Is There a Federal Eminent Domain Power?

Author : Ilya Somin

Date : September 4, 2013

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

One of the most widely accepted truisms of American constitutional law is that the federal government has the power to condemn property through eminent domain. In modern times, even scholars and jurists who generally take a narrow view of federal power—myself included, until I read this pathbreaking article—did not question this idea. Yet, as William Baude shows, the conventional wisdom at the time of the Founding, and for many decades thereafter, was exactly the opposite: the federal government did not have the authority to condemn property within the territory of state governments. It could only do so in the District of Columbia and the federal territories. Baude's research has important implications for the constitutional law of both federalism and takings.

Most students of takings law are aware that the Supreme Court did not rule that the federal government had the power of eminent domain until the 1875 case of *Kohl v. United States*. But Baude's important work shows that that result was far from a foregone conclusion. Indeed, he argues that *Kohl* was wrongly decided.

Baude demonstrates that, prior to the 1860s, the federal government virtually always relied on state governments to condemn property at its behest when it sought to obtain land within the states that could not be purchased through voluntary sales. Although the power of eminent domain is not one of the enumerated powers listed in Article I of the Constitution, most modern scholars assume that its use is authorized by the Necessary and Proper Clause, which gives Congress the authority to enact laws that are "necessary and proper" for "carrying into execution" the other powers granted to the federal government.

Baude, however, shows that the dominant view at the time of the Founding and throughout most of the nineteenth century was that the Clause did not authorize the use of eminent domain, because it was seen as giving Congress only authority "incidental" to enumerated powers, not "great and independent" powers that amount to major separate grants of authority. This theory was partially elaborated by Chief Justice John Marshall in *McCulloch v. Maryland,* where he noted that the Clause does not authorize the exercise of "great substantive and independent power[s]." It was also famously adopted by Chief Justice John Roberts in his decisive opinion in *NFIB v. Sebelius*, where he ruled that the individual health insurance mandate was not "proper" because the power to impose mandates is a great and independent power, not an incidental one. As several of the Founding Fathers pointed out, if the Clause authorized any powers that might be "useful" or "convenient" tools for implementing other powers, then much of Article I would become superfluous. For example, there would be no need for a separate power to levy taxes, since taxation is clearly a useful means of raising revenue needed to implement the enumerated power to raise armies.

In the first part of his article, Baude shows that the power of eminent domain was regarded as a great and independent power similar to taxation, both by the Founders and by most early nineteenth century scholars and jurists. Given the Founders' strong commitment to property rights, it is not surprising that what Supreme Court Justice William Patterson in 1795 called "the despotic power" to take property was regarded as more than merely incidental. Multiple unanimous or near-unanimous Supreme Court

decisions reached the same conclusion in the 1840s and 1850s. As late as the 1860s, even such advocates of relatively broad federal power as Representative Thaddeus Stevens and Senator Lyman Trumbull raised constitutional objections to legislation that would have allowed the federal government to condemn property for railroads.

The Supreme Court in *Kohl* and some later commentators also claimed that the power of eminent domain is implicit in the existence of the Takings Clause of the Fifth Amendment. There would be no point to requiring "just compensation" for the taking of property if the federal government—the only entity restricted by the Bill of Rights at the time of the Founding—could not condemn property in the first place. But Baude notes that the Takings Clause was likely intended to constrain the use of eminent domain in the District of Columbia and the federal territories, where the federal government has always been able to wield sovereign powers otherwise available only to the states. He also points out that, unlike much of the rest of the Bill of Rights, the Takings Clause was not enacted in response to any strong political demand by anti-Federalists or by state governments, but was likely a personal initiative of James Madison's. This reinforces the idea that the federal government was not believed to have a general power of eminent domain, and therefore there was not much concern about constraining it.

The *Kohl* Court's main argument in defense of a federal eminent domain power is that this authority is inherent in the nature of sovereignty and therefore did not need to be enumerated. Baude rebuts this idea effectively, noting that the same could be said of many enumerated powers in Article I, including the power to raise armies and the power to tax, among others. The latter are surely even more essential to the workings of effective government than eminent domain is, but they were still enumerated. The fact that the federal government had survived and (mostly) prospered for almost a century without the power of eminent domain suggests that it was not really essential after all.

