No. 401

In the Supreme Court of the United States

OCTOBER TERM, 1935.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL.,
RECEIVERS OF HOOSAC MILLS CORPORATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FILED BY MALCOLM DONALD AS AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF COTTON MANUFACTURERS

MALCOLM DONALD,
EDWARD E. ELDER,

HERRICK, SMITH, DONALD & FARLEY,
Boston, Massachusetts.

INDEX, AND OUTLINE OF ARGUMENT.

PAGE

PETITION OF MALCOLM DONALD, ON BEHALF OF NATIONAL ASSOCIATION OF COTTON MANUFACTURERS, TO FILE A BRIEF AS *Amicus Curiae*. 1

BRIEF OF *Amicus Curiae:*

I.

PRELIMINARY MATTERS. 4–18

A. Brief Statement of the Case. 4

B. Issues Discussed in this Brief. 4

C. Importance of the Questions. 5

D. Summary of our Argument. 6

The processing taxes are an integral part of a scheme to restrict production. 6

The scheme constitutes a gigantic combination in restraint of production. 7

If this legislation is lawful, the United States has almost unlimited power, over production in the States. 7

It is a fundamental principle that power granted the United States should not be so construed as to nullify powers clearly reserved to the States. 8

Control of agriculture is reserved to the States. .. 8

Contentions of the Government stated. 9

Our contentions in reply thereto stated. 10

Madisonian interpretation of the welfare clause, permitting appropriations of tax moneys only for carrying out granted powers, is correct, and does not justify appropriations to promote agriculture. 11

But if Hamiltonian interpretation of welfare clause be adopted, and Congress has the right to appropriate tax moneys for purposes not embraced within the granted powers, this does not authorize an appropriation for the direct purpose of effectuating a scheme to regulate or control agriculture. 13

PAGE

This legislation is not justified as a means of carrying out the fiscal policies of the United States. 16

The processing taxes violate due process of law. .. 17

II.

ANALYSIS OF THE AGRICULTURAL ADJUSTMENT ACT. 19–30

A. Provisions of the Act. 19

B. Purposes of the Act. 21

Direct purpose: to reduce production of agricultural commodities in order to raise their prices. 21

Other purpose: to make direct contributions to the income of farmers. 21

Powers granted to effectuate purposes. 24

Summary of purposes. 26

Questions raised. 26

III.

THIS LEGISLATION AUTHORIZED A DRASTIC REGULATION OF AGRICULTURE. 30–37

A. The Act Authorized a Gigantic Combination to Restrict Production In Order to Enhance Prices. 30

B. The Carrying Out of the Act Has Resulted in a Drastic Regulation of Agriculture. 31

(1) Execution of the scheme of regulation for 1933 in respect to cotton. 31

(2) Execution of the schemes of regulation for 1934 and 1935 with respect to cotton. 33

(3) Execution of schemes of regulation with respect to other crops. 35

(4) Other measures initiated to effect control. 35

C. The Regulation Achieved and the Reduction of Production Have Produced Radical Changes in the Internal Economy of the States. 36

IV.

PAGE

If This Legislation Is Constitutional, It Necessarily Follows That Congress Has An Almost Unlimited Power To Impair the Control by the States Over Their Internal Affairs. 38–41

V.

This Legislation Violates the Constitutions and Laws of Many States, and the Public Policies of All States. 42–46

VI.

The Following Rules of Constitutional Interpretation Are Applicable in the Present Case. 47–53

A. No presumption of any grant of power to the United States. 47

B. A practical construction must be adopted which permits the United States and the States to function with the minimum of interference each with the other. 48

C. Neither the United States nor a State may accomplish by indirection what it is not authorized to accomplish directly. 50

D. Any interference by the Federal Government with matters which are within the States' jurisdiction is unconstitutional in a twofold sense. 51

E. Application of these principles. 52

VII.

The Importance of the System of Dual Sovereignty upon Which the Constitution Is Based. 54–64

A. The embodiment of this principle in the Constitution was the necessary result of the existing conditions. .. 54

a. fear of strong central government. 54

b. fear of oppression of minority states by majority. 55

PAGE

c. fear of interference with slavery. 56

d. desire for local self-government. 56

B. The system of dual sovereignty and citizenship. 57

1. Dual sovereignty. 57

2. Dual citizenship. 58

3. Dual general welfare. 59

C. The necessity of preserving the sovereignty of the States and their control of local matters has always been recognized by this court. 59

D. Reasons for preserving jurisdiction of States still vitally important. 61

VIII.

REGULATION OF AGRICULTURE IS SOLELY A MATTER OF STATE JURISDICTION. 65

IX.

POWERS GRANTED THE UNITED STATES BY THE CONSTITUTION WHICH THE UNITED STATES CONTENDS JUSTIFY THIS LEGISLATION. 66

X.

THE INTERSTATE COMMERCE CLAUSE DOES NOT JUSTIFY THE PRESENT LEGISLATION. 67–69

XI.

THREE DIFFERENT INTERPRETATIONS HAVE BEEN GIVEN TO THE GENERAL WELFARE CLAUSE. 70–73

View that the welfare clause gives independent power to legislate as to all matters, although not embraced within enumerated powers, is admittedly wrong. 71

The Government's contention is based on the Hamiltonian interpretation. 72

We contend that the Madisonian interpretation is the correct one; but that neither the Madisonian nor the Hamiltonian view justifies the present legislation. 73

XII.

PAGE

MADISON'S INTERPRETATION OF THE WELFARE CLAUSE SHOULD BE ACCEPTED. 74–161

1. The situation at the time of the adoption of the Constitution precluded vesting in the federal government any power not essential to the attainment of certain primary objects. 74
2. Madison's doctrine in accord with fundamental principles. 78–83
   (a) Under dual system, provision for welfare divided between state and federal governments. 78
   (b) Division of powers marks division of responsibility. 78
   (c) "United States" designates the political body, not the people who vested it. 79
   (d) General design to "promote general welfare" was to be effectuated through the exercise of the delegated powers. 79
   (e) Taxing power normally auxiliary to regulatory power, and this is reasonable. 80
   (f) Power to appropriate is an implied power auxiliary to the vested powers. 81
   (g) Only explicit language would justify accepting Hamiltonian view. 82
   (h) Opinion of Chief Justice Marshall denied Congress power to tax for purposes within the exclusive province of the States. 83
3. It is inconceivable that the convention should have given the Federal Government power to raise money to provide for matters with respect to which the States retained the power to tax and over which they insisted on keeping control. 83
4. The Hamiltonian interpretation would defeat the public policies which the States have the right and duty to declare and enforce. 84
   (a) Regulation through spending an invasion of State power. 84

PAGE

(b) Enlargement of federal taxing purposes a burden on State taxing power. 84

(c) Burden on State taxing power impairs State's ability to provide for welfare of its citizens. 85

(d) Enlargement of federal taxing purposes opens door to sectional discrimination. 85

5. If the general welfare clause had been designed to enlarge the taxing power, a similar clause would have been appended to the borrowing power. 86

6. The Hamiltonian interpretation would defeat the express restrictions on taxation imposed in the Constitution. 87

7. The words "of the United States" emphasize distinction between objects of Federal and objects of State welfare-control; the "surplusage" contention is unfounded. 91

8. The purposes sought to be accomplished by the Constitution did not require, for their attainment, that the Federal government be given power to apply money in a field not controlled by it, but reserved to the States. 93

9. The words "common defense" and "general welfare" were taken from the Articles of Confederation, where they had the limited meaning for which we contend. 98

The contention of the Government—that the General Welfare Clause was not given a restricted meaning in the Articles of Confederation—is not supported by evidence. 102

10. Proceedings in the Federal Convention prove Madison's interpretation correct. 104

(a) The doctrine subsequently advocated by Hamilton was not brought up or discussed in the Convention. 104

(b) Account of debates and proceedings—the discussion centered about the payment of the public securities. 105

PAGE

(c) Conclusions to be drawn. 112

1. Taxing clause in the form in which it was first reported (by Committee on Detail) and accepted by the Convention would have given no power to tax for purposes outside field of Federal power. 112

2. The failure of delegates to object to the general welfare clause shows it was not suspected to have the meaning Hamilton subsequently attributed to it. 113

3 Reason for adoption of clause shown to be one entirely disconnected with taxing for purposes outside the field of Federal powers, namely, a cautious regard for the payment of existing public debts. 115

4. The general welfare clause was a familiar phrase added to prevent a limitation solely to debt-paying. 117

(d) Evidence of Sherman's speech on the proposed Glass Manufactory Loan. 118

11. Hamilton's doctrine was not an issue in the campaign for ratification of the Constitution. 119

12. An additional reason for accepting Madison's view is that he was preeminently qualified. 123

13. Hamilton's interpretation was originated by him from motives of expediency after the Constitution was adopted. 126

14. The Government's contention, that Hamilton's doctrine was adopted by early Congresses, is not supported by the historical evidence. 130

(a) Story's statement as illustrating a common misconception. 130

(b) General principles applicable to evaluating legislative precedents. 131

(c) Reasons for this common misconception as to the precedents. 134

(d) No early precedents adopted Hamilton's doctrine. 139

PAGE

The Codfisheries Act, 1792. 139
The San Domingo Refugees Relief Act, 1794. 141
The Whiskey Rebellion Sufferers Relief Act, 1795. 142
Washington's Recommendation Relative To Agriculture And A National University... 142
Savannah Fire Sufferers Relief Bill Defeated, 1797. 144
Virginia Resolutions (1798) And Madison's Report (1800) Thereon Controverted Hamilton's Doctrine. 144
Two Acts (1803, 1804) To Relieve Fire Sufferers Related To Bonds For Duties. 145
Act For Relief Of Earthquake Sufferers In Missouri Territory. 145
Venezuela Earthquake Sufferers Relief Act, 1812. 145
Conclusion As To So-Called Relief Legislation. 146
Roads and Canals. 147
Jefferson's Message to Congress, 1800. 148
Madison's Message to Congress, 1815. 149
Madison's Veto Message, 1817. 149
Monroe's Message to Congress, 1817. 150
Committee's Report and Debates on Monroe's Message, 1817. 151
Monroe's Veto of Cumberland Road Bill, 1822. 155
President Jackson's Views. 156
President Polk's Veto Message, 1847. 156
President Pierce's Veto Message, 1854. 157
President Buchanan's Veto Message, 1860. . 157
Conclusion As To Precedents Prior to Civil War. 157
Precedents After Civil War. 158

XIII.

PAGE

THE HAMILTONIAN INTERPRETATION OF THE GENERAL WELFARE CLAUSE DOES NOT AUTHORIZE THE PRESENT LEGISLATION. 162–203

1. Under the Hamiltonian interpretation a right to tax for limited purposes only is granted. 162
2. The power under Hamiltonian view is limited to application of money and does not include power to do any other thing not authorized by Constitution. 165
3. It gives no authority to legislate with respect to or to control agriculture. 166
4. The purpose of the legislation must be judicially inquired into. 169
5. The power, under Hamilton's view, is subject, therefore, to limitations; among them, that money may not be applied to unlawful purposes, which includes repugnant to an essential principle of the Constitution. 171
6. An appropriation made for the direct purpose of restricting or interfering with or regulating agriculture is repugnant to the constitution, violates the tenth amendment and is illegal. 174
   (a) This legislation effectuates a direct control over and intermeddling with agriculture. .. 174
   (b) Reliance by the Government on the so-called voluntary character of the reduction agreements, ignores the fact that a combination or conspiracy to restrain trade or limit production is not made lawful because voluntarily entered into by the individuals who are parties to it. 175
   (c) The alternatives open to the farmer are such that his election to sign a reduction agreement is not voluntary. 177
   (d) The nature of illegal interference with State control further considered. 179

PAGE

7. Previous legislation by Congress affords no precedent for the present legislation. 180

8. No interference, not the incidental result of the exercise of an admitted power, is permissable; this principle is violated by the Act. 184

9. Cases which fully sustain the principle above stated. 187

The Child Labor Cases—*Hammer* v. *Dagenhart* 187

Bailey v. *Drexel*. 192

Hill v. *Wallace*. 193

Cases involving the rights of states to grant or withhold privileges in order to obtain compliance with matters beyond their jurisdiction. 194

Summary of foregoing cases. 199

Other cases establishing analogous principles. 200

10. Contention by the Government that no control is exercised by this legislation further considered. 201

XIV.

CONTENTION THAT CONGRESS HAS POWER TO REGULATE AGRICULTURE TO CARRY OUT THE FISCAL POLICIES OF THE UNITED STATES ANSWERED. 204–208

XV.

THE PROCESSING TAXES VIOLATE THE DUE PROCESS OF LAW PROVISION OF THE FIFTH AMENDMENT. 209–221

XVI.

SINCE THE PLAN FOR RESTRICTING AGRICULTURE PROVIDED FOR IN THIS LEGISLATION IS UNLAWFUL AND SINCE THE PURPOSE IS NOT A PUBLIC PURPOSE, THE TAXES IMPOSED TO CARRY IT OUT ARE UNLAWFUL. 222–225

CITATIONS

Decisions.

