
TAKING FROM STATES: SOVEREIGN IMMUNITY'S PRECLUSIVE EFFECT ON PRIVATE TAKINGS OF STATE LAND

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The core of a state is its physical presence and dominion over its land. States are now battling to maintain their dignity as sovereigns, while traditional tools essential to federalism risk erosion. Private actors, ostensibly empowered by the federal government to condemn land through eminent domain, threaten state sovereignty by attempting to take state property without consent. Select federal statutes, such as the Natural Gas Act and Federal Power Act, grant eminent domain power to private companies to take property for public use. Without proper limiting principles, a statute granting such power could allow a private corporation to condemn and take a state capitol—and the state would have no recourse to respond. However, because takings must be effectuated through courts, federal courts remain as a bulwark against improper intrusion into core sovereign realms.

Where the private company seeks to exercise the power of eminent domain and condemn state-owned land, how should courts evaluate a state's defense of sovereign immunity under the Eleventh Amendment? This Article traces the independent but overlapping histories of state sovereign immunity and federal eminent domain power. We argue that under current state sovereign immunity doctrine, within the limited instances in which Congress has delegated its eminent domain power to a private actor for a specified public use and just compensation, the private actor is nonetheless prohibited from wielding that power to take state lands, absent state consent. This Article ultimately concludes that a delegation of eminent domain authority to a private actor does not abrogate or waive the independent state power of sovereign immunity, therefore rendering private parties unable to exercise eminent domain to take state property. Although intertwined,

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the separate and distinct history and evolution of delegated eminent domain and sovereign immunity doctrines confirm that where they collide, state sovereign immunity is still supreme.

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INTRODUCTION

Delegation is all around us. Congressional delegations of legislative power comprise the backbone of the American administrative state. Setting aside scholarly support of—or derision for—their magnitude and scope, delegations are essential for modern government. Congress typically delegates its powers to

federal executive agencies, but also maintains the power to delegate the federal government's power to private actors. Yet such transfers of power are not unfettered, nor should they be. They are carefully circumscribed by countless judicial doctrines that both define and limit their sweep: clear statement, intelligible principle, and nondelegation provide some of the principal limits. State sovereign immunity also limits these powers when private actors are the recipients of great federal powers.

State sovereign immunity prevents unconsenting states from being sued by private actors absent limited circumstances. Sovereign immunity is not just a shield states may raise as a defense to liability. Rather, it precludes suits against states altogether unless a state surrenders its immunity,¹ such as through waiver, forfeiture,² or Congressional abrogation. And current doctrine severely curtails when Congress may abrogate a state's sovereign immunity, largely limiting it to Congressional powers under Section 5 of the Fourteenth Amendment. Understood in context, state sovereign immunity operates outside of other constitutional provisions and the Bill of Rights.³

It is an understatement to say that modern bureaucratic governance has expanded beyond what the founders ever imagined, and courts must now harmonize increasingly colliding constitutional provisions. This Article argues that the text, structure, history, and background of federal eminent domain power, as limited by the Fifth Amendment's Takings Clause, and state sovereign immunity are properly read separately, and where the provisions collide because a private party attempts to take land from a sovereign state, courts should give full force and effect to both provisions. State lands are within the core of sovereign immunity. Further, Congress lacks the power to abrogate state sovereign immunity using its enumerated Article I powers. Thus, in the context of eminent domain provisions, when Congress has delegated its takings power to private actors, state sovereign immunity constrains the ability of delegees to take states' property without their consent.

Today, litigants who seek redress from governments have relatively few options. Sovereign immunity has reached new heights such that the Court's aspiration in *Marbury v. Madison*, that there be a right for every remedy, has become more of a whisper, if it ever was a true accounting. Official immunity in tort against federal government officers overwhelmingly leaves litigants with no

1. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) ("The Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury' . . . it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'").

2. Waiver of sovereign immunity occurs when a state consents to suits by a private litigant or class of litigants. By contrast, a state forfeits its immunity when it fails to properly raise its sovereign immunity as a jurisdictional defense. For example, a state may forfeit its sovereign immunity by removing a case from state to federal court.

3. The Eleventh Amendment both restores the operation of state sovereign immunity prior to ratification of the Constitution and modifies the relationship of the Bill of Rights to the states because of the later-in-time principle. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

legal remedy; the combination of constitutional standing requirements, heightened pleading standards and lack of *respondeat superior* liability frequently prevents plaintiffs from any legal recourse at all.

The background and history of eminent domain is distinct but intertwined with the evolving concept of state sovereign immunity.⁴ At least partially instantiated by the Eleventh Amendment, state sovereign immunity existed prior to the ratification of the Constitution and Bill of Rights.⁵ Although intertwined, the separate and distinct history and evolution of each doctrine confirms that where they collide, state sovereign immunity does not yield to eminent domain power. This Article argues that under current state sovereign immunity doctrine, within the limited instances in which Congress has delegated its eminent domain power to a private actor for a specified public use and just compensation, the private actor is nonetheless prohibited from wielding that power to take state lands absent state consent. Further, without fully reconceiving the existing scope of states' sovereign immunity, Congress is unable to delegate its abrogation power when its legislation is rooted in the Commerce Clause and other Article I powers. While billions of dollars are at stake between infrastructure initiatives and state public lands, the scope of the article is primarily doctrinal—examining the balance of power between corporate interests and state dominion. This Article does not advocate for the economic benefits of eminent domain or the theoretical justifications of sovereign immunity, only that they must be analyzed independently when the doctrines collide. In Part II, we briefly describe the erratic legal history and doctrine of state sovereign immunity and federal eminent domain powers. There, we show how each power evolved separately. In Part III, we outline the limited caselaw confronting the problem of reconciling these two fundamental aspects of sovereignty. Collisions have arisen when private parties exercise eminent domain power under the Natural Gas Act and inverse condemnation suits, where a private party seeks to sue a government for just compensation after the government has taken land, and could arise under the Federal Power Act. In Part IV, this Article examines how state sovereign immunity and federal eminent domain collide, and how these independent doctrines should be understood when they are in tension from Congressional delegation of federal eminent domain authority to private actors. Finally, we conclude with a brief description of the potential effects of resolving this tension and a normative assessment of how laws where federal eminent domain power

4. Although there is significant scholarship on the collision between the Fifth Amendment's regulatory takings jurisprudence and state sovereign immunity, *see, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493 (2006), there is scant exploration of the interplay between a private party's use of Fifth Amendment eminent domain power and state sovereign immunity. In part, these doctrines do not collide frequently, because the courts have rarely had cause to examine the narrow set of circumstances in which a private party seeks to condemn state-owned lands. This Article begins that conversation.

5. As set out in Part II.B. below, the Eleventh Amendment does not comprise the whole corpus of state sovereign immunity.

is delegated to a private party should function.

I. BACKGROUND LAW

A. Eminent Domain in the United States

1. The Original Understanding of American Eminent Domain

Eminent domain is the power of the sovereign to take property for its own use.⁶ Paradigmatically, this practice involves the government seizing private property, and is a power many consider an inherent attribute of sovereignty.⁷ Under English common law, “land was owned by right of the king and that individual ownership was merely a holding of the king in return for the performance of duties and governmental functions.”⁸ Eminent domain was well established in the American colonies by the time of independence,⁹ and was understood to emanate to the sovereign from natural law.¹⁰ After independence, when each colony became a sovereign state, the thirteen new states gained all the attributes inherent in sovereignty.¹¹ By nature of that sovereignty, each state assumed control over the people and property within its jurisdiction which had previously belonged to the king.¹² That included each state’s right of eminent domain. Much of this natural law understanding of eminent domain was then constitutionalized.¹³ Eminent domain also flowed to the federal government as its own sovereign, although in the early republic, there was some doubt whether the federal government possessed eminent domain power because it had not been specifically enumerated in the Constitution.¹⁴ Now this power is limited by the Fifth Amendment’s Takings Clause, which serves as a restriction on the federal

6. *See, e.g.*, *Kohl v. United States*, 91 U.S. 367, 373-74 (1875).

7. *See, e.g.*, *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924) (“The power of eminent domain is an attribute of sovereignty, and inheres in every independent State.”).

8. FREEMAN W. SHARP, LEGIS. REFERENCE SERV., DOC. NO. 406/112 A-201, FEDERAL POWER OF EMINENT DOMAIN: A SOVEREIGN POWER WITH CONSTITUTIONAL LIMITATIONS 1 (1967).

9. *Id.* at 3.

10. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 555 (1972).

11. *City of Chattanooga*, 264 U.S. at 480.

12. PHILIP NICHOLS, POWER OF EMINENT DOMAIN: A TREATISE ON THE CONSTITUTIONAL PRINCIPLES WHICH AFFECT THE TAKING OF PROPERTY FOR PUBLIC USE 3 (1909). Both the public trust doctrine and state ownership of navigable riverbeds are born out of this same principle. *See generally id.*

13. Stoebuck, *supra* note 10, at 555-56. *Cf.* *United States v. Jones*, 109 U.S. 513, 518, 3 S. Ct. 346, 350 (1883) (“The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and . . . requires no constitutional recognition.”).

14. Sharp, *supra* note 8, at 6.

government.¹⁵ The remainder of this Subpart traces recent historiography about the federal government's eminent domain power between the founding and present day, and concludes with the current legal framework by which courts consider delegations of federal eminent domain powers to private parties.¹⁶

There has been renewed academic debate about why the federal government did not directly exercise federal eminent domain power until after the 1860s and 1870s, but it is nonetheless clear that in the period immediately following ratification, "the exercise of federal eminent domain power within state borders occurred generally in state proceedings and always with state legislative involvement"¹⁷ There are four potential explanations given now for why the federal government failed to exercise eminent domain prior to the 1870s: (1) the federal government did not have the power to engage in such takings; (2) the monetary cost associated with federal takings was too high; (3) the Enclave Clause required that the federal government obtain consent prior to exercising eminent domain power; or (4) the political cost of federal takings was too high.¹⁸ The following briefly recounts some of the possible original understandings of federal eminent domain power, which will be instructive in understanding how the founders may have understood the interaction between eminent domain and sovereign immunity.

The first explanation of why the federal government did not use eminent domain power in the early republic is because it simply lacked the power to condemn land within other states' jurisdiction. The federal government is one of limited, enumerated powers, with the Constitution providing the initial grants of power to each branch of government, reserving non-enumerated powers to the states, while the Bill of Rights limits the powers of the federal government. Eminent domain power is not explicitly provided in the Constitution, and therefore, its original basis must be implied from the nature of sovereignty or the structure of the Constitution; or was a background principle against which the

15. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation."). Although the text explicitly notes that takings of *private* property require just compensation, the Supreme Court has interpreted the clause to apply to public property taken by the federal government. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). *See also infra* note 29.

16. This Article focuses specifically on the federal eminent domain power; however, it is important to note that state delegations of eminent domain powers to private parties were upheld as constitutional throughout the late 1800s. Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 519, 545-46 (2009) (discussing the Mill Acts). Such delegations continue, and are more common than federal delegations of this power.

17. 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, 140 (2004).

18. Christian R. Bursset, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 CALIF. L. REV. CIRCUIT 187, 197-98 (2013) (setting out historical theories and proposing an alternate explanation).

Constitution was crafted, and was only modified by the Takings Clause.¹⁹

Such a power could be inferred from three likely sources: the Necessary and Proper Clause, the Takings Clause of the Fifth Amendment, or by the general nature and structure of the Constitution.²⁰ William Baude suggests that the “original view was that the federal government had eminent domain power only in the District of Columbia and the territories, where the Constitution expressly granted it plenary power.”²¹ Rather than allowing Congress to exercise eminent domain power by implication, through Congress’ enumerated powers, by the Necessary and Proper Clause, or by negative inference to the Fifth Amendment, Baude argues that the founders understood eminent domain power as too great to allow the federal government to condemn land without express Constitutional authorization.²²

Baude has also argued that the modern Supreme Court understands the Necessary and Proper Clause to limit implied powers,²³ and that eminent domain was a “great power” that could not be implied according to the Founders’ understanding.²⁴ Certain delegations of power carry with them incidental powers in order to effectuate the original delegation. As Baude explained, “when one person delegated authority to another, courts frequently had to decide whether the granted authority implicitly gave additional authority to help carry out the grant. The doctrine generally provided that a ‘principal’ power carried with it ‘incidental’ powers, even if they were not enumerated.”²⁵ However, a critical determination of this greater-includes-the-lesser theory of delegation is that certain “great” powers simply could not be implied because they would have been enumerated if such a significant power was truly meant to be delegated along with the original grant.

Analyzing historical evidence, Baude finds support for his argument that the federal government did not understand itself as possessing a broad eminent domain power. Baude’s evidence suggests that the federal government condemned land using a cooperative federalism regime, in which it “relied on the state’s condemnation authority—either by having the state condemn the land and then transfer it to the federal government, or by having federal agents

19. *United States v. Jones*, 109 U.S. 513, 518 (1883) (“The provision found in the Fifth Amendment to the federal Constitution, and in the Constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised.”).

20. These three sources were later discussed in *Kohl v. United States*, 91 U.S. 367, 373-74 (1875).

21. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* 1738, 1742 (2013).

22. *Id.*

23. *Id.* at 1749 (citing *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012)).

24. *Id.* at 1749 (citing *Sebelius*, 132 S. Ct. at 2591).

25. *Id.* at 1750.

proceed as plaintiffs under state condemnation law.”²⁶ Shepherding legislative documents during Senate debate of an 1864 railroad bill, Baude shows that many were concerned about the impact to this federalist scheme if a statute were passed to authorize eminent domain power.²⁷

Scholars have set forth a second explanation for why the federal government did not exercise eminent domain in the early years: because the costs associated with obtaining the land and paying just compensation were too high for a federal government with a limited budget. Until 1897, states were not bound by the Takings Clause,²⁸ and could exercise eminent domain power freely without compensating private owners.²⁹ In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, the Supreme Court held that states were required to pay just compensation for condemned private property,³⁰ and in doing so made the substance of the Takings Clause applicable to the Due Process Clause of the Fourteenth Amendment.³¹ Prior to that extension, the federal government could avoid its obligation to justly compensate for its condemnations by simply persuading a state to undertake the condemnation for it.

Third, some have argued that the Enclave Clause limited the federal government’s eminent domain power by requiring the federal government to obtain state approval before exercising this power.³² This view is most prominently argued by Adam Grace, and is predicated on his examination of the lighthouse acts. Grace explained that it was clear to the founders that the federal government could finance and build improvements to facilitate other federal powers, such as permissible regulations of commerce. Because early commerce was conducted heavily over water, some of the first federal improvements commissioned by Congress after Constitutional ratification were for lighthouses, which were constructed and operated using “virtually unquestioned” federal authority.³³ Along with this improvement typically requiring lands obtained via eminent domain, the federal government “always sought a jurisdictional cession over such lands from the state.”³⁴ States often granted these cessions over lands,

26. *Id.* at 1762.

27. *Id.* at 1779-83.

28. *See, e.g.,* *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833) (“We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.”).

29. *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

30. *Id.*

31. The Due Process Clause of the Fourteenth Amendment makes no mention of takings, eminent domain or just compensation, only that property may not be “deprived” without “due process.”

32. U.S. CONST. art. I, § 8, cl. 17.

33. Grace, *supra* note 17, at 101-02 (citing Act of Aug. 7, 1789, ch. 9, § 1, 1 Stat. 53 (1789)).

34. *Id.* at 143.

but early state approvals often carried with them limits of federal condemnation power.³⁵ Yet he couches the common practice of Congress asking for state permissions as required by the Enclave Clause, not the Takings Clause, arguing that it was commonly known that the federal government could take private land without state approval.³⁶ Rather, Grace contends, the proper explanation about why the practice was rarely utilized was political.³⁷

Finally, responding to Baude in a student note, Christian Burset has suggested that the federal government simply lacked the political capital with states required to execute a federal takings.³⁸ This political capital theory of the federal relationship, then, mirrors larger debates about states' rights in the pre-Civil War era. The nascent republic simply did not want to inflame the passions of states and states' rights advocates by engaging in activities which arguably infringed upon a traditional state power. When approaching any condemnation, the federal government would have to assess the state's willingness to participate and approve use of eminent domain power. Reconciling this theory, the political capital idea is reflected in the fact that many early federal projects which involved eminent domain power involved some version of cooperative federalism, either with states being empowered with an Enclave Clause "veto" or the ability to select the individual parcels of land which would later be condemned for a project.³⁹

The Railroad Acts are one of the federal government's first major acts of delegated eminent domain authority to private actors.⁴⁰ A series of acts passed through the 1860s, these were direct condemnations of private land, then granted

35. *Id.* at 143-44 ("If land was to be taken by the federal government, state mandated procedures would have to be adhered to, *including a requirement that all charges related to the appraisal proceeding be paid by the United States.*") (emphasis in original).

36. *Id.* at 147-48, 151 ("People understood long before the *Kohl* case that the states' power to withhold consent under the Enclave Clause did not constitute a power to prevent federal exercise of the power of eminent domain Not only does the Enclave Clause empower states to impose limitations on the federal government's acquisition of properties where exclusive jurisdiction is desired, but if the federal government is going to obtain state consent in any event, there is doubtless some benefit to having the takings issue ironed out at the same time.").

37. See generally Grace, *supra* note 17.

38. See generally Burset, *supra* note 18, at 197-98.

39. See *infra* Part II.A.2.

40. JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 59-61 (2002). Much of the federal government's role in the construction of the western railroads was passive. *Id.* at 2. States had previously delegated eminent domain power to private entities. See, e.g., Krithika Ashok, Paul T. Babie & John v. Orth, *Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, and the United States*, 42 *FORDHAM INT'L L.J.* 999, 1031 (2019) ("From early in American history, states had delegated the sovereign power of eminent domain to private companies engaged in providing useful improvements, such as canals. But it was with the advent of the railroad that delegation of the state's power of compulsory acquisition became widespread. At first, the delegation was in private acts of incorporation of individual railroads. Later, general railroad laws granted all carriers the power of eminent domain").

to the railroads as an arm of the state, which then became private. In the normal course, the federal government granted general eminent domain power to construct a railroad, but the power was contingent on the state selecting the actual parcels which would later be taken.⁴¹ Title did not pass to the railroad until after the project was complete.⁴² Thus, consistent with the understanding of the takings power at the time, federal eminent domain power could not be exercised without state consent.

