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Fred A. Dewey

LEGAL PROBLEMS INVOLVED IN CONTROLLING AGRICULTURAL PRODUCTION

By Fred A. Dewey*

As productive activities become more and more specialized, individual members of society become increasingly dependent upon each other for the satisfaction of their economic needs. Specialization makes necessary an exchange before the individual can enjoy the full benefit of his productive efforts and the reward for his contribution to the needs of others is measured, not by the social value of the contribution, but by its exchange value which is determined by the relation of the total supply to the demand rather than the extent of the individual contribution toward the satisfaction of the demand. Thus, though it seems clear that a bountiful supply of food commodities is of more value to a world that harbors nations of starving populations than a small supply, the exchange value of a small supply is often far greater than it is for a large supply. As a result of this the individuals who produce a small supply are able to exact more in exchange for their product than if they had produced a larger amount.

Other things being equal, the individual naturally prefers to engage in the kind of production that will bring him the greatest returns for his efforts. To the extent that this desire results in accurate predictions of and production for social needs rather than in production to satisfy the wants of those most able to pay, it serves a useful social function. But specialized production, involving as it does a specialized training, concentration and investment of capital, and adaptation to available opportunities, requires that the individual, if he has any choice in the matter, make his prediction and prepare to act upon it considerably in advance of the actual engagement in productive effort. Even in normal times the aggregate result is very apt to lead to the development of productive capacities out of proportion to the relative needs of society. Hence,

* Member of the Iowa and Ohio Bars; A. B., Iowa (1931); J. D., Iowa (1933); LL. M., Columbia (1934); President, Iowa Law Rev. 1932-33; contributor to various legal periodicals.

adjustments must be made by the shifting of some individuals to other lines of endeavor. The existence of available opportunities tempers the individual hardships which must be suffered as a result of the necessity for such adjustments.

Abnormal stimulation of demand followed by the sudden loss of markets, like a revolution in methods of production, may lead to the necessity of adjustment to changed conditions by the entire industry. American agriculture is faced with this necessity. And there are no fields of production to which the bankrupt farmers can turn at this time. This means that the adjustment will have to be made, at least temporarily, within the industry.

Since the war the productive capacity of American agriculture has been seriously out of balance with the available market outlets. Prior to the war American production of agricultural commodities for export was gradually declining. The disruption of production in Europe brought about by the war and the Russian revolution stimulated demand to such an extent that other countries, including the United States, Canada, Argentina, and Australia, greatly expanded their production for export. American loans helped to finance this new demand for agricultural products.

After the war the situation was radically changed. The United States was, for the first time in history, a creditor nation. We loaned our money to Europe during the war and refused to permit payment thereafter in the only manner in which it was possible for her to pay, namely, in goods. Simultaneously, we demanded payment of war debts and raised our tariff barriers against European goods. Europe could not pay unless she sold more goods than she purchased. High tariffs and unfavorable exchange rates made trade with the United States unprofitable. The necessity of meeting war debts led several of the European countries to impose import restrictions in various forms. High tariffs, import quotas, import monopolies and licenses, and regulations requiring the use of a certain proportion of domestic goods were among the methods used to prevent the importation of goods. Another factor which led to the same result was in the wave of intense nationalism which swept over Europe after the war. The shortage of food experi-

enced during the war served to foster such restrictions on imports as would tend to make them more self-sufficient. At no time in history has there existed so many and such effective barriers to world trade.[1]

These restrictive policies also made food prices considerably higher in those countries because of the higher cost of producing agricultural commodities on the worn soil which they are compelled to utilize. Higher food costs have led in turn to decreased consumption of all but the cheaper foods. The total result, therefore, has been an increased production in Europe, excluding Russia, and a decreased consumption thus materially lessening the foreign market for our agricultural products.[2]

No doubt many of the restrictions on foreign trade which exist today will not remain permanently. But the situation contains one important factor which will permanently affect our foreign markets for agricultural goods. The war demand provided the impetus which led to great expansion of production in Canada, Argentina, and Australia. These countries have many natural advantages over the United States in the production of many agricultural commodities. Labor is cheaper and the land is newer and more suited to mechanized farming. With the improvement of their transportation facilities we can expect an increasing burden from their competition. Soviet Russia, also, is now in the lime light as one of the major producing countries of the world having surpassed in the past few years its pre-war production.[3] Here also we may expect greater and greater difficulty in meeting competition in the foreign markets. It appears probable that America will suffer a permanent dimunition of its European market for agricultural products.[4]

Expansion of production and contraction of exports naturally means a piling up of surpluses which must be disposed of on the domestic market. The result has been the depression of the unit price of farm commodities to such a low level that

[1] World Trade Barriers in Relation to Agriculture, Senate Document No. 170 (1933).
[2] *Ibid.* See also, World Agriculture, An International Survey, Royal Institute of International Affairs (1932).
[3] *Ibid.*
[4] Edwin G. Nourse, American Agriculture and the European Market (1924).

the purchasing power of the farmer has been practically destroyed. In relation to interest payments, taxes, payments on existing obligations and prices that the farmer must pay for the things he buys, the exchange value of his product has suffered such a serious blow that the industry as a whole is practically insolvent. It is not the purpose of this paper to portray in detail the all too familiar plight of the American farmer. It will be assumed that an increase in the exchange value of farm products in relation to the things that farmers buy is desirable.

Agriculture, as an industry, is one of the few major producing groups that is unable materially to restrict production. It is an industry that is carried on throughout the entire world by individual farmers and peasants who control, individually, such an insignificant part of the total that, acting alone, they cannot affect the market at all. The individual farmer has no special market that he can affect by limiting his production and hence cannot hope to affect the unit price of his product by restricting his output. His only hope for increasing his income lies, therefore, in increasing the number of units he has for sale. That is what all farmers have done with the result that the point of diminishing returns has long since been reached. Increased effort on the part of the farmer, while adding to the total wealth of society, has only served to further impoverish him. If substantial results are to be obtained, unified action is, therefore, clearly necessary.

The primary aim of the farm relief legislation is to aid the farmers in raising the exchange value of their products and to restore their purchasing power by enabling them to act concertedly in reducing production. Prior to the Agricultural Adjustment Act[5] (A. A. A.) unified action was not only a practical impossibility, due to the fact that non-cooperators reaped the same benefits as the cooperators without the correlative sacrifices, but it was also limited by the anti-trust laws to cooperation in the field of marketing.[6] The A. A. A. legalizes unified action looking toward controlled output as well as marketing.[7]

[5] Public No. 10, 73rd Congress, H. R. 3835 (1933).

[6] The anti-trust laws did not extend to cooperation in the reduction of production. Jennings and Sullivan, Legal Planning for Agriculture, 42 Y. L. J. 878, 891 (1933).

[7] A. A. A. *supra*, n. 5, Sec. 8 (1), (2), (3). Notice, however, that

Colonel Leonard P. Ayres has characterized the A. A. A. as a scheme designed to pay the farmer more for doing less.[8] Paradoxical as this may seem, it is essentially true. The policy of the act is to assist the farmer in a unified reduction program in order to establish a fair exchange value for agricultural products in relation to the things that farmers buy.[9] As long as farmers receive less for a large crop than for a small one, there should be nothing startling, at least to a business man, in the suggestion that one way to remedy the situation is to produce smaller crops, for that is the way the business man meets the situation when it arises in his own business.[10] Whether this is the proper method of attacking the situation is a question for the economist.[11] While such measures may be necessary to solve the emergency needs of agriculture, the sensible solution for the future would seem to be to balance bargaining power by stimulating production in other fields rather than reducing it in agriculture, and unless reduction in agriculture has that effect indirectly, reduction may tend to equalize bargaining power and at the same time result in lowering the total wealth instead of increasing it.[12]

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the agreements for reduced production apply only to "basic" commodities unless "marketing agreements" which are exempted from the anti-trust laws in subsec. (2) are interpreted to include reduction agreements among producers. Subsec. (3) which provides for licensing specifically makes the conditions and terms thereof subject to "existing acts of Congress" which apparently includes the anti-trust laws. Sec. 8 (1) is amended in the Cotton Control Act, H. R. 8402, 73d Congress, Mar. 20, 1934, Sec. 25, to allow agreements for the reduction of production of "basic commodities" to include agreements for limiting production of other than "basic" commodities.

[8] Leonard P. Ayres, Economics of Recovery (1933).

[9] A. A. A. *supra*, n. 5. Declaration of Policy.

[10] ". . . under existing economic arrangements, most enterprises must normally restrict output in order to maintain solvency." Slichter, Modern Economic Society (1932), p. 5.

[11] See Edwin G. Nourse, Can Agriculture Affect Prices by Controlling Production? Proceedings of the Academy of Pol. Sci., Vol. XIV, p. 523 (Jan., 1932).

[12] The numerous restrictions on production in various industrial codes as well as the addition of some crops to the category of "basic commodies" and the extension of the power to include non-basic commodities in reduction agreements regarding "basic" commodities gives rise to the apprehension that production will, on the whole, be diminished, thereby impoverishing instead of enriching the nation. Increased purchasing power and direct stimulation of production along other lines may result in taking up the slack. See the report of the A. A. A. 1933-34 for a summary of its conclusions on the effect of the restrictions. On the whole it appears rather optimistic.

But as long as business operates on a restricted basis, the objection that it is a means of paying the farmer more for doing less is not entitled to much consideration. And so long as business continues to receive the aid of the protective tariff as a means of exacting a higher price for its product than it would otherwise receive, it is in no position to complain on the ground that governmental action is being used to accomplish the same results for agriculture. This is the obvious effect of the tariff.[13] Business, like agriculture, would gain little by restricting production if it had to compete on even terms with the whole world. But the protective tariff gives business a market in which it may restrict production and receive more for its product than it could if the market was open to unfettered foreign competition. And the more comes from those with whom the exchange is made. Agriculture suffers a direct decrease in the exchange value of its products due to the tariffs which protect industrial products. The tariff has the effect of restricting the amount of industrial goods shipped into this country and the amount of agricultural products which must be sold on the domestic market.[14] In other words the farmer pays more for what he buys and gets less for what he sells. And persons engaged in protected industries, in addition to receiving more for what they sell, are further benefited, at least temporarily, by lower prices of food products. It is not my intention to debate the merits of the tariff. If it has some value in it besides increasing the bargaining power of industry over agriculture, there seems to be nothing in the farm relief legislation to destroy that value. Unified action is clearly necessary if substantial reduction is to be secured and this can be secured only by governmental action. The problem involves two major considerations. It involves those considerations relating to the emergency or present needs of agriculture, and it involves the adjustments which will be necessary to meet the problems which arise out of increased competition in the world markets. Due to the present drastic curtailment of foreign markets, which may not exist permanently, and the existing carry-over of large

[13] Louis H. Hacker, Holding the Feed Bag, The New Freeman (Aug. 27, 1930), Vol. I, p. 62.

[14] *Ibid.* World Trade Barriers in Relation to Agriculture, Senate Document No. 70 (1933), World Agriculture, An International Survey, Royal Institute of International Affairs (1932).

stocks, considerably greater reductions are necessary to give immediate relief than will be necessary as a permanent policy.[15]

The methods for restricting production which are embodied in the Agricultural Adjustment Act and supplementary legislation include both coercive and non-coercive measures. It will not be attempted within the scope of this paper to discuss the particular provisions of all of the restrictive measures as they apply to individual crops. And no attempt will be made to forsee and discuss all of the problems which will arise in relation to any one of them. The purpose of this essay will be to deal with some of the more important legal problems that are suggested by the various methods of control, to examine the legal basis for the exertion of Federal power over production, and to make suggestions, when any occur to the writer, how certain legal difficulties may be avoided.

Assuming that control of production in some manner is to be attempted, the question immediately arises whether and how this can be accomplished under our constitutional system of government. The chief sources from which congress may possibly derive the necessary power are the following: (1) Spending and Taxing Power, (2) Power to Regulate Interstate Commerce, (3) Treaty Making Power, (4) Power over Money and Credit including Bankruptcy.

CONTROL OF PRODUCTION UNDER THE TAXING AND SPENDING POWER

The first method which suggests itself under the Taxing and Spending Power is to secure voluntary reduction of acreage or production by means of financial inducements to the farmers. This is the method suggested by the Voluntary Domestic Allotment Plan and is the means adopted in the Agricultural Adjustment Act. It is not my purpose to discuss the

[15] It has been suggested that "The more permanent policy should be directed toward inducing farmers to cultivate more of the poorer acres extensively and to use more intensive methods on their better lands." Black, Agricultural Reform in the United States, Land Utilization, p. 295 (1929). Purchase of sub-marginal lands by the government and a gradual absorption of many who are now engaged in agriculture by industry is probably the most practical means of handling the long time problem. Report of Secretary of Agriculture, 1923; Report of the Agricultural Adjustment Administration, 1933-34, Planning for the Future, p. 271.

merits of this method as an effective means of securing the control desired but rather to examine its legal validity. As the A. A. A.[16] embodies this method of control, it may be utilized as a convenient point of departure from which to examine the legal problems involved. One of the first problems that presents itself is whether Congress may constitutionally make an appropriation or levy a tax to be used for making payments to farmers for acreage or production reduction. Since Congress may appropriate money for such purposes as it may raise money by taxation, the power to appropriate being an implied power, the question as to legality of purpose for which a tax may be levied or an appropriation made would seem to be the same. There is, however, one important respect in which the tax and the appropriation must be considered separately. That is the problem of raising the constitutional question in a manner to present a justiciable issue to the court. In the case of a tax, there is no difficulty in raising a justiciable issue.[17] But when an appropriation is made out of the general funds of the treasury the difficulty of raising a justiciable issue as to the congressional authority may be very great. This was the problem presented in *Massachusetts* v. *Mellon*[18] in which the validity of the Shepard-Towner act[19] was questioned. Massachusetts, not having accepted the Federal grant, brought suit to enjoin the payment of money to those states that had. A citizen taxpayer of Massachusetts and of the United States also brought suit. The court held that neither the State nor a citizen taxpayer had any standing in court to question the validity of an appropriation made by Congress. As a result of this decision, it seems difficult to get a judicial review of the spending power of Congress. It is possible that the problem could be raised by

[16] Agricultural Adjustment Act, Public No. 10, 73d Congress (H. R. 3835).

[17] O. P. Field, Recovery of Illegal and Unconstitutional Taxes, 45 H. L. R. 50 (1932). See Breck P. McAllister, Public Purpose in Taxation. 12 Calif. L. Rev. 137, 139 (1922-23); Lewinson, Restraining the Assessment or Collection of a Federal Tax, 14 Calif. L. Rev. 46 (1926); *Note*, Who May Test the Constitutionality of a Statute, 47 H. L. Rev. 677 (Feb., 1934).

[18] 262 U. S. 447 (1923).

[19] 42 Stat. at L., c. 135, p. 224. This statute provided for an appropriation of money to be distributed among such states as accepted the grant by matching the Federal funds for the purpose of promoting the welfare and hygiene of infancy and maternity and other purposes.

a person who was entitled to a payment under the terms of the act if the disbursing officer refused to make payment on the ground that the appropriation was void because unconstitutional.[20] The possibility that the question will be raised in this manner seems, however, to be rather remote. It would not seem that the issue, if so raised, could be avoided by holding the payment to be due as a debt resulting from a moral obligation as was held in the *Sugar Bounty* Cases[21] for those cases turned on the fact that Congress passed an act specifically authorizing the payment of bounties to farmers who, in reliance on a prior statute which had been repealed, had produced sugar with the expectation of receiving a bounty.[22] The court held that even if the bounty statute were unconstitutional, a question which the court reserved, it nevertheless created a moral obligation which Congress could recognize as a debt and provide payment therefor under its power to pay the debts of the United States.[23] To make the case of a farmer suing for a payment to which he was entitled parallel to the *Sugar Bounty* Cases, Congress would have to pass an act authorizing payments of existing claims.[24]

The Agricultural Adjustment Act[25] may have, inadvertently, created another means of raising a justiciable issue in regard to the constitutionality of an appropriation by Congress although, apparently, the act was artfully drawn with the intention of avoiding the constitutional issue, for it provides that the rental and benefit payments shall be paid "out of any moneys available for such payments".[26] Sec. 12 (a) makes a

[20] See *Intercontinental Rubber Co.* v. *Ferguson, Collector of the United States* (Dist. Ct. (1926), V-2 C. B. 104); *United States* v. *Realty Co.; United States* v. *Gay*, 163 U. S. 427 (1896); see *Note*, Who May Test the Constitutionality of a Statute, 47 H. L. Rev. 677 (Feb., 1934): It is usually held that a State Treasurer may question the constitutionality of a statute under which payment is to be made. See Public Officers' Right to Question the Constitutionality of a State in Mandamus Proceedings, *Note*, 42 H. L. R. 1071, cases cited at 1072, footnote 5.

[21] *United States Realty Co., U. S.* v. *Gay, Ibid.*

[22] Cf. Kingman Brewster, Is the Process Tax Constitutional? 19 A. B. A. 420 (July, 1933).

[23] Art. I, Sec. VIII, U. S. Const.

[24] A more likely ground of avoiding the issue would be to hold that the disbursing officer had not a sufficient interest to raise the question. See *Note*, Who May Test the Constitutionality of a Statute, 47 H. L. R. 677 (Feb., 1934).

[25] *Supra*, n. 3.

