the Constitutional authority of Congress. We shall here show, that none of this legislation relied on by the United States constitutes an interference with the authority of the States in accordance with the principles laid down above and, therefore, constitutes no precedent for the present legislation.

The most that can be said of the precedents is that they show the practice of Congress to appropriate for matters beyond the scope of the enumerated powers. They do not show instances like the present of appropriations made for the direct purpose of carrying out plans to interfere with the authority of the States in violation of the Tenth Amendment and the basic principles of the Constitution.

The so-called precedents may be divided into the following classes:

(a) Appropriations made for matters not in any way related to the internal affairs of the States and which therefore can not constitute any interference with the State's authority, are not in any way repugnant to our system of dual sovereignties or to the Tenth Amendment.

These include the example cited by the Government of the grant by the United States of $50,000 in 1897 to destitute Americans in Cuba, the grant to aid sufferers from earthquake in Japan in 1925 and other grants for similar purposes. These grants it would seem might be justified as proper means to create good will in our foreign relations, etc., but in any event they do not interfere with the State's authority.

(b) Grants for what may be termed charitable or benevolent purposes, including the relief of distress, education, scientific investigation, etc.

While such appropriations or gifts may relate to internal affairs of the States, yet as we have shown above (if we accept the Hamiltonian theory that the United States can tax for objects beyond the scope of the enumerated powers) they can not be deemed an interference with the State's authority. If these gifts or appropriations had been made by an individual, the State could not control or prohibit them as it would violate the due process clause for a State to restrain a citizen from relieving distress or from educational or scientific research or applying funds for such purposes. Such an application of money, therefore, since not subject to the jurisdiction or control of the States, can not be deemed an invasion of a State's rights.

Under this head are included practically all of the so-called precedents cited by the Government in its brief. They include the following:

(1) Relief of distress due to catastrophe.

Under this head are cited grants "to aid sufferers from earthquakes, Indian depredations, fires, war or famine, tornadoes or cyclones, yellow fever, grasshopper scourges and floods."

These are all purely charitable grants of the character to which the Red Cross devotes its funds.

(2) Health.

Under this head are cited grants for studies in sanitary engineering and rural sanitation, the dissemination of health information, research into the nature and cause of disease, studies designed to promote the safety and health of miners, studies in educational methods, gifts to aid educational institutions and projects, and research and appropriations for the dissemination of information.

Here again we have purely benevolent grants which the States could not prohibit or control.

(3) Social Welfare.

Under this head are cited appropriations to "acquire and diffuse among the people of the United States useful information on subjects connected with labor," appropriations "to investigate and report upon all matters pertaining to the welfare of women," and to publish the results of such investigations, and to investigate and report "upon all matters pertaining to the welfare of children and child life."

Here again are benevolent grants which the States could not prohibit or control.

(4) Agriculture.

Under this head are cited appropriations for the collection of agricultural statistics, distribution of seeds, agricultural experiments and education, the study and eradication of animal diseases, investigation of plant and tree diseases, the study of "plant nutrition and soil fertility."

Here again are purely benevolent purposes.

There is not one of the foregoing matters which a State could constitutionally prohibit or regulate. They constitute no invasion of the State's authority. How strikingly they differ and how weak is the Government's case when they are cited as authority for the present gigantic combination to plow up ten million acres of growing cotton, eliminate forty per cent. of the total land planted in cotton, and to restrict other crops in proportion by agreements induced by benefit payments and entered into with millions of farmers in the country, such contracts being in violation of the constitutions, laws and public policy of the states.

(5) Certain grants made to the States to be used by the States in carrying out plans which they authorize and execute.

These appropriations are certainly not an invasion of the rights of the States.

These instances of grants cited by the United States therefore afford no precedent whatsoever for the present legislation.

8. SUMMARY OF THE PRINCIPLES INVOLVED AND ITS APPLICATION TO THE PRESENT CASE.

Under our constitutional system neither a State nor the United States can directly interfere, intermeddle with or control matters which under the Constitution are within the exclusive control of any other sovereignty, state or national.

Each sovereignty can exercise the powers which are exclusively conferred on it. Any effect which the normal and proper exercise of such power may have on the affairs of other sovereignties, state or national, is permissible. Such effect is held to be indirect and incidental to the exercise of a legitimate power.

But no direct interference, that is, no interference which is not the incidental result of the exercise of an admitted power, is permitted.

Furthermore, while motives of legislators cannot ordinarily be examined into, on the other hand if the legislation shows on its face that although purporting to be the exercise of an admitted power it is not an exercise of such power for its own sake, but is for the sole purpose of accomplishing something within the control or jurisdiction of another sovereignty (state or national), it will be held illegal. Furthermore, since taxes can only be levied for specified purposes, the purpose set forth in

its legislation must be inquired into, to see if it falls within the authorized purposes.

Still further, it makes no difference if such interference is accomplished by direct action or by indirection or with the voluntary assent of citizens of the sovereignty whose rights are invaded. The principle is applied that:

> "What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." (*Fairbank* v. *United States,* 181 U. S. 283, 294.)

This is "the well established rule." (*Macallen* v. *Mass.,* 279 U. S. 620, 629.)

These principles are applied because they are necessary to preserve our system of dual sovereignties, the basic principle upon which our Constitution and its system of government is founded. If this principle could be defeated by direct or indirect assault, the sovereignty of our individual governments would be impaired or destroyed and the system devised by the Constitution would collapse.