PAGE

Allen v. Smith, 173 U.S. 389..... 214
Almy v. *California,* 24 How. 169, 294..... 50
Bremmer v. *Redman,* 138 U.S. 78..... 201
Child Labor Tax Case (*Bailey* v. *Drexel*), 259 U S. 20, 37 16, 61, 170, 192-193
Cole v. *La Grange,* 113 U.S. 1..... 216, 217
Cohens v. *Virginia,* 6 Wheat. 264, 418..... 93, 133
Dartmouth College v. *Woodward,* 4 Wheaton, 518, 629..99, 187
Dick v. *United States,* 208 U.S. 340, 353..... 49
Doyle v. *Continental Insurance Co.,* 94 U.S. 535..... 173, 196
Fairbank v. *United States,* 181 U.S. 283, 289, 300..... 47, 50, 51, 134, 185
Fidelity & Deposit Co v. *Tafoya,* 270 U.S. 426, 434... 173, 198
Frick v. *Pennsylvania,* 268 U.S. 473..... 198
Frost Trucking Co. v. *R. R. Com.,* 271 U.S. 583, 593..... 177, 194-196
Frothingham v. *Mellon,* 262 U.S. 447..... 223
Gibbons v. *Ogden,* 9 Wheat. 199..... 83
Green v. *Frazier,* 253 U.S 233..... 63, 220
Hammer v. *Dagenhart,* 247 U.S. 251, 275, 276..... 6, 16, 52, 60, 174, 187-192
Hill v. *Wallace,* 259 U.S. 44.... .....16, 170, 171, 193
Houston v. *Moore,* 5 Wheat. 1, 48..... 47
Hylton v. *United States,* 3 Dallas, 171, 177..... 114
Industrial Association v. *United States,* 268 U.S. 64, 82.. 66, 68, 69
Jones v. *City of Portland,* 245 U.S. 217, 221..... 209, 219
Kidd v. *Pearson,* 128 U.S 1, 21.... ..... 66, 67, 68
Knowlton v. *Moore,* 178 U.S. 41, 95, 96..... 114
Lane County v. *Oregon,* 7 Wall. 71, 76..... 59
Levering & G. Co. v. *Morrin,* 289 U S. 103, 107..... 68
License Tax Cases, 5 Wall. 462, 471..... 174
Linder v. *United States,* 268 U.S. 5, 17..... 30, 167
List v. *Burley Tobacco Growers Cooperative Ass'n,* 151 N. E. 471, 476, 114 Ohio 361..... 46

PAGE

Loan Association v. *Topeka,* 20 Wallace, 655..... 215, 216
Looney v. *Crane Co.,* 245 U.S. 178, 188..... 197
Lowell v. *Boston,* 111 Mass. 454..... 217, 218

Macallen v. *Mass.,* 279 U.S. 620, 629..... 51, 185
Martin v. *Hunter's Lessee,* 1 Wheat. 304, 351-352..... 132
Massachusetts v. *Mellon,* 262 U.S. 447..... 134, 223-225
McCray v. *United States,* 195 U.S. 27..... 170, 193
M'Culloch v. *Maryland,* 4 Wheaton, 317, 423.... 50, 205, 206
Metcalf and Eddy v. *Mitchell,* 269 U.S. 514, 523..... 48, 49
Minnesota v. *Barber,* 136 U.S. 33..... 201
Myers v. *United States,* 272 U.S. 52, 171..... 134

New State Ice Co. v. *Liebmann,* 285 U.S. 262, 311..... 63
Nebbia v. *New York,* 291 U.S. 502, 524..... 59, 78
Nigro v. *United States,* 276 U.S 332..... 167
Norton v. *Shelby County,* 118 U.S. 425, 442..... 30

Oliver Iron Co. v. *Lord,* 262 U.S. 172..... 66
Osborn v. *Bank,* 9 Wheaton, 738..... 205, 206

Parkersburg v. *Brown,* 106 U.S. 487..... 216
Pollock v. *Farmer's Loan & Trust Co.,* 157 U.S. 429, 563, 564, 587, 588..... 51, 114

Railroad Retirement Board v. *Alton R. Co.,* 55 Sup. Ct. Rep. 758..... 39, 220, 221

Schechter v. *United States,* 55 Sup. Ct. Rep. 837..... 6, 27, 39, 66, 171
Smith v. *Kansas City Title Co.,* 255 U.S. 180..... 206
South Carolina v. *United States,* 199 U.S. 437, 461..... 209
Standard Oil Co. v. *United States,* 221 U.S. 1, 54, 58.... 44

Terral v. *Burke Construction Co.,* 257 U.S. 529..... 198
Texas v. *White,* 7 Wall. 700, 725..... 59
The Collector v. *Day,* 11 Wall. 113, 124, 125..... 60, 199
Twining v. *New Jersey,* 211 U.S. 78, 92..... 60

Union Pacific R. R. Co. v. *Public Service Com.,* 248 U.S. 67..... 178
United States v. *Cruikshank,* 92 U.S. 542, 549..... 58, 78
United States v. *Doremus,* 249 U S. 86..... 170
United States v. *Realty Co.,* 163 U.S. 427..... 73, 134, 214-215
United States v. *Sprague,* 282 U.S. 716, 733..... 57

PAGE

Veazie Bank v. *Fenno,* 8 Wall. 533, 541 52
Voight v. *Wright,* 141 U.S. 62 201
Ware v. *Hylton,* 3 Dallas, 199, 225 98
Wheeler v. *Smith,* 1849, 9 Howard, 55, 78 99
Willcuts v. *Bunn,* 282 U.S. 216, 225 49
Worcester v. *State of Georgia,* 6 Peters, 515, 570 194
Wyoming v. *Colorado,* 286 U.S. 494, 502 37

STATUTES.

I. Federal.

The Agricultural Adjustment Act, 48 Stat. 32, approved May 12, 1933, §§ 2, 6, 8, 8(2), 9(a), 10(c), 10(d), 11, 12 (amended by Sec. 35, Acts No. 320, 74th Congress, August 24, 1935 ..... 2, 4, 6, 17, 19, 21, 30, 31

Articles of Confederation
Article I 98
Article II 101
Article III 98, 100
Article VIII 100, 101, 109
Article IX 99

Bankhead Cotton Control Act, 48 Stat. 598, approved April 21, 1934 ..... 35, 36

Constitution of the United States
Article I, Sec. 8 ..... 9, 86, 91-92
Article IV, Sec. 3 135
Article VI 111

Kerr Tobacco Control Act, 48 Stat. 1275, approved June 28, 1934 ..... 35, 36

1 Stat. 423, Whiskey Rebellion Sufferers Relief Act... 142
2 Stat. 173, 175, Roads in Ohio 148
2 Stat. 661, Cumberland Road 148
2 Stat. 730, Venezuela Earthquake sufferers 145, 148
3 Stat. 206, Cumberland Road 148
3 Stat. 211, Sufferers in Missouri Territory 145
4 Stat. 128, Cumberland Road 148
4 Stat. 228, Cumberland Road 148
6 Stat. 49, 6 Stat. 53 } Fire sufferers and bonds for duties 145
12 Stat. 503, Bill to establish Agricultural Colleges 159

II. State.

PAGE

Alabama
Constitution, Sec. 103 (Code of Alabama of 1923, Vol. I, Pages 300, 301) 42
Laws (Code of 1923, Ch. 211, Sec. 5212) 42

Arizona
Constitution of 1910, Art. XIV, Sec. 15 42

Arkansas
Statutes, Ch. 124, Sec. 7368 42

Connecticut
Laws (General Statutes of 1930, Sec. 6352) 43

Idaho
Constitution, Art. XI, Sec. 18 43
Laws (Code 17-4013) 43

Iowa
Laws (Ch. 434 of Code of 1931, Sec. 9906) 43

Louisiana
Constitution, Art. XIX, Sec. 14 43
Laws (Code, Sec. 4924) 43

Maine
Revised Statutes of 1930, Ch. 138, Sec. 31 43

Michigan
Compiled Laws, 1929, Sec. 16647, Ch. 278, Act 255 of 1899 43

Minnesota
Constitution, Art. IV, Sec. 35 43

New Mexico
Laws, (Ch. 35, Art. XXIX) 44

North Dakota
Constitution, Art. VII, Sec. 146 44

Miscellaneous.

Adams, James Truslow, *America's Tragedy*, page 20 ... 55n.

Agricultural Adjustment, Report of the Administration of the Agricultural Adjustment Act, May, 1933 to February, 1934, pages 1, 3, 4, 5, 6, 7, 9, 10, 23, 27, 28, 29, 38, 39, 40, 43n, 69, 271, 278, 331, 332 ..... 5, 19, 20, 21, 22, 23, 24, 25, 26, 32, 33-35, 39, 222n.

Annals of Congress

First Congress PAGE

Vol. I, Madison *re* Tenth Amendment, page 441.... 57

Vol. II, Smith of South Carolina and Sherman oppose Glass Manufactory Loan, page 1630... 118, 119

Sherman opposed Glass Manufactory Loan, page 1631 119

Madison on Bank Bill, pages 1896-1897..... 124

Duty laid on salt, page 2129..... 140

Drawback of salt duty, page 2131..... 140

Second Congress

Gerry said no bounty intended in Codfisheries Bill, page 376..... 140

Williamson on Codfisheries Bill, pages 378-379, 380, 381 ..... 89-91, 141

Madison on Codfisheries Bill, pages 386-389..... 101-102, 124, 140, 151n.

"Allowance" substituted for "bounty" in Codfisheries Bill, page 401..... 140

Third Congress

Madison on San Domingo Refugees, pages 370-371..124,141

Fourth Congress, second session

Washington's Speech to Congress, pages 1594, 1595, 1698-1702 ..... 143, 144

House voted against establishing National University, page 1704 144

Sufferers from Savannah Fire, page 1712..... 144

Clairborne, Nicholas, Relief denied sufferers of Savannah Fire, pages 1720-1727..... 144

Fifth Congress

Vol. II, Gallatin re punctuation of taxing clause, page 1976. ..... 112n.

Fourteenth Congress, second session, Debates on Internal Improvements, pages 1061-1062..... 150n, 151, 152

Fifteenth Congress, first session, Vol. I,

Barbour proposes constitutional amendment, pages 21, 22. ..... 150n.

Report of Committee on Roads and Canals, page 458 152

Debates on Roads and Canals, pages 1114-1250..... 151, 153, 154, 155

BEARD, CHARLES A., *Economic Origins of Jeffersonian Democracy,* pages 34-73..... 139n.

PAGE

BRYAN, WILLIAM JENNINGS, *Central Law Journal, 1908,* page 273; *Quoted in Thompson, Federal Centralization,* page 364 ..... 63, 64

CHANNING, EDWARD, *History of the United States (Letter, Trist to Van Buren),* page 162 .....127n., 128

Congressional Debates, Vol. III,

Burgess on Alexandria Sufferers, page 752 147

Stevenson on Venezuela Act, pages 757-758 146

Rives on general welfare clause, page 768 147

Cotton Regulations, Series 1, Supplement 1, approved September 18, 1933 32

Series 2 31

Cotton Textile Industry, 74th Congress, first session, Document #126—Report by President to Congress August 21, 1935, page 61 ..... 211, 212

COX, A. B., *The Cotton Situation Approaches a Crisis...* 29n.

DEPARTMENT OF AGRICULTURE, *Economic bases for the Agricultural Adjustment Act, 1933,* page 6 22

Economics of the Recovery Program, pages 24, 157 ..... 28n.

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Charles C. Pickney, page 83 ..... 87, 88

Madison, Letter to Stevenson, pages 483, 492 ..... 112, 129

FEDERAL TRADE COMMISSION, *The Textile Report,* part II, page 18 ..... 5n.

Federalist—Ford's Edition

HAMILTON, Vol. XV 97

HAMILTON, Vol. XVI 94

HAMILTON, Vol. XVII 94

HAMILTON, Vol. XXI 97

HAMILTON, Vol. XXII 97

HAMILTON, Vol. XXIII 97

HAMILTON, Vol. XXXI 95, 121

HAMILTON, Vol. XXXIII 92

HAMILTON, Vol. XXXIV 94

MADISON, Vol. XLI 95, 96

FORD, PAUL LEICESTER, *Pamphlets on the Constitution,* page 71 107

Government's Brief, pages 138, 142, 143, 150; Appendix, pages 34, 35 ..... 14, 103, 121, 125

PAGE

HAMILTON, ALEXANDER, *Report on Manufactures,* Hamilton's *Works, Lodge Edition,* Vol. III, page 372...164, 165

JACKSON, ANDREW, on Madison's Veto, *Elliot's Debates,* 2nd Ed., Vol. IV, pp. 526-7..... 150n.

JEFFERSON'S *Works,* Vol. IV, Washington Ed., pages 457, 524, 525. ..... 129, 166

MCMASTER, JOHN BACH & STONE, FREDERICK D., EDITORS, *Pennsylvania and the Federal Constitution,* page 595 119-120

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Letter to Pendleton, January 12, 1792, Vol. I, pages 546, 547 .....124, 128

Letter to Washington, April 16, 1787, Vol. I, page 287 123

Letter of Madison to Henry St. George Tucker, Vol. III, page 54..... 125, 150n.

Letter to Monroe, Dec. 27, 1817, Vol. III, page 56 125-126, 150n., 151

Letter to Stevenson, Vol. IV, page 121..... 126, 151n.

Letter to Van Buren, Vol. IV, page 88..... 151n.

MADISON, JAMES, *Debates in Federal Convention of 1787,* Hunt & Scott Edition, page 75

Hamilton's proposal as to powers of Congress, pages 118-119. 104-105

Report of Draft of Constitution by Committee of Detail, page 337. 105

Taxing Clause in the above draft, page 340..... 105

Sherman's motion to amend taxing clause, page 111... 116

Debates on entrusting the Senate with power of originating money bills, pages 388, 395..... 114

Carroll, on taxing clause, page 410..... 105

Gerry, Rutledge, Sherman & King, page 421..... 107, 108

Committee appointed to consider the assumption of state debts, pages 422, 423..... 108

Debate on Militia, pages 425, 452, 453..... 114

Livingston for Committee of Eleven proposed a clause, page 436. 108

Debates on right to tax exports, Butler, page 439.... 114, 115
Gerry, page 440..... 115

Debates on prohibition of the slave trade, page 442.... 114

Report of Committee of Detail on taxing clause, page 448 110

PAGE

Consideration of Report postponed, page 450..... 110
Ellsworth, Randolph, Madison, Gerry, Gouverneur Morris, discussed the Report of Committee of Eleven 109-110
Butler on domestic debts, pages 457, 460..... 110, 111
Col. Mason, pages 410, 485..... 55, 105-106, 111
Randolph suggested a new clause and passed, pages 466, 467..... 111
Debates on Slave Trade and Navigation Act, page 483.. 114
Pinckney & Butler on different interests of East and South, pages 483, 484, 485..... 114
Report of Committee of Detail Referred to Committee on Unfinished Portions, page 502..... 112
General Welfare Clause Agreed To by Convention, page 507..... 112
"Legislature" Changed to "Congress", page 548.... 112n.
Sherman on payment of debts, page 553..... 111
Uniformity Clause added, page 563..... 112n.
Hamilton, page 581..... 127
Question of punctuation after *excises,* page 630..... 112n.

MADISON, JAMES, *Report on Virginia resolutions, Elliot's Debates, Second Edition,* Vol. IV, pages 528, 550, 551-553 .....117, 125, 145

MORISON, SAMUEL ELIOT, *History of the United States,* 1783-1917, pages 38-39. ..... 55n.

North Carolina State Records, Vol. XX, pages 777-779... 88

NOURSE, EDWIN GRISWOLD, *Legal Status of Agricultural Cooperation.* 46

RICHARDSON, J. D., *Messages and Papers of the Presidents*

Vol. I:

Jefferson, Annual Message, 1806, pages 409-410..... 149
Madison, Annual Message, 1815, and Veto Message, 1817, pages 567-568, 584-585..... 149

Vol. II:

Monroe, Message to Congress, 1817, pages 11, 18..... 150
Monroe's *View on Internal Improvements,* pages 142, 144, 148, 167..... 58, 156, 164
Jackson's Views, pages 484-485..... 156

Vol. IV:

Polk's Veto Message, pages 610, 618, 620..... 156, 157

Vol. V: PAGE

Pierce's Veto Message, pages 247, 250-252..... 157

Buchanan's Veto Message, pages 599-601..... 157

ROBERTSON, D. H., *Money,* page 26, 27..... 28n.

