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The Constitutionality of the A. A. A. Processing Tax

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To be able consciously to observe history in the making is always interesting. Frequently we do not realize the importance of events which we witness. Some events however are so obviously destined to influence substantially the current of national or international life that their results cast shadows before them. Such an event is the coming decision of the Supreme Court of the United States on the constitutionality of the processing tax imposed by the Agricultural Adjustment Act. A writ of certiorari to review the judgment of the First Circuit Court of Appeals in Butler, et al., Receivers of the Hoosac Mills Corporation v. United States holding the tax unconstitutional, has been granted.

Whatever disposal is to be made of this case is sure to affect the economic history of this country. Our legal history will be materially affected if the Supreme Court discusses the taxing power under the General Welfare Clause. This is true because the meaning of that clause has never been decided by the Supreme Court. It is a part of the first paragraph of Article 1, Section 8 which is as follows:

"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."
If this one paragraph should be construed as conferring several different powers—the taxing power being one and the power to provide for the general welfare another—the government would be clothed with

published in Elliott's Debates (J. B. Lippincott ed. 1896) is said to be copied from and carefully compared with the original in the Department of State. "Punctuation, paragraphs, and capital letters, same as said original." This copy as reproduced in Richardson, Journal of the Federal Convention Analyzed (1899) 234, 237, shows only a comma and no new paragraph or capital "T" in "to pay." See comment in note 8 to article by Corwin, 36 Harv. L. Rev. 551 (1923).

The history of the Constitution and the language of the document considered as a whole indicate that Congress was not intended to have the power to do anything and everything that would promote the general welfare. Otherwise why enumerate all the other powers? Enumeration would be unnecessary if Congress were authorized in the beginning to do everything that would provide for the general welfare. Federalist XLII; 1 Story, Commentaries on the Constitution of the United States (3d ed. 1858) §§907, 908; 4 Jefferson's Correspondence 524, 525, cited in Story, op. cit. supra, §926; Pomeroy, An Introduction to the Constitutional Law of the United States (4th ed. 1879) 174; Willoughby, Principles of the Constitutional Law of the United States (2nd ed. 1930) §58; United States v. Boyer, 85 Fed. 425 (W. D. Mo. 1898). See also the remarks of Governor Randolph and Mr. George Nicholas in the Virginia Convention, 2 Elliot, Debates (1828) 170, 195; of a Mr. Wilson in Pennsylvania, 3 Elliot, Debates (1828) 262.

In United States v. Boyer, District Judge Rogers says of Judge Story, at page 432 of 85 Fed.: "After a most elaborate and historical discussion of the subject, presenting the different views of the different political schools or parties, he concludes that the 'general welfare' clause 'contains no grant of power whatsoever, but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation.' Id. §911. I content myself with the fact that the former construction has never been sustained by any court, and the reverse has been held so often as not to require citations to support it; while the latter construction rests upon the theory that the 'general welfare' clause contains no power of itself to enact any legislation, but, on the contrary, the words 'and provide for the common defense and general welfare' of the United States, according to the most liberal constructionist, is a limitation on the taxing power of the United States, and that only."

Dr. Pomeroy in the passage cited above says: "... or does it [the Constitution] confer a limited power of taxation, by restricting the purposes for which taxes may be laid, and confining them to the payment of debts and provision for the common defence and general welfare? The latter construction is the one which has been almost universally adopted, although the language, taken apart from the context, is susceptible of the other. There are two grounds for preferring the interpretation which has been generally received. Both these clauses are found in a subsection which relates to taxation, and it would be doing violence to the context to wrest one of these from its natural connection and make it refer to a subject entirely different. But again: if the construction should be adopted which regards the second clause as an independent grant of power, it would, in effect, be making our general government unlimited. Providing for the common defence and general welfare includes every thing which any government could possibly do; and a grant of power in these broad terms would be the same as making Congress omnipotent, equal in the extent of its functions to the British Parliament.

