Essay: Cooperative Federalism and Federal Takings After the Trump Administration's Border Wall Executive Order

Gerald S. Dickinson

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COOPERATIVE FEDERALISM AND FEDERAL TAKINGS AFTER THE TRUMP ADMINISTRATION’S BORDER WALL EXECUTIVE ORDER

ESSAY

Gerald S. Dickinson*

TABLE OF CONTENTS

INTRODUCTION........................................................................................................... 647
I. THE BORDER WALL EXECUTIVE ORDER................................................................. 651
II. COOPERATIVE FEDERALISM AND TAKINGS AT THE FOUNDING.................... 653
   A. Political Developments..................................................................................... 654
   B. Doctrinal Developments.................................................................................. 659
   C. The Practice of Cooperative Federalism Post-Ratification............................... 661
III. COOPERATIVE FEDERALISM AND THE U.S.-MEXICO BORDER WALL.. 668
CONCLUSION.............................................................................................................. 673

INTRODUCTION

The Trump Administration’s (arguably) most polemic immigration policy—Executive Order No. 13,767 mandating the construction of an international border wall along the southwest border of the United States—offers a timely and instructive opportunity to revisit the elusive question of the federal eminent domain power and the historical practice of cooperative federalism. From federal efforts to restrict admission and entry of foreign nationals and aliens (the so-called “travel ban”) to conditioning federal grants on sanctuary city compliance with federal

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2. See generally Hawaii v. Trump, 871 F.3d 646, 649–50 (9th Cir. 2017) (per curiam); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 573, 6
immigration enforcement, state and local governments (mostly liberal and Democratic enclaves) today have become combative by resisting a federal immigration agenda pushed by the Trump Administration. These efforts to resist rely upon self-determined local and state policymaking or the federal courts to sustain sovereign autonomy. However, amidst the more well-known examples of “uncooperative federalism,” such as the travel ban and sanctuary cities, is a property law angle to “cooperative federalism.” A recently introduced bill in Congress may be viewed not only as a political reaction to an arguably heavy-handed federal immigration policy, but an aide-mémoire to an old cooperative system of land acquisitions between the federal government and the states in the early republic.

In October 2017, ten Democratic members of the House of Representatives introduced “Protecting the Property Rights of Border Landowners Act” that, if passed, would prohibit Attorney General Jeff Sessions and Kirstjen Nielsen, Secretary of the Department of Homeland Security (“DHS”), from acquiring, by eminent domain, private property along the border to build an international border wall. Specifically, the bill restricts the federal eminent domain power for purposes of “constructing a wall, or other physical barrier, along the international border between the United States and Mexico.”

The bill is just one of many congressional responses to President Donald J. Trump’s immigration policy. The proposed amendment revises the existing Immigration and Nationality Act (“INA”), which currently gives the Secretary of DHS the authority to put resources into her agency to patrol the border, and where necessary and appropriate, construct


4. See Federalism and Administrative Structure, 92 YALE L.J. 1342, 1343 (1983) (published summary of a paper presented by Robert Cover at a Yale symposium) (arguing that “cooperative federalism” undermines the only viable restraint on the congressional exercise of enumerated powers: the political process”).


6. U.S. CONST. amend. V.


8. Id.

9. Id.
barriers. The sponsors of the bill to restrict the federal eminent domain power are all Democrats representing districts either abutting or located near the U.S. border with Mexico (with the exception of New York), including ones in Texas, New Mexico, California, and Arizona.

The proposed amendment is instructive. It reminds us that, indeed, the early practice at the founding of the nation was to limit, or simply refuse to recognize, the federal government’s power to condemn land within state borders. For almost eight decades after ratification the federal government did not purely exercise an eminent domain power. Instead, the custom was for the federal government to identify land located within state borders that it needed for a federal project (say, for a courthouse, lighthouse, or roads) and request a state legislature to condemn the land and convey it over to the federal government. Or the federal government would file suit in state court as a plaintiff and follow state condemnation proceedings to acquire the land. Otherwise, during that era, the Takings Clause was arguably a constraint on the federal government’s power to condemn land only in the District of Columbia and the federal territories where it always had the sovereign power similarly available to the states. This historical record suggests the federal power to condemn land was not an essential ingredient for the federal government to accomplish its major federal projects, particularly military and national security building. Instead, it was cooperation with the states.

This Essay sheds light on the old cooperative system of land acquisition between the federal government and the states in light of today’s debates over land acquisition for the construction of an international wall. This Essay proceeds in three Parts.

Part I briefly discusses President Trump’s Executive Order mandating the construction of a physical wall along the border for purposes of national security and raises some of the potential land acquisition obstacles the Trump Administration faces along the way.

Part II explores the historical practices and sentiments of federal land acquisition post-ratification. In particular, this Part explores the
debates in Congress and amongst federal and state courts, including the Supreme Court, over the question of whether Congress enjoyed a federal eminent domain power. William Baude’s scholarship is instructive on this point. Part II also shows how the consent and cooperation system of land acquisition between the federal government and the states actually operated in practice, drawing on mid to late 1800s examples of cooperation to acquire land for forts and arsenals. This history suggests that the founding generation would likely have been reluctant to allow Congress to seize private land purely within state boundaries for an international wall, or any other national security or civil-military project.

Part III draws practical parallels and political contradictions between the history of cooperative federalism and the recent bill introduced by House Democrats to restrict the federal takings power along the border. This contemporary effort to rein in the federal eminent domain power, supported entirely by Democrats, embraces an originalist spirit of the founding generation by potentially forcing a Republican Administration and Republican-led Congress to revert to a system of consent and cooperation to acquire land for the border wall. If such a bill were to pass, the federal government, in essence, would likely have to pursue alternative means, such as filing as a plaintiff in state court to condemn land necessary for the wall, or requesting the legislatures of states bordering Mexico to condemn the land under state law and then purchase the land from the states. Of course, the likelihood of the bill’s passage is quite low given the current political climate in Washington. However, this political reality should not hinder the unusually paradoxical nature of today’s Republicans’ support of federal takings to acquire land for the border wall and Democrats’ efforts to restrain the national eminent domain power.

