COMMENT

THE FEDERAL GOVERNMENT'S POWER OF EMINENT DOMAIN OVER STATE LANDS REGARDING THE U.S.-MEXICO BORDER WALL*

ABSTRACT

Construction of the U.S-Mexico border wall remains in the media spotlight with continued debate over the balance between the wall's necessity and its potentially adverse impacts. Notwithstanding this debate, the acts providing for construction of the wall afford the federal government broad powers to disregard other federal legislation that might otherwise hinder the construction from proceeding. These acts also provide for the acquisition of land for the border wall through condemnation.

Even though the federal government has survived several challenges to its exercise of eminent domain power to acquire land for the border wall, Texas lawmakers have introduced a bill in the Texas Legislature expressing specific opposition to the use of eminent domain for border wall construction. This Comment examines the potential effect of this bill by analyzing the power of the federal government to acquire state-owned lands by condemnation and uses the hypothetical construction of the U.S.-Mexico border wall in the Big Bend Ranch State Park as a modern-day example. The federal-state balance of power is investigated in light of state statutes providing automatic consent to such federal actions and through a study of potential limits to the federal government's powers under both the Fifth Amendment Takings

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Clause and the Enclave Clause of the Constitution. This Comment finds that although the power of the federal government to procure state-owned lands might be limited only by a judicial finding that the selection of land is arbitrary and capricious, the required burden of proof on the part of the challenger presents a high threshold. Additionally, though the Takings Clause of the Fifth Amendment of the Constitution applies to the federal government when it acquires state-owned land for a public use by condemnation, the federal government is bound only to provide appropriate compensation to the state. Thus, even if passed, the opposition bill in the Texas legislature would have no effect in curtailing the powers of the federal government. Furthermore, should the federal government somehow act beyond its constitutionally-enumerated powers in condemning specific state-owned lands with consent of the state, then it would be difficult to identify a suitable plaintiff who would have the necessary standing to oppose or enjoin such actions.

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I. INTRODUCTION

This Comment explores the federal government's power to compulsorily acquire state-owned lands, with a focus on the wall along the border with Mexico, and specifically addresses state-owned lands within Texas. President Trump's overtures while campaigning[1] and his Executive Order 13767 of January 25, 2017, directing executive departments and agencies to deploy "all lawful means" to secure the southern border[2] has reignited the national debate over the legitimacy and desirability of a border wall.[3] The prospect of building a large border wall in the Big Bend area in Texas has attracted specific media attention,[4] and several Texas lawmakers introduced Bill S.C.R. 31 in the 85th Regular Session of the Texas Legislature to seek a resolution that "the 85th Legislature of the State of Texas hereby express its opposition to using eminent domain for the construction of a wall or fence along the U.S.-Mexico border . . . ."[5] This Comment shows that, despite such sentiment and legislative efforts, there is no impediment to federal condemnation of state-owned lands to construct a border wall and therefore, even if Bill S.C.R. 31 is passed, the Texas Legislature's mere expression of opposition to such federal use of eminent domain will be effectively futile.

Big Bend Ranch State Park lies adjacent to Big Bend National

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1. Jenna Johnson, *Here Are 76 of Donald Trump's Many Campaign Promises*, WASH. POST (Jan. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/01/22/here-are-76-of-donald-trumps-many-campaign=promises/?utm_term=.256493c5a15f [https://perma.cc/94HR-Q6BB].

2. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

3. *Trump's Border Wall, Immigration Plans Re-emerge at Top of National Debate*, FOX NEWS (Sept. 26, 2017), http://www.foxnews.com/politics/2017/08/05/trumps-border-wall-immigration-plans-re-emerge-at-top-national-debate.html [https://perma.cc/XHR5-84EJ]; Todd J. Gillman, *White House Defends Use of Eminent Domain for Border Wall as Feds Gird for Land Fights*, DALL. MORNING NEWS (Mar. 22, 2017), https://www.dallasnews.com/news/politics/2017/03/22/white-house-defends-use-eminent-domain-border-wall-feds-gird-land-fights. [https://perma.cc/4MYM-E2J2]. Additionally, disagreement between the President and the House of Representatives over funding for the wall was at the center of the partial shutdown from December 2018 until January 2019. *See* Nicholas Fandos et al., *Trump Signs Bill Reopening Government for 3 Weeks in Surprise Retreat from Wall*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/us/politics/trump-shutdown-deal.html [https://perma.cc/9TXU-YD82].

4. Asher Price, *With Land Already in Hand, Trump Eyes Big Bend for Border Wall*, AUSTIN AM.-STATESMAN (Sept. 22, 2018, 1:49 AM), https://www.statesman.com/news/20170316/with-land-already-in-hand-trump-eyes-big-bend-for-border-wall [https://perma.cc/LN8A-JEFP]; Fernando Ramirez, *Big Bend's Incredible Views Threatened by Trump's Border Wall*, HOUS. CHRON. (Mar. 17, 2017, 6:15 PM), https://www.chron.com/news/houston-texas/texas/article/Big-Bend-stunning-threatened-from-Trump-s-border-11009657.php [https://perma.cc/YL5K-RL94].

5. Tex. S. Con. Res. 31, 85th Leg., R. S. (2017).

Park and includes land along the Rio Grande—the river forming the border with Mexico.[6] The land was purchased by the Texas Parks & Wildlife Department from private owners in 1988 and is operated as a natural preserve.[7] A border wall's potential environmental impact here, just as elsewhere, has been featured in the media.[8] Furthermore, the necessity for a wall specifically in the Big Bend area is also at issue given the very small number of illegal entries reported for the area compared to other locations along the U.S.-Mexico border.[9] In light of all these factors, this Comment uses Big Bend as an example upon which to examine a more fundamental question: a legal justification in support of a federal taking of state-owned lands.

Political wrangling over the border wall continues. In February 2017, fifty-nine members of the U.S. House of Representatives introduced a bill seeking to prevent further construction of the border wall.[10] The House referred the bill to three Committees, each of which then referred it to one of three

6. *Big Bend Ranch State Park*, TEX. PARKS & WILDLIFE DEP'T, https://tpwd.texas.gov/state-parks/big-bend-ranch/park_history [https://perma.cc/PA4S-W3T4] (last visited Jan. 20, 2019).

7. *Id.*

8. *See, e.g.*, Ramirez, *supra* note 4; Jeremy Schwartz, *Border Wall May Sidestep Review and Cut Off Access to Wildlife Refuge*, AUSTIN AM.-STATESMAN, (Sept. 22, 2018, 3:22 AM), https://www.statesman.com/NEWS/20170721/Border-wall-may-sidestep-review-and-cut-off-access-to-wildlife-refuge [https://perma.cc/Y97T-4XFP]; Melissa del Bosque, *Against the Wall*, TEX. OBSERVER (June 27, 2008, 12:00 AM), http://www.texasobserver.org/2796-against-the-wall-not-even-federal-law-can-keep-bushs-fence-from-ripping-through-natural-areas-along-the-rio-grande [https://perma.cc/EAC8-FK9V]; Daniella Silva & Suzanne Gamboa, *Trump's Border Wall 'Catastrophic' for Environment, Endangered Species: Activists*, NBC NEWS (Apr. 22, 2017, 11:25 AM), https://www.nbcnews.com/science/environment/trump-s-border-wall-catastrophic-environment-endangered-species-activists-n748446 [https://perma.cc/HG55-4WAR].

9. According to the Department of Homeland Security U.S. Customs and Border Protection, the Big Bend Sector of operations comprises 510 miles of the Rio Grande River frontage, which is nearly a quarter of the southwestern border, and its operational area covers 165,154 square miles. *Big Bend Sector Texas*, U.S. CUSTOMS & BORDER PROTECTION (Apr. 11, 2018), https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/big-bend-sector-texas [https://perma.cc/5TDX-WYK2]. There were 6,002 apprehensions of illegal aliens in the Big Bend Sector in Fiscal Year 2017, which is a mere 1.9% of the total number of such apprehensions along the border with Mexico. *U.S. Border Patrol: Total Illegal Alien Apprehensions by Month, FY 2017*, U.S. CUSTOMS & BORDER PROTECTION (2017), https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY2000-FY2017/.pdf [https://perma.cc/BZ7S-QPNB]. The necessity of a physical barrier in such an environmentally-sensitive area is under question. *See* Angela Kocherga, *Big Bend National Park Visitors Worry About Trump's Proposed Border Wall*, DALL. MORNING NEWS (Nov. 29, 2016), https://www.dallasnews.com/news/mexico/2016/11/29/big-bend-national-park-visitors-worry-trumps-proposed-big-border-wall [https://perma.cc/H7UV-7REK].

