THE LAW OF PUBLIC HOUSING

WILLIAM EBNSTEIN*

I. THE SALIENT FACTS IN THE HOUSING PROBLEM

Concerted action of reformers, pressure of circumstances and farseeing statesmanship have finally succeeded in making this country "housing-conscious." The biggest housing survey ever undertaken in history was done by 12,000 CWA workers, and was finished toward the end of 1934.¹ This survey dealt with 64 cities in 48 states and covered 2,633,135 dwelling units in 1,931,055 buildings. The number of people in these units was 9,074,781. Cities in excess of 750,000 were not included in the survey. This is significant, for the results of the Inventory, serious as they are, would have been still more impressive had the large cities been covered by the survey as well. But even within the self-chosen limitations of the survey the data produced give ample evidence of the major factors and tendencies in the housing situation.

These are some of the more important data emerging from the Inventory:

17.1 per cent of the dwellings are overcrowded
60 per cent need repairs
49.4 per cent have no furnace or boiler
30.4 per cent have no gas (for cooking)
24.5 per cent have no tubs or showers
17.3 per cent have no private indoor toilet
9.4 per cent have no electricity.

In New York City there are nearly 300,000 rooms with no windows at all. Addressing the United States Conference of Mayors at Washington, D. C., on November 19, 1935, United States Senator Robert F. Wagner said: "In my own city of New York 510,000 families, or over one-fourth of the total, live in

*Member, National Association of Housing Officials; Instructor of Political Science, University of Wisconsin.
¹Real Property Inventory, 1934, Department of Commerce, Bureau of Foreign and Domestic Commerce.
quarters that a well-trained prison warden would brand as unfit for his inmates." In New Orleans almost half the homes in two large blighted areas were provided with no sanitary equipment of any sort.² Similar conditions prevail in other large cities which were not covered by the Real Property Inventory.

So far no detailed surveys of the Real Property Inventory have been undertaken for the rural areas. However, from the data in possession of the Census Bureau and the Department of Agriculture, the following facts should be noted:

Five out of six homes have no running water; six out of seven have no electric light; one-half need major repairs; only one out of twenty comes up to the American standard.³

The lower-income groups of the American people are the hardest hit by this all-round housing inadequacy. The Bureau of Foreign and Domestic Commerce made a "Financial Survey of Urban Housing" in 1934, which it published in 1937. This survey covered sixty-one cities, and each state was represented by at least one city. Only one city investigated had more than 1,000,000 inhabitants, and only five less than 25,000. The inquiry therefore is fairly representative of all sections of the country. According to the popularly held belief 20 to 25 per cent of the family income is supposed to be spent for rent. In reality less than thirty per cent of cases reported conformed to this assumed rule, 5 per cent of the families spending less than 20 per cent of their incomes for rent, and not less than 65 per cent spending more than 25 per cent of their total incomes for rent. The income groups of $1-249 spent 112.4 per cent of their income on rent; the following table gives a picture of the other low income classes:⁴

<table>
<thead>
<tr>
<th>Income</th>
<th>Number of Reports</th>
<th>Rent Bill as per cent of income</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>1884</td>
<td></td>
</tr>
<tr>
<td>$ 1-249</td>
<td>2694</td>
<td>112.4</td>
</tr>
<tr>
<td>250-499</td>
<td>3569</td>
<td>58.9</td>
</tr>
<tr>
<td>500-749</td>
<td>3907</td>
<td>38.2</td>
</tr>
<tr>
<td>750-999</td>
<td>2928</td>
<td>30.0</td>
</tr>
<tr>
<td>1000-1499</td>
<td>5049</td>
<td>26.0</td>
</tr>
<tr>
<td>1500-1999</td>
<td>3412</td>
<td>21.6</td>
</tr>
<tr>
<td>2000-2999</td>
<td>2540</td>
<td>19.7</td>
</tr>
<tr>
<td>3000-4499</td>
<td>1057</td>
<td>17.3</td>
</tr>
<tr>
<td>4500-7499</td>
<td>360</td>
<td>15.0</td>
</tr>
<tr>
<td>7500 and over</td>
<td>113</td>
<td>10.9</td>
</tr>
</tbody>
</table>

²Homes for Workers, Federal Emergency Administration of Public Works, Housing Division, Bulletin No. 3, 1937.
³These data are taken from Homes for Workers, see p. 12 et seq.
⁴Financial Survey of Urban Housing, p. 279. The data given in the
These figures show how the housing problem is the problem of the low income earner. It is also significant that these ratios of income and rent bill remain pretty much the same in times of prosperity and depression. The lower income groups of the American people thus not only live in inadequate housing conditions to a very appreciable degree, but also pay an excessive amount of their income toward the rent, certainly a larger share than was assumed before the recent accurately compiled figures were available.

In this country property had customarily been thought of not so much in terms of earning an income as of reselling it at a higher price. The rapid rate of growth had led to expectations of further and further growth until the speculative element in the value of real property had often overshadowed the economic calculation of actual yield capacity.

This traditionally speculative element in real property came to a fatal test with the outbreak of the depression after the seven prosperity years 1922-1929. The value of building permits issued in 65 representative cities fell from almost 1500 million dollars in the first half of 1929 to only 160 million dollars in the first half of 1933. In terms of families provided with housing this meant a drop from 130,000 families to 9,000. The resulting breakdown of the construction industry accounted for a third of the total unemployment. In 257 representative cities new dwellings erected averaged 400,000 a year between 1925 and 1929. The number dropped to 20,848 in 1934. This is less than the number of houses destroyed by fire each year. The President’s message on housing on November 29, 1937, gave the following figures for the country as a whole: the annual average of new dwelling units was 800,000 in the seven years prior to 1930, and fell to 180,000 in the seven years 1930-1937. Another vital new element has entered the picture: while in 1928 77.5 per cent of the country’s building was done by private enterprise, and only 22.5 per cent table refer to the city of Cleveland. For a more detailed discussion of this question see Philipson: What Can Families Pay for Housing?, (1936) 1 Insured Mortgage Portfolio 7.

For a further discussion of this problem see Unwin, Housing and Planning: English and American Compared, (1937) 85 Journal of the Royal Society of Arts 718; and Fisher, Impressions of English Housing, (1936) 1 Insured Mortgage Portfolio 18; Delano, The National Small Homes Demonstration Program, a radio address reprinted in (1937) Housing Legal Digest No. 37, 33; Our Cities: Their Role in the National Economy, National Resources Committee, June, 1937, pp. 18, 60.

by public agencies, this ratio changed to 44.5 per cent private and 55.5 per cent public building activity in 1936. This new relationship is not only "due to the large amounts expended for public works," but still more so to the inability of private enterprise to meet the housing needs. One third of the American people earn less than $1,200 a year, and another third less than $2,000 a year. The average cost of a house would require an annual outlay of over $500 for interest, amortization, taxes and the like, which amount by far exceeds the financial strength of over two thirds of the American people. This inability of private industry to meet the nation's housing needs cannot be too strongly emphasized, for it will be considered again later on in examining the problem whether public housing represents a public purpose in the meaning of the law or not.

The costs of under-housing are manifold. Studies in various countries including the United States, undertaken by private and official investigators, have clearly brought out the correlation between bad housing and crime. It has not been accurately established as yet, and perhaps this problem is incapable of being solved, to what measurable extent bad housing constitutes a direct cause of crime; it is beyond dispute, however, that there exists a definite correlation between the two. In the case of juvenile delinquency even a direct causation can be demonstrated. This in turn reflects upon the whole problem of crime, since in recent studies it is shown that the majority of adult criminals begin their delinquent careers as children.

Bad housing as a direct cause of increased morbidity and mortality has been long established as an unchallengeable fact. Professor C. E. A. Winslow of Yale, Chairman of the Committee on

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8 Wood, Housing, 7 Encyc. of the Soc. Sc. 512.
the Hygiene of Housing of the American Public Health Association, recently stated that after the struggles for pure milk, control of tuberculosis, diphtheria immunization, etc., the fight for decent hygienic housing is the next and most important object of those concerned with the pressing problems of public health.\textsuperscript{10}

While the interrelationships of bad housing and crime and disease supply the main arguments for the attack on defective and dangerous housing conditions, a new line of approach has recently been suggested. It is the net cost of the slums in dollars and cents which is more and more emphasized. The huge relief burden of the federal government, state and municipal authorities in the last ten years has focused the attention of many students on the cost of bad housing to the community at large. Studies of this kind have been undertaken notably in the cities of Boston, Cleveland, Indianapolis, Minneapolis and Birmingham. In Indianapolis each person in the substandard areas cost the taxpayer $28 as against $4 per person in other areas. Thirty per cent of the city hospital service, 26 per cent of the taxes spent for police, fire, health, sanitary services, more than 33 per cent of public relief, and 36 per cent of the city expenditure for arrests, trials, and imprisonments went into the substandard areas containing only 10 per cent of the population. Similar data were found in the other cities where investigations of the same type have recently been undertaken. It should be pointed out, in addition, that these figures for expenditures refer only to governmental agencies. If the expenditures made for welfare purposes by private agencies be included, the financial liabilities of the substandard housing areas to the community appear in a still more unfavorable light.\textsuperscript{11}
The magnitude of the housing problem can also be measured from the discrepancy between what has been achieved and what is needed. In the last seven years an annual average of only 180,000 new dwelling units has been constructed as against 800,000 in the years prior to 1930, this in face of a constantly growing population. Yet these are the figures on the estimated numbers of needed new dwellings in the next ten years: President Roosevelt gave the figure of 600,000 to 800,000 per annum;\textsuperscript{12} Mr. Henry Harriman, President of the Chamber of Commerce of the United States, gave the figure of 750,000 per annum for working men alone;\textsuperscript{13} Mr. Nathan Straus, United States Housing Administrator, stated the number at 900,000 per annum;\textsuperscript{14} Senator Wagner, who has given as much study and reflection to the housing problem as anyone in Congress, declared that in the next ten years fourteen million new homes will be needed to provide adequately for normal population increases, for obsolescence, and for the demolition or abandonment of millions of dwellings totally unfit for human habitation.\textsuperscript{15}

The depth of the depression had to be reached for large-scale government building of homes to come into its own. The Housing Division of the Public Works Administration established under the National Industrial Recovery Act in 1933\textsuperscript{16} was authorized to engage in construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects. The primary purpose in the creation of the Public Works Administration as well as of the Housing Division was to “increase employment quickly.”\textsuperscript{17} Long-term planning thus, at times, had to be sacrificed to exigencies of extreme emergency. But it was a beginning on a large scale, larger than ever before undertaken by any governmental agency in the United States.