SANDBURG, CARL, *Abraham Lincoln's, The Prairie Years,* page 489..... 133

SPARKS, JARED, *Life of Gouv. Morris,* Vol. III, pages 260-265 127

STORY, JOSEPH, *Commentaries on the Constitution, Fifth Edition,* Vol. I, pages 173, 218, 663, 672-673, 717-727, 728 ..... 72, 75-76, 130, 163, 166, 172

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In The

Supreme Court of the United States

October Term, 1935

No. 401.

UNITED STATES OF AMERICA
Petitioner,

v.

WILLIAM M. BUTLER et al.,
Receivers of Hoosac Mills
Corporation,
Respondents.

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned respectfully petitions this Honorable Court for leave to file this brief as *amicus curiae* in the above entitled suit.

Your petitioner asks to file said brief on behalf of the National Association of Cotton Manufacturers, an association composed of a majority of the cotton mills located in the north and east sections of the United States, comprising some of the largest mills in the country.

The members of this Association process cotton in conducting their business, and against practically all of them the United States has asserted the right to collect

processing taxes under the provisions of the Agricultural Adjustment Act. They are, therefore, vitally interested in a decision of the Constitutional questions presented in the above-entitled suit.

The Solicitor General of the United States and counsel for the Respondents have assented to the filing of this brief and their written assents are filed herewith.

Malcolm Donald

MALCOLM DONALD

On Behalf of
National Association of Cotton Manufacturers.

Boston, Massachusetts,
November 30, 1935.

No. 401.

In the Supreme Court of the United States

OCTOBER TERM, 1935.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL.,
RECEIVERS OF HOOSAC MILLS CORPORATION.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FILED BY MALCOLM DONALD AS AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF COTTON MANUFACTURERS

This brief is filed by Malcolm Donald as Amicus Curiae on behalf of The National Association of Cotton Manufacturers, an association composed of a majority of the cotton mills located in the north and east sections of the United States.

I.

PRELIMINARY MATTERS.

A. BRIEF STATEMENT OF THE CASE.

This case arose in connection with the receivership proceedings of Hoosac Mills Corporation. The United States filed in said proceedings a claim for certain processing and floor stock taxes, totaling $81,694.28, levied under the Agricultural Adjustment Act for cotton processed in the period, August 1, 1933 to October 7, 1933.

The receivers reported that the claims for these taxes should be disallowed. The District Court for the District of Massachusetts held the taxes valid. On appeal, the Circuit Court of Appeals for the First Circuit reversed the District Court on the grounds that the Act unlawfully delegated legislative power to the Secretary of Agriculture and because the legislation invaded the rights of the states.

B. ISSUES DISCUSSED IN THIS BRIEF.

The issues discussed in this brief are as follows:

First: Can Congress, by reason of its right to levy taxes to provide for the "general welfare of the United States" impose taxes to be paid to cotton growers who conform to its plan to restrict the production of cotton, and by this means regulate the production of cotton?

Second: Can Congress so regulate the production of cotton in order to carry out its fiscal policies?

Third: Do taxes so imposed on cotton manufacturers, to be paid cotton growers who reduce their production for the purpose of enabling cotton growers to obtain higher prices for their product, and thereby, and by reason of the payments so made them, receive a fair share

of the national income, violate the due process of law clause of the Fifth Amendment?

C. IMPORTANCE OF THE QUESTIONS.

It is hardly necessary to point out the importance of these questions.

1. As respects the cotton textile industry of the country the case involves the question of whether the United States can lawfully impose an excise tax upon cotton mills for the purpose of making payments to cotton growers, for the express purpose of inducing cotton growers to reduce the amount of cotton grown in order to increase the price of this raw material which the mills must purchase.*

2. The case involves another question of still more far reaching importance. If this legislation is held constitutional, the United States by offering benefits to those who accede to its plans can accomplish the control over the internal affairs of the states which was denied it in

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*NOTE. The cotton textile industry must pay taxes amounting to approximately $116,000,000 annually (Agricultural Adjustment Report, 1933-1934, p. 29) for the purpose of taking out of production a substantial percentage of the cotton acreage of the country and for the express purpose of increasing the price of cotton—the principal raw material used by the mills—approximately an equal amount. As the total value of the goods produced in 1933 by the cotton textile industry was $861,170,352, the processing taxes alone amount to 13.4% of that value. The price of cotton has risen from 6 cents to 12 cents since the legislation was enacted. (See U. S. Census Report, 1933: Census for Manufacturers, Cotton Goods.) If the portion of this increased cost resulting from the reduction program of cotton used by the mills be estimated at the rate of 3 cents per pound on the amount of cotton estimated by the Secretary of Agriculture to be used by the mills—5,523,809 bales—there is an added cost of $82,857,000 annually imposed on the mills or 9.5% of the value of goods produced in 1933, making a total added cost of approximately 23%.

The processing taxes paid by 206 companies spinning and weaving cotton in the period January 1 to June 30, 1934 were 40% of the wages paid in that period (Federal Trade Commission, The Textile Report, Part II, p. 18).

Schechter v. *United States* (55 Sup. Ct. Rep. 837) and in the long line of cases, the principal of which was reaffirmed in the *Schechter* case. If the United States has power so to control the internal affairs of the states this will destroy the "authority of the States over matters purely local" which is "essential to the preservation of our institutions" (*Hammer* v. *Dagenhart,* 247 U. S. 251, 275).

D. SUMMARY OF OUR ARGUMENT.

Our contentions are, briefly, as follows:

THE PROCESSING TAXES ARE AN INTEGRAL PART OF THE SCHEME TO RESTRICT PRODUCTION.

1. The Agricultural Adjustment Act provides that the Secretary of Agriculture may make benefit payments to farmers producing basic commodities who agree to restrict their production of such commodities. The processing tax on each commodity goes into effect only when the Secretary of Agriculture determines to make benefit payments in respect to such commodity. It terminates when such benefit payments cease. The scheme to restrict production is not authorized in order to levy taxes; the taxes are levied in order to provide the essential means of carrying out the scheme. They are an integral part of the scheme, and clearly would not have been authorized if the scheme had not been authorized. If the scheme is unlawful, the taxes are necessarily unlawful, being levied for the sole purpose of carrying out the unlawful scheme. As a matter of fact, if the Secretary of Agriculture cannot lawfully determine to put the scheme into effect, then by the very terms of the Act itself, no tax can be imposed.

THE SCHEME CONSTITUTES A GIGANTIC COMBINATION IN RESTRAINT OF PRODUCTION.

2. The scheme constitutes a gigantic combination to limit the production of agricultural products in order to increase prices of such products. Its object is to give to farmers a fair share of the national income by taxing processors in order to make payments to such farmers as agree to reduce their production. By reducing production, it is planned that higher prices will be obtained by farmers for the reduced amount of products, and such higher prices, plus the benefit payments, will give farmers a fair share of the national income, which the Act determines is the proportionate share they received in 1909 to 1914.

In carrying out the plan with respect to cotton, the Secretary of Agriculture, immediately upon the passage of the Act, entered into contracts with over 1,000,000 cotton growers under the terms of which 10,000,000 acres of growing cotton were ploughed up during the season of 1933 out of a total acreage of approximately 40,929,000, and the production of cotton was reduced by 4,400,000 bales, or approximately 80% of the amount annually consumed in the United States, and in 1934 15,000,000 acres were taken out of cultivation. The annual cotton taxes levied for the purpose of making these payments and paying the expenses in connection therewith are approximately $116,000,000 annually.

IF THIS LEGISLATION IS LAWFUL, THE UNITED STATES HAS ALMOST UNLIMITED POWER OVER PRODUCTION IN THE STATES.

3. It is clear that if the United States has the power to pay such benefits to those who consent to carry out such a scheme, it follows that Congress has power to carry into effect in the States any policy which it pleases in respect to agriculture, manufacturing, mining, labor relations, or

otherwise. There are few, if any, things it can not accomplish if sufficient inducement is offered.

The power to tax is the power to destroy. A power, backed by the taxing authority of the United States, to confer benefits on those who conform to its wishes and to withhold benefits from others is a power to coerce or destroy those who do not conform.

FUNDAMENTAL PRINCIPLE THAT POWER GRANTED UNITED STATES SHOULD NOT BE SO CONSTRUED AS TO NULLIFY POWERS CLEARLY RESERVED TO THE STATES.

4. The United States can exercise only the powers granted by the Constitution. All powers not so granted are reserved to the States or people, which reservation of rights is expressly affirmed and emphasized by the Tenth Amendment. The Constitution provides for a system of dual sovereignty. Each citizen is a citizen of the United States, owing it allegiance in respect to matters which the United States is entitled to control, and a citizen of his State, owing it allegiance in respect to matters which such State is entitled to control.

It is a basic principle of the Constitution that the United States shall be protected in the exercise of its granted powers and the States equally protected in the exercise of the powers confided and reserved to them, and that the rights of neither shall be impaired. Any action by either which impairs or destroys the rights of the other is repugnant to the Constitution and unlawful. If an apparent conflict arises between the powers granted the United States and the powers reserved to the States, it has been held that neither should be so interpreted or enforced as to "nullify or substantially impair the other".

CONTROL OF AGRICULTURE IS RESERVED TO THE STATES.

5. The control of agriculture is admittedly reserved to the States. The States have the right and duty to control it in so far as it can constitutionally be controlled.

The States have exercised their right of control. The Constitutions, laws or public policy of all the states forbid such a combination as the present to restrict agriculture in order to enhance prices.

CONTENTIONS OF THE GOVERNMENT.

6. The United States claims the right to enact the present scheme of regulation on the following grounds:

A. It contends that though Congress has no right to control or legislate with respect to agriculture, it has the right under Article I, Section 8, of the Constitution, "to levy . . . taxes . . . to . . . provide for the general welfare of the United States", and that this so-called "welfare clause" gives it the right to levy taxes and appropriate the proceeds not only for matters in respect to which it can legislate, but in respect to all matters which it determines are for the general welfare of the United States. It contends that it can exercise this power of appropriation to pay money to those who conform to its wishes, and thus regulate agriculture not by direct legislation, but by granting or refusing benefits, and in this manner can lawfully put into effect the present plan, the direct purpose of which is to limit the production of agricultural products within the States and under which practically all the farmers of the country growing basic commodities have entered into a combination drastically to limit their production.

B. The Government further contends that the banks organized by it have the right to loan money on mortgages to the farmers; that these banks hold some 18% of all farm mortgages; that the Government, having created these banks, may preserve them, and in order that they may be able to collect on their mortgages, the United States may regulate not only the particular mortgages

which they hold or the business of these particular mortgagors, but the entire agricultural industry.

OUR CONTENTIONS.

7. We contend:—

A. That the Madisonian interpretation of the welfare clause is the proper interpretation, viz.: that by the "general welfare of the United States" is meant those matters in respect to which the United States is authorized to act and with which it is concerned, and that under this interpretation, since the United States is not authorized to legislate or deal with agriculture, it is not within the "general welfare of the United States" and Congress, therefore, cannot levy taxes for the purpose of any such plan as the present concerned with agriculture.

B. That if the broader Hamiltonian interpretation of the welfare clause is adopted, and Congress can levy taxes to carry out its granted powers and also appropriate tax money for other purposes in respect to which it cannot legislate or which it can not regulate, nevertheless, Congress can not use this mere right to appropriate, as in the present case, to bring about the regulation of agriculture which, by the express terms of the Constitution, it is forbidden to regulate.

C. That the right of Congress to authorize the creation of banks which can make agricultural loans, and loans to industry, does not empower it to regulate all agriculture or all industry.

D. That the taxes imposed on cotton manufacturers to be paid to cotton growers not to induce them to perform a service to the public, but for their own benefit, violate the due process of law provision of the Fifth Amendment.

MADISONIAN INTERPRETATION OF THE WELFARE CLAUSE IS CORRECT.

8. We submit that the Madisonian interpretation of the welfare clause which permits Congress to tax only for the purpose of carrying out its granted powers is correct.

If we look only at the Constitution, this is the fair meaning of the words themselves. The United States was organized, as the Preamble of the Constitution provides, among other things, "to promote the general welfare." It must be presumed that all powers were granted the United States which it was deemed necessary it should exercise in order to provide for the national general welfare which it was the purpose of the Constitution to promote. The responsibility for the general welfare in relation to other matters was confided to the States. The United States is concerned with the general welfare relating to matters confided to it; the States are concerned with the general welfare in respect to matters for which they are responsible and for which they have a duty to provide. The right to tax would naturally be given to the United States to enable it to carry out matters for which it was responsible. It would be unnatural to give it power to tax for the purpose of applying the proceeds to matters in respect to which the States have the right and duty to provide and for which they have power to tax. The United States has power to tax to pay the debts of the United States, to provide for the common defense of the United States, and the general welfare of the United States. This general welfare is clearly the general welfare in respect to matters for which it is responsible and not the general welfare for which the States are responsible.

This view is confirmed by extemporaneous circumstances. The original taxing provision as adopted by the

Constitutional Convention merely gave power to lay taxes. This would clearly have limited the United States to taxing in order to carry out its powers granted to it. It is clear that the words "to pay the debts and to provide for the common defence and general welfare of the United States" were added solely for the purpose of emphasizing the right of the United States to tax for the purpose of paying the obligations of the United States under the Articles of Confederation, which by the express terms of the Articles of Confederation, included the debts of the States incurred "for the common defence and general welfare." In other words, under the Articles of Confederation the debts incurred by the States for Federal purposes were to be repaid them by the United States. Sherman, who originally suggested these words, and the Committee which adopted and proposed the final wording of the taxing clause, clearly had no idea that they could be construed as giving the vast power now claimed. They were adopted without debate, although the Committee which recommended them and the Convention which adopted them without debate had many members such as Madison, Williamson, and others who strongly opposed the Hamiltonian interpretation and, like Madison, insisted that it had never even been suggested until after the adoption of the Constitution that the phrase could be so construed. The Hamiltonian construction was not suggested in the *Federalist* or by any responsible person in any of the discussions preceding the adoption of the Constitution. It was not thought of until advanced by Hamilton, as Secretary of the Treasury, for the purpose of giving the United States greater power in conformity with Hamilton's views of what the Constitution should have provided and not in accordance with what it did provide.

Contrary to the often expressed opinion, Hamilton's view was bitterly opposed in the early Congresses, and there is not a clear-cut instance of its acceptance in legislation until after the Civil War, and it is only comparatively recently that it has been acted upon except in sporadic instances.

HAMILTONIAN INTERPRETATION OF WELFARE CLAUSE.

9. If the Hamiltonian interpretation is adopted, it does not authorize the present legislation.

Hamilton admitted that the right to appropriate for objects other than the powers granted the United States does not give Congress the power to control or legislate with respect to such objects. Otherwise, the United States would have unlimited powers, since all that would be necessary to enable it to control a subject matter would be to appropriate money towards it and then legislate in respect to such subject matter and thus control it.

It is clear, then, that if the Hamiltonian interpretation is accepted and the United States has the right to appropriate for objects beyond its granted powers, the United States is not authorized to control such objects. The government's sole right under this doctrine is to apply money to agriculture—not to control it.