10. Build Bridges Not Walls Act, H.R. 837, 115th Cong. (2017).

Subcommittees, where it has sat ever since.[11] Furthermore, questions over the fundamental correctness of the federal power of eminent domain continue to attract debate.[12] While scholars have postulated various potential legal challenges to the erection of the border wall,[13] and litigants have tried and failed to block the federal government's progress of the wall's construction,[14] this Comment presents an objective analysis of the legal battleground with respect to federal eminent domain power over state-owned lands. Part II provides a brief overview of the federal legislation concerning border wall construction. Part III examines Texas state laws that apparently acquiesce to a federal exercise of eminent domain. Lastly, Parts IV and V analyze the implications of the U.S. Supreme Court's interpretations of the "Takings" and the "Enclave" clauses, respectively, of the Constitution of the United States.

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11. The bill's current status is reported on Congress' website. *All Actions H.R.837—115 Congress (2017–2018): Build Bridges Not Walls Act*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/837/all-actions?q=%7B%22search%22%3A%5B%22hr837%22%5D%7D&r=1 [https://perma.cc/YP8Q-6Z9B] (last visited Jan. 20, 2019).

12. Gerald S. Dickinson, *The Founders Would Have Opposed Seizing Land for Trump's Border Wall*, WASH. POST (Nov. 29, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/11/29/the-founders-would-have-opposed-seizing-land-for-trumps-border-wall/?utm_term=.e8c20642703b [https://perma.cc/S3CC-V9RZ]; Jazz Shaw, *The Democrats' Hilarious Eminent Domain Argument Against the Wall*, HOT AIR (Nov. 29, 2017, 5:31 PM), https://hotair.com/archives/2017/11/29/democrats-hilarious-eminent-domain-argument-wall [https://perma.cc/H2JC-A249].

13. Denise Gilman, *Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall*, 46 TEX. INT'L L.J. 257, 275–84 (2011) (analyzing human rights issues); Stephen P. Mumme & Oscar Ibáñez, *U.S.-Mexico Environmental Treaty Impediments to Tactical Security Infrastructure Along the International Boundary*, 49 NAT. RESOURCES J. 801, 804–07 (2009) (discussing how erecting the wall might contravene an international environmental treaty); Jenny Neeley, *Over the Line: Homeland Security's Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure*, 1 ARIZ. J. ENVTL. L. & POL'Y 139, 150–61 (2011) (concluding that the statutory waiver of any law is unconstitutional); David Fisher, Note, *The U.S.-Mexico Border Wall and the Case for "Environmental Rights"*, 50 TEX. INT'L L.J. 145, 160–67 (2015) (concerning environmental issues); Nicole Miller, Note, *How Property Rights Are Affected by the Texas-Mexico Border Fence: A Failure Due to Insufficient Procedure*, 45 TEX. INT'L L.J. 631, 641–43, 646–53 (2010) (proposing procedural improvements to satisfy concerns over Due Process).

14. *See, e.g.*, Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 124, 126–27 (D.D.C. 2007), *cert. denied*, 554 U.S. 918 (2008) (holding that the Secretary's exercise of statutorily-permitted waivers of certain laws did not "transform the waiver into an unconstitutional 'partial repeal' of those laws," and the statutory waiver provision itself was not "an unconstitutional delegation of legislative power"); City. of El Paso v. Chertoff, No. EP–08–CA–196–FM, 2008 WL 4372693, at *1 (W.D. Tex. Aug. 29, 2008) (denying plaintiffs' application for a preliminary injunction against construction of a section of border wall); Sierra Club v. Ashcroft, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244, at *16–25 (S.D. Cal. Dec. 12, 2005) (holding the delegation of decision-making to the Executive Branch to be constitutional).

II. FEDERAL LEGISLATION PROVIDING FOR THE BORDER WALL

A. Summary of the Acts and Their Relevant Provisions

Through a succession of acts, Congress has given the Secretary of Homeland Security sweeping powers to construct a barrier along the border with Mexico. Construction of the border wall is provided under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[15] as amended sequentially by the REAL ID Act of 2005,[16] the Secure Fence Act of 2006,[17] and the Department of Homeland Security Appropriations Act of 2008.[18] Section 102(d) of the IIRIRA (as amended) permits the Secretary of Homeland Security to "contract for or buy any interest in land" that is deemed "essential to control and guard the [border]."[19] This authority extends to the use of eminent domain.[20] The REAL ID Act amended Section 102(c) of the IIRIRA to permit the Secretary of Homeland Security to "waive all legal requirements" that, in the Secretary's sole discretion, (s)he deems "necessary to ensure expeditious construction of the barriers and roads under this section."[21] For example, the Secretary can waive a wide array of laws and regulations concerning the environment and the preservation of antiquities and cultural heritage.[22] In 2008, construction of a section of border fence in Hidalgo County, Texas was commissioned when the Secretary of Homeland Security exercised a waiver of twenty-seven federal laws.[23] Furthermore, the REAL ID Act provides that

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15. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, div. C, tit. 1, § 102, 110 Stat. 3009–546, 3009–554 (codified as amended at 8 U.S.C. § 1103 note (2012)) [hereinafter IIRIRA].

16. REAL ID Act of 2005, Pub. L. No. 109–13, div. B, tit. 1, sec. 102, § 102, 119 Stat. 302, 306 (codified as amended at 8 U.S.C. § 1103).

17. Secure Fence Act of 2006, Pub. L. No. 109–367, sec. 3, § 102, 120 Stat. 2638, 2638–40 (codified as amended at 8 U.S.C. § 1103).

18. Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, div. E, tit. V, sec. 564, § 102, 121 Stat. 1844, 2090–91 (2007) (codified as amended at 8 U.S.C. § 1103).

19. 8 U.S.C. § 1103 (b)(1). As indicated by Miller, *supra* note 13, at 634 n.8, the IIRIRA's reference to the "Attorney General, in consultation with the Commissioner of Immigration and Naturalization" was amended in the Department of Homeland Security Appropriations Act to read "Secretary of Homeland Security." (citing § 102, 121 Stat. at 2090).

20. IIRIRA, sec. 102(d)(1)(B), § 103, 110 Stat. at 3009–555 (codified as amended at 8 U.S.C. § 1103(b)).

21. REAL ID Act, sec. 102, § 102(c)(1), 119 Stat. at 306 (codified as amended at 8 U.S.C. § 1103 note 102(c)(1) (Improvement of Barriers at Border)).

22. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 73 Fed. Reg. 19,077, 19,077–78 (Apr. 8, 2008).

23. *Id.*; *see also* Miller, *supra* note 13, at 635.

"[a] cause of action or claim [regarding the waiver] may only be brought alleging a violation of the Constitution of the United States."[24] This presents a significant limitation to any legal challenge to actions sanctioned under the relevant statutes,[25] and hence any review of the Secretary's exercise of eminent domain power over a state pursuant to the IIRIRA necessitates analysis of the constitutional balance of power between the federal government and the states.[26]

B. Examining Legislative Intent with Respect to Enumerated Constitutional Powers

Although Congress enacts legislation pursuant to powers granted to it by the Constitution, the Judicial Branch determines the interpretation of the legislation.[27] Generally, this interpretation begins with an analysis of the plain language of a statute and proceeds—albeit to varying extents—to an examination of the statute's legislative history only if this language is unclear or ambiguous.[28] In their determinations of whether the statutes themselves are constitutional, courts may pay attention to reported expressions of Congressional legislative intent that tie those statutes to constitutionally enumerated powers.[29] This Part briefly explores how the IIRIRA, as amended,

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24. REAL ID Act, sec. 102, § 102(c)(2)(A), 119 Stat. at 306 (codified as amended at 8 U.S.C. § 1103 note 102(c)(2) (Improvement of Barriers at Border)); *see also* Miller, *supra* note 13, at 635.

25. *See* Miller, *supra* note 13, at 635 n.23 (discussing several cases that have unsuccessfully challenged the constitutionality of the waiver provision and the limitation on judicial review); Neeley, *supra* note 13, at 142 (discussing the waiver provision's restriction of federal appellate courts' jurisdiction and how this has prevented successful challenges to its constitutionality).

26. U.S. CONST. art. VI, cl. 2.; *id.* amend. X; IIRIRA § 102(d), 110 Stat. at 3009–555 (codified as amended at 8 U.S.C. § 1103(b)).

27. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

28. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917). However, individual Justices and judges disagree over the extent to which legislative intent should influence interpretations of the meaning of words in a statute. *See* ROBERT A. KATZMANN, JUDGING STATUTES 6 (2014) (describing a humorous interaction between Justices Scalia and Sotomayor concerning their differing views over how much weight should be placed on legislative history).

29. The following is an example with respect to the Commerce Clause: In *United States v. Lopez*, Alfonso Lopez Jr. was convicted under the federal Gun-Free School Zones Act of 1990 (GFSZA). 2 F.3d 1342, 1345 (5th Cir. 1993). Lopez then successfully appealed his conviction under the rationale that the Act was unconstitutional under the Commerce Clause. *Id.* at 1367–68. After an appeal, the U.S. Supreme Court confirmed the Fifth Circuit's decision, holding that the activity sought to be regulated had no substantial

relates to enumerated federal regulation power concerning immigration and commerce. To the extent that the statutes' language under review here may be considered clear, the brief analysis presented in this Part is performed in light of the plain meaning of the statutory provisions themselves.

1. Intent of the IIRIRA (as Amended) as Revealed in the Act Itself. The IIRIRA provides that the actions "as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border" are "to deter illegal crossings in areas of high illegal entry into the United States."[30] The Secure Fence Act of 2006 labels itself as "An Act [t]o establish *operational control* over the international land and maritime borders of the United States."[31] Furthermore, the act defines "Operational control" as "the prevention of *all unlawful entries* into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband."[32] Thus, it appears the legislature's intentions became more stringent with the passage of the Secure Fence Act of 2006; the original *deterrence* of illegal border crossings into the United States became an absolute prevention and the original focus on *areas of high illegal entry into the United States* was widened to encompass *all unlawful entries into the United States*.

2. Analyzing the Purpose of the IIRIRA (as Amended) Against the Federal Power to Regulate Naturalization. The Constitution gives the federal government the power to regulate how foreigners may become citizens of the United States.[33] The

connection with interstate commerce and therefore was unconstitutional. United States v. Lopez, 514 U.S. 549, 562–63 (1995). The Court relied at least in part upon the fact that Congress' stated intent, both in the body of the Act itself and in the legislative committee reports made no mention of the relevance of gun possession in school zones to interstate commerce. *Id.* As neatly summed up by Justice Kennedy, "neither the purposes nor the design of the statute has an evident commercial nexus." *Id.* at 580 (Kennedy, J., concurring). The provision at issue in the GFSZA was then amended by Congress to include a "'jurisdictional element which would ensure . . . that the firearm possession in question affects interstate commerce.'" United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005). Subsequently, two courts of appeals found the amended statute thereby to be constitutional. *Id.*; United States v. Danks, 221 F.3d 1037, 1038–39 (8th Cir. 1999), *cert. denied*, 528 U.S. 1091 (2000).

30. IIRIRA § 102(a), 110 Stat. at 3009–554 (codified as amended at 8 U.S.C. § 1103 note 102(a) (Improvement of Barriers at Border)).

31. Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat. 2638, 2638 (emphasis added).

32. *Id.* § 2(b) (codified as amended at 8 U.S.C. § 1701 note (Achieving Operational Control on the Border)) (emphasis added).

33. U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an

U.S. Supreme Court has held that this power logically includes the power to regulate immigration.[34] Given that the Secure Fence Act of 2006 seeks to achieve "the prevention of all unlawful entries into the United States,"[35] and the Constitution does not identify limits to levels of immigration, illegal or otherwise,[36] the statute's stated intent to prevent *all unlawful entries into the United States* correlates to the federal government's enumerated power to regulate naturalization.

3. Comparing the IIRIRA (as Amended) with the Federal Power to Regulate Commerce with Foreign Countries. The Constitution provides the federal government with the power to regulate commerce with foreign countries.[37] This regulation of commerce includes the power to prevent items dangerous to the health and welfare of the general public from entering the commerce stream.[38] The federal government recognizes the need to regulate the traffic of controlled substances that are potentially dangerous to the health and well-being of the general public.[39] Therefore, the stated intent of the Secure Fence Act of 2006 to prevent the unlawful entry of narcotics into the United States correlates to the federal government's enumerated power to regulate commerce with foreign nations.

4. Examining Whether the Waiver Provision is Consistent with the Accepted Domains of the Legislative and Executive Branches. In examining the constitutionality of the waiver provision contained within the REAL ID Act, the United States District Court for the District of Columbia in *Defenders of Wildlife*

uniform Rule of Naturalization . . . .").

34. Arizona v. United States, 567 U.S. 387, 394–95 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . This authority rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.").

35. § 2(b), 120 Stat. at 2638 (codified as amended at 8 U.S.C. § 1701 note (Achieving Operational Control at the Border)).

36. U.S. CONST. art. I, § 8, cl. 4.

37. *Id.* art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . .").

38. United States v. Darby, 312 U. S. 100, 114 (1941) ("Congress . . . is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare . . . .").

39. *See, e.g.*, 21 U.S.C. § 801 (2)–(3) (2012) ("The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people. . . . A major portion of the traffic in controlled substances flows through interstate and foreign commerce.").

v. Chertoff identified the accepted practice of the Legislative Branch of government to delegate decision-making to the Executive Branch in areas where the Executive Branch has considerable discretion.[40] The court made specific reference to the fact that the waiver provided in the REAL ID Act related to "foreign affairs and immigration control—another area in which the Executive Branch has traditionally exercised a large degree of discretion."[41] Thus, the court concluded that the waiver did not offend established principles concerning such delegations of power.[42]

C. Conclusions

The stated intent of the IIRIRA, as amended, to prevent "all unlawful entries into the United States," including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband, corresponds with the federal government's Constitutional power to regulate immigration and to regulate commerce with foreign nations.[43] Furthermore, the waiver provision, despite its broad scope, does not violate the precedential line of U.S. Supreme Court cases that define the legal standards of such delegations of power.[44] Therefore, it appears that the provisions of the IIRIRA, as amended, are Constitutionally sound.

To the extent that the statutory provisions of the IIRIRA were enacted according to constitutionally-enumerated powers,[45] this Comment analyzes the legal landscape concerning a federal

40. 527 F. Supp. 2d 119, 126 (D.D.C. 2007).

41. *Id.*

42. *Id.* at 127–28 ("[T]his Court cannot agree that the REAL ID Act's waiver provision constitutes an impermissibly standardless delegation. This conclusion is also in accord with the only other decision to address the question of whether the REAL ID Act's waiver provision is a constitutional delegation. In that case, the district court upheld the waiver provision, finding that '[a]pplying a standard of "necessity" to Congress' delegation of authority passes constitutional muster.'" (citing Sierra Club v. Ashcroft, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244, at *21 (S.D. Cal. Dec. 12, 2005))). The court also explained that an acceptable delegation of power by Congress to the Executive Branch provides an "intelligible principle" of the general policy plus the boundaries of the delegated authority within which the actions of the relevant agency of the Executive Branch must remain. *Id.* at 127.

43. *See supra* Sections II.B.2 and Section II.B.3.

44. *See supra* Section II.B.4.

45. Any deeper analysis on the constitutionality of the IIRIRA (as amended) itself, and particularly the waiver provision, is outside the scope of this Comment. For further review on these aspects see generally *Defenders of Wildlife*, 527 F. Supp. 2d at 124–26 (distinguishing the waiver provision from the Line Item Veto Act that was found unconstitutional in *Clinton v. City of New York*, 524 U.S. 417, 421 (1998)). *See also* Neeley, *supra* note 13, at 150–61.

governmental condemnation of state-owned lands pursuant to the IIRIRA, as amended. Next, in Part III, this Comment discusses how the Texas state government may be constrained by its own laws to acquiesce to such federal actions. Parts IV and V then examine the constitutional bases under which the federal government may legitimately exercise a power of eminent domain over the states.

