South Carolina Law Review

Volume 9 | Issue 3 Article 8

Spring 1657

Limitations on the Power of the Federal Government to Acquire Lands within a State or: The Metamorphosis of a Constitutional Provision

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LIMITATIONS ON THE POWER OF THE FEDERAL GOVERNMENT TO ACQUIRE LANDS WITHIN A STATE

OR:

THE METAMORPHOSIS OF A CONSTITUTIONAL PROVISION

" . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be . . . "—Art. I, Sec. 8, U. S. Const.

Has the Federal Government the power to condemn private lands within a State? If so, what is the source of that power? And is the power absolute, or is it subject to limitations and restrictions? These are the questions which this paper will attempt to answer.

In the famous steel seizure case, *Youngstown Sheet and Tube Co. v. Sawyer*,[1]—which dealt primarily with the secondary issue of seizure by the President without Congressional authorization—, both Mr. Justice Douglas in his concurring opinion and Mr. Chief Justice Vinson in his dissent asserted, in passing, the existence in the Federal Government of the power of eminent domain. Said Douglas: "The power of the Federal Government to condemn property is well established." Said the Chief Justice: "The power of eminent domain, invoked in this case, is *an essential attribute of sovereignty*[2] and has long been recognized as a power of the Federal Government." Both Douglas and Vinson cited as their authority the case of *Kohl v. United States*,[3] an 1876 case which may be regarded as the final major step in the establishment of the modern concept of Federal eminent domain.

The *Kohl* case bases the Federal Government's right of eminent domain primarily on the theory that eminent domain is an incident of sovereignty, rather than on any grant, express or implied, in the Constitution. This reliance on the "sovereignty" theory may seem somewhat surprising on the part of the 1876 court; it is somewhat more surprising that Chief

1. 343 U. S. 579 (1952).
2. Wherever italics appear in this paper, they have been supplied by the author, except of course in cases of Latin phrases, case names, etc.
3. 91 U. S. 367 (1876).

Justice Vinson should have, in 1952, taken up this line of reasoning. For, leaving aside completely the question of whether a government of delegated and enumerated powers can be truly "sovereign" in the first place, the Supreme Court has for a long time tended, in controversies of a related nature, to frown rather strongly on the idea that a power can be possessed by the Federal Government simply because that power is an attribute of sovereignty.[4]

Be that as it may, in the *Kohl* case those provisions of the Constitution (Art. I, Sec. 8; and Amendment V) which indicate or imply a power of eminent domain in the Federal Government were touched upon only casually, almost incidentally; while the "attribute of sovereignty" theory was asserted, explained, rationalized, justified, and hammered home. Arguing for the United States, Assistant Attorney-General Edwin B. Smith set the tone as follows: "Though some have denied to the United States the right of eminent domain, we presume it will not be seriously contested now and here. It is *inherent in the very idea of sovereignty; an inseparable incident of sovereignty.*" And the majority opinion in the case, written by Mr. Justice Strong, embraced his argument on this point completely.

But let us not devote too much time, at this juncture at least, to condemning the court for concentrating on the wrong reason. Whatever the source, whether "attribute of sovereignty" or constitutional grant, it seems clear that the Federal Government does possess the bare right to condemn for public use lands situated within a State.

But now we come to the heart of the matter—is this right absolute, or is it restricted? *Corpus Juris Secundum*, while espousing the attribute-of-sovereignty theory and denying the necessity of constitutional grant, goes on to say:[5] "The right

4. In Kansas v. Colorado, 206 U. S. 46 (1907), when counsel for the United States, as intervenor, urged upon the Court a doctrine of "sovereign and inherent" power, the Court replied as follows: "But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments . . . . This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted."

5. 29 C. J. S., *Eminent Domain* § 3 (1941).

of eminent domain is not conferred, *but may be recognized, limited, or regulated* by constitutions."

