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Patrick R. Douglas

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CONSERVATION OR COERCION: FEDERAL REGULATION OF INTRASTATE WETLANDS UNDER THE SWAMPBUSTER PROVISIONS OF THE FOOD SECURITY ACT

*United States v. Dierckman*¹

I. INTRODUCTION

The Food Security Act ("FSA"), enacted by Congress in 1985, included a "Swampbuster" provision that made any individual who converted a wetland and grew crops on the land after December 23, 1985 ineligible for USDA farm benefits.² In 1990, Congress passed the Food, Agriculture, Conservation, and Trade Act ("FACTA"), which strengthened the original provision by adding a provision which provided that any individual who converted a wetland with the purpose of making it suitable for agricultural production after November 28, 1990 would be ineligible for USDA farm benefits.³ Following the 1990 amendments, an individual could become ineligible for USDA benefits by either converting wetlands and growing crops on the land after December 23, 1985, or by simply converting wetlands after November 28, 1990.⁴ In *United States v. Dierckman*, the United States Court of Appeals for the Seventh Circuit held that the Swampbuster provisions of the FSA, as amended by the FACTA, are a valid exercise of Congress' spending power. By so characterizing the Swampbuster provisions, the court greatly expanded the power of the federal government to regulate wholly intrastate wetlands. The court also endorsed a coercive federal regulatory scheme under which Congress may, through the guise of its spending power, indirectly regulate use of private property that it is unable to regulate under its constitutionally enumerated powers.

II. FACTS AND HOLDING

In 1993, the United States Department of Agriculture ("USDA") declared Jerry Dierckman⁵ ineligible for all USDA farm benefit programs, retroactive to the 1991 crop year, based on alleged violations of the "Swampbuster"⁶ provisions of the Food Security Act ("FSA") of 1985, as amended by the Food, Agriculture, Conservation, and Trade Act ("FACTA") of 1990.⁷ The United States sued to recover \$92,703.00 in farm benefits paid to Jerry Dierckman in the crop years 1991, 1992, and 1993.⁸

A. Swampbuster Provision Background Facts

The Food Security Act ("FSA"), enacted by Congress in 1985, included a "Swampbuster" provision that made any individual who converted a wetland and grew crops on the land after December 23, 1985 ineligible for USDA farm benefit programs.⁹ In 1990, Congress added even more stringent requirements to Swampbuster in the Food, Agriculture, Conservation, and Trade Act ("FACTA").¹⁰ The amendments implemented by FACTA retained the original 1985 provision¹¹ and added a new provision stating that any person who converted a wetland for the purpose of making

¹ 201 F.3d 915 (7th Cir. 2000).

² Pub. L. No. 99-198, tit. XII, § 1221, 99 Stat. 1507 (1985); 16 U.S.C. § 3821 (1986). Such benefits include price supports or payments, loans, crop insurance, or disaster payments related to agricultural production.

³ Pub. L. 101-624, tit. XIV, § 1421(b), 104 Stat. 3572 (1990). The original provision is currently codified at 16 U.S.C. § 3821 (a) (1994), and the provision added by FACTA is codified at 16 U.S.C. § 3821 (c) (1994).

⁴ 201 F.3d at 918.

⁵ Following the lead of the 7th Circuit in the instant decision, this note will refer to Jerry Dierckman as "Jerry," to avoid confusion because Jerry's father, Milton Dierckman is also substantially involved in the events underlying the case. Milton Dierckman will herein be referred to as "Milton."

⁶ "Swampbuster" is the common name of Title XII of the Food Security Act of 1985.

⁷ *United States v. Dierckman*, 201 F.3d 915, 917 (7th Cir. 2000).

⁸ *Id.*

⁹ See *supra* note 2.

¹⁰ 16 U.S.C. § 3801 (1994).

¹¹ See *supra* note 3.

agricultural production possible would be ineligible for USDA farm benefits.¹² Thus, following the 1990 amendments, an individual could become ineligible for USDA farm benefits by either converting wetlands and growing crops on the land after December 23, 1985, or by converting wetlands such as to make agricultural production possible after November 28, 1990.¹³

Under the Swampbuster provisions, the two agencies within the USDA that are charged with making ineligibility determinations are the Soil Conservation Service ("SCS") and the Agricultural Stabilization and Conservation Agency ("ASCS").¹⁴ The SCS determines whether a wetland or converted wetland exists on a farm and whether production of crops is possible on any converted wetlands.¹⁵ The determination by the SCS is initially made by a district conservationist, whose decision is appealable to an area conservationist, then to the state conservationist, and finally to the Chief of the SCS in Washington, D.C.¹⁶

After the SCS determines the existence or conversion of a wetland on a farm, the ASCS determines if any exemptions¹⁷ apply to the conversion of the particular wetland, and then determines the eligibility of a farmer who applies for USDA benefits.¹⁸ The initial eligibility decision is made by an ASCS county committee, which can be appealed to the ASCS state committee, then to the Deputy Administrator for State and County Operations ("DASCO") and lastly, to the National Appeals Division ("NAD") of the ASCS.¹⁹

B. Facts Surrounding the Dierckman Determination

Jerry Dierckman was a farmer who grew crops on both his own land and land he rented from others, including land rented from his father, Milton Dierckman.²⁰ The land at issue in *United States v. Dierckman* was property Jerry rented from his father located in Franklin County, Indiana.²¹ In 1986, Milton cut down the trees on approximately two-thirds of the northeastern portion of the property in question.²² Milton left the stumps in the ground for a number of years thereafter, leaving the portion of the property at issue unsuitable for farming.²³ In August of 1990, Jerry hired Gunter Excavating Company ("Gunter") to dig up the stumps, remove them, and fill the holes.²⁴ On September 3, 1990, Gunter issued a proposal to Jerry concerning the work.²⁵ Gunter began work shortly thereafter and sent Jerry a bill for the work on September 25, 1990.²⁶ The bill indicated "work ordered" by Jerry, but Milton paid the bill on October 10, 1990.²⁷ Due to heavy rains in October, Gunter was unable to finish the work and for the next several months, the land remained unchanged, with only some of the stumps removed and some of the holes left unfilled.²⁸

On January 7, 1991, Jerry filled out ASCS form AD-1026 ("Highly Erodible Land and Wetland Conservation Certification") in order to have his eligibility to receive USDA farm benefits for the 1991 crop year certified by the ASCS.²⁹ On this form, Jerry indicated that he intended to convert "wet areas" and grow crops on those areas of his farm.³⁰

¹² The relevant portions of the section state that "any person who in any crop year beginning after November 28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for" USDA farm benefits. 16 U.S.C. § 3821 (c) (1986).

¹³ 201 F.3d at 918.

¹⁴ The SCS has been abolished and its functions transferred to the Natural Resources Conservation Service. See 7 U.S.C. § 6962 (1994).

Likewise, the ASCS has been replaced by the Farm Service Agency. See 7 U.S.C. § 6932 (1994) (replacing ASCS with the Consolidated Farm Service Agency ("CFSA")); 60 Fed. Reg. 56,392 (Nov. 8, 1995) (renaming the CFSA as the Farm Service Agency). However, both the SCS and ASCS were operative at all times relevant to the instant decision and the agencies are herein referred to as the SCS and ASCS.