The Division started out in 1933 with a policy of lending primarily financial assistance to new housing constructions. Qualified

\textsuperscript{12}In his message on Housing of November 29, 1937.
\textsuperscript{13}In his address of November 1, 1934, on Unemployment Relief and Housing.
\textsuperscript{14}New York Times, October 25, 1937.
\textsuperscript{15}In his address to the United States Conference of Mayors, at Washington, D. C., on November 19, 1935.
\textsuperscript{17}Section 203a of the NIRA.
applicants for loans were to receive a loan of 85 per cent of the cost of the project. The applicants themselves had to supply the remainder 15 per cent in true equity. The loans were to yield 4 per cent interest, and were to be paid off within 30 years. The Housing Division received 500 applications by the end of 1933. Only seven projects of limited-dividend housing corporations were approved. All other applications had to be refused, either because the prescribed equity was not available, or because some applicants requested loans for such projects as hotels, stores, theaters, and tourist camps, including a twelve-story hotel in the desert of Arizona. In February, 1934, the Housing Division abandoned the limited-dividend loan policy, and started with the construction of low-rent housing and slum-clearance under its own responsibility. Fifty-one projects in thirty-six cities providing for about 22,000 families were the result. The Division of Housing was allotted some 150 million dollars for the purpose. 45 per cent of the entire cost is borne by the United States; 55 per cent of the development cost is amortized over a period of sixty years, the interest being 3 per cent.

The room rentals in these projects range from $7 a month in New York downward to much lower figures in smaller communities, especially in the South. This compares favorably with the room rentals of $10 to $13 in the limited dividend corporation projects.

The Housing Division of the Public Works Administration was taken over by the United States Housing Authority on November 1, 1937; its record has been much criticized on the grounds of excessive costs, of excessive centralization, of indifference to the wishes of local authorities, and of unfair and ruinous competition with private enterprise.

An important feature in the four years' life history of the Housing Division of the Public Works Administration was its standardizing influence on the housing legislation of the states. Already in 1933 and 1934 ten states had passed enabling acts for public housing authorities, foremost among them the Municipal Housing Authorities Law of the State of New York. In 1935

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18 New York Laws of 1934, ch. 4. Harold L. Ickes, Public Works Administrator, sent Mayor La Guardia the following telegram on January 3, 1934: "The Public Works Emergency Housing Corporation has earmarked an amount not to exceed twenty-five million dollars available for loan to duly constituted New York City Housing Authority subject to submission satisfactory low cost housing project which meets our approval." On January 31, 1934, the state legislature passed the bill, and on February 6, 1934, the New York City Housing Authority was estab-
the Legal Division of the Public Works Administration drafted model bills for both state and supplementary municipal legislation. Today thirty states, the District of Columbia, Hawaii and Puerto Rico have housing authority laws. Under these enabling laws one hundred three local housing authorities had been created by February, 1938, and their number is constantly increasing due to the complete decentralization under the new United States Housing Authority. All these states except one have granted the right of eminent domain to housing authorities, but a number of states do not exempt the property of the housing authorities from taxation. The United States Housing Act of 1937 provides that the United States Housing Authority will make no annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects "unless and until the State, city, county, or other political subdivision in which such project is situated shall contribute, in the form of cash or tax remissions, general or special, or tax exemptions, at least 20 per centum of the annual contributions herein provided." In states, therefore, where tax exemption is not provided for by the law, this 20 per cent will have to be raised by loan or otherwise, which will no doubt prove a stumbling block to the realization of the projects in many cases.

Federal participation in housing has finally found a more comprehensive organization in the "United States Housing Act of 1937," popularly known as the Wagner-Steagall Act. Whether or not it is the "greatest single step forward in national housing

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19 Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, Wisconsin. For sources of authority see (1938) Housing Legal Digest, No. 43, 34, and State Housing Authority Legislation, A Comparative Study of State Enabling Laws, published by the National Association of Housing Officials, with Addenda there to as of December 1, 1937.

20 Rhode Island authorizes the cities to condemn for the housing authorities.

21 Delaware, Illinois, Massachusetts, New Jersey. In the case of Illinois the statute is silent on the point, but Mr. Otto Kerner, Attorney General of Illinois, has rendered his opinion on January 17, 1936, stating that "property held by Housing Authorities under the Act of March 19, 1934, is held as private property and is taxable in full." In the case of Ohio the law is silent, too, but the Attorney General of the State, Mr. John W. Bricker, has given an opinion on September 29, 1934, declaring property of housing authorities to be tax exempt.

22 Public. No. 412, 75th Congress, Ch. 10 (a).

23 Public. No. 412, 75th Congress. Passed on September 1, 1937.
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policy ever taken by any country,” it is certainly the greatest step forward in housing policy in the history of the United States. Under the regime of the Housing Division of the Public Works Administration the main objective of governmental intervention was creation of employment and purchasing power, and the housing projects had the avowed aim of serving as a demonstration of public activity breaking into a new field. Under the Act of 1937, housing has assumed a status of autonomy in the range of federal and state activities.

The main objective of the United States Housing Authority is to give federal financial aid to state and local housing authorities to provide decent, sanitary, and safe dwellings for families of low income. The latter term means, according to section 2 (2) of the Act, “families who are in the lowest income group and who cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use.” This is important as a final governmental admission that housing for large sections of the population has moved into the type of goods for which mere economic market calculations have to be abandoned in favor of a policy of social welfare.

Only those families are eligible whose income is less than five times the rental, including the cost of heat, light, water, and cooking fuel. This is to prevent persons from higher income brackets from taking advantage of the low-rent housing intended for persons who cannot afford decent dwellings in the private market.

The United States Housing Authority will undertake only financial transactions of the types described, and will not engage in any demonstration projects or make loans to limited-dividend or cooperative housing associations, as did the Housing Division of the Public Works Administration. The federal government no longer engages in construction of dwellings itself, not only because it has been declared unconstitutional as not constituting a federal public purpose, but because the time has come for de-

24 Mr. Nathan Straus, United States Housing Administrator, at the annual meeting of the National Association of Housing Officials in Cleveland, November 18-20, 1937.

centralizing housing and placing responsibility and authority on the local agencies. Mr. Nathan Straus has rightly characterized the Act as "essentially a piece of enabling legislation," since it formulates the national housing policy in broad outlines, and leaves the actual work of planning and developing the projects as well as authority and responsibility to the local housing body.

The projects which the Authority took over from the Housing Division of the Public Works Administration are gradually turned over to the local housing agencies; section 12 (b) of the Act requires the Authority to divest itself of those Federal projects "as soon as practicable." This is another step to ensure that the Authority be a financing agency, and leave the responsibility for operating slum-clearance and low-rent projects to local agencies.

Another provision of the Act aiming at the decentralization of housing in the country is section 21 (d) of the Act which establishes that not more than 10 per cent of the Authority's funds for loans, capital grants or annual contributions shall be expended in any one state.

The importance of the United States Housing Act of 1937 lies in the fact that it has made federal and state participation in solving the housing problem a permanent governmental activity; has abandoned calculations of a market economy in the specific problems of slum-clearance and low-rent housing, which now have become areas of public purpose and public use; and has raised the housing issue above the contentiousness of partisan opinion, turning it into a lasting national concern of the American people.

II. PUBLIC HOUSING AND THE LAW: FEDERAL

The housing program of the Public Works Administration began in February 1934, and in July of the same year a Federal District Court in Cleveland had to decide whether the United States could condemn land for a low-cost housing project. The domain on behalf of a Resettlement Administration project was held unconstitutional in Franklin Township v. Tugwell, (1936) 66 D. C. App. 42, 85 F. (2d) 208. The only decision where slum-clearance and low-cost housing had been held a federal public use authorizing the exercise of eminent domain is Oklahoma City v. Sanders, (C.C.A. 10th Cir. 1938) 94 F. (2d) 323. The Supreme Court has not decided as yet upon this question.

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In his address to the annual meeting of the National Association of Housing Officials at Cleveland, November 18-20, 1937.

If, indeed, the deeper purpose of democratic government is to assist as many of its citizens as possible, especially those who need it the most, then we have a great opportunity lying ahead in the specific field of housing.

President Roosevelt, (1937) Housing Index-Digest No. 13, 52.

United States v. Certain Lands in the City of Cleveland, District
Cleveland project included the acquisition by the United States Government of all the property bounded by Cedar and Central Avenues. About 88 per cent of the land needed for this so-called Cedar-Central project had been secured by voluntary agreement, but in some of the remaining parcels of land no agreement could be reached, so that condemnation proceedings under section 203a of the National Industrial Recovery Act and Executive Order No. 6252 were instituted.

The Court decided in favor of the United States. The main contention of the motion of the property owners, viz., that the United States was not the proper and legal party to the suit, sidetracked the real issue whether housing was a federal public purpose for which eminent domain could be exercised. Nevertheless the Court pointed out in the opinion that even if that question were made and presented here, it would not have been entirely satisfied that the law was unconstitutional, and would therefore have ruled that it was not.

Another case in which the exercise of eminent domain by the Federal Government was disputed was In the Matter of Condemnation of Part of Lot 29 in Square 926. The District of Columbia Dwelling Act provided for the discontinuance of the use as dwellings of buildings situated in alleys, to eliminate the hidden communities in inhabited alleys of the District of Columbia in the interest of public health, comfort, morals, safety and welfare. The exercise of eminent domain was expressly granted to the Alley Dwelling Authority.

The Court rendered an oral opinion overruling the demurrer of the property owners, holding that Congress in the exercise of its exclusive legislative authority over the District of Columbia could authorize the employment of such means and methods as are necessary to protect the health, comfort, morals, safety and welfare of the citizens of the District of Columbia, and that the employment of the power of eminent domain to remedy conditions which notoriously undermine and endanger the health, comfort, morals, safety and welfare of the citizens of the District of Columbia was clearly within the scope of the constitution. The Court further held that having once acquired the property, the govern-
ment was authorized under the constitution to dispose of it in the manner indicated by the Act.

Important as this case is, it is necessary to emphasize two points: first, that it did not pass at all on the question of housing as a federal public purpose, since it was confined to the District of Columbia, in which Congress legislates in the same way as states do in their territories. The case therefore, although dealing with activities of the federal government, really bears on the constitutionality of the exercise of eminent domain for housing by the states. The second significant characteristic of this case is that the primary issue which it decided was slum-clearance as a public purpose, and not the provision of low-rent housing. The problems are in practice closely related to each other, but are not the same.

