unreasonable and discriminatory rail rates. The objective of the Sherman Act was to protect consumers against unreasonably high prices. The purposes of the Ashurst-Sumners Prison-Made Goods Act was to protect manufacturers and workers against the competition of poorly paid prison labor. The purpose of the Tobacco Inspection Act was to protect farmers against undue price variations. Each of the statutes referred to regulates interstate commerce itself,[56] as does the Act in question here.

The statutes upheld in *Stafford* v. *Wallace*, 258 U. S. 495, and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, regulated intrastate transactions directly affecting interstate commerce for the primary purpose of protecting farmers against low or fluctuating prices and unfair practices. In the *Stafford* case this Court pointed out (p. 514):

> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. * * * Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any

[56] Except for the Sherman Act, which also applies to intrastate restraints upon interstate commerce. See *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295.

> unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce.

The purpose of the regulation upheld in the *Olsen* case was the protection of producers and consumers against fluctuations in the price of grain caused by speculation and manipulation of the futures markets (262 U. S., at 537). The Court accepted the finding of Congress that such price fluctuations directly burdened and obstructed interstate commerce (*id.* at 39–40), thus, plainly indicating that control of the prices of agricultural commodities was a proper purpose of Congress under the commerce clause.

This brief analysis of the statutes and authorities demonstrates plainly that the commerce clause has always been regarded as most appropriately to be exercised to benefit the economic interests of the public—of manufacturers, farmers, shippers, or consumers. And the kind of regulation most frequently sustained has been that which has as its ultimate objective the raising (the tariff), lowering (Sherman Act), or stabilizing (Tobacco Inspection and Grain Futures Acts) of prices. As the Court pointed out in the *Olsen* case, in upholding federal regulation of intrastate transactions (262 U. S., at 40):

> The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it.

One of the primary goals of Congress in enacting the Agricultural Adjustment Act of 1938, was to control the marketing of agricultural commodities in order to stabilize farm prices at an adequate, fair level. A direct regulation of the prices sought to be controlled, most of which are prices in interstate sales, would, in the language of Mr. Justice Cardozo in the *Carter* case, have been "to regulate commerce itself" (298 U. S., at 326). Thus, the purpose of Congress in regulating one aspect of interstate commerce—the amount marketed—is to influence another aspect of interstate commerce—the price. A statute with an objective more legitimately or closely related to the regulation of interstate commerce would be difficult to find.

The same is true of the other primary purpose of the Act—balancing the flow in commerce of agricultural commodities so as to insure distribution proportionate to demand in years of over-production and of shortage. The *Stafford* and *Olsen* cases demonstrate that stabilizing the market through the removal of undesirable fluctuations in price and in the amount moved is an appropriate exercise of the commerce power even if applied to intrastate transactions. All the more so when interstate commerce itself is regulated as it is here.

What has been said disposes of the argument that the Act cannot be a regulation of commerce because it does not "benefit" commerce. A statute which is designed to aid and protect an interstate industry, including producers who sell in interstate

commerce, is designed to benefit commerce. Appellants' argument assumes that commerce is benefited only when it is increased, not when it is restricted. That obviously is not so, as the many cases sustaining statutes prohibiting commerce demonstrate. As Mr. Justice Cardozo said in his dissenting opinion in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, at 438 (on a point not passed upon in the majority opinion), with respect to restricting the interstate transportation of illegally produced petroleum:

> In its immediacy, the exclusion * * * from the channels of transportation is a restriction of interstate commerce, not a removal of obstructions. * * * But what is restriction in its immediacy may in its ultimate and larger consequences be expansion and development.

Commerce is benefited when an over-supply which unduly depresses prices is kept off the market, as well as when an obstruction to trade is removed. Cf. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 372. There is no such thing as benefit to commerce in the abstract; the commerce power protects and promotes the interests of the public generally and of the persons who engage in or are dependent upon commerce.

But in any event the Constitution does not give Congress power only to "benefit" or "promote" commerce, but to regulate it. The power to regulate includes the power to restrain, as this Court

has frequently indicated. *Second Employers' Liability Cases,* 223 U. S. 1, 47; *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U. S. 548, 570; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 37. "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." Story, *Commentaries,* Sec. 1089. See also *United States* v. *The William,* Fed. Cas. No. 16,700, 28 Fed. Cas. 614, p. 106.

3. *Even though the Act were to be regarded as a direct regulation of the amount of tobacco produced, it would not for that reason fall without the commerce power*

We believe that this Act has been plainly shown to be a regulation of marketing and not of production. However, the appellants' arguments are all based upon the proposition that the Act is a regulation of production. Accordingly, we deem it desirable to point out, in addition, that even if it were so regarded it would nevertheless be valid.[57]

This Court has frequently pointed out that "the power to regulate commerce is the power to enact

[57] We have shown that there is a distinction between regulating the amount marketed and regulating the amount produced. However, in this section of the brief we are accepting, for purposes of the argument, appellants' premise that this distinction is unreal. We, accordingly, treat findings and evidence as to the quantity of tobacco "marketed" and "produced" without making the differentiation which we insist upon elsewhere in the brief.

'all appropriate legislation' for 'its protection and advancement' (*The Daniel Ball,* 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile* v. *Kimball,* 102 U. S. 691, 696, 697); 'to foster, protect, control, and restrain.' *Second Employers' Liability Cases, supra,* p. 47. See *Texas & N. O. R. Co.* v. *Ry. Clerks, supra.* That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it'. *Second Employers Liability Cases,* p. 51; *Schechter Corp.* v. *United States, supra.* Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. * * *

"The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. * * *" *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, at 36–38; *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 464.

These principles have been applied to intrastate transactions occurring before interstate commerce begins. *Coronado Co.* v. *U. M. Workers,* 268 U. S. 295; *Santa Cruz Co.* v. *Labor Board, supra.* In the

Santa Cruz case the Court held that (303 U. S. at 465):

> With respect to the federal power to protect interstate commerce in the commodities produced, there is obviously no difference between coal mined, or stone quarried, *and fruit and vegetables grown.* [Italics supplied.]

The Court there rejected the petitioner's argument as to its productive facilities not being subject to the commerce clause partly upon the ground that petitioner itself was engaged in interstate commerce. This is just as true of the growers of tobacco here as it was of the Fruit Packing Company; both sell the commodities they grow or process for shipment in interstate commerce.[58]

Thus even if the Act were to be deemed a regulation of production, it would not be invalid in the absence of a showing that the production so regulated does not directly affect interstate commerce.

The facts of record and those of which this Court may take notice demonstrate that the effect upon commerce of the amount of tobacco produced is direct and substantial. They thus bulwark the presumption that facts exist to support the legislative judgment and the findings of Congress in the statute and committee reports, which, unless dis-

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[58] Congress may also regulate local activities of persons who, themselves, engage in no interstate activities whatever if their activities directly affect interstate commerce. *Consolidated Edison Co.* v. *National Labor Relations Board*, No. 19, this term.

proved, are binding upon the Court. See *U. S.* v. *Carolene Products Co.,* 304 U. S. 144; *Stafford* v. *Wallace,* 258 U. S. 495; and *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. Here neither the presumption nor the findings have been disproved. On the contrary the record supports them. Thus the Court here is doubly bound to accept the findings of the legislature.

In Section 311 of the Act Congress made the following findings with respect to tobacco:

> (b) The disorderly marketing of such abnormally excessive supplies affects, burdens, and obstructs interstate and foreign commerce by (1) materially affecting the volume of such commodity marketed therein, (2) disrupting the orderly marketing of such commodity therein, (3) reducing the price for such commodity with consequent injury and destruction of interstate and foreign commerce in such commodity, and (4) causing a disparity between the prices for such commodity in interstate and foreign commerce and industrial products therein, with a consequent diminution of the volume of interstate and foreign commerce in industrial products.
>
> (c) Whenever an abnormally excessive supply of tobacco exists, the marketing of such commodity by the producers thereof directly and substantially affects interstate and foreign commerce in such commodity and its products, and the operation of the provisions of this Part becomes necessary

> and appropriate in order to promote, foster, and maintain an orderly flow of such supply in interstate and foreign commerce.

These findings are repeated and amplified in the reports of the Congressional Committees (see Appendix, *infra, pp.* 205–240). The legislative findings and the record demonstrate that the amount of tobacco produced and marketed determines the supply, which consists of the amount produced and marketed each year, plus the quantity in storage from preceding years. Supply, present and prospective, is the predominant determinant of the price (R. 78). Because the cost of tobacco is only a small part of the cost to consumers of manufactured tobacco products [59] and because the manufacturers follow fixed price policies (H. R. Rep. 1645, Appendix, p. 224), neither the consumer demand nor the price paid

[59] A computation from the record demonstrates that the cost of the flue-cured tobacco (52 percent of the total tobacco) in a standard package of cigarettes selling from 12 to 15 cents is less than three-fourths of a cent. The record shows that almost all cigarettes weigh *less* than 3 pounds per thousand (R. 71). Assuming a weight of 3 pounds per thousand, the weight of a package of 20 cigarettes would be 6/100 of a pound. With 52 percent of the tobacco flue-cured (R. 64), the flue-cured tobacco in the pack would weigh 3/100 of a pound. At the 1937 price of 23 cents a pound (R. 79) this would bring the farmer .69 of a cent. This figure should be adjusted slightly upward because of a small difference between farm sales weight of tobacco and weight after processing.

The remainder of the price paid by the consumer goes to cover taxes, manufacturing, distributing, advertising, and

by consumers is materially affected by changes in the price paid to growers for tobacco. Accordingly, a decrease in the farm price does not result in increased consumption, with the consequent adjustment between supply, demand, and price which would be expected under orthodox, economic theory (H. R. Rep. 1645; Appendix, p. 224). With demand relatively stable price is controlled largely by supply.

The price of course, also affects the supply, but only at yearly intervals. Prices may vary from day to day while the supply depends upon the amount marketed each year. Moreover, since farmers have inadequate knowledge of demand and would be unable to use that knowledge if they possessed it, since at the time they plant their crop, they are only informed of the previous years' prices, and since (except after years of unduly low prices) each farmer feels that it is to his interest to plant as much as he can, they are in no position to adjust either their marketing or their production so as to conform accurately to demand or to control price except in a rough way and over a period of years (R. 73–74).

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storage costs, and profits for the manufacturers and dealers (R. 73–74, 84).

A change of 20 percent in the farm price would affect the consumer's price only 1 percent—from .12 to .15 of a cent. Changes that small probably would not be passed on to the consumer through an increase in the retail price, even if the manufacturers did not follow fixed price policies.

Consequently, although price and supply each react upon the other, over a short term, price is dominated by supply. The record states that: "The price of flue-cured tobacco reacts to changes in the supply. During the period 1920 to 1937 the changes in the supply were associated with changes in the price. With the exception of one year (1922), the price has decreased relative to the previous year when the supply increased relative to the previous year. Without exception the price has increased relative to the previous year when the supply decreased relative to the previous year (Table 14, Chart II)" (R. 78).

Even more significant than the obvious relationship between supply and price is the relationship between an excessive supply and a fair price to the farmer. The record states that "In years when the actual supply was greater than the reserve supply level, the price of flue-cured tobacco was lower relative to the parity price.[60] * * * In years when the actual supply was less than the reserve supply level, prices of flue-cured tobacco were higher relative to parity prices" (R. 78).

Moreover a relatively small excess will bring about a large diminution of price. (See Chart IV,

[60] The "parity price" or "computed price" used in the stipulation (R. 78–79) as an index of the purchasing power of a pound of tobacco is the season's average price that would have given flue-cured tobacco the same purchasing power with respect to things farmers buy that existed during the ten-year period August 1919–July 1929 (R. 78–79) (see Section 2, and Section 301 (a) (1) Appendix, pp. 177, 179).

R. 82.) For example between 1929 and 1930 the excess of actual supply over the reserve supply level increased by only 6 percent (R. 76). The average price in the same period dropped 33.3 percent, from 20 percent below the parity price to 40 percent below the parity price (R. 79, 82). As would be expected where demand is inelastic a small excess of supply usually causes a large decrease in price.

This analysis indicates that the most appropriate method of stabilizing the price of tobacco (apart from price-fixing itself) is by striking at the primary cause of price fluctuations—an unbalanced supply. That may be done either by regulating the quantity produced or by regulating the quantity which may be marketed when supplies are excessive. Either method would have the effect of diminishing fluctuations. Thus control of production would constitute one appropriate means of protecting interstate commerce in tobacco against the price fluctuations described above.

That it is proper for Congress to regulate local activity in order to stabilize interstate prices cannot be subject to doubt. The most striking illustration of such an exercise of federal power is the Grain Futures Act upheld in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. That statute regulated contracts for sales of grain for future delivery, most of which, this Court said (p. 36), "do not result in actual delivery but are settled by offsetting them

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with other contracts of the same kind." The sales were between buyers and sellers in the city of Chicago, but they affected the price at which cash grain was sold throughout the country. Thus the question was not one of regulating the movement or the sale of a commodity in interstate commerce, but of regulating purely local activity which Congress had found affected the price of commodities moving in interstate commerce and caused price fluctuations which burdened and obstructed interstate commerce.

This Court sustained the regulation, declaring (pp. 39, 40):

> Manipulations of grain futures for speculative profit * * * exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only * * * justifiable hedging but disturb the normal flow of actual consignments.
>
> * * * * *
>
> If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the States. *Sales of an article which affect the*

> *country-wide price of the article directly affect the country-wide commerce in it.* [Italics supplied.]

