

ORIGINAL ARTICLE

## The Reconstruction of Federalism: Foreign Submarine Telegraph Cables and American Law, 1868–78

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In the wake of the American Civil War, the process of reconstructing the Union embroiled the United States federal government. In Congress and throughout the nation, Americans clashed over federal intervention in the South and new constitutional amendments extending the reach of the national government in unprecedented ways. Conflict over federal authority played out in remarkably concrete terms in a controversy that erupted in late 1868 surrounding regulation of international telegraphy. The debate centered on whether a state could authorize the landing of a submarine telegraph cable on American shores by a foreign company without permission from Congress—a question with resounding significance for the federal government's efforts to assert sovereignty before both state authorities and other nations. A cadre of men, including notable Europeans who had supported the Confederacy during the Civil War, founded the Société du Câble Transatlantique Français (also called the French Atlantic Cable Company) to establish a telegraph cable between France and the United States. The company intended to land its cable on the coast of the United States in the summer of 1869, having received approval from a state legislature but not from Congress.

From December 1868 through July 1869, as preparations concluded and the steamer the *Great Eastern* inched toward the United States laying the cable in its wake, Americans disputed where to draw the line between federal and state authority over the shores and commerce of the United States. Did states or instead the national government possess exclusive power over the country's maritime borders, or did they share such authority? What rights had states retained after the Union's victory? Supporters of the French company argued that each state owned the territory along its shores from the low-water mark

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to a distance of 3 miles offshore, based on the European tradition that a power's jurisdiction extended along a maritime belt roughly a cannon shot from its coast.<sup>1</sup> Invoking antebellum jurisprudence and practice, they argued that the company needed permission only from the state where it intended to land the cable—ultimately Massachusetts—not from Congress or the president.

President Ulysses S. Grant's administration, congressional Republicans, and sectors of the press held that the French government, the state of Massachusetts, and the telegraph company threatened the United States government's sovereignty. The plan to land the cable without federal approval impinged on the United States government's control of the nation's shores, Congress's power "to regulate commerce with foreign nations" under the Commerce Clause of the Constitution, and the executive branch's exercise of diplomacy.<sup>2</sup> The French government had granted the company a monopoly over telegraphic communication between the United States and France for 20 years, purportedly limiting the construction of submarine cables from American shores without the United States government's consent. Similarly, by presuming to authorize the cable, Massachusetts pre-empted control of the area off the coast, which the Grant administration and many congressional Republicans considered to be under federal jurisdiction. The state's action also might foreclose the federal government's opportunity to secure, by diplomacy or treaty, more favorable terms for American companies hoping to compete in transatlantic telegraphy. By this account, the company would violate the sanctity and honor of the United States if it proceeded without federal assent in some form.

In the absence of authorizing congressional legislation, Grant's administration nevertheless allowed the cable to land in July 1869 on condition that the company relinquish the monopoly that the French government had granted and comply with whatever regulations Congress might later enact. Although Grant and Secretary of State Hamilton Fish prevented a confrontation off the shores of Massachusetts, the company delayed giving up its exclusive privileges for another year, and debate continued throughout the 1870s about the proper role of the national government in regulating international telegraphy and controlling the area within 3 miles of the coast.

The French cable controversy has remained confined to scholarship on business, technology, and communication, where it receives only brief mention.<sup>3</sup> Yet, the legal and political history of the episode is a story of Reconstruction. It reflects

<sup>1</sup> H.S.K. Kent, "The Historical Origins of the Three-Mile Limit," *The American Journal of International Law* 48 (1954): 537–53.

<sup>2</sup> United States Constitution, Article I, Section 8.

<sup>3</sup> Pascal Griset, *Entreprise, Technologie et Souveraineté: Les télécommunications transatlantiques de la France (XIXe-XXe siècles)* (Paris: Editions Rive Droite, 1996), 50–54. Gillian Cookson, "The French Atlantic Cable of 1869: Settled Technology and Unsettled Relationships," *Engineering Science and Education Journal* 8 (1999): 135–41. Gillian Cookson, "Ruinous Competition: The French Atlantic Telegraph of 1869," *Entreprises et Histoire* 4 (1999): 93–107. Simone M. Müller, *Wiring the World: The Social and Cultural Creation of Global Telegraph Networks* (New York: Columbia University Press, 2016), 58–59, 131, 192–93. Daniel R. Headrick, *The Invisible Weapon: Telecommunications and International Politics, 1851–1945* (New York: Oxford University Press, 1991), 33–34. Pascal Griset and Daniel R. Headrick, "Submarine Telegraph Cables: Business and Politics, 1838–1939," *The Business*

critical, although now often overlooked, international dimensions of the revision of federalism following the Civil War. A vast scholarship has examined attempts to assert federal authority in different domains, militarily in the South and legally in the protection of rights and regulation of marriage.<sup>4</sup> Historians have debated the extent to which the Civil War and Reconstruction restructured American federalism and the magnitude of change that lawmakers intended. Analyzing constitutional conflicts during Reconstruction, scholars have most closely scrutinized the implications for the rights of individuals and, eventually, American corporations.<sup>5</sup> The consequences for the nation's international relations and commerce have received far less attention. Scholars have considered these subjects mainly in the context of immigration history, tracing how the federal government gradually but decisively supplanted the states in monitoring borders and restricting immigration.<sup>6</sup> As the controversy surrounding oceanic telegraphy demonstrates, however, national debate over the proper role of the federal government extended beyond immigration to encompass how the United States would promote business, conduct diplomacy, define its jurisdiction, and determine the prerogatives of individual states in an increasingly interconnected international realm. While attempting to check the authority of the states,

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History Review 75 (2001): 555. Dwayne R. Winseck and Robert M. Pike, *Communication and Empire: Media, Markets, and Globalization, 1860-1930* (Durham: Duke University Press, 2007), 49-52.

<sup>4</sup> See, for example, Gregory P. Downs, *After Appomattox: Military Occupation and the Ends of War* (Cambridge, MA: Harvard University Press, 2015); Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015); and Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002).

<sup>5</sup> For a sample of works emphasizing persistent limitations of federal power, dedication to states' rights, or expectations that changes would be temporary, see Michael Les Benedict, *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York: Fordham University Press, 2006); Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869* (New York: W.W. Norton & Company, 1974); Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Knopf, 1973); and Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (New York: Cambridge University Press, 2017). Among accounts highlighting the revolutionary impact of the Reconstruction amendments and legislation, see Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York: W.W. Norton & Company, 2019); Robert J. Kaczorowski, "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction," *New York University Law Review* 61 (1986): 863-940; Robert J. Kaczorowski, "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War," *The American Historical Review* 92 (1987): 45-68; and Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 351-401. For the most part, authors in both camps emphasize how changes to federalism related to individual rights; the exception is Nicoletti, who analyzes the doctrine of secession.

<sup>6</sup> Gerald L. Neuman, "The Lost Century of American Immigration Law (1776-1875)," *Columbia Law Review* 93 (1993): 1833-901. Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (New York: Oxford University Press, 2017). E.P. Hutchinson, *Legislative History of American Immigration Policy, 1798-1965* (Philadelphia: University of Pennsylvania Press, 1981), 47-84. Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882-1943* (Chapel Hill: The University of North Carolina Press, 2003). Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: The University of North Carolina Press, 1995), 1-32.

proponents of a more robust national government also had to make a revised federalism legible to foreign powers.

The episode of the French cable revealed the varied alliances and sources of opposition that emerged amid attempts to project federal power during Reconstruction. Initially, the cable controversy pitted Northern Republican officials at the state level, along with many voices from the Democratic Party and a foreign corporation, against Republicans in the federal government. Accounts of Reconstruction have traced the ideological, generational, and geographical differences that riddled the Republican Party.<sup>7</sup> Another division—that between state and national authorities within the party—also hampered congressional Republicans and the Grant administration. Despite early widespread Democratic support for state sovereignty in the case of the French cable, several prominent Democrats subsequently joined Republicans in Congress to advocate federal authority over the regulation of foreign submarine cables. In the end, the issue largely split state officials from their federal counterparts, rather than dividing Americans along familiar party fault lines.

The debates over foreign cables also reflected many Americans' growing expectations of the national government as the Civil War and Reconstruction fostered a vision of expanded federal power in commerce and the international sphere. Many congressmen and constituents, Democrats and Republicans, envisaged an energetic role for the national government in protecting American interests and business abroad. By the 1870s, the Supreme Court also condoned a broader interpretation of Congress's power to restrain the states in regulating foreign and interstate commerce. The federal government, however, assumed this imagined role in the international sphere, as in the domestic realm, only in halting ways. Congress failed to regulate telegraphy, both domestic and international, to the extent that many Americans demanded, the Supreme Court seemed to approve, and the two houses of Congress each endorsed at different points. The prolonged debate surrounding submarine telegraph cables exposed intractable problems of federalism that contributed to Congress's inaction. The question of jurisdiction over the coastal shores remained unsettled well into the twentieth century. While undertaking the formidable work of reconstructing the Union, the United States government struggled even to delineate the physical boundaries of its authority.

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With its generous concession from the French government in hand in 1868, the French Atlantic Cable Company determined to lay a telegraph cable from Brest, France, to the French island of St. Pierre, near Newfoundland, and proceed from there to American shores.<sup>8</sup> Leaders within the company assumed

<sup>7</sup> Eric Foner, *Reconstruction: America's Unfinished Revolution* (New York: HarperCollins, 1988), 343–44. Nicolas Barreyre, *Gold and Freedom: The Political Economy of Reconstruction*, trans. Arthur Goldhammer (Charlottesville: University of Virginia Press, 2015). Benedict, *A Compromise of Principle*.