18. Id. at 1738.
19. It is fair to say that both Republicans and Democrats (and for that matter conservatives and liberals) have historically entertained a game of fair-weather federalism, choosing expanded federal intervention or state and local control depending on the political environment at the time. Heather Gerken has written on this subject of progressive federalism tending to flip (or readjust) the paradigm of the historical binary vision of conservative support for federalism and liberal support for national power. See Heather K. Gerken, A New Progressive Federalism, DEMOCRACY, no. 24, Spring 2012, at 37, https://democracyjournal.org/magazine/24/a-new-progressive-federalism. For example, many Democrats supported stronger policing and patrolling of the southwest border, including condemning private lands to construct a 700-mile fence along the border in 2007, during the Bush Administration. See infra Part I; Annie Linskey, In 2006, Democrats Were Saying ‘Build That Fence!’ BOS. GLOBE (Jan. 27, 2017), https://www.bostonglobe.com/news/politics/2017/01/26/when-wall-was-fence-and-democrats-embraced/QE7ieC8XjXVxO63pLMTe9O/story.html.
20. See infra Part III (discussing examples of the old cooperative federalism system of land acquisition in detail).
I. THE BORDER WALL EXECUTIVE ORDER

On January 25, 2017, President Donald J. Trump issued an Executive Order mandating the “immediate construction of a physical wall on the southern border” of the United States.\textsuperscript{21} Pursuant to the Immigration and Nationality Act,\textsuperscript{22} the Secure Fence Act of 2006,\textsuperscript{23} and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”),\textsuperscript{24} the Executive Order seeks to “ensure that the Nation’s immigration laws are faithfully executed”\textsuperscript{25} and to protect the country from a “recent surge of illegal immigration at the southern border with Mexico.”\textsuperscript{26} The Executive Order proposes, among other things, the construction of a physical, contiguous, and impassable wall along the southern border at all points of entry in accordance with the Secure Fence Act and the IIRIRA to mitigate illegal immigration.\textsuperscript{27} Under current federal laws, Kirstjen Nielsen, Secretary of Homeland Security, may take necessary steps to allocate resources to construct the wall, and with the assistance of Attorney General Jeff Sessions and the Department of Justice, acquire the necessary land to construct the wall by voluntary sale or eminent domain.\textsuperscript{28} The response to the Executive Order was both welcoming and divisive.\textsuperscript{29} And while an international wall requires congressional approval of federal funds to finance such a large-scale national security project, some of the most difficult problems are not necessarily the costs, but land acquisition.\textsuperscript{30}

Indeed, the construction of an international border wall would be inconceivable if it were not for Congress's power to acquire private

\textsuperscript{25} Exec. Order No. 13,767, 82 Fed. Reg. at 8793.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 8794. A physical wall is defined in the Executive Order as a “contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.” Id.
\textsuperscript{28} Immigration and Nationality Act, 8 U.S.C. § 1103(a)–(b) (2012).
property by eminent domain. The U.S.-Mexico border is almost two thousand miles. Only about one-third—approximately 632 miles—of the land the wall would sit on is owned by the federal government or by Native American tribes. States or private property owners, especially along the Texas-Mexico border, own approximately sixty percent of the borderland. Texas, where more than half of the land abutting Mexico is located, retained its public lands when it was admitted to the Union in 1845. The state retained title to its land and therefore was not implicated by President Theodore Roosevelt’s “Roosevelt Reservation,” which designated lands within sixty feet of the U.S.-Mexico border as public in 1907, including parts of California, New Mexico, and Arizona. Most of the land Texas retained has now been sold to private property owners and local governments. Today, approximately forty-nine hundred privately owned parcels exist along the Texas-Mexico border, which means there will likely be many takings challenges to come if landowners refuse voluntary sale and purchase negotiations. The construction of a seven hundred mile fence along the border during the Bush and Obama Administrations required a significant number of condemnations to be filed in Texas, New Mexico, Arizona, and California between 2007 and 2012, some of which are still ongoing.

31. General Condemnation Act, 40 U.S.C. § 3113 (2012). While the General Condemnation Act (“GCA”) gives the federal government the general power to exercise eminent domain, the Declaration of Taking Act (“DTA”) created a procedure to expedite the taking of title and possession of lands to enable the United States to begin construction work before final judgment. 40 U.S.C. § 3114 (2012). This expedited procedure has raised concerns amongst affected landowners as to whether the federal government will adequately negotiate or properly consult with landowners prior to, during, or after condemnation proceedings. Congress mandates some level of negotiation between the federal government and the affected landowner of a property interest prior to the institution of eminent domain procedures. 8 U.S.C. § 1103(b)(3) (2012). The negotiation must be a bona fide effort. See United States v. Certain Interests in Prop. in Cascade, 163 F. Supp. 518, 524 (D. Mont. 1958). Further, a federal court may require additional negotiations as a condition precedent to condemnation if it finds negotiations inadequate. See United States v. 1.04 Acres of Land, 538 F. Supp. 2d 995, 1011 (S.D. Tex. 2008) (citing Cascade, 163 F. Supp. at 524).


33. Id.

34. Id.

35. United States v. City & Cty. of Denver, 656 P.2d 1, 5 n.2 (Colo. 1982) (en banc).


38. United States v. 1.04 Acres of Land, 538 F. Supp. 2d 995 (S.D. Tex. 2008). In 1996, Congress passed the IIRIRA, which gave the Attorney General the authority to condemn
Today, it is déjà vu all over again, but this time the rhetorical punch of a "fence" along the border has been replaced with an impassable and contiguous "wall." While Congress and the Trump Administration's power to appropriate federal monies to construct the international wall is universally accepted today, historically Congress and its federal agents did not enjoy such a pure and direct power to condemn private property within state boundaries. This history makes the recently introduced bill by Democrats (which I will discuss shortly) to rein in the federal eminent domain power a timely opportunity to discuss an old cooperative relic of the past.

II. COOPERATIVE FEDERALISM AND TAKINGS AT THE FOUNDING

It is commonly accepted that both federal and state governments may take private property for a public use upon just compensation. The power to condemn has been a key ingredient for many of the government's modern-day national security and public works projects. Part of the universal acceptance is that Congress statutorily authorizes the power, and any officer of the government may use the power to acquire real estate that is necessary or advantageous by filing a taking action in federal court. William Baude's excellent scholarship helps us untangle some of the confusion over why this important power exists, even though nothing in the Constitution expressly grants Congress the power. As Baude argues, "[t]he lack of federal eminent domain


40. 40 U.S.C. § 3113 (2012) ("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 for the Government by condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so."); William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782, 787 (1995) (noting that a common purpose for exercising eminent domain in the colonial era was for building roads); see also Baude, supra note 13, at 1763.

41. See Baude, supra note 13, at 1761.
authority was not simply the oversight of an earlier time, but rather the result of a well-functioning regime of cooperative federalism."  

According to Baude, it took almost eight decades after the founding for political and doctrinal uncertainty over the federal eminent domain power to be resolved as a result of a congressional act in 1864 and a Supreme Court ruling in 1875. This history strongly suggests that the federal power to condemn was not necessary for the government to pursue its national projects. It is not out of the realm of possibility that the founding generation would have supported a cooperative system of takings with the states instead of purely federal action to acquire land for a border wall.  

A. Political Developments

There was much confusion over whether Congress could exercise the power to condemn land within the states post-ratification (starting in 1789 and the amendments beginning in 1791). While Congress historically enjoyed the power to raise money to construct forts, lighthouses, arsenals, courthouses, and roads, among other things, Baude's research shows that it is by no means obvious that the Founders intended to give Congress the power to directly condemn land within the states to build federal structures, such as walls or fortresses, for national security purposes. This is further complicated by the text of the founding document itself, which does not expressly grant such a power. Similar to today's contentious debates over acquiring land for an international wall, the acquisition of private property for major national security projects also endured controversy in the founding era.