It is here contended that the Federal Government's right of eminent domain *is* limited, and limited severely, by two provisions of the Constitution, one in the body of that instrument, the other in an Amendment. The Amendment is of course the Fifth, and the limitation therein is well recognized and has been universally abided by: " . . . nor shall private property be taken for public use, without just compensation."[6]

The other provision in question, the one in the body of the Constitution itself, (Art. I, Sec. 8), has not been so kindly dealt with. On the contrary, it has been subjected to a most extraordinary word-juggling process, a process which represents perhaps the most flagrant (yet one of the least-known) of all the examples of constitution-twisting indulged in by the consolidationist school—exceeding in boldness, if not in far-reaching effect, even the apparently illimitable stretching of the interstate commerce clause.

For the limitation in question, while stated indirectly, is stated perfectly clearly. The provision reads: [The Congress shall have Power . . .]

> To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places *purchased by the Consent of the Legislature of the State in which the Same shall be,* for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Nothing could be more clear: Congress is given the power of exclusive jurisdiction over such lands within the States as may be acquired, for the stated purposes, by the Federal Government—such acquisition being dependent upon the consent of the Legislature of the affected State.[7]

In the face of this constitutional clause, it is hard to believe that any jurist could have asserted that there were other

6. This Amendment, of course, does not in any way supersede, but only supplements, the other limitation—that of State consent—on the Federal Government's right to acquire lands within a State.

7. Whether consent must be affirmatively granted in each case or will be presumed in the absence of a resolution of objection is a secondary question which we need not consider here.

ways in which the Federal Government might acquire land within a State. Can it be seriously contended that the words "by the Consent of the Legislature . . . "—placed directly after the word "purchased" and modifying it—would have been inserted if the framers had intended that the Federal Government should also possess the power to acquire such lands *without* the consent of the State Legislature? The men who framed the Constitution were not in the habit of wasting words or of inserting them for no purpose—they meant that what lands the government might need for the stated purposes could be purchased with the consent, and *only* with the consent, of the Legislature of the affected State.[8]

The mere fact that the limitation is expressed indirectly and parenthetically rather than affirmatively is no excuse at all for failure to abide by it. The meaning is the same as if the provision read: " . . . shall have power to exercise like authority over such areas as may be purchased for the erection of forts . . . and other needful buildings, such areas to be acquired, of course, only by the consent of the Legislature of the State in which they lie."

And how does the Supreme Court now "interpret" this clear mandate of the framers? Let us quote briefly from the case of *James v. Dravo Contracting Company*:[9]

> It is not questioned that the State may refuse its consent and retain *jurisdiction* consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal government *by virtue of its sovereignty* and thus it may, *regardless of the wishes either of the owners or of the*

8. This is beyond dispute, as shown by the Madison papers. The consent provision, missing from the original draft, was inserted specifically to give the States the right to veto Federal land acquisition.

"So much of the fourth clause as related to the seat of government was agreed to, *nem. con.*

"On the residue, to wit, 'to exercise like authority over all places purchased for forts, &c.'

"Mr. GERRY contended that this power might be made use of to enslave any particular State by buying up its territory, and that the strong holds proposed would be a means of awing the State into an undue obedience to the General Government.

"Mr. KING thought, himself, the provision unnecessary, the power being already involved; but would move to *insert, after the word 'purchased,' the words, 'by the Consent of the Legislature of the State.' This would certainly make the power safe.*

"Mr. GOUVENEUR MORRIS seconded the motion, which was agreed to, *nem. con.*; as was the residue of the clause, as amended."

See p. 1496, *Madison's Reports of Debates in the Federal Convention.*

9. 302 U. S. 134 (1937).

> *States,* acquire the lands which it needs within their borders. *Kohl v. U. S.,* 91 U. S. 367, 371, 372, 23 L. Ed. 449, 451. In that event, *as in cases of acquisition by purchase without consent of the State, jurisdiction* is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses . . . .

This is indeed a metamorphosis. The phrase "by the consent of the legislature" has been bodily lifted from its position after the word "purchased"—which word it was clearly intended to modify, as demonstrated in the Madison papers—and has been made instead to modify the phrase "to exercise like authority." In other words, in the eyes of the Court, the provision now reads: "The Congress shall have power to exercise exclusive legislation, provided the State Legislature consents thereto, over such lands as may be purchased for the erection of forts, magazines, etc."

