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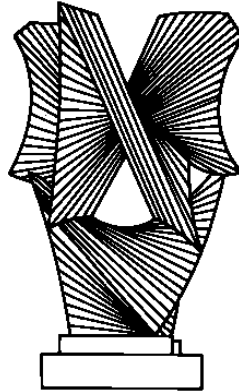
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THE INTERBELLUM CONSTITUTION: FEDERALISM IN THE LONG FOUNDING MOMENT

Alison L. LaCroix*

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Today, the mechanism of the spending power drives the gears of the modern federal machine. But early-nineteenth-century constitutional debates demonstrate that the spending power is essentially a workaround, and a recent one at that – a tool by which Congress achieves certain political and legal ends while respecting the formal boundaries set by Article I and the Tenth Amendment. This “interbellum” period was enormously significant for American constitutional law, in particular the constellation of related doctrines concerning congressional power that we now place under the general heading of “federalism”: the spending power, the enumerated powers of Article I, and the anticommandeering principle of the Tenth Amendment. Political and legal actors in the early nineteenth century believed themselves to be living in what this Article argues was a long founding moment, in which the fundamental terms of the federal-state relationship were still open to debate. Constitutional scholars have mistakenly overlooked the constitutional creativity of the period. As a normative matter, I argue for an approach to modern constitutional interpretation that recognizes the ever-changing nature of the landscape of constitutional permissibility, and that offers documentary evidence of the precise contours of that change. Studying the evolution of the spending power over time, especially where the text itself remains constant, demonstrates that ideas about federal structure are not fixed. Therefore, constitutional federalism itself is not fixed – a particularly important insight in an area of constitutional doctrine that is dominated by originalist approaches.

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THE INTERBELLUM CONSTITUTION: FEDERALISM IN THE LONG FOUNDING MOMENT

Time and experience have verified to a demonstration, the public utility of internal improvements. That the poorest and most thinly populated countries would be greatly benefitted by the opening of good roads, and in the clearing of navigable streams within their limits, is what no person will deny. . . . The only objection is to paying for them; and the objection to paying arises from the want of ability to pay.

– Abraham Lincoln, 1832¹

The constitutional landscape of the early nineteenth century, roughly between the Revolution and the Civil War, was dramatically different from that of the twenty-first, or even the twentieth, century. Even in the realm of textual provisions that have not changed since the 1790s, such as Article I’s enumeration of Congress’s powers or the Tenth Amendment’s reservation of powers to the states and the people, the foundational assumptions – and the resulting worries and preoccupations – of what this Article terms the “interbellum” period proceeded from premises that must be understood as distinct and to some degree alien from modern ones. The constitutional text is the same, but the modes of interpretation that contemporaries used were different, as were the basic questions they were asking the text to answer. The words of Article I and the Tenth Amendment have not changed, but the surrounding universe of constitutional possibility has.²

Given these differences, why are nineteenth-century constitutional debates relevant to modern constitutional thought? Because the landscape of constitutional possibility is perpetually changing, and the change in each moment informs, and indeed shapes, the contours of the constitutional landscape in the next moment. Yet still the landscape of each remains distinct, and in some cases appears incompatible, when one attempts to reconcile cases and doctrines across eras. Early-nineteenth-century Americans exemplify this point. Their writings routinely

¹ ABRAHAM LINCOLN, *Appeal to the Voters of Sangamo County*, Mar. 9, 1832, in *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN* 4 (Richard N. Current ed., 1967).

² See Alison L. LaCroix, *The Shadow Powers of Article I*, 123 *YALE LAW JOURNAL* (forthcoming, 2014) (discussing the structural and doctrinal significance for federalism of changing theories of Congress’s powers under Article I).

expressed both a sense of vigorous participation in the founding of the Republic, and a gnawing worry that they had been born too late, and too undistinguished, to wear that mantle comfortably.³ They viewed themselves as both a special cohort of energetic enactors of their forbears' plans and a lesser generation of founders-manqués.⁴

This point is a historical one; it attempts to explain the actions and motivations of historical actors. But concerns of historiography and constitutional interpretation also offer important reasons to examine the early nineteenth century. From a historiographical perspective, focusing on the competing narratives that scholars have offered, the period is ripe for reexamination. Many of the dominant accounts are several decades old, or they pay insufficient attention to constitutional thought: the “age of Jackson”; the “market revolution”; the “rise of American democracy”; the “communications revolution.”⁵ These stories fail to recognize one of the most significant markers of the era: the relentless focus of legal elites, politicians, and ordinary people on the Constitution. This interbellum period witnessed the emergence of the Constitution as the preeminent organizing lens through which Americans viewed political and legal questions.⁶ One reason for the period’s relative neglect in legal history is the emphasis of constitutional law scholarship on the founding period and Reconstruction, which has meant that the period between those watershed events has not received due attention.

The early nineteenth century is thus enormously significant for American constitutional law, in particular the constellation of related doctrines concerning congressional power that we now place under the general heading of “federalism”: the spending power and the anticommandeering principle of the Tenth Amendment.⁷ The period

³ See Alison L. LaCroix, *The Lawyer’s Library in the Early American Republic*, in *SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL IN THE EIGHTEENTH AND NINETEENTH CENTURIES* (Martha C. Nussbaum & Alison L. LaCroix eds., 2013).

⁴ The paradigmatic example of the anxious inheritor, albeit from a few decades later, is Henry Adams. See HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* (1918).

⁵ See, respectively, ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* (1945); CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1848* (1991); SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (2006) DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT*; ALFRED D. CHANDLER, JR., *THE VISIBLE HAND*. But see Daniel Feller, “The Market Revolution Ate My Homework,” 25 *REVS. IN AM. HIST.* 408 (1997).

⁶ For a related point regarding the Civil War, see Arthur Bestor, “The American Civil War as a Constitutional Crisis,” 69 *AM. HIST. REV.* 327 (1964).

⁷ On the reemergence of judicial federalism, see ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* 97 (2012) (discussing the emergence of “New Federalism” theories, “first as a political movement in the 1970s and 1980s, and then as the judicial revolution of the 1990s.”); see also Neil A. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *VAND. L. REV.* 1629, 1648-50 (2006) (describing the benefits of federalism); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *TEX. L.*

between roughly 1815 and 1850 witnessed a series of sustained and contentious public debates about the federal government's power to fund public works projects – “internal improvements,” in the parlance of the day. These projects included roads, canals, harbors, lighthouses, and, later, railroads.⁸ The central issue was the scope of Congress's power vis-à-vis the states in a federal system. Unlike recent challenges to federal regulation that arguably interferes with state sovereignty,⁹ however, the nineteenth-century controversy was not framed in terms of the states' power to resist encroachments by Congress. Rather, the debate turned on an entirely different conception of state sovereignty at the time of the founding from the one employed in modern caselaw.

As I will demonstrate, the principal factors in much of the Court's modern federalism jurisprudence were largely absent from, or irrelevant to, the debates over the practical meaning of federalism in the early nineteenth century.¹⁰ The assumptions of unwaivable, monolithic state sovereignty and perpetual, systemic federal-state tension that have underpinned the majority opinions in many of the Court's federalism cases since the 1980s are difficult to trace to the founding period or the early nineteenth century. As the controversy over internal improvements illustrates, crucial interbellum constitutional debates about federalism unfolded in the political branches: Congress, the presidency, and the state legislatures. At issue was the scope of legislative power. Moreover, the key themes included state consent; distinctions among Congress's power to appropriate funds for internal improvements, to execute the improvements itself, and to transfer the public lands to the states for the purposes of executing the improvements; and the role of the federal government as proprietor of the public lands.

REV. 1, 51-63 (2004) (evaluating the Court's treatment of “the values that motivate our attachment to federalism in the first place”); Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

⁸ See JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT* (2001); CARTER GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890* (1974); GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION, 1815-1860*; Carter Goodrich, *National Planning of Internal Improvements*, 63 POLI. SCI. Q. 16 (1948).

⁹ See, e.g., *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

¹⁰ As I have argued elsewhere, federalism also had a distinctly different meaning in the founding period from the meaning that is often ascribed to it today. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 220-21 (2010) (arguing that “the federal ideal” is “an intellectual artifact, not a transcendent or timeless idea that has always hovered around waiting to be applied to a particular political project”).

Today, the mechanism of the spending power drives the gears of the modern federal machine.¹¹ The internal improvements debates offer a nineteenth-century lens on that power that highlights the differences between interbellum and millennial constitutional thought. The internal improvements controversy is thus both analogous and disanalogous to modern debates on the practical implementation of federalism principles. As I will show, interbellum constitutional thought was generally wary of consolidated federal power over public works projects, preferring instead to structure such projects as cooperative federal-state efforts. In contrast, modern constitutional law doctrine often takes the opposite approach: the federal government's enumerated powers under Article I, where appropriate, are the preferred structural route for such projects, and indirect routes via state cooperation are disfavored.¹² As an interpretive matter, to the extent that modern caselaw relies on a particular substantive concept of federalism that has been consistent since the founding, the internal improvements example urges us to rethink that notion. Since the earliest days of the Republic, federalism has been an unstable and contested concept, worked out through the meshing of theory and practice.¹³ By highlighting nineteenth-century understandings of the spending power, the internal improvements debate demonstrates the dynamic nature of federalism in practice.

But this story is much more than a plea for recognizing contingency or appreciating a path not taken. As a historical matter, I contend that political and legal actors in the early nineteenth century believed themselves to be living in what I term a “long founding moment,” in which the fundamental terms of the federal-state relationship were still open to debate. As a historiographical matter, I posit that scholars have mistakenly overlooked the constitutional creativity of the period. As a matter of constitutional interpretation, I argue for an approach that recognizes the ever-changing nature of the landscape of constitutional permissibility, and that offers documentary evidence of the precise contours of that change.

The spending power, in both its interbellum and millennial versions, is essentially a workaround – a tool by which Congress achieves certain political and legal ends while respecting the formal boundaries set

¹¹ See Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (2012); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Thomas R. McCoy and Barry Friedman, *Conditional Spending: Federalism's Trojan Horse* 1988 SUP. CT. REV. 85; see also Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975 (2011).

¹² See, e.g., *Pierce Co. v. Guillen*, 537 U.S. 129 (2003); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

¹³ See Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733 (2011).

by Article I and the Tenth Amendment.¹⁴ In keeping with the changing nature of those boundaries as limned by the Court, the legislative workaround also changes.¹⁵ Studying the changes to the workaround over time, especially where the text itself remains constant, demonstrates that ideas about federal structure are not fixed. Therefore, constitutional federalism itself is not fixed. Comparing a particular doctrine across time offers insight into the path of constitutional change by revealing what arguments are, and what arguments are not, part of the Constitution at any given moment.

I. THE MODERN SPENDING POWER.

Imagine that a majority of representatives in Congress settles on a plan to build a new national highway system. Some states already have adequate roads that can be incorporated into the new system, but others have decrepit highways that must be improved in order to allow the most up-to-date cars – electric, perhaps, or self-driving. Those states’ legislatures are dominated by politicians who oppose federal funding for state public works projects and who endorse a narrow view of congressional power. These state politicians also worry that the expansion of the electric/self-driving car industry will harm carmakers in their states. A handful of these states express their intention to resist the federal program. Undeterred, members of Congress insist that the cooperation of all the states is necessary to achieve the goals of the new highway system. But the congressional representatives would prefer not to inflame the resisting states by issuing direct, and preemptive, federal legislation. May Congress threaten to take away all federal highway funding from these states if they do not undertake the necessary improvements? Not just new highway funding for the new highway system, but *all* highway money?

To a degree rarely seen in constitutional law, the answer to this question depends on when the question is asked. Prior to June 2012, the answer would likely have been “yes.” The governing Supreme Court precedent, *South Dakota v. Dole*,¹⁶ offered a clear answer: the Constitution “empowers Congress to ‘lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.’”¹⁷ As part of this spending power, Chief Justice William Rehnquist wrote, Congress “may attach conditions

¹⁴ See LaCroix, *supra* note __, at __ (*Shadow Powers*) (discussing the doctrinal and structural relationships between Article I and the Tenth Amendment).

¹⁵ See generally Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

¹⁶ 483 U.S. 203 (1987) (upholding federal legislation requiring states to raise the minimum age for purchase or public possession of alcoholic beverages to 21 years or else lose a percentage of otherwise allocable highway funds).

¹⁷ *Id.* at 206 (quoting U.S. CONST. Art. I, sec. 8, cl. 1).

on the receipt of federal funds” in order to “further broad policy objectives.”¹⁸ The majority in *Dole* waved aside concerns about federal coercion of the states that had underpinned analogous cases decades earlier.¹⁹

After June 2012, however, the answer to the question of the scope of Congress’s conditional spending power changed. The Court did not overrule *Dole*, but it dramatically circumscribed the previously vast domain in which the conditional spending power had been understood to operate.²⁰ In the health care case, *National Federation of Independent Business v. Sebelius*, the Court invalidated the Medicaid provision of the Affordable Care Act on the ground that it “penalize[d] States that choose not to participate in that new program by taking away their existing Medicaid funding.”²¹ Reviving an early-twentieth-century strand of doctrine, as well as invoking the “new federalist” decisions of the 1980s and 1990s, Chief Justice John Roberts wrote, “Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when pressure turns into compulsion, the legislation runs contrary to our system of federalism.”²² In short, the provision amounted to “economic dragooning” insofar as it “threatened [the] loss of over 10 percent of a State’s overall budget.”²³ The Court thus returned coercion to the center of the analysis of federal conditional spending programs.