[26] Sec. 8, subsec. (1).

general appropriation to be used for administrative expenses and for rental and benefit payments. In addition the National Recovery Act authorizes the President to allocate a part of the appropriation authorized by the act for the expenditures which he deems necessary in carrying out the Agricultural Adjustment Act.[27] The Agricultural Adjustment Act also contains an express provision that if any provision is declared unconstitutional as to any person, circumstance, or commodity, the remainder of the act shall not be affected thereby.[28] So far so good. If the Act stopped here the difficulty of raising the constitutional issue would be that of questioning the validity of a general appropriation. Let us now turn to the processing tax. "Sec. 9. (a) *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. . . ." (Italics the writer's.)

Thus, while the act attempts to make the processing tax purely a revenue measure which as such could not be questioned, it does not succeed in separating the tax entirely from the rental or benefit payments, for the tax is not to go into effect on any commodity until the Secretary of Agriculture decides to make rental or benefit payments in connection with that commodity. Sec. 12 (b) appropriates the money from such taxes to be used partially for the purpose of making rental and benefit payments. Hence it would seem that the processing taxes are inextricably tied up with the provision for making rental and benefit payments and the two must stand or fall together.[29] It would seem, therefore, that a person who was

[27] N. R. A. Public No. 67, 73rd Congress, Sec. 220.

[28] A. A. A., Sec. 14.

[29] On inseparability of provisions see, *Note*, 40 H. L. R. 676; *Williams* v. *Standard Oil Co.*, 278 U. S. 235 (1928); Kingman Brewster of the Washington, D. C., Bar believes that the whole Act, with the possible exception of Titles II and III which deal with agricultural credits and inflation must fall if the Process Tax falls. See his article, "Is the Process Tax Constitutional?" 19 A. B. A. 419 (1933). Compare Charles N. Goodwin, The Processing Taxes, 11 Tax Magazine 330

assessed with a processing tax could raise the question of the validity of the rental and benefit payments because if they are unconstitutional the tax, being dependent upon such payments for its levy, could not constitutionally be assessed.[30] Obviously, the purpose of the process tax is to enable the Secretary to carry out the program of reduction as its levy is specifically dependent thereon, and if that fails the purpose of the tax is eliminated.

Assuming that the issue has been properly raised, the next question that arises in relation to the validity of a tax for the purpose of controlling agricultural production is the scope of the congressional power to tax. The Constitution of the United States provides:[31]

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

The Congress may, it appears, levy taxes for three purposes,[32] (1) to pay the debts, (2) to provide for the common defense, and (3) to provide for the *general welfare* of the United States. The first two purposes are obviously inapplicable. This brings us to the question of whether a tax or an appropriation of money for the purpose of controlling agricultural production comes within the power to levy a tax for the "general welfare". This, in turn, leads to another question which must be settled before answering the first. Who shall determine what is for the general welfare? Since the power to levy a tax for the general welfare is entrusted to Congress it naturally follows that Congress must determine what the "general welfare" consists of, at least, in the first

(Sept., 1933). Mr. Goodwin believes that while the Process Tax is dependent upon the validity of the rental and benefit payments, the latter is not necessarily dependent upon the validity of the Process Tax. I believe the legal problem regarding the validity of the rental and benefit payments and the Process Tax is the same outside of the question of raising the issue.

[30] *Employers Liability Cases*, 207 U. S. 463 (1908); *New York Central R. R. Co.* v. *White*, 243 U. S. 188 (1917); Cf. *Jeffery Mfg. Co.* v. *Blagg*, 235 U. S. 571 (1915).

[31] Art. I, Sec. VIII.

[32] That these are the purposes for which the tax may be laid rather than an additional grant of power, see Edwin S. Corwin, The Spending Power of Congress—Apropos the Maternity Act, 36 H. L. Rev. 548, 551 (1922-23).

instance, else Congress could not exercise its power. One eminent authority on Constitutional questions, having made a critical study of "The Spending Power of Congress",[33] says:

"We must conclude that into the 'dread field' of money expenditure the court may not 'thrust its sickle'; that so far as this power goes, the 'general welfare' is what Congress finds it to be."

It does not follow, however, that Congress is subject to no control whatsoever in the exercise of its taxing power. The very nature of the taxing power requires that it be exercised only for a public purpose else it is not a tax but only a legislative fiat. And though the court will resolve every doubt in favor of its validity, it is ultimately a question for the court to determine what constitutes a public purpose.[34] All of the cases that have dealt with what constitutes a public purpose for which taxation can be sustained have related to State taxation. Among the earliest of the cases arising in the Federal Courts are *Railroad Co.* v. *Otoe*[35] and *Olcott* v. *The Supervisors*,[36] both of which dealt with the legality of a tax to aid privately owned railroad corporations. The Federal Court had original jurisdiction in both instances and no Federal question was involved. In *Railroad Co.* v. *Otoe*, the language of the court was such as to indicate that since there was no express constitutional limitation the exercise of the spending and taxing power was completely within the discretion of the state legislature.

"No one questions," said the Court, "that in the absence of some constitutional inhibition the power of a state to appropriate money, however raised, is limited only by the sense of justice and by the sound discretion of the legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly nothing has been more common in the State and Federal governments than to appropriate money raised by taxation to objects in regard to which no legal

[33] Edwin S. Corwin, 36 H. L. R. 548 at 580 (1922-23).

[34] *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112 (1896); *Loan Assoc.* v. *Topeka*, *supra*, n. 33. On the general topic see F. N. Judson, Public Purpose for which Taxation is Justifiable, 17 Y. L. J. 162 (1917); Breck P. McAllister, Public Purpose in Taxation, 18 Calif. L. Rev. 137 (1930); *Note*, 41 H. L. R. 775 (1928); State Taxation for Relief of Group Distress, 41 Y. L. J. 779 (1932).

[35] 16 Wall. 667 (1872).

[36] 16 Wall. 678 (1872).

liability has existed. State legislatures have made donations for numerous purposes, wherever in their judgment, the public well being required them, and the right to make such gifts has never been seriously questioned."[37] . . .

"It was for the legislature to determine whether the object to be aided was one in which the people of the State had an interest."[38]

In *Olcott* v. *The Supervisors*[39] much the same question was involved. But there was an additional complication. In a case involving exactly the same question, the Supreme Court of Wisconsin had held that taxation for the aid of a privately owned railroad was not for a public purpose and that the bonds given to the railroad company were void.[40] Since no Federal question such as the impairment of contracts was raised, the case seemed clearly to be one for the application of State law. The Federal Court refused to be bound by the decision of the Wisconsin court and upheld the authority of the legislature to grant aid to privately owned railroad corporations. It evaded the Wisconsin decision by holding that what constitutes "public purpose" is a question of *general* law. Said the Court:

"Now, whether a use is public or private is not a question of constitutional construction. It is a question of *general* law. . . .

"The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine for us."

This decision would seem to indicate that the Federal decisions on public purpose in State taxation would also serve as precedents in cases involving Federal taxation if the latter came before the court. And it would seem, if the State legislatures are limited to taxation for public purposes only, that Congress, which has no powers other than those expressly granted to it by the Constitution, would be similarly limited. If the very definition of a tax implies that the money can be used only for a public purpose it seems clear that the delegation of the power to tax is a delegation of a power to collect money only for a public purpose.

[37] *Railroad* v. *Otoe, supra*, n. 35 at 675.
[38] *Id.*, at 676.
[39] 16 Wall. 676 (1872).
[40] *Whiting* v. *Fond du Lac Co.*, 25 Wis. 167 (1870).

The Federal Courts have not thought it necessary to rely upon any particular provision of the State constitutions in order to determine the validity of a particular tax. All that has been necessary is a finding by the court that the tax was not levied for a public purpose.[41] This position seems unsound in principle as applied to the legislatures of the States since they are said to have all power not prohibited to them by the State or Federal Constitutions.[42] But, as the Federal Government has only those powers delegated to it, a Federal exaction which is not for a public purpose and therefore not a tax at all would appear to violate the Tenth Amendment of the United States Constitution. However, there is another basis for the Court's jurisdiction over Congress in this matter.

In *Fallbrook Irrigation District* v. *Bradley*,[43] a case arose involving the question whether a special assessment tax for the purpose of irrigating arid lands was for a public purpose. Due to a State constitutional amendment declaring the use of water for irrigation to be a public use and because of several decisions by the Supreme Court of California upholding the act as to State law it became necessary to raise a Federal question in order to get the question reviewed by the Federal Courts. The court assumed jurisdiction on the ground that if the tax was not for a public purpose it would be a violation of the "due process" clause of the 14th amendment to the Federal Constitution. In view of this holding it would seem possible to question the purpose of Federal taxes under the Fifth Amendment,[44] since the restraint imposed upon legislation by the due process clause of the two amendments is the same.[45]

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[41] In *Cole* v. *La Grange*, 113 U. S. 1 (1885), the federal court had original jurisdiction. The lower court held that bonds dedicated to a steel manufactory were void on two grounds, (1) that it violated the Missouri Constitution, (2) that the tax was not levied for a public purpose. On appeal the Supreme Court affirmed the decision on the latter ground and expressly avoided an interpretation of the Missouri Constitution though the case involved the application of state law. For a similar holding see *Loan Assoc.* v. *Topeka*, 20 Wall. 665 (U. S., 1874).

[42] *Sharpless* v. *Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759 (1853).

[43] *Supra*, note 34.

[44] *Heiner* v. *Donnon*, 285 U. S. 312 (1932); *Nichols* v. *Coolidge*, 274 U. S. 531, 542 (1927). Cf. *Brushaber* v. *Union Pac. R. R. Co.*, 240 U. S. 1 (1916).

[45] *Hurtado* v. *California*, 110 U. S. 516, 535 (1884); *Coolidge* v. *Long*, 282 U. S. 582, 596 (1930); *Coppage* v. *Kansas*, 236 U. S. 1, 11 (1915).

Passing then, from the problems involved in raising the issue, to the broader constitutional aspects, is an appropriation or tax to be used in controlling agricultural production to be condemned as a use of public revenue and the taxing power for private purposes? Perhaps the first step should be to ascertain from a proper perspective just what the purpose of controlling production is. With this in view let us examine the pertinent provisions of the A. A. A. The act is entitled:

"An act . . . To relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for orderly liquidation of joint stock land banks, and for other purposes."

The declaration of emergency and the declaration of policy in Title I of the Act further indicate that the purpose of the Act is not limited to giving aid to the individual farmers who receive rental or benefit payments. The theory of the Act is that general prosperity will be aided by restoring purchasing power to the farmers, so that farmers will be able to buy industrial products. This purchasing power is to be restored by bringing production and consumption into such balance as will enable farmers to realize a fair equivalent in exchange for their products. It is thought that both Industry and Agriculture will be aided by the establishment of a fair exchange value for agricultural commodities.[46] Whether or not the Act will accomplish its purpose is not a legal problem.[47] The legal problem is to ascertain the purpose of the Act and determine whether that purpose is public or private. It is a very difficult matter to draw the line between what constitutes a public and what constitutes a private purpose. If possible the Act must be so construed as to make the purpose public since a construction which will make the Act constitutional is preferred to one that will make it invalid. Hence, the legislation should not be dissected

See *Note*, 29 Col. L. Rev. 624 (1929), for a discussion of the Fifth and Fourteenth Amendments.

[46] See Statement of Sec. Wallace, June 4, 1933, Prent. Hall. Fed. Trade and Industry, Vol. 3, Sec. 40, 113; Hearings before Senate Committee on Agriculture, Mar. 17-28, 1933; "When producing concerns fail . . . and communities dependent upon profitable production are prostrated, the wells of commerce go dry." Hughes, J., *Appalachian Coals Co.* v. *United States*, 288 U. S. 344, 372 (1932).

[47] *Nebbia* v. *People* (U. S. Sup. Ct., Mar. 5, 1934); *Green* v. *Frazier*, 253 U. S. 233 (1920).

and considered piecemeal in order to bring certain phases of the Act within the *ratio decedendi* of selected constitutional precedents. It is believed that Mr. Kingman Brewster has fallen into this error in his discussion of the constitutionality of the Process Tax[48] After making the assumption that the whole Act will fall[49] if the processing tax is unconstitutional, Mr. Brewster then isolates the tax for purposes of discussion. In dicussing the question whether the tax is for a public purpose he ignores the general purpose of the Act and assumes that the purpose of the tax is to be found solely in the source of its expenditure. He says:[50] "The above adjudication (referring to *Loan Association* v. *Topeka*)[51] naturally impels us to consider whether or not the present law taxes for a public purpose, i. e., *whether the rental of lands and the distribution of benefits to the farmers* under the present emergency situation can be considered as a public purpose. *To say that it is not a tax until one can first decide the nature of the relief given to farmers would seem to beg the question.*" He then adverts to *the Sugar Bounty Cases*[52] and ends up by asserting that the substance of the tax "is an attempt to tax A for the benefit of B" and that "it is certainly difficult to say that the purpose for which this tax is raised can be designated as a public one."

This conclusion is obviously based upon the assumption that the purpose of the tax is to pay a sort of bonus or benefit payment to the particular farmer who participates in the plan. It wholly ignores the broader purpose of the Act considered as a whole. It also ignores the fact that the farmer is not receiving the money for nothing. Every farmer who receives money from the government must agree to cooperate in the broader purposes of the Act by reducing acreage or production. Thus these payments are not intended to benefit alone the particular farmer who receives them. Indeed, it is questionable who the payments will benefit more, those who do not limit their acreage or those who receive the payments and limit their acreage.[53] But regard-

[48] *Supra*, n. 29.

[49] He indicates a possible exception of Titles II and III which relate to credits and inflation. *Supra*, n. 29 at p. 419.

[50] *Supra*, n. 29 at 420.

[51] 20 Wall. 655 (1874).

[52] 163 U. S. 427 (1896).

[53] Incidence of Processing Taxes, Report of A. A. A. for 1933-34, p. 219 *et seq.*

less of the actual effect, it is clear that the purpose is to raise the general level of prices on those commodities taxed by controlling their production, thus adding to the purchasing power of all who have such commodities for sale.[54]

Mr. Brewster's statement that the tax is a tax on A for the benefit of B has no more validity than a statement that every tax when collected and spent by the government is spent for the purpose of benefiting the person who sold goods or services to the government rather than for the general purpose for which the goods or services were purchased. To illustrate, take a tax which is expended for educational purposes. Assume that the money is actually expended for teachers' salaries, janitors' services and supplies. No one would maintain that the purpose of the tax was to benefit teachers, janitors and supply merchants nor that the general purpose was in any way affected by the fact that the money was so expended. So it is with the payments of rentals and benefits to the farmers. In each instance the money is paid out to those who bind themselves to carry out the general purpose for which the tax is levied, in the one case education, in the other controlled production.

It is not material who receives the money so long as it is spent for a public purpose. It may be material, however, whether the persons who receive the money are legally bound to act in accordance with the general purpose of the act. If the act merely provides a donation to a private individual or private corporation with no assurance other than a mere hope that the money will be used in furthering the public interest, it will be considered that the purpose of the act is private.

Loan Association v. *Topeka*[55] is the leading case on this question. The case involved an outright donation by a municipality to a private corporation for the purpose of establishing a privately owned bridge factory. No conditions were attached to the grant which would insure the operation of the factory in the interest of the public.[56] Mr. Justice Miller, who dissented

[54] Effects on Farm Buying Power, *Id.*, p. 261 *et seq.*

[55] 20 Wall. 655 (U. S., 1874).

[56] The law requires that some standards be established by the legislature for the guidance of government administrative officers. It would seem to follow a *fortirori* that the public moneys to be spent for the welfare of the public cannot be intrusted to the complete discretion of a private agency or individual.

in the cases upholding grants to private railroad corporations, stated the issue in the case thus:

". . . we assume that unless the legislature of Kansas had the right to authorize the towns and counties in that state to levy taxes to be used in aid of manufacturing enterprises, conducted by private individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void."[57]

The court stressed the fact that if the legislature could donate money to such an enterprise it could do so to any or all enterprises, and that the benefits which might accrue to the public was only the incidental benefit that accrued from investment of capital in any enterprise.[58] There were no special facts or circumstances that made the establishment of a bridge factory a public need or necessity.[59] There was no public control or regulations whatever that would insure the operation of the factory in the interest of the public.[60] The situation in the case of *Cole* v. *La Grange*[61] was the same.

Contrast this situation with the problems involved in controlling production of agricultural commodities. During the war American agriculture and farm debts were greatly increased under the double stimulation of price and patriotism. Our foreign trade was greatly increased reaching a high point in 1919. Thereafter it gradually decreased until 1929 and then sharply. Production continued to increase. The natural result of these factors was a piling up of surpluses which were forced upon the home market with its resulting influence on price. By early 1933 farm commodities had only half of their pre-war exchange value. Debts contracted at high rates of interest when

[57] *Supra*, n. 37, at 670.

[58] It has been quite common in the past for communities to vie with each other in attracting industries to locate therein. The most common means has been by granting tax exemptions. See Claude W. Stimson, The Stimulation of Industry Through Tax Exemption, 11 Tax Magazine, 169, 221 (May, 1933).

[59] In *Fallbrook Irrigation Dist.* v. *Bradley*, *supra*, n. 34, at 159, the court said, "It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." See *Eakin* v. *South Dakota State Cement Comm.*, 44 So. Dak. 268, 183 N. W. 651 (1921), in which the court holds constitutional the support of a public cement plant.

[60] In *Olcott* v. *The Supervisors*, 16 Wall. 678 (U. S., 1872), involving a donation to a private railroad corporation, the court was influenced by the fact that railroads, even though privately owned, were subject to regulation by the government.

