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.

BRIEF FOR RECEIVERS OF HOOSAC MILLS CORPORATION, RESPONDENTS.

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Opinions Below.

The opinion of the District Court for the District of Massachusetts is reported in 8 F. Supp. 552, under the style *Franklin Process Company* v. *Hoosac Mills Corporation* (Record, pp. 19-38). The opinion of the Circuit Court of Appeals for the First Circuit is reported in 78 Fed. (2d) 1, under the style *William M. Butler et al.* v. *United States* (Record, pp. 45-61).

Jurisdiction.

The decree of the Circuit Court of Appeals to be reviewed was entered July 13, 1935 (Record, p. 61). Jurisdiction to review by writ of certiorari is found in the provisions of section 240 (a) of the Judicial Code as amended February 13, 1925 (28 U.S.C. 347).

Questions Presented.

1. Whether the provisions of the Agricultural Adjustment Act as originally enacted by which it is sought to levy and apply floor stocks taxes and processing taxes are constitutional.

2. If not, whether the attempted ratification contained in provisions of the amendatory Act approved August 24, 1935, makes valid the said processing and floor stocks taxes.

Statutes Involved.

The statute under examination is Title I of the Agricultural Adjustment Act, approved May 12, 1933, c. 25, 48 Stat. 31, 7 U.S.C. 601-619, in the form in which it was enacted and remained until October 7, 1933, the date of filing of the bill and answer (Record, p. 1) and the date of appointment of a temporary receiver for Hoosac Mills Corporation and the date to which the principal amount of the claim of the United States was computed (Record, p. 14). (Note: The decree appointing receivers dated October 17, 1933, at Record, p. 1, is the appointment of permanent receivers.) This Act has been amended since October 7, 1933. The amendments brought in issue in this case are principally the provisions of new section 21 (b), added to the Act by section 30 of the Act of Congress approved August 24, 1935. The sections of the statute to which any extended reference is herein made, together with the pertinent sections of the Constitution, are set forth in Appendix A, hereto annexed.

Statement of the Case.

This case arises in the administration of the receivership of Hoosac Mills Corporation, a Massachusetts corporation, operating mills in New Bedford, Taunton and North Adams, all within the Commonwealth of Massachusetts, for the manufacture of cotton goods. After the appointment of a receiver on October 7, 1933, an order of notice issued to all

creditors to prove their claims. Pursuant to this order of notice the United States filed a claim for taxes. This appeal deals with so much of the claim of the United States as relates to processing and floor stocks taxes under the Agricultural Adjustment Act. The Receivers in their First Report on Claims (Record, p. 7), contested the validity of the taxes under the Agricultural Adjustment Act on the ground that said taxes and said Act are unconstitutional, and recommended that the claim for said taxes be disallowed. In order that the issue might be confined solely to questions of constitutionality, counsel for the Receivers moved to amend the Receivers' First Report on Claims by striking from paragraph 11 the following sentence:

> "The regulations issued under said Act and the rate of tax prescribed by said regulations are not in accordance with the requirements of said Act and are illegal."

This amendment was allowed (Record, p. 12). After hearing before the District Court a decree was entered wherein the Receivers were ordered to allow said claim as a valid claim (Record, p. 18). From this decree the Receivers appealed (Record, p. 19) and filed their assignment of errors (Record, p. 38). After a praecipe had been filed by counsel for the Receivers and allowed by the court (Record, p. 41), a cross-praecipe with a proposed statement of evidence was filed by counsel for the United States. The court did not settle the statement of evidence, and denied the cross-praecipe (Record, p. 43).* Upon appeal to the Circuit Court of Appeals for the First Circuit the order of the District Court was reversed.

This proceeding is in no wise concerned with the claim for 1919 income taxes contained in the claim of the United States and mentioned in the Receivers' First Report on

* A brief comment on the Addendum, filed after the denial of the cross-praecipe, is made in Appendix C.

Claims, such portion of the claim having been removed from consideration in this case by paragraph 5 of the decree (Record, p. 19). The matter relating to the 1919 income tax has already been adjudicated in a separate proceeding.

The Facts.

The material facts involved in this case are determined in the opinion of the District Court (Record, p. 19) and in the findings of facts made at the request of the government (Record, p. 13). As so determined the facts are as follows:

Hoosac Mills Corporation, a processor of cotton, prior to receivership (October 7, 1933), and its Receivers after receivership, filed original and amended floor stocks tax returns containing an inventory of articles processed wholly or in chief value from cotton held for sale or other disposition on August 1, 1933, showing tax liability on account thereof under section 16 of the Agricultural Adjustment Act, and also processing tax returns for the period from August 1, 1933, to October 7, 1933, inclusive, showing the number of pounds of cotton put in process by it during said period and showing tax liability on account thereof under section 9 of said Act. A portion of the taxes shown therein was paid by Hoosac Mills Corporation or the Receivers (Record, p. 14).

On or about February 12, 1934, the United States, through its Collector of Internal Revenue for the collection district of Massachusetts, filed a claim with the Receivers of Hoosac Mills Corporation, which, so far as it relates to cotton processing and floor stocks taxes, is in the amount of $81,694.28, which amount contains interest and penalties to February 9, 1934, and covers the unpaid balance of taxes of both classes accruing from August 1, 1933, through October 7, 1933. Further interest is claimed from February 9, 1934 (Record, p. 13).

The amounts of unpaid balance of said taxes for said period and the interest and penalties thereon to February 9, 1934, as

shown on said claim, are summarized as follows (see Record, p. 14):

	Tax	Interest	Penalties	Total
Section 9.				
Processing Tax	$43,125.35	$645.99	$286.30	$44,057.64
Section 16.				
Floor Stocks Tax	37,466.37	170.27		37,636.64
			Total	$81,694.28

There is no dispute regarding the amount of the balance claimed to be due the United States for this tax claim (Record, p. 15).

On July 14, 1933, with the approval of the President, the Secretary of Agriculture made Cotton Regulations Series 2, wherein he prescribed that the first marketing year for cotton shall begin August 1, 1933, and that as of August 1, 1933, the processing tax on the first domestic processing of cotton shall be at the rate of 4.2 cents per pound of lint cotton, net weight, and stated that said rate as defined in the Act had been ascertained by him from available statistics of the Department of Agriculture. By further regulations approved July 28, 1933, he established conversion factors computed from available statistics of the Department of Agriculture to determine the amount of tax imposed or refunds to be made with respect to articles processed from cotton (Record, pp. 15-16).

In determining the rate of tax at 4.2 cents per pound the Secretary of Agriculture determined the difference between the current average farm price of cotton and the fair exchange value of cotton from statistics available in the Department of Agriculture as follows (Record, p. 16):* He

*The exact mathematical operations are not revealed in the statement of facts, but are here spelled out as the necessary implication from the terms used.

computed from reports and statistics gathered in accordance with established practice an average of farm price of cotton during the period August 1, 1909, to July 1, 1914, which he determined to be 12.4 cents per pound. From similar reports and statistics he computed an average farm price of cotton on June 15, 1933, which he determined to be 8.7 cents per pound. From similar reports and statistics he computed an index number to indicate the percentage relationship between the current prices paid by farmers for commodities they buy and the prices paid by farmers for commodities they bought in the period August 1, 1909, to July 1, 1914. This he determined to be 103%. To determine the "fair exchange value" of cotton he applied the index of 103% to 12.4 cents, the figure determined as the average price of cotton from August 1, 1909, to July 1, 1914, and obtained a value of 12.77 as the fair exchange value. From this he deducted the average farm price of cotton on June 15, 1933, as determined above, 8.7. This should have given the difference between the fair exchange value and the current average farm price, both as computed by the Secretary, but the difference as so computed is 4.07 cents per pound, and not 4.2 cents per pound. It is apparent that a further adjustment not revealed in the record was applied.*

As found in the opinion the statistics of the Department of Agriculture at best are only averages obtained from variable factors subject to different interpretations (Record, p. 30).

The taxes involved in this case are computed at the rate of 4.2 cents per pound of lint cotton (Record, p. 16).

The prescribed marketing year was consistent with the cotton year recognized by government agencies, private agencies and foreign countries (Record, p. 16).

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*For the sake of completeness of the computation it is here stated that the further adjustment was an average factor applied to correct for tare, farm prices being figured gross in bales and the tax on processors being figured net on lint cotton out of bales.

The Receivers, as above stated, intentionally removed from this case language which would have raised questions of the regularity under the Act of the acts of the Secretary of Agriculture. As found by the court, no question is raised in this proceeding of the regularity of his acts under the Agricultural Adjustment Act, nor that his regulations and the provisions thereof were properly and correctly promulgated and were in conformity with said Act, nor that the rate of tax was computed in accordance with the provisions of said Act (Record, p. 17); but we do not waive any rights which may accrue to or belong to the Receivers for refunds in the event that it shall be determined that the acts of the Secretary of Agriculture, his regulations or the provisions thereof, or the rate of tax, were not in conformity with the Agricultural Adjustment Act.

The evidence for the United States discloses and supports the factual grounds upon which the Congress proceeded in its declaration of emergency and of a legislative policy, and upon which the Secretary of Agriculture proceeded in executing that policy. No evidence was introduced in behalf of the Receivers tending to contradict or disprove the findings made by the Congress in the declaration of emergency set out in the Agricultural Adjustment Act (Record, p. 17).

With the conclusion in the Opinion (Record, p. 20) to the effect that there was factual support for the declaration of an economic emergency in agriculture we do not take issue, but we do contend that as a matter of law the declaration of emergency could not and did not transform into interstate commerce either agricultural pursuits or the manufacturing of agricultural commodities. Further, an examination of the Declaration of Emergency and section 2 of the Act shows that the "emergency" to which Congress referred was not an emergency in the ordinary sense, but rather a departure from price relationships existing in 1909 through 1914, which Congress attempts both to reestablish and to maintain.

Certain of the evidence submitted by the United States which was uncontroverted shows the nature and details of the factual formulae prescribed by Congress which are to be considered in the determination by the Secretary of Agriculture of the rates of processing taxes on basic agricultural commodities. In addition there is in the record uncontroverted testimony showing the physical basis on which the Secretary of Agriculture ascertained and established the conversion factors to determine the amount of tax imposed or refunds to be made with respect to articles processed from cotton (Record, p. 17).

The conclusion in the Opinion (Record, p. 29) that Congress laid down a formula by which the rate of tax was to be determined and the conclusion that Congress prescribed the source from which the Secretary should derive his data in applying the formula remain conclusions of law in that they are matters of statutory construction, and with these conclusions we take issue in the sections of this brief dealing with delegation of legislative power to an administrative officer.

Contentions of Respondents.

The respondents submit the following contentions:

1. That the enactment of the Agricultural Adjustment Act is an attempt on the part of Congress to regulate the local production of agricultural commodities and the prices to be paid by manufacturers and that the processing and floor stocks tax provisions of the Act have no other purpose than to finance this regulatory scheme.

2. That the regulation of local agricultural production and prices to be paid by manufacturers is not within the scope of the powers granted to Congress by the Constitution either in the commerce clause or elsewhere; and that, if such regulation is a proper governmental function at all, it is one that is reserved to the states or to the people by the Tenth Amendment.

3. That where, as here, an exaction, although styled a tax, appears upon the face of the statute to be nothing but an integral part of an unconstitutional scheme to control production, the levy is not an exercise of the taxing power of Congress, and refusal to pay it is the citizen's constitutional right.

4. That even if the processing and floor stocks tax provisions can be considered as an exercise of the taxing power, it is such an exercise as is prohibited by the Fifth Amendment, because the raising of money for the benefit of selected agriculturists is not taxation for a public purpose; because the taking of the processor's money in order to benefit the producer is nothing less than confiscation of the property of one class for the economic advantage of another; and because the measure of the tax is unreasonable and capricious.

5. That (apart from every other consideration) the floor stocks tax provision of the statute is invalid because either the tax is a direct tax that is void for lack of apportionment or, if an excise, is an unfair and unjust retroactive excise not levied to produce revenue and unlimited as respects the period during which it accrues.

6. That even if Congress had the power to lay the taxes in question, that power was a power in trust the exercise of which could not be delegated; and that the scope and nature of the taxing function devolved by the statute upon the Secretary of Agriculture amounted to such an attempted delegation and was ineffective to give to his exactions the quality of taxes laid by Congress. Similarly the production control scheme, if it is within the powers of the United States, is a legislative function, but it is likewise left entirely to the discretion of the Secretary of Agriculture.

7. That the Amendment of August 24, 1935 was ineffective to validate the prior exactions of the Secretary of Agriculture because Congress, being in the first instance without

power to appoint him an agent to levy a tax, was without power to ratify the exaction which, without authority, he had attempted to make. As a matter of principle, it would be subversive to our form of government to countenance the drastic, illegal and unauthorized acts of the Secretary of Agriculture.

8. That the Amendment of August 24, 1935 discloses no intention to lay a retroactive tax; but even had such been the intention of Congress, the tax so laid would have been either an unapportioned direct tax or, if an excise, such an unreasonable exercise of retroactive power as is prohibited by the Fifth Amendment.

Before supporting these propositions by argument the court will perhaps permit four general observations:

The first is that, underlying the Agricultural Adjustment Act and its companion statute the National Industrial Recovery Act, the respondents detect an insidious effort to transform the Congress of the United States from a federal legislature with limited powers into a national parliament subject, as respects control over both industry and agriculture, to no restraint except self-restraint. We submit that such a transformation cannot properly be accomplished by legislative action and judicial approval. If it is to take place, it must be accomplished by the people through the deliberate process of constitutional amendment.

The second observation is that whatever of strength there is in the petitioner's argument depends upon ability to persuade the Court to ignore altogether the existence of the scheme of production-control, to disregard the specified purpose for which it is proposed to take money out of the citizen's pocket and to focus attention upon two points only, first, that the statute levies a tax and, second, that the citizen has no standing to question an appropriation. The respondents are confident that the Court will think realistically as did the Circuit Court of Appeals for the First Circuit,

and will not accord to these exactions the quality of taxes if in fact the statute discloses them as having no such character. The respondents are likewise confident that the Court will decline to force a citizen to pay out his money under an unconstitutional scheme merely because, if he had already parted with it, he might not have a standing to control the Sovereign's use of it.

The third general observation is that the respondents deem it to be unnecessary to answer in detail the lengthy argument in the petitioner's brief based on the "general welfare" provision in article I, sec. 8, cl. 1, of the Constitution. Whatever may be the effect of the "general welfare" clause upon the taxing power, it seems clear to us that it cannot possibly include a power to control through the use of tax money the conduct and activities of citizens in spheres otherwise beyond congressional control. To argue that Congress cannot indeed regulate production by laying down rules of conduct and prescribing penalties for their violation, but that it may purchase control of production by laying taxes for that very purpose and by spending whatever is necessary to induce the producer to sell his birthright, is to make an assertion without a basis in reason or morals. We feel confident that no amount of argumentation based upon conflicting opinions expressed in the past will convince the Court that the federal government differs from the accepted concept of a government of limited powers. If, however, the Court is disposed to consider the welfare clause with more particularity, we beg leave to refer to the brief filed on behalf of the National Association of Cotton Manufacturers, in which with learning and cogency Mr. Donald, as amicus curiae, examines the history of the provision and gives convincing reasons in opposition to the contention which the petioner bases upon it.

The fourth observation is that this Act, as conceived and administered, is not an emergency measure. The Act does

not aim to give temporary relief or restore the *status quo ante*. Its aim is to resurrect by force of law an arbitrarily chosen assumed millenium defined as the condition existing some twenty years ago. There are provisions for adjusting the scheme to changes in economic conditions as they occur in the course of time. For over two years the enforcement of this measure has continued without any suggestion that its policies were to be changed or withdrawn. Only recently, the Chief Executive, charged with the general supervision and approval of the administration of this Act, in whose hands is the power to terminate it, has openly declared that this agricultural control program is a part of the permanent policy of his administration. Aside from the facts, it has been repeatedly asserted in cases decided within recent months that extraordinary conditions do not create or enlarge constitutional power.*

With these preliminary observations, we beg leave to discuss the several propositions above submitted.

Argument.

We shall proceed with the argument along five main lines:

First. Congress exceeded its limited powers and trespassed upon the powers reserved to the States and to the people in authorizing and applying the taxes under the Agricultural Adjustment Act.

Second. The processing and floor stocks taxes are levied in violation of the Fifth Amendment.

Third. Congress may not, under guise of the taxing power, assert a power not delegated to it by the Constitution.

Fourth. The floor stocks taxes are direct taxes and are void because not apportioned.

Fifth. The Act is invalid in that it delegates legislative power to the Secretary of Agriculture.

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*In *Schechter* v. *United States*, 295 U.S. 495, this statement was made with respect to the companion statute to the Act here involved.

I.

Congress Exceeded its Limited Powers and Trespassed upon Powers Reserved to the States and to the People in Authorizing and Applying the Taxes under the Agricultural Adjustment Act.

To determine whether or not a statute is within or beyond the powers of Congress it is necessary to determine both broadly and in detail the power which Congress on the face of the statute seems to exercise; in other words, what Congress intended and attempted to do.

The Purpose of the Act is to Fix Prices by Controlling Production.

