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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 401.

UNITED STATES OF AMERICA,
Petitioner,

v.

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

BRIEF OF *AMICI CURIAE* WITH PETITION, NOTICE AND APPENDICES.

NATHAN L. MILLER,
JOHN W. DAVIS,
WILLIAM R. PERKINS,
Attorneys for Amici Curiae.

THE COURT PRESS, N. Y. C.

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Petitioner,

v.

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

Respondents.

Notice of Motion for Leave to File a Brief as Amici Curiae.

PLEASE TAKE NOTICE that the undersigned, acting as counsel for litigants interested in the questions involved in the above entitled suit, will move this Court at the hearing of this case on the 9th day of December, 1935, or as soon thereafter as the case may be heard, for leave to file a brief as *amici curiae* and for such other or further relief as may be proper.

New York, November 15th, 1935.

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No. 401.

UNITED STATES OF AMERICA,

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

Respondents.

Petition for Leave to File Brief as Amici Curiae.

The undersigned respectfully petition this Honorable Court for leave to file a brief *amici curiae* in the above entitled suit.

Your petitioners apply as counsel for Hygrade Food Products Corporation, National Biscuit Company, a corporation and P. Lorillard Company, a corporation, respectively. Each of these concerns is a processor of a basic agricultural commodity in one or more factories located and operated in the United States. As such it is subject in that respect to the terms and provisions of the Agricultural Adjustment Act, familiarly known as the AAA. And against each the United States is asserting its right to assess and collect taxes under the terms and provisions of said Act.

Each of these concerns has brought a suit in equity in a Federal District Court (as have other like concerns, so that the number of such suits now aggre-

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gates largely over one thousand) in which is sought an order restraining the further collection under said Act of taxes accrued both before and after the amendments of August 24, 1935, on the ground that said Act is wholly unconstitutional and that the claim for refund, for many years existing as an established procedure for contesting such constitutionality, has been so circumscribed by amendments to the said AAA as to render said procedure totally inadequate as a legal remedy as well as entirely lacking in the elements of due process of law required for that purpose.

Each of said concerns, therefore, is vitally interested in a decision of the constitutional questions presented in the above entitled suit.

Notice of this application having been served on counsel for the respective parties in the above entitled suit, this motion is now respectfully submitted for the consideration and action of the Court.

New York, November ~~22nd~~ 23rd, 1935.

NATHAN L. MILLER,
JOHN W. DAVIS,
WILLIAM R. PERKINS,
Attorneys for Amici Curiae.

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BRIEF OF AMICI CURIAE.

I.

Statement.

Hygrade Food Products Corporation, National Biscuit Company, a corporation and P. Lorillard Company, a corporation, file this brief *amici curiae* in opposition to the contention of the petitioner that the Agricultural Adjustment Act, familiarly known as the AAA, is constitutional and gives to petitioner the right to assess and collect taxes in the manner and for the purposes it provides.

Each of said concerns is a processor of a basic agricultural commodity in one or more factories located and operated in the United States. As such it is subject in that respect to the terms and provisions of said AAA. And against each the United States

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is asserting its right to assess and collect, under the terms and provisions of said Act, taxes accrued and accruing before and after the 1935 Amendments.*

Each of these concerns has brought a suit in equity in a Federal District Court (as have other like concerns, so that the number of such suits now aggregates largely over one thousand) in which is sought an order restraining the further collection under said Act of taxes accrued both before and after the amendments of August 24, 1935, on the ground that it is wholly unconstitutional and that the claim for refund, for many years existing as an established procedure for contesting such constitutionality, has been so circumscribed by limitations thereof by Sec. 21, added by Sec. 30 of the 1935 Amendments, as to make said procedure an inadequate legal remedy and entirely lacking in the elements of due process of law required for that purpose.

Thus each of said suits presents the very same constitutional questions that are involved in the above entitled suit, as well as the right of these concerns to contest such constitutionality by suit in equity, in view of the exceptional circumstances presented by the novel provisions of the AAA and the inadequacy of, and lack of due process in, the procedure by claim for refund under the said limitations thereon.

II.

AAA is a complete counterpart of NRA.

The AAA, in all essentials, from its inception has been and still is under the 1935 Amendments, a complete counterpart of the NRA, recently considered by this Court in the *Schechter* case (295 U. S. 495) and found beyond the constitutional powers of Con-

* Public No. 320, 74th Congress, approved August 24th, 1935, for brevity in this brief called "the 1935 Amendments".

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gress. The two Acts are complementary expressions of the same theory of the nature, scope and function of the Federal Government. Both attempt rehabilitation through regulation by a centralized power—the NRA of industry through a regimentation vested in the discretion of the President, and the AAA of agriculture through a regimentation vested in the discretion of the Secretary of Agriculture. In both, for the very same fundamental reasons, the attempt is in total disregard of the rights of the States and the citizens, as well as of the diverse powers vested in the coordinate branches of our Government, and on that account utterly unconstitutional.

The declared "policy of Congress" in the AAA has been, and still is, "to establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers" at a prescribed level, measured in terms of articles that farmers buy with respect to selected basic periods (Sec. 2 of the AAA and Secs. 1(a) and 62 of the 1935 Amendments). This corresponds to the declared policy of the NRA (Sec. 1) for industry under the terms of that Act.

This policy the AAA undertakes to effectuate by the inauguration of what has been aptly termed "the philosophy of scarcity", which it seeks to impose and maintain through the delegation to the Secretary of Agriculture for that purpose of large discretionary powers with respect to agriculture, just as the NRA to effectuate its policy delegated similar large discretionary powers to the President with respect to industry.

The Secretary is authorized "to provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural com-

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modities, through agreements with producers or by other voluntary methods" in consideration of "rental or benefit payments" he is authorized to make to such producers for such purpose out of funds made available by the AAA therefor (Sec. 8 of the AAA and Sec. 2 of the 1935 Amendments). These agreements in all respects—existence, terms, payments—rest in the absolute discretion of the Secretary for effectuating the declared policy of the AAA, and correspond to the codes which likewise rested in the absolute discretion of the President for effectuating the policy of the NRA. And for this purpose they bring agriculture under the control of the Executive Department of the Federal Government, represented by the Secretary of Agriculture, just as the codes brought industry under the control of the Executive Department of the Federal Government, represented by the President.

Funds for these "rental or benefit payments" are "derived" through a tax levied by the AAA "upon the first domestic processing of the commodity" which "shall be paid by the processor" (Sec. 9(a) of the AAA and Sec. 11 of the 1935 Amendments). This tax embraces "floor stocks" on hand at its incidence (Sec. 16(a) of the AAA) and may be extended at the discretion of the Secretary to the processing of competing or imported commodities to prevent shifting from agricultural commodities upon the processing of which the tax is being levied (Secs. 15(d) and 15(e) of the AAA and Secs. 23 and 24 of the 1935 Amendments). Heretofore Sec. 12(b) appropriated "*the proceeds derived** from all taxes imposed under this title" for "administrative expenses, rental and benefit payments, and refunds on taxes", whereas now, as amended by Sec. 3 of the 1935 Amend-

* Italics are ours unless otherwise stated.

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ments, this section appropriates for those purposes "a sum equal to *the proceeds derived* from all taxes imposed under this title". But no difference in substance arises from this difference in language, since each appropriates only "the proceeds derived" from the taxes as, when and to the extent "derived" therefrom. There can be no "sum equal to the proceeds derived" from the taxes imposed unless and until those proceeds have been thus derived; the derivation is a condition precedent to the effectiveness of the appropriation.

This taxation, in all essential respects, rests wholly in the discretion of the Secretary of Agriculture for the effectuation of the declared policy of the Act. Now, as heretofore, as respects each basic agricultural commodity, it begins and ends as and when he in his discretion determines and proclaims the commencement or termination of "rental or benefit payments" with respect to such commodity (Sec. 9(a) of the AAA and Sec. 11 of the 1935 Amendments); at any time and from time to time, as his discretion dictates, he may exclude from the operation of the tax any commodity, or classification, type or grade thereof, suspend the tax, cause a refund thereof, and exempt processors from its payment (Secs. 11, 15(a) and 15(b) of the AAA and Secs. 8, 21 and 61 of the 1935 Amendments); and said Sec. 9(a) still, as heretofore, expressly provides that the rate of the tax "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 it necessary to effectuate the declared policy, be adjusted by him to conform to such requirements".

While the Act provides an indefinite general standard for the rate (Sec. 9(b) of the AAA and Sec. 12 of the 1935 Amendments) and specific rates

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are imposed on the respective agricultural commodities by Pars. (2), (3), (4) and (5) of the provisions added to Sec. 9(b) by Sec. 12 of the 1935 Amendments, it is nevertheless true that the quoted provision of Sec. 9(a), as to the rate of the tax, still obtains and controls, and gives the Secretary complete discretion to adjust the rate as he thinks desirable to effectuate the declared policy of the Act. This is shown in a detailed analysis of these provisions which we annex as Appendix A. Briefly stated: Pars. 9(b) (1) and (6) (A) of the provisions added to Sec. 9(b) by Sec. 12 of the 1935 Amendments expressly authorize the Secretary to *decrease* such rates, "including a decrease to zero", as he may find necessary or desirable to prevent the AAA and the operations thereunder from causing either an accumulation of stocks or depression of prices in any commodity or product thereof for any use or uses thereof; and Par. (6) (D) of the provisions added to Sec. 9(b) by Sec. 12 of the 1935 Amendments expressly authorizes the Secretary to *increase* such rates "in accordance with the formulae, standards and requirements *prescribed in this title*", which of course includes the quoted provision of Sec. 9(a) authorizing the Secretary to make such adjustments of such rates as he may consider necessary to effectuate the declared policy of the Act.

This construction is confirmed by the following provision added to Sec. 9(c) by Sec. 13 of the 1935 Amendments:

> "The rate of tax upon the processing of any commodity, in effect on the date on which the amendment is adopted, shall not be affected by the adoption of this amendment, and shall not be required to be adjusted or altered, unless the Secretary of Agriculture finds that it is

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> necessary to adjust or alter any such rate pursuant to section 9(a) of this title."

Under this power the Secretary has stoutly asserted his right to maintain rates above the general standard enunciated in Sec. 9(b). Illustration of this is afforded by the opinion of Judge Kirkpatrick in *Vogt* v. *Rothensies* (D. C. Pa., 11 F. S. at 229-30) in which he said:

> "On the basis of the latest available data the formula now gives a rate of 81¢ per hundredweight, but the rate of tax is and has been since March 1934, $2.25, and the Secretary proposes to maintain it at that figure until he is satisfied that a reduction of the tax will not destroy the desired balance. Not only is this the effect of the Act, but the argument is a plain assertion by the defendant that the apparently definite and easily ascertained formula may be disregarded by the Secretary, leaving the policy of the Act as the only semblance of control of his discretion."

While Subdiv. (G) of Par. (6) of Sec. 9(b), added by the 1935 Amendments, provides that, in case AAA is declared unconstitutional, then, in lieu of all rates fixed in pursuance of Par. (6) there shall be assessed and collected the rates specified in Pars. (2), (3), (4) and (5), this provision, as shown in Appendix A, in nowise controls the discretion of the Secretary as to rates until such unconstitutionality is declared, and then only with respect to rates he may have fixed under Par. (6) of Sec. 9(b), which excludes those he may have fixed under this broad discretion given him by Sec. 9(a).

Finally, the Secretary is authorized to impose a system of regimentation on the handling of agricultural commodities and their products, violation

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of which subjects the offender to severe penalties. Sec. 8(3) of the AAA authorized the Secretary "to issue licenses *permitting* processors" to handle such articles upon "such terms and conditions" as he thought would effectuate the declared policy. By Secs. 5 and 6 of the 1935 Amendments this section has been expanded into Secs. 8(c), 8(d) and 8(e), which authorize the Secretary, with the assent or at the instance of a required percentage of the producers of a given commodity, to impose a system of "orders", the terms of which at his discretion may, as respects any such commodity or product, or grade, size or quality thereof, limit the total quantity which may be marketed, allot the amount thereof which each handler may acquire from producers and market, determine the disposition of any surplus, establish and dispose of reserve pools, prohibit unfair methods and practices, prevent sales at prices differing from those filed in the manner provided in such order, and establish agencies for the administration of the AAA, which may be associations of producers, the expenses of which shall be borne by the processors. Congress may not control to this extent even the commerce that is subject to its regulation (*Hammer* v. *Dagenhart,* 247 U. S. at 274-6; *Adkins* v. *Children's Hospital,* 261 U. S. at 545-55; *Brooks* v. *United States,* 267 U. S. at 438).

III.

Long established constitutional principles control.