[61] 113 U. S. 1 (1885).

prices were high could not be paid. Bankruptcies and mortgage foreclosures reached a new high peak. The collapse of farm prices caused a corresponding drop in farm valuations wiping out the equities of a large number of formerly well-to-do farmers and endangering, at the same time, the stability of many of our financial institutions. The depressed exchange value of agricultural commodities has largely if not totally destroyed the purchasing power of a large percentage of the farmers thus accentuating the decline in demand for industrial goods and services.[62]

Most of the important factors which have led to the serious condition in which agriculture finds itself are national or international in character and are closely interwoven with general economic conditions. Various factors have grown up as an aftermath of the war which have led to governmental intervention in the conduct of international trade on a scale probably never before equaled in modern times. Among the most important of these factors are: the intense feeling of nationalism engendered by the war together with the complimentary goal of self-sufficiency; the division of European territory into several new countries; the changed status of the United States from a creditor to a debtor nation, making it necessary for the debtor countries to sell more than they buy; retaliation against the high American tariffs; unstable currency and exchange fluctuations.[63] All of these factors have grown out of national or international relationships and can obviously be attacked only on a national or international scale.

The need for a national policy in relation to American agriculture is clearly recognized by the leading economists who have dealt with the problem.[64] Secretary Wallace has recently presented the various alternatives from which America must make

[62] For a short but comprehensive presentation of the agricultural situation, see the Report of the Secretary of Agriculture (Nov. 15, 1933); see also, Slichter, Modern Economic Society (1933), at p. 114, where the author points out some of the far-reaching effects of a loss of purchasing power by any important group.

[63] World Trade Barriers in Relation to Agriculture, Senate Document No. 70 (1933); World Agriculture, an International Survey. Royal Institute of International Affairs (1932).

[64] Bee Duddy, Economic Policy for American Agriculture (Sept., 1931), for a collection of reports by several leading agricultural economists; J. D. Black, Agricultural Reform in the U. S. (1929); Seligman, Economics of Farm Relief (1929).

its choice in dealing with the agricultural situation.[65] The remedy must lie along one of three lines: an extension of the foreign markets to a very marked degree entailing a willingness to accept a greatly increased amount of foreign products, self-containment with a resulting lower standard of living, or a planned middle course somewhere between the two first mentioned. And whichever path is pursued will require national action. The problem of surpluses is intimately tied up with the national policy in relation to such things as tariffs, transportation, money, and credit, national defense, insular possessions, and taxation that any individual attempts to deal with the situation is doomed in advance to failure. How then can it possibly be said that taxation for the purpose of dealing with this situation is a tax levied for a private purpose? What is the basis of distinction on which the court must rely?

In *Loan Association* v. *Topeka,* the Court said:[66]

"And in deciding whether, in the given case, the object for which the taxes are assessed falls upon one side or the other of this line, they must be governed mainly by the course and usage of the government, *the objects for which taxes have been customarily and by long course of legislation* levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." (Italics are the writer's.)

Taxes have been customarily and by long course of legislation levied by Congress for the advancement of the economic welfare of the people of the United States. One has only to mention the activities of the Department of Congress both at home and abroad. 'Dollar diplomacy' and the expenditures it has entailed are a commonplace in American political history. Then there is the protective tariff which has been called to the aid of almost every economic group within the United States and which has been specifically upheld by the Supreme Court.[67] But we need not go beyond the expenditures which have been

[65] Henry A. Wallace, America Must Choose, World Affairs, Pamphlet, No. 3 (1934).

[66] 20 Wall. 665 (1874).

[67] *Hampton and Co.* v. *United States,* 276 U. S. 394 (1928). Even if the protective tariff could be sustained as a regulation of foreign commerce, it would hardly be maintained that it could be levied for a private purpose. It is therefore available as an illustration of public purpose.

made for the promotion of Agriculture. The extensive ramifications of the Department of Agriculture are well known. It has been said that America does more for the promotion of its agriculture than any other country in the world.[68] Dissemination of information, collection of farm statistics, control of plant and animal diseases, scientific experimentation, drainage, irrigation, control of soil erosion, stabilization of the markets, encouragement of farmers' cooperatives, land banks and loans to farmers are among the many activities in which the government has engaged and the people have sanctioned by time and acquiescence.

We have seen that the only cases in which a tax has been held to be for a private purpose involved an outright donation to private corporations. Let us now examine some of the decisions in which the purpose has been questioned and held to be public. The cases involving aid to the railroads have already been mentioned. In *Railroad Company* v. *Otoe*[69] it was held to be a public purpose for a county to donate money to a railroad for the purpose of securing a connection with the eastern markets. Is it not equally a public purpose to stimulate trade with the various markets which the transportation facilities exist to serve?

In *Fallbrook Irrigation District* v. *Bradley*[70] the validity of a California statute which provided for the establishment of irrigation districts to be paid for by a special assessment against the land was questioned in the Federal courts. After deciding that the Fourteenth Amendment gave the Court jurisdiction to determine whether the tax was a taking of property without due process of law, the Court sustained the tax holding it was for a public purpose. In this case we have a clean cut decision in which it is held that the promotion of the material prosperity of a community by the improvement of agricultural land is a public purpose. The Court was strongly influenced by the fact that the undertaking was one that could not be advantageously undertaken without the cooperation of the whole group. It said:

"The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. . . .

"While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to constitute a

[68] *Op. cit.*, n. 10.
[69] *Supra*, n. 35.
[70] *Supra*, n. 34.

public use is not to be regarded as conclusive in favor of such use, yet that fact in this case is a most important consideration."[71]

The necessity for cooperation as a prerequisite to control of agricultural production and the lack of any practical or effective method of securing it without governmental action seems equally obvious and fully as important a consideration as in irrigation.

This case, it is true, is not a case of general taxation but one of special assessment. But a special assessment is merely an exercise of the taxing power with the burden apportioned among those most benefited. And the decision of the Court is broad enough to have sustained a general tax. A person cannot be taxed even by special assessment purely for his own benefit.[72] But the Court held that the interest of the general public was also served. It said:

"To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community or even any considerable part of it should directly enjoy or participate in an improvement in order to constitute a public use."[73]

Here it was obvious that the direct benefits would go primarily to one class, so obvious that that class was specially taxed for the improvement, yet the purpose was held to be public. The mere possibility that the farmers may benefit more than others from controlled production is not, then, a valid reason for holding that the purpose is a private one.[74] When concerted action is necessary to insure the material prosperity of a community as a class, individual rights must yield or be modified by the rights of others for the public benefit.[75] And the increase of the beneficial use of land is a public purpose when concerted action is necessary to attain it.[76] The value of agricultural land, in an

[71] *Supra*, n. 34, at 160, 161.

[72] *Macon* v. *Patty*, 57 Miss. 378, at 397 (1879). ". . . power does not exist in a constitutional government to compel a person to improve his estate for his own private benefit." *St. Paul Trust and Savings Bank* v. *American Clearing Co.*, 291 Fed. 212 (1923).

[73] *Supra*, n. 34, at 161.

[74] *Schaff* v. *So. Dak. Rural Credits Board*, 39 So. Dak. 377, 387, 164 N. W. 964 (1917).

[75] *Supra*, n. 34, at 163; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9 (1885).

[76] *Supra*, n. 34, at 167, 168. "If land which can, to a certain extent, be beneficially used without artificial irrigation, may yet be so much

unsocialized state, is determined by the exchange value of its products. The theory of controlled production is that by balancing production with consumption the exchange value of agricultural commodities will rise;[77] the effect of such a rise would be an increase in the beneficial use of the land.

Another class of cases involving the question of taxation for a public purpose are those in which the State directly engages in business. It is too well settled to be questioned that the State may enter into business activities which are not governmental in character.[78] But it cannot support a business by taxation unless the business is one which serves a public purpose. There is no instance in which the Supreme Court has held a business engaged in by the State to be unauthorized because for a private purpose. It appears that the courts are much more liberal in allowing a State or its subdivisions to engage in a business itself than to donate aid to a private individual or a corporation with the possible exception of grants to privately owned railroads.[79] If this be true then the nature of the business cannot be the only important factor. If a business which is operated under private ownership is not such as can be aided by taxation, but may become so when operated by the State, then it follows that how the business is operated, i. e., privately or by the public, may be equally as important as what kind of business it is. If the activity is one which is regulated in the public interest either because it is "affected with a public interest"[80] or because the

improved by it that it will be thereby and for its original use substantially benefited, and in addition to its former use though not in exclusion of it, if it can be put to other and more remunerative uses, we think it erroneous to say that the furnishing of artificial irrigation to that kind of land cannot be, in a legal sense, a public improvement, or the use of the water a public use."

[77] "Under existing economic arrangements, most enterprises must *normally* restrict output in order to maintain solvency." Slichter, Modern Economic Society (1932), p. 5; see Edwin G. Nourse, Can Agriculture Affect Prices by Controlling Production? Proceedings of Academy of Pl. Sci., Vol. XIV, p. 523 (1932).

[78] *South Carolina* v. *U. S.*, 199 U. S. 437 (1905); *Standard Oil Co.* v. *City of Lincoln*, 114 Neb. 243 (1926); affirmed 275 U. S. 504 (1927); *Green* v. *Franzier*, 253 U. S. 233 (1920).

[79] This can probably be explained by the fact that transportation has long been considered a public service, and also by the fact that it is a public utility subject to regulation.

[80] It seems not unlikely that grants to Railroad Companies would have been held invalid had they not been subject to regulation. Cf. *Whiting* v. *Fond du Lac Co.*, 25 Wis. 167 (1870), with *Olcott* v. *The Supervisors*, 16 Wall. 678 (1872); *Gelpecke* v. *City of Dubuque*, 1 Wall. 175 (1846).

State directly controls it through ownership and operation,[81] it is not likely that the Supreme Court will deny the right to support such activity by taxation on the ground that it is not a public enterprise.[82] In such cases the expenditure of public moneys is not entrusted to the hands of private individuals who are neither officers of the state nor subject to state control. One of the points stressed by the Court in *Loan Association* v. *Topeka*[83] was the fact that the money was turned into private hands with no assurance that the factory would be operated for the welfare of the community. This objection cannot be raised to the expenditure of Federal funds for agricultural control. The money is expended by the government officials for a definitely specified *quid pro quo,* the reduction of acreage or production in stipulated amounts.

In *Green* v. *Frazier*[84] the Supreme Court, in sustaining legislation which provided that the State would engage in the manufacturing and marketing of farm products, provide homes for the people, and appropriate money and create a state banking company to carry the scheme into effect, adopted the following language from Justice Cooley.[85]

"Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the well being of society, and advance the prospective happiness and prosperity of the people."[86]

In view of the paternalistic history of our Federal Government, the purposes for which it was founded, and the "general welfare" clause of the taxing power of Congress, this broad language seems equally applicable to the Federal Government.

[81] Under the rule of *Loan Assoc.* v. *Topeka,* 20 Wall. 665 (1874), a donation to a private company could not be sustained. And a state cannot regulate the prices of gasoline of privately owned companies because the business is not "affected with a public interest." *Williams* v. *Standard Oil,* 275 U. S. 235 (1927). But a municipality may engage in the business of operating a gasoline filling station. *Standard Oil Co.* v. *City of Lincoln,* 114 Neb. 243 (1926); affirmed 275 U. S. 504 (1927). See also *Eakin* v. *So. Dak. State Cement Comm.,* 44 So. Dak. 268, 183 N. W. 651 (1921), where it is held permissible for the state to operate a public cement plant.

[82] *Standard Oil Co.* v. *City of Lincoln, ibid.,* in which the court affirmed the decision of the Sup. Ct. of Neb. in a memorandum opinion.

[83] 20 Wall. 655 (1874).

[84] 253 U. S. 233 (1920).

[85] 20 Mich. 452 (1870).

[86] *Green* v. *Frazier, supra,* n. 78, at 240.

But it is not for the court to decide whether such legislation is wise.[87]

That is the problem of the legislative body. The problem of the court is merely to determine whether the legislative body has exceeded its constitutional powers. It is therefore submitted that the Court will have no difficulty in supporting such legislation as a proper exercise of the taxing power from the standpoint of public purpose.

Another ground which has been suggested for holding such legislation unconstitutional is that it is really price-fixing under the guise of taxation and as such interferes with the reserved powers of the states.[88] It must be admitted that legislation which is designated to effect controlled production is intended to affect prices. But it does not follow from the fact that the states may, within the scope of their police power,[89] enact legislation which affects, regulates, or even fixes prices of services or commodities that affect the public interest that such power is reserved exclusively to the states.[90] While Congress may not violate the Tenth Amendment by exercising powers it does not have,[91] the Tenth Amendment affords no criterion as to what powers Congress does have. This can be determined only by reference to and interpretation of the powers delegated to Congress by the Constitution for within the sphere of its delegated powers the Federal Government is supreme.

The question then is whether the power to tax which has been delegated to Congress includes the power to raise money to be used in controlling production when it is intended thereby to affect prices. If it does there is no interference with the reserved powers of the states, and if it does not, there is. The con-

[87] "With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm is not within our province to inquire." Id., at p. 240; *Nebbia* v. *People* (U. S. Sup. Ct., Mar. 5, 1934).

[88] Kingman Brewster, Is the Process Tax Constitutional? 19 A. B. A. 419, 421 (July, 1933); Senator Reed of Penn., *Ibid.*, 419, Congr. Record, Vol. 77, pp. 1632-35.

[89] That such regulation is an exercise of the police power, see *Munn* v. *Illinois*, 94 U. S. 113 (1876); *Nebbia* v. *People* (U. S. Sup. Ct., Mar. 5, 1934).

[90] Nor is it sufficient to invalidate the taxing authority given to Congress by the Constitution that the same business may be regulated by the police power of the state. *Lambert* v. *Yellowley*, 272 U. S. 581, 596 (1926); *U. S.* v. *Doremus*, 249 U. S. 86 (1919).

[91] *Child Labor Tax Case*, 259 U. S. 20 (1922); *Hill* v. *Wallace*, 259 U. S. 44 (1922).

tention that to so use the power to tax is a perversion of the taxing power for private purposes has already been disposed of. The only remaining question is whether the power to tax, a revenue raising power, is being perverted into a regulatory power, not within the powers delegated to Congress by the Federal Constitution. Or more pointedly, is a Federal tax measure which is patently intended to affect production and prices void because of such intent?

The answer to this question should not be made without considering the nature of the taxing power and the broad discretion which rests with the legislature in exercising it. Since the very nature of a tax implies that it is a revenue raising power, it might have been held, as it was in the regulation of public utilities, that a tax could not be confiscatory. It is, however, well settled that a Federal tax which is otherwise valid will not be voided by the Court on the sole ground that it is excessive.[92] Neither will the Court inquire into the motives of Congress. In *McCray* v. *United States*[93] the Court was confronted with a tax which was clearly discriminatory as between colored and uncolored oleomargarine and was so excessive as to have the practical effect of excluding the colored product from the market, a result that Congress had no power to effect directly.[94] But the Court held that the discretion of Congress to levy excise taxes could not be controlled and that "a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax."[95] The principle that the Court will not void a tax merely because it is excessive or prompted by an improper motive when otherwise valid together with the power to select and classify the subjects of taxation afford a powerful means of directing policy by taxation in those situations where, by accident, the course of conduct which it is desired to discourage coincides with what the court considers a proper basis of selection and classification for

[92] *Veazie Bank* v. *Fenno*, 8 Wall. 533 (U. S., 1869); *McCray* v. *United States*, 195 U. S. 27 (1904). The court was probably influenced by the apparent impossibility of devising any judicial method of determining whether a particular tax is or is not excessive.

[93] *Ibid.*

[94] In *Veazie Bank* v. *Fenno*, *supra*, n. 92, at 549, it appears that Congress had the power to accomplish by direct means what it effected by means of a drastic tax.

[95] Per Ch. J. Taft in the *Child Labor Tax Case*, *supra*, n. 91, at p. 42, discussing the *McCray* case.

the purpose of taxation, or where by design the legislature seeks to discourage only so much of undesirable conduct as it can reach by this method.[96] Thus, while chain stores may be discouraged by progressive taxation according to the number in the chain, it cannot be discouraged on the basis of how many counties they are operated in.[97] But the act must not show on its face that its main purpose is to prohibit or regulate conduct.[98] Therefore, any detailed legislation designed to effect regulation must bear a reasonable relation to the enforcement or collection of the tax[99] even though it is obvious that the tax is prohibitory and hence no tax is expected to be collected. In other words, if a measure is in form a tax it will not be invalidated because it is in effect a regulation of policy. This may seem an unreasonable rule of law, but when it is remembered that the choice of subject matter for every tax involves a choice of policy between activities left untaxed and those taxed, and the rate of every tax involves to some extent a choice of policy between the activities taxed, and that both the choice of subject matter and the rate of the tax involves a consideration of the effect of the tax even when it is in fact levied for revenue only, it may not seem unreasonable to leave to Congress the full control of all matters of policy which may be reached through the device of taxation. It is not a sufficient reason to deny a power because its exercise is subject to abuse.

