

FROM THE LIGHTHOUSES: HOW THE FIRST FEDERAL INTERNAL  
IMPROVEMENT PROJECTS CREATED PRECEDENT THAT BROADENED THE  
COMMERCE CLAUSE, SHRUNK THE TAKINGS CLAUSE, AND AFFECTED EARLY  
NINETEENTH CENTURY CONSTITUTIONAL DEBATE

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# FROM THE LIGHTHOUSES

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I will not go to a dictionary for the meaning of the word “regulate.” I will go to the history of legislation, commencing with the foundation of this Government, and continued without interruption or objection, on constitutional principles, down to this day, to prove what the undoubted right of Congress, under the power in question, is.

*Rep. Jacob C. Isacks*  
(*Mar. 24, 1830*)<sup>1</sup>

[The power to take private property] only appears a little novel, because we are not familiarized to it.

*Rep. Joseph Hemphill*  
(*Jan. 14, 1823*)<sup>2</sup>

INTRODUCTION

In the first few decades of the nineteenth century, pages and pages of the Annals of Congress and Register of Debates were filled with repeated debates over the constitutionality of federally-sponsored internal improvement projects—projects intended to facilitate commerce through

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<sup>1</sup> 6 Reg. Deb. 662 (1830).

<sup>2</sup> 40 Annals of Cong. 622 (1823).

improved transportation.<sup>3</sup> Among other topics, Congressmen fought over whether the power to “regulate” commerce included the power to “facilitate” commerce by constructing roads and canals.<sup>4</sup> And the existence of a federal eminent domain power (potentially necessary to bring such projects to fruition) was also questioned during these debates.<sup>5</sup>

The quotes above come from two such internal improvement debates. At the time the statements were made, Congress was not debating on a clean slate. Or rather, the slate was only one-third clean. Though a question of crucial importance to the development of the country, whether or not the Constitution empowered the federal government to create internal improvements never reached federal court.<sup>6</sup> But the slate did contain the prior constitutional interpretations (or constructions) of the other two branches of government. It was that slate—the “history of legislation”—that Tennessee’s Jacob Isacks was consulting instead of the dictionary, in searching for constitutional meaning. Isacks’ comment is a window to a key aspect of the debate he and his colleagues were engaged in: whether Congress could rely on legislative precedent (over the dictionary, even) as conclusive of how the Constitution was to be interpreted.

The dominant twentieth and twenty-first century conception of the balance of powers places the power of constitutional interpretation squarely within the province of the judiciary.<sup>7</sup> However, recent scholarship, particularly by Larry D. Kramer, has argued for a revival of the legislature’s

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<sup>3</sup> “Internal improvements” was the phrase then used to refer to transportation projects. Harry N. Scheiber, *The Transportation Revolution and American Law: Constitutionalism and Public Policy*, in *Transportation and the Early Nation* 1, 1 (1982). In the 1780s, the phrase was used loosely to refer to a variety of programs aimed at encouraging the new nation’s “security, prosperity, and enlightenment,” but the concept eventually narrowed until it became “synonymous with public works for improved transportation.” John Lauritz Larson, *Internal Improvement* 3 (2001).

<sup>4</sup> Other powers were often cited to justify construction of internal improvements, such as the power to establish postal routes, the power to conduct military affairs, or the power to spend for the nation’s general welfare, but my focus here is on how early Congresses debated and constructed federal authority under the Commerce Clause.

A sense of the difficulty of the “internal improvements” question can be gleaned from the fact that Justice Story, in his *Commentaries on the Constitution*, was unwilling to opine on whether the Constitution empowered the federal government to construct roads and canals and improve the navigation of watercourses. Joseph Story, *Commentaries on the Constitution of the United States*, vol. II at 162-65 (3d ed. 1858)(saying that “the reader must decide for himself upon his own views of the subject”).

<sup>5</sup> For a discussion of eminent domain, see *infra* at \_\_\_\_.

<sup>6</sup> Harry N. Scheiber, *The Transportation Revolution and American Law: Constitutionalism and Public Policy*, in *Transportation and the Early Nation* 1, 3 (1982).

<sup>7</sup> Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 8 (forthcoming).

historical role in determining constitutional meaning,<sup>8</sup> and the proper roles of court and legislature in constitutional interpretation are very much in debate today.<sup>9</sup>

But rather than entering that debate, let us return instead to the internal improvement debates of the early nineteenth century. In doing so, we find much strongly worded dissent from Mr. Isacks' view that Congress could rely on legislative precedent to impart meaning to words in the Constitution when the dictionary may have suggested otherwise.<sup>10</sup> The issue was not just one of balance of powers (whether Congress, rather than the Court, could impart meaning to the Constitution). Central to the debate was whether legislative precedent could be given weight in any constitutional interpretation. It is a question that goes to the heart of the nature of our Constitution.

As John Reid has shown, the concept of constitutional law being built on custom was a part of 18<sup>th</sup>-century jurisprudence.<sup>11</sup> Just as rights

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<sup>8</sup> *Id.* at 176-92; Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Col. L. Rev. 237, 319-30 (2002); Keith E. Whittington, *Constitutional Construction* 1-3 (1999); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1, n.271 and accompanying text (Nov. 1998).

<sup>9</sup> *See, e.g.*, Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, in *Marbury v. Madison: A Bicentennial Symposium*, 89 Va. L. Rev. 1106 (Oct. 2003); L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren and Rehnquist Courts*, in *Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial of Marbury v. Madison*, 38 Wake Forest L. Rev. 697 (Oct. 2003). The Supreme Court's recent Commerce Clause trilogy (*United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995)) has also fueled the debate.

<sup>10</sup> *See, infra*, \_\_\_\_\_. Research by Michele L. Landis has found that reliance on precedent played a significant role in early Congressional provision of disaster relief. Those early legislative acts bear a quasi-judicial stamp (in Landis' words, Congress was acting more like a court than a legislature in handling requests for relief), and Congressional debaters often argued either that precedent must be followed to ensure that analogous cases would be treated equally, or that a particular petition should be denied for fear of creating additional precedent. Though some argued against the binding nature of precedent, by the late 1820s many members in Congress felt bound by prior actions to entertain (and pay) federal claims for relief under similar circumstances. *See* Michele L. Landis, "Let Me Next Time Be 'Tried by Fire'": *Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 Nw. L. Rev. 967, 1003, 1009-11, 1015-16 (Spring 1998); Michele L. Landis, *Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State*, 33 Law & Soc. Rev. 257, 268-70 (1999).

<sup>11</sup> John Philip Reid, *The Authority to Legislate* 153 (1986); Kramer, *The People Themselves* 22-28 (discussing 18<sup>th</sup> century view that Constitution could be amended by precedent). *See also* Kramer at 261-76 (discussing early nineteenth century shift in

could be established by customary practice, the dangerous flipside was that any innovation in the law could become “mutated from an aberration into a precedent.”<sup>12</sup> In Reid’s words, the creation of precedent was the “ultimate constitutional risk,” because through it the unconstitutional could be converted into the constitutional.<sup>13</sup> The internal improvement debates of the early nineteenth century provide a rich example of a debate over whether earlier conceptions of a customary constitution still held sway. Did legislators of the period believe that prior unopposed legislative practices could be deemed precedent that would provide meaning to an evolving Constitution, or did they believe that reliance on such precedent was unconstitutional because it could potentially amend the fixed words of the Constitution outside the established amendment mechanism?<sup>14</sup>

In arguing that legislative precedent established Congress’ “undoubted right” under the Commerce Clause, Representative Isacks was harkening back to the then longstanding federal practice of building one particular type of internal improvements: lighthouses and similar navigational aids.<sup>15</sup> In fact, despite the slow evolution of the federal internal improvement program, the power to build lighthouses was established within the first five months of the First Federal Congress.<sup>16</sup> From that early date forward, the power to “regulate” (*i.e.* facilitate) commerce by constructing such navigational aids was continuously exercised without serious challenge. And just as routinely, federal

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thinking of Constitution similarly to ordinary law).

<sup>12</sup> Reid, *The Authority to Legislate* at 157-58.

<sup>13</sup> *Id.* at 158.

<sup>14</sup> Supreme Court practice during the same period has been characterized as enforcing the “original meaning” of the Constitution, based on an understanding that such meaning was “fixed” and could only be changed by formal amendment. See Howard Gillman, “*The Collapse of Constitutional Originalism and the Rise of the Notion of the ‘Living Constitution’ in the Course of American State-Building*,” 11 *Studies in Am. Pol. Devel.* 191, 192, 194, 198-204 (Fall 1997). But compare *id.* at 204 (interpreting Justice Marshall’s decision in *M’Culloch v. Maryland*, 17 U.S. 316 (1819), as consistent with a fixed original understanding of the scope of federal power) with H. Jefferson Powell, “*The Original Understanding of Original Intent*,” 98 *Harv. L. Rev.* 905, 940-44 (1984-85) (saying that Justice Marshall shared Madison’s acceptance of the authority of precedent). See also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. Chi. L. Rev.* 519, 525-29 (2003) (discussing Madison’s conception of constitutional meaning being “liquidated” or “settled” over time through precedents); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 *Yale L.J.* 1717 (May 2003) (setting forth a modern theory of “common law” constitutional interpretation).

<sup>15</sup> “It has been the work of every year to make harbors, build custom-houses, warehouses, seawalls, light-houses, and do every thing which the convenience of external trade requires.” 6 *Reg. Deb.* 662 (1830).

<sup>16</sup> See Act of Aug. 7, 1789, ch. 9, 1 Stat. 53 (the “Lighthouse Act”).

lighthouse construction was relied on as a helpful analogous precedent by Congressmen arguing in favor of a broader power to construct roads and canals.<sup>17</sup>

Whenever Congress debated the legal weight to be given to Commerce Clause precedents, construction of lighthouses and related navigational aids was always a factor in the discussion. In fact, the birth of the federal lighthouse system provides an excellent example of the power that legislative precedent—or the lack of such precedent—had over the development of constitutional interpretation in the early republic.

In 1789, when the First Federal Congress first sat, it would not have been clear to everyone that (1) the federal government had the power to construct lighthouses; and (2) that the power to “regulate” commerce included the power to “facilitate” commerce by constructing such internal improvements. Nevertheless, the Commerce Clause precedent created by the Lighthouse Act remained virtually unquestioned even while the power to “construct” improvements and “facilitate” commerce would be debated for decades in relation to proposed road and canal programs. Whether the lighthouse precedent was to be accorded broader application was heavily debated. But the precedent of federal lighthouse building was never turned back.

In the first half of Part I, I explain how the Commerce Clause was expanded so quickly to encompass federal lighthouse operation. As it turns out, the federal government’s swift entry into questionable constitutional waters did not occur because the First Federal Congress arrived at a principled interpretation of the Commerce Clause, to be applied in all analogous situations. Rather, the federal government took up this one type of internal improvement so rapidly because of narrow considerations stemming from the newly-imposed federal tax policy. With the new federal government collecting the specific type of duties previously relied upon by states to maintain their lighthouses (“tonnage duties”), political considerations were greatly aided by an interpretation of the Commerce Clause that justified creation of a federal lighthouse system.

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<sup>17</sup> See, *infra*, \_\_\_\_\_. A typical example is this argument by Massachusetts’ Timothy Pickering, made thirteen years before Isacks’ remarks: “[C]ommerce (which consisted in the exchange of commodities) was carried on by land, as well as by water; and if Congress, under the clause for regulating commerce, could rightfully do, what, from the formation of the Government, they had been doing and without a single objection—erecting lighthouses, beacons, and piers, to give facility and safety to commerce by water; why should they not exercise the like power to facilitate, secure and render less expensive by means of roads and canals, the commerce *by land*?” 30 Annals of Cong. 859 (1817).

In the second half of Part I, I show how the precedent of lighthouse building was relied in during the internal improvement debates, and how interpretations of the Commerce Clause were affected by such legislative precedent. In sum, subsequent Congressional debate shows that although the Lighthouse Act was enacted before it would have been widely accepted that the power to “regulate” under the Commerce Clause included the power to “facilitate” commerce (and for reasons related to the nexus between lighthouses and federal tonnage policy), the legislative precedent for lighthouses became solidified as a valid Constitutional interpretation.

In Part II, I examine the eminent domain issue raised by the second quote provided at the beginning of this article. The federal government’s power to take private property was not confirmed by the Supreme Court until the 1870s. The accepted historiography holds that the federal government did not exercise its eminent domain powers until that late date because of doubts that the power existed. However, the history of the federal lighthouse program in the 1790s suggests the need for reconsideration of the accepted eminent domain historiography. In brief, there is evidence that the early administrators of the lighthouse program were more prepared than previously assumed to exercise federal takings power—and that the delay in solidification of a federal eminent domain power occurred not because of doubts that existed right after the founding, but rather because the use of the power never took hold as precedent for other reasons. As explained in Part II, early exercise of the power combined federal acquisition of title (which did not require state consent) with acquisition of jurisdiction (which did require state consent), and later politicians blurred the two concepts together in arguing that the federal government lacked the power to take title without state consent.

In other words, an examination of the birth of the federal lighthouse system shows us both sides of the power that non-judicially created precedent could hold in the early republic. Because lighthouses were routinely constructed, the interpretation of the Commerce Clause followed suit. But because the federal government had not routinely and clearly exercised its powers to condemn property without any state involvement, federal takings power shrunk, even though earlier understandings of the Constitution could have supported its exercise.

We turn now to an examination of how the federal lighthouse system created Commerce Clause precedent in the first months of the First Federal Congress.

I. FEDERALIZATION OF LIGHTHOUSES AND THE CREATION OF LEGISLATIVE PRECEDENT UNDER THE COMMERCE CLAUSE

A. *How federal tax policy led to the establishment of Commerce Clause Precedent in the first five months of the First Federal Congress*

In a world with speedy land and air transportation, and sophisticated navigation systems, it is easy to forget how important lighthouses were to our eighteenth century predecessors. But when the First Federal Congress first sat in March 1789, a dozen or so (now quaint, to us) pillars with lamps guided the way over the nation's most significant commercial routes.<sup>18</sup> All of them had been put there by the individual colonial and state governments.<sup>19</sup> In assessing whether the framers or ratifying conventions of the Constitution would have anticipated the new federal government immediately supplanting the state governments' role in erecting and maintaining them, three facts are worth noting:

At the Constitutional Convention, the question of federal control over lighthouses was not debated. Delegate James McHenry considered making a motion to provide for such power, but on the last day of debate—the day after the convention rejected a motion by Benjamin Franklin for a grant of power to cut canals—McHenry's Maryland delegation moved instead for a clause preventing Congress from restraining States from laying "duties of tonnage" for erecting lighthouses and clearing harbors.<sup>20</sup> In response to the motion, the convention decided to treat tonnage duties the same way imposts and duties on imports and exports were treated; states would be restricted from laying them without the consent of Congress.<sup>21</sup> Thus, the Constitution left a significant potential lighthouse funding

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<sup>18</sup> See Dennis L. Noble, *Lighthouses & Keepers* 5 (noting that colonial lighthouses were erected near important ports of trade). Decades later, water travel was still superior to overland commercial routes.

<sup>19</sup> Francis Ross Holland, Jr., *America's Lighthouses: An Illustrated History* 8-12, 69-80 (1988). Prior to 1789, the national government expended no monies for erecting or repairing lighthouses or navigational aids. American State Papers, Vol. 2, Ser. 15, No. 235 (Expenditures for Surveying the Seacoast, Bays, &c, and for the Lighthouse Establishment, communicated to the Senate, Nov. 17, 1820). That can be contrasted with the interstate postal system, which a 1982 Congressional ordinance dubbed "essentially requisite to the safety as well as the commercial interest" of the United States, and into which the Continental Congress had poured over \$150,000 in order to keep it afloat. Journals of the Continental Congress at 670 (Fri. Oct. 18, 1782); Wayne E. Fuller, *The American Mail* 36 (1972).

<sup>20</sup> Max Farrand, *The Records of the Federal Convention of 1787*, Vol. II at 504 (McHenry) (1911); *id.* at 615 (Madison), 625 (Madison), and 633 (McHenry). Tonnage duties were traditionally used to fund lighthouse operations. See, *infra*, at \_\_\_.

<sup>21</sup> *Id.* at 624-26 (Madison), 633-34 (McHenry).

mechanisms to subsequent political resolution, and said nothing explicitly one way or the other regarding state or federal power to construct and operate lighthouses.

Second, during the ratification period, both federalists and anti-federalists argued from the position that the federal government would lack power over building lighthouses and other forms of internal improvements. Federalists assured a wary public that the federal government would not interfere with such traditional state operations.<sup>22</sup> Anti-federalists decried the fact that the Constitution left the states nothing more than that.<sup>23</sup> The anti-federalist concern was not that Congress would start building transportation-related projects, but that it might interfere with the states' own projects by virtue of its broad power over critical sources of funding (*i.e.* taxes).<sup>24</sup>

Third, throughout the ratification period—and even while Congress was first sitting—states continued to plan and construct new lighthouses, in addition to maintaining the existing structures.<sup>25</sup> That is not to say that the state-run system was without problems. But in 1789, the state-built lighthouse system was functional and in the capable hands of state-appointed caretakers.<sup>26</sup>

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<sup>22</sup> XV Documentary History of the Ratification of the Constitution, Commentaries on the Constitution, Public and Private, Vol. 3 at 453, 457-8 (John P. Kaminski et al. eds., 1984) [Number 472, "A Freeman I," Pennsylvania Gazette, 23 January, 1788]; *id.* at 508, 510 [Number 488, A Freeman II, Pennsylvania Gazette, 30 January, 1788].