III. TEXAS STATE LEGISLATIVE PROVISIONS CONCERNING THE FEDERAL GOVERNMENT'S EXERCISE OF EMINENT DOMAIN POWER

A. The Extent of Statutory Consent to the Federal Government's Exercise of Eminent Domain in Texas

1. Interpretation of the Current Texas "Consent" Statute. Subchapter B of the Texas Government Code authorizes the Governor of the state of Texas to sell state-owned lands to the federal government of the United States for certain purposes.[46] These purposes are explicitly referenced as being "specified by Section 2204.101."[47] Section 2204.101 provides that these purposes are the erection and maintenance of

> [1] a lighthouse, fort, military station, magazine, arsenal, dockyard, customhouse, post office, or other necessary public building; or
>
> (2) for erecting a lock or dam, straightening a stream by making a cutoff, building a levee, or erecting any other structure or improvement that may become necessary for developing or improving a waterway, river, or harbor of this state.[48]

This section further provides consent by the Texas legislature "to the purchase or acquisition by the United States, including acquisition by condemnation, of land in this state made in accordance with this subchapter."[49] This explicit consent for the United States to acquire land for these purposes is conditioned on the federal government (i) considering the land acquisition to be expedient, and (ii) seeking to occupy that land as a site.[50]

In applying the statute to the federal government's acquisition of state-owned land for the border wall, one question of

46. TEX. GOV'T CODE ANN. § 2204.102(a).
47. *Id.*
48. *Id.* § 2204.101(b)(1)–(2).
49. *Id.* § 2204.101(a).
50. *Id.* § 2204.101(b).

interpretation is whether the border wall qualifies as an "other necessary public building." However, although it appears by plain reading that Texas consents to the federal government's use of condemnation power only in specific circumstances for a limited list of prescribed activities, the Texas Attorney General's Office subscribes to a broader view.[51] The Office has effectively eschewed the textual canon of *expressio unius est exclusio alterius* by concluding that the lack of any express withholding of consent by the state legislature for the federal government to acquire land in Texas for any other purpose meant that the state of Texas acknowledged that the federal government already possesses the right to acquire land in Texas for any public purpose.[52] Although the statute does not provide specific consent for federal land acquisition to build the border wall,[53] the apparent prevailing modus operandi of the Texas Attorney General's Office effectively renders moot an examination of the meaning of "other necessary public building" and whether the border wall falls within the scope of this phrase.[54]

2. The Current Statute Viewed in Light of Judicial Interpretations of Previous Versions. The current 1993 statute providing consent for federal government acquisition of lands within the state of Texas is a recodification without substantial amendment of pre-existing state laws.[55] Previous incarnations of these laws had been (re)codified in 1925,[56] 1911,[57] and 1895.[58]

51. Tex. Att'y Gen. LO-96-122 (1996).

52. *Id.*; *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.").

53. GOV'T § 2204. 101(b)(1)–(2).

54. Such an analysis is included *infra* Part V of this Comment with respect to the Enclave Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 17. One may postulate that the interpretation of this statute provided by the Texas Attorney General's Office is inappropriate because it arguably renders this part of the statute meaningless. If the federal government already possesses a power to do something—whether or not a state consents—then what purpose does the state statute providing consent actually serve? There is no need for a state to statutorily acknowledge a constitutionally-enumerated power of the federal government. However, as discussed *infra* Section V.C, this consent is relevant with respect to the Enclave Clause of the Constitution in establishing the right of the federal government to obtain exclusive jurisdiction over lands acquired from a state. Moreover, the analysis in *infra* Part IV also shows why the interpretation by the Texas Attorney General's Office might be reasonable.

55. S. Comm. on Admin., Bill Analysis, Tex. S.B. 248, 73d Leg. R. S. (Tex. 1993); Tex. House Comm. on St. Aff. Minutes 18–19, 73d Leg., R.S. (Apr. 28, 1993).

56. 1925 TEX. REV. CIV. STAT. ANN. art. 5242–48.

57. 1911 TEX. REV. CIV. STAT. ANN. art. 5252–77.

58. 1895 TEX. REV. CIV. STAT. ANN. art. 361–76. Interestingly, reference is made to the "eighteenth clause of the eighth section of the first article of the constitution of the

These previous versions have been subject to analysis by Texas courts. In *Curry v. State*, the Texas Court of Criminal Appeals examined the 1895 statute and concluded that consent by the state legislature was unnecessary for the federal government to acquire title to lands within the state.[59] The Court found persuasive an earlier opinion by the Supreme Court of Michigan that had reached the same conclusion as part of its analysis of the acquisition of private lands by a state for the purpose of transferring those lands to the federal government.[60] The conclusion in *Curry* was cited with approval by a Texas Court of Civil Appeals in *Dodson v. Home Owners' Loan Corporation* in its review of the 1925 version of the statute.[61] Therefore, the broad consent opined by the Texas Attorney General's Office appears not to be directly contradicted by the courts' historical interpretations of the statute. This implies that removing Texas's statutory automatic consent to federal government seizure of lands for the border wall can be achieved only through legislative action.

3. Remaining Portions of the Current "Consent" Statute.

The remainder of the statute providing consent for federal acquisition of Texas state lands details situations not necessarily relevant to the border wall with respect to Big Bend Ranch State Park. Subchapter C concerns state-owned land under the control of the Texas Department of Transportation.[62] Big Bend Ranch State Park is under the control of the Texas Parks & Wildlife Department, hence the provisions of this subchapter are not applicable here.[63] Subchapter D relates to provisions for federal flood control projects on the Rio Grande (and other rivers) that stem from a 1944 treaty between the United States and Mexico

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United States . . . ." *Id.* art. 361. This clause is the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."). This appears to acknowledge that the list of purposes provided in the statute is more extensive than that provided in the Enclave Clause. *See id.* art. I, § 8, cl. 17 (listing "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"). Reference to the Necessary and Proper Clause was dropped in subsequent revisions. *See, e.g.*, 1911 REV. CIV. STAT. art. 5252.

59. Curry v. State, 12 S.W.2d 796, 798 (Tex. Crim. App. 1928).

60. *Id.* (citing People *ex rel.* Trombley v. Humphrey, 23 Mich. 471 (1871)); *Humphrey*, 23 Mich. at 479 ("We think counsel is in error in supposing that the assent of the state is a condition precedent to the taking of lands by the general government. Its consent is required only for the purpose of a transfer of jurisdiction.").

61. Dodson v. Home Owners' Loan Corp., 123 S.W.2d 435, 436 (Tex. Civ. App.—El Paso 1938, no writ).

62. GOV'T § 2204.201.

63. *See supra* Part I and text accompanying note 9.

concerning river water usage.[64] Since the border wall is unrelated to such flood control projects this subchapter is irrelevant to the focus of this Comment. Subchapter E represents the provision of consent to the federal government to acquire—or gain an easement for access to—the bed and banks of the Rio Grande to implement measures according to a 1972 treaty between the United States and Mexico that resolved issues over the location of the international boundary between those nations.[65] The projects provided in the statute are specific to maintenance of the course of the Rio Grande and therefore are not related to the border wall.[66] The other remaining subchapters either concern acquisition of land by the state of Texas itself or federal acquisition of specific state lands that lie outside the Rio Grande area.[67] Only the provisions of Subchapter B are relevant to federal acquisition of state lands for the border wall in the Big Bend area; therefore, the broad statutory consent for such acquisition provided therein is unimpeded by any other statutory provisions.

B. The Likely Effect if Bill S.C.R. 31 is Passed

Bill S.C.R. 31 was referred to the Committee on State Affairs in March 2017 and, as of January 2019, has not progressed any further.[68] Even if it does pass, it is unclear whether this bill will have any practical effect. The Bill merely expresses specific opposition to the use of eminent domain for border wall construction[69] and therefore would be inconsequential should the federal government avoid the use of eminent domain to acquire land, or access to land, for the border wall. Passing the Bill might create conflict with the current Texas statute granting consent to federal land acquisitions;[70] however, as discussed in Part IV, such conflict would likely be moot given the federal government's

64. GOV'T § 2204.301.

65. *Id.* § 2204.401.

66. *Id.*

67. *Id.* §§ 2204.001, .501, .601, .701.

68. S. J. of Tex., 85th Leg. R. S.545 (2017) (showing that Bill S.C.R. was referred to the Committee on State Affairs in March 2017). The latest status is reported on the official website of the Texas Legislature. *History of Bill S.C.R 31 of 85th Regular Session*, TEX. LEGISLATURE ONLINE, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=SCR31 [https://perma.cc/3H9P-6MET] (last visited Jan. 20, 2019).

69. Tex. S. Con. Res. 31, 85th Leg. R. S. (2017).

70. *Compare id.* ("RESOLVED, That the 85th Legislature of the State of Texas hereby express its opposition to using eminent domain for the construction of a wall or fence along the U.S.-Mexico border. . . .") *with* GOV'T § 2204.101(a) ("The legislature consents to the purchase or acquisition by the United States, including acquisition by condemnation, of land in this state. . . .").

supreme power of eminent domain.[71] Therefore, passing this Bill would not achieve any practical results, bar the mere expression of opposition.