How was such a change in meaning wrought? Obviously, the idea of State consent as a prerequisite to the Federal Government's acquisition of necessary lands was intolerable to the advocates of consolidation and national supremacy (who have, generally speaking, dominated the Supreme Court from John Marshall's day on). Yet they could not ignore completely the existence of the passage "by the consent . . . . " Their only alternative, therefore, was simply to juggle the clause to suit themselves—which they did.[10]

But let the Court speak for itself. In the *Kohl* case, Mr. Justice Strong laid down the new line, in the following passage, more insistent in tone than convincing:

> The consent of a state can never be a condition precedent to its [the power's] enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

10. Thus providing a vivid demonstration of a tendency noted by Professor Walter F. Dodd in his *Implied Powers and Implied Limitations in Constitutional Law,* 29 Yale L. J. 137 (1919): "The court is an organ of the national government, associated with that government, and has in the long run shown a disposition to support national powers."

It does not take a Professor Dodd to see the danger and injustice inherent in the Marshallian concept of the Supreme Court as final arbiter of Federal-State disputes. The Anglo-Saxons recognized it long ago and so developed as one of their basic axioms the rule that "no man shall be judge in his own cause." Is it any more sensible or just for the final arbiter of disputes between the United States and a State to be a branch of the United States Government: the Supreme Court?

But it was left to Mr. Justice Field (whose opinion in the *Kohl* case, in which he dissented on a secondary issue, indicates that he at least had some doubts about Strong's sweeping assertion) to lay bare the process by which, without any amendment, this constitutional limitation on Federal power was subverted and brazenly given a different meaning, one that was harmless to the concept of national supremacy. In his opinion setting forth the holding of the Court in *Fort Leavenworth R. Co. v. Lowe*,[11] Field explains:

> This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the Legislatures of the States in which they are situated, for the specific purposes enumerated. *It would seem to have been the opinion of the framers of the Constitution, that without the consent of the States, the new government would not be able to acquire lands within them*; and therefore it was provided that when it might require such lands for the erection of forts and other buildings . . . , and the consent of the states in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. *Purchase with such consent was the only mode then thought of* for the acquisition by the General Government of title to lands in the states.

Continuing, Field now describes the metamorphosis:

> Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the General Government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the states, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the states to the purchase of lands within them *is, however, essential,* under the Constitution, *to the transfer to the General Government, with the title, of political jurisdiction and domain.* Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is

11. 114 U. S. 525 (1885).

subject to the legislative authority and control of the States equally with the property of private individuals.

That this view (the view held by the framers that the Federal Government could acquire land within a State only by the consent of the State) "has not generally prevailed" since the adoption of the Constitution is no accident. Consolidationists very early began the process of making the consent provision modify "exercise like authority" instead of "purchase".[12] And one can easily see why they did: the consent of the State as a prerequisite to Federal acquisition of land would be a potent weapon by which the States could resist the trend toward that centralization of power so eagerly promoted by the Federalists.

Let us summarize briefly the present position of the Court and of our modern constitutional theory in respect to this matter of eminent domain:

1) The Federal Government definitely is a sovereign government; yet it possesses only those powers granted it by the Constitution, for it is a government of delegated and enumerated powers.

2) But as to eminent domain, the Federal Government possesses *this* particular power as an attribute of its sovereignty.

3) And as to the constitutional provision which makes State consent a prerequisite to the exercise of eminent domain—well, such a provision simply cannot be permitted to exist, as it would seriously jeopardize the basic principle of national supremacy and sovereignty as well as cripple the Federal Government in its operations.

4) But we cannot completely ignore the presence of this consent provision, so what we'll do is, we'll just juggle it around to mean something else.

The above summary is of course couched in somewhat facetious terms, but in substance it represents truly the position of the Court.

It is here submitted that so patently absurd and preposterous a theory in the body of our constitutional law should not

12. See Story's views in his *Commentaries on the Constitution*, Secs. 1224-1227.

be allowed to stand. Let us hope that if and when a test case[13] does reach the Supreme Court, that body will look the Constitution squarely in the face and declare what the Constitution says—namely, that the Federal Government cannot acquire land within a State without the consent (either express or, in the absence of objection, implied) of the State Legislature.

