CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1935.

UNITED STATES *v.* BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORP.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 401. Argued December 9, 10, 1935.—Decided January 6, 1936.

1. Processors of farm products have a standing to question the constitutionality of the "processing and floor-stock taxes" sought to be laid upon them by the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31. *Massachusetts* v. *Mellon*, 262 U. S. 447, distinguished. P. 57.
2. A tax, in the general understanding and in the strict constitutional sense, is an exaction for the support of Government; the term does not connote the expropriation of money from one group to be expended for another, as a necessary means in a plan of regulation, such as the plan for regulating agricultural production set up in the Agricultural Adjustment Act. P. 61.
3. In testing the validity of the "processing tax," it is impossible to wrest it from its setting and treat it apart as a mere excise for raising revenue. P. 58.
4. From the conclusion that the exaction is not a true tax it does not necessarily follow that the statute is void and the exaction uncollectible, if the regulation, of which the exaction is a part, is within any of the powers granted to Congress. P. 61.
5. The Constitution is the supreme law of the land, ordained and established by the people, and all legislation must conform to the principles it lays down. P. 62.
6. It is a misconception to say that, in declaring an Act of Congress unconstitutional, the Court assumes a power to overrule or control the action of the people's representatives. P. 62.

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7. When an Act of Congress is appropriately challenged in a court, it is the duty of the court to compare it with the article of the Constitution which is invoked and decide whether it conforms to that article. P. 62.
8. All that the court does or can do in such cases is to announce its considered judgment upon the question; it can neither approve nor condemn any legislative policy; it can merely ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution. P. 62.
9. The question in such cases is not what powers the Federal Government ought to have, but what powers have in fact been given it by the people. P. 63.
10. Ours is a dual form of government; in every State there are two Governments—the State and the United States; each State has all governmental powers, save such as the people, by the Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. P. 63.
11. The Government of the United States is a Government of delegated powers; it has only such powers as are expressly conferred upon it by the Constitution and such as are reasonably to be implied from those expressly granted. P. 63.
12. The Agricultural Adjustment Act does not purport to regulate transactions in interstate or foreign commerce; and the Government in this case does not attempt to sustain it under the commerce clause of the Constitution. P. 63.
13. In Article I, § 8, cl. 1 of the Constitution, which provides that Congress shall have power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States," the phrase "to provide for the general welfare" is not an independent provision empowering Congress generally to provide for the general welfare, but is a qualification defining and limiting the power "to lay and collect taxes," etc. P. 64.
14. The power to appropriate money from the Treasury (Constitution, Art. I, § 9, cl. 7) is as broad as the power to tax; and the power to lay taxes to provide for the general welfare of the United States implies the power to appropriate public funds for that purpose. P. 65.
15. The power to tax and spend is a separate and distinct power; its exercise is not confined to the fields committed to Congress by the other enumerated grants of power; but it is limited by the requirement that it shall be exercised to provide for the general welfare of the United States. P. 65.

1 Syllabus.

16. The Court is not required in this case to ascertain the scope of the phrase "general welfare of the United States," or to determine whether an appropriation in aid of agriculture falls within it. P. 68.

17. The plan of the Agricultural Adjustment Act is to increase the prices of certain farm products for the farmer by decreasing the quantities produced; the decrease is to be attained by making payments of money to farmers who, under agreements with the Secretary of Agriculture, reduce their acreage and crops; and the money for this purpose is exacted, as a tax, from those who first process the commodities. *Held:*

(1) The Act invades the reserved powers of the States. P. 68.

(2) Regulation and control of agricultural production are beyond the powers delegated to the Federal Government. P. 68.

(3) The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan—the means to an unconstitutional end. P. 68.

(4) The power of taxation, which is expressly granted to Congress, may be adopted as a means to carry into operation another power also expressly granted; but not to effectuate an end which is not within the scope of the Constitution. P. 69.

(5) The regulation of the farmer's activities under the statute, though in form subject to his own will, is in fact coercion through economic pressure; his right of choice is illusory. P. 70.

(6) Even if the farmer's consent were purely voluntary, the Act would stand no better. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the States. P. 72.

(7) The right to appropriate and spend money under contracts for proper governmental purposes cannot justify contracts that are not within federal power. P. 72.

(8) Congress cannot invade state jurisdiction by purchasing the action of individuals any more than by compelling it. P. 73.

(9) There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon the assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. P. 73.

(10) Owing to the supremacy of the United States, if the contracts with farmers contemplated by the Agricultural Adjustment Act were within the federal power to make, the States could not declare them void or prevent compliance with their terms. P. 74.

(11) Existence of a situation of national concern resulting from similar and widespread local conditions cannot enable Con-

gress to ignore the constitutional limitations upon its own powers and usurp those reserved to the States. P. 74.

(12) If the novel view of the General Welfare Clause now advanced in support of the tax were accepted, that clause would not only enable Congress to supplant the States in the regulation of agriculture and of all other industries as well, but would furnish the means whereby all of the other provisions of the Constitution, sedulously framed to define and limit the powers of the United States and preserve the powers of the States, could be broken down, the independence of the individual States obliterated, and the United States converted into a central government exercising uncontrolled police power throughout the Union superseding all local control over local concerns. P. 75.

(13) Congress, being without power to impose the contested exaction, could not lawfully ratify the acts of an executive officer in assessing it. P. 78.

78 F. (2d) 1, affirmed.

CERTIORARI, 296 U. S. 561, to review a decree which reversed an order of the District Court (*Franklin Process Co.* v. *Hoosac Mills Corp.*, 8 F. Supp. 552), directing the receivers of Hoosac Mills, a cotton milling corporation, to pay claims of the United States for processing and floor taxes on cotton, levied under §§ 9 and 16 of the Agricultural Adjustment Act of May 12, 1933. The opinion of this Court begins on p. 53, *post;* the dissenting opinion on p. 78.

Solicitor General Reed, orally, after stating the case:

The conditions to which power is addressed are always to be considered when the exercise of power is challenged,—extraordinary conditions may call for extraordinary remedies; but, as the Court has said, "the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power." *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Schechter Case,* 295 U. S. 495.

In the effort to meet the emergencies arising during this depression, we have proceeded under that view of the

law; and we do not now contend that the extraordinary conditions give rise to anything more than an opportunity to use extraordinary remedies; but, of course, such remedies as flow from the language of the Constitution as it has been interpreted by this Court.

The Government, in legislating in regard to the depression, was quick to ratify actions that had been taken without clear, specific Congressional authority. The Court will recall that the first ratification by the Congress was as to the closing of the banks, which had been done under a statute conferring that authority, but in terms making ratification advisable. Further, there was an abrogation of the gold clause. There were Acts directed to the relief of distress. Others authorized lending to the home-owner, through the Home Owners Loan Corporation; to the farmer, through the Farm Credit Corporation; and to banks and industry, through the Reconstruction Finance Corporation.

As a part of this concerted effort to bring about recovery, the Agricultural Adjustment Act was passed. It should not, however, be approached as an emergency measure, nor as a measure that came into consideration because of the present emergency. Rather should we bear in mind that since the 68th Congress at least, the House and the Senate and the Executive have been giving careful attention to the problem of agricultural surpluses.

Eight times have acts been reported by the Agricultural Committee of the House, and ten times by the Committee on Agriculture and Forestry of the Senate. The House has rejected two and passed five. The Senate has rejected two and passed four. It is recalled, of course, that the McNary-Haugen Act was twice vetoed by President Coolidge, that the Federal Farm Board Act was approved by President Hoover, and the Agricultural Adjustment Act by President Roosevelt.

We have a long history of Legislative and Executive consideration of the problem of agricultural surplus. There were innumerable acts that dealt with other agricultural difficulties, rather than the surplus as such. But it was the mounting supply of the great staple, nonperishable, agricultural commodities that demanded the attention of the Legislature and of the Executive, and that has received the attention of the courts throughout those years.

I need refer only to the Coöperative Marketing Acts passed by States, complemented by acts of Congress, which had for an end not only an orderly marketing of commodities but an endeavor to bring about an adjustment of supply and demand and a hoped-for diminution of a burdensome surplus. They did not achieve that result.

The Federal Farm Board Act, 46 Stat. 11, 12 U. S. C. § 1141, while providing for loans to coöperatives that complied with the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. §§ 291, 292, also contemplated a control of production of cotton and wheat through stabilization corporations. I mean the handling of the surplus, as distinct from a control of the actual growth of the commodity. . . .

The present Act is comprehensive. The title probably gives as accurate a reflection of its purposes as any statement of mine could do.

I might say parenthetically that this act in separate titles dealt with the Farm Credit Administration and the establishment of the Farm Loan Bank Corporation, through which two billion dollars was loaned to agriculture.

The Act opens with a declaration of emergency, and passes on to a declaration of policy. A cursory reading will show that this declaration of policy, while it follows in form and in location in the Act declarations of policy that this Court considered in *Panama Rfg. Co.* v. *Ryan*,

293 U. S. 388, and in *Schechter* v. *United States,* is entirely distinct. It is a great deal more than a hope of what may happen, and will become important as an actual standard of what Congress sought from the passage of this legislation, and of what discretion it gave to its chosen instruments for carrying that out.

The essence of the declaration is that Congress hopes to re-establish prices to farmers at a level that will give agricultural commodities a purchasing power, with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. For the purpose of this commodity and of all others, I believe, except tobacco, the base period was fixed as August, 1909, to July, 1914. . . .

After this declaration of policy, the Act points out what is to be done to effectuate it. Part 2 relates to the authority of the Secretary of Agriculture to achieve this standard which Congress has laid down. Section 8 gives to the Secretary of Agriculture the power to provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith. . . .

This case involves the floor-stock tax, together with the processing tax. The processing tax is covered by § 9 of the Act. Section 9(a) provides the action that puts the tax into effect, and § 9(b) declares what that tax shall be:

"The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity," . . .

The current farm price for the commodity is a figure determined by the Department of Agriculture. The determination involves many different commodities, but includes all of those which are basic agricultural com-

modities under this Act. Prices of farm commodities have been determined and published by the Secretary of Agriculture for at least twenty years.

The exchange value of the commodity is defined in § 9 (c) of the Act, and is—

"the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such comodity had during the base period specified in § 2."

That means that the value or farm price would need to be increased according to the rising scale of prices for articles that farmers bought. Both of those factors had been used by the Department of Agriculture for many years. . . .

The collection of the tax is left to the Collector of Internal Revenue in the usual form, and an appropriation is made to carry out the purposes of the Act. The appropriation, I am sure, will be found important because it clearly answers the contention that this tax was wholly for the purpose of rental and benefit payments.

By § 12 one hundred million dollars are appropriated "For administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage." It also appropriated "The proceeds derived from all taxes imposed under this title . . . to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under Part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes."

There has been no adjustment of the tax rates in respect to cotton. No question is here as to refunds of the tax, nor of amendments to the Agricultural Adjustment Act. We do not conceive that the amendments (passed in August, 1935, 49 Stat. 750) have any effect upon the present case, unless the Court should determine that the

old Act, the first Act, does not properly delegate to the officers of the Government discretion to handle the duties imposed upon them, and in that case there has been a ratification of the action of the officers, so that the tax is now authorized not only by the discretion of the administrative officers, but by the amendatory legislation.

The license taxes are in and of themselves a revenue measure; they are levied as an excise on the processing of the commodity, and for that reason are to be collected without regard to the purposes for which they are to be spent, inasmuch as they go into the Treasury of the United States, together with other funds that were appropriated by the same section, and become there a part of the revenue of the Government.

It is true that by the very Act which imposed the tax and provided for its collection, the proceeds were appropriated to other purposes. But § 12 shows that if not a dollar had been collected in the way of processing taxes, the Government, nevertheless, made provision for the payment of rental and benefit contracts out of the hundred million dollars which Congress directly appropriated and out of the authority which they gave to the Secretary of the Treasury to furnish funds for carrying on this activity of the Government. As a matter of fact, something less than a billion dollars has already been collected in these taxes.

The question of the validity of the Agricultural Adjustment Act as a tax or revenue statute alone is dependent upon a consideration of the cases which this Court has decided, namely, the *Child Labor Tax* case, 259 U. S. 20, and the case of *Hill* v. *Wallace*, 259 U. S. 44, upon the one side, and *United States* v. *Doremus*, 249 U. S. 86, *Veazie Bank* v. *Fenno*, 8 Wall. 533, and *Magnano Company* v. *Hamilton*, 292 U. S. 40, upon the other.

We distinguish the *Child Labor Tax* case. That case involved a tax of ten per cent. upon the profits which

might be earned by a manufacturer who employed child labor, to be imposed immediately upon a violation of the law. It was not a tax in the sense that it was levied upon an operation by the manufacturer, but was held by this Court to be a penalty which affected the income from the operation of a manufacturer who employed children, and that penalty applied at the very instant when he employed the first child contrary to that Act, and employed that child knowingly. The doctrine of scienter entered into that case. In *Hill* v. *Wallace* the tax was upon the selling of futures upon the Grain Exchange, and was levied at a rate of 20 cents a bushel, when the commission of the broker was only a fraction of a cent a bushel, so that it was prohibitive.

