

nary courts has not yet been clearly ruled upon, but a recent Supreme Court decision seems to indicate that a higher standard may be required in reorganization proceedings.³³

Constitutional Law—Federal Power of Eminent Domain—[Federal].—Courts² and commentators³ have generally³ agreed that the Constitution denies to federal agencies all powers which are not specifically granted to the United States or which are not appropriate for carrying into execution powers specifically granted to the United States. It has thus been urged that the federal government may not constitutionally condemn land for public purposes unless such condemnation may be justified as an exercise of one or more of the powers vested in the federal government by the Constitution.⁴

In the recent cases of *United States v. Dieckman*,⁵ *United States v. Eighty Acres of Land*,⁶ and *United States v. 458.95 Acres of Land*,⁷ however, lower federal courts have departed from the above analysis. In order to sustain the use of federal condemnation to establish public recreational parks⁸ and reforestation areas,⁹ they appear to have argued that the federal government may constitutionally condemn land for any public purpose. If this doctrine is to be accepted, it must be maintained that the federal eminent domain power is a power, co-ordinate with, rather than resulting from, the powers enumerated in Article I, Section 8 of the Constitution. The instant cases rely most strongly upon the cases of *United States v. Threkehd*,¹⁰ and *Kohl v. United States*.¹¹ In the *Threkehd* case the Supreme Court held that the power to condemn land for a railway to be used to transport wood from a nationally owned forest resulted from the specified federal power to dispose of and protect national property. The *Kohl* case maintained that the power to condemn a postoffice site flowed from the grant of power to establish post-offices and post-roads. Assertions in the *Kohl* and other cases that the eminent domain power is an inherent attribute of sovereignty¹² are accordingly rather weak authority for the results in the principal cases.

In order to reconcile the results in the *Dieckman*, *Eighty Acres of Land*, and *483 Acres of Land* cases with the position that the United States is a sovereignty with pow-

³³ *Taylor v. Standard Gas Co.*, 306 U.S. 307 (1939); see *Pepper v. Litton*, 7 U.S. Law Week 639 (U.S. S. Ct. 1939).

¹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936); *Kansas v. Colorado*, 206 U.S. 46, 83, 87, 89 (1907); *Martin v. Hunter's Lessee*, 1 Wheat. (U.S.) 304, 326 (1816).

² Willis, *Constitutional Law* 220 (1936); Rottschaefer, *Constitutional Law* 82 (1939).

³ For a different viewpoint, compare the Wilson-Roosevelt theory of constitutional powers discussed in Willoughby, *Constitutional Law* 56-7 (2d students' ed. 1930).

⁴ See *Kohl v. United States*, 91 U.S. 367, 374 (1875).

⁵ 101 F. (2d) 421 (C.C.A. 7th 1939).

⁶ 26 F. Supp. 315 (Ill. 1939).

⁷ 22 F. Supp. 1017 (Pa. 1937).

⁸ Cases cited in notes 5 and 7 supra.

⁹ *United States v. Eighty Acres of Land*, 26 F. Supp. 315 (Ill. 1939).

¹⁰ 72 F. (2d) 464 (C.C.A. 10th 1934); cf. *Burley v. United States*, 179 Fed. 1 (C.C.A. 9th. 1910).

¹¹ 91 U.S. 367 (1875).

¹² See *Kohl v. United States*, 91 U.S. 367, 371 (1875); *United States v. Lynah*, 188 U.S. 445, 465 (1903).

ers upon which there are limitations other than that legislation be for the general welfare,¹³ it is necessary to assume that use of the eminent domain power to establish public recreational parks and reforestation projects is an appropriate means of executing the federal power to spend for the general welfare. That the United States might constitutionally purchase land to be used for recreation parks and reforestation areas seems free from doubt¹⁴ inasmuch as the Supreme Court has asserted the Hamiltonian view that the federal government can expend funds in order to execute any policy conducive to the common good.¹⁵

Only commentators, however, have asserted that from the federal power to spend funds for the general welfare there results a federal power to coerce the sale of property.¹⁶ Although the maintenance of such a view seems necessary if the instant cases are to be reconciled with the position that the United States has only such powers as are expressly or impliedly granted by the United States Constitution, the pertinence of such a view is ignored by the instant cases. On the contrary, they only inquire whether the objects sought to be attained constitute "public uses." A court should in any case refuse to make this inquiry, which is relevant only to the question of whether condemnation has been conducted in accord with the limitations upon federal power imposed by the Fifth Amendment, unless it is satisfied that the condemnation challenged constitutes an exercise of a resulting federal power of eminent domain. If in a given case it were held that the power to condemn results from the power to spend for the general welfare, and that the purpose of the condemnation whose constitutionality was in question was the advancement of the general welfare, the inquiry whether the condemnation in question was for a public use should prove to be a mere formality since it would be anomalous to hold both that land was to be devoted to the general welfare and that it was to be dedicated to a non-public use.