To determine the purpose of this statute and the powers which Congress therein sought to exercise we rely not only on the provisions authorizing taxes, but also upon the intent and purpose of the Act as revealed by all its declarations and provisions and to some extent upon contemporaneous and related statutes. The declarations and provisions of the Act are herein analyzed with a view to bringing out such purpose and intent.

The Act begins with—

"Declaration of Emergency

> "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agricul-

ture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

This is followed by—

"Declaration of Policy

"Sec. 2. It is hereby declared to be the policy of Congress—

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909–July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919–July 1929.

"(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

"(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909–July 1914."

There cannot be the slightest doubt after reading these declarations that the sole purpose of the Act is to regulate, control and adjust prices of basic agricultural commodities. They contain not a word about revenue. This same purpose continues to be revealed as the aim of the Act in its further provisions.

Sections 3 to 7, inclusive, constituting part I of Title I of the Act, although not here directly in issue, must properly be examined to learn the nature and intent of the Act. In these sections the Secretary of Agriculture is authorized to enter the cotton market as a buyer and seller; to acquire title to all cotton owned by certain government agencies and all cotton upon which such agencies have made advances; to enter into option contracts with producers of cotton to sell them such cotton substantially at cost in exchange for the agreements of such producers to reduce their production of cotton. The intended effect of these sections is to reduce the available supply of cotton and to curtail production.

In section 8, subsection 1, is the basic provision upon which, through further provisions in section 9, the taxes here involved are made to depend.

> "Section 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—
>
> "(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. . . ."

This key provision further emphasizes the purpose to control and reduce the production of basic agricultural commodities.

The remaining subsections of section 8 are, as in the case of part I, not directly involved here, but continue to show this same purpose. Thus, still *for the purpose of effectuating the declared policy of the Act,* the Secretary may enter into marketing agreements with processors and associations of producers, notwithstanding the anti-trust laws, and may require and issue licenses to processors and associations of producers upon such terms and conditions, to be fixed by him, as may be necessary to eliminate unfair practices. Criminal penalties are provided to punish evasions of such licenses.

Then comes section 9, the section providing for processing taxes. Section 9 (a) is as follows:

> "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall termi-

> nate 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. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided,* That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid."

Through this subsection the initiation of the tax for a given commodity is made to depend on the determination by the Secretary of Agriculture under section 8 (1) that rental or benefit payments are to be made with respect to that commodity. The rate of tax originally to be fixed in conformity with section 9 (b) is to be adjusted at intervals by the Secretary *to effectuate the declared policy of the Act.* The tax is to terminate when rental or benefit payments cease. Not only the initiation and termination of the tax, but the rate of tax itself is made a part of and an active, integral and inseparable force in the policy of crop reduction.

In section 9 (b) it becomes more evident that the tax rate is intended to be, not in fact a source of revenue for general purposes of government, but an active force in the crop reduction and price raising program. The rate to be applied in the first instance is described as "such rate as equals the difference between the current average farm price" and the "fair exchange value" of the commodity. Thus, if the commodity is not selling at what the Secretary may determine is a fair exchange value, he is to take the amount of deficiency in the price from processors and have that amount available

to pay out to farmers to accomplish a two-fold object: (1) to increase the farmers' income and (2) to induce the farmers to agree to raise smaller crops.

But this original rate is not necessarily to remain the rate, for under further provisions of section 9 (b), after investigation and hearing, the Secretary may fix such a rate of tax as will prevent an accumulation of surplus stocks and a depression of farm prices of the commodity. This is the final test of the tax rate and is in effect a direction to reduce surplus stocks and to prevent depression in farm prices in any event, and to this end to fix any tax rate and adjust and readjust it on any theory that might lead to this paramount purpose of the Act. The tax rate is here revealed as not a tax rate at all, but as an adjusting surcharge to be used principally as a bounty to producers for the purpose of adjusting farm income to whatever is determined to be a fair return, at the same time raising prices to be paid by processors to a price considered fair by those in authority, irrespective of the market price or ability of the consumer to pay. The tax rate is nothing more than a device, inseparably interwoven with the control scheme, to change the price level of certain commodities through the strong arm of the government.

The further provisions of the Act continue in the same tone and for the same paramount purpose of controlling prices and surpluses. Section 10 gives broad administrative and regulation-making power. Section 11 defines basic agricultural commodities, with power to make exceptions if it appears to the Secretary of Agriculture that the *declared policy* cannot be accomplished with respect to any commodity or classification thereof through administration of Title I of the Act. Section 12 appropriates the entire proceeds of the processing and floor stocks taxes to payment of administrative expenses, expansion of markets, removal of surplus, and rental and benefit payments under this Title I of the Act. Thus all of the so-called tax is appropriated to this control

scheme. None of it is made available for any purpose within the powers of the government. Under section 13 the duration of Title I itself or its operation with respect to any commodity is made dependent on the determination by the President of the economic condition of the country and of the desirability of carrying out the *declared policy* of surplus and price control.

The driving economic purpose of this Act and the function of the tax rate in this economic purpose are vividly focused in sections 15 (a) and (d). Under section 15 (a) if the Secretary finds that any class of products of a taxed commodity is of such low value that the imposition of the tax will prevent, in whole or in part, the use of the taxed commodity in the manufacture of such products, the tax may be abated with respect to so much of the commodity as is used in the manufacture of such products. Under section 15 (d) the Secretary is authorized to assess a compensating tax on any commodity which competes with a taxed commodity, and causes disadvantages in competition.* The rate of this compensating tax is to be such a rate as is "necessary to pre-

*In T.D. 4415, Cum. Bul. XIII-1, p 515, and T.D. 4495, Cum. Bul. XIII-2, p. 515, compensating taxes are announced with respect to various products fabricated from paper or from jute as competing with cotton. As an example of the unlimited control which is exercised under this Act and varied from time to time at the will of the Secretary of Agriculture or his subordinates, T.D. 4415 (January 8, 1934), provided in part (par. B) for compensating taxes on paper as competing with cotton as follows:—

2.04¢ per lb. weight of paper in multiwall paper bags.
3.36¢ per lb. weight of paper in coated paper bags.
2.14¢ per lb. weight of paper in open mesh paper bags.
.715¢ per lb. weight of paper in paper towels.
4.06¢ per lb. weight of paper in gummed paper tape.

On November 10, 1934, in T D. 4495 (par. D), the tax on paper towels was changed to .346¢ per lb A new basis was established for taxes on coated paper bags and multiwall paper bags, printed, labeled or otherwise identified as bags designed and in form for use in the packaging of grain, flours, corn meal, sugar, salt, fertilizers, feeds

vent such disadvantages in competition." Through these sections named commodities may be relieved of the tax, and any commodity in trade may be subjected to tax for purely economic reasons, and the tax itself is the device which exerts the desired economic force. It could hardly be stated in clearer words that the purpose of the Act is control and the purpose of the tax is control; both are a part of a single integrated scheme. The scheme has an inclusive magnitude, not limited to the commodities named in the Act, but extending as far as the Secretary of Agriculture in his discretion may wish to deal with the repercussions of competition in trade.

Section 16 deals with floor stocks taxes. It seems to be an attempt to fix a charge equivalent to the processing tax on goods already processed when the tax goes into effect and to refund a similar equivalent on processed goods when the tax ceases. The uncertainty of the provisions of this section is hereinafter considered more fully. That such an adjustment is deemed proper is a further indication that the processing tax is not considered as a tax, but rather as a forced adjustment of prices, which must for economic reasons operate simultaneously on all goods into which a taxed commodity is incorporated, whether processed or not.

This Act is an attempt to create an artificial economic situation by use of the proceeds of processing and floor stocks taxes such that farmers will be driven to accept the program of the Department of Agriculture, by the knowledge that they

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or potatoes of a sacking capacity of 4½ pounds or over and less than 75 pounds:

4.5 to 5 4 pound size bags incl.	$1 24	per thousand bags
5.5 to 7.9 pound size bags incl.	1.47	per thousand bags
8 to 10.9 pound size bags incl.	2.02	per thousand bags

and so on.

In this same regulation, based on findings made by R. G. Tugwell, as Acting Secretary, the tax on gummed paper tape remained unchanged.

will suffer in competition if they do not. At the same time, through the amount of the tax rate, it is intended to create a complementary artificial economic condition such that no purchaser may acquire certain commodities except by paying a price which in the judgment of the Department is equivalent in purchasing power to the prices in existence in an arbitrarily chosen period in history. Such a goal is vastly different from any legislation theretofore attempted.

It is part and parcel of the same movement which prompted the attempt to impose the federal will upon all business through the National Industrial Recovery Act and later called for the enactment of the Bankhead Cotton Control Act. This later Act is an attempt, through outright penalties, to make more effective the same crop reduction scheme initiated in the Agricultural Adjustment Act. The principle is the same, whether the means employed is economic compulsion or legal compulsion. With its companion statutes the Agricultural Adjustment Act is part of a colossal system which, if accepted, whether so intended or not, will mark a change from our federal government with its limited powers to a national government subject to no restraints except such as are self imposed.

To the Extent that Price Fixing and Control of Production is a Governmental Function it is Reserved to the States or to the People.

The Declaration of Emergency in this Act is substantially that transactions in agricultural commodities have, by the depression in business, been affected with a national public interest and that the normal currents of commerce in such commodities have been burdened and obstructed. It is a fair assumption that, in this Declaration of Emergency, Congress intended to associate the control scheme of the Act with the power of the United States to regulate interstate commerce.

This manifestation of legislative intention is precisely similar to that disclosed in the National Industrial Recovery Act. From a study of these companion Acts (the National Industrial Recovery Act for the control of industry and the Agricultural Adjustment Act for the control of agricultural projects) it is obvious that in the case of both statutes Congress proceeded upon the theory that under the commerce clause the federal government might do whatever in its judgment was necessary to check a fall in prices, a decline in wages and employment and the shrinkage of the market for commodities.

Recognizing that of course neither production nor manufacture was interstate commerce, the proponents of both the Agricultural Adjustment Act and the National Industrial Recovery Act sought to justify regulation on the theory that conditions in agriculture and industry at the time were such as to *burden* or *affect* interstate commerce—thus making a specious attempt to bring the control within the scope of the commerce clause. This proposition, however, was answered simply in *Schechter* v. *United States*, 295 U.S. 495, by pointing out the obvious distinction between direct and indirect effects; and by demonstrating that if the wages and hours of employees might be regulated because of their indirect effect upon interstate commerce, a similar control might be exercised over all processes of production and distribution. This Court said, in disposing of the question: "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction which the commerce clause itself establishes between commerce 'among the several states' and the internal concerns of a State." "Stress is laid," observed the Chief Justice in the course of the opinion, "upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting the 'cumulative forces making for expanding commercial activity.' Without in any way disparaging this motive, it is

enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution'' (p. 550).

The same observation applies with equal force to the principles underlying the Agricultural Adjustment Act. Indeed, the connection between the declared purpose of the Act and interstate commerce is even more tenuous, because Congress is in the first instance actually seeking to *reduce* the amount of agricultural products going into commerce—whereas all previous efforts on the part of Congress have been directed to free such commerce from restrictions.

Deprived by the *Schechter* decision of the commerce clause as a basis for the support of the Agricultural Adjustment Act, counsel for the petitioner now attempt a wholly different justification. Reduced to its lowest terms, the proposition upon which the petitioner in the instant case relies is this: That since the agricultural interests of the country are of national and not merely of state concern, and since Congress has for a century been accustomed to appropriate money for the promotion of agriculture, therefore Congress may properly come to the relief of the farmer by purchasing from him with public money an agreement to limit his production and to subject himself to an elaborate system of federal control.

That Congress has in fact over a long period made appropriations for the betterment of agricultural conditions may freely be conceded. It is to be observed, however, that in other instances these appropriations have involved simply the extension *of financial aid.* It has never heretofore been asserted by Congress or by any responsible authority that in consideration of financial aid the Congress might exact from the farmer an agreement to subject himself to a scheme of federal control actually or potentially inconsistent with the policy of his State with respect to production.

Whether or not Congress, with a view to improving the financial position of the farmer, may authorize loans of money to him from the federal treasury or the payment of bounties out of funds raised by a legitimate exercise of the power of taxation is a question distinct from the question in the instant case. We are not here dealing with money appropriated for relief free from all restraint upon the liberty of action of the recipient. The problem presented by the record in the instant case is the problem of the effectual control of local activity, wholly unrelated to interstate commerce and in a field in which hitherto the individual citizen has enjoyed the fullest degree of personal liberty except to the extent that his State has lawfully limited it. It will not be contended by counsel for the petitioner that Congress might, with constitutional propriety, zone the country for agricultural purposes, allot production-quotas to individual farmers and impose upon them criminal penalties for disregard of the quota regulations. This would instantly be recognized as beyond the interstate commerce power. Something like this has indeed been attempted by the Potato Act of 1935; but even in that remarkable piece of legislation Congress has felt it necessary to invoke the taxing power as some sort of justification of what is attempted. The point upon which we are now insisting is that if, apart from any exercise of the taxing power, a system of agricultural control cannot lawfully be set up under the sanction of fines and penalties, it ought not to be true that precisely the same control can lawfully be exercised by Congress through the subtle and effective use of money exacted from the taxpayer.

Implicit in the petitioner's theory is the proposition that if there is a national interest to conserve, the power to promote it must necessarily inhere in the federal government. There is no justification in the authorities for any such doctrine. It met with definite disapproval in *Kansas* v. *Colorado,* 206 U.S. 46, in which case, at page 89, there is an effective answer by

Mr. Justice Brewer to the contention there strenuously made that the mere existence of a national interest creates the legislative power to secure it. This was the case of an original suit brought to restrain Colorado from diverting the water of the Arkansas River for the irrigation of lands in Colorado, and thus preventing, as was alleged, the natural and customary flow of the river into Kansas. The United States filed a petition for intervention, asserting the right to control the waters of the river to aid in the reclamation of arid lands. The contention was that "the determination of the rights of the two states *inter sese* in regard to the flow of waters in the Arkansas River" was "*subordinate to a superior right to control the whole system of the reclamation of arid lands.*" It was recognized in the opinion of Mr. Justice Brewer that the national government had full power to dispose of and make all needful rules and regulations respecting its own property, but the power over its own property did not embrace a grant to Congress of legislative control over the States. Appreciating this, the government brought forward the doctrine of "inherent power," as giving to Congress the broad control asserted over the whole subject of reclamation of arid lands. The contention involved the subordination of all proceedings with respect to the *actual conduct* of that reclamation to such as might be provided by the legislation of Congress. The short answer of the Court is at page 92: "But if no such power has been granted, none can be exercised."

In the instant case this alleged "inherent power" is sought to be exercised to diminish production on arable land rather than to increase the areas available for production. In both cases, however, the federal government claims the power to determine whether production within a State shall be increased or diminished. If the thing cannot be done by coercion then (so runs the argument for the petitioner) let

federal control of the conduct of the citizen of a sovereign State be purchased by the use of federal money.

We have no disposition to minimize the subtle force of this argument. In estimating its validity the Court will of course have in mind the consequences to which its acceptance would lead. It has recently become popular to assert with confidence that there is no constitutional limit to the uses to which Congress may apply the people's money, and that, this being the case, the way is open to accomplish by federal purchase what cannot be accomplished by federal power. Where limited legislative power ends the unlimited money power begins. The argument for the petitioner is merely the application of this broad contention to the particular scheme embodied in the Agricultural Adjustment Act. If the contention is accepted here, there is no sound reason why control over industry may not be purchased as effectively as control over agriculture. For example, Congress could just as logically limit and control stocks and surpluses of any manufactured commodity such as shoes or textiles. By the use of federal money Congress could in practice effectually nullify all the decisions of this Court which have protected the areas reserved to the States by the Tenth Amendment.

Whether this is wholesome American constitutional law it now becomes the function of the Court to decide. The respondents earnestly contend that it is not. Without at this time considering gifts and loans of federal money, we submit that it would be subversive of our whole system of state and federal government to give judicial approval to the asserted right of Congress to acquire by purchase the control either of purely intrastate commerce or of local agricultural production. We freely concede that if Congress were to attempt such control by appropriation of money already in the treasury there would be, under the existing decisions of the Court, difficulties in the way of effective objection by the individual taxpayer. We urge, however, that no such difficulty

arises where (as here) Congress seeks to take out of the taxpayer's pocket money for a specific and designated use which we contend to be extra-constitutional.

In the enabling act establishing Oklahoma as a State, Congress attempted to impose a condition that the state capitol should not be removed. In that case, as in this, Congress sought to exert control over internal affairs of a State by means of a condition imposed upon a privilege offered to the citizens. But in *Coyle* v. *Smith,* 221 U.S. 559, this Court determined that the United States could not, by imposing such a condition, extend federal control beyond the granted powers. If internal control could not be obtained by a condition imposed upon the privilege of creating a State, how much clearer it is that Congress should not be allowed to control internal affairs and create inequalities* between the States by conditions placed on grants of money to citizens within States fully organized.