If Congress can regulate intrastate sales of grain futures because of their effect upon the price of grain,[61] it should equally have the power to regulate the quantity of tobacco marketed or produced because of its effect upon the price of tobacco.[62]

Neither argument nor evidence should be necessary to demonstrate that the amount of tobacco produced directly affects the amount shipped in interstate commerce. The larger—or smaller—quantity produced, the larger—or smaller—the quantity moving in interstate commerce. Control of the amount produced clearly would be a reasonable and appropriate means of exercising the unquestionable power of Congress to regulate the amount of a commodity to be permitted in interstate com-

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[61] The more recent cases sustaining the validity of regulation of the futures markets are *Moore* v. *Chicago Mercantile Exchange*, 90 F. (2d) 735 (C. C. A. 7th), certiorari denied, 299 U. S. 606; *Bennett* v. *Board of Trade of City of Chicago*, 90 F. (2d) 735 (C. C. A. 7th), certiorari denied, 299 U. S. 606; *Board of Trade of Kansas City* v. *Milligan*, 90 F. (2d) 855 (C. C. A. 8th), certiorari denied, 299 U. S. 610. See also *Pete* v. *Howell*, decided December 14, 1938 (C. C. A. 7th), holding a corner on the grain exchanges a violation of the Sherman Act.

[62] The record here indicates that extremely low prices for tobacco may have the effect of completely obstructing the movement of the commodity in commerce. See pp. 35–37, *supra*.

merce. See *United States* v. *The William*, Fed. Cas. 16,700, 28 Fed. Cas. 614; *Griswold* v. *The President of the United States*, 82 F. (2d) 922. To hold that the effect of the amount produced upon the amount shipped is not direct would be "to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum." *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 41.

Cases under the Antitrust laws demonstrate that Congress may exercise its commerce power over intrastate transactions because of their effect upon the supply and price of goods moving into interstate commerce. *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163; *Coronado Co.* v. *U. M. Workers*, 268 U. S. 295; *United States* v. *Patten*, 226 U. S. 525; *Swift and Company* v. *United States*, 196 U. S. 375, 397; *United States* v. *Trenton Potteries*, 273 U. S. 392. In the *Standard Oil* case, *supra*, the Court declared (p. 169):

> Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to *limit the supply or to fix the price* of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. [Italics supplied.]

In the second *Coronado* case the Court ruled that "while the mere reduction in the supply of an article to be shipped in interstate commerce by the

illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the 'intent of those unlawfully preventing the manufacture or production is shown to be to *restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets,* their action is a direct violation of the Antitrust Act.' " (Italics supplied.) *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 40. The existence of a direct effect in fact upon interstate commerce plainly takes the place of the intention to restrain such commerce found necessary in the *Coronado* case.[63] *Labor Board* v. *Jones & Laughlin, supra; Santa Cruz* v. *Labor Board,* 303 U. S. 453; *Stafford* v. *Wallace,* 258 U. S. 495, 520.

The purpose of the Sherman Act is to prevent private restrictions upon the supply and price in interstate commerce because Congress regarded such restrictions as harmful to such commerce. With respect to the basic farm commodities, Con-

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[63] There is a close parallel between the second *Coronado* case and the case at bar. In the one, the justification for Federal control is the effect upon commerce of a stoppage of production; in the other, it is the effect upon commerce of overproduction. In the one, the exercise of Federal power was occasioned by conditions which concerned production of an insignificant portion of the country's coal resources, coupled with a possible slight effect upon price. In the other, Federal power has been exercised by reason of the fact that conditions governing the supply of tobacco present a constant threat to the entire fabric of interstate commerce in that commodity.

gress now, with good reason, regards excessive supply and low prices as detrimental to commerce. The Antitrust Acts and the Agricultural Adjustment Act of 1938 reflect the fact that differing economic conditions call for different remedies. But both have the same objectives, the protection and promotion of interstate commerce. There can be no difference in constitutional power over intrastate transactions where the purpose is to protect interstate commerce against high prices and a limited supply and where the purpose is to protect it against low prices and an oversupply. It is the function of Congress to choose between economic theories and to determine the particular policy deemed necessary for the protection of interstate commerce against whatever evils affect it. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337; *Nebbia* v. *New York*, 291 U. S. 502; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 319, 332 (dissenting opinions).

These decisions demonstrate that it is proper for Congress to regulate intrastate transactions because of their effect upon price and supply in interstate commerce. The effects of excessive marketing upon price and supply in such commerce were stated by Congress to be the reason for enacting the quota regulations in the Agricultural Adjustment Act of 1938. The purpose of the Act is to relieve interstate and foreign commerce from the disruptive effect of marketing more tobacco than can be absorbed at fair prices. A statute which was

designed to and which did protect and foster interstate commerce by these means would be valid no matter whether its primary impact was on interstate or intrastate transactions, on marketing, or on production.

4. *The cases relied on by appellants are not controlling*

(a) UNITED STATES V. BUTLER AND CASES UNDER THE KERR-SMITH TOBACCO ACT

The Agricultural Adjustment Act of 1933 (48 Stat. 31) provided for the payment of benefits to farmers who would agree to reduce acreage and for the imposition of processing taxes in order to provide funds for the benefit payments. A majority of this Court held in *United States* v. *Butler,* 297 U. S. 1, that this constituted a regulation of production rather than an exercise of the power to tax and provide for the general welfare of the United States. The provisions of the 1933 Act there under review did not purport to regulate interstate or foreign commerce, and it was not claimed that they were valid under the commerce power (pp. 63–64).

The present Act regulates marketing, not production. It is based on the determination of Congress that marketing both constitutes and directly affects interstate and foreign commerce and there is ample evidence in the record to confirm this finding. The purpose and effect of the Act are to stabilize marketing and price, both legitimate objectives under the commerce clause. Cf. *Currin* v. *Wallace, supra.* Thus, the present Act does not

regulate the subject matter found in the *Butler* case to be beyond the scope of federal power.

Even if the present statute be deemed a regulation of intrastate activity or production, it would not follow, because such a regulation could not be based upon the power to tax and provide for the general welfare that it does not come within the commerce power. Under the commerce power Congress may regulate incidents of production which directly affect interstate commerce (see pp. 96–98, *supra*). Any language in the *Butler* case susceptible of the construction that under no circumstances or under any granted power could such intrastate acts be regulated must be deemed to have been qualified by the subsequent decisions of this Court to the contrary in the Labor Board cases.[64]

It is clear from *Hill* v. *Wallace,* 259 U. S. 44 and *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, that Congress may utilize the commerce power to regulate subjects which it may not reach under the taxing power. The former case held invalid the Futures Trading Act (42 Stat. 187) which imposed prohibitive taxes on certain types of dealing in grain futures. The latter case sustained the constitutionality of the Grain Futures Act (42 Stat. 998), which contained an identical system of regulation under the commerce clause.

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[64] *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453; *Consolidated Edison Co.* v. *Labor Board*, Oct. Term, 1938, No. 19, this term.

The Kerr-Smith Tobacco Act (48 Stat. 1275, 7 U. S. C. § 751) was a companion measure to the provisions of the Agricultural Adjustment Act of 1933 held invalid in the *Butler* case, and was repealed shortly after the decision in that case (49 Stat. 1106). The regulations in the two statutes were interconnected, in that farmers who carried out contracts with the Secretary of Agriculture to adjust production under the 1933 Adjustment Act were exempted from the Kerr-Smith Act. The cases holding the latter act invalid are grounded entirely upon the *Butler* case. *Robertson* v. *Taylor,* 90 F. (2d) 812 (C. C. A. 4th); *Glenn* v. *Smith,* 91 F. (2d) 447 (C. C. A. 6th), certiorari denied, 301 U. S. 691. See also *United States* v. *Moor,* 93 F. (2d) 422 (C. C. A. 5th) certiorari denied, 303 U. S. 663, a similar decision under the Bankhead Act. These decisions can, of course, carry no greater authority than the decision of this Court upon which they rely.

(b) CASES SUSTAINING STATE TAX OR REGULATORY STATUTES

Many of the cases cited by appellants hold only that state tax or regulatory statutes are constitutional (*Kidd* v. *Pearson,* 128 U. S. 1; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210; *Coe* v. *Errol,* 116 U. S. 517; *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129). That such cases do not establish a limitation upon the power of Congress is clear. As this Court said

in *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 466:

> Nor are the cases in point which are cited by petitioner with respect to the exercise of the power of the State to tax goods, which have not begun to move in interstate commerce or have come to rest within the State, or to adopt police measures as to local matters. In that class of cases the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority. *Bacon* v. *Illinois,* 227 U. S. 504, 516; *Stafford* v. *Wallace, supra,* p. 526; *Minnesota* v. *Blasius,* 290 U. S. 1, 8.

(C) HAMMER V. DAGENHART

Hammer v. *Dagenhart,* 247 U. S. 251, denied to Congress the power to prohibit the interstate shipments of products from factories employing child labor. The case has been treated in later decisions (*Brooks* v. *United States,* 267 U. S. 432; *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* 299 U. S. 334) as holding the Child Labor Act invalid "because it was not really a regulation of interstate commerce but a Congressional attempt to regulate labor in the state of origin, by an embargo upon its external trade." Since in the act here under consideration Congress is not controlling production, but regulating interstate commerce in order to further orderly marketing and insure reasonable

prices in such commerce itself (see pp. 86–88, *supra*), the same comment cannot legitimately be made. For this reason *Hammer* v. *Dagenhart* is distinguishable.

But we do not believe that in any real sense the Child Labor Act was a mere regulation of labor in the States. The statute in terms prohibited interstate shipments; it thus regulated interstate commerce itself, and nothing else. Four justices of this Court thought at the time that such a statute was a regulation of interstate commerce within the meaning of the Constitution. We believe that they were correct, and that their views have been given effect by the Court in subsequent decisions. *Brooks* v. *United States,* 267 U. S. 432; *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* 299 U. S. 334; cf. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1.

The majority of the Court in *Hammer* v. *Dagenhart* advanced a number of reasons why the prohibition of the interstate transportation of child-made goods was not a regulation of interstate commerce. We will consider each in turn.

(1) The majority stated that Congres did not have the power to prohibit the interstate movement of "ordinary" or "harmless" commodities (pp. 270–272). A similar contention was held "inadmissable" in *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* 299 U. S. 334, 347–348, and since it is inconsistent

with that case as well as others, we can assume that to that extent *Hammer* v. *Dagenhart* is no longer law.

(2) As a corollary to the argument just considered, the opinion suggested that the power to restrict interstate transportation may be exercised only when necessary to avoid "the accomplishment of harmful results" (p. 271), and that the Child Labor Act can not be deemed to fall within that category. This argument appears to be no more than a restatement of the first; it is clear from the opinion that only "harmful commodities" (such as impure food, lottery tickets, liquor, and women) were considered capable of producing "harmful results." The opinion does not find that the use of child labor and dissemination of its effect through the channels of interstate commerce is not an evil, but rather suggests the contrary (p. 275). Thus the decision could hardly have been justified if the phrase "harmful results" had been given its ordinary or natural meaning. Accordingly, even if the "harmful result" limitation be read into the commerce clause—and we submit that the Constitution does not permit of that construction—the ruling of the Court was not warranted. This Court has so held with respect to a strictly comparable evil—the use of prison labor. Cf. *Ky. Whip & Collar Co.* v. *I. C. R. Co., supra.*

(3) The opinion holds that Congress may not "control interstate commerce" in order to prevent "unfair competition" between manufacturers in

States with different standards of labor (p. 273). Since there can be no question as to the general power of Congress to prevent unfair competition in interstate commerce, the rationale of the opinion must either be that the use of cheap child labor could not be declared unfair, or that an unfair practice occurring during the course of the production of goods to be shipped into interstate commerce could not be subjected to the commerce power no matter how great its effect upon interstate competition. The opinion does not seek to establish the first of these propositions; and the second is inconsistent with the doctrine that Congress may protect interstate commerce against injury "no matter what the source of the dangers which threaten it." *Second Employers' Liability Cases,* 223 U. S. 1, 51; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 37. This principle has been applied not only to labor relations in productive industry (*Santa Cruz Co.* v. *Labor Board, supra*), but also and more frequently to intrastate acts which give an advantage in interstate competition to persons engaged in practices regarded by Congress as unfair or otherwise against public policy (*Swift and Company* v. *United States,* 196 U. S. 375; *United States* v. *Patten,* 226 U. S. 525; *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Coronado Co.* v. *U. M. Workers,* 268 U. S. 295; *Stafford* v. *Wallace,* 258 U. S. 495; *Van Camp & Sons* v. *Am. Can Co.,* 278 U. S. 245; *American Can Co.* v. *Ladoga Canning Co.,* 44 F. (2d) 763, certiorari denied, 282 U. S.

899.[65] Cf. *Houston & Texas Ry.* v. *United States,* 234 U. S. 342.

(4) The opinion in *Hammer* v. *Dagenhart* holds that "a statute must be judged by its natural and reasonable effect" (p. 275), and that since the prohibition against interstate shipment of child-made goods necessarily affected child labor it was not a regulation of interstate commerce. We have pointed out above (*supra,* pp. 67–73) that the constitutionality of a regulatory statute is to be determined by what it regulates, not by what it affects. We will say no more about this question here. We believe that the dissenting opinion clearly reveals the unsoundness of the ruling of the majority, and now represents the law of the Court.