Georgia v. Chattanooga provides an interesting example. In 1837, Georgia began efforts to build a railroad between Atlanta, Georgia and Chattanooga, Tennessee. The Tennessee legislature approved Georgia's purchase of the necessary rights of way from the Georgia state line to Chattanooga, and eleven acres for a terminal and rail yard within the city limits.⁴³ In the years that followed, Chattanooga grew and its business district became close to the rail yard, leading the city to attempt exercising its eminent domain power over the rail yard to extend city streets through the property.⁴⁴ Georgia, however, asserted sovereign immunity in Tennessee courts in response to the attempted condemnation of its Tennessee property.⁴⁵ The Supreme Court held that Georgia's "enterprise" outside of its territorial jurisdiction was a "private undertaking," and therefore the sovereign powers it possessed did not apply because the role of the state had been transformed to that of a private actor.⁴⁶

41. See, e.g., *Kan. Pac. R.R. Co. v. Atchison, Topeka & Santa Fe R.R. Co.*, 112 U.S. 414, 421 (1884).

The grant to the Kansas Pacific Company, by the act of 1862, carried the odd sections within the limit of ten miles from its road, and by the act of 1864 such sections within the limit of twenty miles. The act of 1862 is to be construed, as already said, as though the larger number were originally inserted in it, and, with the exceptions stated, it must be held to pass the title to the grantee as against the United States, and against all persons not having acquired that title previous to the amendment. The grant to Kansas, as stated, conferred only a right to select lands beyond ten miles from the defendant's road, upon certain contingencies. It gave no title to indemnity lands in advance of their selection.

Darlington v. United States, 82 Pa. 382, 386 (1876).

42. Ely, *supra* note 40, at 59. Although southern railroad development after the Civil War was largely initiated and funded by the southern states without federal assistance, much of the land used for the western railroads was federal land. *Id.* at 58. Federal land grants to railroads were conditional on meeting stated conditions, and the railroads did not take title to land from the federal government until they satisfied the conditions. As such, the legislation frequently required railroads to forfeit infrastructure if conditions were not met, such as completion of a project within a given timeframe. *Id.*

43. *Georgia v. City of Chattanooga*, 264 U.S. 472, 478 (1924). Georgia subsequently leased its interest to a private company to operate the railroad. *Id.*

44. *Id.* at 478-79.

45. *Id.* at 479.

46. *Id.* at 480-81 ("Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership . . . Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It

Thus, because the state had “divested itself of its sovereign character,” its property could be taken in another state’s courts.⁴⁷

Common practice changed in 1875 when the Supreme Court decided *Kohl v. United States*, in which the federal government, acting in its own right, attempted to condemn land in Cincinnati, Ohio so it could build and operate a federal building housing a court, post office, custom house, and other services.⁴⁸ After the federal government initiated the condemnation action in federal court, private landholders appealed to the Supreme Court, raising two arguments. First, the private landowners argued that the federal government lacked jurisdiction to effectuate a takings because the authorizing legislation required the state of Ohio to cede jurisdiction over the site. Second, they asserted that the takings was invalid because it exceeded the Congressionally-granted authority, which only authorized “purchase” of land.⁴⁹ Although the Court noted that the federal government had yet to exercise its own eminent domain power, the Court discussed three wells of authority for the power: (1) the Necessary and Proper Clause; (2) the Takings Clause; and (3) inherent sovereign power.⁵⁰ The Court found that the federal government could take land so long as it paid just compensation, and its failure to utilize the right previously did not mean that such a right did not exist.⁵¹ Specifically, the Court determined that eminent domain is a right of the federal government that “may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.”⁵²

From 1875 until 1922, Takings Clause jurisprudence focused primarily on direct federal or state government takings of a private landowner’s fee simple interests.⁵³ But with the Supreme Court’s decision in the landmark case *Pennsylvania Coal v. Mahon*, in which a state statute that restricted land use was adjudicated a taking, takings jurisprudence was transformed.⁵⁴ Subsequent

occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity.”).

47. *Id.* at 482. *See also* *Burbank v. Fay*, 65 N.Y. 57, 62 (1875) (“When one State holds lands within the limits of another State, it acquires its estate subject to all the incidents of ordinary ownership.”).

48. 91 U.S. 367 (1875).

49. *Id.* at 374.

50. *Id.* at 372-74.

51. *Id.* at 372-73; *see also* *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (eminent domain “requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right.”).

52. *Kohl v. United States*, 91 U.S. 367, 372 (1875).

53. *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY 688 (5th ed. 2016). Regulatory takings were not understood to constitute a taking until much later. *Id.* *See also* *Shoemaker v. United States*, 147 U.S. 282, 321-22 (1893) (upholding the federal taking of private property to create Rock Creek Park where precise tracts to be taken were selected by Senate-approved commission).

54. 260 U.S. 393 (1922).

decisions expanded takings doctrine, with much of the focus on regulatory takings, and courts grappled with ensuing inverse condemnations.⁵⁵ As Congress expanded the federal government's reach through the creation of new federal agencies, particularly during the New Deal, federal delegations of eminent domain authority to both the new agencies and private parties increased significantly.

2. Delegated Eminent Domain Power

Today, it is unquestionable that the federal government itself can take private land for public use so long as it pays just compensation. Much of the scholarship and debate surrounding eminent domain focuses on what can or should constitute "public use," but it is nonetheless clear that eminent domain may be used for building public works projects, such as roads, bridges, and many energy projects. Some commentators have noted that judicial interpretation of the Takings Clause has been remarkably void of historical analysis.⁵⁶ It is equally clear that today, the federal government may take land directly through legislation, as it did when passing the Railroad Acts in the 1860s, although takings are more commonly done through executive agencies or private actors to whom the federal government has delegated its eminent domain power. This Subpart will detail how eminent domain power may be, and has been, Congressionally delegated.⁵⁷

The federal government may delegate eminent domain power to either federal agencies⁵⁸ or to private actors.⁵⁹ States do not normally need to consent to takings of private property within their jurisdiction when the federal government directly exercises eminent domain.⁶⁰ Where Congress has delegated

55. See *infra* Part III.C. In contrast to physical takings, in which a government actor takes title to a property interest, a regulatory taking is government action which deprives a property owner of all value. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Inverse condemnation is the claim which allows a private party to seek just compensation for condemned property.

56. William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 803-05 (1995) ("Strikingly, even originalists do not use history to interpret the Takings Clause.").

57. Notwithstanding the problems that arise with both delegations of federal eminent domain to federal agencies and private actors to condemn private lands, these issues do not address the core question this Article attempts to answer: whether these delegations could ever be used to take state land. As evidence, the authors have been unable to locate any case where the federal government directly condemned state land against the state's consent.

58. See, e.g., 40 U.S.C. § 257. Some public entities with eminent domain power delegated by Congress have also taken corporate form, such as the Tennessee Valley Authority, or by states, such as many of the railroads. See, e.g., An Act to Provide for the Incorporation of Railroad Companies, No. 82, Laws of Michigan, 1855 (repealed 1873).

59. *United States v. Carmack*, 329 U.S. 230, 240 n.10 (1946). Federal exercise of jurisdiction over condemned properties within a state requires state consent. *Id.* (citing U.S. CONST. art. I, § 8, cl. 17).

60. Nichols, *supra* note 12, at 24 (1909). And it is common for state legislatures to delegate eminent domain power to private parties for public uses. U.S. GOV'T

federal eminent domain power to federal agencies, the delegation must meet the normal constitutional standards for a delegation, namely, the intelligible principle test set out by *J. W. Hampton, Jr. & Co. v. United States*, in which the Court required Congress to establish a discernible principle proscribing how the Executive would perform the delegated function.⁶¹ A similar principle exists for private delegations.⁶²

Where Congress has delegated eminent domain power to private actors, those actors may be either private individuals or business entities.⁶³ Private delegations of public powers are often seen as problematic because they frequently lack public accountability or appropriate oversight. Political accountability is often understood as public accountability to an elected official, or to a government official who ultimately answers to an elected official. Many private delegations evade both public and political accountability; private actors are not answerable to the general public, and what oversight exists is minimal.

Delegations of eminent domain power to private entities are atypical of most private delegations, where the federal “government provides the funds, sets programmatic goals and requirements, or enacts the regulatory scheme into which private decision making is incorporated.”⁶⁴ In a federal statute delegating condemnation power to a private entity, the government sets out specific regulatory conditions a private party must meet in order to take private land, and qualified private parties apply to the federal regulatory body for licensing to determine if the applicant meets the conditions set out by Congress.⁶⁵

Private delegations of this traditionally sovereign power lack significant public accountability. This power’s atypical nature does not make it fare any

ACCOUNTABILITY OFFICE, GAO-07-28, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 6 (Nov. 2006), <https://perma.cc/6XXP-RF48> (“State legislatures generally determine who may use eminent domain by delegating eminent domain authority to state or quasi-public entities, such as housing, transport, and urban renewal authorities, which may exercise that power only for the purpose for which it was established.”).

61. 276 U.S. 394 (1928).

62. There has been academic debate about whether a private delegation doctrine should exist, which would be more restrictive than the nondelegation doctrine’s sole intelligible principle test. Such a doctrine “assesses whether the Constitution’s separation of powers and due process requirements prohibit the government from delegating certain types of powers to private hands.” Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370 (2003); cf. Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J. L. & PUB. POL’Y 931 (2010).

63. See, e.g., *United States v. 243.22 Acres of Land in Village of Farmingdale*, 43 F. Supp. 561, 565 (E.D.N.Y.) (“The Congress may properly delegate to individuals or to corporations power to condemn . . . to carry out its legislative intent.”), *aff’d*, 129 F.2d 678 (2d Cir. 1942).

64. Metzger, *supra* note 62, at 1395. These exist in numerous areas of traditional governmental concern, with the outsourcing of the management and servicing of entitlements to private companies as a primary example.

65. See, e.g., Natural Gas Act, 15 U.S.C. § 717f, described in greater detail in Part III.A below.

better when privately delegated, particularly when delegated without limitation. In the case of the railroad acts, Congress, or more commonly the states themselves, designated specific lands already owned by the designating government to be granted to a private company, for a specifically identified use.⁶⁶ Although these statutes are essentially private delegations, they were limited in nature and scope, granting a single company a contract to build a railroad line and take land along a broadly predetermined route. In the cases where direct takings existed, members of Congress voted to approve the delineated taking.⁶⁷

Where Congress delegates eminent domain to a private party, with oversight placed in an executive agency, levels of accountability are further removed. Today, any limited oversight power is commonly placed in independent or quasi-independent commissions, such as the Federal Energy Regulatory Commission (FERC), which are insulated from political pressures that could provide accountability.⁶⁸ FERC, when fully seated, has five commissioners, appointed by the president and confirmed by the Senate, who each serve for five-year terms.⁶⁹ The Commission is independent, and no more than three commissioners of out five can be members of the same political party.⁷⁰ Commissioners, even when only three are sitting, may approve certificates conferring eminent domain power on qualified private parties by a simple majority vote to construct natural gas pipelines.⁷¹ Commissioners are not directly accountable to the president because they may only be fired for cause and, because their terms do not correspond to election cycles, Commissioners are often not appointed by the sitting president.⁷² Further, there is less accountability for private actors attempting to exercise eminent domain because takings oversight is bifurcated. While the Commission may determine whether the private actor is statutorily qualified to exercise eminent domain, private actors commonly must still take title through court proceedings. While qualified private parties have the jurisdictional choice to bring a condemnation action in state or federal court, judges have extremely limited oversight.⁷³ In this role, judges do not look beyond

66. See Ely, *supra* note 40, at 52-53.

67. See *generally id.*

68. The clash of powers at the heart of this Article is currently playing out in front of FERC, which we focus on in more detail in Part III.A below.

69. *Meet the Commissioners*, FERC, <https://perma.cc/SX4G-BP7W>.

70. FERC, STRATEGIC PLAN FY 2018-2022, at vi (Sept. 2018), <https://perma.cc/3X3C-R7HW>.

71. Three sitting FERC members constitute a quorum. *McNamee leaving FERC; will agency lose quorum?* RENEWABLE ENERGY WORLD (Jan. 1, 2020), <https://perma.cc/VR5F-AVRS>.

72. As an independent commission, FERC is subject to the “for cause” termination rules set forth by *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). See also *supra* notes 40, 40.

73. Condemnation courts have not permitted landowner challenges to the validity of the Commission-issued certificate that grants the private party condemnation power; landowners must raise such claims in a separate action on direct appeal to a circuit court. See, e.g., 15 U.S.C. § 717f(h).

Commission authorization and merely administer the procedural aspects of condemnation, namely, fixing compensation.⁷⁴

B. State Sovereign Immunity

1. History and Application of the Eleventh Amendment

“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

U.S. CONST. amend. XI.

For such a terse admonition, the Eleventh Amendment has generated outsized scholarly and judicial discussion. And legal scholars have extensively, perhaps exhaustively, covered the legal history of state sovereign immunity, which is neither defined by nor encapsulated within this succinct command.⁷⁵ Sovereign immunity is the right of a sovereign to not be haled into court without its consent.⁷⁶ States enjoy an iteration of sovereign immunity barring suits by private citizens absent their consent or, in some limited cases, when Congress abrogates their sovereign immunity.⁷⁷ However, state sovereign immunity does not preclude federal government suits against them.⁷⁸ Some conceptions of sovereign immunity, discussed below, consider this akin to a jurisdictional defense, which not only provides a defense to suit by a private party, but an absolute immunity such that a case may not even be heard by a court.⁷⁹ Exploring the Eleventh Amendment’s history and function is a prerequisite to understanding the federal government’s power to delegate eminent domain and its clash with state sovereign immunity. Below we will briefly review its checkered history as a prologue to examining its role when a private party wants

74. Const. Pipeline Co. v. Permanent Easement for 1.33 Acres in Delaware County, N.Y., No. 314CV2034NAMRFT, 2015 WL 12559875, at *1 (N.D.N.Y. Mar. 31, 2015) (noting that courts do not look beyond the existence of the certificate).

75. See generally RICHARD H. FALLON, JR., ET AL, HART & WESCHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 914-22 (7th Ed. 2015).

76. *Sovereign Immunity*, BLACK’S LAW DICTIONARY (9th ed. 2009).

77. *Alden v. Maine*, 527 U.S. 706, 755-56 (1999).

78. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

79. See, e.g., Louis L. Jaffe, *Sovereign Immunity*, 77 HARV. L. REV. 1, 20 (1963) (“As a result of the eleventh amendment individuals could no longer sue a state *eo nomine* This has meant that relief which in England was available only by petition of right could not be had as a rule in this country without legislative consent.”); WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *242 (Wayne Morrison ed., 2001) (1765) (“[N]o suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.”).

to condemn land from a state.

Countless sources confirm that state sovereign immunity existed at the time of ratification.⁸⁰ For example, Alexander Hamilton famously described in the Federalist Papers that the “plan of the convention” was to preserve States’ “pre-existing” immunity from suit, because “inherent in the nature of [State] sovereignty” is the freedom of a State “not to be amenable to the suit of an individual without its consent.”⁸¹

Shortly after ratification, the Supreme Court decided *Chisholm v. Georgia*, in which the state’s assertion of sovereign immunity did not bar a private damages action brought against a state by a citizen of another state.⁸² *Chisolm* has been repeatedly described by history as a “profound shock,” which spurred quick political action to abrogate the decision: Congress passed the Eleventh Amendment on March 4, 1794, and the states ratified it less than a year later. Thus, if state sovereign immunity was not previously discernible from the Constitution’s structure, the Eleventh Amendment overtly constitutionalized it. Yet, the contours of state sovereign immunity remained unclear for nearly a century, until *Hans v. Louisiana* first attempted to clarify its scope.⁸³

In *Hans*, a Louisiana citizen sued the state of Louisiana to recover interest on state-issued bonds. The suit was not textually prohibited by the Eleventh Amendment, which facially only precluded suits against states by citizens of *another* state, but the Supreme Court dismissed the case for lack of jurisdiction.⁸⁴ State sovereign immunity, as described in *Hans*, is part of the larger constitutional scheme emanating from the text, structure, and history of the Constitution.⁸⁵ Although partially memorialized in the Eleventh Amendment,

80. Several scholars have recently recounted other writings by the founders at the time of ratification. See, e.g., William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 10-11 (2017) (describing how James Madison invoked Virginia’s sovereign immunity when discussing Article III at the Virginia Convention); Bradford Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1838-62 (2010); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 93-97 (1989).

81. THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961); James E. Pfander, *History and State Suability: An Explanatory Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1270 (1998) (bolstering the idea that pre-existing state sovereignty was inextricably linked with repayment of revolutionary war debts).

82. 2 U.S. (2 Dall.) 419, 434-35 (1793).

83. 134 U.S. 1 (1890). There were unsuccessful efforts prior to *Chisholm* to codify the concept of state sovereign immunity through legislative action. See Pfander, *supra* note 81, at 1279 (“the framers regarded the Eleventh Amendment as an ‘explanatory’ or ‘declaratory’ amendment . . . [which] sought to clarify the meaning of a law that a court had interpreted (perhaps erroneously), and were often applied retroactively. By establishing an explanatory rule of construction to govern the scope of the judicial power, the Eleventh Amendment swept away *all* of the claims within its description, not just those filed after its effective date.”).

84. *Id.* at 1271.