A further principle is applied to insure the preservation of the system. Where two powers possessed by two sovereignties (state and national) which considered apart from other provisions of the Constitution, or, if taken literally, would be in apparent conflict, they are interpreted in accordance with the spirit and intent of the Constitution as a whole; that is, a "practical construction" or interpretation is applied which "will not nullify or substantially impair" either power and will permit so far as possible each government to "administer its affairs within its own sphere . . . free from undue interference by the other." (See *supra* pp. 48, 49.)

Application of these principles to the present case.

In the present case we have under the Hamiltonian theory on the one hand a power to tax for certain purposes, namely, to pay the debts and to provide for the common defense and for the general welfare of the United States, and to appropriate or apply the proceeds to such purposes.

We have, on the other hand, the basic principle of the Constitution which requires that States should have exclusive control over local affairs which includes agriculture, and the Tenth Amendment which emphasizes this principle and expressly provides for such control by the States.

We have before us legislation, the sole and direct purpose of which by its terms is to directly restrict and thus control the production of agricultural commodities on a vast scale, and thus intermeddle with and control a matter of exclusive State jurisdiction.

We have, in addition, the circumstance that if the principle of this legislation is recognized as legal, Congress can cause the adoption in a State of practically any policy with reference to its internal affairs which Congress desires to put into effect, provided only Congress is willing to offer sufficient benefits to induce or coerce its acceptance, and therefore, if the principle is recognized, it results in Congress having power for practical purposes to impair if not destroy the authority of the States over their local affairs.

To hold that the welfare clause permits Congress to appropriate money for the express purpose, and in such manner as to control agriculture in the States, would mean that the framers of the Constitution, having expressly denied to Congress the right to control agri-

culture, gave Congress, nevertheless, by the application of money, the very right it had expressly denied it.

We must also consider that the asserted right of the United States to use the power to appropriate money for the purposes of controlling matters which it has no authority to control directly, and thus to accomplish a purpose clearly not intended by the Constitution, must be supported on the ground that such a purpose can be regarded as promoting "the general welfare of the United States."

Chief Justice Marshall in *Dartmouth College* v. *Woodward,* 4 Wheaton, 518, 629, said:

> "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

Under these circumstances can there be any doubt as to the proper interpretation of the clause we are now considering, or that the right to appropriate the proceeds of taxes for the general welfare of the United States can not include the right to appropriate for the direct purpose of impairing or interfering with the authority of the States over their local affairs?

9. CASES WHICH FULLY SUSTAIN THE PRINCIPLE ABOVE STATED.

THE CHILD LABOR CASES.

The first Child Labor case, *Hammer* v. *Dagenhart,* 247 U. S. 251, establishes the foregoing principle completely and for this reason we ask the indulgence of the court to analyze it at some length. The principle laid down in the dissenting opinion in that case delivered by Mr.

Justice Holmes and concurred in by three other justices, also sustains the illegality of the present legislation.

In the Hammer case Congress passed legislation forbidding the transportation in interstate commerce of manufactured goods produced in any factory in which within thirty days of shipment children under certain ages were employed. The court said:

> "The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States" (pp. 271-272).

The court therefore held the Statute unconstitutional and in the course of its opinion said:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.
>
> "The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution" (pp. 273-274).

So, in the present case, the right of Congress to appropriate money for purposes related to the general welfare of the United States was clearly not intended to enable Congress to control matters which the States are exclusively authorized to control in the exercise of their police power over agriculture.

The court further said, at pages 275, 276:

> "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 interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. (Cases cited.) To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States. . . .
>
> "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority."

Mr. Justice Holmes in his dissenting opinion said (p. 277 *et seq.*):

> "The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of

direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

"The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that if invalid, it is only upon some collateral ground. The statute confines itself to prohibiting carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued to-day that the power to regulate does not include the power to prohibit. . . .

"The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. . . .

"The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States."

We wish first to point out the similarities between the Hammer case and the present case.

In the Hammer case we have legislation by Congress forbidding the transmission in interstate commerce of certain goods. The purpose as shown by the act is to restrict or prohibit child labor in the States. Such labor was not, however, prohibited directly. It was sought to be controlled by offering a privilege or benefit —namely, the right to ship in interstate commerce—to those who conformed. Each manufacturer was free to conform or not as he pleased. If he did not conform, he did not receive the privilege. The majority of the court held that the effect on child labor as shown by the act was the direct purpose, and therefore the direct effect of the act, and not the indirect effect of the lawful exercise of an admitted power since the exercise of such power solely for an ulterior purpose, was an unlawful exercise of the power.

In the present case Congress undertakes to use the power of appropriating money for the express, sole and direct purpose of restricting and thus controlling agriculture. It offers a privilege—a grant of money—to those who conform to its plan and denies it to those who do not conform. The cotton grower is free to conform or not as he pleases.

It is clear that under the principles laid down in the majority opinion in the Hammer case the exercise of the right to appropriate for the direct purpose of effecting this unlawful result must be held invalid.

The present case is, however, much stronger than the Hammer case. Here we have no purported exercise of a legislative power, the indirect but lawful effect of which might be to regulate agriculture. We have here only the right to appropriate. **The effect on agriculture could not possibly be deemed the indirect effect of the right to**

appropriate money. The money was appropriated for this express purpose, and the effect to be produced was the express and direct effect of the appropriation and could not by any possibility be called its indirect effect (see *supra* p. 175).

For this reason the present legislation is also unlawful under the principle laid down in the minority opinion.

Mr. Justice Holmes said that direct intermeddling with methods of production in a State is unlawful. In the Hammer case he said Congress was merely exercising its admitted right to regulate interstate commerce, which included the right to prohibit transportation in interstate commerce, and that, such being the case, the motive or real purpose of Congress would not be considered even though it was apparent on the face of the act.