This Court said in the case of *Veazie Bank* v. *Fenno* that "the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people, by whom its members are elected."

The case of *Hampton & Company* v. *United States,* 276 U. S. 394, involved an Act which declared in its very title that it was for the protection of industries and for the raising of revenue.

In the present case there is a plain statement in the Act that the tax is to be used for something other than the general support of the Government. The contract which the Secretary of Agriculture makes with the individual producer is to be for the purpose of inducing the producer to reduce his production.

In *United States* v. *Doremus,* which involved licenses and taxes to control the dealing in drugs, there was a tax, in the earlier acts, of only one dollar a year, and a license for the purpose of handling; and upon that tax Congress built an entire system for information in regard to dealing in morphine and other narcotics. That was upheld. . . .

In the case of *McCray* v. *United States,* 195 U. S. 27, there was a clear intention on the part of Congress, which was not, however, expressed in the Act itself, to use the power of taxation for purposes other than the raising of revenue.

I think it may be said that the *Doremus* case and the *McCray* case on one side, and the case of *Hill* v. *Wallace* and the *Child Labor* case on the other, lead to the conclusion that the motives of Congress in levying a tax are not to be considered by this Court. Even if the Act shows that the motive is ulterior to the tax in the mind of Congress, that is immaterial to the validity of the tax, so long as it is based upon an authority which occurs in the Constitution.

In both the *Child Labor Tax* case and in the case of *Hill* v. *Wallace,* you had clear evidence of prohibitions against constitutional rights which people had and exercised. In the *Child Labor Tax* case there had been, up to that time, and of course now is, the right to use child labor in manufacture if there was no State prohibition; and of course the brokers who deal upon the Exchange at Chicago, on the Grain Exchanges wherever they may be, have the right to deal upon those exchanges. So you had a tax which in effect prohibited the exercise of a right by the taxpayer. You had, in the *Child Labor* case, in addition to the excessive tax, an imposition of that tax for a violation of a rule laid down. That, we think, distinguishes those cases from this one. Here is a tax which is to be used, let us say, in rental and benefit payments, together with other things, but there is nothing in the use for a rental or benefit payment which deprives the person who contracts with the Government of any constitutional right which he had at that time. He may be induced to give up a right which he had, which of course every employee of the Government gives up when he gives up his liberty to do other things and agrees to do certain things for the Government.

In so far as the excise is concerned, our briefs, I think, cover that thoroughly. We have the question of uniformity, we have the question of floor-stocks, and I pass to the problem of delegation.

[Here followed an interesting discussion (interrupted by many questions from the Bench) of the method of fixing the tax and of the question whether the functions sought to be delegated to the Secretary of Agriculture in that regard were constitutionally delegated, with proper legislative standards. The speaker also contended that, in any event, the acts of the Secretary in fixing the taxes were ratified by § 21 (b) of the Amendatory Act of August 24, 1935.]

As to whether or not this is a violation of the Fifth Amendment, we contend that there is no power in the taxpayer to question the expenditures that are made. Citing *Massachusetts* v. *Mellon,* 262 U. S. 447. . . .

If the Court should think it proper to go beyond the tax itself, and consider the purpose for which this money is expended, then we contend that the general welfare clause gave Congress power to expend it for rental and benefit payments.

We distinguish, of course, between the use of Federal money to coerce some action by an individual, and the inducement to the individual. We say that the general welfare clause is a clause that is construed not as a general power, but as a special power in Congress to expend this money; and we rely particularly upon the case of *United States* v. *Realty Company,* 163 U. S. 427, where it was held that Congress had authority to appropriate for the payment of a claim for sugar bounty which was a moral claim upon the Government, even if the earlier act granting the bounty were unconstitutional. . . .

We also take up a discussion of the purpose of this money—as to whether this tax has been levied for a public purpose. We do not think that that can be ap-

proached except from the standpoint of the general rules in regard to the use of tax money. We know how hesitant the Court is to interfere with the appropriation by Congress of money for purposes deemed by Congress to be within the public welfare.

We accept the decision in the case of *Loan Association* v. *Topeka,* 20 Wall. 655, where this Court held that a State act was not for a public purpose, where it had authorized the payment to a local manufacturer of funds to operate his business. Upon the other side, the theory of public purpose upon which we rely is that enunciated in the case of *Noble State Bank* v. *Haskell,* 219 U. S. 104. In that case money was taken from the various banks that were operating in the State of Oklahoma and paid into a fund which was to be used to make whole the depositors in banks that failed. That is an illustration of the use of public money for a public purpose. It seems to us similar to the use that is made here of a tax levied on processors in the form of an excise passed on to the general consuming public, the purpose of which is to raise money to be used by the Government in contracts with farmers, for the reduction of surplus production that was pressing on the price and pressing on the supply in the hands of the American handlers of commodities. . . .

Extracts from the printed argument for the Government, signed by *Attorney General Cummings, Solicitor General Reed, Assistant Attorney General Wideman, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Andrew D. Sharpe, Robert N. Anderson, Alger Hiss, Mastin G. White,* and *Prew Savoy.*

The sole purpose of the processing and floor-stock taxes is to raise revenue.

The processing and floor-stock taxes are excises; not direct taxes.

The floor-stocks adjustment may be separately justified as a necessary adjunct to the processing taxes.

Powers were not unlawfully delegated.

If in the original Act Congress exceeded its power to delegate, that is now immaterial because Congress has expressly ratified the assessment and collection of the taxes. Agricultural Adjustment Act, as amended Aug. 24, 1935, § 30, subsec. 21 (b); *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *The Peggy*, 1 Cranch 103, 110; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Dorchy* v. *Kansas*, 264 U. S. 286; *Steamship Co.* v. *Joliffe*, 2 Wall. 450.

This Court has recognized that Congress may ratify taxes, illegal when assessed but assessed under claim and color of authority, if it could have imposed such taxes in the first instance and if its power to do so remained unimpaired to the date of ratification. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226. See also *Mascot Oil Co.* v. *United States*, 282 U. S. 434; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 10, 11; *Seattle* v. *Kelleher*, 195 U. S. 351, 359–360; *Hamilton* v. *Dillin*, 21 Wall. 73; *Hodges* v. *Snyder*, 261 U. S. 600, 602–603; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 332; *Wagner* v. *Baltimore*, 239 U. S. 207, 216, 217; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Kansas City Ry. Co.* v. *Road District*, 266 U. S. 379; *Tiaco* v. *Forbes*, 228 U. S. 549. Cf. *Matter of People* (*Title & Mortgage Guaranty Co.*), 264 N. Y. 69; *Fisk* v. *Kenosha*, 26 Wis. 23; *Miller* v. *Dunn*, 72 Cal. 462.

A tax is not necessarily invalid because retroactively applied. Taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed.

The processing and floor-stocks taxes do not contravene the Fifth Amendment. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85; *Nebbia* v. *New York*, 291 U. S. 502, 525; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 347 (footnote 5); *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44; *McCray* v. *United States*, 195 U. S. 27;

Nicol v. *Ames,* 173 U. S. 509, 521; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

The contention that these taxes are not for a public purpose is simply another way of challenging their character as revenue measures. The money collected goes into the Treasury of the United States. One must presume that it will be used for a purpose within the powers of Congress. If so used, no objection could be made on the ground that the taxes are not levied for a public purpose. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Veazie Bank* v. *Fenno,* 8 Wall. 533.

Respondents should not be allowed to question the appropriation as a defense to the payment of their taxes. *Massachusetts* v. *Mellon,* 262 U. S. 447, 487. Cf. *Knights* v. *Jackson,* 260 U. S. 12, 15; *Patton* v. *Brady,* 184 U. S. 608, 620; *United States* v. *Realty Co.,* 163 U. S. 427.

Public policy requires that taxpayers shall not avoid payment of otherwise valid taxes by questioning the purpose of the levy or of an appropriation contained in the taxing statute. The appropriateness of such a rule is particularly apparent where, as here, it is not possible to ascertain the exact use to which the taxpayers' money will be put. It is true that the Act in its original form contained in itself an appropriation. § 12 (b). But this fact would not have made the money, if collected at that time, any the less a part of the public funds. See *Knights* v. *Jackson,* 260 U. S. 12. Furthermore, money collected under the Act could be used to defray any of the Government's expenses should Congress see fit to change the appropriation before the money was actually transferred from the general fund of the Treasury as a set-off against advances made out of that fund. Cf. *Head Money Cases,* 112 U. S. 580.

In the case of respondents' taxes, the use is made even more uncertain by the terms of the appropriation provisions found in the Act.

Under the Act of August 24, 1935, the appropriation is out of the general funds of the Treasury in an amount equivalent to the taxes collected under the original Act. Also, under the appropriation the Secretary of Agriculture may now use any part of the money for additional kinds of payments and for the acquisition of agricultural commodities pledged as security for certain loans made by federal agencies. Thus, additional objects of expenditure and additional elements of uncertainty have been introduced.

The general welfare clause should be construed broadly to include anything conducive to the national welfare; it is not limited by the subsequently enumerated powers. Congress may tax (and appropriate) in order to promote the national welfare by means which may not be within the scope of the other Congressional powers. That this, commonly known as the Hamiltonian theory, is correct, is shown by the plain language of the clause; by the circumstances surrounding its adoption; by the opinion of most of those who participated in the early execution of the Constitution; by the opinion of later authorities; and by long-continued practical construction.

The question was elaborately discussed in the briefs filed in *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Realty Co.,* 163 U. S. 427; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180; and *Massachusetts* v. *Mellon,* 262 U. S. 447.

The Madisonian theory, rejecting the natural meaning, and treating the clause as an introduction to the subsequent enumeration of Congressional powers (1 Richardson's Messages, etc., 585), violates the basic principle of constitutional construction. *Holmes* v. *Jennison,* 14 Pet. 540, 570–571. See Story, Const., §§ 912–913. This would transform a great independent power into a mere incident of other powers.

The circumstances surrounding the adoption of the clause and the opinions of most of those who participated

in the adoption and early execution of the Constitution support the Hamiltonian view. Arts. of Confed. § 8; 9 Writings of James Madison (Hunt ed.), pp. 411–424, 370–375; 4 Madison, Letters and Writings, 126; Elliott's Debates.

The clause was adopted along with that relating to payment of the debts, after a prolonged discussion, not only of the Revolutionary debts, but also of the power of Congress, as against that of the States, in regard to matters of general interest. See Elliott's Debates, V, I; cf. 4 Madison, Letters and Writings, pp. 121 *et seq.*

Discussion in the ratifying conventions indicates clearly an almost unanimous view that the clause was not limited by the enumerated powers. Elliott's Debates; Hamilton's Rep. on Manufactures, 3 Hamilton's Works, pp. 192, 250; President Monroe, 2 Richardson's Messages, etc., pp. 165, 173.

There would seem no doubt that President Washington agreed with Hamilton and Monroe (Story, Const., § 978, note). And it is clear that John Quincy Adams was of the same opinion (Letter to Stevenson, July 11, 1832, reprinted in Cong. Rec., 49th Cong., 1st Sess., vol. 17, Part 8, Appendix, pp. 226 to 229), as was likewise Calhoun (30 Annals of Congress, 14th Cong., 2d Sess., p. 855). Henry St. George Tucker, of Virginia, representing a special committee of the House of Representatives in 1817, expressed the same opinion (II American State Papers (Misc.), 443, 446, 447), as did also Daniel Webster (Webster's Great Speeches, 243). Apparently, Jefferson likewise shared this view, although his opinion on the Bank of the United States has been quoted both as supporting the Hamiltonian and the Madisonian view. IV Elliott's Debates, 2d ed., 610. See Story, Const., § 926 (note); 1 Hare, American Const. Law, 244; and see President Jackson's statements in his veto of the Maysville Road Bill. [An Appendix to the Government's brief in this case contains

a valuable collection of the opinions on this question delivered before the ratifying conventions, and other examples of contemporaneous exposition. See also 36 Harv. L. Rev. 548; 23 Georgetown L. J. 155; 22 *id.* 207; 8 Va. L. Rev. 167–180; 42 Yale L. J. 878.] Madison himself in later years recognized that his view had not been followed in practice. 4 Madison's Letters and Writings. 146.

Not only was the Hamiltonian theory adopted by the "weight of contemporaneous exposition" (See *Martin* v. *Hunter,* 1 Wheat. 304, 350); it has been accepted by most of the later great commentators on the Constitution. See Story, *ubi supra;* Pomeroy, the Const. (3d ed., 1883), pp. 174–175; Willoughby, Const., pp. 582–593; 1 Hare, Am. Const. L., pp. 241 *et seq.;* Mr. Justice Miller's "Lectures on the Constitution," pp. 229–231, 235; Burdick, Const., § 77. Of even more importance is the practical construction by the earlier Congresses. 30 Annals of Congress, 14th Cong., 2d Sess., p. 855; II American State Papers (Misc.), 443, 446, 447; Story, *op. cit.,* § 991.