<sup>23</sup> In Patrick Henry's words to the Virginia ratification convention, "What shall the states have to do? Take care of the poor, repair and make highways, erect bridges, and so on, and so on? Abolish the state legislatures at once. What purposes should they be continued for? Our legislature will indeed be a ludicrous spectacle...." 3 Elliot's Debates 171 (June 9, 1788).

<sup>24</sup> XVII Documentary History of the Ratification of the Constitution, Commentaries on the Constitution, Public and Private, Vol. 5 at 133, 142 (John P. Kaminski et al. eds., 1995) [Number 688, "A Farmer," Philadelphia Freeman's Journal, 16, 23 April 1788].

<sup>25</sup> See, e.g., Acts and Laws of the Commonwealth of Massachusetts (publ. 1893), 1787—Ch. 21 (p.577) and 1787—Ch. 31 (p.595); Acts and Laws of the Commonwealth of Massachusetts (publ. 1894), 1789—Resolves, Ch. 131 (p.600); Hennings—1787, Ch. I, section XXII (p.428), Ch. IV, section XV (p.442), section XXXI (p.445); Contract between the Commissioners of the Navigation of Cape Fear and Matthew Lyall, dated May 28, 1788, located in Record Group 26 of the National Archives, 17G, Box 1; William Campbell, Benjamin Smith, Henry Toomer, George Hooper, M. R. Willkings, Auly Macnaughten, and Thomas Withers to Alexander Hamilton, Sept. 5, 1791 (reprinted in IX Syrett 173) (stating that construction began in 1788, and describing plan and state of Cape Fear lighthouse); David Stick, Bald Head: A History of Smith Island and Cape Fear 32 (1985) (concluding that state did most of the work on the Cape Fear lighthouse); XXV The State Records of North Carolina (Walter Clark, ed.) 54 (1906) (Ch. 58 of 1789 laws, providing for erection of lighthouse on "Ococock Island").

<sup>26</sup> Report of Alexander Hamilton to George Washington, June 18, 1790 (providing

Given that background, why did the dramatic change from state to federal control over these key pieces of state-owned infrastructure occur so quickly in the early days of the First Federal Congress? It was not because of a shared majority conception of the new government's broad role in internal improvement projects. Rather, the expansion of federal power grew out of a conflict between typical state funding mechanisms for lighthouses and Congress' exercise of its new taxation powers.

Prior to 1789, a primary source of funds for constructing, maintaining, and operating lighthouses had customarily been the assessment of "tonnage duties" (or "light money") on ships that came into port.<sup>27</sup> The Constitution gave the federal government the power to assess tonnage duties, and (as noted above) provided that states could not lay such duties without federal consent. As a general matter, of course, the more taxes the federal government collected, the fewer the resources left in state hands for any state-run projects. But with lighthouses there was additionally a specific link between a particular type of tax and the projects traditionally funded by that tax. It is that link that brought the Commerce Clause issue to the fore so quickly: If the federal government collected tonnage duties rather than consenting to state assessed duties, what would happen to the states' lighthouses? Could the federal government constitutionally take control of them? These are the questions that arose as soon as Congress sat down to discuss the issue of tonnage.

*1. The Tonnage Act Debate: How Constitutional and Political Issues Regarding Federal Operation of Lighthouses Were Effectively Resolved Before They Had Been Fully Debated*

*[If the Constitution] had in view institution of lighthouses and other things, [it] might have*

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favorable summary of the present condition of the lighthouses, and stating that the prior state-appointed keepers have been recommended as proper to be continued).

<sup>27</sup> The following are examples of state light money statutes: Leonard Woods Laberee, ed., *The Public Records of the State of Connecticut from May, 1785, through January, 1789* 22 (1945); XIX, Pt. 2 *Colonial Records of the State of Georgia* 476, 479 (1911); XXV *State Records of North Carolina* (Walter Clark, ed.) 54-55 (1906); N.H. Act of Apr. 16, 1784; XII *Statutes at Large [Virginia]* (William Hening, ed.) 304, 305 (1823); X *Records of the State of Rhode Island* (John Russell Bartlett, ed.) 105 (1865); *Acts and Laws of the Commonwealth of Massachusetts 1782-83* at 543 (1890).

Though lotteries and general revenues were also used for lighthouse construction, light money was (in addition to being an important source of funds for construction) the major source of funds for ongoing operational and maintenance costs. *See id.*; George R. Putnam, *Lighthouses and Lightships of the United States* 1, 4-6, 11, 15, 18, 22 (1933); Edward Rowe Snow, *The Lighthouses of New England 1716-1973* at 322 (1973).

*given [Congress] this power by introducing few words.”*

*Rep. Theodorick Bland,  
during the tonnage debate*<sup>28</sup>

Revenue was the new government’s primary need. And so, after a month of waiting for congressmen to arrive, and a week spent ironing out procedural matters, the House got down to business in early April 1789, with James Madison introducing an impost and tonnage resolution in order to cure “the deficiencies of the federal treasury.”<sup>29</sup> The main goal was generating revenue, but by including tonnage duties in his resolution, Madison also intended to address another need: use of Congress’ taxation and regulatory powers to bolster American commerce by addressing power disparities the individual states had faced in their competition with foreign shipping.

Accordingly, the draft resolution set forth (with blanks for the amounts yet to be debated) a protectionist schedule of separate tonnage duties for American vessels, foreign vessels, and foreign vessels from countries with whom the United States had treaties.<sup>30</sup> The inability of the states to respond as a unified group to other nations’ harmful foreign trade policies had been a significant problem during the Confederation, and Madison’s resolution was intended to achieve a national tonnage policy of “discrimination” against foreign vessels.<sup>31</sup>

The reaction to Madison’s introduction of the discriminatory tonnage issue was swift. South Carolina’s Thomas Tudor Tucker, representing a state whose merchants relied heavily on British shipping, immediately voiced his objection, asking that discussion of the matter be

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<sup>28</sup> X Documentary History of the First Federal Congress of the United States of America (Bickford, Bowling, and Veit eds.) [“DHOFFC”] 395 (May 4, 1789) (Lloyd’s Notes, 4 May).

<sup>29</sup> *Id.* at 1-2 (Apr. 8, 1789) (The Daily Advertiser, 9 Apr. 1789).

<sup>30</sup> *Id.* at 2.

<sup>31</sup> As reported in the Daily Advertiser, Madison explicitly stated that the subject of his resolution “might be considered in two points of light. First as it respected only the regulation of commerce. Secondly as to revenue.” *Id.* at 1. “Regulation” refers to the impact that the various imposts and tonnage duties would have on commerce related to the targeted items and vessels. *See, e.g.*, James Madison to Jos. C. Cabell, Esq., Sept. 18, 1828, reprinted as Madison on the Tariff, Letter 1, in 4 Elliot’s Debates 600, 601, 604 (stating that the power to regulate trade with foreign nations “embraces the object of encouraging by duties, restrictions, and prohibitions, the manufactures and products of the country;” and describing Virginia’s pre-convention view that uniformity of commercial regulations was needed between the states and foreign nations); Jeffrey T. Renz, *What Spending Clause? (Or the President’s Paramour)*, 33 J. Marshall L. Rev. 81, 88-94 (1999) (discussing Congress’ power to levy duties for either revenue or regulatory purposes).

deferred until additional representatives were present.<sup>32</sup> The motion succeeded and the tonnage issue was set aside while Madison's proposed imposts were debated.<sup>33</sup>

On April 21, the House returned to the issue of tonnage, the first point of discussion (in the order of Madison's resolution) being how much American vessels should be charged. Massachusetts' Benjamin Goodhue (whose state was a major center of the American shipping industry) opened the debate by questioning why Congress should impose any tonnage on American vessels at all.<sup>34</sup> The response provided by Pennsylvania's Thomas Fitzsimons gives us the first mention of lighthouses by the First Congress: Why was tonnage needed? In order to raise sufficient revenue for "lighthouses, and regulation of places that are incident to them."<sup>35</sup> Madison agreed, and chimed in with the suggestion that there were also other "establishments incident to commerce" for which "some small provision of this kind was necessary"—such as hospitals for disabled seamen.<sup>36</sup>

The above quotes could certainly support a conclusion that Congress set out to assert national control over the lighthouses, and then looked to the tonnage duty as a means for funding it. But such a conclusion is called into doubt by the underlying motives of the actors, by comments of other Congressmen, by the actions of Congress as a deliberative body, and by the historical background. Nationalization of the lighthouse program and imposition of federal tonnage duties on both American and foreign shipping represents a chicken and egg problem: did federal tonnage policy require

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<sup>32</sup> X DHOFFC at 12 (Apr. 9, 1789) (Lloyd's Notes, 9 Apr.) (noting the differing interests states had respecting tonnage duties, and threatening vote against Madison's resolution if the tonnage duty were "persisted in"); George C. Rogers, Jr., *Evolution of a Federalist: William Loughton Smith of Charleston 173-74* (1962) (discussing how a high tonnage rate on foreign vessels would hurt South Carolina).

<sup>33</sup> X DHOFFC at 49 (Tucker, Apr. 11, 1789) (Lloyd's Notes, 11 Apr.); *id.* at 111 (Madison, Apr. 14, 1789) (Congressional Register, 14 Apr.).

<sup>34</sup> *Id.* at 223 (Apr. 21, 1789) (Lloyd's Notes, 21 Apr.) (Goodhue: "At a loss for tonnage at all. . . I wish some gentleman give reason why a duty on American vessels.").

<sup>35</sup> *Id.* at 223 (Apr. 21, 1789) (Lloyd's Notes, 21 Apr.).

<sup>36</sup> *Id.* at 254 (Apr. 21, 1789) (Congressional Register, 21 Apr.). The phrase "incident to commerce" appears in only one of the three extant versions of Madison's speech. Lloyd's Notes reads as follows: "Several necessary purposes required, conveniently provided for by tonnage duty—hospital for mariners. Some fund raising from ships would be natural and convenient for this purpose. . . ." *Id.* at 224 (Lloyd's Notes, 21 Apr.). In The Daily Advertiser, Madison is recorded as having said "there was a number of objects to which this duty would be most properly applied, and which rendered this tax proper and expedient—such were the support of light-houses, the erecting hospitals for disabled seamen and other things of that sort—For these purposes a tax on shipping was the most natural and convenient resource." *Id.* at 241 (Daily Advertiser, 22 Apr.).

federal responsibility for lighthouses, or did a perceived need for a federal lighthouse policy result in an imposition of additional tonnage duties? The weight of the evidence suggests the former is much more likely: the driving force behind Congress' action was tonnage policy, and not lighthouses.

Both Fitzsimons and Madison shared the intent to impose a discriminatory tonnage on foreign vessels in order to protect and encourage American ship-building. Fitzsimons also thought that foreign tonnage was an important source of revenue to be exploited.<sup>37</sup> Of course, if revenue generation from foreign ships were a legislative goal, then the same amount of discrimination (in terms of the absolute difference in cents-per-ton) would yield greater revenue from foreign shipping if American tonnage were set above zero (e.g., zero cents versus twenty cents per ton generates more revenue than ten cents versus thirty cents per ton). But even if discrimination were the only purpose in determining where foreign tonnage should be set, then either setting domestic tonnage at zero or disclaiming a need to provide for lighthouses could have posed problems for achieving a meaningful national tonnage policy.

For one thing, Fitzsimons and Madison must have been able to foresee that the lower the American tonnage, the harder it would be to subsequently convince opposing Congressmen to set foreign tonnage high enough to have an impact on foreign nation's shipping policies.<sup>38</sup> Second, setting the domestic tonnage duty at zero and foregoing federal lighthouse operation could have threatened the system of a unified policy of discriminatory tonnage.

If the national government did not assess any tonnage duties on American shipping, that would leave a potential source of revenue open to the states. To the extent some states exploited that source, and others did not, it would be impossible to keep the nation's discriminatory tonnage policy uniform. Of course, as discussed above, the Constitution limited

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<sup>37</sup> *Id.* at 491 (May 6, 1789) (Congressional Register, 6 May). Madison disclaimed wanting a high foreign tonnage in order to generate revenue. *Id.* at 497. Others agreed with Fitzsimons. *Id.* at 497 (Page).

<sup>38</sup> *See id.* at 488 (Livermore, arguing that a high foreign tonnage duty was needed in order to have something to give up to Britain when she is willing to enter into a treaty); 496 (Ames, arguing against those who said that foreign duty ought not to exceed more than two or three times the duty laid on American shipping: "I beg to remind gentlemen it never was the intention of the House to impose any duty whatever on American shipping, the 6 cents that were laid was upon a different principle. This being the case, gentlemen will not draw any inference from what was done, to favor what is yet to be done...."); 453 (May 5, 1789) (Congressional Register, 5 May) (Jackson, saying that a foreign duty of 20 cents created sufficient encouragement of American shipping because "the duty on our own being only 6 cents").

state authority to assess tonnage duties by requiring congressional consent.<sup>39</sup> However, if the lighthouse system were left in state hands, states with ports would have a legitimate ground for seeking such consent—by potentially widely differing amounts depending on the number of lighthouses and local variations in operating costs, not to mention any political desires to adjust the amount of tonnage “required.” Given the necessity of lighthouse operation, it would be difficult indeed for Congress not to grant such consent. Thus, those in favor of a uniform discriminatory tonnage policy—such as Madison and Fitzsimons—had a strong motive to lay the responsibility for lighthouses on the federal treasury in order to justify imposition of domestic tonnage duties, in that way securing complete federal control over the domestic-foreign tonnage differential, as well as the absolute amount of tonnage assessed to any foreign nation.<sup>40</sup>

As the rest of the historical evidence bears out, federalization of lighthouses was not important as a national public works policy, but as a taxation policy.<sup>41</sup> Though by its very nature, the subsequent passage of the

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<sup>39</sup> U.S. Const. art. I, § 10, cl. 3.

<sup>40</sup> In assessing whether Madison was truly concerned that important national programs be federally funded, or whether his reference to “establishments incident to commerce” was a way of justifying his tonnage resolution, it is worth pointing out (1) that he never attempted to enumerate a complete list of such establishments: “I think sufficient reason given why some duty imposed on these [American] vessels.” (X DHOFFC at 224 (Apr. 21, 1789) (Lloyd’s Notes, 21 Apr.) (Madison)); and (2) the low domestic tonnage of six cents was agreed to without any data regarding the states’ lighthouse expenses and funding, other than a comment by Fitzsimons that Pennsylvania laid a duty of 6 to 7 cents which covered lighthouse and pilot expenses and added little more. *Id.* at 225 (Fitzsimons); *see id.* at 224 (Smith, Maryland, saying that the proposed six cents was “so moderate” as to not injure merchants, and that tonnage duties in Maryland and other states were far larger).

As it turned out, the only “establishment” Madison mentioned other than lighthouses—hospitals for disabled seamen—was not legislated for until the Fifth Congress (1798), and funding was provided not from tonnage but from deductions from the seamen’s salaries. 5<sup>th</sup> Cong., Sess. II, Ch. 77 (July 16, 1798). Although a bill providing for a marine hospital had first been introduced in August 1789, the matter was continuously tabled over the years, despite two separate petitions (in 1791 and 1793) for congressional action. *See* I House Journal 63, 92, 111, 112, 137, 364, 696; II House Journal 16, 250-51.

<sup>41</sup> During the tonnage debate, one representative suggested that the purposes that had been asserted as requiring a domestic tonnage (lighthouses and hospitals) could be funded by impost duties on goods, so that no tonnage on American shipping was necessary. X DHOFFC at 224 (Apr. 21, 1789, Sturges) (Lloyd’s Notes, 21 Apr.) and 241 (The Daily Advertiser, 22 Apr.). Madison and his supporters simply ignored the suggestion. Whether that was a politically or fiscally workable solution was never debated. But it is easy to see that it would not have constituted wise tax policy. The issue here was not just preserving uniform tonnage policy, but “preempting” as many sources of revenue as the federal government had, constitutionally, at its disposal. *Cf.* Stanley Elkins and Eric McKittrick, *The Age of Federalism* 118-19 (1993) (noting that Hamilton’s desire to have the federal government assume outstanding state debts stemmed in part from a desire “to preempt the

Lighthouse Act of 1789 carried with it federalism implications connected with the Act's exercise of federal commerce powers, its genesis in the Tonnage Act debate reflects that the *real* underlying federalism issue concerned federal taxation policy. Congress' decision to exercise its Constitutional grant of exclusive power over tonnage duties ended up dictating the division of federal and state responsibility over the major structures funded by those duties.