C. The Effectiveness of a State's Consent to Unconstitutional Federal Actions

As argued by Philip Hamburger, a state's consent to an unconstitutional federal action does not necessarily bring that action within constitutional limits.[72] Hamburger further argues that "[the Constitution's] limits are not alterable by private or state consent, but only by the consent of the people."[73] Nevertheless, in distinguishing constitutional rights from private rights, Hamburger concedes that property rights "can be waived or forfeited, whether by individuals, institutions, or states."[74] Thus Hamburger recognizes that although a property right may be unilaterally relinquished, a relinquishment of that property right does not affect the constitutionality of the ensuing activity or action even though this may be done to allow an activity or action that is unconstitutional. Indeed, the U.S. Supreme Court has recognized the requirement that a federal action must be within the scope of the Constitution in order for consent by the relevant state to be effective.[75]

D. Brief Hypothetical: Potential Ramification of an Unconstitutional Condemnation of State Lands by the Federal Government with the State's Consent

This purely hypothetical scenario envisages federal government condemnation of specific state-owned lands somehow outside its constitutionally-enumerated powers achieved with the consent of the state. In a legal challenge, who would have standing as a plaintiff? First, the putative plaintiff must be able to demonstrate a cognizable injury caused by the defendant that can probably be remedied by a court.[76] In the case at issue in this

71. *See infra* Part IV.

72. Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 485, 487–88 (2012) (noting that it "is notorious that the cases on unconstitutional conditions are poorly conceptualized and consequently are hesitant, inconsistent, and confusing").

73. *Id.* at 483.

74. *Id.* at 484.

75. *See, e.g.*, New York v. United States, 505 U.S. 144, 182 (1992) ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

76. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

Comment—the construction of a border wall in Big Bend Ranch State Park—the injured party would be arguably the state of Texas as a whole, and yet, it is the very state (in this hypothetical) that statutorily consents to federal government action to build a border wall on state lands. Second, assuming Texas does not file suit against the federal government, a third party plaintiff must establish that the grievance suffered by that plaintiff is not generalized—i.e., the plaintiff's purported injury must not be shared across an unrepresented class.[77] If the state itself does not file suit, then it could be difficult to identify a suitable plaintiff because of these issues of standing.

Notwithstanding the complexities of such a scenario, an examination of the constitutionality of federal government actions is relevant and necessary even if (in this case) the state of Texas statutorily or otherwise grants broad consent for those actions.

E. Conclusions

Current Texas law broadly consents to federal government acquisition of state-owned land for the purpose of constructing a border wall.[78] Should Bill S.C.R. 31 be passed, the bill could conflict with existing law, though specifically only with respect to the federal government use of eminent domain to acquire land, or access to land, for the construction of the border wall.[79] However, such conflict would likely be moot in light of the federal government's supreme power of eminent domain.[80] Nevertheless, a determination that the federal government's actions in this regard are unconstitutional would negate the effectiveness of the state's consent.[81] Although it might be difficult to establish a suitable plaintiff in such a circumstance, it is relevant to examine the federal government exercise of eminent domain power.[82]

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77. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) (indicating that the grievance of a single taxpayer against a tax code that affected many people was "so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity"). By analogy, the construction of the border wall—including specifically in Big Bend Ranch State Park—would adversely affect the pleasure gained by the many people who visit the area to revel in its natural beauty, and thus this would appear to be a generalized grievance.

78. *See supra* Section III.A.

79. *See supra* Section III.B.

80. *See supra* Section III.B.

81. *See supra* Section III.C.

82. *See supra* Section III.D.

IV. FEDERAL POWER OF EMINENT DOMAIN AGAINST THE STATES AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

A. Summary of Federal Condemnation Processes

There are four ways in which the federal government can exercise its power of eminent domain.[83]

The first way is when an authorized officer of the federal government initiates a judicial process that is conducted through the Attorney General.[84] The court conducts a hearing and fixes an appropriate amount of compensation,[85] following which the government decides whether to proceed with the acquisition.[86]

The second way involves a more direct judicial process in which a "declaration of taking" is filed in court.[87] Here, title immediately vests in the federal government when both the filing and a deposit of funds amounting to the estimated value of the land are made.[88] The land owner receives the deposit of funds as compensation; the amount may be adjusted later upon the final decision of the court and the resulting deficiency or surplus is then credited to the relevant party.[89]

A third way in which the federal government can exercise its power of eminent domain is when Congress passes legislation specifying the taking and establishing the procedure for determining the compensation.[90]

Finally, the federal government may obtain physical possession of the land, thereby ousting the owner.[91] Absent either a court order or the initiation of condemnation proceedings, the federal government does not, by physical possession alone, immediately acquire title to the land. Subsequent tribunal proceedings look to the date of physical possession as the date upon which to determine compensation.[92]

The IIRIRA, as amended by the Department of Homeland Security Appropriations Act of 2008, provides that the Secretary of Homeland Security may initiate condemnation proceedings if

83. 26 AM. JUR. 2D *Eminent Domain* § 18 (2017).

84. 40 U.S.C. § 3113 (2012).

85. FED. R. CIV. P. 71.1(h).

86. *See, e.g.*, Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 4 (1984).

87. 40 U.S.C. § 3114(a) (2012); *Kirby Forest*, 467 U.S. at 4.

88. § 3114(b)(1); *Kirby Forest*, 467 U.S. at 4–5.

89. FED. R. CIV. P. 71.1(j)(2).

90. *Kirby Forest*, 467 U.S. at 5.

91. *Id.*

92. *See, e.g.*, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 340 (1963) (citing United States v. Dow, 357 U.S. 17, 21–22 (1958)).

there is no agreement with the landowner over a reasonable price for the land interest being acquired by the federal government.[93] This places a requirement on the federal government to first enter into some form of negotiation with a landowner over the amount of compensation before resorting to condemnation proceedings if the parties fail to agree.[94] Whilst the government is required to make a genuine attempt to reach an agreement with a landowner, there is no particular prescribed procedure for doing so.[95] Nevertheless, the statutory burden is on the federal government to demonstrate that it has made a genuine attempt to reach an agreement with the landowner over the amount of compensation before instigating condemnation proceedings.[96]

The second way is the most likely method should the federal government resort to the power of eminent domain to access Big Bend Ranch State Park for the construction of the border wall because it does not require the government to negotiate with the opposing party prior to acquisition.

B. The Federal Power of Eminent Domain and the Takings Clause of the Fifth Amendment

At first look, the Takings Clause of the Fifth Amendment to the Constitution does not appear to be relevant to the states because it specifies the taking of *private* property (without just compensation).[97] However, the U.S. Supreme Court plugged that apparent gap in the Constitution by indicating that this clause also covers state-owned land subject to condemnation by the federal government.[98] The Court has observed that the Takings

93. Consolidated Appropriations Act, 2008, Pub. L. 110-161, div. E, tit. V, sec. 564, § 102, 121 Stat. 1844, 2090–93 (2007) (codified as amended at 8 U.S.C. § 1103(b)(3) (2012)); 40 U.S.C. § 3113 (2012) ("The Attorney General, on application of the [federal] officer, shall have condemnation proceedings begun within 30 days from receipt of the application at the Department of Justice."); *see supra* note 19 (discussing substitution of "Attorney General" to "Secretary of Homeland Security").

94. *See, e.g.*, United States v. 1.04 Acres of Land, 538 F. Supp. 2d 995, 1010 (S.D. Tex. 2008).

95. *See id.* at 1010 n.9.

96. *See id.* at 1012 ("The Government is required . . . to put forth a bona fide effort to determine whether an agreement can be reached. The United States must provide this Court with sufficient evidence for it to determine that the Government has made a bona fide effort to negotiate with [the landowner] for this interest in her land.").

97. U.S. CONST. amend. V ("[N]or shall *private property* be taken for public use, without just compensation") (emphasis added).

98. *See* United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984) ("[I]t is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States." (citing United States v. Carmack, 329 U.S. 230, 242

Clause presupposes an existing power of eminent domain rather than granting a new power to the federal government.[99] This comports with a policy rationale vindicating federal use of eminent domain over state-owned lands expressed by the U.S. Supreme Court in 1875.[100] In *Kohl v. United States*, the Court reasoned that the functioning of the federal government necessitates a right for it to acquire land from the states and that the federal government should not rely upon the states to function.[101] The Court's dicta further emphasized the absolute sovereign power of the federal government over the states in the exercise of eminent domain.[102]

The Supremacy Clause of the Constitution provides for federal eminent domain power that outweighs the power of the states themselves.[103] The federal power of eminent domain even applies to state lands that are already being used for a public purpose.[104] In *United States v. Carmack*, the federal government sought to condemn land for the construction of a post office and customhouse in the city of Cape Girardeau, Missouri.[105] The targeted land included part of a public park and a county courthouse building.[106] This land was private land held in trust by the city for existing public purposes.[107] The U.S. Supreme Court found the existing status of the land to be immaterial to the question of whether or not the federal government was entitled to implement its power of eminent domain.[108] Furthermore, the Court opined that the Supremacy Clause makes "it appropriate to

(1946))).