The Hamiltonian view has been so continuously and so extensively followed by Congress that many of our most familiar and significant governmental policies and activities are dependent upon its validity. [Under this head the brief cites a large number of instances of appropriations for various objects, including: relief of distress due to catastrophes; health; education; science; social welfare; industry; agriculture.]

The relevant judicial authorities support the Hamiltonian theory. *United States* v. *Realty Co.,* 163 U. S. 427; *Missouri Utilities Co.* v. *California City,* 8 F. Supp. 454, 462; *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668, 681; *Head Money Cases,* 112 U. S. 580, 595; *Gibbons* v. *Ogden,* 9 Wheat. 1, 197; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 153.

The literal reading of the general welfare clause has been adopted by most of the lower federal courts. *Langer* v. *United States,* 76 F. (2d) 817; *Kansas Gas & Electric*

Co. v. *Independence,* 79 F. (2d) 32, supplemental opinion on rehearing, 79 F. (2d) 638; *Missouri Utilities Co.* v. *California City,* 8 F. Supp. 454; *Vogt & Sons* v. *Rothensies,* 11 F. Supp. 225. Cf. *Miles Planting Co.* v. *Carlisle,* 5 App. D. C. 138; *Washington Water Power Co.* v. *Coeur D'Alene,* 9 F. Supp. 263.

It is not suggested that the public money may be expended by Congress for any other than national purposes, or for any other uses than those of the Nation. But the question of what is a national purpose, of what is a national use, is, in the first instance, purely a question of governmental policy, of which Congress is to judge.

The procedure provided by the Constitution for the consideration by Congress of fiscal measures, and the accountability to the electorate, were the only checks on congressional appropriations. *McCulloch* v. *Maryland,* 4 Wheat. 316, 428; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433, 443.

The entire range of discussion in the Convention was directed to *locating* the power and little or no attention was given its *extent,* which everyone seemed to concede must, in the nature of things, be discretionary. The same is, in general, true of the ratifying conventions. In the early years following the adoption of the Constitution, the view was generally expressed that Congress' determination of what was for the general welfare was not subject to judicial review. Madison, Veto Message of March 4, 1817; Hamilton, Opinion on the National Bank, 3 Hamilton's Works (Lodge ed.), p. 485. See also Hamilton's Report on Manufactures, III Hamilton's Works (Hamilton ed.), p. 250; Monroe, Veto of the Road Bill, II Richardson, 142, 165, 166; Pomeroy, Const. L. (10th ed.), § 275; 1 Hare, American Const. L., 249; Cooley, Taxation (2d ed.), 109; Story, Const., §§ 924, 944, 991, 1348.

In *United States* v. *Realty Co.,* 163 U. S. 427, it was said that the determination of what debts or claimed debts

should be paid "depends solely upon Congress" (p. 441); and that the decision of Congress recognizing a claim founded upon principles of right and justice "can rarely, if ever, be the subject of review by the judicial branch of the government" (p. 444). If this be true of the word "debt"—so familiar to our courts—Congressional application of the term "general welfare" cannot be more readily subject to judicial review.

The expenditures authorized by the Agricultural Adjustment Act were soundly designed to promote the general welfare. [Here followed an elaborate explanation of the agricultural situation and the application of the statute].

The tax was laid and the proceeds appropriated for a public purpose.

Rules applicable to municipal taxation are not relevant to the great power of Congress to raise revenues. 1 Cooley, Taxation, 4th ed., pp. 388–390.

While in local taxation the courts may, in extreme cases, review the legislative determination that a particular object is for a public purpose, in federal taxation Congress should be the final arbiter of what constitutes a federal public purpose. That which is for the "general welfare" as those words are used in the Constitution, must of necessity also be for a public purpose.

Yet even viewed by the more narrow and critical rules applicable to state taxation, the purpose here was clearly public. Citing and discussing many authorities, including *Loan Association* v. *Topeka,* 20 Wall. 655, 665; *Green* v. *Frazier,* 253 U. S. 233, 240–242; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Parkersburg* v. *Brown,* 106 U. S. 487; *Cole* v. *LaGrange,* 113 U. S. 1.

It is no objection to the tariff acts that they benefit manufacturers as well as the country generally. *Field* v. *Clark,* 143 U. S. 649, 696; *Hampton & Co.* v. *United States,* 276 U. S. 394, 411.

The appropriations contemplated by the Act are a valid exercise of the fiscal powers of Congress. To stabilize and preserve the credit structure of the Nation, to protect the banks and other credit agencies which it had already established or sponsored, and to protect the credit of the Government itself.

It was inevitable that the sudden and tremendous decrease in farm incomes should have caused a serious strain on the farm-credit agencies which had already been weakened by the long price decline and general liquidation which had characterized agriculture since 1920. Only by increasing the purchasing power of the farmer could the stability of the financial system be restored and the large investments which the Federal Government had made in this field ever be liquidated.

Power of control over or regulation of agriculture has not been asserted, but, to the contrary, the steps authorized by this Act and taken under it do not go beyond the appropriation and spending of the money.

The contracts are a matter of negotiation and voluntary agreement and on the part of the United States amount to no more than a method by which the Secretary of Agriculture sees that the money appropriated goes to persons in the class specified by Congress. It is, indeed, probable that the Secretary would be held to have the right to enter into contracts of this sort even though he had not been specifically authorized by Congress to do so. See *United States* v. *Fidelity & Deposit Co.*, 80 F. (2d) 24. Similar contracts are entered into by administrative officials in almost every case where money is expended for such familiar matters as the construction of buildings and the delivery of supplies.

It would be most unusual to suppose that a contract of this nature, entered into freely by both parties, is an exercise of sovereign regulation and control over one of

the parties or over the subject matter with which the contract deals. "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf." *United States* v. *Bostwick,* 94 U. S. 53, 66; See also *Cooke* v. *United States,* 91 U. S. 389, 398; *Smoot's Case,* 15 Wall. 36. No method of enforcement of these contracts has been provided by Congress. Under them the rights of the United States are no greater than would be the rights of a private citizen under similar contracts, and enforcement must be by ordinary judicial process according to the law of the forum. The contracts are not derogatory of any sovereign rights of the States; they are carried out pursuant to and under the protection of the laws of the States.

In this Act the Government goes no further than offering benefits to those who comply with certain conditions. If power over the matters to which those conditions relate is vested in the States, they remain free to pass laws rendering it impossible for any of their inhabitants to comply with such conditions. In so doing the States would not be clashing with any enactment of Congress, even though the result were to terminate completely the administration of the agricultural provisions of the Act in those States. There is no attempt to require the States to take or refrain from action with respect to agricultural land within their borders, a power which this Court in *Kansas* v. *Colorado,* 206 U. S. 46, has declared does not reside in the Federal Government.

The distinction between an application of the law-making power to enforce compliance, and the use of the spending power to persuade, was pointed out in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 529, and illustrated by the case of *Federal Compress Co.* v. *McLean,* 291 U. S. 17.

The effect which the Act of Congress will have in a State is dependent entirely upon the voluntary action of

that State and its inhabitants. The situation is much like that in *Massachusetts* v. *Mellon,* 262 U. S. 447.

Furthermore, if the expenditure results in regulation of matters normally within state control, that result cannot deprive Congress of the right of taxation for the general welfare given it by the Constitution. *McCray* v. *United States,* 195 U. S. 27.

Similarly, considering this Act as an exercise of the fiscal powers of Congress, it is not invalid even if it invades state fields. *First National Bank* v. *Fellows,* 244 U. S. 416; *Legal Tender Cases,* 12 Wall. 457, 539.

Oral argument of *Mr. George Wharton Pepper,* for respondents.

May it please your Honors, this record gives rise, as I see it, to two entirely distinct questions. One question is whether the portions of the Agricultural Adjustment Act which are under discussion would be constitutional in respect of the taxes levied under their authority, if Congress had itself levied them and settled every detail in connection with them. The second is the entirely distinct question (assuming that Congress might itself have done all that the Secretary of Agriculture has here done) whether the delegation to him of the authority in virtue of which he had undertaken to act was such a valid delegation that the acts done by him have the quality of taxation.

Mr. Hale, my colleague, who represents the receivers, respondents in this case, has invited me to address myself to the first of these questions, namely, whether or not this processing tax is a valid exaction, irrespective of the question of delegation; and he, with your Honors' permission, will address himself to the question of delegation, a great and important question in the case, but quite distinct, as it seems to me, from the one which I am going to discuss.

I have no disposition to raise an issue with the Solicitor General respecting the seriousness of the situation with which Congress undertook to deal; but when I come to consider whether or not the attempted remedy for the economic evils is or is not within the limits of the power of Congress, I cannot escape the conclusion that in his argument, able as it was, he has indulged somewhat in oversimplification. The case presents to him no difficulty. Congress, in the familiar course of legislation, has done two things, both of which, as he sees it, are well within its power. First it has laid a tax. Second it has made an appropriation. The tax feature is an ordinary exercise of the taxing power; and, as to the appropriation, even if it is for any reason questionable, nobody has a standing to question it. Apart from the question of delegation, he thus readily convicts the court below of error and asks confidently for a reversal.

I, on the other hand, find in this record some constitutional questions of great difficulty and of vast importance. It seems to me that a reversal of the judgment appealed from would justify the conclusion that Congress, originating as a federal legislature with limited powers, has somehow been transformed into a national parliament subject to no restraint except self-restraint.

I venture to hope that the judicial power of the United States does not extend to working any such transformation and that, to bring it about, we the people of the United States must deliberately resort to the process of constitutional amendment.

One of the difficulties necessarily involved in the argument of this case is to identify the relevant portions of the statute and to isolate the essential facts, and then make a statement of them that is full enough to be fair but compact enough to be manageable. Although the Solicitor General has done this to the extent required by his argument, I hope the Court will be patient with me if I attempt a brief restatement.

In what I am about to say I am referring to the unamended act, inasmuch as the taxes sought to be recovered by the Government in the instant case had accrued before the amendment. The significance of the amendment will be discussed at the proper point in the argument in connection with what we hold to be an ineffective attempt to ratify taxes theretofore invalid.

Any such statement must, as its first point, make a reference to the declared policy of the AAA, which is found in § 2 of Title I. That policy is by an elaborate mechanism to re-create for the farmer the favorable financial conditions which, under the operation of economic law, he for a short time enjoyed about a quarter of a century ago. More specifically, the policy is to raise the price which the farmer receives for a unit of what he produces until the sale of that unit shall enable him to buy as much and as many needed commodities as a unit sale would have enabled him to buy during the base period. The base period selected as the golden age of agriculture is, in the case of all commodities except tobacco and potatoes, the pre-war period from 1909 to 1914. In the case of tobacco and potatoes it is the post-war decade from 1919 to 1929. The golden age value to be secured for the unit is called its "fair exchange value." Obviously its determination requires first the ascertainment (at any given moment) of the actual current market price of the unit; second the actual current market price of commodities needed by the farmer; third the number of dollars that a unit fetched in the base period; and, fourth, the quantity of needed commodities for which a unit was then exchangeable. When the Secretary of Agriculture has ascertained these factors he has the material for a formula which will determine the gap or "spread" between the actual price and the ideal, or parity, price. This gap it is the laudable purpose of the act to close. Accordingly, the Secretary undertook, in the early part

of 1933, to determine what had been, in the base period, the farm price per pound of cotton, and he found that it was 12.40 cents. He then ascertained that the price index of the commodities which farmers buy pointed to a figure higher than their price in the base period by 3 per cent, so that the figure was 103 per cent as of the time of his determination compared with the situation in the base period.

Applying his 103 per cent to his 12.40, he got 12.77. He then ascertained that the farm price current for a pound of cotton was 8.7 cents. Subtracting the 8.7 cents from 12.77, he got 4.07. Then he made an adjustment, which is explained by the fact that the farm prices have to do with the lint cotton, in bales, and the price to the farmer is based upon the unbaled weight, so he finally determined the gap to be 4.2 per pound.

It is perfectly true, as the Solicitor General has said, that we do not dispute that the Secretary of Agriculture did the best job he could do with the figures at his disposal. He gathered a lot of statistics from all over the country, and he weighted them and he did all the things which have been suggested from the bench as the common practice in the departments; and there did result this figure of 4.2, and there is no dispute between us respecting the fidelity with which the Secretary acted in an attempt to find the figures upon which to base the tax.

Adjustment of production to consumption by closing the gap in order to increase the purchasing power of agricultural commodities thus being the ultimate objective, the second important point is that the adjustment is to be accomplished by a reduction in acreage, or reduction in the production for market, or both, of any basic agricultural commodity. This reduction of production is relied upon to cause a corresponding diminution of marketable units and a consequent approximation of their actual market price to the golden age price.

