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CONSTITUTIONAL ASPECTS OF FEDERAL HOUSING

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Recent litigation has brought into issue the constitutionality of the federal housing program.¹ Title II of the National Industrial Recovery Act of June 16, 1933,² "with a view to increasing employment quickly,"³ undertakes to authorize the President, through a Federal Emergency Administration of Public Works or such other agency as he may designate or create, "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 Two constitutional questions arise: first, is the national government empowered to expend the national revenues for such a purpose, the expenditure being 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 the furtherance of such a program?

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1. In *United States v. Certain Lands in City of Louisville*, 78 F. (2d) 684 (C. C. A. 6th, 1935), *aff'd* 9 F. Supp. 137 (W. D. Ky. 1935), it was held in an opinion by Circuit Judge Moorman, Circuit Judge Allen dissenting, that the federal government cannot constitutionally exercise the power of eminent domain under Section 203 (a) of the N. I. R. A., *infra* notes 3, 4, since the use of the land would not be a "public use." Certiorari has been granted by the United States Supreme Court, October 28, 1935.

2. 48 STAT. 195 (1933), 15 U. S. C. A. § 702 (Supp. 1934).

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

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

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

I.

THE NATIONAL SPENDING POWER—AN INDEPENDENT SUBSTANTIVE POWER

A. *The Constitution*

Article I, section 8, clause 1 of the Constitution reads as follows: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." In a single particular does this language require, or indeed fairly admit of, interpretation. The power "to lay and collect taxes" implies the duty of applying the proceeds thereof to the general welfare. The latter term, on the other hand, is virtually a term of art to designate the ordinary discretion of principal (in contradistinction to subordinate) legislative bodies in the appropriation and application of public funds. Allowed, therefore, its literal force and effect, the above clause of the Constitution unquestionably confers upon the national government the power claimed for it in Title II of the N. I. R. A., so far as the mere expenditure of the national revenues is concerned.

B. *The Madison Doctrine*

In the face of a verbal clarity not excelled in any other provision of the Constitution, the contention was nevertheless advanced at an early date that, read in the light of the "intention" of the framers of the Constitution, the clause under consideration must be given a different and greatly restricted meaning.

Whether such a claim is entitled to a hearing would appear to be highly doubtful, in the light of admitted principles of statutory and constitutional interpretation. "If the text is explicit the text is conclusive";⁶ it is not the function of the interpretative process to import obscurities, but to remove them.⁷ Had the framers entertained the alleged intention, it is safe to assume that they would have been capable of giving it unmistakable expression, and certainly of avoiding the very phrase most precisely calculated to defeat it. Confronted with a similar assertion (and from the same source) regarding "the reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress", the Court answered, that such reasons "do not, however, affect or limit the extent of the power itself."⁸ The principle of interpretation thus invoked applies even more evidently, if possible, to the phraseology at present under consideration.

6. Attorney-General for the Province of Ontario v. Attorney-General for the Dominion of Canada, (1912) A. C. 571.

7. Russell Motor Car Co. v. United States, 261 U. S. 514, 519, 520 (1923).

8. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 228 (1899).

The logical and scientific merits of a theory do not, however, invariably afford full measure of its historical importance. The theory in question regarding the intention of the framers in conferring on Congress the power "to lay and collect taxes" for "the general welfare" has not only influenced discussion of the national spending power, but also at times to some extent the actual exercise of that power.⁹ But what is much more important, it has deranged ideas concerning the constitutional nature of this power and hence of its relationship to Congress' auxiliary powers of enforcement under "the coefficient clause." The theory must therefore be examined for its effect upon both of the constitutional questions posed at the outset of this article.

The author of the restrictive view of the national spending power was James Madison. Alarmed by the suggestion, which was offered by opponents of the Constitution while ratification was pending, that the general welfare clause "amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the . . . general welfare", Madison had urged in *The Federalist*¹⁰ that this phrase must be treated as being defined by the succeeding enumeration of powers; and he later extended this construction to cases of national provision for "the general welfare" by the expenditure of money. For the latter power, he argued, together "with the train of powers incident thereto", "would still leave within the legislative power of Congress all the great and most important measures of government, money being the ordinary and necessary means of carrying them into execution." The power of taxation and expenditure conferred upon Congress by the opening clause of Section 8 of Article I must, therefore, he argued, be viewed not as additional to the other enumerated powers of the national government, but merely as a means of carrying these others into effect.¹¹

In other words, although the power of the national government "to lay and collect taxes" is exercised throughout the nation as an entity, yet it is not a *substantive* power but only an *instrumental* power; and outside the powers to which it is instrumental there is no national "general welfare" which may be provided for by an expenditure of money. Confronted with the confessed inability of the state and local governments to deal effectively with the present crisis, such a contention seems the very acme of paradoxical absurdity. How then did it first obtain standing as a doctrine of constitutional interpretation and what is its standing as such today?

As a matter of fact, the Madisonian thesis, so far as concerns the spending power alone, was almost universally rejected throughout the first

9. See Corwin, *The Spending Power of Congress—Apropos the Maternity Act* (1923) 36 HARV. L. REV. 548; WARREN, CONGRESS AS SANTA CLAUS (1932).

10. No. 41.

11. In addition to THE FEDERALIST No. 41, see 6 WRITINGS OF JAMES MADISON (Hunt's ed. 1906) 354-357; 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS (1898) 584-586; 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON (1865) 134-139. Curiously, in THE FEDERALIST No. 14, Madison seems to be forecasting the broadest use of the spending power by the national government.

forty years of government under the Constitution. In *The Federalist* itself, Hamilton had, in discussing the taxing clauses, envisaged a government which would undertake "liberal" and "enlarged plans of public good", and one whose fiscal needs must be expected to expand indefinitely, while those of the states would "in a short course of time . . . naturally reduce themselves within a *very narrow compass*." ¹² And in his famous *Report on Manufactures*, of 1791, Hamilton expressed the same point of view with more elaboration. Elucidating the term "general welfare", he there remarked:

"The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union, to appropriate its revenues, should have been restricted within narrower limits than the 'general welfare.' . . .