Two questions of federal power—whether Congress *should* “take up [the] business” of lighthouses, and whether Congress *could* constitutionally do so—were briefly mentioned during the Tonnage debate.<sup>42</sup> The latter was passed over without further discussion (at least for now; it was discussed when the Lighthouse Act was debated). But the first question received decidedly more attention. The key answer to the question was provided by South Carolina's Thomas Tucker: “If we neglect this measure at present [I] don't know how the lighthouses are to be supported . . . .”<sup>43</sup> Tucker did not elaborate on the nature of his concern, but he had to be referring to the states' inability to charge tonnage without Congressional consent. The only other possible meanings for his words can be ruled out as implausible or without factual foundation.

Why would support of the nations' lighthouses be threatened if Congress did not address the tonnage issue right away? There are really only two possibilities other than the Constitution's tonnage clause: (1) That the Constitution clearly mandated that the federal government operate the

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best sources of revenue for the United States Treasury”). Charging even a relatively small amount of domestic tonnage presented states' citizens with a tax burden that would help minimize a state's political will (and ability) to seek consent for additional tonnage assessments for its own purposes.

<sup>42</sup> Although Massachusetts' George Partridge agreed that pilots and lighthouses would constitute expenses legitimately covered by tonnage (and, according to Partridge, the only legitimate ones at that), he found Fitzsimons' attempt to secure tonnage for those expenses to be premature because “We don't know that such expense will arise. It is proposed by some gentlemen to take up this business. Whether or no is uncertain.” X DHOFFC at 224-25 (Apr. 21, 1789) (Lloyd's Notes, 21 Apr.). Partridge suggested waiting for a bill to be brought in for the purpose of paying pilots and supporting lighthouses: “If that found expense to United States, then time enough to charge the ships of United States with this expense.” *Id.* at 224.

Later in the debate, Virginia's Theodorick Bland questioned whether the federal government had the power to run the lighthouses, suggesting that if the Constitution “had in view institution of lighthouses and other things, [it] might have given [Congress] this power by introducing a few words.” *Id.* at 395 (May 4, 1789) (Lloyd's Notes, 4 May).

<sup>43</sup> *Id.* at 225 (Apr. 21, 1789) (Lloyd's Notes, 21 Apr.) (“If we neglect this measure at present don't know how the lighthouses are to be supported....I think a light duty is necessary and appears if take up tonnage at all then [this is] proper time to fix what it should be.”).

lighthouses, and states lacked all authority to do so themselves; or (2) That the states were, in fact, failing to keep up their lighthouses and federal intervention was needed to keep the lighthouses running. As for the first possibility, it would have been remarkable for the anti-federalist leaning Tucker to have taken such a position (indeed, he made the complete opposite argument months later during the Lighthouse Act debate). As for the second possibility, there is no historical evidence of major systemic failures in lighthouse operation throughout the states, let alone any evidence of Congressional perception of such failures.<sup>44</sup> In fact, Tucker subsequently proposed a scheme that would have left states in control of lighthouse operation, supported by a part of the federal tonnage money (6 cents per ton) and whatever additional amounts an individual state needed to assess in order to maintain its lights. And though Tucker's proposal was rejected, the lighthouse bill that was passed implicitly allowed for the possibility of continued state lighthouse operation.<sup>45</sup>

On the other hand, when Tucker questioned how lighthouses would be supported if Congress did not assess a tonnage duty to do so, one thing was certainly true: Under the Constitution, the states had no authority to collect tonnage duties unless they had been given congressional consent to do so. And as no state had requested such consent, Tucker's point was that unless Congress acted to fill the revenue gap, the states would be left without the main source of funding they relied upon to keep the lighthouses burning.<sup>46</sup>

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<sup>44</sup> As discussed above, states at the time were not only operating current lighthouses but were engaging in building projects for new ones. *See supra*, \_\_\_\_\_. Though shipwrights and mercantile interests petitioned the First Congress throughout the first few months of its first session, Congress did not receive any petitions decrying a poor state of lighthouse management or expressing an urgent need that the federal government take over lighthouse operation.

<sup>45</sup> *See, infra*, at \_\_\_\_\_.

<sup>46</sup> *See also* X DHOFFC at 224 (Apr. 21, 1789) (Lloyd's Notes, 21 Apr.) (William Smith, saying that states repealed tonnage laws because "[i]t was supposed necessary."). Of course, one answer to that predicament would have been for Congress to give consent to the states to charge a tonnage duty. Although Tucker eventually pushed for that very solution during debate on the Lighthouse Act, he did not raise that possibility during the tonnage debate. One wonders whether he did not mind his colleagues' linking of lighthouse operation with domestic tonnage because he wanted to make sure that Massachusetts did not succeed in its attempt to leave domestic ships free of all tonnage. Apparently, once he partially lost the debate on the discriminatory foreign tonnage, he sought to limit the amount of federal monies used to support lighthouses, with a corresponding grant of power to each state to assess additional duties as needed. *See, infra*, at \_\_\_\_\_.

In any event, as the above discussion shows, providing universal consent to states for lighthouse operation would not have been a popular solution in Congress (and, in fact, it

Either Congress needed to validate state tonnage collection by consenting to it, or it needed to fund lighthouses itself. The debate on the Tonnage Act left no doubt as to which policy Congress would follow. Consent was not palatable. The Constitution empowered Congress to institute a uniform federal tonnage policy, and uniformity was a desired end in the first months of the First Congress. Achievement of that end was best served by federal control of lighthouses.

It would be inappropriate to conclude that because of the linkage between tonnage policy and lighthouses Congressmen simply ignored the question whether Congress in fact had the power under the Constitution to operate lighthouses. The issue did end up getting debated when the Lighthouse Act was considered. But still, what are we to make of the fact that the question was ignored during the Tonnage debate, even while lighthouse support was being used as a reason for assessing tonnage duties?<sup>47</sup>

On the one hand, discussion of constitutionality may have been considered premature. To the extent that the Tonnage Act simply established the fees that ships could be charged for lighthouse management, such legislation would seem to come squarely—and uncontroversially—within the Commerce Clause’s power to regulate commerce.<sup>48</sup>

On the other hand, members of the House no doubt understood that including lighthouse fees in the Tonnage Act went hand-in-hand with additional federal activity, such as, at the very least, paying for state lighthouse expenses out of the federal treasury.<sup>49</sup> Why, then, was the House

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was rejected by Congress when Tucker moved for it months later).

<sup>47</sup> The six cents domestic tonnage was agreed to by the House of Representatives on April 21. X DHOFFC at 242. On May 29, the House passed the entire tonnage bill and sent it to the Senate. VI DHOFFC 1950. Only days later, on June 2, did it form a committee to bring in a bill for regulating lighthouses. V DHOFFC 1246. The Tonnage Act was passed by both houses on July 9, and signed into law by the President on July 20. VI DHOFFC 1951. The Lighthouse Act was first debated on July 16, and was signed into law on August 7. V DHOFFC 1247-48. Despite one congressman having explicitly raised the issue of constitutionality during the tonnage debate (*see, supra*, note \_\_\_\_), the Tonnage Act was passed without debate on the matter.

<sup>48</sup> *See, supra*, note \_\_\_\_, discussing the relationship between tonnage duties and the regulation of commerce. This relationship was understood, and lobbied for, by those outside of Congress. On May 25, 1789, Congress received a petition from the Shipwrights of Philadelphia, seeking certain regulations that would benefit American shipping. Second on the shipwrights’ list was a proposal “to encourage the Increase of American Shipping” by laying no tonnage duty on American ships “except for the support of Bays [*Buoys*] & Lighthouses.” VIII DHOFFC 348, 349.

<sup>49</sup> *See* X DHOFFC at 224-25 (Apr. 21) (Lloyd’s Notes, 21 Apr.) (comments of Partridge: If supporting lighthouses and paying pilots are “found expense to the United

so willing to include what was essentially “light money” in the Tonnage Act before a lighthouse bill was even drawn up and debated? Was it so clear that a lighthouse bill would be constitutional? To attempt an answer to that question, we must first examine the legislative history of the Lighthouse Act.

## 2. *Debate and Passage of the Lighthouse Act: Commerce Clause Interpretive Precedent is Established*

The Tonnage Act meant that the United States treasury would possess money collected for the support of lighthouses. But important questions remained: How would that money be distributed? Who would be in charge of spending it? Who would operate the lighthouses? Would the federal government be involved in constructing new lighthouses? Congress explored a variety of solutions to these questions, but every draft bill shared two things in common: state choice and federal control. Both elements set the stage for the constitutional debate that followed.

### *State choice*

From the very first draft, the operating principle was that the federal government would not fund or operate a state’s lighthouse unless the state wanted it to.<sup>50</sup> For example, the first draft provided that upon a state’s “application” to the Secretary of the Treasury, the federal government would provide the state’s lighthouse(s) with an “overseer,” with necessary materials for keeping the lights, and would reimburse the expense of supporting the lights.<sup>51</sup> Thus—no state application, no federal funds.

In the version of the law that was enacted, the element of consent was delayed, but present nonetheless: in the first instance, the federal government would, without the need for a specific state request, pay for the “support, maintenance, and repairs” of all lighthouses; however, such payments would stop after a year unless the state in question had in the

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States, then time enough to charge the ships of United States with this expense;” and “It is proposed by some gentlemen to take up this business. Whether or no is uncertain.”)

<sup>50</sup> V DHOFFC 1248 (Lighthouses Bill {HR-12}, July 1, 1789); 1249 (same, July 20, 1789); 1252 (same, July 24, 1789). The only “exception” was a provision for federal construction of a new lighthouse at Cape Henry, which Virginia had apparently requested. See Hamilton to Commissioners of Cape Fear, June 11, 1791, reprinted in VII Syrett at 464. But even there, the Act provided that the new lighthouse would only be erected when the selected land was ceded by Virginia. Thus, Virginia had the ultimate say in the matter.

<sup>51</sup> V DHOFFC 1248 (section 1 of the bill). Additionally, if the state ceded the lighthouse and land to the United States, the federal government would keep the light “in good repair at the expense of the United States.”

meantime ceded jurisdiction and title over the lighthouse lands.<sup>52</sup> As cession of lighthouses was not mandated, states could effectively opt out of the federal lighthouse program by choosing not to cede their lands.<sup>53</sup>

Is the requirement of state consent constitutionally relevant? Though one can certainly glean the political and practical necessities of not imposing a federal program on unwilling states, there is nothing to indicate that Congress believed that state consent was a constitutional prerequisite to federal funding of lighthouses, or even federal lighthouse operation by “overseers.” But lighthouses exist in physical space, and the physical space of existing lighthouses was located within State boundaries. If the federal government wanted full control over any lighthouse lands—not just title, but exclusive federal jurisdiction as well—then state consent would indeed be required, by the Constitution’s “Enclave Clause.”<sup>54</sup>

There is another reason, though, that the draft bills’ provision for state consent is constitutionally relevant—and in a manner that bears directly on our analysis of the Lighthouse Act as an early construction of the Commerce Clause. If states had the power to opt out of federal support of their lighthouses, then they were not constitutionally precluded from the field of lighthouse operation. In short, all of Congress’ draft lighthouse bills reflect an understanding that if the federal government did not act, the states still (theoretically) could.<sup>55</sup>

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<sup>52</sup> Lighthouse Act, § 1.

<sup>53</sup> However, the phrasing of the law leaves one with the impression of federal coercion (effectively, “do this if you want federal funds”) rather than state choice. In the context of the Tonnage Act, which secured for the federal treasury the duties customarily used to fund lighthouse operation, the proviso was indeed coercive. That was not lost on Massachusetts’ lieutenant-governor, Samuel Adams. See, *infra*, \_\_\_\_.

<sup>54</sup> Article I’s “Enclave Clause” provides that Congress shall exercise “exclusive legislation . . . over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.” U.S. Const. art. I, § 8, cl. 17. From an early date, the power of “legislation” was equated with “jurisdiction.” See, e.g., *United States v. Bevans*, 17 U.S. 337, 388 (1818) (“the power of exclusive legislation (which is jurisdiction) is united with cession of territory”).

Thus, in the final version of the Lighthouse Act, the proviso for state consent was not a political act of federal restraint, but an act of constitutional necessity.

<sup>55</sup> See Alexander Hamilton, Draft Opinion on the National Bank, reprinted in VIII Syrett at 104 (referring to Lighthouse Act as an analogous exercise of federal authority supporting broad interpretation of “necessary” powers, and stating that it could *not* be “affirmed” that it “was *absolutely* necessary that provision should be made for this object [*i.e.* lighthouses] by the National Government or that the interests of Trade would have essentially suffered if it had been left upon its former footing or that the power of regulating trade would be *nugatory* . . .”).

*Federal Control*

Every draft of the lighthouse bill provided not just for use of federal monies in the support of lighthouses, but for federal control over how that support would be carried out.<sup>56</sup> Tucker and fellow South Carolinian William Loughton Smith tried to change that, but failed.<sup>57</sup> As debate on the lighthouse bill opened, Tucker moved to strike out the whole bill (except the enacting clause) and substitute it with a bill that kept lighthouses under state control. Under Tucker's plan, basic funding would come from the federal government (through an appropriation of a proportion of tonnage duties, not to exceed six cents per ton) but if those monies were not sufficient states would be empowered to lay additional tonnage duties in harbors with lighthouses.<sup>58</sup>

In Tucker's motion, we see the inextricable link between the Tonnage Act and operation of the nation's lighthouses. Tucker could perhaps have simply suggested keeping the states in charge of both lighthouse operation and funding, but (and remember his comments to this effect during the Tonnage Act debate) complete state funding would not work because the federal government was collecting tonnage duties. Thus, Tucker's motion provided for state operation using federal appropriations (the six cents "assigned" to lighthouses during the Tonnage Act debate). It is a solution that carried with it problems for both the federal government

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<sup>56</sup> At first glance, the Act appears to provide merely for federal reimbursement of state expenditures. However, federal control is implied by section 3, which requires the Secretary of the Treasury, with Presidential approval, to contract for lighthouse rebuilding and maintenance, furnishing of supplies, and the hiring of persons appointed by the President to superintend and care for the lighthouses.

<sup>57</sup> Tucker and Smith were political rivals whose leanings were towards opposite ends of the anti-federalist (Tucker) and federalist (Smith) spectrum. But they both shared their state's concern about protecting South Carolina's trade with Great Britain from harmful actions by the federal government, and they joined together both in the Tonnage Act debate and in debate on the Lighthouse Act. George C. Rogers, Jr., *Evolution of a Federalist: William Loughton Smith of Charleston (1758-1812)* 168, 171, 173-77, 180 (1962).

<sup>58</sup> Tucker's motion was paraphrased in the *Daily Advertiser* as follows:

The principle of this was to place the establishment both of light house and pilots in the hands and under the controul of the state government, the former to be supported by the appropriation of a certain proportion of the duty on tonnage of vessels, not exceeding six cents per ton—and in case that were insufficient, that each state should have power to lay an additional tonnage duty on all vessels entering the ports where such houses were erected, and that pilots should be under the direction of the states.

XI DHOFFC 1130 (July 16, 1789) (*Daily Adv.*, 17 July). As mentioned below, the Lighthouse Act left regulation of pilots—at least for the moment—in State control. *See, infra*, at \_\_\_\_.

(which would lose control over how its money was spent) and the states (whose lighthouses might require additional funding).

Enabling states to assess additional tonnage duties would solve the second problem, but in pushing for that solution Tucker was fighting an uphill battle on a hill that was built when the Maryland delegates lost their tonnage motion two years earlier at the Constitutional Convention. With the Constitution prohibiting states from assessing tonnage duties without federal consent, Tucker had no leverage in the lighthouse debate.

Basically, state control over tonnage duties was not going to happen. And once the Tonnage Act asserted federal control over tonnage duties, then federal funding of lighthouses was, as a practical matter, a required policy—or rather, the *offer* of federal funding was required. Forcing states to operate lighthouses at the same time the federal government was capturing all tonnage duties would have been unfair. And it is certainly understandable that Congress would want to place lighthouses under their control if they were going to be footing the bill.

The question, of course, is what does the Constitution have to say about all of this? Tucker's motion led to a debate in the House that touched on that very topic.

#### *The Commerce Clause Debate*

Unfortunately, only a portion of the debate sparked by Tucker's motion has been preserved. After reporting on opposing arguments made by Pennsylvania's Fitzsimons (who had been a member of the committee that drafted the initial lighthouse bill, and represented a state whose merchants strongly supported the legislation) and Tucker and Smith, the *Daily Advertiser* leaves us with the unhelpful summary "[o]ther arguments were used on both sides."