(5) The majority further holds that the regulation of labor conditions in manufacturing enterprise is a purely local matter, that accordingly it falls within the power reserved to the States, and that the Tenth Amendment precludes Congress from regulating interstate commerce so as to invade that field. The Labor Board cases, establish-

[65] The *Ladoga Canning* case permitted a packing company to recover triple damages under Sections 2 and 4 of the Clayton Act because the defendant manufacturer sold cans to a packing company, a competitor of the plaintiff, at discriminatory prices. The court upheld this application of the statute although over 99% of the sales of the defendant to the favored concern were intrastate (see p. 770), upon the ground that the price discrimination in the intrastate sales of cans affected interstate commerce in the goods manufactured therefrom.

ing that Congress may regulate labor relations in industry when they directly affect interstate commerce, are inconsistent with the premise of this argument. Moreover, the Child Labor Act did not regulate intrastate transactions affecting interstate commerce, but regulated interstate transportation itself. The opinion thus seems to hold that an exercise of the commerce power may invade the reserved rights of the States under the Tenth Amendment. Since that Amendment reserves to the States only the powers not granted to Congress, such a construction would be contrary to its plain terms.[66] This subject is considered more fully below, *infra,* pp. 120–138.

None of the reasons advanced in support of the decision in *Hammer* v. *Dagenhart* has a sound basis.[67] The effect of the decision was to establish a limitation upon the commerce power which is contained nowhere in the Constitution, and is contrary to the nature of the grant as defined in cases running from *Gibbons* v. *Ogden*, 9 Wheat. 1, 196,

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[66] The majority opinion seems to amend the Tenth Amendment by inserting therein the word "expressly" (p. 275); the Court states that "the powers not expressly delegated to the national government are reserved" to the States and to the people. That the word "expressly" was intentionally omitted from the Amendment is shown by its history. See p. 125, *infra;* Story, *Commentaries*, Sections 1907–1908.

[67] If necessary, it would not be difficult to show that a statute designed to eliminate competitive advantages resulting from the use of child labor on commodities competing in interstate commerce had a legitimate "commerce purpose."

to the most recent decisions of this Court. *Ky. Whip & Collar Co.* v. *I. C. R. Co., supra; U. S.* v. *Carolene Products Co.,* 304 U. S. 144, 147; *Currin* v. *Wallace, supra.* The decision in *Hammer* v. *Dagenhart* created a no-man's land in which neither State nor Nation could function—just as would a holding in the instant case that Congress may not regulate the marketing of agricultural commodities in interstate commerce. The states are precluded by the commerce clause itself from prohibiting interstate shipment of child-made goods. Cf. *Leisy* v. *Hardin,* 135 U. S. 100. Under the decision in *Hammer* v. *Dagenhart* the power thus lost to the States did not pass to the Nation. The establishment of such a hiatus in governmental power is plainly contrary both to the letter and spirit of the Constitution. Story, *Commentaries,* Section 282; *Carter* v. *Carter Coal Co.* 298 U. S. 238, 326 (dissenting opinion of Mr. Justice Cardozo).

For these reasons it is respectfully submitted that this Court has abandoned the principles which governed the unfortunate decision of a bare majority of this Court in *Hammer* v. *Dagenhart* and that that case may no longer be regarded as an authority.

D. CONCLUSION

In *The Minnesota Rate Cases,* 230 U. S. 352, 398, quoting from *Gibbons* v. *Ogden,* 9 Wheat. 1,

195,[68] this Court declared with respect to the line of demarcation between federal and state power under the commerce clause:

> * * * The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States. "The genius and character of the whole government," said Chief Justice Marshall, "seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. * * *"

Under this classical definition of the scope of the commerce clause, there can be no doubt as to the power of the federal government to deal with such major national economic problems as those which have long confronted American agriculture.

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[68] See also *Mayor of New York* v. *Miln*, 11 Pet. 102, 146; *The Daniel Ball*, 10 Wall. 557, 564; *Kidd* v. *Pearson*, 128 U. S. 1, 17; *Champion* v. *Ames*, 188 U. S. 321, 346; *Employer's Liability Cases*, 207 U. S. 463, 493, 507 (both majority and dissenting opinions). See Stern, *That Commerce which Concerns more States Than One*, 47 Harv. L. Rev. 1335.

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II

THE MARKETING QUOTA PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT DO NOT VIOLATE THE TENTH AMENDMENT

It has been shown that the marketing quota provisions of the Agricultural Adjustment Act are an exercise of the power of Congress to regulate interstate and foreign commerce. This disposes of appellants' argument that the Act violates the Tenth Amendment, which merely provides that:

> * * * The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Language could not express more clearly the thought that the Amendment does not reserve to the states any part of any power which is "delegated to the United States by the Constitution," nor indicate more plainly that the Amendment does not limit the scope of any power which is delegated to the United States. The Amendment has no independent operation. It comes into effect only after a determination that an Act of Congress is not authorized under the granted powers.

These propositions seem self-evident. But several relatively recent decisions of this Court are susceptible of being interpreted as giving the Amendment greater sweep than its language permits. Under these circumstances we deem it proper to call to the Court's attention both the

historical facts surrounding the adoption of the Amendment and the long line of cases in which it has been construed as meaning only what it says.

A. THE HISTORY OF THE ADOPTION OF THE TENTH AMENDMENT

The first ten amendments are a close adaptation of those proposed by Massachusetts in ratifying the Constitution.[69] At that time four States had ratified. The opposition was strong and becoming increasingly vocal in the states yet to act. The omission of a bill of rights was generally regarded as the most vulnerable point in the proposed charter.[70] John Hancock, president of the Massachusetts Convention, accordingly introduced the proposed amendments "in order to remove the doubts and quiet the apprehensions of gentlemen" (Elliot's Debates, II, 123). John Adams welcomed the proposal with enthusiasm; it would allay doubts, conciliate opposition, and serve to ease the path of ratification in the eight states which had not acted. Stillman considered them "peace-makers" (Elliot, II, 123–124, 169). These predictions were fulfilled. South Carolina, New Hampshire, Virginia, and New York each ratified the Constitution but expressed their earnest hope for amendments; only

[69] The first of the nine recommendations of Massachusetts read: "That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised" (Elliot's Debates, I, 322).

[70] Warren, *The Making of the Constitution*, p. 769.

the North Carolina convention insisted upon amendments prior to ratification.[71]

The discussion in the ratifying convention confirms the plain meaning of the words of the Tenth Amendment, and indicates that the proponents wished merely to insure that the central government would be one of delegated powers. In Massachusetts Adams stated that the proposed amendment "removes a doubt which many have entertained" and made sure that "if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution," it would be held unconstitutional (Elliot's Debates, II, 131). Jarvis agreed as to the desirability of the proposal, to "remove every doubt on this head" (*id.,* II, 153). In Virginia, Grayson thought, since there was a similar clause in the Articles of Confederation, it could not be "totally unnecessary" (*id.,* III, 449). Mason agreed, since the amendment would "remove our apprehensions" (*id.,* III, 442). Bloodworth, in North Carolina, urged the amendment because "every possible precaution

[71] Elliot's Debates, I, 325–332. It may be noted that only in Massachusetts and New Hampshire was the Tenth Amendment offered as an amendment (Elliot, I, 322, 326); in South Carolina, Virginia, and New York it was set forth as declaratory of the conventions' understanding of the construction of the Constitution (*id.*, I, 325, 327). Maryland ratified without attaching proposed amendments, but its convention addressed a statement to the people of that State, explaining that the Constitution was "very defective," and recommending various amendments, including one similar to the Tenth Amendment (*id.*, II, 547, 550).

should be taken when we grant powers" (*id.,* IV, 167). The delegates who opposed the amendment did so largely on the ground that it was unnecessary, if not dangerous.[72]

The anxiety for this declaratory rule of construction may be traced to two fears: that the national government might assert the right to exercise powers not granted, and that the states would be unable fully to exercise the powers which the Constitution had not taken from them. The first fear may be exemplified by Bloodworth of North Carolina, who warned that "without the most express restrictions, Congress may trample on your rights" (Elliott, IV, 167). So, too, Patrick Henry inveighed against the surrender of powers to the national government "without check, limitation, or control" (*id.,* III, 446). But perhaps the most frequently expressed purpose was to insure that the states should continue able to exercise the numerous powers which had *not* been granted to Congress. Grayson of Virginia "thought it questionable whether rights not given up were reserved" (*id.,* III, 449). Henry of Virginia thought ratification of the unamended constitution "the most absurd thing to mankind that ever the world saw—a government that has abandoned all its powers" (*id.,*

[72] Massachusetts: Varnum (Elliot, II, 78); Virginia: Nicholas, Randolph and Madison (*id.*, III, 450, 464, 600, 620, 626); North Carolina: Maclaine and Iredell (*id.*, IV, 140, 149); South Carolina: Pinckney (*id.*, IV, 315–316); Pennsylvania: Wilson and M'Kean (*id.*, II, 435–436, 540).

III, 446). Mason of Virginia asked, "Is there any thing in this Constitution which secures to the states the powers which are said to be retained?" (*id.*, III, 441).[73]

When the proposed amendments were introduced by Madison in the first Congress, "to give satisfaction to the doubting part of our fellow-citizens" (1 Annals of Congress 432), he viewed the Tenth Amendment as merely declaratory (1 Annals 441):

> I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.

There was no other explanatory statement in the briefly recorded debate on this Amendment. But Madison in the course of debate on Hamilton's bank proposal, on February 2, 1791, when nine states had ratified the amendments which he had proposed, said (2 Annals 1897):

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[73] For the possible convenience of the Court, citations to additional discussion of the proposals which became the Tenth Amendment are: Elliot's Debates, II, 153, 540; III, 464, 588, 589, 622.

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.

Finally, any possibility of doubt must be removed when it is remembered that the adoption of the Tenth Amendment was accompanied by a deliberate refusal to reserve to the states all powers not "expressly" granted to the national government. This was the wording of Article II of the Articles of Confederation,[74] of the Massachusetts [75] and New Hampshire [76] proposals, of the South Carolina declaration,[77] and of the Maryland convention's statement to its electors.[78] New York referred to powers

[74] "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States * * *."

[75] See footnote 69, *supra.*

[76] "That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised" (Elliot, I, 326).

[77] "This Convention doth also declare, that no section or paragraph of the said Constitution warrants a construction that the states do not retain every power not expressly relinquished by them, and vested in the general government of the Union" (*id.*, I, 325).

[78] "That Congress shall exercise no power but what is expressly delegated by this Constitution" (*id.*, II, 550).

"clearly" delegated.[79] Only Virginia, in its declaration, made no such qualification.[80] While Madison's proposals for new amendments were under consideration in Congress, Tucker and Gerry each moved to amend this proposal so as to reserve to the states the powers not *expressly* delegated; each motion was defeated (1 Annals of Congress 761, 767–768). Even the original reservation in the Articles of Confederation of powers not "expressly" delegated, it is to be noted, was intended by the Continental Congress to do no more than to preserve the autonomy of the states.[81] Whether or not a reservation to the states of powers not expressly delegated would have impaired the last clause of Section 8 of Article I, granting "necessary and proper" powers, it is plain that there was a deliberate choice of the Congress to except from the reservation to the states the powers granted to Con-

[79] "* * * that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress * * * remains to the people * * * or to their respective state governments * * *" (*id.*, I, 327).

[80] "* * * that every power not granted thereby remains with them (the people) * * *" (*id.*, I, 327).

[81] Thomas Burke, writing to Governor Caswell from the Congress, on May 23, 1777, said the proposal originally "expressed only a reservation of the power of regulating the internal police, and consequently resigned every other power. It appeared to me that this was not what the States expected, and, I thought, it left it in the power of the future Congress * * * to make their own power as unlimited as they please." Burke accordingly proposed the Article which, after two days of spirited debate, was adopted 11–1, with one state divided. 7 Journals of Cont. Cong. 122–123.

gress by implication. This choice cannot be squared with any argument that appropriate federal powers cannot be exercised because of the operation of the Tenth Amendment.

In summary, the men who proposed the Tenth Amendment seem to have been clear that the Amendment was simply declaratory of the evident proposition that Congress could not constitutionally exercise powers not granted to it, and that these powers could continue to be exercised by the states. It was designed solely to allay extravagant fears such as those of Spencer of North Carolina, who felt that a clause as innocuous as that relating to the election of senators and representatives "strikes at the very existence of the states, and supersedes the necessity of having them at all" (Elliott's Debates, IV, 55). As Story has emphatically said (Story on the Constitution, secs. 1907–1908):

> This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. * * *
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> It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect, as an abridgement of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be as-

> sumed beyond those which are granted. * * * The attempts then which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word "expressly;" to qualify what is general, and obscure what is clear and defined. * * *

B. THE JUDICIAL HISTORY OF THE AMENDMENT

The plain purpose of the Amendment has been confirmed by more than a century of constitutional history. The decisions of this Court have reiterated that the Tenth Amendment offers no independent limitation upon the powers granted to the United States but merely states the unquestioned principle that the central government is one of enumerated powers.

In 1808 in what, so far as we have been able to discover, is the first federal case interpreting the commerce clause, *United States* v. *The William*, Fed. Cas. No. 16,700, 28 Fed. Cas. 614, (see p. 51, *supra*), Judge Davis [82] stated with respect to the powers of the states that (p. 622):

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[82] Judge Davis (See note 37, p. 51, *supra*) was a delegate to the Massachusetts constitutional convention which first proposed the Tenth Amendment (see p. 121, *supra*). He was thus in a position to know personally what the amendment was intended to mean.

> * * * The general position is incontestible, that all that is not surrendered by the constitution, is retained. The amendment which expresses this, is for greater security; but such would have been the true construction, without the amendment.