But the court does not tolerate the regulation of policy under guise of the taxing power when Congress attempts to regulate subjects of public interest over which it has no direct control by setting up a standard of conduct and imposing a tax on departures from it.[100] "To give such magic to the word 'tax' would be to break down all constitutional limitations of the powers of Congress and completely wipe out the sovereignty of the states."[101] Under the rule of the *McCray*[102] case is appears that Congress may require the "goose that lays the golden eggs" to lay any number it desires even if the number required kills the

[96] See *Flint* v. *Stone Tracy*, 220 U. S. 107 (1910); *Liggett* v. *Lee*, 288 U. S. 517 (1933).
[97] *Liggett* v. *Lee*, *ibid.*
[98] *Child Labor Tax*, *supra*, n. 91; *Hill* v. *Wallace*, *supra*, n. 91.
[99] *United States* v. *Doremus*, 249 U. S. 86 (1919).
[100] *Hill* v. *Wallace*, *supra*, n. 91; *Child Labor Tax Case*, *supra*, n. 91.
[101] Per Ch. J. Taft in *Child Labor Tax Case*, *supra*, n. 91, at 38.
[102] *Supra*, n. 92.

"goose". Under the *Doremus*[103] case Congress may direct the goose when and where to lay the "eggs" so that they may be easily collected even though this adds to the strain on the already over-burdened "goose." But under the *Child Labor Tax Case*[104] and *Hill* v. *Wallace*,[105] Congress, who has a right only to the "eggs," may not enforce other duties or contributions by exempting the "goose" from the duty of laying the "eggs." This doctrine is very analagous to the doctrine of unconstitutional conditions. If Congress may destroy the "goose," it might seem that it could spare its life on its own terms. But the likelihood that Congress will abuse its power by imposing the death penalty and thus lose the "golden eggs" is not great if it has no power to grant a reprieve on conditions more to be desired than the "golden eggs."

What if, however, a tax law which is essentially a revenue measure discloses the existence of an incidental motive not itself within the jurisdiction of Congress? It has been held that this does not invalidate the tax.[106] Does it make any difference that the incidental motive relates to production or price? Before examining the cases on this point it might be pointed out that every tax, regardless of motive, is likely to have some effect on production and prices, since it adds an additional item of cost.[107] This being so, it would seem that an intent to affect prices would be less objectionable, not more so, than an intent to effect other incidental consequences wholly unrelated to the exercise of the taxing power but which can, nevertheless, be accomplished by its exercise. The cases support the view that a tax may be valid though it intended, in addition to being a revenue measure, to affect prices. Under the Tariff Act of 1922, the President was authorized to revise the tariff schedule by proclamation when it was found that the duties fixed in the act did not equalize the cost of production at home and abroad. The defendant company violated the changed schedule fixed under the authority of the act and was prosecuted therefor.[108] One of the defenses urged

[103] *Supra*, n. 90.
[104] *Supra*, n. 91.
[105] *Supra*, n. 91.
[106] *United States* v. *Doremus, supra*, n. 90; *In Re Kollock*, 165 U. S. 526 (1897); *McCray* v. *U. S., supra*, n. 92; *Hampton & Co.* v. *U. S.*, 276 U. S. 394 (1928); *Quong Wing* v. *Kirkendall*, 223 U. S. 59 (1912).
[107] *Pacific American Fisheries* v. *Alaska*, 269 U. S. 269, 277 (1925).
[108] *Hampton & Co.* v. *U. S.*, 276, U. S. 194 (1928).

was that the tax was invalid because its purpose was to protect industry rather than to raise revenue. And though it was admitted that the tax rate was determined with reference to that motive the Court upheld the tax saying:

"So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action . . . And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is to so fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, cannot invalidate a revenue act so framed."[109]

In this case we have an express adjudication of the validity of a tax imposed on one class for the benefit of another with the express purpose of raising prices to a level that will protect and encourage home industries. And the obvious purpose was to raise prices by limiting the supply from abroad to that which could be sold on the American market at a profit after having incurred the additional cost of a tax, the rate of which is to be determined with a view to protecting home industries.[110]

In *Alexander Theatre Ticket Office* v. *United States*,[111] a tax which imposed a levy of five per cent on premiums up to fifty cents on the resale price of theatre tickets and a fifty per cent tax on all premiums above fifty cents was held to be a valid exercise of the taxing power. It will be noted that the Ticket

[109] *Ibid.*, at 412. Compare *Champlain Refining Co.* v. *Corp. Comm.*, 286 U. S. 210 (1932), where the court upheld an oil proration statute on the ground that it prevented waste although it was undoubtedly intended to raise prices as well.

[110] While the court clearly based its decision on the taxing power the *Hampton & Co.* v. *U. S.*, *ibid.*, it has been suggested that it could have been sustained as an exercise of the power to regulate foreign commerce. Robert P. Reeder, 76 U. of Pa. L. Rev. 974-9, (1927-8). There seems no more reason, however, for holding that the power to regulate commerce includes the power to affect prices intentionally than does the taxing power. If the issue turned on a distinction between a penalty and a tax it might be material if the exaction could be supported even if a penalty under some other power. See *Veazie Bank* v. *Fenno*, 8 Wall. 533, 539 (U. S., 1869); *Child Labor Tax Case*, *supra*, n. 91. But where, as here, the exaction was in the nature of a tax, being a revenue raising measure and not a penalty to prohibit the importing of such articles, there was no reason to rely on the power to regulate foreign commerce when the tariff could be upheld, as a proper tax measure. And it does not necessarily follow that regulations which would be valid under the commerce power can be sustained if secured under the taxing power. Cf. *Hill* v. *Wallace*, *supra*, n. 91, with *Board of Trade of Chicago* v. *Olsen*, 262 U. S. 1 (1922).

[111] 23 Fed. (2nd) 44 (1927).

Company would make more profit under this tax by selling at a premium of fifty cents at a five per cent tax than by selling at a ninety per cent premium at a fifty per cent tax. The court readily distinguished *Tyson* v. *Banton*,[112] involving a New York statute which prohibited the sale of theatre tickets at a price exceeding fifty cents above the box office price, on the ground that the owner of the ticket was at liberty to fix the price at which he would sell and the purchaser free to fix the price at which he would buy. The fact that the tax was graduated in a manner to affect the profits differently at different prices was held not to invalidate the tax.

Taxation by the states for the support of public competition with private enterprises for the purpose of securing cheaper services has been sustained.[113] Thus it appears that the incidental result of a revenue measure may be to affect prices without interfering with the reserved powers of the States.[114]

If, then, the Process Tax is invalid as an interference with the reserved powers of the states, it is not so because it is a revenue measure which is incidentally intended to affect prices but because it is in fact not a revenue measure at all but an outright regulation of prices. This brings us to consider the nature of the Process Tax and what it is intended to accomplish.

It seems very clear that the Process Tax is primarily a revenue measure.[115] It is intended to raise money and the act designates the manner in which it is to be spent. Obviously it is not a penalty to discourage the processing of agricultural commodities for that is contrary to and would defeat the very purpose of the act, namely, to raise money to effect acreage or production reduction.

The Act is readily distinguishable from the Acts involved in the *Child Labor Tax Case*[116] and *Hill* v. *Wallace*.[117] In both

[112] 273 N. S. 418 (1926).

[113] *Note*, Municipalities in Competition With Private Business, 34 Col. L. Rev. 324 (Feb., 1934); Bird & Ryan, Public Ownership on Trial (1930); *Standard Oil Co.* v. *City of Lincoln*, *supra*, n. 81; *Jones* v. *City of Portland*, 245 U. S. 217 (1917).

[114] See *Nebbia* v. *People* (U. S., Sup. Ct., Mar. 5, 1934), for a recent decision in which the idea that prices cannot be as readily regulated in the interest of the public as other things seems at last to have been exploded.

[115] Report of A. A. A. 1933-34, Financial Report, Ch. 19. See also Chas. N. Goodwin, The Processing Tax, 11 Tax Mag. 330 (Sept., 1933).

[116] *Supra*, n. 91.

[117] *Supra*, n. 91.

of these cases what was called a tax was in fact a penalty imposed on a course of conduct not within the regulatory powers of Congress. Certainly there is, in the Process Tax, no attempt to regulate the processor by taxing a departure from a prescribed course of conduct since no alternative is suggested by which the tax can be avoided other than going out of business which obviously is not intended. In the *Child Labor Tax Cases* the statute showed on its face that Congress intended to penalize the employment of children below a specific age when done with knowledge of that fact. If the act had been a revenue measure imposed on the manufacture of certain commodities to be used for the purpose of disseminating literature on the evils of child labor, a different question would have been involved. And if *Hill* v. *Wallace* had involved a tax for revenue to be used in establishing a Federal Farm Loan Fund it would no doubt have been held valid.[118]

The Process Tax is a revenue measure. The money is intended to be spent partially for the control of production thus incidentally affecting prices by decreasing the supply. Aside from the expenditure of the tax there is obviously no intent to regulate or even affect prices, since the only prices directly affected by the tax are affected adversely to the purpose of the act.[119] There is obviously no attempt to control the prices directly by means of coercion which the processor must pay the producer. It is merely intended that by controlling supply the price will be raised.[120] This is not price fixing since no prices are set and the buyer and seller are free to fix their own prices. Neither has the Act had the effect in practice of price fixing. Prices have fluctuated widely since the Act went into effect.

The farmer is certainly in no position to complain of price regulation since the plan is optional[122] with those who enter into it and other farmers, if affected at all, are affected beneficially.[123]

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[118] See *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921); *Schaff* v. *So. Dak. Rural Credits Board*, 39 So. Dak. 377, 164 N. W. 964 (1917).

[119] Aside from the expenditure of the tax its effect would be to decrease the price to the producer and increase it to the consumer.

[120] See *Hampton & Co.* v. *United States*, *supra*, n. 67.

[122] See *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923).

[123] See *Note*, Who May Test the Constitutionality of a Statute, *supra*, n. 23.

It is submitted that the Process Tax, though it is to be expended for control of production, is a uniform excise tax levied for the sole purpose of raising revenue.[124] Thus the whole question of its validity turns on the purpose for which it is to be spent. It is further submitted that an expenditure for the purpose of controlling production is a valid public purpose and if gained only by financial inducement and not by coercion does not involve an invasion of the regulatory power of the states.[125]

There has been considerable agitation for a system of control which will force the cooperation of all farmers because, due to the fact that the present plan is voluntary, some have stayed out and increased production thus setting at naught the efforts of those who have cooperated with the government under the rental and benefit payment plan of the Agricultural Adjustment Act. The difficulty of finding authorization in the Federal Constitution for compulsory control of production is much greater than it is to find authorization for securing control through voluntary agreements induced by financial compensation. It is conceded by all that there is no *express* authorization in the Constitution for Federal regulation of production unless production is interstate commerce. If the power exists it must therefore be an implied power or a power arising of necessity out of the exercise of an express power.[126] The question again arises whether the taxing power may be exercised in a manner to secure the desired control over production of agricultural commodities. The answer must depend upon whether a tax can be levied in such a manner that its incidental burden will effect the desired control without violating the constitutional requirement of uniformity and without violating the principles of classification required by the due process clause of the Fifth Amendment. And the tax must be a tax and not a penalty upon the departure from a prescribed course of conduct not within the regulatory power of the Federal Government. It would be very easy to reduce the total production of

[124] The requirement of uniformity in the Federal Constitution means geographical uniformity. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911); *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103 (1916).

[125] See *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923).

[126] "Any tax is a discouragement and therefore a regulation so far as it goes . . ." *Pacific American Fisheries* v. *Alaska*, 269 U. S. 269, 277 (1925).

a particular commodity by imposing a heavy excise on some process it undergoes on its way to the consumer. Such a tax, however, would be a burden to the industry, not a benefit. Reduction of production is not itself the goal to be attained; it is only a means to an end, the end being to increase the returns to the individual producer by so limiting the supply as to effect such an increase in the price level that the smaller amount produced will sell for more than an unlimited amount at prices prevailing under such circumstances.[127] This would be comparatively simple if we were interested only in increasing the price or exchange value of the total production of a single commodity without regard to the distribution of benefits and the sharing of burdens. But the exchange value of one commodity obviously cannot be raised without lowering the exchange value in terms of that commodity of the commodities for which it is to be exchanged. And production of certain commodities cannot be curtailed without releasing productive capacity which must be absorbed in the production of something else or result in a *pro tanto* curtailment of the total production. Thus if the production of a particular crop is curtailed it means a release of lands available for other crops, labor displacement and a decreased exchange value for other commodities and products for which it is exchanged. These factors should be considered in determining the advisability of limiting the production of a particular product, but when it has been determined that production shall be curtailed, regulation and direction of such economic by-products are beyond the scope of a tax measure.

There are many difficulties involved in devising a tax measure which will raise the price of a particular commodity and at the same time bring about increased returns to a majority of the producers of that commodity. Obviously if this is to be accomplished the measure must effect an equitable appor-

[127] Even though the total amount paid for a large crop by the ultimate consumer may be greater than is paid for a smaller one, the total amount received by the farmers for a small crop is generally greater than for the larger crop. The handling charges such as storage and freight are generally the same per unit and the price received per unit is much greater resulting in a greater profit on the smaller crop for the farmers. See Edwin R. A. Seligman, Economics of Farm Relief (1928), p. 87 *et seq.;* Black, Agricultural Reforms in the United States, Ch. IV, The Effect of Surpluses on Prices and Incomes.

tionment of the total reduction caused by the tax so that the amount each may produce will bring more at the advanced prices than they would have produced without the limitation.

What devices are available to secure this result? Congress may levy an excise tax subject only to the limitation that it be uniform. The power to levy a tax includes the power to select the subjects and objects upon which it shall rest from whence the power to exempt and classify is derived.[128] The method by which it is proposed to control production is based upon these powers. The idea is to impose a heavy tax, the burden of which will fall upon the production of the commodity, and to grant exemptions to individual producers in amounts the total of which will correspond roughly to the amount of the product it is thought desirable to have produced. Thus the burden of the tax falls only upon production in excess of the amount desired. The legal as well as the practical difficulty lies in establishing a formula for determining an equitable exemption for each individual producer which is uniform and which is based upon a reasonable classification. The plan can be effective only if the tax upon the excess is sufficiently heavy to discourage its production. Yet it is impossible for a farmer to gauge his production to his exemption with any great degree of accuracy because of the fluctuations in yield per acre due to such contingencies as drought, wind, floods, hail, insects, and plant disease.[129] But this relates to the wisdom of such legislation rather than the difficulty of finding a legal basis for determining the individual exemption from the tax.

The Bankhead Cotton Control Bill as amended and passed by Congress,[130] hereafter to be referred to as the "Cotton Control Act," affords an illustration as well as a point of departure for the discussion of an attempt to control the production

[128] The power to exempt is based upon the selection of the subject of taxation and must be based upon a reasonable classification. See *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322 (1912); *In Re Opinion of the Justices*, 149 Atl. 321, 329 (N. H., 1930).

[129] "The variation of the (total) annual crop depends far more on the yield per acre than on the amount of acreage." Edwin R. A. Seligman, Economics of Farm Relief (1928), p. 61. Of course this might not be true if the amount of acreage fluctuated much. Naturally if the acreage remains fairly constant the variation will not depend on the amount of acreage.

[130] H. R. 8402, 73rd Congress, Mar. 20, 1934.

by compulsory methods, of an important agricultural crop. It is drawn in a manner to indicate that reliance is placed upon both the taxing power and the commerce power.[131] As the author of the Act apparently relied largely on the taxing power,[132] I shall first discuss it in relation to that source of power. I shall deal further with the Act in my discussion of the Commerce clause as a source of power for the regulation of production. A brief description of the Act will be necessary in order to discuss the legal problems involved.

The Act is effective with respect to the crop year, 1934-35,[133] and also as to crop year 1935-36 if the Secretary of Agriculture finds that two-thirds of the persons who control cotton land favor it.[134] And the President may extend the Act to include the crop year 1936-37 if he finds that the economic emergency in cotton production still exists.[135] The Act provides that not more than ten million bales shall be marketed out of the crop grown in 1934-35 exempt from the payment of the tax.[136] With respect to other years in which the Act is in effect, the Secretary of Agriculture is required to estimate from the probable market requirements and the quantity of cotton available the quantity of cotton that should be marketed exempt from the tax.[137] The Act then provides for a tax on the *ginning* of cotton *harvested* during a crop year in which the Act is in effect. The rate of the tax is 50 per cent of the average central market price of the lint cotton produced from the ginning, but in no event less than five cents per pound.[138] The act applies regardless of when the cotton is ginned,[139] and seed

[131] *Id.*, Declaration of Policy and Sec. 5.

[132] See "Extension of Remarks of Senator Bankhead." Constitutionality of Cotton Allotment Bill, by Alex. Holtzoff, 78 Cong. Rec., 2nd Sess., p. 4116 (1934).

[133] Cotton Control Act, *op. cit.*, Sec. 2.

[134] Cotton Control Act, *op. cit.*, Sec. 2, 3(a). This unusual provision is not a necessary part of a control plan and since the act has a "Separability of Provisions" clause I shall not discuss this feature of the Act. Cf. *Field* v. *Clark*, 143 U. S. 649 (1892); *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116 (1928); *People of Porto Rico* v. *Havemeyer*, 60 Fed. (2nd) 10 (C. C. A., 1st 1932); *Van Cleve* v. *Passaic Valley Sewerage Comm.*, 71 N. J. Law 570, 60 Atl. 214, 108 Am. St. Rep. 754 (1905).

[135] *Id.*

[136] *Id.*, Sec. 3 (c).

[137] *Id.*, Sec. 3 (a).

[138] *Id.*, Sec. 4 (a).

[139] *Ibid.*

(unginned) cotton cannot be exported.[140] Cotton harvested by any publicly owned experimental station, *an amount of cotton harvested from each farm equal to its allotment*, and cotton harvested prior to the crop year 1934-35 is not subject to the tax.[141] The Act provides for a system of tax exemption certificates which are distributed to producers in amounts equal to their allotment together with bale tags for the identification of the cotton which is not subject to the ginning tax.