¹⁵ 201 F.3d at 918. See 7 C.F.R. § 12.6(c).

¹⁶ *Id.*

¹⁷ See 16 U.S.C. § 3822 (1994).

¹⁸ 201 F.3d at 918. See 7 C.F.R. § 12.6(a)(b).

¹⁹ *Id.*

²⁰ 201 F.3d at 919.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

The ASCS then referred the matter to SCS to determine if the Swampbuster provisions of the FSA protected any of the wetlands indicated.³¹ In March of 1991, an SCS district conservationist determined that Jerry's farm contained both wetlands and converted wetlands. They, however, determined that the more stringent provisions of the FACTA amendments did not cover the converted wetlands because the conversion had ended before the FACTA amendments took effect on November 28, 1990.³² Therefore, Jerry was not in violation of Swampbuster because no crops had been grown on the converted wetlands.³³ The district conservationist did inform Jerry, however, that any further conversion would be a Swampbuster violation regardless of whether crops were grown.³⁴

Jerry then filed another Form AD-1026, indicating that he had no intention to convert wet areas on the land, but on March 19, 1991, he appealed to the area conservationist requesting a redetermination and permission to continue clearing the land.³⁵ In May 1991, the area conservationist denied the appeal, and in July of 1991, the state conservationist affirmed the determination of the area conservationist.³⁶ In September 1991, the Chief of the SCS affirmed the determinations of the area and state conservationists.³⁷ The Chief found that because the wetlands were converted before November 28, 1990 and no crops had been grown, no Swampbuster violation existed, but any future conversion would result in USDA ineligibility.³⁸

On December 18, 1991, the district conservationist inspected the part of Jerry's farm designated as wetlands and found that additional stumps had been removed and that the land appeared to be farmable.³⁹ The district conservationist then denoted a Swampbuster violation and notified Jerry by letter in January 1992.⁴⁰ Jerry responded by phone, claiming that he had "no control" over the land, and that his father, Milton Dierckman, owned the property in question and that Milton intended to continue converting the land.⁴¹

Jerry met with SCS officials at the farm in July 1992, where SCS officials determined that further conversion had taken place.⁴² Both Jerry and his mother, who was also present at the meeting, explained that Milton, as the owner of the property, had done the conversion.⁴³ The SCS agent inquired whether Jerry had discussed with the ASCS the possibility of reconstituting the property so as to make the records show Jerry as the operator of the cropland only and Milton as the operator of the wetlands.⁴⁴ Jerry responded by saying that he had no dealings with the ASCS.⁴⁵

After the district conservationist had determined that the fact that the wetlands had been converted after November 28, 1990 constituted a violation of Swampbuster, Jerry appealed to the area conservationist.⁴⁶ The area conservationist rejected the appeal in July of 1992, and the state conservationist then affirmed the determination of the district conservationist.⁴⁷ In September 1992, the SCS sent Jerry a letter urging him to contact the local ASCS office concerning the status of his USDA farm benefits as operator of the farm.⁴⁸ In October 1993, the Acting Chief of the SCA rejected Jerry's appeal.⁴⁹

Following the rejection of Jerry's final appeal, the SCS referred the matter to the ASCS office of Franklin County,

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 919-20.

³⁶ *Id.* at 920.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* The agent's notes indicate that the agent was informed by the ASCS office in Jennings County, IN, that the farm could indeed be reconstituted to show Jerry as the operator of the cropland only, but instead of pursuing this option, Jerry continued to claim to be the "operator" of the farm, filing another AD-1026 with the ASCS for the crop year 1992, indicating that he had converted or would convert wetland into farmable land. *Id.* n. 8.

⁴⁶ *Id.* at 920-21.

⁴⁷ *Id.* at 921.

⁴⁸ *Id.*

⁴⁹ *Id.*

stating that SCS determinations were complete and that Jerry had in fact converted wetlands after November 28, 1990.⁵⁰ On November 17, 1993, the county ASCS committee found that both Jerry and Milton were responsible for the conversion and declared them ineligible for USDA benefits for all land they owned and operated.⁵¹ Jerry then appealed to the state ASCS committee, which found that Jerry had no control over Milton's decision to convert the land.⁵² The state ASCS committee asked the county committee to grant Jerry's requested relief, but the county committee refused to reverse.⁵³ The Deputy Administrator for State and County Operations found Jerry ineligible for benefits because evidence existed that Jerry was in general control of the operation on the converted wetlands.⁵⁴ Jerry then appealed to the National Appeals Division ("NAD") of the ASCS.⁵⁵ The NAD denied his appeal in January 1995, finding Jerry ineligible for benefits for the crop years 1991, 1992, and 1993.⁵⁶ The United States then instituted the present suit in Federal District Court for the Southern District of Indiana to recover \$92,703.00 in USDA benefit payments made to Jerry in the 1991, 1992, and 1993 crop years.⁵⁷

Jerry argued that the wetland at issue was outside of the reach of the FSA, as it had no connection to interstate commerce.⁵⁸ Jerry also challenged the ineligibility determination, arguing that the agency decision was not supported by evidence.⁵⁹ Jerry argued that it was his father, and not he, who was the "operator" of the wetlands.⁶⁰ Jerry argued that the ineligibility determination was incorrect because the USDA regulation mandating his ineligibility, 7 C.F.R. § 12.4(e),⁶¹ was void due to its inconsistency with the FSA.⁶² Jerry specifically argued that this provision extended liability to a farm "operator" who has played no role in wetlands conversion and that the plain language of Swampbuster itself prohibited this extension.⁶³ Jerry asserted that the person who converts the wetland must be the person who physically brings about the conversion, and that an "operator" of the land should not be charged with the actions of the owner because the owner has "ultimate" control over the land.⁶⁴ Jerry lastly contended that the FSA and its implementing regulations violated substantive due process.⁶⁵

The parties filed cross-motions for summary judgment and the District Court entered summary judgment in favor of plaintiff United States.⁶⁶ The District Court held that the wetland at issue was subject to Swampbuster, even if it did not affect interstate commerce, as the act was a function of Congress' spending power. The court further held that the administrative finding that Jerry was the "operator" of the wetlands in question was supported by evidence, and that 7 C.F.R. § 12.4(e), the regulation defining a "person converting wetlands" as an "owner or operator" of land, was a reasonable and consistent interpretation of the statute.⁶⁷ The District Court also held that the Swampbuster provision and

⁵⁰ *Id.*

⁵¹ *Id.* Jerry then moved for reconsideration on the basis that he was not the operator of the converted wetlands and that any work on the converted lands by him was completed prior to November 28, 1990. In January of 1994, the county committee rejected this motion, finding that Jerry was the operator of the entire farm, "not just the cropland." *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 925.

⁶⁰ *Id.*

⁶¹ [A] person shall be determined to have produced an agricultural commodity on a field in which highly erodible land is predominant or to have designated such a field as conservation use, to have produced an agricultural commodity on converted wetland, or to have converted a wetland, if:

(1) SCS has determined that:

(i) Highly erodible land is predominant in such field, or
(ii) All or a portion of the field is converted wetland; and

(2) ASCS has determined that the person is or was the owner or operator of the land, or entitled to share in the crops available from the land, or in the proceeds thereof.

7 C.F.R. § 12.4(e).

⁶² 201 F.3d at 923.