I pause to note that the phrase "adjustment of production to consumption" is really not an accurate statement of the objective. The natural meaning of that phrase is that you are merely reducing production to the extent of equalizing it to a consumption which is to remain undisturbed. It is evident, however, that what is really proposed is such a reduced production as will secure for the farmer his parity price, irrespective of the effect produced upon the consumer.

The third point is that the closing of the gap through reduction of production is to be accomplished principally through agreements with producers containing provisions for rental or benefit payments in such amounts as the Secretary of Agriculture deems fair and reasonable; the producer in consideration of the payment agreeing to act in conformity with the federal policy.

The fourth point is that, in order to raise the money with which to purchase the promise of the farmer to limit his production and otherwise submit to regulation, a processing tax is levied upon processors in respect of the first conversion of raw material into a manufactured product; and the proceeds of this tax, while paid into the Treasury, are appropriated in advance to the Secretary of Agriculture for the specific purposes which I shall presently state. The rate of tax, per unit processed, is by the act declared to be the difference between the current average farm price for the commodity and the fair exchange value thereof. In other words, the rate of tax corresponds to the gap or spread between the actual and the ideal. Thus the rise and fall of the so-called tax is dependent upon factors wholly unrelated to the business of the processor. From his point of view the tax might as well have been levied at a figure per unit processed dependent upon the rise or fall of the mercury in the Fahrenheit thermometer.

The next point to be noted is that the proceeds of the tax when received by the Secretary of Agriculture are to

be available for specific purposes, to wit, disbursements which include not merely rental and benefit payments to farmers but what is euphemistically described as "expansion of markets" and "removal of surplus agricultural products." "Expansion of markets" I understand to include those open market operations which, when conducted in financial centers, are described as "rigging the market." "The removal of surplus agricultural products" means in the case of hogs (for example) the purchase of quantities of animals at high prices and their incineration with a view to limitation of supply. My friend the Solicitor General is quite right when he says that there was appropriated a hundred million dollars initially out of the Treasury, before the scheme got to work, which was available for the time being for rental and benefit payments; but I am sure that the provision of the Act has not escaped him which is to the effect that as the proceeds of the tax come in, the amounts advanced by the Treasury are to be repaid; so that the whole financing of the scheme which I am outlining is accomplished by a tax paid by the processors in accordance with a measure or yardstick which has no relation under heaven to their activity or the business they are to do.

Finally, it may be observed that the original list of agricultural commodities as contained in § 11 of the act, has been increased by the subsequent inclusion of many others, the most recent being potatoes. Naturally it is impossible to make a definite statement respecting the scope of that provision of the act which authorizes the imposition of compensating taxes on articles found to be in competition with basic commodities. These competing commodities are to be identified only by the Secretary and might include a vast area of production in addition to the area specified in the act.

In making the foregoing statement I have carefully refrained from stating such features of the act as give rise

to the question of delegated power. It seems to me to conduce to clearness to reserve a reference to those features until the argument on delegation is made. I merely remark in passing that the whole scheme of the act necessarily calls for so many determinations, adjustments and decisions on points of policy that it might fairly be described as a scheme for the government of agriculture with the Secretary of Agriculture as Governor General.

That is my basic statement of the significant parts of the Act and of the facts which it seems to me it is important to bear in mind in approaching the constitutional questions, which, as I have said, seem to me to be two. I affirm, first, that the processing exaction is not in its nature the exercise of the taxing power of the United States, but is wholly regulatory in character, and is part of a nation-wide scheme for the Federal regulation of local agricultural production; and, second, that if that scheme as a whole is unconstitutional as an invasion of the reserved powers of the States, then the whole scheme falls and the processing tax falls with it. . . .

When the Court rose yesterday I had completed an introductory statement upon the basis of which I desire to present two propositions for the consideration of this Court.

First: That the exactions called processing taxes are not exercises of the taxing power as such but are integral parts of a regulatory scheme and are themselves regulatory in character.

Second: That this regulatory scheme is an invasion of the field reserved by the Tenth Amendment to the States and to the people and that therefore the scheme must fall and carry the processing taxes with it.

If I can sustain these propositions, then without regard to the question of delegation, the judgment appealed from must be affirmed. I confidently assert, without

arguing the point, that if my propositions are sound, nothing in the amendment of August 24, 1935, in any way affects them. I do not understand it to be seriously contended that the amendment has changed the nature of the regulatory scheme. If the original act was invalid for lack of power the amendment is in no better case.

The outline of the scheme which I have already made makes it clear that control of production is the objective of Congress. I now wish to show that the processing tax is merely a cog, though an essential cog, in the regulatory machine. That this is its true character appears from the following considerations:

There is no tax until the Secretary of Agriculture determines that rental or benefit payments are to be made. See § 9 (a). In other words, the making of rental or benefit payments is the sole occasion for the tax.

The declared objective being to close the gap between the farmer's financial condition today and his condition in a pre-war period, the rate of the tax is declared to be the extent of such gap. § 9 (b). In other words, (as already explained) there is no relation whatever between the rate of tax and the activity of the processor, except that the extent of the gap in the farmer's income is translated into such-and-such a sum per pound of raw material processed. Congress in so many words has said "We exact from the processor a sum equal to our estimate of what the farmer should be receiving in addition to his present income."

The sum so exacted is to be paid into the treasury but is by the act itself so appropriated as to be available to the Secretary of Agriculture for rental and benefit payments and other features of the reduction program. § 12 (b). In other words, the tax and its use are so related that, except for the specified use, there would be no tax, and except for the tax, the scheme could never go into effect.

The tax terminates at the end of the marketing year current at the time the Secretary determines to discon-

tinue rental and benefit payments. § 9(a). In other words, just as the proposed exercise of control is the occasion of the tax so a determination to abandon control marks the end of the tax. The provision on that subject is the reciprocal of the first that I mentioned. The tax goes into effect when the Secretary declares that rental and benefit payments are to be made. The tax ceases to exist at the end of the market year when he declares that the rental and benefit payments are to terminate; and, as I have explained, in the interval the tax, in theory at least, is modified upward or downward by fluctuations in the fortunes of the farmer. I say "in theory at least," because (referring to the brief filed on behalf of the processors of hogs) you will find that while in the case of cotton it so happens, as so clearly explained by the Solicitor-General yesterday, that the tax has been maintained and still exists at the same figure at which it was originally placed—namely, 4.2 cents per pound, that being the precise mathematical outcome of the formula in the act, with some administrative adjustments—in the case of hogs the authority given to the Secretary to approach compliance with the formula gradually has been exercised so liberally that while the tax which the formula would have yielded at the time the tax was imposed was something over four dollars and a half per hundred-weight of hogs, the Secretary imposed a tax first of fifty cents, then of a dollar, then of a dollar and a half, and subsequently, as of March, 1934, a tax of $2.25 the hundred-weight, which has continued in effect and is in effect at the present time, although at the outset that was only about half the figure yielded by the formula; and the gap has in fact so far closed, owing to the successful operation of the scheme, that there was, I think, one time when the gap disappeared entirely; and there are judicial findings in a number of cases to the effect that the gap had shrunk to 81 cents at the time of the findings in question, although the tax was still maintained at $2.25.

I mention this to show that the tax is regulatory in character, and does not really follow even the fluctuations as required by the formula, but that resort must be had to that provision of the Act which authorizes the Secretary not merely to fix the rate at the outset in accordance with the formula or a gradual approach to it, but authorizes him to maintain the tax after it has been laid, so that if the tax equals the formula or is less than the formula at the time it is laid, and subsequently the gap closes, even approaching the vanishing point, the power to maintain is invoked for the purpose of keeping the tax at a figure in excess of the formula, provided in the opinion of the constituted authority it is necessary to do that thing in order to regulate local production.

Since the object of the scheme of federal control is to enable the farmers to get higher prices for their products, and so close the gap, it must follow that if (for example) the processors of hogs had voluntarily paid to their several vendors such prices as would close the gap there never would have been any tax whatever.

While the formula for the tax rate is specified in the act, the Secretary of Agriculture is given discretion to lower it, § 9(b); he is, by § 15(a), given authority to exempt the processing of any commodity from all tax whatever, and even to refund what has been paid; and he is empowered by § 15(d) to impose compensating taxes of unspecified amounts upon commodities competing with basic commodities.

In view of the foregoing I submit that what Congress has done is not to exercise its taxing power except as part of and solely in aid of a regulatory scheme, the administration of which it has confided to an executive official.

If I am right in my analysis, it is about as clear a case of an exaction masquerading as a tax, but really regulatory in its character, as I think has ever come before this Court. . . .

Now, may it please your Honors, if I am right in my contention that this so-called processing tax is merely a regulatory exaction, and not an exercise of the taxing power as such, it remains for me to satisfy your Honors that it is such an exaction as should fall if the scheme itself is beyond the power of Congress.

On this point I contend that this Court has decided that wherever it appears upon the face of the statute that levies are being imposed not to replenish the public treasury but to control the conduct of the private citizen, the validity of the levy depends upon whether the exercise of control is within the powers granted by the people to Congress.

At this point the Solicitor General advances the objection that there is a difference between this case and the decisions to which I refer. He is right: there *is* a difference but it is not a significant difference. It is true that in the *Child Labor Case* and others the tax was laid upon A in order to control A's conduct. In the instant case the money is exacted from A in order to be used for the control of the conduct of B. If, however, the fact be that *control of conduct* is the legislative objective and if such control cannot be accomplished without resort to a tax, then it must be immaterial whether the control, if achieved, results from A's desire to escape the tax or from B's readiness to exchange his freedom for a share of A's money. . . .

But the objection is then advanced in another form. It is said that in the instant case it is optional with the farmer whether he will accept the benefit payment and that, if he subjects himself to control, he does so voluntarily. This, it seems to me, is a factual distinction without a legal difference. The employer of child labor was not coerced except by economic pressure. The farmer is not coerced except by economic pressure. Whether the pressure takes the form of threatened exaction or of prom-

ised bounty, the Court is faced by the same fundamental proposition, namely that Congress is using the device of a tax as a means to the exertion of effective pressure upon the citizen in order to make him conform to congressional policy. If the control thus sought is within some granted power, well and good. If not, the whole scheme fails.

The Court will note that I am not contending that a federal loan or a federal bounty to farmers is, *per se*, invalid. I recognize that for a hundred years there have been all sorts of unchallenged congressional appropriations to promote agriculture. But these measures merely offered advice or instruction or extended financial aid to farmers. In no case, as far as I know, was there an attempt by Congress through the use of money to regulate local production. The type of regulation here attempted is the limitation of local agricultural production. Suppose it were the policy of a given State to stimulate such production through bounties or by more positive coercion. I find it hard to believe that the Constitution of the United States would sanction a public auction in which the farmer is placed on the auction block, the federal government bidding in order to purchase his promise to limit production and the State bidding in order to retain his loyalty to the local law. That is not at all an extravagant illustration, because, if, when your Honors come to look at Mr. Donald's able brief [referring to one of the briefs filed by *amici curiae*] you will glance at page 42, you will find the most interesting collection of constitutional and statutory declarations in the several States that seem to me to be at war with this Federal policy; and if it is going to be possible for the Federal Government to offer pecuniary reward to the farmer under conditions such that he cannot very well afford to decline, you get a situation in which he sells his freedom for this mess of pottage, and disavows his allegiance to that State which, under the Tenth Amendment, is entitled to control his

production, and subjects himself to what is, in that sense, an alien scheme. I always distrust my capacity to put a perfect dilemma; but I suggest that in this case one of two things is true—either that control acquired by purchase is, if lawful, the supreme law of the land or that a scheme of local regulation which it is within the power of the State to nullify is a scheme which Congress lacks the power to set up.

If you look at the case realistically, it is not a voluntary matter with the farmer whether he does or does not accept the regime. It is no more voluntary than it was in the case of the manufacturer of goods made with child labor to continue to pay the tax and still remain in the business of which Congress disapproved. It is not possible for the farmer in any neighborhood who refuses to accept the regime to compete successfully with his next door neighbor who has accepted it. If you think realistically, it is not a voluntary scheme at all; and if you will glance at pages 32 to 36 in Mr. Donald's brief and note the intensive sales effort that was put out to capture the allegiance of the farmers, you will think that I am not extravagant in saying that that was a method of compulsion that is a good deal more effective than allotting quotas and threatening criminal penalties for their violation. It is a good deal more effective to purchase control with the use of liberal sums of money than it is to enforce obedience to a complicated scheme by means of criminal sanctions.