The effect of the Tenth Amendment seems to have been considered for the first time by this Court in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 325, where the Court said the principle, that "the sovereign powers vested in the state governments * * * remained unaltered and unimpaired, except so far as they were granted to the government of the United States," had been "positively recognized" by the amendment. Even Luther Martin, Attorney General of Maryland, arguing in *McCulloch* v. *Maryland,* 4 Wheat. 316, conceded that the amendment meant what it said, that it was "merely declaratory of the sense of the people" and designed to allay an apprehension which the federalists "treated as a dream of distempered jealousy" (4 Wheat., at 372, 374). Chief Justice Marshall's opinion agreed that the amendment "was framed for the purpose of quieting the excessive jealousies which had been excited" and that it left open the question "whether the particular power * * * has been delegated to the one government, or prohibited to the other" (4 Wheat., at 405, 406). Taney, as well, accepted this self-evident proposition. In *Gordon* v. *United States,* 117 U. S. 697, 705 (1864), he said: "The reserva-

tion to the States respectively can only mean the reservation of the rights of sovereignty * * * which they had not parted from."

This Court has continued to treat the Tenth Amendment as containing no limitation on the powers granted to the United States. In the *Lottery Case,* 188 U. S. 321, 357, it brushed aside the suggestion that this Amendment forbade the legislation because "the power to regulate commerce among the States has been expressly delegated to Congress." In *Northern Securities Co.* v. *United States,* 193 U. S. 197, 344–345, the majority opinion refused to entertain argument based on the Tenth Amendment which the defendants "strangely enough" raised; it could not "conceive how it was possible for any one to seriously contend" that the commerce power was limited by the state power to charter corporations.[83] The Court, speaking of the National Prohibition Act, in *Everard's Breweries* v. *Day,* 265 U. S. 545, 558, said "if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States 'powers not delegated to the United States by the Constitution'." In *Missouri* v. *Holland,* 252 U. S. 416, 432, the Court said that, to answer the question as to the validity of the Migratory Bird Treaty and act in view of the

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[83] Only four justices joined in this opinion; the concurring opinion of Justice Brewer seems not to have gone so far. 193 U. S. at 363.

rights reserved to the States, "it is not enough to refer to the Tenth Amendment * * * because * * * the power to make treaties is delegated expressly * * *." Again, in *United States* v. *Sprague,* 282 U. S. 716, 733, this Court said: "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted * * *. It added nothing to the instrument as originally ratified * * *."

These cases show a consistent [84] and express recognition that the Tenth Amendment means just what it says. However, the clarity of these decisions has been obscured by several of the recent opinions of this Court. Thus, in *Hopkins Savings Ass'n.* v. *Cleary,* 296 U. S. 315, the Court held (pp. 338–339) that "The destruction of associations established by a state is not an exercise of power reasonably necessary for the maintenance by

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[84] We are not here concerned with the ebb and flow of the "states' rights" doctrine (summarized in Corwin, *The Commerce Power versus States Rights*), but with those cases in which the Court has considered the specific application of the Tenth Amendment to powers assumed to have been granted to the national government. *The Collector* v. *Day*, 11 Wall. 113, relies upon the Tenth Amendment, but the decision seems to have been placed ultimately upon the supposed scope of the federal taxing power. In *Kansas* v. *Colorado*, 206 U. S. 46, 89–90, the Court rejected the argument of the United States that powers not delegated to it could be exercised if they were beyond the competence of the states: the Tenth Amendment, "seemingly adopted with a prescience of just such contention," made "absolutely certain" that the national government should not "attempt to exercise powers which had not been granted."

the central government of other associations created by itself in furtherance of kindred aims." This seems to be a construction of federal powers; as such there need be no quarrel with it. But the opinion appears to view this conclusion as based upon the Tenth Amendment, independently of the scope of the powers granted to the United States (pp. 335, 336). In *United States* v. *Butler,* 297 U. S. 1, the Court held that the Agricultural Adjustment Act tax was not a true tax, because the proceeds were earmarked for benefit contracts (p. 61), and that the payments to farmers were not merely expenditures under the general welfare clause, because they were coupled with coercive conditions in effect regulating agricultural production (pp. 71, 73). The opinion, however, seems further to decide that, "wholly apart 'from the scope of the general welfare clause,' the act invades the reserved rights of the states" (p. 68). Similarly, in *Ashton* v. *Cameron County Dist.,* 298 U. S. 513, 527, the Court held Chapter IX of the Bankruptcy Act invalid, not because the bankruptcy power did not extend to the public debtors there specified, but because, if the Act were sustained, "the sovereignty of the State, so often declared necessary to the federal system, does not exist" (p. 531).[85] Indeed, the

[85] The decision is not in terms placed upon the Tenth Amendment. But its analysis seems basically similar to the other cases, in that the scope of the federal power was considered largely irrelevant and the validity of the Act was judged solely on the basis of the powers taken to be reserved to the States.

opinion assumes "that the enactment is adequately related to the general 'subject of bankruptcies' " (p. 527). But cf. *United States* v. *Bekins,* 304 U. S. 27. Finally, in *Steward Machine Co.* v. *Davis,* 301 U. S. 548, and *Helvering* v. *Davis,* 301 U. S. 619, the Court sustained Titles IX, VIII, and II of the Social Security Act in opinions which not only held the titles within the powers granted to the federal government but in addition held that they did not violate the Tenth Amendment. The circumstances relied upon to show the latter conclusion might, by the traditional analysis, more appropriately have served to show that the Titles were a valid exercise of the federal power to tax and to spend for the general welfare.[86]

In none of these opinions did the Court explicitly announce a departure from its historic treatment of the Tenth Amendment. The government does not believe that, merely because of implications derived from the form in which these opinions have been cast, so important a constitutional doctrine should be taken to have been overruled *sub silentio.* Particularly is this the case when other, and contemporaneous, decisions retain the accepted interpretation of the Tenth Amendment. In *Ashwander* v. *Valley Authority,* 297 U. S. 288, the Court

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[86] A somewhat similar approach may be indicated in *Cincinnati Soap Co.* v. *U. S.*, 301 U. S. 308, 312, where the Court said, "The Tenth Amendment is without application, since the powers of the several states are not invaded or involved."

refused to consider objections raised under the Tenth Amendment to the sale of power by the Government. It said (pp. 330–331): "To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable * * *. The question is as to the scope of the grant and whether there are inherent limitations * * *." In *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, and in *Associated Press* v. *Labor Board,* 301 U. S. 103, the Court, having determined the National Labor Relations Act as applied to be an exercise of the commerce power, found it unnecessary even to discuss the Tenth Amendment despite persistent reliance upon it by counsel and dissenting justices.[87] Similarly, in *Sonzinsky* v. *United States,* 300 U. S. 506, the Court saw no occasion to consider petitioner's argument based on the Tenth Amendment (p. 508), but contented itself with the decision that the firearms tax was an exercise of the taxing power. In *Wright* v. *Union Central Ins. Co.,* 304 U. S. 502, 516, this Court declared at the last term that: "In view of our decision that the law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment." Finally, in *United States*

[87] The effect of the Tenth Amendment was urged by the dissenting opinion in the *Jones & Laughlin* case (301 U. S., at 97) and by respondents in the *Associated Press* case (301 U. S. at 105), in *Labor Board* v. *Freuhauf Co.*, 301 U. S. 49, 51, and in *Labor Board* v. *Clothing Co.*, 301 U. S. 58, 71.

v. *California,* 297 U. S. 175, 184, the Court declared, in a slightly different connection, that "the sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government."

In none of these recent cases has the Government presented any detailed analysis of the origin of the Tenth Amendment or of the decisions under it; in none has a considered or detailed argument been offered in support of the position contrary to that of the Government; in none has the Court expressly considered the basis for its occasional assumption that the Tenth Amendment operates as an independent limitation upon the federal powers. Certainly, if this Court is to abandon its traditional position, in apparent disregard of the intention of the framers, the importance of the question requires that this choice should not be made without full discussion.

C. CONCLUSION

The argument of appellants, so far as it is based on the Tenth Amendment, must of necessity begin with the premise that the power in question is reserved to the states alone and therefore cannot be exercised or affected by the central government. This, it is to be noted, assumes that the scope and existence of an exclusive state power can be determined without reference to the federal powers.

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This assumption is contradicted by the whole course of our constitutional history. Judgment upon the scope of the federal power cannot fail to be clouded if the issue, in part or in whole, be resolved in advance by the assumption that the same or a related power belongs affirmatively or exclusively to the States. Recognition of the importance of protecting the independence of the States would thus imperceptibly be transmuted into vitiation of powers which have in fact been granted to the Federal Government.

The constitutional grant of federal power is, then, the measure of the power granted—not some hypothetical reservation of a specific power to the states. This principle of constitutional interpretation, which is a part of our dual system of government, is in no way inconsistent with such a system. Thus, the fact that ours is a federated system of government may have a bearing in resolving difficult questions of construction as to the scope of a granted power.

As in the present case, the denial of a specific power to the states should be a weighty factor in determining whether or not the power in question has been granted to the federal government. Still another principle has developed in cases dealing with the scope of the federal taxing power, in which it has been held that the power may not be used so as to destroy or burden the essental in-

strumentalities or activities of the state governments. This doctrine has not been applied to other powers of the Congress. *United States* v. *California,* 297 U. S. 175, 184–185. Indeed, since the Constitution creates a federal government primarily by granting certain plenary powers and withholding others, the doctrine applied in the tax cases must necessarily be an exceptional one.

But this exceptional doctrine, even were it applicable, in no way impairs the basic principle that the question must always be whether or not the power has been granted to the United States. If the powers and rights of the states were made the first inquiry, it would result in an exaggerated form of that "perfect solecism which affirms" that a national government should exist with paramount powers, and yet that in the exercise of those powers it should not be supreme" (Story, *Commentaries,* II, Sec. 1837).

The plain meaning of the language of the Tenth Amendment, the circumstances of its adoption, and a century of constitutional litigation support the approach represented by the *Ashwander* and *Jones & Laughlin* opinions. We respectfully submit that it should be adopted in this case. Any other rule must condemn constitutional interpretation to a perpetual servitude to sophistry and contradiction: neither layman nor scholar can ever be expected to contrive a satisfactory touchstone by which to

determine what powers granted to the national government may not be exercised because reserved to the states as a power "not delegated to the United States."

III

THE MARKETING QUOTA PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT DO NOT VIOLATE THE FIFTH AMENDMENT

Appellants argue that the marketing quota provisions of the Act violate the due process clause in the Fifth Amendment (1) because they are vague and indefinite, and (2) because they are retroactive in effect as applied to the 1938 crop, which was planted and harvested before the quotas were established. Appellants do not suggest in their brief or assignment of errors that the Act is arbitrary, capricious or unreasonable (except in the above respects), or is not related to the object sought to be attained. Accordingly, before examining the general question as to the validity of the statute under the due process clause, we shall first consider the two specific objections raised by appellants.

A. THE PROVISIONS OF THE ACT ARE NOT SO VAGUE AND INDEFINITE AS TO VIOLATE DUE PROCESS OF LAW

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 allotments administratively determined under such standards (Sec. 314), this objection is untenable. The principle that "a penal statute * * * must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" (*Connally* v. *General Const. Co.,* 269 U. S. 385, 391; *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 242) does not apply to statutory provisions which are implemented by specific administrative regulations.

Any unfairness which may be inherent in a vague penal law results from the inability of a person to tell whether or not he is acting unlawfully, and thus subjecting himself to punishment. When penalties are imposed only for violation of specific administrative orders, persons know when they act precisely what they are forbidden to do, irrespective of how indefinite the grant of authority to the administrative agency may be. The generality of the delegation of power to the administrative body affords no reason for applying the rule against indefinite penal statutes.

In each of the cases in which this Court has held penal laws invalid for indefiniteness, the penalty was imposed for violating the statute, not an ad-

ministrative order issued under it.[88] In *Champlin Rfg. Co.* v. *Commission, supra,* this Court indicated that the objection to vague statutes does not apply to those implemented by definite administrative rulings before penalties are imposed. The Court of Appeals of New York expressly so held in *Long Island R. R. Co.* v. *Dept. of Labor,* 256 N. Y. 498, 514, distinguishing *Connally* v. *General Const. Co., supra,* on this very ground. Cf., also, *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, and *Highland* v. *Russell Car Co.,* 279 U. S. 253, cases involving different sections of the Lever Act.

Appellants' argument confuses the requirements of the due process clause as to definiteness in penal statutes with the test to be applied to legislative action to determine whether the legislative body has abdicated its functions by delegating unfettered authority to administrative agencies. The first relates only to the provisions of a statute or order which itself tells the individual citizen just what he may not do. The second is concerned only with whether any standard has been laid down to guide administrative action. The same definiteness is

[88] *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Small Co.* v. *Sugar Ref. Co.*, 267 U. S. 233; *Connally* v. *General Const. Co.*, 269 U. S. 385; *Cline* v *Frink Dairy Co.*, 274 U. S. 445; *Smith* v. *Cahoon*, 283 U. S. 556; *Champlin Ref. Co.* v. *Commission*, 286 U. S. 210 *Herndon* v. *Lowry*, 301 U. S. 242.

plainly not required in the two situations. General grants of authority to administrative bodies have uniformly been upheld so long as an intelligible policy to guide the administrative agency has been established (see pp. 170–175, *infra*). That this Act does not contain an invalid delegation of legislative power will be shown below. (See Point IV, *infra,* pp. 160–175)

Here there is no indefiniteness whatsoever as to how much tobacco each farmer may market. This quantity is prescribed in an exact number of pounds by the administrative officials; and not until such a quota had been prescribed could any penalty be imposed, for until such time there would be no quota to exceed. Thus, the claim that the statute violates the Fifth Amendment because of the indefiniteness of the quota provisions is utterly without foundation.

