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The Power of Eminent Domain in Slum-Clearance and Low-Cost Housing Projects

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in the demanding state at the time of the crime or that he is not a fugitive, he will be released from custody.⁶⁰ The accused may prove mistaken identity.⁶¹ The Uniform Law gives the accused the right to appear before a court and apply for a writ of *habeas corpus* if he demands it.⁶² This is a departure from the general rule which makes it a prerequisite to extradition that the accused be heard on a writ of *habeas corpus* unless specifically waived in writing.⁶³

With the exception of the provision which changes the law as to fugitives and the few exceptions pointed out above⁶⁴ the Uniform Extradition Act corresponds substantially with the New York Code of Criminal Procedure.⁶⁵

THOMAS BRESS.

THE POWER OF EMINENT DOMAIN IN SLUM-CLEARANCE AND LOW-COST HOUSING PROJECTS.

Origin of the Problem.

Under the authority of Title II of the National Industrial Recovery Act, enacted by Congress in 1933,¹ the President issued executive orders creating the Federal Emergency Administration of Public Works and delegated to its Administrator all powers granted thereunder.² "With a view to increasing employment quickly,"³ the Pub-

⁶⁰ *State v. Bailey*, 289 U. S. 412, 53 Sup. Ct. 667 (1933) (burden of proving absence should be beyond reasonable doubt); *People ex rel. Sherman v. Barr*, 131 Misc. 915, 229 N. Y. Supp. 268 (1928); (1928) 77 U. OF PA. L. REV. 135; *Lawrence v. King*, 203 Ind. 252, 180 N. E. 1 (1932); *Roger v. Murnane*, 172 Minn. 401, 215 N. W. 863 (1927) (burden of disproving flight on prisoner); *State ex rel. Gaines v. Westhues*, 318 Mo. 928, 2 S. W. (2d) 612 (1928); *In re Hubbard*, 201 N. C. 472, 160 S. E. 569 (1931) (warrant does not preclude defendant from proving no flight)

⁶¹ Proposed Unif. Extra. Act § 10. See *Lee Gim Bor v. Ferrari*, 55 F. (2d) 86, 84 A. L. R. 329 (1932) and note (*John Doe* indictment. Unless a demand describes the person demanded so that he may be identified, no warrant of arrest can properly issue); *Ex parte Jowell*, 87 Tex. Cr. 556, 223 S. W. 456 (1925) (evidence as to identity always admissible).

⁶² Proposed Unif. Extra. Act § 10. Cases, *supra* note 57.

⁶³ N. Y. CODE CRIM. PROC. § 827.

⁶⁴ Notes 21, 63, *supra*. Proposed Unif. Extra. Act § 25 provides that a person brought into this state on extradition is privileged from personal service in civil actions, arising from the same facts as the crime for which he is being returned, until he has been convicted in the criminal proceeding or if acquitted, until he has had ample opportunity to return to the state from which he was extradited." This modifies the New York law which permits personal service for any cause and at any time. *Netograph v. Scrugham*, 197 N. Y. 377, 90 N. E. 962 (1910). See *A. B. C. of Extradition*, N. Y. L. J., Oct. 16, 1934, at 1274.

⁶⁵ REPORT OF LAW REVISION COMMISSION (1935) 153.

¹ 48 STAT. 195 (1933), 15 U. S. C. A. § 701 (1934); 48 STAT. 200, 201 (1933), 40 U. S. C. A. §§ 401, 402, 403 (1934).

² Executive Order No. 6252, 40 U. S. C. A. § 414 (1934).

³ 48 STAT. 203 (a) (1933), 40 U. S. C. A. § 403 (1934).

lic Works Administration was expressly granted the power "to acquire * * * by exercise of the power of eminent domain, any real or personal property"⁴ in furtherance of the "construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects."⁵ Pursuant to such authority, the P. W. A. has embarked upon a comprehensive slum-clearance and low-cost housing program that is nation-wide in scope.⁶

The Federal Aspect.