85. 134 U.S. 1, 10 (1890) (acknowledging the Eleventh Amendment was inapplicable where a citizen sued their own state in federal court); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012) (describing state sovereign immunity

Hans interpreted state sovereign immunity as the Court understood it to be at the founding, declaring that “[t]he suability of a State, without its consent, was a thing unknown to the law.”⁸⁶ Thus, while the *Hans* Court read the Eleventh Amendment as explicitly responding to *Chisolm*, it also understood the amendment as representing and reasserting, a larger precept of federalism.

This extra-textual conception of state sovereign immunity not only prevented suit by private citizens of foreign states but also prevented suit by private citizens of the same state. *Hans*, in short, held that states possess sovereign immunity such that they may not be sued by any private party without their consent.⁸⁷

A century later, the Supreme Court further defined the complex relationship between sovereigns in *Blatchford v. Native Village of Noatak and Circle Village*. *Blatchford* required the Court to examine whether states waived immunity from suit by Indian tribes upon Constitutional ratification.⁸⁸ The Court found that states retained sovereign immunity against foreign sovereigns,⁸⁹ even though states consented to subject themselves to lawsuits by the federal government as part of ratification in 1789.⁹⁰ But, consent “to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select.”⁹¹

In *Alden v. Maine*, the Court found the logical conclusion of this conception of state sovereign immunity, reemphasizing that the Eleventh Amendment did not fully encapsulate the whole of state sovereign immunity.⁹² *Alden*’s holding that sovereign immunity applies with equal force in suits against states brought by private citizens in a state’s own court is best understood as an attempt to reconcile and extend the full implications of *Hans* to all cases where a state’s sovereign immunity may be at issue.⁹³

as part of a “constitutional backdrop[.]”).

86. 134 U.S. at 16.

87. *Id.* at 17, 20-21.

88. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

89. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).

90. States “entered the federal system with their sovereignty intact,” and their limited surrender of immunity encompassed “only two contexts: suits by sister States . . . and suits by the United States.” *Blatchford*, 501 U.S. at 782. *See also, e.g., Alden v. Maine*, 527 U.S. 706, 755 (1999) (“In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.”).

91. *Blatchford*, 501 U.S. at 785 (“We doubt, to begin with, that that sovereign exemption *can* be delegated—even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States might sue. That consent, ‘inherent in the convention,’ to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person’s benefit is not consent to suit by that person himself.”).

92. *Alden*, 527 U.S. at 712-13.

93. FALLON ET AL., *supra* note 10, at 443 (7th Ed. 2015) (“Rather than suggesting a general qualification of the rule against discrimination, however, *Alden* may be best

This is not to suggest that no remedy exists when a private party has a claim against state governments. Of course, private individuals may sue state officers for unconstitutional or illegal acts, but there is a fundamental difference between suits against a state and suits against state officers.⁹⁴ Although other forms of immunity may attach where a suit is against a state officer, only states may invoke state sovereign immunity. In *Alabama v. Pugh*, for example, current and former inmates of Alabama prisons sued the state, its corrections board, and several Alabama officials, alleging Eighth Amendment violations.⁹⁵ There, the Court dismissed the state and corrections board, but allowed the action to proceed against the state officers.⁹⁶ For the purposes of successfully asserting state sovereign immunity, the form of requested relief is immaterial, whether it is monetary, injunctive or otherwise.⁹⁷ Rather, the operative question is the nature of the action.

Although not explicitly part of modern sovereign immunity doctrine, some have understood the relevant inquiry driving whether a state may avail itself of sovereign immunity to be whether the state wrongfully acquired title to the property. As Louis Jaffe observed, cases are seen to be against the state, even where they are brought in the name of an officer, in areas “involving the enforcement of contracts, treasury liability for tort, and the adjudication of interests in property which has come unsullied by tort into the bosom of the government.”⁹⁸ Thus, when asserting an action in tort, there additionally exists a fundamental distinction between property that wrongfully came into the possession of the government, and that which came into the government “unsullied.”

Today, although scholars have identified other possible understandings of state sovereign immunity,⁹⁹ the Supreme Court has principally adopted a Constitutional view, exemplified by the majorities in *Blatchford*, *Seminole Tribe*,

understood as limited to cases involving state sovereign immunity, a doctrine to which the Court is strongly committed, and as reflecting the Court’s desire to address what it viewed as an effort to make an end run around the doctrine.”). See generally Jaffe, *supra* note 10.

94. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908).

95. 438 U.S. 781, 781 (1978).

96. *Id.* at 782.

97. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 90 n.358 (1988) (“Injunctive relief will not necessarily avoid a sovereign immunity bar, however, especially where the government has expressly provided a limited monetary remedy and no claim of constitutional or federal statutory violation is made.”).

98. Jaffe, *supra* note 10, at 29.

99. In addition to the constitutional view advanced in *Alden*, scholars have identified three other primary ways to interpret the Eleventh Amendment: (1) a literal reading which limits sovereign immunity to the text of the Eleventh Amendment; (2) sovereign immunity as a form of diversity jurisdiction, embodied by the Eleventh Amendment, which stripped one of the original grants of diversity jurisdiction in Article III; (3) a federal common law-style view, which allows Congress to waive state sovereign immunity for a state where a statue exists. See generally FALLON ET AL., *supra* note 75, at 914-22.

and *Alden*. The majority in *Seminole Tribe* understood that the pure text of the Eleventh Amendment did not capture the full weight of the immunity states retained as sovereigns in the new constitutional scheme.¹⁰⁰ There, the Court reiterated that sovereign immunity is often absolute, and does not depend on the structure of the suit or remedy sought.¹⁰¹ State real property falls well within the core of state dignity, and thus the core of sovereign immunity doctrine. Suability could not be altered or abrogated except through special powers, not realized until the reconstruction amendments. Rather, sovereign immunity is inherent in the constitutional scheme, and the Amendment's text is simply a reaction correcting for the wrongly decided *Chisolm*.¹⁰²

It is well established that private litigants may not sue states without their consent for damages, where liability may require drawing on the state fisc, but may engage in suits where regulatory takings are at issue, when a state regulation limits a property's use thereby diminishing its value. However, it is entirely different when a private party, empowered by the federal government to condemn land, attempts to exercise that delegated power against an unconsenting state.

It bears noting what the Court has identified as the core attributes of sovereignty, in order to better understand what would impinge on state sovereignty. For the *Alden* Court, state dignity was a paramount sovereign interest, which included the ability of a state to craft and enforce its own laws, and not be haled into court by another sovereign.¹⁰³ This rationale also formed the basis of *Federal Maritime Commission v. South Carolina State Ports Authority*, in which a federal agency attempted to assert jurisdiction over an arm of the state of South Carolina, to hear a private claim.¹⁰⁴ There, garnering a 5-4 decision, the Court held that the state was entitled to sovereign immunity because it was the "type of proceeding[] from which the Framers would have thought the States possessed immunity when they agreed to enter the Union."¹⁰⁵

Although state revolutionary war debts seem to have been the primary driver of state sovereign immunity at the founding, in the modern doctrine, state dignity has since displaced debts as the primary concern.¹⁰⁶ The dignity interests

100. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 70-74 (1996).

101. *Id.* at 58 ("[The] type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity [I]t also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties" (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993))).

102. *Id.* at 73.

103. *Alden v. Maine*, 527 U.S. 706, 748-49 (1999); accord *Seminole Tribe*, 517 U.S. 44 at 58.

104. 535 U.S. 743 (2002) (holding state sovereign immunity precluded a federal administrative agency from adjudicating a private claim jurisdiction where the state did not consent).

105. *Id.* at 756.

106. *Id.* at 769 ("[T]he primary function of sovereign immunity is not to protect State treasuries, . . . but to afford the States the dignity and respect due sovereign entities."); see

afforded to states grew out of those afforded to sovereign persons, i.e., kings and queens,¹⁰⁷ however they are now applied to states as sovereigns in their own right.¹⁰⁸

In *Allen v. Cooper*, the Court advanced *Alden*'s conception of state sovereign immunity. The *Allen* Court held that the Constitution's Copyright Clause, Article I § 8, did not give Congress the power to validly abrogate state sovereign immunity.¹⁰⁹ Justice Kagan, writing for a unanimous Court, reiterated that in *Seminole Tribe*, "the Court had held that 'Article I cannot be used to circumvent' the limits sovereign immunity 'place[s] upon federal jurisdiction.'"¹¹⁰ Justice Kagan made further efforts to cement the Court's previous sovereign immunity caselaw, noting that the Court "demand[s] a 'special justification,' over and above the belief 'that the precedent was wrongly decided.'"¹¹¹ Thus, despite the fact that petitioner Allen argued for a somewhat novel position, it was abundantly clear to the Court that the question before it had already been decided.

2. Permissible Suits against States by Private Parties

"The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."¹¹²

a. Eleventh Amendment Exceptions

There are three situations in which a state directly may be sued in federal court: (1) the state has waived its sovereign immunity;¹¹³ (2) the federal government or another state sues the state;¹¹⁴ or (3) Congress has abrogated state

generally Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 51-75 (2003).

107. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1957 (2003). The shift to emphasize state dignity interests in modern doctrine has been criticized in recent scholarship as ahistorical. See Corey Brettschneider & David McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*, 93 TEX. L. REV. 1229, 1252-66; Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 28-29 (2003) (arguing there is a dubious connection between the law of nations concept of state dignity and state sovereign immunity).

108. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, U. PENN. L. REV. 169, 190-199 (2011) (characterizing the history of state dignity).

109. *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020).

110. 140 S. Ct. 994, 1002 (2020) (quoting *Seminole Tribe*, 517 U.S. at 73).

111. *Id.* at 1003 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

112. *Bd. of Trs. of the Univ. Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

113. *Wis. Dept. of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) ("[T]he Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so Unless the State raises the matter, a court can ignore it.").

114. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) ("We have hitherto found a surrender of immunity against particular litigants in only two contexts: suits

sovereign immunity in a statute grounded in Section Five of the Fourteenth Amendment by using a “clear statement.”¹¹⁵ Notwithstanding these three specific scenarios, there are a few other narrowly defined exceptions to sovereign immunity’s bar, such as officer suits,¹¹⁶ or instances where sovereign immunity is simply inapplicable, as in suits against local or municipal officials.¹¹⁷

A brief review of these principal scenarios helps to elucidate sovereignty’s outer boundaries. First, states are not obligated to invoke sovereign immunity as a defense from suit, and unlike federal subject matter jurisdiction, may choose to waive the defense.¹¹⁸ Blanket waivers are frequent, and range from citizen suit provisions, allowing a certain class to bring a claim against the state for failure to enforce a certain law or for tort claims to recover damages, which provide a defined mechanism to recover liability from the sovereign. Citizen suits provisions against a state’s action are prime examples of blanket sovereign immunity waivers. Second, states cannot assert sovereign immunity in response to a suit by the United States or another state in a federal forum.¹¹⁹ These limits help define the relationships between co-equal sovereigns and the basic underpinnings of our federal-state government.¹²⁰ Finally, the Court has found that while Congress typically “lacks power . . . to abrogate the States’ sovereign

by sister States, and suits by the United States.”) (internal citations omitted).

115. *See, e.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (“the Eleventh Amendment is ‘necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment,’ that is, by Congress’ power ‘to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment.’ As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States’ consent.” (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976))).

116. *See, e.g.*, *Ex parte Young*, 209 U.S. 123 (1908). These may be appropriately described as fictions, rather than exceptions.

117. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (state sovereign immunity does not apply to municipalities).

118. FALLON ET AL., *supra* note 75, at 919-20 (describing the view that the Eleventh Amendment created a non-waivable subject matter immunity “in cases within the terms of its specific text”).

119. In an interesting originalist wrinkle, recently the Court allowed suit against one state in another state’s courts. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019). This was justified on the broad ground, according to the Court, that states had the option of granting sovereign immunity to other states as litigants in their own courts. This history has been challenged, *see* Brief of Professors William Baude and Stephen E. Sachs as Amici Curiae In Support of Neither Party, *Franchise Tax Board of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299), but the Court discussed the advantages of reciprocity of sovereign immunity, as it exists on the international stage, rather than a mandatory recognition of another sister state’s sovereignty.

120. *Cf.* *Alden v. Maine*, 527 U.S. 706, 733-34 (1999) (Congress’ limited ability to abrogate that immunity applies equally in state courts). *See also* FALLON ET AL., *supra* note 75, at 757 (“state sovereign immunity does not derive simply from the Eleventh Amendment . . . but rather is embedded in the Constitution and is generally co-extensive in state and federal courts.”); Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 *BRANDEIS L. J.* 319, 355 n.175 (1998) (noting that Congress only has power to authorize but cannot force jurisdiction in state courts).

immunity,”¹²¹ exercises of this power are valid under the enforcement clause of the Fourteenth Amendment.¹²² Yet, even where Congressional power to abrogate state sovereign immunity exists, this power is not without significant limits. For example, Congressional abrogation pursuant to Section 5 of the Fourteenth Amendment, still presumes that abrogation of state sovereign immunity operates as a concrete and proportional remedy to an identified pattern of constitutional violations.¹²³

While other, untested Constitutional provisions could serve as independent sources of Congressional authority to abrogate state sovereign immunity, the Commerce Clause is clearly not what the court requires as a “valid exercise of power.”¹²⁴ Justice Scalia noted in his *Pennsylvania v. Union Gas Co.* dissent that “[f]orty-nine Congresses since *Hans* have legislated under [the] assurance” that the Commerce Clause could not give rise to private damages actions against States.¹²⁵ Therefore, “[i]t is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred.”¹²⁶ After *Seminole Tribe* overruled *Union Gas*,¹²⁷ the Court made clear that Congress may not abrogate state sovereign immunity pursuant to its exercise of the commerce power.¹²⁸

121. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78 (2000).

122. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). *But see Reconciling State Sovereign Immunity with the Fourteenth Amendment*, Note, 129 HARV. L. REV. 1068, 1088-89 n.133 (2016) (suggesting that *Florida Prepaid* does not impose limits on Congress’ Fourteenth Amendment abrogation power).

123. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 636 (1999) (holding that Congressional abrogation of state sovereign immunity was not concrete and proportional to an alleged due process violation, as required by *City of Boerne v. Flores*, 521 U.S. 507 (1997)). The Court has yet to rule on what constitutional provisions may enable Congress to abrogate state sovereign immunity. For example, although the Court has previously understood the enforcement clause of the Fifteenth Amendment to operate in tandem to the enforcement clause of the Fourteenth Amendment, such that Congress could likely validly abrogate state sovereign immunity against racial vote denial cases, this theory has not been tested.

124. *Green v. Mansour*, 474 U.S. 64, 68 (1985).

125. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 35 (1989) (Scalia, J., dissenting), *overruled by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 45 (1996).

126. *Id.* Justice Scalia went further to speculate that the form of constitutional amendments would be different had the drafters and states known that state treasuries could be impacted by private damages suits.

127. 491 U.S. 1. For a short period after *Union Gas*, Congress mistakenly acted on the assumption it could abrogate state sovereign immunity based on the interstate commerce power. However, *Seminole Tribe* held *Union Gas* was wrongly decided and that Congress could not validly abrogate state sovereign immunity pursuant to the interstate or Indian commerce clauses. *Seminole Tribe*, 517 U.S. at 45.

128. While *Katz* reaffirmed *Seminole Tribe* in that Congress could not abrogate state sovereign immunity using the Indian or Interstate Commerce Clauses, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006), it found that the original understanding of the Bankruptcy Clause, although an Art. I power, was distinct such that Congress could validly abrogate state sovereign immunity, *id.* at 368-78 This indicates that other Article I powers may have

Crucially, in 2020 *Allen v. Cooper* rejected a “clause-by-clause” approach to determining whether a portion of Article I allows Congress to abrogate state sovereign immunity.¹²⁹ Instead, it held that the Bankruptcy Clause stands apart due to its unique history.¹³⁰ Thus, while the caselaw is relatively limited as to constitutionally permissible mechanisms for abrogating or avoiding sovereign immunity claims, the last century is fairly clear about their narrow contours.

b. The Clear Statement Canon of Federalism

In the limited circumstances where the Court finds that Congress may validly abrogate a state’s sovereign immunity, the question remains whether Congress has actually done so. As with many questions relating to federalism, it is generally accepted that the clear statement canon of federalism applies to determine whether an abrogation has occurred.¹³¹ Thus, when the federal government attempts to abrogate state sovereign immunity, courts will carefully consider whether abrogation is permissible, because it has a significant potential to upset the delicate balance of federalism.¹³²

The clear statement rules are canons of textual interpretation whereby, generally speaking, courts “insist that Congress speak with unusual clarity when it wishes to effect a result that, although constitutional, would disturb a constitutionally inspired value.”¹³³ The clear statement rules apply whenever Congress intends to alter the traditional balance between state and federal powers.¹³⁴ In *Atascadero State Hospital v. Scanlon*, the Court held that Congress must make its intention “unmistakably clear in the language of the statute” in order to abrogate the basic sovereign immunity that states retain against suits by private actors.¹³⁵ This test has come to be called the “unmistakably clear” or

sufficient original purposes such that Congress could validly abrogate state sovereign immunity using a clear statement. *But see Allen v. Cooper*, 140 S. Ct. 994, 1002-03 (2019) (rejecting other Article I abrogation power claims).

129. 140 S. Ct. at 1003-04 (2020).

130. *Id.*

131. *See, e.g., Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 547 (1985) (the clear statement rule exists because “[s]tates occupy a special and specific position in our constitutional system.”); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401 (2010) (“the Court gives effect to the value of dual sovereignty by enforcing federalism clear statement rules, to the value of nonretroactivity by presuming that new civil liabilities apply prospectively, and to rule-of-law values by adopting a strong presumption of reviewability of administrative action.” (internal footnotes omitted)).

132. *Allen*, 140 S. Ct. at 1001 (“Not even the most crystalline abrogation can take effect unless it is ‘a valid exercise of constitutional authority.’” (quoting *Kimel*, 528 U. S. 62, 78 (2000))).

133. *Id.* at 406; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2027 n.101 (2009).

134. *See, e.g., Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989).