James Madison drafted the early versions of the Takings Clause, which, by the time of ratification, stated: "[N]or shall private property be taken for public use without just compensation." But Madison left a thin

42. Id. at 1762.  
43. Id. at 1761.  
44. Note that many of the states bordering Mexico did not enter the Union until years after ratification.  
45. Baude notes that his question of the origins of the federal eminent domain power has garnered considerable debate amongst only a few scholars. See Baude, supra note 13, at 1741; see also Adam S. Grace, From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent that Broadened the Commerce Clause, Shrank the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate, 68 ALB. L. REV. 97, 141 (2004); 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); Gary Lawson & David B. Kopel, Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate, 121 YALE L.J. 267, 280–81 (2011).  
paper (and oral) trail of what exactly he was thinking when drafting that ever so important text into the Constitution. As Akhil Amar has noted, "unlike every other clause in the First Congress's proposed Bill [of Rights], the just-compensation restriction was not put forth in any form by any of the state ratifying conventions." 47 There was, in other words, no discussion about the Takings Clause. 48 The provision was inserted by Madison just before ratification. 49 Most scholars agree that the provision was probably meant to protect property from physical seizures 50 by restraining arbitrary and oppressive means of obtaining supplies for armies and taking property for other public uses as a result of the Revolutionary War. 51 Indeed, some have argued that the power is an inherent power of the sovereign that can be interpreted within the Necessary and Proper Clause as well as the Takings Clause. But Amar has noted that "readers should not infer from the language of the Fifth Amendment just-compensation clause that Congress enjoyed a general power of eminent domain. Rather, eminent-domain power, like all other powers, had to be deduced from the Constitution's earlier enumerations of governmental authority." 52

While the legislative record of deliberation over those last few words under the Fifth Amendment is slim, the historical record suggests the founding generation was skeptical of a national eminent domain power. Representative James Pindall of Virginia questioned if "any of the framers of the Constitution could ever have imagined . . . that the power to . . . lay open the enclosures of individuals for roads . . . without [state] consent . . . passed into the hands of Congress by implication." 53 Representative Silas Wood of New York stated that "the appropriation of the soil . . . belong[s] exclusively to the States." 54 President James Monroe noted in 1822 that "condemnation of the land, if the proprietors

47. Id. at 78.
48. See Treanor, supra note 40, at 835–36; see also Baude, supra note 13, at 1794.
50. Treanor, supra note 40, at 791–92.
51. See id. at 790–92; see also Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (permitting uncompensated takings throughout the Revolutionary War); ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 305–06 (Philadelphia, William Young Birch & Abraham Small 1803).
53. See Baude, supra note 13, at 1769 (omissions in original) (quoting 32 ANNALS OF CONG. 1351–52 (1818) (statement of Rep. James Pindall)).
54. Id. at 1769 (alteration and omission in original) (quoting 40 ANNALS OF CONG. 709 (1823) (statement of Rep. Silas Wood)).
should refuse to sell it . . . must be done by the State." Senator Louis Wigfall of Texas was a vocal critic of the federal power and stated that, like President Monroe, the Republican Party was not supportive of a federal eminent domain power. But others, such as Speaker of the House Henry Clay, were supporters of the federal government's power to condemn land to achieve those ends. Some scholars have interpreted his position to mean that the federal government could exercise its eminent domain powers for internal improvements, particularly the building of post offices and roads. David Currie, for example, argues that this position was a recognition of an implicit, inherent power.

Political positions on the issue of a federal takings power tended to (but did not always) break down along party lines. Whigs and Republicans supported a stronger national power. Clay was a Whig at the time, and the Whigs strongly supported major federal improvements, and thus backed a federal eminent domain power. And Republicans, of course, were more open to a national power in a variety of areas during that era. The Democrats and Federalists, however, held the strongest views for the eminent domain power to remain explicitly in the hands of the states and not the federal government. They were suspicious and opposed to such a power, especially as it raised concerns over the federal government's power to invoke the Takings Clause for purposes of anti-slavery agendas and ultimately emancipation. As Robert Natelson notes, "Federalists depicted the Constitution as leaving regulation of real property outside the national authority."

Caleb Cushing, Attorney General in the 1850s, advocated for the federal power to be dependent upon the states. He raised "equality of states" arguments to substantiate this position, writing that:

55. Id. at 1769 (quoting James Monroe, Views of the President of the United States on the Subject of Internal Improvements (1822), in 2 A Compilation of the Messages and Papers of the Presidents 713, 736–37 (James D. Richardson ed., 1897)).
56. Id. at 1778.
57. Id. at 1768 (citing 31 Annals of Cong. 1169 (1818)).
58. Id. at 1769 n.167 (citing Representative Archibald Austin's characterization of Henry Clay's position on federal eminent domain).
60. Of course, today the Republican Party generally takes a strongly limited government position, while the Democratic Party has come to endorse greater national power. As noted, however, there is increasing fluidity between these general positions. See supra, note 19.
61. See Jeremiah Simeon Young, A Political and Constitutional Study of the Cumberland Road 41 (1904); cf. Baude, supra note 13, at 1768–69.
62. See Baude, supra note 13, at 1793 & nn.323–24.
[t]he right of eminent domain belongs to [Texas] by title anterior
to, and of course independent of, its accession to the Union. . . .
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.64

Cushing noted that power to condemn land in Maryland, for example, in
the absence of state consent "might possibly be a matter of controversy."65
Even as late as the 1860s, Congress engaged in "cooperative federalism,”
seeking the consent of the states to condemn land for federal projects.
Indeed, in 1818, "Congress declined a proposal that it explicitly affirm
the existence of the eminent domain power."66

The tides started to shift in the early 1860s. Joel Parker, former Chief
Justice of the New Hampshire Supreme Court, used eminent domain as
a case point about the nature of federal powers. He argued that the
Constitution conferred the power of eminent domain on Congress to take
lands for forts, arsenals, navy yards, military roads, and other public
uses.67 This sentiment existed even though some proponents of federal
eminent domain powers, like Parker, were generally skeptical of
expansive federal powers.68 The Maryland Legislature passed a statute
authorizing federal agents to enter into state territory to construct a
national road and, if there was resistance or outright refusal, then
condemnation proceedings could be initiated.69

One pivotal moment in 1864, however, began to seed changes to the
cooperative system of takings practiced by Congress. Congress had just
passed legislation authorizing funding for the building of an arsenal on

alteration in original) (quoting Eminent Domain of Tex., 8 Op. Att'y Gen. 334 (1857)); see
also 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 . . .").
Att'y Gen. 114 (1855)).
66. Baude, supra note 13, at 1769–71 (citing YOUNG, supra note 61, at 42). However,
Christian Burset argues that the federal power may have already been determined before
ratification and that evidence suggests that, prior to the founding, the interpretations of
the Articles of Confederation show that many implied a federal power of eminent domain.
See Burset, supra note 64, at 190–92.
67. JOEL PARKER, THE RIGHT OF SECESSION 33–34 (1861); see also Burset, supra note
64, at 203–04; Baude, supra note 13, at 1780–81, 1785.
68. See Burset, supra note 64, at 204.
Rock Island in Illinois. The project was briefly stalled, however, due to existing land interests on the proposed site. The land standoff resulted in Vice President Andrew Johnson going before Congress seeking authorization for the Secretary of War to purchase or condemn the land. Senator John Hale of New Hampshire vehemently opposed such action, stating that the bill "involves a new principle [federal eminent domain] 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." Senator Jacob Howard of Michigan explained that the bill to fund the construction of an arsenal on Rock Island—and potentially give direct authority for the Secretary of War to condemn the land of few property holdouts—would not be controversial, "except as to that portion of the land which is now owned by private persons, those persons being only two in number."