In the case of *United States v. Certain Lands in City of Louisville, et al.*,⁷ the constitutionality of the program was seriously challenged. There, the P. W. A. caused the United States Attorney to file a petition in the United States District Court for the Western District of Kentucky to condemn certain lands, preparatory to acquiring a site for its Louisville project. The owners of the lands sought to be condemned demurred, and an order sustaining the demurrer was entered together with a judgment denying the petition. The decision, written by Judge Dawson, was predicated on the following grounds:

- (1) The power of eminent domain is inherent in sovereignty and is, therefore, possessed by the national government. Furthermore, the Fifth Amendment, prohibiting the taking of private property for public use without just compensation, implies that the national government has the power of eminent domain.⁸

⁴ *Id.* 203 (a) (3), 40 U. S. C. A. § 403 (1934).

⁵ *Id.* 202 (d), 40 U. S. C. A. § 402 (1934).

⁶ The housing division of the P. W. A. has on its program ninety active projects in seventy-five cities, which will provide some 45,000 dwelling units. Modern accommodations of limited-dividend housing projects financed by the P. W. A. are already being used by 11,000 persons. Approximately \$290,000,000 have been appropriated by Congress for this work. Two blocks in Louisville and \$1,618,000 were involved in the Louisville case, *infra* note 7. N. Y. Times, Feb. 24, 1936, at 2.

The Federal Housing Administration in its report to Congress stated that its work had stimulated public interest "to a point where more than \$1,000,000,000 of modernization has resulted through other means of finance." The report showed that insurance had been given on modernization loans totaling \$254,070,729, that \$27,030,234 of mortgages on large-scale housing projects had been insured, and that \$257,561,769 worth of home mortgages "have been selected for appraisal. * * * The long-term amortized mortgage has gained nation-wide acceptance at uniform lower interest rates * * *." N. Y. Times, Feb. 14, 1936, at 1.

The Rural Resettlement Administration, which controls approved projects, involving resettlement of destitute or low-income families from rural or urban areas, reported to Congress than in its first year of operation it had transacted \$540,080,202 worth of business. *Ibid.*

⁷ 78 F. (2d) 684 (C. C. A. 6th, 1935), *aff'g* 9 F. Supp. 137 (W. D. Ky. 1935). Appeal dismissed, N. Y. Times, March 6, 1936, at 4.

⁸ 9 F. Supp. 137, 138 (W. D. Ky. 1935).

- (2) This power may be exercised to condemn private property only for a public use, which means a use by the government for legitimate governmental purposes, or a use designed for all the public, even though available to only a part of the public, whether the property is held by the government or by some private agency.⁹
- (3) This public right to use must result from the law itself. In other words, a national emergency may afford a reason for the exercise of the power of eminent domain, but the power must exist independently of the emergency.¹⁰
- (4) Therefore, the N. I. R. A., in so far as it attempts to authorize the government to condemn private property for slum-clearance and low-cost housing projects, is unconstitutional. Such uses are not *public* uses.¹¹
- (5) Article I, Section 8, clause 1, of the Constitution, empowering Congress to lay and collect taxes to pay debts and provide for the general welfare, does not authorize the condemnation. "This clause, by its very terms, restricts Congress to providing for the general welfare through appropriations only, because it relates only to taxation and to the use of funds raised by taxation. It does not authorize the exercise by Congress of a power not committed to it merely that there may be brought into existence something for which appropriations may be made in the furtherance of general welfare. The power granted is that of laying taxes—not that of providing for the general welfare. The latter is only one of the purposes for which taxes may be levied."¹²
- (6) The power to condemn property proved to be a menace to public health or safety is not the power of eminent domain, but a part of the local police power, and may not be exercised by the government within a state.¹³

On appeal to the Circuit Court of Appeals, the government as petitioner contended that it had the power to take land for the purposes enumerated under Title II of the N. I. R. A.¹⁴ because (1) Title II is a valid exercise of the power of Congress to appropriate money under the general welfare clause; (2) condemnation for slum clearance and low-cost housing is for a public use within the Fifth Amendment; and (3) Congress, having declared the existence of the

⁹ *Ibid. et seq.*

¹⁰ *Ibid.*

¹¹ *Id.* at 141.

¹² *Id.* at 142.