It is therefore of necessity left to the discretion of the National Legislature, to pronounce, upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper." ¹³

That President Washington shared the same persuasion is shown by the recommendation in his final message to Congress of manufactures on public account, pecuniary encouragements to agriculture, and a national university.¹⁴ Indeed, even Jefferson appears at this period to have entertained the liberal—and literal—view of the general welfare clause.¹⁵

Such prestige as the highly artificial Madisonian view of the spending power later achieved is directly associated with the spread of the States Rights theory of the Constitution. By this theory, inasmuch as the Constitution represented a compact of "sovereign states", it must be construed in such a way as to confine the powers of "the general government", in the exercise of which it might come into competition with the said states, to the narrowest possible limits. When Jefferson in 1824 characterized the federal government as "our foreign government, which department alone is taken from the sovereignty of the separate States",¹⁶ he expressed with exactitude this point of view, as did also Attorney General Black in 1860, when he advised President Buchanan that the Constitution did not recognize such a thing as "insurrection" against the United States, and for the general government to attempt to enforce its laws in a "seceded" state would be to "wage war" upon such state.¹⁷ That interpretation of the general welfare clause should come

12. 11 WORKS OF ALEXANDER HAMILTON (Lodge's ed. 1904) 259; and see generally THE FEDERALIST Nos. 30, 34.

13. 4 *id.* at 70 *et seq.*, 151.

14. 1 RICHARDSON, *op. cit. supra* note 11, at 201, 202.

15. 3 WRITINGS OF JEFFERSON (Memorial ed. 1903) 147-149.

16. 10 WRITINGS OF JEFFERSON (Ford's ed. 1899) 295.

17. 9 OPS. ATT'Y GEN. (1866) 516.

to reflect in some measure the same general attitude is not surprising; rather it is surprising that the effect was not more pronounced. "*A sociis noscitur.*"

When in March, 1817, Madison vetoed the famous "Bonus Bill", to erect certain sums into a fund pledged to internal improvements, a motion to over-ride the veto in the House received a large, though still insufficient, majority, and among this majority were Webster, Clay, and Calhoun. Later the same year a special committee of the House attacked the Madisonian theory of the spending power at all points,¹⁸ while Monroe, who had entered office an avowed champion of his predecessor's crotchet, soon recanted. Said he, in his *Views of the President of the United States on the Subject of Internal Improvements*, of May 4, 1822:

"It was impossible to have created a power within the Government or any other power distinct from Congress and the Executive which should control the movement of the Government in this respect and not destroy it. Had it been declared by a clause in the Constitution that the expenditures under this grant should be restricted to the construction which might be given of the other grants, such restraint, though the most innocent, could not have failed to have had injurious effect on the vital principles of the Government and often on its most important measures."¹⁹

But the really conclusive refutation of Madison is that given by Story in his *Commentaries*, which came out in 1833. "If there are," he writes, "no other cases which concern the common defence and general welfare, except those within the scope of the other enumerated powers, the discussion is merely nominal and frivolous. If there are such cases, who is at liberty to say that, being for the common defence and general welfare, the Constitution did not intend to embrace them?"²⁰ Nor has he greater difficulty in disposing of Madison's contention that the literal view of the general welfare clause, even if invoked only in "cases which are to be provided for by the expenditure of money, would still leave within the legislative power of Congress all the great and important measures of government." "The only question", Story rejoins, "is whether a power to lay taxes and appropriate money for . . . the general welfare does include all the other powers of government; or even include the other enumerated powers (limited as they are) of the national government."²¹ And he sums up the Madisonian thesis thus: "Stripped of the ingenious texture by which this argument is disguised, it is neither more nor less than an attempt to obliterate from the Constitution the whole clause, 'to pay the debts, and provide for the common defence and general welfare of the United States', as entirely senseless, or inexpressive

18. 21 AM. STATE PAPERS (1817) 443; 31 ANN. CONG. (15th Cong., 1st Sess., 1817) 451.
19. 2 RICHARDSON, *op. cit. supra* note 11, at 144, 166.

20. 1 STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1891) § 924.

21. *Id.* § 923.

of any intention whatsoever. Strike them out, and the Constitution is exactly what the argument contends for." But that, as he justly adds, is "to make a new Constitution, not to construe the old one."²²

To pursue further the topic of this subsection would however, be without point, for two reasons:²³ first, because the later advocates of the Madisonian reading of the general welfare clause are not entitled to audience on any ground of being specially informed as to the intentions of the framers of the Constitution; secondly, because this reading has been, especially since the Civil War, constantly and increasingly discredited by the actual conduct of Congress in the appropriation and application of national funds.

C. *Congressional Practice under the Constitution*

From an early date the Court has declared many times that it will not lightly disturb a long established "practical construction" of the Constitution, that is to say, a construction underlying a long continued practice of either or both of the political branches of the government. In so-called "doubtful" cases, this rule is virtually coercive; and particularly is this so if the construction originated early in the history of the Constitution. In the words of the Court:

"... government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."²⁴

The case for federal housing is not even "doubtful" in any sense adverse to the pretensions of the government. Such element of doubt as it possesses arises from a theory which erases the constitutional phrase which it purports to construe, and which, as we have seen, was rejected by the great weight of opinion fairly contemporaneous with the establishment of the government. That the above-stated rule of deference to a long-continued practical construction of the Constitution is entitled to the fullest observance in the present instance is clear.

22. *Id.* § 919. It is significant that Madison in 1826 urged an amendment expunging from the Constitution the phrase "common defence and general welfare." 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* (1865) 530.

23. It should be noted, however, that the younger Adams was a most convinced exponent of a liberal use by the national government of its spending power in behalf of "progressive improvement of the governed"; and that Jackson's famous veto of the Maysville Road bill, of May 27, 1830, was based on the alleged "local" character of the road. Corwin, *supra* note 9, at 565, 566.

24. *United States v. Midwest Oil Co.*, 236 U. S. 459, 472 (1915). The earlier cases are industriously collected in *Fairbank v. United States*, 181 U. S. 283, 307 (1901).

"Since the formation of the government", said Justice Sutherland, speaking in 1923 for a unanimous Court, "as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect."²⁵ While this clear-cut recognition by the Court of the main fact here contended for is perhaps sufficient of itself, yet it will not be altogether superfluous to point out briefly some of the principal types of "non-federal" expenditures.²⁶

During the first third of the nineteenth century most discussion of Congress' spending power centered about projects for "internal improvements", roads and canals. The national government aided or carried through several such projects, the most extensive being the famous Cumberland Road. Today such expenditures would probably be referred to the commerce power, but in those days they were thought to raise directly the question dealt with here. And the same should be said of Rivers and Harbors bills, the earliest of which became law March 3, 1823.²⁷

Certain other types of national spending, however, must still seek constitutional justification from the general welfare clause alone, and some of these had expanded prodigiously even prior to the present crisis. The story of the growth of expenditures in aid of agriculture is summarized in a compendious brief by the present Chief Justice of the United States, which was filed with the Court in 1920.²⁸ A small appropriation for the collection of agricultural statistics was voted in 1839; eighty years later many millions of dollars were being disbursed annually by the Department of Agriculture for "non-federal" purposes. Indeed, the Department itself is "non-federal" in this sense; as are also the Geological and Geodetic Surveys, the Fisheries Bureau, the Bureau of Mines, and the Department of Labor. Nor is it easy to provide constitutional basis outside the taxing clause for the government's participation in the business of irrigation, of game preservation, and the vast proportion of the labors of the census.