⁶³ *Id.*

⁶⁴ *Id.* at 924-25.

⁶⁵ *Id.* at 921.

⁶⁶ See *United States v. Dierckman*, 41 F.Supp.2d 870 (S.D. Ind. 1998).

⁶⁷ See *id.*

its implementing regulations did not violate substantive due process.⁶⁸

Jerry appealed to the Seventh Circuit Court of Appeals, asserting the same arguments as he did in the District Court.⁶⁹ The Court of Appeals for the Seventh Circuit affirmed the entry of summary judgment in favor of plaintiff United States.⁷⁰ The court held that (1) the Swampbuster provisions of the FSA were a permissible exercise of the spending power of Congress, (2) 7 C.F.R. 12.4(e) was a reasonable and valid interpretation of the underlying statute, (3) The ASCS finding that Jerry was the operator of the wetland when it was converted was proper and supported by evidence, and (4) the FSA and its implementing regulations did not violate substantive due process.⁷¹

III. LEGAL BACKGROUND

Traditionally, Congress has provided vast subsidies to private landowners to drain wetlands for agricultural use.⁷² Large federal flood control and drainage projects in the early half of the 20th century further accelerated wetland conversion, so that by the early 1980s some 60 percent of the original wetlands of the United States had been drained, cleared or filled.⁷³ By the late 1960s and early 1970s, the adverse effects of wetland drainage were becoming more apparent.⁷⁴ In response to the detrimental effects of wetland conversion, in 1972 and 1977 Congress amended the Federal Water Pollution Control Act (commonly known as the Clean Water Act or "CWA"⁷⁵) to maintain and restore the chemical, physical, and biological integrity of the nations waters.⁷⁶

Section 404 of the CWA contains the bulk of the Act's wetland protection provisions, which are enforced by the Army Corps of Engineers.⁷⁷ Section 404 of the CWA requires that an individual wishing to discharge fill material into the "navigable waters of the United States" must first obtain a permit to do so.⁷⁸ The protection afforded by Section 404 turns on the definition of "navigable waters" and "waters of the United States."⁷⁹ Courts have held that the waters defined by the CWA must affect interstate commerce in order to invoke CWA protection.⁸⁰ In addition, the CWA contains certain provisions specifically exempted from protection.⁸¹ Thus, the CWA did not apply to many intrastate wetland conversion activities.⁸²

Fears that the CWA was not adequately addressing the wetland depletion issue prompted Congress to pass the FSA of 1985, and its amendment by the FACTA of 1996.⁸³ In passing the FSA in 1985, Congress stated that the purpose of the legislation was to discourage the draining and cultivation of wetland that is unsuitable for agricultural production in its natural state.⁸⁴ By conditioning payment of USDA benefits on preservation of wetlands, the FSA greatly expanded the

⁶⁸ See *id.*

⁶⁹ 201 F.3d at 921.

⁷⁰ *Id.* at 928.

⁷¹ *Id.*

⁷² See James T.B. Tripp and Daniel J. Dudek, *The Swampbuster Provisions of the Food Security Act of 1985: Stronger Wetland Conservation if Properly Implemented and Enforced*, 16 *Env'tl L. Rep.* 10120 (May, 1986).

⁷³ See *id.*

⁷⁴ See *id.* Effects of large-scale wetland conversion include reductions in fish and wildlife habitat, water quality degradation from sediment, nutrient, and pesticide loadings of the soil, and the loss of natural flood storage capacity. See *id.*

⁷⁵ Pub. L. No. 92-500, § 2, 56 Stat. 884 (codified at 33 U.S.C. § 1344 (1994)).

⁷⁶ See Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 *Harv. Env'tl L. Rev.* 201, 218 (1997).

⁷⁷ See *id.*

⁷⁸ See *id.* 13 U.S.C. § 1344 (a) (1994).

⁷⁹ See *id.*

⁸⁰ See *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Note, however, that isolated waters with no connection to interstate commerce except the occasional presence of migratory birds has been held to affect interstate commerce. See *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999). Such a tenuous reading of the Commerce Clause has been put in doubt by recent decisions of the Supreme Court. Compare *Wickard v. Filburn*, 317 U.S. 11 (1942) with *United States v. Lopez*, 514 U.S. 549 (1995).

⁸¹ Notably, the Act indicates that:

[T]he discharge of dredged or fill material ... from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices... is not prohibited by or otherwise subject to regulation under [section 404]. 33 U.S.C. § 1344(f)(1)(A) (1994).

⁸² See McBeth, 21 *Harv. Env'tl L. Rev.* at 219.

⁸³ See *id.* at 220.

⁸⁴ See S. Rep. No. 99-145, at 303 (reprinted in 1985 U.S.C.C.A.N. 1103, 1969).

ability of the federal government to regulate intrastate wetlands or those exempted by the CWA.⁸⁵

A. Federal Regulations Based on Congress' Spending Power

Article I, section 8, clause 1 of the United States Constitution states that "(t)he Congress shall have the 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."⁸⁶ Since the early days of the United States, scholars have debated the scope of the federal spending power.⁸⁷ James Madison was believed the clause only encompassed spending for enumerated powers conferred upon the legislature by the Constitution.⁸⁸ Alexander Hamilton subscribed to the position that the spending power conferred a power separate and distinct from the other enumerated powers listed in the constitution and granted the Congress the power to tax and spend in order to promote the general welfare of the nation.⁸⁹

In 1936, the Supreme Court, in *United States v. Butler*,⁹⁰ provided for the first time a clear definition of the Congressional spending power.⁹¹ *Butler* involved a challenge to the Agricultural Adjustment Act of 1933, which increased farmer's prices for their products by decreasing the amounts harvested by subsidizing farmers who produced less.⁹² In *Butler*, the Court adopted Hamilton's view, finding that the power to spend was not unlimited, but that its confines were found in the clause conferring the power, and not in the other enumerated powers of Congress.⁹³ Ironically, after very broadly defining Congress' spending power, the Court held the act unconstitutional as a violation of the Tenth Amendment, reasoning that regulation of agriculture was not an enumerated power of Congress.⁹⁴ By this reasoning, the Court held that the effect of the act was to regulate agriculture, not to spend in its furtherance.⁹⁵ The *Butler* court established the principle that Congress' spending power is not limited to furthering enumerated powers, but rather that Congress can spend for the general welfare of the nation.⁹⁶

The Court further expanded the scope of the spending power in 1937 by its decisions in *Steward Machine Co. v. Davis*⁹⁷ and *Helvering v. Davis*.⁹⁸ Both cases involved constitutional challenges to the newly enacted Social Security Act.⁹⁹ In *Steward*, the Court upheld the constitutionality of the act, indicating that it would not hear any assertion that Congress' spending powers under the act were beyond the bounds of spending for the general welfare.¹⁰⁰ In *Helvering*, the Court further held that the power to spend was limited only by promotion of the general welfare, not by furtherance of enumerated powers, and that Congress itself can define the scope of the general welfare.¹⁰¹

This deference was further cemented by *Berman v. Parker*,¹⁰² in which the Court concluded that when Congress has spoken, "the public interest has been declared in terms well-nigh conclusive."¹⁰³ This indicates that the "general welfare" is defined by the very legislation passed by Congress.¹⁰⁴ Likewise, in *Buckley v. Valeo*,¹⁰⁵ the Court further

⁸⁵ See *McBeth*, 21 Harv. Envtl L. Rev. at 221.