99. *See Carmack*, 329 U.S. at 241–42.

100. Kohl v. United States, 91 U.S. 367, 371–74 (1875).

101. *Id.* at 371, 372 ("Neither [the federal government nor state government] is under the necessity of applying to the other for permission to exercise its lawful powers.").

102. *Id.* at 374 ("If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment.").

103. *See, e.g.*, United States v. 32.42 Acres of Land, 683 F.3d 1030, 1034 (9th Cir. 2012) ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." (citing U.S. CONST., art. VI, cl. 2)); *Carmack*, 329 U.S. at 240; Stockton v. Baltimore & N.Y.R. Co., 32 F. 9, 19 (C.C.D.N.J. 1887) ("If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it."); 26 AM. JUR. 2D *Eminent Domain*, *supra* note 83, at § 19.

104. *See* 329 U.S. at 238–39.

105. *Id.* at 232.

106. *Id.* at 233–34.

107. *Id.* at 238–39.

108. *Id.* at 239 ("It makes little difference that the site here sought to be condemned is held by the City in trust instead of in fee.").

recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, is equally supreme."[109]

Even though the federal government has the power to condemn state-owned lands for a public use, it must still fulfill the constitutional requirement to provide appropriate compensation.[110] The question of whether the border wall satisfies the "public use" requirement likely would not be challenged by the state of Texas.[111] Thus, it appears that a potential challenge to federal government use of eminent domain to acquire land for the border wall in the Big Bend area would hinge on whether the federal government has provided "just compensation." Note, however, that this would be a challenge not against the federal government eminent domain power itself, but against the level of compensation due to the landowner for the taking.

C. Limitations to Opposing Condemnation by the Federal Government

Although the federal government power of eminent domain is supreme, a landowner may challenge a taking as exceeding the bounds of statutory authority.[112] Such a challenge, however, does not address such questions as the necessity or expediency of the condemnation proceeding because these decisions lie within the decision-making powers that are delegated to the relevant government department.[113] Therefore, the only issue that is subject to review is "the bare issue of whether the limits of

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109. *Id.* at 240.

110. Block v. N.D. *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 291 (1983) (indicating that it is "probably" correct that a congressional law that deprived "a State of land vested in it by the Constitution" without a compensation payment provision "would constitute a taking of the State's property without just compensation, in violation of the Fifth Amendment").

111. *See* Tom Benning, *Eminent Domain for Trump's Border Wall is Fine, Says Texas Attorney General Ken Paxton*, DALL. MORNING NEWS (Mar. 27, 2017), https://www.dallasnews.com/news/texas-politics/2017/03/27/texas-attorney-general-backs-trumps-plan-use-eminent-domain-border-wall [https://perma.cc/QE3E-B5NV] (reporting that the Texas Attorney General accepts that the border wall satisfies the Fifth Amendment's "public use" requirement).

112. *See, e.g.*, United States v. 1.04 Acres of Land, 538 F. Supp. 2d 995, 999 (S.D. Tex. 2008) ("The sole defense to a condemnation action is that the United States lacks the authority to take the interest sought in the complaint in condemnation. . . . A property owner's challenge to a condemnation action is properly defined as an objection to the validity of the taking for 'departure from the statutory limits.'" (first citing United States v. 162.20 Acres of Land, 639 F.2d 299, 303 (5th Cir. Unit A Aug. 1981); and then quoting Catlin v. United States, 324 U.S. 229, 240 (1945)).

113. *See 162.20 Acres of Land*, 639 F.2d at 303 (citing United States v. 2,606.84 Acres of Land, 432 F.2d 1286 (5th Cir. 1970), *cert. denied*, 402 U.S. 916 (1971)).

authority [are] exceeded."[114] The applicable standard presents a high threshold—that "no reasonable man" could conclude otherwise—to demonstrate that the government was acting outside its statutory remit.[115] When the intended purpose of the taking is valid, "the necessity of the taking and the character of the title to be taken are decisions vested exclusively in the Secretary," and thus not subject to judicial review.[116] As exemplified by *United States v. 1.04 Acres of Land,* a challenge asserting that the federal government exceeded its authority in its exercise of eminent domain power concerning the border wall where the land at issue lies at or near the border will likely result merely in a delay of the inevitable acquisition of that land.[117]

D. The Tenth Amendment as a Challenge to Appropriate Federal Use of Eminent Domain

The Tenth Amendment highlights the division of constitutional powers between the federal government and the states (and the people).[118] Rather than modifying the distribution or extent of powers originally provided in the Constitution, the Tenth Amendment merely explicitly acknowledges the state of affairs at the time the Constitution was accepted by the people of the United States.[119] In addition to alleviating any doubt over this matter, one accepted purpose of the Tenth Amendment was to placate people who were concerned that the fledgling federal government might be tempted to overreach its delegated

114. *Id.*

115. *See 2,606.84 Acres of Land*, 432 F.2d at 1290 ("[Government action outside its statutory remit] would occur if the delegated official so overstepped his authority that *no reasonable man could conclude that the land sought to be condemned had some association with the authorized project*. In such a case *alone* could the taking be considered arbitrary or capricious as those terms are used in condemnation proceedings. There must be basic to the project pervasive deception, unreasoned decision, or will-of-the-wisp determination before these words of pejoration are brought into play." (emphasis added)).

116. *Id.* at 1289 (quoting West, Inc. v. United States, 374 F.2d 218, 222 (5th Cir. 1967)).

117. *1.04 Acres of Land*, 538 F. Supp. 2d 1012 ("The Court will . . . give the Government two weeks from the entry of this order . . . to either: (1) supplement its proof or (2) conduct good faith negotiations with [the landowner], . . . and supplement its pleadings. After that date the Court will proceed to rule on the merits of this aspect of the Government's petition for relief.").

118. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

119. *See* United States v. Sprague, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified . . . .").

powers.[120] Contemporary writings by Alexander Hamilton—one of the framers of the Constitution—support the view that the Constitution had been carefully written so as to provide a discrete set of powers to the federal government and reserve all other rights to the states.[121] Nevertheless, when the federal government acts properly within its Constitutionally-delegated powers, the Tenth Amendment does not provide a way by which the states may somehow impede federal government actions.[122] Hence, the federal government may operate freely within the scope permitted by the Constitution even though the states may retain some degree of sovereignty.[123]

The case of *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.* demonstrates the (im)balance of power between federal and state governments.[124] Congress enacted a plan (referred to as "the Act" in this sub-Part) to dam a section of the Red River in order to provide flood control for the Mississippi River and hydroelectric power for Denison, Texas.[125] The Red River divides the states of Oklahoma and Texas along part of its course.[126] The state of Oklahoma claimed that construction of the dam would result in the flooding of 100,000 acres of land within the state, necessitating the displacement of Oklahoma citizens and resulting in significant

120. *See* United States v. Darby, 312 U.S. 100, 124 (1941) ("There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.").

121. *See* THE FEDERALIST No. 32, at 155, 158 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("[Because] the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. . . . [N]otwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States.").

122. *See Darby*, 312 U.S. at 124 ("[The Tenth Amendment does] not depriv[e] the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." (first citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324–25 (1816); then citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405–06 (1819); then citing Gordon v. United States, 117 U. S. 697, 705 (1864); then citing Champion v. Ames, 188 U.S. 321, 357 (1903); then citing N. Sec. Co. v. United States, 193 U.S. 197, 344–45 (1904); then citing Everard's Breweries v. Day, 265 U.S. 545, 558 (1924); then citing United States v. Sprague, 282 U. S. 716, 733 (1931); and then citing United States v. The William, 28 F. Cas. 614, 622 (D. Mass. 1808) (No. 16,700)).

123. *See Darby*, 312 U.S. at 124.

124. 313 U.S. 508 (1941).

125. *Id.* at 518–20.

