THE MEANING OF PUBLIC USE IN THE LAW OF EMINENT DOMAIN

By Philip Nichols, Jr.*

A. *Introduction.*

It is settled law in every American court today that private property may not be taken by eminent domain except for a public use,[1] and that what constitutes a public use, although in the first instance a legislative question,[2] is in the last analysis a question of Constitutional Law to be determined by the courts.[3] This has been understood to mean that even when the end to be achieved is unquestionably legitimate, the court must inquire independently into the intended use of the land taken. Thus, recoupment by a city of the cost of a new street is a proper end which may be achieved under the power of taxation by special assessments on the land benefited by the street.[4] But it has been held that it may not be achieved by condemning, with the land needed for the street, "excess" land which the improvement will benefit, in the expectation of reselling the land at an increase in price which will accomplish the desired recoupment.[5] Here the court's scrutiny of the intended use showed it that the property taken would end up in private hands. Hence, it was held that the property was sought for a private use, however great the resulting public benefit might be.

Although this doctrine has never figured in the constitutional cases which have aroused passionate controversy, nor in those whose names are known to the lay public, obviously it is an important part of the law of eminent domain, has interesting potentialities as a technical straitjacket on the planning of public improvements, and as a pretext for judical review of their wisdom and advisability, and even, on occasion, as a means of obstructing needed social reform. At the same time, it has been of real value in protecting private property against wholesale

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[1]See I Nichols, *Eminent Domain* (2d ed. 1917) 117, and cases cited n. 1, therein.

[2]According to Mr. Justice Holmes, the decision of the legislature "is entitled to deference until it is shown to involve an impossibility." *Old Dominion Land Co.* v. *United States,* 269 U. S. 55, 66 (1925). Accord: *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 680 (1896). See I Nichols, *Eminent Domain* (2d ed. 1917) sec. 52.

[3]*Rindge Co.* v. *County of Los Angeles,* 262 U. S. 700, 705 (1923); *Sears* v. *Akron,* 246 U. S. 242, 251 (1918).

[4]*Bauman* v. *Ross,* 167 U. S. 548 (1897).

[5]*Cincinnati* v. *Vester,* 33 F. (2d) 242 (C. C. A. 6, 1929), affirmed, 281 U. S. 439 (1930); *In re Opinion of the Justices,* 204 Mass. 607, 91 N. E. 405 (1910).

seizure by corporations able to obtain delegation of the sovereign power of eminent domain from subservient legislatures. It is not the purpose of this article to furnish access to all the authorities which might be cited on the question of whether any particular use is public or private, but rather to trace the history of the doctrine in broad outline, study its present health and usefulness, and anticipate as far as possible its future career. The researches of those who have already worked in the field are, to a considerable extent, incorporated by reference, not repeated.

B. *Constitutional Basis.*

While some state constitutions now specifically prohibit any taking of property for a private use,[6] this is a mere codification of a doctrine which had previously become embedded in constitutional law. American courts seem to have evolved it by reference to the "higher law,"[7] with some assistance from an implication by negative inference from the phrase in the Fifth Amendment to the Federal Constitution, and many state constitutions, "nor shall private property be taken for public use without just compensation."[8] The weakness of the latter argument hardly needs stressing. Surely, if the framers of the Constitution had meant that property should not be taken for private use at all, they would have said so.[9] The due process clauses of the states which had one were not invoked, for the possibilities of the words had not at that period been perceived,[10] but the Supreme Court ultimately held that a taking for private uses under state authority is not due process under the

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[6]*E.g.*, Arizona, art. II, sec. 17; South Carolina, art. I, sec. 17; Wyoming, art. I, sec. 32.

[7]See Grant, *The Higher Law Background of the Law of Eminent Domain* (1931) 6 *Wisconsin Law Review* 67; II Selected Essays on Constitutional Law (1938) 912. The idea that eminent domain might be invoked only for reasons of *public* necessity was common to the thought of the period. Thus, the French *Declaration des droits de l'Homme et du Citoyen* of 1789 provided in Article 17 *"La proprieté est un droit inviolable et sacré; nul ne peut en être privé si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemmement et sous la condition d'une juste et préalable indemnité."* Cf. cases cited, I Nichols, *Eminent Domain* (2d ed. 1917) 119, n. 3, therein. Grant, *op. cit. supra,* interprets *Loan Association* v. *Topeka,* 20 Wall. 655 (1874), the leading case striking down taxation for merely private benefit, as based solely on "higher law."

[8]See I Nichols, *Eminent Domain* (2d ed. 1917) 120, and cases cited n. 5, therein.

[9]See *Harvey* v. *Thomas,* 10 Watts (Pa.) 63, 66 (1840). The *Declaration des droits de l'Homme et du Citoyen, supra,* n. 7, which places the requirement for "nécessité publique, légalement constatée," in a separate clause from "une juste et préalable indemnité" indicates that the framers of the Constitution should have known how to prohibit a taking for private uses, if they had so intended.

[10]See Grant, *op. cit. supra,* n. 7, for a discussion of the restricted meaning given the phrase "due process" in the period prior to the War Between the States. *Cf. Taylor* v. *Porter,* 4 Hill (N. Y.) 140 (1843).

Fourteenth Amendment.[11]

C. *Narrowing of Meaning During Nineteenth Century.*

On its first appearance, the prohibition against eminent domain for private uses was of scant importance, because of the naive breadth of the accepted views as to what constituted a public use. Only a few situations existed, in the primitive America of that day, where eminent domain was felt to be needed. These included rights of way for roads and flowage easements for mills. All were accepted as necessary for the development of the country, even if the road were privately built, solely to give access to the builder's land, or even if the mill were wholly private, not a grist mill obliged to serve all comers.[12] Public benefit resulting from development of natural resources was long generally regarded as sufficient to establish public use.[13]

In the forties and fifties, a narrower construction of the term "public use" began to emerge, according to which public benefit was insufficient, and public use began to be defined as use by the public.[14] In the case of takings by public utilities, this of course meant a right in the public to

[11] *Missouri Pacific R. Co.* v. *Nebraska,* 164 U. S. 403, 417 (1896), and cases cited.

[12] See historical discussions in I Nichols, *Eminent Domain* (2d ed. 1917) secs. 41, 83, 84, 85; I Lewis, *Eminent Domain* (2d ed. 1909) sec. 275.

[13] *Aldridge* v. *Tuscumbia C. & D. R. Co.,* 2 Stew. & P. (Ala.) 199 (1832); *Olmstead* v. *Camp,* 33 Conn. 532 (1866); *Boston & Roxbury Mill Dam Corp.* v. *Newman,* 12 Pick. (Mass.) 467 (1832); *Great Falls Mfg. Co.* v. *Fernald,* 47 N. H. 444 (1867); *Scudder* v. *Trenton Delaware Falls Co.,* 1 N. J. Eq. 694 (1832); *Beekman* v. *Saratoga & Schenectady R. Co.,* 3 Paige Ch. (N. Y.) 45, 73 (1831); *Harvey* v. *Thomas,* 10 Watts (Pa.) 63, 66 (1840).

[14] See I Nichols, *Eminent Domain* (2d ed. 1917) 129, and cases cited n. 17, therein; I Lewis, *Eminent Domain* (3d ed. 1909) sec. 258, and cases cited n. 37, therein; Note (1928) 54 A. L. R. 7, and cases cited. Lewis has been the principal text-writer to advocate this narrow view. The earliest authority for it cited in the standard texts appears to have been a dictum in the separate concurring opinion of Senator Tracy in *Bloodgood* v. *Mohawk & H. R. Co.,* 18 Wend. (N. Y.) 9, 60 (1837). Senator Tracy cites no authority for his position, and he criticizes an earlier New York opinion, *Beekman* v. *Saratoga & Schenectady R. Co.,* 3 Paige Ch. (N. Y.) 45, 73 (1831), looking the other way. The New York courts seem to have taken the lead in introducing the narrow construction. E.g., *In re Albany St.,* 11 Wend. (N. Y.) 149 (1834) ("excess condemnation" unconstitutional; *cf.* subsec. E, *infra*); *Taylor* v. *Porter,* 4 Hill (N. Y.) 140 (1843) (authorization of condemnation for private roads unconstitutional, despite fact that statute represented a public policy dating from 1772). The history of the narrow decisions of the New York courts, with the repeated corrections by amendment to the state constitution, is given by the New York State Constitutional Convention Committee, *Problems Relating to Bill of Rights and General Welfare* (1938) 138-148. Modern authorities adopting the "use by the public" definition include *United States* v. *Certain Lands in Louisville,* 9 F. Supp. 137 (W. D. Ky. 1935), affirmed, 78 F. (2d) 684 (C. C. A. 6, 1935), certiorari granted, 296 U. S. 567 (1935), dismissed on motion of Government, 297 U. S. 726 (1936); *Fountain Park Co.* v. *Hensler,* 199 Ind. 95, 155 N. E. 465 (1927).

use the facility or service for which the land was taken. Of course, it did not mean that the public must have a right to enter the specific property; it might be used as a fort or arsenal or power house from which the public was excluded.[15] But even so, it meant a narrowing of earlier concepts. The reasons for the change can easily be surmised: the courts, feeling the full implications of their role as guardians of property rights, began to see danger in a definition of public use so broad that any purpose might be held to justify a taking. In the pre-industrial America, any fear that eminent domain might be abused was sufficiently met by the requirement that just compensation be paid. When great enterprises began to emerge, with masses of capital at their command, the fear that some legislature's conception of public advantage might lead it to authorize wholesale expropriation of farms and homes was not so academic. The fabrication, out of whole cloth, of a constitutional doctrine, calculated to thwart such an attempt, was natural to the men and the times. The general acceptance of judicial review of legislation had hardened into the unspoken major premise of constitutional law decisions, that the courts were the sole guardians of constitutional rights, that legislatures might be expected to act arbitrarily and capriciously,[16] and consequently, that the existence of a constitutional power could be tested by speculating as to what absurd and outrageous things the legislature might do if the questioned power existed.[17]

D. *Limitations and Evasions of Narrow View.*

However, the doctrine that public use meant use by the public was not destined to exclusive possession of the field. Cooley continued to insist

[15]See I Nichols, *Eminent Domain* (2d ed. 1917) sec. 53.