The first and still the only leading case in which the question of low-rent housing and slum clearance as federal public uses was the central issue, was United States v. Certain Lands in the City of Louisville, decided by Judge Dawson of the United States district court for the western district of Kentucky on January 4, 1935. The United States circuit court of appeals for the Sixth circuit upheld the decision of the lower court on July 15, 1935. The case was to be tried before the Supreme Court on March 5, 1936, but was withdrawn by the attorneys for the government a few hours before oral arguments were to be made before the Court.

The court emphasized in the opinion that it was well aware of the significance of the case at bar, since it presented for the first time the sole question of the constitutional power of the United States to acquire, through condemnation, property of citizens for the purpose of slum-clearance and low-cost housing. Private property can be condemned only for public use, as is stated expressly in the fifth amendment and may be inferred from the due process clause of the fourteenth amendment. But what is public use as relating to the question of eminent domain? In the opinion of the court, there are two schools of thought:

"One, holding that public use is synonymous with public benefit, public advantage and general welfare, while the other holds that public use means use by the government itself in the performance of governmental functions, or a use or service open or available to all or a part of the public as of right, irrespective

of whether the title to the property condemned is vested in the
government or in some private agency. It seems to me that the
first theory is an entirely untenable one."

This is the vision of the grave consequences which in the mind
of the court governmental housing might entail:

"If such an activity is a governmental function, then the gov-
ernment is likewise possessed of the power to acquire by condem-
nation farm lands, improve them, and then sell or lease them to
citizens. Such a power would likewise include the right to ac-
quire by condemnation mills, factories, mines and every conceiv-
able kind of industrial plant, for the purpose of operating them in
competition with private industry, or for the purpose of selling
or leasing them to whomsoever the government might wish."

The very lengthy argument in the government brief concerning
the emergency character of the National Industrial Recovery Act
and the works authorized under it, scarcely finds any discussion
in the opinion of the court. The court admits that an emergency
existed at the time of the enactment of the National Industrial
Recovery Act, and had not yet passed at the time,

"but the power of the National Government to exercise the
right of eminent domain can not be based upon the existence of a
national emergency. The power, if it can be exercised for the pur-
poses for which it is here sought to be used, must exist indepen-
dently of such emergency. The emergency at most can only af-
ford a reason for its exercise."

The court cites in support of this view Home Building & Loan
Association v. Blaisdell, which used similar words but interpreted
them in a broader, more liberal way. The court did not go at all
into the factual background of the Act, as the Supreme Court did
in the case of Home Building & Loan Association v. Blaisdell,
and although admitting the existence of a state of emergency, did
not inquire whether the public works inaugurated under the
National Industrial Recovery Act were "necessary and proper"
toward this aim. What the government claimed was not that it
had a general right of exercising eminent domain on the ground
of national emergency, but that the particular emergency legisla-
tion was constitutional, so that eminent domain as an inherent
power of government could be used for it. The court did not go
into this question, but disposed of the emergency issue in an ab-
stract way by arguing a general proposition that eminent domain
cannot be based on emergency.

As to the claim of the government that its action was consti-

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tutional under the "general welfare" clause of the constitution, the Court emphasized that the interpretation of this clause was still "an open question." However, it was ready to concede that congressional appropriations under this provision of the constitution are not necessarily limited to those matters expressly under the control of Congress.

The United States appealed; the case was tried before the United States circuit court of appeals for the sixth circuit, and the decision of the lower court upheld on July 15, 1935. The central issue was again considered to be the alleged power of the federal government to exercise the power of eminent domain for purposes of slum-clearance and low-cost housing.

The lower court had made no distinction, in the discussion of housing as a public use, between the power of eminent domain as applied to the federal government and as referring to the states. The circuit court pointed out that most of the cases cited in support of housing as a public use were instituted under state statutes, and therefore did not apply to the federal government. What might be a public use under one sovereign might not be a public use under another. The state and federal governments are distinct sovereignties, each independent of the other and each restricted to its own sphere. In the exercise of its police power a state may do these things which benefit the health, morals and welfare of its people. The federal government, however, had no such powers within the states. The Court thus did not deny the character of slum-clearance and low-cost housing as a public use in all instances, but introduced the significant distinction between the constitutional implications of federal and state housing. It may have been motivated to this line of reasoning by the fact that on April 12, 1935, i.e., shortly after the decision of the lower court in United States v. Certain Lands in the City of Louisville, a supreme court of New York had handed down its decision in New York City Housing Authority v. Muller upholding for the first time slum-clearance and low-cost housing as public uses for which a state or an authority created by it could exercise the power of eminent domain.

The Court did not deny that the housing scheme would increase employment and benefit many residents of the community, and that these group benefits, so far as they might affect the general

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33It should be pointed out again that the first judicial interpretation of the clause was given only in the following year in the Butler Case.
34(C.C.A. 6th Cir. 1935) 78 F. (2d) 684.
public, would be beneficial. However, the vision of slum-clearance as a direct step to state Communism plays a decisive part in shaping the attitude of the circuit court of appeals, just as it did in the lower court:

“If, however, such a result thus attained is to be considered a public use for which the government may condemn private property, there would seem to be no reason why it could not condemn any private property which it could employ to an advantage to the public. There are perhaps many properties that the government could use for the benefit of selected groups. It might be, indeed, that by acquiring large sections of the farming parts of the country and leasing the land or selling it at low prices it could advance the interests of many citizens of the country, or that it could take over factories and other businesses and operate them upon plans more beneficial to the employees or the public, or even operate or sell them at a profit to the government to the relief of the taxpayers.”

The ruling of *United States v. Certain Lands in the City of Louisville* was adopted on October 23, 1935, by the United States district court of the eastern district of Michigan in *United States v. Certain Lands in the City of Detroit*.

In this case, too, the United States, acting through the Federal Emergency Administrator of Public Works, attempted to exercise the power of eminent domain for a low-cost housing and slum-clearance project under the public works provisions of the National Industrial Recovery Act.

The United States appealed against the decision in the *Louisville Case* as handed down by the circuit court of appeals, and the case was assigned to be argued before the Supreme Court on March 5, 1936. Only a few hours before oral arguments were to be made in the *Louisville Case* before the Supreme Court, attorneys for the United States asked the Supreme Court to dismiss the case.

The department of justice immediately issued a statement that in forty-one of the slum-clearance projects the necessary land was secured by negotiation. In eight others the land was secured in part by condemnation, no question being raised except the amount of the compensation. The Louisville project and the addition to the Detroit project, which had been determined more than a year ago, had been the subject of continuous legal controversy. In view of the long period of delay, caused by the court proceedings, the funds originally allocated had been diverted to

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other projects which were not involved in litigation and where it was possible to go forward with the work promptly. Even if the case had been considered by the Court, and the theory of the government sustained, it would not have been possible to proceed with either of the undertakings. It was concluded, therefore, that it was not proper to submit to the Court for decision cases which, as a practical matter, had become moot.

In addition to the reasons officially indicated by the statement of the department of justice, the main reason was the following: United States v. Butler, which tended to establish the spending power of Congress as a separate, substantive power, was decided on January 6, 1936, about two months before the Louisville Case was to be argued before the Supreme Court. While the government had based its argument before the district court and the circuit court of appeals primarily on the public use question and the ensuing power of condemnation, the brief presented to the Supreme Court sought to sustain the exercise of the power of eminent domain on the ground that the condemnation is an incident of the spending power of Congress. The brief expressly quoted the Butler Case, for the first time since it was announced, in order to support this argument. However, there were other departments in Washington which were vitally interested in cases to be decided by the Supreme Court in which the interpretation of the "general welfare" clause was involved. They felt strongly that the Louisville Case, because of the additional and doubtful issue of condemnation, was not a particularly suitable one to be heard first. They therefore prevailed upon the department of justice, and through it probably upon the President, to have the appeal dismissed so that the other cases could be decided first. This referred especially to two cases in which the right of the federal government to lend funds and make grants to local government agencies for the production and the distribution of electricity was the issue. In both cases, which were decided by the Supreme Court on January 3, 1938, the right of the government was upheld by a unanimous Court. These favorable decisions will be important as a precedent if and when the United States Housing Act of 1937, which provides for federal expenditures on local government housing projects, will be tested in court.

The most recent case in which the issue was decided whether

slum-clearance and low-cost housing are federal public uses, was
Oklahoma City v. Sanders. The case arose from an action
brought by a contractor engaged in the construction of a federal
low-cost housing project to restrain a city and certain of its offi-
cers from enforcing certain municipal ordinances in connection
with that construction. According to section 10053 of Oklahoma
Statutes 1931, 80 Okla. Stat. Ann., ch. 1, the state of Oklahoma
gives its consent to the acquisition by the United States, by pur-
chase, condemnation or otherwise, of any land in the State re-
quired for sites "for needful public buildings or for any other
purposes for the government." By section 10054 exclusive juris-
diction over lands so acquired by the United States is ceded to the
United States for all purposes except the service upon such sites
of all civil and criminal process of the courts of the State.

The Court refused to adopt the ruling of the Louisville Case,
and upheld federal slum-clearance and low-cost housing as federal
public uses:

"The Congress of the United States has declared such a low-
cost housing and slum-clearance project to be a public use, author-
izing the acquisition of lands for such purpose, either by pur-
chase or the exercise of the power of eminent domain."

Under the United States Housing Act of 1937, federal housing
activities are now restricted to financial operations, so that the
main legal issue that may still be determined in court is the con-
stitutionality of employing the spending power of Congress for
housing. But who could contest the constitutionality? Under
Massachusetts v. Mellon 40 neither a state nor an individual is
recognized to have a sufficient interest to contest the spending
power of Congress. The first major inroad made into this doc-
trine was United States v. Butler, which admitted an exception
from the general doctrine of Massachusetts v. Mellon in those in-
stances where a specific excise or tax is challenged, the proceeds of
which would be used for an illegal purpose. Since the federal
government, under the United States Housing Act of 1937, levies
no specific taxes or excises to finance its housing program there-
under, only the spending power is involved, for which the rule of
Massachusetts v. Mellon still stands.41

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39(C.C.A. 10th Cir. 1938) 94 F. (2d) 323.
41In Franklin Township v. Tugwell, (1936) 66 App. D. C. 42, 85 F.
(2d) 208, popularly known as the Bound-Brook Case, the Resettlement
Administration was enjoined from acquiring land in the township of Franklin
in New Jersey for the purpose of erecting there a "model community" to be
inhabited by resettled urban workers. Both the township and indi-
But even if a court will be found to deal with a case in which the constitutionality of federal spending on housing will be the main issue, the chances are that it will be upheld. This opinion is based on a scrutiny of the decisions of the Supreme Court in the last two years.