In the present case, however, he could not say this. Here we are dealing with an appropriation and not a legislative power. An appropriation can only be made for a purpose. Congress can not merely appropriate money; it must necessarily state the purpose of the appropriation. The validity of the appropriation depends on the purpose and hence the purpose must be examined into. Further, the purpose of the appropriation determines necessarily its direct effect. Thus, in the present case Mr. Justice Holmes would clearly agree that the purpose must be inquired into and that the direct purpose and effect sought to be accomplished was the intermeddling with agriculture.

BAILEY v. DREXEL.

In *Bailey* v. *Drexel,* 259 U. S. 20, the second child labor case, Congress imposed a tax on the profits of those employing child labor with an exception in case of ignorance by the employer of such employment.

The court held that the so-called tax was imposed to prohibit the employment of children and that this motive should be taken into account since the law showed on its face "the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation;" (p. 42). * * * "The so-called tax is a penalty to coerce the people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution" (p. 39).

Here we again have legislation offering a privilege, namely, an exemption from taxation to those who conform to the scheme, they being free to conform or not as they please. There is no direct prohibition. Action is voluntary in the same sense that it is voluntary in the present case. Yet the court calls the effect coercion and the legislation unlawful as an invasion of the rights of the States.

HILL v. WALLACE.

In *Hill* v. *Wallace,* 259 U. S. 44, the same principle was applied in holding the Future Trading Act unconstitutional which imposed a tax on contracts for the sale of grain for the purpose, as shown on the face of the act, of regulating the business of grain boards of trade.

In *Hill* v. *Wallace* the court distinguished *McCray* v. *United States* (*supra*) and similar cases on the ground that "in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law detailed regulation of a concern or business wholly within the police power of the state with a heavy exaction to promote the efficacy of such legislation."

CASES INVOLVING THE RIGHTS OF STATES TO GRANT OR WITHHOLD PRIVILEGES IN ORDER TO OBTAIN COMPLIANCE WITH MATTERS BEYOND THEIR JURISDICTION.

There are numerous cases applying this same principle to State legislation and holding that a State, although it has the absolute power arbitrarily to withhold or grant a privilege, can not use such power to induce the doing of some act which the State can not control or make the grant to a person or its withdrawal of the privilege from the person conditioned on such person conforming to action which the State can not directly control because such control is within the jurisdiction of another State or of the United States, or is a control which cannot be exercised by the State because of a constitutional prohibition. The fact that the person whose conduct is influenced or controlled is free to conform to what the State wishes or not as he pleases is no defense.

The States being as sovereign in respect to the matters committed to their charge, as is the United States, the principle of their right thus to control matters constitutionally beyond their jurisdiction is equally applicable to the right of the United States to control matters beyond its jurisdiction. In *Worcester* v. *State of Georgia,* 6 Peters 515, 570, the court said:

> "The powers exclusively given to the federal government are limitations upon the state authorities. But, with the exception of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power."

The principle is very clearly stated in *Frost Trucking Co.* v. *R. R. Commission of Cal.,* 271 U. S. 583. The

question in that case was whether the State had power to withhold a permit to use the highways from a private contract trucking company unless it became a public carrier. The court held that a private carrier can not, consistently with the due process clause, be converted against his will into a common carrier by the State. The question therefore was whether the State, by reason of its power, which the court for the purposes of the case admitted, of prohibiting the use of the highways, could so bring about the result which it could not accomplish by direct legislation. The court said (p. 593 *et seq.*):

> "There is involved in the inquiry not a single power but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter separately and substantively must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring the surrender which, though, in form voluntary, in fact lacks none of the elements of compulsion. . . .
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state,

> having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence."

In this case we have what is regarded as an absolute right by the State to prohibit or permit the use of its highways. We have also the principle that a State can not compel a private contract carrier to become a public carrier. The State seeks, however, to induce the contract carrier to become a public carrier by offering it a privilege which the State has the right to grant or withhold. The contract carrier is free to accept or not as he pleases. There is no constitutional restriction against his becoming a public carrier. The decision is entirely within his control. But this case holds that a State can not use its power, however absolute it may be, for the purpose of bringing about a result which it has no jurisdiction directly to order or control.

So in the present case the United States is attempting by the use of the right to appropriate money to bring about a restraint of agriculture which is a subject matter entirely beyond its right to control and the control of which is entirely within the jurisdiction of the States.

In the Frost Trucking Co. case the court quotes with approval the dissenting opinion of Mr. Justice Bradley in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, which is now the law, as follows:

> "Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions on their doing so * * *.
>
> "The whole thing, however free from intentional disloyalty, is derogatory to the mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance" (pp. 595, 596).

In *Looney* v. *Crane Company,* 245 U. S. 178, it was held that although the State had an absolute right to permit or refuse to permit a foreign corporation to do business in the State, it could not issue a permit only on condition that the grantee would pay a license tax for such permit based on its assets outside the jurisdiction of the State which therefore the State could not directly tax. The foreign corporation was free to accept the permit or refuse it. By a mere money payment it could obtain the permit. It was held, however, that the State could not use its right or privilege, however absolute, to accomplish a result which it could not accomplish directly because constitutionally beyond its jurisdiction.

In the Looney case the foreign corporation to obtain the privilege was only required to pay a comparatively small sum of money which it was entitled to pay if it chose. The public generally was not affected by the payment. In the present case the farmer in order to obtain the privilege is required to join a gigantic combination to drastically restrict production, which violates the Constitution, laws and public policy of most if not all of the States.