Such as it is, we know at least this from the reported debate: Echoing Madison's comment during the tonnage debate about powers "incidental" to the Commerce Clause, Fitzsimons stated that the Constitution conferred every power "incidental and necessary to it," and that "regulations respecting light houses . . . were a part of the commercial system and had been given up by the states." In response, Tucker and Smith contended that the lighthouse bill "was an infringement on the rights of the states; that these establishments were not necessarily incidental to the power of commerce."<sup>59</sup>

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<sup>59</sup> XI DHOFFC 1130 (July 16, 1789) (*Daily Adv.*, 17 July). Fitzsimons was actually arguing that Tucker's proposed bill was unconstitutional, not that the committee's bill was constitutional. However, Fitzsimons' commerce clause argument implicitly provides an

And so, we know that the Commerce Clause was cited to justify the Lighthouse Act, and we know that *some* Congressmen believed that control over the nation's lighthouses was outside the scope of that enumerated power. Whether or not other powers were cited, but not recorded for posterity, we cannot say with certainty. But those looking back during the First Federal Congress cited only the Commerce Clause as the source of authority for the Act, and President Jefferson later remembered that opposition to the Act focused on the proper scope of the Commerce Clause.<sup>60</sup> To use David Currie's phrasing of the Commerce Clause issue, the potential problem with the Lighthouse Act is this: "the construction and operation of [lighthouses] is not itself *regulation* of commerce, and not obviously necessary or proper for its regulation, which is what the Constitution seems literally to require."<sup>61</sup>

Whether "regulation" of commerce broadly included enactment of measures to *facilitate* commerce would remain a point of contention for

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answer to the latter question. As David Currie has pointed out, Fitzsimons' words—as reported by the Daily Advertiser—can be read as suggesting not just that federal action was lawful, but that "the subject *could not* be left to the states." David P. Currie, *The Constitution In Congress* 70 n.117 (1997). However, such an argument would be inconsistent with the bill reported by Fitzsimons' committee (as well as all subsequent versions of the bill), because, as discussed above, the bill left it in states' hands to choose whether or not they wanted federal operation of their lighthouses. Assuming the paraphrasing we have is accurate, the phrase "had been given up by the states" is probably best interpreted as a broadly phrased statement of the legitimacy of federal power. Notably, in his attempt to "shoot down" Tucker's proposal to leave things under state control, Fitzsimons also broadly argued that Tucker's amendment was unconstitutional because states could not lay imposts, though, as Tucker and Smith rightly pointed out, "[n]othing was clearer...than that each state had a power of laying an impost with the consent of Congress; and if Congress by this law expressed their consent, the supplementary duty proposed by the amendment was perfectly constitutional." XI DHOFFC 1130 (July 16, 1789) (Daily Adv., 17 July).

<sup>60</sup> A year and a half later, participants in the National Bank debate, citing the precedent of the Lighthouse Act to establish the Bank's constitutionality, similarly grounded federal lighthouse authority in the commerce clause. See XIV DHOFFC 388 (Ames, Feb. 3, 1791); Opinion on the Constitutionality of an Act to Establish a Bank, VIII Syrett 97, 104 ("This doubtless must be referred to the power of regulating trade, and is fairly relative to it.").

Years later, when Jefferson questioned how the Commerce Clause could empower Congress to build piers, if it did not also permit the (indistinguishable) power to build factories, he recollected that opposition to the Lighthouse Act was made "on this very ground." David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 Wm. and Mary L. Rev. 1441, 1500 n.314 (May 1998) (quoting Letter from Thomas Jefferson to Albert Gallatin (Oct. 13, 1802)).

For a general discussion of possible Constitutional arguments that could have supported the Lighthouse Act, see Currie, *supra* note 8, at 69-70.

<sup>61</sup> Currie, *supra* note 8, at 70.

decades afterwards.<sup>62</sup> And it is unclear how secure the members of the First Federal Congress in August 1789 would have been in explicitly adopting such a broad definition of “regulation.” Widely accepted was the general precept that a central aim of the federal government should be to aid commerce *by regulation* (such as enactment of the Tonnage Act and establishment of nationally uniform impost duties). Far murkier is the degree to which members of the First Congress would have agreed that the phrase “to regulate commerce” itself meant to take any measure that would protect, facilitate or encourage commerce—or even the narrower concept of creating or operating any facility that would affect commerce.<sup>63</sup> Even Hamilton, in his December 1791 Report on the Subject of Manufactures, had to admit to a lack of consensus regarding the constitutionality of federal involvement in road and canal building projects that would facilitate the transportation of commodities.<sup>64</sup>

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<sup>62</sup> Compare 30 Annals of Cong. 889-90 (1817)(Sheffey: the words “to regulate” commerce conferred the power “to afford it all reasonable facilities”) *with id.* at 897-98 (Barbour: “To regulate, was to prescribe, to direct; the power, therefore, ‘to regulate commerce amongst the several States,’ meant the right to prescribe the manner, terms, and conditions, on which that commerce should be carried on.”). See, *infra*, \_\_\_\_.

<sup>63</sup> During the Confederation period, the regulation of commerce and the protection, or encouragement, of trade were virtually interchangeable concepts—but as *ends* or *goals*. The *means* by which one fostered trade was through regulations. See, e.g., 26 Journals of the Continental Congress 321-22 (Apr. 30, 1784). As Madison put it, in his 1828 letter opining on the Constitutionality of a tariff imposed for the encouragement of manufactures, “the power to regulate trade with foreign nations . . . embraces the object of encouraging by duties, restrictions, and prohibitions, the manufactures and products of the country.” 4 Elliot’s Debates 600, 601. See *supra* note \_\_\_\_.

During the debate on the National Bank, Hamilton expanded the means to the end, suggesting that “an establishment which furnishes facilities to circulation and a convenient medium of exchange & alienation, is to be regarded as a regulation of trade.” VIII Syrett 127. On the other hand, both Randolph and Jefferson defined the power to regulate commerce in terms limited to enactment of rules and prescriptions (*id.* at 115 n.24 and 126) and Madison’s suggested list of enumerated powers that *could* (but did not) permit creation of the Bank did not even include the Commerce Clause. 2 Annals 1946 (Feb. 2, 1791). As supporters of the National Bank cited a number of enumerated powers justifying the legislation, passage of the Act cannot be considered a definitive vote on the scope of the Commerce Clause. Much less significant proposals intended to encourage or assist commerce were rejected by the First Congress, but as objections included both policy and constitutional grounds, the debates similarly do not permit a conclusion one way or the other as to whether constitutional concerns held sway. See Currie at 71-73 (discussing proposal that Congress underwrite a private voyage to Baffin’s Bay to enhance understanding of the magnetic pole, and a proposed loan to rescue a glass factory from financial difficulties).

<sup>64</sup> Improvement of inland navigation, said Hamilton, was an object “worthy of the cares of the local administrations; and it were to be wished, that there was no doubt of the power of the national Government to lend its direct aid, on a comprehensive plan.” X Syrett 230, 310. Granted, Hamilton was discussing the encouragement of manufactures,

Perhaps most telling of all is Chief Justice Marshall's opinion decades later in *Gibbons v. Ogden*, 22 U.S. 1 (1824), after thirty years of unquestioned federal lighthouse power. This is how Marshall rejected Ogden's suggestion that certain powers left to the states demonstrated concurrent state and federal power over regulating commerce:

A State, it is said, or even a private citizen, may construct light houses. But gentlemen must be aware, that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.<sup>65</sup>

Thus we see that even in the most significant statement of federal Commerce Clause power to date, the building of an internal improvement project is characterized as something other than commercial "regulation."<sup>66</sup> That the issue had not been conclusively understood differently back in

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and not commerce—the two cannot be conflated—but if Congress were of the view that roads and canals were permissible under the Commerce Clause, that would have been sufficient to serve Hamilton's purposes.

In a subsequent House debate during the Second Congress spurred by a Senate bill that proposed paying a "bounty" to the desperate owners of boats employed in cod fisheries, the narrow view of the Commerce Clause can be heard in the remarks of representatives Page and Giles. 3 *Annals of Cong.* 393-94 (1792) (encouragement to commerce might redound to honor of Congress, but the "wise framers" saw that if Congress had power to exert a "royal munificence" for that purpose it might reward the ingenuity of one state's citizens over another); *id.* at 398 (right to regulate commerce may give rise to indirect "bounty" resulting from the right to make commercial regulations, but that is they only type of bounty that can be given). Though there certainly were other thorny issues relating to the proposed bounty, one wonders how much briefer the debate would have been had there been a widespread understanding that the power to regulate commerce broadly included the power to facilitate commerce. Indeed, perhaps many words could have been spared over a decades worth of "general welfare" debates if it were understood that the Commerce Clause enabled Congress to simply spend money to facilitate commerce.

<sup>65</sup> *Id.* at 208-09. Consistent with the above, Marshall narrowly defined the power to regulate as the power "to prescribe the rule by which commerce is to be governed."

<sup>66</sup> Marshall's language was not lost on opponents of federally-sponsored internal improvements. *See, infra*, \_\_\_\_.

1789, one need only look at today's originalist scholarship. As well-established as the application has become these 200-plus years later, the idea that the Commerce Clause empowers the federal government to facilitate commerce through internal improvement projects is one that modern-day originalists either still ignore or struggle mightily with.<sup>67</sup>

So why the apparent lack of concern by a majority of the First Federal Congress (including, presumably, James Madison) over the Lighthouse Act's potential stretching of the Commerce Clause? For one thing, the Act's passage should not obscure the fact that Congress was still treading gingerly in this area. Initial drafts of the bill were limited to operation of lighthouses, beacons, and buoys, with "piers" being added only after a group of Philadelphia merchants lobbied for their inclusion—based on the fact that the Philadelphia port wardens had commenced construction of piers that would be left without funding by virtue of the Tonnage Act.<sup>68</sup> No mention at all was made of river clean-up or harbor improvement, items that seem indistinguishable from lighthouses in rendering navigation "easy and safe." A separate bill proposing a hospital for seamen—which Madison had similarly referred to as an "incident" of commerce—was tabled.<sup>69</sup> And the regulation of pilots—if anything, a much clearer example of true commercial "regulation," and no less an example of legislation that would be geared to making navigation "easy and safe"—was left under state control "until further legislative provision shall be made by Congress;" and no such further provision was made.<sup>70</sup> So, as boldly as Congress was

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<sup>67</sup> See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 139-46 (Winter 2001) (starting with proposition that "The power to regulate is, in essence, the power to say, 'if you want to do something, here is how you must do it,'" and exploring whether such a power could also include the power to prohibit certain types of commerce); Grant S. Nelson and Robert J. Pushaw, Rethinking the Commerce Clause: Apply First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues, 85 Iowa L. Rev. 1, 39-42 (Oct. 1999) (conceding that whether the Framers and Ratifiers' intent included the power to create internal improvements is "debatable," but satisfying themselves that the original conception of commerce "possibly encompassed internal improvements").

<sup>68</sup> Philadelphia Merchants to the Pennsylvania Delegation, dated July 16, 1789 (on file at the Federal First Congress Project, Wash., D.C.). An early example of successful lobbying, the Lighthouse Act incorporates a fair amount of language from a proposed bill that the merchants sent with their letter. V DHOFFC 1248-54.

<sup>69</sup> 1 House Journal 112 (Sept. 16, 1789). See, *supra*, note \_\_\_\_.

<sup>70</sup> Lighthouse Act, § 4. Not only did later Congresses fail to act on proposals to regulate pilots both locally and nationally, they tabled proposals seeking a nationwide system of harbor regulation. See I House Journal 92, 112, 137, 451, 456, 489, 615; II House Journal 29. However, pilots were as important as lighthouses in assuring safe passage into harbors. See Petition of the Boston Marine Society, Commonwealth of Massachusetts, to the honorable Senate and the honorable House of Representatives of said

moving, the Lighthouse Act was still a somewhat limited move in asserting control over “incidents” of commerce (to use Madison’s word), or in funding projects to make navigation “easy and safe” (to use the words of the Act).

Limited or not, though, Congress’ first statute construing the Commerce Clause nonetheless represented an interpretation of the clause that was potentially broad in application (though there is no evidence that any such future applications were discussed). In determining why Congress was not dissuaded by Tucker and Smith’s contention that lighthouses “were not necessarily incidental to the power of commerce,” one cannot overlook the power of a Congressional sense of fairness. The fact that Congress was denying the States the right to collect money specifically appropriated for lighthouses was not lost on participants and observers of the day. Even Tucker’s motion called for federal funding of lighthouses. And even anti-federalist Sam Adams, venting his opposition to the Act in correspondence to Elbridge Gerry, observed that if “Congress by Virtue of the Power vested in them have taken from the State for the general Use the necessary Means of supporting such Buildings, it appears reasonable and just that the United States should maintain them . . . .”<sup>71</sup> Indeed, in lobbying Congress to add funding of piers to the Lighthouse bill, the Pennsylvania merchants explicitly stated that the amendment was appropriate because Congress would be keeping the tonnage duties previously anticipated to be collected by the state.<sup>72</sup>

National tax policy and fairness—these were the forces that led to such an early expansion of Commerce Clause power. But without a firm common understanding that the Commerce Clause did indeed empower the

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Commonwealth in General Court assembled at Boston, February 1783 (on file at the Massachusetts Archives, in the bill jacket for Ch. 19--1783).

<sup>71</sup> Samuel Adams to Elbridge Gerry, Aug. 22, 1789. In this letter, Adams was only willing to concede the appropriateness of federal funding, stating “but I think that it follows not from hence, that Congress have a Right to exercise any Authority over those Buildings even to make Appointments of Officers for the immediate Care of them, or furnishing them with necessary Supplies . . . .” However, the motivating factor of Adams’ correspondence was an attempt to protect a friend whom he feared would lose his job to a political appointee once the federal government took over. Samuel Adams to Elbridge Gerry, Aug. 20, 1789. In his last letter on the topic, Adams conceded the appropriateness of federal control once a state had ceded its lighthouse to the federal government, but argued that the federal government should refrain from exercising that authority. Adams to Gerry, Sept. 1789 (undated).

<sup>72</sup> Philadelphia Merchants to the Pennsylvania Delegation, dated July 16, 1789. The letter enclosed an estimate of the annual expense of maintaining their port’s lighthouse (“& other Accommodations for the Ease & Safety of our Navigation”), which the merchants said Congress should provide for “upon the same principles.” *Id.*

federal government to broadly engage in internal improvement projects, would the interpretation unleashed so quickly by the Lighthouse Act take hold?

3. *The Federal Lighthouse System: Creation of Historical\_Commerce Clause Precedent*

To an anti-federalist, what I have described as the “fairness” of the Lighthouse Act was something else entirely. To the ever wary Samuel Adams, the choice presented to states by the Lighthouse Act was not a real choice at all—states were being forced to consent to federal control. Adams suggested to Elbridge Gerry that Congress would face the same fate as the British government if, by governing “too much,” it so insisted on unnecessarily forcing states to give the federal government exclusive jurisdiction over their lighthouses. What particularly rankled Adams was the combined effect of the Tonnage and Lighthouse Acts: “The Means of supporting these Buildings in this State are taken from its Legislature---It is presumed not to be intended that this Legislature shall be told at the End of the Year, you must cede your Lighthouse to Congress & the Territory on which it stands together with the exclusive Power of Legislation, or it shall be of no Use to your state.”<sup>73</sup>

Whether others did not consider Congress’ behavior as unseemly, or whether practical realities won the day, state legislatures fell into line with federal policy and gave up their lighthouses fairly promptly, and without much sign of controversy.<sup>74</sup> The only significant holdout was, perhaps not surprisingly, Rhode Island, which did not cede its lighthouse until 1793—three years after it had finally ratified the Constitution in May 1790. However, the state was never cut off from federal lighthouse monies because Congress passed a series of one-year extensions of its cession deadline.<sup>75</sup> Thus, even where push could potentially have come to shove, the federal government kept the carrot of federal monies dangling a bit longer and employed gentle behind the scenes lobbying rather than holding firm to established deadlines.<sup>76</sup>

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<sup>73</sup> Samuel Adams to Elbridge Gerry, Sept. 1789 (undated), on file with the First Federal Congress Project.

<sup>74</sup> See Pennsylvania (Ch. LLII, Sept. 28, 1789); Virginia, (Ch. V, Nov. 13, 1789); South Carolina (Jan. 20, 1790); New York (Ch. 3, Feb. 3, 1790); Connecticut (May 2, 1790); Massachusetts (June 10, 1790); North Carolina (Ch. II, Nov. 1790); New Hampshire (Ch. 71, Feb. 14, 1791).

<sup>75</sup> R.I. (May 1793). See 1<sup>st</sup> Cong., sess. II, ch. 32 (July 22, 1790); 1<sup>st</sup> Cong., sess. III, ch. 24 (Mar. 3, 1791); 2<sup>nd</sup> Cong., sess. I, ch. 17 (Apr. 12, 1792).