Under the Hamiltonian doctrine, the United States remains a government of strictly limited powers. It admittedly has no power to regulate agriculture; the power to regulate agriculture is admittedly reserved to the States by the Tenth Amendment.

The right to tax under the Hamiltonian interpretation restricts the purposes for which the tax may be levied; it must be levied to pay the debts of the United States, to provide for the common defense of the United States, or to provide for the general welfare of the United States.

The Government admits that the right to tax and appropriate the proceeds for the general welfare has limitations. Thus, it admits that the tax can only be levied for purposes which are general, as distinct from local, national, as distinct from State. (Brief, p. 138.) We submit that this right is necessarily subject to a further limitation. The right to appropriate can not be exercised for unlawful purposes, including purposes repugnant to the express terms of the Constitution itself.

The Constitution provides that the States shall have the exclusive right to regulate agriculture. Taxes levied by Congress for the express purpose of being appropriated in such manner that they necessarily regulate agriculture on a vast scale and for the express purpose of so regulating it, are levied and appropriated for the express purpose of accomplishing an object wholly repugnant to and forbidden by the Constitution.

The mere right to appropriate or apply money to a purpose can not be so construed or exercised as to permit Congress to exert a regulation over local affairs which the Constitution expressly denies Congress the right to regulate. Otherwise, we reach the absurd result that the express intent of the Constitution to confide the regulation of agriculture and other local matters to the States can be nullified by the simple expedient of appropriating money for such matters on conditions which bring about the regulation which the Constitution forbade Congress to impose. There are few schemes of regulation of local matters which Congress could not effect by laying down a scheme and paying benefits to those who conform.

If this principle is established, then, for practical purposes, the principle that the United States is a government of enumerated powers only, the regulation of other matters being left to the States, can be completely nullified. The right to appropriate money would, for prac-

tical purposes, be given the same effect as though the right were expressly granted to the United States to control to such extent as from time to time it saw fit, all local matters. The Constitution would be construed as giving the United States power to completely defeat its express purposes and intent.

We submit that the right to tax and appropriate the proceeds for the general welfare of the United States can be given no such interpretation. Legislation directly intended and having the direct result of regulating agriculture or other local matters violates the purpose, intent, and express provisions of the Constitution, and is unconstitutional and, therefore, unlawful. A tax levied in order to appropriate the proceeds for the purpose of defeating the intent and express provisions of the Constitution can not be deemed for the "general welfare of the United States."

The United States contends that the combination authorized in the present case between the Secretary of Agriculture and the farmers to limit production is voluntary, and therefore lawful. A combination or conspiracy to restrain trade or limit production is not made lawful because voluntarily entered into by the individuals who are parties to it. Practically every combination to restrain trade or limit production is voluntary on the part of the members, but it is well recognized that this constitutes no defense. An unlawful regulation either of interstate commerce or intrastate commerce or production can not be converted into a lawful combination because the members of the combination act voluntarily.

Furthermore, the combination in the present case is not voluntary. The benefits are devised to make it necessary on the part of the farmers to join, as a practical matter. As this court has held, action so induced is induced by coercion.

The principle that a sovereignty can not induce action which is beyond its jurisdiction to control by granting a benefit to those who conform and denying it to those who refuse to conform has been recognized in a large number of cases in this court, such as the Child Labor cases, *Hill* v. *Wallace,* and numerous cases holding unlawful a grant by a State of a permit to do business to a foreign corporation which conforms to the wishes of the State in respect to a matter beyond its jurisdiction, and the refusal of such permit when the foreign corporation declines to conform. The principle of these cases is clearly applicable in the present case.

The right to appropriate, which admittedly gives no right to control, can not be used for the direct purpose of thus controlling matters beyond the jurisdiction of the States. If so, the basic principle of the Constitution—the division of authority between the United States and the States—will be destroyed.

THIS LEGISLATION IS NOT JUSTIFIED AS A MEANS OF CARRYING OUT THE FISCAL POLICIES OF THE UNITED STATES.

10. The contention that the United States can directly regulate agriculture, in order to enable the Federal Land Banks, Joint Stock Land Banks, and other similar agencies of the United States, to collect the farm mortgages which they hold, requires little discussion.

If this contention is correct, it means that the United States, in order to enable the national banks to collect on their loans, which have been made to practically every industry in the country, can regulate all industry and thus destroy the entire basis on which the Constitution is founded.

THE PROCESSING TAXES VIOLATE DUE PROCESS OF LAW.

11. The taxes in the present case also violate the due process clause of the Fifth Amendment.

They are levied on cotton manufacturers and the proceeds paid to farmers who reduce their production of cotton. The purpose is to enable cotton growers to receive higher prices for the cotton they do produce, and thus, by reason of these higher prices received for their products and the receipt of the benefit payments, to obtain a fair share of the national income.

It is to be noted that the Act does not provide for taxing the income of cotton manufacturers and distributing it to farmers to enable the farmers to increase their incomes, and thus to equalize incomes. Cotton manufacturers must pay the tax, whether or not they make a profit or a loss. As a matter of fact, a large portion of the cotton textile manufacturers have not had any income but have suffered only losses since the Agricultural Adjustment Act was enacted.

Payments are not made to farmers because of their poverty. The richest man in the country, if a cotton grower, is urged and has the right to receive the benefit.

The important fact to bear in mind, however, is that these benefits are not paid to cotton growers to induce them to render a service to the public. On the contrary, they are required by the plan to reduce their crops, thereby necessarily discharging farm laborers and furnishing less cotton to the public at higher prices.

The only contention made by the Government that the public receives a benefit is the contention that the cotton growers, by reason of these benefit payments and increased prices, will have more money to buy manufactured goods and thus will indirectly benefit manufacturers and their employees. It is somewhat difficult to see why, if this money were not taken from the cotton manufac-

turers, they and their stockholders (in the case of a corporation) would not equally be in a position to spend more money and thus equally benefit manufacturers and their employees.

Disregarding this, however, the contention of the Government merely means that if money is taken from one class and given to another class, this other class will probably spend it. This is simply and solely a redistribution of wealth by government decree. It is clearly arbitrary and capricious and violates the due process of law provision of the Fifth Amendment.

II.

ANALYSIS OF THE AGRICULTURAL ADJUSTMENT ACT.

A. PROVISIONS OF THE ACT.

The provisions of the Agricultural Adjustment Act which are pertinent to this discussion may be briefly summarized as follows:

The Act contains a preamble entitled "Declaration of Emergency" setting forth that the disparity between prices of agricultural commodities and other commodities has broken down the orderly exchange of commodities and seriously impaired the agricultural assets supporting the national credit structure, and it is declared that these conditions have affected transactions in agricultural commodities with a national public interest and have obstructed the normal currents of commerce in such commodities.

The Act authorizes the Secretary of Agriculture to provide for reduction in acreage and production for market of any basic agricultural commodity, "through agreements with producers or other voluntary methods," and to provide "for rental or benefit payments in connection" therewith. (Sec. 8 (2).) Basic commodities are defined in Section 11 to include cotton, wheat, rye, flax, barley, field corn, grain, grain sorghums, hogs, cattle, rice, tobacco, sugar beets and sugar cane, peanuts, and milk and its products, and potatoes. A few of these commodities have been added by amendments since the passage of the original Act. Upon the determination and proclamation of the Secretary of Agriculture that rental or benefit payments are to be made with respect to any basic commodity, a processing tax is to go into effect at the beginning of the next marketing year on the domestic

processing of such commodity. (Sec. 9 (a).) The rate of the tax is to be determined by the Secretary so as to make it equivalent to the decline in purchasing power of the basic commodity from the base period, which in the case of cotton is defined as the period, August 1909 to July 1914. (Sec. 2.) Provision is made for adjustments by the Secretary of the rate under certain circumstances.

The processing tax in respect to any commodity is to terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity.

Section 12 appropriates the proceeds of the processing taxes to the payment of rentals and benefits.

The Secretary of Agriculture is also authorized to give producers of cotton, options to purchase cotton owned by the United States to an amount not in excess of the reduction in the production of cotton which may be made by such producer below the amount produced by him in the preceding year, but in all cases where such options are given the producer must agree in writing to reduce the amount of cotton produced by him in 1933 below his production for the previous year by not less than 30 per cent, and without any increase in commercial fertilization per acre; and he must further agree not to use the land taken out of cotton production for the production for sale of any other nationally produced agricultural commodity. (Sec. 6.)

The Secretary of Agriculture is authorized with the approval of the President, to make such regulations with the force of law as may be necessary to carry out the powers vested in him. (Sec. 10 (c) (d).)

The powers given the Secretary of Agriculture to make agreements for the reduction of crops and to make such

rental and benefit payments on account thereof are given him for the purpose of enabling him "to effectuate the declared policy" of the Act (Sec. 8), which declared policy is set forth in Section 2.

The declared policy is to re-establish prices to farmers which will give agricultural commodities a purchasing power with respect to articles farmers buy, equivalent to the purchasing power of such agricultural commodities in the period August 1909 to July 1914, except in the case of tobacco for which the period is August 1919 to July 1929.

The Act has been amended by Section 35 of the Public Acts No. 320, 74th Congress, affirmed August 24, 1935, but these amendments enacted after the imposition of the taxes involved in this case are not pertinent to the discussion contained in this brief.

B. PURPOSES OF THE ACT.

DIRECT PURPOSE.

The direct and immediate purpose of the Act is to reduce production of agricultural commodities in order to raise the prices received by farmers for these commodities. This is to be accomplished by levying a tax on domestic processors of these commodities to be paid to farmers who agree to reduce their crops.

OTHER PURPOSES.

The Act sets forth a declaration of emergency and a declaration of policies which are, at first sight, somewhat confusing. Stripped of verbiage, the Act is based upon the following economic theories and intended to accomplish the following direct as well as ultimate purposes. These theories and purposes are apparent upon a careful reading of the Act, and are set forth in chapter 1 of the "Report of the Administration of the Agricul-

tural Adjustment Act," (hereinafter referred to as "Report") the first subsection of which is entitled, "Why the Act Was Passed". Other facts on which the government rests its economic theories are set forth in a pamphlet entitled, *Economic Bases for the Agricultural Adjustment Act,* published in 1933 by the Department of Agriculture.

For some time prior to 1929, it is contended that farm products could be exchanged for relatively less industrial goods than in the four years preceding the War.

> "Even at the crest of the business cycle in 1929, farm products could be exchanged for only 91 per cent as much of other products, on the average, as they could be exchanged for in the period before the war." (Report p. 1.)

By this it is not meant that in 1929 farmers obtained less in exchanging their products than they did in the pre-war period. The total national income rose greatly and the farmers shared in this increase. The contention merely is that they did not get their fair percentage or proportion of the increase.

> "Between 1921 and 1925 farmers shared in the rise in national income, but that share [of the total] was less than before the war." (*Economic Bases for the Agricultural Adjustment Act,* p. 6.)

When the depression came, this so-called disparity, it is contended, increased. "By February, 1933, the exchange value of farm products for industrial goods had fallen to 50 per cent of the pre-war average." (Report p. 1.)

The reason for this reduction in prices for farm products was the usual one which affects prices; namely, supply and demand. "The immediate cause of this disparity was the pressure of surpluses of farm products

on the markets." (Report p. 1.) ". . . a surplus is a quantity so abundant as to depress prices below a figure which will adequately reward the producer. . . . A surplus always means a surplus at some particular price. At a lower price the surplus is absorbed and so disappears." (Report p. 1.) In other words, supply exceeded demand at the price which the government contends gave an "adequate reward". A consequence of the failure of the farmer to receive an adequate reward was that he had less money to purchase manufactured goods. Thus manufacturers suffered due to lack of purchasing power by the farmers and employees were thrown out of work. (Report p. 3.) It was contended that if the farmers could be given a larger return this would, in the first place, help the farmers and in turn, it would enable them to purchase more manufactured goods and thus help manufacturers and their employees. It would also enable the farmers to pay interest on their mortgages and increase the value of their farm lands and thus help the banks and insurance companies holding mortgages, and, in general, assist in the return to prosperity.

Merely to increase prices to the farmer sufficiently to give him an "adequate return" would result in increased production, increased surpluses and, therefore, would result in an increased burden on the government to maintain prices at a level in excess of prices determined by the normal operation of demand and supply. (Report p. 5.) It was, therefore, deemed necessary not only to provide that the farmer receive an adequate price, but also to cut down production so that the supply would not tend to keep prices at less than an "adequate price"; in other words, to adjust supply and demand on a level which would keep prices at the point desired by the government.

The desired price level was not a fixed price but one which was deemed to give the farmer for the exchange of his products the same relative purchasing power which he had in the pre-war years 1909 to 1914.

> "It is because of the series of maladjustments brought about by the surplus of farm products that the Government has undertaken to control their production, bringing supplies into line with demand at a price which will afford the farmers a return commensurate with their income during the 5 pre-war years. (Report p. 3.)
>
> ". . . The evident purpose of the act is to promote the prosperity of the farmer by returning to him a fair share of the national income and to foster national recovery by making the farmer as good a customer for non agricultural industries and services as he was before the World War." (Report p. 4.)

POWERS GRANTED TO ACCOMPLISH THESE PURPOSES.

The Report refers to the two groups of powers provided for in the Act: "those dealing with production control and those dealing with marketing agreements and licenses". (Report p. 5.)

The first group of powers provides for reducing production and thus supply.

> "Authority granted for this purpose recognizes the existence of overproduction and of a burdensome surplus of many farm products; it recognizes the necessity of reducing this oversupply and refraining from further overproduction that maintains and adds to it if the farmer is to receive his fair share of the national income. . . . It provides a method of giving financial assistance through benefit payments to farmers who, voluntarily and not otherwise, cooperate with the government in making the necessary adjustment." (Report p. 5.)

The other group of powers authorizes the Secretary of Agriculture to control marketing and thus to assist him to restore parity prices and at the same time protect the consumer. (Report p. 6.)

> "The powers conferred by the Agricultural Adjustment Act, then, are directed towards economically balanced production of agricultural commodities on the one hand, looking toward a fairer share of the national income for farmers, and, on the other hand, a system of distributing farm products that will be economically sound." (Report p. 7.)

The processing taxes on any commodity so far as possible "are used for benefit payments to the producers of that particular commodity." (Report p. 10.)

> " . . . the processing tax is the heart of the law. The processing tax is a means of raising revenue for accomplishing one or both of two things intended to help farmers attain parity prices and purchasing power." (Report p. 9.)

These two purposes for which the processing tax are levied are as follows:

First. To bring about a reduction in production.

Voluntary efforts of producers to bring about a reduction of crops inevitably comes to naught by reason of the fact that a minority will not cooperate. (Report p. 9.)

> "It is to keep this noncooperating minority in line, or at least prevent it from doing harm to the majority, that the power of the Government has been marshalled behind the adjustment programs." (Report p. 9.)