This analysis of the essential provisions of AAA makes it plain that that Act is a comprehensive scheme whereby

(1) through inadmissible delegation of legislative powers to the Executive Department, repre-

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sented for this purpose by the Secretary of Agriculture,

(2) it is sought to control the internal affairs of the States, to wit, the production and processing of agricultural commodities,

(3) and as an aid in so doing to take, through the form of taxation, imposed in an arbitrary, capricious and discriminatory manner, the property of one set of private citizens, to wit, the processors, and bestow it on another set of private citizens, to wit, the farmers, for their own private benefit, as a consideration to induce these farmers to accede to this Federal control.

We make this succinct statement, throwing into bold relief this true picture of AAA (in advance of our argument that its essential provisions, taken separately, are unconstitutional) because thus viewed as a whole it presents, as did NRA, a manifest attempt by the Federal Government to accomplish precisely the one thing above all others which our forefathers feared and sought to prevent, namely, a vast power, centralized in a single branch or individual, which should endeavor to govern and control, in disregard of the rights and powers they wished reserved and preserved to the States and to the citizens.

Every student of our Government knows it was to this end that the Constitution was so framed as to make the Federal Government one of enumerated powers, which might not be transcended, with these powers vested in three independent, coordinate branches, no one of which might delegate its own powers or usurp those of another. And, further, so tremendously important did our forefathers regard these rights and powers that, with a fine in-

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sight into their real worth and a most prophetic foresight of just what is now occurring, they were unwilling to trust their protection entirely to this careful framing of the Constitution, but required as a condition of ratifying the Constitution that they be further safeguarded by their incorporation, as they later were incorporated, in the first Ten Amendments, which have been aptly termed the "American Bill of Rights". See: *McCulloch* v. *Maryland,* 4 Wheat. 316, 421-3; *Ex parte Milligan,* 4 Wall. 2, 120; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555; and *Schechter* v. *United States,* 295 U. S. 495.

Thus it came to pass that the Tenth Amendment reserves to the States respectively or to the people all the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, which thus reserved to each State the power to regulate its internal commerce, since the power of Congress to regulate commerce is confined to that "with foreign nations and among the several States and with the Indian Tribes" (*Martin* v. *Hunter's Lessee,* 1 Wheat. at 324-6; *Schechter* v. *United States,* 295 U. S. at 528-9, 546, 550).

Thus it also came to pass that the provision upon which it is not too much to say there has been erected, and now rests, all that is legally worth while in what we call civilization, namely, the due process clause and its kindred provision that property may not be taken for even a public use without just compensation, have been imposed as express limitations by the Fifth Amendment upon all of the enumerated powers of the Federal Government (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. at 589, and the cases cited in Note 19 thereto)

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and prevent private property from being taken by taxation or condemnation for another private citizen (*The Citizens' Savings & Loan Assn.* v. *Topeka,* 20 Wall. at 662-7; *United States ex rel. The Miles Planting & Mfg. Co.* v. *Carlisle,* 5 App. Cas. D. C. 138; *Heiner* v. *Donnan,* 285 U. S. at 326).

These simple, familiar and long established constitutional principles furnish the true answer to the questions presented in this case and require a holding that on account thereof AAA is entirely unconstitutional.

IV.

Crop control by the Federal Government under AAA is unconstitutional and renders the whole act abortive and void.

Unquestionably, crop reduction is the key to the accomplishment of the declared policy of AAA. It is the single essential means which the Act adopts for that purpose. Unless the production of crops can be thus regulated, and thereby reduced, by the Federal Government under the terms of AAA, the Act is devoid of means for the accomplishment of its declared policy and necessarily falls.

But agriculture, the production of crops, and therefore crop reduction and agreements and methods for that purpose, are intrastate activities, and thus beyond the regulatory power of the Federal Government, which extends only to the commerce occurring with foreign nations and among the several States and with the Indian Tribes, as we have just seen.

So also, for the same reason, it is likewise true that the processing of agricultural commodities, which AAA attempts in a measure to regulate, is an intrastate activity, beyond such reach of the Federal Gov-

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ernment. Processing is simply manufacturing, and so defined by the Act (Sec. 9(d) of AAA).

The above propositions are well established by express decisions of this Court too numerous to mention. In the very latest, *Schechter* v. *United States* (295 U. S. at 547), Chief Justice Hughes quoted with approval the statement that "building is as essentially local as mining, manufacturing or growing crops" and held that the Federal Government might not determine the wages or hours of employees in factories because that would be to regulate an intrastate activity, not direct in its effect on interstate commerce, and make Federal regulatory power embrace "practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government".

It being thus true that Congress may not regulate such intrastate activities directly, it follows that Congress may not accomplish such regulation through indirection. The expressions of and limitations upon the enumerated powers of the Federal Government are too important and binding to be thus circumvented.

For instance, the fact that an article being produced or processed is intended to move in interstate commerce does not subject that article to the regulatory powers of Congress until the movement in interstate commerce has begun. Commerce succeeds to production and manufacture and is not a part of it. In express point are: *Coe* v. *Errol,* 116 U. S. at 526-8; *Kidd* v. *Pearson,* 128 U. S. at 20-4; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. at 259-60; *Kansas* v. *Colorado,* 206 U. S. at 87-91; and *Chassaniol* v. *Greenwood,* 291 U. S. at 586-7. In the *Heisler* case it was

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said that "the reach and consequences of the contention repel its acceptance" because it would

> "nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

Similarly, one who engages in interstate commerce does not thereby submit his intrastate activities to Federal control. Chief Justice (then Mr. Justice) White in *Howard* v. *Illinois C. R. Co.,* 207 U. S. at 502, said of this suggestion that "to state the proposition is to refute it" because:

> "It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been,

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> and must continue to be, under their control so long as the Constitution endures."

See also *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. at 357, 368, holding the Railroad Retirement Act unconstitutional.

Again, as indicated in the quotation just made, Congress may not condition engaging in interstate commerce upon compliance with regulations it seeks to impose upon intrastate activities. Such was the case of *Hammer* v. *Dagenhart*, 247 U. S. 251, where the Court held unconstitutional an Act of Congress which sought to regulate child labor in factories through the exertion of its power over interstate commerce, saying:

> "To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States" (p. 276).

And so eminent and profound a student of our Government and its policies as President Wilson strongly maintains and endorses the very same view in his work on "Constitutional Government in the United States" (1908 Ed.) at pages 170-2 and 191-2, giving it as his opinion that:

> "It would be fatal to our political vitality really to strip the States of their powers and transfer them to the federal government. It cannot be too often repeated that it has been the privilege of separate development secured to the several regions of the country by the

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> Constitution, and not the privilege of separate development only, but also that other more fundamental privilege that lies back of it, the privilege of independent local opinion and individual conviction, which has given speed, facility, vigor, and certainty to the processes of our economic and political growth. To buy temporary ease and convenience for the performance of a few great tasks of the hour at the expense of that would be to pay too great a price and to cheat all generations for the sake of one."

V.

Taxation may not be imposed, nor the funds thereby raised expended, by the Federal Government for the control of intrastate activities and the benefit of private citizens, as provided in AAA.

The analysis we have made of AAA makes it manifest, without further elaboration, that it imposes taxes for the single purpose of thereby securing funds out of which it may make the rental or benefit payments which the Secretary of Agriculture uses as a consideration to induce producers to make the agreements which he desires on the part of the Federal Government for crop reduction in order thereby to effectuate the declared policy of the Act with respect to agriculture. The taxes are levied only when the Secretary of Agriculture determines to make "rental or benefit payments". They terminate when he decides to discontinue such payments (Sec. 9). For these payments the original Act appropriated "the proceeds derived from the processing taxes" (Sec. 12(b)) while the Amended Act, by Sec. 3, appropriates "a sum equal to the proceeds derived" therefrom.

Thus viewed, in the only light in which the imposi-

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tion of these taxes and the use of the funds thereby raised under the terms of AAA can be viewed, the provisions of the Act in that respect are unconstitutional and void, for the two following fundamental reasons:

(1) *They transgress the settled rule that Congress may not constitutionally use its powers to control intrastate affairs.*

We have just seen that Congress may not use its great power for regulating interstate commerce in order thereby to regulate, directly or indirectly, the internal affairs of a State. The reason is, as stated in the authorities we have cited, that so to hold would bring under the regulatory power of Congress each and every internal concern of a State, whereas regulation of such concerns had been intentionally omitted from the enumerated powers conferred on the Federal Government and expressly reserved to the States by the Tenth Amendment.

If it be true that the power to regulate interstate commerce may not be thus used, it logically and inevitably follows, for like reasons, that the other federal powers, including the revenue power, are subject to a like limitation.

Such was the express decision of this Court in the *Child Labor* case (*Bailey* v. *Drexel Furniture Co.*, 259 U. S. at 38-9) where it held void for this reason a Federal Statute which imposed a tax on articles manufactured by child labor in order thereby to prevent such labor in factories. It said:

> "Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted

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> with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it."

If Congress cannot thus use the *burden* of taxation as a penalty to regulate intrastate activities, it follows that it cannot thus use the *benefits* of taxation as an inducement to purchase such regulation, for the same power is involved, the same principles control, the same reasons forbid—just another route to same end.

Directly in point is the statement of Chief Justice Marshall in his great opinion in *Gibbons* v. *Ogden* (9 Wheat. at 199) that "Congress is not empowered to tax for those purposes which are within the exclusive province of the States". And in *Linder* v. *United States* (268 U. S. at 17-8) the Court held unconstitutional an Act enacted under the revenue powers, because in reality it constituted an attempted Federal regulation of medical practice. In so doing the Court said:

> "* * * we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced."

To the same effect is *Hill* v. *Wallace* (259 U. S. at 66-8). See also forbidding doing indirectly what cannot be done directly: *Fairbank* v. *United States,* 181 U. S. at 294-7; *National Ins. Co.* v. *United States,* 277 U. S. at 520; *Macallen Co.* v. *Massachusetts,* 279 U. S. at 626-31 which involved taxing powers.

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These limitations on the revenue powers, as hereinafter shown, were admitted and accepted even by those who most advocated the Hamilton theory for the welfare clause.

(2) *They transgress the settled rule that private property may not be taken, by taxation or condemnation, for a private use, but only for a public governmental purpose.*

In the leading case of *The Citizens' Savings & Loan Assn.* v. *Topeka* (20 Wall. at 662-7) this Court in an opinion by Mr. Justice Miller held unconstitutional a State Statute authorizing municipal bonds in aid of a manufacturing enterprise because:

> "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 enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

In so doing he vividly depicted the evils of a contrary conclusion, which the experience we are undergoing fully confirms, saying in this respect:

> "If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

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Unquestionably, agriculture is a private enterprise, operated by private citizens for their own personal profit, just like a manufacturing enterprise; and many State decisions have expressly so held. See: *State* v. *Osawkee,* 14 Kan. 418; *Deering & Co.* v. *Peterson,* 75 Minn. 118; *Deal* v. *Mississippi Co.,* 107 Mo. 464; *Michigan Sugar Co.* v. *Auditor General,* 124 Mich. 674.

May the Federal Government so use its powers of taxation and appropriation if the States may not? The question arose, but was not decided, in *Field* v. *Clark,* 143 U. S. at 695; *United States* v. *Gettysburg Co.,* 160 U. S. at 681; *Massachusetts* v. *Mellon,* 262 U. S. at 480; and *United States* v. *Realty Co.,* 163 U. S. at 431-40, which, though claimed to support a contrary view, expressly declared the decision of this question "unnecessary" and placed its decision on the claim of "an equitable, moral or honorary nature" arising from compliance with a bounty act which Congress had rendered abortive by repeal of the act.

However, on principle and authority, we do not see why the doctrine of the *Topeka* case (which was re-affirmed in *Parkersburg* v. *Brown,* 106 U. S. at 501, and *Cole* v. *LaGrange,* 113 U. S. at 6-7) is not as applicable to such Federal taxation and appropriations as to those of a State.

This Court said in the Topeka case that: "The theory of our governments, state and national, is opposed" to such a power (20 Wall. at 662-3).

As respects both subjects and objects, the taxing powers of a State are certainly as broad as those of the United States, and there is no difference whatever in its application to such a situation between the due process clause of the Fifth and of the Fourteenth Amendments (*Heiner* v. *Donnan,* 285 U. S. at 326).

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The very terms of the phrase used to denote the purposes for which Federal taxes may be imposed—"to pay the debts and provide for the common defence and general welfare *of the United States*"—by its use of the words "of the United States" clearly confines such purposes to those which may be truly characterized as "of the United States",—the entity created by the Constitution—which correspondingly excludes those "of a State" or "of a citizen". For instance, Congress may not tax in order to pay the "debts" of a State or a citizen, and therefore by parity of reasoning it follows that it may not tax for the "general welfare" of a State or a citizen.

Taking by taxation is not different from taking by eminent domain (*Fall Brook Irrigation Dist.* v. *Bradley,* 164 U. S. at 161; *Cole* v. *City of LaGrange,* 113 U. S. at 6; *Dodge* v. *Mission Township* (C. C. A. 8th, 1901), 107 Fed. at 829). Each for the same reason may be only for a public governmental purpose (*Kohl* v. *United States,* 91 U. S. at 372-3; *United States* v. *Gettysburg Co.,* 160 U. S. at 679).