<sup>76</sup> Evidence suggests, not surprisingly, that the availability of federal monies was the

The positive collective state response to the Lighthouse Act is reflective of contentment with the Act's broader implications: there was to be a national lighthouse system, organized and controlled by the federal government, with decisions on placement of new lighthouses made by federal officials. What makes that apparent contentment particularly interesting is that the Lighthouse Act itself did not provide the executive branch with any general powers to construct lighthouses; nor did it assert that Congress would exercise such general powers in the future. Other than a specific provision for creation of one lighthouse in Chesapeake Bay, the only ongoing duties went no further than maintenance and repair.<sup>77</sup> Nonetheless, the ink had barely dried on the Lighthouse Act before a merchant in Massachusetts wrote to George Washington asking the government to construct a lighthouse on the island of Seguin.<sup>78</sup>

In short, the import of the Act was obvious—if the federal government could (and would) build one lighthouse, it would build others.<sup>79</sup> Within 15 years, the lighthouses' place in the federal sphere of activity was

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motivating factor for the states' unanimous decisions to cede their lighthouses to the federal government. *See* XXV State Records of North Carolina (Walter Clark ed.) (1906) (Ch. 11 of the laws of 1790) (lighthouse cession specifically including a “whereas” clause referring to the fact that “the funds heretofore appropriated by this state [for lighthouses] are now vested in [Congress]....”); Notation on bill jacket for Massachusetts Lighthouse Bill, and House Journal entry for June 8, 1790 (p.71), both on file at the Massachusetts State Archives (ordering Commissary General to lay before the House an account of the annual lighthouse expenses, before vote on bill to cede lighthouses).

<sup>77</sup> Lighthouse Act, § 3. A draft version of the lighthouse bill would have imbued the Secretary of the Treasury with the duty to provide by contracts, subject to Presidential approval, for the “building or rebuilding” of lighthouses. However, the general power to build was deleted, likely out of separation of powers concerns. V DHOFFC 1253.

<sup>78</sup> Samuel Goodwin to George Washington, Nov. 25, 1789, reprinted in 4 Papers of George Washington, Presidential Series at 323 (information about Goodwin appears at p.302).

<sup>79</sup> In June 1790, Joseph Whipple was appointed Superintendent of “the Light House at the Mouth of Piscatqua River in your State as also of any others that may be erected in your State.” Hamilton to Whipple, June 1, 1790, reprinted in VI Syrett at 452. *See also, e.g.*, Newton to Hamilton, June 27, 1790, reprinted in VI Syrett at 474 (proposing lighthouse at Old Point Comfort); George Heriot to Daniel Huger (with notations to send to Hamilton), dated July 31, 1790 (NARA, RG 26, 17G, Box 1) (expressing that commissioners of port at Georgetown, S.C., were sorry to learn that the law did not empower the Secretary of the Treasury to build beacons, as well as repair them; they will depend on representatives to bring the matter before Congress); Sam Mitchell to Hamilton, Dec. 3, 1792, XIII Syrett at 280 (expressing regret that no present new lighthouse is proposed, but stating that perhaps “this part of our Coast may be considered and benefited in its Turn”); Hamilton to Commissioners of Cape Fear, June 11, 1791, reprinted in VIII Syrett at 464 (stating that Lighthouse Act did not extend further than repair and maintenance, but suggesting that application to Congress for completion of their lighthouse at Cape Fear probably would have met with success).

solidified to the point that a House Committee could report that “The liberal spirit with which these works have been carried on, is very honorable to the national character.”<sup>80</sup> Years later, Joseph Story suggested that we “ask ourselves how it would be possible, without an efficient national government, to provide adequately for the erection and support of lighthouses, monuments, buoys, and other guards against shipwreck.”<sup>81</sup>

Considerations of spirit and necessity aside (accurate or not), federal lighthouse construction and operation became ensconced as a legitimate *constitutional* exercise of Commerce Clause authority. While other forms of internal improvements faced persistent challenges, lighthouses remained securely within the federal domain.<sup>82</sup> Their potency as a symbol of federal power was obvious. When John Quincy Adams tried to convince the nation that the federal government should erect an astronomical observatory, he referred to observatories as “light-houses of the skies.”<sup>83</sup>

Adams’ project, like so many other internal improvement projects, failed (temporarily). But Adams was not the only one to attempt to latch on to the precedent created by lighthouses. Throughout the key internal improvement debates of the nation’s first forty years, lighthouses were mentioned again and again. Supporters of federal improvement projects touted lighthouses as supporting their interpretation of the Commerce

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<sup>80</sup> American State Papers, Comm. & Nav., vol. 1, ser. 14, no. 85 (Feb. 18, 1804) (Report of the Committee of Commerce and Manufacturers on the resolution of the House directing an inquiry to be made into the expediency of laying a tonnage duty upon vessels entering our ports, for the support of Light Houses).

<sup>81</sup> Story, *supra* note \_\_\_\_, at § 504. Note how this compares with Story’s agnosticism on whether the Constitution gave the federal government the power to construct roads and canals. *See, supra*, note \_\_\_\_.

<sup>82</sup> *See, e.g.*, Currie, 39 Wm. & Mary L. Rev. at 1500 and n.314 (noting that Jefferson did not veto bills financing aids to maritime navigation despite doubts as to their constitutionality). Even James Polk, a foe of federally-sponsored internal improvement projects, carved out an exception for lighthouses in his veto message on a harbor and river improvement act, based on the “long acquiescence of the government through all preceding administrations” to a power exercised “coeval with the constitution.” 29<sup>th</sup> Cong., 1<sup>st</sup> sess., House Journal at 1210 (Aug. 3, 1846). Polk’s general constitutional theory regarding internal improvements actually echoed the plan proposed long before by Thomas Tucker during the Lighthouse Act debate: to Polk, Congress’ power was limited to giving or withholding consent to state imposition of tonnage duties to fund internal improvements. John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 Chap. L. Rev. 73, 85 (Spring 2001).

<sup>83</sup> Albert Castel, *The Founding Fathers and the Vision of a National University*, 4 History of Educ. Quart. 280, 295 (Dec. 1964). Allen Cole, who has researched Adams’ rhetoric, believes that Adams coined the phrase, though “there is at least one medieval reference to observatories as lighthouses in the Picatrix.” E-mail from A.F. Cole, University of Maryland, to the author, dated Sept. 10, 2003 (on file with the author).

Clause. Opponents struggled with how best to avoid the force of such precedent. Examination of the role of lighthouses in the major internal improvement debates sheds light on how federal legislators in the early years of the republic viewed the role of precedent in interpreting the Constitution. As it turned out, the motives underlying the First Federal Congress' initial steps to take control of the nation's lighthouses had no impact on the precedential weight accorded to lighthouses as an exercise of Commerce Clause authority.

*B. Lighthouses and the use of legislative precedent in Constitutional debates in the early republic*

*1. James Madison: From the Lighthouse Act of 1789 to a call for a Constitutional Amendment*

As evidenced by his role in the debate on the Tonnage Act in the Spring of 1789, Madison was largely responsible for the federal government's foray into lighthouse operation. As President, he signed a law authorizing the Secretary of the Treasury to purchase Winslow Lewis' patent for lighting lighthouses and to contract with Lewis to outfit and maintain the United States' lighthouses for seven years.<sup>84</sup> And yet, setting down his views in retirement in 1831, he expressed the need to empower the federal government with a constitutional amendment covering "internal improvements, embracing Roads, Canals, Light Houses, Harbours, Rivers, and other lesser objects."<sup>85</sup>

That is not to say that Madison, looking back in 1831, could not also justify lighthouse construction as an exercise of federal power. But the justification he provided (in the same letter proposing the need for a constitutional amendment embracing lighthouses) rested largely on past practices rather than a bare reading of the Constitution:

Light Houses having a close and obvious relation to navigation and external commerce, and to the safety of public as well as private ships, and having recd. a positive sanction and general acquiescence from the commencement of the Federal Government, the constitutionality of them is I presume not

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<sup>84</sup> Papers of J. Madison, Pres. Series, vol. 4 at 252 (1999).

<sup>85</sup> Madison to Reynolds Chapman, dated Jan. 6, 1831, reprinted in \_\_\_ Writings of James Madison 429, 434.

now to be shaken if it were ever much contested.<sup>86</sup>

As President, Madison had explicitly stated that precedent could be used to establish the validity of otherwise arguable constitutional constructions. It was for that reason that he refused to veto the national bank on constitutional grounds, even though he personally believed that the bank was unconstitutional.<sup>87</sup> How remarkable is it, therefore, for Madison to call for a constitutional amendment covering lighthouses, despite decades of legislative and executive precedent (including precedent he took part in creating) that would make their constitutionality otherwise unshakeable? Three facts will help us better understand Madison's position in 1831:

When Jefferson was President, he remembered the Lighthouse Act dissent that Madison had evidently forgotten about thirty years later. And he shared the dissenters' view. Though he questioned how the Commerce Clause could justify creation of coastal navigational aids; though he could not see any distinction between building such aids and building factories to "facilitate" commerce (which he did not deem to be constitutional); and though he believed a constitutional amendment was needed for the federal government to build internal improvements—he nonetheless continued signing lighthouse-related bills into law, apparently, as one historian has concluded, out of a willingness "to let sleeping dogs lie...."<sup>88</sup> As President, Madison may well have taken the same approach.

Second, during Madison's presidency, he had already concluded (as Jefferson before him) that a constitutional amendment was needed for internal improvements in general.<sup>89</sup> Indeed, one of his final acts in office was vetoing a bill intended to establish a permanent fund for internal improvements.<sup>90</sup> Madison's veto message of the so-called "Bonus Bill"

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<sup>86</sup> *Id.* at 435.

<sup>87</sup> In vetoing a recharter of the bank in 1815 on nonconstitutional grounds, Madison stated that he was "waiving" the question of "constitutional authority" as being precluded "by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation . . . ." Veto Message to the Senate of the United States, Jan. 30, 1815, reprinted in VIII Writings of James Madison (Hunt, ed., 1908) 327.

<sup>88</sup> David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 *Wm. & Mary L. Rev.* 1441, n.314 (1998).

<sup>89</sup> John Lauritz Larson, "*Bind the Republic Together*": *The National Union and the Struggle for a System of Internal Improvements*, 74 *J. Am. Hist.*, Issue 2, Sept. 1987, at 371 n.15, 376 n.24.

<sup>90</sup> Bills and Resolutions, H.R. 29 (1816). Because the internal improvements fund was to be financed by the "bonus" and dividends of the National Bank, the bill is often referred

specifically rejected Commerce Clause authority for federal road and canal building:

“The power to regulate commerce among the several States,” cannot include a power to construct roads and canals, and to improve the navigation of watercourses, in order to facilitate, promote, and secure such a commerce, without a latitude of construction departing from the ordinary import of the terms, strengthened by the known inconveniences which doubtless led to the grant of this remedial power to Congress.”<sup>91</sup>

Madison’s message came after extended congressional debate on the matter—debate in which supporters of the bill laid out legislative precedent they deemed indicative of federal powers. Lighthouses had a prominent place among that precedent.<sup>92</sup> But Madison simply brushed all of the proponents’ arguments aside by broadly stating that their position could not be justified without “a reliance on insufficient precedents.”<sup>93</sup> Though he did not attempt to distinguish lighthouses from roads or canals, it may well be that in 1817 (contrary to Jefferson) he saw such a distinction as appropriate. However, it may also be true that by 1831 he was not confident that any legitimate distinction existed. Which brings us back to the 1831 letter, and our third point.

The reference in Madison’s letter to safety and external commerce could logically extend to internal improvements other than lighthouses. In fact, Madison recognized that canals could create channels for foreign commerce; that roads could be necessary for troops and military transportations (in which cases they “must speak for themselves, as occasions arise”); and that rivers requiring removal of obstructions could run the gamut from the Mississippi—“the commercial highway for half the nation”—to “inconsiderable” streams within one state.<sup>94</sup> Conversely, he hinted that not all proposed lighthouse projects may serve the national purposes of foreign or interstate commerce.<sup>95</sup>

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to as the “Bonus Bill.”

<sup>91</sup> 30 Annals of Cong. 211-12 (1817). Madison also found that the law could not be supported by the federal government’s power to provide for the common defense and general welfare. *Id.* at 212.

<sup>92</sup> 30 Annals of Cong. 859 (1817) (Pickering), 869 (Yates), 889 (Sheffey), and 917 (Pickering).

<sup>93</sup> *Id.* at 212.

<sup>94</sup> Writings of James Madison at 435-36.

<sup>95</sup> *Id.* at 435 (“the power is liable to great abuse, and [calls] for the most careful &

That being the case, what distinction would remain between lighthouses and other types of internal improvements? The crucial categorical distinction in Madison's letter would appear to be the course of history: Lighthouses received "a positive sanction and general acquiescence" since the beginning of the federal government; the other forms of improvements did not. But if the only distinction between them were precedent, and not logic, then allowing such "general acquiescence" to remove the need for constitutional amendment could hardly be limited to lighthouses only; logically, one would think the precedent should apply to all analogous improvements. And so, perhaps, that is why Madison, firm in his belief that road and canal building required an amendment, did not exempt lighthouses from his call for an amendment even though they had already attained an unshakable constitutional status built on precedent.<sup>96</sup>

By 1831, whether or not precedent could inform constitutional construction, and whether or not the precedent of lighthouses were indistinguishable from less well-established forms of internal improvements, had been the subject of repeated debate in Congress.

## 2. *The Use of Precedent in Internal Improvement Debates*

By the time the Fourteenth Congress engaged in the drawn out debate that preceded passage of the Bonus Bill, each side could point to certain actions (or inactions) of prior governments as supporting their interpretation of the Constitution.<sup>97</sup> That Madison had recently sanctioned construction of the Constitution based on precedent was not lost on supporters of internal improvements. But opponents—neither then, nor in

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responsible scrutiny into every particular case before an application be complied with").

<sup>96</sup> Madison's letter refers the reader to his 1817 opinion denying the constitutionality of internal improvements, explaining that his opinion is still the same "subject, as heretofore, to the exception of particular cases, where a reading of the Constitution, different from mine may have derived from a continued course of practical sanctions an authority sufficient to overrule individual constructions." *Id.* at 433-34. Lighthouses and harbor clean-up projects are the only cases he mentions in the letter as having been established by continued positive sanctions. Could Madison possibly be suggesting that he himself, despite his comments in Congress during the Tonnage Act debate in 1789, did not necessarily view lighthouses as a constitutional exercise of federal authority—that his view on the matter had changed since 1789 (or even since his Presidency)? Indeed, Madison's earlier veto of the Bonus Bill has been interpreted as a shift by Madison from a more flexible republicanism to a strict constructionalism that included a denunciation of his own post road arguments from 20 years before that. John Lauritz Larson, "Bind the Republic Together:" The National Union and the Struggle for a System of Internal Improvements, 74 *Journal of Am. Hist.* 363, 382 (Sept. 1987).

<sup>97</sup> For a summary of the fits and starts of internal improvements prior to that point, see Larson, *Internal Improvement* at 39-63.

subsequent internal improvement debates—were not about to concede the point. The key internal improvement debates over the next decade routinely included argument over whether it was proper to afford any weight to precedent in interpreting the Constitution.<sup>98</sup>

On one side of the debate, legislators expressed a fear that reliance on precedent could result in amendment of the Constitution without following Article V procedures. The following comment, made during the Bonus Bill debate, is typical of such statements:

The authority to pass the bill, judging from the arguments used, seems to be derived rather from precedents than the Constitution. This surely cannot be the true way to construe that sacred instrument. . . . If precedents are to be the rule of construction, the Constitution may be altered without applying to the States; and according to it, no amendment may be made without their consent.<sup>99</sup>

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<sup>98</sup> Subjects of debate ranged from creating funds for making appropriations to support internal improvements; to commission of general surveys for use in future construction of internal improvements; to funding, investment in, or construction of specific individual projects. *See generally* Larson, Internal Improvement at 63-69, Ch.4, and Ch. 5. Politics and sectional/local interests played a large role in the debates, in votes, and in whether legislation that made it through Congress ultimately was signed into law. However, debate was not solely “political,” as the internal improvement issue found expression “as a constitutional, and not merely a policy, question.” Harry N. Scheiber, *The Transportation Revolution and American Law: Constitutionalism and Public Policy, in* Transportation and the Early Nation 1, 3 (1982). For our purposes, the possible motives underlying the constitutional arguments described are not as important as the nature of the dialogue itself. Generally speaking, though, legislators in favor of internal improvements favored reliance on precedent, and those opposed to improvements argued against the use of precedent to provide meaning to the Constitution. Because the nature of the precedent debate did not change over time during the period in question, and in fact was largely repetitive of itself, regardless of the specific bill being debated, I have illustrated the debate with exemplary comments from the various debates. The debate on the unsuccessful Buffalo to New Orleans road, and the debate that led to Andrew Jackson’s veto of the Maysville Road bill—both critical blows to attempts to create a federal transportation system, and both of which occurred just prior to Madison’s 1831 letter—seemed an appropriate ending point for this inquiry into early nineteenth century congressional debate. *See* Pamela L. Baker, *The Washington National Road Bill and the Struggle to Adopt a Federal System of Internal Improvement*, 22 *J. of the Early Republic* 438; John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 *Chapman L. Rev.* 63, 83 (2001); *for additional background on the period see* Larson, Internal Improvement at 183-91.