Second. The processing taxes constitute a direct payment of so much cash to the farmers thus adding to their income. "The second way in which the processing tax

and benefit plan helps farmers is in making a direct contribution to their income." (Report p. 10.) Thus

"by establishing the parity principle for agriculture, Congress, in the Agricultural Adjustment Act, recognized a fundamental concept of the national recovery program, which is that those large economic groups performing essential functions for society must have a fair share in the national income". (Report p. 10.)

SUMMARY OF PURPOSES.

In other words, this legislation is intended to provide that the farmers shall receive for their products a "fair share of the national income". It authorizes the Secretary of Agriculture to endeavor to accomplish this purpose, first, by a vast combination between himself and the producers of each basic commodity under which the farmers will agree to reduce their production in consideration of the money to be paid them, and those not willing to cooperate will be kept "in line" and made to do so by the inducement or economic necessity of obtaining benefits; and second, by direct payments of cash to the farmers thus increasing their income. The processing tax on each commodity is levied to provide the funds to enable the Secretary to carry out the scheme with respect to that commodity.

The public, it is contended, will be benefited by this increased prosperity and additional purchasing power.

QUESTIONS RAISED.

Two questions are at once raised.

First. Is not the control of agriculture exclusively confined to the States and if so, can Congress constitutionally authorize this plan to control it?

Second. Can Congress levy a tax on processors for the purpose of paying the proceeds to farmers not selected as objects of charity because of poverty, but because it is believed that the transfer of this wealth or purchasing power from the processors to the farmers is required to give them a fair share in the national income and because it is believed that this redistribution of wealth or purchasing power will enhance prosperity or aid in recovery?

The question to be decided in the present case is not whether the plan is economically sound but whether the Constitution confers upon Congress the power to authorize it.*

> "The recuperative efforts of the government must be made in the manner consistent with the authority granted by the Constitution." (*Schechter* v. *United States, supra.*)

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*NOTE. While we do not consider it material there is grave doubt as to the soundness of the economic theory upon which the Agricultural Adjustment Act is based.

1. It is questionable whether the alleged disparity existed. Prices for farm products in the depression undoubtedly fell more than prices for manufactured goods. This was, however, due to larger fixed charges on industry. Manufacturers were for the most part suffering large losses in 1932. Wages were reduced; many employees were out of work or on reduced time. The purchasing power of the manufacturers and their employees was greatly reduced and we doubt if it could be proved that the farmer's purchasing power was reduced in larger proportion. The industrial workers and employers with reduced wages or profits, or none at all, were also buying industrial products at the same prices which farmers paid. The truth is that the national income was reduced by about one-half and the farmer's share was, of course, largely reduced. It would be difficult to prove that the farmer suffered more than other classes.

2. The cost or effort involved in producing farm products has decreased considerably since 1914 due to improvements in farm machinery and methods. If the cost of production of industrial products had remained stable, a bushel of wheat would cost less effort and money to produce and ought to buy less of other products. The question of whether a change in purchasing power of farm products was just, must depend upon relative

decreases in costs or effort required to produce farm products as compared with industrial products.

3. It is impossible to compare the purchasing power or exchange value of agricultural products in 1933 with their purchasing power in the pre-war period. The farmer does not today buy the same products. He now purchases many things not even invented prior to the War, such as radios. Farm machinery, automobiles, and most other products have so changed in character that the combination of articles the farmer may now buy can not be compared with what he bought twenty years ago. Robertson, D. H., *Money*, p. 27) says that the things purchased by the working man change in character so rapidly that "by about 1950, for instance, it may be scarcely more interesting to know the price of the combination of things consumed by the working-class family in 1914 than to know what the price would be in England of the combination of things habitually consumed by Chinamen".

4. There is no particular reason why the years just preceding the War should be taken as a standard of exchange value to which farmers are entitled. The world is not static. "The tendency still persists in economic matters to attribute a peculiar sanctity to the year 1914; all sorts of people who were very discontented at the time tend to look back to it now as having been in some sense the 'normal' or standard year for all time." Robertson, D. H. (*Money*, p. 26.) "Under the changed conditions of technical efficiency in industry and agriculture and with the new standards of personal needs and tastes, the restoration, for example, of the old price relations would require a distribution of the national income absolutely different from what it was twenty-five years ago." (*Economics of the Recovery Program*, p. 157.)

5. The transfer by means of taxation and benefit payments of money purchasing power from processors or the general public to the farmers "does no more than exploit one class at the expense of another, unless it is accomplished by an increase in 'goods', 'purchasing power', or production." (*Economics of the Recovery Program*, p. 24.) In other words, unless the transfer of money from processors to farmers, increases the amount of commodities produced and therefore the national income, it merely benefits one class at the expense of the other. Here we have not an increase but a reduction of production expressly sought. Mere transfer of purchasing power from one class to another can not increase prosperity; the total purchasing power is not thereby increased; nor is it an aid to recovery. The problem of recovery is to increase the production and use of goods by all classes.

When the transfer of property from one class to another is accompanied, as in the present case, by a reduction in production resulting in an enormous decrease in the employment of farm laborers, great losses suffered by ranchmen and dairymen due to the scarcity and high price of cottonseed cake and meal resulting from the reduction in production of 3,500,000 tons of cottonseed (See Article by A. B. Cox referred to below),

and increased prices of agricultural commodities to the public, it may well be doubted if it aids recovery.

6. It is very doubtful if the plan even aids the cotton growers for whose direct benefit it is enacted. There has been a decreased use of cotton in the United States of 329,000 bales in the year 1934-1935 over the previous year, although other businesses have increased production. Cotton production outside the United States for the past year was over 2,500,000 bales larger than for 1932-1933, and over 2,000,000 bales more than the five-year pre-depression average. In other words, foreign production is making up for our restriction, and as over half our cotton must be sold abroad, and it is sold at world prices, we are apparently to lose our market by the amount we reduce production, so that we can not regain it except by drastic reductions in price. By selling more cotton at a lower price, cotton growers would be as well off, and would retain their foreign markets. (See *The Cotton Situation Approaches a Crisis*, A. B. Cox, Director, Bureau of Business Research, University of Texas.)

III.

THIS LEGISLATION AUTHORIZED A DRASTIC REGULATION OF AGRICULTURE.

A. THE ACT AUTHORIZED A GIGANTIC COMBINATION TO RESTRICT PRODUCTION IN ORDER TO ENHANCE PRICES.

The Agricultural Adjustment Act obviously contemplates and authorizes the Secretary of Agriculture to create an immense and far-reaching combination to restrict the production of agricultural products for the purpose of raising prices. No such gigantic scheme has ever been undertaken in this or any other country. If undertaken by individuals, it would, of course, be characterized as an unlawful conspiracy to restrict production and enhance prices. Unless the United States has been empowered by the Constitution to authorize this combination, it must be characterized in the present case in the same manner.

An unconstitutional act is no act at all and gives no authority. "It is, in legal contemplation, as inoperative as though it had never been passed", (*Norton* v. *Shelby County,* 118 U. S. 425, 442).

The Secretary of Agriculture, therefore, when acting under unconstitutional legislation has only such rights as he may exercise in his individual capacity. If the plan carried into effect by him as an individual would be an unlawful conspiracy, it remains an unlawful conspiracy unless he can show the United States was granted by the Constitution power to authorize it.

That the Agricultural Adjustment Act contemplated this vast combination and no minor undertaking which might have no substantial consequences is self-evident from the objectives of the legislation, the purposes of

which were to rid the country of an immense surplus of basic agricultural products and to reduce the supply so that the prices for these basic agricultural products would be increased between fifty and one hundred per cent. These results could not be accomplished except by a far-reaching scheme which was to be adopted and entered into by the Secretary of Agriculture with the large majority of, if not practically all, the farmers growing these basic products. What the Secretary has done under the Act is obviously in accordance with what was contemplated and authorized and what was necessary to carry out the purpose and intent of the Act.

B. THE CARRYING OUT OF THE ACT HAS RESULTED IN A DRASTIC REGULATION OF AGRICULTURE.

(1) EXECUTION OF THE SCHEME OF REGULATION FOR 1933 IN RESPECT TO COTTON.

The Secretary of Agriculture, upon the passage of the Act, took immediate action. He determined that benefits should be paid to cotton growers and with the approval of the President, he adopted Cotton Regulations, Series 2, providing that the first cotton marketing year should begin August 1, 1933, and that the processing tax should be in effect from that date at the rate of 4.2 cents per pound of cotton processed. He also determined to make certain cash payments to cotton growers who conformed to the plan of restriction and as an alternative, in lieu of a portion of the cash payments, offered them options on cotton held by the government.

In accordance therewith he promulgated the terms of the benefit payments and options which were offered by the government and the reduction in acreage and other conditions to which the cotton farmer accepting the benefits was required to agree.

The Report of the administration of the Agricultural Adjustment Act, entitled "Agricultural Adjustment" sets forth the scheme adopted and carried out.

The Secretary determined that there were approximately 40,929,000 acres in cotton cultivation on July 1, 1933. He determined that the minimum objective for 1933 must be the elimination of 10,000,000 acres. Since the year's crop was already planted, he determined this amount of planted cotton must be plowed up and destroyed. He determined that $110,000,000 in addition to options on cotton owned by the government should be paid cotton growers to induce or compel them to agree to destroy these plantings. (Report p. 23.) He estimated that the processing taxes for the year would be $116,000,000 (Report pp. 28 and 29). The contracts offered the cotton growers for the year therefore provided (1) that each cotton grower should take out of production, that is plow up, the cotton then growing on a specified number of acres of his land; (2) that he would not use on his remaining crops any more fertilizer than was used in 1932; (3) that the Secretary should have authority to destroy the crops on the specified acres if the cotton grower failed to do so; (4) the farmer, in consideration of his agreement, was to receive a specified cash payment per acre or, at his option, a lesser amount of cash and an option on certain government owned cotton.

By regulations having under the Act the force of law, it was provided that all producers of cotton who had agreed to reduce the amount of their cotton should plow under the same on or before September 18, 1933; and if they failed to do so, any person authorized by the Secretary was empowered to enter and take action to that end, the cost to be borne by the producer. (Cotton Regulations, Series 1, Supplement 1, approved September 18, 1933.)

A vast campaign was inaugurated to induce farmers to contract which, outside Washington, cost $2,799,000 (Report p. 28). In this campaign 2,200 county agents constituted the "shock troops" "out on the firing line" (Report p. 27). In the 956 counties in which contracts were made there were approximately 22,000 local workers. In many cases, schools of instruction were held before these workers entered into the campaign (Report p. 27). News releases were sent to 664 dailies and 3,500 weekly papers, and special articles were prepared for the farm magazines (Report p. 27). As a result of the campaign, 1,026,514 different contracts were entered into and 10,400,000 acres of growing cotton were plowed up and the production of cotton reduced by 4,400,000 bales, which is about 80% of the amount used domestically in the United States. (Report p. 28.)

(2) EXECUTION OF THE SCHEMES OF REGULATION OF 1934 AND 1935 WITH RESPECT TO COTTON.

The program for 1934 contemplated a reduction in cotton acreage of 40% from the 1928-1932 average acreage, making it possible in 1935 to have a reduction of 25% (Report p. 38). Benefit payments of 3½ cents per pound for the cotton so not to be grown, plus not less than one cent per pound on each processor's share of the cotton domestically consumed, were to be paid (Report p. 39). It was planned that 15,000,000 acres should be eliminated from cultivation (Report p. 39).

The contract for 1934 contained the following terms (Report pp. 331, 332):

> "The Producer shall—
>
> (1) Reduce the acreage to be planted to cotton in 1934 on this farm by not less than thirty-five percent (35%) and not more than forty-five percent (45%) below the base acreage; provided, however, that the

total reduction of all producers offering to enter into 1934-1935 Cotton Acreage Reduction Contracts within the above named county or parish shall not exceed forty percent (40%) of the total base acreage of such producers.

(2) Not grow cotton during 1934 and 1935 on land owned, operated, or controlled by him unless such land is covered by a 1934 and 1935 Cotton Acreage Reduction Contract, except as provided in regulations or administrative rulings.

(4) Not increase on this farm in 1934 above 1932 or 1933 (a) total acreage planted to crops including the rented acres; (b) the acreage planted to each crop for sale, designated in the Act as a basic commodity, except as may be permitted under the contract between the producer and the Secretary; (c) the number and kind of livestock designated as a basic commodity in the Act (or a product of which is designated) kept for sale (or the sale of a product thereof).

(5) Use the rented acres only for: soil-improving crops; erosion preventing crops; food crops for consumption by the producer on this farm; feed crops for the production of livestock or livestock products for consumption or use by the producer on this farm; or fallowing; or such other uses as may be permitted by the Secretary or his authorized agent.

(9) Comply with the terms hereof and of all regulations or administrative rulings which have been given or may hereafter be prescribed by the Secretary with reference to 1934 and 1935 Cotton Acreage Reduction Contracts, and any violation of said terms, regulations, rulings, or any material misstatement herein, or in any information furnished by the producer, shall be grounds for the cancellation of this

contract by the Secretary. In the event of such cancellation, the producer shall repay to the Secretary any sums theretofore paid hereunder to the producer. The determination of the Secretary that any such violation or misstatement has occurred shall be final and conclusive."

(3) EXECUTION OF SCHEMES OF REGULATION WITH RESPECT TO OTHER CROPS.

We have not space to detail the contracts entered into in respect to other agricultural products.

In respect to wheat, the plan contemplated contracts with 550,000 growers, the removal of 7,595,000 acres from cultivation, and payments to farmers of $95,000,000 in benefits (Report p. 43). In respect to tobacco, approximately 275,000 government signed contracts were entered into with growers who agreed to drastically reduce their crops (Report p. 69). In respect to corn and pigs, $350,000,000 was contemplated for benefit payments. Approximately 1,500,000 farmers were asked to sign contracts and a reduction of 25% was required in respect to hogs and 20% in respect to corn (Report p. 69).

(4) OTHER MEASURES INITIATED SHOW INTENTION TO EFFECT CONTROL.

Other means to assist the plan were undertaken by the government.

As respects cotton, the government sponsored a cotton growers marketing agreement under which no new gin could be established or old gin eliminated without the Secretary's consent, and under which maximum rates for ginning were fixed (Rep. p. 40). In addition, in order to bring into the plan those who could not be made to enter under the authority of the Agricultural Adjustment Plan, the government passed the Bankhead Cotton Control Act and the Kerr Tobacco Control Act (48 Stat.

598, Approved April 21, 1934, and 48 Stat. 1275, Approved June 28, 1934, respectively). The Bankhead Act provides for a tax of 50% of the average central market price per pound of lint cotton but in no event less than five cents per pound on the ginning of cotton which is in excess of 10,000,000 bales for the crop year of 1934-1935. Farmers who grow within the amount allotted to them by the Secretary of Agriculture are exempt from the tax. The Kerr Tobacco Act provides a drastic tax on tobacco for those producing in excess of their allotments.