135. 473 U.S. 234, 242 (1985) (concerning a private citizen attempting to sue the State of California in federal court under § 504 of the Rehabilitation Act.), *superseded by Congress*,

“clear statement” test.¹³⁶

Against this backdrop, the Supreme Court elaborated on this basic clear statement tenet in *Will v. Michigan Department of State Police*. There, the Court declared that, “Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States”¹³⁷ These historic powers included those affecting the “federal balance.” Applying this logic, the *Will* court held that Congress did not intend to abrogate state sovereign immunity with 42 U.S.C. § 1983 because it contained no clear statement explicitly evidencing that intent.¹³⁸ Thus, the Court read Section 1983 to apply only to the actions of state officers, not a state itself.¹³⁹ This basic logic applies both in and outside of the Eleventh Amendment context, to any Congressional act limiting a state from prospectively asserting its sovereign immunity.¹⁴⁰

Similarly, in *Dellmuth v. Muth*, the Court limited the permissible sources for discerning whether an abrogation of state sovereign immunity had actually occurred, stating that

[I]n legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress’ intention is ‘unmistakably clear in the language of the statute,’ recourse to legislative history will be unnecessary; if Congress’ intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.¹⁴¹

The clear statement canon generally requires courts to read narrowly statutes purporting to abrogate state sovereign immunity or alter the balance between federal and state powers, to ensure Congress has not overstepped its prescribed Article II constitutional role. For example, in *Pennhurst State School & Hospital v. Halderman*, the Court held that Congress needed to provide a clear statement that state acceptance of federal funds would necessarily waive state sovereign immunity.¹⁴² Deploying this canon often takes the form of a

42 U.S.C. § 2000d-7 (“A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973.”).

136. *Id.* at 242-43.

137. 491 U.S. 58, 65 (1989).

138. *Id.* at 64-65.

139. *Id.* at 66.

140. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (holding that states cannot constructively consent to waive sovereign immunity); *Sossamon v. Texas*, 563 U.S. 277, 290 (2011) (holding that when using its spending power, Congress must provide a clear statement to indicate acceptance of funds requires waiver of sovereign immunity). *But see* *Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) (holding that state waived sovereign immunity by voluntarily availing itself of federal forum).

141. 491 U.S. 223, 230 (1989). *Cf.* *Hoffman v. Conn. Dep’t of Income Maintenance*, 492 U.S. 96, 100 (1989) (rejecting any use of legislative history to provide congressional intent to abrogate sovereign immunity in the bankruptcy context).

142. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

presumption against waiver.¹⁴³

Of course, some legal fictions exist to allow a private party to bring suit against the state, even where state sovereign immunity has not been waived or abrogated using a clear statement. Traditionally, private parties may only sue the government for non-monetary purposes, such as injunctive relief, using the legal fiction of officer suits for official action, where the suit seeks prospective relief against state officials acting in violation of federal law.¹⁴⁴ While sovereign immunity bars suit directly against the state, officer suits allow injunctive relief against a state where no monetary relief is sought.¹⁴⁵ However, suits which are truly against the government may not simply be reformulated to be against an appropriate officer. For example, in *Larson v. Domestic & Foreign Commerce Corporation*, the Court upheld a sovereign immunity defense by a federal official after the plaintiff sought to enforce a contract for sale of coal against the government.¹⁴⁶ There, it was immaterial that the plaintiff sought injunctive relief rather than monetary relief, so that the government would abide by the contract. The Court understood the suit to be against the government itself because the contract was binding on the government rather than the officer in his individual capacity. Regardless, the nature of the suit required the consent of the sovereign for a private plaintiff to bring the action in court. In short, it is clear that any infringement on state sovereign immunity is invalid unless it falls within one of the predicate scenarios and is accompanied by a clear and unequivocal statement. In the case of abrogation by the federal government or blanket consent to suit by a state, it must be shown textually, without reference to legislative history. The U.S. territories' ability to avail themselves of sovereign immunity has not reached the Supreme Court.¹⁴⁷

143. *College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (“[c]ourts indulge every reasonable presumption against waiver” of sovereign immunity) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). The Court recently expanded this presumption in *Sossamon v. Texas*, in which a prison inmate brought suit against Texas, using the clear statement standard to analyze state waiver of sovereign immunity, holding that it is a “longstanding rule that a waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute.” *Sossamon v. Texas*, 563 U.S. 277, 285, 290 (2011) (finding that the phrase “appropriate relief” in 42 U.S.C. § 2000cc-2(a) was not so free from ambiguity that the Court could conclude that the States, by receiving federal funds, had unequivocally expressed intent to waive their sovereign immunity). Several circuit courts have taken this theory further than the Supreme Court. *See, e.g.*, *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl. Prot.*, 833 F.3d 360, 376 (3d Cir. 2016) (“mere acquiescence is insufficient to abrogate sovereign immunity. A state’s gratuity waiver must be knowing and voluntary.”).

144. *Ex parte Young*, 209 U.S. 123, 155-56 (1908); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

145. *See, e.g.*, JOHN ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 7 (1987) (noting that it is consistent with the Eleventh Amendment to allow suits against state officers for constitutional violations).

146. 337 U.S. 682, 703 (1949).

147. The First Circuit held that Puerto Rico may assert sovereign immunity, and that American Samoa, Guam, the Northern Mariana Islands and the U.S. Virgin Islands cannot.

II. COURTS GRAPPLE WITH THE COLLISION

Few courts have had cause to address the collision of eminent domain power and state sovereign immunity.¹⁴⁸ Eminent domain has been exercised largely by the sovereign itself, much more rarely by a private party via delegated power, and far more scarcely by a private party seeking to take land from a state.¹⁴⁹ This Part will analyze how state sovereign immunity collides with eminent domain power in the context of two statutes where Congress has delegated federal takings power to private parties, discussing how courts have attempted to resolve those collisions.

The foregoing Subparts of this Article beg a few questions. State sovereign immunity existed prior to the Constitution and was reaffirmed by the Eleventh Amendment. Eminent domain, similarly, was prevalent before the founding and the Fifth Amendment's Takings Clause limited the federal government's exercise of eminent domain to predetermined limits of public use and just compensation. How is it possible, then, that these provisions have not collided until now? Why haven't questions about which sovereign power reigns supreme arisen in the past?

As many property scholars have noted, the American history of takings can be divided into a few periods: (1) ratification to reconstruction; (2) the railroad acts to 1922; and (3) 1922 to present. And a potential answer to the questions raised above begins with the fact that the states were not subject to the Fifth Amendment's limitations on eminent domain until well after the Fourteenth Amendment's ratification. Thus, as some have proposed, it is quite likely that the federal government did not frequently attempt to condemn lands itself, and instead had states do so on its behalf, so it could avoid paying just compensation or following the requirement that the takings be for public use. Thus, assuming the foregoing to be true, property would not have been taken in an unconsenting state, or from an unconsenting state, because the state would have been the entity effectuating the takings.

The following Subpart traces collisions between state sovereign immunity and eminent domain, addressing the few cases that have grappled with the intersection of private party delegation of federal eminent domain with state

Ramirez v. P.R. Fire Service and Office of Personnel, 715 F.2d 694, 697 (1st Cir. 1983); Guam Soc. of Obstetricians and Gynecologists v. Ada, 776 F.Supp. 1422, 1430 (D. Guam 1990); Norita v. Northern Mariana Islands, 331 F.3d 690, 696 (9th Cir. 2003); Tonder v. M/V The Burkholder, 630 F. Supp. 691, 693-94 (D.V.I. 1986).

148. Where federal law provided for takings to be exercised by private actors, these eminent domain proceedings were largely conducted in state court proceedings. This can be in large part explained by the fact that federal general question jurisdiction did not exist in federal courts until 1875, so any prior federal caselaw existed in diversity or admiralty.

149. There have been instances where the federal government condemned state land directly. *See, e.g.,* Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); North Dakota v. United States, 460 U.S. 300 (1983). However, for reasons discussed below, there is reason to think these cases are no longer good law.

sovereign immunity. This intersection arises with respect to the Natural Gas Act, the Federal Power Act, and inverse condemnation suits against states. There are a few other statutes which delegate federal eminent domain power to private actors, but the dearth of caselaw has made them unremarkable.¹⁵⁰ Here, we examine federal statutory provisions and implied causes of action arising out of eminent domain, which purport to allow private parties to sue unconsenting states.

A. Natural Gas Act

Gas production in the United States did not begin in earnest until the mid-1800s, and gas was not transported until the 1870s.¹⁵¹ The Natural Gas Act, enacted in 1938, created a regulatory framework around the interstate transportation and sale of natural gas in the United States.¹⁵² Congress passed the Natural Gas Act pursuant to Interstate Commerce Clause authority¹⁵³ and, for the first time, took federal control of interstate gas transmission. The Act originally delegated associated regulatory powers to the Federal Power Commission, which was created to regulate hydropower projects under federal control in 1920 and was reorganized as a five-member independent regulatory commission in 1930.¹⁵⁴ The Federal Power Commission was later replaced by FERC in 1977.

The 1938 Natural Gas Act had no eminent domain provision, but Congress amended it in 1947 to enable certain gas pipeline developers to take land upon satisfying enumerated conditions.¹⁵⁵ Congressional testimony on the 1947 Amendments reflects the difficulty that gas producers faced in acquiring land using state eminent domain laws, and the Amendment that later became Section 717f(h) provided a mechanism to take private land for interstate pipelines when state eminent domain laws were unable or insufficient to be utilized. In some instances, state eminent domain power was circumscribed by

150. See, e.g., General Bridge Act, 33 U.S.C. § 532. There are several procedural statutes which govern jurisdiction or how federal takings must be effectuated, but do not affirmatively grant takings powers. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Act), 42 U.S.C. § 4601 *et seq.*; 40 U.S.C. § 3113 (“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. The Attorney General, on application of the officer, shall have condemnation proceedings begun within 30 days from receipt of the application at the Department of Justice.”); 28 U.S.C. § 1358 (federal jurisdiction).

151. See Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 990-91 (2015).

152. 15 U.S.C. §§ 717-717z.

153. *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm’n*, 341 U.S. 329, 334 (1951).

154. *Hydropower and FERC*, FED. ENERGY REGUL. COMM’N, <https://perma.cc/VL5P-UDGF>.

155. 15 U.S.C. § 717f(h); Natural Gas Act, Pub. L. No. 80-245, ch. 333, § 717f(h), 61 Stat. 459 (1947).

requirements that the public use was limited to use by the citizens of the state exercising eminent domain. The report mentions Arkansas, where out of state corporations lacked the power to condemn private property, and Wisconsin, where only Wisconsin corporations were expressly permitted to take property.¹⁵⁶ The House hearings do not indicate there was a traditional holdout problem, where a state refused to consent to pipeline construction in the state. Thus, Congress did not attempt to solve for state holdouts or displace traditional state roles. Rather, the problem only occurred where a state served as a “bridge” between a source and the pipeline’s ultimate destination, without benefitting from pipeline service. Because some state eminent domain authority was insufficient for interstate transportation, such as Nebraska, where corporations only had eminent domain power if they distributed gas in the state, trouble arose.¹⁵⁷

The resulting Section 717f(h) delegated federal eminent domain authority to qualified private certificate holders to take lands necessary for pipeline construction, and made FERC responsible for determining if a given applicant qualified for a certificate.¹⁵⁸ The statute provides:

When any holder of a certificate of public convenience and necessity cannot acquire by contract . . . the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of . . . stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.¹⁵⁹

Section 717f(h) gives flexibility for condemnations to be effectuated by state or federal courts where the property is located. This provision is solely jurisdictional, and contains no language speaking to abrogation or otherwise altering a state’s sovereign immunity. In this way, the Natural Gas Act provides no more textual basis for an abrogation of state sovereign immunity than the general jurisdictional statute for eminent domain proceedings.¹⁶⁰ Further, it

156. *Amendments to the Natural Gas Act: Hearing on H.R. 2956 Before the H. Comm. on Interstate and Foreign Commerce*, 80th Cong. 380, 423 (1947) (memorandum of Rep. Schwabe, Member, H. Comm. on Interstate and Foreign Commerce).

157. *Id.*

158. 15 U.S.C. § 717f(h). Although beyond the scope of this Article, the authorizations that parties require to demonstrate public interest often lie beyond FERC’s sole jurisdiction. For example, environmental authorizations for the project are integral to determining whether a certificate applicant is “qualified” within the meaning of the statute, including Clean Air Act substantive obligations, and permits under the Clean Water Act sections 401 and 404, which may be exercised under authority delegated by the EPA to a state environmental agency. *Del. Riverkeeper Network v. FERC*, 857 F.3d 388 (D.C. Cir. 2017) (Natural Gas Act certificates are subject to the Clean Water Act); 15 U.S.C. § 717b(d); 42 U.S.C. § 7401 et seq. (Clean Air Act).

159. 15 U.S.C. § 717f(h).

160. 28 U.S.C. § 1358 (“The district courts shall have original jurisdiction of all

appears to be extremely rare that pipeline companies bring Natural Gas Act condemnation cases in state courts.¹⁶¹

The Natural Gas Act's eminent domain provision does not contain any explicit limitation on the lands that may be taken using a valid certificate. Some have argued for an understanding of the Act to apply to both public and private lands. This argument is tenuously predicated in large part on the Natural Gas Act's eminent domain provision being unlike a similar statutory provision in the Federal Power Act, which explicitly precludes federally authorized takings of state property already dedicated to public recreational use.¹⁶² Notably, the Natural Gas Act does not delegate the federal government's takings power to FERC directly, and thus the agency itself is not empowered to condemn land; it may only determine whether an applicant meets the certificate of public convenience and necessity standard. There remains some debate about whether the Commission has the power to curtail eminent domain rights by attaching conditions when issuing certificates, or whether, as the Commission maintains, it has no such authority to address the applicants' exercise of eminent domain authority.¹⁶³

To comply with the Fifth Amendment's Takings Clause public use limitation, the Natural Gas Act's statutory text requires that the Commission assess the public convenience and necessity—a public use determination—of each proposed project.¹⁶⁴ The 1947 Natural Gas Act amendment, which later

proceedings to condemn real estate for the use of the United States or its departments or agencies.”).

161. Jim Behnke & Harold Dondis, *The Sage Approach to Immediate Entry by Private Entities Exercising Federal Eminent Domain Authority Under the Natural Gas Act and the Federal Power Act*, 27 ENERGY L.J. 499, 504 (2006).

162. See *infra* Part III.B. See also Order on Petition for Declaratory Order, *PennEast Pipeline Co.*, 170 FERC ¶ 61,064 (Jan. 30, 2020). Although the Federal Power Act was amended in 1992 to clarify that eminent domain power delegated to qualified hydropower providers could not be used to condemn certain state land, no such parallel amendment was proposed for the Natural Gas Act.

163. *PennEast Pipeline Co.*, 170 FERC ¶ 61,064 at P 50 (Jan. 30, 2020) (“[T]he Commission has previously found that it has no role in eminent domain proceedings that result from the issuance of a certificate and that it is not involved in the acquisition of property rights through those proceedings.”); see also Certificate Rehearing Order, *PennEast Pipeline Co.*, 164 FERC ¶ 61,098 at P 33 (Aug. 10, 2018) (“The Commission does not have the authority to limit a pipeline company’s use of eminent domain once the company has received its certificate of public convenience and necessity.”).

164. The statute also contains language grounding it within the Commerce Clause, noting that “it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.” 15 U.S.C. § 717(a). This language justified taking federal control over an area of commerce that had long been within the state purview. While some argue that this language demonstrates public use for all pipelines, that proposition is at odds with the individual certification test, and Section 717f(h)’s express reliance on that test. Moreover, it preceded the 1947 amendments delegating eminent domain authority, and are not referenced therein.

became 15 U.S.C. § 717f(h), reflects a recognition that the previous system, which relied on state eminent domain laws, was insufficient to meet the nation's need for natural gas development.¹⁶⁵ Thus, federal eminent domain for national pipelines was in at least some cases in the public interest. This is the basis for the statute's eminent domain delegation to qualified private parties.¹⁶⁶

The Natural Gas Act contains no clear statement explicitly abrogating state sovereign immunity. In order for any court to find jurisdiction for a private party's claim against a state without a waiver of the state's sovereign immunity, the statute must make an unmistakably clear statement that Congress has delegated its authority to a private actor. Applying the clear statement rule, a narrow reading of the statute must still evince an intention to unequivocally abrogate, delegate or waive a state's sovereign immunity. Further, even taking a broader tact, the Natural Gas Act has no other reference to states, immunity, eminent domain or altering the traditional balance between state and federal powers. The Natural Gas Act condemnation provision does not contain *any* language that anticipates that private actors will be able to bring such suits against *states* in federal court, much less an unmistakably clear statement that evidences Congressional intent that the provision should serve to effectively abrogate state sovereign immunity to such suits in federal court.¹⁶⁷ Nor does the statute address any delegation of the federal government's exception to Eleventh Amendment state sovereign immunity.

Even setting aside the clear statement rule requirements, and instead taking a purposivist interpretation of congressional intent, Congress would not have understood the Natural Gas Act to have abrogated state sovereign immunity. Because the Natural Gas Act was passed prior to the brief period following *Union Gas*, where the Court changed course and made clear that sovereign immunity could be abrogated using the Commerce Clause, it would have been beyond what Congress understood the outer limits of its power to be in 1947 to abrogate state sovereign immunity using the Commerce Clause. The Natural Gas Act would not have needed language specifically precluding condemnation actions against a state or state real property interest, consistent with congressional understanding of the limits of the Commerce Clause power in 1947, when the Natural Gas Act's eminent domain provision was passed. Thus, employing present doctrine, whether or not Congress *can* delegate its exception to state sovereign immunity, Congress did not explicitly delegate its exception to sovereign immunity in the

165. See *Amendments to the Natural Gas Act: Hearing on H.R. 2956 Before the H. Comm. on Interstate and Foreign Com.*, 80th Cong. 608-15 (1947) (Statement of John M. Crimmins, Member, Law Department of Koppers Co.).