We do not overlook the possible contention that, after all, a restraint imposed by contract either upon intrastate commerce or agricultural production is something that the State may nullify if contrary to its public policy. Such a contention, however, merely adds force to the argument against purchased control. It cannot possibly be a constitutional use by Congress of the people's money to finance a scheme which it is within the conceded power of the State to strike down. What Congress does constitutionally, *ipso facto,* becomes the supreme law of the land. The converse of the proposition must likewise be true—that unless what Con-

* It is interesting to note in this connection that, up to March 31, 1934 (Addendum, p. 72, old p. 151), $47,951,791 was paid in benefits to inhabitants of the State of Texas, while the total of all benefit payments to all the New England States was but $379,017 as shown by Exhibit 4-11 at Addendum, page 47 (old page 63). From these same pages it appears that $6,215,755 was collected in taxes from Texas up to February 28, 1934, against $20,422,643 collected from the New England States.

gress proposes to do *can* become the supreme law the thing proposed is not within the competence of Congress at all. Such a conclusion is required not merely in recognition of the powers reserved by the Tenth Amendment but in order to protect the dignity of the federal government. It simply will not do to put the government of the United States in the position of having the validity of its acts dependent upon the tolerance of the States.

At this point it is proper to notice the argument advanced by the petitioner to the effect that the regulatory scheme set up by the Act can be sustained as an exercise of the so-called "fiscal power" of the federal government. This argument appears to come down to this: that because of agricultural difficulties the government must support agriculture in general with manufacturers' money not only to protect the government's interest in certain doubtful agricultural assets acquired by issue of government obligations, but also to assure a future market for government securities to be issued in exchange for further agricultural assets. To follow out this theory to its logical conclusion, if any business falls into a decline, the federal government would be able to pour out funds for its assistance and make regulations for its operation, upon the transparent pretext that such expenditure is necessary to aid the raising of further funds. If a government controlled by manufacturers should decide that manufacturing needed aid, it could impose taxes on farmers for the benefit of mills, or a labor government could tax the class of employers and apply the proceeds for the benefit of unionism. Indeed, if this doctrine be sound, it is difficult to suggest any type of regulation which it would not justify. It needs no enlargement to perceive that such a result is neither desirable nor permitted within the spirit and intention of the Constitution. The doctrine is highly salutary which limits its incidental powers to legislation with respect to matters which affect the granted powers directly, immediately and intentionally.

At the time the Constitution was adopted the States, mindful of their different localized interests, and distrustful of bureaucratic control from a distance, and of taxation by a non-representative authority, carefully reserved to themselves the right to regulate all their affairs except such as they specifically granted to the general government, to the end that they might not be subjected to exactly such interference as is attempted in the Agricultural Adjustment Act.

Notwithstanding the reservation of the Tenth Amendment, this Act by purchased control forces upon agricultural communities within state lines a reduction of production of agricultural commodities without regard to the needs, desires or policies of the State affected. It disregards even the policies against restraints on trade announced by many of the States in formal enactment.*

Under this Act the States are not even asked for their opinion of the effect of the Act upon the welfare of the citizens of the States, a courtesy extended to them in the Maternity Act, although the increased prices forced into effect by the Act may deprive citizens of the States of ability to purchase, or may curtail production of industrial plants within state lines and throw burdens upon state governments, or may curtail employment of labor on farms and increase the relief bur-

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* Constitution of Alabama, sec. 103.
Code of Alabama, c. 211, sec. 5212.
Constitution of Arizona of 1910, art. XIV, sec. 15.
Statutes of Arkansas, c. 124, sec. 7368.
Connecticut General Statutes 1930, sec. 6352.
Constitution of Idaho, art. XI, sec. 18.
Idaho Code, 17-4013.
Iowa Code of 1931, c. 434, sec. 9906.
Constitution of Louisiana of 1921, art. XIX, sec. 14.
Louisiana General Statutes, sec. 4924.
Maine, Revised Statutes 1930, c. 138, sec. 31.
Michigan, Compiled Laws 1929, c. 278, Act 255 of 1899.
Constitution of Minnesota, art. IV, sec. 35.
New Mexico Statutes, 1929, c. 35, art. 29.
Constitution of North Dakota, art. VII, sec. 146.

den of the States. Such control of prices within state lines and all the effects flowing from interference with interior economy are forced upon the States by a general government to which no such power was granted.

Indeed there is a substantial question of the power of the States themselves either to control agricultural activities and internal prices or, *a fortiori,* of their ability to grant any such power to the federal government. The ordinary legitimate pursuits and transactions of citizens are, except in extraordinary circumstances, traditionally free from control even of the States. *New State Ice Co.* v. *Liebmann,* 285 U.S. 262; *Tyson* v. *Banton,* 273 U.S. 418; *Fairmont Creamery* v. *Minnesota,* 274 U.S. 1; *Williams* v. *Standard Oil Co.,* 278 U.S. 235; *Van Winkle* v. *Fred Meyer, Inc.,* Supreme Court of Oregon, 49 Pac. (2d) 1140. If power to regulate the operation of farms and prices of farm products is reserved to the people, as distinguished from the States, it follows that such power may not be delegated to the federal government except by an act of the people, expressed in a constitutional amendment. In the words of Mr. Justice Brewer in *Kansas* v. *Colorado,* 206 U.S. 46, at page 90:

> "The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated."

It is argued that there is something voluntary about the crop reduction program which removes it from the limitations upon the federal government. As a matter of law we

are unable to see any valid distinction arising from the fact that in this Act the regulation of individual activities within the States is accomplished by purchase instead of penalty. No power is granted to Congress to send its emissaries to the several States to purchase control of internal matters. The petitioner certainly may not erect a non-existent power upon the choice of an equally non-existent means to its end. As a matter of fact the signing, by an individual, of a crop reduction agreement is not voluntary, but is compelled by an economic force exactly the same as a penalty when the Secretary may pay to those who conform what he sees fit and may withhold from non-conformers an equal amount. Manufacturers do not voluntarily pay an increased price, whether it arises from the tax adjustment or the later effects of a crop reduction. Whatever may be the situation with respect to individuals, there can be no shadow of a claim that the States voluntarily submit to federal control of their internal affairs, voluntarily permit their citizens to reduce production, or voluntarily permit their citizens to pay the increased prices forced by this measure.*

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* While economic compulsion is invoked in the original Act to secure compliance from the producer, Congress has not hesitated to employ legal compulsion where less drastic methods were too slow. Legal compulsion has thus been resorted to in the case of cotton (the commodity involved in the instant case), tobacco and potatoes. The Bankhead Cotton Act of 1934 (Public 169, 73d Congress, 48 Stat. 598; The Kerr Tobacco Act (Public 483, 73d Congress, 48 Stat. 1275); The Potato Act of 1935 (being Title II of "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved August 24, 1935, Public 320, 74th Congress). Similar power to exert legal compulsion upon the processor or handler is granted in section 8 (3) of the Agricultural Adjustment Act as originally enacted. Such power has been extended by the amendments of August 24, 1935. These related acts and provisions leave no doubt that the original and continuing Congressional intention in the Agricultural Adjustment Act is to impose the federal will upon production of agricultural commodities. In the light of such intentions and acts the argument that control is voluntary becomes mere casuistry.

The Regulatory Measures of which the Tax is an Integral Part cannot be Justified as a Regulation of Interstate Commerce.

The tax starts, continues and ends with the control scheme of the Act. The rate depends, subject always to executive discretion, upon the amount of a price disparity which the Act seeks to correct, and it is the tax itself which, in the first instance, is the means of closing that disparity. The tax, as we have before stated, is an integral and inseparable part of this regulatory measure. The provisions for initiating the tax, determining the rate and terminating the tax in section 9, as well as the provisions appropriating it in section 12, become meaningless except as associated with the control scheme. When the regulatory scheme comes to an end, the tax must go with it.

A study of the Act will reveal that neither the imposition of the tax, nor the enforced price increase through the tax, nor the expenditure of tax proceeds for benefit payments in exchange for crop reduction agreements, nor the dealings in cotton under sections 3 to 7, inclusive, are in any way limited to interstate or foreign commerce or commerce with the Indian Tribes. That those who drafted the Act had intrastate commerce in mind and did not intend to limit these matters to interstate commerce is shown by the inclusion of an interstate commerce limitation in section 8 of the Act with respect to marketing agreements, licenses and regulation of warehouses. Thus the matters with which the tax is most intimately connected through sections 9 and 12 of the Act, the control of production and prices, are not even intended to be confined to the field of interstate and foreign commerce. Those are matters which, under the definitions worked out in the commerce clause cases, are reserved exclusively to state control.

The reference in the Declaration of Emergency to interstate commerce certainly is not enough to transform pursuits

carried on within state borders, such as manufacturing and agriculture, into interstate pursuits. The most solemn declaration of an all-wise legislative body, even when made at a time of economic emergency, cannot change the plain fact that the farmer plants and harvests his crop within state lines and that the manufacturer spins and weaves his cloth within state lines. Such a declaration cannot bring within the definition of commerce that which is not commerce, but is production. If Congress by mere declarations can accomplish such changes in facts and in definitions, there are in truth no more constitutional limitations upon the national powers.

Neither the production of agricultural commodities nor the processing of such commodities is "interstate commerce" within the meaning of those words as used in the Constitution. An intention to ship a commodity when it shall have been produced does not bring the production into interstate commerce. Neither the production of commodities by farmers nor the manufacture of articles is subject to the control of Congress.

Chassaniol v. *Greenwood,* 291 U.S. 584.
Utah Power & Light Co. v. *Pfost,* 286 U.S. 165.
Heisler v. *Thomas Colliery Co.,* 260 U.S. 245.
Oliver Iron Mining Co. v. *Lord,* 262 U.S. 172.
Crescent Cotton Oil Co. v. *Mississippi,* 257 U.S. 129.
Kidd v. *Pearson,* 128 U.S. 1.

Interstate commerce begins only when articles are delivered to a carrier to be transported. It comes to an end when articles are delivered.

Schechter v. *United States,* 295 U.S. 495.
Federal Compress Co. v. *McLean,* 291 U.S. 17.

Interstate commerce ends when raw materials reach a manufacturer, even though the manufacturer may intend to ship his product when completed in interstate commerce.

United Leather Workers v. *Herkert &c. Co. et al.*, 265 U.S. 457.

Neither agriculture nor manufacturing "affect" or "burden" interstate commerce. In order to come within the interstate commerce power, the effect or burden of activities not commerce must be direct and immediate.

Schechter v. *United States,* 295 U.S. 495.
Railroad Retirement Board v. *Alton R. Co.,* 295 U.S. 330.
Levering & Garrigues v. *Morrin,* 289 U.S. 103.
United Leather Workers v. *Herkert &c. Co. et al.*, 265 U.S. 457.
United Mine Workers v. *Coronado Coal Co.,* 259 U.S. 344.
Hammer v. *Dagenhart,* 247 U.S. 251.

It is hardly rational to assume that a farmer planting his crops intends to change the flow of commerce. If his determination of the amount of acreage to plant has any effect upon interstate commerce it is infinitesimal and cannot, after the vicissitudes of weather, diseases and trade, in any real sense be considered a direct effect.

It is equally clear that crops which have reached a resting place within a State at the warehouse of a dealer are not within the stream of commerce. The price which a manufacturer pays for such commodities is not determined upon the basis of an intention to affect the flow of commerce. It is simply the price the manufacturer must pay to keep his mill running. If the price does in fact increase or diminish the flow of commerce, such effect is one of those incidental con-

sequences which flow from every act, such as the effect on commerce of a strike undertaken with no thought of commerce, one of those indirect effects which fail to bring an act within the federal commerce power.

As is clearly stated both in the *Railroad Retirement* case and the *Schechter* case, if such indirect effects as a fertile mind may see in such a situation may be made the basis for federal control there is indeed no limit to the federal power, and notwithstanding the Tenth Amendment the national government in its discretion will be permitted to usurp the powers reserved to the States and impose its own requirements upon every feature of our closely meshed business, agricultural and social life.

The reservation in the Tenth Amendment of all residual powers to the States and the people deserves most careful and serious consideration in relation to the policy of control which permeates the Agricultural Adjustment Act. If such control is permitted to the United States, the powers of the States are immediately curtailed, the authority of the States is diminished, the foundation is laid for ultimate destruction of the States and centralization of all powers in the national government. Such power is the wedge which, driven to its not very distant conclusion, will destroy our union of sovereign states, and will create a national government with powers which the Constitution expressly withholds from the federal government. The implications of the power usurped in this Agricultural Adjustment Act are of the gravest, and require a decisive determination in order that our form of government may continue.

II.

The Processing and Floor Stocks Taxes are Levied in Violation of the Fifth Amendment.

The Act Takes from One Class without Compensation, and Gives to Members of Another.

That private property is to be taken under the authority of sections 9 and 16 of the Act cannot be disputed. It is at variance with any prior tax law of which we are informed, with the taxing power, and with the provisions of the Fifth Amendment to dedicate such property so taken (as dedicated in section 12) to the benefit of private individuals (as prescribed in section 8). By this operation the power of the government steps in to take from manufacturers a portion of the value of their property and business and to pay the value so taken to farmers to whom the manufacturer owes nothing, and from whom the manufacturer gets nothing. It is of course to be paid to farmers in exchange for certain agreements to be made by the farmers, but the amount to be paid is entirely in the discretion of the Secretary of Agriculture and need not, under the Act as drawn, bear any relation to the value of the agreements. It is paid out only to such farmers as the Secretary chooses, farmers who will comply with his wishes. The manufacturer owes the farmer nothing; yet the manufacturer's property is taken by the government and paid to those farmers, selected by the Secretary, who will in return attempt to carry out a plan to raise prices.

Such taking and payment hardly seem for a public use unless there is some foundation for finding that the government thereby pays an obligation owed. Even the case of *United States* v. *Realty Co.*, 163 U.S. 427, does not go to the extent of holding that an obligation to pay arises out of thin air, or that a moral obligation to make a payment can be created by the same Act under which it is sought to justify the payment. The Fifth Amendment forbids taking property for a public

use without compensation. It certainly cannot permit such taking for a private use.

If it is argued that the payment to the farmer is in payment for a contract which the government may make, we must ask under which of its delegated powers the government may make a contract requiring a farmer to reduce his acreage or the production of his fields.

Due process, if it requires anything, requires that the government shall provide usual and orderly procedure to determine what shall be taken from one and paid to another upon the basis of established legal rights. In this unusual and novel Act such safeguards are wiped away. Without any determination or provision for determination of obligations or rights, the government requires the class of manufacturers to pay out of their own property for contracts with these selected farmers which the manufacturers certainly do not desire should be made, contracts which, for an indefinite future, are designed to increase the cost of carrying on the business of this class of manufacturers and to benefit the class of farmers. How can such class legislation possibly be brought within any of the requirements of due process, or indeed within any of the powers of the national government?

The recent opinion in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, is directly in point. It involves a statute which is part of the same school of thought which produced the Agricultural Adjustment Act. One of the grounds upon which the Court finds invalid the provision for pensions for railroad employees out of funds raised by charges against the railroads as a class and their employees is that such a proceeding is a taking of the property of one railroad for the benefit of employees of another, and is a taking without due process of law. The Court said, at page 357:

> "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."

Similarly, in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555, the court held invalid the provisions of the Frazier-Lemke Act on the ground that it took from the mortgagee for the benefit of the mortgagor without compensation valuable property rights incident to the holding of a mortgage. At the close of the opinion is the following statement (page 602):

> "For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

If this measure for relief and control of agriculture can be authorized under any power of the government upon a theory of public benefit, it should be financed by a general tax, not by a private charge upon manufacturers of the agricultural products involved. If, as an element of such a scheme, the costs to be paid by the manufacturers must be artificially raised, the manufacturers should be compensated for the damage to them rather than doubly penalized by being forced to finance the increase in their costs.*

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* A tax which demonstrably exceeds the benefit therefrom is a taking forbidden by the Fifth Amendment. A dictum to this effect with respect to a betterment assessment, which we submit may be justified only as this tax may be justified, on the basis of benefit compared with cost, appears in *Martin* v. *District of Columbia,* 205 U.S. 135, 139.

The Taxing Power is Limited to Taxes Raised for Public as Distinguished from Private Purposes.

Given a constitutional government for the protection of all the people, the proposition that revenue raised by taxation should be used only for public purposes is axiomatic. In this case, for the first time in the history of federal legislation so far as we are aware, the taxes are inseparably linked to the appropriation, and the tax rate is interwoven with the other purposes apparent on the face of the Act. For the first time a taxpayer may point to a direct and substantial injury that is done to him by reason of an illegal appropriation. For these reasons there are no decisions directly in point relating to a federal statute, but the principles are clearly enunciated in decisions relating to other statutes.

A limitation of the taxing power of a municipal government to public as distinguished from private ends is discussed and recognized in*—

Loan Association v. *Topeka,* 20 Wall. 655.
Cole v. *LaGrange,* 113 U.S. 1.
Parkersburg v. *Brown,* 106 U.S. 487.
Lowell v. *Boston,* 111 Mass. 454.

True, the cases apply directly to the powers of municipalities only; but mere size should not be the test of the fundamental powers which go with constitutional government.

* The cases have invariably maintained the distinction between relief to the poor and destitute on the one hand and pecuniary aids or bounties to individuals and businesses on the other. Thus in the following decisions the appropriation was held to be void as for a private and not a public purpose: *Deering & Co.* v. *Peterson,* 75 Minn. 118, 77 N.W. 568 (appropriations for the purchase of seed grain); *State* v. *Osawkee Township,* 14 Kans. 418 (involving bonds the proceeds of which were to be used to provide grain for seed and feed); *United States* v. *Carlisle,* 5 App Cas. D.C. 138 (bounties to sugar producers); *Michigan Sugar Co.* v. *Auditor-General,* 124 Mich. 674, 83 N.W. 625 (bounties to manufacturers of beet sugar); *Dodge* v. *Mission Township,*

Obviously, if there is such a limitation on the taxing power inherent in the States, the same limitation must apply when that same power is delegated to Congress.