In connection with the emphasis laid by the Government upon the alleged voluntary character of the farmer's consent to be regulated, I think it significant to note that there is nothing voluntary in the consequences of his action as they affect the processor and the consumer. These people may well be neighbors of the farmer and citizens of the same State. The necessary result of the farmer's agreement with the federal government to limit

production is threefold: first, it subjects the processor to a tax; second, it raises the price which the processor must pay to the farmer for his raw material; and, third, even if the processor absorbs the tax, he must reflect the rise in raw material costs in his price to the retailer—who, in turn, exacts an increased price from the ultimate consumer. There is, I repeat, nothing voluntary in this scheme as respects the effect upon processor and public. I mention this merely by the way; because I am contending that the criterion of validity or invalidity is the control sought by Congress and not the nature of the economic pressure exerted to secure it.

I have now attempted to establish that these processing exactions are an integral part of a scheme to regulate local production and to affect the price of agricultural commodities and so must be declared invalid if the scheme as a whole is invalid. Before passing to my second proposition—namely, that the scheme *is* invalid—I wish to notice a final objection made by the Government against treating the scheme of the act as a unity.

It is said that while A may resist payment of an exaction intended to control his own conduct, he has no standing to resist it if the proceeds are to go into the Treasury and there become subject to uncontrollable spending power. There is in this objection what seems to me an obvious fallacy. The precedent relied upon by the Government—*Massachusetts* v. *Mellon*—is merely authority for the proposition that neither a State nor an individual taxpayer has a sufficiently direct pecuniary interest to give him a standing to question the validity of an appropriation of money which is lawfully in the Treasury and subject to appropriation. The question presented by this record is wholly different. Here the citizen is resisting an attempt of the Federal Government to take money out of his own pocket and is basing his resistance upon the

invalidity of the scheme of which both the threatened collection and proposed disbursement are necessary parts.

I do not overlook the announcement recently carried by the press that if this act is declared unconstitutional the next move of Congress will be to levy an excise in one Act and then appropriate money for benefit payments by another. If such a course is followed it will be time enough to discuss the constitutional questions to which it may give rise. I venture the suggestion, however, that if the spending power is ever thus deliberately invoked to enlarge the area of Congressional control, it might not be impertinent to ask this Court to consider whether, in a democracy, the individual citizen has not a standing to call the legislature to account, not because of his pecuniary stake but because of his responsible share in government.

I come now to my second proposition—which is that a scheme to regulate farm production and fix farm prices is an invasion of the field reserved by the Tenth Amendment.

I do not see how there can be much controversy over the purpose of this Act. The draftsman with commendable frankness has, as we have seen, explicitly stated it. Whether you call it realistically the philosophy of scarcity or euphemistically the adjustment of production to consumption, the plain fact is that the reduction of local production of crops must at all hazards be achieved or else the desired increase in farm prices is unattainable. It seems to me, therefore, that we have, as to agriculture, the same type of regulation unsuccessfully attempted by NRA in the case of industry. If the Court will compare the declarations of emergency in the two Acts it will be seen that obstruction of the normal currents of commerce figures largely in what Congress evidently hoped would be accepted by the Court as jurisdictional facts. In the

case of both Acts the draftsman had a rosy vision of nationwide economic recovery achieved through increased commodity prices and he mistakenly assumed that this end could be lawfully accomplished through regimentation by a central authority—in one case the President, in the other the Secretary of Agriculture.

When NRA was submitted for judicial examination an effort was made to salvage it by seeking authority for the codes in the power to regulate interstate commerce. Now, however, when AAA is before the Court, there is a significant silence on the part of the Government as to the commerce clause. It seems to be conceded, as indeed it would have to be in the light of the *Schechter* decision, that the federal regulation of production is wholly beyond the scope of the commerce clause. The whole reliance of the Government is accordingly placed upon the proposition that we have nothing to consider but an unimpeachable tax and an uncontrollable appropriation.

To support the tax argument, the Government invokes the general welfare clause. This seems to me to afford the coldest kind of cold comfort.

As I understand it, when Congress merely imposes a tax (whether it be a uniform indirect tax or an apportioned direct tax) no question of *purpose* is involved. There are plenty of legitimate governmental needs for money, and Congress, presumably, is merely undertaking to meet them. Accordingly no problem arises unless and until, in the very act of imposing the tax, Congress (as here) specifies the purpose for which the money is sought to be raised. The purpose so specified might be one clearly within some recognized congressional power. In such case no difficulty would be presented. But suppose (as here) that the only specific power that might plausibly be invoked (to wit, the commerce power) falls far short of what is required. It is then, and then only, that recourse is had to the proposition that it is within the exclu-

sive power of Congress to determine that a particular measure will promote the general welfare and that accordingly a tax to be applied for the purposes of that measure is a valid tax. This proposition, as far as I can see, means this: that Congress may determine that a certain nation-wide policy is necessary to the welfare of the nation; ergo that legislation to effectuate such policy must be within the power of Congress; and that, if you cannot find an applicable specific power which covers the case, you invoke the general welfare clause. The practical result of this argument is the same as that which would flow from the doctrine of "inherent national power" upon which this Court put a quietus in *Kansas* v. *Colorado*. Whether Congress invokes "inherent power" or wallows in the welfare clause—in either event the powers reserved by the Tenth Amendment disappear and that against which I solemnly protest ensues—namely the conversion of a federal legislature into a national parliament—with the consequent destruction of the right of local self-government.

As I understand it, there are three possible views of the general welfare clause. It seems to me to be patient of two interpretations and can be tortured into a third. It is patient of the Madisonian view; it is patient of the Hamiltonian view; and it can be tortured, possibly, although I hope not, to answer the needs of the Solicitor General in the present case.

I understand Madison's view to have been that the welfare for which Congress may appropriate is the welfare which may be achieved in the exercise of the granted powers. I understand the Hamiltonian view to have been that, irrespective of the existence of power in virtue of specific grants or implications, the power to tax may be used to raise revenue for the general welfare, and that appropriations may be made out of that fund for such purposes as Congress may think fit. But I did not know,

until this statute proposed it, of any interpretation which begins where Hamilton stops, and asserts that because you may appropriate for anything which Congress thinks is consonant with the public welfare, you may, through that appropriation, control the local conduct of the producer in a particular reserved to the States under the Tenth Amendment. That, it seems to me, is the general welfare clause gone mad. It seems to me it is impossible to sustain any such view without throwing overboard once and for all the idea that Congress is a federal legislature with limited powers. It carries you all the way to the other extreme, which is that of the national parliament subject to no restraint but self-restraint. . . .

The commerce clause failing to serve his purpose—and the general welfare clause being unsafe ground on which to build, four subsidiary arguments are advanced by the Solicitor General to which I wish to refer briefly.

The first is based upon the historical fact that spending is an executive function. No student of English constitutional history will dispute the proposition and no contemporary observer can doubt that even in the United States the same function is effectively exercised by the Executive. But the conclusion sought to be drawn is a non-sequitur. Because the Executive may spend as he pleases, it is argued that when he pleases to make a certain expenditure his decision puts into operation a tax to raise the money for him to spend. Whether you call this a delegation to him of the taxing power or whether he is attempting to delegate to Congress his executive discretion is largely a matter of words. The practical result would be to give to the President and to Congress an unlimited power to tax for any purpose which could be attained by inflating the general welfare clause to the utmost. . . .

Next it is said that Congress may organize banks and other agencies with power to lend money to farmers on

mortgage. This may be conceded. But the conclusion is remarkable—namely, that *therefore* Congress may take over the control of production in order to increase the farmer's ability to repay the loan. If this argument had been advanced a year ago it might have saved the NRA; because, since Congress has authorized the formation of National Banks with power to lend money to industrialists, it would seem to follow that Congress may take control of any and all industries to make it more likely that the notes will be paid. Here again the trouble with the argument is that it proves too much. It frees the legislature from all constitutional restraint.

The third subsidiary argument is based upon the proposition that power to pay the debts of the United States includes power to discharge a moral obligation. This may be conceded. Thus, if a farmer had performed his part of a contract with the Secretary and the latter were to refuse to pay the consideration on the ground that the contract was void, and if Congress were then to appropriate for the relief of the farmer, nobody could enjoin the appropriation. But to argue that Congress may therefore authorize an unconstitutional scheme in order to create an honorary duty, and may then tax the processor to raise the money to perform it, seems to me to be juggling with words. If the United States is unjustly enriched by accepting a farmer's performance, let Congress appropriate funds in the treasury not otherwise appropriated. If the honor of all the people is at stake, let all the people vindicate it. But for goodness sake do not permit the United States to purge itself of unjust enrichment by unjustly impoverishing the processor. The United States would not be entitled to a thrill of moral satisfaction merely because it had robbed Processor Peter in order to pay Producer Paul.

A fourth subsidiary argument is built around the contention that the farmer needs a tariff—and that therefore

he should have it in the exercise of the same power that justifies the international tariff. The argument overlooks the fact that the international tariff is primarily an exercise of the express power to regulate commerce with foreign nations. It was so decided in *Board of Trustees of State University* v. *United States* in 289 U. S. Being free to forbid admission of goods from abroad, Congress may regulate their admission and use the taxing power in aid of regulation. There is no corresponding power to regulate agricultural production—and the argument loses its force. It has then no other basis than the exploded doctrine of "inherent national power"—to which reference has already been made.

There is one aspect of this case which requires a reference to the Fifth Amendment.

The Solicitor General indeed stoutly maintains that the Amendment has nothing to do with this case. I agree that if this processing exaction is merely part of a regulatory scheme that is beyond the power of Congress, then the reason for the invalidity of the tax is, not the Fifth Amendment, but the lack of power to control local production.

On the other hand, if I am wrong in my main contention and if Congress may lawfully regulate such production—on the general welfare theory or some other equally vague—it by no means follows that the entire cost of the regulatory process may be taken out of the pockets of the processors. As the Fifth Amendment applies to the exercise of all the powers of government it must apply to the regulatory power of Congress no matter whence derived. I concede that an excise tax on all processors to help raise money for the federal treasury could not be resisted merely because it was too heavy. If (contrary to my earnest contention) it were assumed that regulation of production by benefit payments and other uses of money is within some power of Congress, I should also

have to concede that money in the treasury raised by general taxation is available for such use. I suggest, however, that there is something essentially unjust in compelling the first handler of an agricultural commodity to contribute whatever is necessary to make up deficiencies in the income of the man who produces that commodity. It is all very well to think of the promotion of the agricultural industry as a public purpose; but to integrate the industry for purposes of regulation by treating the handler and producer as having interlocking interests and then to compel the stronger group to extend financial aid to the weaker comes perilously close to taking A's property and giving it to B. Something like this was attempted by Congress in the Railroad Retirement Act, where strong roads were expected to make up the deficiencies of the weak. This exaction from the processor might be justified if there were any ascertainable relation between the rate of tax and the activity in respect of which the excise is levied. But when it appears that the tax rate is determined by the width of the gap between what the farmer's income is and what Congress thinks it ought to be, it begins to look as if the processor were brought upon the scene merely in order to have his pocket picked for the benefit of the farmer. It would be hard enough on the processor to have to submit to assessment merely to increase the producer's income; but when we reflect that the increase is accomplished by using the proceeds of the tax to raise the price which the processor has to pay for his raw material, the question arises whether this is the due process which the Fifth Amendment guarantees. It seems clear to me that it is not due process to measure an excise on processing by a deficiency in producer's income.

It is not possible for me to extract from the due process decisions of this Court a formula for determining what does and what does not come within the condemnation

of the Fifth Amendment. Probably the Court has deliberately avoided the formulation of a rule for the same reason that chancellors refuse to specify the limits of fraud. Each case must be determined in the light of its own facts. I suggest, however, that the processing exaction is a far more marked departure from what is usually regarded as permissible in taxation than was the case in *Nichols* v. *Coolidge,* 274 U. S. 531 (1927), in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206 (1931) or in *Heiner* v. *Donnan,* 285 U. S. 312 (1932).

. . . . . .

My time is fleeting and I must not pause to sum up the argument I have made. I have come to the point at which a consideration of delegation is the next logical step, and that is to be dealt with effectively by my colleague, Mr. Hale. But I do want to say just one final and somewhat personal word.

I have tried very hard to argue this case calmly and dispassionately, and without vehement attack upon things which I cannot approve, and I have done it thus because it seems to me that this is the best way in which an advocate can discharge his duty to this Court.

But I do not want your Honors to think that my feelings are not involved, and that my emotions are not deeply stirred. Indeed, may it please your Honors, I believe I am standing here today to plead the cause of the America I have loved; and I pray Almighty God that not in my time may "the land of the regimented" be accepted as a worthy substitute for "the land of the free."

Messrs. Edward R. Hale and *Bennett Sanderson* closed the argument for respondents.