The government's increasing support of education is a parallel story.²⁹ Its first donations for this purpose were in public lands, then in money derived from the sale of these. In 1868, however, the Office of Education was created in the Department of the Interior;³⁰ in 1879 money was voted to aid the education of the blind,³¹ and in 1900 an appropriation from the general funds was made to further education in the states.³² The so-called "federal

25. *Massachusetts v. Mellon*, 262 U. S. 447, 487 (1923).

26. See references cited *supra* note 9.

27. 4 STAT. 175 (1823).

28. The brief is available in 73 CONG. REC. 7890 (1930).

29. Corwin, *supra* note 9, at 570 *et seq.*

30. 15 STAT. 106 (1868).

31. 20 STAT. 467 (1879).

32. 31 STAT. 179 (1900).

grant in aid", the availability of which to a state is contingent upon its meeting certain stipulated conditions, dates from 1914.

It is worthy of especial note that the first donation by Congress in relief of suffering was voted as early as 1794, five years after the establishment of the government.³³ The beneficiaries were refugees from Santo Domingo, and in 1812 citizens of Venezuela were similarly aided. But when a like proposal passed the Senate in 1847 in behalf of victims of famine in Ireland, it was rejected by the House by a narrow majority, which was probably motivated in part by constitutional scruples. Twenty years later Congress made its first appropriation in relief of American citizens, following a considerable discussion of the Constitutional issue. The second grant of the same type, in 1874, was unaccompanied by such discussion. But when, in 1876, an appropriation of \$1,500,000 was proposed for the Centennial Exposition at Philadelphia, constitutional objections were again raised, although they proved unavailing. It is interesting to record the words of the scholarly Senator Edmunds of Vermont in the course of the debate, since he was recognized as one of the foremost constitutional lawyers of the day: "At first I thought Congress had no power, but subsequent examination leads me to believe that Congress has power to appropriate money to any object that it deems to be for the common defense or general welfare."³⁴

The record of Congressional action under the Constitution admits indeed of no other conclusion.

D. *Decisions of the Supreme Court*

The relevant cases fall into two groups, first, those in which certain expenditures of the national government were referred by the Court to other specifically granted powers of Congress; secondly, those in which the Court directly commented on or invoked the general welfare clause.

1. Foremost in the first class are several which assert for Congress the power, by virtue of the commerce clause particularly, to supply the facilities of transportation. This doctrine was first clearly asserted by the Court in 1887, in the *Pacific Railway Cases*.³⁵ Upon examination it would seem that the question of the spending power was not raised in those cases, the main question argued being whether Congress had had the power to grant certain franchises to railway companies and to exempt these from state taxation. The Court answered these questions affirmatively on the basis of the "necessary and proper" clause as construed in *M'Culloch v. Maryland*,³⁶ and by reference to Congress' powers over commerce and the post and its war powers. Later cases raising like issues have been similarly disposed of.³⁷

33. On this paragraph see WARREN, CONGRESS AS SANTA CLAUS (1932) 72.

34. Quoted in *id.* at 85.

35. *California v. Pacific R. R.*, 127 U. S. 1 (1887).

36. 4 Wheat. 316 (U. S. 1819).

37. See, e. g., *Luxton v. North River Bridge Co.*, 153 U. S. 525 (1894).

Closer to the present problem is *Smith v. Kansas City Title & Trust Co.*,³⁸ sustaining the Federal Farm Loan Act of 1916. Although in his elaborate brief in support of the act, the present Chief Justice of the United States dwelt at length upon the power of Congress to expend the national revenues beyond the area of its other enumerated powers,³⁹ the opinion of the Court invoked chiefly the incidental capacity of the Loan Banks to act as fiscal agencies of the national government, an attribute which was held to bring them within the doctrine of *M'Culloch v. Maryland*. Again, the question of tax exemption was, in the words of counsel opposing the act, "the real issue", and the Court evidently felt it desirable to confine a familiar issue to familiar grounds. Nor does its opinion contain a single expression which is construable against the contention in support of the Housing Act.

2. Foremost in the second category is a passage from Chief Justice Marshall's opinion in *M'Culloch v. Maryland*, in which he remarks: "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or *levying taxes*, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished."⁴⁰

In short, the taxing power of the national government is "a great substantive power", not an instrumental power; and it stands in this respect precisely on a level with the war power and the commerce power. All of which is in flat contradiction of the Madisonian thesis.

The decision having the most direct bearing upon the merits of the present question, in both its branches, is *United States v. Gettysburg Electric Ry.*,⁴¹ decided in 1896. Here was sustained the power of the national government to take by eminent domain private land for a national park commemorative of the battle of Gettysburg. The opinion invokes 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 general welfare."⁴² The latter would seem clearly to furnish the real basis of the decision. 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.

38. 255 U. S. 180 (1921).

39. See references cited *supra* note 9.

40. 4 Wheat. 316, 411 (U. S. 1819). Italics supplied.

41. 160 U. S. 668.

42. *Id.* at 681.

The further implications of this case are dealt with in Section II of this paper.

To sum up: Congress' power "to lay and collect taxes", and hence to expend the proceeds thereof for "the general welfare", is a distinct, substantive power, and not a mere means of carrying out its other powers. This proposition is sustained by the plain, literal reading of the Constitution, by the vast weight of opinion contemporary with the establishment of the national government, by the actual practice of Congress both during that period and since the Civil War, and by utterances of the Court directed to the very point. This characteristic of the taxing and spending power being established, we turn next to consider in what relationship it stands to the undoubtedly instrumental powers conferred by "the coefficient clause."

II.

THE NATIONAL EMINENT DOMAIN POWER—AN ARM OF THE SPENDING POWER

A. *The Constitution*

The second branch of our inquiry is whether the national government is constitutionally entitled to employ the power of eminent domain in furtherance of a slum-clearance and housing program which is part of a wider program for the relief of unemployment.