But one might reasonably ask whether a Court comprising several originalist justices might be interested in the history of the spending power. What was the nature of the power at a time closer to the founding, perhaps nearly two hundred years ago, in 1822? Imagine asking a citizen of the early Republic how Congress might permissibly go about building a system of roads connecting the eastern seaboard with the interior states carved out of the Northwest Territory, such as Ohio, Indiana, and Illinois. Would Congress have the power to threaten to withhold funding for roads if, for example, Ohio refused to build its roads using a designated sturdy material, such as the new Scottish macadam technology, which mixed small stones with cement?²⁴ In other words, what textual and structural tools did the federal government possess in 1822 to compel a state to act?

The citizen of 1822 would likely greet this question with a quizzical expression. Yes, she responds, Congress certainly may withhold

¹⁸ *Id.* (internal quotation marks and citation omitted).

¹⁹ See, e.g., *id.* at 209 (distinguishing prior cases).

²⁰ See secondary sources re post-*Dole* scope of cond’l spending power.

²¹ 567 U.S. ___ (2012), No. 11-393 (slip op. at 55).

²² *Id.* (slip op. at 47) (quotation marks omitted).

²³ *Id.* (slip op. at 52).

²⁴ The first macadamized road in the United States was the Boonsboro Turnpike Road in Maryland, completed in 1822.

funding for the Ohio road. Then, she follows with a series of questions: is the road in question located entirely within the state of Ohio? What were the terms of the state of Ohio's admission to the Union? What is the source of the federal road funding – a tariff surplus, the general revenues, some other source? Who owns the lands on which the Ohio road is to be built – the federal government, the state, or private parties? Has Ohio consented to the construction of the road?

These questions from the nineteenth-century observer would aim at understanding not just the nature of the condition – the deal that Congress is offering the state – but also the mechanism of the federal spending program itself. A court in 1822 would likely have concluded that Congress could indeed strip road funding from the states²⁵ because it would have questioned whether Congress could constitutionally grant those monies to the state in the first place. To early-nineteenth-century ears, the Ohio road hypothetical would conjure an entirely different set of constitutional questions from the ones underlying modern spending-power doctrine. The fear of economic dragooning, of commandeering the states and rendering them little more than administrative districts, lies at the heart of the spending power as it has developed since the early twentieth century. “What can Congress compel the states to do?” is the animating question for much of the Supreme Court's modern federalism doctrine. Between the Revolution and the Civil War, however, American legal and political thought considered a different, less defensive question: “What can Congress do in the name of the states?”

The spending power derives from the General Welfare Clause of Article I, section 8, of the Constitution, which provides, “The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the general welfare of the United States.”²⁶ Although the word “spend” does not appear in the clause, the orthodox understanding of the clause is that it vests Congress with the power to tax, and therefore to spend, for the general welfare of the United States. The taxing and spending powers are thus conceptually and textually linked, but the caselaw under each has diverged over the past several decades. Since the 1930s, taxing power cases typically focus on federal taxation of individuals,²⁷ while spending power cases tend to concern Congress's

²⁵ Assuming, of course, that the citizen of 1822 did not regard the offer of federal funds as having created a vested right in the state. On vested rights theory in nineteenth-century American legal thought, see Story's *Commentaries* and *Dartmouth College* and *Fletcher v. Peck* on vested rights.

²⁶ U.S. CONST. Art. I, sec. 8.

²⁷ See, e.g., *NFIB*, 567 U.S. at ___ (upholding the individual mandate provision of the Affordable Care Act under the taxing power); *U.S. v. Butler*, 297 U.S. 1 (1936) (invalidating tax on agricultural commodities under Agricultural Adjustment Act of 1933 as beyond the scope of the “taxing and spending power”).

authority to use federal funds to encourage states to adopt particular programs or policies.²⁸

From the ratification debates of the 1780s to the New Deal controversies of the 1930s, the scope and structural relevance of the General Welfare Clause were the subjects of extensive controversy. At issue was how the clause fit into Article I's architecture of enumerated powers. Was its closest relative the Necessary and Proper Clause, which operates as an auxiliary power to the enumerated powers and thus does not give Congress an independent source of power to enact laws based only on the claim that they are necessary and proper?²⁹ This narrow view is generally associated with James Madison, who held that the general welfare power was not a freestanding power and therefore must be attached to an enumerated power.³⁰ Or was it more akin to one of those enumerated powers, such that Congress could regulate based on a finding that a particular policy aided the general welfare of the nation? This broad view of the general welfare power as a freestanding power is attributed to Alexander Hamilton, and the idea of it becoming the accepted interpretation worried some observers at the ratification debates.³¹ An intermediate position, offered by the constitutional law scholar Edward S. Corwin, treats the general welfare power as "not an independent grant of power, but a qualification of the taxing power."³² On this view, the general welfare power is limited to taxing and spending and does not include broader types of regulation.

In *U.S. v. Butler* (1936),³³ the Court adopted what it termed the Hamiltonian view of the taxing and spending power (although the justices ultimately invalidated the *Butler* tax as impermissibly close to regulation). According to this theory, "the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and appropriate."³⁴ In other words, when Congress can plausibly characterize a particular program as taxing or spending, it need not tie that program to some other enumerated power.³⁵

²⁸ See, e.g., *NFIB*, 567 U.S. at __ (upholding in part and invalidating in part the ACA's expansion of state-run Medicaid programs); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding Social Security Act's scheme of encouraging employers to pay taxes to state unemployment compensation fund).

²⁹ U.S. CONST. Art. I, sec. 8, cl. 18.

³⁰ See James Madison to Martin Van Buren, Sept. 20, 1826.

³¹ See Pauline Maier, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION* (2010).

³² See Edward S. Corwin, *The Spending Power of Congress – Apropos the Maternity Act*, 36 HARV. L. REV. 548, 552 (1923).

³³ 297 U.S. 1, 65 (1936).

³⁴ *Id.*

³⁵ See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (adopting the four-part *Steward Machine* test, according to which the exercise of the spending power must be in pursuit of the general welfare, the condition must be unambiguous, the condition must have some

Following this ostensibly straightforward lineage, many scholars interested in the origins of the spending power have looked to the New Deal period, specifically the 1936 decision in *Butler*.³⁶ Others have identified the internal improvements debates as the source of the spending power, suggesting a more or less direct analogy between the early-nineteenth-century conception of the General Welfare Clause and that of their own period.³⁷

Because it structures the relationship between Congress and the states, the spending power is connected to two other important areas of doctrine: on one side, congressional power under the Commerce Clause³⁸ and the Necessary and Proper Clause³⁹; and on the other side, the limits that the Tenth Amendment places on congressional power. Article I and the Tenth Amendment,⁴⁰ along with the Supremacy Clause, constitute the few places in the Constitution's text where we find reference to federalism.⁴¹ The Tenth Amendment is typically viewed as a textual basis for assertions of state sovereignty. As such, it becomes doctrinally relevant in two situations. The first is the situation in which Congress issues a general statute aimed at individuals pursuant to one of its enumerated powers, and the Court then steps in to strike down the legislation in the name of the states and their reserved powers.⁴² In the second situation, Congress attempts to use its enumerated powers to produce a specific action or policy from a state legislature or executive, and the Court holds that Congress has gone too far – it has “commandeered” the state government.⁴³ The Court's holding in the health care case that the Medicaid provision exceeded constitutional limits and amounted to coercion renders the Tenth Amendment a meaningful

relation to the federal interest in a particular program, and the condition cannot violate any other constitutional provision).

³⁶ See, e.g., Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89 (2001).

³⁷ See, e.g., Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons From the Spending Power*, 103 NW. U. L. REV. 395 (2009); David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1 (1994); Edward S. Corwin, *The Spending Power of Congress – Apropos the Maternity Act*, 36 HARV. L. REV. 548 (1923).

³⁸ U.S. CONST., Art. I, sec. 8, cl. 3.

³⁹ U.S. CONST., Art. I, sec. 8, cl. 18.

⁴⁰ U.S. CONST., Amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

⁴¹ See LaCroix, *supra* note __, at __ (*Shadow Powers*).

⁴² See, e.g., *Lopez v. United States*, 514 U.S. 549 (1995); *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985).

⁴³ See, e.g., *Printz v. United States*, 528 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

limit on the spending power for the first time in decades.⁴⁴ The debates over internal improvements in the early nineteenth century combined elements of all these doctrinal areas, in ways that are sometimes surprising to modern observers.

II. THE NINETEENTH-CENTURY SPENDING POWER: THE CASE OF INTERNAL IMPROVEMENTS.

The debate over the constitutional status of federal internal improvements unfolded in several installments between 1817 and 1850. Each episode centered on a specific public-works project for a road, a canal, a river or harbor, or a railroad. Each round of the debate involved different parties, including presidents James Madison, James Monroe, and Andrew Jackson, as well as senators John C. Calhoun, Henry Clay, Daniel Webster, and Stephen A. Douglas. State legislators, including the young Abraham Lincoln, were also important participants in the discussion.

At stake in each of these debates was a piece of congressional legislation appropriating funds for, or otherwise overseeing, a given improvement project that was “internal” in that it affected travel in the interior of the nation, and sometimes also “internal” to a particular state. In a handful of prominent cases, the president vetoed the bill. Although some commentators have described the process as one pitting a series of improvement-friendly Congresses against a succession of dogged White House opponents,⁴⁵ in fact the dynamic was more complex. Despite Thomas Jefferson’s advocacy of an agrarian republic based on decentralized power, for example, his signing of the Ohio Enabling Act in 1802 and the treaty concluding the Louisiana Purchase in 1803 caused contemporaries (as well as later scholars) to view him as unmistakably committing federal funds and authority to a national program of development.⁴⁶ Other presidents, such as John Quincy Adams, as well as

⁴⁴ See Metzger, *supra* note __, at 84 (describing *NFIB* as “challeng[ing] th[e] basic constitutional consensus” that “the fight over the federal government’s proper role in the economic sphere” is “largely political, not constitutional”); see generally THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS 111 (Nathaniel Persily, Gillian Metzger, & Trevor Morrison eds., 2013) (discussing constitutional issues surrounding *NFIB*); see also Dole, 483 U.S. at 216 (noting that the Court had not invalidated an act of Congress on the basis of the Spending Clause since 1936).

⁴⁵ See, e.g., Baker, *supra* note __ (*Constitutional Ambiguities*).

⁴⁶ See DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS (citing JQA); MERRILL D. PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND (1998); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971); DREW MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY.

presidential hopefuls John C. Calhoun and Henry Clay, embraced broad federal power to oversee internal improvements.⁴⁷

A simple story of a succession of Congresses motivated by a combination of partisan and economic interests, pitted against a series of Constitution-embracing presidents, does not match the reality of cross-cutting regional, partisan, and economic coalitions. Indeed, as the repeated calls for a constitutional amendment permitting internal improvements suggest, many participants in the debate agreed that as a practical matter, Congress ought to have the power to fund such projects. Disputes arose because contemporaries embraced widely conflicting views of constitutional text and structure, and they took those views seriously when confronted with internal improvements proposals.

As contemporaries and scholars alike have noted, the internal improvements debates unfolded across a series of galvanizing moments. Four of these moments are especially helpful in illuminating the multiple constitutional frameworks at work in the interbellum period: (1) Madison's veto of the legislation known as the "Bonus Bill" in 1817; (2) Monroe's change of opinion on the constitutionality of internal improvements between his inauguration in 1817 and his veto of the Cumberland Road Bill in 1822; (3) Jackson's rejection of internal improvements, culminating in his veto of the Maysville Road Bill in 1830; and (4) congressional debates over land grants to states to build railroads, culminating in the passage of the Illinois Central Railroad Bill in 1850. Each of these moments provides a snapshot of the interbellum Constitution as it was being contested and defined in the course of political and legal struggle. Taken together, the debates illustrate the terrain in which constitutional interpretation was taking place in the early nineteenth century. As contemporaries battled over the propriety of specific internal improvements programs and distinguished between permissible and impermissible uses of congressional authority, they sharpened their conceptions of Article I enumerated powers and the Tenth Amendment. For modern constitutional scholars, these fiery debates demonstrate the distinctiveness of the early-nineteenth-century Constitution. They show us familiar text but render it utterly foreign by upending modern presumptions about what the text meant then, and thus what it might mean now.

A. *The Bonus Bill: Madison's Presidential Finale (1817).*

On March 3, 1817, James Madison performed his last official act as president by vetoing a bill supported by a venerable group of

⁴⁷ See LARSON, *supra* note __; RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS* (1989); SELLERS, *supra* note __; HOWE, *supra* note __.

congressmen, including John C. Calhoun and Henry Clay. The bill, titled “An act to set apart and pledge certain funds for internal improvements,”⁴⁸ proposed to allocate a \$1.5 million federal revenue “bonus” and future dividends from the Second Bank of the United States to a fund “for constructing roads and canals and improving the navigation of watercourses.”⁴⁹ Federal funding for internal improvements projects had been debated at least since 1808, when Treasury Secretary Albert Gallatin’s *Report on Public Roads and Canals* had made the case for linking the increasingly important interior of the United States with the coast.⁵⁰ The War of 1812, combined with the decline of the Federalist Party, had temporarily halted the drive to enact a federal internal improvements policy. But in the aftermath of the war, with markets booming and the Second Bank freshly chartered in 1816, nationalist sentiment swelled, and in February 1817 the Bonus Bill passed in the House and Senate, arriving on Madison’s desk four days before his term ended.