<sup>99</sup> 30 *Annals of Cong.* 178 (1817)(Hardin). *See, e.g.*, 31 *Annals of Cong.* 1139 (1818)(A. Smyth) (if precedent is unconstitutional, that is not grounds for acting unconstitutionally now); 5 *Reg. Deb.* 254 (1829)(Barbour: new power requires amendment).

Such argument against precedent really had two components: First, a concern over the nature of the American Constitution and a rejection of eighteenth century conceptions of constitutional change. As Virginia's Alexander Smyth put it, if Congressional power could be extended by construction, then the Constitution "will be no better than that of England, where the rule of construction is, that whatever has been done may be done again."<sup>100</sup>

Second, those arguing against reliance on precedent were concerned about the legislature's appropriate place among the three co-ordinate branches of federal government: "Gentlemen have said that Congress, by its enactments, has settled the constitutional power of the Government in relation to internal improvements. Can Congress confer a new power? Can Congress rule the Constitution?"<sup>101</sup> This was not just a question of whether Congress had the ability to resolve Constitutional questions. The role of a legislature, said Virginia's Philip P. Barbour, was fundamentally different from that of a court. Whereas courts rely on precedent in order to have a fixed rule of construction, Barbour argued, it is the legislature's role to declare what the law *shall be*—not what it *is*. That is, legislatures can pass laws that change prior ones, and should not be bound by what came before.<sup>102</sup>

Internal improvement supporters met the opponents on every front. With respect to the Article V issue, by 1830 they were even partially aided by Alexander Smyth, who had changed his earlier views on precedent and was now willing to concede that relying on precedent to establish the practice of appropriating money for internal improvement projects did not subvert the amendment process because repeated legislative practice constituted a construction of the Constitution by the people's representatives, implicitly sanctioned by the people themselves.<sup>103</sup> Indeed,

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<sup>100</sup> 31 Annals of Cong. 1146 (1818.) (Smyth, A.); *id.* at 1163 (Barbour)(distinguishing the United States from Britain).

<sup>101</sup> 6 Reg. Deb. 730 (1830) (Angel); 31 Annals of Cong. 1227 (1818) (Johnson) (questioning whether "usurpation of power" by the legislature that "has not been resisted by force" should be permitted to amount to legislative adjudication).

<sup>102</sup> 31 Annals of Cong. 1163 (1818).

<sup>103</sup> 6 Reg. Deb. 680 (1830) (Smyth). That concept is an echo of federalism arguments made during the founding. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Col. L. Rev. 1, 263-64 (2000). Despite his sanctioning of repeated Congressional action as having the approval of both the state legislatures and the people, Smyth did pointedly query whether  $\frac{3}{4}$  of the state legislatures would actually admit the power to appropriate funds for road building—suggesting he was not completely comfortable with his own argument. As for federal construction of roads, Smyth still maintained his constitutional objection to such action, as he saw no precedent establishing a different interpretation.

ignoring the different hurdles for passing laws and passing amendments, one Congressman suggested that any improper assertion of power by the national government could be changed by amendment—and a failure to exercise that amendment power signified a “fair presumption” that the power had not been improperly asserted.<sup>104</sup>

But more fundamentally, those in favor of reliance on legislative precedent contended that reliance did not trigger Article V concerns because each legislative act (whether past or present) was no more than Congressional interpretation of the Constitution—and Congress *was* (in their view) fully authorized to engage in such interpretive behavior. As one member of the House put it, Congress was obligated to decide the constitutional question “according to our conscience, and not refer the matter to State decision.”<sup>105</sup> There was no provision in the Constitution, he added, referring doubtful questions to the States.<sup>106</sup>

In that regard, pro-precedent speakers equated Congressional power to judicial powers of interpretation. For example, one representative, pointing out that courts do not pass judgment on every piece of legislation that gets enacted, argued that where the legislature itself must judge a law’s validity, it should be able to make use of the same interpretive tools available to the judiciary:

An appropriation of money to particular objects may be effected by a bill, which may happen to be carried into execution without passing the ordeal of an examination by the judiciary. But, after gentlemen admit that the judiciary may decide on our Constitutional powers, that the judiciary, in making that decision, will adhere to precedents, and, consequently, that precedents have authority whenever an impartial and learned umpire can intervene with its authority; will they contend that, in every case where peculiar circumstances enable us to carry a measure into execution without the aid of the judiciary, and where, of course, we must determine the

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<sup>104</sup> 32 Annals of Cong. 1326 (1818) (Tucker). Another member of the Virginia delegation expressed a fear that invoking the amendment process as a mode of constitutional construction could itself create a harmful precedent. 31 Annals of Cong. 1286 (Mercer).

<sup>105</sup> *Id.* at 1120 (Tucker).

<sup>106</sup> *Id.*

validity of the power ourselves, precedents are to be rejected? How happens it that precedent shall have force in settling the validity of one Constitutional power, and be rejected when the question arises on another?<sup>107</sup>

Indeed, the equation of legislative precedent to judicial precedent was so strong that one debater went so far as to say that “*res judicata*” foreclosed the opponents’ arguments.<sup>108</sup>

Which is not to say that the supporters of precedent were not wary of pressing the point too far. Although they could point to Madison’s position on the national bank to justify reliance on precedent, they still had to wrestle with the problem of whether an unconstitutional “error” could somehow become constitutional simply by dint of having been enacted and enforced. Those who opposed reliance on precedent illustrated the point by invoking the Alien and Sedition laws—laws that no one at the time would be eager to sanction with precedential authority.<sup>109</sup> Speakers on the other side of the debate staked out a more defensible stance enabling them to deflect such concerns: precedent did not replace the “positive and written principles of the Constitution;” rather it furnished “better evidence of the true interpretation of the Constitution than the most refined and subtle arguments.”<sup>110</sup> No doubt having the solid precedent of coastal navigational aids in mind, one legislator characterized prior practices as “landmarks for subsequent legislatures”—“the buoys which the wisdom of the nation has fixed, to mark out the channel that divides the rival jurisdictions.”<sup>111</sup>

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<sup>107</sup> 32 Annals of Cong. 1341 (1818)(Pindall). *See also* 31 Annals of Cong. 1131 (1818)(executive and legislative exercise of power may be considered “so many *decisions* on the instrument or law itself”) (emphasis added) (B. Smith).

<sup>108</sup> 30 Annals of Cong. 878 (1817)(Gold) (“is everything to be in flux and the benefit of precedent to have no place here?”); *see* 32 Annals of Cong. 1343 (1818)(Pindall) (stating that the “unusual course” of denying precedent all authority is a “position involving the endless absurdity of forcing us to ten thousand decisions of a Constitutional question, which, after all, according to [that] theory would leave the same question undecided through all futurity”).

<sup>109</sup> *Id.* at 168 (Daggett), 178 (Macon); 31 Annals of Cong. 1229-30 (1818)(Johnson).

<sup>110</sup> 30 Annals of Cong. 856 (1817)(Calhoun); *see also* 32 Annals of Cong. 1325 (1818)(Tucker: “I do not contend . . . that we are bound by legislative precedents against the clear meaning of the Constitution. But I do contend, that when a principle has been long avowed and admitted, and acted upon, we ought not entirely to disregard it in deciding on a doubtful point.”); 31 Annals of Cong. 1176 (1818) (Clay: agreeing that prior exercise of power should not answer the issue).

<sup>111</sup> 32 Annals of Cong. 1325 (1818)(Tucker).

In sum, the internal improvement debates reflect years of repeated disputes over the nature of the Constitution, the force of legislative precedent, and Congress' role in interpreting the Constitution and causing Constitutional change. Alexander Smyth's personal shift from 1818 to 1830 is reflective of the overall direction in which Congress was heading, though there were still dissenters.

But even as those questions were being debated, the "landmarks" and "buoys" of lighthouses and other navigational aids continued pushing the Commerce Clause debate. Even those opposed to reliance on precedent had to contend with the fact that every Congress since the very first one had provided for them. The reality of the situation was that the parameters of the Commerce Clause had already moved; the real question to be fought over was by how much.<sup>112</sup>

### 3. *Lighthouse As Commerce Clause Precedent For Defining "Regulate" To Include The Power To "Facilitate"*

For those who believed that the Commerce Clause did not empower the federal government to create internal improvements, an obvious focal point was the meaning of the word "regulate."<sup>113</sup> But those who would contend that regulate meant simply to prescribe rules for, and not to

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<sup>112</sup> Over the years, additional non-lighthouse precedents were developed, most prominent among them being the Cumberland Road, whose origins stemmed from a compact that created the state of Ohio. Leonard D. White, *The Jeffersonians* 484 (1959). Though the slow but sure accretion of road and canal-related precedents was significant, debaters in favor of improvements supported the projects with additional powers besides the Commerce Clause (such as military, postal, or spending clause powers), while those opposed to improvements had numerous grounds for distinguishing them (*e.g.* they involved appropriations, or federal investments, rather than federal construction; or they were put in place without any constitutional debate). Such distinctions often provided the constitutional basis for individual and congressional determinations. *See* Larson, *Internal Improvement* at 118 (table of resolutions voted on by the 15<sup>th</sup> Congress; power to *appropriate* funds for improvements was approved; power to *build* roads or canals was rejected); Eastman, *Restoring the "General" to the General Welfare Clause*, 4 *Chapman L. Rev.* 63, 82-3 (2001) (noting Monroe's change of mind on the constitutionality of appropriations for internal improvements); 6 *Reg. Deb.* 680 (Smyth) (finding precedent supporting spending, but not construction). Because the federal lighthouse system was almost universally accepted as an exercise of Commerce Clause authority, and because it represented the most repeated, unchallenged, precedent for *construction of*, and not just appropriations for, internal improvements, the development of Commerce Clause precedent is seen most clearly through legislator's comments about lighthouses. That is not to say, however, that other precedent had no influence on the issues discussed with respect to lighthouses.

<sup>113</sup> *See, e.g.*, statements that to "regulate" did not mean to "facilitate": 30 *Annals of Cong.* 897 (1817); 31 *Annals of Cong.* 1133 (1818); *id.* at 1139; *id.* at 1158.

facilitate, faced a significant problem: the routine construction and operation of lighthouses belied such a narrow reading of the Commerce Clause.<sup>114</sup> Whatever theoretical arguments could be formulated against the use of precedent, the problem for those who opposed federal road and canal programs was that they had simultaneously been party to Congress' continued support of lighthouses. If they could not logically distinguish their views on the different categories of improvements, all the constitutional theory in the world was not going to help their cause.

And so, the debate shifted beyond the meaning of "regulate" to include argument on the *scope* of regulated activity. To argue in the face of lighthouse precedent that Congress could not "facilitate" commerce was almost impossible. Instead (though perhaps not much less difficult of an argument), internal improvement opponents tried to draw the best bright line they could between lighthouses and roads and canals. Thus, they characterized lighthouse building as an appropriate exercise of Commerce Clause authority because it concerned the regulation of *foreign* (or "external") commerce.<sup>115</sup>

The external/internal commerce distinction could perhaps have had *practical* merit (for example, in weeding out proposed improvements that might only serve local, rather than national, interests). And it certainly could explain why the federal government needed to be involved in lighthouse construction (given the importance of national control over anything that could impact foreign trade). But as a matter of Constitutional interpretation, Congressmen on the other side of the debate had little trouble pointing out the lack of textual support for a distinction between foreign and interstate commerce.<sup>116</sup> This retort by then-Federalist Joseph Hemphill of Pennsylvania was typical:

To regulate commerce with foreign nations . .  
 . we have erected lighthouses, piers, buoys,  
 and beacons. . . .

What is the object of these lighthouses and  
 light-ships, and this class of powers  
 constantly exercised by Congress? Is it not to

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<sup>114</sup> See, e.g., citations to lighthouses as precedent for power to facilitate commerce: 30 Annals of Cong. 869 (1817); *id.* at 889-90; 31 Annals of Cong. 1131 (1818); *id.* at 1176; *id.* at 1189; 40 Annals of Cong. 621 (1823); *id.* at 1106; 6 Reg. Deb. 644 (1830); *id.* at 662.

<sup>115</sup> See, e.g., 30 Annals of Cong. 864 (1817); 31 Annals of Cong. at 1139 (1818); see also 6 Reg. Deb. 699 (1830) (characterizing pre-1815 federal government as focused on external affairs, and decrying as "internal and essentially vicious" federal action since then).

<sup>116</sup> See, e.g., 31 Annals of Cong. 457 (1818); *id.* at 1131; *id.* at 1176; 5 Reg. Deb. 279-80 (1829); 6 Reg. Deb. 644 (1830); *id.* at 662.

lessen the price of transportation, by removing dangers and rendering the navigation more safe and secure? . . . And when we find the power to regulate commerce among the States, given by the same sentence, and expressed by the same words, why can we not apply the principle to the regulation of commerce among the States? Why can we not lessen the price of transportation? Can any man living make a sensible distinction?<sup>117</sup>

Picking up on the flawed distinction between foreign and interstate commerce, Henry Clay attacked the apparent self-interested bias of representatives from coastal states who routinely benefited from lighthouses but would now invoke the Constitution to deny roads and canals to the rest of the country.<sup>118</sup> For Clay, it was not so much a matter of adherence to precedent, but a matter of Congressional fairness. If the government exercised its power for one interest, it should not say that the power cannot be exercised for another analogous interest: Having erected lighthouses to facilitate foreign commerce, Congress had a “bounden duty” to either repeal all the lighthouse laws (if they truly were unconstitutional) or enact similar ones to benefit internal commerce.<sup>119</sup>

Repeal of lighthouse laws did not happen.<sup>120</sup> For complicated reasons, including not just Congressional but Presidential politics, the national government moved slowly in providing the fairness sought by Clay

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<sup>117</sup> 40 Annals of Cong. 621 (1823).

<sup>118</sup> 31 Annals of Cong. 1169 (1818) (“Foreign commerce . . . is the spoilt child daughter of this Government. We deck her out in the most precious and costly jewels; we light up her way by Winslow Lewis’ inventions . . . But when the old respectable matron Agriculture asks us for something for her accommodation, gentlemen will not give her a gown even of Virginia cloth.”). *See also* 6 Reg. Deb. 711 (1830) (“it does seem to me that some gentlemen think that constitution, commerce, and every thing stops with tide water”). A regional breakdown of the voting on a series of internal improvement-related resolutions in the Fifteenth Congress can be found in Larson, *Internal Improvements* at 118.

<sup>119</sup> 31 Annals of Cong. 1176 (1818). Though of course politically motivated, Clay’s theory that Congress should apply the Constitution fairly to all parties is in essence a statement of “legislative adjudication:” whether or not precedent could be deemed “binding” under the Constitution, it was imperative that Congressional resolutions (or “adjudications”) of similar funding issues be consistent with each other. *See, supra*, note

<sup>120</sup> Even James Polk, the staunchest Presidential enemy of internal improvement projects, carved out an exception for lighthouses. *See, supra*, note \_\_\_\_\_. Though Andrew Jackson before him expressed fears over abuses in lighthouse projects, he also did not categorically reject them.

and other supporters of broad internal improvement programs.<sup>121</sup> But the fits and starts in putting in place a national system of roads and canals should not obscure the way the constitutional debate had shifted in the meantime. The foundation for defining the power to “regulate” commerce as including the power to “facilitate” was firmly laid with the Lighthouse Act of 1789. Unless Congress were either to reverse course or afford no precedential value to its steady legislative practices, those arguing that “regulate” meant no more than to “prescribe” or “direct” would face an uphill battle.<sup>122</sup>

The locus for the early solidification of Commerce Clause authority is generally placed in Justice Marshall’s hands.<sup>123</sup> Interestingly enough, members of Congress used Marshall’s opinion in *Gibbons v. Ogden* to support their argument that construction of lighthouses and other internal improvements could *not* constitute the exercise of Commerce Clause power because (as Marshall had said) states and individuals could engage in such activities, too.<sup>124</sup> The neutralization of that portion of Marshall’s opinion came through the other branches’ giving definition to the word “regulate” through the continuous enactment of lighthouse-related laws, supported by repeated reliance on the Commerce Clause as their authority for doing so.

## II. EARLY FEDERAL LIGHTHOUSE ADMINISTRATION AND THE DEVELOPMENT OF EMINENT DOMAIN LAW

As we saw above, the Lighthouse Act’s provision for state consent stemmed from the Enclave Clause, which provided a mechanism for the federal acquisition of exclusive jurisdiction over property within state boundaries. When the federal government took over the existing lighthouses starting in 1789, the individual states ceded both title and jurisdiction to the federal government simultaneously. But as the federal lighthouse program grew in the 1790s, and new lighthouses were constructed, the states did not always own title to the property on which the

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<sup>121</sup> See generally Larson, Internal Improvement at 45-69, 109-93; Stephen Minicucci, *The “Cement of Interest,”* 25 Social Science History 247 (2001).

<sup>122</sup> Regarding the weight placed on non-judicial Constitutional precedent, it is worth noting that even opponents of internal improvements ended up relying on precedent-based arguments. Thus, Alexander Smyth contended that the “long *nonuser*” of a power to build roads is “evidence that it is not contained in the [Constitution’s] grant; and we should now consider it as settled, that Congress have not power to enter into a state, assume jurisdiction, and construct roads.” 6 Reg. Deb. 680 (1830). See *id.* at 766 (Hubbard).