Granting such a program to be within the national taxing and spending power, the employment of the power of eminent domain in furtherance thereof is logically indicated by the general welfare clause itself. Otherwise, by refusing to sell, owners of strategically placed sites could entirely prevent the carrying out of the program in localities where it would be of greatest benefit; or, by demanding exorbitant prices, such owners would be enabled to convert a program undertaken for the general welfare into one for their own private enrichment.

The question, however, is not left by the Constitution to conjecture. By the so-called "coefficient clause" Congress is given power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."⁴³ As was shown in the preceding section of this paper, the taxing clause confers upon the national government "a great substantive and independent power", and is not merely a species of secondary and superfluous "necessary and proper" clause. Undoubtedly then the spending power is one of "the foregoing powers" which the powers conferred by the "necessary and proper" clause were meant to aid; and the only question that remains is the meaning of the phrase "necessary and proper" in this context.

43. U. S. CONST. Art. I, § 8, cl. 18.

The answer returned to this question by Chief Justice Marshall in *M'Culloch v. Maryland* is the classic one, and has been invoked by the Court so many times since then, that it may be properly regarded today as part and parcel of the constitutional clause which it elucidates: "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." ⁴⁴

Significant too is Marshall's answer to the contention that the power to create corporations, which furnished the immediate issue of the case, was a "sovereign" power, and that the "necessary and proper" clause did not confer "sovereign" but only "auxiliary" powers. This argument he repelled in the following words: "It [the power of creating a corporation] is never the end for which other powers are exercised, but a means by which other objects are accomplished." ⁴⁵ The application of these words to the power of eminent domain is too clear to require comment.

Indeed, in relation to the eminent domain power the "necessary and proper" clause merely recognizes a universal attribute of governments, that of being able to obtain by expropriation the lands they require for the carrying out of their powers. That land is needed to carry out a program of slum-clearance and housing is self-evident.

B. "*The Monroe Doctrine*"

But for the historical difficulty previously noted, this article might here be brought to a close—the difficulty arising from the effort prior to the Civil War to make state interests, rather than the ordinary meaning of words, the prime consideration in interpreting and applying the Constitution.

Again we are faced with a question of historical nature; but it is one of immediate pertinence to this case. It is this: Did earlier denial that the eminent domain power could aid the taxing and spending power purport to rest upon some quality peculiar to this power, which distinguished it from the other "foregoing powers?" Or was it incidental to a general denial that the national government possessed the eminent domain power? For if the latter was the ground, it no longer holds.

Our starting point is Monroe's veto of May 4, 1822, of the bill "For the Preservation and Repair of the Cumberland Road", on account of the provision made by it for turnpikes with gates and tolls. In his *Views* of the same date, Monroe set forth his position in these words:

"The right of appropriation is nothing more than a right to apply the public money to this or that purpose. It has no incidental power, nor does it draw after it any consequence of that kind. All that Congress could do under it in the case of internal improvements would be to

⁴⁴ 4 Wheat. 316, 421 (U. S. 1819).

⁴⁵ *Id.* at 411.

appropriate the money necessary to make them. For every act requiring legislative sanction or support the State authority must be relied on. The condemnation of the land, if the proprietors should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the State. To these purposes the powers of the General Government are believed to be utterly incompetent.”⁴⁶

Two comments are pertinent. In the first place, it is very evident that what Monroe is attempting here is to formulate a compromise between the literal reading of the general welfare clause and the highly artificial Madisonian reading thereof. Congress’ power of appropriation is stated in the broadest terms; but this conception is accompanied by an emphatic denial that it involves any “jurisdictional” consequences whatsoever, whereas Madison had contended that it “drew in its train” substantially the sum total of governmental powers. Neither position is supported by logic, common sense, or actual experience. As Story pointed out, the general welfare clause, when treated as definitive of the national spending power, does not confer upon the national government the sum total of governmental powers, nor even the other enumerated powers of Congress.⁴⁷ Conversely, if there are other powers which, in certain situations and conditions, are reasonably required in order to guarantee that an expenditure of the national revenues shall attain its objective, namely, provision for the general welfare, then the clear and incontrovertible reading of the “necessary and proper” clause renders those powers available to Congress in such situations and conditions.

Secondly, however, it should be noted that Monroe did not confine his denial of the power of eminent domain to the national government simply in relation to the spending power. Thus the power of Congress to establish “post offices and post roads” was, he argued, simply the power to designate such offices and roads. “The idea of a right to lay off the roads of the United States on a general scale of improvement, to take the soil from the proprietor by force, to establish turnpikes and tolls, and to punish” despoilers of the national property would, he declared, never occur to an intelligent citizen.⁴⁸ (In point of fact, it had occurred to many intelligent citizens, which is just why Monroe was trying to rebut it.) With better reason he also denied that the power “to declare war” afforded foundation for such pretensions. “If it had been intended that the right to declare war should include all the powers necessary to maintain war,” what was the necessity, he queried, for the specific grant of power to raise and support armies and navies?⁴⁹ Lastly, the claim set up under the commerce clause appeared to Monroe to have the least weight of all, the delegation of power effected by this clause

46. 2 RICHARDSON, *op. cit. supra* note 11, at 168. To the same effect is his Veto Message. 2 *id.* at 142.

47. 1 STORY, *op. cit. supra* note 20, at 663 *et seq.*

48. 2 RICHARDSON, *op. cit. supra* note 11, at 157.

49. *Id.* at 159.

having been dictated mainly, he asserted, by the "injuries resulting from the regulation of trade of the states respectively."⁵⁰

And so much for "the Monroe doctrine", standing by itself. One merit should be accorded it. In thus denying the power of eminent domain to the national government in connection with the postal, war and commerce powers, as well as the spending power, Monroe was at least consistent, a virtue not claimable by those who today cite him in support of the idea that this power may not be exercised in furtherance of the taxing and spending power only.