It will be noticed, that while the tax is laid on *ginning*, the so-called exemption is not given to the ginner but to the producer in the form of an allotment. Hence it is not really an exemption at all, but a classification of the ginning of cotton into taxable and non-taxable categories according to whether the cotton being ginned was produced in a particular year within some farmer's allotment.[142] And the farmer, who is subject to no tax at all, is given tax exemption certificates on an amount of cotton allotted to him on the basis provided by the Act on condition that he agrees to be bound by such conditions and limitations as may be imposed by the Agricultural Adjustment Administration.[143] And if he refuses to make such an agreement or produces cotton in excess of the allotment he receives, his cotton, or that excess of it, is tainted and cannot be ginned by anyone without the payment of an exorbitant tax.

The constitutionality of the Act may be attacked from several angles. Some of the objections are of primary concern to the ginner and some to the producer. However, since both the ginner and the producer are directly affected by the act and the provisions which concern each most directly are mutually dependent,[144] either may rely upon the objections which may be raised by the other.[145]

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[140] *Id.*, Sec. 13 (c).

[141] *Id.*, Sec. 4 (e), 1, 2, 3.

[142] "Exemption is an immunity or privilege—it is freedom from a charge or burden to which others are subject." *State* v. *Smith*, 158 Ind. 543, 63 N. E. 25 (1902).

[143] Cotton Control Act, *op. cit.*, Sec. 6.

[144] Obviously the Act as a whole must fall if either the tax or the allotment plan is invalid. Cf. *Williams* v. *Standard Oil Co.*, 278 U. S. 235 (1927); *Connoly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1901); *Note*, Inseparability of Provisions, 40 H. L. R. 676.

[145] *Employers Liability Cases*, 207 U. S. 463 (1908); *N. Y. Central R. R. Co.* v. *White*, 243 U. S. 188 (1917); *Truax* v. *Raich*, 239 U. S. 33, 38 (1915).

IS THE DISTINCTION BETWEEN TAXABLE AND NON-TAXABLE OPERATIONS BASED UPON A REASONABLE CLASSIFICATION?

One of the first questions which is presented by the act is the validity of a tax which applies only to the ginning of cotton which has not been raised within a farmer's allotment. There can be no objection to an excise on the ginning of some cotton which does not apply to the ginning of all cotton if the difference in result is based upon a valid classification either of the ginners[146] or the cotton.[147] But the classification must be reasonable and be grounded in the purposes and objects of taxation.[148]

The transaction upon which the tax in the Cotton Control Act is laid is exactly the same as the transaction which is tax free. The tax is on the ginning of cotton which is in all respects identical and without regard to how, when, or where it is ginned or who gins it. Bale tags are necessary to identify the taxable bales from the ones that are non-taxable. The liability to a tax depends upon circumstances wholly irrelevant to the transaction being taxed, i. e., whether the farmer who produced the cotton received an allotment[149] or whether it was produced in excess of an allotment or in violation of the regulations of the Agricultural Adjustment Administration. Such a basis for liability to taxation is clearly not an exercise of the right to select either the objects or subjects of taxation. It is rather an effort to reach beyond the jurisdiction of the taxing authority through a perversion of the legitimate purposes of classification. It is a classification based solely on a foundation devised to secure a result which Congress has no power to secure directly. If Congress were allowed to do this "it would open the way for easily doing directly what is forbidden to be done indirectly, and would render important constitutional limitations of no avail."[150] The *Child Labor Tax Case*[151] suggests an illustra-

[146] *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89 (1900).
[147] *McCray* v. *United States*, 195 U. S. 27 (1904); *Billings* v. *United States*, 232 U. S. 261 (1913).
[148] *Watson* v. *Comptroller*, 254 U. S. 122 (1920).
[149] Under Sec. 6 of the Cotton Control Act, no allotment may be made to a producer who refuses to agree to such conditions and limitations as the A. A. A. shall impose regarding its reduction program generally.
[150] *Frick* v. *Pennsylvania*, 268 U. S. 473, 494 (1925); Cf. *Child Labor Tax Case*, 259 U. S. 20 (1922), in which the court said, "Grant the

tion of how this could be done. Instead of imposing a tax on incomes received from operations in which children were knowingly employed a heavy excise could be levied upon all such operations with an exemption to all who did not employ children. The illustration stated differs little from what was actually done and condemned by the Court and would undoubtedly fall within the principle of that case.

The case of *Standard Oil Co.* v. *City of Fredericksburg*[152] decided by the Supreme Court of Virginia involves a situation highly analagous to the situation raised by the Cotton Control Bill. That case involved the validity of a law which imposed a license tax on the sale of oil which was transported in bulk, tank cars, or through pipes for distribution, but which did not apply to the sale of oil which was transported in barrels. The Court, holding that the law denied due process, said:

"The business reached by the ordinance is the 'selling to wholesale or retail merchants in this city . . . oil' and is not the business of buying and selling oil. The method or manner by which the oil is introduced into the city before a sale can hardly be said to bear a just and proper relation, or, in fact, any relation at all to the actual sale of the oil. . . . The business is the selling of oil to wholesale and retail merchants, and the tax is not placed upon all who sell to wholesale or retail merchants in the city, but is placed only on those who sell . . . and whose oil, which is the subject of sale, shall have been transported into the city in tank cars or in pipes. . . .

"There is nothing of difference in the two businesses of selling oil, arising from the method by which the oil was transported into the city that would naturally suggest the justice or expediency of diverse legislation with respect to the classification attempted in this section."

The business upon which the tax is levied in the Cotton Control Act is the ginning of cotton, not the production and ginning of cotton. The method or amount of cotton produced, like the method of introducing the oil into the city, bears no relation to the ginning of the cotton. Just as the license tax did

validity of this law and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitations of the powers of Congress and completely wipe out the sovereignty of the states." The same reasoning applies to a "tax" on a "class" chosen arbitrarily for its regulatory effect.

[151] *Ibid.*

[152] 105 Va. 82, 52 S. E. 817 (1906).

not apply to all who sold oil, the ginning tax is not applicable to all who gin cotton. The license tax applied only to those who transported oil in tank cars or in pipes. The ginning tax applies only to those who gin cotton grown in excess of a quota or grown by a farmer who refuses to comply with the regulations of the A. A. A. in regard to his remaining acreage. There is thus no valid distinction in the ginning of cotton arising out of the source of production.[153] The ginning tax is the harder of the two to support since there is a possibility that a transportation tax which applied only to pipe lines and tank cars could be sustained if it applied only to intrastate commerce.[154] But a local license tax if imposed on the sale of oil above a certain quota, which was transported in interstate commerce, would clearly be void as a regulation of interstate commerce.[155] But, it seems, no more clearly so than a Federal tax on the ginning of cotton produced in excess of a quota is void as a regulation of the internal affairs of a State. The decision in *McCray* v. *United States*[156] is not in conflict with these views but rather tends strongly to support them. The court recognized that a classification might be so arbitrary as to violate the Fifth Amendment,[157] but held that it was a proper exercise of the right to select the objects of taxation to distinguish between colored margarine and the uncolored article. The classification was based upon a difference in fact and was thus supportable without reference to the motives which suggested it.[158] The classification in the Cotton Control Act is not based upon a difference in fact between taxable and non-taxable transactions but relates solely to the objectives which the Act is designed to secure, controlled production.

A parallel hypothetical case with reference to a tax on

[153] A classification of goods by reason of their origin through convict labor in imposing a license for selling goods is unreasonable and void. *People ex rel. Phillips* v. *Roynes*, 136 N. Y. App. Div. 417, 120 N. Y. Supp. 1053 (1910); see also *People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53, 94 N. E. 1065, 35 L. R. A. (N. S.) 1079 (1911), holding invalid a license tax which applied only to sellers of bankrupt stock.

[154] See *Quong Wing* v. *Kirkendall*, 223 U. S. 59 (1912).

[155] *Standard Oil Co.* v. *Graves*, 249 U. S. 389 (1918); *Walling* v. *Michigan*, 116 U. S. 446 (1885); *Pueblo* v. *Lukins*, 63 Colo. 197, 164 Pac. 1164 (1917).

[156] 195 U. S. 27 (1904).

[157] *Ibid.*, p. 64.

[158] Cf. *Powell* v. *Pennsylvania*, 127 U. S. 678 (1887).

margarine will demonstrate the essential difference between the problem involved in the McCray case and that raised by the Cotton Control Act. Suppose a tax were levied on the sale of all margarine with a stipulation that margarine received from manufacturers who manufactured only an amount alloted to it by Congress and who agreed to such conditions and limitations regarding the manufacture of vegetable oils, lard and butter as the government should impose could be sold tax free. The mere statement of the parallel demonstrates the inapplicability of the principles enunciated in the *McCray case.*[159]

The case of *Liggett* v. *Lee*[160] involved a State tax on sales by chain stores which was graduated successively according to the number of counties in which stores were located. The court held that a tax based on such a classification was contrary to the Fourteenth Amendment on the ground that the tax arbitrarily discriminated between persons of the same class, the attempted distinction being wholly irrelevant to the subject of the tax, i. e., sales by chain stores. While there is no "Equal Protection" clause in the Fifth Amendment it is believed that a similar tax if imposed by Congress would be held to violate the "Due Process" clause on the ground that an exaction based upon such an arbitrary basis would amount to confiscation of the property of those from whom it was exacted.[161]

In *Heiner* v. *Donnan*[162] the court held that a tax on gifts which applied only to gifts made within a period of two years preceding the death of the donor could not be sustained on the

[159] Such a statute would clearly seem to fall within the principle of *Hill* v. *Wallace, supra,* n. 91, and *The Child Labor Tax Case, supra,* n. 91.

[160] 288 U. S. 517 (1931).

[161] See *Nichols* v. *Coolidge,* 274 U. S. 531 (1927); *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450 (1924); *State* v. *Crosson,* 33 Idaho 140, 190 Pac. 922 (1920). In the last case cited, the Supreme Court of Idaho held that a license tax which applied to all common carriers except those operating between hotels and trains was in violation of the state "Due Process" clause because it resulted in discrimination between those within the same class.

[162] 285 U. S. 312 (1932). A Federal estate tax which levied a tax on transfers made in contemplation of death provided that all transfers made within two years prior to the decedent's death were conclusively presumed to be in contemplation of death. The court held that an opportunity to show the facts denied due process. It was then urged that the tax could be sustained as a gift or transfer tax. But the court held that the act, so interpreted, equally denied due process. Cf. *Schlesinger* v. *State of Wisconsin,* 270 U. S. 230 (1926).

ground that there was no valid distinction between such gifts and gifts made at other times and that a classification so arbitrary and capricious resulted in a denial of due process of law.[163]

It is difficult to see even as much justification for classifying the ginning of cotton according to whether the farmer who grew it has complied with Federal regulations as to the amount he shall be permitted to grow as for classifying gifts according to their proximity to the donor's death for in so classifying gifts Congress was not levying a tax burden upon a subject it could not otherwise reach. However, if the Act were valid in all other respects, it is believed that the objections to the nature of the classification which have been urged could be avoided without seriously changing the operation of the Act in practice. The practical operation of the Act would not be greatly affected if, instead of a tax on *ginning* of cotton from farms in excess of a producer's allotment, a tax were laid upon the *picking*[164] of cotton with an exemption for all producers,[165] the amount of which would be ascertained in the same manner as the act provides for determining the amount of tax exemption certificates to which each producer is entitled. The payment and collection of the tax could be postponed until it was ginned.[166] The tax would then be upon a specific transaction

[163] See also *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1 (1916), where the court referring to the doctrine that the Fifth Amendment does not limit the taxing power said, ". . . that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of the taxing power but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or what is its equivalent thereto, was so wanting in basis for classification as to produce such gross and patent inequalities as to inevitably lead to the same conclusion."

[164] A tax on picking seems just as easily sustainable as an excise as a tax on ginning. One transaction is successive to the other but both are essential to obtain any substantial benefit from the property. Cf. *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288 (1920). The tax on ginning seems more objectionable than on picking from the standpoint of a direct tax since it is a tax on the ginning of cotton because it belongs to a particular farmer. A tax which is levied because of ownership is direct. *Bromley* v. *McCaugn*, 280 U. S. 124 (1919). But a tax on one incident of ownership is indirect. *Id.*

[165] Producers may be exempted from an excise which applies to non-producers. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89 (1900).

[166] Payment may be postponed, *Salomon* v. *State Tax Commission*,

with an exemption to a class of persons who engage in such transactions. Assuming that a tax on picking cotton could be sustained as an excise the only remaining question would be the validity of the basis for the allowance of exemptions, that is whether it had attached to it any unlawful conditions resulting in a violation of the Tenth Amendment or was so arbitrary as to violate the Fifth.

A change in the Act such as has been suggested, while it might eliminate the objection that the tax is based upon an arbitrary classification, would not remove the features of the Act which may be urged as a violation of the Tenth Amendment and would leave unsolved the question whether the method of allotment devised by the Act is so arbitrary as to amount to denial of due process. These problems will be considered next in the order named.

DOES THE COTTON CONTROL ACT VIOLATE THE TENTH AMENDMENT OF THE CONSTITUTION?

A reading of the Act from beginning to end indicates at once that it is not a revenue measure. The declaration of policy and the whole tenor of the act makes clear what everybody, including the Supreme Court, knows, that the purpose of the Act is not to raise revenue but to raise the price of cotton for the purpose of increasing the returns to the cotton farmer by imposing a prohibitive tax on the ginning of cotton in excess of an amount that, according, to a government estimate, will be demanded at a "parity" price.[167] While the tax is laid upon the ginning of cotton, not upon its production, it will have the effect of imposing a penalty upon production in excess of a quota which may be ginned tax free. Since the ginner must pay a heavy tax upon the ginning of cotton purchased from or ginned for a farmer who has no allotment[168] and on the ginning of cotton produced in excess of an allotment he has no choice but to charge a radically different price for ginning it, or if he

278 U. S. 484 (1929), and the tax collected at the gin. *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1 (1916).

[167] Hearings Before the Committee on Agriculture, House of Representatives, 73 Cong., 2nd Sess., H. R. 8402, Feb. 2-17, 1934.

[168] Sec. 6, Cotton Control Act, *op. cit.*, provides that no allotment shall be made to any producer unless he agrees to the conditions and limitations of the A. A. A. regarding its reduction program generally.

purchases the cotton, to pay the farmer a greatly reduced price for it. The rate of the tax is such as to destroy any possibility of raising such cotton at a profit.[169]

The question then is whether the machinery set up to effect this result can be sustained as an exercise of the power to tax. If so the motives which prompted the exercise of the taxing power cannot affect its validity.[170] Let us then examine the machinery of the Act to see what devices have been used.

Under the heading, "Taxation and Exemption," the Act, after imposing a tax equal to 50 per cent of the market price with a minimum of five cents per pound on the *ginning* of cotton[171] provides:[172]

"(e) No tax shall be imposed under this act with respect to—
(2) *An amount of cotton harvested in any crop year from each farm equal to its allotment.*"

As may be seen from this provision the Act does not exempt a certain amount or a certain kind or quality of cotton to all ginners.[173] The liability of the ginner to the payment of a tax on the ginning of cotton depends entirely upon whether it is purchased from a farmer who has produced it within an allotment or quota imposed upon him by Congress and who has, in addition, agreed to be bound by such conditions and limitations regarding his remaining acreage as the Agricultural Adjustment Administration shall prescribe.[174] Thus the liability to pay a tax on ginning cotton is made to depend upon circumstances which are wholly extraneous to the operation upon which the tax is levied and which are entirely beyond the jurisdiction of the taxing authority.[175] While the tax purports to be upon ginning its true effect is to impose a heavy burden upon the departure from a course of conduct by destroying the market value of cotton which is not produced according to regu-

[169] The tax is so designed that it takes a major portion of the returns whatever the market price, the rate of the tax being a fixed percentage of the market price.

[170] *McCray* v. *U. S.*, *supra*, n. 92.

[171] Sec. 4 (a).

[172] Sec. 4 (e), subsec. (2).

[173] Such an exemption would be valid. *Knowlton* v. *Moore*, 178 U. S. 41, 109 (1899); *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 293 (1897).

[174] Cotton Control Bill, *op cit.*, Sec. 6.

[175] See *Frick* v. *Pennsylvania*, 285 U. S. 312 (1932).

lations made under the authority of Congress. The Act therefore appears to fall clearly within the principle of *Hill* v. *Wallace*[176] and *The Child Labor Case*[177] in which it was held that regulatory power over a subject not within the powers of Congress was a violation of the Tenth Amendment of the Constitution.

Hill v. *Wallace* involved the Grain Futures Act which imposed a tax which could be avoided by compliance with certain prescribed regulations. The court held that the so-called tax was, in fact, a penalty to coerce the members of the Board into compliance with regulations which Congress had no authority to prescribe and was therefore a violation of the Tenth Amendment. A quotation from the Cotton Bill will demonstrate the applicability of that decision. Section 6 provides:

"No certificate of exemption shall be issued and no allotment shall be made to any producer unless he agrees to comply with such conditions and limitations on the production of agricultural commodities by him as the Secretary of Agriculture may, from time to time, prescribe to assure the cooperation of such producer in the reduction programs of the Agricultural Adjustment Administration and to prevent expansion of competitive production by such producer of agricultural other than cotton and the allotment of and certificates of exemption issued to any producer shall be subject to revocation on violation by him of such conditions and limitations."

