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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 505

JAMES H. MULFORD ET AL., APPELLANTS

v.

NAT SMITH ET AL., AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 183) is reported in 24 F. Supp. 919.

JURISDICTION

Jurisdiction of the Court rests on Section 3 of the Act of August 24, 1937, c. 754, § 3, 50 Stat. 752 (28 U. S. C. Supp. III, Sec. 380a). The decree of the District Court was signed October 5, 1938, and entered October 7, 1938. The petition for appeal was presented and allowed October 18,

1938, and filed October 21, 1938. The case was docketed in this Court December 5, 1938. The Court noted probable jurisdiction January 3, 1939.

QUESTIONS PRESENTED

1. Whether the provisions of the Agricultural Adjustment Act of 1938 for the establishment of marketing quotas for flue-cured tobacco are a constitutional exercise of the power of Congress to regulate interstate and foreign commerce.

2. Whether those provisions of the Agricultural Adjustment Act of 1938 provide for an unconstitutional delegation by Congress of its legislative powers.

3. Whether those provisions of the Agricultural Adjustment Act of 1938 deprive the appellants of liberty or property in violation of the Fifth Amendment to the Constitution of the United States.

4. Whether those provisions of the Agricultural Adjustment Act of 1938 as applied in 1938 to the marketing of flue-cured tobacco produced before the establishment of farm marketing quotas for 1938 deprive the appellants of property in violation of the Fifth Amendment to the Constitution of the United States.

NATURE OF THE PROCEEDING

The appellants, plaintiffs below, are numerous growers of flue-cured tobacco whose farms are lo-

cated in southern Georgia and northern Florida (R. 44). Each of the defendants below, and appellees here (with the exception, of course, of the United States), operates one or more tobacco auction warehouses in Valdosta, Lowndes County, Georgia, near the Florida border (R. 44).

During the 1938 flue-cured tobacco marketing season, each of the appellants marketed, through one or more of the appellees as warehouseman, flue-cured tobacco in excess of the marketing quota established for his farm under Section 313 of the Agricultural Adjustment Act of 1938 (52 Stat. 31, as amended, U. S. C., Title 7, Secs. 1281, *et seq.*) (R. 44). Section 314 of that Act requires tobacco auction warehousemen to pay to the Secretary of Agriculture a penalty equal to 50 percent of the price of any tobacco,[1] sold through them, in excess of the marketing quotas for the farms on which the tobacco was grown, and permits them to deduct the amount of the penalty from the prices paid to producers.

The appellants brought this suit in the Superior Court of Lowndes County, Georgia, to enjoin the warehousemen from deducting amounts equivalent to such penalties from the price paid to them for such excess tobacco and from remitting such amounts to the Secretary of Agriculture, on the alleged ground that the provisions of Sections 312,

[1] The minimum penalty is three cents per pound (Sec. 314).

313 and 314 of the Act, which provide for the quotas and prescribe the penalties, are unconstitutional.

The warehousemen, as defendants, removed the case to the United States District Court for the Southern District of Georgia, and the United States intervened as a party defendant in the District Court under Section 1 of the Act of August 24, 1937 (c. 754, Sec. 1, 50 Stat. 751 (28 U. S. C. Supp. III, Sec. 401)). On September 23, 1938, the case was heard on a stipulated record by a three-judge court established pursuant to Section 3 of that Act (28 U. S. C. Supp. III, Sec. 380 (a)). That court upheld the challenged provisions of the Act. The appellants ask this Court to reverse that decision.

STATUTE INVOLVED

The legislation here challenged comprises only those portions of the Agricultural Adjustment Act of 1938 which (1) provide that when the supply of flue-cured tobacco is found to exceed a level defined in the Act as the "reserve supply level," a national marketing quota shall become effective which will permit enough flue-cured tobacco to be marketed during the next marketing year to maintain the supply at the reserve supply level, (2) provide for the apportionment of the national quota—in terms of pounds which may be marketed—to the farms on which such tobacco is grown, and (3) provide for the payment of penalties by tobacco

auction warehousemen in connection with the marketing of flue-cured tobacco, in excess of such farm marketing quotas.

The statute of which these provisions are a part comprises five titles, and contains, in addition to the provisions here challenged, many provisions, not relevant to this case, which deal in varying ways with many other phases of the problems of agriculture.[2]

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[2] The Act was approved February 16, 1938 (52 Stat. 31). Amendments were approved March 26, 1938 (52 Stat. 120); April 7, 1938 (52 Stat. 202); May 31, 1938 (52 Stat. 586); and June 20, 1938 (52 Stat. 775).

This case relates solely to the provisions in Title III for marketing quotas for flue-cured tobacco. These are to be found primarily in *Sub-title B*, *Marketing Quotas*, *Part 1*, "*Marketing Quotas—Tobacco*," which comprises Sections 311 to 314 of the Act. The appellants' bill as amended seeks to have declared unconstitutional only Section 312 (a), (b), (c), (d), and (e); Section 313 (a), (b), (c), and (d), and Section 314 (R. 3, 9, 29).

However, in order to understand fully the operation of the quota provisions, it is necessary to refer to some of the definitions contained in Section 301, to some of the general administrative provisions found in Sections 361 to 376, to Sections 388 and 389, authorizing utilization of local agencies and the personnel of the Agricultural Adjustment Administration in carrying out the Act, and to Section 390 relating to separability.

These provisions of the Act are all set out in the Appendix, p. 177, *infra*. In this brief, in the interest of brevity we shall refer to them as "the Act", to the exclusion of the provisions not involved in this case. Moreover, references in this brief to "tobacco" will apply to flue-cured tobacco only, unless the context indicates otherwise, and references to the marketing year 1938 shall be taken to mean the

The provisions which principally affect the questions raised by this case may be summarized as follows:

LEGISLATIVE FINDING

Section 311 is a summary finding by Congress of the facts concerning the marketing of tobacco which, in the judgment of Congress, require, and, under the Constitution, justify the exercise of the federal commerce power through the regulation of tobacco marketing which the challenged provisions impose.

This finding states the determination by Congress that the marketing of tobacco is "one of the great basic industries of the United States with

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marketing year for flue-cured tobacco beginning July 1, 1938, and ending June 30, 1939.

Title I contains amendments to the Soil Conservation and Domestic Allotment Act. Title II provides for arranging adjustments in freight rates for farm products; for means of discovering and developing new uses and markets for farm products, and for continuation of the provisions previously made for distribution of surplus agricultural commodities for relief purposes through the Federal Surplus Commodities Corporation. Title IV provides for taking up and cancelling certain cotton pool participation trust certificates issued in connection with the 1933 Cotton Producers Pool. Title V provides for a federal crop insurance corporation and its operation.

Title III includes, in addition to the provisions here challenged, provisions for loans on agricultural commodities; an authorization for the making of parity payments to producers of certain farm products if, and when, funds are appropriated for that purpose; and provisions for marketing quotas for corn, wheat, cotton, and rice. None of those other provisions of Title III are involved in this case.

ramifying activities which directly affects interstate and foreign commerce"; that stable conditions in the marketing of tobacco are necessary to the general welfare; that tobacco is sold on a national market and, with its products, moves almost wholly in interstate and foreign commerce; that for reasons beyond their control farmers are unable, without federal assistance, to accomplish the orderly marketing of tobacco; that, consequently, abnormally excessive supplies are produced and dumped indiscriminately on the national market; that the disorderly marketing of such excessive supplies burdens and obstructs interstate and foreign commerce by its effect upon the volume of tobacco marketed in such commerce, by disrupting orderly marketing, by causing reduction of tobacco prices and consequent injury to interstate and foreign commerce in tobacco, and by causing disparity between the price of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce and consequently diminishing the volume of interstate and foreign commerce in industrial products.

The section concludes with the specific finding that whenever an abnormally excessive supply of tobacco exists, the marketing of tobacco by the producers directly and substantially affects interstate and foreign commerce in tobacco and that the establishment of quotas as prescribed by the Act becomes necessary and appropriate in order to pro-

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mote, foster, and maintain an orderly flow of tobacco in interstate and foreign commerce.[3]

NATIONAL MARKETING QUOTA

In conformity with these findings, the Act does not provide for continuous regulation of tobacco marketing. The regulation becomes effective only when the Secretary of Agriculture has found that the supply of tobacco exceeds an amount—the reserve supply level—determined by Congress to be so great as to threaten interstate and foreign commerce with the disruption described in Section 311.

More specifically the Act provides that whenever, on November 15th of any year, the Secretary of

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[3] This finding, although summary in form, embraces legislative conclusions based upon long experience and extensive study of agricultural problems by Congress. The facts presented to Congress as the basis for the tobacco quota provisions are somewhat more fully set out in the reports of the House and Senate Committees on the Bill which eventually became the Agricultural Adjustment Act of 1938. The pertinent portions of these reports appear in the Appendix at pages 205 to 240. These in turn reflect the vast accumulation of facts available to Congress, relating to the tobacco industry in particular as well as agriculture generally. A subcommittee of the Senate Committee on Agriculture and Forestry had held many hearings throughout the country during 1937, concerning problems relating to agriculture. The matters covered by such hearings are contained in a document of 4,633 pages, entitled *General Farm Legislation*, of which 1,916 pages relate to cotton, tobacco, and rice. Moreover, the committees of Congress had available reports of many earlier studies and hearings dealing with farm problems. The titles and subjects of these reports are set forth in the Record (R. 47–49).

Agriculture finds that the total supply of tobacco [4] as of July 1st of that year, exceeded the reserve supply level,[5] he shall, by December 1st, proclaim the total supply, and a national marketing quota shall be in effect throughout the marketing year which commences the following July 1st (Sec. 312 (a)).[6]

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[4] The *total supply* "for any marketing year shall be the carry-over at the beginning of such marketing year, plus the estimated production thereof in the United States during the calendar year in which such marketing year begins" (Sec. 301 (b) (16) (B). The marketing year begins July 1st (Sec. 301 (b) (7)).

The *carry-over* for any marketing year is the quantity on hand on July 1, which was produced in the United States *before* the beginning of that calendar year (Sec. 301 (b) (3) (C)). It does not include any of the current year's production.

[5] The *reserve supply level* is "the normal supply plus 5 per centum thereof, to insure a supply adequate to meet domestic consumption and export needs in years of drought, flood, or other adverse conditions, as well as in years of plenty" (Sec. 301 (b) (14) (B)).

The *normal supply* is the sum of (a) 275 percent of *a normal year's domestic consumption*, and (b) 165 percent of *a normal year's exports* (Sec. 301 (b) (10) (B)).

A normal year's domestic consumption and *a normal year's exports* are the ten-year annual average domestic consumption and the ten-year annual average exports, respectively, adjusted for current trends in such consumption or exports (Sec. 301 (b) (11) (B) and Sec. 301 (b) (12)).

[6] The Act not having been approved until several months after November 15, 1937, provided, with respect to the marketing year beginning July 1, 1938, the year for which the quotas involved in this case were effective, that the proclamation of the total supply and of the national marketing quota should be made within fifteen days after the approval of the Act (Sec. 312 (d)).

At the same time the Secretary is to proclaim also the amount of the national marketing quota (Sec. 312 (a)) in terms of the total quantity of tobacco which may be marketed during the ensuing marketing year. This marketing quota is the amount which the Secretary finds will make available during the ensuing marketing year a supply of tobacco equal to the reserve supply level (Sec. 312 (a)).[7]

APPORTIONMENT OF NATIONAL QUOTA TO FARMS

Within thirty days after proclamation of the total supply and the national marketing quota, the Secretary is to conduct a referendum among farmers who produced the tobacco crop harvested prior to holding of the referendum, to determine whether such farmers favor or oppose such quota. If more than one-third of the farmers voting in the referendum oppose the quota, the Secretary is to proclaim the result of the referendum before Janu-

[7] The Secretary is authorized to terminate or increase a national marketing quota which has become effective if he finds, upon investigation, that the operation of the quota will cause the amount of tobacco free of marketing restrictions for the then current marketing year to be less than the normal supply (Sec. 371 (a)) or, if upon investigation, he finds it necessary that the quota be increased because of a national emergency or a material increase in export demand (Sec. 371 (b)). In case of increases under either of these provisions the farm marketing quota of each farm is to be increased proportionately.

ary 1, and in such case the quota shall not be effective thereafter (Sec. 312 (e)).[8]

The Act provides next for the apportionment of the national quota. It is first apportioned among the states (Sec. 313 (a)). Each state's share is based on the total quantity of tobacco produced in the state during the five years immediately before the year in which the quota is proclaimed, plus the normal production of the acreage in the State diverted from tobacco under any agricultural adjustment or conservation program operative during any of those years. This basic determination is subject to adjustments found necessary to correct the state allotments for plant diseases, production trends or abnormal conditions of production which affected production in the several states during the five-year period, and to make provision for the minimum requirements for small farms. In order to avoid excessively sharp reductions the Act provides that no State is to be allotted an amount less than 75 percent of its 1937 tobacco production.