That, moreover, this general denial of the eminent domain power to the national government accorded with the entire states' rights position is evident. In *M'Culloch v. Maryland*, Marshall had opposed to Maryland's endeavor to tax the Bank of the United States the proposition that the Bank was in Maryland by virtue of the supreme mandate of the national government. Maryland's consent to its presence being therefore unnecessary, the Bank—aside from its real estate—was not within her jurisdiction for taxing purposes.⁵¹ This point of view the states' rights doctrine entirely rejected.⁵² The national government was not in the main, it contended, a territorial sovereign at all. It was present in the states by their consent given in the Constitutional Compact, and only for very limited purposes. The real territorial sovereigns and the ultimate proprietors of the lands within their respective boundaries, were the states; and the power of eminent domain sprang from this ultimate proprietorship. It was, therefore, an item of the reserved powers of the states, and as such was not exercisable by the national government outside of areas subject to its exclusive jurisdiction, under any circumstances—doctrine to which the Court of the period subscribed.⁵³

C. *The Status of the Question Today*

The Civil War restored the conception of the national government as a sovereign resting "upon the soil and territory of the country";⁵⁴ while at the same time it brought back into good standing Marshall's reading of the "necessary and proper" clause; and as an early result of this restoration of earlier conceptions came explicit recognition that the national government was entitled to exercise the power of eminent domain within the states whenever this power was fairly claimable under the "necessary and proper" clause.

50. *Id.* at 161. Monroe's idea that the national government must rely on the states to protect its property from despoilers, was long since relegated to the museum of constitutional curiosities. See *Camfield v. United States*, 167 U. S. 518 (1897).

51. 4 Wheat. 316, 429-430 (U. S. 1819).

52. CORWIN, NATIONAL SUPREMACY (1913) 107-112.

53. "The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted." *Pollard, Lessee v. Hogan*, 3 How. 212, 223 (U. S. 1845). See also *New Orleans v. United States*, 10 Pet. 662 (U. S. 1836).

54. *Ex parte Siebold*, 100 U. S. 371, 394 (1879).

The leading case is *Kohl v. United States*,⁵⁵ involving a proceeding instituted by the United States to appropriate a parcel of land in Cincinnati "as a site for a post office and other public uses." Sustaining the proceeding and the act of Congress under which it purported to have been brought, the Court said:

"It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. . . . But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder." ⁵⁶

Nor, the Court continued, was the national government under the necessity of applying to the states for the exercise of the power.

"Neither [government] is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the States

55. 91 U. S. 367 (1875).

56. *Id.* at 371-372.

was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?"⁵⁷

Is there any reason why this language, on which have been based many later decisions, should not be regarded as decisive also of the present question? Is there any reason why, the proposition being established that the power of eminent domain "is the offspring", not of "ultimate ownership of the soil", but "of political necessity", that power should not be available to the spending power on the same terms as it is to the other "foregoing powers?"

It may be argued, however, that the national government has rarely if ever employed its eminent domain power as an instrument of the spending power. There are several answers. In the first place, prior to 1872 Congress had not authorized employment of the power at all, but as the Court said in the *Kohl* case, "The non-user of a power does not disprove its existence."⁵⁸ Secondly, since 1872 the power of eminent domain has been employed repeatedly by the national government either directly or by corporate agents in connection with projects which Monroe himself would have referred to the spending power, although they have since then come to be referred principally to the power to regulate commerce.⁵⁹ Lastly, as we have before seen, in the *Gettysburg* case, the Court sustained the right of the national government to condemn privately owned land in connection with the laying out of a national memorial park, which project was referred by the Court directly to the spending power, the power to declare war, and the power to create armies and navies. "Having such powers," said Justice Peckham, speaking for the Court, "it [Congress] has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect."⁶⁰

Manifestly a heavy burden of proof rests upon any one who would undertake to assert that this holding is not decisive of the issue under consideration. And in view of the survey sketched above of the logical and historical aspects of the present problem, it is exceedingly difficult to imagine from what sources the required proof could be drawn.

57. *Id.* at 372-373.

58. *Id.* at 373.

59. See *supra* 137, and cases cited notes 35 and 37.

60. *United States v. Gettysburg Electric Ry.*, 160 U. S. 668, 681 (1895).

D. Emergency and Judicial Notice

Finally, it is pertinent to recall the factual situation which the government's present program is designed to meet. This is not, of course, to suggest that the Court is required, or indeed empowered, to re-enact the Congressional statute under review, or to weigh its expediency in comparison with other conceivable programs for the same general purpose. It is only to recognize that nowadays constitutional issues are frequently overlaid by matters of fact regarding which a court must be able to inform itself if it is to discharge its role of judicial review intelligently. Fortunately, the present case requires no inordinate exercise of judicial powers of self-enlightenment.⁶¹ The courts know that there is a widespread condition of unemployment and enforced idleness; they know the social menace of such a condition; they know the helplessness of the state and local governments in the presence of this condition; they know that the slum-clearance and housing project is part of an articulated scheme for the relief of unemployment throughout the nation; they know that many modern governments have engaged in projects of this nature without reference to unemployment relief, solely because of the evident connection between housing conditions and the public health, safety, and morals.

It may be conceded that those special conditions, which are apt to be labeled "emergency" because of a general hope that they will presently pass away, "may not call into life a power which has never lived." Nevertheless, as the Court, in uttering these words, at once added, "Emergency may afford a reason for the exertion of a living power already enjoyed."⁶²

Furthermore, the Court has said: "It is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."⁶³ These words, spoken in justification of a treaty and a supporting act of Congress which together brought under national control a subject which had hitherto been left exclusively within state jurisdiction, have a re-emphasized cogency in the present connection. For if the preservation of game birds is, as Justice Holmes asserted it was, "a national interest of very nearly the first magnitude",⁶⁴ certainly the problem dealt with by the present measure may be thus characterized. And granting the national interest involved, what reason can be assigned for supplementing the treaty-making power with

61. "Put at its highest, our function is to determine, in light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure . . . transcends the bounds of reason." Justice Brandeis, in *Burns Baking Co. v. Bryan*, 264 U. S. 504, 534 (1924). Although this statement occurs in a dissenting opinion, it is apparent that the majority opinion proceeds on a like assumption. See further Chief Justice Taft's opinion for the Court in *Board of Trade v. Olsen*, 262 U. S. 1 (1923), and Chief Justice White's opinion in *Wilson v. New*, 243 U. S. 332 (1917).

62. *Wilson v. New*, 243 U. S. 332, 348 (1917).

63. *Missouri v. Holland*, 252 U. S. 416, 433 (1920).

64. *Id.* at 435.

Congress' "necessary and proper" powers, and refusing thus to supplement the spending power?

Certainly, if there are two clauses of the Constitution which are calculated, when words are given their ordinary meaning, to illustrate and confirm Marshall's conception of the Constitution as intended for duration and hence "to be adapted to the various *crises* of human affairs",⁶⁵ it is the two clauses specially dealt with in this article.