[16]" . . . to insist that the determination or expression by the legislature that it is for the public interest and expedient in a particular case to exert the right of eminent domain, or the power of sovereignty, *ipso facto,* establishes that the power of sovereignty is rightfully exerted, is in effect to insist that the power of legislature is above the power of the constitution, and to prove that instead of possessing a government of defined and limited powers, we have one with powers more extensive and irresponsible than those of the regal governments of Europe." Tracy, Senator, in *Bloodgood* v. *Mohawk & H. R. Co.,* 18 Wend. (N. Y.) 9, 63 (1837). These remarks, stripped of their rhetoric, may be paraphrased as follows: "So reckless of the truth and of its oath of office may we expect the legislature to be, that to permit it to decide finally a question of fact on which a constitutional right might turn, would be in effect to destroy the constitutional right itself." Needless to say, courts resort to this kind of reasoning only when they feel like resorting to it, not always. Thus, the finding of Congress that the entire flow of a stream is needed for navigation purposes is conclusive on the courts, although the finding may have the effect of destroying valuable property rights without compensation. *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53 (1913).

[17]"Can the constitutional expression, public use, be made synonymous with public improvement, or general convenience and advantage, without involving consequences

that in the law of eminent domain public benefit or advantage might be public use.[18] A respectable minority of decisions supported his position.[19] More important were the loopholes, the limitations, and the evasions which courts giving lip service to the majority view were forced to sanction, in order to avoid bringing that view into irreconcilable conflict with the expanding industrialism of the times, and the quick exploitation of natural resources which was felt to be necessary.

Perhaps the most remarkable instance of this kind is that of the Mill Act cases. At the time the Constitution was adopted, acts were on the statute books of many states authorizing the erection of dams and the flowing of land for water power purposes, and permitting the owners of flooded land to recover damages in some form of action.[20] It has been said that the enterprises benefited were mostly grist mills, required by law to grind the grain of all comers, and hence arguably in the category of public utilities.[21] But the statutes do not seem to have been limited to such enterprises, and as industrialism began to expand, they were resorted to increasingly by manufacturing plants which assumed no public obligations. At first, even such jurists as Chief Justice Shaw of the Massachusetts' Court had no hesitation in holding that such expropriations were valid under the power of eminent domain because of the general benefit which the growth of industry conferred upon the community as a whole.[22] Soon, however, with the growth of the narrow doctrine, courts began to hold that the use was private, and the authorizing statutes therefore unconstitutional.[23] This was easy in agricultural communities, where industry was unimportant, but it placed

inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees. . . . [Apparently, the Constitution guarantees to private property more security than is reasonable. P. N. Jr.] . . . It is hardly necessary to illustrate by supposed cases the extent to which such a doctrine could be legitimately carried. A person anxious to establish a line of stages for the public accommodation, certainly might ask the interposition of the legislature to enable him to appropriate his neighbor's horses for the public use; . . . . It is not sufficient to say that the legislature will exercise this power of appropriating private property with discretion. . . . " Tracy, Senator, in *Bloodgood* v. *Mohawk & H. R. Co.*, 18 Wend. (N. Y.) 9, 65 (1837).

[18]See *People ex rel. Detroit & H. R. Co.* v. *Township Board of Salem*, 20 Mich. 452, 477-483 (1870).

[19]See cases cited, I Nichols, *Eminent Domain* (2d ed. 1917) 131, n. 18 therein; I Lewis, *Eminent Domain* (3d ed. 1909) 504, notes 26-30 therein. Other cases include *Wilson & Co.* v. *Compton Bond & Mortgage Co.*, 103 Ark. 452, 146 S. W. 110 (1912); *Kansas City* v. *Liebi*, 298 Mo. 569, 252 S. W. 404 (1923). The recent housing cases are discussed in subsec. F, *infra*.

[20]See discussion in *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 15 (1885).

[21]See I. Lewis, *Eminent Domain* (3d ed. 1909) sec. 275.

[22]See *Chase* v. *Sutton Mfg. Co.*, 4 Cush. (Mass.) 152, 169 (1849). *Accord*: cases cited, I Nichols, *Eminent Domain* (2d ed. 1917) 227, notes 19 and 20, therein.

[23]Cases cited, I Nichols, *Eminent Domain* (2d ed. 1917) 228 n. 22, therein.

the Massachusetts courts in a quandary. Were they to reverse their former decisions, and at the same time attack a type of economic enterprise in which the state was becoming preëminent? Or were they to show themselves more backward than other courts in their defense of property rights? Shaw's skill in escaping from this predicament was such as to entitle him to fame if he had done nothing else. "Yes," he said in effect, "the narrow doctrine is our doctrine. But the Mill Acts are not eminent domain statutes at all. Under them, no property is taken. They are exercises of the police power, in requiring compulsory joint development of property, comparable, for example, to statutes providing for repair of property held in common or for compulsory joint drainage. Hence, the requirement that the use must be public is inapplicable."[24]

This ingenious theory roused anger in some, admiration in others,[25] but its unsoundness was not then as apparent as it has become in the light of subsequent decisions. In the examples of comparable police power enactments, the owner always shares in the benefit conferred on his property by the work which the statute authorizes. For example, if I must permit a party wall on my lot line, I can share the use of it when built. But when property is flooded under the Mill Acts, the owner does not become a co-owner of the mill.[26] Shaw suggested that nothing was taken from him,[27] but in fact, a great deal is, including the right to develop and use his land for water power purposes, often an important element of value.[28] Hence, the suggestion that at least in theory the land is not used, because the landowner might keep the impounded water off his land by a dam of his own, without impairing the project as a whole,[29] is

[24]Cases cited, I Nichols, *Eminent Domain* (2d ed. 1917) 230, n. 26. *Accord*: cases cited n. 27. The change in Shaw's position is shown by the following quotations: "But these acts [the Mill Acts] justifying the flowing of another's land without his consent can rest only on the right of eminent domain to take private property for public use on making a compensation, . . . " Shaw, C. J., in *Chase* v. *Sutton Mfg. Co.*, 4 Cush. (Mass.) 152, 169 (1849). "The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, . . . " Shaw, C. J., in *Murdock* v. *Stickney*, 8 Cush. (Mass.) 113, 116 (1851).

[25]"We believe that they [the Mill Acts] cannot be justified upon principle without virtually expunging the words 'public use' from the constitution." I Lewis, *Eminent Domain* (3d ed. 1909) 559. " . . . a very ingenious and perhaps flawless evasion . . . . " I Nichols, *Eminent Domain* (2d ed. 1917) 233.

[26]*Cf. Battelle* v. *Worcester*, 236 Mass. 395, 128 N. E. 631 (1920).

[27]See *Murdock* v. *Stickney*, 8 Cush. (Mass.) 113, 116 (1851).

[28]*Cf. Ford Hydro-Electric Co.* v. *Neely*, 13 F. (2d) 361 (C. C. A. 7, 1926), certiorari denied, 273 U. S. 723 (1926); *United States ex rel. T. V. A.* v. *Southern States Power Co.*, 33 F. Supp. 519 (W. D. N. C. 1940); *Stockton* v. *Ellingwood*, 96 Calif. App. 708, 275 Pac. 228 (1929).

[29]See *Murdock* v. *Stickney*, 8 Cush. (Mass.) 113, 116 (1851).

palpably irrelevant. Flooding which can be guarded against by protective measures is nevertheless a taking.[30]

However, if Shaw's theory did not hold water, the dams which it fostered emphatically did. Eventually, the Supreme Court adopted it,[31] upholding in an opinion by a Massachusetts judge, Mr. Justice Gray, a New Hampshire statute which the state court had considered an exercise of eminent domain, and upheld as essential for the development of the state's resources.[32] Ironically, this theory, now ignored by Gray, later became the basis of several Supreme Court decisions. Of course, the Mill Act cases have become of scant importance today in view of the fact that water power is now usually utilized by hydro-electric power rather than direct mechanical means; and since the user of the water is almost always a public utility, eminent domain on its behalf does not violate the narrow doctrine. Moreover, Article 49 of the Amendments to the Massachusetts Constitution specifically declares that utilization of water resources is a public use.[33]

Another interesting evasion, which frequently solved the problem of takings for the "incidental" benefit of a single corporation, was the view that if the public had a theoretical legal right to use the property taken, the court should not inquire into the probable extent or practicability of the public use.[34] By this means, a logging railroad to serve a single lumber company,[35] spur tracks to connect a single manufacturing plant to a railroad,[36] an irrigation system primarily for a single landowner's

[30]*United States* v. *Chicago, B. & Q. R. Co.*, 90 F. (2d) 161 (C. C. A. 7, 1937), certiorari denied, 302 U. S. 714 (1937); *United States* v. *Wabasha-Nelson Bridge Co.*, 83 F. (2d) 852 (C. C. A. 7, 1936); *United States* v. *Chicago, B. & Q. R. Co.*, 82 F. (2d) 131 (C. C. A. 8, 1936), certiorari denied, 298 U. S. 689 (1936).

[31]*Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 15 (1885).

[32]*Amoskeag Mfg. Co.* v. *Head*, 56 N. H. 386 (1876), affirmed *sub nom, Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9 (1885); *Great Falls Mfg. Co.* v. *Fernald*, 47 N. H. 444 (1867).

[33]Eminent domain under Article 49 does not violate the Fourteenth Amendment to the Federal Constitution. *In re Opinion of the Justices*, 237 Mass. 598, 131 N. E. 25 (1921).

[34]See I Nichols, *Eminent Domain* (2d ed. 1917) sec. 46.