<sup>8</sup> "Translation of Concession," in "Papers Relating to the Concession for a submarine cable, made by the French Government to the Baron Erlanger and Mr. Julius Reuter," in *Message of the President of the United States, with the Reports of the Postmaster General and of the Secretary of the Navy, Communicated to the Two Houses of Congress at the Beginning of the Second Session of the Forty-First Congress* (Washington, DC: Government Printing Office, 1869), XXXIX–XL. Hamilton Fish (United

that Americans and their government would welcome an additional telegraphic connection to Europe.<sup>9</sup> The first transatlantic cable had failed just a few weeks after it was laid in 1858. Two cables, spanning from Ireland to Newfoundland, had restored telegraphic communication between North America and Europe in 1866 and connected to the United States by overland lines.<sup>10</sup> As ocean telegraphy expanded worldwide, the French company perceived demand for the technology in the North Atlantic, which would become a key theater for cable construction during the next two decades.<sup>11</sup>

At the helm of the new company were Baron Frédéric Émile d'Erlanger and Julius Reuter, both men with dubious credentials in the eyes of Americans who had supported the Union. During the Civil War, German-born Erlanger had touted the Confederate cause in France, divorced his wife to marry the daughter of the Confederate ambassador, secured the single loan that the Confederacy received abroad, and spearheaded a blockade-running scheme. Many Americans accused the telegraph agent Reuter of having distributed false stories of Union defeats to bolster the Confederacy's credibility in Europe.<sup>12</sup> Opponents in the United States dubbed Erlanger and Reuter's new enterprise "the Franco-Rebel Telegraph Company."<sup>13</sup> In reality, the company was largely a British undertaking, incorporated under English law and based in London.<sup>14</sup>

Issues quickly arose over how the company could secure permission to land its cable on American shores. At a dinner with the company's directors and shareholders in London in December 1868, the American minister to Britain Reverdy Johnson, a recognized authority on constitutional law, proclaimed the states' exclusive right to authorize the landing of the cable. Formerly attorney general of the United States and a Democratic senator representing Maryland, Johnson provoked an outcry at home by associating with Britons who had supported the Confederacy. His career as a lawyer was noted for his defenses of the slaveholder in *Dred Scott v. Sandford* and an alleged conspirator in Abraham Lincoln's assassination. Johnson would continue to espouse an expansive interpretation of states' rights over the coming years while defending Ku Klux Klan members arrested in South Carolina under the Enforcement

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States secretary of state) to Count Faverney (French chargé d'affaires), July 10, 1869, Hamilton Fish Papers, volume 212, Library of Congress, Washington, DC.

<sup>9</sup> Earl of Clarendon (British foreign secretary) to Sir Edward Thornton (British minister at Washington), February 20, 1869, Add MS 81081, Correspondence of Sir Edward Thornton, British Library (hereafter B.L.), London.

<sup>10</sup> Müller, *Wiring the World*, 4, 26–36. Headrick, *The Invisible Weapon*, 17–19. "The Atlantic Telegraph," *The Observer*, November 4, 1866, 5.

<sup>11</sup> Headrick, *The Invisible Weapon*, 33.

<sup>12</sup> "The Franco-Rebel Telegraph Company," *New York Sun*, July 16, 1869, 2. Jay Sexton, *Debtor Diplomacy: Finance and American Foreign Relations in the Civil War Era* (New York: Oxford University Press, 2005), 162–74.

<sup>13</sup> "Will the Administration Defend the National Honor?" *New York Sun*, July 14, 1869, 2. "The Franco-Rebel Telegraph Company," *New York Sun*, July 16, 1869, 2. "A Curious Attack on the French Transatlantic Telegraph," *New York Herald*, December 1, 1868, 6.

<sup>14</sup> Lord Monck to Clarendon, February 19, 1869, in Clarendon to Thornton, February 20, 1869, Add MS 81081, Correspondence of Sir Edward Thornton, B.L. Headrick, *The Invisible Weapon*, 33.

Acts.<sup>15</sup> Having clashed with congressional Republicans throughout the war, Johnson now infuriated them again by his declaration of state sovereignty in the matter of telegraph cables.<sup>16</sup>

Johnson's speech outraged an array of Republican and independent newspapers. In the throes of Radical Reconstruction, appeals to state sovereignty evoked the doctrine of secession and white Southerners' continued recalcitrance. The *New York Sun*, enjoying a rapidly growing circulation under new direction, led the charge against Reverdy Johnson and the French company. Nominally independent, the *Sun* had recently supported Grant's presidential candidacy. The original stockholders of the company that acquired the *Sun* in 1867 included Cyrus Field, the telegraph entrepreneur who had pioneered the existing transatlantic cables and hoped to continue monopolizing transatlantic telegraphy. The *Sun* did not mention this connection but emphasized that the newspaper stood to benefit from an additional cable and more competitive transmission rates. Amid conflicting material interests, the *Sun* denounced Johnson's comments as a "broad avowal of rebel, State sovereignty doctrine."<sup>17</sup> Several Republican papers echoed this criticism. The *New-York Tribune* observed that, as even most former Confederates grasped, "the doctrine of State Sovereignty was finally settled at Appomattox Court-House." Another newspaper affirmed, "the sovereignty of our coast is not in the separate States but in the United States."<sup>18</sup> In response, the Democratic press attributed opposition to the French company to support for the existing transatlantic telegraph interests. The Democratic *New York World* maintained that "the theory and practice of our whole history" corroborated "that the *property* of the shores and lands under water on the coasts" of a state "is *in the State*" and that anyone who "would occupy this *property* with a telegraphic cable must get his authority to do so, not from somebody who does not own the property, but from the State which does."<sup>19</sup>

Reactions did not, however, fall entirely along partisan lines. The Republican though conservatively inclined *New York Times* joined Democratic newspapers in scolding the *Sun*, maintaining, "Each State *has* sovereign and exclusive jurisdiction over its own soil in the sense in which it was asserted by Mr. Johnson." The *New York Times* reasoned that whenever the national government required

<sup>15</sup> *New York Sun*, June 30, 1869, 2. "Reverdy Johnson in England," *New York Times*, January 12, 1869, 4. Don E. Fehrenbacher, *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981), 148. William C. Harris, *Two Against Lincoln: Reverdy Johnson and Horatio Seymour, Champions of the Loyal Opposition* (Lawrence: University Press of Kansas, 2017), 83. Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871-1872* (Athens: The University of Georgia Press, 1996), 54-61, 67-84.

<sup>16</sup> For Johnson's speech, see "The Franco-American Telegraph Company," *The Observer*, December 13, 1868, 3. "Reverdy Johnson in Favor of State Sovereignty," *New York Sun*, December 28, 1868, 2. On Johnson's wartime conflicts with Republicans, see Harris, *Two Against Lincoln*, 58-82.

<sup>17</sup> "Reverdy Johnson in Favor of State Sovereignty," *New York Sun*, December 28, 1868, 2. "The Story of the Sun," *New York Sun*, September 3, 1883, 1. Candace Stone, *Dana and The Sun* (New York: Dodd, Mead & Company, 1938), 29-32, 56.

<sup>18</sup> *New-York Tribune*, December 29, 1868, 4. "The French Cable and the American Minister," *New-York Commercial Advertiser*, December 28, 1868, 2.

<sup>19</sup> "The Battle of the Cables," *The World*, December 31, 1868, 6.

“territory in States” for federal purposes, such as a navy yard or fortifications, it “always obtains it by cession from the State legislature.”<sup>20</sup> The company leaders’ past ties to the Confederacy ensured that bluster and patriotic indignation colored the debate. Yet, the matter raised fundamental questions about the division of federal and state power and the proper role of the national government in international affairs and commerce. Beneath the bombast, journalists and politicians staked out positions based on a mix of precedent, principles, and interests.

As the Democratic press and *New York Times* suggested, antebellum tradition concerning the governance of inland waters and public utilities bolstered Reverdy Johnson’s position. Although the Supreme Court had not ruled directly on the status of the shorelands along maritime borders, decisions under Chief Justice Roger Taney established a state’s expansive authority over its inland navigable waters and the soil below.<sup>21</sup> In his speech in London, Reverdy Johnson explained an important such case, *Pollard v. Hagan*, which involved a conflict over rights to a tract of previously submerged land in Alabama.<sup>22</sup> One side claimed the area under a patent from the federal government. The Supreme Court held that the “shores of navigable waters and the soils under them” had not been “granted by the Constitution to the United States, but were reserved to the states respectively.” All states, not only the original thirteen, enjoyed “the same rights, sovereignty, and jurisdiction” regarding these areas. The federal government had no jurisdiction and thus lacked the authority to exercise eminent domain by conferring rights to the land in question. The court aimed to avert “the injury of state sovereignty” and protect the states’ ability to execute critical “police powers.”<sup>23</sup> Well before its notorious ruling in *Dred Scott* that national authority could not prohibit slavery from the territories, the Taney Court had fettered the federal government with respect to the states’ inland waters.<sup>24</sup>

States had also long played the primary role in the United States in chartering public utilities and corporations, including canals, banks, domestic telegraphs,

<sup>20</sup> “Minor Topics,” *New York Times*, December 30, 1868, 4. Benedict, *A Compromise of Principle*, 111.

<sup>21</sup> *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842). *Pollard v. Hagan*, 44 U.S. 212 (1845). For state court rulings in the same vein, see *Lansing v. Smith*, 4 Wend. 9 (1829), and *Gould v. Hudson River Railroad Company*, 6. N.Y. 522 (1852).

<sup>22</sup> “The Franco-American Telegraph Company,” *The Observer*, December 13, 1868, 3.

<sup>23</sup> *Pollard v. Hagan*, 44 U.S. 212 (1845), 219–20, 230. How far a state’s “police powers” extended and whether they might impinge on Congress’s power over commerce remained a subject of contention for the Supreme Court in the coming years. These questions had profound implications for the regulation of slavery, the internal slave trade, and the movement of free African Americans and Black British seamen. In the controversy over international telegraphy, however, Reverdy Johnson and others argued for state control based on proprietorship of the submerged land, never as an exercise of the police powers. Scholarship centered on contests over states’ police powers does not capture the related, but distinct and significant, issues that people at the time considered decisive to the regulation of international telegraphy. On states’ police powers, see, for instance, Carl B. Swisher, *The Taney Period, 1836–64* (New York: MacMillan, 1974), especially 363–95; and Michael A. Schoepfner, *Moral Contagion: Black Atlantic Sailors, Citizenship, and Diplomacy in Antebellum America* (New York: Cambridge University Press, 2019).