¹³ *Ibid.*

¹⁴ *Supra* note 1.

necessity to proceed with projects of the character here involved as a means of providing for the public welfare, the courts may not override the legislative determination if Title II bears any reasonable relation to the object intended. The appellee argued that (1) the federal government has not the constitutional right to participate in this project, and (2) Congress has improperly delegated legislative authority to the executive department. Basing his decision only on the first point in the argument of the appellee, Judge Moorman, writing for the majority, affirmed the judgment below.¹⁵

It would appear that the issue is thus resolved upon the questions whether "first, is the national government empowered to expend the national revenues for such a purpose, the expenditure being

¹⁵ 78 F. (2d) 684 (C. C. A. 6th, 1935). The opinion added nothing to what had already been written by the lower court. But Judge Florence Allen wrote a vigorous dissent in which she held the condemnation prayed for to be constitutionally authorized. She reasoned that there was no invalid delegation to the executive of legislative power. "The case in my judgment does not fall within the doctrine of *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1935), and *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935). * * * The sections of the Act here involved provide for no code nor penalty, but relate to a purely executive function, namely, the preparation and carrying out of a comprehensive program of public works * * *. If *Panama Refining Co. v. Ryan*, *supra*, and *Schechter Poultry Corp. v. United States*, *supra*, are controlling, the standards therein held to be necessary exist in these sections of the statute. The terms used are defined in the dictionary, and are understood in common speech. Slum clearance involves the wrecking of houses in a slum and the clearing of slum lands for new and sanitary dwellings. 'Low-cost housing' is not ambiguous. Such projects have been carried on in civilized countries, including the United States, for many years." *Id.* at 688.

Judge Allen held, further, that "The questions are whether under the Constitution (1) the Congress is authorized to levy a tax and make appropriations for a comprehensive program of low-cost housing and slum-clearance, and (2) whether the United States Government can exercise the right of eminent domain in order to carry out such program." *Ibid.* Answering both questions in the affirmative, she held that the general welfare clause conferred upon Congress an independent and substantive power, stating, "It is only to the authority granted by this clause that much of the constructive legislation enacted by the Congress during the past one hundred years is referable. The Constitution made no provision for the Bureau of Education, the Department of Labor, the Department of Commerce, the Public Health Service, the Geological Survey, the Bureau of Mines, the Department of Agriculture, the Bureau of Fisheries, the Children's Bureau, the Smithsonian Institution, the Bureau of Standards. * * * The power of eminent domain may be exercised wherever necessary and proper for carrying into execution the power of taxation and appropriation for the general welfare. * * * national low-cost housing and slum-clearance projects involve a public use" for which the power of eminent domain may be exercised. *Ibid. et seq.*

Judge Allen concluded that "The power of condemnation by the state is to be considered in the light of the police power. The power of condemnation by the National Government is to be considered in the light of the express and independent power of the Congress to levy and collect taxes and make appropriations to provide for the general welfare. In the exercise of this specific power, the National Government may undertake those projects which benefit the health, the morals, and the general welfare of the people. One such project is the elimination on a comprehensive scale of the slum." *Id.* at 691.

part and parcel of a much broader program for relieving a nation-wide condition of unemployment; secondly, is it entitled to exercise the power of eminent domain in furtherance of such a program?"¹⁶

Since the adoption of the Constitution, there has been a conflict of opinion over the scope of the taxing and spending power granted to Congress. The opposing schools of thought have followed Hamilton or Madison as they construed "general welfare" to mean an independent grant of taxing and spending power or merely a descriptive limitation upon the specific powers granted.¹⁷ Although the issue has been the subject of discussion in a line of cases from *McCulloch v. Maryland*¹⁸ to *Massachusetts v. Mellon*,¹⁹ no decision of the Supreme Court can be said to decide the question squarely, unless it is the *Hoosac Mills* case,²⁰ where, although the processing taxes created by the Agricultural Adjustment Act were held to be unconstitutional, as violative of the Tenth Amendment,²¹ yet both the majority and the minority of the court accepted the Hamiltonian interpretation of the general welfare clause. It may be observed, at this point, that the latent conflict between the general welfare clause and the Tenth Amendment has been revealed in this case. However, the case of *United States v. Gettysburg Electric Ry.*²² seems to have the most direct bearing upon the present problem. There, the power of Congress to appropriate money and condemn land for the creation of a national park from the battleground was sustained. The opinion invoked the "necessary and proper" clause in relation to the power "to declare war and to create and equip armies and navies," and "the great power of taxation to be exercised for the common defence and

¹⁶ Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 U. OF PA. L. REV. 131.