Following are excerpts from the respondents' brief, on which were the two gentlemen last named, together with *Messrs. George Wharton Pepper, Humbert B. Powell,*

James A. Montgomery, Jr., J. Willison Smith, Jr., and *Edmund M. Toland:*

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

Indeed, there is a substantial question of the power of the States themselves either to control agricultural activities and internal prices, or *a fortiori,* of their ability to grant any such power to the Federal Government. The ordinary legitimate pursuits and transactions of citizens are, except in extraordinary circumstances, traditionally free from control even of the States. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262; *Tyson Bros.* v. *Banton,* 273 U. S. 418; *Fairmont Creamery* v. *Minnesota,* 274 U. S. 1; *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Van Winkle* v. *Fred Meyer, Inc.,* 151 Ore. 455; 49 P. (2d) 1140. If power to regulate the operation of farms and prices of farm products is reserved to the people, as distinguished from the States, it follows that such power may not be delegated to the Federal Government except by an act of the people, expressed in a constitutional amendment. *Kansas* v. *Colorado,* 206 U. S. 46, 90.

It is argued that there is something voluntary about the crop reduction program which removes it from the limitations upon the Federal Government. As a matter of law we are unable to see any valid distinction arising from the fact that in this Act the regulation of individual activities within the States is accomplished by purchase instead of penalty.

While economic compulsion is invoked in the original Act to secure compliance from the producer, Congress has not hesitated to employ legal compulsion where less

drastic methods were too slow. Legal compulsion has thus been resorted to in the case of cotton (the commodity involved in the instant case), tobacco and potatoes. The Bankhead Cotton Act of 1934, 48 Stat. 598; The Kerr Tobacco Act, 48 Stat. 1275; The Potato Act of 1935 (being Title II of "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved August 24, 1935, Public No. 320, 74th Congress). Similar power to exert legal compulsion upon the processor or handler is granted in § 8 (3) of the Agricultural Adjustment Act as originally enacted. Such power has been extended by the amendments of August 24, 1935. These related Acts and provisions leave no doubt that the original and continuing Congressional intention in the Agricultural Adjustment Act is to impose the federal will upon production of agricultural commodities. In the light of such intentions and acts, the argument that control is voluntary becomes mere casuistry.

The regulatory measures of which the tax is an integral part cannot be justified as a regulation of interstate commerce.

Neither the production of commodities by farmers nor the manufacture of articles is subject to the control of Congress. *Chassaniol* v. *Greenwood,* 291 U. S. 584; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Kidd* v. *Pearson,* 128 U. S. 1.

Interstate commerce begins only when articles are delivered to a carrier to be transported. It comes to an end when articles are delivered. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Federal Compress Co.* v. *McLean,* 291 U. S. 17; *United Leather Workers* v. *Herkert & Co.,* 265 U. S. 457.

Neither agriculture nor manufacturing "affects" or "burdens" interstate commerce. In order to come within

the interstate commerce power, the effect or burden of activities not commerce must be direct and immediate. *Schechter Poultry Corp.* v. *United States, supra; Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Levering & Garrigues* v. *Morrin,* 289 U. S. 103; *United Leather Workers* v. *Herkert & Co.,* 265 U. S. 457; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Hammer* v. *Dagenhart,* 247 U. S. 251.

The processing and floor stocks taxes are levied in violation of the Fifth Amendment. The Act takes from one class without compensation, and gives to members of another. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

The taxing power is limited to taxes raised for public as distinguished from private purposes. *Loan Association* v. *Topeka,* 20 Wall. 655; *Cole* v. *LaGrange,* 113 U. S. 1; *Parkersburg* v. *Brown,* 106 U. S. 487; *Lowell* v. *Boston,* 111 Mass. 454.

The taxes are arbitrary and unreasonable. The Fifth Amendment requires that a law (including a tax law) shall not be unreasonable, arbitrary or capricious. Of tax laws it requires a reasonable classification of objects of taxation, a rate determined upon a reasonable basis, not arbitrary or confiscatory, and reasonableness in the time when the tax becomes effective. The Fifth Amendment also requires that the means selected to carry out one of the granted powers shall have a real and substantial relation to the object sought to be attained. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347, note 5; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589, note 19. See also *Nebbia* v. *New York,* 291 U. S. 502, 525; *Heiner* v. *Donnan,* 285 U. S. 312; *Nichols* v. *Coolidge,* 274 U. S. 531; *Hoeper* v. *Tax Commission,* 284 U. S. 206.

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

Ulterior purposes may be accomplished under this power only when they are truly incidental and necessary to a real revenue measure. Cf. *Railroad Retirement Board* v. *Alton R. Co., supra; Hill* v. *Wallace,* 259 U. S. 44; *Child Labor Tax Case,* 259 U. S. 20. *United States* v. *Doremus,* 249 U. S. 86 and *McCray* v. *United States,* 195 U. S. 27, distinguished.

The taxpayer may contest the tax and question the purpose thereof. *Massachusetts* v. *Mellon,* 262 U. S. 447, distinguished.

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

The Act is invalid in that it delegates legislative power to the Secretary of Agriculture. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Grimaud,* 220 U. S. 506; *Hampton & Co.* v. *United States,* 276 U. S. 394. *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551; *Blair* v. *Oesterlein Machine Co.,* 275 U. S. 220; *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502, and *United States* v. *Grimaud,* 220 U. S. 506, distinguished.

Section 21 (b) of the amendments is ineffective to validate taxes assessed prior to its passage. *United States* v. *Heinszen,* 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *Tiaco* v. *Forbes,* 228 U. S. 549; *Charlotte Harbor & N. Ry. Co.* v. *Welles,* 260 U. S. 8; *Graham & Foster* v. *Goodcell,* 282 U. S. 409; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440.

Solicitor General Reed closed the argument:

May it please the Court, in the brief time remaining to me to close the argument for the Government I should like particularly to call to your Honors' attention the problem of the welfare clause, the Tenth Amendment, and whether or not this tax is for a public purpose.

I do not know whether counsel for the respondents mean to take the position that the welfare clause does give a power of appropriation and a power to tax that can be utilized for the purposes of relief and that can be utilized for the purposes of making loans to agriculture through the Farm Loan Corporation, and making loans to home-owners through the Home Owners Loan Corporation, or can be used for making loans to agriculture, railroads, industry, and banks, through the Reconstruction Finance Corporation; or whether they take the position that the welfare clause as such does not give a right to the Government to make loans. If we can make a loan, can we also make a grant, or if we can make a grant, can we make a contract? The vital point of assault and defense upon the Agricultural Adjustment Act seems to me not to be in the Tenth Amendment, nor in whether this is for a public purpose, but as to whether the Government has the power to appropriate money which it raises by taxation for the benefit of individuals in the States, or to carry out contracts which the Government makes with those individuals.

The scope of the welfare clause has never been finally decided by this Court. The Government's position is not that it may take any action it pleases under the welfare clause. Our contention is that the welfare clause gives the right to tax and the right to appropriate, so long as the appropriations are limited to the general welfare.

This interpretation of the welfare clause has met the approval of those who participated in the ratifying conventions. It met the approval of George Washington when he sent his message to Congress that agriculture should be supported and benefited by Congressional appropriations. It met the approval of the early Congresses when they used the power of giving bounties to the cod fisheries of Massachusetts. . . .

That is the interpretation of the welfare clause which has met the approval of commentators from Story to

Justice Miller. With but one exception that I recall, they have been fully settled in the view that the appropriating power of Congress gave it the right to give money for relief, to aid those who were in distress, to lend where money was needed. And surely if it can take those steps, it can also contract to help, where it is also for the public welfare.

Is this present Act for the public welfare? I heard the manifestation of deep emotion with which counsel spoke of his interest in the preservation of the welfare of this Government, and I respect his motives and the earnestness with which he presents them to this Court. But there is another side to the argument, as to what is the duty of the Government of the United States. Over and over again counsel have used the words "control" and "regiment." There is no control or regimentation in this Act. An emergency existed, not of sudden creation, but grown up over the years; lack of balance between different sections of this country, not geographical sections, but different interests of the people of the United States.

This very corporation is an excellent example of benefits that have been secured from the taxing powers of this Government—a textile mill which, with its competitors, for more than a hundred years has received the bounties which come and the benefits which flow from the protective tariff system. Surely they should be the last to object to a readjustment of the balance between agriculture and industry.

The farmers of the United States comprise 30 per cent of the population, men, women and children, bringing out of the ground the natural resources which sustain the entire American commonwealth, and bringing from the ground the very resource which this corporation uses in its manufacture of textiles. There is no reason to begrudge it the bounties it has received from the Government, but on the other hand there is no reason why the Gov-

ernment of the United States, in the exercise of its power under the general welfare clause, should not seek to equalize the interests of agriculture and industry.

The Government sought to do that in the Act under consideration. The tax which is criticized has relation to the farmer and relation to the consumer. It was sought to equalize the benefits to the farmer, to give him better prices, and not impose a tax so high that the consumer would pay more than the normal amount the farmer was to receive. Therefore it is written that the tax shall not exceed the difference between the selling price of the commodity at the time the tax is placed upon it and the normal purchasing power of that commodity in what has been taken as a normal period.

Is there any reason why this country should be denied a right to help its citizens engaged in agriculture, which is open to every other country? Of course, it is said that we must act within the Constitution. Certainly we must. But the interpretation that is to be given to the Constitution must be viewed in the light of what is reasonable in the exercise of the power of Congress under the general welfare clause. Every nation, from the British Isles to Bechuanaland—we have cited the reports from them in the appendix to our brief—has taken steps to protect its agriculture.

We do not mean to say that that gives us a right so to legislate in this country if it is contrary to the Constitution, but we do say that it is evidence of the reasonable exercise of the power, if we have the power to provide for the general welfare, and the power of appropriation under that provision of the Constitution.

No one could be more firmly convinced of the necessity of keeping inviolate the separation of powers between the National Government and the States than counsel for the Government who appear here before this Court.

This Court, however, has laid down the rules by which we are to judge as to whether we are interfering with the rights of a State.

The case of *Massachusetts* v. *Mellon* has been repeatedly called to your Honors' attention. We have used it as an argument that the respondent cannot object in this case to the way in which the money is spent. But that is not the most important part of the case of *Massachusetts* v. *Mellon* at this moment. In that case the Court said not only that the citizen of a State could not object, but it said that "Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject."

It was also said, in the case of *Ellis* v. *United States,* 206 U. S. 246, that the United States had the right even to control, by criminal provision, the actions of employers who employed people contrary to the laws of the United States when there was a contract between the employer and the United States.

We do not need to go so far in this case but we do say that the right to contract is free from limitation, that we have no more interfered with the rights of the States in this case than we would have interfered with the rights of the State in the case of *Massachusetts* v. *Mellon* if that State had accepted the money which was offered.

With those views, we submit that the Agricultural Adjustment Act, as it has been enacted and amended, is fully within the authority of the Constitution.

By leave of Court, briefs of *amici curiae* were filed as follows:

Mr. Vernon A. Vrooman, on behalf of the League for Economic Equality; *Messrs. Frederic P. Lee* and *Donald Kirkpatrick,* on behalf of the American Farm Bureau Federation; *Mr. Clay R. Apple,* on behalf of the National Beet Growers Assn., and the Mountain States Beet Grow-

ers Marketing Assn.; *Mr. O. O. Haga,* on behalf of the Farmers National Grain Corp.; and *Mr. Dan Moody,* on behalf of the Texas Agricultural Assn.;—supporting the validity of the Act.

Messrs. Nathan L. Miller, John W. Davis, and *William R. Perkins,* on behalf of Hygrade Food Products Corp., P. Lorillard Co., and National Biscuit Co.; *Messrs. Malcolm Donald* and *Edward E. Elder,* on behalf of the National Association of Cotton Manufacturers; *Messrs. Kingman Brewster, James S. Y. Ivins, Percy W. Phillips, O. R. Folsom-Jones, Richard B. Barker,* and *John W. Cutler; Mr. John E. Hughes,* on behalf of American Nut Co., Inc., et al.; *Messrs. Leo P. Harlow* and *Al. Philip Kane,* on behalf of Farmers' Independence Council of America; *Mr. Wm. B. Bodine,* on behalf of Berks Packing Co., Inc., et al.; and *Messrs. Charles B. Rugg, Frank J. Morley, Thomas Nelson Perkins,* and *Warren F. Farr,* on behalf of General Mills, Inc., et al.;—challenging the validity of the Act.

Mr. Justice Roberts delivered the opinion of the Court.

In this case we must determine whether certain provisions of the Agricultural Adjustment Act, 1933,[1] conflict with the Federal Constitution.

Title I of the statute is captioned "Agricultural Adjustment." Section 1 recites that an economic emergency has arisen, due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.

[1] May 12, 1933, c. 25, 48 Stat. 31.

Section 2 declares it to be the policy of Congress:

"To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reëstablish prices to farmers at a level that will give agricultural commodities [2] a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

The base period, in the case of cotton, and all other commodities except tobacco, is designated as that between August, 1909, and July, 1914.

The further policies announced are an approach to the desired equality by gradual correction of present inequalities "at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets," and the protection of consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage returned to him in the base period.