<sup>24</sup> *Scott v. Sandford*, 60 U.S. 393 (1857).

and railroads. Most states actively promoted development in industry and transportation.<sup>25</sup> Decisions by the Taney Court ensured that states retained significant flexibility and authority in pursuing this aim. Under Taney, the Supreme Court affirmed the states' far-reaching power of eminent domain and ensured "a model of federal government structure that left powerful instruments of economic control in the hands of the constituent States." States, along with local governments, invested huge sums in railroads and other forms of transportation and largely determined the routes.<sup>26</sup> Eventually, citizens' rising concern about corruption accompanying states' involvement in railroad development deterred government aid to private undertakings, and the expansion of interstate networks exposed limitations of states' regulatory and "administrative capacities." Nonetheless, state governments played a critical role in advancing American infrastructure, while constitutional questions and regional rivalries hindered Congress's involvement.<sup>27</sup> One Democratic newspaper seized upon this tradition to defend the French Cable Company, asserting, "The laying of a telegraph cable between New York and France, concerns Congress no more than the laying of a railroad."<sup>28</sup>

Indeed, jurisprudence concerning Congress's power to regulate interstate and foreign commerce remained indeterminate on key points. Frequently invoking the Commerce Clause, advocates for federal regulation of cable landings ventured into highly contested territory in case law. Chief Justice John Marshall's foundational opinion in *Gibbons v. Ogden* in 1824 advanced federal power by broadly defining commerce as "intercourse." The decision held that a monopoly, which a state legislature had conferred for operation of steamboats on waters within the state, conflicted with congressional licensing legislation, passed under the Commerce Clause. Marshall left unanswered, however, whether the Commerce Clause restricts states in the absence of congressional action—that is, when Congress's power over commerce lies dormant.<sup>29</sup>

<sup>25</sup> Eric Hilt, "Early American Corporations and the State," in *Corporations and American Democracy*, ed. Naomi R. Lamoreaux and William J. Novak (Cambridge, MA: Harvard University Press, 2017), 38–39. Jessica L. Hennessey and John Joseph Wallis, "Corporations and Organizations in the United States after 1840," in *Corporations and American Democracy*, 74. Harry N. Scheiber, "Federalism and the American Economic Order, 1789–1910," *Law & Society Review* (1975): 58–61, 84–96. Colleen A. Dunlavy, *Politics and Industrialization: Early Railroads in the United States and Prussia* (Princeton: Princeton University Press, 1994), 17–19. Frank Dobbin, *Forging Industrial Policy: The United States, Britain, and France in the Railway Age* (New York: Cambridge University Press, 1994), 28–34.

<sup>26</sup> Scheiber, "Federalism and the American Economic Order," 80, quotation at 81–82, 91–92, 94–96. Dobbin, *Forging Industrial Policy*, 36–37, 40–44. Dunlavy, *Politics and Industrialization*, 51–52.

<sup>27</sup> Dobbin, *Forging Industrial Policy*, quotation at 32, 37, 44–49, 66–70. Dunlavy, *Politics and Industrialization*, 4, 16, 42, 44, 235, 239–45. Zachary Callen, *Railroads and American Political Development: Infrastructure, Federalism, and State Building* (Lawrence: University Press of Kansas, 2016), 2–9, 18, 49.

<sup>28</sup> "An Important Question," *Detroit Free Press*, January 22, 1869, 2.

<sup>29</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824), 189–90, 200, 221. John B. Sholley, "The Negative Implications of the Commerce Clause," *The University of Chicago Law Review* 3 (1936): 556–96. "The Commerce Clause as a Restraint on State Powers," Legal Information Institute, Cornell Law School, <https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-3/the-commerce-clause-as-a-restraint-on-state-powers#fn968art1> (last accessed August 1, 2020; page no longer available). In

The Taney Court, acutely aware of the topic's consequences for the preservation of slavery and the internal slave trade, divided over the Commerce Clause. The court reached a tenuous compromise in *Cooley v. Board of Wardens* in 1852 but provided little clarity. In the decision, Justice Benjamin Robbins Curtis established that Congress's power under the Commerce Clause was partially exclusive of the states. In certain commercial matters that required uniformity throughout the nation, Congress's authority excluded the states; on other subjects that called for diverse local regulation, the states enjoyed a concurrent power. Confining his opinion to upholding state regulation of ship pilots, Curtis did not suggest how other commercial activities would fare under this rule.<sup>30</sup> At the time of the French cable controversy, this malleable doctrine of the "partial exclusivity" of Congress's power left significant room for debate about what the Commerce Clause authorized Congress to do, what constituted an exercise of that authority, and what the states or the executive might undertake if Congress did not act.

Despite this ambiguous jurisprudence, the Civil War had precipitated dramatic shifts in the federal government's role in the nation's economy and infrastructure by 1868.<sup>31</sup> The national government ventured further into railroad development, responding to state authorities' demands for greater federal involvement.<sup>32</sup> In the decade before the war, Congress had initiated federal land grants, transferring lands to state governments that then granted them

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both courts and scholarship, debate has long raged over the effect of Congress's "dormant" power under the Commerce Clause and the judiciary's role in restricting state measures affecting interstate or foreign commerce in the absence of congressional action. Julian N. Eule, "Laying the Dormant Commerce Clause to Rest," *The Yale Law Journal* 91 (1982): 425–35. Barry Friedman and Daniel T. Deacon, "A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause," *Virginia Law Review* 97 (2011): 1877–938. For elaboration of Marshall's position, see *Brown v. Maryland*, 25 U.S. 419 (1827); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829); Felix Frankfurter, *The Commerce Clause under Marshall, Taney, and Waite* (Chapel Hill: The University of North Carolina Press, 1937), 14–47; George Haskins, "John Marshall and the Commerce Clause of the Constitution," *University of Pennsylvania Law Review* 104 (1955): 23–37; and Stuart Streichler, *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism* (Charlottesville: University of Virginia Press, 2005), 68–70.

<sup>30</sup> *Cooley v. Board of Wardens*, 53 U.S. 299 (1852), 319–20. Sholley, "The Negative Implications," 573–77. Swisher, *The Taney Period*, 357–422. Streichler, *Justice Curtis*, 66–97. Haskins, "John Marshall," 30–31.

<sup>31</sup> Scheiber, "Federalism and the American Economic Order," 107. Richard Franklin Bense, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877* (New York: Cambridge University Press, 1990).

<sup>32</sup> In immigration control as in railroad development, many state officials eventually welcomed and solicited federal involvement. After the Civil War, the Supreme Court invalidated certain methods that states had long used to restrict immigration, leading state authorities to seek congressional action and then enforce the resulting national legislation. State officials closely collaborated with the federal government, even if many in Massachusetts did not accept "the idea of complete federal control" over immigration. By contrast, the episode of the French cable demonstrates states' staunch resistance to any intervention by the national government amid a continued absence of federal litigation. Callen, *Railroads and American Political Development*, 126. Hirota, *Expelling the Poor*, 180–204, quotation at 202.

to railway companies.<sup>33</sup> During the war, Congress advanced and financed the construction of transcontinental railroads.<sup>34</sup> Adopting legislation in 1865–66 to facilitate interstate railroad traffic, Congress seemed poised to regulate interstate commerce more vigorously.<sup>35</sup> The wartime Congress also established a new national bank system and currency.<sup>36</sup>

Moreover, through the Telegraph Act of 1866, Congress made a significant foray into regulating telegraphic communication.<sup>37</sup> Aiming to foster competition in the face of Western Union's emerging domestic monopoly, the law allowed companies "organized under the laws of any State in this Union" to build telegraph lines in the "public domain of the United States," along "military or post roads" or "across" the nation's "navigable streams or waters." The act required companies that constructed such lines to prioritize transmission of government agencies' dispatches and authorized the postmaster general to set the rates for such messages. As historian Richard R. John has described, the act transformed the domestic telegraph industry into "a quasi-regulatory political economy in which the federal government promoted rivalry between network providers."<sup>38</sup> The law also provided that the federal government could purchase any telegraph lines of the companies that acted under the law, beginning 5 years after its passage. This provision dangled the possibility of a nationalized telegraph system, akin to those in Europe, while asserting "a firm and lasting claim" by Congress "to regulatory power over the telegraph."<sup>39</sup> Congress's action during and immediately after the war, then, heralded a new and more visible role for the federal government while raising the possibility of further change to come.

Still, antebellum precedent concerning the broad scope of states' powers continued to hold much sway in 1868 when the French cable controversy arose. In an unusual arbitration proceeding, former Supreme Court justice Benjamin Robbins Curtis, author of the doctrine of the "partial exclusivity" of Congress's commerce power, echoed Reverdy Johnson in affirming a state's authority over cable landings on its shores. In April 1867, the New York legislature, under Radical Republican control, had granted a charter to two state residents, giving them an exclusive privilege to lay a telegraph cable between

<sup>33</sup> Dobbin, *Forging Industrial Policy*, 39, 50. Scheiber, "Federalism and the American Economic Order," 91–92.

<sup>34</sup> Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W.W. Norton & Company, 2011), 19. Scheiber, "Federalism and the American Economic Order," 84, 107. Dobbin, *Forging Industrial Policy*, 38–39.

<sup>35</sup> Dunlavy, *Politics and Industrialization*, 247.

<sup>36</sup> Bensel, *Yankee Leviathan*, 14, 162, 172.

<sup>37</sup> Richard R. John observes parallels among the Pacific Railroad, National Banking, and Telegraph Acts. Richard R. John, *Network Nation: Inventing American Telecommunications* (Cambridge, MA: The Belknap Press of Harvard University Press, 2010), 116.

<sup>38</sup> 14 Stat. 221 (July 24, 1866). John, *Network Nation*, quotation at 116–17, 119–22.

<sup>39</sup> Joshua D. Wolff, *Western Union and the Creation of the American Corporate Order, 1845–1893* (New York: Cambridge University Press, 2013), 84–112, quotation at 110.

the state and France during a period of 20 years.<sup>40</sup> The French company, which had not yet selected Massachusetts as its landing site, purchased this franchise in London in July 1868 for £12,000, paying £2,000 immediately. Under the instrument of assignment, the payment of the remaining £10,000 depended on confirmation from American chief justice Salmon P. Chase, or an arbitrator he appointed, that the franchise would ensure that the company could “legally and effectually ... prevent and hinder the laying and working of a telegraphic cable” between France and New York by any rival. In effect, the arbitrator would assess the meaning, validity, and enforceability of the exclusive franchise from the state legislature. The question was whether this franchise would prohibit the establishment of a telegraph cable on New York’s shores by potential competitors, even one who might later acquire a concession from Congress or the state.<sup>41</sup> Now eyeing locations outside of New York to land its cable, the French company sought to avoid making the full payment and ironically argued against the effectiveness of the state monopoly to preclude competitors. Either way the arbitrator decided, however, the French company stood to benefit.