Senator Howard seemed to suggest that the number of affected property owners, which was only a few, justified the taking. But more importantly, he went on to explain that the power to take was implied under the Fifth Amendment Takings Clause. Senator Johnson agreed, arguing that regardless of the Takings Clause, the federal power to take was an incident of sovereignty. Ultimately, President Abraham Lincoln signed the bill, which became the first instance of federal authorization to directly condemn private land within state lines for a federal project. It is unclear whether the private land at issue was ever actually condemned, but the record suggests that it was not, and instead was purchased.

Congress later debated the federal eminent domain power in the states for purposes of constructing railroads. Even there, Senator Howard argued that the federal government could condemn land within a state to construct a railroad. While the takings power to construct an arsenal in Illinois was authorized, the power to condemn for purposes of a railroad inside states lines ultimately failed. Congress defeated such amendments and squashed any further discussion. Later railroad bills

71. CONG. GLOBE, 38th Cong., 1st Sess. 1477–78 (1864); Baude, supra note 13, at 1780–81.
72. CONG. GLOBE, 38th Cong., 1st Sess. 1478; Baude, supra note 13, at 1781.
73. CONG. GLOBE, 38th Cong., 1st Sess. 1478; Baude, supra note 13, at 1781.
74. CONG. GLOBE, 38th Cong., 1st Sess. 1478; Baude, supra note 13, at 1782.
75. Baude, supra note 13, at 1782; see also Act of Apr. 19, 1864, ch. 60, 13 Stat. 50; CONG. GLOBE, 38th Cong., 1st Sess. 1802.
76. Baude, supra note 13, at 1782–83, 1783 n.266.
77. CONG. GLOBE, 38th Cong., 1st Sess. 2379; Baude, supra note 13, at 1783.
78. CONG. GLOBE, 38th Cong., 1st Sess. 2379–84; Baude, supra note 13, at 1783.
79. CONG. GLOBE, 38th Cong., 1st Sess. 2379–80; Baude, supra note 13, at 1783.
followed the traditional custom of consent and cooperation by state legislatures before the federal government could take land for the railroad.\footnote{Baude, \textit{supra} note 13, at 1774–75.} Several other instances of legislative authorization of federal takings occurred, mostly for the construction of national cemeteries\footnote{Act of Feb. 22, 1867, ch. 61, § 5, 14 Stat. 399; Baude, \textit{supra} note 13, at 1784.} and a federal railroad from Missouri to the Pacific.\footnote{Act of July 27, 1866, ch. 278, 14 Stat. 292; Baude, \textit{supra} note 13, at 1784.} Another bill authorized federal takings power for a construction project along rapids on the Mississippi River, but only under existing state condemnation law.\footnote{Act of July 20, 1868, ch. 184, 15 Stat. 124; Baude, \textit{supra} note 13, at 1785.}

Nonetheless, as William Baude’s research shows, it took seventy-five years until the first federal takings authorization by Congress in the 1864 Rock Island legislation.\footnote{Baude, \textit{supra} note 13, at 1761.} Even after some sporadic railroad episodes of federal takings authorizations, Congress still preferred to practice the traditional cooperative federalism system.\footnote{Id. at 1785.} While political considerations largely affected the founding sentiments about federal eminent domain, it took state and federal courts years to finally succumb to a doctrine that espoused an inherent sovereign power of the federal government to condemn land within state boundaries.

\subsection*{B. Doctrinal Developments}

In the early to mid 1800s, several state courts ruled on the question of federal eminent domain. In \textit{Dickey v. Maysville, Washington, Paris & Lexington Turnpike Road Co.}, the Kentucky Court of Appeals stated that Congress was required to obtain consent from the state legislature of Kentucky before using a state road as a post road “[u]nless Congress shall elect to exert its right of eminent domain.”\footnote{37 Ky. (7 Dana) 113, 113 (1838).} These sentiments, of course, had no bearing on the federal courts. In the late 1800s, the Supreme Court affirmed the position that Congress did not have the power to exercise eminent domain directly. In \textit{Pollard v. Hagan}, the Supreme Court said it was “necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands.”\footnote{44 U.S. (3 How.) 212, 222 (1845).}

The issue concerned ownership of a riverfront plot of land in Alabama. The land had been granted by Congress after Alabama’s admission into the Union. The Court explained that by entrance into the Union, Alabama enjoyed equal footing with the original states, and that
included all the rights of sovereignty, jurisdiction, and eminent domain.\textsuperscript{88} The Court, notably, stated that "the United States have no constitutional capacity to exercise ... eminent domain, within the limits of a state ... except in the cases in which it is \textit{expressly} granted [by the Constitution]."\textsuperscript{89} The Court further explained that the Constitution did not expressly grant eminent domain powers to the federal government and that such a power was not authorized under the text by implication.\textsuperscript{90} Then, in \textit{Goodtitle v. Kibbe}, the Court reaffirmed its position, and the one Congress seemingly held, that the federal government had no entrenched granted power to condemn land.\textsuperscript{91} The Court there stated that the federal government could not "grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State."\textsuperscript{92}

Yet as the political landscape began to shift decades after \textit{Pollard} and \textit{Kibbe}, so did the sentiment of state and federal courts. In \textit{Avery v. Fox}, a federal court in Michigan concluded that "[i]t is an incident to the sovereignty of the United States, and a right recognized in the constitution ... that it may take private property for public use."\textsuperscript{93} A Georgia federal district court likewise noted "the paramount right of eminent domain" was "an attribute of sovereignty in the nation."\textsuperscript{94} And state courts in Kentucky and Michigan gave credence to a federal eminent domain doctrine.\textsuperscript{95} Although in New Hampshire, the state supreme court was less certain about the doctrine.\textsuperscript{96} Finally, the Supreme Court in \textit{Kohl v. United States} altered the course of history in 1875.\textsuperscript{97} There, Justice Strong simply implied a federal eminent domain power, stating that "[t]he Constitution itself contains an implied recognition of [eminent domain] beyond what may justly be implied from the express grants."\textsuperscript{98} In \textit{Kohl}, a federal statute was at issue. Congress passed legislation that authorized the Secretary of the Treasury to purchase land for a federal building in Ohio, but Congress