Whether a federal power to coerce the sale of land should be regarded as resulting from the federal power to spend for the general welfare is questionable. The Supreme Court has implied the power to condemn the Gettysburg battlefield from an implied federal power to establish military monuments,¹⁷ the power to condemn land for im-

¹³ It is by no means certain, historically, that the federal government was not intended to have general power to provide for the general welfare. The evidence for this conclusion is, however, beyond the scope of the present note.

¹⁴ The two possible objections: that the project is local and is not open to an extended public seem effectively disposed of by the following cases: *Barnidge v. United States*, 101 F. (2d) 295 (C.C.A. 8th 1939); *Oklahoma City v. Sanders*, 94 F. (2d) 323 (C.C.A. 10th 1938); *United States v. Eighty Acres of Land*, 26 F. Supp. 315 (Ill. 1939); *Missouri Utilities Co. v. California*, 8 F. Supp. 454 (Mo. 1934); see *Shoemaker v. United States*, 147 U.S. 282, 297 (1892), for strong dictum to the effect that land taken for a public park is taken for a public use. But cf. *United States v. Certain Lands in Louisville, Ky.*, 78 F. (2d) 684 (C.C.A. 6th 1935); *Washington Water Power Co. v. Coeur d'Alene*, 9 F. Supp. 263 (Idaho 1934).

¹⁵ See *United States v. Butler*, 297 U.S. 1, 66 (1935). 1 Willoughby, *Constitution of the United States* 97 (2d ed. 1929); *Burdick*, *Law of the American Constitution* § 77 (1922); *Pomeroy*, *Constitutional Law* 228-9 (9th ed. 1886). It may be argued, however, that the holding in the *Butler* case is substantially a repudiation of the Hamilton view. If so, it is to be doubted that the Supreme Court, as presently constituted, would reaffirm the *Butler* case.

¹⁶ *Seak*, *Power of Federal Government to Condemn for Housing*, 1 *Law and Contemp. Probs.* 232 (1935); *McGuire*, *The New Deal and the Public Money*, 23 *Georgetown L.J.* 155, 179-88 (1935); *Willis*, *Constitutional Law* 722 (1936).

¹⁷ *United States v. Gettysburg Electric R.*, 160 U.S. 668 (1896).

provement of navigation from the commerce power,¹⁸ and the power to condemn lands for post offices from the power to establish post offices and post roads.¹⁹

The Court appears uniformly to have admitted, therefore, that if the purchase of a parcel of land is an appropriate means of executing a federal power, condemnation of the same parcel is also an appropriate means.²⁰ It has been argued to the contrary, however, that from the fact that the power to spend for the general welfare is unlimited, it does not follow that there is any power to coerce sales. It has been urged, moreover, that if federal agencies are permitted to employ eminent domain in aid of the spending power, the federal government will be able to acquire extensive jurisdiction over lands within the states and over the activities conducted thereon, thereby converting Article I, Section 8 into something which most scholars have long since decided that it is not, i.e., a general grant of power to provide for the general welfare.

The persuasiveness of this *in terrorem* argument should be weakened by a reminder that judges could rely upon the never explicitly overruled *Butler* case,²¹ if they wished to find that the Tenth Amendment constituted a barrier to extensive federal erosion of state sovereignty. Moreover, no matter how extensive the scale of federal condemnation,²² the states will still retain a certain amount of jurisdiction over federally condemned lands which the states have not ceded to the federal government.²³

While the Supreme Court has not been loathe to indicate the limits of most of the enumerated powers such as the taxing power,²⁴ and the commerce power,²⁵ it has never defined the limits of the spending power. Although the Court has never expressly so stated, such reticence seems to rest upon the feeling that review of Congressional appropriation rests with the people at the polls,²⁶ or, perhaps more realistically, on the ground

¹⁸ *Cherokee Nation v. Kansas R.*, 135 U.S. 641 (1890).

¹⁹ *Kohl v. United States*, 91 U.S. 367 (1875).

²⁰ See *ibid.*, at 371.

