AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 6: Civil War and Reconstruction – Individual Rights/Property/Takings

**Kohl v. United States, 91 U.S. 367 (1875)**

*In 1872, Congress authorized the secretary of treasury to purchase a site in Cincinnati, Ohio, on which to build a federal office complex, including a post office, courthouse, customhouse, and pension office. A few weeks later, Congress added an appropriation “for the purchase at private sale or by condemnation of the ground for a site.” Congress did not specify the means by which the federal government might exercise the power of eminent domain within the state of Ohio, and such a power had apparently not been previously exercised within the boundaries of a state.*

*The treasury department brought a suit in the federal circuit court in Ohio to claim a parcel of land and determine what compensation would be constitutionally required for it. The group of individuals who were perpetual leaseholders in the property sought to have the suit dismissed for want of jurisdiction in the circuit courts for such a proceeding. The court overruled that motion. They appealed to the U.S. Supreme Court, which affirmed the circuit court in an 8-1 decision. The majority concluded that the legal proceedings to exercise the right of eminent domain could be understood as a suit at common law, and suits at common law were within the jurisdiction assigned to the federal circuit courts in the Judiciary Act of 1789.*

*Before reaching that question, however, the majority also clarified that the federal government possessed a general power of eminent domain as an adjunct to exercising its enumerated powers and as implicit within the takings clause of the Fifth Amendment. Like other federal powers, the exercise of this power did not depend on the consent of the state within which the federal government was operating nor did it require any cooperative action by state government officials. In dissent, Justice Field questioned whether Congress had in fact authorized the use of a compulsory process to acquire the land.*

JUSTICE STRONG, delivered the opinion of the Court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain, — a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman v. Booth* (1859), Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? . . .

It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. . . . If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. 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.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. . . .

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*Affirmed*.

JUSTICE FIELD, dissenting.

Assuming that the majority are correct in the doctrine announced in the opinion of the court, — that the right of eminent domain within the States, using those terms not as synonymous with the ultimate dominion or title to property, but as indicating merely the right to take private property for public uses, belongs to the Federal government, to enable it to execute the powers conferred by the Constitution, — and that any other doctrine would subordinate, in important particulars, the national authority to the caprice of individuals or the will of State legislatures, it appears to me that provision for the exercise of the right must first be made by legislation. The Federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of Congress conferring upon them such authority. . . .

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Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation, and a voluntary conveyance of the property: the other implies a compulsory taking, and a contestation as to the value. *Beekman v. The Saratoga & Schenectady Railroad Co.* (NY 1831); *Railroad Company v. Davis* (NC 1837). . . .