"Section 274. The subsection should, therefore, be understood as though it read, taxes may be laid and collected in order to pay debts and provide for the common defence and general welfare." Yet at the time when the adoption of the Constitution was being debated there were those that took the other view. A delegate said in the New York convention: "I yesterday expressed my fears that this clause would tend to annihilate the state governments. I also observed that the powers granted by it were indefinite
much broader powers than the previous decisions of the Court have ever suggested. That the Court will so construe the clause is most unlikely. The result would be the abandonment of the doctrine that the Federal Government is a government of enumerated powers. The decision therefore may be expected to either hold or assume that the Welfare Clause is a description of the taxing power. In other words Congress may exercise the taxing power to pay the debts and to provide for the common defense and general welfare.

The Government’s petition for certiorari alleges that seven questions are presented by the case (Butler or Hoosac Mills Case):

"Whether the processing and floor stock taxes sought to be imposed by the Agricultural Adjustment Act, as amended, constitute an invalid exercise of the power of Congress under the Constitution:

"(1) In that said taxes are direct taxes and therefore should be apportioned under the provisions of Article I, Section 9, clause 4, of the Constitution.

"(2) In that said taxes are not uniform and therefore violate the provisions of Article I, Section 8, clause 1, of the Constitution.

"(3) In that said taxes amount to the taking of property without due process of law, in violation of the Fifth Amendment to the Constitution.

"(4) In that there has been improperly delegated to the executive with respect to said taxes, legislative power granted to the Congress by Article I, Section 8, clause 1, of the Constitution.

"(5) In that said taxes are not authorized by any authority vested in Congress under the Constitution, and hence constitute an improper exercise of the powers reserved to the States, in violation of the Tenth Amendment to the Constitution.

"(6) In that said taxes are not levied or the proceeds appropriated for the general welfare, but rather for a private as distinguished from a public purpose.

"(7) In that said taxes are to be expended for a purpose not authorized by any specific, composite or implied grant of constitutional power."

The more important questions are listed last and the seven problems will therefore be discussed here in reverse order.

since the congress are authorized to provide for the common defence and general welfare and to pass all laws necessary for the attainment of those important objects.” 1 Elliot, Debates (1828) 300. See also 2 id. 327, 328.

One of the most interesting discussions of this perplexing problem is that of Richardson, op. cit. supra. He advances the proposition that the language used was the result of a compromise and was intentionally made equally subject to either of two interpretations—the Federal or the National. The former interpretation would be that the power is to tax for the general welfare and perhaps that the general welfare is limited by the other enumerated powers, the latter interpretation that there is a substantive power to provide for the general welfare.


THE A. A. A. PROCESSING TAX

I

Is the tax invalid because the proceeds are to be expended for a purpose not authorized by the Constitution? The Constitution nowhere specifically authorizes appropriations by Congress. The power to appropriate certainly exists, however, and it has been held that tax money

The pertinent provisions of the Agricultural Adjustment Act are as follows:

Sec. 1. Declaration of emergency

"The present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

Sec. 2. It is hereby declared to be the policy of Congress—

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929...."

Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—

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

Section 9 levies processing taxes to be in effect when the Secretary of Agriculture determines that rental or benefit payments are to be made. The tax is to be paid by the processor on the first domestic processing at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity. The fair exchange value shall be the price that will give the commodity the same purchasing power as such commodity had during the base period specified in Section 2.

"Sec. 12 (b). In addition to the foregoing, [appropriation from any money in the treasury] the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments and refunds on taxes...." 48 Stat. 31 (1933) 7 U. S. C. A. §601 et seq. (1934 Supp.).

"The Government argues in its brief in the Supreme Court that as a matter of public policy respondents should not be permitted to question the appropriation as a defense to their taxes; and also that the appropriation is constitutional. Page 123.