In *Terral* v. *Burke Construction Co.*, 257 U. S. 529, the same principle was applied in holding that the State could not revoke a permit to do business merely because the foreign corporation had resorted to the federal courts. The State had the absolute right to withdraw or withhold the privilege. The corporation had the right to resort to the federal courts or not as it pleased. It could not be induced, however, by the State to give up its exercise of this right by conditioning the benefit on its not exercising its right, because the control of whether it resorted to the federal courts was beyond the jurisdiction of the State.

In *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, the principle was applied to a matter of trivial importance. In that case a statute of the state of New Mexico made it unlawful for any insurance company to pay a fee to a person not a resident of New Mexico for placing insurance on property in New Mexico. It was provided that the permit to do business of a company paying any such fee should be withdrawn. Here again the court held that the legislation was unconstitutional on the ground that although the use of its legislative right to withdraw a privilege was within the State's power to grant or refuse, it attempted to regulate a matter outside its jurisdiction. Mr. Justice Holmes speaking for the court said (p. 434):

> "Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as a part of a scheme to accomplish a forbidden result. *Frick* v. *Pennsylvania,* 268 U. S.

473. *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta,* 256 U. S. 350, 358. *Badders* v. *United States,* 240 U. S. 391, 394. *United States* v. *Reading Co.,* 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral* v. *Burke Construction Co.,* 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203; *Looney* v. *Crane Co.,* 245 U. S. 178, 188. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the attempt. *New York, Lake Erie & Western R.R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646."

In this case the right sought to be controlled was not subject to state control solely because it was an act performed outside the jurisdiction of the State. It was an act of comparatively trivial importance which did not involve any real question of public policy. The legislation was unconstitutional because the State had no right by the exercise of its undisputed power to admit or exclude, to attempt to control this trivial matter outside of its jurisdiction.

SUMMARY OF THE FOREGOING CASES.

The foregoing cases conclusively establish the principle that although a sovereignty (state or national) has an absolute right to grant or withhold a privilege it can not grant or withhold such privilege for the purpose of inducing action which is beyond its jurisdiction to con-

trol, either because such control is confided to the jurisdiction of another sovereignty, or because such control is prohibited by a constitutional limitation.

The present case falls clearly within this principle. The right to appropriate is used by the United States for the direct purpose of inducing action which is beyond the jurisdiction of the United States and is within the exclusive jurisdiction of the States.

OTHER CASES ESTABLISHING ANALOGOUS PRINCIPLES.

It is a fundamental principle of constitutional interpretation that any action by the United States or the States which is repugnant to the intent of the Constitution is unconstitutional.

Thus, although the United States, by the express wording of the Constitution, is given an unlimited right to lay excises for its governmental purposes in respect to any subject matter whatsoever, without any limitation, it has been held that by implication this broad and apparently unlimited right is subject to the restriction that the United States shall not tax the instrumentalities of the State, since by doing so it could interfere with or destroy the State or prevent it from accomplishing its proper functions, which would be repugnant to the spirit and intent of the Constitution.

The Collector v. *Day,* 11 Wall., 113.

In other words, the broadest kind of right expressly granted to the United States by the Constitution is qualified and must be limited where its exercise would be repugnant to the intention of the Constitution.

In the present case, on the same principle, it is clear that if the United States, as the Government contends, has the unqualified right to appropriate tax money for any purpose it pleases, such right by implication must

be restricted where its direct exercise is used to control a matter expressly reserved to the States.

Numerous other cases hold that a State, although acting within its apparent field of power, cannot use such right to discriminate against Interstate Commerce. Thus, the Inspection Laws of a State which are exercised under the power to protect public health, cannot be so exercised as to discriminate against imports from another state.

Minnesota v. *Barber,* 136 U. S. 313.

Bremmer v. *Redman,* 138 U. S. 78.

Voight v. *Wright,* 141 U. S. 62.

On the same principle, in the present case, if the United States has the unqualified right of appropriation, it cannot be so exercised as directly to exert control over agriculture which the United States is not authorized to control.

10. CONTENTION BY THE GOVERNMENT THAT NO CONTROL IS EXERCISED BY THIS LEGISLATION.

The Government contends that "no power of control over or regulation of agriculture has been asserted, but that, to the contrary, steps authorized by this Act and taken under it do not go beyond the appropriation and spending of the money". (Government Brief, p. 264.)

It bases this statement—*first*: on the contention that the compliance with the scheme of production is purely voluntary; and *second*: on the ground that the legislation contemplates that the Secretary would do no acts which are not legal under the laws of the several states.

We have sufficiently answered above the contention that the carrying out of the plan by granting benefits to those who comply and refusing benefits to those who refuse to comply, is not an exercise of control.

The contention that the Secretary of Agriculture is only authorized to carry out the scheme in States where

such a scheme would be lawful if subject to the laws of the States, in other words, where such a scheme would be lawful if carried out by an individual, is immaterial if correct, but it is not correct. An attempt to control matters beyond the jurisdiction of the United States is unconstitutional, not only where it is contrary to the laws of the various States, but also merely because it is the exercise of a control, which control has not been granted to the United States, and for this reason it is beyond the power of the United States, and therefore unconstitutional.

Furthermore, the contention that the Secretary of Agriculture was to put his plan into effect only in those states where the law permitted such a scheme is wholly inconsistent with the legislation. It is clear that the scheme approved by the legislation could not be made effective or carried out unless applied generally—the Secretary would defeat the purposes of the Act if he only reduced production in some states and left it unrestrained in others. The Act would obviously not have been passed unless it could be applied everywhere.