After the State allotment is made it is apportioned among farms in the State on which tobacco is produced in the current year and has been produced previously in one or more of the four years preceding the year in which the quotas are to be-

[8] The Act not having been approved until February 1938, provided that with respect to the 1938 quotas any proclamation of the result of the referendum should be made within 45 days after approval of the Act.

come effective (Sec. 313 (b)).[9] These will be referred to as "old" tobacco farms. The apportionment to old tobacco farms is made on the basis of: "past marketing of tobacco making due allowance for drought, flood, hail, other abnormal weather conditions, plant bed, and other diseases; land, labor, and equipment available for the production of tobacco; crop rotation practices; and the soil and other physical factors affecting the production of tobacco." The Act provides a minimum allotment of 3,200 pounds or the average production during the preceding three years, plus the average normal production of any acreage diverted from tobacco under the agricultural adjustment or conservation programs operative during any such years, whichever is the smaller (Sec. 313 (b)). The Act provides also for allotments to "new" tobacco farms to be made on a slightly different basis.[10]

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[9] By successive amendments approved April 7, 1938, and May 31, 1938 (Sec. 313 (e)), the poundage available for apportionment in each state for 1938 was increased by an amount not exceeding four percent of the state's allotment. This additional poundage was required to be apportioned, in such amounts as the Secretary determined to be fair and reasonable, to farms in the state receiving allotments under the Act which the Secretary should find to be inadequate in view of past production. The national quota was increased in proportion and the additional poundage thus made available to each state was apportioned as an additional allotment to individual old tobacco farms. None of it was apportioned to new tobacco farms, inasmuch as they had no history of past marketing (R. 135).

[10] A reserve of not to exceed 5 percent of the national quota is to be withheld from the apportionment to the states

The apportionment of the quota to individual farms is made through local committees of farmers [11] according to the standards just described, amplified in detail by the regulations and instructions issued by the Secretary (R. 42, 43, 103–173). Each farmer is notified of the marketing quota for his farm by mail, and lists of the quotas of individual farms in each county or other local administrative area are required to be kept freely available for public inspection in the county or local area where the farm is located (Sec. 362; R. 153, 154). The Act and the regulations provide for review of the quotas, including judicial review (Sec. 363–368; R.

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and used for making apportionments directly to farms in any state (whether the state has a quota or not) on which, for the first time in five years, tobacco is produced to be marketed in the marketing year for which the quota is effective (these will be referred to as "new tobacco farms") and for increasing allotments required to be made to small, old tobacco farms (see Sec. 313 (b) and Sec. 313 (c)).

These new tobacco farms have no history of past marketing during the immediately preceding years. Accordingly, the apportionment made to such farms is based on the same factors as for "old" farms but without any allowance for past marketing; but their quotas are not to exceed 75 percent of the quotas established for similar old farms.

The minimum allotment for small farms does not apply to new tobacco farms (Sec. 313 (b)).

[11] The local committees used in the determination of the farm marketing quotas, as provided for by Section 313 (b) and (c) are, by virtue of Section 388 of the Act, the same committees as those established under Section 8 (b) of the Soil Conservation and Domestic Allotment Act as amended (Appendix, pp. 178, 202).

155–162),[12] and for their transfer subject to regulations (Sec. 313 (d); R. 114–117).

PENALTIES FOR SALE OF EXCESS TOBACCO

In case any tobacco in excess of the quota for the farm on which the tobacco is produced,[13] is marketed through a warehouseman, the warehouseman is required to pay to the Secretary of Agriculture a penalty[14] equal to 50 percent of the

[12] The Act provides for review of any quota upon application by the farmer within fifteen days after the notice is mailed. The first review is by a committee of three farmers appointed by the Secretary (Sec. 363–364; R. 156–157). The regulations governing such review provide for notice and hearing before the review committee (R. 157–161). Unless application for review is made within fifteen days the quota originally allotted is final (Sec. 363).

If the farmer is dissatisfied with the review committee's determination, he may, within fifteen days after notice of that determination, file a bill in equity against the review committee in the United States District Court or commence proceedings for review in any State court of record having general jurisdiction and sitting in the county or district in which the farm is located (Sec. 365–367; R. 161, 162). Increases in individual quotas resulting from such review do not require proportionate reduction in other quotas (Sec. 368).

[13] Except tobacco sold for nicotine or other by-product uses (Sec. 314) and except tobacco grown for experimental purposes only by a publicly owned experimental station (Sec. 372 (d)).

[14] (Sec. 314 and Sec. 372 (b)). In case the tobacco is marketed directly to a person outside the United States, the producer is required to pay the penalty. In case the tobacco is sold by the grower directly to the purchaser without intervention of a warehouseman or other agent, the buyer is required to pay the penalty, but the buyer may deduct

market price of the excess tobacco.[15] The warehouseman may deduct an amount equivalent to the penalty from the price paid to the seller for the tobacco (Sec. 314).[16]

The Act imposes no limitation upon the acreage of tobacco which may be planted or produced, and imposes no penalty for planting or producing a quantity of tobacco in excess of the marketing quota or for producing any quantity of tobacco whatever that the grower may choose to produce. Nor does it provide any criminal sanctions for enforcing limitation of marketings to the amount of the quotas.[17] If payment of such penalties should not be made, the sole legal remedy provided is a civil action by the United States for their recovery (Sec. 376).

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an amount equivalent to the penalty from the price paid to the grower (Sec. 314). All of the excess tobacco involved in this case was marketed through warehousemen.

[15] The penalty is to be three cents per pound if that rate is higher than 50 percent of the market price (Sec. 314).

[16] The Act provides (Sec. 372 (b)) for the collection of the penalties in such manner, at such time, and under such conditions as the Secretary prescribes by regulations and that the penalties collected shall be covered into the general fund of the Treasury of the United States. It provides also that the Secretary shall provide by regulations for refund, upon claim filed within a year after receipt of the payment by the Secretary, of penalties erroneously, illegally, or wrongfully collected.

[17] In order to aid the collection of penalties, the Act requires the Secretary to provide such regulations as are necessary for identifying the tobacco subject to quotas, and generally to prescribe regulations necessary for the enforce-

STATEMENT

A. HISTORY OF THE CASE

The Act was approved February 16, 1938. On February 18, 1938, the Secretary of Agriculture proclaimed his finding that the total supply of flue-cured tobacco for the marketing year beginning July 1, 1937, exceeded the reserve supply level and proclaimed the amount of the national marketing quota for the marketing year beginning July 1, 1938 [18] (R. 40, 93–95).

On March 12, 1938, a referendum was held among growers who had participated in the production of the 1937 tobacco crop to determine whether they favored or opposed the marketing quota (R. 41, 95–101). On March 25, 1938, the Secretary proclaimed that 86.2 percent of the growers voting favored the quota, while 13.8 percent opposed it (R. 41, 101).

On June 16, 1938, the Secretary issued instructions for determining flue-cured tobacco farm marketing quotas for 1938 and prescribed forms

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ment of the Act (Sec. 375). It also authorizes the Secretary to require the keeping of records and the making of reports. The sole criminal provision of the pertinent provisions of the Act is the imposition upon handlers other than producers of a fine of $500 for conviction of failure to make any report or keep any record required, or for making any false report or record (Sec. 373 (a) (b)).

[18] The total supply found was 1,733,000,000 pounds; the reserve supply level 1,681,000,000, and the national marketing quota, which would make the reserve supply level available the next marketing year, 705,000,000 pounds (R. 95).

for use in connection therewith (R. 43, 127–151). On July 13, 1938, the Secretary issued regulations governing the publication, notice, and review of farm marketing quotas and prescribed forms for use in connection with such regulations (R. 43, 151–172). On July 22, the Acting Secretary of Agriculture issued regulations relating generally to 1938 flue-cured tobacco marketing quotas, penalties, marketing cards, transfer of quotas, and records and reports. Forms were also prescribed for use in connection with such regulations (R. 42, 103–127).

On July 22, 1938, the Acting Secretary also announced the adjusted apportionment of the national marketing quota among states on the basis of estimated requirements for minimum allotments for small farms and on August 13, 1938, announced a revision of such apportionment based upon subsequent information concerning actual requirements of the states for minimum allotments for small farms (R. 41, 42, 102, 103).

The 1938 national marketing quota was apportioned to flue-cured tobacco farms, including the appellants' farms, in accordance with the Act and with the regulations and instructions referred to above (R. 44, 47). Each appellant received notice of his farm's marketing quota shortly before the opening of the auction markets, but after he had largely, if not wholly, completed the planting, harvesting, curing, and grading of his tobacco (R. 45).

The quota of each appellant's farm was less than the amount of tobacco which subsequently was marketed from his farm in 1938.[19]

On July 27, 1938, before the Valdosta market opened for the sale of tobacco, the appellants filed their bill of complaint in the Superior Court of Lowndes County, Georgia, seeking to have the warehousemen temporarily restrained and enjoined from deducting the amount of the penalties from the price paid them for any excess tobacco they might sell and from remitting the amount so deducted to the Secretary of Agriculture. They sought also a permanent injunction in similar terms and further appropriate relief (R. 1–9). The Georgia Court granted the temporary restraining order on July 27, 1938, and ordered the warehousemen to deduct the amount of the penalties and pay the amount deducted to the Clerk of the Court (R. 9, 10).

On August 3, 1938, by order of the Georgia Court, numerous other growers were allowed to intervene as parties plaintiff and to adopt the allegations and prayer of the original plaintiff's petition (R. 11).

[19] The appellants do not complain of the amount, as such, of the quotas established for their farms (R. 44), and concede that the proclamation of the national quota by the Secretary, the general apportionment and adjustment of quotas and the establishment of the marketing quotas for appellants' farms were accomplished in accordance with the Act and the regulations and instructions issued under it, and that all of their quotas were accurately determined in accordance with regulations and instructions (R. 47).

During the 1938 marketing season which, in Georgia, began about the first of August and ended about the first of September, the several appellants marketed tobacco in excess of their quotas through one or another of the defendant warehousemen, and penalties have been deducted and paid into court (R. 44).

On petition of the defendant warehousemen, filed in the Georgia Court on August 5, 1938, the case was removed to the District Court of the United States for the Middle District of Georgia at Valdosta. On August 9, 1938, the clerk of the District Court certified to the Attorney General of the United States that the constitutionality of the Agricultural Adjustment Act of 1938 was drawn in question and on August 18, 1938, the United States District Court entered its order permitting the United States to intervene as a party defendant (R. 16–18). On August 26, 1938, pursuant to Sec. 3 of the Act of August 24, 1937, the Honorable Rufus E. Foster, Senior Judge of the Fifth Circuit, designated the Honorable Samuel H. Sibley, Circuit Judge, and the Honorable Charles B. Kennamer, United States District Judge, to participate with the Honorable Bascom S. Deaver, Judge of the United States District Court for the Middle District of Georgia, in the hearing and determination of the case (R. 18, 19). On the same date the District Court continued the restraining order, modified to provide for payment of penalties deducted to the Clerk of the District Court rather than to the clerk of the Georgia Court

(R. 22–24). On August 29, 1938, plaintiffs and intervening plaintiffs filed certain amendments to the bill of complaint, including prayers that Section 312 (a), (b), (c), (d), and (e), Section 313 (a), (b), (c), and (d), and Section 314 be declared unconstitutional, and further, that such provisions of the Act be declared unconstitutional insofar as they apply to the marketing of petitioners' tobacco during 1938, and that the penalties imposed as a result thereof be declared null and void (R. 24–29).

On September 2, 1938, an answer was filed on behalf of the defendant warehousemen and the same day the United States, as intervening defendant, filed its separate answer (R. 29–37). The defendant warehousemen asked merely that they be decreed to be in the position of a stakeholder of funds collected and paid or to be paid into the registry of the court, that they be relieved of costs, and that they be protected against loss by reason of the penalties (R. 37).

On September 23, 1938, the case was heard on a stipulated record by the three-judge court established as described above. That court, in a decree signed by Judges Sibley and Kennamer, October 5, 1938, and entered October 7, 1938, denied the injunction, dissolved the restraining order, and dismissed the bill, holding (1) that Sections 312, 313, and 314 of the Act were constitutional and (2) that the application of the Act to the marketing season of 1938 also was constitutional (R. 183–190). The

Court ordered the funds in the hands of the clerk to be returned to the parties and reserved jurisdiction to hear and determine any disputes concerning the fund (R. 190–191). Subsequently, with the consent of appellees, this portion of the decree was stayed until final disposition of the cause (R. 194–195).

The pleadings and evidence before the court below disclose the following especially pertinent facts:

B. THE PRODUCTION OF FLUE-CURED TOBACCO

"Flue-cured tobacco is by far the most important class of tobacco grown in the United States. In 1937 flue-cured tobacco represented 55 per cent of the total tobacco marketed by producers and 60 per cent of the farm value of all tobacco marketed by producers in the United States" (R. 74). Flue-cured tobacco is grown in the group of states ranging from Florida to Virginia, with a small quantity being produced in Alabama (R. 52–53).