Chief Justice Chase declined the role of arbitrator but appointed in his place former justice Benjamin Robbins Curtis of Massachusetts.<sup>42</sup> Known for his resounding dissent in *Dred Scott* and subsequent resignation from the Supreme Court, Curtis decided the arbitration in December 1868 in a circuitous opinion underscoring states’ expansive authority.<sup>43</sup> His decision required Erlanger and Reuter to pay the remaining sum under the contract, but gave them assurance from a pre-eminent jurist that their venture could secure access to American shores without explicit permission from Congress. Curtis’s opinion was not published, leading to some confusion in the press, but several newspapers accurately reported that he had decided “in favor of the sufficiency of the monopoly” from the state legislature.<sup>44</sup> His opinion aligned with that of his brother George Ticknor Curtis, a Democratic constitutional authority, who served as counsel for the New Yorkers seeking full payment for the franchise. Among a litany of arguments asserting a state’s sovereignty over its shores, George Ticknor Curtis stressed the Taney Court’s decisions about states’ proprietorship of soil beneath their navigable waters,

<sup>40</sup> *Laws of the State of New York, Passed at the Ninetieth Session of the Legislature* (Albany: Weed, Parsons, & Company, 1867), vol. 2, ch. 524 (April 22, 1867), 1466. *Laws of the State of New York, Passed at the Ninety-First Session of the Legislature* (Albany: Van Benthuyssen & Sons’ Steam Printing House, 1868), vol. 1, ch. 327 (April 25, 1868), 693. James C. Mohr, *The Radical Republicans and Reform in New York during Reconstruction* (Ithaca: Cornell University Press, 1973), 116.

<sup>41</sup> “The French Cable,” *The World*, January 9, 1869, 1. Benjamin Robbins Curtis, *A Memoir of Benjamin Robbins Curtis, LL.D., With Some of His Professional and Miscellaneous Writings*, ed. by his son Benjamin R. Curtis (Boston: Little, Brown, and Company, 1879), 311.

<sup>42</sup> “The French Cable,” 1. Curtis, *Memoir*, 311–12.

<sup>43</sup> Fehrenbacher, *Slavery, Law, and Politics*, 214. Streichler, *Justice Curtis*, xi, 4–5.

<sup>44</sup> “The Battle of the Cables,” *The World*, December 31, 1868, 6. For other accounts grasping the thrust of Curtis’s decision, see “A State Rights Question,” *Baltimore Sun*, January 2, 1869, 2; “State Ownership,” *Boston Post*, January 15, 1869, 1; and “An Important Question,” *Detroit Free Press*, January 22, 1869, 2. Confused reports included “The French Cable and the American Minister,” *New-York Commercial Advertiser*, December 28, 1868, 2; and *New York Sun*, December 31, 1868, 2.

insisting that it was “immaterial that these decisions relate to what are called inland seas.” He reasoned that only “an unwarrantable stretch” of the commerce power would allow Congress to “grant a right to occupy” state property, as in the landing of a cable.<sup>45</sup> Arbitrator Benjamin Curtis concluded that New York could validly confer the monopoly and that no future concession from the state or Congress could infringe on it. He affirmed that a state was the “proprietor of the soil on its maritime border” stretching from below high-water mark as far out as “the laws of nations recognize ownership of land under tide-waters,” namely 3 miles.<sup>46</sup>

Following Reverdy Johnson’s and Benjamin Curtis’s opinions, several Republicans in Congress scrambled to assert federal power over the French cable and other foreign cables. The success of the Union’s war effort had emboldened legislators who supported a more robust role for Congress in overseeing the nation’s commerce. Since the war, Congress had presumed the authority to permit two American companies to land cables on the nation’s shores. In support of one of these franchises, Radical Republican Senator Zachariah Chandler had urged, “Now, as we are at peace with all the world, that we take care of our commerce, and that we prepare to compete, not only with Great Britain but with the rest of the world, for the commercial supremacy of the world.”<sup>47</sup> Now chafing at the terms of the French company’s charter and declarations of state sovereignty, several Republican legislators wanted Congress to make its power explicit and defend American business interests. In January, Senator Oliver Morton introduced a resolution “to prevent the landing of any foreign submarine cable without authority of Congress.” Fellow senator James Doolittle offered a more intricate proposal that designated the president to authorize the landing of a cable by a foreign company, but automatically “withheld” the “consent of the United States” unless the other nation involved allowed Americans to lay cables “upon reciprocal terms.” In the House, Nathaniel Banks presented a bill requiring explicit congressional approval to “transfer” to foreigners “any charter, grant, or privilege,” which the United States had bestowed to “promote or regulate” foreign commerce.<sup>48</sup>

Alongside these measures, the Senate considered general legislation outlining the conditions under which Congress would authorize the landing of foreign telegraph cables. A bill, spearheaded by Republican Charles Sumner as chairman of the Committee on Foreign Relations, required that telegraph companies prioritize transmission of the United States government’s messages, allow Congress to regulate transmission rates, and grant the United States “the same or similar privileges” in controlling the line as “exercised and

<sup>45</sup> “The French Cable,” *The World*, January 9, 1869, 1–2. On George Ticknor Curtis, see Mark E. Neely, Jr., *Lincoln and the Democrats: The Politics of Opposition in the Civil War* (New York: Cambridge University Press, 2017), 141.

<sup>46</sup> Curtis, *Memoir*, 311–17, quotation at 313.

<sup>47</sup> *Congressional Globe* (hereafter C.G.), 39<sup>th</sup> Congress, 1<sup>st</sup> Session, March 20, 1866, 1518. 14 Stat. 44 (May 5, 1866). 15 Stat. 10 (March 29, 1867).

<sup>48</sup> C.G., 40<sup>th</sup> Congress, 3<sup>rd</sup> Session, January 5, 1869, 171; January 12, 1869, 316; January 14, 1869, 348.

enjoyed by any foreign government whatever.” The bill also instituted a principle of reciprocity, which members of both parties welcomed: Congress would not permit any submarine cable connecting the United States to a country that did not grant “similar privileges” for landing cables to American companies. Amid assertions of Congress’s power, the bill made a nod to the authority of individual states and private property. One section maintained that telegraph cables would be “subject” as well “to any and all rights of property and State jurisdiction in and over the same” areas that lay within the jurisdiction of the United States.<sup>49</sup> The bill passed the Senate but arrived in the House the day before the close of a session.<sup>50</sup> The British minister credited the French company’s agent with having averted discussion of the bill in the House.<sup>51</sup>

As the Committee on Foreign Relations persisted in its attempt to pass a general law, Congress divided over how such legislation should affect the New York, Newfoundland and London Telegraph Company, the pioneer company that had built the existing Atlantic cables and recently petitioned Congress to extend one of them from Newfoundland to American shores. Sumner’s desire to pass special legislation authorizing this cable muddled his efforts to secure general legislation. Republicans and Democrats alike raised concerns about allowing the pioneer company to land a submarine cable, given the exclusive privileges it had received within the British Empire.<sup>52</sup> Moreover, voices from both parties posed the question of whether the task of authorizing cable landings belonged to states rather than Congress.<sup>53</sup>

Although concern emanated from both parties, a Democrat emerged as the most vocal opponent of the proposed cable legislation, as Reconstruction politics gave any matter touching states’ rights a potent and partisan charge. In February 1869, as cable debates continued, Congress wrangled over and eventually passed the Fifteenth Amendment, which would prohibit states from denying the right to vote on the basis of race. The amendment’s narrow wording reflected, among other factors, a widespread and tenacious commitment to the traditional structure of federalism. Even so, Congress passed the amendment with exclusively Republican support. As historian Eric Foner has written, “Democrats and a handful of Republicans” decried the amendment as “the crowning act of a Republican conspiracy to replace a confederation of sovereign states with a consolidated despotism.”<sup>54</sup> On the cable matter, Democrat John Stockton of New Jersey sounded the same alarm in a lengthy speech in the Senate denouncing “any legislation on the subject of ocean cables.” Stockton maintained that Congress had “no power to make telegraphs, or to make

<sup>49</sup> S. 863, 40<sup>th</sup> Congress, 3<sup>rd</sup> Session.

<sup>50</sup> C.G., 40<sup>th</sup> Congress, 3<sup>rd</sup> Session, February 2, 1869, 778; March 2, 1869, 1787, 1826.

<sup>51</sup> Thornton to Clarendon, March 3, 1869, MSS Clar. dep. c. 480, Papers of George William Frederick Villiers, 4<sup>th</sup> Earl of Clarendon, with papers of related families, Bodleian Libraries, Oxford.

<sup>52</sup> C.G., 40<sup>th</sup> Congress, 3<sup>rd</sup> Session, February 11, 1869, 1083; February 23, 1869, 1494, 1500–502. C.G., 41<sup>st</sup> Congress, 1<sup>st</sup> Session, March 17, 1869, 103–4.

<sup>53</sup> C.G., 40<sup>th</sup> Congress, 3<sup>rd</sup> Session, January 5, 1869, 171; February 11, 1869, 1083; February 23, 1869, 1502.

<sup>54</sup> Foner, *The Second Founding*, 107. William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore: Johns Hopkins University Press, 1969), 46–78.

railroads, or to authorize any one else to do it.” Chartering companies had long fallen to the states, and Congress could not meddle with these “creatures” of the states “under the pretense” of the commerce power.<sup>55</sup> One Republican newspaper discounted Stockton’s speech as “a dose of the most approved Democratic doctrine about Congressional usurpations, the rights of the States, etc.”<sup>56</sup>

At the state level, however, many Republicans aligned with Democrats in declaring states’ authority over international cables. As ideological and sectional divisions increasingly frayed the Republican Party, the fissure between federal and state officials over the matter of telegraph cables further divided its ranks.<sup>57</sup> State officials in the North, Democrats and Republicans alike, contested federal power over cable landings, challenging the extension of the national government’s reach outside of the former Confederacy. By early February 1869, the company had shifted its sights from New York to Duxbury, Massachusetts, where the topography of the seabed offered an ideal location for the cable.<sup>58</sup> Authorities in Delaware nonetheless still hoped to lure the cable to their shores. The Democratic legislature appointed an agent to negotiate with the company and asserted Delaware’s “right to use her soil” to authorize a cable landing—a right that Republican legislatures in New York and Maine had previously assumed.<sup>59</sup>

Several Massachusetts politicians and businessmen undertook to outstrip this competition and ensure that the cable could land in their state regardless of the federal government’s action or inaction. In early March, a group of American “nominees” for the French company petitioned the state legislature to incorporate an American company, to be called the “Ocean Telegraph Company,” for the purpose of extending a cable from the Duxbury shore beyond the 3-mile belt in question. The new company—the French company in a different guise—could then splice this American cable to the French one in international waters. Technically, no foreign cable would penetrate American borders, which the French company’s proponents believed would obviate any justification for federal opposition. Prominent businessmen in Boston supported the plan, touting the “great importance that the French Telegraphic cable be landed on the shore of Massachusetts.” Initially, the legislature’s Committee on Mercantile Affairs reported adversely on the bill to

<sup>55</sup> C.G., 41<sup>st</sup> Congress, 1<sup>st</sup> Session, April 5, 1869, 492–95.