\begin{itemize}
\item \textsuperscript{88} \textit{Id.} at 216.
\item \textsuperscript{89} \textit{Id.} at 223 (emphasis added).
\item \textsuperscript{90} \textit{Id.} at 224.
\item \textsuperscript{91} 50 U.S. (9 How.) 471, 478 (1850).
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} 2 F. Cas. 245, 247 (C.C.W.D. Mich. 1868) (No. 674).
\item \textsuperscript{94} \textit{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).
\item \textsuperscript{95} Hughes v. Todd, 63 Ky. (2 Duv.) 188, 190–92 (1865); \textit{People ex rel. Trombley v. Humphrey}, 23 Mich. 471, 476 (1871).
\item \textsuperscript{96} Orr v. Quimby, 54 N.H. 590, 592–93 (1874); \textit{id.} at 603–06 (Doe, J., dissenting).
\item \textsuperscript{97} 91 U.S. 367 (1875).
\item \textsuperscript{98} \textit{Id.} at 372.
\end{itemize}
did not grant federal takings authority, instead choosing to rely upon state procedures.99 Later decisions expanded the implied power to condemn, even invoking the Necessary and Proper Clause in *United States v. Gettysburg Electric Railway Co.*, noting that “[t]he 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.”100 But, as Baude notes, for seventy-five years post-ratification there was never a “purely federal taking” inside state lines.101 That is, nearly every taking occurred cooperatively between the state and the federal government, often requiring consent by the state legislature or requiring the federal government to initiate the suit as a plaintiff under state condemnation procedures. Even when the Court in *Kohl* implied a federal eminent domain power, it noted that at the time of the ruling, “this power [eminent domain] of the Federal government has not heretofore been exercised adversely.”102

C. The Practice of Cooperative Federalism Post-Ratification

So what did the process of consent and cooperation actually look like at the founding, and was it necessarily always cooperative? And how would such a cooperative federalist takings regime work today between federal agents and state governments? Traditional notions of federalism tend to fall along ideological lines, with conservatives supporting federalism and states’ rights elements of the dual sovereign, and liberals tending to support a national government that protects dissenters and minorities.103 Although these traditional camps did not always fall along the same political party, Democrats historically have preferred greater national power and Republicans state rights and sovereignty. These traditional notions also tend to define federalism as a dual sovereign system where states rival and challenge the federal government by wielding their autonomous authority.104 On the other hand, cooperative federalism is the idea that in order for the federal government to execute its policies, it must do so with the support of the states. The federal government, under this argument, simply does not have the resources to fully execute its policies, and, therefore, the role of states in a dual

100. 160 U.S. 668, 681 (1896).
101. See Baude, *supra* note 13, at 1761.
102. 91 U.S. at 372–73.
104. See id.
sovereignty is not primarily of an autonomous nature, but as supportive servants and allies to the federal government. Scholars who support the virtues and general workings of cooperative federalism argue that states are not distinct entities that regulate "[their] own ... sphere of authority." As Jessica Bulman-Pozen and Heather Gerken note, cooperative federalism scholars view the system as integrative, where "states should serve not as rivals or challengers to federal authority, but as faithful agents implementing federal programs."

Cooperative federalism is sometimes viewed as coterminous with interactive federalism, which embraces the "interaction" instead of the "separation" of state and federal relations of federalism. This "[i]nteractive" vision rejects the creation of "enclaves" that exclude state and federal power. While some scholars, such as Robert Schapiro, envision the state-federal system as an "interactive" one that "accepts a substantial role for dissonance as well as harmony," many more cooperative federalism advocates prefer to view the system as "servant" to federal mandates and to avoid resistance because it would be unproductive in the federalist system. Still, Schapiro thinks that state-federal conflicts "present the biggest challenge for interactive federalism." Thus, "interactive" and "cooperative" federalisms view the dual sovereign as complimentary, not competitive.

Robert Cover, on the other hand, offers a "desirable alternative" vision of "[c]ombative federalism," in which "federal programs are exclusively federal," where the federal government provides funds to

105. Id.
108. Bulman-Pozen & Gerken, supra note 103, at 1262.
111. Id.
112. Schapiro, Toward a Theory of Interactive Federalism, supra note 109, at 249.
113. See Bulman-Pozen & Gerken, supra note 103, at 1262–63.
114. Schapiro, Justice Stevens’s Theory of Interactive Federalism, supra note 110, at 2142.
states directly, and that any ensuing "combat" by the states provides "an effective political check on the exercise of national power." Bulman-Pozen and Gerken go further, carving out an independent strand of federalism that begins to look and sound like Cover's "combative federalism"—that is, "uncooperative federalism." They argue that the federalism literature does not account for "the ways in which states playing the role of federal servant can also resist federal mandates, the ways in which integration—and not just autonomy—can empower states to challenge federal authority." In other words, Bulman-Pozen and Gerken seem to distinguish "uncooperative federalism" from the other forms of federalism described above by arguing that states can serve as rivals and challengers to their federal counterparts "even where they lack autonomy." Indeed, whereas cooperative federalism supporters are hesitant to endorse the view that the system is adversarial and combative, Bulman-Pozen and Gerken argue that such contestations and resistance should be valued. In other words, resistance "can and does take place in the many areas of federalism where states lack policymaking autonomy." In theory, states have the power to resist or contest federal policies. Whether they wield that power is a different question.

While it may seem that cooperative federalism is "inconsistent with the spirit of the Constitution," the historical practices of consent and cooperation in land acquisition beg to differ. Indeed, the "early pattern of takings for federal projects" points towards a well-oiled cooperative federalist (or interactive federalist) regime. A case at the California Supreme Court, Gilmer v. Lime Point, is instructive for understanding how consent and cooperation worked in the early practices of cooperative land acquisition.

115. Federalism and Administrative Structure, supra note 4, at 1343 (arguing that cooperative federalism undermines "the only viable restraint on the congressional exercise of enumerated powers: the political process").
116. See Bulman-Pozen & Gerken, supra note 103, at 1262–63.
117. Id. at 1263.
118. Id. at 1263–64.
119. Id.
120. Id. at 1264.
121. Id. at 1271.
122. See Baude, supra note 13, at 1815.
123. Id. at 1823.
124. 18 Cal. 229 (1861). For context, it is worth noting that, at an elementary level, a "fort" is defined as a "strong or fortified place" or "permanent army post" ordinarily reserved for national security and military purposes. Fort, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fort (last updated Apr. 13, 2018). Indeed, a "wall"—the kind proposed by the Trump Administration—is defined as a "contiguous, physical wall
Recall that consent and cooperation was the norm for land acquisitions by the federal government for federal projects from the founding to the late 1800s.\textsuperscript{125} Several years prior to \textit{Gilmer} reaching the Supreme Court of California, the California state legislature enacted a statute that permitted the state to relinquish property located within the state to the federal government for "sites of light-houses and for other purposes, on the coasts and waters" and allowing the federal government to proceed in state court as a plaintiff to condemn land within the state for, among other things, a fort or other military or naval purposes.\textsuperscript{126} \textit{Gilmer} raised the issue of whether the federal government could acquire land within California for purposes of constructing a fort \textit{without} the aid or sanction of the state legislature.\textsuperscript{127}