¹⁷ Legis. (1935) 24 GEO. L. J. 130. No attempt is made here to digest the copious material on the subject. A discussion of it will be found in the article by Professor Corwin, *supra* note 16. See also CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) c. IV.

¹⁸ 4 U. S. 316 (1819).

¹⁹ 262 U. S. 447, 43 Sup. Ct. 597 (1923). This action was brought by the state of Massachusetts on behalf of itself and its citizens, and by a taxpayer, against the United States on the theory that the United States had no power to appropriate and grant money conditionally to the states for maternity aid, the assertion being made that the appropriations were local and not national, and induced the states to yield certain of their sovereign rights. The Court held that neither the taxpayer nor the state could object to such expenditures because neither one was sufficiently a party in interest to give jurisdiction over the subject, for no new tax had been levied to maintain such expenditures. The Court stated that the merits of the constitutional question were not considered.

²⁰ *United States v. Butler, et al.*, — U. S. —, 56 Sup. Ct. 312 (1936).

²¹ U. S. CONST. Amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

²² 160 U. S. 668, 16 Sup. Ct. 427 (1896).

general welfare,"²³ but the latter point appears to have furnished the real basis for the decision.²⁴

The power of eminent domain is an attribute of sovereignty, and may be exercised as an aid in carrying into execution the enumerated powers by means of the "necessary and proper" clause.²⁵ It is not open to serious question that the power may be exercised only for a public use. The term "public use" has been subjected to many interpretations, ranging from the conservative one expressed in the opinion in the *Louisville* case²⁶ to the liberal one adopted by the Supreme Court in *Green v. Frazier*,²⁷ where it was held that the states have power to carry on low-cost housing and slum-clearance projects within their own borders, and the court implied that "public use" might be considered to mean "public purpose" or "public advantage."²⁸ Between these two extremes it has been variously held

²³ *Id.* at 681.

²⁴ "No narrow views of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred." *Id.* at 683.

²⁵ U. S. CONST. Art I, § 8, cl. 18.

"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?" *Kohl v. United States*, 91 U. S. 367, 372, 23 L. ed. 449 (1875). Here, land was appropriated for a post-office, custom-house, and federal court.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, *supra* note 18, at 421.

Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361 (1892); *Chappell v. United States*, 160 U. S. 499, 16 Sup. Ct. 397 (1896).

²⁶ *Supra* note 8. The court based its interpretation on the authority of *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 104 S. W. 762 (1907); *Fitzpatrick v. Warden*, 157 Ky. 95, 162 S. W. 550 (1914); *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413 (1905); *Bloodgood v. Mohawk & Hudson River R. R.*, 18 Wend. 9, 31 Am. Dec. 313 (N. Y. 1837); *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681 (1903); LEWIS, EMINENT DOMAIN (3d ed.) § 258.

²⁷ 253 U. S. 233, 40 Sup. Ct. 499 (1920).

²⁸ *Id.* at 238, 240. For a discussion of the various interpretations laid upon the term "public use" by the Supreme Court, see J. W. and V. J. Brabner-Smith, *The National Housing Program* (1936) 30 ILL. L. REV. 557. The District Court in the *Louisville* case professes with concern to see the implications of state socialism in such an interpretation, *supra* note 8, but in doing so appears to overlook the chief safeguard against such possible implications: the legislation under discussion here is to subsist only during the present emergency. *Supra* note 3.

that the federal government has the right to take private property for interstate canals,²⁹ bridges,³⁰ and railroads,³¹ lighthouses,³² fortifications and military bases,³³ flood control and irrigation projects,³⁴ and national parks.³⁵ In granting the dismissal of the *Louisville* case,³⁶ at the request of the government, the Supreme Court has postponed the determination of whether the project there involved is a public use.

In view of the fact that there are numerous projects still under way similar in nature to the Louisville project, it is likely that the questions presented in the *Louisville* case will come before the Supreme Court at some future time. Then, it may be argued that these projects violate the Tenth Amendment of the Constitution, which reserves to the states the power to promote the public health, safety, morals, and general welfare. If so, it will be the task of the Court to determine whether that reservation is a restriction on the powers of Congress, notwithstanding the long course of legislation by Congress;³⁷ the "occasional excursions" of the Supreme Court;³⁸ and the complete inability of the states to deal effectively with the nation-wide condition of unemployment and sub-standard housing conditions.