This Court has often declared that Federal taxation is "a pecuniary burden for the support of the government". See: *United States* v. *B. & O. R. R. Co.,* 17 Wall. at 326; *Hampton* v. *United States,* 276 U. S. at 412; *United States* v. *La Franca,* 282 U. S. at 572; and *Heiner* v. *Donnan,* 285 U. S. at 327.

Judge Cooley was therefore correct as respects both our Federal and State Governments when he said in his Const. Lim. (7th Ed.) at page 507:

> *"But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the private use and benefit of*

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such other, whether by general law or by special enactment.''

In 1887 President Cleveland, himself a distinguished lawyer, vetoed on this ground an Act of Congress to aid drouth-stricken counties in Texas, saying, "I can find no warrant for such an appropriation in the Constitution" and that "the lesson should be constantly enforced that though the people support the Government, the Government should not support the people" (XI M. & P. of Pres. 5142).

In 1895, in *United States ex rel. The Miles Planting & Mfg. Co.* v. *Carlisle* (5 App. Cas. D. C. 138) the Court held unconstitutional on this ground an Act of Congress authorizing the payment of a bounty to sugar producers, its conclusion being:

> "We think the authorities cited above establish beyond question that the power of taxation, in all free governments like ours, is limited to public objects and purposes governmental in their nature. No amount of incidental public good or benefit will render valid taxation, or the appropriation of revenue to be derived therefrom, for a private purpose" (p. 158).

In 1922 Mr. Justice Holmes, whose liberalism and ability none may gainsay, declared in Pennsylvania Coal Co. v. *Mahon* (260 U. S. at 416):

> *"In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."*

In 1925 President Coolidge in his Annual Message

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declared that "no right exists to levy on a dollar, or to order the expenditure of a dollar, of the money of the people except for a necessary public purpose duly authorized by the Constitution".

And last May in the Schechter case (295 U. S. at 550) *Chief Justice Hughes said for a unanimous Court*:

> *"Stress is laid 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."*

VI.

The general welfare clause does not require a contrary conclusion.

This clause furnishes no support whatever for the provisions of AAA for the three following conclusive reasons:

In the first place, it is now settled that the clause does not constitute the grant of an independent power.

In 1833, when Mr. Justice Story published his Commentaries, he said that it had become "the generally received sense of the Nation", which "seems supported by reasoning at once solid and impregnable", that this clause is not an independent power, but *"a qualification of"* the power "to lay and collect taxes, duties, imposts and excises", expressing the purpose of such power, since "the Constitution was, from its very origin, contemplated to be the frame of a national government of special and enumerated

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powers, and not of general and unlimited powers", whereas to treat the clause as an independent power would create "a general authority in Congress to pass all laws, which they may deem for the common defence or general welfare" (Secs. 908-9, 5th Ed.).

In the second place, this clause, as an expression of the purpose of the taxing power, does not sustain AAA because it does not authorize the Federal Government to transcend the limits set by the preserved rights and powers of the States and the citizens.

AAA is not a mere appropriation of public funds for a national as distinguished from a local purpose. It goes largely further, as our analysis has shown, and by taking the property of one set of private citizens, to wit, the processors, and bestowing it on another set of private citizens, to wit, the farmers, it induces the latter to enter into agreements which vest in the Federal Government complete control, which under said Act and agreements it is now exercising, of a vast area of intrastate activities, to wit, the growing and processing of crops.

This reach of AAA renders it unconstitutional, without regard to a precise definition of the power under this clause, because it usurps the reserved powers of the States and ignores the preserved rights of the citizens, and thereby impinges upon the most sacred and cherished of our constitutional principles.

This is the clear holding of many decisions of this Court, which we have already cited in our previous discussion. From them we select two by way of illustration because of their extreme pertinency to the two separate issues presented:

In *Kansas* v. *Colorado* (206 U. S. 46) this Court held that the Federal Government did not have power to reclaim arid lands in the States. Pointing out that

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the question involved was not navigation, but the "superior right on the part of the National Government to control the whole system of the reclamation of arid lands" and that "that involves the question whether the reclamation of arid lands is one of the powers granted to the National Government", Mr. Justice Brewer, who delivered the opinion of the Court, reviews the provisions of the Constitution and the authorities, and concludes:

> "But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment.
>
> "This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, *under the pressure of a supposed general welfare,* attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act" (pp. 87-90).

In *Savings & Loan Assn.* v. *Topeka* (20 Wall. 655), which has been often followed, this Court enunciated the fundamental principle by reason of which neither

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the State nor the National Government may take by taxation the property of one private citizen and bestow it on another, accordingly holding void a State statute which authorized municipal bonds in aid of a manufacturing enterprise. The opinion of Mr. Justice Miller, breathing his indignation at such a trespass, declared the exaction a robbery, though done in the name of taxation, because:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. * * * The theory of our governments, *state and national*, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name" (pp. 662-3).

In 1798 Mr. Justice Chase enunciated these same principles in *Calder* v. *Bull* (3 Dall. at 388-9) when he said such laws would be "a political heresy altogether inadmissible in our free Republican governments"; and Mr. Justice Roberts reiterated this view when he said that the Railroad Retirement Act "denies due process of law by taking the property of one and bestowing it upon another" (295 U. S. at 350).

Those who have most advocated the larger meaning

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for the clause, and on whose opinions most reliance is placed to sustain AAA—Hamilton, Monroe, Jackson and Story—themselves acknowledged the limitations which prevent the reach which AAA has.

Hamilton in his Report on Manufactures of 1791—which originated this enlarged signification (hence its appellation "Hamilton theory")—strictly limited its scope to an appropriation of money only, saying (Works, Lodge Ed. III: 370-2):

> "There seems no room for a doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, *so far as regards an application of money*";

also that it "must be *general*, and not *local*", and that:

> "A power *to appropriate money* with this latitude, which is granted in express terms, would not carry a power to do any other thing, not authorized in the constitution either expressly, or by fair implication" (italics in original);

thus clearly indicating he regarded the power as one for appropriation only, not for exercise of ungranted powers through means of the appropriation.

Monroe in his paper of May 4th, 1822, entitled "Views of the President of the United States on the subject of Internal Improvements", while stating his belief that the clause gave Congress unlimited discretionary power of appropriation, "restricted only by the duty to appropriate it to purposes of common defence, and of general, not local, national, not state, benefit", though the clause was not the grant of an independent power, nevertheless expressly placed on

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this larger meaning the very limitation for which we are here contending, saying:

> "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants, according to a strict construction of their powers respectively, is there no limitation to it? Have congress a right to raise and appropriate the money to any, and to every purpose, according to their will and pleasure? They certainly have not. The government of the United States is a limited government, instituted for great national purposes, and for those only. Other interests are committed to the states, whose duty it is to provide for them. Each government should look to the great and essential purposes, for which it was instituted, and confine itself to those purposes" (II M. & P. of the Pres., p. 736).*
>
> "From this view of the right to appropriate and of the practice under it I think that I am authorized to conclude that the right to make internal improvements has not been granted by the power 'to pay the debts and provide for the common defense and general welfare', included in the first of the enumerated powers; that that grant conveys nothing more than a right to appropriate the public money and stands on the same ground with the right to lay and collect taxes, duties, imposts, and excises, conveyed by the first branch of that power; that the Government itself being limited both branches of the power to raise and appropriate the public money are also limited, the extent of the Government as designated by the

* Messages and Papers of the Presidents, prepared under the direction of the Joint Committee on Printing of the House and Senate, pursuant to an Act of the 52nd Congress of the United States, published by Bureau of National Literature, Inc.

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specific grants marking the extent of the power in both branches, extending, however, to every object embraced by the fair scope of those grants and not confined to a strict construction of their respective powers, it being safer to aid the purposes of those grants by the appropriation of money than to extend by a forced construction the grant itself; that although the right to appropriate the public money to such improvements affords a resource indispensably necessary to such a scheme, it is, nevertheless, deficient as a power in the great characteristics on which its execution depends" (II M. & P. of Pres., p. 742).

In keeping with these views, on the same day he vetoed an Act of Congress establishing the Cumberland road, with gates and tolls, in a Message which declared:

"It is a complete right of jurisdiction and sovereignty, for all the purposes of internal improvement, *and not merely the right of applying money,* under the power vested in Congress to make appropriations,—under which power, with the consent of the states through which this road passes, the work was originally commenced, and has been so far executed. I am of opinion that Congress do not possess this power; that the states, individually, cannot grant it; for although they may assent to the appropriation of money within their limits for such purposes, they can grant no power of jurisdiction or sovereignty by special compacts with the United States. This power can be granted only by an amendment to the Constitution, and in the mode prescribed by it.

"If the power exist, it must be, either because it has been specifically granted to the United States, or that it is incidental to some

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> power which has been specifically granted. If we examine the specific grants of power, we do not find it among them, nor is it incidental to any power which has been specifically granted" (II M. & P. of Pres., pp. 711-2).

Jackson, for the same reason, vetoed on May 27th, 1830, an Act authorizing a subscription of stock in the Maysville Turnpike Road Company (and other similar Acts later). While he considered Acts of the previous administrations, which he reviewed, imposing

> "so far as the mere appropriation of money is concerned", though he regretted their existence, deeming them "an admonitory proof of the force of implication and the necessity of guarding the Constitution, with sleepless vigilance, against the authority of precedents which have not the sanction of its most plainly defined powers",

nevertheless he was of opinion the Act was unconstitutional because:

> "Although frequently and strenuously attempted the power to this extent ['construct or promote works of internal improvement'] has never been exercised by the government in a single instance. It does not in my opinion possess it and no bill, therefore, which admits it, can receive my official sanction."
>
> "*Assuming the right to appropriate money,* to aid in the construction of national works, to be warranted by the contemporaneous and continued exposition of the Constitution, *its insufficiency for the successful prosecution of them must be admitted by all candid minds.* If we look to usage to define the extent of the right, that will be found so variant, and embracing so much that has been overruled, as

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> to involve the whole subject in great uncertainty; and to render the execution of our respective duties in relation to it replete with difficulty and embarrassment. It is in regard to such works, and the acquisition of additional territory, that the practice obtained its first footing. *In most, if not all, other disputed questions of appropriation, the construction of the Constitution may be regarded as unsettled, if the right to apply money, in the enumerated cases, is placed on the ground of usage*" (III M. & P. of Pres., pp. 1048, 1050, 1053-4).

Story placed the same limitation on the clause not only by his approval of Hamilton's Report and Monroe's "Views" from which he quoted at length (Comm. Secs. 978-90, 5th Ed.), but also expressly in stating his views as to internal improvements. He said:

> "Congress may not indeed engage in such undertakings [internal improvements] merely because they are internal improvements for the general welfare unless they fall within the scope of the enumerated powers. The distinction between this power and the power of appropriation is that in the latter Congress may appropriate to any purpose which is for the common defence or general welfare; but in the former they can engage in such undertakings only as are means or incidents to its enumerated powers * * *. The power to regulate commerce cannot include a power to construct roads and canals and improve the navigation of water courses in order to facilitate, promote and secure such commerce without a latitude of construction departing from the ordinary import of the terms and incompatible with the nature of the Constitution" (Story,

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5th Ed., Secs. 1274 and 1277, *citing with approval Madison's Message of 3d March 1817, Monroe's Message of 4th May 1822 and Jackson's Message of 27th May 1830*).

This limitation has been steadfastly upheld. See, Veto Messages of Tyler of June 11th, 1844, of Polk of August 3rd, 1846 and December 15th, 1847, and of Pierce of May 3rd and December 30th, 1854 (M. & P. of Pres., pp. 2183-4, 2310-2, 2468-75, 2782-8, 2792), in addition to other Messages and the decisions elsewhere cited. Especially interesting and applicable is the following from Polk's Message of December 15th, 1847:

> "The policy of embarking the Federal Government in a general system of internal improvements had its origin but little more than twenty years ago. In a very few years the applications to Congress for appropriations in furtherance of such objects exceeded two hundred millions of dollars. In this alarming crisis President Jackson refused to approve and sign the Maysville Road Bill, the Wabash River Bill and other bills of similar character. His interposition put a check upon the new policy of throwing the cost of local improvements upon the National Treasury, preserved the revenues of the Nation for their legitimate objects, by which he was enabled to extinguish the then existing public debt and to present to an admiring world the unprecedented spectacle in modern times of a Nation free from debt and advancing to greatness with unequalled strides under a Government which was content to act within its appropriate sphere in protecting the States and individuals in their own chosen career of improvement and of enterprise."