<sup>123</sup> *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

<sup>124</sup> 32 Annals of Cong. 1358 (1818)(Orr); 6 Reg. Deb. 839-40 (1830). See also *Gibbons* at \_\_ (“What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.”).

federal government wished to build. That state of affairs potentially raised two questions: If a private land owner refused to transfer its land, did the federal government have power to obtain title through condemnation? If so, could a state affect the federal government's rights by refusing to cede jurisdiction over the property in question?

Fast forward to 1875. In *Kohl v. United States*, 91 U.S. 367 (1875), the Supreme Court conclusively ruled that the federal government had the power to take private property (provided, of course, that just compensation is made in accordance with the Fifth Amendment.<sup>125</sup> And case law from the period clearly distinguished between federal acquisition of soil (which a state could not prevent) and federal acquisition of jurisdiction (which required state consent)<sup>126</sup>—effectively meaning that if the federal government did want “exclusive” jurisdiction, it would have to comply with the wishes of a state that refused to cede jurisdiction if eminent domain powers were exercised.

The question is, what happened in the 86 years between the birth of constitutional government and the Supreme Court's pronouncement in 1875. Was it understood that the federal government could take property by eminent domain? If not, why not?

#### A. *The Enclave Clause's Effect On Precedent*

On September 6, 1797, a group of men gathered at Webbs Tavern in Salem, Massachusetts, for a boat ride to nearby Baker's Island. The group included the United States Superintendent of Lighthouses in Massachusetts, an attorney for the owner of Baker's Island, and the members of a committee appointed by a state court judge “to view, sett off and appraise” ten acres of land on the island, for use by the United States as a site for a new lighthouse. Foul weather prevented the group from undertaking their trip, but less than a week later the committee members succeeded in viewing the land and arriving at an appropriate appraised value.<sup>127</sup> In October, the state court accepted the committee's report,<sup>128</sup> and the United

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<sup>125</sup> *Kohl v. United States*, 91 U.S. 367 (1875).

<sup>126</sup> *See, e.g., Ex Parte Hebard*, 11 F. Cas. 1010, 1011 (D. Kan. 1877) (state consent not required for valid exercise of eminent domain, but state shall not be ousted of jurisdiction except by her consent); *Stockton v. Baltimore & N.Y. R.R.*, 32 F. 9, 18 (D.N.J. 1887)(same).

<sup>127</sup> The court document setting forth all of this information can be found at pages 205-06 of NARA Microfilm Roll M94.

<sup>128</sup> *Id.*

States completed what may well have been its first taking of private property.

As history unfolded, the Baker's Island taking bore two characteristics that would be repeated for decades: the valuation process was overseen by a state court, and it was explicitly authorized *not* by act of Congress, but by the Massachusetts state law ceding jurisdiction over whatever land would become the Baker's Island lighthouse.<sup>129</sup> Indeed, according to the established history of takings, up until the 1870s the exercise of federal eminent domain power within state borders occurred generally in state proceedings and always with state legislative involvement—a pattern of conduct not altered until the Supreme Court's *Kohl* decision upheld a federal court condemnation proceeding and strongly confirmed the federal government's independent power of eminent domain.<sup>130</sup> This large gap in time from the founding to the 1870s has been

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<sup>129</sup> The statute reads, in relevant part:

*Be it enacted . . .* That the United States of America, may purchase or take as hereinafter is provided, any tracts of Land which shall be found necessary and convenient for the Light-houses authorized by Congress to be erected upon *Baker's Island*, and upon *Cape Cod . . . .*

. . .

*And be it further enacted*, That if the Agent or person employed for the *United States*, and the Owner or Owners of any Tract or Tracts of Land which shall be found necessary and convenient for the said Light-houses cannot agree in a sale and purchase thereof, such Agent or Person employed may apply to any Court of General Sessions of the Peace which shall be holden within and for the county wherein such land lies, who shall and may appoint a Committee, of three Freeholders, impartial men, to determine a just equivalent to the Owner or Owners of such Land, which committee shall be sworn before some Justice of the Peace for the faithful discharge of their trust; and shall forthwith proceed to view, set off and appraise such Tract or Tracts of Land; and shall make return of their doings to the same Court; and which award and return being accepted by the Court and the amount of such appraisement being paid to the Owner or Owners of the Land appraised and set off by such Committee . . . the Tract or Tracts of Land so appraised and set off, shall be vested in the *United States*, and shall and may be taken, possessed and appropriated for the purposes aforesaid. *Provided*, That all charges of such application and appraisement shall be paid by the *United States*, and *Provided* that the Land which may be set off for the purposes of this Act, shall not exceed the quantity of ten acres in the whole for each Lighthouse, including and reckoning therewith, any Land purchased for the same.

Mass., ch. 23, June 18, 1796.

<sup>130</sup> Julius L. Sackman, 1 *Nichols on Eminent Domain* (revised 3d ed.) § 1.24 (2002); *Kohl v. United States*, 91 U.S. 367 (1875). From early on, however, federal takings power

attributed to the presence of doubt regarding whether or not the federal government possessed eminent domain power.<sup>131</sup> It is a theory that bears re-examination.

On the one hand, it is true that the federal government's power to take property within state borders, without state consent, was questioned by some during the 19<sup>th</sup> century. Even James Monroe, in arguing against federal authority to construct internal improvements, suggested that "very few would concur" that the federal government, in attempting to obtain land for purposes of internal improvement projects, could summon a jury to condemn the land and compel a transfer for value.<sup>132</sup> But it is difficult to believe that federal officials in the 1790s would not have understood the (recently enacted) "just compensation" limitation of the Takings Clause as an implicit recognition of federal eminent domain power.<sup>133</sup> That is the only sensible reading of the clause, and two Supreme Court Justices explicitly recognized the power in 1798—one of them stating that the absence of such a power would obstruct the operations of government because "Fortifications, Light-houses, and other public edifices, are necessarily sometimes built upon the soil owned by individuals."<sup>134</sup>

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was routinely exercised in federal court when the land being acquired was situated within the District of Columbia. 1 Nichols at § 1.24.

<sup>131</sup> As the lead treatise on Eminent Domain explains: "Originally there was some doubt with respect to the power of eminent domain in the federal government since, it was argued, the United States is a government of delegated powers and the power of eminent domain had not been specifically granted in the federal constitution." 1 Nichols at § 1.24. See Gary Lawson and Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. Chi. L. Rev. 1081, 1087 n.18 ("The existence of a federal power of eminent domain was a matter of some controversy in the founding era."); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 559 n.18 (Aug. 1972) ("Strangely, it was not until [the Kohl] decision that the federal government was clearly determined to have eminent domain power.").

<sup>132</sup> VI Writings of James Monroe (Stanislaus Murray Hamilton, ed.) 216, 233 ("Views on the Subject of Internal Improvements"). See, e.g., 31 Annals of Cong. 1209 (1818) (Austin); 32 Annals of Cong. 1351 (Orr); 40 Annals of Cong. 709 (1823) (Wood). See also *Gilmer v. Lime Point*, 18 Cal. 229 (1861) (counsel argued that the United States lacks the right of eminent domain without State consent; court noted it was not deciding the issue).

<sup>133</sup> See Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings" Clause, 53 Hastings L.J. 1245, 1287 (Aug. 2002) (stating that "far from being a grant of power, Madison's eminent domain clause was an attempt to define the nature of a power already inhering in the national legislature").

<sup>134</sup> *Calder v. Bull*, 3 U.S. 386, 400 (1798) (Iredell, J.). In *Calder*, Justices Chase and Iredell both referred to the government's power to take property as a reason for limiting the scope of the Constitution's prohibition against *ex post facto* laws. *Id.* at 394 (Chase, J.); 400 (Iredell, J., concurring in result). Although the case involved an act by a state legislature, both justices applied their reasoning to the federal government's powers:

Moreover, although the evidence is scant, early lighthouse-related correspondence of Treasury Department officials suggests that they did understand themselves to be empowered to take property without state consent or state-mandated procedures.<sup>135</sup>

It is beyond the scope of this article to identify the reasons that some nineteenth century politicians either doubted federal eminent domain authority, or simply refrained from exercising it in court proceedings without state involvement. However, it is likely that both political thinking and policy were significantly shaped by the Enclave Clause's requirement that the federal government obtain state consent before exercising exclusive jurisdiction over federal lands.<sup>136</sup> Indeed, the procedural pattern established by the Baker Island taking arose out of the Enclave Clause's consent requirement. And it is a pattern that outlasted the *Kohl* case, being used even after the Supreme Court had approved independent federal takings in federal court.<sup>137</sup> We turn now to examine the birth of that pattern.

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It is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any ex post facto laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, 'that private property should not be taken for PUBLIC use, without just compensation,' was unnecessary.

*Id.* at 394 (Chase, J.); *see id.* at 400 (Iredell, J.).

<sup>135</sup> *See, infra*, \_\_\_\_.

<sup>136</sup> *See* 31 Annals of Cong. 1135 (Clagett) (saying that federal government could not take possession of land—or even purchase it—without state consent). During the 1864 debates of Maryland's (new) Constitutional Convention, the Enclave Clause's requirement of state consent was cited as support for an argument that the federal government did not have the power to condemn lands within a state absent state consent. Debates of the Constitutional Convention of the State of Maryland, vol. I at 458. *See also* Cong. Globe (Apr. 19, 1860) at 1790-92 (Senate debate regarding bill that would have established a procedure for taking property, with consent of the state legislature); Mark L. Pollot, *Grand Theft and Petit Larceny: Property Rights in America* 44 (1993) (stating that the federal Constitution does not expressly grant the power of eminent domain, unless one considers the Enclave Clause "to be a modified extension of the power of eminent domain"); Ellen Paul Frankel, *Property Rights and Eminent Domain* 73 (1987) (stating that the Enclave Clause "appeared to limit federal takings to an indirect course, one that would require the 'Consent of the Legislature of the State' in which the property lies.").

<sup>137</sup> *See, e.g.*, *United States v. Jones*, 109 U.S. 513, 520-21 (1883) (noting two examples of recent state legislation providing for takings to be exercised in accordance with state law); *In re Petition of the United States*, 96 N.Y. 227 (1884) (stating that despite its independent condemnation powers, federal government may enter state courts and condemn land through proceedings authorized by the state legislature).

In the 1790s, when the federal government obtained either existing lighthouse lands or lands for new lighthouse construction, it always sought a jurisdictional cession over such lands from the state.<sup>138</sup> The state acts providing such cession sometimes included conditions accompanying the state's consent.<sup>139</sup> The 1796 act passed by the Massachusetts General Court with respect to Baker's Island was no different in that regard.

In reading the act's provision that the United States may "purchase or take [land on Baker's Island] as hereinafter is provided," it would be natural to view that provision as a grant of takings power to the federal government.<sup>140</sup> But the key words are "as hereinafter is provided." Massachusetts was not granting power to the United States—it was limiting it. If land was to be taken by the federal government, state mandated procedures would have to be adhered to, *including a requirement that all charges related to the appraisal proceeding be paid by the United States*.<sup>141</sup> And, of course, the state's power to impose these conditions on the federal government stemmed directly from the power under the Enclave Clause to withhold its consent to federal jurisdiction.

When the federal government set out to obtain land for the Baker's Island light, the official in charge was Tench Coxe, then Commissioner of Revenue in the Treasury Department.<sup>142</sup> Despite the clear process provided

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<sup>138</sup> See, e.g., Act of Apr. 12, 1792, ch. 12, 2d Cong., 1<sup>st</sup> sess.; T. Coxe to A. Hamilton, Jan. 19, 1793, reprinted in XIII Syrett 503; House Journal, 3d Cong., 1<sup>st</sup> sess., p.46 (Jan. 21, 1794); Act of Mar. 2, 1795, ch. 40, 3<sup>rd</sup> Cong., 2d sess.; T. Coxe to Isaac Holmes, June 15, 1796 (NARA M63, roll 1).

<sup>139</sup> See, e.g., Mass. Statutes 1790, ch. 4 (June 10, 1790) (conditioning cession on state retention of jurisdiction for service of process, continued federal operation of the lights, and compensation for lands ceded if other states given the same); V Statutes at Large of South Carolina (Cooper ed.) 147 (1839) (Act No. 1486, Jan. 20, 1790) (U.S. must maintain lights in good repair, and place leading marks and buoys); Laws of Virginia (Henning, ed.), 1789 ch. 5 (Nov. 19, 1789) (cession conditioned upon U.S. completing erection of light in seven years).

<sup>140</sup> Mass. Ch. XXIII, June 18, 1796.

<sup>141</sup> *Id.* At the time, it could not have been clear to the Massachusetts legislature what procedures the federal government might have followed had it attempted to take the land. Takings were generally understood to be an exercise of legislative authority, with compensation and procedures governed by legislative, not judicial, rule. Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings" Clause, 53 Hastings L.J. 1245, 1247, 1263, 1277 (Aug. 2002); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 794 n.69 (1995); Jacques B. Gelin and David W. Miller, *The Federal Law of Eminent Domain* §1.2 (1982). Indeed, the Massachusetts statute is a typical example of that.

<sup>142</sup> In a wonderful bit of irony, Coxe was the "Freeman" who penned the articles assuring nervous readers that the Constitution did not empower the federal government to

by the Massachusetts statute, Coxe was not at all anxious to resort to condemnation. As he told his superintendent of lighthouses in Massachusetts, “[i]t will be much more agreeable to procure the land by treaty and ordinary purchase than to adopt the mode of valuation or condemnation to the Public use, for an appraised consideration, as authorized by the State law.”<sup>143</sup>

The concern was not one of federal-state relations (the state legislature had already given its stamp of approval to condemnation) but one of federal-private citizen relations. Although Coxe was always anxious to keep costs down, including acquiring lands by gift if at all possible, his correspondence also reflects vigilance in avoiding any behavior that would make the federal government appear unfair in dealing with members of the public.<sup>144</sup> Thus, even when push eventually came to shove at Baker’s Island and Coxe had to authorize use of Massachusetts’ takings procedure, he authorized the lighthouse superintendent to agree “to give what three good men will fix upon it,” if that were “more agreeable” to the owner than the non-consensual condemnation proceeding; and he also specified that “[r]ather than incommode him, half an acre may be taken.”<sup>145</sup>

From the Baker’s Island correspondence alone, it is not entirely clear whether Coxe would have considered himself empowered to condemn the land absent the Massachusetts’ statute. Indeed, he had just allowed his superintendent in New York to be put through the ringer of exceedingly difficult negotiations with the owners of land in Montauk, without any indication that he could, if he wished, simply resort to a condemnation proceeding.<sup>146</sup> However, in February 1797—after Coxe was familiar with

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engage in such traditional state activities as building lighthouses. *See supra* note \_\_\_\_.

<sup>143</sup> Tench Coxe to Benjamin Lincoln, dated July 8, 1796 (NARA microfilm roll M63, roll 1).

<sup>144</sup> Tench Coxe to Nicholas Fish, dated May 27, 1795 (NARA microfilm roll M63, roll 1) (regarding land for Montauk lighthouse: “It is true, that the land in this instance appears to be above the medium quality of the Sea Coast, and therefore it is more agreeable, that a Nation should pay a reasonable price, than accept a small gift from Individuals”); Tench Coxe to Peleg Coffin, dated July 29, 1795 (NARA microfilm roll M63, roll 1) (writing to an oil seller haggling over price: “The Treasury has no interest in this Business. We form our minds as the equitable arbitrators between the Community and the Citizen.”); Tench Coxe to Nicholas Fish, dated Sept. 12, 1795 (NARA microfilm roll M63, roll 1) (“the Government do not wish to obtain the land below its just value”); Tench Coxe to Benjamin Lincoln, dated Dec. 20, 1796 (NARA microfilm roll M63, roll 1) (saying that quantity of land could be reduced if desired by the owner “[i]n order to make the matter as little inconvenient to the owner as possible”).

<sup>145</sup> Tench Coxe to Benjamin Lincoln, Mar. 1, 1797 (NARA microfilm roll M63, roll 1).