[35]*E.g., Goose Creek Lumber Co.* v. *White*, 219 Ky. 739, 294 S. W. 494 (1927); *State ex rel. Oregon Washington R. & N. Co.* v. *Superior Court*, 155 Wash. 651, 286 Pac. 33 (1930). *Contra*: *Threlkeld* v. *Third Judicial District Court*, 36 N. M. 350, 15 P. (2d) 671 (1932).

[36]*E.g., Union Lime Co.* v. *Chicago & N. W. R. Co.*, 233 U. S. 211 (1914); *Hairston* v. *Danville & Western R. Co.*, 208 U. S. 598 (1908); *Tift* v. *Atlantic Coast Line R. Co.*, 161 Ga. 432, 131 S. E. 46 (1925); *Sisters of Providence* v. *Lower Vein Coal Co.*, 198 Ind. 645, 154 N. E. 659 (1926); *Dobler* v. *Mayor & City Council of Baltimore*, 151 Md. 154, 134 Atl. 201 (1926); *C. O. Struse & Sons Co.* v. *Reading Co.*, 302 Pa. 211, 153 Atl. 350 (1931). The same result has been reached where the court specifically noticed that there would be no facilities available to the general public. *River and Rail Terminals, Inc.* v. *Louisiana R. & N. Co.*, 171 La. 223, 130 So. 337 (1930).

benefit,[37] a drainage system to drain a single owner's land,[38] a channel to give access by water to the Ford Company's River Rouge plant,[39] or a road to give access to a single landowner by land,[40] all have been held to be for a public use. The fact that a private beneficiary other than the taker is to pay the award and presumably is to enjoy the lion's share of the use, is legally immaterial.[41] The "incidental benefit" to a private corporation when it is the donee of the power does not defeat the public character of the use.[42] Such evasion is aided by the rule that if the use authorized by the statute is public, the court will not inquire into the condemnor's actual intentions.[43]

Among the most amusing of the nominal public use cases are those involving high tension power transmission lines. Ordinarily, of course, use by the intended purchasers of the current, however far away they may be, suffices to make the use public.[44] But suppose these purchasers

[37] *E.g., Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 161 (1896).

[38] *E.g., Manning* v. *Metropolitan Dist. Comm.,* 270 Mass. 348, 169 N. E. 910 (1930).

[39] *In re Condemnations for Improvement of Rouge River,* 266 Fed. 105, 114 (E. D. Mich. 1920).

[40] *E.g., Wright* v. *Mayor & City Council of Cambridge,* 238 Mass. 439, 131 N. E. 294 (1921); *Powell* v. *Town Board of Sinnott Tp.,* 175 Minn. 395, 221 N. W. 527 (1928); *Town of Perry* v. *Thomas,* 82 Utah 159, 22 P. (2d) 343 (1933).

[41] *Union Lime Co.* v. *Chicago & N. W. R. Co.,* 233 U. S. 211 (1914); *In re Condemnations for Improvement of Rouge River,* 266 Fed. 105, 114 (E. D. Mich. 1920); *Forest Preserve Dist.* v. *Chicago Title & Trust Co.,* 351 Ill. 48, 183 N. E. 819 (1932); *Deese* v. *Town of Lumberton,* 211 N. C. 31, 188 S. E. 857 (1936). These were cases where the payment was voluntary. Of course the rule is the same where beneficiaries are forced to contribute to the award by special benefit assessments. *State* v. *Houghton,* 144 Minn. 1, 174 N. W. 885, 176 N. W. 159 (1919); *Board of Hudson River Regulating Dist.* v. *Fonda, J. & G. R. Co.,* 249 N. Y. 445, 164 N. E. 541 (1928). Another "incidental private benefit" case which it is difficult to classify is *State Road Comm.* v. *Miller,* 108 W. Va. 431, 151 S. E. 436 (1930), in which the question was whether a taking of 10,000 yards of granite for roadbuilding was for a public use. An engineering firm had contracted to build a road, and to furnish the necessary granite, but, being faced with a loss, it threatened to throw up its contract and forfeit the earnest money unless the granite were condemned. To obtain prompt completion of the road, the state officials complied. *Held,* that these facts did not defeat the public nature of the use.

[42] *Alabama Power Co.* v. *Gulf Power Co.,* 283 Fed. 606 (M. D. Ala. 1922).

[43] *Old Dominion Land Co.* v. *United States,* 269 U. S. 55, 66 (1925); *United States* v. *Forbes,* 259 Fed. 585 (M. D. Ala. 1919), affirmed on other grounds *sub nom, Forbes* v. *United States,* 268 Fed. 273 (C. C. A. 5, 1920); *Sisters of Providence* v. *Lower Vein Coal Co.,* 198 Ind. 645, 154 N. E. 659 (1926); *Johnson* v. *Mayor & City Council of Baltimore,* 158 Md. 93, 148 Atl. 209 (1930).

[44] See I Nichols, *Eminent Domain* (2d ed. 1917) sec. 72, and cases cited. Note 38 in that section cites a few cases holding a minority view that distribution of electric power is not a public use, but most of these are overruled or "limited to their peculiar facts" by later decisions of the same courts holding that the use is public. *Smith* v. *Western Maine Power Co.,* 125 Me. 238, 132 Atl. 740 (1926); *Nichols* v. *Central Va. Power Co.,* 143 Va. 405, 130 S. E. 764 (1925); *State ex rel. Chelan Elec. Co.* v. *Superior Court,* 142 Wash. 270, 253 Pac. 115 (1927). Another notable case is *Demeter Land Co.* v. *Florida Pub. Serv. Co.,* 99 Fla. 954, 128 So. 402 (1930), holding that the lack of any statutory regulation of the business of the power company does not defeat the public character of the business.

are in a different state? Rather than grapple with the problem of a use practically limited to others than citizens of the sovereignty under whose authority the power of eminent domain is exercised, the courts in these circumstances usually invoke a purely hypothetical right of the farmers along the transmission line to insist that the power be stepped down and made available to them.[45] The difficulties they would encounter if they actually sought to exercise this "right" hardly need to be stressed. The New Hampshire Supreme Court has held that the use is not public if the power is sold outside the state,[46] a result which, though palpably anti-social, seems a logical application of the narrow doctrine.[47] It would seem that under a less technical rule, the expectation a state might have, that if it granted citizens of other states equal benefits under its laws with its own citizens, these citizens could look to other states for like treatment, would support the public nature of the use.

The development of the West through mining and irrigation brought to the forefront a recognized exception to the narrow doctrine. Mining could not be presented to the court as even nominally a use by the public, and yet in many regions, it was regarded as vitally important that exploitation of local mineral resources should proceed quickly, without waiting for corresponding development of other enterprises, and that such exploitation should be aided by eminent domain. Some states specifically provided in their constitutions in some form of words, that mining was a public use, and some added other forms of exploitation of local resources as well.[48] The Supreme Court held that in this class of case the use was not so far private as not to be due process under the Fourteenth Amendment.[49] It is at present a well, if not universally recognized, exception to the narrow doctrine that condemnations neces-

[45]*E.g., Rogers* v. *Toccoa Electric Power Co.,* 163 Ga. 919, 137 S. E. 272 (1926); *Shedd* v. *Northern Indiana Pub. Serv. Co.,* 206 Ind. 35, 188 N. E. 322 (1934); *Webb* v. *Knox County Transmission Co.,* 143 Tenn. 423, 225 S. W. 1046 (1920); *Brooke Electric Co.* v. *Beall,* 96 W. Va. 637, 123 S. E. 587 (1924).

[46]*In re Opinion of the Justices,* 88 N. H. 484, 190 Atl. 425 (1937). Accord: *Grover Irr. & Land Co.* v. *Lovella Ditch R. & Irr. Co.,* 21 Wyo. 204, 131 Pac. 43 (1913) (taking for ditch to irrigate lands wholly outside state held not a public use).

[47]The problem is discussed in a note in (1934) 90 A. L. R. 1032.

[48]These provisions are collected in I NICHOLS, *Eminent Domain* (2d ed. 1917) sec. 38, to which should be added Art. 49 of the Amendments to the Massachusetts Constitution, establishing exploitation of water power resources as a public use, and Oregon, sec. 18, as amended 1921 and 1924: " . . . the use of all roads, ways, and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."

[49]*O'Neill* v. *Leamer,* 239 U. S. 244 (1915) (drainage); *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527 (1906) (mining); *Clark* v. *Nash,* 198 U. S. 361 (1905) (irrigation).

sary for exploitation of natural resources vital to local prosperity may be for a public use.[50]

E. *Cases Where Narrow Doctrine Applies.*

By the Twentieth Century it could fairly well be said that the narrow doctrine of public use had been so tailored that it could be given lip service, and yet it did not obstruct the normal demands of industry, transportation, mining and agriculture. Nevertheless, it remained as a sort of cloud which overhung threateningly any novel or unusual scheme for land use and development by the public itself. A typical case of its application was *Salisbury Land & Improvement Co.* v. *Commonwealth.*[51] In that case the state was seeking to acquire a beach for park purposes. The land company had acquired all of it, had sold and was selling lots for summer cottages. The state did not attempt to interfere with the lots already sold, but it did seek to take the parts which were subdivided but unsold. These parts it was itself to sell, subject, it may be assumed, to restrictions which would assure a development of the residential parts of the beach which would not be inharmonious with the use of the part which would remain in public ownership as a park. *Held,* that because of the authority to sell, not ultimately, when the land might cease to be needed for public use, but immediately, as part of the very scheme of development for which it was taken, the taking was not for a public use. The same court in an advisory opinion laid down the dogma that use of eminent domain to acquire land for housing to relieve a housing shortage, was not a public use, and it could not be upheld even as a slum clearance measure.[52] Another advisory opinion had forbidden the use of "excess condemnation," that is, a taking, with the land for a new street, of land on either side, to prevent the creation of remnant lots, to recoup the cost of the street by enabling the city to resell at a profit from the rise in land values caused by the street, and to promote the best use of the land.[53] The

[50]Cases cited *supra,* note 49, and *Ruddock* v. *Bloedel Donovan Lumber Mills,* 28 F. (2d) 684 (C. C. A. 9, 1928), affirmed after new trial *sub nom., McCarthy* v. *Bloedel Donovan Lumber Mills,* 39 F. (2d) 684 (C. C. A. 9, 1930), certiorari denied, 282 U. S. 840 (1930) (logging); *Indianapolis Oolitic Stone Co.* v. *Alexander King Stone Co.,* 206 Ind. 412, 190 N. E. 57 (1934) (quarrying); *Codd* v. *McGoldrick Lumber Co.,* 48 Idaho 1, 279 Pac. 298 (1929) (logging).