Madison, who had after all prosecuted a war despite substantial sectional opposition and signed the charter for the new Bank of the United States, astounded the bill’s supporters by announcing his intention to veto it.⁵¹ Ignoring Clay’s pointed suggestion that he “leave the bill to your successor,”⁵² Madison took the veto pen in hand. In so doing, he avoided the mistake one of his predecessors had made a dozen years previously of leaving ambiguity surrounding the status of his final official acts.⁵³ The veto was unequivocal: Madison believed that the Constitution did not grant Congress the authority to oversee internal improvements.⁵⁴

Madison’s veto message offered a forceful refutation of Congress’s plan to set apart and pledge certain funds for internal improvements. In returning the bill to the House, Madison noted “the insuperable difficulty I

⁴⁸ H.R. 29, 2d sess., 14 Cong. (1816).

⁴⁹ See Stephen Minicucci, *Internal Improvements and the Union: 1790-1860*, 18 *STUD. IN AM. POLIT. DEV.* 160, 164 (2004) (noting that the contemporary estimate of annual dividends from the Bank was \$650,000).

⁵⁰ See ALBERT GALLATIN, *REPORT OF THE SECRETARY OF THE TREASURY ON THE SUBJECT OF PUBLIC ROADS AND CANALS; MADE IN PURSUANCE OF A RESOLUTION OF SENATE OF MARCH 2D, 1807* (Washington: William A. Davis, 1816); see generally JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT* (2001); GOODRICH, *GOVERNMENT PROMOTION OF INTERNAL IMPROVEMENTS*; Carter Goodrich, *National Planning of Internal Improvements*, 63 *Poli. Sci. Q.* 16 (1948);

⁵¹ See RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 609 (1990) (quoting Clay’s statement that “no circumstance, not even an earthquake that should have swallowed up half this city, could have excited more surprise” than Madison’s decision to veto the bill).

⁵² Quoted in *id.*

⁵³ See *Marbury v. Madison*, 5 U.S. 137 (1803).

⁵⁴ See MCCOY, *supra* note __, at 97-98 (1991) (“For Madison, . . . Congress was not simply making a poor or faulty judgment about the constitutionality of a single issue; it was experimenting with a new approach to establishing constitutionality and perforce threatening to transform the character of America’s republican system.”).

feel in reconciling the bill with the Constitution of the United States.”⁵⁵ His argument was straightforward: the power to fund internal improvements was not included among the enumerated powers of Congress set forth in Article I, section 8; nor was it necessary and proper to the execution of any of those powers.⁵⁶ Internal improvements did not fall within the compass of the Commerce Clause or the General Welfare Clause, Madison wrote. Moreover, he cautioned against viewing the latter clause – to which he referred as “the clause to provide for common defense and general welfare” – as a “general power” rather than a “defined and limited” head of authority.⁵⁷ Properly understood, Madison insisted, the power to provide for the common defense and general welfare extended only to “the expenditure of money” – no mean power, he wrote, “money being the ordinary and necessary means” of executing “all the great and most important measures of Government.”⁵⁸ Furthermore, the fact that a state might agree to the exercise of federal power in the domain of internal improvements, or the suggestion that the act of Congress might itself amount to consent, was irrelevant to the analysis. According to Madison, “[t]he only cases in which the consent and cession of particular States can extend the power of Congress are those specified and provided for in the Constitution.”⁵⁹

This was not to say, however, that Madison believed that a federal internal improvements program could never be enacted. On the contrary: Madison suggested that he would readily support such legislation if it was based upon the proper textual foundation. The veto message described the president as “cherishing the hope” that the “beneficial objects” of the bill would be accomplished through a constitutional amendment explicitly granting Congress the power to oversee internal improvements.⁶⁰ The funding of public works projects in the states was not necessarily beyond the scope of congressional power; it simply required the people’s genius to express its will that such authority be added to the legislative ambit.

The veto message left obscure the precise nature of the congressional authority at issue in the Bonus Bill. Both before and after

⁵⁵ Veto of Federal Public Works Bill, Mar. 3, 1817.

⁵⁶ U.S. CONST., Art. I, sec. 8.

⁵⁷ Some scholars, however, have argued that the language of the veto message did allow for the possibility that appropriations for internal improvements might be constitutional under the General Welfare Clause. See Carlton Jackson, *The Internal Improvement Vetoes of Andrew Jackson*, 25 TENN. HIST. Q. 261, 265 (1966). On this view, Madison was distinguishing between congressional power to appropriate versus the power actually to construct roads and canals. Madison later maintained that he had intended the 1817 message to cover appropriations as well as the substantive power to construct internal improvements. See James Madison to Martin Van Buren, June 3, 1830; see also *infra* TAN ____.

⁵⁸ Madison to Van Buren, June 3, 1830.

⁵⁹ *Id.*

⁶⁰ *Id.*

Madison issued his veto, however, legislators had dissected and taxonomized the elements of the bill. In the House debates prior to the bill's passage, Calhoun distinguished between the power to build roads or canals and the power to appropriate money. Congress did not need the power to "cut" a road or canal in order for the bill to survive, Calhoun argued; rather, the bill was simply an application of Congress' ordinary power to appropriate money.⁶¹ The constitutional issue, therefore, was the power to appropriate, not the power to carry out the underlying action for which the appropriation was being done. And, Calhoun continued, the power to appropriate under the General Welfare Clause could not credibly be limited to the enumerated powers absent clear limiting language to that effect. Cannily citing the examples of the Louisiana Purchase and the Cumberland Road (both the products of the Jefferson administration),⁶² Calhoun sketched the many "instances of money appropriated without any reference to the enumerated powers."⁶³ Other supporters of the bill argued that it was covered under the commerce power, the power to establish post roads, or the "common defense" portion of the general welfare power.⁶⁴ Opponents, meanwhile, anticipated Madison's arguments that the bill was an unwarranted extension of federal power into the domain of the states; some speakers invoked the Tenth Amendment's reservation of power to the states.⁶⁵ Some critics also distinguished between roads and canals, describing the latter as the appropriate object of Congress because they "enable commercial connections across the country," in contrast to the fundamentally "local matter" of roads.⁶⁶

Attempts to classify the precise nature of the congressional power that was at stake recurred throughout the internal improvements debates. Was the relevant power one of appropriation, execution, ongoing jurisdiction, or some combination? If it was appropriation, was the proposed expenditure a proper use of the general welfare power? If one believed that Congress needed to point to a more substantive enumerated power in order to carry out public works projects, which power (if any) best fit the stated purposes of the program – commerce, post roads, common defense, or something else?⁶⁷

⁶¹ Annals of Congress, House of Representatives, 14th Cong., 2d sess., 855 (Feb. 4, 1817).

⁶² See *infra* TAN __.

⁶³ *Id.* at 856.

⁶⁴ See, e.g., *id.* at 869, 886-89 (Feb. 6, 1817) (comments of Yates and Sheffey).

⁶⁵ See *id.* at 895 (comments of Barbour).

⁶⁶ See *id.* at 859 (comments of Root).

⁶⁷ The debate surrounding the application of the Postal Clause to internal improvements demonstrates the fine-grained textual analysis in which some commentators engaged. After critiquing the argument that the Bonus Bill was justified under the General Welfare Clause, one opponent of the bill went on to insist that Congress's power to "establish post offices and post roads" could not be construed as extending to other roads because the accepted terminology for road construction was "to run or to cut," not "to establish."

Moreover, the related themes of state consent and the possibility of a constitutional amendment continued to sound throughout the period. A proposed amendment introduced on the floor of the Senate nine months after the Bonus Bill veto was both a speech act by a state (here, Virginia) and a formal textual rule that made state authorization necessary for internal improvements programs. The draft provision granted Congress the power to appropriate money for roads, canals, and watercourses provided “[t]hat no road or canal, shall be conducted in any State, nor the navigation of its waters improved, without the consent of such State.”⁶⁸ In the years following Madison’s veto of the Bonus Bill, state consent would become a leitmotif of the debates over internal improvements. Commentators focused not only on the ongoing need for agreement by the states to specific public works projects, but also the original terms under which the post-1787 states had joined the Union.

B. Roads I: Bargains with the States (1817-22).

On Tuesday, March 4, 1817, the day after Madison vetoed the Bonus Bill, James Monroe took office as president. His inaugural address that day suggested that Clay might have been correct to suspect that the new president would be friendlier to internal improvements. But Monroe’s views on the issue changed several times over the course of his two terms. In December 1817, Monroe announced his opposition to internal improvements. Five years later, a road bill again stood at the center of public debate, and again it met with the veto. Yet again, the president accompanied his veto with a statement explaining his views – in this case, a sixty-page pamphlet.

Monroe’s inaugural address contained a paragraph with the potential to mollify both supporters and foes of internal improvements. The speech depicted roads and canals as the connective tissue that would “bind the Union more closely together.”⁶⁹ These channels of national feeling would also “facilitate[e] the intercourse between the States” and “add much to the convenience and comfort of our fellow-citizens, much to the ornament of the country.”⁷⁰ Yet Monroe also used language suggesting that his administration might not reject altogether his predecessor’s resistance to a broad congressional power over roads and canals. His first reference to internal improvements came with a caveat: among the “interests of high importance” that would “claim attention”

Annals of Congress, House of Representatives, 15th Congress, 1st sess., 1271 (Mar. 11, 1818) (comments of Sawyer).

⁶⁸ Annals of Congress, Senate, 15th Congress, 1st sess., 22 (Dec. 9, 1817) (proposal by Barbour).

⁶⁹ James Monroe, First Inaugural Address, Mar. 4, 1817 [Richardson, Messages and Papers].

⁷⁰ Id. at __.

from the new chief magistrate would be “the improvement of our country by roads and canals, *proceeding always with a constitutional sanction.*”⁷¹ Did the new president believe that the Constitution as currently written contained such a sanction, such that this was a descriptive statement, or was he cautioning his listeners to distinguish carefully between permissible and impermissible uses of congressional power? Monroe’s statement left room for different interpretations. Clearly, though, Monroe shared Madison’s view that the internal improvements question was not just a political disagreement but also a debate about the meaning of the Constitution.

Nine months later, in December 1817, the new president launched an unambiguous salvo against internal improvements. His first annual message to Congress announced his “settled conviction” that Congress “do not possess the right” to “establish such a system of improvement.”⁷² Monroe acknowledged that this position represented a shift from the views he had previously articulated, describing himself as “[d]isregarding early impressions.”⁷³ His objection stemmed from what he now regarded as a lack of the constitutional sanction he had invoked in his inaugural address. The power to establish internal improvements, Monroe maintained, was “not contained in any of the specified powers granted to Congress,” nor could it be viewed as “incidental to or a necessary means, viewed on the most liberal scale, for carrying into effect any of the powers which are specifically granted.”⁷⁴ The ability to promote internal improvements simply was not contained in Congress’s array of Article I powers.

Importantly, however, Monroe echoed Madison’s suggestion that the textual landscape was capable of being altered. Monroe urged Congress to recognize the “propriety” of “recommending to the States the adoption of an amendment to the Constitution which shall give to Congress the right in question.”⁷⁵ Monroe thus assured his audience that he, too, believed in the utility of federal internal improvements. Such a power in Congress would be useful as a practical matter, but a specific textual authorization was needed to add the power to the federal legislative arsenal. Monroe appeared sanguine about such an amendment’s chances of success. Again like Madison, he suggested that the political entity of “the people” stood ready to deliberate about potential changes to the constitutional text: “We may confidently rely that if it appears to their satisfaction that the power is necessary, it will always be granted.”⁷⁶ The people were no longer “out of doors”; on the contrary, they were

⁷¹ Id. at __ (emphasis added).

⁷² James Monroe, First Annual Message to Congress, Dec. 12, 1817.

⁷³ Id. at __.

⁷⁴ Id. at __.

⁷⁵ Id. at __.

⁷⁶ Id. at __.

somewhere nearby, ready to be gaveled into action and to oblige their representatives with a burst of higher-lawmaking.⁷⁷ “In cases of doubtful construction,” Monroe maintained, “it comports with the nature and origin of our institutions, and will contribute much to preserve them, to apply to our constituents for an explicit grant of the power.”⁷⁸ Triggering a constitutional amendment appeared entirely feasible to interbellum commentators, in contrast to the modern view of the Article V process as effectively impossible except in rare circumstances.⁷⁹ For some early-nineteenth-century commentators, the text of the Constitution virtually invited the people to revise their foundational law on occasion – or, in any event, when invited to do so by their representatives.