The discussion in *Loan Association* v. *Topeka, supra,* is upon broad, fundamental, philosophical grounds of the theory of government, and is as applicable to the largest unit of our government as to the smallest. The question involved was whether a city might issue its bonds, payable out of taxes, to assist a private company to establish a factory in that city. The court said, at page 664:

> "This power [taxation] 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. . . .
>
> "We have established, we think, beyond cavil that there can be no lawful tax which is not laid for *a public purpose*. . . ."

The case is authority as well for the proposition that benefit to private individuals does not become a public purpose

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107 Fed. 827 (C.C.A. 8) (involving bonds the proceeds of which were turned over to a sugar mill for the purpose of encouraging the construction of the mill); *Deal* v. *Mississippi County*, 107 Mo. 464, 18 S.W. 24 (bounty for the planting of forest trees on private land).

As was said in the *Osawkee Township* case, "Its aim is not to furnish food to the hungry, clothing to the naked or fuel to those suffering from cold. It is not the helpless and dependent, whose wants are alone sought to be relieved . . . It taxes the whole community to assist one class, and that not for the purpose of relieving actual want, but to assist them in their regular occupations."

merely by reason of the fact that improvement of the business of the individuals benefited may benefit the community. Neither is private benefit to a class or selected members of the community a public purpose.

Lowell v. *Boston,* 111 Mass. 454, 460, 472.

In the latter case, there was involved the power of a city to raise funds to lend to a portion of its population who were or might become owners of land in a section of the city destroyed by a great fire. There, as here, it was the class to which people belonged rather than their need that determined eligibility. The situation was highly analogous to that now involved, where it is claimed that the means of livelihood of that portion of the population who have entered or may enter certain agricultural pursuits has been destroyed by a great economic depression. But the court said, at page 461:

> "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. . . . 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."

The issues presented raise no question of poor relief. Benefit payments under the Act are not dependent upon want or distress. They may be made to the rich if the rich will submit to regulation; they will be denied to the poor if they refuse to sign crop reduction agreements.

Under the Agricultural Adjustment Act money is taken from processors under the guise of taxation, and is given to such farmers as will agree to reduce crops upon a theory that benefit to individuals thus selected from the class will indirectly benefit the nation. So far the facts do not differ from *Loan Association* v. *Topeka, supra,* and the rule of that case should apply. But it is urged that there is a difference because the farmers receive their money only in exchange for crop reduction agreements. Remembering that under section 8 the amount of benefit payments is solely within the discretion of the Secretary of Agriculture, and that the Act requires no relationship between the value of the agreements and the amount of benefit payments, this claimed *quid pro quo* becomes merely illusory. But this claimed *quid pro quo* does not point a difference from *Loan Association* v. *Topeka, supra.* In fact, it marks the similarity of the two cases, for the City of Topeka advanced its financial support in exchange for the voluntary agreement of an individual to do something which those in charge of the city felt was essential to the welfare of the city, to wit, an agreement to establish a factory for bridges in the city. Can it be said that the establishment of a factory in a city is any less for the welfare of a city than the reduction of present and prospective crops of basic commodities is for the welfare of the nation?

The Taxes are Arbitrary and Unreasonable.

The Fifth Amendment requires that a law (including a tax law) shall not be unreasonable, arbitrary or capricious. Of tax laws it requires a reasonable classification of objects of taxation, a rate determined upon a reasonable basis, not arbitrary or confiscatory, and reasonableness in the time when the tax becomes effective. The Fifth Amendment also requires that the means selected to carry out one of the

granted powers shall have a real and substantial relation to the object sought to be attained.*

Railroad Retirement Board v. *Alton R. Co.*, 295 U.S. 330, 347, note 5.
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555, 589, note 19.
See also *Nebbia* v. *New York*, 291 U.S. 502, 525.

How under this Act is the court to determine whether or not the classification of objects is reasonable when, as discussed below (pp. 73-75), the choice of commodities and competing commodities to be taxed is not set out in the law but is left to uncontrolled executive discretion? How is the court to determine whether or not the rates are reasonable when the rate of tax to be imposed is likewise left to the Secretary of Agriculture (see pp. 75-82, below)? We submit that the failure of Congress to make these determinations, at the same time authorizing an executive to make them, is as much a denial of the taxpayer's right to reasonableness as would be the imposition of the most fantastic and arbitrary provisions conceivable.

So far as the Act makes any attempt to define the objects of taxation, a list is given in section 11, originally wheat, cotton, field corn, hogs, rice, tobacco and milk, but the Secretary may in his discretion exclude any of the named commodities from the operation of the tax,† or, under the provisions of section 15 (d), he may make the tax effective or

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* Cases under the Fourteenth Amendment are fully applicable upon the effect of the due process clause in the Fifth Amendment.

Heiner v. *Donnan*, 285 U.S. 312, 326.

† It was extended in 1934 to include, in addition, rye, flax, barley, grain sorghums, cattle, sugar beets and sugar cane, and peanuts (sec. 1, Act of May 9, 1934; secs. 1, 3 (b), 4 and 5, Act of April 7, 1934); in 1935 it was further extended to include potatoes (sec. 61,

neglect to make it effective with respect to any competing commodity.* There is no assurance that the Secretary will be reasonable and not arbitrary in his choice or exclusion of commodities.

So far as the Act attempts to define the tax rate, it is to be the difference between the current average farm price and the fair exchange value of the commodity, subject to such adjustment as the Secretary of Agriculture considers necessary (section 9 (b)). The indefiniteness and amount of discretion involved in fixing the rate, more fully discussed in the argument concerning delegation of legislative authority, remove all certainty from this attempted definition of the rate, so that the taxpayer in this aspect of the tax has no guarantee against arbitrary, capricious, unfair or confiscatory action.† Nor is there any assurance that the rate will

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Act of August 24, 1935). Processing taxes have been imposed with respect to—

Cotton (T.D. 4377; T.D. 4389; T.D. 4433). Cum. Bul. XII-2, 435; 438; XIII-1, 474;
Field corn (T.D. 4407). Cum. Bul. XII-2, 444;
Hogs (T.D. 4406; T D. 4425; T.D. 4518). Cum. Bul. XII-2, 453; XIII-1, 459; XIV-1, 450;
Tobacco (T.D. 4395; T.D. 4494; T.D. 4530; T.D. 4593). Cum. Bul. XII-2, 466; XIII-2, 500; XIV-1, 475; I.R.B. XIV-43, 13;
Wheat (T.D. 4371; T.D. 4391; T.D. 4579). Cum. Bul. XII-2, 476; XII-2, 480; I.R.B. XIV-34, 14;
Sugar Beets and Sugar Cane (T D. 4441; T.D. 4549). Cum. Bul. XII-1, 501; XIV-1, 462;
Peanuts (T.D. 4489). Cum. Bul. XII-2, 493;
Rice (T.D. 4565; T.D. 4586). I R.B. XIV-29, 18; XIV-37, 15;
Rye (T.D. 4601). I.R.B. XIV-46, 38—

but not with respect to the other named commodities, milk, flax, barley, grain sorghums and cattle.

* Compensating taxes on articles competing with cotton have been imposed on paper, jute fabric and jute yarn (T.D. 4415, Cum. Bul. XII-1, 515; T.D. 4495, Cum. Bul. XIII-2, 515), but not on rayon, linen, silk or wool.

† A tabulation of statistical material relating to the tax rate upon cotton is included in Appendix B.

be changed when prices and exchange values indicate that the old rate is far from the rate intended.

One of the elements mentioned in section 9 (b) as a measure of the tax is "fair exchange value." This is an economic concept involving the relationship between prices at the present time and prices in the years 1909 to 1914 of many undefined commodities other than the commodity to be taxed, and the application of such a relationship to the price at which the taxed commodity sold in the past. None of the component parts of this concept of fair exchange value have any reasonable relationship either to the operation of the manufacturer on whom the tax is laid or to the needs of the United States for revenue. The tax will be higher or lower because farm machinery, household supplies and other articles that farmers buy (undefined, and whatever they may be) were higher or lower at different periods or because cotton was higher or lower twenty years ago, not because of the reasonable likelihood that a manufacturer will be able to pay a certain rate of tax, or even because the government needs a certain amount of revenue. Such a basis cannot be said to be a reasonable basis of taxation. In the case of cotton this arbitrary and capricious method of computing a tax rate resulted in a tax equal to nearly one half of the market price of cotton on the date as of which the tax was figured. This 46 per cent tax was not all that the manufacturer was called upon to pay, for the operation of the control scheme which the tax finances is designed to raise the price the manufacturer is to pay for his raw materials. Such increase he must pay in addition to the tax, unless the Secretary sees fit to reduce the tax as the cost of materials advances.* Such

* Although cotton went from 8.7 cents when the tax rate was fixed, to 13.1 cents at the high point in August, 1934, and has again receded to about 11 cents (figures from U.S. Department of Agriculture, Bureau of Agricultural Economics, Crop Reporting Board), no change has occurred in the rate of tax of 4.2 cents per pound.

assessments, increases in costs, and dependence upon an administrative officer for fair adjustments cannot be justified as reasonable.

The cases fully support this argument. In *Heiner* v. *Donnan,* 285 U.S. 312, a statutory conclusive presumption that gifts within two years of death were in contemplation of death was held to be an invalid provision because it increased the tax as a result of acts bearing no relation to the estate or to death as the cause of the transfer.

In *Nichols* v. *Coolidge,* 274 U.S. 531, a provision of the revenue laws requiring, for the first time, an inclusion in the gross estate subject to estate tax of property conveyed in contemplation of death prior to the enactment was held to be in violation of the Fifth Amendment because the tax was made to depend on past lawful transactions, the effect of which upon the amount of the tax might become arbitrary, whimsical and burdensome.

In *Hoeper* v. *Tax Commission of Wisconsin,* 284 U.S. 206, a provision of a state income tax statute which resulted in the determination of the tax rate not upon the income of the taxpayer alone, but upon the total income of the taxpayer and his wife, was held invalid under the Fourteenth Amendment, because the measure of the rate bore no reasonable relation to the income of the taxpayer.

When the question here arises in what manner the Fifth Amendment limits the taxes imposed under this Act, if it is decided that the taxing power is in fact exercised in this Act, there are presented issues, apart from the recognized requirements of reasonableness and adaptedness, which have never before been squarely met. Purely upon principle, in order that the security of the people in their property may be preserved in accordance with the rights asserted in the Fifth

Amendment, there must be a limitation upon the taxing power such that this broad power may not be used to set class against class, to require one class to apply its property to harm its own interests, to take from one group and give to another, to throw unforeseen and unpredictable obstacles in the path of business, to upset the interior economy of the States by levies on one class and by purchased idleness of another. We submit that such an exercise of the taxing power is not in accordance with due process of law, either such due process as has been established by the history of taxation, or such due process as is required by a Constitution ordained "to form a more perfect Union, establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . ."

III.

CONGRESS MAY NOT, UNDER THE GUISE OF THE TAXING POWER, ASSERT A POWER NOT DELEGATED TO IT BY THE CONSTITUTION.

Attempts have from time to time been made by the Congress to accomplish something not within the powers delegated to the United States by casting the law in the form of a revenue statute. Sometimes such attempts have succeeded and sometimes they have failed. If they have succeeded, it is only because the courts have found in the successful statutes a primary purpose to obtain revenue for the government sufficient to outweigh the other and ulterior purpose of the statute. Ulterior purposes may be accomplished under this power only when they are truly incidental and necessary to a real revenue measure. The broad aspect of this question is stated in note 5 to the opinion in *Railroad Retirement Board* v. *Alton Railroad Company,* 295 U.S. 330:

> "When the question is whether the Congress has properly exercised a granted power the inquiry is whether the means adopted bear any reasonable relation to the ostensible exertion of the power. *Mugler* v. *Kansas,* 123 U.S. 623, 661; *Hammer* v. *Dagenhart,* 247 U.S. 251, 276; *Bailey* v. *Drexel Furniture Co.,* 259 U.S. 20, 27."

In 1921, through the Futures Trading Act, Congress imposed a "tax" on contracts for future delivery of wheat excepting on Boards of Trade approved by the Secretary of Agriculture. There were criminal penalties provided if the tax was not paid, and provisions for approval of boards of trade and for regulation of approved boards of trade. *Hill* v. *Wallace,* 259 U.S. 44, was concerned with a bill to enjoin the enforcement of the tax provisions of this statute. The Court determined that on the face of the statute it appeared to be an act for regulating boards of trade through the supervision of the Secretary of Agriculture and was therefore not a valid exercise of the taxing power, but was a regulation of business wholly within the police power of the State. Both the regulation of business and the tax were held to be unenforceable.*

A similar result was reached in *Child Labor Tax Case* (*Bailey* v. *Drexel Furniture Co.*), 259 U.S. 20, in which the

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* It has sometimes been contended that *Board of Trade of the City of Chicago* v. *Olsen,* 262 U.S. 1, modified the opinion in *Hill* v. *Wallace, supra.* In the *Olsen* case federal control was permitted for the reason that the activities regulated were found to be within the "stream of interstate commerce." The stream of commerce theory has now been more clearly defined in *Schechter* v. *United States,* 295 U.S. 495, and, as so defined, is not applicable to the facts in the case now before this Court. Notwithstanding any modifications in this definition, the *Olsen* case does not in any way affect the principles applied in *Hill* v. *Wallace* to determine that the control there exercised was not incidental to the power of taxation, but was the exercise of a separate ungranted power. The principle of *Hill* v. *Wallace* was later affirmed in *Trusler* v. *Crooks,* 269 U.S. 475.

Court refused its aid to the government in a proceeding to collect a tax imposed on those who employed child labor except in conformity with a certain schedule. Non-conforming child labor was not in terms forbidden, but the Court held that the law was palpably a prohibitory and regulatory law, and not a revenue law, an act not reasonably adapted to the collection of a tax, but solely for the achievement of some other purpose plainly within state power.*

What should be the test to determine whether or not a statute is primarily a taxing statute or primarily a statute to accomplish ulterior purposes? The receipt of cash is not the test; criminal statutes and, outstandingly, the National Prohibition Act, raised cash, but they are not revenue acts. Obviously the test must be the intent shown by the provisions of the statute itself, the manner in which the cash is raised and the manner in which it is applied to determine whether or not it is in fact revenue, by which we understand a charge upon a permitted activity for the proper purposes of government. We have above (pp. 13-21) dwelt at sufficient length upon the purpose and intent of the Agricultural Adjustment Act. We submit that the purpose of price and surplus control is so apparent in every part of the Act that it cannot be maintained that the intent of the Act is to raise revenue. In fact, although it may collect vast sums under the name of tax from processors, it raises no revenue. Every penny from these so-called taxes is at once, in section 12 of the Act, appropriated to a crop reduction program which is not within the powers of Congress and can no more justify the tax than the tax can justify it. After all the processing taxes are collected, the government will have not one cent more for the carrying on of the government than it had before. All will

* See also *Lipke* v. *Lederer*, 259 U.S 557, and *Regal Drug Corp.* v. *Wardell*, 260 U.S. 386, in which the provisions of the National Prohibition Act doubling the ordinary taxes in case of illegal sale were held to impose fines or penalties, and not taxes, and were therefore unenforceable by the usual methods of collecting taxes.

be spent on rental and benefit payments and administrative expenses connected therewith.

The purpose for which these expenses are made is designed to force the person who pays the tax to pay a higher price for his raw materials. It must be clear that the Act is not in essence a revenue measure, but is solely a measure to control the crops raised by farmers and the prices paid by processors, a measure in which the tax is not a revenue producing item at all, but an adjusting charge to increase prices paid by mills and to put such increase in the farmers' hands. It goes into effect only when the Secretary determines the crop should be controlled. Its rate equals the difference between the average farm price and the ideal price which the government seeks to establish by control of production. It ceases when it will no longer effectuate that purpose.

To return to the general test laid down in note 5 to the opinion in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330, quoted above, the Act is not adapted to the raising of revenue, because the money it produces is appropriated in advance to a purpose beyond the power of the government, because the tax rate is not fixed with respect to the needs of the government for revenue, and because limitation of production of the articles with respect to which the tax is laid is not useful or necessary as an aid to raising revenue.

The cases of *United States* v. *Doremus*, 249 U.S. 86 (relating to the Harrison Narcotic Act), and *McCray* v. *United States*, 195 U.S. 27 (relating to the Oleomargarine Tax Act), are not here applicable, as the statutes there involved did not on their face reveal an invalid exercise of the taxing power.*

* So with *Magnano* v. *Hamilton*, 292 U.S. 40 (dealing with a state tax on oleomargarine).

But such an ulterior purpose is baldly stated in the Declaration of Policy of the Agricultural Adjustment Act and carried out in all of the subsequent provisions. In neither statute involved in those cases are the tax proceeds appropriated to purposes beyond the powers of the United States, and removed from the revenue of the United States. In neither of those statutes is the tax rate made an adjusting surcharge to change the price level, an economic result beyond the powers of Congress. In both of the earlier cases revenue is raised and transmitted to the Treasury for general purposes of government. Here such money as is raised is set aside for the control scheme before it reaches the Treasury and is not available for the proper purposes of government. Under the guise of taxation this Act appears to be, in the words of the opinion in the *McCray* case (at page 64), "solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice . . . ," the type of act which the Court in that case felt should be declared invalid.