There is a possibility that the court may decide cases involving these projects arising in the future upon still another ground, namely, the suggested unconstitutional delegation by Congress of its legislative power to the executive department. In that event, the court may consider the contention of the majority of the Circuit Court in the *Louisville* case that "there is nothing in the Act * * * to serve as a guide to the President in exercising the powers conferred upon him,"³⁹ as against the argument of the minority that a reasonable standard has been laid down.⁴⁰

²⁹ *Hanson v. United States*, 261 U. S. 581, 43 Sup. Ct. 442 (1922).

³⁰ *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891 (1893).

³¹ *California v. Central Pacific R. R.*, 127 U. S. 1, 8 Sup. Ct. 1073 (1888).

³² *Chappell v. United States*, 160 U. S. 499, 16 Sup. Ct. 397 (1895).

³³ *Old Dominion Land Co. v. United States*, 269 U. S. 55, 46 Sup. Ct. 39 (1925); see *United States v. First Nat. Bank*, 250 Fed. 299, 302 (N. D. Ala. 1918).

³⁴ *Brown v. United States*, 263 U. S. 78, 44 Sup. Ct. 92 (1923).

³⁵ *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361 (1892).

³⁶ See *N. Y. Times*, March 6, 1936, at 4.

³⁷ Alluded to by Judge Allen in her dissent, *supra* note 15.

³⁸ See, especially, *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1912) (morals); *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529 (1918) (interstate commerce); *United States v. Hill*, 248 U. S. 420, 39 Sup. Ct. 143 (1919) (interstate commerce).

³⁹ *Supra* note 15, at 685.

⁴⁰ *Supra* note 15.

For a discussion of the question of the delegation of legislative power involved in the English housing problem, see Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation* (1936) 49 HARV. L. REV. 426.

The State Aspect.

In the cases of (1) *New York City Housing Authority v. Muller, et al.*,⁴¹ (2) *In Matter of New York City Housing Authority*,⁴² and (3) *Via v. Virginia State Commission on Conservation and Development*,⁴³ the P. W. A. has been provided with an indirect method⁴⁴ of obtaining land for its social program.

In the first and second cases, under the authority of the Municipal Housing Authorities Law,⁴⁵ the New York City Housing Authority brought condemnation proceedings⁴⁶ in the New York Supreme Court against the owners of private property deemed by the Authority⁴⁷ to be in slum areas. The owners urged the unconstitu-

⁴¹ 155 Misc. 681, 279 N. Y. Supp. 299 (Sup. Ct. 1935) (McLaughlin, J.), *aff'd* Court of Appeals, N. Y. Times, March 18, 1936, at 1 (Crouch, J.).

⁴² N. Y. Sup. Ct., June 3, 1935, N. Y. L. J., June 6, 1935, at 2909 (Lockwood, J.).

⁴³ 9 F. Supp. 556 (W. D. Va. 1935).

⁴⁴ By granting the necessary funds, as in the Muller case, *supra* note 41, which, it would appear, no one is a sufficient party in interest to dispute, under the rule of *Massachusetts v. Mellon*, *supra* note 19 (which rule would, of course, extend to those cases where the owners of land would voluntarily sell their property directly to the federal government, thus eliminating the necessity of condemnation proceedings), to the state governments for them to apply to the furtherance of the national program; or by accepting the conveyance of lands condemned by the individual states, as in the *Via* case, *supra* note 43.

But in reference to the rule of *Massachusetts v. Mellon*, *supra* note 19, it has been convincingly stated that, " * * * Here courts have been able to dodge the issue as to how far Congress may go under the general welfare clause by holding that, since damages could not be shown, it could not be claimed that property was taken without due process of law. These precedents, although favorable, are dangerous grounds on which to base a sanction for federal action in housing; it seems self-evident that the taking of property, as well as federal competition with existing housing properties, may be claimed to constitute damages, and such action, therefore, will require a specific warrant under the Constitution." Holden, *Housing at the Crossroads* (Feb. 1936) 25 SURVEY GRAPHIC 2.