⁸⁶ U.S. Const. art. I, §8(1).

⁸⁷ See Chester James Antieau & William J. Rich, *Modern Constitutional Law* vol. 3, § 44.20, 201 (2d ed., West 1997).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ 297 U.S. 1 (1936).

⁹¹ See Antieau & Rich, *Modern Constitutional Law* vol. 3 § 44.20 at 202.

⁹² See *id.* at 200.

⁹³ See Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 Pepp. L. Rev. 869, 897 (1998).

⁹⁴ See *id.* at 898.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ 301 U.S. 548 (1937).

⁹⁸ 301 U.S. 619 (1937).

⁹⁹ See Squire, 25 Pepp. L. Rev. at 900.

¹⁰⁰ See *id.*

¹⁰¹ See *Helvering*, 301 U.S. at 645 ("When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 515 (1937) ("[w]hether the present expenditure serves a public purpose is a practical question for the lawmaking department, and it would require a plain case of departure from every public purpose, which could reasonably be conceived to justify the intervention of a court.")

¹⁰² 348 U.S. 26 (1954).

¹⁰³ *Id.* at 32.

¹⁰⁴ See Squire, 25 Pepp. L. Rev. at 901-02.

expanded Congress' spending power by upholding the Federal Election Campaign Act, which involved federal financing of presidential primary and general election campaigns.¹⁰⁶ The Court rejected claims that such financing was contrary to the general welfare, finding that it is the duty of Congress to determine which expenditures further the public welfare, even if the Court thinks such expenditures are unwise.¹⁰⁷

Congress may also exercise the spending power in order to encourage states to adopt legislation or policies favored by the federal government.¹⁰⁸ By granting funds only to states that adopt laws approved by Congress, the federal government can use the spending power to greatly influence state policy in a myriad of areas such as social security, racial desegregation, pollution, education, and highway construction.¹⁰⁹ In 1987, the court integrated its approach to conditional grants of federal funds in the watershed case of *South Dakota v. Dole*.¹¹⁰ In *Dole*, the Court upheld the power of Congress to withhold federal highway funds from states allowing purchase or possession of alcoholic beverages by persons under the age of twenty-one.¹¹¹ In reaching this result, the Court articulated a four-part test to be used in determining if federal spending limitations are constitutional.¹¹² To pass constitutional muster: (1) the spending at issue must be in furtherance of the general welfare; (2) if Congress desires to condition the state's receipt of funding, it must do so "unambiguously," enabling states to make such a choice knowingly; (3) conditions placed on receipt of federal funds must be "sufficiently related" to "the federal interest in particular national projects or programs;" and (4) there must be no other constitutional clause providing an "independent bar to the conditional grant of funds."¹¹³

In *Dole*, South Dakota argued that section 2 of the Twenty-First Amendment granted states complete control over liquor regulation and thus constituted an "independent constitutional bar" to the conditioning of federal funds.¹¹⁴ In concluding that the Twenty-First Amendment is not an "independent bar," the Court interpreted *Butler* to hold that "the constitutional limitations on Congress exercising its spending power are less exacting than those on its authority to regulate directly."¹¹⁵ The Court reasoned that the "independent constitutional bar" portion of the test did not prohibit indirect regulation by way of conditional granting of funds of areas Congress is not empowered to regulate directly.¹¹⁶ Likewise, the Court found that the Tenth Amendment is not an "independent bar" to conditioning of federal funds, reasoning that states do not have to accept federal money, but if they do, they must accept any conditions on those grants.¹¹⁷

Justice O'Connor dissented in *Dole*, however, her dissent was not based on the "independent bar" prong of the test, but rather her dissent focused on the "federal interest" prong of the test.¹¹⁸ O'Connor argued that the lowered drinking age condition was not "sufficiently related" to the subject of highway construction.¹¹⁹ Since the inception of the four-part test of *Dole*, no conditions on spending have ever failed to pass this "sufficient relationship" test.¹²⁰ The end result of the expansion of spending power over the course of the 20th century is that under the power, Congress currently enjoys sweeping authority to indirectly regulate many activities that it could not directly regulate under its enumerated powers.¹²¹ In reviewing the Court's post-1937 spending power jurisprudence, it appears unlikely that the Court is willing to restrict Congress' spending power in the near future.¹²²

¹⁰⁵ 424 U.S. 1 (1976).

¹⁰⁶ See Squire, 25 Pepp. L. Rev. at 902.

¹⁰⁷ See Buckley, 424 U.S. at 90-91.

¹⁰⁸ See Antieau & Rich, vol. 3 § 44.20 at 203.

¹⁰⁹ See *id.*

¹¹⁰ 483 U.S. 203 (1987).

¹¹¹ See Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* vol. 1 § 5.7. 525 (3d ed. 1999).

¹¹² See *id.*

¹¹³ *Dole*, 483 U.S. at 206-08.

¹¹⁴ See Rotunda & Nowak, vol. 1 § 5.7 at 527.

¹¹⁵ See *id.*

¹¹⁶ See *id.* See *Dole*, 483 U.S. at 212 ("Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in [the federal law] is a valid use of the spending power.").

¹¹⁷ See *id.* at 526. See *Bell v. New Jersey*, 461 U.S. 773, 790 ("Requiring States to honor the obligations assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty.").

¹¹⁸ See Antieau & Rich, vol. 3 § 44.20 at 204.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See Squire, 25 Pepp. L. Rev. at 871.

¹²² See *id.*

B. Review of Administrative Regulations

Typically, agency regulations promulgated in accordance with informal rulemaking procedures are reviewed under the Administrative Procedure Act ("APA") and may only be set aside if the regulations are "arbitrary, capricious, a abuse of discretion, or otherwise not in accordance with law."¹²³ Prior to 1984, courts charged with determining whether an agency regulation was a reasonable construction of the underlying statute produced a very unpredictable corpus of decisions.¹²⁴ Two distinct lines of cases developed.¹²⁵ In the first, a court had to defer to an agency's construction of a statute if it had a "reasonable basis in law."¹²⁶ In the second line of cases, the court simply substituted the agency's construction of the statute for its own interpretation.¹²⁷ However, in 1984, in the watershed case of *Chevron U.S.A., Inc., v. Natural Resources Defense Council*,¹²⁸ the Supreme Court adopted a two-step test to determine whether a court is to give deference to an agency's regulation. Under *Chevron*, the reviewing court must first determine whether Congress has spoken directly to the question at issue.¹²⁹ If so, the court must apply the intent of Congress.¹³⁰ If the court determines that Congress has not spoken directly the question at issue and the statute is ambiguous, then the court must proceed to the second step of the analysis to determine whether the agency's interpretation is reasonable.¹³¹

C. Review of Findings of Fact in Agency Adjudications

Judicial review of findings of fact in agency adjudications is generally governed by one of two standards under the APA; the substantial evidence test or the arbitrary and capricious test.¹³² In formal adjudications governed by sections 556 and 557 of the APA, the proper standard to be applied is that an agency's findings of fact will be set aside if they are unsupported by substantial evidence.¹³³ This standard is a very deferential standard of review, however, it arguably remains less deferential than the "arbitrary and capricious" standard, which applies to informal adjudications under the APA.¹³⁴ Under substantial evidence standard, an agency's findings of fact will be set aside only if "arbitrary, capricious, or otherwise not in accordance with law."¹³⁵ The original permutation of this standard was extraordinarily deferential to agencies.¹³⁶ However, in *Citizens to Preserve Overton Park v. Volpe*,¹³⁷ the Supreme Court tempered slightly this highly deferential standard by requiring "searching and careful inquiry" into the facts that support an agency decision.¹³⁸ However, even with the less deferential tone of *Volpe*, the arbitrary and capricious standard remains a very deferential standard of review of agency findings of fact.¹³⁹

¹²³ 5 U.S.C. § 706(2)(A) (1994).