The Taxpayer may Contest the Tax and Question the Purpose Thereof.

The government's brief contends that the respondents have no standing to question the use to which the proceeds of the tax are to be put. But this merely confuses the issue. Respondents are not attacking an appropriation. They are contesting a tax on the ground it is unconstitutional. Surely this right is not challenged.

Nothing to the contrary is decided in *Massachusetts* v. *Mellon,* 262 U.S. 447. The decision in that case upon a taxpayer's rights is limited to this: that a taxpayer may not question the constitutionality of an act of Congress unless he can show that he has sustained or is in danger of sustaining some direct injury as the result of its enforcement, not

merely that he suffers in some indefinite way in common with people generally. In that case a person, whose only interest was that he paid some of the general taxes, sought to attack the validity of a proposed appropriation for the Maternity Act. There was not in that case the connection here apparent that the tax paid was appropriated to the purpose attacked. It was in that case indicated that, where the interest of the taxpayer is direct and immediate, as in the case of municipal taxes, the taxpayer may then attack the appropriation. We submit that there can hardly be a more direct and immediate interest than is shown in this case, where the very tax of which the taxpayer is mulcted is applied for the purpose of which he complains, and not only that, but applied for a purpose which aims to decrease the stock of merchandise necessary to the taxpayer's business and to increase the prices he must pay for these necessary commodities.

This is not a case in which a taxpayer complains because money which he has contributed in the past or may contribute in the indefinite future to the general treasury is about to be withdrawn for an improper purpose; nor is it a case where a taxpayer seeks to get back money previously paid into the Treasury. In this case the petitioner is seeking to take away from the respondents a specific sum of money, to wit, $81,694.28, which has never left respondents' possession and has never been mingled with the general funds of the United States, in order that the same specific amount of respondents' money may be applied to the control scheme which respondents say is invalid.

But disregarding completely the right of this taxpayer to question the appropriation as an appropriation, every item of argument herein presented may still be presented to determine the nature and validity of the so-called tax and the purpose of the Agricultural Adjustment Act.

IV.

The Floor Stocks Taxes are Direct Taxes and are Void because Not Apportioned.

In this division of the brief we contend that, whether the processing taxes are direct or not, the floor stocks tax laid under the Agricultural Adjustment Act is a direct tax, and is void because not apportioned to the population.

The division between processing and floor stocks taxes, if it becomes essential, is shown at Record page 14, summarized in this brief at page 5, above.

The Nature of a Direct Tax.

What, then, is a direct tax? Without doubt taxes on polls and taxes on real estate are direct taxes. So also is a tax on personal property or a tax on the income from personal property.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, and the rehearing at 158 U.S. 601.

In the rehearing of the *Pollock* case, at page 626 the contention that a tax on personal property may be an excise, raised by the case of *Hylton* v. *United States*, 3 Dall. 171, is effectually settled with an unequivocal opinion that a tax on personal property as well as a tax on the income thereof is direct.

The nature of direct taxes is further revealed in *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, wherein the Court determined that a direct tax on property was laid in a statute providing for a tax on all persons manufacturing, *owning* or *storing* whiskey, to be collected upon all whiskey withdrawn from bonded warehouses in which by law it was required to be kept. In the opinion the Court said (at page 294):

> "But as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i.e., consumption, sale, or keeping for future consumption or sale. . . . The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property."

It seems then that either taxes on owning property or taxes on such fundamental incidents of ownership as are necessary to make any use of the ownership are equally direct taxes. Two of these fundamental incidents, which, if taxed, are equivalent to a tax on the property, are income and possession. It cannot then be broadly stated that a direct tax is a tax on property while an excise is a tax upon the exercise of a single power over property incidental to ownership. There must be in the distinction some element of weighing the importance of the various incidents in the light of the nature of the property concerned, with the result that a tax on the more necessary incidents of ownership of more fundamental property is a direct tax, while a tax on the less necessary incidents of less fundamental property is an excise.

Following out a distinction on this basis it has been decided that taxes on some of the incidents of ownership are excises. A tax on the right to transmit property by inheritance is an excise. *Knowlton* v. *Moore,* 178 U.S. 41. That this should be classed as one of the less necessary incidents is not strange if the feudal background of our law and the doctrine of escheat is remembered. Selling oats on a board of trade was held to be a right subject to excise in *Nicol* v.

Ames, 173 U.S. 509. Such selling is a very limited part of the right to sell, not by any means an interference with the entire ownership. A tax on the sale of a certificate of stock was held an excise in *Thomas* v. *United States,* 192 U.S. 363. This tax falls on an incident of ownership of a corporation, an indirect method of owning property which could be owned in other ways, the very existence of which depends on the consent of a government. In *Bromley* v. *McCaughn,* 280 U.S. 124, a tax on the right to give property was adjudged an excise. The right to give is certainly not the sole incident of ownership. A tax on manufacturing and selling oleomargarine is an excise under the decision in *McCray* v. *United States,* 195 U.S. 27. The very nature of oleomargarine shows that it is a specialized fabrication not strictly necessary, and in the opinion of some deleterious and a possible instrument of deception. The tax involved in *Billings* v. *United States,* 232 U.S. 261, was on the *use* of a foreign-built pleasure yacht. That it was upon the *use* and not the *ownership* is made clear in the two cases of *Pierce* v. *United States,* 232 U.S. 290 and 292. The property involved is pre-eminently in the luxury, unnecessary class. The incident taxed, being the use of a pleasure yacht, must necessarily be a use for pleasure, hardly a necessary incident of ownership of a ship. Of course there are further excises on various incidents of ownership of intoxicating liquors, tobacco and narcotics. In this field even more clearly than in the case of oleomargarine the objects taxed are of very limited necessity and are involved with questions of harmful use and deleterious effect.

As stated in the brief for the United States, the classification of taxes as direct taxes or excises is not a matter of precise definition, but has remained to a large extent historical. Judged from the historical point of view this tax is without precedent. Excises traditionally have been levied on incidents of ownership of luxury articles, or articles possibly harmful, or on incidents of ownership which are not essential

to use of property, or incidents which have arisen in the comparatively recent development of the law with respect to ways of doing business which did not in ancient times exist. From an historical as well as from a philosophical point of view there is, then, in this distinction between direct taxes and excises, this element of weighing the necessity of incidents of ownership against the necessity for the property involved.

The Floor Stocks Tax, if Authorized at All, is a Direct Tax.

In the floor stocks tax we meet a preliminary question which must be decided before considering the nature of the tax. The wording of section 16, under which this tax is authorized, if the section authorizes anything, is, to say the least, unfortunate. The provisions of this section, so far as pertinent, are as follows:

> "Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:
>
> "(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.
>
> "(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an

amount equivalent to the processing tax with respect to the commodity from which processed."

We submit that the words in subsections (a) and (a) (1), above, although they give a general impression of an intent to authorize a tax on goods already processed equivalent to the processing tax, fail to define or authorize any tax. If they authorize anything, they authorize a tax on property, to wit, on articles processed wholly or in chief value from a commodity with respect to which a processing tax is levied.

What is taxed, and when is the tax to be levied under this section 16? Under subsection (a) there is to be a tax adjustment *"Upon the sale or other disposition"* of certain articles that on the date the tax takes effect are held for sale or other disposition. The details of the adjustment at the beginning of the tax are set out in subsection (a) (1). In (a) (1) we find that the tax is to be levied, assessed and collected *"whenever the processing tax first takes effect."* Subsection (a), taken alone, describes a tax adjustment upon the act of sale or other disposition at the time of sale or other disposition. But when qualified by the clearer words of time in subsection (a) (1), it appears to be a tax adjustment upon the act of sale or other disposition at the time when the processing tax first takes effect. Following on in subsection (a) (1), the nature of the adjustment to be made is levy, assessment and collection, all technical words which taken together describe the whole operation of taxation. Thus the whole operation of taxation is to be performed upon the act of sale or other disposition at a time when the sale or other disposition has not yet occurred, for the tax is upon the sale or other disposition of articles held for sale or other disposition. It may be argued that the tax is upon holding for sale or other disposition, but the difficulty with such a position is that the statute places the adjustment in so many

words upon the acts of sale or other disposition, and not upon the act of holding.

The second inquiry is whether the loose phraseology here used, if it indicates an intention to tax anything, indicates a tax upon an incident of ownership or a tax upon the whole ownership, equivalent to a tax on the article itself.

The tax, if it is a tax, is described as a tax upon the sale or other disposition of articles held for sale or other disposition. Do not those words comprise all the beneficial incidents of ownership? If a person cannot sell or otherwise dispose of his property without paying the tax, he can derive no income from it, he cannot give it away, use it or destroy it without paying the tax. The owner is as fully deprived of the beneficial ownership of his property as in the case of the income tax discussed in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429; 158 U.S. 601. The owner is as fully deprived of the right to make some of the only uses of which the property is capable, *i.e.*, consumption, sale or keeping for future consumption or sale, as in the case of the tax on whiskey determined to be a direct tax in *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288.

If, despite the meaning of the words used in section 16, the tax is determined to be a tax on holding for sale or other disposition, the observations in the preceding paragraph still apply. The tax is a tax upon the whole ownership of the property. The case of *Patton* v. *Brady*, 184 U.S. 608, is not authority to the contrary. In the first place, that case dealt with a tax upon tobacco, a commodity traditionally subject to excise, not counted among the necessities and one which has been thought by many to be harmful. The principle of balancing the relative necessity and usefulness of commodities against the degree of interference with the ownership in determining what are proper excises, above discussed, distinguishes *Patton* v. *Brady*, *supra*, from the

tax in this case upon cotton. We submit that, if the tax imposed in that case had been imposed on a commodity of such general use and necessity as cotton, it might well and should have been held to be a direct tax.

In the *Patton* case the tax involved was an adjustment in the tax on tobacco held for sale (not for sale or other disposition) to increase the levy on such tobacco to make it conform to a higher schedule of rates of tax upon manufacture or sale or removal for consumption or use. That the Court had difficulty with this tax even in the case of tobacco is indicated by the fact that it found it necessary to justify it partly on the ground that the tobacco taxed was at an intermediate stage in the acts primarily taxed, partly on the ground that tobacco was traditionally taxed and partly in these words (p. 619): "It is not a tax on property as such but upon certain kinds of property, having reference to their origin and their intended use." Is it not apparent that, when a court finds it necessary to say that a tax is not a tax upon property, but is a tax upon certain kinds of property, considerable doubt exists as to the very issue involved, whether or not it is a tax on property? When in this case an adjustment is imposed, not at an intermediate stage of several acts taxed, but at a point where processing is fully completed, an intent is revealed, not to tax the act of processing or any act incidental to ownership, but to tax the articles themselves into which processing has entered.

If, on the other hand, we pursue the argument of petitioner that this floor stocks tax is an adjustment of the processing tax (assuming that the processing tax itself is an excise), another difficulty presents itself. Upon such a theory it is assumed that the tax is a tax on acts of processing which have occurred in the past, in other words that it is a retroactive excise. A retroactive excise, however, offends

against the Fifth Amendment if it is a new tax on a lawful act not subject to tax when the act was performed.

Blodgett v. *Holden,* 275 U.S. 142.
Untermyer v. *Anderson,* 276 U.S. 440.

If, however, it is enacted as an adjustment of an excise already in effect, or as a necessary adjunct to the collection of an excise, we submit it still offends against the Fifth Amendment unless it is limited in effect to a reasonable time prior to its enactment and is reasonably necessary to prevent evasion of the tax it supports.

Milliken v. *United States,* 283 U.S. 15.

The floor stocks tax was at the passage of the Act a novel tax, a situation similar to that existing in *Untermyer* v. *Anderson, supra;* but even if it is considered as an adjusting tax, it is totally unlimited in time. The burden of this tax fell on whatever articles were in existence when the Secretary of Agriculture put a processing tax in effect without regard to the time when the articles in floor stocks were processed. Thus this tax which the petitioner claims is an adjustment of a tax on processing fell on material processed two years, or ten years, or more prior to the imposition of the processing tax. Such an unlimited retroactive extension of the processing tax is neither reasonable nor fair.

Such unlimited retroactive effect cannot be said to be necessary to avoid evasions of the processing tax. Due to the fact that the imposition of a processing tax is within the discretion of a single official, there is substantially no period prior to its imposition during which evasions could be effected. When the tax was placed on cotton the Act itself had not been enacted or conceived for more than a few months. If there is any necessity for an adjustment in this situation, the necessity does not relate to collection of a tax but rather

to equalizing the effects of the invalid economic purpose of the Act.

If the floor stocks tax is considered as an adjustment of the processing tax, the question remains whether or not the processing tax itself is a direct tax. The object with respect to which the tax is laid is cotton, "a basic agricultural commodity," one of those articles which contribute to comfort, health and maintenance of life itself. The incident of ownership taxed is the "first domestic processing," which is further defined as "spinning and manufacturing or other processing." It takes no great perception to realize that such rights of ownership must inevitably be exercised if cotton is to fill its usual place or be of any substantial use to the owner.

That the floor stocks tax was considered by Congress as a tax on the articles themselves is further indicated by section 16, subsection (b), in which certain articles are exempted from the tax, not on the basis of the nature of the processing which entered into them or of any operation incidental to ownership, but on the basis of the business of the owner of such articles and their location.

To summarize: the floor stocks tax is a direct tax because it is a tax upon the complete ownership of an essential useful commodity. If it is an excise, it is invalid because it is a retroactive excise, extending for an unreasonable period into the past.

V.

The Act is Invalid in that it Delegates Legislative Power to the Secretary of Agriculture.

In this division of the brief is discussed the delegation of legislative power to the Secretary of Agriculture as well as the effect of the amendments of August 24, 1935, which at-

tempt to ratify action taken by that official under such delegation of power.

We here contend that the devices adopted in the Act for its enforcement are in conflict with the requirements of a separation of powers between the legislative, executive and judicial departments of the government.

Such separation of powers and the system of checks and balances made possible by it were considered essential in a union of sovereign states when the Constitution was adopted. In *Field* v. *Clark,* 143 U.S. 649, 692, the doctrine was said to be "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." This system, however harassing it may have been to politicians anxious to accomplish their ends, has guaranteed that legislative power will be exercised only by the duly constituted representatives of the people and that laws will not be adopted without deliberation, or in response to the capricious desires of a single individual or the whims of a despot.

There has been a deplorable tendency to do away with the separation of powers in recent legislation. In the Agricultural Adjustment Act, however, Congress has been led almost entirely to abdicate its legislative function in favor of the executive department.

The separation of powers is clearly set forth in the Constitution:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
>
> Art. I, sec. 1.

> "The executive Power shall be vested in a President of the United States of America. . . ."
>
> Art. II, sec. 1.

"The Congress shall have Power To lay and collect Taxes, . . ."

Art. I, sec. 8, cl. 1.

"All Bills for raising Revenue shall originate in the House of Representatives; . . ."

Art. I, sec. 7, cl. 1.

Discussion of Authorities.

The decisions are unanimous upon the principle that legislative functions cannot be delegated by Congress. Legislation must be a complete, workable and intelligible direction prescribing what is to be done before it is turned over to the administrative branch for executive action. Legislation may leave for administrative determination only such matters as involve minor exercises of discretion or matters of purely administrative detail.

Panama Refining Co. v. *Ryan,* 293 U.S. 388.
Schechter v. *United States,* 295 U.S. 495.
Field v. *Clark,* 143 U.S. 649.
United States v. *Grimaud,* 220 U.S. 506.
J. W. Hampton, Jr., & Co. v. *United States,* 276 U.S. 394.

The decision always first cited is that of Mr. Justice Harlan in *Field* v. *Clark, supra.* In matters relating to foreign trade, the establishment and suspension of duties and embargoes, Congress has been allowed to delegate to executive officers power to determine facts which could not well be determined by legislative procedure and to provide that upon the determination of certain facts the operation of the laws with respect to duties or embargoes would change. Thus in *Field* v. *Clark,* upon determination by the President that

duties assessed by foreign countries were reciprocally unequal and unreasonable, the law provided that the free list with respect to certain commodities coming from such countries should be suspended. The fact only was to be determined by the executive. The action to be taken was prescribed in advance by Congress (pp. 692-694).

In *J. W. Hampton, Jr., & Co.* v. *United States, supra,* upon determination by the President that the tariffs on any commodity in effect did not equalize the cost of foreign production with the cost of local production, the law provided that the duty for this commodity should be changed by the difference determined by him as necessary to equalize the cost of foreign production with that of local production, provided that the total change should not exceed 50% of the rates specified by the law, and this upon tariff rates specifically stated. The discretion granted is within definite arithmetical metes and bounds. The discretion is to be exercised upon the basis of existing facts, *not upon guesses as to future events.* The facts to be determined relate to dealings with foreign countries, a field peculiarly within the executive power. The authority granted is dependent on such finding of fact and is limited to making an exception to an established scheme, upon the basis of arithmetical computations from the facts found. No authority is delegated to initiate action based upon determination of policy. None is granted to set up a new general tariff scheme for the nation.