<sup>56</sup> “Washington,” *New-York Tribune*, April 6, 1869, 1. For a Democratic perspective, see “The Ocean Telegraph Monopoly Bill,” *New York Herald*, March 20, 1869, 3.

<sup>57</sup> On Republicans’ ideological and sectional differences, see Barreyre, *Gold and Freedom*.

<sup>58</sup> “Massachusetts,” *New York Herald*, February 10, 1869, 10.

<sup>59</sup> *Laws of the State of Delaware, Passed at a Session of the General Assembly, Commenced and Held at Dover, on Tuesday, the Fifth Day of January, A.D. 1869, and of the Independence of the United States Ninety-Third* (Dover: Delawarean Office, 1869), vol. 13, ch. 547 (January 26, 1869), 649–50. Foner, *Reconstruction*, 421–22. *Acts and Resolves Passed by the Thirty-Fifth Legislature of the State of Maine* (Augusta: Fuller & Fuller, 1856), ch. 677 (April 10, 1856), 762. *Laws of the State of New York, Passed at the Ninetieth Session of the Legislature* (Albany: Weed, Parsons, & Company, 1867), vol. 2, ch. 524 (April 22, 1867), 1466.

incorporate the Ocean Telegraph Company.<sup>60</sup> At least one Republican committee member, a Boston merchant, maintained that “the authority to land the cable rested exclusively with Congress.”<sup>61</sup> The press suspected that resistance arose from interested parties who wanted a guarantee that the French company would contract to convey messages once onshore through a particular overland telegraph line.<sup>62</sup> Supporters of the French cable, including Republicans and at least one Democrat, quickly overcame the opposition. The almost entirely Republican state legislature incorporated the Ocean Telegraph Company on March 30, 1869, granting permission from Massachusetts to land the cable.<sup>63</sup>

Aiming to sidestep a collision with federal authorities, the attorney general of Massachusetts, Republican Charles Allen, issued an official opinion to clarify the state’s responsibilities to Congress and the new company. He considered it neither “necessary” nor “proper” for the state “to institute any judicial proceedings to ascertain whether the consent of Congress is also necessary to make the act efficacious.” Further, Allen declared that the charter for the Ocean Telegraph Company did not obligate the state “to maintain or vindicate such corporation in the exercise of those rights.”<sup>64</sup> The implication was that state authorities would not be bound to oppose federal forces if the president sent ships to prevent the cable landing. Many newspapers assumed that no such scenario would arise, believing that the state legislature had averted “any difficulty growing out of the Constitution.”<sup>65</sup> In London, the secretary of the French company expressed confidence in the arrangement.<sup>66</sup> Allen’s opinion, however, reflected the doubts that surrounded the state legislature’s action and the looming prospect of federal intervention.

<sup>60</sup> “The French Atlantic Cable,” *The Philadelphia Inquirer*, July 30, 1869, 8. Acts of 1869 c. 112. SC1/229, Massachusetts Archives, Boston, Massachusetts. “Massachusetts,” *New York Herald*, February 10, 1869, 10. “The French Cable,” *New York Herald*, July 20, 1869, 7. Quotation from “Petition of J.M. Forbes and others in aid of the petition of Geo. M. Dexter and others for incorporation of the Ocean Telegraph Co.,” Acts of 1869 c. 112. SC1/229, Massachusetts Archives, Boston.

<sup>61</sup> “Massachusetts Legislature,” *Boston Daily Advertiser*, February 12, 1869, 2. Legislative biographical file card for Samuel Dexter Crane (1816–1889), State Library of Massachusetts, Boston, Massachusetts.

<sup>62</sup> “Massachusetts,” *New York Herald*, February 10, 1869, 10. “Telegraphic Operations,” *New York Herald*, February 16, 1869, 4. The *Herald* eventually ascribed opposition to concern about securing mutual cable-landing rights in France.

<sup>63</sup> Acts of 1869 c. 112. SC1/229, Massachusetts Archives. “Telegraphic Operations,” *New York Herald*, February 16, 1869, 4. Legislative biographical file cards for Benjamin Dean (1824–1897), Gershom Bradford Weston (1799–1869), Horace Hopkins Coolidge (1832–1912), State Library of Massachusetts. “Composition of the State of Massachusetts Senate” and “Composition of the State of Massachusetts House of Representatives,” State Library of Massachusetts, <https://www.mass.gov/info-details/state-library-resources-on-past-and-current-massachusetts-political-figures> (last accessed September 14, 2021).

<sup>64</sup> *Annual Report of the Attorney General for the Year Ending December 31, 1869* (Boston: Wright & Potter, State Printers, 1870), 10.

<sup>65</sup> “The New Cable Success,” *New-York Tribune*, July 14, 1869, 1. *Daily Examiner* (San Francisco), July 14, 1869, 3. “The New Cables,” *The Missouri Democrat*, July 15, 1869, 1. “Another Cable,” *Warren Mail*, July 20, 1869, 2. “The French Cable,” *New York Herald*, July 20, 1869, 7.

<sup>66</sup> “The French Atlantic Cable,” *The Philadelphia Inquirer*, July 30, 1869, 8.

By the end of its session in April 1869, Congress had failed to enact legislation regarding foreign cables and was not slated to reconvene until December, months after the French company intended to land its cable in Duxbury. In May, however, the Grant administration took up the issue. The attorney general of the United States, Ebenezer Hoar, received a letter from the New York, Newfoundland and London Telegraph Company, asking whether the company could legally land its cable from Newfoundland on the shores of Maine or “connect its cables with those of any other company chartered by one of the States of the United States.” The inquiring company held a legislative grant from Maine, issued in 1856, conceding a monopoly over the state’s foreign telegraphy for 25 years.<sup>67</sup> The question had conspicuous bearing on the French company. Hoar’s reply, which the press printed, maintained that permission from a state would not suffice to put a foreign cable on sound footing.<sup>68</sup>

Key to Hoar’s argument was his understanding of what constituted and preserved a nation, in both physical and figurative terms. He quickly dismissed the idea that a concession or charter by a foreign nation could convey “rights to a company to exercise any franchise within the territory of the United States.” The inquiry had raised no question about a foreign government’s concession; Hoar’s statement was a thinly veiled objection to the French company’s charter. Drawing on international law, he defined the nation’s jurisdiction as extending a “marine league,” or a little over 3 miles, from its coast. Hoar turned then to the question of the constitutional division of powers between the federal and state governments. Without Congress’s prior approval, he insisted, no state could “confer rights ... to carry on intercourse with foreign nations by a telegraphic cable” that would provide for “any permanent security for their value or continuous enjoyment.” A telegraphic connection with a foreign nation represented “a means of national communication ... vital and important, both in peace and in war, to the national interests, and under some circumstances, possibly even to the national existence.” It was therefore “impossible” to permit one state to control such a cable.<sup>69</sup>

The attorney general argued that the Commerce Clause and *Gibbons v. Ogden* undergirded exclusive federal control of foreign telegraphing. He maintained that the *Gibbons* precedent readily applied and states could not interfere; Congress had already “asserted and exercised” its power to regulate telegraphic commerce through legislation related to certain telegraph lines and the 1866 Telegraph Act.<sup>70</sup> In response, the secretary of the French company conceded that Congress had acted, but he insisted that the Telegraph Act, in fact, authorized companies accepting its terms to construct oceanic as well

<sup>67</sup> *Acts and Resolves Passed by the Thirty-Fifth Legislature of the State of Maine*, ch. 677 (April 10, 1856), 762.

<sup>68</sup> Ebenezer Hoar to Peter Cooper (president of the New York, Newfoundland and London Telegraph Company), May 20, 1869, in “Opinion of Attorney-General Hoar On the Constitutional Rights of Foreign Telegraph Companies to Land Cables in the US,” *The Telegrapher*, June 12, 1869, 333.

<sup>69</sup> “Opinion of Attorney-General,” 333.

<sup>70</sup> “Opinion of Attorney-General,” 333.

as overland lines.<sup>71</sup> This line of argument drew little attention in 1869 but became a subject of debate among American authorities and telegraph companies in decades to come.<sup>72</sup> As matters stood in 1869, no federal legislation had spoken specifically to the French company or clearly established terms for international cables. Despite Hoar's insistence that Congress had already exerted its exclusive power over telegraphy, federal law remained silent on relevant questions. Jurisprudence surrounding Congress's "dormant" commerce power left room for argument that the cable could proceed uninhibited under state law.<sup>73</sup>

With the legal questions unresolved but with the Grant administration's opposition now clear, the dispute escalated as the *Great Eastern* approached American shores. As Congress remained in recess, newspapers speculated that an injunction might delay the cable's operation until Congress reconvened and authorized its use.<sup>74</sup> The *New York Sun* anticipated that the United States Navy would repel the *Great Eastern* if it attempted to penetrate the 3-mile limit.<sup>75</sup> President Grant avoided such a stand-off through a temporary resolution intended to assert the pre-eminence of the federal government in defending American borders and interests. In an official note to the British minister and the French chargé d'affaires and a copy delivered to the governor of Massachusetts, Secretary of State Hamilton Fish announced, "the entire question of the allowance or prohibition of such means of foreign intercourse, commercial and political, and of the terms and conditions of its allowance, is under the control of the government of the United States." Treating the cable landing as a diplomatic issue, the administration declared that the French government's purported concession of an exclusive right to "maintain" submarine telegraphy between France and the United States represented "an assumption upon the part of France to control the maritime waters of the United States," which the federal government could not ignore. The French company's charter imposed "a monopoly within the limits of the United States, restricting the enterprise of American citizens." The note also took exception to France's claimed prerogative of inspecting all messages to and from the United States.<sup>76</sup>

Having asserted federal authority, President Grant and the Department of State ultimately decided not to interfere with the cable landing when the company agreed to comply with the conditions outlined in the bill that the Senate had passed and with any regulations Congress might enact in its next session.

<sup>71</sup> "The French Atlantic Cable," *The Philadelphia Inquirer*, July 30, 1869, 8.