Monroe’s newly stringent views galvanized Clay and other congressional supporters of internal improvements into action. In addition to continuing to draft amendments granting Congress the relevant new enumerated power, advocates of internal improvements in the House convened a select committee to respond to Monroe’s annual message. Two days after being convened by Speaker Clay, the committee, chaired by Henry St. George Tucker, son of the venerable Virginia judge and treatise-writer, produced a report that forcefully rebutted Monroe’s claims. The Tucker committee’s report emphasized two themes: first, the consent of the states; second, the distinction among the power to appropriate funds for internal improvements, the power to construct roads and canals, and the power to maintain ongoing jurisdiction in those improvements.⁸⁰

As a matter of text and precedent, the report argued, if a given state consented to a specific federal internal improvements program, that program was a constitutional exercise of one of the enumerated powers (post offices and post roads, common defense, or commerce), or else necessary and proper to the execution of those powers. The report thus offered a cooperative vision of internal improvements federalism. A road, the argument went, was the product of combining a state’s territorial sovereignty with federal funds and, even more important, with the impetus to connect across federal space. Therefore, although “the constitution confers only a *right of way*, and that the rights of soil and jurisdiction

⁷⁷ On the eighteenth-century conception of popular sovereignty and the people “out of doors,” SEE BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*; LARRY D. KRAMER, *THE PEOPLE THEMSELVES*.

⁷⁸ Monroe, First Annual Message, at ___.

⁷⁹ See, e.g., Rosalind Dixon, *Amending Constituting Identity*, University of Chicago Public Law Working Paper No. 332 (2010).

⁸⁰ *Report, in Part, of the Committee on So Much of the President’s Message as Relates to Roads, Canals, and Seminaries of Learning*, Dec. 15, 1817, at 11 [Annals] (hereinafter TUCKER REPORT).

remain exclusively with the states,” the report argued that “there seems no sound objection to the improvement of roads *with their assent*.”⁸¹

Significantly, the Tenth Amendment’s reservation of powers to the states and the people appeared to the committee to present no bar to this focus on state consent. On the contrary: the report pointed to the Tenth Amendment as the source of the state’s right to consent. “For if, by the 10th amendment, this right is reserved to the states, it is within the power of the state to grant it, unless the United States are incapable of receiving such a privilege.”⁸² The members of the Tucker committee thus viewed the Tenth Amendment not as a defensive bulwark to be invoked against invasions of state sovereignty, but rather as a fount of the state’s own legal powers, including the power to consent (or not) to the introduction of a federal right of way. The state’s ability to grant or withhold its consent to a particular improvement project therefore obviated the need for a general constitutional amendment.⁸³ On this view, federalism could be preserved by placing the burden on individual states to opt out of congressional regulation, rather than by requiring Congress to point to a particular enumerated power (and to launch a popular movement to add one to the text if none existed). In an inversion of much of the Court’s modern federalism jurisprudence, a broad view of states safeguarding their own power under the Tenth Amendment outweighed a narrow view of Congress’s particular heads of power.⁸⁴

To be sure, the consent-based view articulated in the Tucker committee report was contested in the period. In a letter to Tucker shortly after the report was published, Madison challenged the report’s consent-based theory.⁸⁵ Madison wrote that he could not “concur in the latitude of Construction taken in the Report, or in the principle that the Consent of States, even of a single one, can enlarge the jurisdiction of the Gen[era]l Gov[ernmen]t.”⁸⁶ Consequently, he did not share the Tucker committee report’s call for the Bonus Bill to be revived absent a constitutional amendment.⁸⁷

In addition to its emphasis on state consent, the Tucker report also differentiated among various slices of congressional power over internal improvements, especially the powers of appropriation, execution, and

⁸¹ *Id.* at 6.

⁸² *Id.*

⁸³ See also MCCOY, *supra* note __, at 96.

⁸⁴ See, e.g., Holmes dissent in *Hammer vs.* cases on 10th Am. as substantive limit.

⁸⁵ See Madison to Tucker, Dec. 23, 1817, in __; see also MCCOY, *supra* note __, at 96-97 (describing Madison’s disapproval of “Tucker’s opportunistic confounding of utility and constitutionality”).

⁸⁶ See Madison to Tucker, Dec. 23, 1817.

⁸⁷ See TUCKER REPORT at 11 (concluding with a proposal to use incorporation fees and dividends from the Second Bank as a “fund for internal improvement”).

jurisdiction. The report culminated with its strongest claim: the claim that Congress possessed the authority to execute federal internal improvements programs directly. In other words, Congress could itself “construct roads and canals through the several states” (again, with consent).⁸⁸ This power did not extend to “jurisdictional rights,” which remained with the states.⁸⁹ Jurisdictional rights were understood to refer to ongoing regulations of the road or canal in question – for example, tollgates. As for the appropriations power, the report rejected Monroe’s view that the exercise of such a power amounted to an unconstitutional attempt by Congress to “establish” internal improvements. Unlike an attempt to assert jurisdiction over the road or canal, and thereby to “federalize” it, an appropriation was a limited federal intervention at the beginning of a project. The theory was that Congress would appropriate funds, but the construction would be carried out by the state.⁹⁰ The Tucker report pointed to the expansive nature of the “common defense and general welfare” provision of Article I, sec. 8 to bolster its claim for a congressional power of appropriation as an absolute constitutional minimum.

The House’s response to the Tucker report accepted the committee’s spectrum of congressional powers but stopped short of the echoing its full-throated endorsement of expansive federal authority. The full chamber passed a nonbinding resolution granting Congress the power to appropriate money for the construction of “post roads, military, and other roads, and of canals,” but the committee’s three others resolutions providing for actual federal construction failed.⁹¹ For many contemporaries, then, the broad contours of the General Welfare Clause provided a sound textual basis for federal funding to the states, who would in turn apply the money to build roads and canals. But the other enumerated powers were regarded by many interbellum Americans as insufficient to give Congress the authority to build the roads and canals itself.

Monroe’s second term brought renewed public attention to these questions, with a new focus. In the wake of the Tucker committee report, Secretary of War Calhoun produced his own report setting forth the benefits of a system of roads and canals for military as well as commercial purposes.⁹² But the next major event in the internal improvements drama was Monroe’s veto of the Cumberland Road bill in 1822.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id. at 8-9 (“If indeed the power was denied to the general government of constructing roads and canals themselves, a question might still arise, whether it had not power to appropriate part of the revenue to aid in the construction of roads and canals by the states.”) (internal quotation marks omitted).

⁹¹ 32 Annals of Congress 1381, 1385-86 (1818).

⁹² Report on Roads and Canals, Communicated to the House of Representatives, Jan. 14, 1819, in 5 The Works of John C. Calhoun 40 (1859).

The origins of the Cumberland Road lay in the negotiations surrounding Ohio's organization as a state beginning in 1802 and admission to the Union in 1803. Pursuant to its admission compact, Ohio was guaranteed that Congress would set aside five percent of all future net proceeds from the sale of lands in the state to build roads.⁹³ Three percent of the proceeds were to be spent on roads within Ohio, and two percent were to be spent on roads leading to Ohio from other states.⁹⁴ The roads connecting the state with the eastern seaboard were of particular concern to Ohioans, who wanted to ensure access to coastal cities and markets. The Cumberland Road (sometimes known as the National Road⁹⁵) was built as part of this program, extending from Cumberland, Maryland (on the Potomac River) west through Ohio, eventually ending at Vandalia, Illinois. The road received congressional approval in 1806, and construction began in 1811.⁹⁶

For the first eleven years of its existence, the Cumberland Road was relatively uncontroversial, despite the ongoing disputes about the status of internal improvements. The road's origins in Ohio's admission compact led contemporaries to view it as a product of contract, rather than constitutional, law.⁹⁷ Consequently, the road routinely received appropriations, even during periods when Congress or the president were otherwise resistant to funding roads and canals.

All this changed in 1822, however, when Congress passed a bill to repair the Cumberland Road. Crucially, the bill also provided for the installation of "toll houses, gates, and turnpikes" on the road.⁹⁸ This

⁹³ Ohio Enabling Act (1802).

⁹⁴ See DANIEL FELLER, *THE PUBLIC LANDS IN JACKSONIAN POLITICS* 8 (1984).

⁹⁵ See PHILIP JORDAN, *THE NATIONAL ROAD* (1948); JEREMIAH S. YOUNG, *A POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD* (1904); *THE NATIONAL ROAD* (Karl Raitz ed., 1996).

⁹⁶ An Act to Regulate the Laying Out and Making a Road From Cumberland, in the State of Maryland, to the State of Ohio, Mar. 29, 1806. [Annals]

⁹⁷ See FELLER, *supra* note __, at 8-9. Feller notes that Treasury Secretary Albert Gallatin may have intended Ohio's arrangement to serve as a precedent for other, potentially more controversial federal internal improvements projects. See *id.* at 9.

⁹⁸ An Act for the Preservation and Repair of the Cumberland Road, May 3, 1822. The bill set forth a detailed schedule of tolls according to the type of vehicle and cargo:

For every space of twenty miles in length of the said road, the following sums of money, and so in proportion for any greater or lesser distance, to wit: For every score of sheep or hogs, six and a quarter cents; for every score of cattle, twelve and a half cents; for every led or drove horse, one cent; for every horse and rider, ax and a quarter cents; for every sleigh or sled, for each horse and ox drawing the same, three cents; for every dearborn, sulky, chair, or chaise, with one horse, twelve and a half cents; for every chariot, coach, cochee, stage wagon, phaeton, chaise, or dearborn, with two horses and four wheels, eighteen

provision proved the bill's undoing. The following day, Monroe vetoed the bill. The president accompanied his veto with a lengthy pamphlet titled *Views on the Subject of Internal Improvements*.

Monroe objected to the Cumberland Road bill because he viewed it as a dramatic expansion of congressional power over internal improvements. As in his first annual message of 1817, he insisted that if such a power was to be exercised, it must be grounded in a constitutional amendment. While Monroe agreed with the contemporary consensus that the initial construction of the road was unproblematic insofar as it stemmed from Ohio's admission compact,⁹⁹ he argued that the new bill was an unprecedented expansion of congressional power. In practice, the "preservation and repair" of the road meant that federal officials would be stationed along a road traversing the interior of the nation, with a perpetual brief to demand money from travelers and merchants. "A power to establish turnpikes with gates and tolls, and to enforce the collection of tolls by penalties, implies a power to adopt and execute a complete system of internal improvement," Monroe warned.¹⁰⁰ The veto message conjured the specter of presidentially appointed toll collectors as the vanguard of "a complete right of jurisdiction and sovereignty for all the purposes of internal improvement."¹⁰¹ The fact that the officials would be appointed by the president rather than by Congress did not appear to assuage Monroe's fears; rather, the bill's entire toll-gathering structure amounted to an unconstitutional overreach by Congress.¹⁰²

and three-quarter cents; for either of the carriages last mentioned, with four horses, twenty-five cents. For every other carriage of pleasure, under whatever name it may go, the like sum, according to the number of wheels and hones drawing the same. For every cart or wagon, whose wheels do not exceed the breadth of four inches, six and one-fourth cents for each horse or ox drawing the same. For every cart or wagon, whose wheels shall exceed in breadth four inches, and not exceeding six inches, three cents for every horse or ox drawing the same; and every other cart or wagon, whose wheels shall exceed six inches, shall pass the said gates free and clear of toll.

Exceptions from tolls were specified for "any person passing to or from public worship, or to or from his common business on his farm or woodland, or to or from a funeral, or to or from a mill." *Annals*.

⁹⁹ JAMES MONROE, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, WITH HIS OBJECTIONS TO THE BILL FOR THE PRESERVATION AND REPAIR OF THE CUMBERLAND ROAD; ALSO A PAPER CONTAINING HIS VIEWS ON THE SUBJECT OF INTERNAL IMPROVEMENTS 42 (Washington: Gales & Seaton, 1822) (hereafter *VIEWS OF THE PRESIDENT ON THE SUBJECT OF INTERNAL IMPROVEMENTS*) (stating that the Cumberland Road "was founded on an article of compact between the United States and the state of Ohio").

¹⁰⁰ James Monroe, Cumberland Road Veto Message, May 4, 1822.

¹⁰¹ *Id.* at __.

¹⁰² See "An Act for the Preservation and Repair of the Cumberland Road," at __ ("And be it further enacted, That, as soon as the said gates and turnpikes shall be erected, the President of the United States is hereby authorized to appoint, or cause to be appointed,

Yet Monroe's attack on the bill also contained a modulation of his earlier views. In contrast to his suggestion in the 1817 annual message that Congress might lack the power even to appropriate funds for internal improvements, the 1822 veto message distinguished between the ongoing "right of jurisdiction and sovereignty" and the power to make occasional appropriations.¹⁰³ Appropriations might be justified if the state in question consented, but Monroe contended that the states lacked the power to consent to federal jurisdiction and sovereignty.¹⁰⁴ The fact that the entire Ohio congressional delegation had voted for the bill seemed not to matter to Monroe's evaluation of whether the state in question had consented.¹⁰⁵ Similarly, in *Views of the President of the United States on the Subject of Internal Improvements*, Monroe reaffirmed his opposition to the Tucker committee's expansive view of state consent. But he also diverged from the narrow theory of appropriations that Madison had articulated in his veto of the Bonus Bill. Whereas Madison had insisted on a narrow reading of the spending power under the General Welfare Clause, Monroe now read the Constitution to grant Congress "the right to appropriate" but not "the right to make internal improvements."¹⁰⁶ Consistent with this analysis, Monroe proposed that Congress revise the bill to provide appropriations for repairs to the road but omit the tollgate plan.¹⁰⁷ At the boundary between appropriations and jurisdiction, then, Monroe viewed the Tenth Amendment as shifting from a declaration of states' rights to a restraint on the states' power to give up those rights.