126. *Id.* at 520.

detrimental economic impacts on Oklahoma.[127] The Act included the transfer of title of the flooded lands to the federal government.[128] The state of Oklahoma contended that the damaging impacts on the state, including its enforced loss of territory, rendered the Act in violation of the Tenth Amendment.[129] However, the U.S. Supreme Court found the Act to be a valid exercise of federal power under the Commerce Clause.[130] The Court reasoned that because flooding the Mississippi River had a detrimental effect on interstate commerce and the project prescribed by the Act was aimed at mitigating that flooding, the project was authorized under the commerce power of the federal government.[131] This was so even though the Red River itself was not navigable in the area where the damming project was set to be carried out.[132] Hence, the Court found that this federal action was justified under the Constitution and not hindered by the Tenth Amendment.[133] Therefore, state ownership of affected lands subject to condemnation by the federal government does not in itself impede the federal power of eminent domain.[134]

E. Conclusions

Prior to initiating condemnation proceedings to acquire land (or access to land) for the construction of the border wall, the federal government bears a statutory burden to demonstrate that

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127. *Id.* at 511–12 (noting that these claims by the state of Oklahoma specified the potential loss of 50,000 acres of lands underlain by oil and gas, and because the state gained a significant portion of its income from taxes on hydrocarbon production, it stood to lose a "wealth production" of approximately $1,500,000 per year).

128. *Id.* at 511.

129. *Id.* at 515.

130. *Id.* at 516.

131. *Id*. at 525–26 ("[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the *navigable* portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries."). The Court also noted that it has repeatedly recognized that "the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce." *Id.*

132. *Id.*

133. *Id.* at 534; *accord* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 428 (1940) ("So long as the things done within the states by the United States are valid under [the Commerce] power, there can be no interference with the sovereignty of the state.").

134. *See id.* at 534 ("The fact that land is owned by a state is no barrier to its condemnation by the United States. . . . 'Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.'" (first citing Wayne County v. United States, 53 Ct. Cl. 417 (1918), *aff'd*, 252 U.S. 574 (1920); and then quoting Florida v. Mellon, 273 U.S. 12, 17 (1927))).

it has first made a bona fide attempt to reach an agreement with the landowner over the amount of compensation.[135] The Takings Clause of the Fifth Amendment applies to the taking by the federal government of state-owned land for a public use and implies a pre-eminent condemnation power that overrides state sovereignty.[136] Because the state of Texas concedes that the border wall satisfies the "public use" requirement of the Fifth Amendment, a viable challenge to federal government acquisition of land in the Big Bend area would likely not be against the federal government eminent domain power itself, but against the level of compensation due to the landowner as a result of the taking.[137] Nevertheless, a challenge may be brought against the exercise of federal government condemnation power in the narrow scenario in which federal government demonstrably acts outside its statutory remit, though the burden on the challenging party is particularly stringent.[138] Finally, the Tenth Amendment does not alter this balance of power between the federal government and the states when the federal government acts appropriately under one of its constitutional powers.[139] Therefore, concerning land in the Big Bend area, as long as the federal government selects land that is appropriately located (i.e. not arbitrarily or capriciously) and first makes a genuine attempt to agree on compensation, there will likely be no legal barriers to the federal government exercise of its condemnation power.

V. THE FEDERAL VERSUS STATE BALANCE OF POWER UNDER THE ENCLAVE CLAUSE WITH RESPECT TO EMINENT DOMAIN

A. Intent of the Enclave Clause

As well as paving the way for founding Washington, D.C. as the seat of the federal government, the Enclave Clause establishes exclusive federal jurisdiction "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, dock-Yards, and other needful Buildings[.]"[140] This part of the eventual Enclave

135. *See supra* Section IV.A.

136. *See supra* Section IV.B.

137. *See supra* Section IV.B.

138. *See supra* Section IV.C.

139. *See supra* Section IV.D.

140. U.S. CONST. art. I, § 8, cl. 17. ("To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent

Clause had originally been proposed as a provision of power for Congress to "authorise [sic] the Executive to procure and hold for the use of the United States landed property for the erection of forts, magazines, and other necessary buildings . . . ."[141] This proposed clause was separate and distinct from other proposed clauses that provided for the establishment of a seat of government and exercise of exclusive jurisdiction therein.[142] A later incarnation of the proposed clause was similar to the eventually-adopted Enclave Clause.[143] The addition of the phrase "by the Consent of the Legislature of the State in which the Same shall be" after the word "purchased" was made during the Federal Constitutional Convention of 1787 in response to concerns that the federal government may procure land for the use of military installations in order to subjugate unwilling states.[144] Thus, there exists a view that the federal government requires the consent of the relevant state legislature in order to create a federal enclave.[145]

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of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .").

141. James Madison, *Journal: Saturday August 18, 1787*, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321, 321 (Max Farrand ed., 1911).

142. *Id.* at 321–22.

143. *Compare* U.S. CONST. art. I, § 8, cl. 17 (Congress has the power "to exercise [exclusive] Authority 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, dock-Yards, and other needful Buildings . . . ." (emphasis added)), *with* James Madison, *Journal: Wednesday September 5, 1787*, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 509, 509. (Congress has the power "to exercise [exclusive] authority over all places purchased for the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful buildings . . . .").

144. Madison, *supra* note 141, at 505–06 (explaining that the word "purchased" was added next to "by the consent of the Legislature of the State"); *see also* Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 354–55, 357 (2005) (showing that before the Enclave Clause was passed, anti-federalists were mainly concerned about Congress using military enclaves to undermine the independence of the states from the federal government and that, in response to their concerns, the Framers specified that the Enclave Clause could only be used to install military enclaves if states granted permission and that the Enclave Clause would equalize state and federal powers); Madison, *supra* note 141, at 510 ("On the residue, to wit, 'to exercise like authority over all places purchased for forts &c. Mr. Gerry contended that this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government—Mr. King thought himself the provision unnecessary, the power being already involved: but would move to insert after the word "purchased" the words "by the consent of the Legislature of the State" This would certainly make the power safe. Mr. Govr Morris 2ded. the motion, which was agreed to nem: con: as was then the residue of the clause as amended.").

145. *See* Natelson, *supra* note 144, at 355. To support this premise, Natelson quotes a passage from The Federalist No. 43. *Id.* at 355 n.132 ("And as it [i.e., an enclave] is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the

Further evidence points to an intent for there to be an explicit requirement that states consent to relinquishing jurisdiction to the federal government.[146] Indeed, the Texas statute concerning eminent domain (discussed in Part III) contains express provisions consenting to federal government acquisition of state lands for certain purposes and consenting to cede jurisdiction to the United States (as long as certain conditions are met).[147] Therefore it appears that the Enclave Clause may require that states consent to both the acquisition of lands by the federal government and to the transfer of jurisdiction to the federal government.[148]

B. Judicial Construction of the Enclave Clause

The Enclave Clause plays a role in determining the allocation of jurisdiction over acquired lands; the acquisition of state-owned lands with concurrent or later-conferred consent by the state will provide exclusive jurisdiction to the federal government.[149] Jurisdiction of the federal government will not be exclusive if the state does not provide consent.[150] *Paul v. United States* concerned

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cession . . . .'" (quoting THE FEDERALIST NO. 43, at 310 (James Madison) (Benjamin Fletcher Wright ed., 1961))). In the original text, this passage is immediately preceded by the sentence: "The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature." THE FEDERALIST NO. 43, at 310. The "it" at the beginning of the cited passage likely refers specifically to the "federal district" that was to be created by cession of lands by the relevant states, and therefore it is unclear whether the reasoning in the passage is relevant only with respect to the establishment of the seat of government or to the per se creation of federal enclaves, including those founded for forts, etc.

146. THE FEDERALIST No. 43, s*upra* note 145, at 310 ("The necessity of a like authority [i.e., exclusive federal jurisdiction,] over forts, magazines, etc., established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, requires that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment.").

147. TEX. GOV'T CODE ANN. § 2204.103(a)–(c).

148. Nevertheless, this is somewhat at odds with the prevailing opinions regarding the Takings Clause of the Fifth Amendment, discussed in Part IV. The acceptance that the federal government has a general pre-eminent right to acquire state lands by condemnation is not easily reconciled with a requirement that the federal government obtains consent from a state to purchase lands for certain purposes. Even the framers of the Constitution disagreed over this. As discussed above with respect to the evolution of the Enclave Clause, Mr. Gerry was concerned about the exercise of federal power over the states, whereas Mr. King opined that the proposed Enclave Clause (without the consent language) was superfluous ("the power being already involved")—it documented a power that the federal government already possessed. *See supra* text accompanying note 144.