<sup>72</sup> 14 Opinion Attorney General 64 (July 22, 1872). *United States v. Western Union Tel. Co.*, 272 F. 311 (February 25, 1921). Acting Comptroller Gen. Elliott to B.R. Allen, Superintendent, Western Union Telegraph Company, 19 Comp. Gen. 555, B-1878 (December 6, 1939).

<sup>73</sup> "The Right to Land Cables," *The Telegrapher*, June 12, 1869, 336. "The Government and the French Cable," *The Telegrapher*, July 24, 1869, 384.

<sup>74</sup> "The New Cable and the Old," *Springfield Republican*, July 3, 1869, 2. "Telegraph News," *Baltimore Sun*, July 15, 1869, 1.

<sup>75</sup> *New York Sun*, June 30, 1869, 2. "The Franco-Rebel Telegraph Company," *New York Sun*, July 16, 1869, 2.

<sup>76</sup> Fish to Count Faverney and Thornton, July 10, 1869; Fish to William Claflin (governor of Massachusetts), July 14, 1869; L.G. Watson (agent of the French Atlantic Cable Company) to Fish, July 16, 1869, in "Papers Relating," *Message of the President*, XLII-XLV.

To that end, the company agents promised “to do their utmost to induce the government of His Majesty the Emperor” to revise the company’s exclusive concession and allow United States telegraph companies to land on French shores. The question of government censorship remained unaddressed.<sup>77</sup> Grant appreciated the benefits of an additional cable and considered the company’s commitment to relinquish its exclusive privileges a sufficient safeguard for American interests and acknowledgement of federal authority.<sup>78</sup> Some denounced Grant’s stance as evidence of an overreaching executive branch, presuming to infer the will of Congress, and a spineless and unconstitutional surrender to the French company. Others cheered his handling of the crisis.<sup>79</sup> On July 27, 1869, amid great fanfare, the cable arrived at Duxbury.<sup>80</sup> The *Great Eastern* departed to lay its next cable, one connecting Britain and India.<sup>81</sup>

Fish and Grant now faced obstacles in enforcing the general principles that they had laid down. The division between state and federal power remained ambiguous. The Republican governor of Massachusetts William Claflin still maintained that permission from a state legislature sufficed to authorize a foreign cable. In August 1869, an agent inquired whether a British company could land a cable with permission from the governor or would instead require legislation. Claflin replied that the company needed only to secure “an act of incorporation” from the state legislature “in the same manner that the French Cable Company did.” He made no mention of the federal oversight Grant’s administration had proclaimed.<sup>82</sup>

When Congress reconvened in December 1869, the French Atlantic Cable Company had failed to relinquish its exclusive privileges, and Congress took up the matter again at President Grant’s urging.<sup>83</sup> The Senate’s return to the topic coincided with debate over the legitimacy of the state government in Georgia, which had expelled its elected Black legislators in 1868. As senators battled over Congress’s proper role in reconstructing Georgia, the question of a state’s sovereignty over its borders was immediate and incendiary.<sup>84</sup>

<sup>77</sup> Fish to Elihu Washburne (United States minister to France), July 30, 1869, in “Papers Relating,” *Message of the President*, XLVI–L. Thornton to Clarendon, July 12, 1869, Series II, Box 3, Sir Edward Thornton Papers, Beinecke Rare Book & Manuscript Library, New Haven, Connecticut.

<sup>78</sup> *Congressional Record* (hereafter C.R.), 44<sup>th</sup> Congress, 1<sup>st</sup> Session, December 7, 1875, 177–78.

<sup>79</sup> “A Usurpation of Power,” *New York Sun*, July 20, 1869, 2. “The Government and the French Cable,” *The Telegrapher*, July 24, 1869, 384. “The Secretary of State Humbugged,” *New York Sun*, July 21, 1869, 2. “Facts of History—An Apology to Secretary Fish,” *New York Sun*, July 22, 1869, 2.

<sup>80</sup> “The French Cable,” *New-York Tribune*, July 28, 1869, 1.

<sup>81</sup> “The French Atlantic Cable,” *The Observer*, July 4, 1869, 5. Müller, *Wiring the World*, 51.

<sup>82</sup> Letters Official, Letter to R.C. Hawkins from Gov. Claflin (signed by private secretary Chas. H. Taylor), August 31, 1869, vol. 70, p. 51, GO1/series 568X, Massachusetts Archives, Boston. Executive Department Letters, Letter to Claflin from Hawkins, August 20, 1869, vol. 123, p. 110, GO1/series 567X, Massachusetts Archives, Boston.

<sup>83</sup> The American minister in France simultaneously sought to negotiate with the French government to establish terms more favorable to United States companies. C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, December 6, 1869, 6; December 10, 1869, 64; December 17, 1869, 198. Washburne to Fish, September 18, 1869, in “Papers Relating,” *Message of the President*, LI.

<sup>84</sup> C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, December 17, 1869, 201–5. 16 Stat. 59 (December 22, 1869). Edmund L. Drago, *Black Politicians and Reconstruction in Georgia: A Splendid Failure* (Baton Rouge: Louisiana State University Press, 1982), 48–56.

Republicans remained fiercely divided from Democrats, while disaffection about Radical Reconstruction splintered the Republican Party.<sup>85</sup> Many moderate Republicans, like Democrats, remained committed to defending states' rights and curbing the federal government's power.<sup>86</sup> When Radical Republican Charles Sumner moved to consider a bill regarding foreign cables, Ohio Democrat Allen Thurman quickly reminded the Senate of the "very serious question" about a state's right to authorize a cable "irrespective of any assent of the General Government." Sumner blasted these comments as "reviv[ing] an old and very familiar question...States rights under another *alias*." Although Thurman resented the implication that he had stirred up "the ghost of secession, much less the reality of the civil war," an argument for state sovereignty was inextricably bound to these, especially in the eyes of radicals.<sup>87</sup>

Nonetheless, consensus emerged among legislators of both parties that Congress indeed had authority to regulate international telegraphy and faced an imperative to do so. Legislators cited varied justifications, reaching beyond the Commerce Clause that had featured prominently in earlier debate.<sup>88</sup> Despite Thurman's lip service to states' rights, he concluded that Congress had "some power of regulation" based on the constitutional war power, which ensured that the federal government needed "some control over these cables." Sumner held that his home state of Massachusetts had usurped the nation's "jurisdiction," the "common property of the whole country" in which all Americans had an interest.<sup>89</sup>

Others pointed to practical reasons for congressional action. Democrat Fernando Wood, who trumpeted states' rights when decrying Reconstruction amendments and Republican policies, fully backed federal power over international telegraphy in his report for the Committee on Foreign Affairs to accompany a general bill for regulating foreign submarine cables. He acknowledged that lack of legislation and jurisprudence had left the states' role in the matter "undetermined." He maintained, though, that Congress could regulate cables without presuming its "exclusive authority." Appealing to common sense as Hoar had, Wood wrote, "it is obvious that there should be established by Congress some general provisions" to extend permission to land cables and determine the "conditions and obligations" attending this privilege. "An interest so great should be under central control," he affirmed.<sup>90</sup> Fellow Democrat Thomas Bayard elaborated that foreign "capitalists" had received "the

<sup>85</sup> Benedict, *A Compromise of Principle*, 14.

<sup>86</sup> Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *The Journal of American History* 61 (1974): 65–90.

<sup>87</sup> C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, December 17, 1869, 198–200. S. 115, 41<sup>st</sup> Congress, 1<sup>st</sup> Session. This bill was nearly identical to that which the Senate had passed the previous spring (S. 863, 40<sup>th</sup> Congress, 3<sup>rd</sup> Session).

<sup>88</sup> Among earlier arguments centered on the Commerce Clause, see C.G., 39<sup>th</sup> Congress, 1<sup>st</sup> Session, March 20, 1866, 1519; and "The French Cable," *The World*, January 9, 1869, 1.

<sup>89</sup> C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, December 17, 1869, 200; December 21, 1869, 268–69.

<sup>90</sup> Committee on Foreign Affairs, "Telegraph Between United States and Foreign Countries," to accompany bill H.R. No. 2591, 41<sup>st</sup> Congress, 3<sup>rd</sup> Session, Report No. 1, December 21, 1870, 9–10.

idea ... that some action is necessary of an affirmative character—action, not by State governments, but by the Government of the United States” to ensure the “safety for their investment” in submarine cables. Only a congressional measure, he argued, could instill confidence among entrepreneurs.<sup>91</sup> A Republican from Wisconsin maintained that limitations on state action, as under the Constitution’s Contracts Clause, ensured that only Congress was equipped to combat “the fearful growth of monopolies” in industries such as telegraphing.<sup>92</sup> Across the political spectrum, congressmen embraced the idea that foreign telegraphs posed commercial problems beyond the authority and capacity of states to address—a conclusion that Northern state officials of both parties had resisted.

The main differences in Congress arose over whether to calibrate legislation to target the French company and how to set conditions for foreign telegraphing without impinging on the jurisdiction of other nations. Congress divided over whether general legislation should apply retroactively to the French cable or other existing cables.<sup>93</sup> Congress also struggled to determine its response to the French government’s ongoing inspection of messages. Wood’s report recognized that “throughout Europe communication by telegraph is under the government eye.” He took for granted that the United States government could not retaliate with the “same supervision” since it would be “inconsistent with our institutions,” implicitly evoking vaunted republican ideals and general freedom from surveillance that had long distinguished the American postal system from its European counterparts. With international telegraphy, the United States would have to act on its “right ... of asking that all cable companies connecting with the American coast” grant the American government and public “exemption from the inspection or interference with messages transmitted from this end.” The federal government hoped that consuls would broker conventions to ensure privacy and favorable terms for Americans. In the meantime, Congress could only resort to its “right ... of asking.”<sup>94</sup> The realization of sovereignty hinged on recognition from abroad. The quandary led two senators to conclude that the matter required a treaty in addition to or in place of legislation.<sup>95</sup>

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Jerome Mushkat, *Fernando Wood: A Political Biography* (Kent: The Kent State University Press, 1990), 146, 153, 161, 176, 279 (FN 1).

<sup>91</sup> C.G., 41<sup>st</sup> Congress, 3<sup>rd</sup> Session, January 12, 1871, 450.

<sup>92</sup> C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, December 21, 1869, 270.

<sup>93</sup> C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, December 21, 1869, 268–73. Committee on Foreign Affairs, “Telegraph with Foreign Countries,” to accompany bill H.R. No. 1263, 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, Report No. 35, March 3, 1870, 9.