C. THE REGULATION ACHIEVED AND THE REDUCTION OF PRODUCTION HAVE PRODUCED RADICAL EFFECTS ON THE INTERNAL ECONOMY OF THE STATES.

It needs no extended statement to show the enormous extent to which these plans and regulations affect the internal economy of the States. The question is not whether these plans are economically sound and beneficial. The question is, to what extent they regulate, control, and intermeddle with agriculture, a matter exclusively within the jurisdiction of the States.

As respects cotton, 15,000,000 acres or 40% of cotton producing land was made idle for the 1934 crop. The prosperity of many of the States is largely dependent on their cotton crops. At even $30 an acre, $450,000,000 of taxable land was made idle. The number of farm hands, croppers, etc., required to plant and harvest these crops who, in consequence, are thrown out of employment alone presents a serious problem. In States producing cotton and also having cotton mills, the supply of cotton has been decreased and the cost greatly increased, which may cause serious effects on the operation of the mills and upon the demand for labor. In respect to other crops, the effect is equally great.

That this effect upon the States deeply concerns them can not be questioned.

In *Wyoming* v. *Colorado,* 286 U. S. 494, 502, where suit was brought by the State of Wyoming against the State of Colorado with reference to diversion of irrigation water, in which case objection was made that the rights of individuals only were concerned, the Court said:

> "As respects Wyoming the welfare, prosperity and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that State. Thus the interests of the State are indissolubly linked with the rights of the appropriators."

IV.

IF THIS LEGISLATION IS CONSTITUTIONAL, IT NECESSARILY FOLLOWS THAT CONGRESS HAS AN ALMOST UNLIMITED POWER TO IMPAIR THE CONTROL BY THE STATES OVER THEIR INTERNAL AFFAIRS.

It is clear that Congress can not directly regulate or control agriculture, manufacturing, or any of the other internal affairs of the States and that for Congress to do so would violate the Constitution in a two-fold sense: *first,* because Congress would exercise a power not conferred upon it; and *second,* because such action would intermeddle and interfere with matters, jurisdiction of which is expressly reserved to the States.

Yet if Congress can constitutionally authorize the present scheme, it follows that it has practically unlimited power to intermeddle with and control matters which the Constitution intended should be exclusively controlled by the States.

Under the present legislation, Congress does not directly prohibit. It controls by offering inducements in the shape of benefit payments to those who conform to its scheme. When the power to confer financial benefits on those who conform to the wishes of the donor of the benefits is backed by the unlimited taxing power of the United States, there is little limit to the extent of the regulation and control which can be effected. In cases where Congress really desires to control, it is as effective a means as the power to prohibit.

If the United States by this means can carry through the present gigantic scheme of regulation and restriction, it is clear that it can put into effect any Congressional policy, no matter how much it may interfere with the

internal economy of the States, by merely paying enough to see that such policy is carried out. There are few things which men would be unwilling to do in the way of conforming to Congressional policies, and few things which, therefore, could not be accomplished, were sufficient inducement offered.

It would be no defense to such interference with State matters that the action was voluntary, but it can not be called voluntary in any real sense. Benefits in this case and in all cases can be so calculated as to compel those to whom they are offered to accept or suffer serious economic consequences,—the destruction of their business and the loss of their livelihood. **The power to tax is the power to destroy. The power to confer or withhold unlimited benefits is the power to coerce or destroy.**

Let us examine a few of the results which could be accomplished under this doctrine.

Clearly, the United States could bring about through this means the purposes this Court held it could not accomplish directly in the *Schechter* case (*supra*) and the *Railroad Retirement case* (55 Sup. Ct. Rep. 758); by conferring benefits on those who conformed to its wishes, it could make it impracticable not to conform.

In the field of agriculture it could proceed much further than it has attempted to proceed in this Act and accomplish a complete regimentation of farmers. Indeed, if the present scheme is regarded as successful and its legality sustained, the United States will probably do so.

In the Report of the Administration of the Agricultural Adjustment Act, May, 1933, to February, 1934, is a chapter entitled "Planning for the Future" (p. 271). It is there stated that far-reaching and fundamental production adjustment programs which already have been undertaken or are completed must be consolidated into

permanent measures. This long-term planning "means removal of large areas of sub-marginal land from production and the development of well-balanced systems of farming on the farms remaining in production".

It means, the Secretary says, the removal of the owners to other lands or industries, the determination of the amount of agricultural products required in the future, the determination of the regions most available for certain crops and livestock products, and the development of "a regionalized plan" which will employ farm labor and farm land throughout the country in what is determined to be the most suitable manner. By the use of benefit payments all of this can be accomplished by the United States Government.

The effect of such a program may well be practically to destroy the entire economy of some of our States. If the Secretary of Agriculture determines under future legislation that the land in certain States should not be cultivated as unsuitable, he can, by refusing benefits to the owners thereof, compel them to move to other States, or he can induce them so to do by the grant of benefits.

But the effect of this principle is not limited to agriculture. It can equally well be applied to manufacturing and other industries. Benefits can be paid to certain manufacturers if they will reduce production. Benefits can be paid to manufacturers to move out of one State to some other State, determined by an official in Washington to be more suited to such industry.

The agricultural South and West in control of some future Congress, for example, can adopt or authorize the adoption of a "long-time planning" for manufacturing involving a "regionalized plan." Under this it can be determined that the cotton textile manufacturing industry should be conducted only in the South, near the source of raw material. Benefits can then be paid to

New England manufacturers who move their plants South. An official in Washington can determine that shoe manufacturing is too concentrated in New England and that "long-time planning" requires the payment of benefits to manufacturers who move their plants to other districts, and the refusal of benefits to manufacturers who choose to remain in Massachusetts. These suggestions are not idle. They are not dissimilar to the Secretary of Agriculture's proposed "regionalized" plan for agriculture.

It can be determined that large units in manufacturing are uneconomical, and benefits can be paid to small manufacturers, or vice versa.

Is it too much to say that the issue in this case involves the fundamental right of the States to control their internal affairs, and the question whether or not the Constitution gives Congress power virtually to destroy this authority?

V.

THIS LEGISLATION VIOLATES THE CONSTITUTIONS OF MANY STATES, THE LAWS OF OTHERS, AND THE PUBLIC POLICIES OF ALL STATES.

The scheme authorized by this legislation and entered into by the Secretary of Agriculture for the drastic restriction of crops not only undertakes to interfere with and control a subject matter which is within the exclusive jurisdiction of the States, but it also violates the constitutions of many States, the laws of others, and the public policies, as heretofore understood, of all the States.

Thus the Constitution of Alabama, Sec. 103 (Code of Ala., 1923, Vol. 1, pp. 300-1) provides that:

> "The legislature shall provide by law for the regulation . . . of associations . . . combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, . . ."

The laws of Alabama (Code 1923, Chap. 211, S. 5212), prohibit the formation of pools or combinations to regulate the "quantity or price" of products, or to fix or limit the quantity of any article or commodity to be produced in the State.

The Constitution of Arizona of 1910 (Art. XIV, Sec. 15) provides that no association of persons, etc., "shall combine in any manner whatever to . . . limit production . . . of any product or commodity".

The Statutes of Arkansas (Chap. 124, Sec. 7368) forbid combinations "to fix or limit in this State or elsewhere the amount or quantity of any . . . commodity . . . or any article or thing whatsoever."

The Laws of Connecticut (General Statutes 1930, Sec. 6352) make it a criminal offense, punishable by fine of not more than $1000 or imprisonment for not more than five years, or both, to conspire "for the purpose of limiting or restraining production" of any necessity of life for the purpose of increasing the price thereof.

The Constitution of Idaho (Article XI, Sec. 18) prohibits corporations and associations from combining for the purpose of regulating the production of any article of commerce or of produce of the soil or of consumption by the people. By the laws of Idaho (Code 17-4013) a violation is made a criminal offense.

Iowa (Chap. 434 of Code of 1931, Sec. 9906) forbids combinations "to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State".

The Constitution of Louisiana of 1921 (Article XIX, Sec. 14) provides that it is unlawful for any persons to combine for the purpose of forcing up or down the price of any agricultural product or article of necessity for speculative purposes. The Code (Sec. 4924) forbids combinations "to limit or reduce the production or increase or reduce the price of merchandise, produce or commodities".

Maine (Revised Statutes 1930, Chap. 138, Sec. 31) makes a criminal offense the wilful destruction or permitting preventable waste in the production, etc., of the necessities of life, which necessities include food for human consumption.

Michigan (Compiled Laws, 1929, Sec. 16647, Chap. 278, Act. 255 of 1899) forbids combinations "to limit or reduce the production" of any commodity.

In Minnesota the Constitution provides (Art. IV, Sec. 35) that "Any combination of persons . . . to monopolize the market for food products in this State or to inter-

fere with or restrict the freedom of such markets, is hereby declared to be a criminal conspiracy."

By the laws of New Mexico (Chap. 35, Article 29), every contract or combination having for its object or which shall operate to "control the quantity, price, or exchange of any article of manufacture or product of the soil or mine is hereby declared to be illegal," and any violation is made a criminal offense (New Mexico Annot. Sts. 1929).

The North Dakota Constitution (Art. VII, Sec. 146) provides that any combination between individuals having for its object the effect of controlling the price of "any product of the soil" is prohibited and declared "unlawful and against public policy."

PUBLIC POLICY OF THE STATES.

Contracts or combinations entered into for the purpose of restricting the production of any articles, especially articles of necessity such as food products, for the purpose of raising prices, have always been held illegal as contrary to public policy in all our states.

In *Standard Oil Co.* v. *United States,* 221 U. S. 1, Chief Justice White considered at length what was deemed by the common law of England and this country to constitute unlawful restraints against public policy. He analyzed the law as follows (pp. 54, 58):

> "Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result

from monopoly, that is an undue enhancement of price. 3. That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void."

. . . . . .

"Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions . . . of such a *character as to give rise to the inference or presumption that they had been entered into or done with the intent to . . . bring about the evils, such as enhancement of prices, which were considered to be against public policy.*" (Italics ours)

Recent cooperative marketing acts have to some extent changed the public policy of the States as respects combinations for marketing agricultural products. It is not clear to what precise extent they have changed the public policy of the States so as to authorize combinations affecting prices of articles which they sell on behalf of their members. In considering the law relating to such cooperatives it has been held in a number of cases that their purpose is to market their goods in an orderly manner and that monopoly or unreasonable enhancement of prices is not authorized or attempted or possible. It has not been held that they are authorized to restrict production and it does not appear that in any case before

the courts this has been attempted. The clear implications of the decisions are that such would not be permissible. For example, in *List* v. *Burley Tobacco Growers Cooperative Association,* 151 N.E. 471, 114 Ohio 361, the Ohio court said (p. 476)

> ". . . Nor does the evidence tend to show any agreement to limit or reduce production".

(See Edwin G. Nourse, *Legal Status of Agricultural Cooperation.*)

We submit that combinations directed to restrict production in order to enhance prices violate the constitutions, laws, or public policies of all our States.

The plan put into effect under this legislation is the most gigantic scheme to restrict production ever contemplated.

VI.

THE FOLLOWING RULES OF CONSTITUTIONAL INTERPRETATION ARE APPLICABLE IN THE PRESENT CASE.

A. NO PRESUMPTION OF ANY GRANT OF POWER TO THE UNITED STATES.

There is no presumption that any power has been granted the United States Government.

Mr. Justice Story in *Houston* v. *Moore,* 5 Wheat. 1, 48, said:

> "The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. *Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution;* and, on the other hand, we are bound to support that Constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains." (Italics supplied.)

In *Fairbank* v. *United States,* 181, U. S. 283, 289, the Court said:

> "If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; * * * it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally

> construed and that language of restriction is to be narrowly and technically construed. * * * The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

In accordance with this rule of construction the Court held a tax on a foreign bill of lading, since it resulted indirectly as a tax on exports, fell within the constitutional prohibition against a tax on exports.

The powers granted the United States and the limitations imposed by the Tenth Amendment must be given a fair interpretation in accordance with their purpose and intent.

B. A PRACTICAL CONSTRUCTION MUST BE ADOPTED WHICH PERMITS THE UNITED STATES AND THE STATES TO FUNCTION WITH THE MINIMUM OF INTERFERENCE EACH WITH THE OTHER.

A practical construction must be applied in interpreting the Constitution, which does not violate the basic principles of the Constitution or destroy or impair the powers intended to be exercised by the federal government and the states, respectively.

In *Metcalf and Eddy* v. *Mitchell,* 269 U. S. 514, involving the right of the United States to tax fees received by contractors from certain states and municipalities, the Court said that in construing the respective rights of the federal and state governments, recourse may be had to the reason for the rule which limits taxation by the respective governments, namely, "the conviction that each government, in order that it may administer its affairs, within its own sphere, must be left free from

undue interference by the other''. The Court added (p. 523):

> ''*But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.* Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina* v. *United States,* 199 U. S. 437, 461; *Flint* v. *Stone Tracy Co., supra,* at 172), or the appropriate exercise of the functions of the government affected by it. *Railroad Co.* v. *Peniston, supra,* 31.'' (Italics ours.)

See also *Willcuts* v. *Bunn,* 282 U. S. 216, 225.

In *Dick* v. *United States,* 208 U. S. 340, involving the question of the right of Congress to legislate against introducing intoxicating liquors into Indian country, the Court stated that there could be no ''divided authority on the subject.'' Either the power must be in the United States or in the State. The Court further stated that in deciding the question ''we are confronted by certain principles that are deemed fundamental in our governmental system'' (p. 353). One principal is that a State has full control over persons and things within its jurisdiction. Another principle is that Congress has power to regulate commerce with the Indian tribes. The Court said (p. 353):

> ''These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other.''

C. NEITHER THE UNITED STATES NOR A STATE MAY ACCOMPLISH BY INDIRECTION WHAT IT IS NOT AUTHORIZED TO ACCOMPLISH DIRECTLY.

In *M'Culloch* v. *Maryland,* 4 Wheat. 317, 423, Chief Justice Marshall said:

> " * * * * * * * Should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such decision come before it, to say that such an act was not the law of the land."

In *Linder* v. *United States,* 268 U. S. 5, 17, the Court said:

> "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

In *Fairbank* v. *United States,* 181 U. S. 283, a stamp tax imposed by the United States on foreign bills of lading was held unconstitutional as violating the prohibition against taxes on articles exported. The Court, referring to *Almy* v. *California,* 24 How. 169, holding a stamp tax by a State on bills of lading for gold shipped out of the State unconstitutional, said (p. 294):

> "In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished

> indirectly by legislation which accomplishes the same result."

In *Macallen* v. *Massachusetts,* 279 U. S. 620, this statement is quoted and stated to be "the well established rule" (p. 629).