With his *Views of the President on the Subject of Internal Improvements*, Monroe moved beyond his constitutional obligation to communicate objections after presentment,¹⁰⁸ taking his views to the coordinate branches of government, and indeed to a broader public stage.¹⁰⁹ The president went so far as to send copies of the veto message and the pamphlet to the members of the Supreme Court. Chief Justice John Marshall replied with a brief and hedging letter of acknowledgment. After noting that he had read the materials "with great attention and

toll-gatherers, to demand and receive, for passing the said turnpikes, the tolls and rates hereinafter mentioned.").

¹⁰³ See FELLER, *THE PUBLIC LANDS*, *supra* note __, at 57 ("Monroe's new constitutional interpretation left Congress free to subsidize state and private projects and to continue the Cumberland Road, for which it had received explicit permission from the states concerned. The president's retreat from strict construction opened the way to a vigorous internal improvements policy.").

¹⁰⁴ Monroe veto message at __.

¹⁰⁵ In addition, five of the six members of Ohio's delegation in the House voted to override Monroe's veto.

¹⁰⁶ MONROE, *VIEWS OF THE PRESIDENT ON THE SUBJECT OF INTERNAL IMPROVEMENTS*, *supra* note __, at 46.

¹⁰⁷ Monroe veto message at __; see also FELLER, *supra* note __, at 57.

¹⁰⁸ U.S. CONST., Art. I, sec. 7.

¹⁰⁹ See reprints of *Views* in newspapers.

interest,” Marshall concluded with a vague set of observations on internal improvements. The chief justice termed the president’s views “profound” and “most generally just.”¹¹⁰ He then made the following observation:

A general power over internal improvement, if to be exercised by the Union, would certainly be cumbersome to the government, & of no utility to the people. But, to the extent you recommend, it would be productive of no mischief, and of great good. I despair however of the adoption of such a measure.¹¹¹

Marshall appeared to agree with Monroe’s distinction between appropriations for road and canal construction on one hand, and ongoing federal management of tolls and traffic on the other hand. But these views are surprising from the chief justice who, two years later, would read the Commerce and Supremacy Clauses to find that a federal coasting statute preempted a state steamboat monopoly in *Gibbons v. Ogden*.¹¹²

In contrast to Marshall’s temporizing, the outspoken associate justice William Johnson responded to Monroe’s mailing with an overtly nationalist view of internal improvements more in line with what one might have expected from Marshall. Stating that his “Brother Judges” had “instructed” him in his reply, Johnson maintained that the Court’s decision two years earlier in *McCulloch v. Maryland* should also be viewed as the justices’ opinion on the constitutionality of internal improvements. The Court’s decision to uphold Congress’s establishment of the Second Bank and deny Maryland’s power to tax the Bank, Johnson argued, “completely commits them on the subject of internal improvement, as applied to Postroads and Military Roads.”¹¹³

Monroe’s veto of the Cumberland Road bill capped five years of intense efforts by two presidents and numerous members of Congress to articulate a theory of internal improvements. Throughout the debates, there was broad agreement that roads and canals were desirable and even necessary to carry passengers, produce, news, and goods throughout the expanding nation. Even in Madison’s and Monroe’s strongest veto messages, each of them took pains to note that the projects themselves would likely bring substantial benefits. “I am not unaware of the great importance of roads and canals and the improved navigation of water courses,” Madison wrote, “and that a power in the National Legislature to

¹¹⁰ John Marshall to James Monroe, June 13, 1822, in 9 THE PAPERS OF JOHN MARSHALL 236 (Charles F. Hobson ed., 1998).

¹¹¹ Id.

¹¹² 22 U.S. 1 (1824).

¹¹³ Editor’s Note, 9 PAPERS OF JOHN MARSHALL, *supra* note ___, at 237 n2.

provide for them might be exercised with signal advantage to the general prosperity.”¹¹⁴

But both presidents insisted that any general congressional power to develop substantive internal improvements plans must be grounded in a constitutional amendment; it simply did not exist in their view of the text. Madison and Monroe therefore urged Congress to continue the founders’ drafting process by using the amendment process to add another enumerated power to the list found in Article I. The prospect of appropriations alone, meanwhile, raised textual and structural questions about how the General Welfare Clause fit into the list of congressional powers, and into the system of federalism more broadly. This wide-ranging interrogation of different levels of constitutional proposals to deal with the internal improvements question continued for decades after Monroe’s veto of the Cumberland Road bill.

C. *Roads II: Money versus Land (1826-30).*

The internal improvements debate entered a new phase with Andrew Jackson’s election to the presidency in 1828. In 1828, as in the bitter 1824 contest that Jackson ultimately lost to John Quincy Adams, the internal improvements question was intertwined with other highly controversial issues including the tariff, the retirement of the national debt and the resulting prospect of a federal budget surplus, and the expansion of slavery.¹¹⁵ Consequently, Jackson viewed internal improvements as a site to demonstrate his commitment to local markets and his belief that the powers of the national government (or, at any rate, Congress) ought to be limited. Jackson ultimately vetoed six internal improvement bills, four of them through the pocket veto.¹¹⁶ It was the Maysville Road veto, however, that reignited the internal improvements blaze and sent Jackson and his lieutenant Martin Van Buren scrambling to find support for their positions in text and precedent.

The Maysville Road was connected both spatially and conceptually to the vexed Cumberland Road. The bill authorized the federal government to purchase \$150,000 worth of stock in a Kentucky corporation, the Maysville, Washington, Paris, and Lexington Turnpike Road Company, which would in turn build a road connecting the Cumberland Road at Zanesville, Ohio, with the Tennessee River at

¹¹⁴ Madison Bonus Bill veto message, *supra* note __, at __.

¹¹⁵ See RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS* (1987); SCHLESINGER, *supra* note __; SELLERS, *supra* note __; WILENTZ, *supra* note __.

¹¹⁶ See Jackson, *supra* note __, at 278. Carlton Jackson note, however, that President Jackson approved more internal improvements bills than he vetoed. See *id.* at 261.

Florence, Alabama.¹¹⁷ Unlike the Cumberland Road bill that Monroe had rejected, the Maysville Road bill contemplated an appropriation rather than ongoing federal control. Shares, not tollgates, were at stake in 1830.

The bill was vigorously debated in the House for three days and ultimately passed by a vote of 102 to 86.¹¹⁸ The bill was rapidly returned to the House by Jackson's nephew and secretary, Andrew Jackson Donelson, with the news that the president had declined to sign it. After the obligatory claim of support for internal improvements in general,¹¹⁹ Jackson's veto message cited two principal problems with the bill: first, its assertion of what Jackson regarded as an unconstitutional extension of the appropriations power; and second, its attempt to extend federal power into what Jackson viewed as the inherently local domain of the states.

For the appropriations point, Jackson drew heavily on Madison's veto of the Bonus Bill and Monroe's veto of the Cumberland Road bill. Despite decades of practice dating back to the Louisiana Purchase that had expanded the appropriations power, Jackson suggested that a proper understanding of the text argued against such an interpretation. Although he noted the necessity of ceding to "a well settled acquiescence of the people and confederated authorities in particular constructions of the constitution, on doubtful points," the rest of the message implied that the tenuous origins of the appropriations power required strict interpretation.¹²⁰ From a textual standpoint, Jackson suggested that he supported a narrow construction of Congress's power under the General Welfare Clause. According to this view, the scope of the spending power was limited to performing an ancillary function to the enumerated powers. In other words, Congress could appropriate money from general federal funds only to carry out its enumerated powers, and not in the service of a broader notion of the general welfare. The Madisonian approach, in other words, was still alive.¹²¹

Of course, one consequence of this distinction between the spending power and the enumerated powers was to create an opening for supporters of internal improvements to use the appropriations power as a wedge to create an opening for Congress to act. On this point, Jackson cited Madison, pointing to the Bonus Bill veto as evidence of the need to

¹¹⁷ See An Act Authorizing a Subscription of Stock in the Maysville, Washington, Paris, and Lexington Turnpike Road Company, H.R. 285, 21st Congress, 1st session, Feb. 24, 1830; see also Jackson, *supra* note __, at 262.

¹¹⁸ See Register of Debates in Congress.

¹¹⁹ See Annual Messages, Veto Messages, Protest, &c. of Andrew Jackson, President of the United States, 2d ed., 27 (Baltimore: Edward J. Coale & Co., 1835) (second paragraph beginning "Sincerely friendly to the improvement of our country by means of roads and canals") (hereafter Jackson, Veto Message).

¹²⁰ *Id.* at 29.

¹²¹ See Madison vs. Hamilton, *Butler* and progeny.

distinguish between the appropriations power and the power to execute improvements projects.¹²² But in correspondence with Van Buren, the seventy-nine-year-old Madison protested that this claim mischaracterized his 1817 veto. On the contrary, Madison insisted,

It was an object of the Veto to deny to Congress, as well the appropriating power, as the executing and jurisdictional branches of it. And it is believed that this was the general understanding at the time, and has continued to be so, according to the references occasionally made to the document. Whether the language employed duly conveyed the meaning of which J. M. retains the consciousness, is a question on which he does not presume to judge for others.¹²³

According to Madison, then, his 1817 veto had extended to the appropriations power as well as the power of carrying out internal improvements.¹²⁴

Jackson did not press the claim in his veto quite so far, however. Perhaps because he sought to preserve the appropriations power as applied to other types of improvements such as lighthouses and military fortifications,¹²⁵ he presented himself as willing to tolerate the acquiesced-in view of the appropriations power that he believed had emerged in practice since the 1790s.¹²⁶ Rather than launching an attack on practice, Jackson introduced a different limiting factor into the analysis. Appropriations for internal improvements were constitutional only to the extent that they adhered to what Jackson termed a “general principle”: “that the works which might be thus aided, should be ‘of a general, not local – national, not state’ character.”¹²⁷ Collapsing the boundary between

¹²² Id. at 28-30 (distinguishing between Congress’s power to assert ongoing jurisdiction over internal improvements, which affects the sovereignty of the states, and its power to appropriate money, which is then spent on projects carried out by the states).

¹²³ James Madison to Martin Van Buren, June 3, 1830.

¹²⁴ See also Alison L. LaCroix, *The Constitution of the Second Generation*, in Symposium on AKHIL AMAR, AMERICA’S UNWRITTEN CONSTITUTION, 2013 ILL. L. REV. ___ (forthcoming 2013) (analyzing the Madison-Van Buren exchange as an example of intertemporal constitutional interpretation).

¹²⁵ See Jackson, *supra* note ___, at 265.

¹²⁶ Jackson’s reliance on acquiescence and practice anticipated Justice Felix Frankfurter’s concurring opinion in the Steel Seizure Case. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (rejecting an “inadmissibly narrow conception of American constitutional law” that would look to “the words of the Constitution” and ignore “the gloss which life has written upon them”) (Frankfurter, J., concurring); see also Alison L. LaCroix, *Historical Gloss: A Primer*, HARV. L. REV. FORUM, www.harvardlawreview.org/forum (responding to Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411) (2013).

¹²⁷ Jackson, Veto Message, *supra* note ___, at 31.

general and local, national and state, Jackson argued, would “of necessity lead to the subversion of the federal system.”¹²⁸ The Maysville Road simply did not meet the requirement of national character, he wrote, because it had “no connection with any established system of improvements” and was “exclusively within the limits of a State, starting at a point on the Ohio River and running out sixty miles to an interior town.”¹²⁹ The local-national distinction crystallized much of the past decades’ debates about internal improvements. The Maysville Road veto was widely popular, in part because the distinction appeared to capture some essential truth about the federal system. “The veto message was a hodgepodge of constitutional and expedient arguments,” notes Daniel Feller, “but in its very logical fuzziness lay its political strength.”¹³⁰

Indeed, the local-national approach to internal improvements questions had emerged a few years before it achieved prominence the Maysville Road veto. Prior to the Maysville controversy – indeed, prior to Jackson’s election – Madison and then-Senator Van Buren exchanged a series of letters on the subject of internal improvements.¹³¹ Van Buren initiated the correspondence by requesting Madison’s views on a constitutional amendment that Van Buren had proposed. “There is not in my opinion any other matter so threatening to the confederacy as the pretension of the Federal Government upon this subject,” the New York senator wrote to the retired president.

At this moment, the assumed power is used by the Government as a most powerful, indeed irresist[i]ble engine, to acquire the favour & secure the allegiance of portions of the union at the expense of those who having made the constitution know what it cost & what it is worth. It is supposed that an extension of the money power beyond

¹²⁸ The underlying concept behind this distinction dated from the colonial period, when British North Americans argued that imperial regulations that encroached on the colonies’ internal affairs violated what they regarded as the constitution of the British Empire. See, e.g., RICHARD BLAND, *THE COLONEL DISMOUNTED: OR THE RECTOR VINDICATED* (Williamsburg, 1764) (arguing that for purposes of external government, “we are and must be subject to the authority of the British Parliament,” but that “the legislature of the colony have a right to enact any law they shall think necessary for their internal government”); see also ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010) (discussing the internal-external distinction in founding-era thought).

¹²⁹ Jackson, Veto Message, *supra* note ____.