The growing of the annual crop of flue-cured tobacco begins in Georgia and Florida in December with the preparation of seed beds, followed soon afterwards by preparation of the land to which the plants are to be transplanted (R. 45). A considerable quantity of fertilizer is usually applied to the land before transplanting, and additional fertilizer is often applied in the course of subsequent cultivation. Transplanting begins about the first of April in Georgia and Florida. Six

thousand or more plants per acre are set out. Soon after the plants begin to grow, cultivation, consisting of plowing, poisoning for insects and worms, topping and removal of suckers, is begun and continues throughout the growing season (R. 45, 50–51).

Harvesting and curing begins in June and early July in Georgia and Florida and continues until all suitable leaves on the stalks have been removed. Harvesting is accomplished by pulling off the leaves as they mature. From four to six such "croppings" are usually required to harvest a crop (R. 51). After harvesting the leaves are strung on sticks and placed in the curing barn, where, for three or four days, the tobacco is "cured" by the continuous application of heat through "flues"—large pipes laid about the floor of the barn so that the smoke from the fuel used does not come into contact with the tobacco (R. 51). After curing, the tobacco is packed away, to be removed from the sticks later, sorted or graded, and prepared for marketing when the markets open. In Georgia and Florida the markets open about the first of August (R. 45, 51).

The steps just described had been largely, if not wholly completed by the appellants in 1938 before they received official notice of their 1938 farm marketing quotas under the Act. They received such notice, however, before the opening of the auction markets (R. 45).

C. METHODS OF MARKETING TOBACCO

Tobacco of all kinds is marketed principally through middlemen—auction warehousemen, wholesale merchants, exporters, export agents, brokers and cooperative marketing associations (R. 55). Approximately 85 percent of all tobacco is sold through auction warehouses. At present, sale through auction warehouses is about the only method of marketing tobacco extensively available in the flue-cured tobacco producing areas (R. 56). A few sales are made to dealers outside the auction warehouses, and occasionally sales are made through contracts entered into during the growing season, or are negotiated at the farm after the tobacco is harvested, but these methods are not widely used in selling flue-cured tobacco (R. 56).

In earlier years large quantities of flue-cured tobacco have been marketed through cooperative associations of producers (R. 56, 88–90). This method has long been used and continues to be used extensively in the marketing of Maryland and cigar leaf tobacco (R. 56). It could be equally available to flue-cured tobacco growers in lieu of selling at auction warehouses, although no cooperative associations were in operation in Florida and south Georgia during the 1938 marketing season (R. 56).

Before flue-cured tobacco can be kept in satisfactory condition in storage for future use it must

be redried and packed in hogsheads.[20] The buyers treat the tobacco they purchase in this way and store it from one to five years before manufacture.[21] Individual growers usually have been unable to do so because, individually, they have lacked facilities for redrying tobacco. By forming cooperative associations they can either operate their own redrying plants or have their tobacco redried in private plants (R. 56). They can thereby hold for later, more advantageous sale, tobacco which cannot be sold profitably during the short marketing season on the auction markets. Although cooperative associations have failed when they endeavored

[20] Most leaf tobacco is redried and stored before manufacture. Flue-cured tobacco delivered at the warehouse by the grower usually contains from 20 to 25 percent moisture which tends to prevent breakage in handling. Promptly after sale the tobacco is moved to redrying plants, where practically all of the original moisture is removed and a controlled amount added to condition the tobacco for packing in hogsheads. Redrying of flue-cured tobacco usually occurs within a week after purchase. Most of the dealers and manufacturers own redrying plants which are concentrated principally at manufacturing plants, points of export, and centers of supply (R. 62–64).

[21] In storage the tobacco ferments, or sweats, thereby eliminating certain acrid characteristics. Tobacco for domestic trade is usually transported to a point near the manufacturing plant of the owner and stored there. Foreign manufacturers have their own storage facilities abroad for aging tobacco. Accordingly exporters customarily do not store tobacco in the United States for any considerable length of time, but maintain a small reserve supply sufficient only to meet changes in the usual foreign demand. Such export tobacco as is stored in the United States is usually stored near the export center (R. 63, 64).

to control marketings they did perform valuable services in operating warehouses and redrying plants (R. 88). With marketing controlled this major cause for their failure has been eliminated.

D. OPERATION OF THE AUCTION MARKETS

The marketing season is fixed principally by the buyers and warehousemen (R. 61). The auction markets in Florida and Georgia open about the first of August and remain open for some 3 to 6 weeks. Markets in states farther north open later and continue open for a longer period, those in northern North Carolina and Virginia opening generally in September and continuing through the following February, with the greatest volume of sales in October or November (R. 61).

The auction warehouse method of selling tobacco in Georgia is practically unchanged since it was considered by this Court in *Townsend* v. *Yeomans,* 301 U. S. 441, 445, and is substantially similar to that followed in North Carolina, recently considered by this Court in *Currin* v. *Wallace,* No. 275, this term, decided January 30.

The growers after curing their tobacco sort it as best they can. In Florida and Georgia the leaves are not made into bundles or "hands", as is done in other areas, but are marketed loose. Growers usually transport the tobacco to the warehouse in private conveyances. The warehouse operator acts as agent for the seller and receives a fee for his

services (R. 60–61). At the warehouse the tobacco is placed in trays furnished by the warehouseman, and weighed under the supervision of warehouse employees; a ticket giving the name of the owner, and the number of pounds in the tray and providing space for the name of the buyer and the price paid is placed on each lot of tobacco. The warehouseman's employees then place the trays in rows with a passageway between the rows. No distinction is made between the tobacco produced in the state and tobacco produced in any other state, and tobacco which may be sold for transportation out of the state cannot be distinguished from any tobacco that may be destined for local manufacture (R. 60). The destination of the tobacco depends upon who buys it, and the buyer of any lot of tobacco cannot be foretold before the bidding is completed and the bid accepted (R. 60–62).

When the sale begins the auctioneer who conducts the sale, the warehouseman, and the warehouse employees proceed along one side of a row of trays and the buyers along the other side. Following the auctioneer on his side of the trays, usually 25 or 30 trays behind the sale, are calculators or "bookmen" who calculate the price a tray of tobacco brings, the amount due to the warehouseman, and the amount due to the grower (R. 60).

The sale proceeds with great rapidity. Lots of tobacco are sold as rapidly as 360 baskets per hour—one basket every 10 seconds. The sale is in constant motion. The auctioneer calls the bids and

offers so rapidly that his words can be understood only by the initiated. Bids are usually made by gestures known only to the auctioneer and the bidder. The warehouseman customarily makes the opening bid and sometimes acquires tobacco at the sale (R. 60).

When a sale is made a ticket marker places the buyer's name, the price, and the buyer's grade on the warehouse ticket. The bookmen following the sale make their calculations, described above, and unless the seller rejects the offer by folding the ticket on the tobacco and laying it back on the tray, the tobacco is promptly removed by the buyer from the warehouse floor,[22] commingled with other tobacco purchased by the buyer and shipped to whatever place the purchaser chooses for redrying, storage, and manufacture.[23] A grower who rejects the sale may, and usually does, subsequently reoffer his tobacco at the same or another warehouse. The warehouseman's employees calculate the gross value of each lot sold, and deduct the warehouseman's fee. The grower is paid the net proceeds and the warehousemen later collect the gross sale price from the buyer (R. 60, 61).

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[22] Tobacco bought by the warehouseman is not removed from the floor but usually is rearranged and put back in line for resale (R. 60).

[23] This must be done within a few minutes of the sale, and can only be done by a buyer present at the sale (R. 60).

E. INTERSTATE AND FOREIGN COMMERCE IN FLUE-CURED TOBACCO

A preponderant part of the flue-cured tobacco sold at auction warehouses is transported in interstate or foreign commerce promptly after sale. During the five-year period 1932–1936, an average of 55% of the flue-cured tobacco grown in the United States was exported (R. 64). At least two-thirds of the flue-cured tobacco sold at auction in the United States moves outside the state where it is first sold to be manufactured (R. 65).[24] The preponderantly interstate and foreign character of flue-cured tobacco sales at auction warehouses is most strikingly illustrated by the Georgia sales. Substantially all of the tobacco sold in Georgia is sold for shipment in interstate and foreign commerce. During the five-year period 1932–1936, Georgia marketings averaged almost 53 million pounds,

[24] Although the figure given for tobacco sold and shipped in interstate commerce is the most accurate available, it represents only a minimum, since it assumes that all tobacco manufactured in a state which grows tobacco was produced in that state (R. 65). It thus does not take account of interstate sales to factories in other tobacco growing states. That there are substantial quantities of tobacco so sold appears from the fact that many domestic manufacturers buy in Georgia and Florida, although their main factories are in North Carolina and Virginia (R. 61–62).

The figures on page 65 of the Record indicate that the statement on that page that approximately two-thirds of the flue-cured tobacco moves to other States refers to both interstate and foreign movements rather than to the interstate movement alone.

whereas an average of only 200 pounds per year was manufactured in Georgia. In other words, an amount less than four ten-thousandths of one per cent of the Georgia sales was manufactured in Georgia. All the rest was sold for manufacture outside the state. Although in other states in the flue-cured producing area the excess of the quantity sold over the quantity manufactured in the state is not as high as in Georgia, the tobacco manufactured in South Carolina and Florida is negligible, and that manufactured in North Carolina is less than 40 percent of the sales in the state. The poundage manufactured in Virginia is slightly less than 78 percent of the quantity sold in Virginia (R. 59, 65). (See note 24, *supra,* p. 28.)

The interstate character of the marketing of flue-cured tobacco is further emphasized by the fact that most of the tobacco is bought by a small number of buyers for use in factories scattered throughout the world (R. 61–62). In the United States tobacco is manufactured in nine hundred factories in forty-four States (R. 71). Since tobacco products are composed of blends of various domestic and foreign tobaccos, each of these factories receives tobacco from various States and countries (R. 64). The products of these factories are then distributed throughout the United States (R. 71). A large portion of the tobacco exported also moves in interstate commerce before shipment abroad, most of it clearing through Virginia ports and some from northern states (R. 67).

F. RELATIONSHIP BETWEEN INTERSTATE PRICES AND THE VOLUME SOLD AND SHIPPED IN INTERSTATE AND FOREIGN COMMERCE

The consumption of tobacco is relatively stable (R. 73). The amount marketed fluctuates widely from year to year (R. 73). There is a positive, readily apparent, interrelation between the amount marketed and the price received by growers (R. 73, 74, 78). Over a long period, before the Federal government gave assistance to growers in controlling the amount marketed, prices were consistently low when large crops came to market and relatively higher when crops were small relative to the demand (R. 73, 74, 78).

But equally significant is the fact that the quantity marketed in any year varied directly with the prices paid for the crop marketed the previous year. The prices paid for the crop in any year directly affected the amount which growers would market in succeeding years and, consequently, the price for which the buyers would be able to get tobacco in succeeding years (R. 73, 74). When prices were low in any year farmers brought to market in the suceeding year a smaller quantity of tobacco and the price in the succeeding year accordingly increased. Conversely, when the price had been high in any year farmers consistently brought to market greater amounts the next year

and had to sell them at lower prices.[25] Such increases in volume did not compensate, in terms of total income, for decreased prices (R. 82, 84).

These relationships result from the manner in which the tobacco industry is organized. About 300,000 families of growers produce and market the crop (R. 55, 74). Each grower conducts his production and marketing independently and in competition with other farmers growing the same class of tobacco (R. 74). They lack the detailed information available to the few buyers and have been unable, individually, to adapt their plans for production and marketing to meet requirements of the buyers (R. 74). Moreover, they have been unable to devise effective methods of coordinating their activities in either production or marketing so as to adjust the supply offered for sale to the effective demand.[26] Accordingly, influenced by individual hope of gain and by fear that, because they lacked effective methods of coordinated action, other growers would profit from prevail-

[25] With the exception of one year, 1922, when despite an increase of 1.3 per cent in supply over the previous year, the price did not decrease relative to the previous year but instead increased substantially. It is noteworthy, however, that despite the increase in the quantity marketed in 1922 the total supply in that year had fallen from 4 per cent over the reserve supply level in 1921 to 5 per cent below the reserve supply level (R. 78, 79).

[26] The private efforts of growers to adapt their marketings to market requirements have generally been unsuccessful (see pp. 24, 25, *supra*). Efforts of the states have also failed to meet the situation (R. 73, 90–92).

ing prices at their expense if they should attempt, as individuals, to limit their production or their marketing, they consistently planted and brought to market after each year of high prices, large crops which they found they could sell only at low prices, or part of which they could not sell at all (R. 73, 75, 79).[27]

When the actual supply exceeded the reserve supply level, prices to growers dropped especially low, and the purchasing power of the tobacco sold consistently fell below the parity price deemed by Congress to be a fair return to tobacco farmers (R. 75, 78). In such years of low prices the increase in the volume sold did not offset the low prices.