The effect of this section is to impose conditions upon the farmer that are wholly unrelated to the levy or collection of any tax. It means that the farmer must submit to the control of the Agricultural Adjustment Administration not only in the production of cotton but in the production of other commodities also or bear the burden of a tax equal to 50 per cent of the market price on all the cotton he has to sell. This certainly amounts to the imposition of a drastic penalty on the refusal to comply with conditions entirely beyond congressional power.[178] It is a regulatory measure pure and simple devised for the purpose of preventing cotton farmers who have been forced by the tax to reduce cotton acreage from planting their excess acres to other crops in direct opposition to the policy of

[176] *Supra*, n. 91.
[177] *Supra*, n. 91.
[178] *Hill* v. *Wallace*, *supra*, n. 91. This statement is made on the assumption that Congress has no power to impose such conditions under the commerce clause, a question which will be discussed later. Cf. *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (1923).

the A.A.A. to reduce production of other crops. Without it corn, wheat, tobacco, peanuts and many other crops which are being reduced under the A. A. A. would be immediately subjected to increased competition. This possibility was the very reason for the insertion of the section and it is very unlikely that the bill could have passed without it as the purpose of the Act was to force the recalcitrant minority to co-operate with the voluntary program of the A. A. A.[179] The necessity for such a provision is not an argument in favor of its validity. It merely demonstrates that the machinery of taxation, even with an ingenious scheme of exemption and arbitrary classification is not adapted to the compulsory control of production of agricultural commodities.

The *Child Labor Tax Case*[180] is also a decision which stands squarely in the way. A federal statute subjected employers who engaged in certain enumerated operations to a tax of 10 per cent of the net income received from those operations when children were knowingly employed in conducting those operations. The court held the statute void as an attempt to regulate child labor, a power not delegated to the Federal Government and, therefore, reserved to the States under the Tenth Amendment.

In order to see more clearly the applicability of the *Child Labor Tax Case* to the problem under discussion, let us suppose the levy of a tax by Congress on the ginning of cotton with a provision that the tax shall not apply to cotton produced by farmers who do not employ children below certain ages in its production, instead of the provision in the Cotton Bill that the tax shall not apply to cotton produced by a farmer within his allotment. If the one is regulation of Child Labor, the other is regulation of production. In both cases the attempted classification is based upon considerations over which Congress has no jurisdiction and which bears no reasonable relation to the exercise of the taxing power. Both are equally within the principle of the *Child Labor Tax Case* which holds such regulation to be

[179] Hearings before the Committee on Agriculture, House of Representatives on H. R. 8402. Feb. 12 to 17, 1934, at 9, 10, 73rd Congress, 2nd Session.

[180] 259 U. S. 20 (1922).

in violation of the Tenth Amendment.[181] The necessity for the inclusion of regulatory provisions in a tax measure which is designed to regulate production arises out of the fact that material reduction of one crop by political action gives rise to many collateral problems which it is politically impossible to ignore. Yet the only way to avoid clashing with the Tenth Amendment is to refrain from conditioning the exemptions from the tax on the compliance with regulations concerning these collateral problems. Unfortunately, there is no common denominator to which the production of all crops, in which a surplus is feared, may be reduced. Unless Congress is willing to ignore the collateral problems to which the reduction of particular crops give rise, no means of avoiding conflict with the Tenth Amendment can be suggested. Assuming, however, that the regulatory provisions are abandoned or are held valid under the Commerce power, another fundamental difficulty remains.

IS THE METHOD OF DETERMINING THE QUOTA OR EXEMPTION OF THE INDIVIDUAL PRODUCER COMPATIBLE WITH THE UNITED STATES CONSTITUTION?

The Cotton Bill lays no tax upon the producer as such. But the tax exemption certificates are given to the producer. This may have been an attempt by the draughtsman of the Act to make it impossible for the producer to question the basis upon which the amount of the individual allotment was determined. In economic effect, however, it makes little difference whether he sells cotton subject to the tax or gins it himself and pays the tax. This being so, the producer as well as the ginner is in a position to attack the validity of the method set up by the Act for determining what cotton falls within the taxable and what in the non-taxable categories.[182]

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[181] The tax in the Child Labor Tax Case would have been invalid even though it had applied to incomes received from operations in which children were employed to produce goods for shipment in interstate commerce. *Hammer* v. *Dagenhart*, 274 U. S. 251 (1926). But see, *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (1923).

[182] In *Truax* v. *Raich*, 239 U. S. 33, 38 (1915), it was held that an alien *employee* was entitled to restrain the enforcement of an Arizona law making it a crime for *employers* to hire less than 80 per cent native born citizens. It was urged that the employee could not attack the statute because it was the employer who was subjected to prosecution for its violation. J. Holmes, in answer to this objection, said:

It has been urged that a tax upon the ginning of cotton which is made to depend upon whether the producer of it has kept within an allotment issued to him by the government is wholly arbitrary from the standpoint of classifying ginning into different categories for the purpose of taxation. And due to the necessary tie-up between the tax and the exemptions it has been urged that the producer as well as the ginner could rely on this objection. As a matter of fact, they are often the same individual. It has been suggested, however, that this particular difficulty could be met by imposing the tax on the picking of the cotton with an exemption to each producer. But even if the Act were unobjectionable on this score a serious question as to the constitutionality of the Act would remain. The question concerns the validity of the basis from which the individual allotment or exemption is ascertained. There are two main objections that may be urged against the validity of the methods provided in the Act. First, it can be urged that the bases of the exemption or allotment are wholly arbitrary and unreasonable and result in a violation of the "Due Process" clause and second, it can be urged that the tax when considered with the method of allotment or exemption is not uniform. I shall consider these objections in the order named in relation to the methods of allotment provided in the Cotton Bill.

IS THE BASIS OF ALLOTMENT OR EXEMPTION ARBITRARY AND UNREASONABLE AND IN VIOLATION OF THE FIFTH AMENDMENT?

The allotment is the method provided by the Act for ascertaining how much cotton each producer may produce subject to no tax burden. From the standpoint of due process of law it makes no difference whether we are dealing with a classification or an exemption. If a tax burden falls upon some but not upon others or in different amounts or with greater weight on some than on others it must be on some rational basis of distinction. Congress has the power to classify the transaction upon which the tax is laid according to different classes who engage in it,

"The act operates directly upon the employment af aliens and if enforced would compel the employer to discharge a sufficient number of employees to bring the alien quota within the prescribed limits. . . . It is therefore idle to call the injury indirect or remote."

as, for example, producers and non-producers.[183] It may classify the transaction according to substantial differences in the article upon which it is performed, as, for example, long staple and short staple cotton.[184] Or it may exempt some part of the transactions to all the members of the class upon which it is laid.[185] But an exemption of a part of the transactions is only a sub-classification of the transaction itself and must be based upon some rational principle so that all who are similarly circumstanced will receive substantially the same exemptions. If the basis upon which exemptions are determined is wholly arbitrary the statute violates the Fifth Amendment.[186]

The Cotton Control Act provides that allotments may be made from the county's allotment to any farm upon application by the producer and may be based upon:

"(1) A percentage of the annual cotton production of the farm for a fair representative period; or

(2) By ascertaining the amount of cotton the farm would have produced during a fair representative period if all the cultivated land had been planted to cotton, and then reducing such amount by such percentage (which shall be applied uniformly within the county to all forms to which the allotment is made under this paragraph) as will be sufficient to bring the total of the farm allotments with the country's allotment; or

(3) Upon such basis as the Secretary of Agriculture deems fair and just, and will apply to all farms to which the allotment is made under this paragraph uniformly, within the county, on the basis of classification adopted. The Secretary of Agriculture in determining the manner of allotment to individual farmers, shall provide that the farmers who have voluntarily reduced their cotton acreage shall not be penalized in favor of those farmers who have not done so."[187]

(b) After the crop year 1934-35 the apportionment shall not be on the basis set out in paragraph (1) of subsection (a) of this section.[188]

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[183] *American Sugar Refining Co.* v. *Louisiana, supra,* n. 165.

[184] *McCray* v. *United States, supra,* n. 92.

[185] *Knowlton* v. *Moore, supra,* n. 173.

[186] *Heiner* v. *Donnan, supra,* n. 162; *Nichols* v. *Coolidge,* 274 U. S. 531 (1927); *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322 (1912); *La Belle Iron Works* v. *United States,* 256 U. S. 377 (1921); *State* v. *Crosson,* 33 Idaho 140, 190 Pac. 922 (1920); Cf. *In Re Opinion of the Justices, supra,* n. 128, in which it was held unreasonable to exempt married men from the income tax to the extent of $4,000 plus $400 for each dependent while single men were exempted only on $2,000. And an exemption of large timber tracts which did not apply to small ones was also held unduly discriminatory though an exemption of the smaller ones might have been sustained.

[187] Sec. 7 (a).

[188] Sec. 7 (b).

Under the terms of the Act, the Secretary may determine the individual allotment or exemption on any one of these three bases. The first of these makes the amount of cotton a producer may have ginned tax free from a particular farm depend upon the average amount of cotton that has been raised on the farm from which his present crop is produced. To determine the liability for the payment of a tax on the ginning of cotton on the basis of the past uses to which the property on which it was grown has been put is wholly arbitrary since it bears no relation to the act now being performed on which the tax is laid. The same would be true if the tax was on the picking of the cotton. The effect of such a standard is to impose a burden on a present transaction based upon past conduct wholly disconnected from the transaction upon which the present tax is laid. Such a basis for determining liability to a tax seems to be wholly arbitrary and capricious and in violation of the Fifth Amendment.

Nichols v. *Coolidge*[189] involved a Federal estate tax which purported to include within the value of the estate all property which the decedent had at any time transferred to trustees which was intended to take effect in possession or enjoyment at or after his death even though the transfer was irrevocable. The court held that the conveyance to the trustees was in no sense testamentary and that it bore no substantial relationship to the transfer by death. The following words of the court seem peculiarly applicable to the situation under discussion.

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. *An excise is prescribed, but the amount of it is made to depend upon past lawful transactions,* nontestamentary in character and beyond recall. . . . Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died." (Italics the writer's.)

The court held that the tax was arbitrary and capricious and amounted to confiscation.[190] Under the first method of allotment in the Cotton Bill different farms would receive disproportionate quotas depending upon what the owner of the

[189] 274 U. S. 531 (1927).

[190] *Ibid.* See also *Untermeyer* v. *Anderson,* 276 U. S. 440 (1928), in which it was held that a tax on gifts made prior to the passage of the Act violated the Due Process clause of the Fifth Amendment.

farm had grown in years gone by.[191] This method obviously favors the farmer who has grown the most cotton in the period over which the estimate is made and penalizes the farmer who has voluntarily reduced his acreage or who has grown other crops. It is like basing an exemption from the present income tax on a percentage of the past average income of the taxpayer, or who ever he was successor to in business over a period of years.

The second method of allotment, based upon what the land would have produced over a period if all the cultivated land had been planted to cotton, instead of what was actually produced is open to the same objections as the first method, and is, in addition, based upon an estimate of very doubtful accuracy.[192] Present liability for payment of taxes on a transaction in cotton is predicated upon an estimate of the average amount of cotton that a theoretical farmer could have produced if he had planted all the cultivated acres of the farm to cotton. A more arbitrary and capricious method can hardly be imagined. It favors those who have not previously engaged in cotton cultivation and penalizes those whose land is especially suited to cotton culture. Those who have no intention of shifting to cotton may apply for an allotment, thereby cutting down the allotment of those who specialize in cotton. As the certificates are negotiable it will provide a means of exacting tribute, through the sale of the tax exemption certificate, from the *bona fide* cotton farmer.[193]

The third method is a recognition of the arbitrary nature of the first two. It sets up no standards at all for the guidance of the Secretary, but leaves it up to him to devise a method that is uniform and fair. Aside from the objection that this method is an unlawful delegation of the taxing power to the Secretary, its validity must depend upon the manner of its exercise. When it is remembered, however, that the Secretary has the power to

[191] Secretary of Agriculture Henry A. Wallace, warns against the "freezing of the present cotton producing regions and preventing abnormal change over from cotton producing lands to non-cotton producing lands, and vice versa." Hearings before Committee of Agriculture, House of Representatives on H. R. 8402, Feb. 12-17, 1934, p. 34.

[192] *Id.*, at p. 33.

[193] *Id.*, at 33.

fix the total exemptions limited only by a maximum, this becomes a very real objection. The amount of an exemption as well as the rate enters into the determination of what the tax on an individual shall be.[194] The general principle stated in *Field* v. *Clark*[195] and in the *Hampton Case*[196] is that when the legislature lays down an intelligible principle or policy, "a primary standard,"[197] to guide the administrative discretion in filling in the details of the statute by making rules and regulations, and in applying the statute to factual situations upon which the statute is intended to operate, then there is no unconstitutional delegation of legislative power. It would hardly appear that "such basis as the Secretary of Agriculture deems fair and just, and will apply to all farms uniformly" could be called an intelligible principle or standard. The provision that it shall apply uniformly adds nothing as this is a limitation on the Congressional power by the Constitution. "Such basis as the Secretary of Agriculture deems fair and just," then, becomes the only criterion as to the method of ascertaining the exemption to which one is entitled.

In *People of Porto Rico* v. *Havemayer*[198] the legislature of Porto Rico authorized the treasurer to determine the tax rate by taking the estimate given him by the Commissioner of Interior of the amount necessary to defray expenses for the ensuing year, deducting or adding the surplus or deficit of the preceding year and dividing the total by the number of acres in the district. The court held this to be an invalid delegation since the rate was based upon an estimate of an administrative officer. Instead of the rate, it is the basis on which the individual exemption is figured that is left to the administrative

[194] "Every system of taxation consists of two parts—the elements that enter into the composition of the tax and the steps taken for its assessment and collection. The former is a legislative function conserved by constitutional prescriptions; the other is mere machinery. The latter may be delegated to other governmental agencies; not so the former . . . But no element that enters esentially into the tax itself may be so delegated." *Van Cleve* v. *Passaic Sewerage Com.*, 71 N. J. L. 574, 60 Atl. 214, 108 Am. St. Rep. 754 (1905).

[195] 143 U. S. 649 (1892).

[196] *Hampton* v. *United States, supra,* n. 67.

[197] *United States* v. *Shreveport Grain and Elevator Company,* 287 U. S. 77 (1932).

[198] 60 Fed. (2nd) 221 (C. C. A., 1st 1932); *note,* delegation of power to tax, 1 Geo. Washington Law Rev. 231 (1932-33).

officer in the Cotton Bill. But the latter is far more important than the former because the purpose of the act hinges on keeping production within the exemptions prescribed. However, it is very difficult to draw the line between what is and what is not a delegation of legislative power and if no other objection were available it is possible that the Act might be sustained under such liberal decisions as *United States* v. *Grimaud*,[199] the *Intermountain* Rate Cases,[200] and *Radio Commission* v. *Nelson Bros.*[201]

All three methods of determining the individual exemption from taxation seems objectionable on the further ground that it is made to depend indirectly on the factors which determine the quota of the State and the County in which he lives.[202] Some standard should be set up that bears some relation to the transaction upon which the tax is laid and it should apply to all who are similarly situated regardless of State and County lines.[203]

DOES THE TAX, WHEN CONSIDERED WITH THE EXEMPTIONS, SATISFY THE CONSTITUTIONAL REQUIREMENT OF UNIFORMITY?

Uniformity as used in the Constitution means geographical uniformity.[204] But a tax which applies uniformly without exemptions cannot be geographically uniform if it is subject to exemptions which are not uniform. And it cannot be uniform if it is based upon a different classification within different geographical areas. It makes no difference then whether the allotment is an exemption or a classification; it must be made on the same basis without regard for geographical location. Sec. 7 (a) of the Act provides three alternative methods of de-

[199] 220 U. S. 506 (1911).
[200] 234 U. S. 476 (1914).
[201] 289 U. S. 266, 285 (1933). In granting licenses the Radio Commission was required to act "as public convenience, interest or necessity requires." The court held that this standard was not so indefinite as to confer unlimited power.
[202] It is difficult to justify a basis of exemption which makes an individual's liability to a Federal Tax on a present transaction depend in any way upon the amount of cotton the state and county in which he lives has raised in proportion to that raised in other states and counties in the past five or ten years.
[203] *Liggett* v. *Lee*, 288 U. S. 577 (1933).
[204] *Supra*, n. 124.

termining the individual allotment within a county. These methods are very different and the results would vary greatly according to the method adopted.[205] Yet the act authorizes the Secretary to use any of the three methods providing only that the method adopted applies uniformly *within the county*. But the constitution is not satisfied by making Federal taxes uniform within a county. For purposes of a Federal tax a person is a citizen of the United States[206] and the requirement of uniformity means that the tax must apply uniformly wherever the subject is found.[207] Exemptions cannot be made in order to adapt it to local conditions.[208] The act would therefore seem to be invalid because the method of determining individual exemptions is based upon geographical distinctions.

A method of determining the individual exemption which is entirely fair seems impossible to devise due to the numerous factors which enter into such consideration. Soil conditions, weather conditions, capacity, specialization, crop rotation, market conditions, equipment, personal preference, intention, labor conditions, and the like are all factors deserving of consideration in allocating production. Obviously no formula can be

[205] Obviously the allotment of a farmer who had previously raised very little cotton would differ greatly depending on whether a percentage of his past production or a percentage of an estimate of what he could have produced on his cultivated area is chosen by the Secretary of Agriculture as the basis of his allotment. Hence farmers similarly situated but located in different counties might get totally different allotments if one basis was used in one county and the other in the other county.