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> "Such a system is subject, moreover, to be perverted to the accomplishment of the worst of political purposes. During the few years it was in full operation, and which immediately preceded the Veto of President Jackson of the Maysville Road Bill, instances were numerous of public men seeking to gain popular favor by holding out to the people interested in particular localities, the promise of large disbursements of public money. Numerous reconnoissances and surveys were made during that period for roads and canals through many parts of the Union and the people in the vicinity of each were lead to believe that their property would be enhanced in value and they themselves be enriched by the large expenditures which they were promised by the advocates of the system should be made from the Federal Treasury in their neighborhood. Whole sections of the country were thus sought to be influenced and the system was fast becoming one, not only of profuse and wasteful expenditure, but a potent political engine" (M. & P. of Pres. at pp. 2462, 2464).

It thus seems incontrovertible that the reach of AAA totally prevents it from being sustained under the Constitution, not only by reason of the decisions but even on the authority of these advocates of the larger meaning for the general welfare clause, for the reason that these advocates expressly limit the power under this larger meaning to "mere appropriations"—and that for general and national, not local or state, benefit—thus excluding on the one hand control of intrastate activities through the medium of these appropriations and on the other hand the bestowal of one citizen's property on another citizen by taxation.

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In the third place, this clause does not authorize an appropriation for the accomplishment of objects not intrusted to the Federal Government.

This is the clear requirement of the basic constitutional principle that the "end" must be "legitimate" and "within the scope of the Constitution", the "means" consistent with its "letter and spirit". Enunciated by Chief Justice Marshall in *McCulloch* v. *Maryland* (4 Wheat. at 421), this principle has become the established test (*United States* v. *Gettysburg Co.*, 160 U. S. at 681), axiomatic, universal (*Fairbank* v. *United States*, 181 U. S. at 287-9; *Kansas* v. *Colorado*, 206 U. S. at 87-91). And it plainly forbids appropriations for ends beyond Federal powers of accomplishment. See the convincing consideration by Hon. John Randolph Tucker in his work on the Constitution (Vol. I, pp. 470-97).

Chief Justice Marshall himself drew this inevitable conclusion when he further said in *McCulloch* v. *Maryland* that: "*Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government,* it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land" (4 Wheat. at 423). And he gave a perfect illustration and authoritative upholding of the precise point we are here making when in *McCulloch* v. *Maryland* he sustained national banking as within the limits of the Constitution and in *Gibbons* v. *Ogden* accorded plenary power under the commerce clause over the commerce it embraces, yet, nevertheless, in the latter case at the same time declared, with entire consistency, that:

> "Congress is not empowered to tax for those purposes, which are within the exclusive province of the States" (9 Wheat. at 199),

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which means, of course, that in his opinion a tax may not be levied, and hence no appropriation made, for such extraneous purposes.

This conclusion undoubtedly accords with the intentions of the Conventions which framed and ratified the Constitution and has been that accepted over the years as most conforming to the fundamentals of our Government. The data in this respect has been collected and reviewed in an able and thorough manner by Hon. Henry St. George Tucker in an address published in the American Bar Association Law Journal for July and August, 1927, under the title "Judge Story's Position on the General Welfare Clause". Mr. Tucker shows, with copious references and extracts, that Hamilton's theory "was six times, directly or indirectly, rejected in the Constitutional Convention", that a large majority of the Committee of Eleven which finally reported the clause for incorporation in Sec. 8, Art. I, was strongly opposed to Hamilton's theory, that a more restricted meaning, which makes the clause co-extensive with the granted powers, has been approved by the great preponderance of authority, including a distinguished list of statesmen, judges and authors, given in the footnote,* which he cites in support of his statement.

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* *Chief Justice Marshall*, in *Gibbons* v. *Ogden* (9 Wheat. at 199) and *McCulloch* v. *Maryland* (4 Wheat. at 421, 423); *Mr. Justice Brewer*, in *Kansas* v. *Colorado* (206 U. S. at 87-91) and *Fairbanks* v. *United States* (181 U. S. at 287-9, 294, 300): *Mr. Justice Miller*, in his work on the Constitution (p. 229, notes 2, 247) and *Loan Assn.* v. *Topeka* (20 Wall. at 662-4); *Madison*, in Art. 41 of the Federalist, the Report on the Virginia Resolutions of 1798, his letter to Andrew Stevenson of Nov. 27th, 1830, with the supplement thereto (Writings, Hunt Ed. VI: 356-7; IX: 411-31) and also his Messages of Mar. 3rd, 1817 and May 4th, 1822: *Jefferson*, in his opinion on the *Bank of the United States* of Feb. 15th, 1791, and his letter to Judge Spencer Roane of Oct. 12th, 1815 (Ford Ed. VI: 199; XI: 489-90); *James Wilson*, (Andrews Ed. II: 56-9); *Judge Cooley*, in his work on Taxation (2nd Ed. p. 110) and his Const. Lim. (pp. 11, 106); *John C. Calhoun* (Vol. III: 36, 37, 41); *Hare*, American Constitutional Law (I: 242-3); *Duer*, Constitutional Jurisprudence (2nd Ed. p. 211); Willoughby on the Constitution (I: 40: 2nd Ed. p. 97); *Van Holst*, Constitutional Law of the United States (p. 118): the Message of *President Cleveland* in 1887, vetoing the appropriations for drouth-stricken counties in Texas; and *President Coolidge's* address before the Budget Meeting on Jan. 21st, 1924, and in his Annual Message of Dec. 8th, 1925.

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Story himself, though personally favoring the Hamilton theory, verifies these conclusions in a most convincing manner.

His deduction from the history of the clause in the National Convention is that:

> "The truth is, as the historical review also proves, that after it had been decided that a positive power to pay the public debts should be inserted in the Constitution and a desire had been evinced to introduce some restriction upon the power to lay taxes, in order to allay jealousies and suppress alarms, it was (keeping both objects in view) deemed best to append the power to pay the public debts to the power to lay taxes; and then to add other terms, *broad enough to embrace all the other purposes contemplated by the Constitution.* Among these none were more appropriate than the words 'common defense and general welfare' found in the Articles of Confederation and subsequently with marked emphasis introduced into the preamble of the Constitution. *To this course no opposition was made because it satisfied those who wished to provide positively for the public debts and those who wished to have the power of taxation coextensive with all constitutional objects and powers"* (Story's Comm., 5th Ed., Sec. 930).

Thus we have complete confirmation from Story of the fact that this clause was inserted as a power only coextensive with the other powers, in aid of which it was from its very nature, and not as authorization for something entirely beyond them—any more than the use of the terms "common defense" and "general welfare" in the preamble expressed such

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a further purpose (*Jacobson* v. *Massachusetts,* 197 U. S. at 22).

But more important still, quoting as follows from Jefferson's opinion on the Bank of the United States in 1791 (Ford Ed. VI: 199):

> "To lay taxes to provide for the general welfare of the United States, is, to lay taxes for the purpose, of providing for the general welfare. For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. Congress are not to lay taxes *ad libitum,* for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do any thing they please, to provide for the general welfare; but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give that, which will allow some meaning to the other parts of the instrument, and not that, which will render all the others useless. Certainly, no such universal power was meant to be given them. *It was intended to lace them up strictly within the enumerated powers, and those, with-*

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out which, as means, those powers could not be carried into effect.''; [also letter to Gallatin in 1817, XII: 72]

and further quoting the following statement from the opinion of Chief Justice Marshall in *Gibbons* v. *Ogden* (9 Wheat. at 199):

> "Congress is authorized to lay and collect taxes, &c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power, that is granted to the United States. In imposing taxes for state purposes, they are not doing, what Congress is empowered to do. *Congress is not empowered to tax for those purposes, which are within the exclusive province of the states.* When, then, each government is exercising the power of taxation, neither is exercising the power of the other.";

Mr. Justice Story thus comments thereon:

> "The same opinion has been maintained at different and distant times by many eminent statesmen. It was avowed, and apparently acquiesced in, in the stated conventions, called to ratify the constitution; and it has been, on various occasions, adopted by congress, *and may fairly be deemed, that which the deliberate sense of a majority of the nation has at all times supported. This, too, seems to be the construction maintained by the Supreme Court of the United States. * * * Under such circumstances, it is not, perhaps, too much to contend, that it is the truest, the safest, and the most authoritative construction of the constitution.*

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> * * * The view thus taken of this clause of the constitution will receive some confirmation, (if it should be thought by any person necessary,) by an historical examination of the proceedings of the convention" (Comm., 5th Ed., Secs. 926-8).

How can these statements of Story be true and at the same time the Hamilton theory be regarded as the proper and accepted meaning of the general welfare clause instead of *this construction of Jefferson and of Marshall which Story thus endorses, and shows to have been thus widely approved, and is the very construction which Madison urged* against Hamilton's view and because of his distinguished support has come to be known as the "Madison theory".*

Madison, in amplification of his Article 41 in the Federalist, and in the light of Hamilton's Report on Manufactures, had thus stated his construction, with the reasons therefor, in his Report on the Virginia Resolutions of 1798:

> "Now, whether the phrases in question be construed to authorize every measure relating to the common defence and general welfare, as contended by some—or every measure only in which there might be an application of money, as suggested by the caution of others—the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follow these general phrases in the Constitution; for it is evident that there is not a single power whatever which

* Daniel Webster declared that Madison had "as much to do as any man in the framing of the Constitution, and as much as any man in administering it. *Nobody among the living or the dead is more fit to be consulted on a question growing out of it,*" in which sentiment John C. Calhoun concurred; indeed, Madison has been aptly termed, without dissent, "the father of the Constitution" (Warren, "The Making of the Constitution", pp. 57, 794, Note 1).

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may not have some reference to the common defence or the general welfare; nor a power of any magnitude, which, in its exercise, does not involve or admit an application of money. The government, therefore, which possesses power in either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers; and, consequently, the meaning and effect of this particular enumeration is destroyed by the exposition given to these general phrases."

"The true and fair construction of this expression, both in the original and existing Federal compacts, appears to the committee too obvious to be mistaken. In both, the Congress is authorized to provide money for the common defence and general welfare. In both, is subjoined to this authority an enumeration of the cases to which their powers shall extend. Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with and is enforced by the clause in the Constitution which declares that 'no money shall be drawn from the Treasury, but in consequence of appropriations by law'. An appropriation of money to the general welfare would be deemed rather a mockery than an observance of this constitutional injunction" (Writings, Hunt Ed. VI: 356-7).

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Years later, from his retirement, after mature reflection in the light of his great experience, Madison again thoroughly reviewed and discussed this subject in his letter of November 27th, 1830, to Speaker Stevenson and showed himself to be of the same opinion, for the very same reasons (Writings, Hunt's Ed. IX: 411 *et seq.*). He said:

> "That the terms in question were not suspected in the Convention which formed the Constitution of any such meaning as has been constructively applied to them may be pronounced with entire confidence. For it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of Federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by them.
>
> "Consider for a moment the immeasurable difference between the Constitution limited in its powers to the enumerated objects; and expounded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other, the the one possessing powers confined to certain specified cases, the other extended to all cases whatsoever; for what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary & proper to carry these powers into execution; all such provisions and laws superseding, at the same time, all local laws & constitutions at variance with them. Can less be said, with the evidence before us furnished by the Journal of the Convention itself, than that it is impossible that

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> such a Constitution as the latter would have been recommended to the States by all the members of that Body whose names were subscribed to the instrument" (pp. 420-1).

And he finds evidence "if possible, still more irresistible" in support of this understanding and meaning in the fact that neither in the Ratifying Conventions nor in the Session of Congress which initiated the first Ten Amendments was there suggested an amendment with respect to the welfare clause, although if this broad meaning sought to be given that clause had then been asserted those advocating the amendments could not but have regarded it "as giving a scope to Federal legislation infinitely more objectionable than any of the specified powers which produced such strenuous opposition and calls for amendments" (pp. 421-3).

Finally, in a supplement to this letter Madison put the case, logically and historically, in a nutshell thus:

> "3. A power to appropriate money, without a power to apply it in execution of the object of appropriation, could have no effect but to lock it up from public use altogether; and if the appropriating power carries with it the power of application and execution, the distinction vanishes. The power, therefore, means nothing, or what is worse than nothing, or it is the same thing with the sweeping power 'to provide for the common defense and general welfare'.
>
> "The result of this investigation is, that the terms 'common defence and general welfare' owed their induction into the text of the Constitution to their connexion in the 'Articles of Confederation,' from which they were copied, with the debts contracted by the old Con-

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> gress, and to be provided for by the new Congress; and are used in the one instrument as in the other, as general terms, limited and explained by the particular clauses subjoined to the clause containing them; that in this light they were viewed throughout the recorded proceedings of the Convention which framed the Constitution; that the same was the light in which they were viewed by the State Conventions which ratified the Constitution, as is shown by the records of their proceedings; and that such was the case also in the first Congress under the Constitution, according to the evidence of their journals, when digesting the amendments afterward made to the Constitution. It equally appears that the alleged power to appropriate money to the 'common defence and general welfare' is either a dead letter, or swells into an unlimited power to provide for unlimited purposes, by all the means necessary and proper for those purposes. And it results finally, that if the Constitution does not give to Congress the unqualified power to provide for the common defence and general welfare, the defect cannot be supplied by the consent of the States, unless given in the form prescribed by the Constitution itself for its own amendment." (Writings, Hunt Ed. IX; note, pp. 425, 428-9.)