¹²⁴ See Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* vol. 1 § 3.1, 107 (3d ed., Little, Brown & Co. 1994).

¹²⁵ See *id.* at 108.

¹²⁶ See *id.* (citing *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944)). See also *Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 413 (1982) (agency's construction must be affirmed unless it is "arbitrary or contrary to law"); *INS v. Wang*, 450 U.S. 139, 145 (1981) (agencies have authority to adopt a narrow construction of a statutory term "should they deem it wise to do so").

¹²⁷ See *id.* at 109. See also *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974) (court imposes its own definitions of "employees" for federal labor relations purposes).

¹²⁸ 467 U.S. 837, 842-43 (1984).

¹²⁹ *Id.* at 842.

¹³⁰ *Id.* at 842-43.

¹³¹ *Id.* at 843-44.

¹³² See Davis and Pierce, *Administrative Law Treatise*, § 11.2 at 174.

¹³³ 5 U.S.C. § 706(2)(E) (1999).

¹³⁴ See Davis and Pierce, *Administrative Law Treatise*, § 11.4 at 200. Compare *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 683 (D.C. Cir. 1984) ("[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter, separately recited by the APA not to establish a more rigorous standard of factual support, but to emphasize that in the case of formal proceedings the factual support must be found in the closed record as opposed to elsewhere.").

¹³⁵ 5 U.S.C. § 706(2)(A) (1999).

¹³⁶ See *id.*; See *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) ("[I]f any state of facts reasonably can be conceived that would sustain [the order], there is a presumption of the existence of that state of facts, and one who assails [that presumption] must carry the burden of showing that the action is arbitrary").

¹³⁷ 401 U.S. 402 (1971).

¹³⁸ *Id.* at 416.

¹³⁹ See Davis and Pierce, *Administrative Law Treatise*, § 11.4 at 202. See *Abbot Laboratories v. Gardner*, 387 U.S. 136, 143 (1967) (substantial evidence test provided a "considerably more generous judicial review than the 'arbitrary and capricious' test").

D. Substantive Due Process

The doctrine of substantive due process found its genesis in the late 1800s amidst a political and social climate in which scholars and judges increasingly believed in an unregulated laissez-faire economy based on principles of Social Darwinism.¹⁴⁰ Support for a laissez-faire philosophy reflected industry's growing hostility toward progressive legislation aimed at protecting workers, unions, and consumers, and was primarily based on the belief that government regulations interfered with the natural rights of people to own and use their property and contract freely.¹⁴¹ As early as 1877, the Supreme Court indicated that under some circumstances, government regulation of business would violate due process.¹⁴²

The doctrine of substantive due process reached its zenith with the Supreme Court's decision in *Lochner v. New York*,¹⁴³ in which the court declared a New York law that set the maximum number of hours a baker could work unconstitutional.¹⁴⁴ The court's decision in *Lochner* introduced three themes which were to become the pillar for the court's substantive due process jurisprudence for the first third of the 20th century: Freedom of contract was a right protected by the due process clauses of the Fifth and Fourteenth amendments; the government could interfere with freedom of contract only to serve a valid police purpose; and the judiciary would carefully scrutinize legislation to ensure that it served such a valid police purpose.¹⁴⁵ Under the ruling in *Lochner*, the court struck down many laws as violating substantive due process over the course of the next three decades.¹⁴⁶

By the mid-1930s, with the nation in the midst of the Great Depression, pressure was mounting for the court to abandon its laissez-faire ideology of the *Lochner* era.¹⁴⁷ In the early 1930s, the court showed signs of departing from *Lochner* era substantive due process ideology.¹⁴⁸ The true demise of *Lochner* came in 1937 and 1938 with the court's decisions in *West Coast Hotel v. Parrish*¹⁴⁹ and *United States v. Carolene Products Co.*¹⁵⁰ In *West Coast Hotel*, the court declared that it would no longer protect freedom of contract as a fundamental right, that government could regulate to serve any legitimate purpose, and that the judiciary would defer to legislative choices as long as they were reasonable.¹⁵¹ In *Carolene Products*, the court found that economic regulations should be upheld as long as they are supported by a rational basis and that the court should defer to the government and uphold laws that are reasonable so long as they did not interfere with fundamental rights or discriminate against 'discrete and insular minorities'.¹⁵² In essence, the *Carolene Products* holding created a presumption of constitutionality for economic regulation as long as it does not interfere with individual rights or discriminate against a distinct minority.¹⁵³

Since 1937, court decisions have made it very clear that economic regulations will be upheld when challenged under the due process clause so long as they are rationally related to serve a legitimate purpose.¹⁵⁴ Decisions have emphasized that it is the role of the legislature to determine whether economic regulations are wise or prudent.¹⁵⁵ The end

¹⁴⁰ See Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, § 8.2.1, 477 (Aspen Law & Business 1997).

¹⁴¹ See *id.*

¹⁴² See *Munn v. Illinois*, 94 U.S. 113, 126 (1877) ([T]he central question is whether "private property is affected with a public interest. [because] when one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good.").

¹⁴³ 198 U.S. 45 (1905)

¹⁴⁴ *Id.*

¹⁴⁵ See Chemerinsky, *Constitutional Law: Principles and Policies*, § 8.2.2 at 482.

¹⁴⁶ See *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down law protecting unionizing); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (striking down minimum wage law for women); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (striking down consumer protection law setting maximum price for gasoline).

¹⁴⁷ See Chemerinsky, *Constitutional Law: Principles and Policies*, § 8.2.3 at 487. Much of this pressure came from a more widely accepted view that positive government intervention was necessary to economic survival and also the growing belief that the characterization of property rights and freedom of contract as "natural liberties" was simply subterfuge to a political choice made by the court to favor employers over employees. See *id.*

¹⁴⁸ See *Nebbia v. New York*, 291 U.S. 502 (1934) ("[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows or exercise his freedom of contract to work them harm").

¹⁴⁹ 300 U.S. 379 (1937).

¹⁵⁰ 304 U.S. 144 (1938).

¹⁵¹ See *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937) ("[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process").

¹⁵² 304 U.S. at 152-53 n. 4.

¹⁵³ See Chemerinsky, *Constitutional Law: Principles and Policies*, § 8.2.3 at 490.