As stated in *Field* v. *Clark,* it may be desirable, if not essential, for the protection of the interests of our people against the unfriendly and discriminating regulations established by foreign governments, to invest the President with large discretion. Yet in that case the Court was careful to determine, before holding the law valid, that (1) Congress itself had determined that free introduction should be suspended, (2) Congress itself prescribed in advance the duties to be levied, (3) nothing involving expediency or just opera-

tion of such legislation was left to the President, (4) when he ascertained a fact it became his duty to issue the proclamation upon which the act was to take effect, (5) the legislative power was exercised when Congress declared that suspension would take effect on a named contingency. These conditions may be taken as a guide in drawing the line between what may be delegated and what may not. The decision in *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394, does not depart from or change these conditions. They are in fact in part quoted in this recent opinion.

A further and clearer example of use of delegated power to make individual exceptions to an established scheme is found in various cases under a statute permitting the Commissioner of Internal Revenue to fix special individual rates in certain cases where a taxpayer's ability to pay is in question. Some of these cases are *Williamsport Wire Rope Co.* v. *United States,* 277 U.S. 551; *Blair* v. *Oesterlein Machine Co.,* 275 U.S. 220; *Heiner* v. *Diamond Alkali Co.,* 288 U.S. 502. These cases are no authority for delegating general power to establish all the details of a nationwide tax and control scheme.

The Interstate Commerce Commission rate cases are in the same class. They deal with the myriad details of transportation rates and transportation business, no one of which can possibly affect the nation at large, all of which taken together have not the unavoidable force of a revenue law. All of such cases relate to matters solely of filling up the details within the limits of a complete legislative scheme enacted by Congress.

The regulation making power, often delegated to administrative officers, as in *United States* v. *Grimaud,* 220 U.S. 506, is not adequate to support the delegation of power to pass general laws, for the field within which the executive has been allowed to make regulations has always been closely circumscribed by law and in most cases the power delegated has

been only that to make regulations as to matters of purely administrative detail within the field of a law full, complete and workable when it left the hands of Congress.

When the law delegates no more power than the power to fill up details or determine facts upon which the operation of a law prescribed by the legislative body depend, the law delegating even such authority must establish definite, certain and intelligible guides for executive action. It cannot speak in vague or general terms and trust to the good sense of the executive to act properly. That much is clear in all of the above cases. In one or two of these cases, as in the *Hampton* case, the court may have gone beyond its own statement of the abstract law in allowing reasonableness or fairness to be made an element in the standard, but it is to be borne in mind that the broader powers are approved only where the action will affect individual, exceptional or very limited cases.

When the power delegated approaches the general law-making power, especially where criminal penalties are attached, the dangers of allowing the executive to make his determinations upon considerations of reasonableness or fairness become apparent and it is held without peradventure that reasonableness or fairness is not a sufficiently definite standard for executive action in completing the details of a law. Thus in *United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81, a law forbidding unjust and unreasonable charges in handling or dealing in necessaries was held too vague a standard for executive action. And in *Adkins* v. *Children's Hospital,* 261 U.S. 525, a direction to determine minimum wages to supply the necessary cost of living to women and to maintain them in good health and protect their morals was held to be a standard so vague as to be impossible of practical application.

When Congress attempts to delegate power to make nation-wide control measures, and power to initiate original rules of general application, then the true limitations upon delega-

tion of legislative power are brought into sharp focus. They are not and should no longer be fogged by considerations of expediency and convenience, for at such a point the question is raised and must be decided, whether the constitutional separation of powers is to be preserved, or whether by legislative and judicial encroachments it is to be destroyed. Such an issue was presented in the cases of *Panama Refining Co.* v. *Ryan* and *Amazon Petroleum Corp.* v. *Ryan*, 293 U.S. 388, commonly known as the "hot oil cases." There it was unqualifiedly decided that the power to make laws may not be delegated to the executive department.

The *Panama* and *Amazon* cases dealt with section 9 (c) of the National Industrial Recovery Act, which authorized the President in unequivocal terms to prohibit the transportation in interstate and foreign commerce of petroleum in excess of the amount permitted to be produced or withdrawn from storage by certain authorities. Just as unequivocally the President had issued an executive order prohibiting such transportation and had caused regulations to be issued to aid in enforcing the prohibition. Congress left no uncertainty about what the President might do, and there is no doubt he did it, but Congress failed to make certain the circumstances and conditions upon which the President might take such action, except a general declaration of policy, and failed to require a finding of fact upon which such a prohibition should become effective. After an exhaustive review of the cases relating to delegation of legislative power, the Court decreed that such delegation of power was without sufficient standards for executive action and was in violation of article I, section 1, of the Constitution. In the course of the opinion the Court said (p. 430):

> "If section 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have

> reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

Following the *Panama* case the Court considered in *Schechter* v. *United States*, 295 U.S. 495, the delegation of legislative power involved in the promulgation of codes of fair competition under the National Industrial Recovery Act. As the Court pointed out, while the subject of statutory prohibition was defined in the *Panama* case, the determination in the *Schechter* case of what was to be regulated as unfair competition as well as what regulations were to be imposed was left to executive discretion. Thus the *Schechter* case brings the facts close to those in the case at bar, for under the Agricultural Adjustment Act the statute not only leaves indefinite and subject to discretionary action the nature and degree of control over agriculture to be attempted and whether or not such control shall be undertaken and a tax imposed for that purpose, but it also leaves subject to executive discretion the amount of tax to be imposed, what shall be done with the proceeds, and how long it shall continue. In all three cases the only guide to executive action with respect to initiation of the action under delegated authority is an oft-repeated injunction that such action shall be designed to effectuate a broad declaration of policy, which has now twice been held insufficient.

The declaration of policy in the Agricultural Adjustment Act is no more a certain guide to executive action than is that found in the National Industrial Recovery Act. Both express

a laudable ambition to improve the lot of certain sections of trade or business, to increase purchasing power, and to protect consumptive demand. The device considered in the *Schechter* case was codes of fair competition. The device here suggested is to raise the purchasing power of farmers by restricting their production and by taxing their product in the hands of processors. In neither case are sufficient details given to guide the executive in applying the device in question. The specification in the Agricultural Adjustment Act of a base period adds but little definiteness to the policy declared in the National Industrial Recovery Act to increase purchasing power; it adds no definiteness to the manner in which such an object is to be attained, or the time when it is to be attempted with respect to any commodity. We shall discuss later whether or not the determination of the tax rate is made subject to proper standards by the Agricultural Adjustment Act. As a proposition of law, the imposition of a tax and the determination of a tax rate are as clearly legislative functions as are the definition and prohibition of unfair trade practices.

In the Agricultural Adjustment Act there is, in addition, the executive authority to exercise, without any limit whatsoever, full control over the amount of production of agriculture by an unrestrained use of the funds raised by this tax. We submit that such power to control ought not to be delegated to an executive officer, but, if it may be exercised at all, should be among those powers which may be exercised only by the elected representatives of the people by clear and definite statutory provisions prescribing what shall be done, how it shall be done and what it shall cost.

Bearing in mind that this Act purports at least in part to be drawn under the taxing power, which is entrusted to the care of Congress, not only by the general provisions of article I, section 1, above, but is also twice specifically mentioned in other sections as being within the control of Con-

gress and limited in certain aspects to a particular part of Congress, let us now examine whether or not the legislative power of taxation in this unprecedented Act is exercised by those to whose care it was committed or is abandoned by that body to the executive section of our tripartite government.

Power to Initiate the Tax is Illegally Delegated.

The taxes are authorized, as we have earlier noted, in section 9 of the Agricultural Adjustment Act. When and under what conditions is there to be a tax? Section 9 (a) provides:

> "When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation."

Where is the determination of circumstances and conditions under which the tax is to become effective? The only thing resembling a fact to be determined as a prerequisite to the tax is the Secretary's determination that rental or benefit payments are to be made, but this is a determination of the Secretary's state of mind, not of a fact, unless the sophistry is indulged that a matter of individual discretion and determination becomes something else, merely because it is proclaimed. There is no standard of action furnished in this section by which the Secretary is to reach the particular state of mind calling for rental or benefit payments.

No further standard by which the Secretary is to reach the determination to make such payments is found in section 8, which, so far as pertinent, says only this:

> "In order to effectuate the declared policy, the Secretary of Agriculture shall have power—(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments."

Unless the reference to the declared policy is a standard for action, there is no limitation to the uncontrolled discretion of the Secretary at this point. It cannot be maintained that this reference is such a limitation or a standard; for, whatever the declared policy, there is no standard by which the Secretary is to judge whether or not such determination will effectuate the policy declared. Doubt as to whether or not the policy will be effectuated by such payments is expressed throughout the Act (see sections 11, 15 (a) and 15 (d)).

The nature of the Secretary's decision to initiate benefit payments, at the same time by specific provisions of the Act initiating a processing tax, is not changed by spelling out his single act of decision as, *first,* a mathematical computation; *second,* a determination as an executive to spend money in part available in the Treasury, but chiefly to be raised by taxes resulting from his determination; and *third,* the incidence of a tax by operation of law, a tax which comes into being only when he makes his decision to spend it, a tax for which the rate is to be determined by that same Secretary in such a manner as to effectuate the same purpose which he presumably had in mind when he decided to spend the money. No Secretary can thus deceive his left hand by the facility with which he gives with his right. It cannot be ignored that, when he decides it is time

to initiate a benefit payment program, he decides it is wise to control certain features of agriculture; nor that when, as an executive, he reaches the determination to spend money for such a program, at the same time he performs the legislative function of imposing a tax to raise the money.

The Secretary is not directed to initiate benefit payments in any set of circumstances. He is merely given the power—a vastly different situation. He is not required, on any fair interpretation of the Act, to base his decision to exercise this power solely upon a comparison of indexes of purchasing power; he is free to reach his decision to exercise or not to exercise this power for any reasons which may appeal to him as tending to effectuate the declared policy.

When the declaration of policy is examined, no further standard or guide for executive action in this respect is found. The policy, broadly stated, is to establish the purchasing power of agricultural commodities at an equivalent to a base period, at as rapid a rate as is feasible in view of current consumptive demand in domestic and foreign markets, with a warning that consumers' interests are to be protected. No concrete facts are to be determined as a prerequisite of action. No time when or conditions under which the action is to be taken are set forth. The policy is so hedged about with conditions and provisos that it may mean whatever the person interpreting it wishes it to mean. The declaration of policy, so far as it deals at all with the time when or the conditions under which a crop reduction program is to be initiated with respect to any commodity or whether it is to be undertaken at all, leaves it entirely to judgment and discretion.

Power to Determine the Commodities Taxed is Illegally Delegated.

Returning to section 9: Upon what commodities is the tax to be laid? Equally with the determination of whether or not the tax shall be levied at all and when it is to be laid, this question under sections 9 (a), 8 (1) and the Declaration of Policy is left to the uncontrolled discretion of the Secretary of Agriculture without standards to guide his choice, or facts to be determined upon which the operation of the law is to depend. True it is that section 11 mentions as basic agricultural commodities wheat, cotton, field corn, hogs, rice, tobacco and milk, but Congress has not decided which, if any, of such commodities shall bear the tax and has set up no standard to control the Secretary in his choice, has described no circumstances and conditions under which a tax on one commodity and not another is to be levied, and has required no findings of fact prerequisite to the application of the Act to a particular commodity. The only guide of any kind prescribed by Congress is the effectuation of the declared policy, which, as discussed above, places no factual limits on executive action, but rather places the determination of what shall be taxed squarely within the field of judgment, discretion and individual preference.

Related to the determination of commodities to be taxed is the provision in section 15 (d) for taxation of competing commodities:

> "(d) The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity

for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, until such rate is altered pursuant to a further finding under this section, or the tax or rate thereof on the basic agricultural commodity is altered or terminated. In no case shall the tax imposed upon such competing commodity exceed that imposed per equivalent unit, as determined by the Secretary, upon the basic agricultural commodity."

Although no tax on competing commodities is here involved and the tax on such commodities is not in this case directly in issue, yet the power to assess or fail to assess a tax on things which by statutory definition are competing commodities carries with it a question of fundamental policy with respect to the commodity taxed. In the case of cotton the burden of the tax upon the processor may be made either prohibitive or bearable by reason of the determination to tax or not to tax such competing commodities as jute, silk, rayon and wool. Such a matter of policy is by reason of its nature and potential effect upon manufacturers and the people at large one that is entrusted to the legislative, not the administrative, division of the government. Congress, if it intended to tax or not to tax competing commodities, should have expressed its will and should not have left this question of legislative policy to an executive, without a certain, unambiguous chart to guide his action. It is submitted that here, as in other sections of this Act, the fact to be found is involved in theo-

retical statistical analysis, the action to be taken is not prescribed, and there are no workable limits, standards or guides to control the Secretary in determining what action to take.

The Secretary is not bound even by his own determination of commodities to be taxed. Under section 11 he has full power at will to except any commodity or classification thereof from the operation of the Act solely on his determination that he does not think the tax will work. In section 15 (a) he is given power to refund taxes paid upon such classes of products of taxed commodities as he may determine are of such low value compared with the quantity of the commodity used that the imposition of the tax will reduce consumption and increase the surplus of the commodity, matters of pure discretion and opinion.

There can hardly be more fundamental legislative issues in this question of taxation, which has been placed in the care of Congress by three separate sections of the Constitution, than deciding whether or not there shall be a tax and choosing what shall be taxed. Congress, however, has failed to perform its duty and has left these matters to the determination of a single executive officer uncontrolled by anything except his own judgment and conscience. It has also delegated to this same executive officer wide discretion in deciding what is perhaps the next in order of the fundamental legislative issues of taxation, the determination of the tax rate.

Power to Fix the Tax Rate is Illegally Delegated.

The provisions for determining the rate of tax are primarily found in sections 9 (a) and 9 (b). Here we find an attempt to create an illusion of factual control, which, however, is dissipated upon analysis. The Act directs the Secretary of Agriculture to fix the rate in the first instance in conformity with section 9 (b). Section 9 (b), as amplified by section 9 (c), contains the provisions which counsel for the United

States will argue constitute a precise mathematical formula limiting the Secretary in the determination of the rate. It directs that (in the first instance) the tax shall be "*at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity.*" Concededly a mathematical operation is described, but is it a mathematical formula? Has it any precision? Does it in any way limit the Secretary? Precision, the *sine qua non* of mathematics, requires definition not only of what is to be done with certain values, but equally an unmistakable definition of what those values are. If the values are not defined, no amount of mathematical operation upon them can ever reach a precise result. And while we are in the field of mathematics, if one only of several values in a formula is uncertain, the result must forever remain uncertain. The values which enter into this so-called "formula" are "current average farm price" and "fair exchange value." These on their face do not sound like mathematical descriptions of values, but rather resemble economic abstractions. For if, as Mr. Justice Stone said in *West* v. *Chesapeake &c. Tel. Co.*, decided June 3, 1935: "Present fair value at best is but an estimate"—a statement with which we are in accord—what can be said about "current average farm price" and "fair exchange value"? But it may be possible to make them more certain. This further certainty is attempted in section 9 (c).

In section 9 (c) it is provided that the Secretary of Agriculture is to determine both these values from available statistics of the Department of Agriculture. This at least defines the buildings, filing systems and warehouses in which the fundamental statistical information is to be found. But does it go any further? From the mass of figures undoubtedly available in the Department, how is the Secretary to compute even the simpler of these values, the current average farm price? Suppose on a particular day one farmer received $50 a bale and another received $45 a bale while at

some distant point another farmer received $65 a bale: Is the average to be a straight arithmetical average of these prices notwithstanding that one sale may have been of one bale and another of one hundred bales, or is the average to be weighted according to the size of each individual transaction, or are many prices to be grouped under a simple average and weighted according to averages for counties or states? If one farmer sells in square bales and another in round bales and the weights and tares of these bales are different, is the Secretary to adjust for such variations, in order to arrive at a price per pound of lint cotton, upon the basis of actual weights of the individual bales, or in his discretion is he to adopt regional average factors and apply such factors to a relatively large number of grouped averages to determine the net cotton weight? Still further, upon what basis is the Secretary to determine how many items of information to obtain in order to reach a representative average, and from what farmers he is to obtain them before constructing his current average farm price? Even this relatively definite value implies at every turn an exercise of discretion, weighting and judgment before it can be determined.

When the fair exchange value is to be determined, the problems requiring the exercise of discretion multiply in geometrical progression. Not only are there problems like those described in the preceding paragraph, but further and more complicated ones raised by the definition in section 9 (c) of fair exchange value as *"the price . . . that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2."* The base period is defined in section 2 (in the case of cotton) as the pre-war period, August 1909–July 1914. The base period is not a single date, but a period of approximately five years. No direction is given as to how a value for such an extended period is to be determined, whether the highest or the lowest is to be taken, or an

arithmetical average of high and low points, or of daily, weekly or monthly values, or whether it is to be weighted for volume of trade. The Secretary is left to his own statistical and economic theories. The articles farmers buy are not specified either for the base period or for the current period. No direction is given as to whether the same articles are to be used in both periods or whether some one is to use discretion to determine what farmers buy at different times. Nothing prevents such a selection and weighting of these articles as will seriously affect the result. No formula is given for determining purchasing power. It is not decided in the Act whether it is the purchasing power of a particular grade of cotton or an average of unidentified grades, whether the relative necessity and use of the articles purchased are to be considered or purchasing power is to be figured on the lines of straight arithmetical average. It is apparent that enough cotton to buy one tractor in 1909 might buy several now, while the very same amount of cotton might buy less coal now than it bought in 1909. Such a simple illustration indicates the real uncertainty of the term "purchasing power." The Act leaves it to the Secretary to decide as best he may what the term means and how to apply it in the determination of "fair cash value." Is it not apparent that this section 9 (c) is an attempt to make certain that which is and must forever remain essentially uncertain?