B. APPLICATION OF THE ACT TO THE 1938 TOBACCO CROP DOES NOT VIOLATE THE FIFTH AMENDMENT

Appellants contend that the marketing quotas for the marketing year 1938–1939 were retroactive and accordingly violate due process of law inasmuch as the 1938 crop was planted, grown, and harvested before the quotas were allotted to individual farms. The short answer to this argument is that the Act imposes penalties only for excessive amounts *marketed* after individual quotas are prescribed, not for the quantity produced before that time.

The facts relating to this phase of the case are as follows: The bill which was eventually enacted as the Agricultural Adjustment Act of 1938 provided for the fixing of tobacco marketing quotas in substantially the same terms as those of the Act as it was finally passed. This bill was approved by committees of the House and Senate in November 1937 (S. Rep. 1295, Nov. 22, 1937; H. R. Rep. 1645, Nov. 27, 1937, 75th Cong., 1st Sess.). Appellants began to arrange for the planting of their crop in December 1937, planting the tobacco seedbeds at that time (R. 45). The Act was approved by the President on February 16, 1938. On February 18 the Secretary of Agriculture issued his proclamation that the total supply of tobacco exceeded the reserve supply level (R. 40). On March 12, 1938, a referendum was held, and on March 25 the Secretary proclaimed the result of the referendum approving the fixing of marketing quotas for flue-cured tobacco by a vote of 250,095 to 35,253 (R. 41).

The tobacco was transplanted from the seedbeds beginning in the middle of March (R. 45) and harvested in June and July (R. 46). The tobacco was cured and graded on the farm prior to marketing. The markets in south Georgia and Florida opened about August first (R. 45). On July 22, the Secretary announced the apportionment of the national quota among the states (R. 41), and shortly before

the opening of the markets, notice of the allotment for each farm was given to the individual appellants (R. 45). Thus, although appellants may not have known exactly what their individual marketing quotas would be when they grew the tobacco, they did know what those quotas were before marketing it.

It is thus plain that there was no retroactive operation of the statute in applying it to 1938 marketings. Since the Act was passed five and a half months before the marketing season began, it cannot seriously be urged that the law itself applied retroactively. The substance of appellants' contention is merely that the allotments were retroactive because they were made after the farmers had expended considerable sums in raising the crop. But the quotas apply only to acts occurring after their promulgation—to the marketing of tobacco, not its production—and accordingly do not operate retroactively.

This Court has frequently held that "a statute is not retroactive merely because it draws upon antecedent facts for its operation." *Lewis* v. *Fidelity,* 292 U. S. 559, 571; *Reynolds* v. *United States,* 292 U. S. 443, 449; *Cox* v. *Hart,* 260 U. S. 427, 435; *Mugler* v. *Kansas,* 123 U. S. 623; *In re Rahrer,* 140 U. S. 545, 564; *United States* v. *Freight Ass'n,* 166 U. S. 290; *New York Cent. R. R.* v. *United States,* No. 21, 212 U. S. 500; *Chicago & Alton R. R. v. Tranburger,* 238 U. S. 67; *Jacob Ruppert* v.

Caffey, 251 U. S. 264, 301; *Samuels* v. *McCurdy,* 267 U. S. 188, 193. This statute does not even have such an effect.

In the *New York Central* case, defendant railroad was indicted for paying a rebate contrary to the terms of the Elkins Act. The contract for the rebate had been made and the goods transported in interstate commerce prior to the passage of the Elkins Act; but the rebate was not actually given until after the law was passed. The Court held that since the rebate was given after the passage of the Act, to apply the Act to the rebate was not to give it retroactive operation regardless of when the contract was made or the goods transported.

In many of the above cases the charge was made that application of the statute in question to property rights previously established would cause great financial injury because of expenses previously incurred. The contention that this invalidated the statute (and this is the basis of appellants' claim here) has been uniformly rejected. In *Mugler* v. *Kansas, supra,* a state law prohibiting the manufacture and sale of intoxicating liquor was upheld both as applied to factories lawfully built at great expense and to beer lawfully acquired before the passage of the law—although the investment in such property might be completely destroyed as a result of the statute. In *Ruppert* v. *Caffey, supra,* application of the Volstead Act to beer on hand at the time of passage of the law was sustained, although the value of the property was

thus destroyed. Cf. *In re Rahrer, supra.* In *Samuels* v. *McCurdy, supra,* a state statute prohibiting the possession of intoxicating liquors was held constitutionally applicable to liquor possessed before the statute was passed, although the value of the liquor was thus destroyed. In *Chicago & Alton R. R.* v. *Tranbarger,* 238 U. S. 67, a statute imposing penalties upon a railroad for failure to maintain openings through its road-bed for drainage purposes was held valid as applied to an embankment lawfully built without such openings before the passage of the Act.

These principles have been applied repeatedly in upholding the application of statutes to previously existing continuing contracts. *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 306; *Holyoke Power Co.* v. *Paper Co.,* 300 U. S. 324; *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211; Phila., *Balt. & Wash. R. R.* v. *Schubert,* 224 U. S. 603. In the *Norman* case the Court said (pp. 307–310):

> This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of

> dominant constitutional power by making contracts about them.
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> * * * There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt. * * * The power of the Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. The reason is manifest. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by "prophetic discernment" to bring within the range of their agreements. The Constitution recognizes no such limitation.

Appellants here are not even deprived of any contract rights by the regulation in question. No contracts to sell tobacco subsequently grown are shown to have been in effect before the law was passed or the allotments made. Nor are they deprived of any physical property. At most the statute takes from them an expectation that all of the crop planted and harvested could be sold, an expec-

tation upon which they had based certain expenditures. But such an expectation is not entitled even to the protection of a contract right. As the Court declared in the *Holyoke Water Power* case, *supra* (300 U. S., at 341):

> * * * But the *disappointment of expectations* and even the frustration of contracts may be a lawful exercise of power when expectation and contract are in conflict with the public welfare. "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity." *Norman* v. *Baltimore & Ohio R. Co., supra,* pp. 307, 308. [Italics supplied.]

The loss of the right to sell tobacco after legally producing it is precisely the same in kind as the loss of the right to sell beer after legally acquiring it involved in the *Mugler, Rahrer,* and *Ruppert* cases. Such distinction as there may be between the two situations is one of degree. In the latter cases the loss of the value of the factories or the property concerned was total, and, as far as the statute was concerned, final; here it is only fifty *percent* of the value of such part of the excess as the farmers may choose to market. Moreover, the reasonable expectation of Congress was that not only would the reduction in the amount marketed increase the total return to growers for the tobacco sold but that the growers could, if they should

choose, make fully adequate provision for retaining any excess for later sale either within a later quota or free of quota restriction. See p. 64, *infra.*

There is peculiar appropriateness in applying the principle that a Federal regulation of commerce may validly disappoint an expectation, where as in this case, the regulation is designed to increase—and apparently has increased—the total value of the crop sold by an amount far exceeding the amount of any penalties paid. The record shows that as compared with all former years, despite the penalties paid for excess marketings, the return to farmers in Georgia and Florida for their 1938 crop was greater by almost two million five hundred thousand dollars than the return they had received for any previous crop. The value of the crop to the growers in those states was approximately $21,700,000 in 1938 (R. 46); it was $18,898,-000 in the next best year, 1936, and in 1937 $17,469,-000.[89] The average price in 1938, 20.3¢ per pound,

[89] The following table compares the figures for Georgia and Florida between 1928 and 1937 as computed from Table 2c (R. 55), with the figures for 1938 as shown at and computed from R. 46:

Year	Production	Price per pound	Farm value
	1,000 pounds	*Cents*	*1,000 dollars*
1928	87,329	12.8	11,189
1929	93,006	18.4	17,098
1930	109,071	9.9	10,827
1931	63,280	6.4	4,059
1932	13,275	10.5	1,388
1933	60,946	11.3	6,913
1934	34,970	18.8	6,584
1935	76,600	18.2	13,927
1936	89,650	21.1	18,898
1937	88,047	19.8	17,469
1938	107,000	20.3	21,700

was higher than that in any previous year, except 1936. And these favorable consequences were not achieved by any drastic curtailment of the amount produced. On the contrary, the total crop amounted to 107 million pounds. This greatly exceeded the amount marketed in Georgia and Florida in any previous year, except 1930 and in that year a crop of 109 million pounds brought the Georgia and Florida growers over ten million dollars less than the value of their 1938 crop. Even after the penalties of $374,000 (R. 46) paid by growers in the area because of excess marketings are subtracted from the value of the crop to the farmers, the amount they received in 1938 remains substantially higher than that received in any previous year. We think it not unfair to assume that the program of which appellants complain was in large part responsible for these increased returns to the growers. The price for the 1938 crop was enhanced not only because of the existence of a national marketing quota in that year but also because of buyers' knowledge that the Act might prevent prices paid in 1938 from causing excessive marketings in subsequent years (see pp. 34–35, *supra*).

It seems plainly evident that the marketing restrictions applied in 1938 not only did not result in loss to the growers, but brought them increases in the returns from their tobacco crop far exceeding the amount of any penalties they paid. It requires considerable hardihood to contend that such a consequence should be regarded

as depriving them of property without due process of law.

Appellants attempt to avoid the application of these principles by asserting that the Act really regulates production and not marketing. They endeavor to support this position by insisting that regulation of marketing necessarily affects the amount produced. In answer to the suggestion that the growers might store the tobacco produced in excess of marketing quotas for sale in the future (and this was expressly contemplated by Congress, see pp. 63–64, *supra*), they urge that this is impossible in the absence of redrying plants, that such plants can only be made use of by cooperative marketing associations, and that there are no such associations in Georgia or Florida.[90]

That any effect which a regulation of the amount marketed may have upon the amount produced does not convert it into a regulation of production has already been shown (*supra,* pp. 67–73). Particularly must this be true when any such effect would come about only because the growers in a particular area might not see fit to avoid any necessity of reducing production by arranging for cooperative redrying and storing of any excess they may produce.[91]

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[90] In Maryland, Virginia, Kentucky, Tennessee, and Wisconsin cooperative associations of tobacco growers are functioning (R. 89–90).

[91] The growers knew long before marketing their tobacco that quotas would be effective (see p. 142, *supra*). Without

Even if the quotas had applied to production rather than marketing and were therefore "retroactive," they would not for that reason be invalid. When production began, the growers knew that a statute which might limit the amount to be marketed was likely to pass, and shortly thereafter the law was passed and the national marketing quota proclaimed. Although the exact quota for each farm was not yet determined, every farmer was necessarily forewarned that an allotment restricting his marketings was to be made. Under such circumstances the absence of precise demarcation of individual quotas at the time of planting the crop would not make the statute arbitrary or unreasonable.[92] If the Act were to be regarded as limiting production, the situation would be analogous to that considered in *Milliken* v. *United*

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adjusting their production in any degree whatever they could have provided, through cooperative marketing, fully effective facilities for redrying any excess and storing it for future sale (R. 56). Such cooperatives had not been successful largely because they attempted to control marketing in addition to providing facilities for redrying and storage (R. 88). The prospect that quotas would control marketing whenever supplies might grow too large would tend to protect such efforts against the principal cause of previous failures.

[92] As Judge Sibley pointed out below: "Had the quotas been fixed in December, as hereafter they will be, many producers would have produced an excess anyhow, the season having been unusually favorable. That chance always must exist" (R. 186).

States, 283 U. S. 15, and *United States* v. *Hudson,* 299 U. S. 498, in each of which the Court held that retroactive application of a statute to transactions occurring after persons were forewarned as to the imminence of future regulation was not unreasonable. In the *Milliken* case an increase in the rate of the applicable tax two years after the making of a gift in contemplation of death was sustained, inasmuch as the testator was left "in no uncertainty" at the time of the transfer that the transaction was to be taxable; he was regarded as "taking his chances of any increase in the tax burden," 283 U. S., at 23. The farmers here who made expenditures with knowledge that a restrictive program was to become effective must also be regarded as taking their chances as to the precise amounts of their individual allotments.

C. THE MARKETING QUOTA PROVISIONS ARE NOT UNREASONABLE, ARBITRARY, CAPRICIOUS, OR UNRELATED TO A LEGITIMATE OBJECT OF CONGRESSIONAL ACTION [93]

In *Nebbia* v. *New York,* 291 U. S. 502, 525, this Court defined the scope of the limitations imposed

[93] We assume in the following argument that the provision in the Fifth Amendment that persons may not be deprived of life, liberty, or property without due process of law gives the courts power to look into the substantive reasonableness or unreasonableness of Congressional regulation. Since this statute plainly does not violate due process, however broadly the Fifth Amendment be interpreted, it is not necessary here to consider whether or not such a construction—first announced many years after the adoption of the Amendment in 1791—is historically accurate or otherwise justified.

by the due process clause in the Fifth and Fourteenth Amendments as follows:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *

In *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 391, the Court asserted with respect to the liberty protected by the due-process clause:

> * * * The Constitution * * * speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and *welfare* of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted

> in the interests of the community is due process. [Italics supplied.]

The ends which Congress was seeking to attain in the Act here under consideration 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. We have shown that it was entirely proper for Congress to exercise its commerce power to accomplish such ends. See pp. 86–96, *supra.*

There can be no question that the provisions of the Act constitute appropriate means of achieving these objectives. In order to prevent excessive marketing, the Act limits the amount which may be marketed. A more direct relationship between means and object would be difficult to find. Under these circumstances, as this Court declared in *Virginian Ry.* v. *Federation,* 300 U. S. 515, 558, "it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause."