In the *Fairbank* case the Court further said (p. 300):

> "Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

In the *Pollock* v. *Farmer's Loan & Trust Co.,* 157 U. S. 429, 581, the Court said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, * * * . But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

The principle is fully sustained by the cases cited and analyzed below.

D. ANY INTERFERENCE BY THE FEDERAL GOVERNMENT WITH MATTERS WHICH ARE WITHIN THE STATE'S JURISDICTION IS UNCONSTITUTIONAL IN A TWOFOLD SENSE.

It clearly follows from the principles established above that the right of the States to exercise without interference by the United States, authority over all matters jurisdiction of which is reserved to them, is a fundamental principle of the Constitution.

Any such interference is unconstitutional in a twofold sense: *first,* it exceeds the powers granted the United States by the Constitution; *second,* it violates the rights expressly reserved to the States.

In *Hammer* v. *Dagenhart, supra,* the Court said (p. 276):

> "Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."

This principle is also recognized in *Veazie Bank v. Fenno,* 8 Wall. 533, 541, where the Court said:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

E. APPLICATION OF THESE PRINCIPLES.

The United States can only exercise the powers expressly granted it. In determining what these powers are there is no presumption in favor of a grant of power to the United States; the limitations of the Tenth Amendment reserving all powers not granted to the United States to the States and the people must be given a fair and reasonable construction so as to carry out the purposes and spirit of the Constitution.

Furthermore, to carry out these purposes, neither a State government nor the United States can accomplish by indirection what it can not accomplish directly.

The division of power between the States and the

United States is a fundamental and basic principle of the Constitution. In case of doubt, or in case of an apparent conflict of powers, "a practical construction" must be adopted so that "neither power will nullify or substantially impair the other." This is the principle applied in determining the limits imposed on Congress in the regulation of interstate commerce which is expressed in the principle that only matters which constitute interstate commerce or directly affect interstate commerce are subject to the control of Congress. Action concerned with the normal control of internal affairs, even though they may affect interstate commerce, are held to affect it only indirectly, since otherwise Congress would have power to defeat the purpose of the Constitution which was to leave control of internal affairs to the States.

VII.

THE IMPORTANCE OF THE SYSTEM OF DUAL SOVEREIGNTY UPON WHICH THE CONSTITUTION IS BASED.

Before discussing the particular powers granted the federal government by the Constitution, which the government contends permits this legislation, it is essential to discuss the general principles which are pertinent in this discussion.

A. THE EMBODIMENT OF THIS PRINCIPLE IN THE CONSTITUTION WAS THE NECESSARY RESULT OF THE PREVAILING CONDITIONS.

The fundamental and unique principle of the Constitution is the system of dual sovereignty for which it provides. The formulation of this system made the adoption of the Constitution, possible and is a basic principle in the light of which any interpretation of its meaning must be made.

HISTORICAL REASONS FOR THIS PRINCIPLE.

The principal reasons which resulted in our dual form of government under which the federal government holds and may exercise only certain enumerated powers while to the States and the people are reserved unconditionally all other powers, may be summarized as follows:

A. FEAR OF STRONG CENTRAL GOVERNMENT.

First. The same apprehensions which caused the limitations expressly contained in the first nine amendments, namely, the fear of oppression by a strong central government not subject to local control. The spirit of the New England town meeting was strong. The experience of the colonies with England had implanted the belief that large or unlimited powers in a centralized

government would inevitably lead to the loss of that liberty which they had just attained.*

B. FEAR OF OPPRESSION OF MINORITY STATES BY MAJORITY.

Second. The desire engendered by strong sectional feelings of the colonies to prevent so far as possible oppression of a minority of States by a majority which might be in control of the federal government, since the interests of such majority might be very different from and perhaps hostile to the minority States.

This feeling appeared in the debates at the Constitutional Convention, and is shown in various provisions of the Constitution itself. George Mason, delegate from Virginia, said, "The Southern states are in a minority in both houses. Is it to be expected that they will deliver themselves, bound hand and foot, to the Eastern states and enable them to exclaim, in the words of Cromwell on a certain occasion . . . 'The Lord hath delivered them into our hands'?" (*Debates in the Federal Convention* . . . by James Madison, Hunt & Scott ed., p. 485.)

The South especially feared that the right to regulate foreign commerce would be used to the detriment of the southern agricultural states which were in a minority

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*NOTE. "The strong local pride and attachment of citizens to their particular colonies were naturally intensified by the rise in status of those colonies to independent sovereignties. An exhausting war had just been fought for the sole purpose of freeing themselves from the control and tyranny of a higher power having jurisdiction over them. To substitute for that power another superior one, even though of their own making, seemed fraught with heavy risk." (James Truslow Adams, *America's Tragedy*, p. 20.) "As Burke had said, 'the Americans were accustomed to snuff the approach of tyranny in every tainted breeze.' When the east wind ceased to blow, they discovered the same deadly odor in their own westerly. One might safely entrust a quantum of power to one's State government, where the legislators were friends or neighbors; provided elections were frequent and the scope of government limited by a Bill of Rights." (*History of the United States, 1783-1917*—Morison, pp. 38, 39).

and to the advantage of the eastern commercial states. Hence the restrictions that no tax may be laid on articles exported from any State and no preference given to the ports of one State over those of another. To protect against discrimination in taxation by a hostile majority of States, provision was made that no direct taxes may be levied except on the basis of representation by the States and all duties, imports and excises must be uniform. Likewise, for the same purpose the small States were given an equal representation in the Senate with the largest State.

C. FEAR OF INTERFERENCE WITH SLAVERY.

Third. The more southern slave States were unwilling to enter a union which had any power to interfere with slavery.

D. DESIRE FOR LOCAL SELF GOVERNMENT.

Fourth. The belief that local affairs could be best administered locally and that only the minimum of power necessary for the central government should be granted.

For these reasons not only were the powers granted to the federal government limited to matters deemed essential but even these powers were restricted.

Section 9 contains eight restrictions. The first eight amendments by the First Congress adopted pursuant to the understanding on which the Constitution was accepted, consists entirely of restrictions intended to prevent the central government from taking arbitrary and oppressive action. There are other restrictions in the Constitution showing the ever present intent to prevent interference by the central government with matters of local concern, including even the provision that the federal government shall not have complete jurisdiction over forts, magazines, and arsenals situated within the

borders of a State unless purchased with the assent of a State.

Finally, to leave no doubt as to this intent, Amendment IX provides that the enumeration of certain rights shall not be construed "to deny those retained by the people" and the Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". This Tenth Amendment did not strip the federal government of any powers granted it by the original Constitution. In this respect, it added nothing to the Constitution. (*United States* v. *Sprague,* 282 U. S. 716, 733; Madison, I *Annals of Congress,* 441.) But it added much in the way of emphasis. It underlined, so to speak, the powers which were reserved and emphasized in an unmistakable manner that the preservation to the states of control over their internal affairs is a vital, fundamental principle of the Constitution, and that it can not be interpreted so as to impair or destroy this exclusive control of the States over their internal affairs without violating its purpose and intent.

B. THE SYSTEM OF DUAL SOVEREIGNTY AND CITIZENSHIP.

A. DUAL SOVEREIGNTY.

President Monroe, describing our dual system, said:

> "There were two separate and independent governments established over our Union, one for local purposes of each State by the people of the State, the other for national purposes over all the States by the people of the United States. The whole power of the people, on the representative principle, is divided between them. The State governments are independent of each other, and to the extent of their

powers are complete sovereignties. The National Government begins where the State governments terminate, except in some instances where there is a concurrent jurisdiction between them. This Government is also, according to the extent of its powers, a complete sovereignty.

. . . . . .

"It is impossible to speak too highly of this system taken in its two fold character and in all its great principles of two governments, completely distinct from and independent of each other, each constitutional, founded by and acting directly on the people, each competent to all its purposes, . . ." (President Monroe's *Views on Internal Improvements* submitted to Congress, May 4, 1822. Richardson's *Messages and Papers of the Presidents,* Vol. II, pp. 144-148.)

B. DUAL CITIZENSHIP.

Thus, under the Constitution, we have a dual citizenship. In *United States* v. *Cruikshank,* 92 U. S. 542, 549, the Court said:

"We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other."

Each sovereignty is entitled to obedience by the citizens within its constitutional field of power but not outside of that field.

C. DUAL GENERAL WELFARE.

"Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power (citations), as do the States in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government. . . ." (*Nebbia* v. *New York,* 291 U. S. 502, 524.)

C. THE NECESSITY OF PRESERVING THE SOVEREIGNTY OF THE STATES AND THE CONTROL OF LOCAL MATTERS HAS ALWAYS BEEN RECOGNIGED BY THIS COURT.

In *Texas* v. *White,* 7 Wall. 700, 725, the Court said:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

In *Lane County* v. *Oregon,* 7 Wall. 71, 76, the Court said:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States * * * * * *."

In *The Collector* v. *Day,* 11 Wall. 113, 124, 125, where the power of the United States to tax the salary of an officer of a State was involved, the Court said:

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States. * * * * *
>
> "Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States. * * * * *
>
> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, * * * * * "

In *Hammer* v. *Dagenhart, supra,* at p. 275, the Court said:

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."

In *Twining* v. *New Jersey,* 211 U. S. 78, 92, the Court said, with reference to the Fourteenth Amendment, that

it limited the powers of the States and therefore it was the duty of the Court to enforce such limitations, but it added:

> "But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union."

D. REASONS FOR DIVISION OF JURISDICTION STILL VITALLY IMPORTANT.

As the Constitution clearly provides that the preservation of the rights and jurisdiction over internal affairs reserved to the States is a fundamental principle of the Constitution, only an amendment can authorize any impairment of these reserved rights.

It may be well, however, briefly to show the importance and vitality of this principle at the present time.

During the last few years, it has been urged that the federal government should have authority to control such matters reserved to the States as the federal government decides it can deal with more effectively than the States. When local conditions seem chaotic, it is natural to seek aid elsewhere. This danger was emphasized by Chief Justice Taft in the *Child Labor Tax Case,* 259 U. S. 20, 37, where he said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We can not avoid the duty even though it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an

insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. *In the maintenance of local selfgovernment, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.*" (Italics ours.)

Woodrow Wilson in his *Constitutional Government in the United States,* says:

"Uniform regulation of the economic conditions of a vast territory and a various people like the United States would be mischievous, if not impossible. The statesmanship which really attempts it is premature and unwise. (p. 179.) * * * *

"It is this spontaneity and variety, this independent and irrepressible life of its communities, that has given our system its extraordinary elasticity, which has preserved it from the paralysis which has sooner or later fallen upon every people who have looked to their central government to patronize and nurture them. (pp. 182-183.)

"It would be fatal to our political vitality really to strip the States of their powers and transfer them to the federal government. It cannot be too often repeated that it has been the privilege of separate development secured to the several regions of the country by the Constitution, and not the privilege of separate development only, but also that other more fundamental privilege that lies back of it, the privilege of independent local opinion and individual conviction, which has given speed, facility, vigor and certainty to the processes of our economic and political growth. *To buy temporary ease and convenience for the performance of a few great tasks of the hour,*

> *at the expense of that would be to pay too great a price and to cheat all generations for the sake of one.''* (pp. 191-192.) (Italics ours.)

Mr. Justice Brandeis said in *New State Ice Co. v. Liebmann,* 285 U. S., 262, 311,

> ''To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.''*

The North Dakota legislation which came before the Supreme Court in *Green v. Frazier,* 253 U. S. 233, was a social experiment which turned out disastrously, but the unfortunate consequences were largely localized. Had the experiment been tried on a national scale, it would have resulted in a national disaster.

William Jennings Bryan said with respect to extending the national powers,

> ''Not only would national legislators lack the time necessary for investigation, and therefore lack the information necessary to wise decision, but the indifference of representatives in one part of the country to local matters in other parts of the country would invite the abuse of power. Then, too, the seat of government would be so far from the

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*NOTE. Chief Justice Taft said, ''There is a great advantage in having different State governments try different experiments in the enactment of laws and in governmental policies, so that a State less prone to accept novel and untried remedies may await their development by States more enterprising and more courageous. The end is that the division of opinion in State governments enforces a wise deliberation and creates a *locus poenitentiae* which may constitute the salvation of the Republic.'' (*Popular Government,* p. 155.)

great majority of the voters as to prevent the scrutiny of public conduct which is essential to clean and honest government. The union of the separate states under a central government offers the only plan that can adapt itself to indefinite extension." (*Central Law Journal,* 1908, p. 273, quoted in *Thompson, Federal Centralization,* p. 364.)

VIII.

REGULATION OF AGRICULTURE IS SOLELY A MATTER OF STATE JURISDICTION

This proposition needs little argument. Agriculture is essentially local. There is no power granted the federal government which can by any possibility be construed to give Congress any control over it.

The most important matters within the control of the States are local government, education, police, agriculture, manufacturing, and mining, and the general health and the safety of the citizens of the State, and other similar matters falling within the police power. This Court in *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, said that manufacturing is a local business and added:

> "Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

Agriculture is even more intrinsically local than manufacture as the latter may require the transportation, in interstate commerce, of the supplies and raw materials to be manufactured as well as the shipment in interstate commerce of the manufactured articles. But in the case of agriculture, commerce does not begin and can not begin or be affected until such products are produced and harvested. See *Schechter* v. *United States, supra; Kidd* v. *Pearson,* 128 U. S. 1; *Industrial Asso.* v. *United States,* 268 U. S. 64, 82.

IX.

POWERS GRANTED THE UNITED STATES BY THE CONSTITUTION WHICH THE UNITED STATES CONTENDS JUSTIFY THIS LEGISLATION.

The United States contends that the power to regulate agriculture in the manner attempted by this legislation is conferred by the Constitution.

First. Under the power to tax for the general welfare of the United States.

Second. By reason of the right of the United States to carry out its fiscal policies.

The contention is not made that the interstate commerce clause justifies this legislation. However, since the District Court based its decision on the interstate commerce clause, we shall consider the application of this clause briefly, especially as such consideration will tend to clarify the issues in this case.

X.

THE INTERSTATE COMMERCE CLAUSE DOES NOT JUSTIFY THE PRESENT LEGISLATION.

Agriculture is intrinsically a local matter and not subject to control by Congress (*supra,* p. 66).

The growing of crops is obviously not commerce, nor is it an instrumentality of commerce like a railroad. The growing of crops affects the amount of interstate commerce in such commodities. But it is abundantly established that reduction or increase in the growing of crops, the manufacture of commodities, or the mining of minerals, even though such crops, commodities, or minerals are intended for shipment in interstate commerce, is not itself interstate commerce and, therefore, not subject to federal control.

It is, of course, true that an act though seemingly wholly disconnected with interstate commerce may become unlawful if done as part of a scheme to restrict interstate commerce. In such case the direct purpose of the act being to regulate interstate commerce, it can properly be regarded as directly affecting and, therefore, be subject to control by Congress.