On the other hand, a few large buyers purchase substantially the entire crop by open competitive bidding at public auctions (R. 61, 62). They customarily have on hand large stocks of tobacco, adequate to meet their requirements for a considerable time,[28] even without their buying much of the crop

[27] The individual grower, even though it may mean a loss to him, usually sells all of his tobacco except that which will not bring a sufficient price to reimburse him for marketing charges and the cost of preparing it for market. Moreover, in some years buyers have refused to bid at all on large quantities of tobacco which ordinarily would have been marketed. Growers have customarily used such tobacco as fertilizer. This has been done widely in some years (R. 75), although production figures for tobacco, being based largely on marketing, fail to show the quantities thus withheld from market.

[28] In the case of the domestic manufacturers these stocks on hand when the markets open and before they acquire any

offered in any particular year. They are well informed before the markets open as to the quantity, not only of their own stocks but of those in the hands of manufacturers generally, and as to the size of the crop coming to market (R. 73). As marketing progresses they are able to keep informed as to the amounts being bought and the prices being paid by the other competing buyers. Moreover, they are fully aware of the fact that if any of the large buyers should bid the price to a high level in the current season, in the absence of effective control of marketing, growers will bring to market the next year a larger crop which buyers who have not overloaded their inventories at the high price can buy at lower prices. Any buyer of disproportionate quantities at high prices would be at a competitive disadvantage the succeeding year.

Each buyer was in a position as the marketing season progressed to hold down its bids and limit the quantity bought if it considered that prices were getting too high in view of prospective price and supply. Accordingly the amounts bought by each buyer and the prices paid were designed to prevent other large competitors from procuring an advantage through holding back on current pur-

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of the current crop normally amount to almost twice their annual requirements. The exporters retain smaller stocks adequate only to meet changes in foreign demand, but only because the foreign manufacturers to whom they sell have their own facilities for storing supplies abroad (R. 63, 64).

chases and replenishing their stocks at lower prices in the subsequent year. In this way the size of the crop which any particular level of current prices would bring to market the next year was a definite factor in determining the prices actually bid in the current year. See H. R. Report 1645, Appendix, p. 223, *infra.*

The reluctance of each buyer to acquire greater relative quantities of tobacco at higher prices than its competitors consistently depressed prices below the level which would have resulted from uninhibited bidding if the buyers had been unconcerned with these competitive hazards of bidding freely. Had growers been able to control the amounts they brought to market each year the markets would have been freed of this price-depressing factor. See H. R. Rep. 1645, Appendix, pp. 223, 224, *infra.* This is strikingly evident from the fact that after 1933, when buyers were reasonably assured that the crops brought to market would be held approximately in line with demand regardless of the prices paid, they raised prices by approximately 50 percent in the middle of the 1933 marketing season and have since continued to pay unprecedentedly high prices for relatively large crops (R. 53, 76–83).

Federal or state programs for assisting growers to regulate the quantity of tobacco marketed were in effect or in prospect each year from 1933 to 1938. For the three years 1935, 1936, and 1937, growers have sold, not small crops, but crops which have brought the total supply in each of those years well

above the reserve supply level (R. 79, 80). They have received for such crops not the low prices which they had been accustomed to receive for crops of that relative size, but prices generally as high as or higher than the prices previously received even in the few years when supplies were below the reserve supply level (R. 78–79). Without the prospect of governmental assistance which has been present every year since 1933, the certainty of excessive marketings in response to such prices would have resulted in much lower prices (R. 83).

Because the cost of tobacco is but a minor part of the cost of manufactured tobacco products (R. 73, 74, 84), and because manufacturers follow relatively fixed price policies there is little, if any, relationship between the prices received by farmers for their leaf tobacco and the prices paid by the consumer for manufactured tobacco products (R. 74; H. R. Report 1645, Appendix, pp. 223–224, *infra*). Thus, increases in prices and real income to farmers such as have resulted from effective control of the amount marketed do not serve to raise prices to the ultimate consumer (R. 74).

Depressed tobacco prices and severe annual fluctuations in prices and in the quantity marketed not only adversely affect the farmers who sell tobacco in interstate and foreign commerce but also result in severe disruption of such commerce itself. Notable instances of the latter were "the difficulties which culminated in the so-called night

rider activity in the tobacco areas of Kentucky and Tennessee; the wide-spread closing of tobacco markets for varying periods of time, which followed the drastic decline of tobacco prices after the World War; and the similar closing of auction markets because of low prices during the early part of the 1933 tobacco marketing season" (H. R. Report 1645, Appendix, p. 227). The most acute disturbance of commerce in tobacco was that which occurred in 1933.

Between 1927 and 1933 excessive supplies accumulated and prices declined progressively. When the 1933 marketing season opened, prices were even lower than in 1932 (R. 78). Protests from the growers first arose in Georgia, where the markets first opened, "and then spread to South Carolina and North Carolina. Appeals were made to the Agricultural Adjustment Administration for relief. Mass meetings of growers were held throughout the flue-cured tobacco belt and, pending some action by the Federal Government, the auction markets in South Carolina and North Carolina were closed by official action of the respective governors of these two states. The marketing in Georgia had been completed and selling in Virginia had not yet commenced, so that the flue-cured tobacco industry was at a complete standstill. Conferences were held among the growers, the buyers, and officials of the Agricultural Adjustment Administration in Washington, D. C., and elsewhere.

There was an insistent demand that immediate action be taken by the Federal Government to save the remainder of the 1933 flue-cured tobacco crop from being sacrificed at the prices prevailing at the time of the closing of the markets. As a result, a marketing agreement was entered into between the principal buyers of flue-cured tobacco and the Secretary of Agriculture pursuant to the provisions of Section 8 (a) of the Agricultural Adjustment Act of 1933 * * *" (R. 73).

This agreement raised the prices from a level lower than the average price of 11.6 cents (received for the 1932 crop) to a minimum of 17 cents (R. 78). During the period since 1933 "prices were influenced by the operation and prospective operation of governmental programs regulating the production or marketing of tobacco" (R. 78). They have since remained at levels favorable to the growers and no further similar disruptions in commerce in tobacco have occurred.

The previous federal programs sought to assist farmers through adjustment of the quantity produced. This Act seeks to aid them by limiting merely the amount offered for sale, irrespective of what the production may have been or may be, and does this only in years when the supply exceeds the reserve supply level. It is apparent from the facts summarized above that the influences which have disrupted the marketing of tobacco and depressed prices in interstate and for-

eign sales of tobacco are minimized by the effective control of present and prospective marketings.

SUMMARY OF ARGUMENT

I. *The Commerce Clause.*—A. Most flue-cured tobacco is sold at auction markets for extrastate shipment. Such sales are interstate or foreign commerce and subject to Congressional regulation. The Agricultural Adjustment Act of 1938 regulates only *sales* of tobacco; it provides a mechanism for determining how much each grower may market, and "market" as used in the Act means "sell." To the extent that the Act is applied to interstate selling, it regulates interstate commerce itself, and clearly falls within the federal commerce power. (See pp. 45–54, *infra.*)

B. If the Act may validly be applied to sales of tobacco for interstate or foreign shipment, it may be applied also to sales to intrastate destinations. It is impossible physically to separate interstate and intrastate sales of tobacco. Often even after the sale has been completed the destination of the tobacco may not be known. All that is known is that in Georgia all but a minute quantity and in the nation over two-thirds of the total is being sold for immediate shipment in interstate and foreign commerce. Economically, as well as physically, interstate and intrastate sales of tobacco are intermingled. The quantity sold intrastate contributes to the total supply and affects the entire price structure as much as that which crosses state lines.

In view of this commingling of interstate and intrastate operations, the commerce power may be applied to the whole. (See pp. 54–59, *infra.*)

C. 1. (a) The Act does not regulate production. It authorizes the fixing of quotas for the amount to be sold, not the amount to be produced. In no way does it control the conduct of a grower prior to the marketing of his tobacco. That it was not intended to operate as a regulation of production appears from the fact that Congress contemplated that under certain conditions marketing quotas were to be established after the harvesting of the crop but before marketing. The purposes of the Act—stabilizing prices and marketings in commerce—are achieved by regulating the amount marketed rather than the amount grown. Moreover, a restriction upon marketing may not have the effect of limiting production. Tobacco (as well as the other crops for which quotas may be established under Title III) may be and customarily is stored for long periods of time. Growers acting cooperatively can readily arrange to have any tobacco produced in excess of marketing quotas kept for sale in years when no quotas are in effect or when quotas are not exceeded. (See pp. 59–67, *infra.*)

(b) Even if it were true that the fixing of marketing quotas necessarily affected production, it would not follow that production was being regulated. Marketing, production, and transportation are so interrelated that regulation of any one of them often will inevitably affect the others. And

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yet this court has repeatedly recognized that such collateral effects do not determine the constitutionality of legislation. If that were not the case, many unquestionably valid statutes, such as the tariff, petroleum and liquor laws, and the Lottery, White Slave, and Kidnapping Acts, might have fallen by the wayside. (See pp. 67–73, *infra.*)

2. (a) In the same way the purpose of a regulation of interstate commerce cannot affect its validity. The Constitution nowhere provides that the power of Congress to regulate commerce may be exercised only for a commerce purpose. In the interstate field Congress may act for the public benefit just as may the States in the regulation of their internal commerce. From the earliest decisions and the *Commentaries* of Mr. Justice Story to the latest pronouncements of this Court, these principles have been recognized. (See pp. 73–85, *infra.*)

(b) Nevertheless, the Act would be valid even if the most orthodox commerce purpose were requisite. The objectives sought by Congress are the stabilizing of prices so as to prevent the unreasonably low prices to farmers and the disorderly marketing in commerce which results from surpluses in years of excessive yield and shortages in lean years. The prevention of such evils is much more closely related to the underlying objectives of the commerce clause than protection of the public against immorality, crime, and disease. Most important legislation enacted under the commerce

clause has had a similar objective—the promotion of the economic interest of particular classes of the public. This has been most frequently sought to be achieved through regulation designed to influence prices, such as the tariff, the Sherman Act, the Packers and Stockyards Act, the Grain Futures Act, and the Tobacco Inspection Act. The objective of the Agricultural Adjustment Act of 1938 is fundamentall ythe same. (See pp. 89–96, *infra.*)

3. Even though the Act be regarded as a direct regulation of the amount of tobacco produced, it would not for that reason fall without the commerce power. Congress may regulate intrastate transactions which directly affect interstate commerce, even though they are incidents of production. Here the quantity of tobacco produced has a most direct and substantial effect both upon interstate prices and the amount shipped in interstate commerce. Intrastate acts have frequently been held to fall within the commerce power because of their effect upon interstate supply and prices in interstate markets. (See pp. 96–109, *infra.*)

4. The cases relied upon by the appellants are not controlling in this case. *United States* v. *Butler,* 297 U. S. 1, held the provisions of the Agricultural Adjustment Act of 1933 involved in that case to be a regulation of production rather than an exercise of the power to tax and provide for the general welfare. Such provisions did not purport to regulate interstate and foreign commerce. The

present Act is concerned only with interstate marketing, and thus, does not regulate the subject found in the *Butler* case to be beyond the scope of federal power. Moreover, even if it were a regulation of production it would, nevertheless, come within the commerce power because of the direct effect of the activity regulated upon interstate and foreign commerce. (See pp. 109–111, *infra.*)

Hammer v. *Dagenhart,* 247 U. S. 251, is also distinguishable. But the reasons advanced by the majority in that case are inconsistent with subsequent decisions of this Court. We believe that the principles which governed the decision in that case have been abandoned by this Court and that the case is no longer an authority. (See pp. 112–118, *infra.*)

II. *The Tenth Amendment.*—Since the marketing quota provisions of the Act are an exercise of the power of Congress to regulate interstate and foreign commerce, they cannot violate the Tenth Amendment. That Amendment provides only that "the powers not delegated to the United States * * * are reserved to the States." Language could not indicate more plainly that the Amendment does not limit the powers which are delegated to the United States. The history of the adoption of the Amendment, the statements of early judges and commentators and numerous decisions of this Court demonstrate that the Amendment means only what it says. We do not believe that implications in a few relatively re-

cent opinions can be said to have discarded *sub silentio* such a basic constitutional doctrine. (See pp. 120–138, *infra.*)

III. *The Due Process Clause.*—A. Appellants contend that the Act is invalid for indefiniteness because farmers cannot tell from the statute itself what their quotas are to be. Inasmuch as the Act does not penalize farmers for marketing tobacco in violation of the general statutory standards, but only for marketing quantities in excess of specific quotas administratively determined under such standards, this objection is untenable. (See pp. 138–141, *infra.*)