[51]215 Mass. 371, 102 N. E. 619 (1913).

[52]*In re Opinion of the Justices,* 211 Mass. 624, 98 N. E. 611 (1912). "That opinion is the one judicial decision in this country expressly denying the right of public assistance to persons of low income forced to live under unsafe, insanitary and demoralizing conditions." Robinson, *Public Housing in Massachusetts* (1938) 18 BOSTON UNIVERSITY LAW REVIEW 83, 89.

[53]*In re Opinion of the Justices,* 204 Mass. 607, 91 N. E. 405 (1910). Accord: *In re* Albany St., 11 Wend. (N. Y.) 149 (1834). However, a number of state constitutions now specifically permit excess condemnation, *e.g.,* Michigan, art. XIII, sec.

court also, during this period, held unconstitutional a statute permitting the destruction of equitable servitudes which no longer accomplished their intended purpose and blocked the best development of the neighborhood, compensation being paid the holder of the servitude. This too was deemed to be for a private use.[54] All these cases really stemmed from *Lowell* v. *Boston*,[55] in which the court had held that the raising of funds by the city to assist owners in reconstructing after the great fire of 1872, was unconstitutional as not for a public use. As stated in that case, the requirement of public use is usually deemed to limit the spending of tax-raised funds or the pledging of public credit equally with the taking of land by eminent domain.

Of course, characteristic narrow doctrine cases could be selected from other jurisdictions. Thus, the Federal Circuit Court of Appeals for the Sixth Circuit, in *Cincinnati* v. *Vester*,[56] has held that "excess condemnation," even when specifically authorized by the constitution of the state, is forbidden by the Fourteenth Amendment to the Federal Constitution. The Supreme Court affirmed on other grounds, but did not repudiate the decision below. In Pennsylvania, it has been held that a taking of land around a public square, for resale with restrictions to protect the beauty of the square, is for a private use.[57] In Indiana, a taking of lands for Chatauqua grounds is for a private use.[58] In New Jersey, a taking of a fee simple title for highway purposes is not for a public use, because it is evident that an easement would suffice for the purpose intended, and the purpose of taking the fee is apparently to preserve the state's investment by acquiring an interest which would be marketable if the highway use should end.[58a] However, the Massachusetts cases are more com-

5, Ohio, art. XVIII, sec. 10; also state constitutions enumerated in I Nichols, *Eminent Domain* (2d) ed. 1917) 181, n. 40 therein.

[54] *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242, 117 N. E. 244 (1917).

[55] 111 Mass. 454 (1873). See discussion of this case in *infra.* n. 72. *Accord*: *In re Opinion of the Justices*, 182 Mass. 605, 66 N. E. 25 (1903); *In re Opinion of the Justices*, 155 Mass. 598, 30 N. E. 1142 (1892) (municipal fuel yards not for public use).

[56] 33 F. (2d) 242 (C. C. A. 6, 1929), affirmed, 281 U. S. 439 (1930).

[57] *Pennsylvania Mutual Life Ins. Co.* v. *Philadelphia*, 242 Pa. 47, 88 Atl. 904 (1913).

[58] *Fountain Park Co.* v. *Hensler*, 199 Ind. 95, 155 N. E. 465 (1927).

[58a] *Frelinghuysen* v. *State Highway Commission*, 107 N. J. L. 218, 152 Atl. 79 (1930), affirmed *per cur.*, 108 N. J. L. 403, 158 Atl. 465 (1932). Possibly this decision is the gem of the collection. Accord: Cases cited, II Nichols, *Eminent Domain* (2d ed. 1917) 919, n. 48, therein. But *cf. Thompson* v. *Orange & Rockland Electric Co.*, 254 N. Y. 366, 173 N. E. 224 (1930) (statute authorizing taking for county highway presumed to authorize taking of fee simple title); *United States* v. *Meyer*, 113 F. (2d) 387 (C. C. A. 7, 1940) (when statute authorizes taking of either fee or easement for river improvement project, acquiring officer's selection of fee not subject to judicial review, and court will not inquire whether easement would be adequate for intended public use).

plete than those of any other one jurisdiction in the variety of situations where rigorous application of the narrow doctrine occurred. They give a complete picture of it in all its phases, not merely those involving the use of land, to which the present discussion is limited.

In general, the cases make possible a more specific statement of the narrow doctrine than the unsatisfactory "use by the public" formula. It may be restated as follows:

"To take property rights from *A* for transfer to *B* for *B*'s private enjoyment is not a public use, regardless of what ultimate public purpose the transaction is intended to further."[59]

This seems to state the rule of all the Massachusetts cases which have been referred to in this subsection. *Riverbank Improvement Co.* v. *Chadwick,* the case in which a taking to eliminate obsolete equitable servitudes was held not for a public use, might seem an exception, as the court had before it a finding to the general effect that no ultimate public purpose was furthered by the taking involved. However, the Legislature evidently had thought that such a purpose would be served, and it may be doubted whether it was properly a judicial question whether the particular taking was in fact capable of furthering the legislative object.[60] The legislature evidently intended that the highest and best development of urban real estate should not be obstructed by obsolete equitable servitudes, but whether and to what extent an isolated, individual taking would serve to further that policy, and therefore the public end which the legislature had in mind, would seem practically impossible of ascertainment by a court. Hence, the finding, although masquerading as a finding of fact, must be construed as really a ruling of law that the public had no legitimate legal interest in enabling owners to make the best use of their property—a characteristic application of the narrow doctrine, brought into sharper focus by the subsequent universal acceptance of zoning laws, which of course have a similar objective. For the present, therefore, we will retain the *Riverbank* case among the authorities for that doctrine.

F. *Decay of Narrow Doctrine in Recent Years.*

We have already seen how the narrow doctrine requires the court in

[59] "Many courts seem to treat the question of *What is a public use?* as though the question was *For what purposes may the power of eminent domain be properly exercised?* This is a serious error [under the narrow doctrine]." See I Lewis, *Eminent Domain* (3d ed. 1909) 503.

[60] *United States* v. *80 Acres of Land in Williamson County,* 26 F. Supp. 315 (E. D. Ill. 1939); *Pine Martin Mining Co.* v. *Empire Zinc Co.,* 90 Colo. 529, 11 P. (2d) 221 (1932).

determining public use to disregard the ultimate purpose of the taking and consider only the intended use of the particular land. In recent years the instances have multiplied in which the courts have refused so to blind themselves, and the ultimate purpose has been held to justify a taking which by itself, was from *A* to *B* to *B*'s private enjoyment. Thus, the Supreme Court of the United States, in a case rising out of the World War, held that expropriation of property for national defense was for a public use despite the fact that the property was turned over to private corporations engaged in essential defense industries.[61] So far as appears, these corporations were not public utilities or under any special legal obligation to "serve the public." More recently, in a suit brought against the United States by an Indian tribe, under a special jurisdictional act, the question was whether the ouster of the tribe from certain of its property, in order to place certain private interests in possession, to rectify a previous error, could have constituted a taking by eminent domain for public use. The Government relied strongly on the narrow doctrine, but the court held for the tribe.[62] In two other cases,[63] the court had before it the question of "substitute condemnation," that is, condemnation of property to be turned over to private owners in lieu of property taken from them for a public purpose. Obviously, this may be of value in reducing litigation and securing amicable settlement of cases; if the condemnation greatly reduces the available land for certain private uses, owners of that remainder may be able to exact extortionate prices from dislodged condemnees, and they, fearing this, will in turn put every obstacle in the way of the condemnation. On principle, so far as the narrow doctrine is concerned, "substitute condemnation" would seem indistinguishable from "excess condemnation," yet the Supreme Court in *Brown* v. *United States*,[64] upholding the former, strangely, went out of its way to quote with approval the Massachusetts opinion striking down the latter.[65] At times, as in *Dohany* v. *Rogers*,[66] the beneficiary of

[61] *International Paper Co.* v. *United States*, 282 U. S. 399 (1931). See also *Highland* v. *Russell Car and Snow Plow Co.*, 279 U. S. 253, 260 (1929). In the *International Paper Co.* case, it was the taker, the United States, which asserted that the use was not public, in order to establish that the taking was not an exercise of the power of eminent domain, and that consequently the United States was not obliged to pay just compensation. Possibly, this factor made the court less sympathetic to the argument.

[62] *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119 (1938). *Cf.* also *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937); *United States* v. *Creek Nation*, 295 U. S. 103, 111 (1935), *reh, den., Id.* at 769 (1935).

[63] *Dohany* v. *Rogers*, 281 U. S. 362 (1930); *Brown* v. *United States*, 263 U. S. 78 (1923).

[64] 263 U. S. 78, 83 (1923).

[65] *In re Opinion of the Justices*, 204 Mass. 607, 91 N. E. 405 (1910).