"Having power to raise money for that purpose [to pay the debts] it of course follows that it has power when the money is raised to appropriate it to the same object." United States v. Realty Company, 163 U. S. 427, 440, 16 Sup. Ct. 1120, 1125, 41 L. ed. 215, 219 (1896).
can be expended for the purposes mentioned in the first clause\(^\text{10}\) of Section 8, Article 1 which confers the taxing power. First, taxes may be levied to pay the debts of the United States. Debts include moral obligations.\(^\text{11}\) The Agricultural Adjustment Act led farmers to believe that they would be paid rentals or benefits and they acted in reliance thereon. They were put in a position where they had to plan their planting with a view to the A. A. A. Those that elected to cooperate will be saved harmless from the reduction of their crops only if they are compensated by the Government. However, if these facts constitute a debt of the United States, Congress must have indicated an intention to pay the debt in order for the tax to be valid on this ground. The language of the Act\(^\text{12}\) indicates an intention to pay rentals and benefits for the purpose of raising the purchasing power of agricultural commodities, not for the purpose of discharging a debt.

Passing on to the words, "and provide for the common defense and general welfare,"\(^\text{13}\) the "common defense" obviously is not provided for by the Agricultural Adjustment Act. That brings us to the General Welfare Clause and the sixth question stated in the Government's petition.

**II**

Is the tax invalid because not levied for the general welfare but rather for a private as distinguished from a public purpose? The language used by the attorneys for the Government indicates an assumption of a connection between general welfare and public purpose. The assumption seems well founded. Doesn't "general welfare" put upon the taxing power the same limitations that result from the doctrine of "public purpose"? The Supreme Court has never decided\(^\text{14}\) that the Congress can impose taxes only for public purposes but the language used in

\(^{10}\) The *Realty Company* opinion, cited note 9, supra, assumes that Section 8 of Article 1 is as follows: The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States *etc.* See supra note 5. The present discussion will be based on this assumption.


\(^{12}\) See note 8, supra.

\(^{13}\) Still assuming that these words are a part of the first paragraph of Section 8 of Article 1 and are a part of the statement of the taxing power and not a statement of a separate power. Due to overlapping of questions 5, 6 and 7 of the Government petition the problem of whether the General Welfare Clause authorizes the appropriations is discussed in divisions II and III in connection with questions 6 and 5 of the petition.

\(^{14}\) But in South Carolina v. United States, 199 U. S. 437, 450, 26 Sup. Ct. 110, 112, 50 L. ed. 261, 265 (1905), appears the *dictum* that the grant is limited in two ways in Section 8. The revenue must be collected for public purposes and all duties, *etc.* must be uniform throughout the United States.
Citizens' Savings & Loan Association v. Topeka\textsuperscript{15} is broad enough to apply to the United States as well as to the individual states. Consequently it may safely be said that Congress can impose taxes only for public purposes either because of the inherent nature of the taxing power or because of the General Welfare Clause. Public welfare would apparently have the same meaning as general welfare.\textsuperscript{16}

Some half century ago Professor Cooley said, "There is no such thing as drawing a clear and definite line of distinction between purposes of a public and those of a private nature. Public and private interests are so commingled in many cases that it is difficult to determine which predominates; . . . all attempts to lay down general rules whereby the difficulty may be solved have seemed, when new and peculiar cases arose, only to add to the embarrassment instead of furnishing the means of extrication from it."\textsuperscript{7} Many cases have been decided since but the concept of public purpose remains vague.

In Citizens' Savings & Loan Association v. Topeka\textsuperscript{18} the Supreme Court of the United States said that in deciding whether in a given case the object for which the taxes are assessed falls upon the one side or the other of the line dividing private interest from public use, the courts 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. But in Green v. Frazier\textsuperscript{19} the same Court said that under the peculiar conditions existing in North Dakota that State could appropriate money to establish a state-owned system of warehouses, elevators, flour mills, factories, plants and equipment for the purpose of improving the marketing conditions for farm products and thereby realizing for the farmers just prices (that is, prices deemed by the legislature to be just). The "peculiar situation" referred to by the Court seems to consist mainly of the importance of agriculture to the State, the dependency of other industries on agriculture, and the impossibility or difficulty of improving the condition of agriculture without state aid. The same situation existed in the United States as a whole when the Agricultural Adjustment Act was passed. In the opinion in Green v.