B. Appellants contend that the establishment of quotas for 1938 was retroactive and violated due process of law because the 1938 crop was planted, grown, and harvested before the allotments to individual farms were made. But the Act imposes penalties only for excessive amounts marketed after individual quotas are prescribed, not for the amount produced before that time. Thus it does not operate retroactively. The fact that appellants may have expended considerable sums in raising their crop before the marketing quotas were fixed (although after they were aware that quotas were likely to be established) is not material. Many decisions have held that statutes operating prospectively are not invalidated because of losses which may result from expenses previously incurred. (See pp. 141–152, *infra.*)

C. The ends which Congress was seeking to attain in the Act were the maintenance of a balanced

supply of farm products marketed in interstate and foreign commerce and the protection of farmers against unreasonably low prices. These ends are legitimate under the commerce clause, and the provisions of the Act are reasonably adapted to achieve them. Accordingly, the statute satisfies the requirements of due process of law. The plight of American agriculture because of decreased exports, the accumulation of surpluses, and the resultant low prices has presented a serious national problem since the 1920's. The present Act reasonably seeks to meet this situation by keeping unwieldy surpluses off the market. In the absence of affirmative disproof the finding by Congress that the means adopted are reasonable and appropriate must be accepted by the Court. Here the record confirms the legislative judgment. (See pp. 152–160, *infra.*)

IV. *Delegation of Power.*—The provisions of the Act which determine when a national marketing quota is to be established, what the amount of the quota is to be, and how it is to be apportioned among the States, merely require the Secretary to make findings of fact from official statistics (subject to minor adjustments). Section 312 (a), 313 (a). In the main these determinations are purely mathematical. The narrow and well-defined latitude permitted to administrative discretion in making definitely prescribed adjustments is plainly unobjectionable. (See pp. 160–166, *infra.*)

The Act carefully enumerates the specific factors to be considered in apportioning the state quotas to

individual farms. Section 313 (b). Although the administrative officials are called upon to exercise judgment in determining how much weight shall be given to each factor, Congress has definitely established an intelligible policy and prescribed adequate standards to guide administrative discretion. In many prior cases this Court has upheld statutes containing delegations of authority far more sweeping and less circumscribed than any in the case at bar. (See pp. 166–175, *infra.*)

ARGUMENT

I

THE MARKETING QUOTA PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT ARE VALID REGULATIONS OF INTERSTATE AND FOREIGN COMMERCE

A. THE MARKETING QUOTA PROVISIONS ARE REGULATIONS OF INTERSTATE AND FOREIGN COMMERCE

The question of federal power in this case is fundamentally the same and just as simple as that before this Court in *Currin* v. *Wallace,* No. 275. The master facts, the same in both cases, may be briefly summarized. Most tobacco is sold at auction warehouse markets (R. 56). Substantial quantities of the tobacco brought to the warehouses comes from outside the state (R. 57–58).[29] At least

[29] That is true as to some of the appellants, whose farms are in Florida, but not as to those appellants whose farms are in Georgia (R. 44). In *Currin* v. *Wallace* approximately 15 per cent of the tobacco sold on the Oxford, North Carolina, market came from Virginia. The amount coming to a market from outside the state probably varies with the distance of the market from a state line.

two-thirds [30] of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination, 55 percent being exported (R. 64–65). In Georgia 99.9996 percent of the flue-cured tobacco so sold—52,807,600 out of 52,807,800 pounds—is purchased by extra-state purchasers (R. 59).

In markets where tobacco is sold to both interstate and intrastate purchasers, no one can know when the grower places his tobacco on the warehouse floor for sale whether it is destined for interstate or intrastate commerce (R. 60). Thus, any regulation of the sale of tobacco for interstate commerce must apply also to sales in intrastate commerce if it is to be effective.

As this Court declared in the *Currin* case, sales of tobacco by growers through warehousemen [31] to purchasers taking the tobacco outside the state *are* interstate commerce. The word "commerce" does not refer merely to transportation; its primary connotation at the time the Constitution was adopted and thereafter was "exchange of goods." [32]

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[30] See note 24, p. 28, *supra*.

[31] The same would be true of any sales by growers, on the farm or elsewhere, to purchasers for interstate shipment. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222.

[32] In his concurring opinion in *Gibbons* v. *Ogden*, 9 Wheat. 1, 229–230, Mr. Justice Johnson defined the word "commerce" as follows:

"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor,

This Court has pointed out repeatedly that interstate commerce consists of buying and selling as well as of transportation. "Such commerce is not confined to transportation from one State to another, * * *. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation." *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 290. *Currin* v. *Wallace, supra. Shafer* v. *Farmers Grain Co.,*

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transportation, intelligence, care and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."

The opinion of Chief Justice Marshall, in the same case, indicates that counsel for appellee admitted that "commerce" included "buying and selling or the interchange of commodities" but denied that it comprehended navigation. To this argument he replied (9 Wheat., at 189):

"This would restrict a general term, applicable to many objects, to one of its significations."

The *American Encyclopedia*, published in 1798, contained the following definition: "Commerce—is an operation by which the wealth or work either of individuals or of society may be exchanged by a set of men called merchants for an equivalent * * *." *Webster's Dictionary*, as late as 1841, contained the following definition: "Commerce—in a general sense, an interchange or mutual change of goods, wares, productions, or property of any kind by the nations or individuals, either by barter, or by purchase and sale; trade, traffick." See also *Webster's Dictionary* (1st ed. 1806); *Samuel Johnson's Dictionary* (6th ed. 1785); *Perry's Royal Standard Dictionary* (4th Am. ed. 1796); *Alexander's Columbia Dictionary* (1800).

268 U. S. 189, 198. In his dissenting opinion [33] in *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 326, Mr. Justice Cardozo declared with respect to sales of coal by mine operators, f. o. b. mine, for interstate shipment "that sales made under such conditions constitute interstate commerce, and do not merely 'affect' it." See also, the opinion of the Chief Justice in the *Carter* case at page 320; and *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Swift & Co.* v. *United States,* 196 U. S. 375, 398; *Flanagan* v. *Federal Coal Co.,* 267 U. S. 222, 225; *Stafford* v. *Wallace,* 258 U. S. 495, 519; *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 10; *Globe Elevator Co.* v. *Andrew,* 144 Fed. 871; *Krueger* v. *Acme Fruit Co.,* 75 F. (2d) 67, 68 (C. C. A. 5th).

"So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation." *Currin* v. *Wallace, supra.* State power to regulate them has been denied only because of the existence of the superior federal power. In *Lemke* v. *Farmers Grain Co., supra,* which dealt with sales of grain by farmers to buyers transporting it to terminal markets in other states—a method of doing business

[33] The references in this brief to the dissenting opinions of the Chief Justice and of Mr. Justice Cardozo in the *Carter* case will (unless otherwise noted) be to those portions of the opinions upholding the power of Congress to fix prices, a question upon which the majority of the Court did not find it necessary to pass.

strikingly similar to that here under consideration—the Court held that the states were powerless to regulate such sales because the power to control them was vested in the Congress. The Court stated (258 U. S., at 60–61):

> It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control.

The principles applied by these decisions to sales of grain at country elevators for interstate shipment are clearly applicable as well to sales of tobacco at the warehouses for interstate shipment. *Currin v. Wallace, supra.* Thus, the sale of tobacco at the warehouse when the buyer immediately thereafter transports the tobacco out of the State is itself interstate or foreign commerce and subject to Federal regulation.

The tobacco marketing quota provisions of the Agricultural Adjustment Act of 1938 regulate only *sales* of tobacco. The Act prescribes a mechanism by which the amount to be *marketed* by each grower

is to be determined. The term "market" is defined in the Act to mean "to dispose of by sale, barter, or exchange." Section 301 (b) (6) (A).[34]

Tobacco is not commonly bartered or exchanged except for money and there is no suggestion that appellants do not market their tobacco by selling it.

The provisions of the Act authorizing the Secretary of Agriculture to establish marketing quotas for each farm thus mean only that he may establish sales quotas, that he may determine the amount which each grower may sell. To the extent that this determination relates to interstate selling—and substantially all appellants' sales are interstate (see pp. 28–29, *supra*)—it regulates the amount of tobacco which can be sold in interstate commerce. Such a regulation is unquestionably a regulation of commerce among the states. It is not even subject to the attack made on the Tobacco Inspection Act that the inspection there called for preceded interstate commerce and was for that reason beyond the federal power. A regulation of the amount sold regulates nothing that precedes or fol-

[34] Section 301 (b) (6) contains *inter alia* the following definitions:

"(A) 'Market,' in the case of cotton, wheat, and tobacco means to dispose of by sale, barter, or exchange, but, in the case of wheat, does not include disposing of wheat as premium to the Federal Crop Insurance Corporation under Title V.

"(D) 'Marketed,' 'Marketing,' and 'for market' shall have corresponding meanings to the term 'market' in the connection in which they are used."

lows interstate commerce; it regulates only such commerce itself.[35]

That a regulation of the quantity of interstate commerce is a regulation of such commerce would seem to be plain upon its face. Absolute prohibitions of shipments of particular commodities have frequently been upheld. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147, and cases cited therein. If such complete prohibitions are commerce regulations, a partial prohibition—which is what the quota system amounts to—must also be within the commerce power. This was conceded in *United States* v. *The Brigantine William*, Fed. Cas. No. 16,700, 28 Fed. Cas. 614 (1808), perhaps the earliest reported case under the commerce clause, where the embargo on foreign commerce was upheld as constitutional.[36] Judge Davis[37] declared (at page 621):

> * * * Stress has been laid, in the argument, on the word "regulate", as implying,

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[35] That the regulation is, under familiar doctrine, valid as to intrastate sales, if valid as to interstate, is shown below, *infra*, p. 54.

[36] The Supreme Court approved this decision (although without referring to it by name) in *Gibbons* v. *Ogden*, 9 Wheat. 1, at 192–193.

[37] Judge Davis stated that he was giving his impressions "coeval, in mind, with the constitution" (p. 623). Judge Davis was the youngest member of the Massachusetts convention called to ratify the Constitution. *National Cyclopedia of American Biography*, Vol. XXII, p. 349; *Dictionary of American Biography*, Vol. V, p. 132. The case is discussed in Warren, *The Supreme Court in United States History*, Vol. I, pp. 341–350.

> in itself, a limitation. Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the national government, to whom the subject appears to be committed?

Allotments of the amount of a commodity which a person may ship in interstate commerce have been upheld with respect to petroleum (*Griswold* v. *The President of the United States,* 82 F. (2d) 922 (C. C. A. 5th))[38] and coal (*Assigned Car Cases,* 274 U. S. 564; *Avent* v. *United States,* 266 U. S. 127).[39] The lower federal courts have with one exception[40] upheld the validity of marketing quotas established for fruits and vegetables under the

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[38] The Connally "Hot Oil" Act (49 Stat. 30, U. S. C. Title 15, § 715) prohibits the shipment in interstate and foreign commerce of oil produced in excess of that allowed by state law. No one has seen fit to carry the question of the constitutionality of the Act to this Court.

[39] The allotment of railroad cars to coal mines in time of car shortage was in substance a determination of the amount of coal each mine could ship in commerce.

[40] The only unreversed District Court case holding such orders invalid is *Chester C. Fosgate Co.* v. *Kirkland,* 19 F. Supp. 152 (S. D. Fla.), which in effect has been overruled by the decision of the Circuit Court of Appeals for the Fifth Circuit in *Whittenburg* v. *United States,* 100 F. (2d) 520.

Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended in 1935 (49 Stat. 750), and later reenacted as the Agriculture Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. § 601). *Edwards* v. *United States,* 91 F. (2d) 767 (C. C. A. 9th); *Wallace* v. *Hudson-Duncan & Co.,* 98 F. (2d) 985 (C. C. A. 9th); *Whittenburg* v. *United States,* 100 F. (2d) 520 (C. C. A. 5th); *United States* v. *Goldsmith Fruit Co.,* 19 F. Supp. 147 (S. D. Fla.). Cf. *United States* v. *David Buttrick Co.,* 91 F. (2d) 66 (C. C. A. 1st), certiorari denied 302 U. S. 737; *United States* v. *Whiting Milk Co.,* 21 F. Supp. 321 (D. Mass.).[41] In numerous antitrust cases this Court has recognized that the supply of a commodity in interstate commerce was a proper concern of Congress under the commerce power. *Standard Oil Co.* v. *United States,* 221 U. S. 1; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 169.

For these reasons we believe that the statement that the commerce question in this case is fundamentally a simple one is amply justified. The Agri-

[41] In the following unreported cases district courts have granted temporary restraining orders or preliminary injunctions enforcing orders of the Secretary of Agriculture of the kind referred to: *United States* v. *Babcock Dairy Co. et al.* (N. D. Ohio); *United States* v. *Herman M. Sheffield et al.* (S. D. Texas); *United States* v. *Melvin Child Andrews et al.* (D. Mass.). See also *United States* v. *Corinth, Creamery, Inc.,* 21 F. Supp. 265 (D. Vt.).

cultural Adjustment Act of 1938 in establishing marketing quotas, does no more than limit the amount which may be sold and shipped in commerce. The commerce so regulated is substantially all interstate or foreign commerce. Accordingly, the Act is a regulation of interstate and foreign commerce.