The major policy of the Act (Section 2) is to establish and maintain a balance "between production and consumption of agricultural commodities, and such marketing conditions therefor as will re-establish prices to farmers." The justification for the legislation is stated in the Declaration of Emergency which sets forth that the prevailing prices of agricultural commodities have destroyed the purchasing power of the farmers for industrial products, impaired agricultural assets supporting the national credit structure and affected transactions in agricultural commodities with a national public interest, and obstructed the normal currents of commerce in such commodities. The Secretary is given authority by Section 8, sub-section (1), to provide for the limita-

tion of production for the express purpose of effectuating the policy of the Act. He is given further power, with the approval of the President, "to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title." It is quite clear that the Act contemplates its being carried out under the powers claimed by the United States, and regardless of State laws, and that it could not otherwise accomplish its objects. The administration of the law has coincided with this view. The Secretary has proceeded to put the plan into effect, regardless of the laws of the States under which such a combination to limit production is unlawful.

XIV.

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

The Constitution confers power to borrow money, levy taxes, coin money and regulate the value thereof, which powers considered together the Government refers to as the fiscal powers of the United States. The United States, of course, also has implied power to collect the taxes and other receipts of the Government and to disburse them for various governmental purposes.

Under these powers the National Banks, the Federal Reserve Bank, and the Federal Land Banks and Joint Stock Land Banks have been authorized. The latter are authorized to make agricultural loans. The plight of the farmer is such today that the Government contends these banks have found difficulty in collecting their loans, that they have many frozen assets and cannot turn over their assets rapidly, so that credit is contracted.

Having created these banks with the power to make agricultural loans, it contends that Congress has power to preserve them.

The argument then proceeds that by restricting and regulating agriculture, as provided for in the present legislation, farm property will increase in value, farmers will be able to pay their mortgages; this will benefit the banks set up by the Government and make them more effective, enabling them to sell their bonds so as to increase their assets and thus supply additional credit, and carry out their policies more effectively. The Government has also invested money through the Recon-

struction Finance Corporation in twelve regional agricultural credit corporations. The Government says,

> "Only by increasing the purchasing power of the farmer could the large investments which the federal government has made in this field ever be liquidated and the stability of the financial system be restored."

The trouble with the Government's contention is that it proves too much.

The United States in *M'Culloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *Bank,* 9 Wheat. 738, was held entitled to establish banks. It was admitted that the Constitution granted no express power to form such corporations but it was held that the organization of such banks was permissible because it was an appropriate means to carry out the Government's fiscal policies.

The Government collects in taxes each year large sums of money in the various parts of the country; it must keep, transport, and disburse these sums, and engage in other similar financial operations. It, of course, must have power to conduct these operations. It could conduct them itself, if it saw fit to do so, through its own employees. It was held that to conduct them through banks was a reasonable, appropriate method, and for this reason the Government was authorized to create banking corporations for the purpose.

Having decided to create a corporation or corporations for the purpose, in order that such banks might be efficient and economical, it was held that they might be authorized to engage in the general banking business in the same manner as other banking corporations which the United States might use for the purpose of aiding in its financial operations.

In *M'Culloch* v. *Maryland, supra,* Chief Justice Marshall, in speaking of the fiscal operations which the Government had to conduct, for which a bank was an appropriate means, said,

> "Throughout this vast republic from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive?" (p. 408).

In *Osborn* v. *Bank, supra,* Mr. Justice Johnson, in referring to the fiscal policies of the bank, said:

> ". . . it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury;" (p. 872).

It was these fiscal operations, absolutely essential to government operations, which the court held in these cases justified the creation of banks.

Authority to create the Federal Land Banks and the Joint Stock Land Banks was based on the same premises. The court in *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, sustaining their validity, said,

> "We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositaries of public moneys and purchasers of Government bonds, brings them

> within the creative power of Congress, although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions."

In other words, Congress is authorized to create banks as agencies through whom it may conduct its fiscal operations and, in order that such banks may be efficient, it may give them the additional powers normally exercised by banks. In the same way, if Congress should construct an interstate railroad it would have authority, in order that the railroad might operate economically and reasonably, to permit it to conduct the ordinary intrastate business which an interstate railroad normally conducts.

The contention that the Government now makes is that because Congress is authorized to create banks as an appropriate means to conduct the Government's fiscal operations and authorize such banks to conduct normal banking business, it may, in order that such banks may be successful, regulate and control any industry in which they may invest their money. Because the banks and other governmental agencies hold about eighteen per cent of the total farm mortgage debt, Congress, it is contended, may regulate the entire agricultural industry. The Government does not limit itself to provisions respecting the collection or liquidation of the particular mortgages which these banks may hold, but contends it is authorized to regulate all agriculture.

If this principle is sound, the Government, having constructed a railroad under its interstate commerce authority, could, in order to make such railroad successful and give it enough business to support it, regulate all intrastate industry which might furnish it with business. Or, having created the national banks which lend money to practically every industry in the country, it can, in order to protect such banks, regulate intrastate industry of every character.

We submit the contention does not justify further discussion.

XV.

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

Under the Fifth Amendment, no person can be deprived of property without due process of law. This provision is applicable to the taxing power.

It is not due process of law to take, without compensation, the property of one person or a class of persons by taxation or otherwise in order merely to hand it over to another person or class of persons.

In the case of a tax raised for a particular purpose, as in the present case, the purpose for which it is to be applied, must be a public purpose.

In *Jones* v. *City of Portland,* 245 U. S. 217, 221, the court said,

> "It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State."

See also *South Carolina* v. *U. S.,* 199 U. S. 437, 451.

