Baude has made an important contribution in resurrecting the historical argument against federal eminent domain. In doing so, he has added nuance and vigor to the increasingly influential conversation about "great powers" and the Necessary and Proper Clause. But he errs in assuming an antebellum consensus that eminent domain was such a great power. From the Founding until the Civil War, jurists and policymakers advanced opposing views of whether the federal government could take land within states. (They also disagreed about states' eminent domain authority, but that is beyond my scope.[149]) And in the early Republic, the forces in favor of federal eminent domain occasionally prevailed. But because federal eminent domain is closely connected to other important federal powers—as Baude so clearly demonstrates—the issue became enmeshed in the nineteenth-century politics of federalism and slavery. Political circumstances, not doctrinal consensus, rendered it temporarily impossible for Congress to perform direct federal takings. The only Supreme Court precedent against federal eminent domain, *Pollard's Lessee*, was similarly embedded in a divisive political context. Only the Civil War, by reconfiguring the politics of federal power, allowed older arguments for federal eminent domain to resurface. As a result, the decade after Appomattox was marked by renewed uncertainty about federal takings, until *Kohl* ended the debate, at least for a time.

This history matters not just because federal agencies continue to acquire land,[150] or even because of eminent domain's implications for the Necessary

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e.g., State of Illinois v. Ill. Cent. R. Co., 33 F. 730, 754 (C.C.N.D. Ill. 1888), *aff'd sub nom.* United States v. Ill. Cent. R. Co., 154 U.S. 225 (1894) and *aff'd as modified,* 146 U.S. 387 (1892); Light-House at Great Beds, Raritan Bay, 16 Op. Att'y Gen. 369 (1879).

148. Great Falls Mfg. Co. v. United States, 16 Ct. Cl. 160, 183 (1880), *aff'd,* 112 U.S. 645 (1884). The lawyer's citation was surprising, since *Dickey* had no authority in a federal court, especially with a Supreme Court decision on point; but his opponent also cited a state court case (People *ex rel.* Trombley v. Humphrey, 23 Mich. 471 (1871)) along with *Kohl. Great Falls Mfg. Co.*, 16 Ct. Cl. at 181. The judge cited *Kohl* alone, as one would expect. *Id.* at 197.

149. *See, e.g.*, Fletcher v. Peck, 10 U.S. 87, 145 (1810) (Johnson, J., concurring) (expressing concern that Chief Justice Marshall's interpretation of the Contract Clause undermined states' power of eminent domain); *supra* note 73 (discussing uncertainty about states' duties to compensate for takings); *supra* note 78 (discussing attacks on state eminent domain in the 1770s and 1780s); *supra* notes 82-84 and accompanying text (discussing debates over new states' eminent domain authority).

150. *See* Baude, *supra* note 1, at 1743; *see also* United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cnty., Cal., 683 F.3d 1030 (9th Cir. 2012) (condemning land in California on behalf of the Navy); United States v. 1.604 Acres of Land, 879 F. Supp. 2d 525, 528 (E.D. Va. 2012) (taking land for a federal courthouse); Texas Border Coal. v. Napolitano, 614 F. Supp. 2d 54 (D.D.C. 2009) (discussing condemnation of land to build a fence near the Mexican border); *History of the Federal Use of Eminent Domain*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/enrd/

and Proper Clause. It matters more generally for how we use history to inform our reading of the Constitution. To the extent that post-Ratification practice guides our analysis,[151] we need to be attentive to the ways in which politics have shaped that practice.[152] The history of federal eminent domain lacks the clarity that Baude would attribute to it. It depended on factors ranging from the vicissitudes of partisan electoral success to sectional rivalries to morally discredited defenses of slavery. Baude's *Rethinking the Federal Eminent Domain Power* is a careful explication of what post-Ratification practice looked like and an insightful discussion of its implications. But if we focus exclusively on *what* practice was, rather than *why* it evolved as it did, we risk incorporating mere contingencies into our constitutional interpretation. We need to remember how messy constitutional history can be.

History_of_the_Federal_Use_of_Eminent_Domain.html (last updated Nov. 2010) (giving a broad overview of historical and contemporary uses of the federal eminent domain power); *Where Our Cases Have Taken Us*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/enrd/4877.htm (last updated Nov. 2010) (same).

151. Baude offers a strong defense of its relevance. *See* Baude, *supra* note 1, at 1743, 1811.

152. *Cf.* Campbell, *supra* note 54, at 1111 (noting that "the rapidly changing political climate" ofthe early Republic rendered some constitutional ideas "unstable").