Polk thus aptly expressed both the cause of the persistence, and the reason for the negation, of the Hamilton theory in his Message of December 15th, 1847:

> "How forcibly does the history of this subject illustrate the tendency of power to concentration in the hands of the general government." * * *

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> "The power of appropriation is but the consequence of the power to raise money; and the true inquiry is whether Congress has the right to levy taxes for the object over which the power is claimed. * * * When our experience, observation and reflection have convinced us that a legislative precedent is either unwise or unconstitutional it should not be followed. * * * The investigation of this subject has impressed me more strongly than ever with the solemn conviction that the usefulness and permanency of this government and the happiness of the millions over whom it spreads its protection will be best promoted by carefully abstaining from the exercise of all powers not clearly granted by the Constitution" (M. & P. of Pres., pp. 2470, 2471, 2475-6).

Pierce also took Madison's view. On May 3rd, 1854 he vetoed a donation to the States for the indigent insane because for "objects"—"social relations" of education, order, relief—not entrusted to the United States. He said:

> "I cannot find any authority in the Constitution for making the federal government the great almoner of public charities throughout the United States. To do so would in my judgment be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of the States is founded. * * * I have never found anything in the Constitution which is susceptible of such a construction. No one of the enumerated powers touches the subject or has even a remote analogy to it. *The powers conferred upon the United States have reference to federal relations or to the means of accomplishing or executing things of federal relation.* * * * It

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> [the welfare clause] is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties and imposts. * * * All the pursuits of industry, everything which promotes the material or intellectual well-being of the race, every ear of corn or boll of cotton which grows, is national in the same sense, for each one of these things goes to swell the aggregate of national prosperity and happiness of the United States; but it confounds all meaning of language to say that these things are 'national', as equivalent to 'Federal', so as to come within any of the classes of appropriation for which Congress is authorized by the Constitution to legislate (M. & P. of Pres., pp. 2782-4, 2788; see also his Messages of August 4th and December 30th, 1854, May 19th (2), May 22nd, August 11th and August 14th, 1856, *ibid.* pp. 2789, 2919-21).

Buchanan was of the same opinion. On February 24th, 1859 he vetoed a donation of lands to States for colleges, believing it "undeniable" that Congress could not appropriate federal funds "for the purpose of educating the people" because:

> "Should Congress exercise such a power, this would be to break down the barriers which have been so carefully constructed in the Constitution to separate Federal from State authority. We should then not only 'lay and collect taxes, duties, imposts, and excises' for Federal purposes, but for every State purpose which Congress might deem expedient or useful. This would be an actual consolidation of the Federal and State Governments so far as the great taxing and money power is concerned, and constitute a sort of partnership between the two in the Treasury of the United States,

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> equally ruinous to both. * * * *The natural intendment would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers''* (M. & P. of Pres., pp. 3078-9; also his Message of February 1st, 1860, *ibid.* p. 3135).

Likewise were *Cleveland's* Vetoes in 1887 and 1889 of gifts of seeds to drouth-stricken counties and of distribution of tax funds to the several States and Territories (M. & P. of Pres., pp. 5142, 5424), as well as *Coolidge's* Address and Message, already mentioned (pp. 25-6, 38).

Then there are the express decisions in *Miles Planting Co.* v. *Carlisle* (1895), 5 App. Cas. D. C. at page 159, and in *United States* v. *Boyer* (1898), 85 Fed. at 429-32. In the former the Court said:

> "If Congress be conceded power to grant subsidies from the public revenues to all objects it may deem to be for the general welfare, then it follows that this discretion, like all admitted powers of taxation, is absolute. Such a doctrine would destroy the idea that this is a government of 'delegated, limited and enumerated powers', render superfluous all the special delegations of power contained in the Constitution, and open the way for a flood of socialistic legislation, the specious plea for all of which has ever been 'the general welfare'. It is a doctrine that we cannot subscribe to."

It is now the accepted doctrine that the phrase "to provide for the common defence and the general welfare" was intended to be a limitation, not a grant of power.

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It no longer has to be argued that the Federal Government is one of enumerated powers.

If Par. 1, Sec. 8, Art. I, had simply said: "The Congress shall have power to lay and collect taxes, duties, imposts and excises", no one would have doubted that the taxing power could be exercised only for the execution of the enumerated powers. Certainly, the power was not conferred to enable the States to execute their reserved powers, much less to enable the Federal Government to usurp those powers.

By what process of reasoning, then, can words of limitation be held to enlarge the power conferred by the words of grant?

The refinement by which Hamilton and his followers seek to answer this query is the assertion that the power is one merely "to appropriate money" and does not require for its exercise any power in the Federal Government to accomplish the ends for which the appropriation is made, which well deserves the blunt remark of Hon. John Randolph Tucker in his work on the Constitution (Vol. I, p. 480): "That a government should have this great means to execute the powers of other governments reaches the point of absurdity."

The power to tax implies the power to appropriate, and that is implicit in the limiting phrase, but if the power to appropriate carries with it the power of application and execution the latter power must be limited to the enumerated powers and those to be implied therefrom or it is destructive of the limitations imposed by them and they become utterly meaningless. If the power of appropriation does not carry with it the power of application and execution it is utterly meaningless, except as it might be made use of, as is now being done, to usurp that power by indirection.

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In truth the challenged Act imposes the tax, appropriates the proceeds or a sum equal to the proceeds to an object outside of the federal power and provides for the execution of that object by a federal agency. The tax, the appropriation, the application and execution in a forbidden field are thus inseparably tied together. If such an Act can be sustained the Federal Government ceases to be one of enumerated powers.

Hamilton was unable to persuade the Convention to accept his views of the powers that should be possessed by the central government and after the Constitution was adopted he strove by construction to extend the grant made as much as he could. (1 Tucker on Const., p. 491.)

Curiously, Story accepted Hamilton's theory, although that gave the welfare clause a meaning utterly inconsistent with his reasoning that it did not constitute an independent power because we had formed "a national government of special and enumerated, and not of general and unlimited, powers" (Secs. 908-9). Reconciliation taxed Story beyond even his great talents. He is forced to argue (Sec. 922) that the clause as thus construed is a "limited" or "qualified" power because such things as "propagating Mohametanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its heroes" would be "wholly indefensible upon constitutional principles"—yet under his view the will of Congress governs and he cites as precedents (Sec. 991) our aid to Santo Domingo in 1794 and to Venezuela in 1812!!! So his effort at distinction patently fails and there is no limitation on appropriations under the clause unless we adopt that of Madison, Jefferson and Marshall which conforms it to

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the Constitution Story said we had when he denied the clause was an independent power.

While this reach of AAA has thus been expressly held unconstitutional by this Court, the question of mere appropriation for objects not entrusted to the Federal Government has been left open by it for future decision with the statement that "it would be difficult to suggest a question of larger importance or one the decision of which would be more far-reaching" (*Field* v. *Clark* (1891), 143 U. S. at 695; *United States* v. *Realty Co.* (1896), 163 U. S. at 433; and *Massachusetts* v. *Mellon* (1923), 262 U. S. at 480).

We feel confident, however, that a denial of such power of appropriation is implicit in the decisions of this Court which we have cited and the constitutional principles they have established; that a contrary conclusion would expand the clause beyond its nature and context and make it a glaring exception, completely undermining the intended scope of our Federal Government.

It seems to us the supremacy of these fundamentals, in a way controlling here, has been illustrated and declared in the recent opinions of this Court in the *Schechter, Rathbun, Frazier-Lemke* and *Railroad Retirement Act* cases. In the latter this Court nullified the Railroad Retirement Act—a like piece of fiscal legislation for the benefit of another class, to wit, railroad employees—and notwithstanding its claimed effect on an instrumentality of interstate commerce. Brushing aside the arguments based on improved morale, general welfare, etc., because of their "failure to distinguish constitutional power from social desirability", Mr. Justice Roberts, for the Court, declared the Act lay "outside the orbit of

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Congressional power" and at the same time put his finger squarely on the crucial evil of the unfettered Hamilton theory for appropriations by pointing out that the effect of the Act would be to "transfer the drive for pensions to the halls of Congress and transmute loyalty to employer into gratitude to the Legislature" (295 U. S. at 367, 368, 351).

Nor can such an issue, thus characterized by this Court, and left open for presentation in justiciable form, be regarded as concluded by appropriations Congress may have made for purposes outside the enumerated powers. As expressly held in *Miles P. Co.* v. *Carlisle* (5 App. Cas. D. C. at 161) and amply confirmed by the vetoes and other opinions we have cited and the *Field, Realty Co.* and *Mellon* cases in this Court, such acts have "met with determined opposition and denial of power at all times", so that "it cannot be said they have ever received general consent or acquiescence", although not the subject of adjudication, because the question "is so hard to be raised in an effective manner". See also *U. S.* v. *Boyer,* 85 Fed. at 432. In *Fairbank* v. *United States* (181 U. S. 283) this Court held unconstitutional an act of 1898 taxing foreign bills of lading, although Congress had exerted such power in contemporaneous acts in 1797-1802, in 1823 and in 1862-4, Mr. Justice Brewer saying, what is most pertinent here,

> "it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny", so that "the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution" (p. 312).

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The vital import of the question—the true consequence of an affirmation of the power—is now being made manifest in realization of the fears of our forefathers by the experiences of widespread expenditures and unbalanced budgets, with mounting deficits and confidence lost through dread of taxation, inflation, bankruptcy. It is a time when all can unite in the wish so fervently *expressed by Jefferson* in his letter to Judge Spencer Roane in the evening of his life:

> "I hope our courts will never countenance the sweeping pretensions which have been set up under the words 'general defence and public welfare'. These words only express the motives which induced the Convention to give to the ordinary legislature certain specified powers which they enumerate, and which they thought might be trusted to the ordinary legislature, and not to give them the unspecified also; or why any specification? They could not be so awkward in language as to mean, as we say, 'all and some'. And should this construction prevail, all limits to the Federal Government are done away. This opinion, formed on the first rise of the question, I have never seen reason to change, whether in or out of power; but, on the contrary, find it strengthened and confirmed by five and twenty years of additional reflection and experience; and any countenance given to it by any regular organ of the government, I should consider more ominous than anything which has yet occurred" (Ford Ed. XI: 489-90).

Still later *Jefferson* wrote Gallatin "our tenet ever was" that:

> "Congress had not unlimited powers to provide for the general welfare but were re-

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> strained to those specifically enumerated; and that as it was never meant they should provide for that welfare but by the exercise of the enumerated powers, so it could not have been meant they should raise money for purposes which the enumeration did not place under their action; consequently that the specification of powers is a limitation of the purposes for which they may raise money" (Ford Ed. XII: 72).

At bottom the issue is the very same that confronted the National Convention and was answered by a government of enumerated powers; that arose in the Ratifying Conventions and was answered by the first Ten Amendments; that arose in this Court and was answered by the historic opinions of Chief Justice Marshall in *Marbury* v. *Madison, McCulloch* v. *Maryland* and *Gibbons* v. *Ogden;* that arose in our Civil War period and was answered by *Ex parte Milligan;* and that has now arisen in our acute depression and been again likewise answered by the statement of Chief Justice Hughes in the *Schechter* case that "the recuperative efforts of the Federal Government must be made in a manner consistent with the authority granted by the Constitution".

VII.

The provisions of AAA are plainly unconstitutional delegations of legislative power by Congress.

So recently and fully has this Court considered this question in *Panama Refining Co.* v. *Ryan* and *Schechter* v. *United States* that a reference to those cases is all that is needed upon the law of the subject.

A comparison of the provisions of AAA with the provisions of NRA, which this Court in those cases

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held to be such delegation of legislative power, cannot but bring a like conclusion in the instant case. The powers vested by AAA in the Secretary of Agriculture correspond entirely with the powers vested by NRA in the President and bring this case squarely under the declaration of Chief Justice Hughes in the *Schechter* case:

> "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry" (295 U. S. at 537-8).

In the first place, the Secretary has the same mandate for rehabilitating agriculture that the President had for rehabilitating industry. In his hands is placed the accomplishment of "the declared policy" of the Act, namely:

> "To establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor, as will re-establish 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"—August 1919—July 1929 for tobacco and August 1909—July 1914 for other agricultural commodities (Sec. 2).

This is nothing less than a substitution of the powers conferred on the Secretary for the laws of supply and demand—a discretionary control whereby it was hoped he might succeed where it was thought those laws had failed. The scope is just that broad—the standard just that indefinite.

In the second place, there is just as broad a grant to the Secretary of the means of accomplishing this declared policy. He is authorized:

> "(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" (Sec. 8).

In these few but potent words agriculture as represented by our basic commodities—its growth and marketing with all that means as to quantity and price—are handed over absolutely to the Secretary's control, regardless of the terms of the Constitution and of the rights of the citizens and the States.