Where, however, the act in question is merely normal action respecting a matter wholly internal to the States, then, although it may affect interstate commerce, such effect is clearly held to be indirect and not subject to the control of Congress.

Thus, a State may prohibit the manufacture of liquor because it deems such manufacture against its public policy although the effect is to completely prevent interstate commerce in such liquor. To hold otherwise the result would be as stated in *Kidd* v. *Pearson,* 128 U. S. 1, 21,

> "that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago?"

Thus, although a certain action may seriously affect interstate commerce, it is not for this reason subject to federal control. If the action deals with a local matter and is not part of an unlawful plan to restrict interstate commerce, its effect on interstate commerce is held to be indirect and not subject to Congressional control.

In *Levering & G. Co.* v. *Morrin,* 289 U. S. 103, it was held that a conspiracy to suppress local building operations solely for the purpose of compelling employment of union labor is not a conspiracy to restrict interstate commerce merely because it curtails the sale and shipment of materials in interstate commerce. The Court said (p. 107),

> "*Use* of the materials was purely a local matter and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy."

In *Industrial Association* v. *U. S.*, 268 U. S. 64, it was held that a combination to establish the open shop plan of

employment by requiring builders who desired building materials of certain kinds to obtain permits, did not violate the Sherman Anti-Trust Act. The Court said (p. 82),

> "The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation—for building is as essentially local as mining, manufacturing, or growing crops—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In the present case we have a purely local situation. Farmers were merely exercising their normal right to grow crops which, after they were harvested, might be shipped in interstate commerce. There was no intent or plan to obstruct interstate commerce.

Congress by the present legislation was not even attempting to remove any obstruction to interstate commerce. If there is any such obstruction it has been created by the Secretary of Agriculture in inducing the farmers to enter into a combination to restrict their crops in order to obtain higher prices and thus to restrict the amount of crops shipped in interstate commerce and the prices received therefor.

It is clear, therefore, that the commerce clause affords no justification for the present legislation.

XI.

THE THREE DIFFERENT INTERPRETATIONS OF THE GENERAL WELFARE CLAUSE.

Congress is given authority—

> "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."

The Government in its discussion of this so-called welfare clause contends that even though Congress has not the power to regulate agriculture by direct legislation, and therefore directly to put its desired plan into effect, nevertheless it can under this so-called welfare clause impose taxes to be paid to farmers to induce them to conform to its scheme.

We contend that under no interpretation of the welfare clause which has so far received any support can Congress so tax for the express purpose of applying the money on such conditions as to effect a regulation of agriculture.

THE THREE INTERPRETATIONS OF THE WELFARE CLAUSE.

Three interpretations of this clause have been advanced:

1. That it constitutes two separate grants of power: *first,* the power to tax; and *second,* as a wholly separate power, the power to legislate in any manner Congress deems appropriate for the general welfare of the United States.

2. That Congress is authorized to tax for all matters which concern the general welfare of the United States, the United States being the political body created by the Constitution and the general welfare for which it may

tax being the matters which have been confided to its charge and for which it is responsible, and not matters for which by the express provisions of the Constitution it has no responsibility under the Constitution or the right to exercise any authority. In other words, under this interpretation the power to tax was given Congress in order to enable it to carry out its authorized powers and therefore taxes can be levied only for the purposes comprised within its enumerated powers. This view was strongly held by Madison and is hereafter referred to as the Madisonian interpretation.

3. The third view, on which the Government relies, which was sponsored by Hamilton, and is hereafter referred to as the Hamiltonian interpretation, is that the clause authorizes Congress to tax not only to enable the United States to appropriate money to carry out the powers and responsibilities conferred on it by the Constitution but also to appropriate money for other objects which concern the general welfare of the people of the United States although Congress has no power to legislate as to or control such matters.

VIEW THAT THE WELFARE CLAUSE GIVES INDEPENDENT POWER TO LEGISLATE AS TO ALL MATTERS OF GENERAL WELFARE.

The first interpretation, namely, that the clause should be read as giving, first, the power to tax and, second, an independent power to legislate for the general welfare of the people of the United States including in the phrase "general welfare" matters not embraced within the enumerated powers has never been very seriously advanced and is now generally rejected, and we believe needs no further consideration. The government admits this interpretation is inadmissable.

If so construed as an independent, substantive grant of power, it would render wholly unimportant and unnecessary the subsequent enumeration of specific powers and would create a general authority in Congress to pass all laws which Congress may deem for the general welfare. As stated by Judge Story, "under this interpretation, the Constitution would practically create an unlimited national government" (Story *Commentatives on the Constitution,* 5th Ed., Sec. 909). It is well established that Congress has no such authority.

THE GOVERNMENT'S CONTENTION IS BASED ON THE HAMILTONIAN INTERPRETATION OF THE WELFARE CLAUSE.

The Government bases its contention on the Hamiltonian interpretation of the welfare clause, viz.: that although the United States has no power or right to legislate with respect to or regulate matters not included within its enumerated powers, it, nevertheless, may appropriate and apply tax moneys to other matters not embraced within the enumerated powers, which matters it can not control or regulate. It contends that in the present case we have a mere appropriation of money for the benefit of agriculture, and that this legislation constitutes no control or regulation of agriculture. It bases its position on the contention that in making an appropriation Congress can specify the objects to which the money is to be applied; that in the present case Congress merely specifies that the benefits shall be paid to those farmers who agree to conform to and carry out its scheme to restrict agriculture; that it does not compel any farmer to conform so that no direct regulation is exercised, and that, therefore, the legislation merely amounts to an appropriation of money.

WE CONTEND THAT THE MADISONIAN INTERPRETATION OF THE WELFARE CLAUSE IS CORRECT, BUT THAT NEITHER THE MADISONIAN NOR THE HAMILTONIAN INTERPRETATION JUSTIFIES THE PRESENT LEGISLATION.

We submit that the Madisonian interpretation of the welfare clause is correct. If so, since Congress is given no power to control agriculture, no tax can be levied for the purpose of paying the proceeds to farmers to benefit agriculture.

We further confidently submit that if the Hamiltonian interpretation of the welfare clause is adopted, it clearly does not justify the present legislation which directly effects and is intended to effect a regulation of agriculture.

We propose to discuss both the Madisonian theory and the Hamiltonian theory as to the interpretation of the general welfare clause.

The meaning and scope of this clause has never been interpreted by this court. In *United States* v. *Realty Co.*, 163 U. S. 427, the court said, of this question:

> "The question is one of the greatest importance. It should not be decided without very mature investigation and deliberation. . . ."

This lack of judicial interpretation and the importance of the question is our excuse for the extended discussion which follows.

XII.

MADISON'S INTERPRETATION OF THE WELFARE CLAUSE SHOULD BE ACCEPTED.

We submit that the Madisonian interpretation of the welfare clause—namely, that Congress is only authorized to levy taxes to be used with respect to matters within the federal field of power—is correct. If so, it follows, necessarily, that power to control agriculture not having been conferred on Congress, the regulation and control of agriculture—as, in the present case, by the Agricultural Adjustment Act—is not one of the purposes for which taxes can be constitutionally levied.

1. THE SITUATION AT THE TIME OF THE ADOPTION OF THE CONSTITUTION SHOWS NO POWERS NOT ESSENTIAL GRANTED THE UNITED STATES.

The Articles of Confederation which created "The United States of America", proposed in 1777 and finally ratified by the requisite number of states in 1781, granted insufficient power to create a real nation.

The purported rights granted Congress were sufficient in many respects but the Federal Government lacked all powers to function efficiently, since for practical purposes it could enforce its will in the matters confided to it only with the consent of the states and its only means of raising revenue to carry out its purposes was by requisitions on the states which they refused to comply with. Its authority was therefore flouted and it was helpless and held in general contempt.

Washington wrote to Jay in 1786,

> "I do not conceive we can exist long as a nation without having lodged somewhere a power which will pervade the whole union in as energetic a manner, as the authority of the States Governments extends

> over the several States. . . . Requisitions are a perfect nullity, where thirteen sovereign, independent, disunited States are in the habit of discussing and refusing compliance with them at their option. Requisitions are little better than a jest and a byeword throughout the land. If you tell the Legislature that they have violated the treaty of peace and invaded the prerogatives of the Confederacy, they will laugh in your face." (Letter of Washington to Jay, August 1, 1786, Charles Warren, *Making of the Constitution,* pp. 17-18 and cf. *The Federalist,* No. XV.)

Neither the United States nor the States had credit. Business was in a collapse. Shay's Rebellion brought fears of revolution and the possible alternatives of complete disorder or a strong monarchial government.

It was deemed essential by the thoughtful and the business interests that the United States be given direct power to fulfill its functions—to deal with foreign nations, to defend the country against attack, to control foreign trade so that it could exact trade agreements with England and other commercial nations, and to insure harmony among the States by controlling interstate relations. The right to enforce its powers in these respects and to enforce by direct action the collection of taxes necessary for these purposes was deemed essential.

On the other hand, there was a strong reluctance to grant power to any authority other than the individual States and local government units.

Mr. Justice Story in his *Commentaries* says,

> "That which strikes us with most force is the unceasing jealousy and watchfulness everywhere betrayed in respect to the powers to be confided to the General Government. For this several causes may be assigned. The Colonies had been long engaged in struggles against the superintending authority of the

> Crown and had practically felt the inconvenience of the restricted legislation of the parent country. These struggles had naturally led to a general feeling of resistance to all external authority; and these differences to extreme doubts, if not to dread of any legislation, not exclusively originating in their domestic assemblies." (*Commentaries on the Constitution,* 5th Ed., Vol. 1, p. 173.)

See also *supra* pp. 54-57.

Great jealousy also existed among the States and a very grave fear that the States might be oppressed by a central government controlled by a hostile majority of the States, or a majority whose interests differed from those of the minority.

John Dickinson of Delaware said to Madison,

> ". . . We would sooner submit to a foreign power than submit to be deprived of an equality of suffrage in both branches of the Legislature, and thereby be thrown under the domination of the large states." (Charles Warren, *The Making of the Constitution,* p. 218.)

This fear of domination by a majority of States whose interests were different was due to the vital social and economic differences existing among the States.

> "Virginia was much more unlike Massachusetts than Massachusetts was unlike England. The Carolinas, with their lumber and forests and their rice fields felt themselves utterly unlike Virginia; and the Middle states, with their mixture of population out of many lands, were unlike both New England and the South." (Woodrow Wilson, *Constitutional Government in the United States,* p. 45.)

There were also the differences between the slave States and the free States; the more southern States were de-

termined that slavery should not be interfered with by the central government. Commercial interests differed greatly; the southern States were almost entirely dependent upon their exports of tobacco, rice, and indigo, while Massachusetts and the other New England States were dependent upon the carrying trade and the fisheries.

Furthermore, the States feared taxation by any authority other than the local government as the abuse of the power of taxation had been one of the motivating causes of the Revolution.

The Constitution was a compromise between these conflicting points of view. The provisions of the Constitution therefore protected a minority of the States against the oppression of a hostile majority so far as this was possible. An attempt was made to limit the powers actually granted the federal government against abuse, by various restrictions, and by the first ten amendments, which were adopted in accordance with the understanding on which the Constitution was accepted.

One thing seems clear—that no important powers were intended to be granted the United States which were not deemed necessary to the accomplishment of the main purposes in view. It was doubtful if the Constitution would be adopted even if these powers were granted. Certainly, it was far from any intention of the members of the Convention to increase the risk of rejection by including any important grants of power which were not deemed essential.

2. MADISON'S DOCTRINE IN ACCORD WITH FUNDAMENTAL PRINCIPLES.

(a) Under dual system, provision for welfare divided between state and federal governments.

A government is organized to provide for the general welfare of its citizens. The function of a single unitary government is to provide for the welfare of its citizens in all respects in which it is proper for a government to act.

Under our system of dual governments, we have two sovereignties acting on the same individuals.

> ". . . and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other." (*United States* v. *Cruikshank*, 92 U. S. 542, 549.)
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> ". . . The power to promote the general welfare is inherent in government. Touching matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacities, touching all subjects jurisdiction of which is not surrendered to the federal government." (*Nebbia* v. *New York*, 291 U. S. 502, 524.)

(b) Division of powers marks division of responsibility.

Responsibility for the general welfare of the people living in the territory comprised within the United States is thus divided. That concerned with matters over which the United States has the right and duty to control is the general welfare of the United States. That in respect to matters which the States have the right and duty to control is the general welfare of the States.

(c) "United States" designates the political body.

When the Constitution gave the United States authority to levy taxes to provide for the "general welfare of the United States" it seems clear that this general welfare related solely to matters with which the United States as a political body had the right and duty to deal.

Taxes may be levied "to pay the debts and to provide for the common defence and general welfare of the United States". It is the debts of the United States as a political body which are to be paid, not the debts of the people of the United States; it is the common defense in war which is to be provided for, and since only the United States can declare and engage in war, it is necessarily the common defense of the United States, as distinguished from the States, which is intended. It is the general welfare of the United States as a political body which is to be provided for, so that thereby the people under its protection will be benefitted in their federal relations—as citizens of the United States and not in any other capacity or status.*

(d) General design to "promote general welfare" was to be through exercise of delegated power.

The Constitution in its preamble recites that it is established to "promote the general welfare". It must be presumed that this purpose of promoting the general welfare was, for the purposes of the Constitution, to be fully accomplished by conferring on the United States the enumerated powers set forth in the Constitution,

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**Note.* An examination of the Constitution shows over forty instances where the words "United States" or "United States of America" are used to designate the body politic. In a few cases the words refer to the territory under the jurisdiction of the federal government. In no case do the words mean—"people of the United States." In the Preamble, the "people of the United States"—the creative power—are distinguished from the "United States of America"—the created body politic.

leaving the control of other matters with the States. It follows that the general welfare of the United States is the general welfare touching matters, power over which was confided to the United States. If we hold that there are matters of general welfare of the United States which the United States is not authorized to control, but for which it can only apply money, we reach the absurd result that a constitution expressly framed to promote the general welfare did not give Congress any direct power to promote it with respect to certain matters.

This view is strengthened by other considerations.

(e) Taxing power normally auxiliary to regulatory power, and this is reasonable.

In the first place, the taxing power would normally and naturally be given for the purpose of carrying out those matters with which the government was authorized to deal. The government of the United States and the government of the States are similar to the multiple "districts" or organs of local government set up in some of our States. For example, the same people and the same territory may be organized locally into a municipality, a school district, and a fire district, each having control of its own functions and each having the taxing power. It would take very strong, explicit language in the governing statutes to convince one that the school district was empowered to tax and apply the money to the purchase of fire apparatus to be controlled by the fire district, or for the payment of salaries of policemen controlled by the municipality. Yet the situation is the same here. The United States has no duty or authority, except in connection with its powers. It would be wholly unnatural to give it power to tax for objects over which another sovereignty has the exclusive responsibility and authority. It is impossible to answer John Randolph