⁴⁵ N. Y. Laws 1934, c. 4. "It is hereby declared that in certain areas of cities of the state there exist unsanitary or sub-standard housing conditions owing to over-crowding and concentration of population, improper planning, excessive land coverage, lack of proper light, air, and space, unsanitary design and arrangement, or lack of proper sanitary facilities; that there is not an adequate supply of decent, safe, and sanitary dwelling accommodations for persons of low income; that these conditions cause an increase and spread of disease and crime and constitute a menace to the health, safety, morals, welfare, and comfort of the citizens of the state, and impair economic values; that these conditions cannot be remedied by the ordinary operation of private enterprise; that the clearance, replanning, and reconstruction of the areas in which unsanitary or sub-standard housing conditions exist and the providing of decent, safe, and sanitary dwelling accommodations in said areas and elsewhere for persons of low income are public uses and purposes for which public money may be spent and private property acquired; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination." § 61.

⁴⁶ The taking of necessary land by eminent domain is provided for in § 70.

⁴⁷ For a report of the findings of the New York City Housing Authority, see its publication, *FIRST HOUSES* (1935).

tionality of the housing law on the grounds that it (1) allows a taking of private property for a private use, and (2) is legislation for a particular class of persons. However, the courts in both instances sustained the right to condemn, holding that a use designed for the entire public, even though available to only a part of the public, is a public use,⁴⁸ and that the legislative determination that such condemnation would help to abolish disease- and crime-breeding slums for the benefit of all the people of the state was constitutionally authorized.⁴⁹

In opposition to these decisions, it may be pointed out that legislation for "persons of low income," as provided in Section 61,⁵⁰ is legislation for a class and for a private purpose; that the tax exemptions provided in Section 74⁵¹ will cause the loss of part of the taxable area of the city,⁵² thereby resulting in a proportionately increased burden of taxation for private landowners; and that there will be a consequent decrease in the value of privately owned land in the vicinity of the projects.⁵³

In the third case, the right of a state to take private property by eminent domain for the purpose of conveying the property thus acquired to the federal government to establish a national park was

⁴⁸ *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U. S. 30, 32, 36 Sup. Ct. 234 (1916) (public utility may take land for the purpose of supplying electricity to the public); *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676 (1904) (property appropriated for an irrigation ditch); *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 26 Sup. Ct. 301 (1905) (mining corporation may take land for the purpose of bringing materials necessary to mining operations); *Hairston v. Danville & Western R. R.*, 208 U. S. 598, 28 Sup. Ct. 331 (1908) (railroad may appropriate land for right of way to reach a private industry); *O'Neill v. Leamer*, 239 U. S. 244, 36 Sup. Ct. 54 (1915) (property may be taken for a drainage system).

⁴⁹ *Cf. Hermitage Co. v. Goldfogle*, 236 N. Y. 554, 142 N. E. 281 (1923), and *Mars Realty Corp. v. Sexton*, 141 Misc. 622, 253 N. Y. Supp. 15 (Sup. Ct. 1931), where a statute providing for the exemption from taxation of limited-dividend corporations, which own houses for the same low-income groups sought to be aided under the Municipal Housing Authorities Law, *supra* note 46, was held to be constitutional.

⁵⁰ *Supra* note 46.

⁵¹ § 74 provides: "An authority shall be exempt from the payment of any taxes or fees to the state or any subdivision thereof or to any officer or employee of the state or subdivision thereof. Bonds and mortgages of an authority are declared to be issued for a public purpose and to be public instrumentalities, and together with interest thereon, shall be exempt from tax. The property of an authority shall be exempt from all local and municipal taxes. An authority shall pay to the city a sum fixed annually by the city. Such sum shall not exceed in any year the sum last levied as an annual tax upon the property of the authority prior to the time of its acquisition by the authority."

⁵² There are seventeen square miles of land involved in the three city projects: First Houses (Manhattan—lower east side), Ten Eyck Houses (Brooklyn—Williamsburg), and River Houses (Manhattan—Harlem). *Supra* note 47, at 15.