[66] 281 U. S. 362 (1930).

the condemnation is a public utility which might have itself condemned, but this fact seems immaterial in view of the corrolary requirement of the narrow doctrine that the use for which the property is taken must be a use of the condemnor.[67] There are a number of state cases of both types in accord with the Supreme Court.[68] If the doctrine is still accepted as sound, that public use means the same when it is a question of expenditure of tax-raised funds, or pledging of the public credit, as in eminent domain,[69] then the broad views as to the purposes for which public funds may be spent, expressed in *Green* v. *Frazier*,[70] and, more emphatically, in the Social Security cases,[71] should be another nail in the coffin of *Lowell* v. *Boston*,[72] and therefore of the narrow doctrine of

[67]See I Nichols, *Eminent Domain* (2d ed. 1917) 145, and cases cited n. 44 therein. However, this rule is not construed to prevent the condemnor from carrying out the intended use through an operating lessee. *Patterson Orchard Co.* v. *Southwest Ark. Util. Corp.*, 179 Ark. 1029, 18 S. W. (2d) 1028 (1929); *Pine Martin Mining Co.* v. *Empire Zinc Co.*, 90 Colo. 529, 11 P. (2d) 221 (1932); *Robertson* v. *Brooksville & I. R.*, 100 Fla. 195, 129 So. 582 (1930).

[68]*Smouse* v. *Kansas City Southern R. Co.*, 129 Kan. 176, 282 Pac. 183 (1929); *Pitznogle* v. *Western Maryland R. Co.*, 119 Md. 673, 87 Atl. 917 (1913); *Meisel Press Mfg. Co.* v. *Boston*, 272 Mass. 372, 172 N. E. 356 (1930); *Fitzsimons & Galvin, Inc.* v. *Rogers*, 243 Mich. 649, 220 N. W. 881 (1928); *Foley* v. *Beach Creek Ext. R. Co.*, 283 Pa. 588, 129 Atl. 845 (1925); *Weyel* v. *Lower Colorado River Authority*, 121 S. W. (2d) 1032 (Tex. Civ. App. 1938); *Town of Cookeville* v. *Farley*, 171 Tenn. 260, 102 S. W. (2d) 56 (1937).

[69]*In re Opinion of the Justices*, 204 Mass. 607, 91 N. E. 405 (1910). See I Nichols, *Eminent Domain* (2d ed. 1917) 153.

[70]253 U. S. 233 (1920). This was the case holding that the North Dakota experiment in "state socialism" did not violate the Fourteenth Amendment. The part of the opinion most pertinent to the present discussion upholds a scheme for the state to purchase land for resale to farmers, in order to convert them into landowners rather than mere tenants. To obtain a large proportion of homeowners in the population was thought to be a public object making the proposed expenditure a public use. Accord: *Jones* v. *Portland*, 245 U. S. 217 (1917) (municipal wood yard).

[71]*Helvering* v. *Davis*, 301 U. S. 619 (1937); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937).

[72]111 Mass. 454 (1873). Although that case has been followed many times, the following comment, from *Scott* v. *Frazier*, 258 Fed. 669, 677 (D. N. D. 1919), reversed for want of jurisdiction, 253 U. S. 243 (1920), indicates perhaps more accurately the position it holds in American law today:

"Returning, now, to *Lowell* v. *Boston*. It was decided in 1873, and has been a precedent for many decisions in Massachusetts and in other states condemning uses of the taxing power which were deemed to be for the public welfare. In 1917 the state held a constitutional convention. Its first action was to adopt an amendment sweeping away this decision. In a convention characterized by the conservatism of Massachusetts, the amendment was carried by a vote of 275 to 25, and was adopted by a popular vote of 261,138 to 52,437. This was the first time that the reasoning of *Lowell* v. *Boston* was brought to the judgment bar of the people of the state. That decision had stood for more than half a century as an authority supporting scores of decisions nullifying laws to correct evils from which men, women, and children were suffering and furnishing reasons to even more Congresses, Legislatures, and city councils why other laws should not be passed to correct such evils. And now that the real supreme tribunal of Massachusetts, the people of that

public use.[73]

However, the unkindest cuts to the narrow doctrine are given by the recent state cases upholding condemnation for housing and slum clearance. It will be remembered that this aspect of New Deal social reform, first instituted on a nation-wide scale by the Federal Government under Title II of the National Industrial Recovery Act,[74] got off to a bad start with a typical narrow doctrine opinion by Federal Judge Dawson, holding that condemnation could not be had as the intended use was private.[75] The Circuit Court of Appeals affirmed, relying rather on its conception as to the limits of federal power than on the supposed general rule of eminent domain which the court below had invoked.[76] The Tenth Circuit subsequently held that the use was public,[77] but meanwhile,

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commonwealth, has swept all these judicial precedents away in that state, what do we say has happened? This:

> "'The court was right all the time; but the people have now amended their Constitution and granted the Legislature power to do what the court said they could not do before, and so the Legislature may hereafter enact needed laws.'

"But does that state the whole truth? I think not. Is it not more true to say that the people of Massachusetts have corrected, if not rebuked, the judges of their Supreme Judicial Court. Have they not really said to their judges:

> "'You have been wrong all this half century. We never intended those general words in the Constitution to mean what you have been saying they mean, and we wish you would not use them any more to protect practices that have been proven to be economically, morally, and legally unsound'."

The amendment to which the court refers is Article 47 of the Articles of Amendment. Articles 43 and 49 also appear to be aimed at the rule of *Lowell* v. *Boston*.

[73]In *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32 (1916), Mr. Justice Holmes said:

> "In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established."

Since the use in question met the test of "use by the public," this language was hardly necessary to the decision, but that this great judge went out of his way to avoid using an accepted formula which would have supported the result he wished to reach, hardly enhances the authority of the formula.

[74]40 U. S. C. A. secs. 401-411, 48 STAT. 200.

[75]*United States* v. *Certain Lands in Louisville*, 9 F. Supp. 137 (W. D. Ky. 1935).

[76]*United States* v. *Certain Lands in Louisville*, 78 F. (2d) 684 (C. C. A. 6, 1935), certiorari granted, 296 U. S. 567 (1935), dismissed on motion of Government 297 U. S. 726 (1936).

[77]*Oklahoma City* v. *Sanders*, 94 F. (2d) 323 (C. C. A. 10, 1938).

Congress had enacted the United States Housing Act of 1937,[78] which eliminated the question of federal power by placing housing in the hands of state agencies, which were to be aided by federal grants of money. However, they were of course to condemn in the state courts. Public housing was opposed by influential groups in most communities, and the narrow doctrine seemed a convenient legal weapon which the state courts could have seized upon if they had desired to block the program.

That it did not turn out that way must be credited largely to the New York Court of Appeals, whose opinion in *New York City Housing Authority* v. *Muller,*[79] decided in 1936, had already, as it turned out, established the law. It had held that condemnation for housing and slum clearance was for a public use and purpose, and every state court which has considered the question since has reached the same result.[80] The public use question involved in those cases is not simple. At first blush, it might seem that since the houses (a) furnish an essential facility (b) to members of the community who stand peculiarly in need of it, they would be as much for a public use as the municipal fuel yards, for example, involved in *Jones* v. *Portland.*[81] That only a special group in the community, not all of it, may use the facility provided, is immaterial: that is equally true of a hospital or a school. We have already seen that a project actually benefiting only a single person may be for a public use, even under the narrow doctrine.[82] But reasoning along these lines, how-

[78]42 U. S. C. A. secs. 1401-1430, 50 STAT. 888.

[79]270 N. Y. 333, 1 N. E. (2d) 153 (1936).

[80]*Brammer* v. *Housing Authority of Birmingham,* — Ala. —, 195 So. 256 (1940); *Humphrey* v. *Phoenix,* — *Ariz.* —, 102 P. (2d) 8 (1940); *Housing Authority of Los Angeles County* v. *Dockweiler,* 14 Cal. (2d) 437, 94 P. (2d) 794 (1939); *People ex rel. Stokes* v. *Newton,* — Colo. —, 101 P. (2d) 21 (1940); *Marvin* v. *Housing Authority of Jacksonville,* 133 Fla. 590, 183 So. 145 (1938); *Williamson* v. *Housing Authority of Augusta,* 186 Ga. 673, 199 S. E. 43 (1938); *Krause* v. *Peoria Housing Authority,* 370 Ill. 356, 19 N. E. (2d) 193 (1939); *Edwards* v. *Housing Authority of Muncie,* — Ind. —, 19 N. E. (2d) 741 (1939); *Spahn* v. *Stewart,* 268 Ky. 97, 103 S. W. (2d) 651 (1937); *State ex rel. Porterie* v. *Housing Authority of New Orleans,* 190 La. 710, 182 So. 725 (1938); *Allydonn Realty Corp.* v. *Holyoke Housing Authority,* — Mass. —, 23 N. E. (2d) 665 (1939); *In the Matter of Brewster St.,* 291 Mich. 313, 289 N. W. 493 (1939); *Laret Investment Co.* v. *Dickman,* — Mo. —, 134 S. W. (2d) 65 (1939); *Lennox* v. *Housing Authority of Omaha,* — Neb. —, 290 N. W. 451 (1940); *Romano* v. *Housing Authority of Newark,* 123 N. J. L. 428, 10 A. (2d) 181 (1939), affirmed *per cur.,* 124 N. J. L. 452, 12 A. (2d) 384 (1940); *Wells* v. *Housing Authority of Wilmington,* 213 N. C. 744, 197 S. E. 693 (1938); *State ex rel. Ellis* v. *Sherrill,* 136 Ohio St. 238, 25 N. E. (2d) 844 (1940); *Dornan* v. *Philadelphia Housing Authority,* 331 Pa. 209, 200 Atl. 834 (1938); *McNulty* v. *Owens,* 188 S. C. 377, 199 S. E. 425 (1938); *Knoxville Housing Authority, Inc.* v. *Knoxville,* 174 Tenn. 76, 123 S. W. (2d) 1085 (1939); *Housing Authority of Dallas* v. *Higginbotham,* 143 S. W. (2d) 79 (Tex. Sup. Ct. 1940); *Chapman* v. *Huntington Housing Authority,* — W. Va. —, 3 S. E. (2d) 502 (1939). A few unreported cases are collected in (1940) V *Legal Notes on Local Government* 211, id., 295.