In the third place, there is the like broad discretionary delegation to the Secretary of two other distinct powers, to wit, (1) the imposition of taxes and (2) the appropriation of the revenues therefrom, each of which is expressly a legislative power of Congress under Sec. 8, Art. I, of the Constitution.

The discretion of the Secretary of Agriculture with respect to taxation is shown in a detailed analysis annexed as Appendix A. Suffice it here to say that the taxes begin "when the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity" and "terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be dis-

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continued with respect to such commodity" Sec. 9(a).

The whole proceeds of these taxes are allocated to "administrative expenses, rental and benefits payments, and refunds of taxes". Sec. 12(b). And these "rental or benefit payments" as to every single element—time, amount, place, commodity, person—are left utterly to the discretion of the Secretary by the extraordinary power given in Sec. 8 as to crop reduction that we have just noted.

While there is a general standard for the rate in Sec. 9(b), other provisions make this entirely subservient to the discretion of the Secretary for effectuating the declared policy of the Act. The dominant provision in this respect is that of Sec. 9(a) that:

> "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."

Art. 6 of U. S. Treasury Dept., Reg. 81, provides that:

> "The rate of processing tax with respect to any commodity will be determined by the Secretary of Agriculture and thereafter the rate of tax will be announced by the Commissioner of Internal Revenue. The rate of processing tax with respect to any particular commodity may be adjusted at intervals by the Secretary of Agriculture, that is, increased or decreased. Any such change of rate, and the day upon which such changed rate takes effect, will be announced by the Commissioner of Internal Revenue."

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And *Vogt* v. *Rothensies,* 11 Fed. Supp. 229-30, plainly shows that the Secretary has asserted this right, even to maintaining a tax at a rate above the general standard of Sec. 9(b).

In addition, the Secretary may from time to time, as his discretion dictates, suspend the tax or cause its refund, exempt processors from it, and exclude from its operation any basic agricultural commodity, or any classification, type or grade thereof, as well as vary it as he may think will effectuate the declared policy of the Act. See Secs. 9(b), 11, 15(a), 15(b).

The truth of the foregoing is amply demonstrated by a consideration of any of our basic industries. It has been shown in detail as respects the tobacco industry in a booklet entitled "Tobacco Under The AAA", prepared by Mr. Harold B. Rowe and published by The Brookings Institution.

Leaf tobacco, like other agricultural commodities, has various classifications (as for example our own Bright, Burley, Maryland, Air-Cured, Fire-Cured, Flue-Cured, Cigar, while some are imported, as Turkish, Havana, Sumatra), each of which has many types or grades, with their different volumes and values, due to conditions of soil and climate, the manner of harvesting and curing, and the products in which utilized, so that even the leaves of tobacco on the same plant have each their different use and worth.

And, of course, price and popularity of the article produced greatly affect leaf value. More may be paid for such raw material for a 10¢ than for a 5¢ article. Cigarettes are vastly more in vogue than smoking tobacco, and it in turn exceeds cigars and chewing, which are decadent.

Accordingly the tobacco program thus accurately described at pages 88-90 of the above-mentioned pub-

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lication gives an instructive picture of the operations under AAA:

> "The tobacco program as a whole is made up of several distinct plans which are being applied to the different kinds of tobacco. Under the authority provided by Section 11 of the Adjustment Act to treat separately 'any regional or market classification, type, or grade * * *,' the Secretary of Agriculture designated cigar-leaf, flue-cured, Burley, Maryland, dark air-cured, and fire-cured tobaccos each as a basic commodity. For each commodity a separate plan has been developed. Furthermore, the plan for cigar tobacco provides for some variation in procedure with respect to certain types and producing areas.
>
> "When these plans are considered collectively, it becomes apparent that a combination of methods for limiting production constitutes the central element in each plan and in the program as a whole. Other devices have been used, however, including marketing agreements, licenses, and codes. These devices have been co-ordinated with the production approach and used to supplement it to various degrees in the plans for the several commodities. The result has been the evolution of a tobacco program which represents something more than a choice from among those general plans contemplated by the framers of the act. The several devices authorized by the Agricultural Adjustment Act have been combined with the use of powers conferred by the Kerr-Smith Act. Thus a scheme of operation has been developed, the details of which are adapted to differences in the problem as interpreted for the several kinds of tobacco and to the varying conditions encountered in the respective producing areas.

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"Three general methods, which constitute the dominant feature of the program as a whole, are being used to effect the limitation of production. The first is the reduction of production through voluntary contracts with growers, as authorized by the Adjustment Act. Basically, these contracts bind producers who participate in the plans to restrict production in return for cash payments out of the funds obtained from processing taxes. This is accomplished by three steps:

"1. Establishing a base from which reductions are to be made. In the first plan only an acreage base was determined, but in the plans subsequently developed for other types both a 'base tobacco acreage' and a 'base tobacco production' were established for each contract signer.

"2. Specifying the reduction required. Typically, this is accomplished by designating a percentage of the base acreage to be kept out of production. The remaining percentage upon which the producer is allowed to grow tobacco constitutes the 'tobacco acreage allotment'. The same percentage of the base production constitutes the 'production allotment' assigned to the grower. It represents the quantity of tobacco he is authorized to produce for market. The cigar plan represents an exception in that only acreage reductions and allotments were specified.

"3. Designating the payments to be made in return for the reduction required.

"The second method for limiting production is the assignment of allotments, representing the quantities which can be marketed, under the terms of a marketing agreement and parallel

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license. As will be noted later, this method has been used only for cigar-wrapper tobacco grown in one area and really constitutes an exception in the program as a whole.

"The third and final method is provided by the Kerr-Smith Act. Under the provisions of this act the equivalent of a relatively heavy tax is placed upon most sales of tobacco not covered by allotments assigned under the voluntary contracts to reduce production. This is accomplished by levying the tax upon all sales of types to which the tax is applicable and then issuing tax-payment warrants to producers who have allotments. Such warrants are accepted by the Bureau of Internal Revenue as payment of the tax on the amounts of tobacco covered by allotments. In this manner a tax is collected upon the production of such types by growers who do not sign voluntary contracts, excepting that provision is made for issuance of a limited quantity of additional warrants to producers not eligible to sign contracts and receive benefit payments."

Added to the foregoing are the further facts (1) that every tobacco product is a blend of different types of leaf tobacco, each of which has its own rate of taxation, and (2) that prices of leaf tobacco, as well as prices of the things that farmers buy vary during the year so that parity is constantly changing. See discussion in "Tobacco Under The AAA" at pages 182 *et seq.*

The result has been great differences in the essential terms of the tobacco crop reduction contracts, a summary of which may be found in Appendix D to the above-mentioned work. The rates of taxation have also varied greatly among themselves and from the

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general standard prescribed by Sec. 9(b). Prior to the Amendments of 1935, as tabulated by Prentice-Hall, Federal Tax Service, Vol. IV, Par. 34,703.2, they were mainly as follows:

Market Classification of Tobacco	Effective Date	Rates of Tax per Pound Unsweated Farm Sales Weight	Applicable to: Stem Not Removed Sweated	Stem Removed Sweated
CIGAR-LEAF of any kind except that classified in U. S. Department of Agriculture B. A. E. Service and Regulatory Announcements No. 118 as fire-cured tobacco, used in the manufacture of cigars or small cigars	Oct. 1, 1933	$0.03	$0.0375	$0.05
CIGAR-LEAF of the kind classified in U. S. Department of Agriculture, B. A. E., Service and Regulatory Announcements No. 118 as fire-cured tobacco, used in the manufacture of cigars or small cigars	Feb. 1, 1935	.03	.0325	.043
CIGAR-LEAF of any kind used in the manufacture of scrap chewing or smoking tobacco	Feb. 1, 1935	.02	.025	.033
MARYLAND	Oct. 1, 1934	.00	.00	.00
BURLEY				
Used in manufacture of:				
Chewing tobacco	Feb. 1, 1935	.025	.029	.039
Other articles*	Oct. 1, 1934	.061	.07	.095
			In Processing	Order
FLUE-CURED				
Used in manufacture of:				
Chewing tobacco	Feb. 1, 1935	.02	.023	.029
Other articles*	Oct. 1, 1933	.042	.047	.061
FIRE-CURED				
Used in manufacture of:				
Chewing tobacco	Feb 1, 1935	.02	.022	.029
Other articles*	Oct. 1, 1933	.029	.032	.041
DARK AIR-CURED				
Used in manufacture of:				
Chewing tobacco	Feb. 1, 1935	.02	.023	.031
Other articles*	Oct. 1, 1933	.033	.038	.051

* Except cigars and scrap chewing or smoking tobacco

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VIII.

The unconstitutionality of AAA is not cured by the attempted blanket ratifications by the 1935 Amendments.

By Subdivs. (b) and (c) of Sec. 21, added by Sec. 30 of the 1935 Amendments, and set forth in Appendix B, Congress has attempted to cure, for the antecedent period, the blanket delegations of power to the Secretary of Agriculture by blanket ratifications, couched in the most general and indefinite terms, of all that he had theretofore done under the supposed authority of AAA.

This endeavor fails of its purpose, for the following distinct and conclusive reasons:

In the first place, it goes without saying that Congress cannot ratify what it could not authorize as an original proposition. This is necessarily so, and will be found expressly stated as a limitation in all the cases we hereinafter cite. It follows that if AAA be unconstitutional, because (1) of usurpation of the powers reserved to the States with respect to their intrastate affairs or (2) of taking by so-called taxation the property of one set of private citizens and bestowing it on another set of private citizens contrary to the preserved rights of the people, then the authorization was unconstitutional and the ratification cannot bring it within the terms of the Constitution.

In the second place, such ratification, in so far as the taxation is concerned, violates the general rule that "ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act" (*Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. at 339). The reason

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is that such ratification is the creation of a liability, not with respect to a pre-existing one. Here the tax is upon the act of processing, by the express mandate of Sec. 9(a); and a tax upon that act, such as here imposed (*Liggett & M. Co.* v. *United States* (C. C. A. 3rd), 77 F. (2d) at 67; *Cornell* v. *Coyne,* 192 U. S. 418), is just as much, and for the same reason, beyond retroactive imposition as is a tax upon the act of making a gift (*Untermeyer* v. *Anderson,* 276 U. S. at 445). Accordingly, the cases which hold that taxes may be assessed for improvements that have been made and paid for, or for one year measured by the income of the previous year, or during a current year on the income of its portion that has elapsed (such as *Wagner* v. *Baltimore,* 239 U. S. at 216-7, and *Stockdale* v. *Insurance Co.,* 20 Wall. at 331-3) are not in point, but must be distinguished, as they were with respect to a retroactive tax on the making of gifts.

In the third place, the ratification is totally beyond the scope accorded by the decisions to legalization by ratification.

In making this statement we are not unaware of the *Philippine Islands* cases (*United States* v. *Heinszen,* 206 U. S. at 370; *Tiaco* v. *Forbes,* 228 U. S. 549; *Rafferty* v. *Smith,* 257 U. S. 226; to which may be added *Springer* v. *Philippine Islands,* 277 U. S. 189), on which counsel for the Government so strongly rely. They are totally inapplicable because, as pointed out in those cases, (1) neither the Constitution nor the Bill of Rights of the Philippine Islands imposes such a principle for its internal affairs (*Tiaco* v. *Forbes,* 228 U. S. 549) and (2) Congress may delegate legislative power to the Executive Department or its representative as respects acquired possessions such as these islands (*Dorr* v. *United States,* 195

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U. S. 138). This was the express conclusion, and reason, given in the *Heinszen* case, the Court there saying, what is most pertinent here:

> "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, 49 L. ed. 128, 24 Sup. Ct. Rep. 808" (206 U. S. at 384-5).

The true nature and scope of ratification, showing the ratification here attempted to be totally beyond its purview, is that declared by Chief Justice Hughes for the Court in *Graham* v. *Goodcell* (282 U. S. at pp. 426-30).

The Act assailed as void for retroactivity was sustained on the express ground that:

> "This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached. There is no question here as to the original liability of the taxpayers. The tax was a valid one, and the fact that the taxpayers

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> had been indebted to the government for the amount which was subsequently collected is not now open to dispute" (p. 426).

He then reviews the cases, and concludes:

> "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice",

approving in this connection the statement in *Charlotte etc. Co.* v. *Wells* (260 U. S. at 11-2) that:

> "The power is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration",

saying: "This principle covers the present case" (pp. 429-30).

Surely, these ratifications are typical cases of what Chief Justice Hughes described in the above quotations as "a bare attempt of the legislature retroactively to create liabilities". If the delegations to the Secretary were unconstitutional they created no liability whatever.

In the fourth place, the principle here involved, and "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution" (*Field* v. *Clark*, 143 U. S. at 692) cannot be maintained if omnibus delegations to the Executive Department may be validated by omnibus ratifications.