<sup>146</sup> *See* correspondence from Tench Coxe to Nicholas Fish, dated Apr. 10, 1795; May

the Baker's Island statute, and just as things were heating up with the Baker's Island owner—Coxe instructed his superintendent of lighthouses in Rhode Island to consider condemning the land on which the Newport Lighthouse was situated:

It is wished, that you would endeavor to procure the Soil:—  
1<sup>st</sup> by treaty with the owner, or  
2dly by taking measures to procure the land upon a just valuation of a Jury under the authority of law, in that manner which is understood to be called “condemning land” in the Eastern states.—<sup>147</sup>

What makes Coxe's suggestion significant is that at the time he made it, Rhode Island had already ceded jurisdiction over the property, *and there was no Rhode Island statute authorizing or consenting to a condemnation proceeding by the United States*. Whether Baker's Island planted the seed of eminent domain in Coxe's mind, or whether after both Montauk and Baker's Island his patience had worn thin, Coxe's Newport letter indicates that at the time it was written (1) Coxe did not view state consent as a prerequisite to federal exercise of eminent domain power; and (2) once the state had consented to a cession of jurisdiction—the only object for which state consent is required by the Constitution—resort to condemnation would not cause Coxe to return to the state legislature for additional approval. Neither of which is to say that Coxe felt unconstrained in using federal condemnation power. He did feel constrained—but the constraints appear to have stemmed from a fear of antagonizing private citizens, rather than from a belief that the federal government lacked power without state legislative consent.<sup>148</sup>

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26, 1795; Sept. 12, 1795 (NARA microfilm roll M63, roll 1). In the last letter, Coxe, authorized his superintendent to raise their offer, but his exasperation at the owners' “unhandsome conduct” was clearly reaching its limits:

But as good and reasonable men should abide by their own offers or first askings, and as the Government do not wish to obtain the land below its just value, it is earnestly hoped, that no obligation may be imposed by the owners upon the Government to give a price which may render them apparently inattentive to the proper value of things and careless of the Public Money.

<sup>147</sup> Tench Coxe to Wm Ellery, Feb. 28, 1797 (NARA microfilm roll M63, roll 1).

<sup>148</sup> Coxe's letter regarding the Newport lighthouse stresses that it is “particularly desirable” not to resort to a just valuation if it can be avoided, and that paying “a liberal price” would be better “than to recur to Court and Jury.” *Id.* Despite Coxe's professed willingness to pay a “liberal price,” one wonders whether Coxe may also have been nervous that a valuation proceeding could lead to imposition of an unfair price by a jury

The evidence under Coxe's successor, William Miller, is similar. After the State of Virginia ceded jurisdiction to the United States for construction of a new lighthouse at New Point Comfort, the Treasury Department found itself dealing with an unreasonable land owner. Although the state law contained no authorization of condemnation proceedings, the local federal official raised the prospect of resorting to one—but summarily dismissed it out of fears that the federal government would find itself mistreated: “As far as I can discover, there seems in that neighborhood a general disposition to make the United States pay well for the scite of a Lighthouse, and I suspect that even a jury from that vicinity, under a writ of *ad quod damnum*, would estimate the price not by the real value of the article, but by the ability of the purchaser, the Public.”<sup>149</sup>

On the other hand, in a situation where the State of New Jersey had not yet ceded jurisdiction, Miller wrote the following as his agent wrestled with a stubbornly unfair bargainer:

If the Mercantile interest of New York were to represent to the New Jersey legislature during the Session which will immediately take place, that their interference is necessary, I trust that they would without hesitation, provide some mode of converting as much ground as may be necessary in this

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partially disposed towards the owner.

Rhode Island had ceded both title and jurisdiction over the Newport Lighthouse in 1793—four years before Coxe wrote his letter authorizing his superintendent to obtain the “soil” by purchase or condemnation. Back in 1790 and 1791, when the federal government was first attempting to obtain a cession of jurisdiction, there had been some question regarding whether the State of Rhode Island actually owned the lighthouse land, which was claimed by a Jerathmel Bowers. VI Syrett 550 (Ellery to Hamilton, dated Aug. 2, 1790); VIII Syrett 163, 332 (Ellery to Hamilton, Mar. 7, 1791, and May 9, 1791). The matter appears to have been dropped, for reasons not explained in the historical record. Coxe picked up the matter in 1797, again for reasons that are not clear. His letter appears to be his last word on the subject, and local land records do not reflect a transfer of rights to the United States. However, years later, in 1804, a private transfer of land from a “John Bowers” contained exception for “such part and portion thereof as this State or the United States have a right or title to....” The exception apparently refers to the lighthouse land. (Correspondence from Mary R. Miner to the author, dated Mar. 17, 2003, containing relevant excerpts from the local land evidence book; on file with the author).

<sup>149</sup> William Davies to William Miller, dated Jan. 31, 1802 (National Archives, Wash. D.C., RG 26, 17A). The writ of *ad quod damnum* was used when land was valued in condemnation proceedings. See *Attorney General v. Turpin*, 13 Va. 548 (1809) (emanation, execution, and return of writ of *ad quod damnum* automatically divests owner of title over land to be valued).

instance, to public use, without requiring more than the just value.<sup>150</sup>

Significantly, we see that Miller suggests not just that the state could clear the path for condemnation, but that the state actually would have the power to require the federal government to pay *more* than “just value.” What could possibly be the source of such power? As we have already seen, it is a power that stems directly from the Enclave Clause: New Jersey could require excess compensation as a condition of their consent to cede jurisdiction over the land.<sup>151</sup>

People understood long before the *Kohl* case that the states’ power to withhold consent under the Enclave Clause did not constitute a power to prevent federal exercise of the power of eminent domain.<sup>152</sup> But as a practical matter, the lighthouse administration’s general policy to obtain exclusive jurisdiction over all lighthouse lands (a policy established by the Lighthouse Act and subsequent congressional lighthouse enactments) gave that power to the states. And it is easy to see how conflation of the takings clause with the consent required under the Enclave Clause could occur, particularly in arguments by those seeking to limit federal authority.<sup>153</sup>

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<sup>150</sup> William Miller to David Gelston, dated Oct. 20, 1801 (NARA, RG 26, 17A).

<sup>151</sup> When this matter finally did get resolved by the New Jersey legislature, they passed a law consenting to purchase of the land, ceding jurisdiction over the land upon such purchase, and providing for an appraisal proceeding if the owner and the federal government could not come to terms. N.J., ch. 131 (Mar. 1, 1804).

<sup>152</sup> In 1808, Jefferson sent a message to Congress informing them of the difficulties the executive branch was having carrying out its duties under an act calling for fortification of ports and harbors. The problem, Jefferson said, stemmed from property being held by those incapable of consenting to transfer (such as minors) or by those who refuse to transfer, “or demand a compensation far beyond the liberal justice allowable in such cases.” In submitting the matter to Congressional consideration, Jefferson pointed them to their power to take property with just compensation, and concluded:

I am aware that, as the consent of the legislature of the state to the purchase of the site may not, in some instances, have been previously obtained, exclusive legislation cannot be exercised therein by Congress until that consent is given. But, in the mean time, it will be held under the same laws which protect the property of the United States, in the same state . . . .

VI House Journal 245-46, Thomas Jefferson to the Senate and House of Representatives, March 25, 1808.

<sup>153</sup> The early history of federal “takings” is often described as a process in which states condemned land for the federal government. See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 559 n.18 (Aug. 1972); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Ore. L. Rev. 203, 212 (1978). However, as the Baker’s Island episode makes clear, the federal government *did* at times condemn property in its own name—but simply using state-mandated procedures. See United States

Whatever political reasons later prevented the federal government from more assertively condemnation powers in the 19<sup>th</sup> century, the lighthouse administration's early practices under the Enclave Clause should not be overlooked. Whenever the federal government used state-mandated condemnation procedures even after the Supreme Court's *Kohl* decision, it was simply following in the footsteps set a century earlier in Webbs Tavern.

### *B. The Takings Clause in Internal Improvement Debates*

Though some Congressmen in the early nineteenth century questioned federal takings power, there were also numerous Congressmen who did not.<sup>154</sup> In fact, three internal improvement resolutions that contained explicit recognition of the federal takings power garnered the support of almost half of Congress.<sup>155</sup> These supporters of the eminent domain power seemed to stand on firmer textual ground.

For instance, some opponents argued that federal takings power required state consent. That's not a surprising argument, given that issues of state consent were inextricably intertwined with broader internal improvement questions, such as whether the federal government could build a road or canal within the boundaries of an objecting state even if it were able to purchase property from private individuals.<sup>156</sup> But looking at the text of the Constitution, the only potentially relevant provision incorporating a "consent" requirement is the Enclave Clause. And that

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v. Dumplin Isl., 1 Barb. 24 (N.Y. Gen. Term 1847). In approving the federal government's taking of Baker's Island, it is difficult to imagine that Tench Coxe would have believed that the Massachusetts legislature could have empowered the federal government to do something that it was otherwise prohibited from doing under the Constitution. *See Dickey v. Maysville, Washington, Paris and Lexington Turnpike Rd. Co.*, 37 Ky. (7 Dana) 113 (1838) (if power not delegated to Congress by the Constitution, consent of state could not give that power to Congress).

<sup>154</sup> *See, e.g.*, 31 Annals of Cong. 1131 (B. Smith), 1169 (Clay), 1193 (Cushman), 1221 (Simkins), 1235 (Lowndes), 1295 (Mercer) (1818); 5 Reg. Deb. 248 (Strong), 269 (Fort), 286 (Smith) (1829); 6 Register of Debates 642 (1830)(Hemphill).

<sup>155</sup> 32 Annals of Congress 1382-89 (1818); Larson, Internal Improvement at 118. A number of the legislators who spoke out in favor of the takings power came from slaveholding states, which suggests that the motivations of nineteenth century debaters on the issue are more complicated than present eminent domain historiography allows. *Cf.* Timothy Sandefur, A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use," 32 Southwestern Univ. L. Rev. 569, n.267 (suggesting that Congress limited eminent domain powers to avoid issue of whether federal government could free slaves by "taking" them).

<sup>156</sup> 31 Annals of Cong. 1135 (1818) (state consent was required for both taking and purchase of land).

clause—as internal improvement debaters pointed out—bore on issues of exclusive jurisdiction, not soil.<sup>157</sup>

Similarly, one Congressman was willing to infer *some* power from the Fifth Amendment, but contended that the power was limited simply to times of war when the government has to destroy property or temporarily take it for public purposes.<sup>158</sup> That is not an unreasonable concept, but nothing in the language of the Fifth Amendment limits its operation either to personal property or times of war.<sup>159</sup> And again, decades earlier two Supreme Court justices had already read the clause far more broadly (not to mention the more recent views of President Jefferson).

Putting text aside, though, the one thing that eminent domain supporters did not have on their side was a wealth of precedent to cite. One member was able to remember one instance of a federal taking involving a property owner affected by construction of the Cumberland Road.<sup>160</sup> Beyond that, though, all he could say was that the taking of private property only appeared “a little novel” to Congress because they were not “familiarized with it.”<sup>161</sup>

Precedent, of course, may not have changed the political outcome. But we have already seen how it could affect the Constitutional debate. Current historiography assumes that the lack of precedent stems from an “original” doubt in the founding era regarding existence of a federal eminent domain power. But that same dominant history simultaneously explains the Fifth Amendment’s wording as resulting from the fact that politicians in the 1790s understood the power of eminent domain as inhering in the federal government by virtue of its sovereign authority.<sup>162</sup>

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<sup>157</sup> *Id.* at 1239, 1295 (Enclave Clause does not restrain federal power, but rather provides a way by which exclusive jurisdiction can be obtained); *see also* 30 Annals of Cong. 890 (1817) (stating that opponents were confusing issue with consent required for exclusive jurisdiction).

<sup>158</sup> 31 Annals of Cong. 1209 (1818) (Austin).

<sup>159</sup> *Id.* at 1243 (Lowndes, refuting Austin’s argument). *See* James W. Ely, Jr., *The Guardian of Every Other Right* 31, 57 (1998) (the Fifth Amendment was both prefigured by earlier colonial and state developments, and influenced states to incorporate similar protections in their own constitutions); *see also* *Barron v. Baltimore*, 7 Pet. 243 (U.S. 1833) (rejecting property owner’s claim for compensation under the Fifth Amendment, stemming from alleged “taking” by the City of Baltimore, because the Fifth Amendment applied only to the federal government, and not to the states).

<sup>160</sup> 40 Annals of Cong. 620 (1823) (Hemphill).

<sup>161</sup> *Id.* at 622.

<sup>162</sup> *See, supra*, note \_\_\_; Ellen Paul Frankel, *Property Rights and Eminent Domain* 77 (1987) (“eminent domain was uncontroversial, requiring no elaborate justification”).

Perhaps further research into the handling of all federal land acquisitions in the late eighteenth and early nineteenth centuries will show what the Baker's Island episode suggests: that failure of a strong federal eminent domain practice to take hold in the early years of the republic stemmed not from interpretive doubts shared by a majority of decision makers, but rather from practices understandably generated by the Enclave Clause. Not only does the Enclave Clause empower states to impose limitations on the federal government's acquisition of properties (if exclusive jurisdiction is desired, that is), but if the federal government is going to obtain state consent in any event, there is doubtless some benefit to having the issue of takings ironed out at the same time.<sup>163</sup> That, of course, could explain why the practice outlived the *Kohl* decision.

None of the above is intended to suggest that the federal exercise of eminent domain power was politically uncontroversial, or that federal officials would not have been shy about exercising it. There is indeed evidence that in the early 1800s federal practice was fairly comfortable with the concept of purchasing private land without state consent to jurisdiction—a comfort level that apparently did not yet embrace compulsory purchases through condemnation.<sup>164</sup> The point here is simply that whatever accounts for the slow development of federal takings precedent, we should not assume (a) that it stems from a genuine widespread concern that a fair reading of the Constitution evidences a lack of such power; and (b) that any stated nineteenth century doubts on the matter are reflective of views held by decision makers in the 1790s.

The procedure exercised in Baker's Island was undoubtedly a *federal* taking. It was not a *state* taking executed on behalf of the federal government. Neither the repeated use of that procedure, nor its morphing into circumstances in which states simply exercised their own eminent domain powers on the federal government's behalf, should in and of themselves lead us to conclude that early federal officials doubted their own Constitutional powers.

Unfortunately, though, there is a tendency to view the Constitution as muddled until the Supreme Court finally spoke in *Kohl*. But the

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<sup>163</sup> See *United States v. Jones*, 109 U.S. 513, 351 (1883)(upholding use of state procedures in federal taking: “[F]rom the time of its establishment, [the federal] government has been in the habit of using, with the consent of the states, their officers, tribunals, and institutions as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of federal government; but as a matter of convenience and as tending to a great saving of expense”).

<sup>164</sup> 31 *Annals of Cong.* 1296 (1818) (Mercer); 32 *Annals of Cong.* 1332-33 (1818) (Tucker).

Supreme Court justices were not the only ones to think the issue a clear one. A few years earlier, the Michigan Supreme Court, in a decision holding that states could not condemn property on behalf of the United States, explained that the United States itself “may without question seize the property of individuals”—and that doing so was “but an ordinary exercise of the right of eminent domain.”<sup>165</sup> Decades before that, numerous Congressmen believed the same thing. Did Tench Coxe believe any differently when he authorized the taking of land, according to state-approved procedures, back in 1797?

#### CONCLUSION

The development of Constitutional precedent and the development of accepted meanings of the text do not always go hand in hand. With the birth of the federal lighthouse system, we see that circumstances (the need for a fair imposition of a federal tax program) created Commerce Clause precedent well before Congress was prepared to accept the potentially broad Constitutional construction embodied by the Lighthouse Act of 1789. On the other hand, federal practices related to the Enclave Clause may well have slowed development of Takings Clause precedent more than original shared understandings of the power would have otherwise dictated.

To the Congress of the early nineteenth century, whether or not precedent should dictate Constitutional construction was a matter of debate. Earlier 18<sup>th</sup> century ideas of a customary constitution built upon past practices still had rhetorical force. And though such ideas clearly had their detractors, it is difficult to read the internal improvement debates without sensing that legislative precedent was moving the meaning of the Constitution regardless of the words and arguments that could be piled up to stop it, and regardless of the ultimate results reached in the political process. As one internal improvement foe in Congress recognized with great resignation in 1830:

I will not enter into the discussion of the abstract constitutional right of the Government to make roads and canals in the several States, without the consent of the States or the people. It has been assumed and exercised so often, that, until some express provision to the contrary shall be made in the

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<sup>165</sup> *Trombley v. Humphrey*, 23 Mich. 471 (1871).

constitution, it is worse than useless to question the power.<sup>166</sup>

Likewise, the force of negative precedent (the “non-user” of a power) could slow Constitutional interpretation, rather than vice versa. Looking back at the historical record, issues of cause and effect are not always clear. Did practices such as the taking at Baker’s Island stem from a diminished view of federal takings power, or did they simply help solidify that view? If indeed the current historiography is correct that the federal government never took property without state assistance until the 1870s,<sup>167</sup> the historical evidence from the lighthouse administration in the 1790s suggests that the generally accepted explanation of that large gap (a nineteenth century belief that the federal government lacked eminent domain authority without state consent) is either terribly oversimplified or overlooks a historical “break” from an earlier, more expansive, understanding of federal power—an understanding that got “mistranslated” for later generations by virtue of the early practice of obtaining Enclave Clause jurisdictional consent for all lighthouse acquisitions.

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<sup>166</sup> 6 Reg. Deb. 728 (1830) (Monell).

<sup>167</sup> Given the contemporaneous widely held view that individual states could not consensually expand the federal government’s powers under the Constitution, it is difficult to see why state consent (or even state procedures) should matter doctrinally. The Massachusetts statute underlying the Baker’s Island taking does not change the fact that the federal government itself appropriated private property back in 1797.