[81]245 U. S. 217 (1917).

[82]See authorities cited *supra* notes 35-40.

ever logical, would not satisfy the exigencies of opinion-writing. A court, having decided to uphold the law, would naturally want to invoke to justify its decision the wide-spread social benefit from the hoped-for elimination of the slums. This was of course what led the legislature to enact the law. But mere public benefit is a consideration irrelevant to the narrow doctrine, and any talk about public benefit in an opinion is more or less inconsistent with it. Yet every state court which has considered the question has invoked general public benefit as the major ground of its decision, and few have even mentioned those things which might have been said to square the result with the narrow doctrine. Several have directly repudiated the narrow doctrine. Thus, the New York Court of Appeals said, in *New York City Housing Authority* v. *Muller*,[83]

> "The fundamental purpose of government is to protect the health, safety and general welfare of the public. . . . Its power plant for the purpose consists of the power of taxation, the police power and the power of eminent domain . . . *it seems to be constitutionally immaterial whether one or another of the sovereign powers is employed.* . . . Use of a proposed structure, facility, or service by everybody and anybody is one of the abandoned universal tests of a public use. . . . That is a public benefit and, therefore, at least as far as this case is concerned, a public use." [Italics ours.]

The Pennsylvania Supreme Court, in *Dornan* v. *Philadelphia Housing Authority*,[84] after stating the conflicting views as to the meaning of "public use," citing decisions of its own on both sides of the question, and pointing out, as suggested above, that the state housing act is not necessarily inconsistent with the narrow doctrine, proceeds to state another "factor which conclusively determines that the use . . . is a public one, namely, . . . " that the housing provisions are a mere adjunct to the main purpose of the act, which is to eliminate dangerous and unsanitary slums, an obviously legitimate object under the police power. " . . . what we now decide is that when the power of eminent domain is thus called into play as a handmaiden to the police power and in order to make its proper exercise effective, *it is necessarily for a public use.*" [Italics ours.] The view of both courts plainly is that the legitimacy of the purpose as a whole is the criterion, not the intended use of the particular property taken. Logically, they would have to reach the same result if the scheme for slum clearance required that title to the property condemned pass into hands wholly private, although undoubtedly, as a

[83]270 N. Y. 333, 340, 342, 343, 1 N. E. (2d) 153, 155, 156 (1936).
[84]331 Pa. 209, 223, 226, 200 Atl. 834, 841, 842 (1938).

practical matter, the intended public ownership was of great assistance to the courts in reaching the result they did.

By the time the question came before the Supreme Judicial Court of Massachusetts, an overwhelming body of authority supporting the housing legislation had been built up, and the chief question of interest lay in the manner in which the court would get around its earlier decisions, which, as we have seen, espoused the narrow doctrine with unusual emphasis and consistency. It cannot be said that the opinion, by Mr. Justice Qua,[85] achieves the necessary reconciliation in a satisfactory manner. Following most of the other states, it does not attempt to say that the legislation is consistent with the narrow doctrine. It lists the Massachusetts cases on public use. Differing, apparently from the present writer's conclusion that these cases make Massachusetts the chief home of the narrow doctrine, it says that "They do not, however, establish any universal test. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare." It then suggests a number of possible criteria of public use, from which "use by the public" is conspicuously absent. Then comes the now well worn line of reasoning connecting the housing provisions of the statute with its provisions for clearing the slums—a legitimate police power objective. Finally, we consider the apparently inconsistent earlier cases. But three are discussed. The *Opinion of the Justices,* rejecting as not for a public use a previous housing scheme,[86] the court distinguishes as not involving slum clearance. This is of course literally true, but the Opinion does contain these inconvenient words:

> "It may be urged that the measure is aimed at mitigating the evils of overcrowded tenements and unhealthy slums. These evils are a proper subject for the exercise of the police power."[87] [But not, the plain implication is, for exercise of the taxing power or the power of eminent domain.]

Salisbury Land and Improvement Co. v. *Commonwealth,*[88] the court now distinguishes on the ground that the provisions for condemnation of residential property for resale, there involved, "had no relation to the public safety, health, morals or welfare and rendered the whole unconstitutional."[89] This alleged lack of relationship is a wholly gratuitous

[85] *Allydonn Realty Corp.* v. *Holyoke Housing Authority,* — Mass. —, 23 N. E. (2d) 665, 667 (1939).
[86] 211 Mass. 624, 98 N. E. 611 (1912).
[87] 211 Mass. 624, 630, 98 N. E. 611, 614 (1912).
[88] 215 Mass. 371, 102 N. E. 619 (1913). See subsec. E, *supra.*
[89] — Mass. —, 23 N. E. (2d) 665, 669 (1939).

assumption of the present court, having no support in the earlier opinion, in which Chief Justice Rugg had clearly indicated that he considered the measure invalid, as against his view of public use, regardless of its effect on public welfare. "In a general sense it is of public interest that the people be well housed, but this does not authorize the State to become the general landlord. *That subject is a proper one for the exercise of the police power but not of eminent domain.*"[90] [Italics supplied.] Since the court now seemingly takes the line that if the purpose is within the police power, use of eminent domain to bring it about is necessarily a public use, it is hard to see how the two views can be reconciled.

The only other early case mentioned is the *Opinion of the Justices* rejecting excess condemnation.[91] This is brushed aside as (p. 669) "representing a purely commercial venture." Perhaps, but it also represented an application of the narrow doctrine.

It may be regretted that, in at last coming round to a liberal view of public use, the court did not see fit to overrule its earlier decisions, rather than slur them over in an opinion which nowhere mentions the salient doctrine for which they stood. It may also be regretted that the court did not see fit to discuss Article 43 of the Amendments to the Massachusetts Constitution, authorizing the Legislature to provide for the purchase and sale of real estate by the Commonwealth to relieve population congestion and provide homes, but sales to be at not less than cost, and Article 47, declaring that the providing of shelter during time of war, public exigency, emergency, or distress is a public function.[92]

It seems apparent that these cases mark the end, or at least the beginning of the end, of the basic hypothesis of the narrow doctrine, that the requirement of public use necessitates judicial scrutiny of the intended use of the land taken without regard to the broader purposes of the authorizing statute. So construed, the requirement was of course of major importance to the law of eminent domain. Under the present judicial technique the requirement of public use is still in the Constitution, but as it relates to underlying purpose rather than intended land use as such, it is not a part of the law of eminent domain, and will become of minor importance in eminent domain cases.

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[90] 215 Mass. 371, 377, 102 N. E. 619, 622 (1913).
[91] 204 Mass. 607, 91 N. E. 405 (1910).
[92] *Cf.* Robinson, *Public Housing in Massachusetts* (1937) 18 BOSTON UNIVERSITY LAW REVIEW 83, in which the construction of these two articles is treated as basic to the determination of the constitutionality of public housing in Massachusetts.

G. *A Public Use of the Federal Government.*

What constitutes a public use when property is condemned by the Federal Government is of course determined by the attitude of the federal courts. It seems correct to say that these courts have shown little interest in the narrow doctrine. With few exceptions,[93] they have not attempted to force it on the states,[94] although the rule that due process under the Fourteenth Amendment forbids a state to condemn for a private use[95] would have afforded a perfect opening. In a number of cases, they have refused to apply the doctrine to federal takings.[96] As is indicated above, if the narrow doctrine is rejected, the question of public use becomes one, not of the intended utilization of the particular land taken, but of the constitutional power of the sovereign to engage in the project for which it is taken.[97] Recently, some federal courts have taken this position. One has said:

> "If the Federal Government, under the Constitution, has power to embark upon the project for which the land is sought, then the use is a public one. Confessedly the purpose cannot be a private one."[98]

And another:

> "It is a public use if the project comes within the purview of federal power."[99]

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[93]The only notable exception is *Cincinnati* v. *Vester,* 33 F. (2d) 242 (C. C. A. 6, 1929), affirmed, 281 U. S. 439 (1930), but on other grounds. This case is discussed in subsec. E, *supra.*

[94]*Cf.* cases cited, *supra,* notes 49, 66, 70, 73 and 81. In *In re Opinion of the Justices,* 237 Mass. 598, 131 N. E. 25 (1921), the judges conclude that a use previously deemed private, but specifically declared public by amendment to the state constitution, will not be held to violate the due process clause of the Federal Constitution.

[95]*Missouri Pacific R. Co.* v. *Nebraska,* 164 U. S. 403 (1896).

[96] Cases cited, *supra,* notes 61, 62 and 64. In *Old Dominion Land Co.* v. *United States,* 296 Fed. 20, 22 (C. C. A. 4, 1924), affirmed, 269 U. S. 55 (1925), a taking to salvage improvements erected on land held under a lease which was about to expire, was held to be for a public use, although the land was to be sold as soon as title was acquired. In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 602 (1935), *reh. den.,* 296 U. S. 661 (1935), Mr. Justice Brandeis intimated that eminent domain might be used to relieve debtors of the demands of their creditors. The only important narrow doctrine decision in recent years in the federal courts, applying to federal takings, is discussed *supra,* in subsec. F, and in this subsection, notes 112-114.

[97]Lewis, although advocating the narrow doctrine, concedes that if it is rejected the conclusion stated in the text must follow. See I Lewis, *Eminent Domain* (3d ed. 1909) secs. 256, 258.

[98]See *Barnidge* v. *United States,* 101 F. (2d) 295, 298 (C. C. A. 8, 1939).

[99]*United States* v. *4,450.72 Acres of Land,* 27 F. Supp. 167, 174 (D. Minn. 1939). This was a holding, not a dictum. The issue before the court was a condemnation to furnish a source of wild rice for an Indian tribe, raising a question, not only of federal power, but also of the applicability of the narrow doctrine. In support of the statement quoted in the text the Court cites *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 681 (1896) in which a federal public use is defined as "a use which is legitimate and lies within the scope of the Constitution."