One issue is no longer open to dispute now: Congress may spend money in aid of the "general welfare." United States v. Butler, decided in 1936, seems for the first time expressly to have adopted the Hamiltonian view that the power of Congress "to provide for the general welfare" is an independent and substantive power in addition to those enumerated elsewhere. And in Helvering v. Davis,42 a case dealing with the constitutionality of the Social Security Act, Mr. Justice Cardozo, handing down the majority opinion said: "Congress may spend money in aid of the 'general welfare.'" There have been great statesmen in our history
who have stood for other views. We will not resurrect the con-
test. It is now settled by decision."

However, *United States v. Butler* has not only settled an old
issue, but created new ones. In determining whether the federal
government under its spending power could appropriate money
for the farmers upon condition that they restrict production, the
Court did not go into the question of whether these appropri-
tions were for the general welfare, and thus the exercise of an
independent, substantive power. Instead the Court based its
reasoning on the consideration that agriculture is a matter reserved
to the states by the tenth amendment.

The Social Security Act cases, decided in 1937, brought some
clarifications on the points which the *Butler Case* had left obscure.
First of all, the Supreme Court did not start out with an a priori
assertion that unemployment relief or old age benefits are subjects
reserved to the states. Instead it considered all the factual studies
on these issues undertaken by private and official research bodies.
From these it unmistakably emerged that these problems were
definitely national in character. It recognized the difficulties of
satisfactorily defining the extent of the spending power, and said:

"The line must still be drawn between one welfare and another,
between particular and general. Where this shall be placed can-
not be placed through a formula in advance of the event. There is
a middle ground or certainly a penumbra in which discretion is at
large. The discretion, however, is not confined to the courts. The
discretion belongs to Congress, unless the choice is clearly wrong,
a display of arbitrary power, not an exercise of judgment. This
is now familiar law."48

As to the argument that the Social Security Act was coercing
the States and invading their reserved rights in contravention of
the Tenth Amendment, the Court, through Mr. Justice Cardozo,
pointed out that the states had passed these laws under no duress,
and had realized the advantages of a nationally co-ordinated sys-
tem of administering the provisions contained in the Social Security
Act.

It is submitted that the United States Housing Act of 1937
would be held constitutional even within the limitations of the
*Butler Case*, and certainly if the rulings in the *Social Security Act
Cases* should be adopted in place of the *Butler Case*. The Social
Security Act was upheld as constitutional because it differed from
the *Butler Case* in four vital points, upon which the latter was in-

A. L. R. 1319.
validated: (1) The proceeds of the tax in controversy were not earmarked for a special group; (2) The unemployment compensation law which is a condition of the credit had the approval of the state and could not be a law without it; (3) The condition was not linked to an irrevocable agreement, for the state at its pleasure may repeal its unemployment law, terminate the credit, and place itself where it was before the credit was accepted; (4) The condition was not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully co-operate.44

In contrast to the Butler and the Social Security Cases the constitutionality of housing would not present the first problem at all, since the federal government does not levy any specific excise the proceeds of which are used for its financial activities in the housing field. While in the Agricultural Adjustment Act (declared unconstitutional in the Butler Case) the transactions of appropriations and control were carried on directly between individual farmers and the federal government, the Social Security Act provides for State Boards established under state laws which deal with the federal government. The same also applied to the slum-clearance and low-cost housing activities of the states under the United States Housing Act of 1937.

We also do not think that a court would adopt for the matter of slum-clearance and low-cost housing the warning of the Butler Case that a "wide-spread similarity of local conditions" does not create a "situation of national concern." In the Social Security Cases the questions of the national aspects of unemployment and old age disabilities were thoroughly examined in the light of the available data, and found to be covered by the "general welfare" clause of the constitution. There is no doubt that if in a federal housing case the Court will adopt the factual approach of Mr. Justice Cardozo and Mr. Justice Stone in the Social Security Cases, the national character of the housing problem not only in its geographical distribution, but also in its causes, effects and remedies will be recognized. In the Louisville Case both the district court and the circuit court of appeals persisted in viewing slum-clearance and low-cost housing activities as isolated relations between the government and individual citizens. That pattern of thinking would hardly be adopted by the Supreme Court

after the Social Security Cases. As was said in Greenwood County v. Duke Power Co.:

“No matter how clearly national the end to be attained by expenditures under the general welfare clause, or how appropriate the means adopted for the attainment of that end, each individual expenditure must needs have a local as well as a national character.”

No a priori legal reasoning can decide in advance whether and when agriculture, unemployment or housing become national concerns relating to the “general welfare” clause of the constitution. The decision that the federal government may finance and co-ordinate certain essential programs relating to unemployment and old age at a certain time like ours, does not necessarily imply that these subjects have been made federal spheres of action in all aspects and at all times. As was aptly said in Helvering v. Davis:

“Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well being of the nation. What is critical or urgent changes with the times.” There is nothing a priori federal or non-federal about any newly emerging subject. The urgency and seriousness may change according to the conditions of the time which have to be investigated in each instance, and if this factual and pragmatic approach will be employed in adjudicating the housing problem of our time, there is hardly any doubt that the housing problem will be found to be national in character.

The most recent cases which would point to the constitutionality of the Wagner-Steagall Act are two cases upholding the right of the federal government to lend funds and make grants to local agencies for the production and distribution of electricity. These cases involved “loan-and-grant agreements” made by the Federal Emergency Administration of Public Works with four municipalities in Alabama.

The court held that these municipalities have the right under state law to engage in business in competition with the company, and if the business of the latter “be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.” These federal loans and grants to municipalities for the production and distribution of

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45(C.C.A. 4th Cir. 1936) 81 F. (2d) 986.
electricity are very similar to the loans and grants made by the United States Housing Authority to local government agencies for slum-clearance and low-cost housing projects. In both cases there is no specific excise tax to lend itself as a basis for an action, as in the AAA and Social Security issues. These power cases are again strengthening the essential doctrine of Massachusetts v. Mellon, after the inroads made on it in the Ashwander (TVA), AAA, and Bound-Brook Cases.

Still more important than the question of justiciability is the recognition that municipalities have the right to use federal funds to compete with private companies, even if that action would injure or even ruin the business of the latter. In the Louisville Case both the district court and the circuit court of appeals had pictured a vision of federal participation in slum-clearance and low-cost housing as a logical step to state communism. Both courts did not inquire either whether or when private industry had failed to meet the housing needs of large sections of the American people, nor what legal right the building industry could claim to carry on the construction of houses as an exclusive monopoly. The answer to the anxiety of the two courts dealing with the Louisville Case lest federal housing may lead to socializing the whole economy is given in a clear way by the PWA Power Cases, as it was already intimated by the late Justice Holmes in Noble State Bank v. Haskell.47

"It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise."48

47(1910) 219 U. S. 104, 31 Sup. Ct. 299, 55 L. Ed. 112. The case dealt with the constitutionality of an Oklahoma statute of December 17, 1907, subjecting state banks to assessments for a Depositors' Guaranty Fund.

48The question has been discussed repeatedly whether the federal government has the power of eminent domain in its housing projects. This question is now of purely theoretical interest, since under the Wagner-Steagall Act the United States has no authority to undertake housing projects of its own for which the exercise of eminent domain might be necessary. For literature bearing on this problem, cf. Corwin, Constitutional Aspects of Federal Housing, (1935) 84 U. Pa. L. Rev. 131; Woodbury, Land Assembly for Housing Developments, (1934) 1 Law and Cont. Prob. 213; Seaks, A Note on the Power of the Federal Government to Condemn for Housing, (1934) 1 Law and Cont. Prob. 232; Robbins, The Use of Eminent Domain for Housing Purposes, Housing Officials' Yearbook, 1935, p. 116; Comment (1937) 12 Wis. L. Rev. 512; Samuel, State and Federal Power of Eminent Domain (1935) 4 George Wash. L. Rev. 130. The federal government has won eminent domain cases involving the taking of property for bridges, Luxton v. North River Bridge Co., (1893) 153 U. S. 525, 14 Sup. Ct. 874, 38 L. Ed. 812, interstate canals, Hanson v. United States, (1922) 261 U. S. 531, 43 Sup. Ct. 442, 67 L. Ed. 809, lighthouses, Chappel v. United States, (1895) 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510, fortifications,
LAW OF PUBLIC HOUSING

III. PUBLIC HOUSING AND THE LAW: STATE

The United States Housing Act of 1937 has definitely established the local housing authority as the public agency entrusted with the tasks of slum-clearance and low-cost housing. To date thirty states have passed enabling acts which have given birth to over 100 local housing authorities, and the number is constantly on the increase. This development is very recent, the first authorities having been created only in 1934 under the influence and guidance of the Housing Division of the Public Works Administration. Public housing as a municipal activity of clearing slums and erecting planned low-rent projects is a novel issue in American law. The two main issues that are involved are the power of eminent domain and the power of taxation. The police power has been the major means to regulate housing conditions in the period prior to 1934, when the intervention of the local government agencies in housing was confined to primarily prohibitive and restrictive measures. Today, in an era of constructive measures toward a solution of the housing problem, the power of eminent domain and the spending power of state and local authorities have come into the forefront.

The first test case to define the powers of a municipal housing authority was New York City Housing Authority v. Muller. It arose already in connection with the first project of the Authority, called “First Houses.” The project involved the entire

Old Dominion Land Co. v. United States, (1925) 269 U. S. 55, 16 Sup. Ct. 433, 40 L. Ed. 583, flood control and irrigation projects, Brown v. United States, (1922) 263 U. S. 76, 44 Sup. Ct. 92, 68 L. Ed. 171, national parks, Shoemaker v. United States, (1892) 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170, a national memorial, United States v. Gettysburg Electric Ry. Co., (1896) 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576. In all these cases the eminent domain was exercised by the federal government on the basis of powers specifically granted to it. Now that the spending power of Congress has been recognized as an independent and substantive power since the Butler Case it would seem at first sight that the case for federal eminent domain in housing has been strengthened. However, it is very doubtful whether this assumption is legitimate. In the Butler Case we find the dictum that the true construction of the “general welfare” clause is that “the only thing granted is the power to tax for the purpose of providing funds for payment of the nation’s debts and making provision for the general welfare.” The AAA was invalidated in the Butler Case because coercive measures were linked to the Act based on the “general welfare” clause. The Social Security Act was distinguished from the AAA by the absence of coercive measures, and was upheld. These decisions would indicate that, if the question will ever become practical at all, the federal government could hardly build a claim for the exercise of eminent domain in housing on the “general welfare” clause.