To the argument that recognition of such a weapon in the hands of the States would tie completely the hands of the Federal Government and threaten national security and national welfare, the answer is: the Constitution provides an orderly method for its own amendment. If the Federal Government must have the power of eminent domain without restriction, let it gain that power by the only method prescribed and recognized by the Constitution, even if great concessions must be made to the States in return for ratification.

There are those who will cry: "Hold up! This is a time-honored doctrine! The rule of the *Kohl* case has been the law as to eminent domain since 1876 and, right or wrong, it must remain the law. *Stare decisis!*" This is obviously not a valid argument—more than once the Court has dealt it an emphatic rebuttal.[14] In considering this matter of eminent domain, let us all bear in mind what Mr. Justice Holmes said nearly thirty years ago[15] in urging the abandonment of another time-honored but erroneous doctrine:[16] " . . . The prevailing doctrine has been accepted upon a subtle fallacy . . . . The fallacy has resulted in *an unconstitutional assumption of power* by the courts of the United States *which no lapse of time or respectable array of opinion should make us hesitate to correct.*"

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13. The bringing of a test case should not be difficult. Take a situation where the Federal Government is seeking to condemn land for, say, the construction of a hydroelectric project which has strong opposition in the State at large. Have the Legislature pass a formal resolution forbidding Federal acquisition, and let one of the affected landowners introduce said resolution in the condemnation proceedings as a defense.

14. Most notably in recent years in Brown v. Board of Education, 347 U. S. 483 (1954), in which the rule of Plessy v. Ferguson, 163 U. S. 587 (1896), was struck down.

15. In 1928, in his famous dissent in Black & White Taxicab & Transfer Co. v. Brown and Yellow T. & T. Co., 276 U. S. 518 (1928).

16. That of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1806), which was finally overturned—after holding sway for 132 years—by Erie R. Co. v. Tompkins, 304 U. S. 64 (1938).

CONCLUSION

That such a legal muddle as has been described above should exist in our constitutional law is indeed deplorable; but the fact might as well be faced that such situations *are* going to exist so long as the notion persists that the Federal Government has sovereignty.

This is the root of the fallacy of the *Kohl* case, on which faulty foundation the whole structure of Federal eminent domain is built.

"Sovereignty" as correctly used is a word of precise meaning. Unfortunately, however, it began to be used loosely in the early days of the republic, to designate the "sum of powers" possessed by a government; and, understandably, its repeated use in this context gave many people, even eminent jurists,[17] the idea that it, sovereignty, was divisible; for *powers* may always be divided, by delegation[18] or otherwise, so why not the "sum of powers"?

But true sovereignty—"the ultimate will of the political community"—is never divisible; and any attempt to treat it as divisible can only result in just the sort of political schizophrenia that the court's views on eminent domain exemplify.

Actually, even if sovereignty did reside in the Federal Government, the Court's position would still be untenable in this particular case—eminent domain—since, sovereign or not, the Federal Government's right is strictly limited by the constitutional requirement of State consent. But the whole erroneous structure built up in the *Kohl* case—the "attribute of sovereignty" argument and all the rest of it—could never have come into being had not jurists been under a misapprehension as to the nature and locus of sovereignty: that overwhelmingly important concept which even today still plagues Federal-State relationships.

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17. See, for example, Judge Story's comments on sovereignty.

18. This is what was effected by means of the Constitution: a division of *powers*, through delegation. Originally, all powers, as well as sovereignty, were in the hands of the States. Then, first by means of the Articles of Confederation, and finally by means of that written instrument known as the Constitution, the States *delegated* certain of their *powers* (some of them very broad ones) to a central agency known as the Federal Government. It is important to remember that the word used in the Constitution—see the Tenth Amendment—is not "surrendered," but "delegated": a word of entirely different meaning implying a principal-agent relationship. The important thing to remember here is that only *powers* were involved, not sovereignty. Whatever the extent of the *powers* which the States entrusted to the Federal Government, their sovereignty they retained.