166. See 15 U.S.C. §§ 717f(e), (h).

167. However, on a 2-1 vote, the Federal Energy Regulatory Commission recently issued a declaratory order characterizing the lack of reference to states in the Natural Gas Act as ambiguous with regard to how the Natural Gas Act applies to state-owned property, allowing the Commission to determine the Natural Gas Act did apply. *PennEast Pipeline Co.*, 170 FERC ¶ 61,064. The Commission declined to opine on whether the Gas Act abrogated state sovereign immunity. *Id.*

Natural Gas Act, and Congress could not have abrogated state sovereign immunity through the Natural Gas Act.

Finding that the Natural Gas Act precludes private parties from effectuating takings of state land in federal courts will not yield catastrophic results. Although the United States already has extensive infrastructure to frack and transport natural gas, some analyses “urge that future infrastructure expansion is necessary,”¹⁶⁸ if only because new corporate affiliate structured transactions allow significant profits from building infrastructure unrelated to unmet capacity demands.¹⁶⁹ In 1938, when Congress passed the Natural Gas Act, people could not get gas to heat their homes in the winter, because of limited gas supply and wartime steel shortages. Now, the industry itself acknowledges a glut of gas supply without corresponding demand.¹⁷⁰ If the natural gas industry grows, and if FERC fails to correct its practice of accepting affiliate’s private contracts to exclusively establish public need, more private pipeline companies holding valid FERC certificates of public necessity and convenience could attempt to condemn lands owned by sovereign states. Yet, few courts have confronted the collision of this eminent domain provision and state sovereign immunity. The Third Circuit’s opinion in *In re PennEast Pipeline Co., LLC.*, in which the court found that Section 717f(h) contained no clear statement of Congressional intent to abrogate state sovereign immunity, is the most prominent, because a state took the unusual step of exercising its sovereign immunity to defend its lands from private condemnation.¹⁷¹

1. *In re PennEast Pipeline Company*

On January 19, 2018, FERC issued an order granting a certificate of public convenience and necessity to PennEast Pipeline Company, LLC, finding it met the Natural Gas Act’s Section 717f(e) standard for certification of a proposed 120-mile pipeline.¹⁷² In February 2018, as certificate holder, PennEast initiated more than 180 federal condemnation proceedings in federal courts in New Jersey and Pennsylvania.¹⁷³ The State of New Jersey owns or has ownership interests in

168. See Klass & Meinhardt, *supra* note 151, at 1004.

169. See, e.g., Spire STL Pipeline LLC, 169 FERC ¶ 61,134 (Nov. 21, 2019) (Glick, Comm’r, dissenting at ¶ 2); Steve Isser, *Natural Gas Pipeline Certification and Ratemaking* (Oct 19, 2016), <https://perma.cc/7BZF-WCRZ>.

170. Clifford Krauss, *Natural Gas Boom Fizzles as a U.S. Glut Sinks Profits*, N.Y. TIMES (Dec 11, 2019), <https://perma.cc/9E79-BLB7>.

171. 938 F.3d 96, 108 (3d Cir. 2019), *cert. granted*, No. 19-1039, 2021 WL 357257 (U.S. Feb. 3, 2021). The Supreme Court will hear an appeal in spring 2021.

172. PennEast Pipeline Co., 162 FERC ¶ 61,053 (Jan. 19, 2018) (Certificate Rehearing Order).

173. See *In re Penneast Pipeline Co., LLC*, No. CV 18-1585, 2018 WL 6584893 (D.N.J. Dec. 14, 2018), at *6, *26, *vacated and remanded sub nom. In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019), *as amended* (Sept. 11, 2019), *as amended* (Sept. 19, 2019); *PennEast Pipeline Co. v. A Permanent Easement of 0.06 Acres + in Moore Township*,

a significant number of properties that PennEast attempted to condemn, and over which the district court asserted jurisdiction. New Jersey raised sovereign immunity as a defense to the court's exercise of jurisdiction.¹⁷⁴

The New Jersey district court ruled that the certificate conferred on PennEast the right to condemn properties along the approved pipeline route, and that it could exercise this power via preliminary injunction to immediately enter and survey the properties.¹⁷⁵ The New Jersey district court would proceed to the valuation stage to determine just compensation.¹⁷⁶ It largely failed to engage with any discussion of state sovereign immunity, finding instead that PennEast stood in the shoes of the federal government by virtue of the delegated federal eminent domain authority contained within NGA Section 717f(h), and therefore that state sovereign immunity did not apply to the case at hand.¹⁷⁷ It stated:

PennEast has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign. The Court is not persuaded by the State Defendants' argument that the NGA is silent as to the rights of a private gas company; the NGA expressly allows "any holder of a certificate of public convenience and necessity" to acquire rights of way "by the exercise of the right of eminent domain" in this District Court. 15 U.S.C. § 717f(h). As more thoroughly discussed below, PennEast holds a valid certificate as issued by the FERC Order. Therefore, the Eleventh Amendment is inapplicable, and the State Defendants are not entitled to immunity.¹⁷⁸

Thus, according to the court, because PennEast held a valid certificate, it also held the same sovereign rights as the federal government over the state when exercising delegated eminent domain powers.

On appeal, the Court of Appeals for the Third Circuit disagreed with this theory. The Third Circuit agreed that Congress had delegated federal eminent domain authority to qualified private parties, with FERC determining whether the parties satisfied the requisite legal standard to obtain that power.¹⁷⁹ However, the appellate court analyzed delegation of eminent domain independently from

Northampton County, Pennsylvania, Tax Parcel NO. J5-3-3 et al, No. 18-cv-00505 (E.D. Pa Feb. 6, 2018) (WL).

174. State Opp'n To Order to Show Cause at 24, In re PennEast Pipeline Co., 2018 WL 6584893 (D.N.J. Dec. 14, 2018) (No. 18-01684).

175. PennEast Pipeline Co., Tax Parcel No. 1007-32-33, No. 18-cv-01699 (D.N.J. Feb. 7, 2018) (WL).

176. Order of Condemnation at 3, In re PennEast Pipeline Co., No. 18-01684, 2018 WL 6584893 (D.N.J. Dec. 14, 2018) (according PennEast the right to condemn a permanent Right of Way and temporary easement). As of this writing, because of the Third Circuit opinion, the District Court has not acted with respect to the private parties.

177. See State Defendants Brief in Support of Motion for Reconsideration at 8, In re PennEast Pipeline Co., No. 18-01684, 2018 WL 6584893.

178. In re PennEast Pipeline Co., No. 18-01684, 2018 WL 6584893, at *12 (internal footnote omitted) (citing *City of Newark v. Cent. R.R. of N.J.*, 297 F. 77, 82 (3d Cir. 1924); *Georgia Power Co. v. 54.20 Acres of Land*, 563 F.2d 1178, 1181 (5th Cir. 1977); *City of Davenport v. Three Fifths of an Acre of Land*, 252 F.2d 354, 356 (7th Cir. 1958)), *vacated and remanded*, 938 F.3d 96 (3d Cir. 2019).

179. In re PennEast Pipeline Co., 938 F.3d at 99-100.

sovereign immunity, rejecting the notion that Congressional delegation of eminent domain power automatically carried with it a delegation of the federal government's exception to state sovereign immunity protections. Thus, the Third Circuit held sovereign immunity precluded a private party from suing the state of New Jersey to condemn state lands in federal court because the Natural Gas Act "does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity."¹⁸⁰ The Third Circuit further noted that the Gas Act "does not refer to the States at all."¹⁸¹ The Third Circuit then directed the district court to dismiss claims against New Jersey.¹⁸²

The Third Circuit only went so far as determining that Congress has not delegated that authority through the Natural Gas Act. However, it discussed the pipeline company's theory that it had received delegation of the federal government's exception to state sovereign immunity. First, the *PennEast* court analyzed *Blatchford*'s caution that exceptions to sovereign immunity likely could not be delegated.¹⁸³ It concluded that even had there been a clear statement of delegation, there was a significant constitutional question of "whether the federal government can delegate its ability to hale fellow sovereigns into federal court and force the States to respond."¹⁸⁴ Next, the court dismissed any analogy to *qui tam* actions against a state, where a private relator sues in the federal government's name, as imprecise and inapplicable. Finally, the Third Circuit concluded with a realistic acknowledgement that the sovereign immunity decisions could cause precisely the problems that eminent domain is meant to fix: a state's power to assert sovereign immunity may frustrate some projects. Yet, the Court's proposed solution suggested a politically accountable federal official could effectuate a condemnation of state land rather than the delegated private entity.¹⁸⁵

Critiquing the Third Circuit's opinion in *In re PennEast*, Bernard Bell concludes that separately analyzing sovereign immunity and eminent domain are "two aspects of the exercise . . . that are not, as a practical matter, divisible."¹⁸⁶ Bell wonders why Congress would empower a private actor with federal powers, theoretically enforceable in federal courts, but fail to grant that private party power to effectuate such a power.¹⁸⁷ The answer, he concludes, is that Congress

180. *Id.* at 112-113.

181. *Id.* at 111.

182. *Id.* at 113.

183. *Id.* at 105 (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786-86 (1991)).

184. *Id.* at 109.

185. *Id.* at 113. The court's proposed solution, as suggested by New Jersey, indicates the state's likely consent to a federal taking in this instance.

186. Bernard Bell, *Delegation of Eminent Domain Powers to Private Entities: In Re PennEast Pipeline Co.*, NOTICE & COMMENT: YALE J. ON REG. (Sept. 16, 2019), <https://perma.cc/B24Y-4WR8>.

187. *Id.*

did not intend to limit the party's ability to effectuate a taking, so abrogation of state sovereign immunity must be embedded in the delegation of eminent domain. Yet, this critique ignores the independent force and history of sovereign immunity. Further, it fails to engage with the central tenets of sovereign immunity canons: Congress' eminent domain delegation is not a self-executing abrogation of state sovereign immunity because it *did not* contain a clear statement, and Congress *cannot* abrogate sovereign immunity using the commerce power.

For Bell, the result of the Third Circuit's decision is that it would "authorize private entities to proceed by simply taking property and imposing upon states the obligation to bring inverse condemnation suits."¹⁸⁸ However, it seems highly unlikely that private pipeline companies would invade and claim ownership of government property without state consent or judicial permission. Invading state property would attack the heart of what it means to be a sovereign, and states are imbued with police power in substantial part. Further, while some courts have allowed qualified certificate holders immediate entry,¹⁸⁹ the statutory mandate of Section 717f(h) clearly states that eminent domain may only be exercised in courts. Therefore, the invasion scenario imagined would be outside of the delegated authority granted by Congress. As described below, the two other courts confronting whether a private party may initiate suit against a state entity to effectuate Natural Gas Act takings have analyzed the issue similarly to *In re PennEast*.

2. *Sabine Line v. A Permanent Easement of 4.25 +/- Acres of Land in Orange County, Tex.*

In *Sabine Line v. A Permanent Easement of 4.25 +/- Acres of Land in Orange County, Tex.*, a pipeline company attempted to assert eminent domain power over land owned by an arm of the state of Texas. The pipeline company, Sabine, argued that Texas was not entitled to sovereign immunity from condemnation proceedings for its property because: (1) the practical effect of the Natural Gas Act was to treat those holders of FERC-issued certificates of public convenience and necessity as delegees of the federal government's eminent domain power; and (2) that allowed the pipeline company to condemn Texas lands in federal court without the state's consent because Congress abrogated the states' sovereign immunity through enactment of the Natural Gas Act.¹⁹⁰

The District Court for the Eastern District of Texas held that the pipeline company was not the federal government, and, although it had been delegated federal eminent domain power, Sabine nonetheless was still a private party for

188. *Id.*

189. *East Tenn. Gas Pipeline Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004) (allowing quick take under Section 717f(h)), *reh'g denied*, 369 F.2d 357 (2004), *cert. denied*, 543 U.S. 978 (2004).

190. *Sabine Pipe Line*, 327 F.R.D. 131, 139 (E.D. Tex. 2017).

the jurisdictional purposes of sovereign immunity.¹⁹¹ The district court, similar to the Third Circuit in *In re PennEast*, bifurcated its analysis of eminent domain and sovereign immunity powers, examining the intersection of the two. In doing so, it found that Sabine could not hale Texas, or an arm of the state, into federal court without the state's consent even though Sabine may have had a substantive right had the state consented to jurisdiction.¹⁹² In other words, it is not an inherent attribute of delegated eminent domain powers to effectuate that right against a state in federal court without the consent of a state. The court then found that the Natural Gas Act's Section 717f(h) did not delegate the federal government's exception to state sovereign immunity.

However, the *Sabine* court went further, and discussed whether Congress even had the power to delegate the federal exception to state sovereign immunity. There, the court said:

The Supreme Court, however, has doubted that the federal government's exemption to the Eleventh Amendment can be delegated. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991). In considering the proposition, the Supreme Court stated: 'The consent, 'inherent in the convention,' to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select.'¹⁹³

Although the pipeline company in *Sabine* attempted to argue that the issue was one of federal supremacy, the *Sabine* court rejected that argument.¹⁹⁴

3. *Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less, in Washington County, Maryland*

In 2019, the District Court for the District of Maryland confronted the same issue in *Columbia Gas Transmission, LLC v. .12 Acres of Land*.¹⁹⁵ In *Columbia Gas*, a pipeline company received a FERC certificate on July 19, 2018 to build a proposed 3.38-mile natural gas pipeline from Pennsylvania to West Virginia, which crossed through western Maryland and under the Potomac River. Although the pipeline company agreed with the Maryland Department of Natural Resources on an easement price that was above appraised value, the State Board of Public Works rejected this agreement.¹⁹⁶ The pipeline company initiated a condemnation action after further negotiations with the Maryland Department of

191. *Id.* at 140 ("Sabine's theory, thus, conflates two separate rights held by the federal government: the right to exercise eminent domain and the right to sue states in federal court.").

192. *See id.* at 140 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *see also* *Alden v. Maine*, 527 U.S. 706, 755 (1999).

193. *Sabine Line*, 327 F.R.D. at 140.

194. *Id.* at 139-40.

195. *Columbia Gas Transmission, LLC v. .12 Acres of Land*, GLR-19-1444, 2019 U.S. Dist. LEXIS 116524, at *2-3 (D. Md. July 12, 2019).

196. *Id.* at 3-4.

Natural Resources stalled.¹⁹⁷ Columbia Gas filed suit against the state on May 16, 2019.¹⁹⁸

In ruling on a preliminary injunction, which would have allowed the pipeline company to immediately enter the state lands at issue, the district court found that it lacked jurisdiction over the matter because although the Natural Gas Act granted Columbia Gas the “power of eminent domain to condemn land, the Court . . . [found] that the Natural Gas Act does not abrogate state sovereign immunity or delegate the United States’ state sovereign exception to permit Columbia to sue the State of Maryland for an order of condemnation without Maryland’s consent.”¹⁹⁹ The court characterized the state’s argument as jurisdictional, such that “sovereign immunity bars Columbia’s suit notwithstanding Columbia’s alleged substantive right.”²⁰⁰ Here too, the district court determined that Congress had not abrogated state sovereign immunity through the Natural Gas Act because the statute was not passed pursuant to a valid exercise of congressional power to abrogate, which is limited primarily to Section 5 of the Fourteenth Amendment.²⁰¹ The district court rejected any suggestion that the Supremacy Clause or “other enumerated powers” allowed Congress to abrogate state sovereign immunity in federal courts under Commerce Clause powers.²⁰² As of July 2020, the parties are mediating in advance of a potential appeal to the Fourth Circuit.

In sum, these three examples—the only cases that have considered the question—have held that the Natural Gas Act does not abrogate state sovereign immunity using a clear statement. These cases did not reach the constitutional question of whether the Natural Gas Act *could* abrogate state sovereign immunity. Rather they illustrate the doctrinal difficulty with interpreting a statute passed pursuant to Article I powers as allowing private parties to exercise eminent domain against an unconsenting state.

B. Federal Power Act

The Federal Power Act (“FPA”) is a second statutory provision where state sovereign immunity may clash with a private party’s use of federal eminent domain power. The FPA regulates the transmission of electricity in interstate commerce and wholesale sales of electricity in interstate commerce. Originally passed in 1920 as the Federal Water Power Act, and amended several times since, courts have generally understood the FPA and Natural Gas Act to mirror each

197. *Id.* at 2.

198. *Id.*

199. *Id.* at 4-5.

200. *Id.* at 7.

201. *Id.* at 10.

202. *Id.* at 16 (“If the federal government deems it important to condemn the [State’s] land, it is within the federal government’s right to bring such an action.”).

other and have frequently applied the interpretations of one statute to the other.²⁰³ The FPA first created federal authority over hydroelectric power regulation in the United States before adding the provisions relating to interstate sales and transmission of electricity in 1935.²⁰⁴ Although the federal government controlled navigable waters prior to the passage of the FPA, hydroelectric power had previously been a duty relegated to individual states, and the Act tasked the Federal Power Commission, later FERC, with federal control over the industry. This created a patchwork of state and local regulations, inhibiting regional energy infrastructure.²⁰⁵ The FPA helped to clarify the state and federal roles in the electricity sector.

First, private parties may exercise eminent domain against private lands for hydropower projects licensed by FERC:

When any licensee can not acquire by contract, . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. . . . That no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992 [enacted Oct. 24, 1992], were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case of lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge established under State or local law on or after the date of enactment of such Act [enacted Oct. 24, 1992], no licensee may use the right of eminent domain under this section to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.²⁰⁶

A second provision enables takings for electric transmission facilities regulated by FERC.²⁰⁷ Each explicitly carves out or places limits on using eminent domain

203. Prior to the 1992 Federal Power Act amendments, the Federal Power Act and Natural Gas Act were interpreted in tandem. *See, e.g.,* KY. W. Va. Gas Co. v. Penn. Public Utilities Comm'n, 862 F.2d 69, 74 n.8 (3d Cir. 1988) ("the two statutes 'are in all material respects substantially identical,'" and decisions interpreting them may be cited interchangeably.").