In view of what has already been said in the Statement, *supra,* pp. 21–38, and Point I, *supra,* pp. 100–103, with respect to the facts in the tobacco industry, it is not necessary to repeat that description of the industry here. It is evident from the record that tobacco prices had been depressed by 1932 to ruinously low levels. It should be suf-

ficient to point out that the amount received by the growers of flue-cured tobacco had decreased from an average of $137,000,000 from 1926 through 1929 to $56,000,000 in 1931 and $43,000,000 in 1932 (R. 84). This drastic reduction in price was not merely the result of the impact of the general depression upon the tobacco industry, since in the same period the profits available for dividends of the chief tobacco manufacturers increased from an average of $76,000,000 to $104,000,000 (R. 84).

When the 1933 marketing season opened, prices were even lower than in 1932 (R. 78). This resulted in the cessation of all marketing operations and the negotiation of a marketing agreement. See pp. 36–37, *supra.*

This agreement raised the average price from below 11.6¢ (the preceding year's average) to a minimum of 17¢ (R. 78). During the period since 1933 prices have been at levels favorable to the growers. "Prices were influenced by the operation and prospective operation of governmental programs regulating the production or marketing of tobacco" (R. 78). Except for the year 1934,[94] prices during that period have been relatively stable, averaging from 20¢ to 23¢ a pound (R. 79).

These facts indicate that conditions in the flue-cured tobacco industry before the adoption of the original agricultural program called for remedial

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[94] In 1934 production was abnormally low (R. 53), and the price correspondingly high (R. 79).

action not only to stabilize the prices of tobacco in interstate and foreign commerce but to preserve such commerce itself; they also show that Congress was not unreasonable in assuming that a program for the limitation of marketing in years of excessive supply would stabilize prices—interstate prices—at reasonable levels.

The validity of the Act under the due process clause is supported by other considerations than those just set forth. This Court has frequently declared that the police power embraces regulation designed to "promote the public convenience or the general prosperity." *C., B. & Q. Railway* v. *Drainage,* 200 U. S. 561, 592; *Eubank* v. *Richmond,* 226 U. S. 137, 142; *Sligh* v. *Kirkwood,* 237 U. S. 52, 59. Since Congress may exercise "the police power, for the benefit of the public, within the field of interstate commerce" (*Brooks* v. *United States,* 267 U. S. 432, 437; *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* 299 U. S. 334, 347), it may, within that field, legislate for the "general prosperity" or the "public welfare." This was expressly recognized in the passage from the *Nebbia* case quoted above, wherein it was stated that "the Fifth Amendment in the field of federal activity" does "not prohibit governmental regulation for the public welfare." *Nebbia* v. *New York, supra.*

The plight of the tobacco growers was, of course, only typical of that of farmers generally. The Agricultural Adjustment Act of 1938, like the

statutes which preceded it, was enacted because of the problem presented with increasing intensity since 1922 with respect to the existence of continuing surpluses of agricultural commodities. These surpluses were in large part caused by the restoration of European agriculture after the war and the erection of trade barriers in European nations—following the example of this country—aimed at protecting their domestic agriculture and restricting the use of foreign products.[95] These policies of economic nationalism simultaneously expanded agricultural production abroad and contracted the outlets for American farm products. As early as 1925 Congress was concerned about "the existing depression in agriculture." Hoch-Smith Resolution of January 30, 1925, 43 Stat. 801; *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 665.

Thus, even before 1929 farm prices and farmers' income had begun to decline[96] and the American farm problem had become acute. The annual reports of the Secretaries of Agriculture from 1922 on emphasized the necessity of avoiding the continued agricultural surpluses if the farm problem was to be solved.[97] The onset of the depression in

[95] See *World Trade Barriers in Relation to American Agriculture*, Senate Doc. No. 70, 73rd Cong., 1st Sess.

[96] See *Facts Relating to the Agricultural Situation*, U. S. Dept. of Agric., May 1932.

[97] See Report of the Secretary of Agriculture, 1922, pp. 2-4; 1923, pp. 4, 6, 7, 13, 19; 1924, p. 21; 1925, p. 14; 1926, pp. 1-2, 4; 1927, p. 19; 1928, pp. 27, 28; 1929, p. 19; 1930, pp. 11, 25, 28, 29, 30; 1931, pp. 6, 10, 13.

1929 and the resultant diminution in domestic buying power greatly aggravated the situation. Surplus stocks accumulated more rapidly [98] and prices drastically declined.[99] By 1933 there was an irresistible demand for federal legislation to alleviate the plight of the farmers.[1]

The first Agricultural Adjustment Act, enacted in May 1933, was designed to limit agricultural surpluses through the payment of benefits to farmers who would reduce the amount produced. The plan adopted in 1938 was designed to meet both the contingencies of surplus and of shortage [2] by restricting marketings, rather than production, in years of excessive supply. The amount produced in excess of the quantity to be marketed in years of

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[98] See Ezekiel and Bean, *Economic Bases for the Agricultural Adjustment Act* (U. S. Dept. of Agric., 1933, p. 19).

[99] Whereas the wholesale prices of all commodities declined 37.3 *per cent* between 1929 and 1933, prices received by farmers dropped 64 *per cent.* Ezekiel and Bean, *supra*, at p. 4.

[1] In the preceding paragraphs we have only outlined in briefest form the causes and consequences of the agricultural problem confronting the nation since the 1920's. The facts thus generally set forth may be said to be of common knowledge and subject to judicial notice. Cf. *Atchison T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, 260. For more detailed consideration of the problem see Ezekiel and Bean, *supra; World Trade Barriers in Relation to American Agriculture*, Sen. Doc. No. 70, 73rd Cong., 1st Sess; Bean and Chew, *Economic Trends Affecting Agriculture*, U. S. Dept. of Agric., 1933, and the reports referred to at R. 47–49.

[2] The Court may take judicial notice of the droughts which have reduced agricultural production in several recent years.

surplus was to be stored for sale and consumption in other years. (See H. R. Rep. 1645, 75th Cong., 2nd sess., Appendix, p. 208.)

We do not, of course, claim, and it is not incumbent upon the government to show, that this legislation provides a complete panacea for the problems of American agriculture. It is for Congress, not the courts, to decide such questions of policy and wisdom. *Nebbia* v. *New York,* 291 U. S. 502, 537; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337. The requisites of due process of law are satisfied if the effort to improve the agricultural situation can be said to promote the "general prosperity" or the "public welfare" and if the means adopted by Congress to accomplish these objectives have "some rational basis" in knowledge and experience. Cf. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152. The above brief outline of the problem with which Congress was seeking to deal is sufficient to demonstrate that this statute fulfills both of these requirements.

We have up to this point considered the question of due process as if the burden were on the government to show that the Act is not arbitrary or unreasonable. As this Court has frequently recognized, that burden is upon the one attacking the statute. Even without any Congressional findings, facts supporting the reasonableness of a statute will be presumed to exist and facts found by Congress will be accepted by the courts as

true unless affirmatively and clearly disproved. *United States* v. *Carolene Products Co., supra; Metropolitan Co.* v. *Brownell,* 294 U. S. 580, 584, and cases there cited. Here the Act itself and extensive reports contain findings of fact supporting the reasonableness of this legislation. The principles set forth in the above cases are thus clearly applicable. This case differs from the *Carolene* case in that (1) appellants here make no claim that the facts found by Congress are untrue, and (2) instead of disproof, there is here ample affirmative evidence in the record confirming the findings of Congress and the statements in the committee reports.

IV

THE APPLICABLE PROVISIONS OF THE ACT CONTAIN NO UNCONSTITUTIONAL DELEGATION OF POWER

Appellants, though disclaiming any contention that the marketing quotas allotted to them were not established in conformity with the statute, assert that the Act on its face contains an unconstitutional delegation of power. We are confident that examination of the statute will reveal that very few acts of Congress dealing with complex economic problems have gone as far as the present Act in spelling out standards for and limitations upon executive action.

It is apparently not contended that the referendum provision contained in Section 312 (c) con-

tains an invalid delegation to the farmers. Any such argument has been foreclosed by the decision of this Court in *Currin* v. *Wallace, supra.*

We will consider therefore only the standards established as a guide for administrative action in determining whether to fix marketing quotas and what those quotas shall be.

A. WHEN MARKETING QUOTAS ARE TO BE ESTABLISHED

Section 312 (a) of the Act establishes with definiteness the conditions upon which the Secretary shall proclaim a national marketing quota. Whenever, on specified dates,[3] "the Secretary finds that the total supply of tobacco as of the beginning of the marketing year then current exceeds the reserve supply level therefor," he "shall proclaim the amount of such total supply, and * * * a national marketing quota shall be in effect."

The making of such a finding requires the Secretary only to determine and compare the total supply and the reserve supply level. The Act defines total supply as the carry-over as of July first, plus estimated production (Sec. 301 (b) (16) (B)). It defines "reserve supply level" (Sec. 301 (b) (14) (B)) as the normal supply plus five *per cent* thereof. "Normal supply" is defined (Sec. 301 (b) (10) (B)) as 275 *per cent* of a normal year's

[3] The proclamation is to be made by December 1 (Sec. 312 (a)), except that for the year 1938–1939 it is to be made within fifteen days following the date of the enactment of the Act (Sec. 312 (d)).

domestic consumption and 165 *per cent* of a normal year's exports. "Normal year's domestic consumption" (Sec. 301 (b) (11) (B)) and "normal year's exports" (Sec. 301 (b) (12)) are defined to mean the average quantity consumed in the United States and exported during the ten preceding years, adjusted for current trends. Each of these figures can be determined from available statistics kept by the Federal Government, and Section 301 (c) requires the Secretary to use the latest of such statistics in making these determinations.

It is apparent that the Secretary's function in determining whether a national marketing quota is to be established is limited to the finding of facts contained in official statistics and the making of simple computations, in the main arithmetical, therefrom. The room for discretion and judgment in making adjustment for current trends and in estimating the next year's production is slight, since those factors are reasonably predictable in the light of official statistics.

The national marketing quota so proclaimed goes into effect unless in a referendum conducted by the Secretary among the farmers within thirty days of the original proclamation over one-third of those voting oppose the quota. In such case the Secretary is directed to proclaim the result of the referendum, "and the quota shall not be effective thereafter" (Sec. 312 (c)).

The statute declares that the Secretary "shall" provide for the apportionment of the national mar-

keting quota among the states and individual farms (Sec. 313 (a), (b)). Thus, the fixing of a quota for the states and farms follows automatically once a national marketing quota is established.

We know of no case in which it has even been suggested that administrative action so circumscribed constitutes an invalid delegation of power.

B. DETERMINATION OF THE AMOUNT OF THE NATIONAL MARKETING QUOTA

Section 312 (a) provides that the Secretary shall "determine and specify" in his proclamation "the amount of the national marketing quota." The amount is to be the total quantity of tobacco which will make available during the marketing year a supply equal to the reserve supply level (Sec. 312 (a)). The Act also provides for minor upward adjustments in the amount so determined. The marketing quota for any state is not to be reduced to a point less than 75 percent of the production in such state for the year 1937 (Sec. 313 (a)). Each state is to be given a minimum allotment equal to the average national yield for the preceding five years of five hundred acres of flue-cured tobacco (Sec. 313 (e)). For the year 1938 the national quota is to be increased an amount sufficient to allow an increase of up to four percent for each state to prevent individual farmers from receiving inadequate allotments in view of past production (Sec. 313 (e)). The total of these adjustments for

1938 raised the national quota for flue-cured tobacco from 705,000,000 to 748,079,000 pounds (R. 42). Since they serve only to increase the quota, they cannot prejudice any grower.[4]

It is plain that the determination of the amount of the national marketing quota also requires only the making of a finding from available statistics and leaves nothing of consequence to administrative discretion.

C. APPORTIONMENT OF THE NATIONAL QUOTA AMONG THE STATES

The standards to be employed by the Secretary in apportioning the national marketing quota among the states are prescribed in Section 313 (a), which reads as follows:

> SEC. 313. (a) The national marketing quota for tobacco established pursuant to the provisions of section 312, less the amount to be allotted under subsection (c) of this section, shall be apportioned by the Secretary among the several States on the basis of the total production of tobacco in each State during the five calendar years immediately preceding the calendar year in which the quota is proclaimed (plus, in applicable years, the normal production on the acreage diverted under previous agricultural adjustment and conservation programs), with such adjustments as are determined to be necessary to make correction for abnormal conditions of

[4] See footnote 7, p. 10.

> production, for small farms, and for trends in production, giving due consideration to seed bed and other plant diseases during such five-year period: *Provided, however*, That to prevent in any case too sharp and sudden reduction in acreage of tobacco production in any State, the marketing quota for flue-cured tobacco for any State for any marketing year shall not be reduced to a point less than 75 per centum of the production of flue-cured tobacco in such State for the year 1937.

The figures for production and diversion under previous programs are readily available for each state. Except for the adjustments for abnormal conditions of production,[5] for small farms, and for trends in production, the determination here too is a mathematical one leaving nothing to discretion. Each state is to be given an allotment proportionate to its share of the total national production during the preceding five years but not less than 75 per cent of the production for the year 1937.