The ground on which taxation is justified is that every person is liable to contribute to the public treasury, funds to be put to public use. The right to tax the individual is based on his obligation to contribute to such public purposes, including the maintenance of the Government, and the consideration he receives is his interest in the maintenance of the Government and the public services so furnished by or through the Government. If taxes are levied on him for a private use, he is under no obligation to contribute and he cannot be deemed to have re-

ceived a benefit and his property is arbitrarily taken without compensation.

Is the present purpose a public purpose?

To determine this, we must ascertain why and for what purpose the payments provided for in the present legislation are made to cotton growers. This question, we have fully considered above (*supra,* pp. 21-6). The payments are made to cotton growers to enable them to receive a "fair share in the national income". This is to be accomplished by direct cash payments to those who agree to restrict their production. The payments add to the cotton growers' income and the restriction enables them to get higher prices for the restricted production. The objective is to give cotton growers the same relative purchasing power or share of the national income for their products which they had in the period 1909 to 1914.

It is contended that if farmers receive this increased share of the national income they will purchase more manufactured or other goods and thus indirectly increase general prosperity. The following points are to be noted:

1. The payments are not made to farmers as objects of charity. Recipients of benefits are not selected on the ground of their poverty. The richest man in the country, if a cotton grower, is requested and is entitled to join in the plan and receive benefits.

2. The cotton growers are not paid to perform or provide any direct service to the public. They are not asked to produce more products required by the public; on the contrary, they are required to produce less. They are not asked to do a single thing which can in any conceivable way be regarded as a direct service to the public; on the contrary, they are given a cash benefit in order that they may do less work so as to enable them to charge the public more for what they do produce.

In other words, the cotton growers are paid to do something which is for their own interests and involves no sacrifice on their part or any direct service to the public. On the contrary, the direct immediate effect is a decrease of supply, and an increase in prices—a detriment to the public.

3. The purpose of the plan is to give "a fair share of the national income to the cotton growers" (*supra,* p. 26), but the money used for this purpose is not taken from the incomes of those who have more than the farmers and given to the farmers so that they will have more nearly an equivalent income. There might be some social justice, if not constitutional authority, if incomes in excess of a certain amount were taken from one class and given to another class having smaller incomes in order to equalize them.

But, in the present case, the tax is not an income tax or a tax on income in excess of a certain amount. The taxes are imposed on cotton manufacturers no matter how much money they may be losing. The plan does not propose to equalize incomes, but to take money or property from the cotton manufacturers whether or not they have any incomes and pay it over to the farmers in order that the farmers may have an income.

It is a well known fact that for a decade the cotton textile industry on the whole has been losing rather than making money. The situation became so disastrous that the President on March 26, 1935 appointed a committee composed of cabinet members to investigate conditions in the industry. Their report was submitted by the President to Congress on August 21, 1935 (*Cotton Textile Industry, 74th Congress, 1st Session, Document No. 126*). This report shows the unfortunate conditions in the textile industry. One can not read it without con-

viction that this industry needs help as much as the cotton growers. To illustrate the report shows that in the period July 1 to December 31, 1934 out of 457 cotton mills comprising the principal cotton textile mills in the country, 300 sustained losses and only 157 made profits. (Report, p. 61.) During this period the cotton manufacturers became liable for over $50,000,000 in processing taxes necessarily paid for the most part out of capital and used for the purpose of giving the farmers a "fair share of the national income" or profits.

But this is not all. The cotton growers, receiving these taxes so paid out of the capital of the cotton mills, have agreed to reduce the cotton available for sale so as to increase the cost of this product which the mills must purchase. The plan is to increase the cost by at least six cents a pound, or over $150,000,000 a year for the cotton domestically consumed. Thus, so far as the plan is successful, the cost to the cotton textile industry will be over $150,000,000 a year for increased cost of cotton and over $100,000,000 a year in processing taxes, a total of over $350,000,000 a year. The total value of product of the cotton textile industry in 1933 was $861,170,352. (*cf.* note p. 5.) These additional taxes must be paid regardless of whether the mills make any profits.

It is, of course, contended that the mills will pass the tax on to their customers. Of course, they will, to the extent that they can do so, but to what extent they can is another question. The tax is a direct tax on the manufacturers, payable by them whether or not they make any profits and whether or not they are able to include all or any part of the tax in their prices to the public. Furthermore, to the extent the tax can be passed on to the public, it is passed on to every class in the community and not merely to those who have an income equal to the farmers.

All classes of persons necessarily buy cotton goods, including the very poor.

4. The contention that the increased purchasing power thus given the farmers will enable them to purchase more manufactured goods and thus increase general prosperity merely means this: By taking property from Class A and giving it to Class B, Class B will have more purchasing power and will therefore spend more money and thus indirectly add to the general prosperity. This is merely distribution of wealth by governmental decree.

The fact stated above—that the cotton manufacturers are required to pay these immense sums, whether or not they make any profits, to the farmers for the purpose of giving the latter "a fair share of the national income"—is a simple fact. Whether the economic theory that this will increase general prosperity is sound is another question which is not, perhaps, material. We have discussed it in the note at pages 27-29, *supra*.

Can a reduction of production increase national income; if not, how can the reduction of production provided for by this legislation aid the public generally? How can a price be determined which will give the farmers the same relative purchasing power for their products as before the war, since the cost and labor involved in producing agricultural commodities and the character and cost of most articles farmers buy has radically changed? Why is the relative pre-war purchasing power which farmers had, even if it could be determined, a fair basis for division of the national income today? These are some of the questions discussed above.