Counsel for the petitioner argue (U.S. Br. p. 53) that no other data than that used by the Secretary could be confused with it, basing their argument on the glib assertion of a department official (Addendum, pages 18, 19). But that same Addendum contains a positive proof of the opposite of this assertion, for it is apparent that the Department of Agriculture maintains at least two indexes of prices of articles farmers buy, similar in general outline but different in detail. One appears on page 55 of the Addendum, the other on page 60 thereof. A careful comparison of the two curves repre-

sented on each chart as a dotted line and marked on each chart "Retail Prices" shows that there are in the Department at least two different indexes to determine one of the elements in this so-called formula which could readily be confused.* Clearly it was the duty of Congress, if it intended to prescribe a "formula" in such a situation, to define the factors so that the Secretary might know which was intended. It is not even contended by the government that the Department of Agriculture ever kept any set of statistics known as "fair exchange values."

If the Addendum is to be considered, the description of the actual computation of this tax rate in the affidavits of Nils A. Olson on pages 16 and 20 of the Addendum shows the amount of discretion that is left to executive officers in determining the factors to be considered and in fixing the rate of tax.

We have, we believe, demonstrated that the values in the so-called formula of section 9 (b) are matters requiring the exercise of an enormous amount of judgment, selection and discretion, values not in any sense definite or fixed, and values which can be computed only by the use of many subsidiary

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* An examination of the monthly reports of the Crop Reporting Board, similar to that shown at Addendum, p 5 (old p. 7), issued since the trial in the District Court, shows that the indexes put forward as a mathematical basis for the tax rate are subject to constant revision. Revisions are mentioned in notes contained in the issues of August 28, 1934, September 3, 1934, and January 29, 1935. After September, 1934, the indexes appear under the heading: "New Series—Revised and Enlarged." Beginning with the August 29, 1935, issue appears a new index, described: "Prices paid by farmers, interest and taxes," which thereafter appears in addition to the previous index described, "Prices paid by farmers." The values given for prior months of "Prices paid by farmers" in the issues of September, 1934, and June, 1935, reflects slight changes from the values previously given for those prior months. These facts, if the Court cares to consider them, raise substantial doubts about the certainty and accuracy of the averages and indexes.

formulae not given or described in the Act, but constructed and applied solely in the discretion of an executive officer.

Under this "formula" the Secretary is bound by no real limits, but the extent of his discretion in fixing the rate of tax is much broader. It is not in fact limited even by the formula, for in the remainder of section 9 (b) there is found this charter for discretionary action:

> ". . . except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that such result will occur, then the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. . . ."

Nowhere in the Act is there any further limitation to this final test of the tax rate. True, this section requires a finding of something which may be dignified with the name of fact; but even that fact is a matter of forward aspect and opinion as to what will happen in the future. Whatever the thing to be found, there is no complete and workable legislative scheme provided by Congress which is to go into effect when the finding is made. The action to be taken is left to uncontrolled theory and discretion without standards of any kind to govern, limit or control the determination of the tax rate. No limitation whatever is contained in the provision that the tax shall be at such rate as will prevent an accumulation of surplus and depression of farm price. Who can say what rate

will accomplish these desired results? If Congress knew a formula for such a rate, it should have prescribed it. If Congress did not know the formula, it has delegated to the Secretary not only power to make a law, but also power to determine whether or not the law should be made, or, worse, to experiment with the welfare and fortunes of the people in order to try out an untried and highly controversial economic theory.

Even the vague generalities of section 9 (b) do not mark the full extent of unlimited discretion given to the Secretary with respect to the tax rate. Congress intended, if it had any real intent in passing this Act, to say to the Secretary substantially: "Make the tax rate whatever you think will work." That is what is said in legal phraseology in section 9 (a):

> ". . . Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. . . ."

Floor Stocks Taxes. The rates of tax to be applied to floor stocks are dependent upon the rate fixed for processing taxes, but involve still further exercises of discretion for which no standard is furnished. Section 16 provides that the tax on floor stocks shall be "equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date."

The meaning to be given to the word "equivalent" is nowhere defined. Obviously it does not mean "equal." In section 10 (c) the Secretary is authorized to establish "conversion factors for any commodity and article processed

therefrom to determine the amount of tax imposed or refunds to be made with respect thereto." There are no further instructions in the Act to limit the Secretary's discretion in this regard.*

Power to Terminate the Tax is Illegally Delegated.

The provision for termination of the tax is within the Secretary's discretion as fully as is the initiation of it. In section 9 (a) it is provided:

> ". . . The processing tax shall 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. . . ."

There are no more limitations upon this power than upon the power to initiate the tax and crop reduction program. The provisions of section 8 (1) and of the Declaration of Policy fail to furnish any factual control or standard for action. The power to terminate is of the same extent and as uncontrolled as the power to initiate.

Power to Expend the Proceeds of the Tax is Illegally Delegated.

The power delegated to the Secretary with respect to this tax is not limited to laying and collecting it. He is given as

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* Discretion has been exercised again and again in determining such conversion factors. In T D. 4377, approved July 29, 1933, Cum. Bul. XII-2, 435, a general conversion factor of 105.2% was prescribed in paragraph D, and this rate was continued in T D. 4389, approved September 6, 1933, Cum. Bul. XII-2, 438, but in T.D. 4433, approved May 10, 1934, Cum. Bul. XIII-1, 474, hundreds of different conversion factors for different kinds of goods processed from cotton were established effective as of December 1, 1933, and these varied from zero to 162%. Nothing except a wide exercise of discretion can explain such differences in rates.

well unlimited discretionary power in expending the proceeds. Section 12 (b) appropriates the entire proceeds of the tax:

> ". . . to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of the title: Administrative expenses, rental and benefit payments, and refunds on taxes."

The Secretary's discretion is particularly untrammelled in determining how he shall spend the tax, for section 8 prescribes that the Secretary may make rental and benefit payments *"in such amounts as the Secretary deems fair and reasonable"* and section 10 (e) provides:

> "The action of any officer, employee, or agent in determining the amount of and in making any rental or benefit payment shall not be subject to review by any officer of the Government other than the Secretary of Agriculture or Secretary of the Treasury."

The expenditure under this Act is not comparable to the ordinary expenditure of an executive officer under a general appropriation, for this expenditure is an essential part of the mechanics by which improper control is exercised. We are not aware, and the petitioner does not argue, that under any prior statute an executive has been authorized to expend funds appropriated to his use in such a manner as to regulate the internal affairs of a State without the assent of the State.

There is not in these sections even the form or pretext of any legislative control over the Secretary's acts, yet the acts of deciding when, where and in what amounts the proceeds of taxes shall be spent are, as in the case of laying of taxes, con-

sidered as of sufficient importance to be placed in the care of the legislative branch by a specific clause of the Constitution:

> "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."
>
> United States Constitution, art. I, sec. 9, cl. 7.

This Act is Contrary to the Fundamental Principles of Constitutional Government.

If it is argued that all this delegation of power is justified by expediency, or because the end sought could not be attained except by this means, that returns us to an earlier division of the brief, for it is an admission that the tax is solely a means to a price control end and is not a tax at all. Elaborate provisions for flexible rates of tax adjusted at every angle to economic purposes are not necessary or desirable to the raising of revenue, but are an incident of a regulatory measure. Furthermore, the end cannot justify illegal means, nor can any means be employed by the government to an unconstitutional end.

The power delegated transcends the taxing power. Through the discretion authorized in this Act Congress has left to the Secretary of Agriculture the determination of far-reaching economic policy. Such questions as these are made matters of executive discretion: Is it wise to attempt to reduce the crops of basic commodities such as cotton and wheat to be raised throughout the land? How much of a reduction should be attempted? How much is it wise to spend for such reduction? Is it wise to attempt to raise prices and by how much? The implications of the delegation of such discretion are enormous. If this may be done, Congress, acting within its enumerated powers, may delegate any and all of its functions by indefinite enactment.

The extent to which Congress has in this Act abdicated its function of making the laws for the people it represents is now clear. It has, without retaining restraint or control, without prescribing the conditions and circumstances under which action shall be taken, without determining what that action shall be, and without furnishing any standard or guide for executive determination of such action, delegated to an executive officer every material item in a law which purports to be a general revenue law. Among the powers so delegated are the power to decide whether or not there shall be a tax, when it shall go into effect, what commodities shall be taxed, what relief shall be given by way of tax on competing commodities, what the tax rate shall be, when the rate shall be changed and in what amount, when the tax shall cease, and where, when and in what amounts it shall be spent. Failure to comply with the regulations for collection of taxes so laid is made punishable as a crime by section 19 and the statutes therein incorporated by reference. In short, the Secretary of Agriculture may make the tax or he may unmake it. From his determinations there is no appeal.

Is such a situation in accord with the careful limitations, boundaries and restrictions placed upon delegation of legislative power to an executive recognized in every case which has touched upon the subject from *Field* v. *Clark,* 143 U.S. 649, *supra,* down to *Schechter* v. *United States,* 295 U.S. 495, *supra?* If the government of the United States is to continue as a constitutional government, there must be no relaxation or extension of the rule laid down in *Field* v. *Clark.* Even in that case, in the dissenting opinion of Mr. Justice Lamar, concurred in by Chief Justice Fuller, the delegation of legislative power there permitted was considered a dangerous step of first departure. If the reluctant departure there made from the clear path of direct exercise of the legislative authority by the Congress is to be made the excuse for what is indeed a delegation of the law-making powers, we shall no

longer have a government of the people, by the people and for the people, but a government by a bureaucracy for the benefit of the bureaucrats, effected, not by orderly amendment of the Constitution, but by legislative encroachment and judicial interpretation.

Section 21 (b) of the Amendments is Ineffective to Validate Taxes Assessed Prior to its Passage.

Separate and apart from other considerations, petitioner relies upon section 21 (b) of the amendatory Act of August 24, 1935, to sustain the taxes imposed under the earlier Act. This subsection reads as follows:

> "(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment."

Obviously section 21 (b) can in any event do no more than cure an unlawful delegation of legislative power. It cannot cure or supply an entire lack of power. The invalidity of the Act is not predicated on this ground alone. Respondents contend that the Act is in violation of the Tenth Amendment, and not within any of the powers delegated to Congress, in that it constitutes a scheme of which the tax is an integral part to control production of agricultural commodities within the States, further, that the tax is an exaction condemned by the Fifth Amendment. These infirmities would invalidate the Act even had Congress itself specifically levied the taxes in the first instance. If Congress for these reasons could not have imposed the tax, it cannot now ratify what it never could have done.

Even assuming that the Act and the taxes are within the granted powers, still Congress is and should be totally without power to ratify taxes imposed by the Secretary of Agriculture under an invalid delegation of its powers. It is an elementary principle of agency that, where a principal may confer authority *ab initio* upon an agent to perform an act for him, he may also ratify a similar act of the agent done without precedent authority. This principle, however, has no application in the present instance. These propositions cannot successfully be contradicted: *first,* that Congress is not a principal, but is itself the agent of the people; *second,* that Congress does not hold a general power of attorney, but has only those powers delegated to it by the Constitution; and *third,* those powers at least, so far as they are legislative powers—as this Court has reaffirmed—can be exercised only by Congress itself. In the present instance the situation of Congress is not that of a principal, or even of an agent with power to delegate authority to sub-agents. It is closely analogous to that of an agent who, because of his peculiar fitness to perform the task entrusted to him, is specifically denied the privilege of appointing another to act for him.

The conclusion must inevitably follow that Congress, having no power to make the delegation in the first instance, cannot substitute the judgment of another for its own, and then, by ratification, bind its principal to the decisions made by one whom the principal had in advance specifically excluded from discretionary power. Ratification, in its true sense, necessarily presupposes original power to delegate. If Congress is an agent of the people, with no authority to appoint a sub-agent to execute its legislative functions, it is only a devious evasion of constitutional principles to permit it to ratify a legislative act done by such a purported sub-agent.

The petitioner, in its brief, beginning at page 107, relies to a large extent upon the case of *United States* v. *Heinszen,* 206 U.S. 370, as a precedent for the ratification. An examination of this case shows the fallacy of the citation, and points the way to the true distinction. The facts of the case are briefly as follows: After the conquest of the Philippine Islands, the President of the United States, by virtue of his authority as Commander-in-Chief, issued an order providing for the enforcement by the military power of a system of tariff duties to be levied on goods coming into the Islands. The tariff schedule became effective in November, 1898. It was in force when the Treaty of Peace was signed (December 10, 1898), and when that Treaty was ratified (April 11, 1899), and was continued in effect by the Philippine Commission appointed by the President in April, 1900, and subsequently by legislative act of the civil government. It was in force in March, 1902, when it was approved and continued by Act of Congress. Subsequently, it was held (in *Dooley* v. *United States,* 182 U.S. 222) that the right of the President to impose duties under the *war power* ceased with the ratification of the Treaty of Peace.* To remedy the situation, Congress in 1906 passed an act ratifying the collection

* The *Dooley* case dealt with the tariff on goods coming into Porto Rico, but of course was equally applicable to the Philippines.

of all tariff duties imposed by the military government prior to the passage of its own Tariff Act.

This Court upheld the ratification of the tariff duties, but in so doing stated this principle:

> "That where an agent, without precedent authority, has exercised in the name of a principal *a power which the principal had the capacity to bestow,* the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement" (p. 382). (Italics ours.)

The opinion quoted with approval from the case of *Mattingly* v. *The District of Columbia,* 97 U.S. 687, as follows (p. 690):

> "If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and to prescribe that the assessments should be made in the manner in which they were made, *it had power to ratify the acts which it might have authorized.*" (Italics ours.)

This case concerned the validity of an act of Congress in effect confirming the actions of the Board of Public Works of the District concerning the improvement of streets and roads and ratifying certain void assessments for street improvements.

The ratification is valid only because Congress had full power to legislate for the District of Columbia, including the power to delegate to the Board of Public Works the determination of the assessments in issue.

The contention was made in the *Heinszen* case, as here, that Congress had no power of ratification because it had no power to delegate to the President the right to prescribe

tariff duties. This contention was rejected in that case, not upon the ground that Congress could ratify what it could not authorize, but because, in the case of the Philippine Islands, Congress did in fact have the power to delegate to an executive the power to fix tariffs. It had such power to delegate because the Philippine Islands, being a *territory,* were not entitled to the guaranties which the Constitution preserves to the *States.* The contention was stated and discarded as follows (p. 384):

> "First. Whilst it is admitted that Congress had the power to levy tariff duties on goods coming into the United States from the Philippine Islands or coming into such islands from the United States after the ratification of the treaty, it is yet urged that as that body was without authority to delegate to the President the legislative power of prescribing a tariff of duties, it hence could not by ratification make valid the exercise by the President of a legislative authority which could not have been delegated to him in the first instance. But the premise upon which this proposition rests presupposes that Congress in dealing with the Philippine Islands may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select, a proposition which is not now open for discussion. *Dorr* v. *United States,* 195 U.S. 138."*

Further, in the words of this Court (p. 386):

> ". . . the act is but an exercise of the conceded power dependent upon the law of agency to ratify an act done on behalf of the United States which the United States could have originally authorized.

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* The *Dorr* case, specifically holding that a Philippine citizen was not entitled to a jury trial, established the principle that the ordinary constitutional guaranties did not run to conquered territory.

> ". . . when the duties were illegally exacted in the name of the United States *Congress possessed the power to have authorized their imposition in the mode in which they were enforced,* and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered." (Italics ours.)

It is thus evident that the *Heinszen* case, far from justifying the ratification now attempted, establishes the principles which make it necessary to declare the attempted ratification invalid. Subsequent cases fall into the same category.

Rafferty v. *Smith, Bell & Co.,* 257 U.S. 226, approved the ratification by Congress of export tariffs imposed by the Philippine legislature at a time when the imposition of such duties was prohibited by an earlier act of Congress. It was affirmed, without discussion, upon the authority of the *Heinszen* case. The principle is the same; Congress could delegate the power to legislate for a *territory* and could limit the power so delegated. Naturally, it could ratify acts which were invalid only because in excess of the limits which Congress itself had placed and could remove.

Tiaco v. *Forbes,* 228 U.S. 549, arose out of the deportation of an alien by the Governor General of the Philippines, and the subsequent legislative ratification of his action. In sustaining the deportation, this Court cited *Fong Yue Ting* v. *United States,* 149 U.S. 698, in which it was held that the immigration and deportation of aliens were political matters, and—

> "The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers . . ." (p. 713).

Obviously, the rights of citizens of this country do not fall into the same category. The decision was not so much upon

the power to ratify as it was upon the protection to be given an executive personally when acting under apparent authority.

Charlotte Harbor & Northern Railway Co. v. *Welles,* 260 U.S. 8, not unlike the *Mattingly* case, *supra,* involved the right of a State to ratify the action of an administrative body creating an improvement district and assessing taxes for the benefits resulting from such improvements. No question was raised as to the power of the state legislature in the first instance to grant authority to the administrative board to create such districts.