149. *See* Paul v. United States, 371 U.S. 245, 264 (1963).

150. *See id.* ("[W]ithout the State's 'consent' the United States does not obtain the benefits of Art. I, § 8, cl. 17, its possession being simply that of an ordinary proprietor." (citing James v. Dravo Contracting Co., 302 U.S. 134, 141–42 (1937))).

a federal-versus-state jurisdiction dispute over whether the state of California could enforce its price regulations on milk sold to the United States at military installations located within the state.[151] The Court's analysis focused on whether or not California had ceded exclusive jurisdiction to the United States.[152] Interestingly, California had a state statute consenting to federal acquisition of state lands that was similar to the current equivalent Texas statute in that it expressly provided consent to federal acquisition of land by "purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings . . . ."[153] The Court concluded that California had yielded exclusive jurisdiction to the federal government in the case of appropriated funds under the statute and therefore state price controls that were in effect at the time of the acquisition would still be applicable.[154]

Thus, the focus of the Enclave Clause pertains to a question of jurisdiction over acquired lands.[155] Additionally, current federal statutes provide that the federal government is not required to obtain exclusive jurisdiction over acquired land and that it is "conclusively presumed" that exclusive jurisdiction by the federal government is not assumed until it is formally accepted according to a prescribed procedure.[156] Furthermore, the U.S. Supreme Court has made it clear that the Enclave Clause does not affect the right of the federal government to acquire land by condemnation from nonconsenting states.[157] Therefore, protagonists looking to the Enclave Clause as a means by which to curtail the acquisition of land for the border wall would be limited to arguing over questions of jurisdiction. But that itself may depend on whether the border wall qualifies as one of the defined uses for the land as enumerated in the Enclave Clause. This

151. *Paul*, 371 U.S. at 247–48.

152. *Id.* at 267–69.

153. *Id.* at 265 n.31. *Compare* 1939 Cal. Stat. 2331, *with* TEX. GOV'T CODE ANN. § 2204.103(a).

154. *Paul*, 371 U.S. at 269.

155. *See id.* at 264 (citing *James*, 302 U.S. at 141–42).

156. Thus, the federal government has the option to accept exclusive jurisdiction and exclusive jurisdiction can be conferred only if the federal government accepts it. 40 U.S.C. § 3112(a)–(c) (2012).

157. *James*, 302 U.S. at 147 ("It is not questioned that the state may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the federal government by virtue of its sovereignty, and thus it may, regardless of the wishes either of the owners or of the states, acquire the lands which it needs within their borders." (citing Kohl v. United States, 91 U.S. 367, 371–72 (1875))).

question is explored next.

C. The Meaning of "Other Needful Buildings"

The word "needful" in the common vernacular when the Constitution was adopted meant "necessary."[158] In *James v. Dravo Contracting Co.*, the U.S Supreme Court "construe[d] the phrase 'other needful buildings' as embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government."[159] The Court cited examples of "other needful Buildings" to include a court building, a customs house, post offices, plus locks and dams.[160] The Court rejected a narrow construction that was based on the doctrine of *ejusdem generis* on the policy basis of how the federal government was envisaged to function.[161] However, not discussed in either *James* or *Paul*, the Supreme Court of Appeals of Virginia in *Nikis v. Commonwealth* took a narrower construction of "other needful Buildings" in ruling that a bridge and its approach road were outside the scope.[162] Even if one might be able to reconcile this view with that elucidated in *James*, these later U.S. Supreme Court rulings take precedence, and therefore, the broad construction given in *James* would apply.

Following the *James* rationale, the border wall constructed to regulate immigration and international commerce would be considered necessary by the government "in the performance of the functions of the federal government," just as a dam on a waterway regulates a highway of interstate commerce.[163] Therefore, because the state of Texas statutorily grants consent to federal acquisition of land for the border wall, the acquired land would be subject to exclusive federal jurisdiction if the federal government accepts exclusive jurisdiction pursuant to the applicable federal statute.

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158. *See* Natelson, *supra* note 144, at 347, n.98 ("'Necessary and proper' are, then, equivalent to *needful and adapted*." (quoting McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 356 (1819))).

159. *James*, 302 U.S. at 143.

160. *Id.* at 142–43 ("Locks and dams for the improvement of navigation, which are as clearly within the federal authority as post offices, have been regarded as 'needful buildings.' We take that view." (citing United States v. Tucker 122 F. 518, 522 (W.D. Ky. 1903))).

161. *Id.* at 142; *Ejusdem generis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.").

162. Nikis v. Commonwealth, 131 S.E. 236, 238, 238–39 (Va. 1926) ("That a bridge is not a building has been frequently decided, and it seems hardly necessary to say that an approach to a bridge which is a public highway is not a building.").

163. *See James*, 302 U.S. at 143.

D. Conclusions

Although the Enclave Clause includes reference to "Places purchased by the Consent of the Legislature of the State in which the Same shall be," this has no bearing upon the right of the federal government to use its power of eminent domain over a reluctant state in order to appropriate its land.[164] Thus, the Enclave Clause does not provide a state the means to successfully challenge the right of the federal government to acquire state-owned land by condemnation.[165] Instead, the Enclave Clause provides for a determination of the allocation of jurisdiction between federal and state governments when the federal government acquires land from a state for certain defined purposes.[166] If the federal government purchases land from a state for one of those defined purposes, then the federal government is entitled to obtain exclusive jurisdiction over that land. However, by federal statute, conferring such jurisdiction is neither automatic nor presumed, though the eminent domain statutes of Texas provide for the handing over of exclusive jurisdiction to the federal government upon request. The prevailing judicial interpretation of the phrase "other needful Buildings" in the Enclave Clause as "whatever structures . . . found to be necessary in the performance of the functions of the federal government" likely encompasses the border wall, and therefore the federal government would have the constitutional right to obtain exclusive jurisdiction over lands acquired for the border wall, current federal statutes notwithstanding.[167]

VI. OVERALL CONCLUSIONS

This Comment has analyzed the power of the federal government to acquire state-owned lands by condemnation, using the hypothetical construction of the U.S.-Mexico border wall in Big Bend Ranch State Park as an example. The federal statutes providing for the acquisition of lands and erection of the border wall are commensurate with the federal government's constitutional powers to control immigration and regulate commerce with a foreign power. The Texas statute governing eminent domain provides consent for federal condemnation proceedings and for the cession of jurisdiction to the federal government. The overriding policy concern is that the federal

164. U.S. CONST. art. I, § 8, cl. 17; *see supra* Section V.B.
165. *See supra* Section V.B.
166. *See supra* Section V.B.
167. *See supra* Section V.C.

government should not be hostage to a recalcitrant state—or individual—in conducting its business. Thus, the power of the federal government to procure state-owned lands is potentially limited only by a finding that the selection of land is arbitrary and capricious, though this presents the challenger a heavy burden of proof. The federal government is not limited in applying its power of eminent domain to state-owned lands in furtherance of the objectives of the border wall statutes as long as the exercises of condemnation power are "appropriate and plainly adapted to the permitted end."[168] Though the Takings Clause of the Fifth Amendment of the Constitution applies to the federal government when it acquires state-owned land for a public use by condemnation, the federal government need only provide appropriate compensation to the state. Furthermore, the "consent" provision of the Enclave Clause does not limit the condemnation power of the federal government to acquire state-owned land.

For these reasons, Texas lawmakers' pursuit of Bill S.C.R. 31 futilely expresses opposition to the construction of the border wall. Even if the Bill is passed and curtails Texas's statutory consent to federal condemnation, the federal government's supreme power would prevail. Therefore, if there is such a desire within the federal government, state-owned land, including land within Big Bend Ranch State Park, may be acquired by the federal government by condemnation to construct the border wall despite any protest by the state of Texas or anyone else. Additionally, should the federal government act beyond its constitutional powers in condemning state-owned lands with the consent of the state, it would be difficult to identify a suitable plaintiff who would have the necessary standing to oppose or enjoin such actions.

Apart from organizing protests, lobbying federal legislators, and so on, the chief remaining avenue that is preserved in law for protagonists to counter the construction of the border wall—in Big Bend Ranch State Park or elsewhere—is via the ballot box.[169]

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168. United States v. Darby, 312 U.S. 100, 124 (1941).

169. *See* Veazie Bank v. Fenno, 75 U.S. 533, 548 (1869) ("[T]he responsibility of the legislature is not to the courts, but to the people by whom its members are elected."); THE FEDERALIST NO. 44, at 322 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("[I]n the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is, that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason, that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives.").

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