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The reason is plain, and fully exemplified in the situation here presented, and it is for this reason that we have deemed it necessary to set forth in our analysis of AAA not only the provisions of that Act as heretofore existing, but as they exist under the 1935 Amendments, in order that the Court may thoroughly understand exactly what it would sanction should it uphold the ratifications.

For these provisions show the following important sequence and consequence: (1) An omnibus delegation of legislative power to the Secretary of Agriculture, (2) followed at a succeeding Congress by an omnibus ratification of all he may have done thereunder, (3) *accompanied by a like omnibus delegation of legislative power to the Secretary for the indefinite future,* (4) *with, of course, the prospect, if the ratification be sustained by this Court, of future ratifications accompanied by future delegations from subsequent sessions of Congress.*

Only a moment's consideration will suffice to show that if this *mode of legislation* be sustained then the principle that legislative power may not be delegated has thereby been nullified. Under such a system Congress need not hereafter pass laws which definitely define and impose taxes; all Congress would have to do is to declare as a matter of policy that the budget of the nation should be kept balanced, with broad power to the Secretary of the Treasury to impose taxes of such kinds, at such rates, and with respect to such persons, acts and things, as he may from time to time determine is necessary for that purpose, with Congress at recurring sessions ratifying what he may have levied and collected under this delegation. Similarly, since there would thus be ratified the creation by the Secretary of legal duties on the part of growers and processors, non-observance of which constituted a criminal offense, Congress

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need not pass laws defining crimes and imposing punishments therefor; all it need do is to declare criminal acts against the policy of the country, delegate broad power to the Attorney General, by proclamation from time to time to determine what shall constitute crimes and what punishments shall be imposed therefor, with recurring ratifications of the acts of the Attorney General at succeeding sessions of Congress.

Manifestly, such a *mode of legislation* is mere circumvention, which would make a travesty of the constitutional principle involved, and runs squarely counter to the well established doctrine, required for the preservation of the rights and powers reserved from the Constitution, and illustrated by many decisions in this Court, some of which we have already cited (*ante* pp. 16-8, 20-1), so well expressed by Mr. Justice Brewer in *Fairbanks* v. *United States* (181 U. S. at 294), when he said:

> "In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. But that principle is not dependent alone upon the case cited [*Woodruff* v. *Parham*, 8 Wall. 123]. It was recognized long anterior thereto, in *Brown* v. *Maryland*, 12 Wheat. 419."

Of course, this *mode of legislation* will hereafter obtain if such ratifications be upheld. Congress plainly indicated this intention when it accompanied the ratifications with a renewal of the delegations. It further evidenced this intention by the inclusion, as a component part of this scheme of legislation, of another provision of said Sec. 21 (also set forth in Appendix B) which would likewise circumvent for

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this purpose another important constitutional principle, to wit, due process of law.

We refer to Sec. 21(d)(1), which provides that "no recovery, recoupment, set-off, refund or credit" shall be allowed on account of "any amount of any tax, penalty or interest, which accrued before, on or after the date of the adoption of this amendment" unless, after a claim for refund has been filed, (1) it shall be established "to the satisfaction of the Commissioner", in addition to other facts, 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 * * * or passed on any part of such amount to the vendee or to any other person in any manner * * * and that the price paid by the claimant or such person was not reduced by any part of such amount" and (2) the Commissioner, after a hearing before him, shall so "find and declare" in a record which by him "shall be duly certified and filed as the record in the case and shall be so considered by the Court".

To understand this section certain essentials must be borne in mind. Sec. 9(a) levies the tax "upon the first domestic processing of the commodity", it is therefore a tax on manufacturing, which enters into the cost of the article and is collected from, passed on to, the purchaser by the simple act of selling (*Lash's Products Co. v. United States,* 278 U. S. at 176). Sec. 9(a) further provides that the tax "shall be paid by the processor" and there is no provision whereby the vendee may recover the tax for himself or the processor may recover it for him, so that whatever of the tax the processor may not be able to recover for himself under the terms of this section must remain in the Treasury of the United States.

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though unconstitutionally collected and notwithstanding this Court in *Bull* v. *United States* (295 U. S. at 260-1), has authoritatively declared that the retention by the United States of taxes wrongfully collected is "against morality and conscience * * * and amounts in law to a fraud on the taxpayer's rights". See, also, *Moore Ice Cream Co.* v. *Rose,* 289 U. S. at 378-9, and *United States* v. *Emery,* 237 U. S. at 32.

Viewed in the light of these essentials, the section plainly has as its object circumvention of the due process clause, through two important means, as a component part of this scheme of legislation, for the purpose of allowing the United States to get and keep as much revenue by unconstitutional exactions under AAA as possible. The first of these means is the total prevention of recovery by anyone of any amount of the tax, though unconstitutionally exacted, if the processor has included the tax in the price of his article or passed on any part of the tax in any manner to his vendee—this is the plain language, and it has been so construed in the Bulletin thereon of the Agricultural Adjustment Administration, as well as by various District Courts (as will appear from extracts therefrom given in Appendix B). The second of these means is the requirement that the Court record shall be that certified by the Commissioner, so as to confine the taxpayer to a Court review of a record made by a political appointee, instead of the taxpayer having that complete judicial re-examination heretofore afforded him (*United States* v. *Jefferson Co.,* 291 U. S. at 397-9). The Conference Report on the Act (see extract in Appendix B) expressly says that this provision was included so that "no trial *de novo* on the facts by the Court" might be had, "nor can judicial proceedings be brought in the absence of the prior administrative hearing and the record".

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The curious theory on which these novel and drastic limitations are sought to be sustained is that: "The constitutional basis for such a provision is found in the power of the United States at any time to assert its sovereign right not to be sued and the power of Congress to determine the jurisdiction of the Courts" (pp. 22-3 of the Senate Report and 23 of the House Report, accompanying the Bill). This is a complete misconception and misstatement of the constitutional rights of the taxpayer. It entirely overlooks the limitations upon the sovereignty of the United States imposed by the first Ten Amendments, one of which is that no person shall be deprived of life, liberty or property without due process of law. The remedy may be changed, but it must preserve the essential elements of due process of law, because the United States cannot, any more than a State, and for the same reason, "make anything due process of law which by its own legislation it chooses to declare such" (*Davidson* v. *Board of Administrators,* 96 U. S. at 102).

The opportunity thus afforded the taxpayer for the unrestricted ascertainment and determination of his rights as respects taxation is not a *privilege* which the United States can circumscribe or withhold at its pleasure; it is the requirement of the terms of the Fifth Amendment, which are a limitation upon the sovereignty of the United States (*Graham* v. *Goodcell,* 282 U. S. at 430-1; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. at 679-80; *Ettor* v. *Tacoma,* 228 U. S. at 155-6; and *Worthen Co.* v. *Kavanagh,* 295 U. S. at 60).

Only by reason of the fact that the system of tax collection, consisting of payment and claim for refund, accorded full opportunity for the ultimate judicial determination of the liability in a manner whereby

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the form of the procedure in no way minimized or negatived the rights of the taxpayer, so that he thereby had his "full day in court" *to the same extent as if he were defending an action by the United States to recover the tax,* has this system of procedure been upheld under the limitations of the Fifth Amendment (*Phillips* v. *Commissioner,* 283 U. S. at 595-9; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. at 721-5; *Bull* v. *United States,* 295 U. S. at 259-61).

Sec. 424 of the Revenue Act of 1928 was held in *United States* v. *Jefferson Co.* (291 U. S. at 401-2) not to be a violation of the Fifth Amendment only because it squared with this broad constitutional privilege, by allowing a complete recovery of the tax from the United States, with the simple requirement "that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax and therefore is entitled in justice and good conscience to such relief", which the section did by allowing the claimant to recover not only for himself to the extent he had absorbed or refunded the tax, but also the residue for the benefit of his vendee by giving bond for such refunding.

This Court has jealously safeguarded this right of due process of law so that a taxpayer might not be in any wise deprived of his full day in Court with respect thereto. Illustrations are also furnished by the decisions of this Court which involve rates of public utilities (*Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. at 227-8; *State Corporation Comm.* v. *Wichita Gas Co.,* 290 U. S. at 569), as well as by its decisions with respect to such administrative tribunals as the Federal Trade Commission and the Board of Tax Appeals (*Fed. Trade Comm.* v. *Curtis Pub. Co.,* 260 U. S. at 580; *Fed. Trade Comm.* v. *Eastman Co.,* 274

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U. S. at 619; and *Helvering* v. *Taylor*, 293 U. S. 515-6).

Thus we see, with a clearness that is unmistakable, the nature of the mode of legislation being attempted through AAA and that the effect of its sanction will be to nullify the great constitutional principles we here invoke.

CONCLUSION.

It is submitted that the AAA is unconstitutional, for the fundamental reasons we have urged; that these reasons go to the very foundation of the Act as it formerly existed and as it now exists after the Amendments of August 24th, 1935; that on account thereof the whole Act should be held totally beyond the powers of Congress and void, with further making of agreements and collection of taxes thereunder barred and all taxes previously collected thereunder refunded with interest.

Respectfully,

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APPENDIX A.

DISCRETION OF SECRETARY OF AGRICULTURE AS TO TAXATION UNDER AAA.

Now, as heretofore, under Sec. 9(a), as amended by Sec. 11 of the 1935 Amendments, when the Secretary of Agriculture "determines that rental or benefit payments are to be made with respect to any basic agricultural commodity" and proclaims such determination,

> "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"

and

> "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".

Now, as heretofore, under Sec. 9(a), as amended by Sec. 11 of the 1935 Amendments, the tax is an excise tax "upon the first domestic processing of the commodity" and "shall be paid by the processor".

Now, as heretofore, the Secretary of Agriculture has unlimited discretion, when in his opinion necessary to effectuate the policy of the Act, to exclude any agricultural commodity, or any classifications, type or grade thereof, from the operation of the tax (Sec. 11, as amended by Sec. 61 of the 1935 Amendments), to suspend the tax or cause a refund thereof (Sec. 15(a), as amended by Sec. 21 of the 1935 Amendments), and to exempt processors from the tax (Sec. 15(b), as amended by Sec. 8 of the 1935 Amendments).

There is a general standard for determination of the rate. It is, as heretofore,

> "the difference between the current average farm

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> price for the commodity and the fair exchange value of the commodity",

with the following addition, added by the 1935 Amendments:

> "plus such percentage of such difference, not to exceed 20 per centum, as the Secretary of Agriculture may determine will result in the collection, in any marketing year with respect to which such rate of tax may be in effect pursuant to the provisions of this title, of an amount of tax equal to (A) the amount of credits or refunds which he estimates will be allowed or made during such period pursuant to section 15(c) with respect to the commodity and (B) the amount of tax which he estimates would have been collected during such period upon all processings of such commodity which are exempt from tax by reason of the fact that such processings are done by or for a State, or a political subdivision or an institution thereof, had such processings been subject to tax" (Sec. 9(b)(1) as amended by Sec. 12).

And the terms used in this standard are defined just as before, namely:

> "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",

with the following inserted by the 1935 Amendments in lieu of the asterisks we have used showing an omission:

> "and, in the case of all commodities where the base period is the pre-war period, August 1909 to July

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1914, will also reflect interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during said base period" (Sec. 9(c) as amended by Sec. 13).