Graham & Foster v. *Goodcell,* 282 U.S. 409, involved a tax illegally imposed, but collected (under a mistaken theory of the law) after the statute of limitations had run. This Court sustained an act of Congress prohibiting recovery in cases where the collection of the tax had been delayed by action of the taxpayer. No contention was made that the taxpayer was not originally liable for the tax. No issue of ratification was involved, but rather a question of the taking away of the right to refund.

It is hardly to be assumed that section 21 (b) would be intended to propose a retroactive tax. The processing tax can be valid only if it is an excise tax, and it is well settled that excise taxes may not be retroactively imposed. *Nichols* v. *Coolidge,* 274 U.S. 531; *Blodgett* v. *Holden,* 275 U.S. 142; *Untermyer* v. *Anderson,* 276 U.S. 440.* In any event, the intent of the subsection is clearly not to impose a retroactive tax. The tax must have been levied at one of two points in time: either in August, 1933 (when the Secretary first imposed the tax upon the processing of cotton), or in August, 1935 (when section 21 (b) was enacted, nearly two years after the cotton here involved had been processed). It is

* Cases where taxes are imposed in respect of past benefits are adequately distinguished in *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U.S. 338.

clear that, if any tax was imposed, it was upon the former date. Not only does the subsection in terms ratify the acts of the Secretary, but in addition it declares:

> "Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment."

Congress by this language clearly indicates that in its judgment the Secretary himself had imposed the tax, and that its aim is to make valid the tax previously imposed. If so, a tax can hardly be imposed a second time.

To say that Congress may not ratify an act done under an invalid delegation of power is not merely to invoke the formal rules of the law of agency. It goes to the very roots of our scheme of government. Under this scheme the people of the United States have delegated to their duly elected representatives alone the highly discretionary, highly personal power to make the laws by which the people are to be bound. This power of legislation cannot consistently with the trust involved in turn be delegated by Congress to any other body or individual. And if the power to legislate is improperly delegated to another, it must follow that Congress is not exercising its fiduciary power itself, nor is it faithful to its constituents when by a mere verbal ratification it accepts the decisions made by another.

Where Congress has concededly exercised its legislative power and placed in the hands of subordinate officials the execution of the law, it may of course by a subsequent act cure any defects or irregularities in the administration of that law—at least where substantial equities have not intervened. In such case the legislative will has already mani-

fested itself. Furthermore, even where the legislative will has not functioned, Congress may ratify the act of an official done on its behalf where, because of the nature of the act or because of the absence of constitutional guaranties, Congress might have authorized the official to act in the first instance. Here, however, the act is the imposition of a tax, the legislative act which among all the others the people have most carefully guarded, and this is an act which Congress may not authorize the Secretary to perform unless we are to return to the days of taxation without representation. It will not do for Congress first to make an illegal delegation of power, and then to assemble for the purpose of rubber-stamping the act performed. The people have a right to ask that Congress itself legislate. They have no assurance that the legislative mind has functioned if, after the lapse of time, in the midst of many practical problems created by the administrative laws promulgated by the Secretary, it operates merely to put its stamp of approval upon the legislation of another upon the plea that so much has been done by the executive that approval of his acts has now become necessary. This, in essence, is a fraud upon the power delegated to Congress. The people, when told to obey a law, have a right to know that it is a law which, through their representatives, they have imposed upon themselves. It will not do to tell them that they must obey an invalid law now because it may become a valid law in the future. Their equity lies in the fact that they have granted the legislative power to Congress, and not to the Secretary of Agriculture. They are not compelled to assume that an act of the latter may happen to coincide with the legislative will in the future. They have a right to insist that duress of interim executive laws shall not be permitted to force their representatives to adopt legislative decisions of another. To hold otherwise is to reduce our scheme of government to a par with that of those continental states where the executive functions as he pleases in

the first instance and summons an acquiescent assembly at stated periods for a solemn ratification of all his acts.

Conclusion.

It has been the contention of this brief that the Act and the taxes are invalid. It is clear that Congress has come to the same opinion. Congressional consciousness of invalidity is reflected throughout the amendments of August 24, 1935. Not only is there the attempt to ratify the acts of the Secretary above discussed, but, as a further example, in section 21 (d),* added by these amendments, is a barefaced attempt to collect and keep the proceeds of these taxes whether they are legal or not, in effect a ratification with a future aspect upon the principle that might makes right. The practical effect of this subsection is to deny the processor any adequate remedy to recover his payments if the levy is held invalid. *Baltic Mills Co.* v. *Bitgood,* D.C. Conn., August 28, 1935; *Grosvenor-Dale Co.* v. *Bitgood,* D.C. Conn., September 26, 1935; *G. B. R. Smith Milling Co.* v. *Thomas,* D.C. Tex., 11 F. Supp. 833; *Shenandoah Milling Co.* v. *Early,* D.C. Va., September 23, 1935; *John A. Gebelein, Inc.,* v. *Milbourne,* D.C. Md., 12 F. Supp. 105; *Larabee Flour Mills Co.* v. *Nee,* D.C. Mo., October 3, 1935. In order to obtain refunds not only must the taxpayer prove facts practically unprovable, but he and the Court must be satisfied with the record prepared by the Commissioner of Internal Revenue. The taxpayer is denied his right to a full trial in court and a determination of the facts by a jury.

The form of government which may be erected upon the two words "general welfare," if this Act is approved, is now outlined: A central government with plenary and unlimited power, supreme in every sphere over the States and the people, with power to take property in any amount from any

* Quoted in Appendix A at page 110.

class for any purpose without accountability to the people or the restraints of a bill of rights; a central government in which the executive dominates, lays taxes, decides how they shall be spent and in short does what he desires by virtue of an unlimited power to tax and to purchase, while the representatives of the people are expected to give compliant approval to what the executive has done, and the judiciary is to be bound by decisions made by subordinate executives. With such a background we feel confident that the Court will look behind the presumption which, it is asserted, tends to support this Act.

It must be fundamental that there can be no presumption in favor of powers of the United States as against powers of the States; otherwise the Tenth Amendment would be of little effect. The presumption must be in favor of state powers. There is a general presumption in favor of constitutionality of acts of Congress. But such a presumption is no more conclusive than a presumption of fact, of which the Court said, in *Lincoln* v. *French,* 105 U.S. 614, 617:

> "Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear."

Just as certain facts in the normal experience of mankind are expected to occur, so it is normally expected that a legislative body will respect the Constitution under which it operates; but when it becomes apparent that the legislative body has been derelict in its duty and has attempted to exceed its authority or evade its limitations, any presumption of regularity disappears. The Constitution remains the fundamental law of the land which the courts must protect. As authority we have only to cite the various cases herein cited wherein legislative action has been held unconstitutional. A collection of forty or more such cases is found in "The Constitution of

the United States," published as Senate Document 154 of the 68th Congress. It is our respectful submission that this Agricultural Adjustment Act, revealing at every turn a disregard of the Constitution and its provisions, has long since caused any presumption of constitutionality to disappear.

Counsel for the Receivers of Hoosac Mills Corporation respectfully submit that Congress in enacting the taxing provisions of the Agricultural Adjustment Act has unlawfully delegated its legislative power, in that it has authorized the Secretary of Agriculture to levy a charge for the purpose of adjusting prices and controlling crops, which is a tax in name only, and is to be laid for a purpose which is neither public nor for the general welfare, a purpose forbidden by the due process clause and the reservation of powers to the several States, and beyond the power of Congress. If the charge is a tax, it is a direct tax not apportioned; if an excise, so far as levied on floor stocks, it is unreasonable. For these reasons the taxes assessed under the Agricultural Adjustment Act should be declared null and void, the decision of the Circuit Court of Appeals should be sustained, the decree of the District Court should be reversed, and the Receivers should be ordered to disallow the claim of the United States for processing and floor stocks taxes in the amount of $81,694.28.

Respectfully submitted,

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APPENDIX A.

Excerpts from the Constitution.

Preamble to the Constitution.

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. Clause 3. Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Section 7. Clause 1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Section 8. Clause 1. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Section 8. Clause 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Section 8. Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. Clause 4. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Section 9. Clause 7. No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Article II.

Section 1. Clause 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 10.

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.

Excerpts from Agricultural Adjustment Act.

Title I—Agricultural Adjustment.

Declaration of Emergency

That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act.

Declaration of Policy

Sec. 2. It is hereby declared to be the policy of Congress—

(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909–July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919–July 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909–July 1914.

Part 2 – Commodity Benefits

General Powers

Sec. 8. In order to effecuate* the declared policy, the Secretary of Agriculture shall have power—

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit

* So in original.

payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. Under regulations of the Secretary of Agriculture requiring adequate facilities for the storage of any non-perishable agricultural commodity on the farm, inspection and measurement of any such commodity so stored, and the locking and sealing thereof, and such other regulations as may be prescribed by the Secretary of Agriculture for the protection of such commodity and for the marketing thereof, a reasonable percentage of any benefit payment may be advanced on any such commodity so stored. In any such case, such deduction may be made from the amount of the benefit payment as the Secretary of Agriculture determines will reasonably compensate for the cost of inspection and sealing, but no deduction may be made for interest.

Processing Tax

Sec. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect,

and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall 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. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided*, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that such result will occur, then the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. In computing the current average farm price in the case of wheat, premiums paid producers for protein content shall not be taken into account.

(c) For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with

respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture.

(d) As used in part 2 of this title—

(1) In case of wheat, rice, and corn, the term "processing" means the milling or other processing (except cleaning and drying) of wheat, rice or corn for market, including custom milling for toll as well as commercial milling, but shall not include the grinding or cracking thereof not in the form of flour for feed purposes only.

(2) In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term "cotton" shall not include cotton linters.

(3) In case of tobacco, the term "processing" means the manufacturing or other processing (except drying or converting into insecticides and fertilizers) of tobacco.

(4) In case of hogs, the term "processing" means the slaughter of hogs for market.

(5) In the case of any other commodity, the term "processing" means any manufacturing or other processing involving a change in the form of the commodity or its preparation for market, as defined by regulations of the Secretary of Agriculture; and in prescribing such regulations the Secretary shall give due weight to the customs of the industry.

(e) When any processing tax, or increase or decrease therein, takes effect in respect of a commodity the Secretary of Agriculture, in order to prevent pyramiding of the processing tax and profiteering in the sale of the products derived from the commodity, shall make public such information as he deems necessary regarding (1) the relationship between the processing tax and the price paid to producers of the commodity, (2) the effect of the processing tax upon prices to

consumers of products of the commodity, (3) the relationship, in previous periods, between prices paid to the producers of the commodity and prices to consumers of the products thereof, and (4) the situation in foreign countries relating to prices paid to producers of the commodity and prices to consumers of the products thereof.

Sec. 10. (c) The Secretary of Agriculture is authorized, 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, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(d) The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

(e) The action of any officer, employee, or agent in determining the amount of and in making any rental or benefit payment shall not be subject to review by any officer of the Government other than the Secretary of Agriculture or Secretary of the Treasury.

Commodities

Sec. 11. As used in this title, the term "basic agricultural commodity" means wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, and any regional or market classification, type, or grade thereof; but the Secretary of Agriculture shall exclude from the operation of the provisions of this title, during any period, any such commodity or classification, type, or grade thereof if he finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that the conditions of production, mar-

keting, and consumption are such that during such period this title can not be effectively administered to the end of effectuating the declared policy with respect to such commodity or classification, type, or grade thereof.

Appropriation

Sec. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended.

(b) In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection.

Termination of Act

Sec. 13. This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation termi-

nate with respect to any basic agricultural commodity such provisions of this title as he finds are not requisite to carrying out the declared policy with respect to such commodity. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may be necessary to aid him in executing this section.

Supplementary Revenue Provisions

Exemptions and Compensating Taxes

Sec. 15. (a) If the Secretary of Agriculture finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that any class of products of any commodity is of such low value compared with the quantity of the commodity used for their manufacture that the imposition of the processing tax would prevent in whole or in large part the use of the commodity in the manufacture of such products and thereby substantially reduce consumption and increase the surplus of the commodity, then the Secretary of Agriculture shall so certify to the Secretary of the Treasury, and the Secretary of the Treasury shall abate or refund any processing tax assessed or paid after the date of such certification with respect to such amount of the commodity as is used in the manufacture of such products.

(d) The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this proclamation the competing commodity and the compensating

rate of tax on the processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, until such rate is altered pursuant to a further finding under this section, or the tax or rate thereof on the basic agricultural commodity is altered or terminated. In no case shall the tax imposed upon such competing commodity exceed that imposed per equivalent unit, as determined by the Secretary, upon the basic agricultural commodity.

Floor Stocks

Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

(b) The tax imposed by subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held at the date the processing tax first takes effect; but such retail stocks shall not be deemed to include stocks held in a warehouse on

such date, or such portion of other stocks held on such date as are not sold or otherwise disposed of within thirty days thereafter. The tax refund or abatement provided in subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held on the date the processing tax is wholly terminated.

Collection of Taxes

Sec. 19. (b) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, in so far as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: *Provided,* That the Secretary of the Treasury is authorized to permit postponement, for a period not exceeding ninety days, of the payment of taxes covered by any return under this title.

Sec. 21. (b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, cer-

tificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agri-

culture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secre-

tary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

APPENDIX B.

Processing Tax on Cotton.

A recomputation of the rate by the method described in petitioner's brief (p. 50) from monthly reports of the Crop Reporting Board similar to that shown at Addendum, p. 5, old p. 7, near dates when the Treasury Department issued new regulations, near the high point of August, 1934, and on the recent date of October, 1935.

	June 15/33	Aug. 15/33	Apr. 15/34	Aug. 15/34	Oct. 15/35
Rate of tax	4.2¢	4 2¢	4 2¢	4 2¢	4.2¢
Fixed by	T D 4377	T.D. 4389	T.D. 4433	T.D. 4433	T.D. 4433
Dated	7/29/33	9/6/33	5/10/34	5/10/34	5/10/34
Average price in the base period 1909–1914	12 4¢	12 4¢	12 4¢	12.4¢	12 4¢
Multiplied by 500/478 to adjust for tare	12.9¢	12 9¢	12.9¢	12.9¢	12.9¢
Multiplied by ratio of latest index of prices of things farmers buy to the index in the base period	103%	112%	120%	123%	123%
To obtain "Fair Exchange Value"	13 3¢	14.4¢	15 5¢	15.9¢	15 9¢
From which is subtracted "Current Average Farm Price".	8 7¢	8.8¢	11.6¢	13.1¢	10 9¢
Multiplied by 500/478 to adjust for tare	9.1¢	9.2¢	12 1¢	13.7¢	11.4¢
To obtain the difference between "Current Average Farm Price" and "Fair Exchange Value"	4.2¢	5 2¢	3.4¢	2.2¢	4.5¢
This difference varies from the rate in effect by	0	1¢ more	.8¢ less	2¢ less	.3¢ more
Percentage variation from the interpretation the Secretary has placed on section 9	0	24%	19%	48%	7%
Percentage of tax over adjusted price of cotton	46%	46%	35%	31%	37%

APPENDIX C.

Comments on the Addendum.

Economic material from the Addendum and elsewhere is used by petitioner to support an argument that the Act is for the general welfare, or is an adjunct to "fiscal powers," whatever they may be. It is our contention that the argument and the material are irrelevant to the issue, and particularly so in view of the findings of the District Court in its opinion (R. 20), its findings of fact (R. 13), and its refusal to incorporate such material in the record (R. 43). The material is further irrelevant in that it fails to distinguish between cause and effect (Examples: pp. 52-57, 66), ignores many factors affecting business, including many acts of the government, such as gold manipulation and National Industrial Recovery Act and Bankhead Act, to a large extent is without authentication as to original source or method of compilation, and after all represents only the selection made by counsel for petitioner from the mass of statistical material available.

Such material fails to give any weight to the fact that prices and the maintenance of industrial purchasing power affect surplus, although it emphasizes the fact that surplus affects prices (Example: p. 38).

It appears on page 14 that the prices paid by farmers are based in the first instance upon an "estimate of general average prices" made by persons with no obligation to maintain accuracy. And on page 13 it appears that the source material of prices farmers receive is a similar "estimate of the average prices," one price only for each commodity to be representative of all transactions.

Some of the material is a mere guess into the future (Example: Charts following p. 68, old pp. 131-142). Some has no conceivable bearing on the case (Example: p. 64 and Charts following p. 68, old pp. 117-130).

From the tables on pages 70 and 71 it appears that the production of cotton was increased instead of diminished in the first year of operation of the Act, and also that prior to the Act natural forces had begun to cure overproduction.

The mere size of the figures involved on pages 47 and 72 shows the extent of the money power which has been given to the Secretary. It is interesting to compare the collections of cotton taxes from August 1, 1933, to February 28, 1934 (p. 72), with the total value of the cotton crop for the entire preceding year (p. 71).

Further material incorporated in petitioner's brief attempts to give the impression that in some aspects conditions are now better than in 1932. So far as this is an attempt to justify the Act it is irrelevant, and furthermore still continues to ignore all other factors affecting agriculture, and still fails to distinguish between cause and effect, but tacitly assigns all improvements to this Act.