49(1935) 155 Misc. Rep. 681, 279 N. Y. S. 299, (1936) 270 N. Y. 333, 1 N. E. 2d 153. The first decision was handed down by the New York supreme court on April 12, 1935, the second decision by the New York court of appeals, the highest court of the state, on March 17, 1936.
rehabilitation of a section in the Lower East Side in New York. When the Authority sought to acquire two old tenements owned by one Andrew Muller and others, the owners of the buildings, which separated two large areas of the planned project, refused to sell at the prices offered to them by the Authority. The latter therefore instituted condemnation proceedings.

The court held that constructive intervention in housing by the government was necessary owing to the failure of private enterprise to supply proper habitations, and owing to the inadequacy of restrictive police measures to combat substandard housing conditions:

"It is true that these restrictive measures have been somewhat beneficial, but history and experience have shown that they were inadequate as a cure or to combat successfully the evils of the conditions they sought to remedy. Something constructive was essential."

The case was heard again by the New York court of appeals, the highest tribunal of the state, on March 17, 1936. This decision was important for two reasons: first, it came just twelve days after the withdrawal by the federal government of the appeal from the Louisville Case before the Supreme Court; second, it was the first time that the highest court of a state passed on the question of whether a state, municipality, or public housing body or a limited dividend corporation had the right to exercise the power of eminent domain, given it by state legislation, for purposes of slum-clearance and low-cost housing projects. In the opinion of the court, written by Judge Crouch, it was held that the condemnation did not constitute, as the tenement-owners averred, a taking of private property for a private use in violation of the state constitution and the due process clause of the fourteenth amendment of the federal constitution.

The court points out that the use by the legislature of the power of taxation and of the police power in dealing with the evils of the slums had repeatedly been upheld by the courts. It then discusses the question whether the third power, that of eminent domain, could be employed for the same purpose:

"Now, in continuation of a battle, which, if not entirely lost, is far from won, the legislature has restored the last of the trinity

\[50\text{Article 1, section 6 of the constitution of the state of New York reads in part as follows: "... No person shall be ... deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."}\n
\[51\text{Section 1 of the fourteenth amendment reads in part as follows: "... Nor shall any state deprive any person of life, liberty, or property without due process of law."}\]
of sovereign powers by giving to a city agency the power of
eminent domain. We are called upon to say whether under the
facts of this case, including the circumstances of time and place,
the use of the power is a use for the public benefit—a public use
—within the law. There is no case in this jurisdiction or else-
where directly in point. . . . There are differences in the nature
and characteristics of the powers, though distinction between them
is often fine. But if the menace is serious enough to the public
to warrant public action, and the power applied is reasonably and
fairly calculated to check it and bears a reasonable relation to the
evil, it seems to be constitutionally immaterial whether one or
another of the sovereign powers is employed. The menace of the
slums in New York City has long been recognized as serious
enough to warrant public action. The session laws for nearly
seventy years past are sprinkled with acts applying the taxing
power and the police power in attempts to cure or check it. The
slums still stand. The menace still exists. What objections,
then, can be urged to the application of the third power, least
drastic, but as here embodied probably the most effective of all?"

Answering the contention that the statute was class legislation,
the Court said:

“But the essential purpose of the legislation is not to benefit
that class or any class; it is to protect and safeguard the entire
public from the menace of the slums.”

By upholding the constitutionality of the Municipal Housing
Authorities Law 52 the Court established the following proposi-
tions: 53 (1) That slum clearance and low-cost housing is a public
purpose; (2) that the power of eminent domain may be employed
for acquiring property for these purposes; (3) that public moneys
may be used; (4) that the housing authority may own, operate
and control the projects: (5) that housing authorities serve the
protection, safety, and general welfare of the people; (6) that
bonds of housing authorities are legal obligations; (7) tax exemp-
tion on projects and bonds.

The value of the decision in the Muller Case lay also in the fact
that the court adopted in this new legal issue the technique of
carefully scrutinizing all available data relating to the subject of
dispute, instead of delving into general and more abstract discus-
sions of the complex problem of eminent domain, as was notably
the case in United States v. Certain Lands in the City of Louisville.
With the great power of moral persuasion which the decisions of
the New York court of appeals command over the highest tribunals
in many other states, it was also to be expected that the directness

52 New York, Laws 1934, ch. 4.
York City Housing Authority.
and forcefulness of the opinion would serve as a guidance in the reasoning of other courts. Finally the *Muller Case* was one of the decisive factors in speeding up the trend toward decentralization of public housing in this country. The withdrawal by the federal government of the *Louisville Case* before the Supreme Court occurred only a few days before the appellate decision in the *Muller Case*, and when the latter established that the state could exercise the power of eminent domain where the federal government could not, it was obvious that public housing projects would be taken over by the local government housing authorities. The United States Housing Act of 1937 not only restricts the United States Housing Authority to functions of finance and co-ordination of standards, but also provides that all federal projects shall be handed over as soon as practicable to local housing bodies.

The next case involving the legal issues in slum-clearance and low-cost housing by local government agencies was *Spahn v. Stewart.* The lands involved were the same as in *United States v. Certain Lands in the City of Louisville*, in which the federal government was denied the power of eminent domain in a similar project.

The court, following closely and quoting extensively from the *Muller* decision, sustained the constitutionality of the Municipal Housing Commission Law of Kentucky, and also held: (1) that the proposed slum-clearance and housing project was for a public and governmental purpose, and, therefore, that land could be condemned for the project; (2) that the bonds and property of the Municipal Housing Commission are public and, therefore, tax exempt under the laws of Kentucky; (3) that the Municipal Housing Commission may issue its special obligation bonds payable exclusively from the revenues of the project, and that such bonds are not obligations of the state or any political subdivision thereof; (4) that the provision of housing facilities for persons of low income is not class legislation but for the benefit of the whole community; (5) that the City of Louisville had the power to appropriate moneys to the Municipal Housing Commission to cover administrative and other initial costs.

The question of the necessity for the exercise of the power of eminent domain is addressed to the legislature, while the question of whether or not the use to which the proposed condemned property be put is a public use or purpose, is one to be determined

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54(1937) 268 Ky. 97, 103 S. W. (2d) 651.
Slum-clearance without the power of condemnation is an impossible task. Slums usually comprise large areas, and can be rehabilitated only on a large-scale basis. The value of individual new buildings would be annihilated by the adjoining dilapidated dwellings. Apart from that, the slum problem is not only a problem of adequate re-housing, but also of replanning the character of a whole neighborhood. Only large-scale projects can achieve both increased and better services and amenities for the new community, and at the same time bring about economies and savings which will make the new housing facilities accessible to the incomes of the former slum dwellers. Since secret acquisition of the land required is impossible owing to the publicity of low-cost housing developments to-day, it is common knowledge that there are always a number of property owners who can and do hold a long time. Especially owners of unmortgaged properties have proved to be in a commanding bargaining position. Official inquiries have shown that the complete assembling of four contingent blocks in developed sections of a large city like New York, which is the necessary minimum for economical operation, is economically impossible by making use of the ordinary methods of land acquisition. In New York, for example, for which accurate data have been compiled, the owners claimed 204 million dollars in 371 condemnation proceedings for acquiring land for various public uses in the years 1926 to 1930. The City's experts estimated the value of the land at 107 million dollars. The awards totalled 157 million dollars, a little more than halfway between the claimants' and the City's estimates. Since in low-rent housing projects every dollar paid per square foot of land increases the rental by $.40 to $1.00 per room per month, it is obvious that low-cost housing without low-cost land is hardly feasible. While this fact alone would not by itself conclusively solve the question of slum-clearing and low-cost housing as a public use within the meaning of the law, the courts have admitted it as an important consideration.

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55Spahn v. Stewart, (1937) 268 Ky. 97, 103 S. W. (2d) 651, and cases cited there.
56Cf. Report of the New York Commission on Housing and Regional Planning, Legislative Document 1926, No. 66. The Reports of the New York State Housing Board for the years 1932 and 1933 also contain valuable data relevant to this question.
Since the passage of the Wagner-Steagall Act three important cases dealing with slum-clearance and low-cost housing have all upheld the rulings of New York City Housing Authority v. Muller and Spahn v. Stewart. In Wells v. Housing Authority of the City of Wilmington, decided by the Supreme Court of North Carolina on May 24, 1938, a taxpayer had brought action to test the constitutionality of the State Housing act. The supreme court of North Carolina held that the Housing Authority of the City of Wilmington constitutes a public body "exercising public power, and has all the powers necessary and convenient to carry out and effectuate the purposes and provisions of said Housing Authorities Law." In particular the court ruled that the housing authority could exercise the powers of eminent domain and taxation, and that real and personal property held by the authority is exempt from state or local taxes. It also held that bonds, indentures and obligations issued by the housing authority constitute no debt or liability of the city, since the housing authority is not an administrative agency of the city, but a separate and distinct municipal corporation entitled to the privileges, immunities and rights of a municipal corporation. In June 1938, both the supreme court of Louisiana, in State ex rel. Gaston L. Porteris, Attorney General, v. Housing Authority of New Orleans, and the supreme court of Pennsylvania, in Dorman v. Philadelphia Housing Authority, have closely followed New York City Housing Authority v. Muller, Spahn v. Stewart, and Wells v. Wilmington. The problems of eminent domain, expenditure of public moneys, tax exemption of property held by housing authorities, have all been favorably decided in all these recent cases.

New York City Housing Authority v. Muller, Spahn v. Stewart, Wells v. Wilmington, Porteris v. New Orleans, and Dorman v. Philadelphia are so far the first cases in which the direct issue is decided that the power of eminent domain can be exercised for purposes of slum-clearance and low-cost housing. The other two powers of the state, with regard to public housing, the police

(1906) 200 U. S. 527, 56 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174. Nichols, Eminent Domain (3d ed. 1917) sec. 42 writes as follows: "Courts have been more ready to uphold a particular use of land as public when, from the nature of the undertaking, it was impossible or difficult to carry it out without the aid of eminent domain than when a particular site was not essential, and a suitable one could be secured equally well by purchase."

59(1938) 213 N. C. 744, 197 S. E. 693.

60(1938) 190 La. 710, 182 So. 725.

61(1938) 331 Pa. St. 209, 200 Atl. 834. See also Opinion of the Justices, (1938) 235 Ala. 485, 179 So. 535, in which tax exemption of property held by housing authorities was affirmed.
power and the power of taxation look back on a longer and better settled history.

The most important decisions where the police power has been tested with regard to unsanitary and dangerous housing conditions are in the State of New York, where the slum problem always has been and still is the most pressing in the whole country. In Health Department of the City of New York v. Rector, etc., of Trinity Church\textsuperscript{62} the following issue was decided: Trinity Church owned several houses in New York City, and the Health Department of the City had ordered the Church to install appliances to receive and distribute a supply of water for domestic use on each floor of each of the houses. The Church was fined a penalty for non-compliance with the order, whereupon it appealed upon the ground that the legislation requiring the water to be furnished was unconstitutional, violating due process of law, and not within the police powers of the state. The New York court of appeals upheld the constitutionality of the statute as a proper exercise of the police power, and said in its opinion:

"We cannot say as a legal proposition that it tends only to the convenience of the tenants in regard to their use of water. . . . The supply of water to the general public in a city has become not only a luxury, but an absolute necessity for the maintenance of public health and safety."