The difficult problem is to determine when a project requiring condemnation comes within the "purview of federal power." There is of course no difficulty when it comes within the powers specifically granted to Congress, or the implied powers necessary for their exercise, or the treaty-making power.[100] The real problem arises when the justification for the project must be sought in the power to levy taxes and spend money for the general welfare. Despite the importance of the question, the authorities are scanty and contradictory. Only recently was it determined that taxes could be levied and funds expended for such purposes.[101] In all instances, until quite recently, when Congress authorized condemnation, some express power was involved to at least a sufficient extent to avoid raising the problem now under consideration. For example, condemnation of forest lands was justified as protecting the navigability of navigable streams, by prevention of soil erosion,[102] and condemnation of land to irrigate private lands was upheld because lands owned by the United States were also to be irrigated.[103] A more striking illustration of the same thing is the erection of huge dams, for the improvement of navigation or other incontestably federal purposes, but which are also adapted to produce hydro-electric power.[104] In contemplation of law, at least, the power gets more attention than it should, for it is a mere surplus by-product of the project, sold under Article IV, Clause 3, of the Constitution in order to help defray the cost.[105]

Several classes of cases have come before the courts in recent years where the purpose of the taking could not be tied to any expressly granted power. One general category consists of the national parks and forest reservations, the acquisition of which cannot be said, or at least is not

[100]In *United States* v. *2271.29 Acres of Land,* 31 F. (2d) 617 (W. D. Wis. 1928), a condemnation for a migratory bird refuge was held to be for a federal public use under the treaty-making power, the authorizing act having been enacted to implement a treaty with Canada. *Cf. Missouri* v. *Holland,* 252 U. S. 416 (1920).

[101]By dictum in *United States* v. *Butler,* 297 U. S. 1, 65, 66 (1936).

[102]*United States* v. *80 Acres of Land in Williamson County,* 26 F. Supp. 315 (E. D. Ill. 1939); *United States* v. *546.03 Acres of Land,* 22 F. Supp. 775 (W. D. Pa. 1938); *United States* v. *Griffin,* 58 F. (2d) 674 (W. D. Va. 1932); *United States* v. *Crary,* 1 F. Supp. 406 (W. D. Va. 1932).

[103]*Burley* v. *United States,* 179 Fed. 1 (C. C. A. 9, 1910).

[104]*Cf. Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330, *reh. den. id.* at 728 (1936); *Arizona* v. *California,* 283 U. S. 423 (1931); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 72, 73 (1913); *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 21 F. Supp. 947 (E. D. Tenn. 1938, 3 Judge Ct.), affirmed, 306 U. S. 118 (1939); *Waters* v. *Phillips,* 284 Fed. 237 (C. C. A. 7, 1922), appeal dismissed, 260 U. S. 757 (1923); *Missouri* v. *Union Electric L. & P. Co.,* 42 F. (2d) 692, 696 (W. D. Mo. 1930); *Alabama Power Co. v. Gulf Power Co.,* 283 Fed. 606, 613 (M. D. Ala. 1922).

[105]*Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330, *reh. den. id.* at 728 (1936).

said, to protect the watersheds of navigable streams. In all these cases, however, the power of the United States to condemn has been upheld.[106] The same result was reached in *Barnidge* v. *United States,*[107] where a large part of the business section of St. Louis was being condemned for the Jefferson National Expansion Memorial. In most of the cases, the courts were content to cite judicial precedents more or less in point, without designating the clause of the Constitution on which they relied, but in one, reported as *In re United States,*[108] the court in an able and elaborate opinion holds that the United States may condemn land for the purposes of general welfare. All these cases rely heavily on *United States* v. *Gettysburg Electric R. Co.*[109] a condemnation for a battlefield memorial park, in which the court relied in part on the war power but also used language open to the interpretation that the General Welfare Clause might constitute sufficient authority for the taking.[110] The con-

[106]*United States* v. *Dieckmann,* 101 F. (2d) 421 (C. C. A. 7, 1939); *In re United States,* 28 F. Supp. 758 (W. D. N. Y. 1939); *United States* v. *80 Acres of Land in Williamson County,* 26 F. Supp. 315 (E. D. Ill. 1939); *United States* v. *546.03 Acres of Land,* 22 F. Supp. 775 (W. D. Pa. 1938). *Cf. Via* v. *State Commission,* 9 F. Supp. 556 (W. D. Va. 1935, 3 Judge Ct.) affirmed *per cur.,* 296 U. S. 459 (1935); *In re Opinion of the Justices,* — Mass. —, 8 N. E. (2d) 753 (1937).

[107]101 F. (2d) 295 (C. C. A. 8, 1939).

[108]28 F. Supp. 758 (W. D. N. Y. 1939).

[109]160 U. S. 668 (1896).

[110]160 U. S. 668, 680, 681, 682 (1896).

"Upon the question whether the proposed use of this land is a public one, we think there can be no well founded doubt. And also, in our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defence and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid. This proposed use comes within such description. The provision comes within the rule laid down by Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, in these words: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.'"

The court proceeded to explain the historic importance of the battle of Gettysburg, the site of which was being condemned, and that the use was "one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country" [p. 682]. It would instil patriotism in visitors to the park. "The power to condemn for this purpose need not be plainly and unmistakably deduced

nection with the war power certainly existed, but it was indirect at best; if it could be justified as a furtherance of national defense, so could a taking for housing and slum clearance, or power purposes, or almost anything one would care to name.[111]

Under Title II of the N. I. R. A.,[112] the Government condemned much land for housing and slum clearance, but was finally halted by *United States* v. *Certain Lands in Louisville,*[113] in which it was held that housing was not a federal public use; that the United States could not condemn except in furtherance of the expressly enumerated powers. The Circuit Court of Appeals for the Tenth Circuit, in *Oklahoma City* v. *Saunders,*[114] refused to follow this case, and it is doubtful authority today in view of the inconsistency of much that is said in it with the later Social Security cases.[115] However, Congress acquiesced, turning housing over to state agencies by the Housing Act of 1937.[116] The grants of money to the state agencies, there provided for, would not inject any question of federal public use into condemnations by the state agencies, since it is well settled that the condemnee may not question the source of the funds with which his award is paid.[117]

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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."

The reader may draw his own conclusions as to whether the court intended to say that the United States might condemn for the common defense and general welfare alone. It certainly intended to say that the case before it was not one in which that question arose. But for an elaborate gloss on the words of the court, contending for the affirmative, see Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 *University of Pennsylvania Law Review* 131. And lower federal courts have certainly so construed it. See, *e.g., In re United States,* 28 F. Supp. 758, 765 (W. D. N. Y. 1939); *United States* v. *546.03 Acres of Land,* 22 F. Supp. 775, 777 (W. D. Pa. 1938).

[111]See Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 *University of Pennsylvania Law Review* 131, 139. "Certainly, if the creation of a memorial park falls within the power to raise armies because the patriotic impulses of casual visitors may be momentarily stimulated, then a scheme for better housing can be justified on the same basis. Obviously citizens will fight better if they know that their families are decently housed; they will better defend their homes if they have homes worth defending."

[112]40 U. S. C. A. sec. 402, 48 STAT. 201.

[113]78 F. (2d) 684 (C. C. A. 6, 1935), certiorari granted, 296 U. S. 567 (1935), dismissed on motion of Government 297 U. S. 726 (1936).

[114]94 F. (2d) 323 (C. C. A. 10, 1938).

[115]This inconsistency is pointed out in *In re United States,* 28 F. Supp. 758, 765 (W. D. N. Y. 1939).

[116]42 U. S. C. A. secs. 1401-1430, 50 STAT. 888. Pub. L. No. 671, 76th Cong., 3d Sess. (1940) authorizes the Federal Government to condemn for defense housing purposes. This is too clearly a federal public use to warrant further discussion here. See *United States* v. *Stein,* 48 F. (2d) 626, 628 (N. D. Ohio, 1931), upholding similar legislation enacted during World War I.

[117]*Barnidge* v. *United States,* 101 F. (2d) 295 (C. C. A. 8, 1939); *Light* v. *Danville,* 168 Va. 181, 190 S. E. 276 (1937). The source of funds "is a matter which

Condemnations for flood control do not present a problem when the project in question is to prevent or control overflows of a navigable river,[118] but it has been suggested in one case that the General Welfare Clause as well as the Commerce Clause justifies such projects.[119] If the stream is non-navigable, and the project does not affect a navigable stream, the problem is more difficult. A few district court cases upholding federal condemnation in these circumstances[120] are probably not the last word, since major projects now under way have aroused bitter opposition which undoubtedly will result in appellate decisions.

No attempt is made in this article to enumerate all the purposes outside the specifically enumerated powers, for which the United States is now condemning land. In most instances, the cases are of little interest, since the right to condemn is not often challenged. One case, however, which might have influenced the development of the law considerably if the court had not decided it without opinion, was *United States* v. *138 Acres,*[121] which a condemnation for a subsistence farming project was held despite the condemnee's challenge to be for a federal public use.

The Supreme Court's adoption of the Hamiltonian view as to the scope of the power to tax and spend seems a strong indication that it will ultimately hold that condemnation for the general welfare is for a federal public use. Any other decision would lead to logical and practical difficulties. Acquisition by donation or direct purchase, for purposes outside the specifically granted powers, has been treated as of settled legality for too long a time to be questioned now.[122] It would be absurd to permit expenditure to further the general welfare, without permitting expenditure to acquire property rights to further such welfare. But if such expenditures are for a public use, then condemnation for a similar purpose cannot be held not for a public use unless a difference is recognized between the definition of public use for the two purposes, while the

neither affects nor concerns the owners." *In re Condemnations for Improvement of Rouge River,* 266 Fed. 105, 117 (E. D. Mich. 1920). *Cf. Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938).