B. THE ACT IS VALID AS APPLIED TO INTRASTATE SALES OF TOBACCO

If the Agricultural Adjustment Act of 1938 may validly be applied to sales of tobacco for interstate shipment, it may be applied also to sales to intrastate destinations. This must necessarily be the case when interstate and intrastate transactions are both physically and economically inseparable, as they are here. The question here, too, is the same as that before the Court in *Currin* v. *Wallace, supra.*

A brief description of the course of trade will demonstrate that commerce in tobacco is not susceptible of division into interstate and intrastate fractions. Most tobacco, as has been indicated, *supra,* p. 23, and all of that involved in this case, is sold on auction markets. Tobacco comes to many of these markets, including the Valdosta market, from growers outside as well as from growers within the state in which the market is located (See p. 45, *supra*). At each market representatives of the buyers compete with each other for the various lots sold (R. 60). Although most of the buyers pur-

chase for interstate shipment, some may purchase for shipment to factories within the state (R. 65). Most purchases are made by representatives of a few major companies, some of which have factories in several states (R. 61, 62). Such purchasers may buy both for interstate and intrastate shipment. Since tobacco products are generally composed of blends of various types of tobacco, both foreign and domestic (R. 64), factories located in producing states necessarily receive large quantities of tobacco from outside sources. Most of that portion of the tobacco crop which is processed in factories within the state in which it is grown ultimately moves into interstate commerce, since the products of these factories are distributed generally throughout the United States.[42] (R. 71).

The commerce thus described does not admit of physical division into separate interstate and intrastate streams. The regulation here in question takes effect at the time of marketing, which in the vast majority of instances means at the time of sale on the warehouse floor. When the tobacco is offered for sale and while the auction is proceeding, no one can tell which tobacco is destined for interstate and which for intrastate shipment. (R. 60–61) Insofar as purchases by the large buyers,

[42] The processing consists in the main of drying, shredding, and blending. The tobacco remains tobacco; it is not changed into a substantially different product as are the raw materials going into manufacturing plants in other industries.

who take a major proportion of the total crop (R. 62), are concerned, even after the sale is completed and the identity of the purchaser determinable the destination of the tobacco may not be known (R. 61). All that is known is that in Georgia all but a minute quantity and in the nation over two-thirds of the total is being sold for immediate shipment in interstate and foreign commerce, and that most of the remainder will eventually move in such commerce. (See pp. 45–46, *supra*.)

Economically as well as physically intrastate and interstate sales of tobacco are inextricably intermingled. This fact also makes control of intrastate marketing essential in view of the fact that the Act is designed to insure orderly marketing and a fair and stable price (see pages 86–87, *infra*). The quantity sold intrastate contributes to the total supply and affects the entire price structure as much as that which crosses state lines. An excess amount purchased intrastate and there stored will decrease both the price and the demand for new-grown tobacco in subsequent years just as much as if it were purchased in interstate commerce, and will thus contribute to the disorderly marketing in such commerce which the statute was designed to avert.

What is not segregated in fact need not be segregated in law. The Constitution does not require separation of the inseparable. Marketing transactions relating alike to the interstate and intrastate movement of commodities may be regulated

as to all when the small intrastate part is commingled with the dominant interstate part. *Currin* v. *Wallace, supra. The Shreveport Case,* 234 U. S. 342; *The Minnesota Rate Cases,* 230 U. S. 352; *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.,* 257 U. S. 563; *Virginian Ry. Co.* v. *System Federation No. 40,* 84 F. (2d) 641, 647–651, affirmed, 300 U. S. 515. Cf. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453.[43]

In the *Currin* case this Court applied these principles to sales on the tobacco markets, saying:

> The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care. * * * Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale.

These principles are most appropriately applied to the regulation of marketing in an industry

[43] The "commingling of interstate and intrastate operations" (*The Minnesota Rate Cases,* 230 U. S., at 399) referred to in the above cases may be economic as well as physical. In the railroad rate cases it was the competitive interrelationship which caused the Court to regard interstate and intrastate rates as commingled. See *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 328–329 (dissenting opinion of Mr. Justice Cardozo).

which, in the language of the statute (Section 311 (a)) has "ramifying activities which directly affect interstate and foreign commerce at every point." Even if the marketing of tobacco by the growers were not itself in the interstate stream, it would be so close to interstate commerce as to subject it to federal regulation as an intrinsic part of the nation-wide current of commerce in tobacco. What has been said in upholding the regulation of *intrastate* transactions on the stockyards and futures markets may also be said as to the tobacco auction markets. Cf. *Stafford* v. *Wallace*, 258 U. S. 495, 515–519; *Swift & Co.* v. *United States*, 196 U. S. 375, 398; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 34. The language of this Court in *Stafford* v. *Wallace* is peculiarly appropriate here (pp. 518–519):

> The application of the commerce clause of the Constitution in the Swift Case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the states and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation

by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.

C. THE MARKETING QUOTA PROVISIONS OF THE ACT ARE NOT INVALID AS A REGULATION OF PRODUCTION

Appellants seek to evade the force of the decisions cited above demonstrating that the Act is a valid regulation of interstate commerce by the contention that it is really a regulation of production rather than commerce. For that reason they assert that it is not within the commerce power and in addition that it violates the Tenth Amendment. It is argued that the purpose and necessary effect of the Act are to control the production of tobacco on the farm, and that a regulation of that kind is beyond the power of Congress. To this we make answer:

(1) That the Act is not a regulation of production and the fact that it may affect production does not render it unconstitutional (pp. 60–73, *infra*).

(2) That the purpose of a regulation of commerce is immaterial, but that if purpose be relevant, this Act has a valid commerce purpose (pp. 73–96, *infra*).

(3) That even if the Act were to be regarded as a regulation of production, it is nonetheless valid in view of the direct effect of the transactions regulated upon interstate commerce (pp. 96–109, *infra*).

(4) That *United States* v. *Butler, Hammer* v. *Dagenhart,* and other cases cited by appellants are not controlling (pp. 109–118, *infra*).

We shall furthermore demonstrate in Point II, *infra,* pages 120–138, that the Tenth Amendment has no independent application, since it merely reserves to the states the power not delegated to Congress.

1. *The Act is not a regulation of production and the fact that it may affect production does not render it unconstitutional*

(a) THE ACT IS NOT A REGULATION OF PRODUCTION

The Act regulates marketing, not production. It authorizes the setting of quotas for the amount to be marketed or sold, not the amount to be produced. It imposes no penalties on a grower because of the amount he produces nor does it attempt to control any of his conduct prior to the act of marketing.

If the fact that the Act does not regulate production were not enough to demonstrate that it is not a regulation of production, consideration of other pertinent provisions of the Act, of its purposes and objectives, and of the manner in which it operates would lead to the same conclusion.

(1) Internal evidence in the statute of intention to regulate marketing rather than production may be found in the fact that Congress contemplated that some tobacco marketing quotas might become effective after the planting and growth of the crop. This appears plainly from Section 312 (b), which

provides with respect to burley and fire-cured and dark air-cured tobacco that, if the total supply exceeds the reserve supply level by more than five per cent, a national marketing quota shall become effective for the period from the date of the Secretary's proclamation to the end of the marketing year *then current* as well as for the succeeding marketing year. The marketing year for burley, and for fire-cured and dark air-cured tobacco runs from October 1 to September 30 (Sec. 301 (b) (7)). The year's crop is harvested by September, but the markets do not open until around December 1. The Secretary's proclamation is to be made by December 1 (Sec. 312 (a)) . Since these quotas provided for by Section 312 (b) apply to tobacco harvested more than two months before they become effective they could not possibly have been intended to limit production.

The quotas for flue-cured tobacco for the marketing year 1938–1939 present a similar situation. The Act was approved February 16, 1938. Under Section 312 (d) the Secretary was required to proclaim the amount of the national marketing quota for the year 1938–1939 within fifteen days and the result of the farmers' referendum within forty-five days of the enactment of the statute. The establishment of State and farm quotas provided for in Section 313 was to take place after the holding of the referendum, and obviously would take considerable time. Flue-cured tobacco is planted

in seedbeds between December and March, transplanted in April, May, and early June, and harvested in the more southerly producing states in June and early July (R. 50–51). Marketing in these states begins in late July or early August (*ibid.*). It is apparent from these facts that Congress must have realized that the quota provisions for flue-cured tobacco for 1938 would become operative in time to control the amount marketed but not in time to control the amount produced.

(*k*) The Act is designed to raise or stabilize prices. It achieves that result by controlling the amount marketed rather than the amount grown. With demand relatively constant, the price of tobacco is determined by supply—present and prospective (see pp. 30–37, *supra,* and pp. 100–103, *infra*). But the supply that primarily affects the price is that which may be marketed, not that which is grown but immobilized. Thus, in providing for the establishment of quotas limiting marketing alone regardless of production Congress went as far as was necessary for the accomplishment of the desired ends.

The purpose of stabilizing commerce through providing an orderly, adequate, and balanced flow of commodities in lean years as well as in good is likewise accomplished by controlling marketing rather than production. Natural factors—drought, flood, soil conditions—as well as the amount planted and the care taken of the crop de-

termine the amount produced in each year.[44] An even flow of commerce at reasonable prices can be achieved without regulating production by keeping surpluses in fat years from being marketed until years of shortage. This is what the Act contemplates, not limitation of production. The report of the Committee on Agriculture of the House of Representatives (H. R. Rep. 1645, 75th Cong., 2nd Sess.) makes this clear. It states that legislation to meet the farm problem (Appendix, pp. 206–207): "should not be posited on an economy of scarcity. Nor should such legislation be designed to meet a temporary emergency. It should, on the contrary, encourage the abundant production of agricultural commodities, and provide for the storage or warehousing of the production above current needs in order to have such commodities available at reasonable prices in years of drought or other adverse conditions. Such legislation should, by means of loans, assist farmers to cooperate with government in reaching this desirable objective." The report proceeds to state that "loans on agricultural commodities" are provided "in order to enable farmers to finance the storage and warehousing of commodities in years of excessive yields so that surpluses may be kept off the market, and so that in years of drought or other adverse conditions, supplies of agricultural commodities will be plenti-

[44] At the time of planting a farmer cannot tell precisely how many pounds of tobacco will be grown. This will vary with the weather and other natural factors.

ful" (Appendix, p. 208). The emphasis throughout is on keeping excessive supplies *off the market*, not on prohibiting their production.

(3) The marketing quota regulations do not necessarily affect production. The distinction between regulating production and regulating marketing is not an academic or unreal one. Tobacco (as well as the other crops regulated under Title III of the Act) can be stored for a long period of time. Indeed practically all tobacco is stored for a period of one to five years before it is used (R. 63). If an amount in excess of marketing quotas is grown, that excess can be stored for sale in years when marketing quotas are not in effect, or when a grower produces less than his quota. Although individual growers may have difficulty in redrying tobacco for storage, growers acting cooperatively can readily do so (see pp. 23–24, *supra*). Furthermore, the Act provides for federal loans to enable farmers to finance the storage of commodities (Sec. 302 (a)).

The possibility of growers later selling excess tobacco withheld from market in a quota year is not a merely theoretical prospect. The Act provides that quotas may be established only after the Secretary has found that the total supply of tobacco exceeds the reserve supply level and after two-thirds of the farmers engaged in producing the crop have voted in favor of the quota (Sec. 312 (a), (c)). If either of these two conditions is not met in any year, quotas do not become operative the next year.

Adverse weather conditions or numberless other factors may reduce production in any year so as to remove all basis for quotas in the next year. All tobacco held over may be sold in such a year. Similarly, adverse conditions confined to a local area or to individual farms will leave some farmers each year without their full quota of new tobacco to sell. Even if quotas are in effect such a farmer may then sell his stored tobacco within his quota.

Furthermore, the farmers themselves may procure the suspension of quotas in any year. The present litigation involves quotas for the marketing year 1938–1939 (July 1, 1938–June 30, 1939). Although on November 21, 1938 (3 Fed. Register 2769), the Secretary proclaimed that the supply as of the beginning of the marketing year 1939–1940 exceeded the reserve supply level for that marketing year and specified a national marketing quota, over one-third (though considerably less than a majority) of the growers voted against the establishment of such quotas in the referendum held under the Act on December 10, 1938. Accordingly, no marketing quotas for flue-cured tobacco will be in effect for the year 1939–1940, and any excess stocks not sold in the marketing year 1938–1939 may be marketed free of penalty after the expiration of that period.[45]

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[45] Although the individual growers in Georgia and Florida did not have facilities for redrying and storing their excess tobacco, they could have foreseen the problem and taken steps to meet it. See opinion of Judge Sibley, R. 186.

