Supplementary Material

Chapter 7: The Republican Era—Individual Rights/Property/Takings

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Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166 (1871)

Wisconsin in 1848 authorized Curtis Reed to build a dam across the Fox River. In 1861, the Green Bay & Mississippi Canal Company acquired the rights to maintain and improve the dam. For the next six years, the dam caused the Fox River to flood local land, including property owned by Pumpelly. Pumpelly sued the Canal Company for damages. The Canal Company responded that the state law authorizing the dam immunized them from damage suits. Pumpelly asserted that the state law took his property without compensation. The Circuit Court in Wisconsin ruled that that Canal Company did not have to pay damages. Pumpelly appealed to the Supreme Court of the United States.

The Supreme Court of the United States ruled that Wisconsin had taken Pumpelly's property. Justice Miller's unanimous opinion declared that state laws which authorized a private dam company to flood local lands took property, even though Pumpelly retained title to his land. On what basis did Miller reach this conclusion? To what extent did Pumpelly *hold the crucial element in a takings case is a physical invasion? To what extent did* Pumpelly *hold that a taking may occur when a law destroys the value of property?*

JUSTICE MILLER delivered the opinion of the Court.

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This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz.: that 'the property of no person shall be taken for public use without just compensation therefor.' Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection.

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The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for

invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

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[T]here are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. . . .

. . .

We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

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