[206] *Massachusetts* v. *Mellon*, 262 U. S. 447 (1933).

[207] *Billings* v. *United States*, *supra*, n. 147.

[208] *Florida* v. *Mellon*, 273 U. S. 12 (1926). What is said in this case about uniformity is a dictum because it was held that Florida had no standing in court. But the dictum is of great importance because legislation based upon the principle of this case has been suggested to induce states to adopt unemployment insurance. The dictum appears to be unsound. The law under consideration allowed a deduction up to 80 per cent from the Federal Estate tax for any estate, inheritance, or succession taxes paid to a state under a state law. Florida had no state inheritance tax and could have none under its constitution. The court said that Congress could not accommodate its legislation to conflicting or dissimilar laws of the states. But the effect of the decision is to allow them to do just that. It is difficult to see how a law concerning a citizen of the United States can be said to operate uniformly when its operation depends directly upon the existence or non-existence of a particular state law. The law would be uniform as to citizens of different states if no deductions were allowed. Is it still uniform if one is allowed a deduction from his Federal tax and the other is not, due to the difference in state laws?

devised to include them all. However, I shall venture to suggest a basis which, though it is no less unsatisfactory than those embodied in the act from a practical point of view, is uniform and not wholly arbitrary. Instead of basing the exemption on a percentage of the past average production or a percentage of the past productive capacity of cultivated acres, it could be based on a percentage of the present productive capacity. The past average production would be helpful in estimating the present productive capacity. The percentage to be allowed could be determined by dividing the total estimated capacity of those who applied for exemptions into the amount desired to be produced. Such a basis would not be wholly arbitrary since Congress has the right in the public interest to exempt a portion of the object of the tax from the tax burden. And the capacity of the producer bears a direct relation to any amount Congress chooses to exempt.[209]

In *United States* v. *Singer*,[210] the court sustained a liquor manufacturing tax based upon the capacity of the distillery. The excess profits tax[211] provided for a deduction from income equal to the same percentage of the invested capital for the taxable year which the average amount of annual net income of the trade or business during the pre-war period was to the invested capital of that period. Since the tax was imposed on excess profits a means of determining the excess had to be chosen and the Court held that the method adopted by Congress was not wholly arbitrary.[212] It can hardly be denied that the ratio of income to paid-in capital at different times does bear some relation to the comparative profitableness of the enterprise. But the amount of cotton previously produced bears no relation to the transaction being taxed in the Cotton Bill.

DOES THE COTTON CONTROL BILL VIOLATE ARTICLE 1 SECTION 8 OF THE FEDERAL CONSTITUTION WHICH PROHIBITS THE LEVY OF A TAX ON EXPORTS?

The Cotton Control Act provides that *lint* cotton may not be moved beyond the boundaries of the county in which it was

[209] See *Champlain Refining Co.* v. *Corp. Com.*, 286 U. S. 210 (1932).
[210] 15 Wall. 111 (U. S., 1872).
[211] 40 Stat. at L. 300, 302, et seq.
[212] *La Belle Iron Works* v. *United States*, 256 U. S. 377 (1921);

produced except by permission of the Commissioner of Internal Revenue until the tax has been paid upon the ginning of it.[213] And bales of lint cotton may not be opened or sold until the tax is paid.[214] It further provides that no seed cotton shall be exported from the United States to any foreign country.[215] "Seed cotton" is defined as the harvested fruit of the cotton plant,[216] which is the same thing as lint cotton except the latter has been ginned.[217]

The gist of the situation is, then, that while seed cotton may be transported freely from state to state, it cannot be exported to a foreign country. But lint cotton, which is merely seed cotton which has been ginned, may be exported freely. These provisions are obviously framed to prevent a farmer who has not kept within his allotment from selling his seed cotton abroad and thereby escaping the payment of the tax upon the ginning of it. There is no prohibition against selling the foreign buyer both the lint cotton and the seeds after the tax has been paid upon the ginning of it. This is much the same as requiring that the farmer who raises cotton which is not exempt from the tax on ginning cannot export it without paying a tax on it. Is the tax void because of a tax on exports?

A tax upon the ginning of cotton is clearly valid even as to that which is to be exported.[218] A tax upon the exporting of cotton is just as clearly invalid.[219] If the tax is invalid, it is because of the prohibition of the exportation of seed cotton which goes along with the tax. The court has said time and again that it will look through form to substance to see what

see A. A. Ballentine, Some Constitutional Aspects of the Excess Profits Tax, 29 Y. L. J. 625 (1919-20).

[213] *Op. cit.*, Sec. 14 (b).

[214] *Ibid.*

[215] *Id.*, Sec. 14 (c).

[216] *Id.*, Sec. 23 (g).

[217] *Id.*, Sec. 23 (f).

[218] *Cornell* v. *Coyne*, 192 U. S. 418 (1904). The court might find itself in an inconsistent position if it were to hold that ginning was a part of interstate commerce rather than merely related to it in such a manner as to require regulation. If production and ginning are a part of interstate commerce it would logically follow that that which was produced and ginned for export was a part of foreign commerce. If the court holds that production and ginning are sufficiently relate to interstate commerce to warrant regulation by Congress the tax on ginning can be sustained as an indirect burden on exports. *Ibid.* See cases cited *ante*, n. 237.

[219] U. S. Const., Art. 1, Sec. 8.

the effect of a tax is. Obviously the effect of the tax when taken with the prohibition of export is to impose the burden of the tax upon the cotton which is exported. There is no public policy which warrants the prohibition of the export of seed cotton other than to enable the Government to collect the tax upon it, the very thing prohibited by the Constitution.

The fact that no tax burden is imposed on such cotton that is not imposed on cotton sold on the domestic market is not a valid reason for sustaining the tax as to that which is exported.[220] Thus a State tax on gross sales is invalid as to foreign sales.[221] The prohibition of export of cotton plus the tax upon the ginning of the cotton certainly places as direct a burden *in fact* upon the export of cotton as a gross sales tax would. And it seems more direct than the burden imposed upon foreign commerce by a statute requiring sellers of steamship tickets to take out a license.[222] A tax on a sale by a manufacturer to a broker to fill an order from a foreign merchant is invalid as a tax on exports where the title passes when the property is delivered to the carrier.[223]

The court can easily sustain the tax if it ignores the purpose for which the ban on export of seed cotton was made merely by saying that the tax is on a transaction which is not a part of foreign commerce. If it sustains the prohibition of export and the tax on cotton ginned for export as well, it means that Congress can do by indirection that which it cannot do directly.[224] The court is not apt to be very acute on this point unless it overthrows the act on other grounds, however, for the result of holding these sections invalid would be to encourage an exodus of all non-exempt cotton to be ginned in foreign countries. It would thus fail to check the production of cotton and result in further unemployment.

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[220] M. Heintz, Federal Prohibition of Export Taxes, 61 Am. L. Rev. 194 (1927). As the constitution has been construed, Congress may tax exports from state to state but not exports to foreign countries.

[221] *Crew Levic Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); Cf. *Di Santo* v. *Pennsylvania*, 273 U.. S. 34 (1927).

[222] *Di Santo* v. *Pennsylvania, Ibid.*

[223] *Spaulding Bros.* v. *Edwards*, 262 U. S. 66 (1923).

[224] In *Fairbanks* v. *U. S.* 181 U. S. 283, it was held that a tax on a foreign bill of lading was in effect a tax on the goods it represented. Cf. *British Columbia* v. *McDonald Murphy Lumber Co.* (1930), A. C. 357, in which the English court held that a general tax on cut lumber with an exemption on lumber used at home was a tax on exports.

If the objections urged against the validity of the Cotton Control Bill as an exercise of the taxing power of Congress are valid, it must be concluded that the power to tax does not afford a satisfactory legal foundation for a comprehensive control of Agricultural production. A tax upon some productive transaction with an exemption based upon productive capacity, even if valid, affords little hope for effective regulation since it affords no source of power for correlating legislation dealing with different crops or for handling the collateral problems raised by such legislation.

CONTROL OF AGRICULTURAL PRODUCTION UNDER THE COMMERCE POWER

In *Gibbons* v. *Ogden*[225] Marshall, speaking of the commerce power, asks: "What is this power?" and answers the question as follows:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in it the same restrictions on the exercise of the power as are found in the Constitution of the United States.[226]

The Tenth Amendment does not limit the Federal power over Congress in any way. It merely reserves to the States all powers not delegated to Congress. The problem of delimiting the Federal power over commerce is a problem of determining what is and what is not a regulation of interstate commerce. This is necessarily a judicial question for the Tenth Amendment would mean nothing if Congress has not only unlimited power over commerce but also full power to determine what activities fall within the scope of "commerce among the states." There is a recognized distinction between the abuse of a power and the scope of a power.[227] Hence, while Congress is subject

[225] 9 Wheat. 1 (U. S., 1824).

[226] *Id.*, 196.

[227] "Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all, it must be exercised at

only to political responsibility for abuse of the power to regulate commerce[228] it is nevertheless subject to having the scope of its powers, i. e., what constitutes regulation of commerce among the states, defined by the Supreme Court. Hence, it does not follow that "whether commerce among the states should be prohibited, and for what reasons were . . . questions for Congress to determine, subject only to its political responsibility at the polls,"[229] unless it be conceded that prohibition of commerce for any reasons whatever is a *regulation* of commerce. Just as Congress may under the guise of the taxing power seek to extend its power to police regulations[230] or the States in the exercise of their taxing power may seek to regulate interstate or foreign commerce,[231] so Congress may seek to prohibit commerce on such conditions as to extend its control into entirely unauthorized fields.[232] Mr. Corwin's argument that Congress may prohibit commerce for any reason it sees fit subject only to political responsibility would extend to a law which prohibited divorced persons from traveling in interstate commerce with a view to lessening the number of divorces; yet he expressly disavows that Congress has the power to bring within its control matters in no wise related to the Interstate Market such as marriage and divorce.[233] This is an admission that the power of Congress over interstate commerce is subject to review by the Court, for if Congress cannot "use the power over commerce to bring within its control matters in no wise related to the Interstate Market such as marriage and divorce," someone (the Court) must decide "what matters are in no wise related to the Interstate Market." And since such a question of relation is clearly a question of degree, the Court must decide when

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the will of those in whose hands it is placed." *Brown* v. *Maryland*, 12 Wheat. 419 (U. S., 1827).

[228] *Ibid.*

[229] Quoted from Edward S. Corwin, Congress's Power to Prohibit Commerce, 18 Cornell L. Q. 477, 485., where he maintains the thesis that Congress may prohibit interstate commerce subject only to responsibility at the polls. His quotations only sustain his position if it is granted that complete prohbition of commerce for any reasons whatever amount to a *"regulation of commerce among the states,"* the point in issue.

[230] *Child Labor Tax Case, supra*, n. 91.

[231] *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927).

[232] *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918).

[233] *Op. cit.*, p. 502.

a matter is sufficiently unrelated to the Interstate Market so as to be beyond the reach of the commerce power. *Hammer* v. *Dagenhart*[234] can be explained on this theory. The majority of the Court thought that Child Labor was in no wise related to interstate commerce. It did not define interstate commerce as the Interstate Market as Mr. Corwin does,[235] but envisaged it merely as transportation and those things directly connected therewith. And the hours and conditions of labor were not thought by the majority of the court to be sufficiently related to transportation to bring it within the regulatory powers of Congress. If we grant the Court the power of defining "interstate commerce" and of determining what is related thereto it is difficult to see how it can be argued that *Hammer* v. *Dagenhart* is an intrusion by the Court upon Congress's legislative discretion.[236] At most we can only quarrel with the definition and the conclusion as to what is related thereto.

Congress has never before attempted an outright regulation of production. If such legislation is sustained, the Court will be compelled either to enlarge upon its definition of interstate commerce or to recognize a different kind of relationship than it has previously done. It will not be necessary, in order to sustain the power of Congress to regulate production to hold that interstate commerce includes production. It has long been established[237] and has recently been reaffirmed[238] that production is not interstate commerce, no matter how closely connected with it it is. But it has never been held that production does not, under some circumstances, affect interstate commerce.[239]

[234] *Supra*, n. 232.

[235] *Op. cit.*, Edwin S. Corwin, footnote 77, p. 503.

[236] This seems to be the real basis of Mr. Corwin's criticism of *Hammer* v. *Dagenhart* rather than the legalistic objections which he has urged. *Op. cit.*, Edwin S. Corwin, p. 503, where Mr. Corwin contrasts the court's definition with his own.

[237] *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922); *Oliver Mining Co.* v. *Lord*, 262 U. S. 172 (1923) (mining); *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284 (1926) (production of natural gas which was piped directly from the well into pipes leading to interstate pipe lines); *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459 (1919) (manufacturing).

[238] *Utah Power Co.* v. *Pfost*, 286 U. S. 165 (1932), sustaining a tax on the generation of electricity for sale, barter, or exchange, although it was transmitted directly into an adjoining state; *Champlain Refining Co.* v. *Corporation Com.*, 286 U. S. 210 (1932), holding oil production is not interstate commerce.

[239] It is a mistaken theory "that treats the source of injury rather

Hence by the mere technique of expanding the definition of interstate commerce to include all traffic between the states the Court need only recognize the obvious fact that production does vitally affect that traffic to bring within the control of Congress all phases of production which materially affect that traffic, for it is well settled that Congress, within its power to regulate commerce, may regulate activities which are admittedly no part of interstate commerce when such regulation is necessary to promote and foster interstate trade.[240] Hence the decisions which hold that a State may tax or regulate productive processes, though they burden interstate commerce indirectly, on the ground that such a tax or regulation is not directly on interstate commerce, afford no criterion of the existence or nonexistence of the Federal power to regulate the same activities when by doing so it will promote interstate commerce.[241] The test that has been applied in such cases has been whether the burden placed upon interstate commerce by state action has been direct or indirect[242] and generally the Court has decided that question merely by affirming one conclusion or the other[243] although in some cases involving police regulations the Court has relied upon whether there has been an actual diversion of traffic from the channels of interstate commerce.[244] It does not necessarily follow, however, from the fact that the burden was

than its effect upon interstate commerce as the criterion of congressional power." *Second Employers Liability Cases*, 223 U. S. 1, 51 (1912).

[240] *Houston and Texas Ry.* v. *United States*, 234 U. S. 342 (1914) (intrastate rates); *Southern Ry.* v. *United States*, 222 U. S. 20 (1911) (safety appliances on intrastate cars); *United States* v. *Ferger*, 250 U. S. 199 (1919) (punishment of forgery of bills of lading though no goods were shipped).

[241] *Reid* v. *Colorado*, 187 U. S. 137 (1902); *Houston and Texas Ry.* v. *United States*, *Ibid.*

[242] "The tax may indirectly and incidentally affect such commerce, just as taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference." *Oliver Mining Co.* v. *Lord*, *supra*, n. 237.

[243] *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927). The majority opinion held that a state law requiring a license to sell steamship tickets to foreign ports imposed a "direct" burden on interstate commerce. Justice Stone, in a dissenting opinion concurred in by Holmes, J., and Brandeis, J., pointed out that the majority opinion merely affirmed that the burden was direct which was the question at issue.

[244] *Minnesota* v. *Barber*, 136 U. S. 313, 321 (1890); compare also *So. Ry.* v. *King*, 217 U. S. 524, with *Seaboard Air Line Ry.* v. *Blackwell*, 244 U. S. 310 (1917). In the latter case the same statute as that which was held valid in the former was, on the facts shown, held invalid.

held indirect in such cases that the court would hold that Congress could not regulate the activity if it desired to do so for there are many instances where the states may legislate concerning local matters which are closely related to interstate commerce until Congress steps in and legislates on the matter.

Burdens and obstacles to interstate commerce which Congress may legislate against need not be concerned with the actual shipment of goods. *United States* v. *Ferger*[245] was a case involving the power of Congress to punish the forgery of and fraudulent dealing in bills of lading purporting to involve interstate shipments. It was argued that since no goods were shipped, the defendant was not within the jurisdiction of Congress. But the Court held that such conduct placed a burden upon commerce which Congress had the authority to remove. There was no factual showing of the existence of any actual burden. But if the Court feels that no such burden exists it may hold the legislation unconstitutional.[246] *Hammer* v. *Dagenhart*[247] can easily be put aside if the Court feels disposed to hold that the commerce power exends to the regulation of production. That case can be explained by saying that Congress was not attempting to remove a burden from interstate commerce, but to remove a burden from the children by withholding the channels of interstate commerce from those who employed children. Congress should leave out references to altruistic motives and rely on the effect of the conduct it seeks to regulate on interstate trade and commerce, and if it can be shown that local activities burden interstate commerce, the fact that such activities are also regulated is immaterial and *Hammer* v. *Dagenhart* would not apply.

It is not so easy to put aside the philosophy upon which the Child Labor Case is decided. In that case the Supreme Court said:

"The maintenance of the authority of the state over matters purely local is as essential to the preservation of our institution as is the conservation of the supremacy of the Federal power in all matters entrusted to the nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of

[245] 250 U. S. 199 (1919).
[246] *Adair* v. *United States*, 208 U. S. 161 (1908).
[247] *Supra*, n. 232.

local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government."[248]

The only basis upon which the Court can sustain legislation by which the power of Congress is extended to the control of production opens up a precedent by which the powers of Congress may be extended to the regulation of all business and the powers of the State may be restricted to closer and closer quarters. Once the Court evinces a willingness to admit evidence compiled for the purpose of showing the effect of local or sectional business conditions upon interstate commerce and to listen to the economic interpretation of such evidence by counsel for the different interests, the Tenth Amendment can be practically nullified.