¹³⁰ See Feller, *PUBLIC LANDS*, *supra* note ___, at 139. Feller continues: “The nebulous distinction between national and local works stung American System men to fury, for it freed Jackson to decide on individual bills precisely as he chose – a freedom he exploited to the utmost.” *Id.*

¹³¹ In his autobiography, written in the 1850s, Van Buren claimed that he had advised Jackson to veto the Maysville Road bill and then drafted the veto message.

that of Jurisdiction is practicable and indispensable to the successful operation of the Government.¹³²

Van Buren concluded with a bold petition not only for Madison's views, but for a draft revision to the Constitution's text. "If agreeable it would please me to have an amendment worded by yourself; but it does not become me to be more particular." Van Buren then promptly closed by tendering his regards to Mrs. Madison.¹³³

In his correspondence with Madison, Van Buren thus emphasized both the appropriations-jurisdiction distinction. Madison replied with a letter in which he outlined a range of possible structural mechanisms to address what he regarded as the constitutional problem of internal improvements. Madison sketched three options: (1) a functional division of power between the general government and the states; (2) a constitutional amendment granting Congress the power to appropriate for internal improvements; (3) a constitutional amendment granting Congress a general power over internal improvements; or (4) a more profound constitutional amendment revising the language of the General Welfare Clause.

Madison began by evaluating a functional separation between federal and state authority: "dividing the power between the General & State Govt by allotting the appropriation branch to the former & reserving the jurisdiction to the latter."¹³⁴ According to this subject-matter-based division of legislative power, Congress would have the power to appropriate funds for internal improvements, but execution of the programs and jurisdiction over the finished projects would be the state's domain.¹³⁵ While this tidy line-drawing had "doubtless, a captivating aspect," however, Madison rejected the solution based on "the difficulty of defining such a division and maintaining it in practice."¹³⁶ As the previous decades' debates had shown, the line between appropriations and jurisdiction was a fuzzy one. Was the construction of toll gates on the Cumberland Road an exercise of the spending power, or was it an attempt to exert ongoing federal control over traffic and commerce on the road? Moreover, Madison was skeptical that the people of the United States would be willing to fund projects and then give up the ability to monitor and control those projects to "ensure their constant subserviency to

¹³² Martin Van Buren to James Madison, Aug. 30, 1826.

¹³³ *Id.*

¹³⁴ James Madison to Martin Van Buren, Sept. 20, 1826.

¹³⁵ On the efforts of founding-era theorists to construct a subject-matter-based division of power between levels of government within the federal republic, see LACROIX, *supra* note ____.

¹³⁶ See Madison to Van Buren, Sept. 20, 1826, *supra* note ____.

national purposes.”¹³⁷ Given the lack of clear boundaries, Congress would eventually expand its domain to include jurisdiction, but with no textual or structural basis to rein in such reaching.

Rather than a murky division between types of power, Madison advocated a step that would “obviate the unconstitutional precedent” of past decades, while also recognizing the growth in the “constructive authority” of Congress over that period.¹³⁸ Madison thus proposed two types of constitutional amendment. One would give Congress a new enumerated power over internal improvements, but only for appropriations. Such an amendment would read “Congress may make appropriations of money for roads & Canals, to be applied to such purposes by the Legislatures of the States within their respective limits, the jurisdiction of the States remaining unimpaired.”¹³⁹ Congress would thus give funds to state legislatures to be used for roads and canals, and the state legislatures would carry out the projects. But what would happen if a state refused? Madison did not discuss this possibility in the letter to Van Buren. An earlier draft amendment introduced in the Senate in 1817 had granted Congress the power to appropriate money for internal improvements, provided that the state in question consented to the project.¹⁴⁰ The inclusion of a consent provision implied that a state could refuse road or canal funding. Madison’s language, however, contained no such provision, leaving open the question whether a state could decline the federal money.

In his second suggested amendment, Madison proposed granting to Congress the entire bundle of powers relating to internal improvements. His draft amendment stated, “Congress may make roads & Canals with such jurisdiction as the cases may require.”¹⁴¹ Unlike the appropriations amendment, this provision contemplated an appropriation by Congress, followed by federal – not state – officials and engineers handling the actual construction projects. Again, Madison appeared to be taking a realist view based on what he regarded as the slow creep of congressional power over the past decades, for he noted that an amendment granting the full jurisdictional power might be preferable given “the moral certainty, that it will be constructively assumed, with the sanction of the national will, and operate as an injurious precedent.”¹⁴² Again, an amendment would avoid messy line-drawing exercises and would also permit a fresh start on firmer constitutional ground. If Congress was likely to

¹³⁷ *Id.* Indeed, as the facts in *McCulloch v. Maryland* suggested, the prospect of a single state (e.g., Maryland) having the power to frustrate the national will (e.g., the statute chartering the Second Bank of the U.S.) was a real possibility to contemporaries. Madison himself had signed the bill chartering the Bank after initially opposing it.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Barbour amendment, Dec. 9, 1817. See *supra* TAN __.

¹⁴¹ Madison to Van Buren, Sept. 20, 1826, *supra* note __.

¹⁴² *Id.*

accumulate power anyway, Madison implied that it was better to cabin the power *ex ante* with a constitutional amendment.

Madison's final suggestion to Van Buren was an amendment with a potentially greater reach beyond the realm of internal improvements than either of the previous two. This amendment proposed to revise the language of the General Welfare Clause in such a way as to settle the controversy about its scope that dated back to the founding.¹⁴³ In contrast to the views of Alexander Hamilton and others, Madison had long argued that the clause ought to be understood as an auxiliary to the enumerated powers – an enabling act that granted Congress the power to tax and spend to carry out its commerce, postal, monetary, war, and other enumerated powers.¹⁴⁴ At this point in the letter to Van Buren, Madison's language took a more forceful tone: “[W]hilst the terms ‘Common defence & general welfare’ remain in the Constitution, unguarded against the construction which has been contended for, a fund of power inexhaustible, & wholly subversive of the equilibrium between the General and the State Governments, is within the reach” of the general government,” he argued.¹⁴⁵ To prevent a vast (and, he suggested, unintended) expansion of federal power, Madison suggested two solutions. One was to add a new amendment “expunging the phrase [‘common defense and general welfare’], which is not required for any harmless meaning; the other was to “mak[e] it harmless” by adding to the end of the General Welfare Clause the limiting phrase “in cases authorized by this Constitution.”¹⁴⁶ Either of these approaches would end the controversy about the scope of the taxing and spending authority. It was not an independent power, Madison claimed, merely an aid to the (other, genuine) enumerated powers.

Madison's letter containing the proposed amendments crossed in the mail with a letter from Van Buren enclosing a new report from the Senate committee on roads and canals. Aside from a brief, shared speculation as to George Washington's attitudes toward internal improvements, correspondence between the two trailed off until 1830, when Madison revived it with his letter informing Van Buren that Jackson's message accompanying the Maysville Road Veto had not accurately captured the logic behind Madison's veto of the Bonus Bill.

These discussions of internal improvements between 1826 and 1830 illustrate the struggles of actors as diverse as Jackson and Madison to create a proper framework for understanding the internal power, and an

¹⁴³ See MAIER, *supra* note __ (discussing the disputes over the scope of the General Welfare Clause during the state ratification debates).

¹⁴⁴ See MAIER, *supra* note __.

¹⁴⁵ Madison to Van Buren, Sept. 20, 1826, *supra* note __.

¹⁴⁶ *Id.*

appropriate constitutional box – textual, structural, and practical – in which the power might operate. Notably, each of them, like Monroe, supported a constitutional amendment granting Congress some power over internal improvements. Rather than continue the fight at the level of struggles over particular legislation, they thought in terms of revising and fixing the text, even if it meant enshrining a particular substantive view that was not their preferred approach.

D. *Roads III: Land to the States, Charters to the Corporations (1850).*

For some scholars, Jackson’s veto of the Maysville Road bill was the “beginning of the end” of ambitious national programs of internal improvements.¹⁴⁷ Internal improvements bills continued to be debated in Congress, especially public works involving rivers and harbors.¹⁴⁸ While the era of the classic internal improvements bill for a canal or a turnpike had largely passed by the mid-1830s, the 1840s and 1850s brought new transportation technology as well as a distinct set of constitutional concerns and approaches. The growth of railroads raised some new issues and put a different emphasis on some old ones. Examining the debates in this period, in particular the establishment of the Illinois Central Railroad in 1850, illuminates the contemporary constitutional framework because it allows us to see a constitutional workaround in action. That workaround was the mechanism of the federal land grant to a state for the purpose of establishing a railroad.

By the 1840s, politicians who supported internal improvements had begun to shift their focus from direct congressional regulation to land grants from Congress to the states. As the historian Yonatan Eyal puts it, a group of “development-minded Democrats used land grants to skirt the question of the constitutionality of federally sponsored internal improvements.”¹⁴⁹ The grants operated in the following manner:

Congress would donate public lands so that state governments themselves could use them for improvements. This would obviate endless controversy about the propriety of directly creating a road or a lighthouse and would contribute to the same goal of building up the new western states. When desirous of constructing a railroad, for example, Congress would grant alternate sections of public

¹⁴⁷ Feller, *supra* note __, at 141-42.

¹⁴⁸ James K. Polk vetoed a major river and harbor improvements bill in 1846. See also the Memphis Convention debates over internal improvements in 1845.

¹⁴⁹ YONATAN EYAL, *THE YOUNG AMERICA MOVEMENT AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY, 1828-1861*, at 47 (2007).

land for the project. The sections of land not donated could then be sold at a much higher price, since the availability of rail transportation nearby would make them suddenly more lucrative.¹⁵⁰

As a descriptive matter, the historical account tells us about a change in the legal and political mechanism that interbellum Americans applied to internal improvements questions. Land grants were more appealing than substantive congressional regulation – whether through appropriations or jurisdiction – because they allowed contemporaries to build railroads while also honoring state sovereignty.

But what was the constitutional framework underlying this change of mechanism? Why did early-nineteenth-century Americans find land grants to states for the purpose of building railroads less objectionable than either federal funding for, or federal construction of, a railroad? Either approach presented opportunities for private profit and, in some cases, graft. To the extent that the land grants came with obligations, placed restrictions on how the states could go about building the railroad, and indeed required significant effort and investment from the state, why did contemporaries view them as preferable to federally directed programs resembling the Cumberland or Maysville road plans, which might have cost some quantum of sovereignty but required less participation by the states?

The debates surrounding the railroad land grants provide a rich case study of the interbellum constitutional landscape. In particular, the congressional debates surrounding the establishment of the Illinois Central Railroad (ICR) in 1850 throw into relief contemporary conceptions of the commerce power, the spending power, and the Tenth Amendment. The congressional grant of public lands to the state of Illinois, which included a related grant to Mississippi and Alabama, on September 20, 1850, was the first of its kind.¹⁵¹ Drafted by Senator Stephen A. Douglas of Illinois, the bill was viewed by Douglas and others as an essential step in the program of building national infrastructure and expanding national power across the continent.¹⁵² Within a few years, “a slew of bills proposing to grant public lands and rights-of-way for the building of railroads, canals, and telegraphs filled the dockets of Senate and House.”¹⁵³

Historians studying the 1840s and 1850s suggest that contemporaries viewed the land grants as a replacement for the less-

¹⁵⁰ Id.

¹⁵¹ See W.H. Allen, *The Charter Tax of the Illinois Central Railroad*, 6 J. Polit. Econ. 353, 353 (1898).

¹⁵² See EYAL, *supra* note __, at 45-46.

¹⁵³ Id. at 49.

avored mechanism of substantive internal improvements regulation.¹⁵⁴ The orthodox historiographical story has thus held that the land grants in some sense solved the decades-long controversy over internal improvements. Scholars have not probed in depth what it was about the land grants that made them more palatable to contemporaries' constitutional taste. The fact that nineteenth-century Americans adopted the land-grants approach suggests that they believed that an approach under which Congress used the states to build the railroads was constitutional – or, at any rate, less constitutionally problematic than the alternative approach. The alternative was for Congress to send federal engineers to build and run the railroads, akin to the proposed Maysville Road toll collectors.

Yet concluding that the land grants seem to have been more acceptable to contemporaries than direct regulation tells us little about why they might have held this view. It is not at all obvious that a commitment to robust federalism based on state sovereignty necessarily entails a preference for land grants to the states rather than direct congressional regulation. As the ICR debates illustrate, however, interbellum Americans adopted the land-grants approach because it satisfied key concerns that had plagued the previous three decades' worth of internal improvements arguments. These concerns centered on the role of state consent, the appropriation-implementation and local-national distinctions, and the need for a constitutional amendment. The ICR debates also implicated a new set of issues, including the permissible restrictions and conditions on land grants to the states, and the responsibilities of the federal government as a proprietor of land. In short, contemporaries preferred land grants to direct federal regulation because land grants came closer to satisfying crucial interbellum concerns about how federalism, in particular concurrent power, should operate in action.¹⁵⁵

The land-grants approach relied on a few important background principles, chief among them the surveying and land-sale system established by the Ordinance of 1785 and the Northwest Ordinance of 1787, the fact that new states were typically admitted by compact, and the at-times controversial fact that the federal government retained ownership

¹⁵⁴ See, e.g., Eyal, Goodrich, Taylor.