Section 8 provides, amongst other things, that "In order to effectuate the declared policy," the Secretary of Agriculture shall have power

"(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to

[2] Section 11 denominates wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, "basic agricultural commodities," to which the act is to apply. Others have been added by later legislation.

be paid out of any moneys available for such payments. . . . "

"(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. . . ."

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof."

It will be observed that the Secretary is not required, but is permitted, if, in his uncontrolled judgment, the policy of the act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable.

Section 9 (a) enacts:

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

The Secretary may from time to time, if he finds it necessary for the effectuation of the policy of the act, readjust the amount of the exaction to meet the require-

ments of subsection (b). The tax is to terminate at the end of any marketing year if the rental or benefit payments are discontinued by the Secretary with the expiration of that year.

Section 9 (b) fixes the tax "at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value," with power in the Secretary, after investigation, notice, and hearing, to readjust the tax so as to prevent the accumulation of surplus stocks and depression of farm prices.

Section 9 (c) directs that the fair exchange value of a commodity shall be such a price as will give that commodity the same purchasing power with respect to articles farmers buy as it had during the base period and that the fair exchange value and the current average farm price of a commodity shall be ascertained by the Secretary from available statistics in his department.

Section 12 (a) appropriates $100,000,000 "to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments . . ."; and § 12 (b) appropriates the proceeds derived from all taxes imposed under the act " to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products . . . administrative expenses, rental and benefit payments, and refunds on taxes."

Section 15 (d) permits the Secretary, upon certain conditions, to impose compensating taxes on commodities in competition with those subject to the processing tax.

By § 16 a floor tax is imposed upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied in amount equivalent to that of the processing tax which would be payable with respect to the commodity from which the article is processed if the processing had occurred on the date when the processing tax becomes effective.

On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933; and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton levied under §§ 9 and 16 of the act. The receivers recommended that the claim be disallowed. The District Court found the taxes valid and ordered them paid.[3] Upon appeal the Circuit Court of Appeals reversed the order.[4] The judgment under review was entered prior to the adoption of the amending act of August 24, 1935,[5] and we are therefore concerned only with the original act.

First. At the outset the United States contends that the respondents have no standing to question the validity of the tax. The position is that the act is merely a revenue measure levying an excise upon the activity of processing cotton,—a proper subject for the imposition of such a tax,—the proceeds of which go into the federal treasury and thus become available for appropriation for any purpose. It is said that what the respondents are endeavoring to do is to challenge the intended use of the money pursuant to Congressional appropriation when, by confession, that money will have become the property of the Government and the taxpayer will no longer have any interest in it. *Massachusetts* v. *Mellon,* 262 U. S. 447, is claimed to foreclose litigation by the respondents or other taxpayers, as such, looking to restraint of the expenditure of government funds. That case might be an authority

[3] *Franklin Process Co.* v. *Hoosac Mills Corp.,* 8 F. Supp. 552.

[4] *Butler* v. *United States,* 78 F. (2d) 1.

[5] 49 Stat. 750, c. 641.

in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys. It was there held that a taxpayer of the United States may not question expenditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds and thus increase the burden of future taxation. Obviously the asserted interest of a taxpayer in the federal government's funds and the supposed increase of the future burden of taxation is minute and indeterminable. But here the respondents who are called upon to pay moneys as taxes, resist the exaction as a step in an unauthorized plan. This circumstance clearly distinguishes the case. The Government in substance and effect asks us to separate the Agricultural Adjustment Act into two statutes, the one levying an excise on processors of certain commodities, the other appropriating the public moneys independently of the first. Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment.

The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. Beyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers [6] who will reduce their acreage for

[6] U. S. Department of Agriculture, Achieving A Balanced Agriculture, p. 38: "Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every dollar collected in processing taxes goes to the farmer in benefit payments."

U. S. Dept. of Agriculture, The Processing Tax, p. 1: "Proceeds of processing taxes are passed to farmers as benefit payments."

the accomplishment of the proposed end, and, meanwhile to aid these farmers during the period required to bring the prices of their crops to the desired level.

The tax plays an indispensable part in the plan of regulation. As stated by the Agricultural Adjustment Administrator, it is " the heart of the law "; a means of " accomplishing one or both of two things intended to help farmers attain parity prices and purchasing power." [7] A tax automatically goes into effect for a commodity when the Secretary of Agriculture determines that rental or benefit payments are to be made for reduction of production of that commodity. The tax is to cease when rental or benefit payments cease. The rate is fixed with the purpose of bringing about crop-reduction and price-raising. It is to equal the difference between the " current average farm price " and " fair exchange value." It may be altered to such amount as will prevent accumulation of surplus stocks. If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it. (§ 11.) The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use. The entire agricultural adjustment program embodied in Title I of the act is to become inoperative when, in the judgment of the President, the national economic emergency ends; and as to any commodity he may terminate the provisions of the law, if he finds them no longer requisite to carrying out the declared policy with respect to such commodity. (§ 13.)

The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production.

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[7] U. S. Department of Agriculture, Agricultural Adjustment, p. 9.

In these aspects the tax, so-called, closely resembles that laid by the Act of August 3, 1882, entitled "An Act to Regulate Immigration," which came before this court in the *Head Money Cases,* 112 U. S. 580. The statute directed that there should be levied, collected and paid a duty of fifty cents for each alien passenger who should come by vessel from a foreign port to one in the United States. Payment was to be made to the collector of the port by the master, owner, consignee or agent of the ship; the money was to be paid into the Treasury, was to be called the immigrant fund, and to be used by the Secretary of the Treasury to defray the expense of regulating immigration, for the care of immigrants and relieving those in distress, and for the expenses of effectuating the act.

Various objections to the act were presented. In answering them the court said (p. 595):

"But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration. . . ."

"It is true not much is said about protecting the ship owner. But he is the man who reaps the profit from the transaction, . . . The sum demanded of him is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government."

While there the exaction was sustained as an appropriate element in a plan within the power of Congress "to regulate commerce with foreign nations," no question was made of the standing of the shipowner to raise the ques-

tion of the validity of the scheme and consequently of the exaction which was an incident of it.

It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. *Child Labor Tax Case,* 259 U. S. 20, 37.

We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction.

It does not follow that as the act is not an exertion of the taxing power and the exaction not a true tax, the statute is void or the exaction uncollectible. For, to paraphrase what was said in the *Head Money Cases* (*supra*), p. 596, if this is an expedient regulation by Congress, of a subject within one of its granted powers, "and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution," the exaction is called a tax.

Second. The Government asserts that even if the respondents may question the propriety of the appropriation embodied in the statute their attack must fail because Article I, § 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case.[8] We approach its decision with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the Government.

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the ques-

[8] Other questions were presented and argued by counsel, but we do not consider or decide them. The respondents insist that the act in numerous respects delegates legislative power to the executive contrary to the principles announced in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 495; that this unlawful delegation is not cured by the amending act of August 24, 1935; that the exaction is in violation of the due process clause of the Fifth Amendment since the legislation takes their property for a private use; that the floor tax is a direct tax and therefore void for lack of apportionment amongst the states, as required by Article I, § 9; and that the processing tax is wanting in uniformity and so violates Article I, § 8, clause one, of the Constitution.

tion. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.[9]

The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

Article I, § 8, of the Constitution vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review.

The third clause endows the Congress with power "to regulate Commerce . . . among the several States." Despite a reference in its first section to a burden upon, and an obstruction of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign[10] commerce. Its stated pur-

[9] Compare *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488.

[10] The enactment of protective tariff laws has its basis in the power to regulate foreign commerce. See *Board of Trustees of the University of Illinois* v. *United States,* 289 U. S. 48, 58.

pose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.

The clause thought to authorize the legislation,—the first,—confers upon the Congress power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." [11] The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

Nevertheless the Government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally

[11] Story, Commentaries on the Constitution of the United States, 5th ed., Vol. I, § 907.

construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and finally that the appropriation under attack was in fact for the general welfare of the United States.

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. I, § 9, cl. 7.) They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated " to provide for the general welfare of the United States." These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. How shall they be construed to effectuate the intent of the instrument?

Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to ap-

propriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position.[12] We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

But the adoption of the broader construction leaves the power to spend subject to limitations.

As Story says:

"The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers." [13]

Again he says:

"A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them." [14]

That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his

[12] *Loc. cit.* Chapter XIV, *passim.*

[13] *Loc. cit.* § 909.

[14] *Loc. cit.* § 922.

well known Report on Manufactures, states that the purpose must be "general, and not local." [15] Monroe, an advocate of Hamilton's doctrine, wrote: "Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not." [16] Story says that if the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles.[17] And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare.

As elsewhere throughout the Constitution the section in question lays down principles which control the use of the power, and does not attempt meticulous or detailed directions. Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them. But, under our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we hardly need remark. But, despite the breadth of the legislative discretion, our duty to hear and to render judgment remains. If the statute plainly violates the stated principle of the Constitution we must so declare.

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[15] Works, Vol. III, p. 250.

[16] Richardson, Messages and Papers of the Presidents, Vol. II, p. 167.

[17] *Loc. cit.* p. 673.

We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted.[18] The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a de-

[18] The Tenth Amendment declares: "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."

cision come before it, to say that such an act was not the law of the land." *McCulloch* v. *Maryland,* 4 Wheat. 316, 423.

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced." *Linder* v. *United States,* 268 U. S. 5, 17.

These principles are as applicable to the power to lay taxes as to any other federal power. Said the court, in *McCulloch* v. *Maryland, supra,* 421:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.

"Congress is not empowered to tax for those purposes which are within the exclusive province of the States." *Gibbons* v. *Ogden,* 9 Wheat. 1, 199.

"There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the [taxing] power if so exercised as to impair the separate existence and independent self-government of the States or if exercised for ends

inconsistent with the limited grants of power in the Constitution." *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541.

In the *Child Labor Tax Case,* 259 U. S. 20, and in *Hill* v. *Wallace,* 259 U. S. 44, this court had before it statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states,—matters not within any power conferred upon Congress by the Constitution—and the levy of the tax a means to force compliance. The court held this was not a constitutional use, but an unconstitutional abuse of the power to tax. In *Linder* v. *United States, supra,* we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue. In *United States* v. *Constantine,* 296 U. S. 287, we declared that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor. These decisions demonstrate that Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton, and exempt those who agree so to do, with the purpose of benefiting producers.

Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to

agree to the proposed regulation.[19] The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a non-coöperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory.

In *Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583, a state act was considered which provided for supervision and regulation of transportation for hire by automobile on the public highways. Certificates of convenience and necessity were to be obtained by persons desiring to use the highways for this purpose. The regulatory

[19] U. S. Dept. of Agriculture, Agricultural Adjustment, p. 9. "Experience of cooperative associations and other groups has shown that without such Government support, the efforts of the farmers to band together to control the amount of their product sent to market are nearly always brought to nothing. Almost always, under such circumstances, there has been a noncooperating minority, which, refusing to go along with the rest, has stayed on the outside and tried to benefit from the sacrifices the majority has made. . . . It is to keep this noncooperating minority in line, or at least prevent it from doing harm to the majority, that the power of the Government has been marshaled behind the adjustment programs."

commission required that a private contract carrier should secure such a certificate as a condition of its operation. The effect of the commission's action was to transmute the private carrier into a public carrier. In other words, the privilege of using the highways as a private carrier for compensation was conditioned upon his dedicating his property to the quasi-public use of public transportation. While holding that the private carrier was not obliged to submit himself to the condition, the commission denied him the privilege of using the highways if he did not do so. The argument was, as here, that the carrier had a free choice. This court said, in holding the act as construed unconstitutional:

"If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." (p. 593.)

But if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditures is so made. But appropriations and expenditures under contracts for proper

governmental purposes cannot justify contracts which are not within federal power. And contracts for the reduction of acreage and the control of production are outside the range of that power. An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.

We are referred to numerous types of federal appropriation which have been made in the past, and it is asserted no question has been raised as to their validity. We need not stop to examine or consider them. As was said in *Massachusetts* v. *Mellon, supra* (p. 487):

". . . as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect."

As the opinion points out, such expenditures have not been challenged because no remedy was open for testing their constitutionality in the courts.

We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. Many examples pointing the distinction might be cited. We are referred to appropriations in aid

of education, and it is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended. But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.

But it is said that there is a wide difference in another respect, between compulsory regulation of the local affairs of a state's citizens and the mere making of a contract relating to their conduct; that, if any state objects, it may declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms. The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject matter of the contract. If this does reach the subject matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a State. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the States do not dissent.

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this

is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states.

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business. A few instances will illustrate the thought.

Let us suppose Congress should determine that the farmer, the miner or some other producer of raw materials is receiving too much for his products, with consequent depression of the processing industry and idleness of its employes. Though, by confession, there is no power vested in Congress to compel by statute a lowering of the prices of the raw material, the same result might be accomplished, if the questioned act be valid, by taxing the producer upon his output and appropriating the proceeds to the processors, either with or without conditions imposed as the consideration for payment of the subsidy.