In any event, we do not deem them material. Whether or not general prosperity is aided by such transfer of

purchasing power, it is clear that it is an indirect result only and that it is sought to be accomplished by a transfer of property from the manufacturers, regardless of the amount of income they have, to the farmers who are not required to render any direct service to the public in exchange, the only service rendered being the agreement to restrict production, the direct result of which is to aid the farmers by increasing their prices and consequently to increase the cost of farm products to the public.

We respectfully submit that a transfer of property from one class to another for such purposes is clearly not for public purposes, as recognized by the law.

In *Allen* v. *Smith,* 173 U. S. 389, the bounty for sugar which was sustained in *United States* v. *Realty Co.,* 163 U. S. 427, as the recognition of a moral obligation to those who had planted their crop the previous year on the faith of the bounty law then in existence, whether or not such law was legal, was under consideration. The question was whether the payment should go to the manufacturer of the sugar or to the grower of the cane. The court held that the bounty was intended for the manufacturer of the sugar in consideration of his manufacturing it. Otherwise, the court held it would be a mere donation. The court said,

> "This disassociates the bounty altogether from the motive which actuated Congress in granting it, and turns it into a mere donation of so much money, which it can not be presumed to have made, even if it had the power. Bounties granted by the government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or

> moral obligations to be recognized. To grant a bounty irrespective altogether of these considerations, would be an act of pure agrarianism;" (p. 402).

In the present case, we have no direct service to be rendered to the public but action only, which it is admitted, is for the farmers' own interest. Benefit payments are, therefore, a pure gratuity.

In *Loan Association* v. *Topeka,* 20 Wall. 655, it was held that bonds issued by a municipality to induce a bridge company to locate in the municipality were illegal since the money must be raised by taxation and the purpose would not be a public purpose. The court said,

> "The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.
>
> "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.
>
> "Nor is it taxation. . . . 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.'
>
> ". . . If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pur-

> suit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving of aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town'' (pp. 663, 664, 665).

In this case, the recipient did give consideration by the operation of a factory in the municipality which presumably otherwise would not have been operated, and he did furnish bridges to the public, employment to the inhabitants of the municipality, and maintained property which the municipality could tax. In the present case, the farmer is restricting the products he offers to the public, taking taxable land out of cultivation, and throwing farm laborers out of employment.

In *Parkersburg* v. *Brown,* 106 U. S. 487, the City of Parkersburg was authorized to issue bonds for the purpose of lending the proceeds to persons engaged in manufacture, the money to be repaid. This was held unconstitutional since the money to pay the bonds might have to be raised by taxation. The court said,

> ''Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person'' (p. 501).

In this case, as in the *Topeka* case, the manufacturer was to furnish a consideration by maintaining a manufacturing plant.

In *Cole* v. *La Grange,* 113 U. S. 1, the Constitution of Missouri authorized the issue of municipal bonds to aid manufacturers. The court said,

> "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It can not, therefore, authorize them to issue bonds to assist merchants or manufacturers whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject" (p. 6).

The court pointed out that aid given public utilities such as railroads and grist mills has been sustained on the same ground that the right of eminent domain has been justified, namely, that these furnish an essential or necessary public service and are, therefore, to be distinguished from cases of aid to private business which is not ordinarily a matter of public necessity. It is to be noted, however, that in both cases some consideration or service was rendered which differentiates both from the present case.

The principle has been sustained in many cases in the State courts. In the leading case of *Lowell* v. *Boston,* 111 Mass. 454, the City of Boston was authorized to issue bonds to raise funds to render aid by way of loans in rebuilding a portion of the city burned in the great fire of 1872. The court held that taxes to be raised for this purpose would not be raised for a public purpose. The court points out clearly that a purpose to be public must furnish some direct public service to the community and that the indirect benefits which might ensue from a private business furnishing employment and otherwise aid-

ing in producing prosperity can not turn what is a direct private purpose into a public purpose. The court said,

> "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. **It is the essential character of the direct object of the expenditure which must determine its validity,** as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.
>
> "The principle of this distinction is fundamental. It underlies all government that is based upon reason rather that upon force. . . .
>
> "an appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway, is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community,

> to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. . . . But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation'' (pp. 461, 462, 463).

In certain other cases the right of a State to raise taxes in order itself to engage in business which has usually been considered of a private or semi-private character has been contested. Quite a different principle is here involved. The State in such case furnishes a direct service to the public. The question is whether the State may furnish this character of service, which is ordinarily furnished by private individuals, and which doubtless would be so furnished if the State did not provide therefor. The question is quite different from cases of furnishing money to private individuals for businesses of a private character so that they may make a profit even though in consideration thereof they also furnish a service.

In *Jones* v. *City of Portland,* 245 U. S. 217, it was held that the City of Portland could engage in the business of selling coal to the inhabitants at cost. The court stated its reluctance to interfere with the right of a State to determine what was a public purpose. It stated that States and municipalities could furnish light and water and also natural gas for heating purposes, which were recognized as public purposes and that, therefore, it saw no reason why the municipality should not also furnish heat in a different form by such means as were necessary, heat being as indispensable to the health and comfort of the people as light or water. Here a direct service to the public was rendered by the municipality.

In *Green* v. *Frazier,* 253 U. S. 233, the same principle was applied to the legislation of the State of North Dakota providing that the State, through corporations organized for the purpose, might engage in banking, manufacture and marketing of farm products and furnishing grain elevators and home building operations. It was shown that ninety per cent of the wealth of the State was produced from agriculture and that a large proportion of the people were tenants moving from place to place for whom it was desirable to furnish homes.