¹⁵⁵ On concurrent power, see Jessica Bulman-Pozen and Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing the ways in which states can resist federal policy); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 3459 (2012) (arguing that state administration of federal law counteracts the tendency of statutory ambiguity and broad delegations of authority to enhance executive power); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011).

of large tracts of public lands within the borders of new states.¹⁵⁶ The Ordinance of 1785 set the basic units of land: the township (six miles by six miles) and the section (one mile by one mile, or 640 acres).¹⁵⁷ In the ordinance, the Confederation Congress also mandated that several lots in each township must be “reserved for the United States.”¹⁵⁸ Two years later, the Northwest Ordinance, one of the initial pieces of legislation passed by the First Congress, provided that the legislatures of new states “shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.”¹⁵⁹ In the Ohio Enabling Act of 1802, according to which Congress granted Ohio permission to seek statehood, the federal government granted the new state certain lands for salt springs and schools. The foundational assumption behind the terms of admission, however, was that “the fee-simple to all the lands within its limits, excepting those previously granted or sold, should vest in the United States.”¹⁶⁰ Consequently, many of the states of the Old Northwest that joined the Union in the early nineteenth century contained large tracts of federal land at the time of their admission. The new sovereign states, in other words, accepted as a term of admission to the Union that significant portions of their land would be held by the general government.

This land provided a hook for Congress to reach into the states and build railroads. In the act establishing the Illinois Central Railroad, the sequence of transactions was clear: it announced itself as an act “granting the right of way, and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a Railroad from Chicago to Mobile.”¹⁶¹ Step one: grant right of way to the state; step two, grant land surrounding that right of way to the state. Congress was not appropriating funds for internal improvements, nor was it proposing ongoing federal involvement with the management of traffic on the nation’s roads. Instead, the act invoked one of the most fundamental congressional powers: the power to dispose of public lands.¹⁶² This

¹⁵⁶ See FELLER, *supra* note ____.

¹⁵⁷ Ordinance of 1785.

¹⁵⁸ *Id.*

¹⁵⁹ Northwest Ordinance (1787), art. IV.

¹⁶⁰ John Kilbourne, *The Public Lands of Ohio*, in 1 HISTORICAL COLLECTIONS OF OHIO . . . AN ENCYCLOPEDIA OF THE STATE 128 (Henry Howe ed., 1889-91).

¹⁶¹ 31 Congress, 1st sess., ch. 61 (1850) (hereafter “ICR Act”). In his biography of Douglas, Robert W. Johannsen posits that Douglas included Alabama and Mississippi in the bill in order to win southern support. He notes that during a visit to his wife’s plantation in Mississippi in 1849, Douglas met with officials of the ailing Mobile and Ohio Railroad, who told him that they needed additional funds in order to fulfill their plan of connecting the Gulf of Mexico with the Ohio River. See ROBERT W. JOHANNSEN, STEPHEN A. DOUGLAS 311 (1973).

¹⁶² See U.S. CONST., Art. IV, sec. 3 (“Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to

transfer of federal land to the states simply happened to come with a condition attached: it was “in aid of the construction of a Railroad” – or a “road,” as contemporaries typically referred to the projects.

As Eyal’s description suggests, the specific provisions of the grant of land to the state, and the reservation of a significant amount of other land to the federal government, were complex. The right of way provision was fairly straightforward: from the terminus of the Illinois and Michigan Canal near present-day Peru, in north-central Illinois; south to Cairo, Illinois, at the junction of the Ohio and Mississippi rivers; with branches eastward to Chicago and northwest to Galena, Illinois, and eventually Dubuque, Iowa. The alternate-section requirement for the selection of the actual parcels of land was more complicated. It provided

[t]hat there be and is hereby granted to the State of Illinois, for the purpose of aiding in making the Railroad and branches aforesaid, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches.”¹⁶³

The alternate sections would thus run perpendicular from the line of the railroad, each measuring one section (one mile) long and stretching six sections (six miles) outward in either direction from the right of way. The result was what was known as a “checkerboard” pattern of land ownership, for as one progressed along the right of way, each mile would bring a new owner. In the immediate aftermath of the bill’s passage, and given the remoteness of the land at issue, those owners would for the most part alternate between the State of Illinois and the federal government. Here came the final piece of the congressional scheme: the double-price provision, according to which the land that remained in the hands of the United States could not be sold for less than double the minimum price of the public lands, or \$2.50 per acre.¹⁶⁴

The ICR act set some penalties for noncompliance by the State of Illinois. The act began by stating that the lands in question “shall be applied to no other purpose whatsoever.”¹⁶⁵ More pointedly, if the railroad was not completed within ten years, the act required Illinois to remit to the federal government the proceeds of any of its sales of the land associated with the grant. The same terms were applied to Alabama and

the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State”).

¹⁶³ ICR Act, *supra* note ___, sec. 2.

¹⁶⁴ *Id.* at sec. 3.

¹⁶⁵ *Id.* at sec. 2.

Mississippi pursuant to a section of the act that established the Chicago and Mobile Railroad.¹⁶⁶

From a structural perspective, the land grants took an unusual form, as contemporaries acknowledged. The federal government possessed lands within the boundaries of some states that it proposed to transfer to the state on condition that the state use the lands for a specific purpose defined by Congress. These lands were located within states that had previously been federal territories, even though many in the newly sovereign states objected to this condition of statehood.¹⁶⁷ In an 1846 debate on a similar plan for a railroad in Michigan, some senators had voiced “old Jacksonian” concerns about the project, arguing that the land grants were merely a cover for federal direction of internal improvements.¹⁶⁸ By 1850, these concerns about federal expansion and encroachment on state power through land grants continued to haunt some legislators. Others, however, had the opposite concern: that the grants were suspect because they allowed a single state to derive undue benefits from the people of the entire United States.¹⁶⁹

When the bill was debated in the Senate, the discussion focused on the broad issue of the relationship that the act established among Congress, the state of Illinois, and the railroad company. Some senators objected to the alternate-section and double-price provisions, which they viewed as creating excessive restrictions on Illinois. They did not oppose the notion that Congress could grant the lands in the first place, or that the lands could be granted to a state provided that they were used for a specific purpose. Rather, their position was that if such a grant was to take place, the land ought to be given to the state – and its citizens – free from conditions. “The route, it is said, will be about four hundred miles in length, and the grant will be equivalent to a strip of land six miles wide throughout the whole length, or one million five hundred and thirty-six thousand acres of land,” Senator Isaac Walker of Wisconsin noted.¹⁷⁰ Under the terms of the ICR act, “[o]n an equal amount of land it is proposed to increase the price to double the usual Government price.”

¹⁶⁶ Id. at sec. 7.

¹⁶⁷ The continuation of westward expansion resulted in a shift in presumptions about the amount of land in new states that would be held by Congress. As post-founding states grew in number, so did their congressional delegations, many of whom were sympathetic to new states’ claims that statehood was incompatible with a presumption that Congress retained large tracts of land. See Sally Fairfax, *Making New States and Establishing the Public Domain*, YEARBOOK OF AGRICULTURE 7 (1987).

¹⁶⁸ See EYAL, *supra* note __, at 47.

¹⁶⁹ Here again the similarity to Marshall’s concerns in *McCulloch* about what modern scholars have termed “representation reinforcement” is striking. See *supra* note 113; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980).

¹⁷⁰ Remarks of Senator Walker, Illinois Central Railroad Debates, Apr. 29, 1850, Congressional Globe, 31st Congress, 1st session, at 845.

Walker condemned this increase in the price of certain federal lands as “a tax upon the actual settlers to that amount in order to build the road.”¹⁷¹ Illinoisans would be burdened by the act’s required price increase, a requirement that prompted Walker to question Congress’s motives. “If the Government is going to be generous, let it be generous; but let it not speculate upon its own lands at the expense of those who are to settle upon them,” he argued.¹⁷²

For Walker and others, the act was problematic not because it promoted internal improvements, or because it gave land to a state to be used for a railroad, but rather because it amounted to a federally imposed tax on settlers in that state who would pay double the pre-act amount to purchase land within the zone of the railroad grant. As William Dawson of Georgia put it, “[W]here is the power in this Government to make a donation to A in a manner that presses B into paying double price? How is it that A became a beneficiary under the Constitution, whilst you put a penalty upon B?”¹⁷³ These critics of the act were skeptical of arguments offered by Douglas and others that the plan would promote the public interest. They regarded it as an exploitation of the people of Illinois and a potential source of “embarrassment” – in the nineteenth-century sense of financial difficulty – for the state itself.

Other opponents of the ICR bill expressed discomfort with the premise that Congress possessed the power to grant 1.5 million acres of federal land to one state, even if Congress claimed that the benefits of the railroad would redound to the entire nation. The chief concern of these senators was therefore that it represented an improper use of the public domain to enrich a single state – that is, that the act was creating excessive restrictions on the federal government. If Congress was going to do something with the public lands, they suggested, it had to be for the benefit of “we the people” of the United States, not simply for Illinois. Unlike the first group of critics, who argued that the ICR act imposed the federal will on a state, these opponents of the act suggested that a single state had captured the federal will and was using it selfishly, perhaps even to the detriment of the other states. Their arguments thus sounded in the local-national distinction that Jackson had used to justify his veto of the Maysville Road bill. Instead of a beleaguered state populace suffering at the hands of an overweening federal government, they saw Illinois and its representatives as attempting to profit from Congress’s zeal for railroads. Dawson put the point in the law French terms of trusts:

Can Congress give to Illinois under the *cestui que trust*, a million and a half acres of land, and then turn round and

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Remarks of Senator Dawson, ICR Debates, *supra* note ___, at 849.

tell the other States in the *cestui que trust*, we do it in order to benefit the whole of you? The question is, have we any such power? In my judgment, we have it not at all. The public property belongs to the entire people, and when we dispose of it we must dispose of it on that principle.¹⁷⁴

The bill's supporters responded to these criticisms by wrapping themselves in the mantle of state sovereignty, while at the same time, and somewhat paradoxically, dismissing the notion that the act subjected Illinois to penalties, coercion, or excessive requirements. James Shields of Illinois argued that "if the bill as it is will be any injury to Illinois, that injury will be for the benefit of the people of the United States, and we who represent Illinois are responsible to our people for that injury."¹⁷⁵ In contrast to Shields's effort to erect a barrier around the people and state of Illinois, William Dayton of New Jersey took a more pragmatic view. "The State of Illinois is not bound to go on and construct this road," he stated. "If you pass this act, she sees what she has before her, and accepts it or does not accept it. There is no obligation incident to the passage of this act that imposes any obligation on her."¹⁷⁶ Dayton thus rejected the implicit argument of many of the act's opponents that the structure of the land grant had any coercive force. The state could simply take it or leave it, he argued.

Proponents of the program also characterized Congress as a beneficent proprietor of the public lands, a trustee with a duty to use the property for the benefit of the people. "I have never entertained the least doubt that the Government, being the large landholder of our country, had the right to dispose of, reserve, or improve the public domain," commented Henry S. Foote of Mississippi.¹⁷⁷ Other advocates invoked the appropriation-jurisdiction distinction that had so powerfully influenced previous debates. Lewis Cass of Michigan insisted that there was "a fundamental difference between the principle of this bill and the Government carrying on a system of internal improvement." Unlike the internal improvements bills of the 1820s and 1830s, "[t]here is no proposition in this bill that the Government should build the road; there is no assumption of authority within the jurisdiction of the States for that purpose whatever." Moreover, Cass argued, echoing Dayton, the states were not even bound by the act. "The jurisdiction is left entirely to the States to do as they please; to make the road or leave the road unmade."¹⁷⁸

¹⁷⁴ Remarks of Senator Dawson, *id.* at 849.

¹⁷⁵ Remarks of Senator Shields, *id.* at 848.

¹⁷⁶ Remarks of Senator Dayton, *id.* at 854.

¹⁷⁷ Remarks of Senator Foote, *id.* at 847.

¹⁷⁸ Remarks of Senator Cass, *id.* at 846.

Still others invoked the continental aspirations of the United States, referring to the ICR as “a great national thoroughfare.”¹⁷⁹

As the Senate debates demonstrate, the railroad land grants raised many of the same themes as had the controversies over roads and canals a few decades earlier. Throughout the ICR discussions, however, one familiar concept proved particularly significant, even as participants struggled to define it and determine its boundaries: the idea of state consent. It was a particularly powerful idea for opponents of the ICR bill, some of whom feared that the plan threatened the sovereignty of Illinois, and others of whom found on the part of Illinois too much consent, even eagerness, to take Congress’s bargain. As has been noted, the entire Ohio congressional delegation supported the Cumberland Road bill in 1822, but that did not amount to the relevant form or quantum of consent for President Monroe.¹⁸⁰ The chief loser (or winner, depending on one’s perspective) from the ICR bill was Illinois, and the ardent support offered by Douglas both aided and hindered the bill’s passage because contemporaries identified the bill with the senator.¹⁸¹ But perhaps the clearest, most concrete evidence of consent came in connection with the bill’s proposal to link the ICR with Mobile, Alabama. After Douglas had met with local representatives of the Mobile and Ohio Railroad and decided to include Mississippi and Alabama in the draft bill, the legislatures of both states instructed their counterparts in the U.S. House and Senate to support the bill.¹⁸² Senator William R. King of Alabama introduced the amendment extending the railroad to Mobile. Was all this evidence of consent by Mississippi and Alabama to a physical invasion by an instrumentality of the federal government? Or was it simply evidence of classic nineteenth-century graft, in which the representatives of the southern states came to view the economic and political benefits of the railroad as outweighing their sovereignty concerns? For critics of the bill, both of these were plausible explanations. Insufficient state consent gave rise to fears of congressional overreach, while a surfeit of consent suggested that the state was funneling away more than its share of benefits from the Union and thus was not adhering to the rules of the federal republic.