We have held in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, that Congress has no power to regulate wages and hours of labor in a local business. If the petitioner is right, this very end may be accomplished by

appropriating money to be paid to employers from the federal treasury under contracts whereby they agree to comply with certain standards fixed by federal law or by contract.

Should Congress ascertain that sugar refiners are not receiving a fair profit, and that this is detrimental to the entire industry, and in turn has its repercussions in trade and commerce generally, it might, in analogy to the present law, impose an excise of two cents a pound on every sale of the commodity and pass the funds collected to such refiners, and such only, as will agree to maintain a certain price.

Assume that too many shoes are being manufactured throughout the nation; that the market is saturated, the price depressed, the factories running half-time, the employes suffering. Upon the principle of the statute in question Congress might authorize the Secretary of Commerce to enter into contracts with shoe manufacturers providing that each shall reduce his output and that the United States will pay him a fixed sum proportioned to such reduction, the money to make the payments to be raised by a tax on all retail shoe dealers or their customers.

Suppose that there are too many garment workers in the large cities; that this results in dislocation of the economic balance. Upon the principle contended for an excise might be laid on the manufacture of all garments manufactured and the proceeds paid to those manufacturers who agree to remove their plants to cities having not more than a hundred thousand population. Thus, through the asserted power of taxation, the federal government, against the will of individual states, might completely redistribute the industrial population.

A possible result of sustaining the claimed federal power would be that every business group which thought itself under-privileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income.

These illustrations are given, not to suggest that any of the purposes mentioned are unworthy, but to demonstrate the scope of the principle for which the Government contends; to test the principle by its applications; to point out that, by the exercise of the asserted power, Congress would, in effect, under the pretext of exercising the taxing power, in reality accomplish prohibited ends. It cannot be said that they envisage improbable legislation. The supposed cases are no more improbable than would the present act have been deemed a few years ago.

Until recently no suggestion of the existence of any such power in the Federal Government has been advanced. The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument, and the writings of great commentators will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, (which has aptly been termed "an indestructible Union, composed of indestructible States,") might be served by obliterating the constituent members of the Union. But to this fatal conclu-

sion the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument when seen in its true character and in the light of its inevitable results must be rejected.

Since, as we have pointed out, there was no power in the Congress to impose the contested exaction, it could not lawfully ratify or confirm what an executive officer had done in that regard. Consequently the Act of 1935 does not affect the rights of the parties.

The judgment is

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed.

The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the Act. They are:

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power

by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.

2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid, not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved.

3. As the present depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes to "provide for the . . . general welfare." The opinion of the Court does not declare otherwise.

4. No question of a variable tax fixed from time to time by fiat of the Secretary of Agriculture, or of unauthorized delegation of legislative power, is now presented. The schedule of rates imposed by the Secretary in accordance with the original command of Congress has since been specifically adopted and confirmed by Act of Congress, which has declared that it shall be the lawful tax. Act of August 24, 1935, 49 Stat. 750. That is the tax which the government now seeks to collect. Any defects there may have been in the manner of laying the tax by the Secretary have now been removed by the exercise of the power of Congress to pass a curative statute validating an intended, though defective, tax. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Graham & Foster* v. *Goodcell*, 282 U. S. 409; cf. *Milliken* v. *United States*, 283 U. S. 15. The Agricultural Adjustment Act as thus amended de-

clares that none of its provisions shall fail because others are pronounced invalid.

It is with these preliminary and hardly controverted matters in mind that we should direct our attention to the pivot on which the decision of the Court is made to turn. It is that a levy unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production and is thus a forbidden infringement of state power. The levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare rather than for some other support of government. Nor is the levy and collection of the tax pointed to as effecting the regulation. While all federal taxes inevitably have some influence on the internal economy of the states, it is not contended that the levy of a processing tax upon manufacturers using agricultural products as raw material has any perceptible regulatory effect upon either their production or manufacture. The tax is unlike the penalties which were held invalid in the *Child Labor Tax Case,* 259 U. S. 20, in *Hill* v. *Wallace,* 259 U. S. 44, in *Linder* v. *United States,* 268 U. S. 5, 17, and in *United States* v. *Constantine,* 296 U. S. 287, because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states. Here regulation, if any there be, is accomplished not by the tax but by the method by which its proceeds are expended, and would equally be accomplished by any like use of public funds, regardless of their source.

The method may be simply stated. Out of the available fund payments are made to such farmers as are willing to curtail their productive acreage, who in fact do so and who in advance have filed their written undertaking to do so with the Secretary of Agriculture. In saying that this method of spending public moneys is an invasion of the reserved powers of the states, the Court does not assert

that the expenditure of public funds to promote the general welfare is not a substantive power specifically delegated to the national government, as Hamilton and Story pronounced it to be. It does not deny that the expenditure of funds for the benefit of farmers and in aid of a program of curtailment of production of agricultural products, and thus of a supposedly better ordered national economy, is within the specifically granted power. But it is declared that state power is nevertheless infringed by the expenditure of the proceeds of the tax to compensate farmers for the curtailment of their cotton acreage. Although the farmer is placed under no legal compulsion to reduce acreage, it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the curtailment were made mandatory by Act of Congress. In any event it is insisted that even though not coercive the expenditure of public funds to induce the recipients to curtail production is itself an infringement of state power, since the federal government cannot invade the domain of the states by the "purchase" of performance of acts which it has no power to compel.

Of the assertion that the payments to farmers are coercive, it is enough to say that no such contention is pressed by the taxpayer, and no such consequences were to be anticipated or appear to have resulted from the administration of the Act. The suggestion of coercion finds no support in the record or in any data showing the actual operation of the Act. Threat of loss, not hope of gain, is the essence of economic coercion. Members of a long depressed industry have undoubtedly been tempted to curtail acreage by the hope of resulting better prices and by the proffered opportunity to obtain needed ready money. But there is nothing to indicate that those who accepted benefits were impelled by fear of lower prices if they did not accept, or that at any stage in the operation

of the plan a farmer could say whether, apart from the certainty of cash payments at specified times, the advantage would lie with curtailment of production plus compensation, rather than with the same or increased acreage plus the expected rise in prices which actually occurred. Although the Agricultural Adjustment Act was put into operation in June, 1933, the official reports of the Department of Agriculture show that 6,343,000 acres of productive cotton land, 14% of the total, did not participate in the plan in 1934, and 2,790,000 acres, 6% of the total, did not participate in 1935. Of the total number of farms growing cotton, estimated at 1,500,000, 33% in 1934 and 13% in 1935 did not participate.

It is significant that in the congressional hearings on the bill that became the Bankhead Act, 48 Stat. 598, as amended by Act of June 20, 1934, 48 Stat. 1184, which imposes a tax of 50% on all cotton produced in excess of limits prescribed by the Secretary of Agriculture, there was abundant testimony that the restriction of cotton production attempted by the Agricultural Adjustment Act could not be secured without the coercive provisions of the Bankhead Act. See Hearing before Committee on Agriculture, U. S. Senate, on S. 1974, 73rd Cong., 2nd Sess.; Hearing before Committee on Agriculture, U. S. House of Representatives, on H. R. 8402, 73rd Cong., 2nd Sess. The Senate and House Committees so reported, Senate Report No. 283, 73rd Cong., 2nd Sess., p. 3; House Report No. 867, 73rd Cong., 2nd Sess., p. 3. The Report of the Department of Agriculture on the administration of the Agricultural Adjustment Act (February 15, 1934 to December 31, 1934), p. 50, points out that the Bankhead Act was passed in response to a strong sentiment in favor of mandatory production control " that would prevent noncooperating farmers from increasing their own plantings in order to capitalize upon the price advances that had resulted from the reductions made by contract

signers." [1] The presumption of constitutionality of a statute is not to be overturned by an assertion of its coercive effect which rests on nothing more substantial than groundless speculation.

It is upon the contention that state power is infringed by purchased regulation of agricultural production that chief reliance is placed. It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.

The Constitution requires that public funds shall be spent for a defined purpose, the promotion of the general welfare. Their expenditure usually involves payment on terms which will insure use by the selected recipients within the limits of the constitutional purpose. Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained. The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition, incorporated in the Morrill Act, 12 Stat. 503, 26 Stat. 417, that it be used for the intended purpose. Similarly it would seem to be compliance with the Constitution, not violation of it, for the government to take and the university to give a contract that the grant would be so used. It makes no dif-

[1] Whether coercion was the sole or the dominant purpose of the Bankhead Act, or whether the act was designed also for revenue or other legitimate ends, there is no occasion to consider now.

ference that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid since both are in furtherance of the national purpose for which the money is appropriated.

These effects upon individual action, which are but incidents of the authorized expenditure of government money, are pronounced to be themselves a limitation upon the granted power, and so the time-honored principle of constitutional interpretation that the granted power includes all those which are incident to it is reversed. "Let the end be legitimate," said the great Chief Justice, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. This cardinal guide to constitutional exposition must now be re-phrased so far as the spending power of the federal government is concerned. Let the expenditure be to promote the general welfare, still, if it is needful in order to insure its use for the intended purpose to influence any action which Congress cannot command because within the sphere of state government, the expenditure is unconstitutional. And taxes otherwise lawfully levied are likewise unconstitutional if they are appropriated to the expenditure whose incident is condemned.

Congress through the Interstate Commerce Commission has set aside intrastate railroad rates. It has made and destroyed intrastate industries by raising or lowering tariffs. These results are said to be permissible because they are incidents of the commerce power and the power to levy duties on imports. See *Minnesota Rate Cases,* 230 U. S. 352; *Shreveport Case,* 234 U. S. 342; *Board of Trustees of the University of Illinois* v. *United States,* 289 U. S. 48. The only conclusion to be drawn is that re-

sults become lawful when they are incidents of those powers but unlawful when incident to the similarly granted power to tax and spend.

Such a limitation is contradictory and destructive of the power to appropriate for the public welfare, and is incapable of practical application. The spending power of Congress is in addition to the legislative power and not subordinate to it. This independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection among divers ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence or flood, but may not impose conditions—health precautions designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas. All that, because it is purchased regulation infringing state powers, must be left for the states, who are unable or unwilling to supply the necessary relief. The government may spend its money for vocational rehabilitation, 48 Stat. 389, but it may not, with the consent of all concerned, supervise the process which it undertakes to aid. It may spend its money for the suppression of the boll weevil, but may

not compensate the farmers for suspending the growth of cotton in the infected areas. It may aid state reforestation and forest fire prevention agencies, 43 Stat. 653, but may not be permitted to supervise their conduct. It may support rural schools, 39 Stat. 929, 45 Stat. 1151, 48 Stat. 792, but may not condition its grant by the requirement that certain standards be maintained. It may appropriate moneys to be expended by the Reconstruction Finance Corporation "to aid in financing agriculture, commerce and industry," and to facilitate "the exportation of agricultural and other products." Do all its activities collapse because, in order to effect the permissible purpose, in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command? The answer would seem plain. If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end. If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not any the less so because the farmer at his own option promises to fulfill the condition.

That the governmental power of the purse is a great one is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government. Both were well understood by the framers of the Constitution when they sanctioned the grant of the spending power to the federal government, and both were recognized by Hamilton and Story, whose views of the

spending power as standing on a parity with the other powers specifically granted, have hitherto been generally accepted.

The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. "The power to tax is the power to destroy," but we do not, for that reason, doubt its existence, or hold that its efficacy is to be restricted by its incidental or collateral effects upon the states. See *Veazie Bank* v. *Fenno,* 8 Wall. 533; *McCray* v. *United States,* 195 U. S. 27; compare *Magnano Co.* v. *Hamilton,* 292 U. S. 40. The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive. "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Justice Holmes, in *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U. S. 267, 270.

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent — expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive

concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, "to obliterate the constituent members" of "an indestructible union of indestructible states" than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO join in this opinion.

UNITED STATES *v.* SAFETY CAR HEATING & LIGHTING CO.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 75. Argued December 20, 1935.—Decided January 6, 1936.

A patent-owner began suit in 1912 to restrain infringements and for damages and profits. The litigation was pending on February 25, 1913, the effective date of the Sixteenth Amendment, and March 1, 1913, the effective date of the first statute enacted under it, and was continued for many years thereafter during which the patent-owner obtained a decree finally sustaining the patent followed by a decree on accounting, of which a definite part was for profits received by the infringer before March 1, 1913, and the remainder for profits received thereafter, the claim for damages having been waived. Pending an appeal by the infringer involving the extent of his liability, a compromise occurred (1925) in which the patent-owner accepted a smaller amount in satisfaction of the judgment. *Held:*

1. The profits thus received accrued to the patent-owner and became taxable as his income, at the time of the settlement and liquidation. P. 93.

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* Together with No. 76, *Rogers, Collector of Internal Revenue,* v. *Safety Car Heating & Lighting Co.* Certiorari to the Circuit Court of Appeals for the Third Circuit.