¹⁵⁴ See *id.*

¹⁵⁵ See *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("[I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation.")

result of the evolution of the court's substantive due process jurisprudence is that substantive due process is simply unavailable as a challenge to economic regulations.¹⁵⁶

E. Constitutional Dimensions of Wetlands Regulation and Swampbuster Jurisprudence

In recent years, the Supreme Court has shown a willingness to affirmatively limit Congress' power to regulate under the commerce power.¹⁵⁷ While none of the cases where the court has affixed limits on Congress' ability to regulate under the commerce clause have involved a challenge to environmental regulation, there is no reason to believe that environmental regulations based on the commerce clause are exempt from this shift in commerce power jurisprudence.¹⁵⁸ Indeed, late in the 1999 term, the Court agreed to hear *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,¹⁵⁹ involving a challenge to the EPA's migratory bird rule, a commerce power based rule which prohibits destruction of wetlands, including intrastate wetlands, that are likely to be or actually are frequented by migratory birds.¹⁶⁰ This rule has generated a great deal of controversy as an impediment to development of private property with no apparent or direct effect on interstate commerce.¹⁶¹ In light of the recent commerce clause jurisprudence, it is possible that this rule may not pass constitutional muster.¹⁶² It has been intimated that if this rule is invalidated, Congress' spending power may present an alternative basis for regulation of intrastate wetlands, although no court has yet issued such a pronouncement.¹⁶³

Judicial treatment of Swampbuster is scant. A review of the existing Swampbuster jurisprudence reveals that no plaintiff has yet argued that Swampbuster is based on the commerce clause power, thus insulating wetlands with no connection to interstate commerce from its reach. Some challenges to Swampbuster concern appeals of agency findings of fact,¹⁶⁴ or the agency's decisions themselves as arbitrary and capricious.¹⁶⁵ Other challenges concern procedural due process.¹⁶⁶ Some plaintiffs have argued that an agency's interpretation of the Swampbuster provision is incorrect or unreasonable.¹⁶⁷ However, it appears that no plaintiff has challenged the Swampbuster provisions by alleging that they were based on the commerce power. Thus, until *Dierckman*, no court had the opportunity to use Congress' spending power as an alternative basis for regulation of intrastate wetlands.

IV. INSTANT DECISION

In *United States v. Dierckman*, the Court of Appeals for the Seventh Circuit held that: (1) the Swampbuster provisions of the FSA are a permissible exercise of the spending power of Congress, (2) 7 C.F.R. 12.4(e) is a reasonable and valid interpretation of the underlying statute, (3) the ASCS finding that Jerry was the operator of the wetland when it was converted was proper and supported by evidence, and (4) the FSA and its implementing regulations do not violate substantive due process.¹⁶⁸

In reaching this holding, the court first turned to Jerry's argument that the wetland in question cannot be regulated

¹⁵⁶ See Chemerinsky, *Constitutional Law: Principles and Policies*, § 8.2.3 at 494.

¹⁵⁷ See *infra* note 197.

¹⁵⁸ See Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*,

30 *Envtl. L. Rep.* 10980 (2000).

¹⁵⁹ 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S.Ct. 2003 (2000).

¹⁶⁰ See Gerhardt, 30 *Envtl. L. Rep.* At 10980.

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *Prokop v. United States*, 91 F.Supp2d 1301 (D. Neb. 2000) (Agency finding that land was "farmed wetland pasture" was not arbitrary and capricious).

¹⁶⁵ See *Von Eye v. United States*, 92 F.3d 681 (8th Cir. 1996) (Agency determination that previous drainage of wetlands fell within exception to Swampbuster, but that further drainage would constitute a violation not 'Arbitrary and Capricious').

¹⁶⁶ See *Downer v. United States*, 97 F.3d 999 (8th Cir. 1996) (Notice and hearing given after violation discovered sufficient due process); *Prokop v. United States*, 91 F.Supp2d 1301 (D. Neb. 2000) (Where farmer failed to summarize witnesses' expected testimony, exclusion of those witnesses at trial was not denial of due process).

¹⁶⁷ See *Barthel v. USDA*, 181 F.3d 934 (8th Cir. 1999) (Agency interpretation that pre-Swampbuster exempted land could not be altered at all was incorrect).

¹⁶⁸ *United States v. Dierckman*, 201 F.3d 915, 928 (7th Cir. 2000).

by the FSA.¹⁶⁹ The main thrust of Jerry's argument concerns an analogy to the CWA,¹⁷⁰ which prohibits discharging pollutants into the "waters of the United States."¹⁷¹ Jerry argued that the "wetlands" regulated by the FSA are a subset of those regulated by the CWA and that regulation of a strictly intrastate wetland is only permissible upon agency determination that the wetland bears some relationship to interstate commerce.¹⁷² Thus, Jerry argued, because the wetland on his farm is within the boundaries of a state, and it has not been determined to bear any relation to interstate commerce, federal agency regulation is precluded.¹⁷³

The court first noted that the "waters of the United States" language in the CWA was not parallel to the language in the FSA.¹⁷⁴ The court then pointed out that Jerry's argument overlooked the difference between Congressional regulation under the Commerce Clause and under the spending power, in that the FSA derives its powers from the Congressional spending power, which does not require a connection to interstate commerce.¹⁷⁵ Critical to this determination was the court's finding that the FSA was not a direct regulation, but instead conditions receipt of USDA farm benefits on the preservation of wetlands, which the court found a proper exercise of Congress' spending power.¹⁷⁶ Relying on the broad grant of Congressional spending powers enunciated in *South Dakota v. Dole*,¹⁷⁷ the court further supported the proposition that intrastate wetlands are subject to regulation by the FSA.

The court further stated that Congressional intent to regulate intrastate wetlands is clear on the face of the FSA, because that the act defines both "wetlands" and "converted wetlands" without reference to interstate commerce or any correlation to the CWA.¹⁷⁸ Therefore, the court concluded that the Swampbuster provisions of the FSA are a valid exercise of the spending power of Congress and can reach intrastate wetlands with no connection to interstate commerce.¹⁷⁹

The court next turned to Jerry's argument that the ineligibility determination was incorrect because the USDA regulation mandating his ineligibility, 7 C.F.R. § 12.4(e),¹⁸⁰ was inconsistent with the FSA and therefore void.¹⁸¹ Jerry's principal assertion was that the plain language of Swampbuster prohibits extension of liability to a farm "operator" who played no role in wetlands conversion. He contended that an "operator" of the land should not be charged with the actions of the owner and that the person who physically brings about the conversion should be liable under the FSA.¹⁸²

The court first established that the proper standard of review of USDA regulations is under the APA and that the agency action may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁸³ The court found that because Congress explicitly authorized the USDA to promulgate regulations on ineligibility of benefits, the court must review the USDA regulations within the framework established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*¹⁸⁴ to determine if the agency interpretation found at 7 C.F.R. § 12.4(e)¹⁸⁵ is permissible.¹⁸⁶

Jerry argued that the plain meaning of the phrase, "any person who converts a wetland" indicated that only the person who physically converts the wetland is ineligible for USDA benefits.¹⁸⁷ The court found that this could be a

¹⁶⁹ *Id.* at 922.

¹⁷⁰ 33 U.S.C. § 1251 (1994).

¹⁷¹ 201 F.3d at 922. *See* 33 U.S.C. § 1251 (1994).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 483 U.S. 203, 207 (1987) ("[o]bjectives not thought to be within Article I's "enumerated legislative fields." [like the Commerce Clause.] may nevertheless be attained through use of the spending power and the conditional grant of federal funds.")

¹⁷⁸ 201 F.3d at 922. *See* 16 U.S.C. §§ 3801(a)(4), (a)(16) (1994).