Baude concludes that "*Kohl*'s invocation of th[e] notion of inherent powers (and its expansion in later cases) has very little support in the text, structure, or early history of the Constitution itself." He suggests that the rise of the ahistorical inherent sovereignty argument was an understandable Unionist backlash against the extreme states' rights claims made by the Confederates and their sympathizers.

Baude's analysis has important implications for federalism doctrine. In particular, it reinforces the idea, endorsed by five justices in *Sebelius*, that a "necessary" law might still be unauthorized by the Necessary and Proper Clause because it is not "proper." Baude follows Chief Justice Roberts and Chief Justice Marshall in contending that a necessary but improper claim of power is one that would give Congress a great and independent new power, rather than merely an incidental one. He contends that this reinforces the Court's earlier decisions holding that the federal government does not have the power to commandeer state officials, and might even reinforce long-rejected claims that Congress lacks the power to impose military conscription. Somewhat surprisingly, given his other conclusions, Baude doubts that the individual health insurance mandate falls on the "improper" side of the line, because Congress had used mandates in the Founding era under its powers to regulate the militia and to raise and support armies.

As Baude admits, the line between a great and independent power and an incidental one is not always clear. He also recognizes that originalist arguments like the one he presents are not the only available tools of constitutional interpretation. Nonetheless, many modern scholars and jurists claim to be originalists of one type or another, and even many nonoriginalists believe that historical arguments should have at least some weight, even if they won't always outweigh other considerations. Baude's analysis has great relevance for this broad audience. At the very least, it helps us understand an important aspect of the constitutional history of eminent domain that previous scholarship has mostly neglected.

Baude's work is also relevant to modern disputes over the interpretation of the Takings Clause, especially the Public Use Clause. The Supreme Court's controversial 2005 decision in *Kelo v. City of New London* rekindled the longstanding debate between advocates of broad and narrow definitions of "public use": those who claim that virtually anything that might potentially benefit the public qualifies as a "public use" justifying the use of eminent domain, and those who argue that "public use" requires government ownership of condemned property or a legal right of access by the general public. Defenders of the broad view sometimes point to the paucity of early statements that the Public Use Clause forbids private-to-private takings as a justification for their position. This absence becomes readily explicable if, at the time, the federal eminent domain power was believed to be limited to federal territories and the District of Columbia. These sparsely settled areas had relatively little private property, and the federal takings likely to occur there nearly all involved public uses in the narrow sense of the term, such as roads and other infrastructure projects. Thus, there was little need to consider the question of whether the Fifth Amendment barred transfers from one private party to another. Obviously, this does not by itself prove that advocates of the narrow view are correct. But it does weaken one standard argument against them.

I have a few reservations about Baude's excellent analysis. Most important is that he fails to consider the possibility that, even if the federal government lacked a general eminent domain power, it is possible that Article I gives it the power to use eminent domain for a few narrowly specified purposes closely related to various enumerated powers. For example, the power to "raise and support" armies might be thought to allow the use of eminent domain to acquire land for military bases. Such a restricted eminent domain power is very different from one that would allow the federal government to condemn property for any purpose that might be beneficial in some way. It might be a genuinely "incidental" power, as opposed to a great and independent one.

Similarly, as I have detailed in a recent article, the flaw in the federal government's argument in *NFIB v. Sebelius* was not so much that it justified the health insurance mandate as such, but that its logic would validate virtually any other mandate of any kind, including the famous "broccoli" hypothetical. A strictly limited power to impose a narrow range of mandates, like that which Congress in the 1790s exercised under the Militia Clause, does not raise the same constitutional objections.

Another weakness in Baude's theory—like Chief Justice Roberts'—is that much more needs to be said about how we should draw the line between incidental powers and great and independent ones. Baude recognizes the problem, but does not come close to fully solving it.

Future research building on Baude's work should explore its implications for public use doctrine, while also considering the possibility that the lack of a general federal power of eminent domain in the states may not preclude a more limited eminent domain power. In the meantime, this article is likely to be the definitive analysis of the constitutionality of federal eminent domain power for some time to come.

Editor's note: This review was written and edited before Prof. Somin knew that he and Mr. Baude would be co-bloggers at volokh.com.

Cite as: Ilya Somin, *Is There a Federal Eminent Domain Power?*, JOTWELL (September 4, 2013) (reviewing William Baude, *Rethinking the Federal Eminent Domain Power*, 122 **Yale L. J.** 1738 (2013)), https://conlaw.jotwell.com/is-there-a-federal-eminent-domain-power/.