<sup>94</sup> Committee on Foreign Affairs, “Telegraph Between United States and Foreign Countries,” to accompany bill H.R. No. 2591, 41<sup>st</sup> Congress, 3<sup>rd</sup> Session, Report No. 1, December 21, 1870, 6–7. Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, MA: Harvard University Press, 1995), 42–44, 257–80. Antebellum suppression of abolitionist mailings, although not backed by congressional legislation, was a key exception to the absence of surveillance in American postal history.

<sup>95</sup> Thurman ultimately advocated treaty making. C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, December 21, 1869, 273; 41<sup>st</sup> Congress, 3<sup>rd</sup> Session, January 12, 1871, 450.

Although the direct conflict with the French company receded, Congress continued to deliberate on the issues the episode had raised. In March 1870, the French government agreed to Grant's demand by rescinding the company's exclusive privileges to connect the United States and France.<sup>96</sup> The revocation of the monopoly removed Grant's primary objection to the company: that the French charter had infringed on the rights of American entrepreneurs and the United States' sovereignty over the nation's shores. The company formally sought and received unqualified federal approval from the secretary of state in June 1870, a year after the cable had landed.<sup>97</sup> Nevertheless, issues surrounding the general regulation of submarine cables and the censorship of American messages remained. By 1871 the French Atlantic Cable Company had become part of the Anglo-American Telegraph Company's "joint purse," a "cartel of cable companies" that set prices and shared profits. When Anglo-American Telegraph fully acquired the French company in 1873, Congress faced an even more pressing need to encourage competition and approve the landing of other cables.<sup>98</sup> By the Grant administration's reckoning, the international standing of both the United States and its enterprising citizens depended on federal action. Congress still needed to do its part to promote the nation's sovereignty, even if the full realization of this sovereignty would turn on the response of foreign governments and corporations.

For the remainder of the 1870s, Congress attempted to pass legislation to regulate the landing of international cables, aiming to counter budding monopolies and resist inspection of American messages. These efforts yielded limited results. The House and Senate each passed bills on the subject, but only once, in the case of the bill that Wood's report had ultimately accompanied, did they manage to pass the same bill in the same session. President Grant pocket-vetoed this bill because it included a clumsily crafted amendment and neglected to require foreign governments to grant reciprocal privileges to American companies.<sup>99</sup> Numerous other bills scattered among committees came to nothing, as one senator bemoaned that Congress's approach to the issue "is an effort, apparently, how not to have any ocean telegraphs."<sup>100</sup> The inefficiency of committees in an overstretched Congress posed a significant obstacle to general legislation. Eventually, these efforts circled back to the vexed question of states' rights.

In 1875, President Grant again laid the question of international telegraphy before Congress, retelling the story of the French cable and explaining the stance that he had adopted. He outlined a set of principles to inform legislation, which he would adhere to in the continuing absence of congressional

<sup>96</sup> Jules Berthemy (French minister to the United States) to Fish, April 8, 1870, in "Message from the President of the United States transmitting in response to the Senate resolution of May 2, 1884, a report of the Secretary of State in relation to the landing of foreign telegraph cables on the shores of the United States," 48<sup>th</sup> Congress, 2<sup>nd</sup> Session, Ex. Doc. No. 51, January 27, 1885, 6–7.

<sup>97</sup> Berthemy to Fish, June 15, 1870; Fish to Berthemy, June 18, 1870, in "Message from the President," 48<sup>th</sup> Congress, 2<sup>nd</sup> Session, Ex. Doc. No. 51, January 27, 1885, 8.

<sup>98</sup> Grisct and Headrick, "Submarine Telegraph Cables," 554–55.

<sup>99</sup> "Pocket Veto of the Ocean Telegraph Bill," *New York Times*, March 7, 1871, 1. C.G., 42<sup>nd</sup> Congress, 2<sup>nd</sup> Session, May 22, 1872, 3667.

<sup>100</sup> C.G., 41<sup>st</sup> Congress, 3<sup>rd</sup> Session, January 12, 1871, 450–52; January 13, 1871, 478.

regulation or international conventions. Grant declared that the government should permit the arrival of a submarine cable only if it met certain conditions for preventing monopolies. Expanding the principle of reciprocity, Grant would oppose any line operating under a concession from a country that did not allow American cables “to land and freely connect with and operate through its land lines.” The United States government would also need assurance that the company landing the cable was “prohibited from consolidating or amalgamating with any other cable-telegraph line.” The line would have to prioritize the transmission of government messages and “enter into a satisfactory agreement” limiting its charges. President Grant considered it the duty of the executive, until Congress might act, to enforce these provisions and promote the interests of the United States government and public in telegraphy.<sup>101</sup>

Although Congress failed to pass legislation laying out general conditions for authorizing international telegraphs, it did grant permission to particular telegraphic entrepreneurs to land cables connecting the United States to Asia and Europe. In legislation regarding the future lines of these specific “corporators,” Congress imposed some of the conditions that had appeared in the more sweeping, and ultimately failed, bills to regulate all international telegraphs landing in the United States. To retain Congress’s approval, each company had to ensure that the United States government would have “the same or similar privileges” in controlling the lines as any foreign government possessed, American citizens would pay the same rate as “citizens of the most favored nations,” and operators would prioritize transmission of government messages “under such regulations as may be agreed upon by the governments interested.” While Congress passed these stipulations for the designated companies, broader legislation supervising and authorizing foreign telegraphs remained elusive.<sup>102</sup>

Animating Congress’s protracted efforts to regulate international telegraphing was a vision of a vigorous federal government that would advance American business interests, ensure competitive transmission rates, and protect a right to privacy and freedom of the press. As Charles Sumner declared the federal government the new “custodian of freedom” within the nation during Reconstruction, many Americans also imagined a reinvigorated national authority in the international realm.<sup>103</sup> Many Republicans and Democrats alike rallied to this idea. In 1868, for instance, Congress passed an Expatriation Act, which committed the federal government to protect the rights of naturalized citizens traveling abroad.<sup>104</sup> In international telegraphy, federal action appeared necessary to challenge the domination of British

<sup>101</sup> C.R., 44<sup>th</sup> Congress, 1<sup>st</sup> Session, December 7, 1875, 177–78.

<sup>102</sup> 19 Stat. 201 (August 15, 1876). 19 Stat. 232 (February 20, 1877). Earlier bills these measures echoed included H.R. 2591, 41<sup>st</sup> Congress, 3<sup>rd</sup> Session; H.R. 2853, 42<sup>nd</sup> Congress, 2<sup>nd</sup> Session; and H.R. 3535, 43<sup>rd</sup> Congress, 1<sup>st</sup> Session.

<sup>103</sup> Quoted in Foner, *The Second Founding*, 17.

<sup>104</sup> 15 Stat. 223 (July 27, 1868). Lucy E. Salyer, *Under the Starry Flag: How a Band of Irish Americans Joined the Fenian Revolt and Sparked a Crisis over Citizenship* (Cambridge, MA: The Belknap Press of Harvard University Press, 2018), 170–73.

corporations and ensure fair opportunity for United States telegraph entrepreneurs and customers.<sup>105</sup>

Amid efforts to regulate foreign cables, heightened expectations for the federal government also contributed to a movement supporting congressional action regarding domestic telegraphy. Great Britain passed legislation in 1868 to nationalize its telegraph networks, following the example of other European powers and leaving the United States as the “only industrialized nation without a government telegraph service.”<sup>106</sup> The British transition revived questions dating back to the 1840s about whether the United States should control domestic telegraphs or charter its own telegraph network under the auspices of the Post Office Department to provide citizens with facilities comparable to those in Europe. Between 1866 and the early 1890s, Congress considered, but repeatedly shied away from, proposals for a postal telegraph.<sup>107</sup> In 1877, as part of the growing movement for a postal telegraph, petitioners declared that “the government alone can secure to us the freedom of the press and the sanctity of private correspondence” as well as affordable and uniform rates.<sup>108</sup> Long before United States jurisprudence took up a “right to privacy,” as such, these petitioners framed the notion and called upon the federal government to enforce it.<sup>109</sup>

Public pressure to protect American communications and counter monopolies compelled Congress to attempt again to pass general legislation regarding international submarine cables. In 1878, scores of merchants and telegraphers petitioned Congress not to grant exclusive privileges for landing cables. They wanted legislation permitting “any and all persons and companies, without preference, to land telegraphic cables on the shores of the United States.”<sup>110</sup> Congress considered a bill authorizing the secretary of state to grant permission to American citizens to land telegraph cables on the nation’s shores and placing restrictions on all international telegraph lines to the United States. In addition to applying more broadly the conditions that Congress had already

<sup>105</sup> C.G., 41<sup>st</sup> Congress, 3<sup>rd</sup> Session, February 14, 1871, 1219. Griset and Headrick, “Submarine Telegraph Cables,” 544, 550–57, 559–62. The federal government’s longstanding direction of the postal system offered a precedent for such an expansive role. See John, *Spreading the News*.

<sup>106</sup> David Paul Hochfelder, “A Comparison of the Postal Telegraph Movement in Great Britain and the United States, 1866–1900,” *Enterprise and Society* 1 (2000): 742, quotation at 747.

<sup>107</sup> C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, July 5, 1870, 5178. Headrick, *The Invisible Weapon*, 33. Wolff, *Western Union*, 16–17, 153, 155–56. Richard R. John, “The Politics of Innovation,” *Daedalus* 127 (1998): 195–200. John, *Network Nation*, 24–64, 170–99. Hochfelder, “A Comparison,” 739–61.

<sup>108</sup> 44A–H12.1, Committee on the Post Office and Post Roads, National Archives and Records Administration (hereafter NARA) I, Washington, DC, includes hundreds of such petitions. See also 44A–H3.1, Committee on Commerce: cheap telegraphy, NARA I. On petitioning for cheap telegraphy, see John, *Network Nation*, 58, 132–33. On the threat to the free press posed by private telegraph monopolies, see Hochfelder, “A Comparison,” 751–52; John, *Network Nation*, 145–49; and Wolff, *Western Union*, 121–22.