The factors to be considered in making the adjustments call for the exercise of judgment, and thus, are not entirely statistical or mathematical. Nevertheless, they clearly reflect the policy of Congress and constitute "standards within the framework of which the administrative agent is to supply details." *Currin* v. *Wallace, supra.* In most of the cases in which delegation of authority to ad-

[5] "Seed bed and other plant diseases" are given consideration under this item.

ministrative officers has been upheld, the exercise of judgment has been subjected to restrictions not nearly as narrow as those considered here. Cf. *United States* v. *Grimaud,* 220 U. S. 506; *Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266; *N. Y. Central Securities* v. *U. S.,* 287 U. S. 12; *Avent* v. *United States,* 266 U. S. 127. See also pp. 170–174, *infra.*

D. THE ALLOTMENT OF THE QUOTAS TO THE INDIVIDUAL FARMS

Congress obviously could not be expected to allocate to each of the 190,000 (R. 74) flue-cured tobacco farms its proportion of the State marketing quota. Establishment of a general standard to serve as the guide for administrative action was essential if the power of Congress to fix such quotas was to be exercised at all. Cf. *Hampton & Co.* v. *United States,* 276 U. S. 394, 406. We submit that in defining the limits and objectives of administrative action in apportioning the State quotas Congress has gone as far in curtailing executive discretion as is practicable and that it has fixed standards much more definite and specific than those in many other valid regulatory laws.

The standards established by Congress for allotting flue-cured-tobacco quotas to farms are to be found in Section 313, paragraphs (b), (c), and (e), of the Act. The primary standard for apportioning the State quotas is set forth in Section 313 (b) as follows:

> The Secretary shall provide, through the local committees, for the allotment of the marketing quota for any State among the farms on which tobacco is produced, on the basis of the following: 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 factors which the Secretary is required to take into consideration are plainly those which would be employed by farmers in determining how much tobacco would be marketed from each farm.

This standard is supplemented by provisions made in Section 313, paragraphs (b), (c) and (e), for certain special situations. The only deviation from the primary standard for the apportionment of the state quota is required by Section 313 (b) which provides[6] that "old" tobacco farms shall

[6] This proviso reads as follows:

> * * * *Provided*, That, except for farms 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, the marketing quota for any farm shall not be less than the smaller of either (1) three thousand two hundred pounds, in the case of flue-cured tobacco, and two thousand four hundred pounds, in the case of other kinds of tobacco, or (2) the average tobacco production for the farm during the preceding three years, plus the average normal production of any tobacco acreage diverted under agricultural adjustment and conservation programs during such preceding three years.

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receive a definite minimum quota of 3,200 pounds, or the average production during the three preceding years, whichever is the smaller. This involves a purely mathematical determination and is the only adjustment to be made out of the state quota.

Section 313 (e) provides for increasing 1938 allotments of farms which the Secretary finds have received inadequate allotments in view of past production. Such increases do not come out of the state quota but from an increase in the 1938 national quota sufficient to provide for increases amounting to not more in each state than 4 percent of the state's quota. Such increases are made directly out of this special reserve and cannot reduce the amount any grower's farm receives under the apportionment of the state allotment.[7]

Allotments to "new" tobacco farms, i. e. those producing tobacco for the first time in five years,

[7] This section reads as follows:

> * * * In case of flue-cured tobacco, the national quota for 1938 is increased by a number of pounds required to provide for each State in addition to the State poundage allotment a poundage not in excess of *4 per centum* of the allotment which shall be apportioned in amounts which the Secretary determines to be fair and reasonable to farms in the State receiving allotments under the Agricultural Adjustment Act of 1938 which the Secretary determines are inadequate in view of past production of tobacco, and for each year by a number of pounds sufficient to assure that any State receiving a State poundage allotment of flue-cured tobacco shall receive a minimum State poundage allotment of flue-cured tobacco equal to the average national yield for the preceding five years of five hundred acres of such tobacco.

are not made out of the state allotment but are made out of a poundage, not exceeding 5 percent of the national quota, reserved especially for allotments to new farms and for additional allotments to small farms. Allotments are made to new farms in any state, whether the State has a quota or not, on the basis of the same factors used in the apportionment of the state allotment to old farms, except, of course, that there are no past marketings to be considered; but new farms are to receive no more than 75 percent of the quota for similar old farms (Sec. 313 (c)).[8]

Plainly administrative officers have "no unfettered discretion" in carrying out such a plan. Cf. *Currin* v. *Wallace, supra.* Congress has laid down

[8] Section 313 (c) reads as follows:

> The Secretary shall provide, through local committees, for the allotment of not in excess of 5 per centum of the national marketing quota (1) to farms in any State whether it has a State quota or not on which for the first time in five years tobacco is produced to be marketed in the year for which the quota is effective and (2) for further increase of allotments to small farms pursuant to the proviso in subsection (b) of this section on the basis of the following: 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: *Provided*, That farm marketing quotas established pursuant to this subsection for farms on which tobacco is produced for the first time in five years shall not exceed 75 per centum of the farm marketing quotas established pursuant to subsection (b) of this section for farms which are similar with respect to the following: 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.

"intelligible principles" to which the administrative agency is directed to conform (cf. *Hampton & Co.* v. *United States*, *supra*), and merely given power "to fill up the details" to those who are to act (cf. *Wayman* v. *Southard*, 10 Wheat. 1, 43).

Appellants' contention is that the statute contains an invalid delegation because no farmer can tell from the Act itself exactly what his quota will be, and because the final determination of the quotas depends upon the exercise of administrative judgment.

It is true, of course, that the determination of farm quotas calls for the exercise of judgment and not merely for mathematical computations. But the same thing may be said of many statutes which have been upheld by this Court, in most of which the delegation of authority was much more sweeping and less circumscribed than in the case at bar.

Most closely in point are cases dealing with the apportionment of coal cars among mines and of rates among railroads under the Interstate Commerce Act. Section 1, paragraph 15, of that Act (41 Stat. 476–477) authorizes the Interstate Commerce Commission in case of emergency "to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interests of the public and the commerce of the people." In *Avent* v. *United States*, 266 U. S. 127, this Court held that

an attack on the constitutionality of this provision did not contain sufficient substance even to warrant the granting of a writ of error. With respect to the adequacy of the above standard, the Court declared that (p. 130):

> The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed.

Both the provision of the Interstate Commerce Act referred to above and those of the Agricultural Adjustment Act here in question are concerned with apportionment. If the general standards of reasonableness and the public interest are sufficient under the Interstate Commerce Act without any specification of the factors to be considered in applying them, the detailed enumeration in the Agricultural Adjustment Act of the factors to be considered must *a fortiori* be sufficient.

Section 1, paragraph 14 (41 Stat. 476), of the Interstate Commerce Act provides that "the Commission may, * * * establish reasonable rules, regulations, and practices with respect to car service by carriers * * *." In *Assigned Car Cases,* 274 U. S. 564, the Court held that this provision authorized the Commission to determine the method of apportionment of coal cars among the mines. The validity of this delegation, which is

just as broad as that considered in the *Avent* case, was assumed without question, although "reasonableness" is the only standard provided in the statute.[9]

Section 15, paragraph 6, of the Interstate Commerce Act (41 Stat. 486) authorizes the Commission to "prescribe the just, reasonable, and equitable divisions" of rates to be received by carriers. It specifies the factors to be considered by the Commission in making the divisions as follows:

> * * * In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carier to a greater or less proportion than another carrier of the joint rate, fare or charge.

[9] As to the standards used by the Commission in determining the ratings for the mines as a basis for the apportionment, see p. 67, *supra*.

This section was given effect and the validity of these standards was assumed without question in *New England Divisions Case,* 261 U. S. 184. The standards prescribed in the above section of the Interstate Commerce Act and those contained in Section 313 of the Agricultural Adjustment Act are similar in that each consists of a number of factors to be considered by the administrative agency in making an apportionment. In both statutes the exercise of judgment is required; under neither can the allotment be determined merely by mathematical formulae. But the factors to be considered under the Interstate Commerce Act are much more general than those prescribed in the Agricultural Adjustment Act. Prominent among the matters which the Interstate Commerce Commission is to consider are "efficiency," "fair return," "importance to the public," and "any other fact or circumstance which would ordinarily * * * entitle one carrier to a greater or less proportion than another carrier." Each of the elements to be considered in apportioning the tobacco quotas under the Agricultural Adjustment Act has more specific content and meaning and will better serve as a guide to administrative action than any of these.

The standards set forth in the instant Act are also far more definite and precise than those contained in numerous other statutes which have been upheld as constitutional. Cf. *N. Y. Central Securi-*

ties v. *U. S.,* 287 U. S. 12 (in the public interest); *Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266 (public convenience, interest, or necessity); *United States* v. *Chemical Foundation,* 272 U. S. 1 (in the public interest); *Colorado* v. *United States,* 271 U. S. 153, and *Ches. & Ohio Ry.* v. *United States,* 283 U. S. 35 (certificates of public convenience and necessity); *Tagg Bros.* v. *United States,* 280 U. S. 420 (just and reasonable commissions); *Wayman* v. *Southard,* 10 Wheat. 1 (in their discretion deem expedient); *Buttfield* v. *Stranahan,* 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Monongahela Bridge* v. *United States,* 216 U. S. 177; *Hannibal Bridge Co.* v. *United States,* 221 U. S. 194; and *Louisville Bridge Co.* v. *United States,* 242 U. S. 409 (unreasonable obstruction to navigation); *Mahler* v. *Eby,* 264 U. S. 32 (undesirable resident); *McKinley* v. *United States,* 249 U. S. 397 (war powers); *United States* v. *Grimaud,* 220 U. S. 506 (regulation of forest reserves).

This Court has repeatedly "recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislation to deal directly," that the Constitution does not deny "to the Congress the necessary resources of flexibility and practicality" which would enable it to lay down policies and establish standards. *Currin* v. *Wallace, supra; Panama Refining*

Co. v. *Ryan,* 293 U. S. 388, 421. "In such cases 'a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.' *Wayman* v. *Southard,* 10 Wheat. 1, 43." *Currin* v. *Wallace, supra.* This Act more than satisfies any criteria ever applied by the courts in determining the validity of legislation authorizing executive action.

The allotting of farm marketing quotas in flue-cured tobacco involves, as the Court stated in the *Panama* case, a consideration of "a host of details with which the national legislature cannot deal directly." The subject matter of the regulation is so complex that the Congressional policy relating to it can be vitalized only through administrative assistance. If Congress was to act at all, it was obviously necessary that it empower those charged with administering the Act to make "subordinate rules within prescribed limits and to find the facts in the many individual cases to which the regulation was intended to apply." Only through such assistance could the power exercised by Congress be effectively executed. It is submitted that the Secretary's role in furnishing this necessary administrative assistance is one required by the nature of the legislative process, and that the purposes of his action and the limits within which he may act are set out in this statute with far greater particularity than in many acts already held to contain valid delegations of authority.

CONCLUSION

The provisions of the Agricultural Adjustment Act for the establishment of the marketing quotas for flue-cured tobacco are a constitutional exercise of the power of Congress to regulate interstate and foreign commerce. They neither contain any unconstitutional delegation by Congress of its legislative power nor deprive the appellants of liberty or property in violation of the Fifth Amendment to the Constitution. The judgment of the court below should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
THURMAN W. ARNOLD,
Assistant Attorney General.
HUGH B. COX,
ROBERT L. STERN,
JOHN S. L. YOST,
ROBERT K. MCCONNAUGHEY,
Special Assistants to the Attorney General.
MASTIN G. WHITE,
Solicitor,
ROBERT H. SHIELDS,
Chief, Agricultural Adjustment Division,
W. CARROLL HUNTER,
HASKELL DONOHO,
Attorneys,
Department of Agriculture.

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APPENDIX

A. Provisions of the Act

AN ACT

To provide for the conservation of national soil resources and to provide an adequate and balanced flow of agricultural commodities in interstate and foreign commerce and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Agricultural Adjustment Act of 1938."

DECLARATION OF POLICY

Sec. 2. It is hereby declared to be the policy of Congress to continue the Soil Conservation and Domestic Allotment Act, as amended, for the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch land resources in the national public interest; to accomplish these purposes through the encouragement of soil-building and soil-conserving crops and practices; 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.

TITLE I—AMENDMENTS TO SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT

SEC. 101.[1] * * *.

* * * *In carrying out the provisions of this section in the continental United States, the Secretary is directed to utilize the services of local and State committees selected as hereinafter provided. The Secretary shall designate local administrative areas as units for administration of programs under this section. No such local area shall include more than one county or parts of different counties. Farmers within any such local administrative area, and participating or cooperating in programs administered within such area, shall elect annually from among their number a local committee of not more than three members for such area and shall also elect annually from among their number a delegate to a county convention for the election of a county committee. The delegates from the various local areas in the county shall, in a county convention, elect, annually, the county committee for the county which shall consist of three members who are farmers in the county. The local committee shall select a secretary and may utilize the county agricultural extension agent for such purpose. The county committee shall select a secretary who may be the county agricultural extension agent. If such county agricultural extension agent shall not have been elected secretary of such committee, he shall be ex officio a member of the county committee. The county agricultural extension agent shall not have*

[1] This provision is an amendment to Section 8 (b) of the Soil Conservation and Domestic Allotment Act (49 Stat. 1148).

the power to vote. In any county in which there is only one local committee the local committee shall also be the county committee. In each State there shall be a State committee for the State composed of not less than three or more than five farmers who are legal residents of the State and who are appointed by the Secretary. The State director of the Agricultural Extension Service shall be ex officio a member of such State committee. The ex officio members of the county and State committees shall be in addition to the number of members of such committees hereinbefore specified. The Secretary shall make such regulations as are necessary relating to the selection and exercise of the functions of the respective committees, and to the administration, through such committees, of such programs.