(4) The fact that the quotas to be allotted to states and individual growers are apportioned on the basis of factors relating primarily to the amount which can be produced does not mean that the statute is a regulation of production.[46] Some fair formula had to be devised which would give each state and grower an equitable share of the allotment to be marketed. The formula adopted should conform as closely as possible to the marketing ability of the state or grower. Plainly, factors showing the amount which could be and had been produced on the farm are the fairest and best indicia of its marketing ability. Acceptance of the argument that the use of such a standard for marketing quotas makes such quotas invalid would result in the absence of any feasible and reasonable basis for the establishment of this method of regulating interstate marketing under the commerce power.[47]

A striking similarity may be noted between the basis for fixing farm marketing quotas set forth in Section 313 (b) of the Agricultural Adjustment

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[46] Tobacco quotas for individual farms are to be based first on past marketings, not past production (Sec. 313 (b)).

[47] The numerous cases holding that taxes on subjects within the power of the taxing authorities may be *measured* by matters not within that power are analogous. Cf. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Pacific Co.* v. *Johnson*, 285 U. S. 480; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Van Allen* v. *Assessors*, 3 Wall. 573; *Peoples National Bank* v. *Board of Equalization*, 260 U. S. 702; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103; *Manhattan Company* v. *Blake*, 148 U. S. 412; *Educational Films Corp.* v. *Ward*, 282 U. S. 379.

Act of 1938 and the rule adopted by the Interstate Commerce Commission under the Transportation Act of 1920 for the establishment of base ratings for mines as a basis for the allotment of coal cars to the various mines. After an extensive investigation culminating in its decision in *In Re Rules Governing Ratings of Coal Mines,* 95 I. C. C. 309, the Commission determined that it should be the duty of the agencies rating the respective mines to take into consideration the following basic principles: "(a) physical conditions, (b) past performance, (c) labor supply, (d) other factors that may affect the production and shipment of coal" (95 I. C. C., at 323). These factors to be used in determining how much coal may be transported from each mine all relate primarily to the capacity of the mine to produce coal—just as some of the factors used in determining how much tobacco may be marketed from each farm relate to the producing capacity of the farm. Yet in the one case no more than in the other can it be said that consideration of such factors converts the regulation of transportation or marketing into one of production. See *Assigned Car Cases*, 274 U. S. 564, 575.

(b) THE FACT THAT THE REGULATION OF MARKETING QUOTAS MAY AFFECT PRODUCTION DOES NOT MAKE THE ACT A REGULATION OF PRODUCTION

It may be that the fixing of marketing quotas would in some years tend to reduce the amount produced as well as the amount marketed. Some farmers may

decrease the quantity they grow rather than produce intentionally in excess of quotas for storage and later sale. But the fact that a regulation of marketing may ~~leave~~ have such a collateral effect upon production does not make it a regulation of production. Congress has power to regulate interstate commerce. If a law regulates such commerce, it is within the power of Congress, regardless of what effect upon other matters it may have.

If the test of constitutionality were the existence of such collateral effects, many unquestionably valid laws would fall by the wayside. Distribution or marketing, transportation, and production are so interrelated that regulation of any one of them may, and often inevitably will, affect the others. Thus, if any one of these activities be prohibited with respect to any commodity, the others may instantaneously be interrupted. If transportation rates from a particular region are raised unduly, the amount produced and distributed from that region may well decrease. Cf. *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462,[49] describing the Lake Cargo coal controversy. Destruction of a monopoly in distribution may inevitably break up a monopoly in manufacture as well. Cf. *Standard Oil Co.* v. *United States,* 221 U. S. 1.

[49] Reversed on grounds of mootness, 279 U. S. 812.

A state may prorate the *production* of oil without conflict with the commerce power, although the necessary and inevitable effect of the limitation of production upon the amount of oil shipped in interstate commerce cannot be gainsaid. *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210. Conversely, Congress may limit the amount of oil distributed in interstate commerce, with an equally inevitable effect upon production, without thereby invading the field of state sovereignty. *Griswold* v. *The President of the United States,* 82 F. (2d) 922. A state may prohibit the manufacture of liquor and thus completely shut off the flow of interstate commerce in that commodity from within its borders. *Kidd* v. *Pearson,* 128 U. S. 1. Congress, on the other hand, by prohibiting the shipment of intoxicating liquor or of prison-made goods to states whose laws prohibit their manufacture and sale inevitably discourages and restricts manufacture. Cf. *Clark Distilling Co.* v. *West'n Md. Ry. Co.,* 242 U. S. 311; *United States* v. *Hill,* 248 U. S. 420; *Kentucky Whip and Collar* v. *Illinois Central Railroad,* 299 U. S. 344.

The protective tariff directly (and designedly) affects the amount of goods manufactured domestically; yet it is not a regulation of manufacture. The lottery act directly (and designedly) discourages lotteries. The Federal Kidnaping Act, it is sincerely to be hoped, discourages not only the interstate transportation of kidnaped persons but

kidnaping itself—although kidnaping *per se* is no concern of the federal government. "Such regulation is not a forbidden invasion of state power *either because its motive or its consequence* is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by the due process clause of the Fifth Amendment. And it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 147; *Currin* v. *Wallace, supra.*

As the majority of the Court (and *a fortiori* the minority) recognized in *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 371, in treating an argument similar to that made by appellants here:

> The collateral fact that such a law may produce contentment among employees,—an object which as a separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional.

The argument that an exercise of federal power may be invalid because of its regulatory or deterrent effect outside the sphere of federal regulation has repeatedly been rejected in cases involving the validity of taxes which were obviously designed to discourage the activity taxed. See particularly,

Veazie Bank v. *Fenno,* 8 Wall 533, 548;[50] *McCray* v. *United States,* 195, U. S. 27, 60;[51] *Sonzinsky* v. *United States,* 300 U. S. 506. Cf. *Magnano* v. *Hamilton,* 292 U. S. 40. In the *Sonzinsky* case, *supra,* this Court reviewed the authorities and laid down the principles which are applicable to the commerce power as well as to the taxing power. The Court said (300 U. S., at 513–514):

> * * * we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power.
>
> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, *United States* v. *Doremus, supra,* 93, 94; *Nigro* v. *United States,* 276 U. S. 332, 353, 354; *License Tax Cases, supra;* see *Child Labor Tax Case, supra,* 38; and it has long been established that an Act of Congress which on its face purports to be an ex-

[50] "Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The Court made short work of the argument as to the purpose of the act." Holmes, J., dissenting, in *Hammer* v. *Dagenhart,* 247 U. S. 251, 278–279.

[51] The tax upon oleomargarine colored to resemble butter "was so great as obviously to prohibit the manufacture and sale." Holmes, J., dissenting, in *Hammer* v. *Dagenhart,* 247 U. S. 251, 278.

ercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *McCray* v. *United States,* 195 U. S. 27, 60–61; cf. *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48.

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. *Veazie Bank* v. *Fenno, supra; McCray* v. *United States, supra,* 56–59; *United States* v. *Doremus, supra,* 93–94; see *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44, 45; cf. *Arizona* v. *California,* 283 U. S. 423, 455; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 210; *Weber* v. *Freed,* 239 U. S. 325, 329–330; *Fletcher* v. *Peck,* 6 Cranch 87, 130. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. *McCray* v. *United States, supra;* cf. *Magnano Co.* v. *Hamilton, supra,* 45.

Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power. *Alston* v. *United States,* 274 U. S. 289, 294; *Nigro* v.

United States, supra, 352, 353; *Hampton & Co.* v. *United States,* 276 U. S. 394, 411, 413.

These cases arising under both the commerce and taxing powers demonstrate that Federal statutes are not rendered invalid because of their "deterrent" or "regulatory" effect upon matters not subject to congressional power—that "if an Act is within the powers specifically conferred upon Congress, * * * it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, * * *." Holmes, J., dissenting, in *Hammer* v. *Dagenhart,* 247 U. S. 251, p. 277.

2. *The purpose of a regulation of interstate commerce cannot affect its constitutionality; but if purpose be relevant, this statute has a valid commerce purpose*

(a) THE PURPOSE OF A REGULATION OF INTERSTATE COMMERCE CANNOT AFFECT ITS CONSTITUTIONALITY

This Court has from the beginning recognized that "the commerce clause (Art. I, § 8, par. 3) confers upon the Congress 'the power to regulate, that is, to prescribe the rule by which commerce is to be governed.' This power 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' *Gibbons* v. *Ogden,* 9 Wheat. 1, 196." *Kentucky Whip and Collar* v. *Illinois Central Railroad,* 299 U. S. 334, 345; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147; *Currin* v. *Wallace, supra.*

The view that a regulation of interstate commerce may be invalid if enacted for a *purpose* not directly related to such commerce is consistent neither with these principles nor with the language of the Constitution. When Congress regulates intrastate transactions which directly affect interstate commerce, the purpose of the regulation may be relevant, since the regulation as well as the subject regulated must have some relation to interstate commerce. Cf. *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330. But such considerations are entirely out of place when what is regulated is interstate commerce itself.

The contention that the commerce power may not be exercised for purposes not in themselves directly concerned with interstate commerce seems to rest upon a confusion between the *power* on the one hand and the *subject matter* upon which, and the *purpose* or *objective* for which, the power may be exercised, on the other. The fact that the wide varieties of subject matter upon which the granted powers of Congress may be exerted (and upon some of which they will have to be exerted if they are exerted at all), are not specifically enumerated in the Constitution, obviously does not mean that Congress is barred from asserting its powers upon such subject, for none are enumerated. In the same way the fact that the various objectives which may be deemed desirable by Congress, and for which Congress may conceivably wish to assert one or more of its granted powers, are not ex-

pressly enumerated, obviously does not mean that Congress must confine itself to objectives which *are* enumerated, for none are, save in the broad language of the preamble. The proposition that the power to regulate commerce can be asserted only for the sake of commerce, or for a purpose related to commerce rests upon an assumption the general acceptance of which would make practically impossible either the construction of the Constitution or the operation of government under it.

Such a construction of the commerce clause was repudiated in the first case arising under it. *United States* v. *The William, supra,* p. 51. Judge Davis there referred to the history of the commerce clause at the time the Constitution was ratified, and concluded that the power over commerce was not limited to its advancement but included the power to abridge it "in favor of the great principles of humanity and justice." He said (28 Fed. Cas., at 621):

> Further, the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but, the national right, or power, under the constitution, to adapt regulations of commerce to other purposes, than

> the mere advancement of commerce, appears to me unquestionable. * * * It was perceived, that, under the power of regulating commerce, congress would be authorized to abridge it, in favour of the great principles of humanity and justice. Hence the introduction of a clause, in the constitution, so framed, as to interdict a prohibition of the slave trade, until 1808. Massachusetts and New York proposed a stipulation, that should prevent the erection of commercial companies, with exclusive advantages. Virginia and North Carolina suggested an amendment, that "no navigation law, or law regulating commerce, should be passed, without the consent of two thirds of the members present, in both houses." These proposed amendments were not adopted, but they manifest the public conceptions, at the time, of the extent of the powers of Congress, relative to commerce.

The notion that a granted power may not be employed for any purpose not expressed in the grant was early sought to be introduced into our constitutional thinking by opponents of a protective tariff, and was answered conclusively and exhaustively by Mr. Justice Story. Speaking of the taxing power, Mr. Justice Story says (*Commentaries on the Constitution,* Sec. 965, 4th ed.):

> The language of the Constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here, and remained in this

> absolute form, * * * there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form in which it may be used, *and for every purpose to which the legislature may choose to apply it.* This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition, and secure a monopoly to the government! [Italics supplied.]

The Constitution does not explicitly say that the Federal Government has power to encourage and protect domestic production, to support agriculture

and manufactures, to set up a policy of domestic economy, to restrain trade, temporarily or otherwise, to suppress particular employments, or to secure a government monopoly. The Constitution does, however, explicitly say that the Federal Government has power to lay and collect taxes, duties, imposts, and excises, and since the taxing power is susceptible of being used to further the foregoing objectives, the Federal Government, as Mr. Justice Story points out, has power to further them through use of the taxing power. The fact that they are not set out as express powers in the Constitution does not cut down the plenary grant of the taxing power to the point where it may not be exerted to effectuate them.

Mr. Justice Story develops the same argument in connection with the commerce power. (*Commentaries on the Constitution*, Secs. 1079–1089.) He states the position which he is refuting, and which represents precisely the position now taken by the appellants, as follows (Sec. 1079):

> But the question is a very different one, whether, under pretense of an exercise of the power to regulate commerce, Congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this, whether a power exclusively for the regulation of commerce is a power for the regulation of manufactures?