Nine years later, in 1904, the New York court of appeals upheld the constitutionality of the New York Tenement House Law of 1901 in Tenement House Department v. Moeschen\textsuperscript{63}. The Law provided for new standards of light, air and increased fire protection. In its opinion the court said:

"It belongs to that class of police regulation to which private rights are held subject and is founded upon the right of the public to protect itself from nuisances and to preserve the general health. The authority of the legislature to pass laws of this character is too well settled to be questioned."

In 1929 the New York Legislature passed the Multiple Dwelling Act, which provided still more progressive building standards than had the Tenement House Law of 1901. It also required owners of "old law" tenements, i.e., those which were built prior to 1901, to effect alterations in their houses designed to comply with the new standards of health and safety. In Adler v. Deegan\textsuperscript{64} the New

\textsuperscript{64}(1929) 251 N. Y. 467, 167 N. E. 705.
York court of appeals upheld the constitutionality of the Multiple Dwelling Act.

Mr. Justice Cardozo, then on the bench of the New York court of appeals, said in a concurring opinion:

"The Multiple Dwelling Act is aimed at many evils, but most of all it is a measure to eradicate the slum. It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwellings of the great metropolis. . . . The end to be achieved is more than the avoidance of pestilence or contagion. The end to be achieved is the quality of men and women. . . . If the moral and physical fibre of its manhood and its womanhood is not a State concern the question is, what is."

In 1936 the constitutionality of the Multiple Dwelling Act was again upheld in *Adamnec v. Post*, although the expense of alterations required by the Law amounted to 60 per cent of the property. In the opinion the court said: "Because the state has tolerated slum dwellings in the past, it is not precluded from taking appropriate steps to end them in the future."

Another type of cases in which the police power as regarding housing was the main issue, was dealt with by the courts in the years following the War. The best known leading case in this category is *Block v. Hirsh*[^65] which upheld the constitutionality of rent regulation in the District of Columbia. Mr. Justice Holmes, in delivering the opinion of the majority, said:

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. . . . Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."

The importance of this dictum of Mr. Justice Holmes lies in the fact that it does not attempt to give a categorical answer to the question whether rent regulation or any other subject connected with housing is a matter of public control and regulation, but makes the answer depend upon the particular circumstances of each case. Mr. Justice Holmes also points out that although a legislative declaration of facts establishing a public use may not be held conclusive by the courts, "it is entitled at least to great respect." In addition, the opinion warns against the misconception that housing is not a matter of public regulation and does not constitute

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[^65](1936) 273 N. Y. 250, 7 N. E. (2d) 120.
a public purpose because in its immediate aspects it is manifest only in private transactions, and, second, because each specific thing affected is not used by the public generally.

Block v. Hirsh was later followed in many other decisions, the best known of which are Marcus Brown Holding Co. v. Feldman, Levy Leasing Co. v. Siegel, and People ex rel. Durham Realty Corporation v. La Fetra. The La Fetra Case, dealing with the New York legislation in the matter, contains perhaps the best discussion of the economic factors which, under certain circumstances make housing a public purpose:

"While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and the market value is the reasonable value; that people often move from one city to another to secure better advantages; that no one is compelled to have a home in New York; that no crisis exists; that to call the legislation an exercise of the police power when it is plainly a taking of private property for private use and without compensation is a mere transfer of labels which does not affect the nature of the legislation, yet the legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds because it is unprofitable to build, that those who own seek the uttermost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become general. It is with this condition and not with economic theory that the state has to deal in the existing emergency."

The first efforts in the United States as well as in most other countries to combat slums took the form of state and municipal statutes and ordinances authorizing the demolition of faulty, dangerous, or insanitary structures. This method was employed under the police power. The constitutionality of using the police power in this direction is now well established.

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67(1921) 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877.
69(1921) 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152.
70The last sentence in this opinion is reminiscent of Mr. Justice Holmes' dissenting opinion in Lochner v. New York, (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, in which the majority held a New York statute unconstitutional which limited the working hours in bakeries to 60 a week:
"This case is decided upon an economic theory which a large part of the country does not entertain. . . . The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire."
71York v. Hargadine, (1919) 142 Minn. 219, 171 N. W. 773; Runge v. Gierum, (1917) 37 N. D. 618, 164 N. W. 284; Jackson v. Bell, (1920) 143
Another procedure of regulating housing under the police power is the control of building lines and the protection of future street reservations. In practically all cases in which the issue of building lines has been dealt with, the constitutionality of the statutes or ordinances has been upheld. The protection of future street reservations has not been so firmly established as yet, at least not in all states, but a careful analysis of the cases in question has brought out the result that "the courts appear to be coming gradually to the point of view that these particular public interests are sufficiently important to justify the use of the police power in their protection."

Zoning and planning have established themselves as two other methods under the police power of regulating public interests, which also vitally affect housing conditions. Comprehensive zoning legislation providing for the control of the use, height and area of buildings in cities, towns and counties is in effect in all forty-eight

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states and in the District of Columbia. "A Standard State Enabling Act" prepared by the Advisory Committee on Zoning of the Department of Commerce has been adopted by thirty-six states. Pursuant to the state enabling acts zoning ordinances are in effect in about 1,300 municipalities and townships, representing a population of fifty million people, or 70 per cent of the urban population of the United States. New York State has the greatest number of zoned cities, i.e., 215, covering a population of over ten million. California and Illinois range next. The leading case on zoning is 'Village of Euclid, Ohio v. Ambler Realty Co.' in which the Supreme Court of the United States upheld the validity of a zoning ordinance of Euclid, Ohio, which excluded all industrial establishments from a given area, and also regulated the use of the property, the height of the buildings, and the type of materials to be used in the construction of the buildings. The law of zoning is too recent to be settled in all aspects, but, as was said in a recent decision, "Courts take cognizance of public and social developments and balance them as best as they can against private rights."

An analysis of all the relevant decisions by both state and federal courts thus establishes the legal use of the police power in its various aspects with regard to public housing beyond any doubt. What is the position with regard to the taxing power of the states? This question, just as that of the power of eminent domain, refers to the right of the states not only to eliminate evils and abuses by control and regulation, as under the police power, but by directly entering the housing field in the form of slum-clearance and low-cost housing. The constitutional issue whether expenditures for public housing as a method of actual provision of housing facilities by local government agencies are expenditures for a public purpose within the meaning of the law. Although the due process clause of the fourteenth amendment contains no specific limitation upon the right of taxation in the states, it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes.

The leading case on this issue is Green v. Frazier, the only case in which the Supreme Court of the United States had to pass

77See note 76.
upon the question of public use and public purpose as relating to public housing. The right of the state to exercise the power of taxation for public housing was sustained. The background of the case is interesting in so far as the North Dakota Act, of which the housing scheme was only one portion, was probably the most advanced piece of legislation conferring upon a state authority to enter hitherto unknown spheres of activity.

The next state case after Green v. Frazier, in which public housing as a public purpose within the meaning of the taxing power was the main issue, came up in California in Veterans' Welfare Board v. Jordan. In this case the Veterans' Welfare Bond Act, authorizing a bond issue to carry out the provisions of the Veterans' Farm and Home Purchasing Act, was challenged as to its constitutionality. The plan contemplated by the Veterans' Farm and Home Purchasing Act was substantially the following: it provided for a single man scheme and for a collective land settlement scheme. In the single man scheme the veteran selects the farm or the home which he desires to purchase, and notifies the Veterans' Welfare Board of his intention to buy a particular piece of property. If the Board approves of the application, it buys the land with the money derived from the bond issue, and sells it to the veteran for the same price plus interest, the money to be repaid to the state over a period up to forty years. The land settlement scheme provides for the use of the proceeds of the bonds in connection with the purchase, improvement, subdivision, and sale of large tracts of land. Here the state pays the purchase price of the land and sells to the veteran on long terms of credit.

The court held the single man scheme unconstitutional, but sustained the land settlement scheme. In the first "no benefit accrued to the state other than the indirect one involved in the reward of the veteran," while in the second "there is carried out a policy of land settlement. In the case of the land settlement provision an object is achieved other than the mere extending of credit to veterans." Once the main purpose of the land settlement scheme is established as a public purpose, it is immaterial "that incidental to the main purpose there was an advantage to the purchaser of the land ultimately derived from the credit of the state."

The importance of Veterans' Welfare Board v. Jordan lies not

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78(1922) 89 Cal. 124, 208 Pac. 284, 22 A. L. R. 1515.
79California, Stat. 1921, ch. 959.
80California, Stat. 1921, ch. 815.
only in its ready and complete acceptance of _Green v. Frazier_ as a ruling precedent, but also in its distinction between a single man and a collective scheme. Public housing, to fall under the concept of public purpose within the meaning of the law, can only refer to collective groups whose housing problem affects the entire community, and which can be solved only on a collective basis. The quality of this aspect of the housing problem as a public purpose is not impaired by the fact that the individual tenants who are rehoused, derive a benefit from this type of scheme. These individual benefits are only incidental to the main objective of ridding the community of blighted areas infested with crime and disease. On the other hand we remember _United States v. Certain Lands in the City of Louisville_, where the district court had refused to see in slum-clearance and low-cost housing a public purpose in terms of federal or state powers, and had viewed the relationships between governmental agency and rehoused tenants in isolation, and not within the wider framework of a state and even nation-wide effort to rid the cities of slums.

The next case, in which public housing as a public purpose within the taxing power was decided, was again in California, _Willmon v. Powell._ Article 25 of the charter of the City of Los Angeles provided for a municipal housing commission which was authorized to incur debts by the issuance of bonds in the name of the City of Los Angeles, and to provide by purchase, lease, condemnation, construction or otherwise homes for those who might otherwise live in overcrowded tenements, unhealthy slums, or the most congested areas.

The Court upheld the constitutionality of the charter providing for the Municipal Housing Commission. Quoting at great length from _Veterans' Welfare Board v. Jordan_, it said in the opinion:

"If those observations were justified in that case, with equal reason it may be said that an enterprise of the kind contemplated by the charter provisions concerning the municipal housing commission, which has for its purpose the elimination of overcrowded tenements, unhealthy slums, and congested areas, thereby tending to ward off epidemics of disease and preserve the health of all the inhabitants of a city, is a public purpose."