The court reiterated its reluctance to interfere with what the Constitution and laws of the State deemed a public purpose and held this legislation did not violate due process. It pointed out that the State was furnishing a direct service to the public:

> "This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Loan Association* v. *Topeka,* 20 Wall. 655-665" (p. 242).

The court also laid stress on the peculiar conditions existing in North Dakota, emphasized in the opinion of its highest court. Here, of course, we again have a direct service furnished to the public by the State itself and the benefit to the public is not the indirect result of a business conducted by private individuals.

In the recent Railroad Pension Case (*Railroad Retirement Board* v. *Alton R. Co.,* 55 Sup. Ct. Rep. 758), one of the objections to the act was that the railroads were treated as a single employer so that pensions from employees of one railroad might be paid out of funds furnished by another. In that case it could also be contended that it was a public benefit that retired railroad employees should have pensions as this would result in their spending money which would aid a more general

prosperity, just as in the present case. The court, however, said,

> "There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees" (p. 765).

We respectfully submit that while the application of the principle involved in these various cases is not precisely defined in all cases, the following limitation appears clearly established.

When money is raised by taxes to be paid to private individuals, it is not a public purpose unless they render some direct service or benefit to the public in return. An indirect benefit which results merely from the fact that the recipients by reason of the payments to them are more prosperous and therefore by spending more money tend to make the community more prosperous is not sufficient to make the payments a public purpose.

The purpose of this legislation—to take property from cotton manufacturers, and pay it to farmers in order to give the farmers what Congress deems a fair share of the national income—is not a public purpose or due process. It is aggravated in the present case by the fact that the money is not taken from the income of the cotton manufacturers for the purpose of equalizing income but is taken from them regardless of whether they have any income in order to provide an income for the farmers.

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.

The plan for restricting the production of cotton, as we have shown above, is unlawful and the benefit payments are made for the express purpose of carrying out this unlawful scheme and, further, are not for a public purpose. Since the taxes are levied solely for the purpose of paying the benefits and thus for the direct purpose of carrying out this unlawful plan, they are necessarily unlawful.

An illegal or unconstitutional tax can not be collected, whether the tax is illegal because levied on an object which it is not within the power of Congress to tax or is for an unlawful purpose.

That the taxes are levied for the sole and direct purpose of carrying out the unlawful plan is undoubted. They go into effect when, and only when, the Secretary of Agriculture determines that the benefit payments are to be made; the Act provides that they shall cease when the benefit payments terminate; they are appropriated for the purpose of paying these benefits which are the heart of the plan and are made solely for the purpose of carrying out the plan.*

---

*NOTE. "Estimated collections and expenditures covering commodity programs in effect or in process of approval for marketing periods indicated" (*Report*, p. 278, table 34). Cotton, Aug. 1, 1933—July 31, 1935; Collections: Processing tax, $237,000,000; Compensating tax, $22,000,000, total, $259,000,000. Expenditures, rental and benefit, $242,236,000; Removal of Surplus, (nothing); Balance, $16,764,000; less administrative expenses chargeable to commodity program, $10,527,757; balance, $6,236,243.

Since the right of the United States to levy taxes is, as we have shown above, a limited right—the right to levy taxes only for specified purposes—and as the carrying out of this unlawful scheme is not included within these purposes, and further since it is not a public purpose, it necessarily follows that the taxes are unlawful.

The cases of *Massachusetts* v. *Mellon* and *Frothingham* v. *Mellon,* decided in one opinion (262 U. S. 447), have no application, as the Government urges, to the present case.

The suit brought by Frothingham did not involve the question of whether an illegal tax could be collected. It involved only the question of whether officers of the United States Government could be enjoined from disbursing moneys from the treasury which had been appropriated by Congress for purposes alleged to be unconstitutional, on the ground that such payments might thereafter affect the plaintiff if, on account of such payment, it thereafter became necessary to assess taxes and taxes were assessed which, because of their nature, might affect Frothingham as a taxpayer.

In the *Mellon* case, the State of Massachusetts and a citizen of the United States brought suits to enjoin the Secretary of the Treasury and other Government officers from carrying out the Shepard-Towner Maternity Act which provided for payments by the United States to such states as undertook, in accordance with the terms of the Act, to cooperate with the United States in reducing maternal and infant mortality.

The court held that the State's right over the subject matter was not invaded since payment would and could be made to the State only with its express consent. To the argument that it was an attempt to induce the State to give up part of its sovereign rights, it was answered

that this question as between the United States and a State was a political question and not a judicial one, and that it therefore could not be decided by the court.

The court held that the individual taxpayer had no standing. The taxpayer's contention was that if the money was appropriated she might be called upon in the future to pay taxes which would not have been assessed on her if these moneys had not been so appropriated.

The court said of the taxpayer:

> "His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity. . . .
>
> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

In other words, it was not shown that the plaintiff was suffering any immediate damage nor was it certain that she would suffer any damage in the future, and the possibility that she would suffer any damage in the future was merely shared with all members of the public and she showed no specific or special damage to herself.

Of course, the present case is quite different. Here the Hoosac Mills is called on to pay immediately over $80,000, which we submit is illegally assessed. It is not an indeterminate question of whether it may or may not be damaged in the future by the payment of these unlawful benefits from the Treasury, nor is the taxpayer

damaged merely as all members of the public are or may be damaged. The damage is immediate, direct, and certain and the public generally is not suffering this damage, but only the Hoosac Mills and a few other cotton textile manufacturers. The *Mellon* case clearly has no application.

Respectfully Submitted,

MALCOLM DONALD
EDWARD E. ELDER

Herrick, Smith, Donald and Farley,
Boston, Massachusetts.