In answering the question he begins by pointing out that those who claim that the commerce power should be used only for the sake of commerce and

the taxing power only for the sake of revenue "* * * admit that the power may be applied so as incidentally to give protection to manufactures, when revenue is the principal design; and that it may also be applied to countervail the injurious regulations of foreign powers, when there is no design of revenue" (Sec. 1081). He then continues (Sec. 1081):

> * * * These concessions admit, then, that the regulations of commerce are not wholly for purposes of revenue, or wholly confined to the purposes of commerce, considered *per se*. If this be true, then other objects may enter into commercial regulations; and, if so, what restraint is there as to the nature or extent of the objects to which they may reach, which does not resolve itself into a question of expediency and policy? It may be admitted that a power given for one purpose cannot be perverted to purposes wholly opposite, or beside its legitimate scope. But what perversion is there in applying a power to the very purposes to which it has been usually applied? * * *
>
> § 1082. * * * When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from all the States, and yet not delegated to the Union. The very suggestion would of itself have been fatal to the adoption of the Constitution. The manufacturing States would never have acceded to it upon any such terms; and they never could, without the power, have safely

acceded to it, for it would have sealed their ruin. The same reasoning would apply to the agricultural States; for the regulation of commerce, with a view to encourage domestic agriculture, is just as important, and just as vital to the interests of the nation, and just as much an application of the power, as the protection or encouragement of manufactures. It would have been strange, indeed, if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures, which had, at the time of the adoption of the Constitution, an unequivocal preponderance throughout the Union. It is manifest, from contemporaneous documents, that one object of the Constitution was to encourage manufactures and agriculture by this very use of the power.

* * * * *

§ 1089. Now, the motive of the grant of the power is not even alluded to in the Constitution. It is not even stated that Congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. Yet no man ever yet doubted the right of Congress to lay duties to promote and encourage domestic navigation, whether in the form of tonnage duties, or other preferences and privileges, either in the foreign trade,

or coasting trade, or fisheries. It is as certain as anything human can be, that the sole object of Congress, in securing the vast privileges to American built ships, by such preferences, and privileges, and tonnage duties, was, to encourage the domestic manufacture of ships, and all the dependent branches of business. It speaks out in the language of all their laws, and has been as constantly avowed and acted on as any single legislative policy ever has been. No one ever dreamed that revenue constituted the slightest ingredient in these laws. They were purely for the encouragement of home manufactures, and home artisans, and home pursuits. Upon what grounds can Congress constitutionally apply the power to regulate commerce to one great class of domestic manufactures, which does not involve the right to encourage all? * * * There are many products of agriculture and manufactures which are connected with the prosperity of commerce as intimately as domestic ship-building. If the one may be encouraged, as a primary motive in regulations of commerce, why may not the others? The truth is, that the encouragement of domestic ship-building is within the scope of the power to regulate commerce, simply because it is a known and ordinary means of exercising the power. It is one of many, and may be used like all others, according to legislative discretion. The motive to the exercise of a power can never form a consti-

tutional objection to the exercise of the power.

Appellants' argument amounts to contending that in addition to enumerating the powers conferred on the federal government, the Constitution should have enumerated the infinite variety of objectives or purposes for which those powers may be exercised. The plain answer is that it does not do so. The framers of the Constitution, designedly according to Marshall, couched even their grants of power in broad general terms, leaving much to implication. What Marshall has said in a famous passage in regard to this economy of expression relating to powers, amply explains and justifies the decision of the framers not to enumerate objectives. Marshall says (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407):

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.

This Court in repeated instances has sustained the exercise of the federal power over interstate

commerce to accomplish objectives, the promotion of which is not only not conferred on Congress by the Constitution in express terms but which, within the geographical limits of each separate state, were appropriate objects of state legislation. Thus, Congress has no general power to protect the morals of the people of the United States and, more specifically, has no power to give such protection by the suppression of lotteries. On the other hand, each state, within its own limits, may employ its police power to suppress lotteries. Nevertheless, this Court has held that the commerce power may be used with the objective of suppressing lotteries so far as that objective may be obtained by regulations of commerce, and the regulations are not invalid because the suppression of lotteries is their object (*Champion* v. *Ames,* 188 U. S. 321).

It could have been urged against the Pure Food and Drug Act that its purpose was to promote health and that the Constitution nowhere confers upon the federal government any power to promate health (*Hipolite Egg Co.* v. *United States,* 220 U. S. 45); it could have been urged against the Mann White Slave Act that its objective was to promote morality and that the Constitution nowhere confers upon the federal government the power to promote morality (*Hoke* v. *United States,* 227 U. S. 308); it could have been urged against the Motor Vehicle Theft Act and the Kidnaping Act that their objective was to prevent theft (of property or persons) and that the

Constitution nowhere confers upon the federal government the power to prevent theft (*Brooks* v. *United States,* 267 U. S. 432; *Gooch* v. *United States,* 297 U. S. 124). In all these cases, however, the Acts were sustained because, irrespective of their various objectives, what was regulated was interstate commerce. The fact that the objective of each was, in one way or another, to promote the general welfare did not invalidate them as regulations of commerce, but served rather to justify them under the due process clause. See p. 156, *infra.*

This Court has stated that Congress may exercise "the police power, for the benefit of the public, in the field of interstate commerce." *Brooks* v. *United States,* 267 U. S. 432, 436–437; *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* 299 U. S. 334, 347. As the Chief Justice declared in his opinion in *Carter* v. *Carter Coal Co.,* 298 U. S., at 319: "We are not at liberty to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce. See *Nebbia* v. *New York,* 291 U. S. 502." [52] The power of the states "in the regu-

[52] This view as to the scope of the commerce power stems from *Gibbons* v. *Ogden,* 9 Wheat. 1, 197, where Chief Justice Marshall said:

> * * * the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the con-

lation of their internal commerce" is absolute, subject only to the specific limitations of the Constitution, including those contained in the Fourteenth Amendment. States obviously need not regulate such commerce for a "commerce purpose," but may do so for any reason which their legislatures believe to be in the public interest. In the field of interstate commerce Congress must be equally free, subject only to the specific limitations in the Fifth Amendment. If federal legislation regulating interstate commerce does not violate the due process clause, it also must be constitutional irrespective of whether it has a "commerce purpose." The concept of a commerce purpose as a limitation on the power of Congress to regulate interstate commerce is thus inconsistent both with the historical background of the Constitution and with the cases decided under it.[53]

> stitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

In his concurring opinion in the same case Mr. Justice Johnson stated that (p. 227):

> The "power to regulate commerce," here meant to be granted, was that power to regulate commerce which previously existed in the states.

[53] The only case which might be regarded as inconsistent with these views is *Hammer* v. *Dagenhart*, 247 U. S. 251, which we believe to have been wrongly decided. The case is discussed *infra*, pp. 112–118.

(b) THIS ACT HAS A LEGITIMATE COMMERCE PURPOSE

Although it is our view that when interstate commerce itself is being regulated the purpose of Congress is immaterial, examination of the purposes of Congress in enacting the Agricultural Adjustment Act of 1938 will demonstrate that the statute is valid even if the most orthodox "commerce purpose" is deemed requisite. The purposes of Congress in enacting the marketing quota provisions of the Act are not subject to inference or speculation. Both the statute itself and the reports of the Congressional committees approving it state specifically what those purposes are.

Section 2 of the Act, entitled "Declaration of Policy," provides *inter alia* [54] that—

> It is hereby declared to be the policy of Congress * * * to assist in the marketing of agricultural commodities for domestic consumption and for export; and to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices.

[54] The omitted portion sets forth the policy supporting the Soil Conservation and Domestic Allotment Act, as amended by Title I of the Act.

The report of the Committee on Agriculture of the House of Representatives (H. R. Rep. 1645, 75th Cong., 2d Sess.) referring to the quota provisions of the House Bill, H. R. 8505, which, in the case of tobacco are substantially the same as the challenged sections of the Act, states (Appendix, p. 208):

> In years of excessive production it provides for the withholding from market in interstate and foreign commerce of surpluses of the five major non-perishable agricultural commodities for the purpose of removing the depressing effect which such surpluses exert on such commerce.

The Report of the Senate Committee on Agriculture and Forestry, S. Rep. 1295, 75th Cong., 2d Sess., likewise discloses the purpose to regulate interstate and foreign commerce in order to maintain a balanced quantity of farm products marketed in commerce and thereby to avoid the disorderly marketing which results from surpluses in years of excessive yield and shortages in lean years, and to stabilize prices so as to protect farmers against unreasonably high prices (Appendix, pp. 233–234).

Such statements by Congress as to its purposes in enacting legislation will, of course, be accepted by the courts. Although legislative findings of objective facts supporting constitutionality may establish the facts so described only presumptively, subject to disproof in judicial proceedings (*United*

States v. *Carolene Products Co.,* 304 U. S. 144, 152), a Congressional declaration of legislative purpose—a subjective matter—is not subject to review.

It should be noted that these purposes are to be achieved only through control of the amount marketed, not of the amount produced. The statute was not designed to prohibit production in excess of current market demands. On the contrary it was designed to encourage farmers to store quantities produced in excess of marketing quotas for use in lean years (see p. 63, *supra*).

That stabilization of the flow of commodities in interstate commerce and of the prices at which such goods are marketed, for the benefit of producers and consumers, is an appropriate purpose under the commerce clause cannot be gainsaid.

The appellants concede the power of Congress to prohibit all interstate commerce in things contraband or things likely to be injurious to the inhabitants of the several states (Appellants' Brief, p. 16). It is evident from the record and from the evidence considered by Congress that the marketing of abnormally excessive supplies of tobacco directly injures those who grow it and sell it in interstate and foreign commerce, and, if unregulated, interrupts and destroys such commerce itself. The prevention of these economic effects upon commerce and upon those engaged in commerce is much more closely related to the underly-

ing objectives of the commerce clause than protection of the public morals against lotteries (*Champion* v. *Ames, supra*), or prostitution (*Hoke* v. *United States, supra*), or theft (*Brooks* v. *United States, supra*), or kidnaping (*Gooch* v. *United States, supra*), or the protection of the public health against diseased livestock (*Reid* v. *Colorado,* 187 U. S. 137), or adulterated foods and drugs (*Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Seven Cases* v. *United States,* 239 U. S. 510), or diseased plants (*Oreg.-Washington Co.* v. *Washington,* 270 U. S. 87). The original purpose of the commerce clause was primarily economic, and the objectives of the most important commerce legislation enacted by Congress, like those of this Act, were to improve the economic well-being of the nation.

Probably the earliest commerce statute of note was the protective tariff, first enacted in 1789 (Act of July 4, 1789, c. 2, 1 Stat. 24). The well-known purpose of that statute, as well as of its numerous successors, was to protect and encourage American manufacturers against foreign competition by raising the prices on imported goods, thereby permitting domestic manufacturers to sell at increased prices. See Story, *supra,* §§ 1091–1092; Hamilton, *Report on Manufactures,* III Hamilton's Works 192. Similarly, the purpose of the Agricultural Adjustment Act is to raise prices to farmers (most of whom sell in interstate commerce) and stabilize marketings. That the pro-

tection of manufacturing through a tariff and the encouragement of agriculture were deemed by Story to be equally within the commerce power[55] appears from the passage quoted, *supra,* pp. 79–80, part of which so closely fits the instant case as to warrant repetition. The learned Justice there states (*Commentaries on the Constitution,* Sec. 1082):

> Now it is well known that, in commercial and manufacturing nations, the power to regulate commerce has embraced practically the encouragement of manufactures * * * When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from all the States, and yet not delegated to the

[55] The constitutionality of the tariff can be based on either the commerce power or the taxing power (*Board of Trustees* v. *U. S.*, 289 U. S. 48; *Hampton & Co.* v. *United States*, 276 U. S. 394). A purpose to protect the interests of manufacturers or farmers would seem to be more closely related to the former power than to the latter.

As was said by Judge Sibley, speaking for the Circuit Court of Appeals for the Fifth Circuit in *Whittenburg* v. *United States*, 100 F. (2d) 520, 522, after referring to the statement of policy in the Act (Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. § 608)):

> * * * This really states the public aim of the Act, and marks it as intending to regulate and sustain interstate commerce for the public good. But if better prices to farmers be taken as the aim, it is only the correction of an injustice that has long been wrought by another use of the commerce power in the fixing of protective tariffs, by which revenue was not sought to be raised, but prices to manufacturers increased, largely at the farmers' expense. The tariff operates only indirectly to raise prices, but is very effectual.

> Union. The very suggestion would of itself have been fatal to the adoption of the Constitution. The manufacturing States would never have acceded to it upon any such terms * * * The same reasoning would apply to the agricultural States; *for the regulation of commerce, with a view to encourage domestic agriculture, is just as important, and just as vital to the interests of the nation, and just as much an application of the power, as the protection or encouragement of manufactures.* It would have been strange, indeed, if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures * * *. [Italics supplied.]

In Sec. 1084 of the *Commentaries,* Justice Story proceeds:

> * * * No man can doubt that domestic agriculture and manufactures may be most essentially promoted and protected by regulations of commerce. No man can doubt that it is the most usual, and generally the most efficient means of producing those results. * * *

Similarly the ultimate purpose of every important statute enacted under the commerce clause has been not merly to promote the physical movement of commodities but to protect and benefit the public or particular groups of persons constituting the public. The ultimate purpose of the original interstate Commerce Act was to protect shippers against