To summarize: Once the character of the power of Congress "to lay and collect taxes . . . to provide for the . . . general welfare" as an independent, substantive power is grasped, the relationship to it of the auxiliary powers conferred by the "necessary and proper" clause becomes manifest. It is the same relationship as obtains between all of the other "foregoing powers" and these auxiliary powers. The question whether use of the eminent domain power is a "necessary and proper" measure in aid of a governmental program of slum-clearance and housing, answers itself. Before such a program can be carried out, land must be obtained. Whenever any government (national, state or local) requires land to carry out a program within its constitutional powers, it is elementary that it may obtain such land by condemnation proceedings. There was, to be sure, a period during which the right of the national government to resort to the power of eminent domain within the states was denied as an invasion of the reserved power of the states. But this doctrine was at the expense of Chief Justice Marshall's construction of the "necessary and proper" clause in *M'Culloch v. Maryland*, and following the Civil War was definitely repudiated by the Supreme Court. Logic, common sense, and precedent combine with the judicially cognizable facts of the present exigency to render the government's case unanswerable.

III

A

The argument will be made that the national government's entrance into a low-cost housing and slum-clearance project violates the Tenth Amendment. Now in the first place, this contention gives no weight to the primary purpose of the pending project, to relieve a nation-wide condition of unemployment which the state and local governments have been unable to deal with effectively. In the second place, the argument is without validity even disregarding this primary purpose of the housing project.

Fully elaborated, the argument involves the following propositions, either stated or assumed: first, that the police power is the power to promote the public health, safety, morals and general welfare; secondly, that the police power, thus defined, is reserved by the Tenth Amendment exclusively

65. *M'Culloch v. Maryland*, 4 Wheat. 316, 415 (U. S. 1819).

to the states, and hence is not delegated to the national government; thirdly, that therefore the national government is without power to promote the public health, safety, morals and general welfare.

That the Tenth Amendment reserves to the states the power to regulate their own internal affairs, nowadays generally termed "the police power", is elementary. But it is equally elementary that this reservation does not serve to define the scope of the delegated powers of the national government. In the words of "The Father of the Constitution": "Interference with the powers of the states was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws or even the constitution of the States."⁶⁶

What this opposing argument boils down to is the contention that, since the police power is commonly described by reference to the broader objectives of good government the world over—namely, promotion of the public health, safety, morals, and general welfare—the national government is consequently forbidden to exercise its granted powers in promotion of these objectives, although just what objectives it should promote are not indicated. In other words, once it is shown that the Constitution delegates a certain power to the national government, that power must be henceforward regarded as stricken from the list of those powers which may be constitutionally employed by government in this country in promotion of the public health, safety, morals, and general welfare. Not only is such a contention intrinsically absurd; it flies in the face of the Preamble of the Constitution, of a long course of legislation by Congress, and the clear doctrine of the Supreme Court.

While the Preamble is not a part of the Constitution in the sense of conferring either powers or rights, it states in clear and unmistakable language the great objects which the Constitution and the government established by it are intended to serve: national unity, justice, peace at home and abroad, and the general welfare. What is more, Congress has, especially in recent decades, passed many laws restrictive of the interstate commerce activity when this was deemed to conflict with the public health, safety, morals, and general welfare of the country, and has been sustained by the Court on the broadest ground in doing so. Reviewing certain legislation of the character just mentioned, the Court said, in the *White Slave Act Case*⁶⁷:

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and

66. 6 WRITINGS OF JAMES MADISON (Hunt's ed. 1906) 28.

67. *Hoke v. United States*, 227 U. S. 308, 322, 323 (1912).

moral. . . . The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the states'; that the power is complete in itself, and Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

Those who attack the government's program may cite *Hammer v. Dagenhart*,⁶⁸ where it was held that an act of Congress prohibiting the transportation in interstate commerce of goods made by child labor was void, as exceeding "the commerce powers of Congress and invading the powers reserved to the states."⁶⁹ Manifestly, the second part of the holding, namely, that the reserved powers of the states had been invaded, was dependent upon the first part, namely, that Congress had exceeded its own power to regulate commerce. This power, the Court held, did not extend to the prohibition of the transportation of articles of commerce which are intrinsically harmless. Seven months later, the Court, speaking by the same Justice, sustained an act of Congress (the so-called Reed "Bone-Dry Amendment"),⁷⁰ forbidding the transportation of liquor into states which forbade its manufacture. The Court said:

"That Congress possesses supreme authority to regulate interstate commerce subject only to the limitations of the Constitution, is too well established to require the citation of the numerous cases in this court which have so held. Congress may exercise this authority in aid of the policy of the states if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the states may induce legislation without reference to the particular policy or law of any given State. Acting within the authority conferred by the Constitution, it is for Congress to determine what legislation will attain its purposes. The control of Congress over interstate commerce is not limited by state laws."⁷¹

Nor does the recently decided *Schechter* case⁷² detract anything from the proper force of this language. There it was held, as in *Hammer v. Dagenhart*, that Congress had exceeded its power to regulate "commerce among the several states"; that and nothing more. When acting within its powers, Congress is, Marshall held, a sovereign legislature; and this too is the import of the language of the present Court in *Nebbia v. New York*:

". . . this court from an early date [has] affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses

68. 247 U. S. 251 (1918).

69. *Id.* syllabus.

70. 39 STAT. 1069 (1917).

71. *United States v. Hill*, 248 U. S. 420, 424 (1919).

72. *Schechter Corp. v. United States*, 295 U. S. 495 (1935).

the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government.”⁷³

Among the matters committed by the Constitution to the United States is the power “to lay and collect taxes” to provide for “the general welfare.” This, therefore, may be used to promote on a wider scale objects which particular states may use their powers of taxation and expenditure to promote on a local scale. Or it may be used to promote on a wider scale objects which the states have neglected to promote on a local scale. The only question is whether “the general welfare” is in truth the *bona fide* objective of Congressional taxation and expenditure.

If, therefore, low-cost housing and slum-clearance would furnish a legitimate object for state expenditure, when engaged in on a local scale, there is no reason why it should not furnish a legitimate object for national expenditure when engaged in on a broader scale. However, as was pointed out before, this question is not necessarily involved in the present case. The precise question which will confront the Court is whether the national power of taxation and expenditure extends to provision for low-cost housing and slum-clearance as part of an articulated program for the relief of a nationwide condition of unemployment with which the state and local governments are confessedly unable to deal effectively.