In the end, the ICR bill passed the House and Senate and was signed into law by President Millard Fillmore on September 20, 1850. A few months later, in February 1851, the Illinois Central Rail Road Company received a charter from the Illinois legislature.¹⁸³ When

¹⁷⁹ Remarks of Senator Shields, *id.* at 848.

¹⁸⁰ See *supra* TAN __.

¹⁸¹ See JOHANNSEN, *supra* note __.

¹⁸² See *id.* at 311.

¹⁸³ An Act to Incorporate the Illinois Central Rail Road Company, by the State of Illinois, 17th Assembly, Feb. 10, 1851, in DOCUMENTS RELATING TO THE ORGANIZATION OF THE ILLINOIS CENTRAL RAIL-ROAD COMPANY 8 (New York: George Scott Roe, 1852).

construction of the railroad was completed in 1856, the right of way crossed – and raised the value of – a section of property along the Chicago lakefront that had previously been owned by Douglas.

III. THE LOST HISTORY OF THE SPENDING POWER?

The debates over internal improvements legislation, from the Bonus Bill in 1817 to the Illinois Central Railroad Act in 1850, suggest two important insights for modern constitutional law.

First, the factors that the Supreme Court’s recent decisions have treated as essential to analyzing a particular regulation’s congruence with principles of federalism are not the same factors that early-nineteenth-century commentators regarded as relevant. Second, the dramatic difference between interbellum and millennial reasoning about federalism challenges the Court’s reliance on a foundational distinction, unchanged since the founding, between local and national activities. The history of constitutional thought in the early nineteenth century demonstrates that there is no single correct relationship between the general government and the states, with all deviations to be explained away as political-branch mistakes awaiting judicial correction. The internal improvements debates, despite their untidy tacking from the appropriation-jurisdiction distinction to states’ consent and back, were not simply one view of the Constitution. Between the Revolution and the Civil War, they *were* the Constitution.

To understand why this is the case, consider the elements of federalism. In interbellum Americans’ analysis of internal improvements, as we have seen, the key factors were the consent of the states; the distinction between Congress’s power to appropriate funds for internal improvements and its power to implement and retain jurisdiction over those projects; and widespread acceptance of the idea that the Constitution could be amended to give Congress additional enumerated powers. In the Court’s modern federalism analysis, however, these factors are largely irrelevant.

The varying significance of state consent is best illustrated in the Court’s 1992 decision in *New York v. United States*. In that case, a majority of the Court invalidated a federal provision requiring states that could not dispose of their own hazardous waste by a certain date to take title to the waste. The majority’s theory was that by requiring a state to assume ownership of the waste, Congress would in effect be “commandeering” the state treasury because it would be compelling the state to subsidize private parties – here, the producers of hazardous waste, who would be relieved of ownership and liability by the federal

provision.¹⁸⁴ “The take title provision offers state governments a ‘choice’ of either accepting ownership of waste or regulating according to the instructions of Congress,” Justice Sandra Day O’Connor wrote for the Court. “As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.”¹⁸⁵ The fact that New York had previously supported the regional waste compact containing the take-title provision was of no moment to the Court. “The constitutional authority of Congress cannot be expanded by the ‘consent’ of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.”¹⁸⁶ It was not possible for New York to consent to what the Court regarded as a violation of New York’s sovereignty. “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities,” O’Connor wrote. “To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”¹⁸⁷ In other words, state sovereignty requires that a state be prohibited from waiving any portion of what the Court understands to be its Tenth Amendment rights.¹⁸⁸

Moreover, in the early nineteenth century, the project of fleshing out precisely what federalism ought to look like in practice took place primarily in the political branches, in contrast to the modern Court’s suggestion that the judiciary is the best judge of what federalism requires. This point is implicit in *New York v. United States*, and it became explicit in the health care case, with the Roberts Court’s revival of the coercion inquiry in the context of the spending power analysis.¹⁸⁹ Although one might plausibly think that the coercion analysis is simply a modern version of the early-nineteenth-century consent inquiry, the Chief Justice’s opinion makes clear that the opposite of coercion is not consent by the state, but rather the Court’s assessment that a particular spending program

¹⁸⁴ *New York v. United States*, 506 U.S. 144, 175 (1992) (.

¹⁸⁵ *Id.* at 175-76.

¹⁸⁶ *New York*, 506 U.S. at 182. But cf. *Hammer v. Dagenhart*, 247 U.S. 251, 278 (1918) (Holmes, J., dissenting) (“The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.”).

¹⁸⁷ *Id.* at 181.

¹⁸⁸ Cf. Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* (Gillian Metzger, Trevor Morrison & Nathaniel Persily eds., 2013).

¹⁸⁹ See *NFIB*, 567 U.S. at ___. On the relationship between the conditional spending caselaw and the anticommandeering doctrine, see Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WISC. L. REV. 339.

does not amount to “economic dragooning that leaves the State with no real option but to acquiesce.”¹⁹⁰

To be sure, as *NFIB* demonstrates, modern federalism doctrine does view the states as having the power to consent to the “bargains” offered by congressional conditional spending programs. Indeed, the fact that the Medicaid provision of the ACA threatened to strip states of pre-ACA Medicaid funds proved dispositive to the majority’s determination that the program was not the type of “relatively mild encouragement” typically associated with conditional spending programs, but instead represented “a gun to the head.”¹⁹¹ In the majority’s view, the problem with the Medicaid provision was precisely that it did not offer the states an opportunity to consent to a deal that might have culminated in the loss of their entire federal Medicaid funding.

But to the extent that notions of consent underpinned the Medicaid portion of the *NFIB* decision, we must distinguish between consent in the context of the conditional spending workaround on one hand, and in the context of direct congressional regulation under Article I on the other hand. As modern federalism cases such as *New York v. U.S.*, *Printz v. U.S.*, and even *Garcia v. SAMTA* – and, of course, the portion of the *NFIB* decision that rejected the Commerce Clause and Necessary and Proper Clause justifications for the individual mandate – demonstrate, state consent can no longer be used a defense for Congress against the charge that its regulation violates the Tenth Amendment. But this was not the case in the early nineteenth century. On the contrary: as the internal improvements debates demonstrate, the presence or absence of state consent was a vital ingredient in the interbellum assessment of congressional regulation under Article I.

Similarly, the early-nineteenth-century distinction between appropriations and implementation, and especially the belief that appropriations were constitutionally less problematic, has no real analogue in modern doctrine. Consider Madison’s array of proposed amendments in his correspondence with Van Buren. His second proposal, to grant Congress the power to make appropriations that it would then turn over to the states for them to apply to road and canal projects,¹⁹² would raise red

¹⁹⁰ *Id.* at 52. State sovereign immunity under the Eleventh Amendment might appear to involve similar issues of consent, insofar as a state may in some cases be held to have waived its immunity, and therefore to be susceptible to suit in federal court. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). Waiver, however, is not the same as consent. Moreover, unlike the Tenth Amendment arena, a state’s acquiescence to judicial process has no direct implications for congressional power.

¹⁹¹ *NFIB*, 567 U.S. at __ (slip. op. at 51).

¹⁹² See *supra* TAN __.

flags today.¹⁹³ To the extent that it permitted Congress to order state legislatures to build roads and canals, the proposal would run afoul of the Tenth Amendment's anticommandeering principle.¹⁹⁴ Moreover, the proposal would be difficult to justify as an exercise of the conditional spending power. Although Congress typically has more latitude to affect state policy through a conditional spending program than through direct regulation, the lack of a condition in Madison's scheme would foreclose that avenue.

A different set of modern objections could be levied against Madison's third proposal, which suggested granting Congress the power both to appropriate funds for, and to implement, internal improvements projects.¹⁹⁵ To be sure, such an approach would be less likely to run afoul of the Tenth Amendment insofar as it does not involve Congress using the states to carry out a federal program. On the contrary: state governments would be excluded from internal improvements projects, which would be carried out by federal officials. (Recall the Cumberland Road toll collectors.) But other modern doctrinal concerns concerning direct congressional regulation would then become relevant. For instance, some of the internal improvements projects – for instance, a short stretch of road within a single state, such as the Maysville Road – would arguably be purely local in nature, with only remote effects on national markets. Such a situation would trigger the intuition underpinning the majority's holding in the health care case that the individual mandate is beyond the scope of the commerce and necessary and proper powers.¹⁹⁶

As these examples demonstrate, the fundamental constitutional relationship between Congress and the states, which is most clearly observed through the device of the spending power, has undergone profound change since the early nineteenth century. Constitutional interpretations that emerged in the course of conflict between members of Congress, and between Congress and the president, are largely absent from modern doctrine. To be sure, doctrine changes over time, and one cannot reasonably expect the same arguments to be made over the course of two centuries' worth of caselaw. But the great silence surrounding the early nineteenth century in modern doctrine is notable given the posture of the Court in recent decades. In the area of the spending power, as in the

¹⁹³ Of course, if any of Madison's proposals was enacted as a constitutional amendment, these textual and structural objections would not apply. But the objections are nonetheless useful because they highlight the gulf that separates modern federalism doctrine from that of the early nineteenth century.

¹⁹⁴ See *New York*, 505 U.S. at 175-76 (stating that "a simple command to state legislatures to implement legislation enacted by Congress" is beyond Congress's power).

¹⁹⁵ See *supra* TAN __.

¹⁹⁶ See *NFIB*, 567 U.S. at __ (slip op. at 29); see also *Lopez v. United States*, 514 U.S. 549, 567 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Cooley v. Board of Wardens*, 53 U.S. 299, 319 (1851).

Tenth Amendment, the Court has frequently taken the position that the basic conditions of the federal-state relation have not changed, and indeed could not have changed, since the founding era. Chief Justice Roberts's opinion in the health care case exemplified this approach: "The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions *and Congress's actions* have reflected this understanding."¹⁹⁷

What are modern constitutional lawyers to make of the internal improvements debates? One answer is that the debates tell us that we should listen to James Madison in order to understand that sometimes listening to James Madison would amount to good historical work but bad lawyering. This is so not because Madison was wrong in some fundamental sense about the best way of implementing the Constitution's scheme of federalism, or because lawyers should not pay attention to history, or because old constitutional ideas are inherently suspect. But neither are old constitutional ideas inherently correct, especially when layers of old constitutional ideas must be sifted through and evaluated.¹⁹⁸ Rather, the point is that the Constitution of the early nineteenth century was not the Constitution of the twenty-first century, even with respect to provisions of the text that remained the same throughout that time.

Indeed, even in the period from 1817 to 1850, the universe of constitutional possibility shifted. As the railroad debates demonstrate, by 1850 discussions of internal improvements were no longer focused on finding the right language for a constitutional amendment that most parties agreed would solve the problem. Instead of ambitious proposals to give Congress additional enumerated powers, Douglas and other supporters of land grants to the states framed their arguments in more conservative terms that worked with the constitutional text as it stood.¹⁹⁹ From the 1810s to the 1830s, presidents and members of Congress believed that they were living in an extension of the original constitutional moment, and therefore assumed that the Constitution was still open to relatively easy amendment. By 1850, however, that moment had ended. Consequently, supporters of internal improvements turned to workarounds that fit with their sense of the constitutionally permissible options. These workarounds, such as the railroad land grants, in turn became part of the interbellum Constitution.

¹⁹⁷ See, e.g., *NFIB*, 567 U.S. at ___ (slip op. at 24) (emphasis added, previous emphasis omitted)

¹⁹⁸ See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

¹⁹⁹ See *supra* TAN ___.

CONCLUSION.

Land grants to railroads did in some sense solve the problem of internal improvements that had dogged American law and politics since the founding. Applying the modern taxonomy of types of congressional regulation, the land grants look more like a conditional spending program than direct federal regulation under the commerce power or the necessary and proper power. We can therefore say that direct regulation, and with it the growth of congressional power, appeared more suspect to early-nineteenth-century Americans than did conditional spending programs that relied on the states to carry out specific projects.

The modern concern with Congress's ability to commandeer the states, and the resulting imperative for the Court to protect the states, thus did not have the resonance in the early nineteenth century that it has today. The interbellum worry about direct congressional implementation of internal improvements did not apply if the regulation was rooted in an enumerated power, and many members of Congress and several presidents were willing to expand that list of powers through the process of constitutional amendment. Analogies to modern doctrine, then, are tempting but ultimately difficult to make. Yet it is precisely this disanalogy between the early-nineteenth-century constitutional landscape and our own that offers valuable lessons for modern constitutional law. Even when modern doctrine can be analogized to arguments and debates from the long founding period, the reasoning behind those preferences is not the same from their period to ours. Constitutional workarounds flourish and change over time. Understanding the doctrinal history that created and was created by the workarounds provides a vital window into the universe of constitutional possibility at a specific time – and a cautionary tale for static or originalist arguments about the nature of American federalism.

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