¹⁷⁹ *Id.* at 928.

¹⁸⁰ *See supra* note 51.

¹⁸¹ *Id.* at 923.

¹⁸² *Id.*

¹⁸³ 5 U.S.C. § 706 (2) (a) (1994).

¹⁸⁴ 467 U.S. 837 (1984).

¹⁸⁵ *See supra* note 51.

¹⁸⁶ 201 F.3d 915. *See Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 851 (7th Cir. 1999) ("[I]f the plain meaning of the text of the statute either supports or opposes the regulation, the inquiry ends and the plain meaning is applied, but if the statute is vague or ambiguous, the court must defer to the agency interpretation so long as it is based on a reasonable reading of the statute.")

¹⁸⁷ *Id.* at 920.

plausible reading of the statute, but that the phrase itself was ambiguous.¹⁸⁸ The court then turned to the agency's definition of the statute in 7 C.F.R § 21.4(e) (2) that "any person who converts a wetland" to include the "owner or operator" of the land and found the definition to be a broad but reasonable reading of the statute.¹⁸⁹ In response to Jerry's argument that an operator should not be charged with the actions of the owner, as the owner has 'ultimate' control over the land, the court found that the agency regulations that define an operator as someone who "must be in general control of the farming operations on the farm" to be a reasonable reading of the statute under *Chevron*.¹⁹⁰ Thus, the court deduced that it was not unreasonable to hold such a person responsible for wetlands conversion, because the operator must have at least acquiesced in the conversion.¹⁹¹ Therefore, the court held that the ineligibility regulations in 7 C.F.R. § 12.4(e) are a reasonable interpretation of the FSA and support imposing USDA ineligibility upon operators of farmland who convert wetlands.¹⁹²

The court next addressed Jerry's argument that the ineligibility determination by the agency was not supported by evidence.¹⁹³ Jerry argued that he was the operator of the cropland only, and that his father Milton was the true operator of the wetlands in question.¹⁹⁴ The court again turned to the APA, finding that an agency's decision may only be set aside if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁹⁵ The court then reviewed the administrative record before the National Appeals Division of the ASCS and found that Jerry had indicated in his filings to the ASCS that he was the "operator" of the farm, and that there were other options, such as reconstitution of the farm, that Jerry could have pursued in order to avoid the determination of ineligibility.¹⁹⁶ The court also rejected Jerry's argument that he had no control over the actions of his father, indicating that he had produced little or no evidence that he tried to stop the conversion.¹⁹⁷ Therefore, the court concluded that it was not arbitrary or capricious for the ASCS to find that Jerry was indeed the operator of the farm at the time of conversion.¹⁹⁸

Lastly, the court addressed Jerry's argument that the FSA and its implementing regulations violated substantive due process.¹⁹⁹ Jerry claimed that it was irrational to attempt to deter the conversion of wetlands through an ineligibility sanction imposed on an operator of a farm, as the owner of the land would not be deterred by the loss of USDA benefits for an operator.²⁰⁰ The court found that sanctioning both owners and operators would further the purpose of Swampbuster, as both the owner and operator of the land share control over the land and both could potentially benefit from USDA subsidies.²⁰¹ The court cited *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,²⁰² which stands for the proposition that legislative enactments adjusting economic benefits and burdens enjoy a presumption of constitutionality and that the complaining party must show that the legislature has acted arbitrarily and irrationally.²⁰³ Therefore, the court concluded that the FSA and its implementing regulations did not violate substantive due process.²⁰⁴

V. COMMENT

The significance of the Seventh Circuit's decision in *United States v. Dierckman* lies in the court's characterization of the FSA as a valid exercise of the spending power of Congress. This characterization allows the federal government to indirectly regulate vast amounts of privately owned wetlands that may lie wholly within the borders of a state and have no connection whatsoever with interstate commerce. While preservation of wetlands remains an

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 925.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 928.

¹⁹³ *Id.* at 925.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 925-26.

¹⁹⁶ *Id.* at 926-27.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² 467 U.S. 717 (1984).

²⁰³ *Id.* at 729.

²⁰⁴ 201 F.3d at 927.

important objective, coercive programs such as Swampbuster indirectly regulate the use of private property even if that property could not be regulated directly by the federal government. Faced with possible loss of all USDA benefits, agricultural producers are faced with a "choice" in which they have no other option but to submit to coercive government regulation of their property via Swampbuster. In addition to their coercive nature, the Swampbuster provisions exceed the power of Congress to spend for the general welfare.

Swampbuster is considered a "voluntary" program because there are no civil or criminal penalties imposed for violations of the act.²⁰⁵ Rather, Swampbuster seeks to protect wetlands by requiring farmers to conserve wetlands on their property in order to qualify for USDA farm benefits.²⁰⁶ However, in light of the fact that by the time of the passage of the FSA 1985, over 90 percent of American agricultural producers relied on such benefits, the program appears much less "voluntary."²⁰⁷ Analogous to the "voluntary" nature of Swampbuster was the conditional grant of highway funding at issue in *Dole*. In *Dole*, the Supreme Court emphasized that states were free to accept federal funds with attached conditions, or decline them, thereby not accepting "federal coercion."²⁰⁸ However, the fact remains that faced with the loss of highway funds, the state of South Dakota had no real "choice" but to accept any conditions attached, even if such conditions would effect a regulation Congress is not ordinarily empowered to achieve. Similarly, farmers are forced to choose between two coercive alternatives, as they can opt to not use wetlands on their property for agricultural use, thereby retaining their USDA benefits, or convert such wetlands and hope their increased yields will offset the loss of benefits. It is clear that with such a large number of agricultural producers receiving such benefits, this "choice" is little more than "coercion."

The Supreme Court addressed similar coercive legislation in *New York v. United States*,²⁰⁹ where the court struck down a provision of the Low Level Radioactive Waste Policy Amendments of 1985 ("LLRWPA") as an improper usurpation of state authority by commandeering the states to legislate according to the will of Congress.²¹⁰ At issue in *New York* was a federal regulation that mandated that states that did not meet Congress' specifications for disposal of such waste within their borders would be liable for any damages resulting from failure to take possession of waste within its borders.²¹¹ In invalidating the law, the court found that the principal issue was the extent to which states were able to accept or reject the demands of Congress, and that the law provided states with "no choice at all" between regulating in accordance with Congress' demands or allowing Congress to pre-empt the field, thus presenting two coercive choices.²¹²

In a similar fashion, the Swampbuster provisions force upon individual farmers a choice between two equally coercive alternatives: farmers must either submit to federal regulation of their property or lose USDA benefits. The fact that the vast majority of farmers in America are dependent in some form on such benefits ensures that no real "choice" remains but for farmers to simply acquiesce to indirect federal regulation of their property. The current interpretation of the spending power allows Congress almost unfettered power to coerce state and local governments to act in accordance with federal designs, even if such coercion would be unavailable under an enumerated power.²¹³ In *Dierckman*, the Seventh Circuit's casting of the Swampbuster provisions of the FSA as a valid exercise of the spending power effectively legitimates a similar coercive power over individual farmers' control over private property that Congress could not regulate under any enumerated power. By casting this regulatory scheme as an exercise of the spending power, the Seventh Circuit, under current spending power jurisprudence, in effect assures that this coercive power is practically unassailable on constitutional grounds.