B

Critics of the program contend that the “public use” for which the power of eminent domain may be exercised in this country means use by the government itself in the performance of governmental functions, or a use or service open to the public as of right, irrespective of whether title to the property condemned is vested in the government or some private agency. In short, “public use” means use by the public of the property taken. The District Court and the Circuit Court of Appeals both based their decisions denying the government’s petition in the *Louisville* case⁷⁴ largely on this proposition.

The government contends, on the other hand, that the test of “public use”, whether for purposes of taxation or eminent domain, is not whether the land sought to be acquired will be used by the public but whether the purpose for which the land is desired will reasonably tend to promote the general welfare and redound to the general welfare. In short, “public use” means to the public advantage. Thus when a government, state or national, desires to exercise one of its constitutional powers in promotion of the public welfare, and needs, in order to achieve this purpose, to take private property,

73. 291 U. S. 502, 524 (1934).

74. See note 1, *supra*.

it is entitled to exercise the power of eminent domain, making just compensation for the property taken. Indeed, when its measures do, in fact, result in a taking of private property, government is obliged constitutionally to resort to the power of eminent domain, which is universally qualified in this country by the requirement of just compensation.

That state courts have sometimes adopted the narrow theory of the eminent domain power when construing their respective state constitutions is no doubt true; but the Supreme Court has never done so in construing the Constitution of the United States. Quite to the contrary, recent decisions of the Court clearly sanction the doctrine that the eminent domain power is not merely a power whereby government may acquire property for use by itself or the public, but is also a constitutional instrument of all governmental powers when resort to it is necessary and proper for effecting the general welfare.

A case bearing very directly on the present issue is that of *Green v. Frazier*,⁷⁵ in which, in 1920, the Court sustained the power of the state of North Dakota to engage in, among other activities, that of providing homes for the people. The right of the state so to act was placed squarely upon its power "to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of the people."⁷⁶ That a tax must be for a public purpose, the Court conceded; but it continued: "'Necessity alone is not the test by which the limits of State authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.'"⁷⁷

But it may be urged that the question before the Court in *Green v. Frazier* was that of "public purpose" in taxation. The answer is that this also is the real question in the housing situation. That the property which the government seeks to take will be taken for its own use, in the strictest sense of the term, is evident on a moment's consideration. That is to say, the government having taken the property, will itself proceed to use it to erect houses thereon by the expenditure of public funds. Granting then that such an expenditure is for a public purpose, the government's use of the property taken can hardly be denied to be a public use. Nor can the fact that the eventual use of the same property will be private alter the aspect of the question. There is nothing in the Constitution, certainly, which requires the government to continue to "use", that is to say, actively exercise ownership over any of its property, however acquired, or for whatever purpose.

75. 253 U. S. 233 (1920).

76. *Id.* at 238.

77. *Id.* at 240, quoting Justice Cooley's statement in *People v. Salem*, 20 Mich. 452, 475 (1870).

The Constitution says explicitly that Congress may "dispose" of the property of the United States.

But let it be conceded that the question of eventual "use" of the property which the Government here seeks to take may be properly considered, still the case of *Green v. Frazier* is pertinent for two reasons. In the first place, the passage quoted from the Court's opinion in that case was taken from an opinion by Judge Cooley, in which the doctrine is advanced that the public purposes which may be advanced by use of the eminent domain power are substantially the same as those which may be advanced by the police power, and are broader than those which may be promoted by the taxing power.⁷⁸

In the second place, the North Dakota legislation sustained in *Green v. Frazier* authorized the employment of the power of eminent domain in furtherance of its objectives, and this feature of the legislation was apparently not challenged before the Supreme Court. At least the Court made no reference to it.

Relevant also to the present issue is the recently decided case in *Louisville Joint Stock Land Bank v. Radford*,⁷⁹ in which the Frazier-Lemke Act of June 28, 1934,⁸⁰ was held void under the Fifth Amendment as taking the property of mortgagees without just compensation. The pertinent portion of the Court's opinion reads thus:

"The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. . . . As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of relief afforded in the public interest may be borne by the public."⁸¹

The theory which underlies these words regarding the power of eminent domain is inescapable. It is that this power may be employed as the instrument of any of the substantive powers of government, and not solely those which require to be implemented by a transfer of private property to public or quasi-public ownership. The "public use", therefore, for which private property may be "taken" is not merely use of such property by the government or the public, but comprehends any purpose which may be legitimately furthered by acknowledged governmental powers; and the immediate bene-

78. COOLEY, CONSTITUTIONAL LIMITATIONS (2d ed. 1871) 536, n. 4.

79. 295 U. S. 555 (1935).

80. 48 STAT. 1289, 11 U. S. C. A. § 203 (s) (Supp. 1934).

81. 295 U. S. at 601, 602.

fiary of the "taking" need not be the government or a quasi-public agency, but may be purely private, so long as the public interest is advantaged by the "taking."

The doctrine is a just and considerate one as respects both the interests involved. On the one hand, it favors the beneficial exercise of public authority in situations in which it would be otherwise partially or wholly ineffective; for example, the use of the bankruptcy power in favor of farm mortgagors. On the other hand, it puts the expense of this mode of forwarding the public interest where it ought to rest, namely, on the shoulders of the public.

In short, the term "public use" in the Fifth Amendment means "public purpose." And "the general welfare" which the national government is expressly authorized to promote by its power of taxation and expenditure comprises such "public purpose." So even if the question of the ultimate "use" of the property which the government seeks to take be conceded to be legitimately in issue, still that use is one for which private property may be constitutionally taken by the national government, certainly in existing circumstances.

C

It will further be contended that in confiding to the President and the Federal Emergency Administrator of Public Works, under the President's direction, the expenditure of \$3,300,000,000.00 on public works, without further limitation or restriction, Congress has attempted an unconstitutional delegation of legislative power. This contention may be bolstered by extensive quotation from the Court's recent opinion in the "*Hot Oil*" Cases,⁸² which lawyers who oppose the program evidently regard as a sort of trump card providentially thrust into their hands at the last moment. Many of the inferior federal judiciary have taken the same attitude.

The question raised is whether the planning of public expenditure is a legislative function. The question is easily answered. While taxation is a legislative function, being indeed the function for which Parliament was originally created, determination of the purposes for which the revenues thus obtained shall be expended is primarily an executive function. Several considerations show this to be the case.

1. An appropriation is a grant by the taxing-power—it is not law-making and involves no element of law-making. To be sure, the grant may be made on conditions. But such conditions do not constitute rules of action for the citizen, nor are they enforceable in court. They govern only administrative action, and their enforcement is left to administrative methods.