\textsuperscript{15} 87 U. S. 655, 22 L. ed. 455 (1875). "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. . . . We have established we think beyond cavil that there can be no lawful tax which is not laid for a public purpose." 87 U. S. at 664, 22 L. ed. at 461.

\textsuperscript{16} Cf. Kansas Gas & Electric Company v. City of Independence, 79 Fed. (2d) 32 (C. C. A. 10th, Aug. 20, 1935), where it is said that the general welfare within the meaning of the Constitution is the national or general welfare; the limitation merely precludes the use of the Federal tax power for local or special purposes. The case holds PWA grants and loans valid.

\textsuperscript{17} Cooley, Law of Taxation (2nd ed. 1886) 106.

\textsuperscript{18} Supra note 15.

\textsuperscript{19} 253 U. S. 233, 40 Sup. Ct. 499, 64 L. ed. 878 (1920).
Frazier, the Court recognized that North Dakota was entering into activities which in the past had been considered as entirely within the domain of private enterprise. The view expressed in *Loan Association v. Topeka*, as to the controlling effect of customary practices of government was therefore disregarded.

The significance of *Green v. Frazier* in connection with the question of the public or private nature of the purpose behind the processing tax is emphasized by the fact that in each case the legislative body is endeavoring to raise prices by setting up a plan in which farmers are permitted but not forced to participate and by this statement in the *Green* opinion:

"This legislation was adopted under the broad power of the State to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people."20

The language used by the Court in describing the power of the State of North Dakota might be a paraphrase of the language of the General Welfare Clause of the United States Constitution. The Court held that under that power North Dakota could appropriate money to be expended for the purpose of raising prices of farm products. Why cannot the United States do the same thing—the same power having been expressly conferred upon it by the Constitution?

This broad view of the ultimate purpose of the two statutes is sound and establishes the *Green Case* as a precedent on the question of the public purpose of agricultural price fixing. A consideration which may militate against the acceptance of this case as a precedent in the A. A. A. case is the fact that in the scheme which the Supreme Court upheld the money was appropriated to state owned enterprises, whereas under the A. A. A. the money is paid directly to individual farmers. In some cases state ownership has been made the determining factor.21

The only direct appropriations to private business which the decisions have held valid are grants to railroads. Most courts hold that privately owned railroads may be given or loaned public money and land.22 One reason given is that long railroad lines cannot be financed without government aid.23 Thus *necessity* for government aid is an important factor. Another reason given is that railroads may be compared to ordinary

20 Italicis ours. *Id.* at 238, 40 Sup. Ct. at 501, 64 L. ed. at 881.
21 See Vette v. Childers, 102 Oda. 140, 149, 228 Pac. 145, 149 (1924). The Supreme Court's attitude is discussed in a note in (1928) 41 HARV. L. REV. 775. See particularly footnotes 6 and 8, page 776.
23 Perry v. Keene, 56 N. H. 514 (1876).
roads and these have long been the object of government spending. However, as already indicated, the question whether governments have customarily spent their funds for the purpose under consideration is becoming less important in the determination of the character of that purpose.

The railroad cases show that money is in some circumstances spent for a public purpose although granted to private persons. In the other decided cases the necessary circumstances simply were not present. The circumstances which justify a tax and appropriation to private persons are such as result in benefit to the public of sufficient importance to justify the expenditure. The mere fact that some individuals benefit more than the average member of the general public does not make the statute invalid. The establishment and maintenance of roads, schools, fire departments, canals, postal facilities, etc., mean more to some persons than to others. A stockholder of Sears, Roebuck & Company undoubtedly receives a benefit from the postal service many times greater and much more direct than that which the average inhabitant receives. The private benefit in such cases is sometimes said to be incidental. However the private benefit may truly be said to be incidental in all cases where the public benefit is sufficiently substantial. Where both the public and private individuals profit, the pertinent question is simply whether the public gain is important and substantial enough to justify the expenditure of public money. There is no sense in weighing the private gain also. In the past the courts have sustained the payment of money from the public treasury to private individuals only in the case of railroads because in no other cases presented for adjudication did the public welfare require such payments. It is believed that no