On the other hand, the Court can keep the situation well in hand by very simple devices. It may recognize the depression[249] and rely on the economic "emergency"[250] which gives rise to conditions in production that unduly affect commerce.[251] Or it may merely affirm that the subject of regulation does or does not unduly burden commerce and give supporting arguments.[252]

The Court will not be entirely without precedent if it desires to control producers for it is well settled that producers

[248] *Id.* See also, *New State Ice Co.* v. *Liebman*, 285 U. S. 262, 278 (1932). "Plainly a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld consistent with the 14th Amendment. Under that Amendment nothing is more settled than that it is beyond the power of a state under guise of protecting the public (to) arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 513 (1923).

[249] See *Minnesota* v. *Blasius*, 54 Sup. Ct. 34 (U. S. 1933).

[250] ". . . and although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson* v. *New*, 243 U. S. 332, 348 (1917); Cf. *United States* v. *Calistan Packers, Inc.*, 4 Federal Supp. 660 (D. C. Calif. 1933).

[251] "When producing concerns fail . . . and communities dependent upon profitable production are prostrated, the wells of commerce go dry." Per Hughes in *Appalachian Coals* v. *United States*, 288 U. S. 344 (1933); *Victor* v. *Ickes* (D. C. Sup. Ct. 1933).

[252] This device is used in determining whether a State tax or regulation is a direct or indirect burden on interstate commerce. See *supra*, n. 243.

who seek to restrain interstate commerce are subject to Federal control.[253] Logically if producers do, in fact, burden or restrain commerce the power to regulate would be the same since Congress does not depend on *intention* for the source of its power. But this brings us back to the determination of a fact question; and logic will have to be sacrificed to the extent of requiring the fact to be proved unless we are prepared to "embark on an uncharted sea" of unprovable economic fact. As between opening the court to proof of the actual effect on interstate trade of a producing group and reliance on affirmation by the court, the latter seems preferable.[254]

Assuming that the court is willing to expand the commerce power to the regulation of production, the next question is how extensive this regulation can be. Logically it should only extend to such aspects of production as unduly affect interstate commerce.[255] Here again it will be necessary to rely upon the good sense of the Court after it has seen the Act in action.

REGULATION OF PRODUCTION—DUE PROCESS

It is well settled that the power to regulate commerce is, like all other express powers, subject to the limitations of the Fifth Amendment.[256] Hence, even if the commerce power extends to the regulation of production, such regulation as Congress undertakes must be consistent with the requirements of the Fifth Amendment. In *Wilson* v. *New*[257] the Court said:

"The powers possessed by the government to deal with a subject are neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies. *This is illustrated by the difference between the much greater power of regulation which may be exercised as to liquor and that which may be exercised as to flour, dry goods and other commodities. It is shown by the right . . . to prohibit lottery tickets, and by the obvious consideration that such*

[253] *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295 (1925).

[254] Cf. *Wolff Packing Co.* v. *Court of Industrial Relations of Kansas*, 262 U. S. 522 (1922).

[255] *Employers Liability Cases*, 207 U. S. 463 (1908). The Court said that because a company engages in interstate commerce all of its business is not thereby subjected to the control of Congress. Congress practically determines, through the Commerce Commission, what constitutes an interference with interstate commerce. See William C. Coleman, The Evolution of Intra State Rates: The Shreveport Rate Cases, 28 H. L. R. 34 (1914-15).

[256] *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893); *Adair* v. *United States*, 208 U. S. 161 (1908).

[257] 243 U. S. 332 (1917).

right to prohibit could not be applied to pig iron, steel rails or most of the vast bodies of commodities.[258] (Italics the writer's.)

This dictum, if adhered to literally, would defeat the Federal program of control since the power to regulate production is essentially based upon the power to prohibit commerce in those commodities which are not produced in compliance with the conditions imposed by Congress. But the difference between the regulation of liquor and food commodities is obviously one of degree and hence a change in facts may make it just as necessary to regulate the one as the other.[259]

People v. *Nebbia*[260] has apparently dealt a death blow to the doctrine that business may be divided into categories of businesses which are and those which are not affected with a public interest. The theory of that case seems to be that regulation of any business or activity is limited only by the requirement that the phase of the activity regulated bears a substantial relation to the welfare of the public.[261] If the Court looks at the Agricultural situation as a whole and considers each control measure a part of a larger plan to raise the purchasing power to those engaged in agricultural pursuits by removing surplus production, it will find no difficulty in holding that the industry sufficiently affects the welfare of the public to warrant regulation.[262]

Under the due process clause, the important question in any particular case will be whether the method used is arbitrary or discriminatory. To what extent must individual equities and property rights be recognized? It will hardly be main-

[258] *Id.* 346, 347. Cf. Edwin S. Corwin, Power to Prohibit Commerce, 18 Cornell L. Q. 477 (1933).

[259] *Block* v. *Hirsh*, 256 U. S. 135 (1921).

[260] Supra, n. 89. Of course the Court may swing back to the old theory since the decision was by a divided court. It is important to note, however, that the majority opinion did not rely upon the doctrine of emergency to support the legislative power to regulate the price of milk and it expressly stated that the business was not in the nature of a public utility.

[261] "Price Control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Nebbia* v. *People*, *supra*, n. 89.

[262] "The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it." *Board of Trade* v. *Olsen*, 262 U. S. 140 (1923).

tained, for example, that Congress can exercise the same degree of control over production as it can over the carriers themselves. Can Congress, for example, recapture excess production under the theory of *Dayton Goose Creek Ry.* v. *United States*?[263] A farmer cannot gauge his production accurately due to weather conditions, insect pests, and soil differences. An attempt to comply with his quota may find him with a crop largely in excess of his expectations. Can the government appropriate this excess without compensation? When property is used for anti-social purposes it may be indirectly confiscated,[264] and regulations which destroy much of its value are permissible in the public interest,[265] but when condemnation is resorted to compensation must be paid. The provision in the Cotton Control Act placing a tax of 50 per cent of the market price on the ginning of the excess together with the provision that the government may buy it and pay 55 per cent of the market price[266] approaches very closely to condemnation at a price of 55 per cent of its value. It may be technically distinguished since the farmer is not compelled to sell and may hold it over and apply it under his next year's quota if the Act is still in effect.

The most obvious objection to the form of control set up by the Cotton Control Act is that the method by which the individual quota is determined is wholly arbitrary. Since there is no common denominator to which the production of all the crops under control may be reduced each crop must be handled separately.[267] How can a non-discriminatory quota be determined for each crop? In view of the different amounts of property controlled by each individual would an equal quota for each be non-discriminatory? *Peoples Petroleum Producers* v. *Smith*[268] holds that proration on this basis is wholly arbi-

[263] 263 U. S. 456 (1924) sustaining the power to recapture excess profits to aid the weaker roads.

[264] *Mugler* v. *Kansas*, 123 U. S. 629 (1887).

[265] *Euclid* v. *Ambler Realty Company*, 272 U. S. 365 (1926) sustaining a zoning ordinance which destroyed much of the value of the land.

[266] *Op. cit.*, Sec. 24.

[267] It has been suggested that production control associations should be formed to handle all the crops in a country, thus centering attention on the whole farming business rather than on individual crops. Planning for the Future, Report of the Administration of the Agricultural Adjustment Act, p. 273 (1933-34).

[268] 1 Fed. Suppl. 361 (1933), noted in 1 Geo. Wash. Law Rev. 399

trary because it bears no relation to capacity. Since each producer contributes to the flow of commerce according to his total production, a quota which bears no relation to his capacity would seem to be discriminatory. If the basis for regulation of individual production is its effect on interstate commerce, the individual quota should be based upon a standard which bears some relation to the extent his uncontrolled production would affect interstate commerce. Production over a past period of years has no relation to the effect present production will have on interstate commerce except in so far as it has aided in the contribution to the existing surpluses and this consideration would require a smaller quota for those who have raised the most in the past if it is to be considered at all. Past capacity to produce obviously has no relation whatever to the effect that present production will have on interstate commerce. Hence the standards set up in the Cotton Control Act, previously discussed in relation to classification for taxation, would have no reasonable relation to the purpose for which the classification is made and hence seems to result in a denial of due process of law.[269] It has been suggested that a quota based upon pres-

(1933). Compare *Williamette Lumber Co.* v. *Waztek*, U. S. Law Week., Feb. 6, 1934, at 39 (D. O. 1934), noted in 43 Yale L. J. 827 (1934) involving a quota under the N. R. A. Lumber Code in which all mills were restricted to a thirty-hour operating week. Some of the mills were operating on a double and some on a single shift. If different equipment was required, the allotment seems somewhat unfair, but as all mills were allowed to operate to capacity for an equal period, the allotment does bear some relation to the ability of each producer to affect interstate trade. The allotment was upheld as the most equitable that could be made.

[269] See *Airway Electric Appliance Corporation* v. *Day*, 266 U. S. 71, (1924), in which the court held that a fee required of a foreign corporation for the privilege of doing business, though it need not be measured by the exact value of the privilege, must bear some relation to the value of such stock. The court said that the number of shares not subscribed or issued has no relation to the privilege held by the plaintiff . . . and it is not a reasonable measure of such a fee. Just as authorized stock bears no relation to the value of the privilege, so past production or capacity bears no relation to the present effect of present production on interstate commerce. Compare *Interstate Transit, Inc.*, v. *Lindsey*, 283 U. S. 183 (1931), which presents a situation parallel to Congress' power to regulate production because of its *effect* on interstate commerce. The case involves the power of a State to tax interstate busses because of their *effect upon* the State highways. The court holds that the busses which are admittedly instruments of interstate commerce are taxable but being valid only if compensatory, the charge must necessarily be predicated upon *the use made, or to be made*, of the highways of the State. A tax based upon earning capacity

ent capacity would not be wholly arbitrary since capacity does bear some relation to the effect of individual production on interstate trade.

The California Cling Peach Marketing Agreement and License illustrates a more direct method of controlled output than the Cotton Control Act and depends entirely on the commerce power for its validity. It involves the outright licensing of canners with a definite quota assigned to each applicant.[270] The authority for licensing the peach industry is derived from Section 8, sub-sections 2 and 3 of the A.A.A. which authorizes the Secretary of Agriculture to enter into marketing agreement with processors, associations or producers, or others engaged in handling agricultural products in the current of interstate commerce and to license them to prevent unfair practices or charges that conflict with the policy of the Act. The agreement provided for a limitation of the pack to 10,000,000 cases and for an allocation to all canners who made application, based upon previous sales record, potential sales ability and outstanding contractual commitments.[271] This seems to be a much fairer basis than that provided in the Cotton Control Act except for the fact that no standards are set up by which it can be determined what weight is given to each factor. The constitutionality of the basis of allotment would largely depend upon the way it is administered. The Act was sustained by J. St. Sure in the District Court of California.[272] Had the case been appealed it would have presented some nice Constitutional questions. One of the provisions in the License is that each canner must pay $5.00 per ton subject to such additional assessments as shall be necessary to raise enough money to pay the farmers $15.00 per ton for all peaches which are unharvested due to the limitation of the pack. It is very doubtful if the A. A. A. authorizes any such requirement as it expressly limits the License to such terms, not in conflict with existing acts of Congress,[273] as

of the busses was therefore held to have no reasonable relation to the purpose for which the tax was permissible.

[270] Supra, note 5.

[271] *Ibid.*

[272] The A. A. A. and the License were upheld as a whole in *United States* v. *Caliston Packers Inc.*, 4 Fed. Supp, 660 (D. C. Calif. 1933), noted in 19 Iowa Law Rev. 376 (Jan. 1934).

[273] *Op. cit.*, Sec. 8 (3). This would seem to subject the License to the antitrust Laws although Marketing Agreements are exempted. *Id.*, Sec. 8 (2).

may be necessary to eliminate *unfair practices and charges.*[274] However, if the Court construes the act to authorize such conditions in the License, it raises, besides the question how great the burden upon engaging in activities connected with interstate commerce may be. This goes far beyond *Nebbia* v. *People*[275] which upheld the right of a State to fix the price of milk for under the license agreement the sale prices of peaches are not only fixed but the price which shall be paid the grower as well and the additional requirement that growers must be paid by the canners for peaches left unharvested. This provision seems to go far beyond such a case as *Nobel* v. *State Bank of Haskell*[276] which sustained a small levy on all banks for a mutual deposit insurance fund. It seems to come closer to a case like *Chicago, M. & St. P. Ry. Co.* v. *Wisconsin* where it was held that a State law requiring that the occupant of a lower berth be given the enjoyment of the space occupied by the upper berth when it was unoccupied was a deprivation of property in violation of the Fourteenth Amendment. It is difficult to see why canners can be compelled, as a condition to entering a useful occupation, to buy all the peaches that are grown by the farmers especially since it was not necessary in order to assure the public an adequate supply. This seems to go even beyond the *Dayton Goose Creek*[277] case in which the recapture of *excess* profits from operating a common carrier was upheld, for it applies regardless of profits, and the canner of peaches can hardly be treated as a Federal public utility.[278]

Another possible basis of attacking regulation of production or the validity of the individual quota is to show that it is confiscatory. Congress cannot require a carrier to charge rates that will effect a confiscation of its property or deny a reasonable

[274] Refusal to pay for peaches never received can hardly be either an unfair practice or charge under the most liberal construction of those terms. *Federal Trade Com.* v. *Gratz*, 253 U. S. 421, 427 (1920). "The words 'unfair competition' are not defined by the statute and their meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they included. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression or as against public policy because of their dangerous tendency to unduly hinder competition or create monopoly."

[275] *Supra*, n. 89.

[276] 219 U. S. 104 (1910).

[277] *Supra*, n. 263.

[278] See *People* v. *Nebbia*, *supra*, n. 89.

return on its investment. On principal it would seem equally obvious that Congress could not constitutionally limit the volume of traffic on a road to such a degree that the property would be confiscated. Logically it would seem that the same rule would apply to the property of farmers. In view of the many quotas and differences in investments and in operating efficiency, an attempt to apply the intricate rules of rate-making to each individual farmer would be ludicrous. But no insurmountable legal difficulty is involved at this point. In *Public Service Com.* v. *Utilities Co.*[279] the plaintiff sought to enjoin the enforcement of a specific, as distinguished from a maximum rate. The plaintiff and a competitor were both public service corporations engaged in serving the same city. There were not enough customers to return a profit to both companies. The plaintiff contended that it amounted to confiscation to prohibit it from cutting prices in order to drive its competitor from the field. The Court held that the plaintiff could be required to charge a reasonable price and if confiscation resulted it was due to competition and not to the rate.

By a parity of reasoning it can be argued that a producer may be required to limit his production to a reasonable amount and if he fails to make a return it is because of competition and other factors and not because of the reduction but in spite of it. This argument would not be very convincing, however, if the producer could show that prior to the forced reduction he was able to operate at a profit. In such a case, it would be necessary to resort to the doctrine that individual hardships cannot invalidate legislation which is enacted for the public welfare.[280] While Congress has no general welfare power as such, the delegated powers are intended to be exercised for the promotion of the general welfare. This being so, it would seem that the commerce power, like the police power, might be exercised for the general welfare even though it resulted in a taking of private

[279] 289 U. S. 130. (1933).

[280] *Grant* v. *Oklahoma City*, 289 U. S. 98 (1933), upholding a city ordinance requiring the posting of a $200,000 bond signed by a surety company authorized to do business in the state before engaging in drilling oil within the city limits. The plaintiff objected because he could not satisfy the conditions required by the surety company. He insisted that to require the bond and to allow the surety company to fix the conditions denied him due process.

property without compensation.[281] *Radio Commission* v. *Nelson Brothers*[282] is a case in which the interests of the public are held to be paramount to those of the individual in the regulation of interstate commerce. The Commission was empowered to license broadcasting stations and allocate time and frequencies according to public convenience, interest or necessity. The plaintiff's license was revoked and the frequency on which he was operating assigned to another station. To the plaintiff's objection the court said:

> "This court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprise." [283]

CONCLUSION

The taxing power as a means of controlling production affords no satisfactory method of controlling collateral economic questions which necessarily arise. There are no insuperable legal difficulties involved in extending the commerce power to the regulation of all phases of production which are closely related in an economic sense with interstate commerce. In deciding this question, legal precedents are not as important as social philosophy.[284] Federal control of production, if upheld, will mean an abandonment of the principle of dual sovereignty leaving state's rights pretty much an empty shell and it will involve the definite acceptance of constitutional change by judicial evaluation of social needs as well as by amendment.

From the ordinary citizen's point of view, the position which the Supreme Court takes regarding due process of law is of far greater importance than the proper division between State and Federal jurisdiction. The fundamental question involved is

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[281] *Nobel* v. *State Bank of Haskell*, 219 U. S. 104 (1910) ". . . it would seem that there may be other cases besides taxation in which the share of each party in the benefit of a scheme for mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." *Grant* v. *City of Oklahoma* 289 U. S. 266 (1933).

[282] 289 U. S. 266 (1933).

[283] Id. 282.

[284] See, Sharp, Movement in Supreme Court Adjudication, 46 H. L. R. 361, 795 (1933).

the extent to which individual freedom of action and use of property may be restricted by the total of the governing powers for the purpose of promoting general economic welfare.

Irrespective of the position the Supreme Court takes, such legislation is bound to leave a lasting impression on our social philosophy. Much has been done which can never be undone. In the long run the Supreme Court cannot stem the tide, though it may momentarily deflect it from its course. It remains to be seen in what direction the Supreme Court will steer.