The argument of class legislation was answered by the court as follows:

"The fact that in the course of administration of the affairs of the commission, private persons will receive benefit, as tenants or otherwise, is not sufficient to take away from the enterprise the
characteristics of a public purpose."

*Willimon v. Powell* is important because it is closer related to
slum-clearance and low-cost housing, the vital problems of to-day,
than either *Green v. Frasier* or *Veterans' Welfare Board v. Jordan.*

In *Simon v. O'Toole* a city ordinance of Newark, N. J., reciting
the desirability in the interest of public health, safety and
morals, of replacing certain blocks of unsafe and unsanitary
dwellings with new housing facilities constructed according to the
proper standards of sanitation and safety and provided with ap-
propriate parks and playgrounds, was held to contemplate public funds
for a public purpose, and was held to be constitutional and valid.
The project was slum-clearance in two blocks in Newark, and was
carried out by the Prudential Insurance Company of America.
The city pledged itself to buy with its own funds a strip of land
between the two blocks to be used as a park and play-ground,
established public uses. The case was fought on this issue, although
it was obvious that the real reason behind the city's transaction
was the desire to reduce the total cost of the new project by con-
tributing out of its own funds toward the cost of the land.

Slum-clearance and low-cost housing as a public purpose was
also upheld in the New York tax-exemption cases under the State
Housing Law of 1926. This law provided for slum-clearance
through private limited dividend corporations, and granted these
corporations tax exemption from all state taxes, while the mu-
nicipalities were authorized by the Law to exempt the buildings
and improvements, but not the land, in the projects of such corpora-
tions from local real estate taxes. The plaintiff corporation, which
was not such a limited dividend corporation, contended in *Mars
Realty Corporation v. Sexton* that it was being discriminated
against unreasonably and that the Act deprived it of the equal
protection of the law guaranteed by the fourteenth amendment of
the constitution of the United States. Tax exemption for the
private limited dividend corporations was upheld as constitutional.

This case, as well as a few others, are significant for two
reasons: first, they show that some state courts like those of New
York are willing to recognize slum-clearance and low-cost housing

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82(1931) 108 N. J. L. 52, 155 Atl. 449; Aff'd in (1932) 108 N. J. L.
549, 158 Atl. 543. The city ordinance in question was issued pursuant to
chapters 201 and 202 of the New Jersey Laws of 1929.

83New York, Laws 1926, ch. 823.


85*Matter of Mount Hope Development Corporation v. James,* (1932)
N. E. 420.
as public purposes even when the projects are owned and operated by private companies, provided they maintain limited dividends and are subject to the control and supervision of the State Housing Board. Second, the conclusion is legitimate, that tax exemption disputes concerning municipal housing authorities will be decided favorably, since tax exemption for private, limited dividend, corporations has been upheld as valid.86

The only state in which decisions hostile to public housing have been rendered is Massachusetts. In 1872 a fire occurred in Boston which was so serious and so ruinous to the wealth and industry of the city that the Legislature of Massachusetts adopted a special Act empowering the city to issue bonds and lend the proceeds to persons who had suffered losses of property owing to the fire. A taxpayer brought an action against the city to enjoin it from issuing the bonds on the ground that the Act was unconstitutional, in Lowell v. City of Boston.87 The supreme judicial court of Massachusetts held the Act unconstitutional, because it would necessitate expenditure of public moneys for private and not for public purposes.

In 1912 the Legislature of Massachusetts sought to pass a law enabling a state agency financed by state funds to buy, rent and sell real estate for the purpose of providing homes to mechanics, laborers or other wage earners. In re Opinion of Justices88 declared the proposed bill unconstitutional on the following ground:

"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. Through the enactment of building ordinances, regulation and inspection as to housing and provisions for light and air lies a broad field for the suppression of mischiefs of this kind."

In 1915 the constitution of Massachusetts was amended so as to confer express power upon the legislature to establish state agencies with the authorities to take land and build upon it homes for the purpose of relieving congested population areas. In re Opinion of the Justices89 held this constitutional amendment not broad enough to include the business of lending money upon mortgages on real estate through a corporation to be created and financed by the state.

In all three instances the courts of Massachusetts have shown

86 The most recent decision declaring property of housing authorities tax exempt is Opinion of the Justices, (1938) 235 Ala. 485, 179 So. 535.
themselves hostile to state intervention in the housing field, but it would be mistaken to attach undue importance to any of the three opinions. The major housing problem to-day is slum-clearance and low-cost housing, and it is submitted that the Massachusetts opinions bear relatively little on this issue. In *Lowell v. City of Boston* no question of public housing was involved at all; the issue was whether state funds can be appropriated for owners of damaged properties. And again *In re Opinion of the Justices* of the year 1935 dealt with the question of whether the state could go into the business of lending money upon mortgages on real estate, and did not touch at all the specific housing problem of to-day, viz., the constitutionality of slum-clearance and low-cost housing by local government agencies. The only one of the three opinions which somewhat resembles our contemporary housing problem is *In re Opinion of the Justices* of the year 1912.

It is necessary to remember the following points, though, in order to see that opinion in its right perspective. The housing schemes to-day for which constitutionality is sought, do not address themselves to certain classes of the population, but are designed to rehabilitate blighted areas and to provide families of all classes, whether wage earners or not, with decent housing facilities unless their income exceeds a fixed limit. They are collective schemes like those held constitutional in *Veterans' Welfare Board v. Jordan*, while the housing scheme as contemplated in the Massachusetts act of 1912 and held unconstitutional in *In re Opinion of the Justices* of the same year, resembles the single man scheme of the California act held invalid in *Veterans' Welfare Board v. Jordan*. In both cases the beneficiaries of state funds were collectively defined only in so far as in the one case they had to be veterans, and in the other mechanics, laborers or other wage earners. But in both instances the actual provision of housing was dissolved in innumerable individual operations, with no standards being set for the range of income of the families to be provided for, nor for any particular areas in which the program was to be carried out. Viewed in their proper perspective the Massachusetts opinions are relevant for the problem of whether the state can go into the business of lending money or insuring mortgages on real estate, but hardly bear upon the main issue of to-day of whether the state can engage in slum-clearance and low-cost housing.

An analysis of all the relevant decisions thus establishes the right of the states to use the taxing power for purposes of slum-
clearance and low-cost housing. Both federal and state courts, with the exception of the state of Massachusetts, have even upheld the right to use the taxing power in aspects of public housing which are much less urgent than slum-clearance and low-cost housing. The Supreme Court has dealt extensively with the whole question in *Green v. Frazier*, and the decision is not only important for its recognition of public housing as a public purpose within the taxing power of the states, but also for its reiteration of the Supreme Court's willingness to accept the findings of state legislative and judicial bodies unless they be clearly unfounded. There is no reason to assume that the Supreme Court to-day would not again uphold the constitutionality of employing the taxing power of the states for purposes of public housing, especially since many new functions of states have been recognized by the Supreme Court as public purposes in the last eighteen years. The tendency since *Green v. Frazier* has been to widen the range of legitimate state activities. In *Green v. Frazier* the Supreme Court said that this was the first case in which it had to deal with the issue of the states' right to use the taxing power for public housing. At first sight it is somewhat surprising that the Supreme Court found in *Jones v. City of Portland* the "nearest approach" to the question presented in *Green v. Frazier*. In *Jones v. City of Portland* a Maine statute was upheld which authorized cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessaries to the inhabitants. The case was a milestone in the evolution of American public law, in so far as it marked a departure from the earlier concept of state and municipal functions which were assumed not to interfere with private enterprise except in cases of natural monopolies. Fuel yards certainly did not represent natural monopolies, but they resemble the former cases held constitutional in one important aspect in that they, too, were indispensable necessities of life. "When we speak of fuel," the Court said, "we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensable necessity of life." This is the decisive element which *Jones v. City of Portland* and *Green v. Frazier* have in com-

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mon. Besides, there is still another common element which is perhaps not less significant: In Laughlin v. City of Portland\textsuperscript{92} which also upheld as constitutional municipal fuel yards, the court pointed out in the opinion that the statute was sustained not only because fuel represented a necessity of life, but also because private competition had broken down in that line of business so that the public was exposed to monopolistic exploitation. This second element, too, applies to public housing because it has been established beyond doubt that private enterprise has failed to meet the housing needs of at least one-third to one-half of the population of the United States. In 1927 the Supreme Court upheld the constitutionality of municipal filling stations for the sale of gasoline and oil in Standard Oil Co. v. City of Lincoln\textsuperscript{93} on similar grounds. On the face of the available facts it can hardly be doubted that public housing as a problem affecting the welfare of the entire community contains the two elements of necessity of life and of breakdown of private competition at least to the same degree as do municipal fuel yards and filling stations. It is doubtful whether "as far as the Supreme Court is concerned there is no real limit to state and municipal activity in the field of business enterprise,"\textsuperscript{94} as has been suggested by a well-known student of the problem of public purpose in taxation; but whether this general proposition be valid or not, public housing presents the criteria of being a necessity of life and of supplementing a failure of private enterprise to meet urgent wants of the people, so that it is a public purpose as applicable to the taxing power of the states.

The police power as well as the power of taxation of the states in slum-clearance and low-cost housing are, as the examination of the cases has shown, supported by a great number of precedents including favorable decisions of the Supreme Court. The question of eminent domain in this connection is somewhat less settled. So far only New York City Housing Authority v. Muller, Spahn v. Stewart, Wells v. Wilmington, Porteris v. New Orleans, and Dorman v. Philadelphia have dealt with the specific issue of the exercise of the power of eminent domain for slum-clearance and low-cost housing, and in all instances the power of the states was sustained. No unfavorable decision has been handed down so far, and it seems very unlikely that it will occur in the future. First

\textsuperscript{92}(1914) 111 Me. 486, 90 Atl. 318.
\textsuperscript{94}McAllister, Public Purpose in Taxation, (1929-30) 18 Cal. L. Rev. 137, 248.
of all, an inquiry into the relation between the three types of powers of the states leads us to the conclusion that if the courts have consistently upheld the constitutionality of the use of the police power and of the taxing power for purposes of public housing, it can be assumed that, especially after the Muller Case and Spahn v. Stewart, they will continue to sustain the use of the power of eminent domain as well. If public housing has been sustained as a public purpose in taxation and police power cases, it is legitimate to predict that the use of the power of eminent domain by the states will be admitted by the courts when housing projects cannot be achieved in any other way. There are of course differences between the three powers, though the distinction is admittedly a fine one and hardly capable of a clear-cut delineation.