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Rogers v. Burlington; Perry v. Keene, both supra note 22. See Chamberlayne, The Sugar Bounties (1892) 5 Harv. L. Rev. 320, 325.

\[25\] 5 Harv. L. Rev. 320, 326, 340; Taylor v. Ypsilanti, 105 U. S. 60, 64, 26 L. ed. 1008, 1009 (1881).

\[26\] Of course the language of many cases is inconsistent with this doctrine but the decisions are not. The following language from railroad cases tends to support the argument advanced above:

"If the purpose is public it makes no difference that the agent by whose hand it is to be attained is private." Perry v. Keene, 56 N. H. 514 (1876).

"It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators; but it is nevertheless true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the services." Taylor v. Ypsilanti, 105 U. S. 60, 26 L. ed. 1008 (1881).

\[27\] Cf. A. Magnano Co. v. Hamilton, 292 U. S. 40, 43, 54, Sup. Ct. 599, 601, 78 L. ed. 1109, 1113 (1934): "And a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class."
court has held an appropriation to be for a private purpose when the money was to be distributed to a large group whose prosperity or lack of prosperity has a major effect on the welfare of the public and when the distribution was made for the purpose of establishing and stabilizing that prosperity.

In the cases in which the Supreme Court has held the tax or appropriation invalid the states have been seeking to aid a single manufacturing concern or a restricted class of manufacturers. The money spent on them would have only a slight effect on the welfare of the public.

The Court of Appeals of Kentucky has made a good presentation of the case for aid to agriculture in an opinion dealing with a county appropriation for the salary of the county agricultural agent:

"If it was essential to the establishment or existence of an enterprise to be set up and sustained by public aid that all members of the public or all members of any class should derive from it the same or like benefits or advantages, then it would be entirely impossible to describe a public enterprise in aid of which public funds might be set apart. There would not be any.

"The truth of this statement is so obvious that no elaboration is needed. It is seen in the operation and conduct of all those uses that are so distinctly public in their nature as to leave no room for doubt as to their public character. There is no public road or public school or public street or public park or public hospital from which some persons do not derive more benefit than others.

"It is not, however, necessary that the whole body of the contributing public shall be directly the recipients of the benefits or advantages accruing from the establishment of the object in aid of which public funds may be set apart. It will be sufficient if it should be of such a character as that it promotes the general welfare and prosperity of the people who are taxed to sustain it.

"Measured by these standards we have no doubt that public funds may be set apart to develop and promote the general agricultural interests of the state, because it is a matter of common knowledge of which everybody must take notice that in the agricultural interests of the state lie its chief source of wealth, and that the prosperity of the state springing from this source contributes to the growth and importance of every other industry in the state as well as to the comfort and happiness of the whole people. And it is in recognition of this indisputable and thoroughly known fact that appropriations made to stimulate the agricultural interests of the state have always been regarded as made for a public purpose."


The Agricultural Adjustment Act declares that an economic emergency exists and surely no fairminded person would deny that such an emergency did exist at the time the Act was passed. It is probable that at least so far as agriculture is concerned the emergency has not ceased. Does this have any effect on the nature of the purpose for which the tax is imposed? The Supreme Court has said with regard to legislative power to fix rents by regulation:

"Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern."

The same Court in an opinion upholding a law which fixed the hours of labor and a temporary wage scale between railroad employer and employee, said:

"The proposition begs the question, since 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."

This doctrine probably does not justify the tax as a regulatory measure under the Commerce Clause because that Clause even in an emergency can not give power to regulate production which is neither interstate nor foreign commerce. On the other hand the imposition of the

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\(^{39}\) Supreme note 8.

\(^{40}\) See Jennings and Sullivan, loc. cit. supra note 3.

\(^{41}\) Three of the factors creating the emergency are the change of the United State from a debtor to a creditor nation, the expansion of European agriculture under government subsidies, and the reduction of the stock feed market in the automobile age. The improvement of general business conditions will not relieve these and other conditions peculiar to agriculture. As to the first two conditions, cf. WALLACE, NEW FRONTIERS (1934) 40, 88. See also id. c. 15.