But the rate of the tax is still in reality what the Secretary, in his discretion, deems proper to effectuate the declared policy of the Act, notwithstanding the medley of provisions added to Sec. 9(b) by Sec. 12 of the 1935 Amendments (as changed by the Joint Resolution) on the subject, namely: Pars. (2), (3), (4) and (5) of Sec. 9(b) and Par. (6) of Sec. 9(b), with its seven Subdivisions,—(A), (B), (C), (D), (E), (F) and (G). This will be plain from the subjoined analysis if we but bear in mind the difference between a rate fixed "pursuant to Par. (6)" of Sec. 9(b) and a rate fixed "in accordance with the formulae, standards and requirements prescribed in this title", which are a great deal broader than the provisions of Par. (6) and bring into play the wide discretionary powers which other parts of the Act have heretofore, and still do, confer on the Secretary for this purpose:

First: Specific rates are imposed by the said Pars. (2), (3), (4) and (5) of Sec. 9(b), as follows: By (2), on wheat, cotton, field corn, hogs, peanuts, tobacco, paper, jute, and (in some instances) sugarcane and sugar beets, the rate in force when the Amendments take effect during the period from such date to December 31st, 1937; by (3), 1¢ per pound of rough rice for the period April 1st, 1935 to July 31st, 1936; by (4), for the period September 1st, 1935 to December 31st, 1937, 30¢ per bushel of rye; and by (5), 25¢ per bushel of barley from the date when the tax takes effect to December 31st, 1937;

Second: By Subdiv. (B) of said Par. (6) of Sec. 9(b) the rates thus fixed by said Pars. (2), (3), (4) and (5), as well as any established under (A) set forth under Third, may be adjusted on a percentage basis of the fair exchange value of the commodity, if and when the aver-

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age farm price of the commodity is equal to, or exceeds by a named per centum, such fair exchange value thereof—which brings in the uncertain, indefinite element of ascertaining average farm price and fair exchange value;

Third: Any rate fixed or adjusted by or in accordance with the provisions mentioned in First or Second above, as well as any rate established under Subdiv. (A) of Par. (6) of Sec. 9(b), under the terms of said Subdiv. (A) "shall be *decreased* (including a decrease to zero) in accordance with the formulae, standards and requirements of paragraph (1)" of Sec. 9(b), and the rate "shall thereafter be *increased* in accordance with the provisions of paragraph (1)" of Sec. 9(b), "but subject to the provisions of subdivision (B) of paragraph (6)", which we have stated in Second above. The reference to Par. (1) of Sec. 9(b) includes not simply the general standard therein stated, but also the provision thereof that if the Secretary finds the processing tax is causing an accumulation of surplus stocks or depressing farm prices he may lower the rate or rates of such tax and thereafter increase the rate of such tax to a point that will not cause such accumulation or depression, but not to a rate "higher than the rate provided in the first sentence" of Par. (1) of Sec. 9(b), namely, that authorized by the general standard;

Fourth: By Subdiv. (C) of Par. (6) of Sec. 9(b), any rate "adjusted pursuant to this paragraph (6) shall remain at such adjusted rate, unless further adjusted or terminated *pursuant to this paragraph (6)*, until December 31st, 1937, or until July 31st, 1936 in the case of rice";

But one of the provisions of said Par. (6) is Subdiv. (D), which provides that:

> "In accordance with the formulae, standards and requirements *prescribed in this title*, any rate of tax prescribed in paragraphs (2), (3), (4) or (5) of this subsection, or which is established pursuant to this paragraph (6), *shall be increased.*"

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Accordingly, we find that by Subdiv. (A) of Par. (6) of Sec. 9(b) any rate may be *reduced* to zero, if the Secretary thinks that necessary to prevent such accumulation or depression, so there is no definite standard in that direction for the discretion of the Secretary.

And when we turn to the "formulae, standards and requirements prescribed in this title" to see what *increases* are authorized by Subdiv. (D) of Par. (6), which we have just quoted, we find in Sec. 9(a), that "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", so there is no definite standard for the discretion of the Secretary in that direction.

True, Sec. 9(a) also says "the rate of tax shall conform to the requirements of subsection (b)". But one of the requirements of said Subsec. (b) is Subdiv. (D) of Par. (6) which we have seen authorizes an increase "in accordance with the formulae, standards and requirements *of this title*"—which includes, and thereby we get back again to, the discretion vested in the Secretary of Agriculture by Sec. 9(a) to adjust the rate to the requirements he thinks will effectuate the declared policy of the Act. Otherwise these adjacent sentences in Sec. 9(a) are mere repetition.

The above conclusion not only results from the plain language of the provisions to which we have referred, but is in keeping with the whole spirit of the Act, including the power it has vested in the Secretary to exclude, exempt and suspend as respects the processing tax; and, further, it is confirmed by the last parts of Subdivs. (E) and (G) of Par. (6) of Sec. 9(b) and by the following language of Sec. 9(c), which was added by Sec. 13 of the 1935 Amendments:

> "The rate of tax upon the processing of any commodity, in effect on the date on which this amendment is adopted, shall not be affected by the adoption of

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> this amendment and shall not be required to be adjusted or altered, *unless the Secretary of Agriculture finds that it is necessary to adjust or alter any such rate pursuant to Section 9(a) of this title.*"

The Secretary has so construed Sec. 9(a). See *Vogt* v. *Rothensies* (D. C. Pa., 11 F. Supp. at 229-30), which explicitly so shows.

Even if the Act as amended be held to have established a maximum beyond which the Secretary may not increase the rates, such as (1) the general standard erected in Sec. 9(b)(1) (which we do not consider sufficiently definite to be a standard) or (2) the rates specified in Pars. (2), (3), (4) and (5) of Sec. 9(b), that would not prevent the exertion of the revenue powers of the Act from being unconstitutional and void, not only because there is no standard or limitation for the expenditures of the revenues which the Secretary may make, but also because of the unlimited discretion, to be exercised according to no definite standard, in the Secretary to change the rates between zero and the maximum, as well as to suspend the rates and exclude commodities and exempt persons therefrom.

In the *Hampton* case (276 U. S. 394, 72 L. ed. 624), it was not the fact that the variation authorized was within the limits of a percentage of a named rate which caused the Court to uphold the Act, but that the Executive Department was simply authorized to ascertain a definite fact by virtue of which the rate might be changed—not to change the rate in accordance with the discretion of the Executive Department to produce thereby desired effects as the result of increasing or lowering the tax, such as raising or lowering the prices of commodities, increasing or decreasing the production of commodities, exempting persons and excluding commodities from the tax, as well as suspending the tax, which vest the change entirely in the discretion of the Executive Department for such purposes.

The broad discretion, which we have just indicated did not characterize the Act upheld in the *Hampton* case, is

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exactly what the Act under consideration has conferred on the Secretary of Agriculture as respects the imposition of a tax, as well as the expenditures of the revenues derived therefrom; and, in addition, he may altogether suspend the tax or exempt persons or exclude commodities therefrom, which are further discretionary and discriminatory powers not authorized in the Act upheld in the *Hampton* case.

The discretion is just as broad as in the Act condemned on this account in the *Panama Refining* and *Schechter* cases, subject only to the maximums, if there be such a limitation in the Act.

But there is no maximum standard. As we have just shown, by the express provisions of Subdiv. (D) of Par. (6) of Sec. 9(b), any rates prescribed or established under the new provisions added by the 1935 Amendments may be "increased" in accordance with the general provisions that have heretofore been in the Act, and these include the positive provisions of Sec. 9(a) that the Secretary of Agriculture, "at such intervals" as he "finds necessary to effectuate the declared policy" of the Act, may adjust the rates "to conform to such requirements".

We thus find that the Secretary under and subsequent to the 1935 Amendments has the very same broad, indefinite discretion as to taxation, in all its essentials, for doing what he considers proper to effectuate the declared policy of the Act that he had prior to those Amendments.

There remains for consideration the consequences of the invalidity of the taxing provisions of the Act as amended. As to this, in addition to the usual provision that the invalidity of one part of the Act shall not affect the rest (Sec. 14), there is Subdiv. (G) of said Par. (6) of Sec. 9(b), which provides that if the applicability to any person or circumstances "of any tax the rate of which is *fixed pursuant to this paragraph (6)*" is finally held invalid "by reason of any provision of the Constitution" or "of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title", then "*in lieu of all rates of tax fixed in pursuance of this paragraph (6)* with respect to all tax liabilities incurred under

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this title on or after the effective date of each of the rates of tax *fixed in pursuance of this paragraph (6)*", there shall be assessed and collected the "rates of tax fixed under paragraphs (2), (3), (4) or (5) of section 9(b)" and such rates shall be in effect "until altered by Act of Congress" unless sooner terminated by proclamation as authorized by the Act.

The effect of this Subdiv. (G) is confined by its terms to such invalidity of any tax fixed *in pursuance of Par. (6)* of Sec. 9(b), and therefore

> (1) it has no application after July 31st, 1936 as respects rice, and after December 31st, 1927 as respects the other commodities, for by Subdiv. (F) of Par. (6) after those dates "rates of tax shall be determined by the Secretary of Agriculture in accordance with the formulae, standards and requirements prescribed in this title, but not in this paragraph (6), and shall, subject to such formulae, standards and requirements, thereafter be effective"; and
>
> (2) it has no application to rates fixed pursuant to the powers given the Secretary for this purpose by Secs. 9(a) and 9(b)(1), as well as in 9(c), 11, 15(a) and 15(b).
>
> So Subdiv. (G) has only a limited scope for a limited period. And within that period the question arises, when is a given rate fixed pursuant to Par. (6) or under the other broad powers in the Act. Whether or not such fixing is a mere mental operation on the part of the Secretary or a selection he may make in the instrument fixing the tax is not the point. The point is this nebulous endeavor of Congress to give complete discretion as to rates to the Secretary of Agriculture and yet have some provision which will sustain the rates or deter their being questioned.

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Of course, Subdiv. (G) is not for the purpose of imposing a rate desired by Congress, but a provision to deter interference by processors with the rates Congress wishes the Secretary, in his discretion, to have power to make. In this respect the subdivision is a use of the taxing powers as a penal means of accomplishing unconstitutional ends, such as the Supreme Court condemned in the *Child Labor* case, 259 U. S. 16, 66 L. ed. 816.

Manifestly the subdivision will not sustain the tax if the Act is held unconstitutional on the grounds we have urged of an unconstitutional use of the commerce and revenue powers to regulate intrastate activities and take the property of one private citizen and bestow it on another. The same thing is true if the Act be held unconstitutional because so arbitrary, capricious and discriminatory as to violate the 5th Amendment. And the same thing is true if the discretion of the Secretary as to exemptions and exclusions from the tax, as well as suspensions of the tax, vested in him legislative powers as to the tax. Such unconstitutionality would preclude the imposition or collection of any tax, however definitely fixed.

And it seems to us that the subdivision cannot save the provisions from the charge of the unconstitutional delegation of the taxing power, for the reason that it is a part of an evident scheme to circumvent this fundamental of our Government, tainted with that purpose, which would not have been enacted to fix rates in and of itself, but only to deter a questioning of the discretion conferred by other provisions. And in this view it comes in the category of a term so interwoven with other unconstitutional terms that the whole must fall together, under the doctrine of such cases as *Dorchy* v. *Kansas*, 264 U. S. 286, 290-1, 68 L. ed. 686, 690; *Butts* v. *M. & M. Trans. Co.*, 230 U. S. 126, 57 L. ed. 1422; *Hill* v. *Wallace*, 259 U. S. 44, 70, 71, 66 L. ed. 822, 830-1; and *Williams* v. *S. O. Co.*, 278 U. S. 235, 241, 73 L. ed. 287, 309, and note. See, also, the decision of the Supreme Court on May 6th, 1935, in the *Railroad Retirement Act* case, 295 U. S. at 361-2.

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APPENDIX B.

Ratifying Sections of 1935 Amendments, with other relevant provisions and extracts from reports and opinions thereon.

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, 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.

Sec. 21 (c). The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, *as determined*, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and *the initiation*, if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under section 8 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods

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prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby *legalized* and ratified, and the making of all such agreements and payments, *the initiation of such programs*, and the adoption of all such methods *prior to such date* are hereby legalized, ratified, and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically authorized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress.

Sec. 21 (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*

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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.

Sec. 21 (g). The provisions of section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery on 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 (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsections (a) or (c) of section 15, section 16, or section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930."

The Agricultural Adjustment Administration in its bulletin of August 30, 1935 entitled "Detailed Outline Of AAA Amendments" says page 5 thereof, that under Sec. 21 (d) (1) added by Sec. 30 of the 1935 Amendments, a recovery through claim for refund

"*will be allowed only* when the plaintiff satisfies the Commissioner of Internal Revenue that he has not (a) included the tax in the price of the article, *or* (b) *passed any part of it on to the buyer*, or (c) included any part of it in the charge or fee for processing, or (d) paid a reduced price for the article because of the tax. Provision is made for court review of the Commissioner's determination on the basis of the record made before him."

The Federal District courts have thus commented on

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the provisions of said Sec. 21 (d) (1) with respect to claim for refund:

Judge Barnes, in *Armour & Co.* v. *Harrison* (N. D. Ill., August 1, 1935), who said: "For the life of me I cannot figure out how a processor, assuming that he sells the pork and sells it for more than the amount of the processing tax, would ever be able to prove he did not pass on the tax"; Judge Hincks, in *Baltic Mills Co.* v. *Bitgood* (D. C. Conn., August 28, 1935), who said: "If on the other hand the processor, through sales at a legitimate profit, opens himself to a suspicion that he has passed on the tax, he will be wholly without evidence to prove the contrary"; and Judge Paul, in *Shenandoah Milling Co.* v. *Early* (W. D. Va., September 23, 1935), who said: "The conditions imposed are practically impossible to perform and I suppose Congress in a large measure realized that."

The Report of the Conference Committee (H. R. No. 1757, p. 32) thus comments on the provision of Sec. 21 (d) (1) which confines the court to the record certified by the Commissioner:

> "Under the Senate amendment, the facts required to be established to obtain the relief could be established before the Commissioner or before the court in any judicial proceeding relating to the claim. Under the Senate amendment the matter is determined on the basis of evidence taken by the court. *Under the conference agreement a transcript of the hearing before the Commissioner is filed with and certified to the court and that record constitutes the evidence in the proceeding. No trial de novo on the facts by the court is provided for* as is provided in the Senate amendment *nor can judicial proceedings be brought in the absence of the prior administrative hearing and record.* This provision applies to suits against the collector as well as against the United States and applies if the issue comes up in connection with any other suit involving the United States or the collector and the claimant."

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