* * * * *

TITLE III—LOANS, PARITY PAYMENTS, CONSUMER SAFEGUARDS, AND MARKETING QUOTAS

SUBTITLE A—DEFINITIONS, LOANS, PARITY PAYMENTS, AND CONSUMER SAFEGUARDS

DEFINITIONS

SEC. 301. (a) GENERAL DEFINITIONS.—For the purposes of this title and the declaration of policy—

(1) "Parity," as applied to prices for any agricultural commodity, shall be that price for the commodity which will give to the commodity a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of such commodity in the base period; and, in the case of all commodities for which the base period is the period August 1909 to July 1914, which will also reflect current interest payments per acre on farm indebt-

edness secured by real estate, tax payments per acre on farm real estate, and freight rates, as contrasted with such interest payments, tax payments, and freight rates during the base period. The base period in the case of all agricultural commodities except tobacco shall be the period August 1909 to July 1914, and, in the case of tobacco, shall be the period August 1919 to July 1929.

(2) "Parity," as applied to income, shall be that per capita net income of individuals on farms from farming operations that bears to the per capita net income of individuals not on farms the same relation as prevailed during the period from August 1909 to July 1914.

(3) The term "interstate and foreign commerce" means sale, marketing, trade, and traffic between any State or Territory or the District of Columbia or Puerto Rico, and any place outside thereof; or between points within the same State or Territory or within the District of Columbia or Puerto Rico, through any place outside thereof; or within any Territory or within the District of Columbia or Puerto Rico.

(4) The term "affect interstate and foreign commerce" means, among other things, in such commerce, or to burden or obstruct such commerce or the free and orderly flow thereof; or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof.

(5) The term "United States" means the several States and Territories and the District of Columbia and Puerto Rico.

(6) The term "State" includes a Territory and the District of Columbia and Puerto Rico.

(7) The term "Secretary" means the Secretary of Agriculture, and the term "Department" means the Department of Agriculture.

(8) The term "person" means an individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or any agency of a State.

* * * * *

(b) DEFINITIONS APPLICABLE TO ONE OR MORE COMMODITIES.—For the purposes of this title—

* * * * *

(3) * * *

(C) "Carry-over" of tobacco for any marketing year shall be the quantity of such tobacco on hand in the United States at the beginning of such marketing year, which was produced in the United States prior to the beginning of the calendar year then current, except that in the case of cigar-filler and cigar-binder tobacco the quantity of type 46 on hand and theretofore produced in the United States during such calendar year shall also be included.

* * * * *

(6) (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.

(7) "Marketing year" means, in the case of the following commodities, the period beginning on the

first and ending with the second date specified below:

Corn, October 1–September 30;
Cotton, August 1–July 31;
Rice, August 1–July 31;
Tobacco (flue-cured), July 1–June 30;
Tobacco (other than flue-cured), October 1–September 30;
Wheat, July 1–June 30.

* * * * *

(10) * * *

(B) The "normal supply" of tobacco shall be a normal year's domestic consumption and exports plus 175 per centum of a normal year's domestic consumption and 65 per centum of a normal year's exports as an allowance for a normal carry-over.

(11) * * *

(B) "Normal year's domestic consumption," in the case of cotton and tobacco, shall be the yearly average quantity of the commodity produced in the United States that was consumed in the United States during the ten marketing years immediately preceding the marketing year in which such consumption is determined, adjusted for current trends in such consumption.

* * * * *

(12) "Normal year's exports" in the case of corn, cotton, rice, tobacco, and wheat shall be the yearly average quantity of the commodity produced in the United States that was exported from the United States during the ten marketing years (or, in the case of rice, the five marketing years) immediately preceding the marketing year in which such exports are determined, adjusted for current trends in such exports.

* * * * *

(14) * * *.

(B) "Reserve supply level" of tobacco shall be 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.

(15) "Tobacco" means each one of the kinds of tobacco listed below comprising the types specified as classified in Service and Regulatory Announcement Numbered 118 of the Bureau of Agricultural Economics of the Department:

Flue-cured tobacco, comprising types 11, 12, 13, and 14;

Fire-cured and dark air-cured tobacco, comprising types 21, 22, 23, 24, 35, 36, and 37;

Burley tobacco, comprising type 31;

Maryland tobacco, comprising type 32;

Cigar-filler and cigar-binder tobacco, comprising types 42, 43, 44, 45, 46, 51, 52, 53, 54, and 55;

Cigar-filler tobacco, comprising type 41.

The provisions of this title shall apply to each of such kinds of tobacco severally.

(16) * * *.

(B) "Total supply" of tobacco 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, except that the estimated production of type 46 tobacco during the marketing year with respect to which the determination is being made shall be used in lieu of the estimated production of such type dur-

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ing the calendar year in which such marketing year begins in determining the total supply of cigar-filler and cigar-binder tobacco.

(c) The latest available statistics of the Federal Government shall be used by the Secretary in making the determinations required to be made by the Secretary under this Act.

* * * * *

LOANS ON AGRICULTURAL COMMODITIES

SEC. 302. (a) The Commodity Credit Corporation is authorized, upon recommendation of the Secretary and with the approval of the President, to make available loans on agricultural commodities (including dairy products). Except as otherwise provided in this section, the amount, terms, and conditions of such loans shall be fixed by the Secretary, subject to the approval of the Corporation and the President.

SUBTITLE B—MARKETING QUOTAS

PART I.—MARKETING QUOTAS—TOBACCO

LEGISLATIVE FINDING

SEC. 311 (a) The marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare. Tobacco produced for market is sold on a Nation-wide market and, with its products, moves almost wholly in interstate and foreign commerce from the producer to the ultimate consumer. The farmers producing such com-

modity are subject in their operations to uncontrollable natural causes, are widely scattered throughout the Nation, in many cases such farmers carry on their farming operations on borrowed money or leased lands, and are not so situated as to be able to organize effectively, as can labor and industry through unions and corporations enjoying Government protection and sanction. For these reasons, among others, the farmers are unable without Federal assistance to control effectively the orderly marketing of such commodity with the result that abnormally excessive supplies thereof are produced and dumped indiscriminately on the Nation-wide market.

(b) The disorderly marketing of such abnormally excessive supplies affects, burdens, and obstructs interstate and foreign commerce by (1) materially affecting the volume of such commodity marketed therein, (2) disrupting the orderly marketing of such commodity therein, (3) reducing the price for such commodity with consequent injury and destruction of interstate and foreign commerce in such commodity, and (4) causing a disparity between the prices for such commodity in interstate and foreign commerce and industrial products therein, with a consequent diminution of the volume of interstate and foreign commerce in industrial products.

(c) Whenever an abnormally excessive supply of tobacco exists, the marketing of such commodity by the producers thereof directly and substantially affects interstate and foreign commerce in such commodity and its products, and the operation of the provisions of this Part becomes necessary and

appropriate in order to promote, foster, and maintain an orderly flow of such supply in interstate and foreign commerce.

NATIONAL MARKETING QUOTA

SEC. 312. (a) Whenever, on the 15th day of November of any calendar year, the Secretary finds that the total supply of tobacco as of the beginning of the marketing year then current exceeds the reserve supply level therefor, the Secretary shall proclaim the amount of such total supply, and, beginning on the first day of the marketing year next following and continuing throughout such year, a national marketing quota shall be in effect for the tobacco marketed during such marketing year. The Secretary shall also determine and specify in such proclamation the amount of the national marketing quota in terms of the total quantity of tobacco which may be marketed, which will make available during such marketing year a supply of tobacco equal to the reserve supply level. Such proclamation shall be made not later than the 1st day of December in such year.[2]

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[2] Sec. 19 of the act entitled "An act to amend the Agricultural Adjustment Act of 1938, and for other purposes," Public, No. 470, 75th Cong., approved April 7, 1938, provides as follows:

"The proclamations heretofore issued by the Secretary of Agriculture under sections 312 (a), 327, 328, and 345 of the Agricultural Adjustment Act of 1938 shall be effective as provided in said sections, and no provision of any amendment made by this Act shall be construed as requiring any further action under section 312 (c) or 347 of the Agricultural Adjustment Act of 1938 with respect to marketing years beginning in 1938."

(b) Whenever in the case of burley tobacco, and fire-cured and dark air-cured tobacco, respectively, the total supply proclaimed pursuant to the provisions of subsection (a) of this section exceeds the reserve supply level by more than 5 per centum and a national marketing quota is not in effect for such tobacco during the marketing year then current, a national marketing quota shall also be in effect for such tobacco marketed during the period from the date of such proclamation to the end of such current marketing year, and the Secretary shall determine and shall specify in such proclamation the amount of such national marketing quota in terms of the total quantity which may be marketed, which will make available during such current marketing year a supply of tobacco equal to the reserve supply level. The provisions of this subsection shall not be effective prior to the beginning of the marketing year beginning in the calendar year 1938.

(c) Within thirty days after the date of the issuance of the proclamation specified in subsection (a) of this section, the Secretary shall conduct a referendum of farmers who were engaged in production of the crop of tobacco harvested prior to the holding of the referendum to determine whether such farmers are in favor of or opposed to such quota. If in the case of burley tobacco, or fire-cured and dark air-cured tobacco, respectively, farmers would be subject to a national quota for the next succeeding marketing year pursuant to the provisions of subsection (a) of this section, and also to a national marketing quota for the current marketing year pursuant to the provisions of subsection (b) of this

section, the referendum shall provide for voting with respect to each such quota. If more than one-third of the farmers voting in the referendum oppose such quota, the Secretary shall, prior to the 1st day of January, proclaim the result of the referendum and such quota shall not be effective thereafter.[3]

(d) In connection with the determination and proclamation of any marketing quota for the 1938–1939 marketing year, the determination by the Secretary pursuant to subsection (a) of this section shall be made and proclaimed within fifteen days following the date of the enactment of this Act, and the proclamation of the Secretary pursuant to subsection (c) of this section shall be made within forty-five days following the date of the enactment of this Act.

(e) Marketing quotas shall not be in effect with respect to cigar-filler tobacco comprising type 41 during the marketing year beginning in 1938 or the marketing year beginning in 1939.

(f) Notwithstanding any other provisions of this Act, the Secretary shall, within fifteen days after the enactment of this subsection (f), proclaim the amount of the total supply of burley tobacco for the marketing year therefor beginning October 1, 1937, and a national marketing quota shall be in effect for burley tobacco marketed during the marketing year for such tobacco beginning October 1, 1938. The Secretary shall also determine and specify in such proclamation the amount of such national marketing quota in terms of the total quantity of such tobacco which may be mar-

[3] See footnote on preceding page.

keted, which will make available during the marketing year beginning October 1, 1938, a supply of such tobacco equal to the reserve supply level. The referendum with respect to such quota, pursuant to subsection (c) of this section, shall be held and the results thereof proclaimed within forty-five days after the enactment of this subsection (f).[4]

SEC. 313. (a) The national marketing quota for tobacco established pursuant to the provisions of section 312, less the amount to be allotted under subsection (c) of this section, shall be apportioned by the Secretary among the several States on the basis of the total production of tobacco in each State during the five calendar years immediately preceding the calendar year in which the quota is proclaimed (plus, in applicable years, the normal production on the acreage diverted under previous agricultural adjustment and conservation programs), with such adjustments as are determined to be necessary to make correction for abnormal conditions of production, for small farms, and for trends in production, giving due consideration to seed bed and other plant diseases during such five-year period: *Provided, however,* That to prevent in any case too sharp and sudden reduction in acreage of tobacco production in any State, the marketing quota for flue-cured tobacco for any State for any marketing year shall not be reduced to a point less than 75 per centum of the production of flue-cured tobacco in such State for the year 1937.

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[4] This subsection (f) was added by the act entitled "An act amending section 312 of the Agricultural Adjustment Act of 1938," Public, No. 452, 75th Cong., approved March 26, 1938.

(b) The Secretary shall provide, through the local committees, for the allotment of the marketing quota for any State among the farms on which tobacco is produced, on the basis of the following: 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: *Provided*, That, except for farms 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, the marketing quota for any farm shall not be less than the smaller of either (1) three thousand two hundred pounds, in the case of flue-cured tobacco, and two thousand four hundred pounds, in the case of other kinds of tobacco, or (2) the average tobacco production for the farm during the preceding three years, plus the average normal production of any tobacco acreage diverted under agricultural adjustment and conservation programs during such preceding three years.

(c) The Secretary shall provide, through local committees, for the allotment of not in excess of 5 per centum of the national marketing quota (1) to farms in any State whether it has a State quota or not on which for the first time in five years tobacco is produced to be marketed in the year for which the quota is effective and (2) for further increase of allotments to small farms pursuant to the proviso in subsection (b) of this section on the basis of the following: Land, labor, and equipment available for the production of tobacco; crop-rota-

tion practices; and the soil and other physical factors affecting the production of tobacco: *Provided,* That farm marketing quotas established pursuant to this subsection for farms on which tobacco is produced for the first time in five years shall not exceed 75 per centum of the farm marketing quotas established pursuant to subsection (b) of this section for farms which are similar with respect to the following: 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.

(d) Farm marketing quotas may be transferred only in such manner and subject to such conditions as the Secretary may prescribe by regulations.

(*e*) *In case of flue-cured tobacco, the national quota for 1938 is increased by a number of pounds required to provide for each State in addition to the State poundage allotment a poundage not in excess of* **4 per centum**[5] *of the allotment which shall be apportioned in amounts which the Secretary determines to be fair and reasonable to farms in the State receiving allotments under the Agricultural Adjustment Act of 1938 which the Secretary determines are inadequate in view of past production of tobacco, and for each year by a number of pounds sufficient to assure that any State receiving a State poundage allotment of flue-cured tobacco shall receive a minimum State poundage*

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[5] The bold-faced words were substituted by sec. 2 (a) of the act entitled "An act to amend the Agricultural Adjustment Act of 1938," Public, No. 557, 75th Cong., approved May 31, 1938, in lieu of the expression "2 per centum."