The plaintiff, Jeremy Gilmer, Captain of Engineers in the Army of the United States of America, was considered an agent of the federal government.\textsuperscript{128} The conflict arose when Gilmer sought to purchase land from Samuel Throckmorton, a landowner in San Francisco, in order to build the fort.\textsuperscript{129} However, a disagreement ensued over the price of the land, which apparently could not be resolved amicably.\textsuperscript{130} But since Throckmorton's land was "necessary and indispensable" to construct the fort, Gilmer relied upon the California statute to acquire the land.\textsuperscript{131} The federal government sought to have the value and damages of the land determined and have the courts of California, pursuant to the statute, award the land and enter title in the United States.\textsuperscript{132}

Throckmorton contended the federal government refused to pay his offer of $200,000 for his land.\textsuperscript{133} He further argued that the California statute, which effectively authorized the federal government to proceed in state court as a plaintiff, was unconstitutional.\textsuperscript{134} The gist of his contentions was that Gilmer presented himself not only as the agent of the federal government, but also as the "instrument or agent of the commonwealth of California in her exercise of" the power of eminent domain.\textsuperscript{135} Throckmorton was concerned over the appropriateness of a

\textsuperscript{125} See \textit{supra} Section II.A.
\textsuperscript{126} \textit{Gilmer}, 18 Cal. at 229.
\textsuperscript{127} \textit{Id.} at 230.
\textsuperscript{128} \textit{Id.} at 230–31.
\textsuperscript{129} \textit{Id.} at 231.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 232.
\textsuperscript{133} \textit{Id.} at 231.
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} at 239.
federal agent seemingly acting as an agent of the state. The concern for Throckmorton had to do with ex post considerations; that is, after the property is condemned pursuant to the California statute and transferred to the federal government, "no power could compel her [i.e., the federal government,] to use it for a fort." 136 Indeed, the prospect of such a result was, according to Throckmorton, opposite of the traditional understanding of taking private property, because "[t]he people of the State of California do not propose to keep the property for one instant of time" but instead "propose to bestow it upon another" by immediately casting the property from the owner and then losing control of the property immediately by transferring it over to the federal government. 137

In an attempt to reconcile these competing understandings of the nature of eminent domain, Throckmorton explained that California is "the source of all title, and gives to the property a State origin." 138 But, he continued, "[t]he people of the State propose now to resume it, and incorporate it with the mass of their other possessions," not for the public use, but in order to transfer the property to the federal government. 139 Thus, Throckmorton concluded that the federal government cannot be instruments of the state legislature "in exercising eminent domain." 140 Throckmorton essentially argued that it would be improper, if not "preposterous," for the state of California to condemn land owned by the federal government to use by the state. 141 And, it would equally be preposterous for the federal government to condemn land within California. The California state legislature, in other words, was "powerless" to condemn private property and transfer it to the federal government as a plaintiff in state court, because doing so essentially permits the government to remove the hat of "governmental panoply" and become an individual or artificial person. 142

Gilmer, on the other hand, argued that "the property... acquired... would be held by the Government as a proprietor, but it would be appropriated for national purposes alone, in which the people of the State would have the use by the protection afforded." 143 The government went further, in discussing the purposes and reasons for a federal fort, noting

136. Id.
137. Id. at 237.
138. Id.
139. Id.
140. Id. at 240.
141. Id. at 241.
142. Id.
143. Id. at 235 (emphasis added).
that "[a] public exigency need not be one which affects all equally . . . . It is enough, for many purposes, that there be merely a local exigency."\(^{144}\)

The Supreme Court of California upheld this form of cooperative federalism for land acquisition. The court explained that national security allows for California, "having a public interest in this defense," to condemn private property and transfer it to the federal government as part of a cooperative scheme to secure the means of defense.\(^{145}\) Indeed, the court was not shy about the reality of foreign affairs, and that the federal government, having the means of war and defense, was entrusted to defend the nation against foreign invasion and provide national security.\(^{146}\) But the court also acknowledged that nothing in the Constitution said anything regarding the power to condemn land within the state for federal forts.\(^{147}\) Indeed, California, the court said, may choose the federal government as the agent to accomplish the goal of constructing a fort for national security purposes, and that such a taking is clearly a public use for the citizens of California.\(^{148}\) Essentially, the court found that there is no rule or principle under the state or federal constitutions that prohibits the federal government from filing a condemnation action in California to obtain the land necessary for a fort.\(^{149}\) As the court concluded, "[i]t may be considered a sufficient guarantee that the Federal Government will use the property in the right way, that such is the implied obligation of the Government, or that its interest or its duty will so direct."\(^{150}\)

A slightly different cooperative federalism was practiced in Michigan. The Michigan state legislature authorized the Governor's power to exercise eminent domain within the state and then turn the land over to the United States to erect a lighthouse.\(^{151}\) The Governor would be contacted by federal agents who would request the land situated within the state as necessary for the construction of a lighthouse.\(^{152}\) The Governor would then appoint three commissioners to condemn the land

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144. Id. (quoting J.B. Thayer, The Right of Eminent Domain, 19 MONTHLY L. REP. 241, 254 (1856)). Interestingly, the court cited Dickey v. Maysville, Washington, Paris & Lexington Turnpike Road Co., which stood for the proposition at the time that "[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." 37 Ky. (7 Dana) 113, 113 (1838).
145. Gilmer, 18 Cal. at 257.
146. Id. at 255–56.
147. Id. at 256.
148. See id. at 256–60.
149. Id.
150. Id. at 260.
152. See id. at 472–73.
by appraising the value and determining just compensation. Once the commissioners completed the taking of title, the Governor would then convey the land to the federal government. The federal government's justification for such a cooperative practice was to regulate, control, and protect commerce along navigable waters. However, the statute was found unconstitutional on the grounds that the state inherently may not authorize the taking of private property within the state border only for the governor to convey it over for use exclusively by the federal government. The judicial decision was an outlier, as there are few cases that purport to find state cooperation in federal land acquisition inconsistent with the Constitution.

In Connecticut, another form of cooperative federalism was practiced. There, a local municipality, as opposed to solely the state legislature, was permitted to condemn private property for the exclusive purpose of conveying the property to the federal government for naval purposes. In April, 1868, New London exercised this power, taking private land and conveying it over to the Secretary of Navy. In Rhode Island, the state legislature enacted a law specifically for the fortification of Newport, which, similar to Michigan, permitted the governor to force the transfer of land to the state to then convey to the federal government. Indeed, in New York, the state legislature authorized the state to commence condemnation proceedings on behalf of the federal government to acquire lands, which would benefit the citizens of the state. There, the statute authorized the federal government to file a claim as a petitioner in New York courts. In other words, the state accepted "aid offered by the United States in carrying on a public work in which both are interested." As Baude remarks, examples of consent and cooperation "suggest that the constitutional design anticipated state involvement in federal land acquisitions and building projects." Central to many of these state-led efforts to seize land and convey to the federal government was national security.

153. Id.
154. Id. at 476.
155. Id. at 472–73, 483.
156. See Darlington v. United States, 82 Pa. 382, 386–87 (1876).
158. Id.
159. See Baude, supra note 13, at 1762.
161. Id.
162. Id.
163. See Baude, supra note 13, at 1760.
So, what is one to make of this history of federal-state cooperation in light of today’s polemic debate over national immigration policy and the proposed international border wall between the United States and Mexico?