[118]*Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 21 F. Supp. 947 (E. D. Tenn. 1938, 3 Judge Ct.), affirmed, 306 U. S. 118 (1939).

[119]See *Sponenbarger* v. *United States,* 101 F. (2d) 506, 509 (C. C. A. 8, 1939), reversed on other grounds *sub nom., United States* v. *Sponenbarger,* 308 U. S. 256 (1939).

[120]*In re United States,* 28 F. Supp. 758 (W. D. N. Y. 1939); *United States* v. *80 Acres of Land in Williamson County,* 26 F. Supp. 315 (E. D. Ill. 1939).

[121](N. D. Okla., 1938, Law No. 2691).

[122]*Cf. Collins* v. *Yosemite Park & Curry Co.,* 304 U. S. 518, 530 (1938). See cases cited, subsec. H, *infra.* " . . . since the right of the Government to maintain a system of national parks has never been challenged, its right to procure lands for their establishment must be recognized, . . . " See *United States* v. *Dieckmann,* 101 F. (2d) 421, 424 (C. C. A. 7, 1939).

authorities agree that no such difference is recognized.[123] "The authority to condemn . . . extends to every case in which an officer of the Government is authorized to procure real estate for public uses."[124] The power of eminent domain is not specifically granted in the Constitution. It is implied, as an "attribute of sovereignty,"[125] and as an instrumental power necessary to make the granted powers effective.[126] Since it is just as necessary to make the power to tax and spend effective, as for the specifically enumerated powers, it would seem to apply equally to them.[127] To deny the power to condemn for any given project, while acquisition for it by other means went on unchecked, would simply add to the cost, imposing an added burden on federal taxpayers, without protecting constitutional limitations in any but a technical way. It would mean a reappearance of the narrow doctrine in a field from which, up to now, it has been happily absent.

Even if it is accepted that condemnation for the general welfare is for a federal public use, it does not follow that any project whatever is for such a use. The purpose must be national in scope,[128] and yet a project which in its immediate incidents is purely local is not excluded if it is part of a nation-wide plan, as, for example, to relieve unemployment.[129]

H. *Condemnation by States For Use of the United States.*

In the early years of the Republic it was customary for proceedings to condemn land for the use of the United States to be conducted in state tribunals.[130] Not until *Kohl* v. *United States*[131] was it settled that the United States could condemn in its own name in its own courts. In some of the early cases the United States was the nominal condemnor, but deemed theoretically to be exercising a delegated power of the state;[132]

[123]See subsec. F, *supra.*

[124]*Albert Hanson Lumber Co., Ltd.* v. *United States,* 261 U. S. 581, 587 (1923). The court used this language in construing a statute (the Act of August 1, 1888, 40 U. S. C. A. sec. 257, 25 STAT. 357), but, of course, would not have so construed it unless, as thus construed, it was constitutional.

[125]See *Albert Hanson Lumber Co., Ltd.* v. *United States,* 261 U. S. 581, 587 (1923).

[126]See *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 681 (1896).

[127]*Cf. United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 681 (1896).

[128]See *United States* v. *Butler,* 297 U. S. 1, 64, 66-67 (1936); *Kansas Gas & Electric Co.* v. *Independence,* 79 F. (2d) 32, 41 (C. C. A. 10, 1935), *rehearing denied Id.,* at 638 (C. C. A. 10, 1935).

[129]*In re United States,* 28 F. Supp. 758 (W. D. N. Y. 1939); *United States* v. *80 Acres of Land in Williamson County,* 26 F. Supp. 315 (E. D. Ill. 1939).

[130]See *United States* v. *Jones,* 109 U. S. 513, 520 (1883); I Nichols, *Eminent Domain* (2d ed. 1917) 107, and cases cited, n. 78 therein. The most recent reported instance of this kind is *United States* v. *Goodloe,* 204 Ala. 484, 86 So. 546 (1920), instituted under authority of 50 U. S. C. A. sec. 79, 39 STAT. 215.

[131]91 U. S. 367 (1875).

[132]*E.g., Gilmer* v. *Lime Point,* 18 Calif. 229 (1861); *Burt* v. *Merchants' Insurance Co.,* 106 Mass. 356 (1871); *United States* v. *Dumplin Island,* 1 Barb. (N. Y.) 24 (1847).

in others, the state condemned and turned the property over to the federal government.[133] In 1871 Judge Cooley held in *People* v. *Humphrey*[134] that the state might not thus make itself an instrumentality in federal land acquisition; that such a taking was not for a public use of the state. However, the rule of that case has subsequently been limited to cases where the intended use of the land is for a function which, under the constitutional distribution of powers, only the United States could perform.[135] If a state condemns for a purpose which is a public use under its own constitution, the taking is not less for that use if the purpose is achieved through the agency of the United States rather than by the state itself.[136] This exception has become of considerable importance owing to the large number of cases in which states or their political subdivisions, anxious to secure federal projects within their borders, have bargained to procure land for the United States and pay the purchase price or the award in condemnation. Acquisition by donation of the state is provided for in a number of federal statutes.[137] Since the states have an interest in the performance of virtually all the functions of the United States, the rule of *People* v. *Humphrey* is all but obliterated by the exception, and no case of recent date has been found where it has been applied. Although Cooley was not an exponent of the narrow doctrine, *People* v. *Humphrey* must be regarded as a narrow doctrine decision, for it seems to rest on the same unexpressed major premise that the intended use of the particular land taken is the sole test of public use.

A question, as yet academic, might become of considerable importance if the Federal Government were held to lack power to condemn for the general welfare. Could the United States acquire such property in-

[133] *E.g., Reddall* v. *Bryan,* 14 Md. 444 (1859) *appeal dismissed,* 24 How. 420 (1860); *In the Matter of League Island,* 1 Brewst. (Pa.) 524 (1868).

[134] 23 Mich. 471 (1871). Followed in *Darlington* v. *United States,* 82 Pa. 382 (1876).

[135] See, *e.g., Via* v. *State Commission,* 9 F. Supp. 556, 560 (W. D. Va. 1935, 3 Judge Ct.), affirmed *per cur.,* 296 U. S. 549 (1935) I Nichols, *Eminent Domain* (2d ed. 1917) 107.

[136] *Via* v. *State Commission,* 9 F. Supp. 556 (W. D. Va. 1935, 3 Judge Ct.), affirmed *per cur.,* 296 U. S. 549 (1935); *Rockaway Pacific Corp.* v. *Stotesbury,* 255 Fed. 345 (N. D. N. Y. 1917); *In re Opinion of the Justices,* — Mass. —, 8 N. E. (2d) 753 (1937); *Orr* v. *Quinby,* 54 N. H. 590 (1874); *In the Matter of the Petition of the United States,* 96 N. Y. 227 (1884); *Yarborough* v. *North Carolina Park Comm.,* 196 N. C. 284, 145 S. E. 563 (1928); *Tennessee* v. *Oliver,* 162 Tenn. 100, 35 S. W. (2d) 396 (1931); *Vann* v. *Cameron County,* 124 S. W. (2d) 167 (Tex. Civ. App. 1939); *Rudacille* v. *State Commission,* 155 Va. 808, 156 S. E. 829 (1931); *Lancey* v. *King County,* 15 Wash. 9, 45 Pac. 645 (1896). In *Orr* v. *Quinby, supra,* at p. 592, the court states that *People* v. *Humphrey* is against the weight of authority, and refuses to follow it.

[137] *E.g.,* 16 U. S. C. A. sec. 403a, 403e, 44 STAT. 616, 47 STAT. 37 (Shenandoah National Park and Great Smoky Mountains National Park).

directly, through condemnations by the states? Theoretically, it would seem not if the United States paid the award, for, as we have seen, if the United States could not condemn for the general welfare, it could not acquire property for such purposes by direct purchase and the state could not condemn in order to make a grant which the grantee had no right to receive.[138] But if the grant were gratuitous, the public use limitation on federal power might not be involved. Moreover, if the state law merely authorized the transfer, but did not require it, and the petition did not declare the intention, it is doubtful if any illegality of the transfer would be available as a defense in the state condemnation proceeding.[139] Here, then, is a possible means by which the Federal Government could acquire property without the consent of the owners, even if it were held unable to condemn for the general welfare—an added argument to show the futility of any attempt to withhold such power.

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[138]A federal judge has recently held in a decision not yet reported that a condemnation by a state flood control district for transfer to the United States was in effect a condemnation by the United States, which was "the real party in interest in the state court proceeding." *United States* v. *Certain Parcels of Land in Riverside County* (S. D. Calif. Central Division, No. 754-M, April 6, 1940, McCormick, J.). This seems unsound. However, some courts, in cases involving condemnation by the state for transfer to the Federal Government, have thought it pertinent to consider whether the United States had authority to receive the grant. *E.g., Via* v. *State Commission,* 9 F. Supp. 556 (W. D. Va. 1935, 3 Judges Ct.), affirmed *per. cur.* 296 U. S. 549 (1935); *Redall* v. *Bryan,* 14 Md. 444, 478 (1859) appeal dismissed, 24 How. 420 (1860); *In re Opinion of the Justices,* — Mass. —, 8 N. E. (2d) 753 (1937); *Rudacille* v. *State Commission,* 155 Va. 808, 156 S. E. 829 (1931).

[139]"The plaintiff contends . . . that it is beyond the power of a state to establish 'national' parks. . . . In fact, the petition in the condemnation proceedings . . . states that petitioner desires to acquire 'for a public park and for public park purposes . . . an area within the Blue Ridge,' etc. There is no statement as to a 'national park.' The power being exercised by the state, as disclosed upon the face of the proceedings, was one of which there could be no question." *Via* v. *State Commission,* 9 F. Supp. 556, 561 (W. D. Va. 1935, 3 Judge Ct.), affirmed *per cur.,* 296 U. S. 549 (1935). If the use indicated by the petition is public, the court will not inquire into the condemnor's actual intentions. See cases cited, *supra,* note 43.