⁵³ The Astor properties, comprising the major portion of the First Houses project, were assessed at a total valuation of \$422,700, but they were sold to the Authority for only \$189,281. *Id.* at 20, 21.

contested. By an act of Congress it had been directed that when title to certain lands in the Blue Ridge Mountains should be vested in the United States in fee simple, they should be dedicated and set apart as a public park, to be known as the Shenandoah National Park, with the provision that no such lands should be purchased by the federal government, but should be procured by it only by public or private donation, and it authorized the Secretary of Interior to accept title to the lands.⁵⁴ The Virginia General Assembly then enacted the National Park Act in which a state commission was empowered to acquire title by condemnation of lands deemed by it to be suitable for public park purposes and to convey them to the United States.⁵⁵ Thereafter, the commission acquired by condemnation proceedings various parcels of land, one of which was owned by the plaintiff, for the purpose of conveying them to the federal government. Subsequently, the plaintiff instituted this suit in the United States District Court for the Western District of Virginia to remove the cloud upon his title placed there by the condemnation proceedings, alleging that he was deprived of his property without due process of law and that the National Park Act⁵⁶ was unconstitutional. Jurisdiction was invoked on the ground of diversity of citizenship.

The plaintiff contended, in substance, that what the federal government could not do by direction, it could not equitably do by indirection.⁵⁷ On the ground that the public had complete enjoyment of the appropriated land, the court held that the plaintiff was not entitled to equitable relief and that the Act was constitutional.⁵⁸

⁵⁴ 44 STAT. 616 *et seq.* (1926), 16 U. S. C. A. § 403 *et seq.* (1927).

⁵⁵ Va. Acts 1928, c. 371, §§ 3, 6, 7.

⁵⁶ *Ibid.*

⁵⁷ In the absence of federal decisions directly in point, the plaintiff relied on *People ex rel. Trombley v. Humphrey*, 23 Mich. 471, 9 Am. Rep. 94 (1871). The court held here that it was beyond the power of the state of Michigan to condemn lands for the purpose of conveying them to the United States for the latter to erect a lighthouse thereon. The plaintiff also relied on *Darlington v. United States*, 82 Pa. 382, 22 Am. Rep. 76 (1876). In this case, the court held that the right of the state to condemn land for the erection of a federal courthouse must be denied because such taking was not for a public use. See *Rindge Co. v. Los Angeles County*, 262 U. S. 700, 707, 708, 43 Sup. Ct. 689 (1923).

⁵⁸ On the authority of *Rudacille v. Virginia State Commission on Conservation and Development*, 155 Va. 808, 156 S. E. 827 (1931). Here, the court held that the condemnation of land by the defendant for the purpose of conveying it to the United States for a national park was a public use because the citizens of Virginia will receive the major benefit from the establishment of the park.

The cases cited by the plaintiff were distinguished on the ground that they concerned situations where the public had no right to use the appropriated lands. See Note (1931) 79 U. OF PA. L. REV. 1143.

Conclusion.

The conclusion reached from a study and comparison of these cases arising out of federal and state condemnation⁵⁹ is that the fundamental distinction between the right of eminent domain of a state and that of the federal government lies in the structure of the powers of the two sovereignties.⁶⁰ The power of eminent domain may be exercised by the state within its borders only in furtherance of a public use, whereas the power may be exercised by the federal government within state borders to effect such purposes as are public and are, at the same time, within the scope of the powers delegated by the states in the Constitution. It seems abundantly clear that the federal program under consideration here involves a public use, and that a liberal application of the general welfare clause would result in the vesting of a power in the federal government to materialize its program. The fundamental principles of the Constitution must be subserved, but because the Constitution is not a fixed definition of static rights, as of the day of its adoption, but was designed rather as a document capable of reflecting future economic and social changes,⁶¹ these principles must be taken into consideration in the argument of slum-clearance and low-cost housing legislation.⁶² It appears that the *Hoosac Mills* case⁶³ takes full cognizance of this basic thought.

The federal aspect of this problem may soon assume different proportions, inasmuch as Senator Robert F. Wagner has declared his intention to introduce into Congress, during the present session, a bill which will supersede Title II of the N. I. R. A., now being contested in the cases herein discussed.⁶⁴ It seems that the day is soon to come, when the solution of our slum-clearance and low-cost housing problem will be realized.⁶⁵ The public has become concerned,

⁵⁹ *United States v. Certain Lands in City of Louisville, et al.*, *supra* note 7; *New York City Housing Authority v. Muller, et al.*, *supra* note 41; *In Matter of New York City Housing Authority*, *supra* note 42; *Via v. Virginia State Commission on Conservation and Development*, *supra* note 43.