"But if the menace is serious enough to the public to warrant public action, and the power applied is reasonably and fairly calculated to check it and bears a reasonable relation to the evil, it seems to be constitutionally immaterial whether one or another of the sovereign powers is employed."

This limitation is not serious, since the requirement of a reasonable relation between the evil to be checked and the means applied to it, is a general condition of state action, and in no way confined to the power of eminent domain. We have pointed out before that according to the findings of various public investigations in New York and other states slum-clearance projects cannot be carried out without the power of condemnation, since slums usually comprise large areas, and the very purpose to be achieved, viz., low-rent housing of decent standards, would be frustrated from the outset if the housing authorities were compelled to pay excessive prices of greedy property owners. It is neither good common sense nor good law that a state or a municipality should have the right to use its taxing power for paying excessive land prices, and be deprived of the right to use the power of eminent domain for obtaining the same land for an acknowledged public purpose. We remember that in low-rent housing projects every dollar paid per square foot of land increases the rental by $.40 to $1.00 per room per month, and that the City of New York, for instance, in its condemnation proceedings in the years 1926-1930 had to pay 157 million dollars only instead of the 204 million claimed by the property owners.

The position of the power of eminent domain is different in case of the federal government and in that of the states. The

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5 Mr. Justice Crouch in New York Housing Authority v. Muller, (1936) 270 N. Y. 333, 1 N. E. (2d) 153.
federal government may exercise the power of eminent domain only in aid of one of the enumerated powers granted to it by the constitution; the interpretation of the "general welfare" clause in the Butler Case and even in the more liberal Social Security Act Cases limits federal action for the "general welfare" to appropriations of money, and does not admit of other legislation deriving its validity from the "general welfare" clause. In particular, the Butler decision condemned federal coercive measures in aid of appropriations under the "general welfare" clause, and the Social Security Cases were distinguished from the Butler Case precisely on the ground that no coercive measures or provisions were linked with the federal appropriations. If the "general welfare" clause should undergo a further step in its liberal interpretation, it is conceivable that the limitation to appropriations will be dropped, and then legislation for the general welfare including the exercise of the power of eminent domain may be admitted by the courts. As the law stands to-day, federal action for the general welfare seems to be limited to appropriations of money, although of course certain minimum standards for its use may be attached. This limitation, though, of the power to provide for the general welfare does not exist in the case of the states. The state can use for the general welfare of its inhabitants any of the sovereign powers, because the state is not a government of limited and specifically enumerated powers like the federal government. Unless subject to a superior federal power the state can use any of its sovereign powers for recognized public purposes, with the restriction under due process that the power employed must bear a reasonable relation to the evil to be remedied.

We live to-day in a period in which the focus of economic and political thinking is shifting from the concept of production to that of distribution. From the seventies of the last century to the twenties of this century, this country witnessed a period of rapid construction and industrialization which concentrated all its energies and all its thought to construct, to build, to produce. This was also the period in which problems of just distribution had to recede before the claims of rapid and comprehensive construction. In these fifty years property rights found more protection in the courts than ever before or afterwards. State intervention in the form of price regulation, wage limits, hours of work, unemployment relief, aid for the needy, were defeated by courts which
reflected the temper of the time in which they functioned. Those fifty years also witnessed a construction of public use under eminent domain which more and more limited that concept to use by governmental agencies and use by the general public. Where ostensible interests of production and development of natural resources were involved, then and then only the rigidity of the interpretation was liberalized to such a degree that no use by the public was required, as long as the productive wealth of the state was indirectly increased. Before this era of rapid construction and production courts held that the power of eminent domain "may be exercised not only for the public safety, but also where the interest, or even the convenience, of the state or its inhabitants, is concerned." Now again signs are visible that those old ideas, interrupted by a period of intensive protection of private property rights, are coming to the fore again:

"Public uses are not limited, in the modern view, to matters of mere business and necessity and ordinary convenience, but may extend to matters of public health, recreation, and enjoyment. . . . A road need not be for a purpose of business to create a public exigency; air, exercise, and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery."

This phenomenon of the shift of the focus from production to distribution is of course not confined to the province of eminent domain. With regard to the police power, too, many restrictions on the uses to which real property may be put, excess condemnation and zoning are now sustained as valid exercises of the police power which a few years ago in most jurisdictions were held unconstitu-

86A typical example of this period is, e.g., Davies v. State of Ohio ex rel. Boyles, (1904) 75 Ohio 114, 78 N. E. 985. An Act entitled "An Act to Provide Relief for Worthy Blind" (97 Ohio Laws, ch. 392) provided that all male blind persons over 21 years, and all female blind persons over eighteen years, who have no property or means with which to support themselves, shall be entitled to and receive not more than $25 per capita quarterly from the county treasury. The court held this act unconstitutional, because "the public purpose, to warrant the exercise of the power of taxation, must be one which appeals to all the people, and is not in any sense partisan." The further agreement of the court that relief of the blind may lead straight to communism, fully anticipates the argument against the federal government in United States v. Certain Lands in the City of Louisville. The Ohio court argued as follows: "If a bounty may be conferred upon individuals of one class, then it may be upon individuals of another class, and, if upon two, then upon all. And, if upon those who have physical infirmities, then why not upon other classes who for various reasons may be unable to support themselves? And, if these things may be done, why may not all property be distributed by the state?"

tional as invading legally protected property rights. In the field of the "business affected with a public interest" the extension of state control is marked from Munn v. Illinois,\textsuperscript{99} decided in 1877, to its present climax in Nebbia v. State of New York,\textsuperscript{100} decided in 1934. Still more marked is this shift of focus in economic and judicial thinking in the development of labor decisions from Lochner v. New York,\textsuperscript{101} decided in 1905, to West Coast Hotel Co. v. Parrish,\textsuperscript{102} decided in 1937. The constitutionality of the Social Security Act marks another important step in that direction. Public housing is to be understood as a part of our contemporary movement to turn the efforts of the federal and of the state governments to the problem of distribution, supplementing, not replacing, the problem of production. The movement is already rich in achievement although young in age, and as far as the field of public housing is concerned, the courts have adapted their ideas to the changing social and ideal pattern of our time, and have upheld the constitutionality of employing all three sovereign powers of the states, the police power, taxing power, and the power of eminent domain.

England, the mother country of the common law, has experienced little if any difficulty of a legal character in carrying out her housing programs since the World War. Obviously the "purpose of the Housing Acts is to interfere with common law rights,"\textsuperscript{103} but this interference was never considered as fundamentally subversive of British legal and political institutions. Already in 1918 we read in the "First Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purpose" the recommendation of the Committee that

"Any Public Department or Local Authority, on whom Parliament has imposed a duty or conferred a power, the due performance or exercise of which involves the acquisition of land, should be able to acquire land compulsorily by some simple and expeditious procedure. . . . Whenever the Public Interest requires the expropriation of particular land, there should be a simple form of procedure to effect the purpose, just compensation being made to the owner affected."\textsuperscript{104}

\textsuperscript{99}(1877) 94 U. S. 113, 24 L. Ed. 77
\textsuperscript{101}(1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937.
\textsuperscript{102}(1937) 300 U. S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703.
\textsuperscript{103}O'Jennings, Courts and Administrative Law—The Experience of English Housing Legislation, (1936) 49 Harv. L. Rev. 426, 437.
\textsuperscript{104}Ministry of Reconstruction, Cd. 8998 (1918) 13.
The law of England to-day provides that owners of land may be required by the Legislature to surrender "for purposes of public utility"105 some or all of the rights they possess over their land. The Public Health Act, 1875, section 175 gave power to certain authorities to acquire land compulsorily for the following purposes: sewerage and drainage; water supply; hospitals and mortuaries; highways and streets; public pleasure grounds; markets and slaughter-houses. The Housing Act, 1925, section 63, provides that land for the purpose of erecting improved dwellings may be condemned by local authorities in the same manner as though it were one of the purposes enumerated in the Public Health Act of 1875. The latest stage of English housing legislation is the Housing Act 1936,106 which consolidates a number of former acts and concentrates its program on slum-clearance and redevelopment areas. A "clearance area" is defined as an area to be cleared of all buildings either by the owner of the buildings under a clearance order, or by a local authority after purchasing the land. The procedure is the following: Where a local authority is satisfied as respects any area in its district that the houses are unfit for habitation or dangerous or injurious to the health of the inhabitants of the area, and that the most satisfactory method of dealing with the conditions in that area is the demolition of all the buildings in it, the local authority defines the area and passes a resolution declaring it a clearance area. The local authority may purchase land compulsorily in the clearance area. Adjoining land may be included in the compulsory purchase order. The owner of the property can appeal against the order to the minister of health. The minister of health can order an inquiry, and give a decision against the local authority, but in practice this has happened very rarely so far.

A "redevelopment area" is defined as an area containing fifty or more working-class houses where at least one-third of the working-class houses are overcrowded, or unfit for human habitation. Here, too, the same condemnation procedure obtains. An aggrieved property owner who desires to question the validity of a compulsory purchase order on the ground that it is not within the statutory power or that any statutory requirement has not been complied with, may, within six weeks after the publication of the notice of confirmation make an application to the High Court. It is important that this application can be made on the ground

1066 Geo. 5 & 1 Edw. 8, ch. 51.
that there was no evidence at all adduced at the inquiry to support the order, but not on the ground that such evidence was insufficient.\textsuperscript{107} Since, as Mr. Morrison stated before the United States Senate, voluntary agreements with the owners are “very rare,”\textsuperscript{108} this speedy and simple condemnation procedure saves much litigation, cost and delay of construction. The important point is that the English law interprets “public use” as public interest or public benefit, and not as “use by the public” as American courts have done for a long time, especially under the influence of the extension of due process on substantive matters. Thus, one of the major legal issues of American governmental housing is alien to the body of the English law; the same is true of all the other democratic countries in Europe or overseas where housing has been recognized as a public utility like water, light on the streets, education, etc., to which every citizen has a right.\textsuperscript{109} In this country, too, this governmental activity of a responsible democracy will find its legitimate place in the body of deeply rooted legal ideas and institutions.


\textsuperscript{108}Senate Hearing April 15, 1937, S. 1685, at 130.

\textsuperscript{109}For the legal and constitutional issues involved in public housing cf. Jennings’ essay, Courts and Administrative Law—the Experience of English Housing Legislation, (1936) 49 Harv. L. Rev. 426. The more general issue of public use in eminent domain is discussed in Burekhardt, Kommentar der Schweizerischen Bundesverfassung (1931) 159, for Switzerland; Harioù, Droit Constitutionnel (1923) 81, and Giraud, Le Jury de l’Expropriation pour Cause d’Utilité Publique (1932) for France; Kruse, Eigentumsrecht (1931) 251, for the Scandinavian countries.