III. COOPERATIVE FEDERALISM AND THE U.S.-MEXICO BORDER WALL

Today, effectively any authorized officer of the federal government may exercise a federal taking by initiating condemnation proceedings in federal court. At one time nearly eight thousand federal takings occurred each year. In fact, the federal government has already acquired “plenty” of land. Indeed, the power, largely authorized through the General Condemnation Act and the Declaration of Taking Act, has given the federal government carte blanche to condemn land for, among other things, civil, military, and national security projects, including an international border wall, with little resistance from landowners, state, or local governments. The specter of such a “great power[]” is relevant to today’s debate over land acquisition for the Trump Administration’s border wall. The debate has culminated in a legislative measure by Democrats in the House to restrict the federal power. This political response to the border wall Executive Order offers an opportunity to tie the historical practices and sentiments of federal land acquisition to a major contemporary debate over federal takings power.

Like the Senate and House representatives who debated land acquisitions for forts and arsenals at the founding, some elected officials representing districts along the U.S.-Mexico border today oppose the construction of the wall. Rep. Ruben Gallego of Arizona, stated that “it’s already abundantly clear that Mexico won’t pay for Trump’s . . . border

164. See 40 U.S.C. § 3113 (2012) (“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 for the Government by condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so.”).

165. See Baude, supra note 13, at 1743 (citing U.S. GEN. ACCOUNTING OFFICE, CED-80-54, FEDERAL LAND ACQUISITIONS BY CONDEMNATION: OPPORTUNITIES TO REDUCE DELAYS AND COSTS 2 (1980)).

166. Id. at 1744.


168. See Baude, supra note 13, at 1738.
wall.” Rep. Raúl Grijalva of Arizona noted that the wall would create “arbitrary borders or barriers between nations” and that a border wall cannot “fix our immigration system.” Rep. Henry Cuellar of Texas, sensitive to the property rights issues in his district, stated “we take the concept of private property very seriously. . . . Texans stand up for ourselves when the federal government tries to take what is ours.” As for the construction of a physical wall, Rep. Juan Vargas of California noted that “[t]he Trump Administration should be spending their energy on carrying out policy ideas that benefit the American people rather than wasting their time and resources on the prototypes for the wall.” These sentiments have become a rallying cry for ten Democratic members of the House to halt the construction of a wall by targeting the federal eminent domain power.

On October 4, 2017, Reps. Gallego, Grijalva, Cuellar, and Vargas, along with six other House members, co-sponsored the “Protecting the Property Rights of Border Landowners Act.” The bill amends the INA by prohibiting the Attorney General and the Secretary of DHS from wielding the federal takings power to acquire private land along the border to build an international border wall. The sponsors of the bill represent districts near the U.S.-Mexico border, including districts in Texas, New Mexico, California, and Arizona (with the exception of the sponsor representing New York). These Democrats—who presumably more often than not support national power over a state-led federalist regime—may be unaware that the bill harkens back to the spirit and practice of the early republic during the founding generation. Like Congress in the mid 1800s, which at times had difficulty agreeing on a number of funding and land acquisition matters concerning forts on Pea Patch Island in Delaware and arsenals on Rock Island in Illinois, today’s


Congress is equally stymied to agree on border wall funding and land acquisition.\textsuperscript{174}

This bill is arguably one of the most recent and sweeping attempts to rein in federal eminent domain for one of the nation's largest land acquisition projects in decades.\textsuperscript{175} But, the history and practice of cooperative federalism suggests that expressly prohibiting the federal eminent domain power does not completely close the door to the DHS and the Attorney General acquiring the land for the wall. Indeed, while the bill may block a purely federal path to taking the land, Congress could still arguably achieve the same land acquisition objective indirectly by relying upon cooperative federalism with state legislatures or local governments in California, New Mexico, Arizona, and Texas along the border by choosing to enter the state courts to achieve the same end or requesting the states to seize land and convey it over to the federal government.\textsuperscript{176}

One might argue that the Protecting the Property Rights of Border Landowners Act attempts, implicitly, to force the Trump Administration to rely upon and cooperate with state legislatures and local municipalities in order to acquire the land to build the wall. The Attorney General and the Secretary of DHS could file an action in state court as a plaintiff seeking to strip title from landowners along the Texas border to build the wall. Further, there does not seem to be any immediate hurdles to the Trump Administration requesting a state legislature or a local municipality to seize the land and convey it over to the DHS for purposes of construction. On the other hand, states along the border are unlikely to successfully place conditions on or restrict the Attorney General or Secretary of DHS from proceeding in state court to condemn land along the border.\textsuperscript{177} There is precedent where some states have codified

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\footnote{174. Burset, \textit{supra} note 64, at 194.}
\footnote{176. \textit{In re} United States, 96 N.Y. 227, 223–24 (1884) ("While the Federal Government, as an independent sovereignty, has the power of condemning land within the States for its own public use, we see no reason to doubt that it may lay aside its sovereignty, and, as a petitioner, enter the State courts and there accomplish the same end through proceedings authorized by the State legislature." (citations omitted)).}
\footnote{177. \textit{See} City of Pleasant Ridge v. Romney, 169 N.W.2d 625, 634 (Mich. 1969) ("[T]he Federal power of eminent domain is complete and cannot, absent some specific statutory limitation in the Federal act itself, be conditioned by any State or local or private rights."); \textit{see also} id. ("If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment." (quoting Kohl v. United States, 91 U.S. 367, 374 (1875))).}
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procedures to permit state and local governments to request the federal
government to condemn land in federal court that the state agency, under
state law, is prohibited from condemning.\textsuperscript{178} These are just a few
contemporary examples of cooperative federalism in takings. However, a
\textit{federal} law prohibiting the DHS and Attorney General from pure
exercises of eminent domain in federal court does raise the likelihood that
"quick take" proceedings, often times used by former DHS Secretary
Michael Chertoff to construct fencing along the border, would be reduced
by forcing the federal government to file takings actions in state courts
where it would have less discretion to invoke the speedy dispossession
mechanism.\textsuperscript{179}

Indeed, it is conceivable that Congress or agents of the federal
government could request legislatures of states along the border to
condemn land and convey it over to DHS, Border Patrol, or the Army
Corps of Engineers to begin construction as part of a renewed cooperative
federalist system as a result of the bill. In California, prior laws have
authorized the board of supervisors of certain counties to take and convey
real property to the federal government.\textsuperscript{180} In Texas, the legislature has
authorized such practices, permitting the seizure of privately-owned land
within Texas to be conveyed to, and used by, the federal government so
long as the legislature has deemed the use a "public use."\textsuperscript{181} There is also
precedent for a municipality authorizing its city solicitor to condemn
private property to be used for a post office.\textsuperscript{182}

The United States and Mexico, through state relations with Texas,
have also acquired lands for projects related to infrastructure under
Texas state law. In \textit{Richardson v. Cameron County},\textsuperscript{183} a Texas appeals
court was faced with the question of whether the state legislature could
delgate the power of eminent domain to a county for the purpose of