82. *Panama Refining Co. v. Ryan, Amazon Petroleum Corp. v. Ryan*, 293 U. S. 388 (1935).

2. Originally, however, such grants by the English Parliament were couched in the most general terms. Money was requested by the monarch for the purpose of waging war with France, and so on and so forth.⁸³ Even following the Revolution of 1688, in William and Mary's reign, a certain annual sum was assigned the king for his own use; a lump sum was voted for the "civil list"; a similar sum for the army; a similar sum for the navy, and so on. Within these broad categories the purposes to which the public revenues should be devoted was left entirely to the executive.⁸⁴ Throughout the nineteenth century, it is true, appropriation acts became more and more detailed.⁸⁵ But such details did not come from Parliament—they came from the Cabinet, that is to say, from the executive. In short, it was still the executive who planned expenditures, not the legislature. So much so is this the case that the most recent authorities on English Constitutional Law state the rule as follows: "Legislation involving the expenditure of money can be initiated only by a minister of the Crown. The House of Commons may reduce the proposed expenditure, but may not increase it."⁸⁶ Current practice among constitutional governments on the Continent, let it be added, is the same.⁸⁷

3. Furthermore, early American practice followed the English model. The following is the appropriation voted by the Congress of the Confederation on July 18, 1785, for that year:

Civil Department	\$122,331
Military Department.....	187,224.32
Marine Department.....	30,000
Indian Treaties	5,000
Federal Buildings	30,000
Contingencies	60,000. ⁸⁸

The first appropriation act under the Constitution, which received President Washington's approval on September 29, 1789, may be quoted entire:

"An act making appropriations for the present year: Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present

83. MAITLAND, *CONSTITUTIONAL HISTORY OF ENGLAND* (1926) 183, 184.

84. *Id.* at 310.

85. *Id.* at 385.

86. WADE AND PHILLIPS, *CONSTITUTIONAL LAW* (1931) 140.

87. See W. F. Willoughby, *Budget*, 3 *ENCYC. SOC. SCIENCES* (1930) 38, 40.

88. 29 *JOURNALS OF THE CONTINENTAL CONGRESS* (Fitzpatrick's ed. 1933) 543.

government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids." ⁸⁹

The second appropriation act ⁹⁰ (March 26, 1790) proceeded in the same general categories as the first, but also contained certain more specific items. The third act ⁹¹ (February 11, 1791) contained only the same general categories as the first, and the grant for "the civil list" was stated to be based on estimates from the Secretary of the Treasury. The entire act fills about two-thirds of a page.

Beginning with the second Congress, however, the annual appropriation acts became more and more detailed; and those voted by the twenty-fourth Congress (May 9 and 14, 1836), fill more than fourteen pages of minute specifications. ⁹² Even so, there were still certain fields in which Congress long left executive discretion a nearly free hand in this matter. Thus, the provision made in the annual appropriation acts during Jefferson's two administrations and during Madison's first administration "for the expenses of intercourse with foreign nations", was voted in lump sums. In the words of Attorney General Cushing, "Just those words, and nothing more, disposed of the whole question during the time of Mr. Jefferson." ⁹³ Indeed it was not until 1855 that Congress began to assign definite diplomatic grades to named countries with a specified annual compensation for each.

The latest chapter in this history is supplied by the Budget and Accounting Act of 1921, ⁹⁴ which, following similar reforms in municipal government in various cities of the United States, represents an effort to restore to the national executive the function of planning expenditure, while leaving to Congress its proper function of consent and grant. In the words of Professor Willoughby, the act makes the president "the working head of the administration in fact as well as in name. The budget serves as his plan of operations." ⁹⁵

It is difficult to conceive of any course of reasoning whereby Title II of the N. I. R. A. can be made out to involve an unconstitutional delegation of legislative power, that would not likewise invalidate the Budget and Accounting Act of 1921; that would not, in other words, condemn the national

89. 1 STAT. 95 (1789).

90. *Id.* 104-106 (1790).

91. *Id.* 190 (1791).

92. 5 STAT. 17-31 (1836).

93. 7 OPS. ATT'Y GEN. (1855) 186, 201, citing 2 STAT. 188 (1802); *id.* at 214 (1803); *id.* at 269 (1804); *id.* at 321 (1805); *id.* at 388 (1806); *id.* at 436 (1807); *id.* at 466 (1808); *id.* at 524 (1809).

94. 42 STAT. 20 (1921), 31 U. S. C. A. § 1 (1927).

95. 3 ENCYC. SOC. SCIENCES (1930) 38, 42.

government to a procedure in financial legislation which has been shown by history to be productive of log-rolling, political favoritism, and senseless extravagance.

4. The maxim that the legislature may not delegate its power comes from the eleventh chapter of John Locke's *Second Treatise on Civil Government*. His words are, "The legislative cannot transfer *the power of law-making*. . . ." ⁹⁶ As we have seen, an appropriation is a grant by the taxing power, not law-making. It is obvious that Locke had no intention of calling into question the practice which then prevailed with Parliament of making money grants to the monarch for general purposes.

5. The Constitution provides: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law. . . ." ⁹⁷ This is a restrictive provision; upon which branch of the government was it intended to operate? Clearly, not upon the legislative or the judicial branches. There remains only the executive branch. The provision reflects, in short, the idea that expenditure is primarily an executive function, while the participation of the legislative branch in this function is essentially negative—that of a check.

Possessed of this check, Congress is, no doubt, able to stipulate any terms it chooses as the condition of its making an appropriation, and thereby to limit the effective scope of the inherently executive power of planning and directing expenditure. But it is certainly not required to stipulate any terms beyond directing that its grants be applied in promotion of the "general welfare", and this it has done in Title II of the N. I. R. A. For the rest, Congress wisely concluded that administrative experimentation in the field of public works was necessary before standards could be worked out with sufficient definiteness to warrant their adoption by Congress as restrictions upon further experimentation.

Invocation of the maxim against delegated legislation is, therefore, totally baseless and irrelevant—as much so as an invocation of the prohibition upon *ex post facto* laws would be against a deficiency appropriation. It is a grasping at straws, a gesture of desperation. Not only history but best modern practice supports the proposition that the planning of public expenditure is an executive function. In leaving this function with the executive, Title II of the N. I. R. A. is not violating the Constitution; it is preserving it. The act is a wholesome precedent in this field of legislative power.

96. (Morley's ed. 1887) 266.

97. U. S. CONST. Art. I, § 9, cl. 7.