204. Fed. Water Power Act of 1920, ch. 285, 41 Stat. 1063 (1920) (codified as 16 U.S.C. § 791) (repealed 1935).

205. Giovanni S. Saarman González, Note, *Evolving Jurisdiction Under the Federal Power Act: Promoting Clean Energy Policy*, 63 UCLA L. REV. 1422, 1430-31 (2016) ("Responding to the uncertain and varying demands of municipalities as well as local political corruption, private utilities sought greater uniformity in state law.") (citing William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1660 (2014)).

206. 16 U.S.C. § 814.

207. In the case of a permit under subsection (b) for electric transmission facilities to be located on property other than property owned by the United States or a State, if the permit holder cannot acquire by contract, or is unable to agree with the owner

for certain state-owned lands.

Discussion of a key distinction in the FPA's two takings provisions, which delegate the federal government's eminent domain power to private actors, has been largely absent from academic literature. In 1992, a major amendment included language explicitly prohibiting certain state lands from being taken using the eminent domain authority conferred by the Act.²⁰⁸ The inclusion of this language may also account for why the issue has not come up frequently in recent years, especially during the proliferation of the Supreme Court's sovereign immunity cases.

There are three other notable differences between hydropower projects and linear gas pipelines that may explain why the conflict between eminent domain and sovereign immunity has not arisen: (1) for hydropower projects, the statute provides states where the project is constructed will receive a set financial benefit from the build; (2) the land taken is confined to one parcel rather than an extensive corridor; and (3) the FPA is limited to waterways which may be dammed for hydropower, whereas the Natural Gas Act allows condemnation of any conceivable land nationwide which could be used in connection with gas transmission. These distinctions may favor states' willingness to consent to such condemnations.

Further inquiry into legislative history also casts doubt on the intended function of this FPA provision. It is possible to understand Congress as intending to be explicitly clear about the reach of these powers, and would allow for other state or municipal lands to be taken if they were not parks, recreational areas, or wildlife areas, so long as the state consented. However, the alteration of the original takings provision in 1992 was passed during the brief interstitial period between *Union Gas* and *Seminole Tribe*, where Congress was under the mistaken impression that it could abrogate state sovereign immunity using the Commerce Clause.²⁰⁹ Thus, while the legislative history does not provide a definitive indication of why Congress decided to explicitly include the prohibition on state takings, it is likely because it sought to clarify the outer limits of the power it wished to delegate when it believed it had greater power to employ. Additionally,

of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located.

16 USC § 824p(e)(1).

208. [T]he right of eminent domain under this section to acquire any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law.

Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, 3009 (1992). Interestingly, this alteration of the FPA's eminent domain provisions was not made to the Natural Gas Act's provision, 15 U.S.C. § 717f(h).

209. *Cf. In re PennEast*, 938 F.3d at 108.

it may have reflected the Congressional determination that such lands were already in public use, and thus the recognition that allowing a private party to condemn them would be pushing the constitutional envelope on public use too far. Finally, the statute's use of this language may describe a limit on the character of the lands that a private applicant may seek to condemn as a siting directive, rather than revealing any Congressional intent that the State must consent to such suits.

Although the Supreme Court has not dealt with the issue directly, in *City of Tacoma v. Taxpayers of Tacoma*, the Court was faced with the situation where a municipal utility was empowered by the FPA to condemn state-owned land, although the state itself had not empowered that political subdivision to seize the state's land. The City of Tacoma, Washington was a qualified licensee to condemn a fish hatchery owned by the state of Washington on the Cowlitz River for the purpose of building a hydropower dam. In the proceedings below, the Washington State Supreme Court had held that even though Tacoma had delegated federal condemnation power through the FPA to condemn a state fish hatchery, it lacked the power to exercise that delegated power, since it had not been granted by the state.²¹⁰ The Supreme Court reversed on procedural grounds, but did not take up the underlying issue, possibly in recognition of the difficult federalism questions it posed.²¹¹ At base, it is a reflection of the Court's preference for a local entity imbued with federal power over state opposition to an infrastructure project, even after the state supreme court held that the local entity lacked the power. It is also the case that courts have previously read parties out of expansive eminent domain statutes.²¹² In sum, while the Federal Power Act may engender federalism concerns among some states due to FERC's regulatory role,²¹³ these frustrations have largely been unrelated to eminent domain of state lands.

C. Inverse Condemnation & Regulatory Takings

Inverse condemnation, an implied cause of action, commonly involves a

210. *City of Tacoma v. Taxpayers of Tacoma*, 307 P.2d 567, 576-77 (Wash. 1957), *rev'd*, 357 U.S. 320 (1958). The Washington State Supreme Court relied on a distinction between the city being prohibited, contrasted with lacking the power. To that court, Tacoma was not prohibited from taking a state fish hatchery, but lacked the affirmative grant of power from the state to do so. *See also* Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977, 986, 989-90 (2011). Reynolds characterizes the Court's rejection of the frame proposed by the state supreme court as focused on the exclusive federal jurisdiction over navigable waters and interest in regulating interstate commerce. *Id.*

211. *City of Tacoma*, 357 U.S. at 320.

212. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 113 (1960) (“[D]espite its general and all-inclusive terms, § 21 does not apply to nor authorize condemnation of lands or interests in lands owned by the United States.”).

213. James J. Hoecker & Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 ENERGY L.J. 71 (2014).

property owner alleging regulatory takings.²¹⁴ These actions provide a final notable example where state sovereign immunity clashes with eminent domain power. It is worth pausing to acknowledge that the situation described in the preceding Subparts are somewhat odd in the American system. Eminent domain is normally exercised by sovereign governments as an integral aspect of their sovereignty. In the normal course of action, a government entity, using its sovereign power, identifies a necessary parcel of land which cannot be acquired by contract and moves to seize that property. Of course, this power is limited by the Fifth Amendment, requiring that a government only exercise such a power if the use of that land is for public use, and the property owner is paid just compensation for the seizure.

Where property is seized, but the taking agent does not proactively pay just compensation—either because the takings is a regulatory one, or the property is seized with immediate occupancy—the condemnee is normally entitled to instigate his or her own action against that agency to ensure that just compensation is paid. This provides another opportunity to test the bounds of state sovereign immunity, mirroring another collision between state sovereign immunity and eminent domain, because, at base, a private party has initiated suit against a sovereign state without the consent of the state.

Eric Berger has argued that in the inverse condemnation context, the Takings Clause is self-executing, and thus was an abrogation of state sovereign immunity.²¹⁵ At root, this is because the Fifth Amendment provides a remedy to parties whose land has been taken, and it would be nonsensical to forbid a private action against a state where the state had acted unconstitutionally by not paying just compensation.²¹⁶ Berger discusses the impact of a Supreme Court footnote, “casually” discussing how the Takings Clause abrogated state sovereign immunity in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.²¹⁷ In 1987, in *First English*, the Court noted that the Takings Clause is self-executing, and thus does not require affirmative legislative action to enable condemnees to bring just compensation claims.²¹⁸

However, many courts which have confronted the issue have long held that state sovereign immunity *still* bars these suits.²¹⁹ For instance, the Ninth Circuit held in *Seven Up Pete Venture* in 2008, that the “constitutionally grounded self-executing nature of the Takings Clause does not alter the conventional

214. See *supra* note 55 and accompanying text.

215. Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493 (2006). Some states have interpreted their own constitutional just compensation clauses as a self-executing abrogation of the state’s sovereign immunity for the purpose of inverse condemnation suits. *Id.* at 574-75, nn.407-08 and accompanying text.

216. These actions are more similar to the posture of an officer suit, in which an action is implied by a state’s unconstitutional or illegal action.

217. 482 U.S. 304 (1987).

218. *Id.* at 315.

219. See, e.g., Berger, *supra* note 215, 495 n.4.

application of the Eleventh Amendment.”²²⁰ The Ninth Circuit explained that its decision was in line with the other courts of appeals who had confronted the question in the inverse condemnation context, and several subsequent decisions have followed suit.²²¹ In addition to the Ninth Circuit, the First,²²² Fourth,²²³ Fifth,²²⁴ Sixth,²²⁵ Seventh,²²⁶ Tenth,²²⁷ and Eleventh²²⁸ Circuit Courts of Appeals have each held that the Takings Clause did not abrogate state sovereign immunity.

There are few constitutionally mandated remedies, and it is arguably the case that where one exists, it is more likely to be a self-executing abrogation of a state’s sovereign immunity. Here, the judicial treatment of the Takings Clause as self-executing is distinct from any notion of the power of eminent domain being self-executing, because eminent domain power does not arise from the Takings Clause. Where no such requirement exists, there is no textual or structural reason why an act of Congress would constitute a self-executing abrogation. Because holding otherwise would require a federal court to place demands on a state’s treasury—a core detriment to state dignity, which is a primary rationale behind the state sovereign immunity—these cases do not end the matter.

In sum, despite their clear distinctions, to the extent that inverse condemnation actions could be thought constitutionally similar with regard to state sovereign immunity to those actions initiated by private parties empowered with eminent domain authority, current caselaw in the majority of circuits indicates sovereign immunity may attach to any such suit by a private party.

III. SOVEREIGN IMMUNITY PRECLUDES PRIVATE TAKINGS OF STATE LANDS

220. *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 (9th Cir. 2008), *cert. denied*, 555 U.S. 885 (2008). *Cf. Howell v. Miller*, 91 F. 129, 136 (6th Cir. 1898) (claim against a state for property owned by the state barred by sovereign immunity).

221. *Seven Up Pete Venture*, 523 F.3d at 955 (collecting cases). *But see Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018) (holding that state sovereign immunity shields state from suits against the “general fund, not investment funds held for the benefit of its employees”), *reh’ng en banc denied*, 918 F.3d 644 (2019).

222. *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982) (*per curiam*).

223. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 553 (4th Cir. 2014) (“[E]very other court of appeals to have decided the question has held that the Takings Clause does not override the Eleventh Amendment.” (internal citations omitted)).

224. *John G. & Marie Stella Kenedy Mem’l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994) (“[A] Fifth Amendment inverse condemnation claim brought directly against the State . . . [is] barred by the Eleventh Amendment.”).

225. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526-28 (6th Cir. 2004), *overruled on other grounds by San Remo Hotel, L.P. v. City & Cnty. of S.F., Cal. et al.*, 545 U.S. 323 (2005) (“[The State] enjoys sovereign immunity in the federal courts from [a] federal takings claim . . .”).

226. *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980).

227. *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019).

228. *Robinson v. Ga. Dep’t of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992).

USING DELEGATED EMINENT DOMAIN POWERS

If we understand federal eminent domain power and sovereign immunity to be two inherent attributes of sovereignty, how do we resolve their collision? While academic scholarship has critically analyzed the history of federal eminent domain power, with significant disagreement about whether and how this broad federal power was understood prior to *Kohl*,²²⁹ it is now beyond question that the federal government has broad power to seize private land.²³⁰ This is largely grounded in historical understanding of the powers traditionally inuring to the sovereign, and is confirmed by substantial, unbroken judicial authority exploring the Constitutional limits placed upon it by the Fifth Amendment. The first such limit, that any taking must be for public use, has been judicially broadened far beyond its original interpretation.²³¹ And the second, just compensation, is perhaps more accurately described as a remedial provision rather than a limit.²³² Although the federal government has delegated eminent domain authority to executive branch agencies in several statutes, it has delegated its eminent domain powers to private parties very few times.²³³ In 1946, in *United States v. Carmack*,

229. Baude, *supra* note 21; Klass & Meinhardt, *supra* note 151; Grace, *supra* note 17 (arguing that much of the scholarship discussing whether the federal government believed itself to possess eminent domain power overlooked the Enclave Clause's role and restrictions on federal infrastructure projects, and mistook lack of federal condemnations as evidence that the power was widely believed lacking.).

230. *United States v. Carmack*, 329 U.S. 230, 237 (1946); 40 U.S.C. § 3113. However, even if the founders believed that the federal government could exercise eminent domain power, the Fifth Amendment specifies that “private property shall not be taken for public use without just compensation.” U.S. CONST. amend. v. If the Takings Clause is meant to fully encompass all use of eminent domain power, the surplusage canon applied to a strict textual would imply that the federal government did not have the power to take state land. Note, too, that the Supreme Court eventually read out the word “private” from the Takings Clause, but it did not do so until 1984. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). However, if the framers thought that federal eminent domain could be exercised against a state in federal courts—courts which were not mandated in the Madisonian compromise—why limit the amendment’s reach to private property? The scant precedent involving the federal condemnation of state land that exists does little to address this issue. See *North Dakota v. United States*, 460 U.S. 300 (1983); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

231. This line of cases includes *Berman v. Parker*, 348 U.S. 26, 31 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); and culminates in *Kelo v. City of New London*, 545 U.S. 469, 482 (2005).

232. Failure to compensate neither invalidates the original property transfer, nor prohibits condemnation from proceeding. Cf. *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

233. See Robert Meltz, CONG. RSCH. SERV., RS22884, DELEGATION OF THE FEDERAL POWER OF EMINENT DOMAIN TO NONFEDERAL ENTITIES 1 (2008). For example, under 45 U.S.C. § 545(d)(1)(B) (1970), federal eminent domain authority had been delegated to Amtrak, considered to be a private party. See *Nat’l R.R. Passenger Corp. v. Two Parcels of Land One 1691 Sq. Foot More or Less Parcel of Land in Town of New London, New London City. & State of Conn.*, 822 F.2d 1261, 1264 (2d Cir. 1987). That delegation provision, however, explicitly acknowledged that Amtrak was prohibited from condemning state lands. See *id.* The

the Court examined the distinction between these two exercises of delegated federal eminent domain authority, finding that Congressional delegations to executive agency officials “authoriz[ed] officials to exercise the sovereign’s power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign’s full powers except such as are excluded expressly or by necessary implication.” By contrast, the Court found that:

[a] distinction exists however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority.²³⁴

Courts have adjudicated private party eminent domain delegations within the context of more limited grants, with courts implicitly or explicitly acknowledging that the grantee is not exercising the sovereign’s own power, but rather, a more limited grant of that power.²³⁵

This Part seeks to show that in the case of private condemnation suits of state property: (1) taking state land through eminent domain is within the core concerns of state sovereign immunity doctrine; (2) Congress lacks the power to abrogate that sovereign immunity; and (3) Congress certainly cannot *delegate* a power that it does not itself possess.

A. Impermissible Intrusions on the Core of State Sovereignty

Taking state property is within the core concern of state sovereign immunity doctrine independent of whether the action was directly against the state *eo nomine* or against state property interests *in rem*. It is clear that the state is an essential party to any condemnation suit, whether the state owns its land in fee simple or a coextensive property interest, such as a conservation easement. Actions against the sovereign’s property are understood to be actions against the sovereign, and therefore, *in rem* cases provide an example of sovereign immunity’s atextual foothold in the Eleventh Amendment jurisprudence. The general rule is that “[a] federal court cannot summon a State before it in a private action seeking to divest the State of a property interest.”²³⁶ For example, in *Ex parte New York*, an admiralty action was brought to recover damages by

Second Circuit found that “Amtrak has not been authorized to exercise the sovereign’s power of eminent domain. It has been granted a limited power, within the meaning of *United States v. Carmack*” *Id.*

234. *Carmack*, 329 U.S. at 243 n.13. (1946).

235. *Id.*

236. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 289 (1997) (O’Connor, J., concurring).

negligent operation of a boat owned by New York.²³⁷ The Supreme Court held that sovereign immunity prohibited an *in rem* suit in admiralty involving a state interest, despite the fact that the Eleventh Amendment explicitly only applies to suits in “law or equity.” Although some commentators have noted that subsequent developments of sovereign immunity in the “admiralty context have not been models of clarity,”²³⁸ in *Ex parte New York*, the Supreme Court found that sovereign immunity should “be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.”²³⁹ More recently, the Supreme Court reaffirmed this basic principle, but required the state to actually own a property interest in the res.²⁴⁰

In *Florida Department of State v. Treasure Salvors, Inc.*, Justice Stevens’ plurality opinion noted that the *in rem* character of an action does not automatically prevent a state from asserting sovereign immunity because “an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*.”²⁴¹ There, a treasure salvage company identified a sunken seventeenth century Spanish ship off the coast of Key West, Florida and sought a warrant through an *in rem* admiralty action, directed at state officials to retain the property found on the ship.²⁴² A four-member plurality ultimately held that sovereign immunity did not bar the suit because it was “not an *in personam* action brought to recover damages from the State.”²⁴³ “At the same time, the opinion for a plurality of four Justices suggested that the Eleventh Amendment might bar adjudication of the state’s ownership of the wreckage.”²⁴⁴

After *Treasure Salvors*, the Court of Appeals for the Fourth Circuit allowed a state to assert sovereign immunity in a garnishment proceeding, even though they are *in rem* actions, in *Carpenters Pension Fund v. Maryland Department of Health & Mental Hygiene*.²⁴⁵ There, the Fourth Circuit noted garnishment

237. *Ex parte New York*, 256 U.S. 490, 490 (1921).

238. See FALLON ET AL., *supra* note 75, at 918 n.11.

239. *Ex parte New York*, 256 U.S. at 500 (1921). It is worth calling attention to the fact that in *Fla. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982) (plurality), the court later characterized the claim to have only been brought in admiralty “to enable the court to acquire jurisdiction over a damages claim that was otherwise barred by the Eleventh Amendment.”

240. See *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 507-08 (1998) (“Although the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests, it does not necessarily follow that it applies to *in rem* admiralty actions, or that in such actions, federal courts may not exercise jurisdiction over property that the State does not actually possess.”).

241. *Fla. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982) (plurality).

242. *Id.* at 673.

243. *Id.* at 699.