\textsuperscript{179} See 40 U.S.C. § 3114 (2012); Commercial Station Post Office v. United States, 48
F.2d 183, 184–86 (8th Cir. 1931) (granting immediate possession to federal government
after taking proceedings initiated, but before just compensation determined); United States
v. 1.04 Acres of Land, 538 F. Supp. 2d 995, 1007 (S.D. Tex. 2008) (noting that provisions of
Declaration of Taking Act permit expedited procedure of taking title and possession of lands
to enable DHS to begin construction of fencing before final judgment is available when the
federal officer is authorized to bring condemnation action in federal court). Quick-take
statutes vary amongst the states.
\textsuperscript{180} San Benito County v. Copper Mountain Mining Co. of Cal., 45 P.2d 428, 429 (1935)
(per curiam) (citing \textit{CAL. CIV. PROC. CODE} § 1238 (repealed 1975)).
\textsuperscript{181} Tex. Fruit Palace, Inc. v. City of Palestine, 842 S.W.2d 319, 322 (1992) (finding a
Texas statute permitting municipal or county governments to acquire land for use by
federal government valid); see also \textit{TEX. LOc. GOV'T CODE ANN.} § 280.001 (West 2005).
\textsuperscript{182} \textit{Tex. Fruit Palace, Inc.}, 842 S.W.2d at 321.
\textsuperscript{183} 275 S.W.2d 709 (1955) (per curiam).
conveying private land to the federal government to use for construction of a flood control system owned by the government.\textsuperscript{184} There, the court upheld the statute as permissible, noting that the Texas legislature could lawfully authorize a county to condemn land and transfer it to the federal government.\textsuperscript{185} Indeed, it is conceivable that the likes of Cameron County or the municipality of Brownsville, where past eminent domain battles over fencing have occurred,\textsuperscript{186} could elect to condemn private property and convey it over to the federal government for the wall. But given the contentious history of land acquisition along those areas of the Texas border,\textsuperscript{187} it could also easily devolve into the kind of combative or uncooperative federalism that Gerken and Cover speak to. Local and state entities along the border could potentially refuse to condemn private land on behalf of the federal government, but as noted, state statutes already permit the federal government to avoid that obstacle by filing petitions in state court seeking to acquire the land through the state condemnation procedures. While some courts have foreclosed states from requiring state consent as a condition precedent to federal exercises of eminent domain, statutory limitations under federal law—perhaps like the one proposed by House Democrats—could potentially permit state and local governments to place some restrictions or conditions on federal agencies' attempts to condemn land within state borders.\textsuperscript{188}

The House Democrats' bill would not be the first time in contemporary history that Congress tried to restrict the federal eminent domain power to some degree, but there are key differences in the proposals. Shortly after the infamous \textit{Kelo v. City of New London} ruling,\textsuperscript{189} the House introduced the Private Property Rights Protection Act of 2005.\textsuperscript{190} This federal effort would have prohibited state and local governments from exercising eminent domain for economic development

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\item[184.] Id. at 710; see \textit{TEX. REV. CIV. STAT. ANN.} art. 7880-147v, § 1 (1936) (current version at \textit{TEX. LOC. GOV'T CODE ANN.} § 561.005 (West 2009)); \textit{see also} Vann v. Cameron County, 124 S.W.2d 167, 172 (1939) (upholding statute authorizing county taking of private property for flood control purposes).
\item[185.] \textit{Richardson}, 275 S.W.2d at 712.
\item[186.] United States v. 1.04 Acres of Land, 538 F. Supp. 2d 995, 1003 (S.D. Tex. 2008) ("Congress made the construction of the fence between Laredo and Brownsville, Texas a priority . . . .").
\item[187.] Id. at 1013 (discussing consultation requirements between federal government and state and local governments prior to condemning land).
\item[188.] City of Pleasant Ridge v. Romney, 169 N.W.2d 625, 634 (Mich. 1969) ("[T]he Federal power of eminent domain is complete and cannot, absent some specific statutory limitation in the Federal act itself, be conditioned by any State or local or private rights.").
\item[189.] 545 U.S. 469, 484–85 (2005) (upholding economic development takings as justifiable public use).
\item[190.] H.R. 4128, 109th Cong. § 1 (2005).
\end{enumerate}
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purposes if the state or local government received federal economic development funds. The bill languished in the House and never made it to the Senate. In March 2017, Rep. Jim Sensenbrenner, Rep. Maxine Waters, and Rep. Brian Fitzpatrick revived the issue of constraining, in part, the federal eminent domain power by introducing the Private Property Rights Protection Act of 2017, which proposed to prohibit the federal government from exercising its condemnation powers for economic development purposes.

Much like prior state reform efforts, the bill would have directly restricted the federal government, as opposed to the state and local governments, from taking private property of economic development purposes. The bill was also partly motivated by concerns over eminent domain abuse in rural areas, where land, such as farmland and ranches, is subject to takings that may impact existing irrigation and reclamation projects. These federal bills, nonetheless, do not implicate the border wall, as one would be hard-pressed to argue that the Executive Order is being pursued for an economic development purpose. Indeed, the major difference with Congress’s prior effort to restrict condemnation powers is that the focus was mostly on constraining federal funding to local and state governments that exercised eminent domain for economic development purposes or reining in economic development takings specifically. But as many know, federal takings involve a wide range of uses, such as civil-military, natural resource, environmental, recreational, and national parks.

CONCLUSION

The Executive Order has offered a timely and instructive opportunity to explore the elusive federal power of eminent domain. This Essay shows that the recent controversy over the border wall adds a property law dimension to ongoing cooperative federalism debates regarding federal immigration policy. The Democrats’ bill embraces the spirit of the founding generation by implicitly invoking the potential of the federal government partaking in a cooperative system of land acquisition with states along the border as an alternative means to achieve the Trump Administration’s policy goal. If the bill blocks a purely federal path to

191. Id. § 2(a).
193. Id. § 2(a).
194. Id.
195. Note however that economic incentives may be accrued from the construction of the border wall as contractors, builders, and developers vie for contracts to build it.
taking the land, then it implies that Congress could still achieve that same objective indirectly by proceeding through to state law to seize the land. This was, of course, the very nature of the process of acquiring land for federal projects post-ratification. The prospect of a Republican-controlled Congress seeking consent and cooperation from the state legislatures in Arizona, Texas, or New Mexico to seize land along the border may, alternatively, give rise to the kind of "uncooperative federalism" experienced in the travel ban and sanctuary city sagas. 196

Indeed, Republicans opposing the construction of a wall may seize the chance to recapture the spirit of the early republic and founding generation against federal takings of land within state boundaries, particularly "as many Republicans subscribe to originalism as a constitutional philosophy." 197 Likewise, Democrats may find solace in this historical account as a basis for resistance against the wall, as it offers the left a "progressive" path to halting the construction of the wall by, oddly enough, relying upon an old federalist land acquisition regime of consent and cooperation. 198 The House Democrats' bill, nonetheless, is the aide-mémoire that helps place land seizures as part of President Trump's border wall Executive Order into historical context.

196. Id.
198. Id.