<sup>109</sup> For a famous early articulation of the “right to privacy” in response to technological advancement, see Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* IV (1890): 193–220. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>110</sup> For examples, see C.R., 45<sup>th</sup> Congress, 2<sup>nd</sup> Session, May 1, 1878, 2991; May 6, 1878, 3184, 3224; May 7, 1878, 3225; June 4, 1878, 4117. See also C.R., 45<sup>th</sup> Congress, 2<sup>nd</sup> Session, May 9, 1878, 3348; and 45A–H6.10, Committee on Commerce: free competition in the construction and operation of telegraphic cables, NARA I.

imposed on specific grantees, the bill included provisions to secure privacy in communications and safety of telegraph lines.<sup>111</sup>

Discussion of the bill reignited disputes about federal and state sovereignty, a decade after the French Atlantic cable affair. By this point, the federal government had largely retreated from efforts to reform the South and protect freedpeople, and Democrats had regained control of former Confederate states.<sup>112</sup> The meaning of the constitutional changes promulgated during Reconstruction remained undetermined.<sup>113</sup> In matters of telegraphy and commerce, the Supreme Court had recently endorsed considerable federal power in *Pensacola Telegraph Company v. Western Union Telegraph Company*, striking down a state law conferring exclusive privileges on a local telegraph company. The decision defined telegraphy as commerce, upheld congressional regulation of domestic telegraphs, and broadly interpreted the 1866 Telegraph Act as prohibiting states from granting monopolies to any telegraph company. The ruling marked the court's increasing tendency to denounce states' incursions on interstate and foreign commerce.<sup>114</sup>

Yet, some federal legislators balked at extrapolating from the *Pensacola* decision. Vermont Republican George Edmunds, a constitutional expert who later declined a nomination to the Supreme Court, drew the Senate's attention to the "very important question as to where the dividing line is between State and national authority in respect of the shores of the sea." Edmunds, known for his "constitutional conservatism," proclaimed the state's "complete dominion over the soil in respect of the uses to which it can be applied." Access to American shores was not Congress's to give, without a cession from the state.<sup>115</sup> Fellow Republican Stanley Matthews of Ohio, later a Supreme Court justice, countered that the bill merely exercised the commerce power, as affirmed in *Pensacola*. Edmunds insisted that because *Pensacola* had not directly involved state property, "there was no invasion of the dominion of the State" as would occur in the landing of foreign cables on the state's shores without its consent.<sup>116</sup> Suggesting a middle ground, Republican Timothy Howe of

<sup>111</sup> S. 861, 45<sup>th</sup> Congress, 2<sup>nd</sup> Session. The provisions regarding privacy of communication and protection of the cables resembled those of the bill that Grant had pocket-vetoed (H.R. 2591, 41<sup>st</sup> Congress, 3<sup>rd</sup> Session).

<sup>112</sup> Foner, *Reconstruction*, 575–87.

<sup>113</sup> Foner, *The Second Founding*, 126.

<sup>114</sup> *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U.S. 1 (1878). For examples of the Supreme Court's decisions limiting states' power in light of the Commerce Clause in the years leading up to *Pensacola*, see *Steamship Co. v. Portwardens*, 73 U.S. 31 (1867); *Case of State Freight Tax*, 82 U.S. 232 (1873); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); and Sholley, "The Negative Implications," 577–83, 585 (FN 145). See also Barry Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," *The University of Chicago Law Review* 67 (2000): 1101–10. For an alternative interpretation, emphasizing certain areas in which the court upheld state regulation, see Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *The Supreme Court Review* 1978 (1978): 55–56.

<sup>115</sup> C.R., 45<sup>th</sup> Congress, 2<sup>nd</sup> Session, June 5, 1878, 4118; June 6, 1878, 4175. On Edmunds, see John, *Network Nation*, 172–73; and Benedict, *A Compromise of Principle*, quotation ("constitutional conservatism") at 40.

<sup>116</sup> C.R., 45<sup>th</sup> Congress, 2<sup>nd</sup> Session, June 6, 1878, 4175–76. For Matthews's later role on the Supreme Court in the adjudication of Congress's dormant power under the Commerce Clause, see *Bowman v. Chi. & N. Ry.*, 125 U.S. 465 (1888); and Sholley, "The Negative Implications," 584–86.

Wisconsin “suppose[d]” that Congress and the states shared jurisdiction over the area “inside of the low-water mark” so that under the bill a company would still need state permission before exercising privileges Congress had conferred. Congress offered little clarification. Senators passed the bill over Edmunds’s objections, but it subsequently died in the House.<sup>117</sup>

The Senate’s debate reflected the deep and lingering ambiguity of federalism that encumbered efforts to assert national sovereignty in the realm of international telegraphy. The subject raised questions about states’ property rights, Congress’s power to regulate commerce, foreign relations, and the government’s responsibility to promote privacy and competition. In 1876, Sumner rightly observed of the issue, “in what various directions it runs; how many different topics it opens.”<sup>118</sup> Between 1869 and 1878, Congress contemplated and experimented with new possibilities in governance, but ultimately checked the role of the federal government in both the domestic and international realms.<sup>119</sup> Congress made forays into regulating telegraph companies, stipulating conditions in grants of landing rights to specific recipients, but did not exercise its power over commerce to the extent many Americans advocated and envisioned. The question of whether the states or the federal government had jurisdiction over the belt extending 3 miles from the low-water mark remained undecided until 1947.<sup>120</sup>

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Although Congress failed to pass general legislation regulating international telegraphy, the federal government had established significant precedents asserting its authority over cable landings. A few years after Grant announced his approach in 1875, the *Compagnie Française du Télégraph de Paris à New-York*, which was incorporated in France, sought and secured permission from the United States government to land “the Second French Cable” in Cape Cod, Massachusetts, in 1879.<sup>121</sup> Most subsequent administrations

<sup>117</sup> C.R., 45<sup>th</sup> Congress, 2<sup>nd</sup> Session, June 6, 1878, 4176.

<sup>118</sup> C.G., 41<sup>st</sup> Congress, 2<sup>nd</sup> Session, December 21, 1869, 273.

<sup>119</sup> On continued limitations of the federal government’s functions and administrative capacity through the end of the nineteenth century even amid new demands for its intervention, see Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982), especially 23 and 29–35. For overviews of debate about the extent of the nineteenth-century federal state, see Gautham Rao, “William J. Novak’s *The People’s Welfare* and the New Historiography of the Early Federal State,” *American Journal of Legal History* 57 (2017): 226–31; and Ariel Ron and Gautham Rao, “Introduction: Taking Stock of the State in Nineteenth-Century America,” *Journal of the Early Republic* 38 (2018): 61–66.

<sup>120</sup> The Supreme Court eventually resolved the issue by ruling that the land stretching from low-water mark to 3 miles offshore falls under federal authority. The court declined to apply to oceans the reasoning from *Pollard* about inland waters. *United States v. California*, 332 U.S. 19 (1947), 29–31. For the subsequent legislative history regarding submerged coastal lands, see *Parker Drilling Management v. Newton*, 139 S. Ct. 1881 (2019), 1887.

<sup>121</sup> Augustin Pouyer-Quertier to William Evarts, August 12, 1879, February 9, [1880], in “Cable-Landing Licenses: Hearings Before a Subcommittee of the Committee on Interstate Commerce,” U.S. Senate, 66<sup>th</sup> Congress, Third Session on S. 4301 (Washington, DC: Government Printing Office, 1921), 436–37, 439. Headrick, *The Invisible Weapon*, 35.

authorized the landing of cables on the conditions that Grant had described.<sup>122</sup> Old controversies and challenges to federal authority, however, resurfaced at various points. In 1891 and 1892, the same *Compagnie Française du Télégraph de Paris à New-York* attempted to circumvent requirements of the Department of State by securing authorization for new cable landings from state legislatures.<sup>123</sup> Finally in 1921 amid another imbroglio, Congress passed legislation requiring any company connecting a submarine cable from a foreign country to the United States to obtain a license from the president. The law also officially empowered the president to prevent unauthorized landings.<sup>124</sup>

The controversy over the French Atlantic cable and the regulation of international telegraphy distilled fundamental elements of the vast undertaking of Reconstruction. Along the country's edges, in the murky 3-mile belt surrounding its shores, efforts to establish federal authority played out in particularly tangible form, inciting challenges simultaneously from within and without the United States. Reconstruction required the national government to draw lines between federal and state jurisdictions and enforce those lines against the states and international governments, corporations, and agents. The enduring complexity of American federalism not only impeded constitutional change within the United States but also presented a puzzle for foreign powers. During the conflict over the French cable, the British permanent under-secretary of foreign affairs mused on "the conflict as to federal and state rights" that the telegraph landing provoked. "It is certainly a curious question," he wrote, "for it was a private transaction between a state and a foreign company, such as a loan might be like to be." He understood that the Constitution prohibited individual states from making treaties with foreign powers but wondered at where the division between federal and state power lay in authorizing cables.<sup>125</sup>

The "curious question" of the French cable demonstrated critical aspects of the nature and context of Reconstruction that scholars have not fully grasped. The constitutional debates of Reconstruction implicated matters of property, commerce, and foreign relations, ranging far beyond the federal adjudication of individual rights that historians have studied so intensively. Attempts to reconfigure power within the Union necessarily and immediately affected the nation's relations with foreign corporations and powers. Among many Americans, the Civil War and Reconstruction awakened new expectations of the federal government both at home and abroad, even as state officials of both parties endeavored to guard their authority in certain key areas. Agents of the federal government faced obstacles to asserting national sovereignty

<sup>122</sup> John K. Richards (acting attorney general) to John Sherman (secretary of state), January 18, 1898, in John Bassett Moore, *A Digest of International Law 2* (Washington, DC: Government Printing Office, 1906), 452–66. "Cable-Landing Licenses," 6.

<sup>123</sup> "Letter from the Secretary of State, transmitting correspondence and information concerning permission to land cable on United States coast since March 1, 1893," 53<sup>rd</sup> Congress, 2<sup>nd</sup> Session, Ex. Doc. No. 14, 1–5. Richards to Sherman, January 18, 1898, in Moore, *A Digest of International Law 2*, 457–61.

<sup>124</sup> 42 Stat. 8 (May 27, 1921). "Senate Passes Bill to Prevent Unauthorized Landing of Cables in United States," *The Commercial & Financial Chronicle*, May 28, 1921, 2265–66.

<sup>125</sup> Edmund Hammond to Thornton, February 5, 1870, Add MS 81081, B.L.

throughout the Union as well as in the international sphere. Americans battled with each other over the definition and re-establishment of their nation amid a technological revolution that knitted nations and economies more closely together. As Americans contested the legal and political settlement of the Civil War on many fronts, their protracted confrontations played out before foreign audiences and were enmeshed in affairs that extended well past the disputed and indeterminate bounds of the national government's domain.

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