²¹ *United States v. Butler*, 297 U.S. 1 (1935); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918). *Contra*: *McCray v. United States*, 195 U.S. 27 (1904); *United States v. Doremus*, 249 U.S. 86 (1919) (semble); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (semble).

²² That the federal government will attempt condemnation of a substantial percentage of American land seems virtually fantastic. It should be remembered that "A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent—expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action," *United States v. Butler*, 297 U.S. 1, 87 (1935) (dissenting opinion of Mr. Justice Stone). *United States v. Railroad Bridge Co.*, Fed. Cas. No. 16114, at 686, 689 (1855) illustrates the doubtful value of *in terrorem* arguments. In that case Justice McLean expressed fear that if the power of the federal government to build internal roads under the commerce power were admitted, the federal government could "make turnpike or railroads throughout the entire country."

²³ *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). *Fields*, *Jurisdiction over Nationally Owned Areas within the States*, 24 *Calif. L. Rev.* 573 (1936).

²⁴ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

²⁵ *Atlantic Coast Line R. v. Standard Oil Co. of Ky.*, 275 U.S. 257 (1927).

²⁶ 1 *Cooley*, *Taxation* §1782 (4th ed. 1924).

that courts are unqualified or unable to reverse legislative determinations of policies conducive to the general welfare. Consistency would therefore require avoidance of judicial review in those cases in which condemnation may be justified only as an exercise of the spending power. How such avoidance of judicial review would be accomplished is a matter of conjecture. Perhaps the doctrines of "political question" or "lack of sufficient pecuniary interest" used effectively in *Massachusetts v. Mellon*²⁷ could be expanded to fit the eminent domain cases. Again the Court might say that discretion belongs to Congress, unless "the choice is clearly wrong, a display of arbitrary power."²⁸ It has even been suggested that to effect such avoidance the Supreme Court should refuse to pass upon the constitutionality of federal action.²⁹

If the courts insist that the eminent domain function may not supplement the spending power, the federal government might still accomplish numerous ends similar to those accomplished in the instant cases by conditioning the award of grants-in-aid upon compliance by the states with terms dictated by federal administrators.³⁰

Damages—Mitigation of Compensatory Damages—[Georgia].—When threatened with a suit for injury from the presence of a foreign substance in a bottle of Coca-Cola, the defendant Coca-Cola Company procured the installation of a device in the plaintiff's hospital room which enabled the defendant's agents to listen to and record private conversations between the plaintiff and her husband, doctors, nurses, and friends. The plaintiff sued for invasion of her right of privacy. The defendant sought to justify its conduct on the basis of its right to protect its property against the plaintiff's allegedly false claim of damage. The court held that although the plaintiff's claim and threatened suit did not justify the defendant's intrusion, the facts might be pleaded in mitigation of damages. *McDaniel v. Atlanta Coca-Cola Bottling Co.*¹

It would seem that the court's refusal to allow the plaintiff's conduct to justify the defendant's invasion is adequately supported by a strong social attitude against invasions of privacy.² The Georgia court's decision that mitigation be allowed was based on a state statute precisely in point;³ however, a Wisconsin court has reached a contrary result under a statute permitting, in an action for libel or slander, use in mitiga-

²⁷ 262 U.S. 447 (1923).

²⁸ *Helvering v. Davis*, 301 U.S. 619, 640 (1936).

²⁹ *Nicholson*, Federal Spending Power, 9 Temple L. Q. 3, 24 (1934). In the interest of securing uniformity, it appears to be desirable that there be review by the federal judiciary of the constitutionality of state legislation.

³⁰ *Missouri Utilities Co. v. California*, 8 F. Supp. 454, 464 (Mo. 1934). *Corwin*, Spending Power of Congress, 36 Harv. L. Rev. 548, 577 (1923).

¹ 2 S.E. (2d) 810 (Ga. App. 1939).

² Conventional delineations of the rules guaranteeing privacy are broad and supported by strong statements of policy. *Warren and Brandeis*, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); *Kacedan*, The Right of Privacy, 12 Boston U. L. Rev. 353 (1932). *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W. (2d) 46 (1931).

Eavesdropping was an indictable nuisance at common law, 2 Wharton, Criminal Law § 1718 (12th ed. 1932). In Georgia, at least, eavesdropping has been condemned by statute as well, Ga. Code (1933) § 26-2001.

³ Ga. Code (1933) § 105-1802: "Circumstances not amounting to justification may be pleaded in extenuation and mitigation of damages."