In addition to being unduly coercive, the spending power, as exercised by the FSA, exceeds its constitutional boundaries. Even Alexander Hamilton, the great proponent of federal power, indicated that the power to appropriate

²⁰⁵ See H.R. Rep. No. 99-271, at 203, 207 (1985), reprinted in U.S.C.C.A.N. 1103, 1969.

²⁰⁶ See Rebecca Fink, "We're From the Government and We're Here To Help." *Farmers' and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door To Governmental Control of Private Property Through the Expanding Scope of Wetlands Regulation*. 30 Tex. Tech. L. Rev. 1157, 1158 (1999).

²⁰⁷ See *id.*

²⁰⁸ *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

²⁰⁹ 505 U.S. 144 (1992).

²¹⁰ See Squire, 25 Pepp. L. Rev. at 883.

²¹¹ See *id.*

²¹² *New York v. United States*, 505 U.S. 144, 176-77 (1992).

²¹³ See Squire, 25 Pepp. L. Rev. at 915-16.

monies would not grant a power to do any other thing not expressly or impliedly authorized by the Constitution.²¹⁴ However, under current spending power jurisprudence, the Court effectively allows Congress to use the spending power to achieve any desired ends.²¹⁵

This treatment stands in stark contrast to the Court's recent decisions restricting Congressional regulation under the Commerce Clause.²¹⁶ While the Court has indicated a willingness to affix limits to Congress' broad power to regulate interstate commerce, it has also shown an unwillingness to curtail the vast power enjoyed by Congress under the spending power, allowing Congress to indirectly regulate a large number of activities it could not ordinarily regulate. Thus, while the Court purports to restrict Congressional regulation of interstate commerce, it provides Congress the very means to regulate the activities under the spending power that the Court would restrict under the Commerce Clause. These two lines of cases are exceedingly difficult, if impossible to reconcile.²¹⁷ Justice O'Connor, in her dissent in *Dole*, indicates that Congress has no power under the Spending Clause to impose conditions on a grant of federal monies beyond specifying exactly how that money is to be spent, and that such a specification is not a condition at all, but a regulation, valid only if it falls within one of the enumerated powers of Congress.²¹⁸

By characterizing the Swampbuster provisions of the FSA as based on Congress' spending power, the Seventh Circuit in *Dierckman* validates exactly such an unconstitutional regulation. While there is little doubt that conservation of wetlands is an important objective,²¹⁹ it should not be achieved at the expense of federalism and the private property interests of the American farmer by coercive, unconstitutional regulation. There are other methods for encouraging environmentally responsible use of farmland other than the questionable methods of Swampbuster. The USDA has a number of other programs that allow farmers to voluntarily provide for wetlands conservation while maintaining their property rights in the land. These include the Wetlands Reserve Program ("WRP"),²²⁰ the Conservation Reserve Program ("CRP"),²²¹ and the Environmental Quality Incentives Program ("EQIP").²²² These programs provide additional financial benefits to landowners who voluntarily enter into agreements for wetlands preservation or grant either permanent or limited negative easements specifying preservation of wetlands.²²³ Rather than relying on unconstitutional and coercive regulatory techniques, these programs emphasize cooperation between the USDA and agricultural producers.²²⁴ In contrast, Swampbuster merely forces farmers to conserve wetlands by way of being a "financially manipulative sugar daddy" instead of providing additional incentives to engage in environmentally sound agricultural practices.²²⁵

The Seventh Circuit's decision in *United States v. Dierckman* greatly expands federal power to regulate wholly intrastate wetlands. By holding that the Swampbuster provisions of the FSA are a valid exercise of Congress' spending power, the court legitimated coercive and constitutionally questionable federal regulatory power over private property not subject to direct federal regulation. Other Circuits should be loath to so characterize the Swampbuster provisions, as

²¹⁴ See 3 Alexander Hamilton, Report on Manufacture, in Works 250 (Lodge ed., 1904) ("And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufacturers, and of commerce, are within the sphere of national councils, as far as regards application of money... A power to appropriate money with this latitude ... would not carry a power to do any other thing not authorized in the Constitution, either expressly, or by fair implication.").

²¹⁵ See Squire, 25 Pepp. L. Rev. at 912.

²¹⁶ See *Printz v. United States*, 521 U.S. 898 (1997) (Striking down the Brady Handgun Violence Prevention Act on the basis that Congress lacked authority to conscript local law enforcement to enforce a federal regulatory scheme); *United States v. Lopez*, 514 U.S. 549 (1995) (Striking down the Gun-Free School Zones Act on the basis that the law's relation to interstate commerce was too attenuated). For a detailed treatment of *Lopez*, see Eric W. Hagen, *United States v. Lopez: Artificial Respiration for the Tenth Amendment*, 23 Pepp. L. Rev. 1363 (1996).

²¹⁷ This difficulty is further compounded when one considers that Chief Justice Rehnquist himself authored the opinions in both *Dole* and *Lopez*.

²¹⁸ See *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting). Justice O'Connor indicated in *Dole* that the better understanding of the spending power, as enunciated by the Court in *Butler* is that "[T]here 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." *Id.* (quoting *United States v. Butler*, 297 U.S. 1, 73 (1936)).

²¹⁹ See generally Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 Harv. Envtl. L. Rev. 201 (1997); James T.B. Tripp and Daniel J. Dudek, *The Swampbuster Provisions of the Food Security Act of 1985: Stronger Wetland Conservation of Properly Implemented and Enforced*, 16 Envtl. L. Rep. 10120 (1986).

²²⁰ 16 U.S.C. § 3837 (1994 & Supp. III 1997).

²²¹ 16 U.S.C. §§ 3831-3836 (1994 & Supp. III 1997).

²²² 16 U.S.C. § 3839(aa)-3839(aa)(8) (1994 & Supp. III 1997).

²²³ See *Fink*, 30 Tex. Tech. L. Rev. at 1179.

²²⁴ See generally *id.* at 1178-96.

²²⁵ *Fink*, 30 Tex. Tech. L. Rev. at 1197.

increasing federal regulatory power over intrastate wetlands, whether that power comes directly or indirectly, raises serious issues concerning private land use and endorses a constitutionally questionable regulatory scheme.

VI. CONCLUSION

In *United States v. Dierckman*, the Court of Appeals for the Seventh Circuit held that the Swampbuster provisions of the Food Security Act were a valid exercise of Congress' spending power. While the decision by the Seventh Circuit is not necessarily inconsistent with current spending power jurisprudence, it raises serious issues about the legitimacy of Congress' ability to indirectly regulate wholly intrastate activities under the spending power. The Swampbuster provisions of the FSA are coercive and constitutionally questionable as they effect an indirect regulation through the spending power of activities Congress could not otherwise regulate. Whether other Circuits will adopt this reasoning is uncertain. What is certain, however, is that by casting the Swampbuster provisions of the FSA as an exercise of the spending power, the Seventh Circuit has legitimized vast indirect federal regulatory power over intrastate wetlands and, in light of the current state of spending power jurisprudence, effectively insulated this power from challenge. What this means for the American farmer is that until the Supreme Court's spending power jurisprudence changes, he will simply have to comply with any directives issued by the USDA if he wishes to retain the benefits he so depends on.

PATRICK R. DOUGLAS