244. See FALLON ET AL., *supra* note 75, at 918 n.11.

245. 721 F.3d 217, 225 (4th Cir. 2013).

actions have both *in rem* and *in personam* elements that would require jurisdiction over the state as the sovereign and its treasury.²⁴⁶ Thus, the court concluded, regardless of how the suit was characterized—as *in rem* or *in personam*—“it is ultimately seeking recovery from the Maryland treasury.”²⁴⁷ The plurality’s holding in *Treasure Salvors* did not apply to real property, and thus may not be instructive. Lessor property, like the artifacts salvaged from the shipwreck, may impinge on state dignity but do not go directly to the core of state sovereignty, as landholding and control over land squarely do.

Federal sovereign immunity, while not identical, is analogous, and courts have largely understood suits against federal government property to be against the United States itself. For example, in the 1869 admiralty case, *The Siren*, the Supreme Court noted that, “there is no distinction between suits against the government directly, and suits against its property.”²⁴⁸ The Seventh Circuit recently took a similar approach in *Hammer v. United States HHS*, in which the estate of a defunct insurance company sought payment of debts owed to the company by the U.S. Department of Health and Human Services.²⁴⁹ Although analyzing federal sovereign immunity, the Seventh Circuit noted “there is no general *in rem* exception to principles of sovereign immunity.”²⁵⁰

When analyzing sovereign immunity as applied to other actors, such as tribal and foreign sovereign immunity, some state courts have approached the problem differently. In *Cass County Joint Water Resource District v. 1.43 Acres of Land*, the North Dakota Supreme Court held that, because a condemnation proceeding over property purchased by a Native American tribe was *in rem*, tribal sovereign immunity was not a jurisdictional bar.²⁵¹ The Supreme Court has similarly held that property owned by foreign states used for non-diplomatic mission purposes is treated as private property for the purpose of the Foreign Sovereign Immunities Act.²⁵² In *Permanent Mission of India to United Nations v. City of New York*, the Court also noted that property ownership of land outside of a sovereign’s territory “is not an inherently sovereign function.”²⁵³

Applying the *Ex parte New York* formulation, property interests are core to sovereignty and despite the fact a suit may be formulated as against the land or property interest *in rem*, the “essential nature and effect of the proceeding” is

246. *Id.* at 225 (“While garnishment has been said to be a proceeding *in rem*, it is not, strictly speaking, *in rem*. It partakes both of the nature of a proceeding *in personam* and a proceeding *in rem*.”).

247. *Id.*

248. *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869).

249. *Hammer v. U.S. Dep’t of Health & Human Servs.*, 905 F.3d 517, 522-23 (7th Cir. 2018).

250. *Id.* 905 F.3d at 528.

251. *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685, 691 (N.D. 2002).

252. *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007); *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1655 (2018).

253. *Permanent Mission of India to the U.N.*, 551 U.S. at 201.

nonetheless against the state owner. Perhaps more strongly favoring this interpretation of state sovereign immunity is *The Siren* and subsequent decisions that emphasized why suits against federal government property were indistinguishable from suits against the federal government for sovereign immunity purposes. Although *Ex parte New York* and *Treasure Salvors*' plurality do not conclusively apply *The Siren*'s federal sovereign immunity approach to state sovereign immunity, each case may implicitly understand the question in terms of state dignity interests, as the Court has done in many other state sovereign immunity cases.

Real property is critical to a state's identity and dignity. Wars over state territorial boundaries and dominion comprise much of the nation's early history. Unsurprisingly, then, expressions of their significance are laced through the Constitution's provisions. For example, the Enclave Clause provides a limit where a state must consent for altering state boundaries or removing land from state jurisdiction. This demonstrates the founders' respect for state sovereignty within the federal system, explicitly linking this dignity to control over lands within their borders.

This is, of course, in addition to the obvious monetary value of property that a private party empowered with delegated eminent domain power would seek to take from a sovereign state. Without sovereign immunity acting as a limiting principle, one could imagine a private, unaccountable energy company condemning a state capitol in federal court without any recourse from the state.²⁵⁴

Applying a different conception proposed by Louis Jaffe yields the same result—that state sovereign immunity protects state lands held with unsullied hands from private condemners. Jaffe's observation posits that wrongful action on the part of the state, which otherwise may give rise to an action in contract or tort, could allow a case to proceed against the sovereign independent of their consent to suit. Here though, for many state lands that comprised the original thirteen colonies, land title came into the hands of the state unencumbered and directly from the crown. In other geographic areas further west, states assumed title as part of statehood. And today, state ownership may result from investing significant public dollars in land purchases for ecological conservation. In any of these iterations, state title has not been wrongfully "sullied" by the state in such a way that could subject the sovereign to suit without its consent.

B. Void Abrogations

Having located state lands well within the core concerns of state sovereign immunity, the second question we consider in this Part is whether Congress may abrogate state sovereign immunity using its Article I powers. Plainly said, it may

254. See *Amendments to the Natural Gas Act: Hearing on H.R. 2956 Before the H. Comm. on Interstate and Foreign Com.*, 80th Cong. 610-15 (1947) (statement of John M. Crimmins).

not. As the Court recently held in *Allen v. Cooper*, stare decisis commands that Congress may not abrogate state sovereign immunity pursuant to Article I powers. This would seem to preclude abrogation of state sovereign immunity using any Article I power, including the Commerce Clause power.

The framework of the modern regulatory state is largely grounded in Congress' Article I Commerce Clause Power.²⁵⁵ This, by default, prohibits abrogation of state sovereign immunity through modern delegations of eminent domain power, such as the Natural Gas Act and Federal Power Act. While Section Five of the Fourteenth Amendment could provide an alternate ground for abrogation of state sovereign immunity, Congress has not, to this point, utilized that power to exercise or delegate eminent domain power. While such an abrogation of state sovereign immunity is doctrinally sound and theoretically possible, it is difficult to imagine how state property could be taken using equal protection powers.

Finally, it is important to note that sovereign immunity is not a simple matter that could be cured by transforming a condemnation suit into one against a state officer. Such suits seek to condemn state lands to which the state holds unsullied title, and unless a state has already waived sovereign immunity to such suits, no state officers could be viewed as acting outside of their statutory authority. And for a private party to condemn state-owned land, the state would be a necessary party. Condemnation suits against its officers, or other possessory owners, would be insufficient to properly effectuate a takings.²⁵⁶

C. End Runs Around Sovereign Immunity

In the remainder of this Part, we explore potential theories that a private plaintiff armed with delegated federal eminent domain power might deploy to hale an unconsenting state into state or federal court without the state's consent, to condemn state land. First, we will analyze whether Congress may delegate its own exception to state sovereign immunity to a private party and conclude that Congress may not delegate such an exception. Next, we discuss whether delegation of eminent domain authority could be self-executing such that it inherently carries with it an abrogation of state sovereign immunity. There, we explain why a delegation of eminent domain is not self-executing. Finally, we examine whether a delegation of eminent domain power could allow a private party to "stand in the shoes of the sovereign," such that the private party takes the place of the sovereign, similar to a *qui tam* suit. We find that these theories are unsupported by the constitution, legal history, or current caselaw.

255. See, e.g., CONG. RSCH. SERV., RL32844, THE POWER TO REGULATE COMMERCE: LIMITS ON CONGRESSIONAL POWER 1 (2014)

256. See, e.g., *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218, 221 (1913) ("The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail.").

1. Takings as a Self-Executing Abrogation or Waiver of Sovereign Immunity

Can the sovereign power of eminent domain function as a self-executing abrogation of state sovereign immunity? As evident from the discussion of inverse condemnation claims in Part III.C above, the Takings Clause is thought to be a self-executing provision of the constitution, and no additional legislative action is necessary to effectuate inverse takings claims.²⁵⁷ Yet, when the Takings Clause collides with state sovereign immunity, every circuit to address some version of that question—whether the normally self-executing Takings Clause constitutes an abrogation of state sovereign immunity—has answered that question in the negative and dismissed the case. Some courts have gone further than ruling on abrogation as self-executing. For example, the Court of Appeals for the Sixth Circuit held that an eminent domain provision of a state constitution was not a *waiver* of state sovereign immunity.²⁵⁸ So what explains this?

One possibility is that the Takings Clause has external limits to its self-execution. Fundamentally, the takings clause is a limitation on eminent domain power and not a statement about the nature of the power. Thus, in contrast to claims where state land has been taken, inverse condemnation claims are about compensation for *a state's exercise* of eminent domain power, not about the condemnation power itself. For example, while no statutory cause of action may be required in order to remedy a takings, whether the takings is effectuated through eminent domain or a regulation that decreases property value, the constitutional remedy provides the basis for an implied cause of action. However, its self-execution is only viable when these actions would not otherwise run afoul of other constitutional powers. Thus, where state sovereign immunity bars actions without a state's consent, the Takings Clause does not alter that sovereign power.

Finally, it is worth pausing to consider that the inverse condemnation cases may be qualitatively or normatively different from the situation presented here, with regard to eminent domain, where a private party seeks to take state *land* rather than draw from a state's treasury. As noted in Part II.B.1 above, a major justification for the push to ratify the Eleventh Amendment and reassert state sovereign immunity was the concern that out-of-state creditors seeking to collect on Revolutionary War bonds would bankrupt states, and that being haled into federal court and forced to repay bonds was an affront to state dignity. In the eminent domain situation, no state monies are at risk of leaving state coffers. But money is still a form of property, and here, land and other property interests, such

257. See *supra* Part III.C.

258. *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986) (“[E]ven if the provision could possibly be construed as a waiver, a conclusion we do not reach, the provision is certainly too ambiguous to satisfy the requirement that the provision be a clear statement of Michigan’s ‘intention to subject itself to suit in *federal court*.’” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985))).

as easements, are at risk of being taken from the State's assets by a federal court without the state's consent. Further, it is hard to imagine that the founders would be *unconcerned* with private actors attempting to divest the state of property, monetary or otherwise, without the state's consent even if it was simply a nonpossessory encumbrance.

Even if those who have advanced the argument that state sovereign immunity is not—or should not be—a barrier to inverse condemnation claims are correct,²⁵⁹ an easy answer is that this situation is distinct from an action where a private party is seeking possession of state land through an eminent domain action.

Another possible response to the distinction is to acknowledge the justifications for the action are distinct, and while they involve the same constitutional provisions, they are fundamentally different actions. Abrogation of state sovereign immunity for inverse condemnation is rooted in a Fourteenth Amendment equitable action, where the private party sues the state for a constitutionally guaranteed remedy, which takes the form of damages. Further, because the state would be acting unconstitutionally, the self-executing abrogation of state sovereign immunity is nonetheless pursuant to the Fourteenth Amendment. Thus, the action is a concrete and proportional remedy to the unconstitutional action, as commanded by *Fitzpatrick* and *City of Boerne*. The situation where a private actor delegated eminent domain power from the federal government takes land from the state involves no “constitutional violation” such as a failure to pay just compensation.²⁶⁰ Thus, while these situations provide for a collision of the same doctrines, the doctrines play out in normatively and analytically different ways. However, this understanding of inverse condemnation would be contrary to the courts that have resolved the question by finding that even those actions cannot abridge state sovereign immunity.²⁶¹

While inverse takings claims superficially involve similar super-constitutional doctrines, another explanation for how they interact is that eminent domain is not self-executing and therefore it cannot automatically defeat a claim of sovereign immunity. As the Supreme Court recently confirmed in *Knick v. Township of Scott, Pennsylvania*, the Takings Clause is self-executing.²⁶² However, the power of eminent domain is not. Eminent domain derives inherently from sovereignty, and has no textual basis in the constitution or laws to be self-executing in and of itself.²⁶³ The Takings Clause, on the other hand, is

259. See Berger, *supra* note 215, at 493.

260. While this may run afoul of normal clear statement canons of federalism, it is possible for the Court to understand this situation as unique since it is one of only two explicit constitutional remedies. It is further complicated by the fact that 42 U.S.C. § 1983, which allows for suits against state officers for constitutional violations, does not abrogate state sovereign immunity. Quern v. Jordan, 440 U.S. 332, 345 (1979).

261. See *supra* notes 220-28 and accompanying text.

262. 139 S. Ct. 2162, 2172 (2019).

263. See *supra* Part II.A.1.

a constitutional *limitation* on eminent domain as a sovereign power. And further, the overriding meaning of self-executing in the context of inverse takings caselaw involves timing (e.g., when injury accrues) or the nature of a claim against the state (e.g., when state processes have been exhausted).

2. Delegation as an End Run Around Sovereign Immunity

Congress clearly can—and does—delegate its *eminent domain* power to federal agencies and private parties as long as these delegations comply with the generally broad limits on delegation. However, may Congress delegate the federal government’s exception to state sovereign immunity, which enables the federal government to instigate suit directly against states, to a private party? If so, do any additional requirements, beyond those required by the nondelegation doctrine, attach to the delegation? There is no definitive federal court precedent addressing whether the federal government can delegate its ability to sue a state in either federal or state court to a private party, what we will call a “sovereign immunity exemption.” In short, allowing Congress to delegate the federal government’s sovereign immunity exemption would effectively allow a private entity to entirely circumvent a State’s sovereign immunity. In this Subpart, we argue that delegation of the federal government’s sovereign immunity exception aggrandizes federal power without political accountability. That would be akin to delegating its very essence of its sovereignty, rather than a specific power.

The two most common elements by which legislative delegations are judged involve the breadth of a delegation, i.e. whether it contains an intelligible principle,²⁶⁴ and whether the delegation is an attempt to assert power through a delegation which Congress could not do directly.²⁶⁵ The Court has struck down congressional attempts to assert or delegate a power it did not have as an aggrandizement of its power.²⁶⁶ As such, some powers simply may not be

264. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Although outside of the scope of this Article, who the intelligible principle is directed has been the subject of healthy debate. Few statutes have been found to violate the intelligible principle. Some cases recently heard by the Supreme Court may indicate that the Court is seeking to revitalize and give teeth to the doctrine. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). As part of this potential effort by the Court, the present case could also be determined as an impermissible delegation of federal power to a private party. Justice Alito has long been an advocate for limiting the amount of power that the federal government can delegate to private parties. *See, e.g., Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 55 (2015).

265. *INS v. Chadha*, 462 U.S. 919, 954 (1983) (one house veto); *Clinton v. New York*, 524 U.S. 417, 448-49 (1998) (line-item veto); *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986) (comptroller general).

266. *FEC v. NRA Political Victory Fund* 6 F.3d 821, 827 (D.C. Cir. 1993) (FEC’s ex officio members), cert. dismissed, 513 U.S. 88 (1994); *Bowsher*, 478 U.S. at 726 (“Congress cannot grant to an officer under its control what it does not possess.”); *Buckley v. Valeo*, 424 U.S. 1, 122-23 (1976) (FEC composition). *Cf. Freytag v. Commissioner*, 501 U.S. 868, 878 (1991) (“separation-of-powers jurisprudence generally focuses on the danger of one branch’s

delegated.

The federal government's exception to state sovereign immunity inheres in that sovereign and may not be delegated. Although one can imagine that an intelligible principle could exist for a delegation of this exemption, such a delegation is impermissible because it would allow Congress to accomplish something indirectly that it could not do directly—namely, effectuating an abrogation of state sovereign immunity using Article I powers. Thus, legislation grounded in Article I powers, such as the Commerce Clause, cannot be the basis for such a delegation because Congress cannot abrogate state sovereign immunity directly using those powers.²⁶⁷ Any such delegation would be a clear end run around the proscriptions of congressional power over states as sovereigns.²⁶⁸ By contrast, Congress could theoretically delegate its exception through statutory grants of the power passed pursuant to Section 5 of the Fourteenth Amendment because it can abrogate state sovereign immunity using these powers, if such delegation were to be permitted at all.

This all presumes that Congress believes it could delegate its sovereign immunity exemption, and *intends to do so*. Supposing for a moment that such a delegation were constitutionally permitted, it is worth restating that this would still require Congress to meet clear statement rules, because a delegation would alter the historic balance of federal-state powers. The Supreme Court has noted that in the sovereign immunity context, legislative history is “irrelevant” to determining whether state sovereign immunity has been abrogated.²⁶⁹ Instead, “evidence of congressional intent must be both unequivocal and textual.”²⁷⁰ It therefore stands to reason that a *delegation* of the exception would also need to be both unequivocal and textually based. A delegation would alter the historic balance of federal-state powers, because it would allow a private party to sue an unconsenting state in federal court, acting as the functional equivalent of an

aggrandizing its power at the expense of another branch”).

267. This obviously does not include Bankruptcy, which is technically an Article I power. *Cf.* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006); *infra* Part IV.C.3.

268. *Cf.* *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) (“[T]he United States cannot delegate to non-designated, private individuals its sovereign ability to evade the prohibitions of the Eleventh Amendment. Only ‘responsible federal officers,’ or those who act at their instance and under their control, may exercise the authority of the United States as sovereign.”); *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, 173 F.3d 870, 883 (D.C. Cir. 1999) (“To assume that the United States possesses plenary power to do what it will with its Eleventh Amendment exemption is to acknowledge that Congress can make an end-run around the limits that the Amendment imposes on its legislative choices.”), *cert. denied*, 530 U.S. 1202 (2000).

269. *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (“Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress’ intention is ‘unmistakably clear in the language of the statute,’ recourse to legislative history will be unnecessary; if Congress’ intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.”).

270. *Id.*

abrogation. Thus, an implied delegation, even if permissible in other contexts,²⁷¹ would be impermissible here.

The delegation theory also presents other problems for which inherent sovereign powers of the federal government may be delegated. If the delegation of the federal government's exception to sovereign immunity could be either inherent or implicit in a delegation of eminent domain power, is it not also necessarily the case that other attributes of sovereignty must attach? For example, if the federal government's state sovereign immunity exemption can be delegated to private parties, can the federal government's sovereign immunity also be delegated to private parties?²⁷² Would parties exercising eminent domain also be immune from liability from torts or other statutory violations relating to the condemnation or use of that land?