⁶⁰ Note (1935) 4 *Geo. Wash. L. Rev.* 130.

⁶¹ 1 WILLOUGHBY, *THE CONSTITUTION OF THE UNITED STATES* (2d ed. 1929) 43; *THE FEDERALIST*, No. XXXI (1788) 182; CORWIN, *op. cit. supra* note 17, at 180 *et seq.*

⁶² Note (1935) 9 *St. John's L. Rev.* 362.

⁶³ *Supra* note 20, at 319. The Court followed the liberal interpretation of the general welfare clause, which is adopted in 1 STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (5th ed.) § 907. *Id.* at 318.

⁶⁴ *N. Y. Times*, Nov. 10, 1935, at 24.

⁶⁵ The need for such legislation is indicated in *Roosevelt's Biggest Failure* (Feb. 19, 1936) 86 *THE NEW REPUBLIC* 1107. However, the American Federation of Labor Housing Committee opposes any coordinated housing program which would combine the activities of the present F. H. A. with the slum-clearance and low-cost housing projects, chiefly on the ground that the F. H. A. has not benefited low-income families. *N. Y. Times*, Feb. 19, 1936, at 4.

An annual rent subsidy, as a substitute for outright federal grants, has been proposed by Harold Riegelman. This proposal, he contends, would both

and the courts and legislatures are striving diligently to round out the proper legal procedure.

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THE LIFE INSURANCE TRUST.

Although the insurance trust was employed in America as long ago as 1869¹ and was actively advocated during the ensuing years,² it has assumed real importance during the last decade and a half.³ Statistics indicate that at the close of 1930 over four billion dollars of insurance trusts were in existence.⁴ These trusts have been classified in two outstanding groups, known as the unfunded and funded trusts.

stimulate private enterprise in housing and provide the low-income groups with the necessary funds for paying their rent. N. Y. Times, Feb. 20, 1936, at 8.

In his interesting article, *supra* note 44, Mr. Holden suggests another solution to the troublesome problem of constitutional sanction. He proposes that the President make recommendations for slum clearance and low-cost housing through his various fact-finding agencies, which recommendations he is authorized to make by virtue of the power "to give to the Congress information of the state of the Union, and to recommend to their consideration such measures as he shall judge necessary and expedient," vested in him by Article II, Section 3, of the Constitution. It has been held that he may appropriate money to prepare such information. Then Congress, under its authority "to coin money, regulate the value thereof, and of foreign coin," granted in Article I, Section 8, clause 5, may put his recommendations into effect by appropriate legislation. Thus, "through intelligent exercise of monetary control," Mr. Holden concludes, "there is vested in Congress power adequate to accelerate or retard the flow of credit for housing and for rebuilding and rehabilitation of the undesirable sections of our cities."

¹ POWELL, TRUSTS AND ESTATES (1932) 48. The Girard Trust Co. of Philadelphia was trustee.

² STEPHENSON, LIVING TRUSTS (1926) 19. The Provident Life & Trust Co. of Philadelphia was its vigorous exponent.

³ The late beginning of insurance is one of the reasons for the late rise of insurance trusts. Although the first life insurance company in the United States, the Presbyterian Ministers' Fund of Philadelphia, was chartered in 1759, most existing companies in the United States were chartered within the last fifty years. See STEPHENSON, *op. cit. supra* note 2.

In fact, up to 1926, the sums placed in insurance trusts were negligible. STEPHENSON, *op. cit. supra* note 2. In the three ensuing years, insurance trusts valued at over a billion dollars were created. 50 Trust Companies Magazine 363 (1930). See Address by F. H. Sisson, 1928, *A Record Year for Trust Service*, published by Guaranty Trust Co., New York City.

⁴ Estimate by Trust Division of The American Banker's Ass'n, no later figures available; Note (1936) 45 HARV. L. REV. 896. The number of trusts that actually take effect at insured's death is not known. Revocations have not been considerable. One large trust company informed Professor Powell, *op. cit. supra* note 1, that revocations of trusts created before 1928 were 3% of the total; in 1929, 4.3%; in 1930, 2.4%, and in 1931, 2.9%.