3. Party in Interest & Standing in the Shoes of the Sovereign

When a private party exercises the eminent domain power delegated to it by the federal government, is that delegee acting in their own interest or in that of the federal government? Although courts have understood assignees of federal powers to "stand in the shoes" of the assignor in other contexts, this approach has never been extended to sovereign immunity.²⁷³ This is precisely the case in officer suits for official action, where, for the "purpose of sovereign immunity 'individuals sued in their official capacities stand in the shoes of the entity they represent.'"²⁷⁴ Traditionally, sovereign immunity does not solely apply to the named parties in a suit, but rather, attaches to the true parties in interest.²⁷⁵

271. Unlike cooperative federalism statutes, which explicitly reference and incorporate state roles, statutes discussing eminent domain, such as the Natural Gas Act, largely have no textual reference to delegation and states.

272. An analogous situation proved too much for the Supreme Court of New Jersey in 1857. *Tinsman v. Belvidere Del. R.R. Co.*, 26 N.J.L. 148, 170 (1857) ("These authorities . . . maintain that corporations holding grants of public franchises are not only vested with the sovereign right of eminent domain, but possess, also, the sovereign immunity against liability for damages. If this be the law, then, wherever authority is granted by the legislature to a private corporation or to an individual to construct a railroad, a canal, a turnpike, a bridge, a raceway for manufacturing purposes, or any other work which the spirit of speculation may prompt and the legislature may conceive will prove conducive to the public good, private property may not only be taken against the will and consent of the owner upon making compensation, but however ruinous in its consequences the work may be to individuals, no redress can be had for damages resulting from their acts.").

273. See, e.g., *UMLIC VP LLC v. Matthias*, 364 F.3d 125, 133 (3d Cir. 2004). It is also briefly worth noting that the federal government can never stand in a private party's shoes. *Young v. United States*, 71 F.3d 1238, 1244 (6th Cir. 1995) ("As a sovereign, it is impossible for the United States ever to stand precisely in the shoes of a private person.").

274. *S.J. v. Hamilton Cnty.*, 374 F.3d 416, 420 (6th Cir. 2004) (quoting *Alkire*, 330 F.3d at 811).

275. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (sovereign immunity attaches to "arm[s] of the state"); *Hander v. San Jacinto Junior College*, 519 F.2d 273, 278 (5th Cir. 1975) (sovereign immunity only attaches where an entity "stands

Another way to understand state sovereign immunity could be to only allow parties to have the power to assert sovereign immunity if the named party was the state or an arm of the state. This, then, requires a court to discern the true party in interest. It's clear that for sovereign immunity purposes, arms of the state and state officers acting legally within their official capacity are both understood as the state itself.²⁷⁶

The Supreme Court has confronted the issue of how to resolve state sovereign immunity questions in *in rem* suits in two additional contexts relevant to this discussion: admiralty and bankruptcy. And, in *United States v. Carmack*, the Supreme Court described in a footnote that a "general authorization" carries with it the "sovereign's full powers except such as are excluded expressly or by necessary implication."²⁷⁷ However, eminent domain power is different when exercised by the sovereign itself, and is changed by the nature of its delegation to other entities, such as public utilities.²⁷⁸ In this Subpart, we analyze whether the delegation of the federal government's eminent domain power could allow the delegee the additional power to "stand in the shoes" of the government, and therefore claim the federal government's sovereign immunity exemption.

a. Bankruptcy's Abrogation of State Sovereign Immunity

While it is still true that states may assert sovereign immunity as a defense in cases in which a state, or an arm of the state, owns a portion of the res for an *in rem* case, the Court held in *Central Virginia Community College v. Katz* that the Bankruptcy Clause in Article I was a self-executing abrogation of state sovereign immunity.²⁷⁹ In *Katz*, acting as an arm of the state, a public college argued it was entitled to sovereign immunity in a bankruptcy suit against trustees seeking recovery of preferential transfers from a bankrupt debtor's estate.²⁸⁰ The opinion, written by Justice Stevens, largely rested on the notion that bankruptcy proceedings are *in rem*, and therefore "d[id] not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction."²⁸¹ Congress has the "power to establish 'uniform Laws on the subject of Bankruptcies throughout the United States,'"²⁸² and therefore, has the subsidiary power to abrogate state sovereign immunity in order to make uniform laws. Further, from an originalist

in the shoes of the state itself").

276. See, e.g., *United States v. Lee*, 106 U.S. 196, 204 (1882) (officer suits); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989) (arm of the state).

277. *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946).

278. *Id.*

279. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006); U.S. CONST. art. I, § 8, cl. 4.

280. *Id.* at 361.

281. *Id.* at 362 (citing *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450-51 (2004)).

282. *Id.* at 370 (quoting U.S. CONST. art. I, §8, cl. 4).

perspective, Stevens reasoned that a nineteenth century understanding of the Bankruptcy Clause did not contravene state sovereign immunity.²⁸³ Thus, weighing the interests in a sort of balancing test, these together, combined with what the majority understood as a minimal infringement on sovereignty to hale states into court for the limited purpose of adjudicating bankruptcy claims, left little reason to deny federal jurisdiction over states where there was a strong federal interest and textual commitment.²⁸⁴ The Court's holding in *Katz* explicitly did not alter the Court's understanding of Congress' ability to abrogate, especially with respect to the Commerce Clause.²⁸⁵ More recently, in *Tennessee Student Assistance Corporation v. Hood*, the Court reaffirmed *Katz*, holding that it did not infringe on a state's sovereignty for a bankruptcy court to exercise jurisdiction to discharge a debt.²⁸⁶

Interpreting *Katz*, several circuit courts have confronted these bankruptcy questions, with varying results. For example, the Second Circuit in *Ace Am. Ins. Co. v. DPH Holdings Corp. (In re DPH Holdings Corp.)* rejected a state's sovereign immunity defense in a bankruptcy proceeding, understanding the Bankruptcy Clause to have been a blanket waiver of state sovereign immunity, limited to the bankruptcy context.²⁸⁷ Moreover, in *Allen v. Cooper*, discussed above in Part II.B.2, the Supreme Court confirmed that the Bankruptcy Clause stands apart in its self-executing abrogation of state sovereign immunity.

Additionally, while sovereign immunity is not evaluated using a balancing test, even if a court were tasked with balancing the interests of the parties, the relevant considerations would pair state interests in core concerns to its sovereignty—the ability to be forced to litigate by a private litigant in federal court without its consent and control its real property “unsullied” by tort, using Louis Jaffe's descriptor, against the private interests in participating in a federal regulatory program.

283. *Id.* at 375-77.

284. In 1787, the Bankruptcy Clause was included in the Constitution with the background that debtors could be imprisoned by states. In *Katz*, the Court relied in part on the relationship of “discharging a debt” to habeas corpus. *Id.* at 374-77. The Bankruptcy Act of 1800 specifically granted federal courts habeas authority to release debtors from state prisons without sovereign immunity objections. The Court viewed this history as allowing the abrogation of sovereign immunity in the bankruptcy context. *Id.*

285. *Id.* at 369 n.9 (“Of course, the Bankruptcy Clause, located as it is in Article I, is ‘intimately connected’ . . . with the Commerce Clause . . . the Bankruptcy Clause’s unique history, combined with the singular nature of bankruptcy courts’ jurisdiction, . . . [mean] the ratification of the Bankruptcy Clause does represent a surrender by the States of their sovereign immunity in certain federal proceedings.”).

286. *Tenn. Student Assistance Corp. v. Hood*, 541 U. S. 440, 448-49, 451 (2004) (balancing hardship of not granting jurisdiction with the potential infringement on state sovereignty).

287. *Ace Am. Ins. Co. v. DPH Holdings Corp.*, 448 Fed. Appx. 134, 137 (2d Cir. 2011) (bankruptcy is “a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction.” (quoting *Katz*, 546 U.S. at 378)).

b. *Qui Tam* Actions as Analogs

In a *qui tam* action, a private party brings suit on the government's behalf. The government is considered the real plaintiff while the private party, called a relator, sues in the name of the government.²⁸⁸ Generally, the relator in a successful *qui tam* action receives a percentage of the money owed to the government. The False Claims Act ("FCA"), originally passed during the Civil War, is possibly the most prominent example of federal *qui tam* actions.²⁸⁹ "FCA establishes a scheme that permits either the Attorney General or a private party to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a *qui tam* action. In this scheme, private parties are enforcing governmental rights. When a relator initiates an action, the United States is given 60 days to review the claim and decide whether it will "elect to intervene and proceed with the action."²⁹⁰

Some have argued that a federal delegation of eminent domain power allows private parties to stand in the shoes of the sovereign, using *qui tam* actions as either a proposed model or an analogy.²⁹¹ But for a private party to sue a state sovereign, even through a *qui tam* suit in the name of the federal government, the statutory basis for the suit must nonetheless permit suit against the state.²⁹² As such, these suits are still subject to the same clear statement rules of federalism that any abrogation of state sovereign immunity would have to meet. For example, when Court analyzed the FCA in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, it began with the question of whether there was a statutory basis to allow the private party to sue a state agency. There, a private plaintiff initiated a *qui tam* action in the name of the federal government against an arm of the state of Vermont.²⁹³ After the federal government declined to intervene in the suit, the state agency moved to dismiss on sovereign immunity grounds. Although the False Claims Act created liability for "any person," the Court determined that in the case of *Stevens*, it did not subject states to liability

288. *E.g.*, *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006) ("The *qui tam* relator brings the action *on behalf of* the federal government. The relator stands in the government's shoes—in neither a better nor worse position than the government stands when it brings suit.").

289. 31 U.S.C. § 3729 *et seq.*

290. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009) (internal citations omitted) (quoting 31 U.S.C. § 3730(b)(2)).

291. FED. ENERGY REGULATORY COMM'N, FERC OPEN MEETING JANUARY 30, 2020, FERC LIVE VIDEO & AUDIO WEBCASTS AND ARCHIVES (Jan. 30, 2020), <https://perma.cc/7KQE-9MFQ>.

292. FERC has on several occasions acknowledged that the agency lacks federal authorization to condemn land itself, and suits brought by private certificate holders to condemn lands for pipelines under the Natural Gas Act are not brought in the name of the commission. Order on Petition for Declaratory Order, *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at P 49 (Jan. 30, 2020).

293. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).

in private suits, because of the “longstanding interpretive presumption that ‘person’ does not include the sovereign.”²⁹⁴ Thus, without any further textual indication that Congress intended to create liability for states, the Court held that a private party could not bring suit against a state. Further, in dicta, the Court expressed “serious doubt” that a private party acting as a federal *qui tam* relator could bring suit against a State.²⁹⁵

Similarly, in *Raygor v. Regents of the University of Minnesota*, the Court discussed whether a statute could incidentally abrogate state sovereign immunity, commenting that, in the case at hand, “[t]he notion that federal tolling of a state limitations period constitutes an abrogation of state sovereign immunity as to claims against state defendants at least raises a serious constitutional doubt.”²⁹⁶ There, plaintiffs filed both an Age Discrimination in Employment Act claim and pendant state law discrimination claims against the University of Minnesota in federal court. The university, as an arm of the state, successfully moved to dismiss on sovereign immunity grounds. Plaintiffs, upon refileing in state court, argued that 28 U.S.C. § 1367, the supplemental jurisdiction statute, tolled their claims. However, the Supreme Court agreed with the Minnesota Supreme Court that dismissal on state sovereign immunity grounds did not toll the claims because the statute did not purport to abrogate state sovereign immunity.

Several circuits have also tackled the same question: whether the real party in interest in a *qui tam* action is the relator or the federal government. In *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, a relator brought a False Claims Act claim against a state university hospital, and the federal government declined to intervene.²⁹⁷ On appeal, the Fourth Circuit allowed the case to proceed despite the University’s sovereign immunity defense because, even though an unconsenting state was litigating against a suit brought by a private plaintiff, the federal government was the “real party in interest.” The Fourth Circuit unquestioningly accepted that states enjoyed immunity against suits by private parties, and that states waived sovereign immunity against suit by the federal government.²⁹⁸ Thus, according to the *Milam* court, the question was, “simply stated: is this a suit by the United States?”²⁹⁹ Answering in the affirmative, the court held that the real party in interest was the federal

294. *Id.* at 780.

295. *Id.* at 787 (“We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is ‘a serious doubt’ on that score.” (quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring))).

296. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 534 (2002).

297. *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 47 (4th Cir. 1992).

298. *Id.* at 48 (citing *United States v. Mississippi*, 380 U.S. 128 (1965); and *West Virginia v. United States*, 479 U.S. 305 (1987)).

299. *Id.*

government, and state sovereign immunity simply did not apply.³⁰⁰

By contrast, in *United States ex rel. Foulds v. Texas Tech University*, a plaintiff brought a *qui tam* action against Texas Tech for alleged False Claims Act violations.³⁰¹ The district court, relying on the Fourth Circuit's analysis in *Milam*, dismissed the state's sovereign immunity defense because *qui tam* actions are in the name of the federal government, not private plaintiffs, such that the Eleventh Amendment did not apply.³⁰² On appeal, the Fifth Circuit reversed and dismissed the case, holding that Texas Tech was entitled to assert sovereign immunity against the private plaintiff. Using *Seminole Tribe* as a benchmark for its analysis, the Fifth Circuit analyzed whether the statutory basis for the *qui tam* action had (1) "unequivocally expressed its intent to abrogate the immunity;" and (2) "whether Congress has acted 'pursuant to a valid exercise of power.'"³⁰³ Interpreting *Blatchford*, the court noted that the Eleventh Amendment was jurisdictional in nature, preventing federal courts from hearing any claim brought by a private party against an unconsenting state where sovereign immunity had not been abrogated.³⁰⁴ Thus, for the Fifth Circuit, the court lacked jurisdiction to even determine if the False Claims Act had created a cause of action to be brought against the state.

However, the *Foulds* court seemed to struggle with the question, and found it difficult to properly square *qui tam* actions against states with an analog.³⁰⁵ First, the Fifth Circuit looked at cases where the federal government had assigned cases to a private plaintiff, who then tried to assert a claim against state actors.³⁰⁶ The Fifth Circuit ultimately concluded that, in the context of *qui tam* actions, "the United States cannot delegate to non-designated, private individuals its sovereign ability to evade the prohibitions of the Eleventh Amendment. "Only 'responsible federal officers,' or those who act at their instance and under their control, may exercise the authority of the United States as sovereign."³⁰⁷

Likewise, the Ninth Circuit held in *Jachetta v. United States* that sovereign immunity barred several *qui tam* claims where a private party attempted to assert what the plaintiff argued was the federal government's pecuniary interest.³⁰⁸

300. *Id.* at 50.

301. *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 279 (5th Cir. 1999).

302. *Id.* at 284 (citing *United States ex rel. Foulds v. Tex. Tech Univ.*, 980 F. Supp. 864, 870 (N.D. Tex. 1997)).

303. *Id.* at 294 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996)).

304. *Id.* at 291-92 ("The Supreme Court has made clear, however, that Congress cannot delegate to private citizens the United States' sovereign exemption from Eleventh Amendment restrictions."). The Fifth Circuit only described the Eleventh Amendment in the federal context, likely in part because it was decided before *Alden*.

305. *Id.* at 289-90 ("The question allows no easy answer. One reason for the perplexity is that Congress has not, in this respect, specified the contours of the relationship between the *qui tam* plaintiff and the United States.").

306. *Id.*

307. *Id.* at 294.

308. *Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011).

There, a plaintiff brought a series of claims against both the Bureau of Land Management and the state of Alaska in a land dispute. Nonetheless, the *Jachetta* court rejected the argument that the federal government could authorize a private plaintiff to sue on its behalf. In sum, several courts have understood *qui tam* actions where the government declines to assert its own interest, leaving the suit in the control of the relator, as only nominally in the name of the government. Thus such actions are not functional analogs as they do not invoke the same governmental interests nor rights.

CONCLUSION

The founders did not craft the Constitution in isolation, but against the backdrop of countless legal traditions and norms, many of which were formally codified within the document. Two of these, eminent domain and state sovereign immunity, both inherent in sovereignty, existed prior to ratification of the Constitution, and their contours were in part limited or bolstered by the Fifth and Eleventh Amendments, respectively. Recognizing this history and legal function, this Article has argued that laws delegating federal eminent domain power to private parties do not, and should not, confer with it the separate power of bringing suit in federal or state courts against states without state consent. As described above, private delegations suffer from lack of accountability. This paper is certainly not meant to suggest that private delegations are improper, that land should not be condemned, or that sovereign immunity is immutable. It is only meant to illustrate how sovereign immunity and eminent domain are separate powers of sovereignty that are not interconnected.

In each private delegation where the extent of the delegation is either undefined or does not limit the power against state real property, this Article concludes that Congress has granted a right without a remedy; that Congress perhaps meant to allow the private party to take state land, and where a state allows that taking to occur, it may be effectuated in the courts. This may well be an unsatisfying resolution for Congress to widely grant rights to private parties through delegation of its own powers, but for them to be unenforceable at the margins. Yet, this is not a new phenomenon, and happens frequently in the context of congressionally established private rights.³⁰⁹ This analysis may also bear on the foundational question of whether or not the federal government has any source of constitutional authority to directly condemn state land without the

309. See, e.g., *Seminole Tribe of Fla.*, 517 U.S. at 55-56 (1996) (sovereign immunity precludes suit against state); *Ex parte Young*, 209 U.S. 123, 151 (1908) (sovereign immunity precludes damages actions against state officials); *Armstrong v. Exceptional Child Center*, 575 U.S. 320, 324-27 (2015) (whether a plaintiff has a federal right is a separate and distinct question from whether a cause of action to enforce that right is available); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (plaintiff only entitled to prospective, not retrospective relief); *Sierra Club v. Trump*, 929 F.3d 670, 697 (9th Cir. 2019) (“Congress may, of course, limit a court’s equitable power to enjoin acts violating federal law.”).

state's consent. While the Supreme Court has previously opined on this question,³¹⁰ this Article raises the specter that its previous reasoning may no longer survive. However, it is abundantly clear that a private party may not take from an unconsenting state.

310. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) (allowing a federal taking of state land).