\(^{43}\) Wilson v. New, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. ed. 877 (1921). See also Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. ed. 413 (1934); Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289, 66 L. ed. 595 (1922); Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405, 68 L. ed. 841 (1924); and Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1923), where it is said: "A limit in time to tide over a passing trouble may well justify a law that could not be upheld as a permanent change." The A. A. Act does not show a clear intention for its operation to continue only during the emergency. It does provide that its purpose is to reestablish prices to farmers at a described level (see note 8, supra) and apparently contemplates that the Secretary of Agriculture will cease to exercise his powers under the Act when this level is reached. The question is, does this bring the case within the doctrine of Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1921), cited supra note 32.

\(^{44}\) "Over interstate transportation or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce, is a matter of local regulation." Hammer v. Dagenhart, 247 U. S. 251, 272, 38 Sup. Ct. 529, 531, 62 L. ed. 1101, 1106 (1918). "Extraordinary conditions do not create or enlarge constitutional power." Schechter v. United States, 55 Sup. Ct. 837, 842, 79 L. ed. 888, 894 (U. S. 1935).
tax as a measure to raise revenue to carry out the A. A. A. program may be sustained because the power to tax to raise money for public purposes has always existed and the emergency makes its exercise public.

III

The fifth question stated in the petition for certiorari in the Butler Case is: Does the processing tax constitute an improper exercise of the powers reserved to the states in violation of the Tenth Amendment to the Constitution? The powers reserved to the states are all those not delegated to the Federal Government.

One of the powers conferred by Article 1, Section 8 on Congress is the power to regulate commerce among the several states. Certain language in the A. A. A. indicates that Congress was relying at least partially on this power in passing the Act. The Supreme Court recently has held that Congress can only regulate the "flow" or "current" of interstate commerce and such matters as directly affect the "flow" or "current." The regulation of transactions involving articles at rest is not justified by the fact that these transactions indirectly affect commerce among the states. The same case decides that production cannot be controlled with a view to raising prices.8

Furthermore, regulation is not validated by being called a tax. In the well-known Child Labor Tax Case it was held that an act of Congress which clearly, on its face, is designed to penalize, and thereby to discourage or suppress, conduct the regulation of which is reserved by the Constitution exclusively to the states, cannot be sustained under the Federal taxing power simply because the penalty is called a tax. The Circuit Court of Appeals for the First Circuit in its opinion in the Butler Case assumes that the processing tax provisions are regulatory rather than revenue raising. Judge Wilson speaking for the Court says:

"The power of Congress to regulate interstate commerce does not authorize it to do so by taxing products either of agriculture or industry before they enter interstate commerce or otherwise to control their production merely because their production may indirectly affect interstate commerce. . . .

"The issue is not as the government contends, whether Congress can appropriate funds raised by general taxation for any purpose deemed by Congress in furtherance of the 'general welfare' but whether Con-


9 Id. at 851, 79 L. ed. at 905.

gress has any power to control or regulate matters left to the states and lay a special tax for that purpose.\textsuperscript{389}

With all due respect to the learned Court, it must be said that this proposition is unsound. Whether a tax is a regulatory measure or a revenue-raising measure depends upon the intention of the legislature as to the effect upon the taxpayer. An intention to regulate his actions by penalizing those not desired is a regulatory law.\textsuperscript{40} A primary intention to make the taxpayer contribute to the support of some government activity or activities creates a revenue-raising measure. In the Federal Courts the intention, it seems, will invalidate the act only if it clearly appears on the face of the act.\textsuperscript{41} If the provisions of the tax statute show a primary\textsuperscript{42} intention on the part of Congress to regulate the taxpayer then the statute is not an exercise of the taxing power and the question becomes one of Congress' power to make regulations in that particular field. Certainly the Agricultural Adjustment Act discloses no purpose to regulate the taxpayers (manufacturers or processors). So far as the tax and the taxpayer are concerned the statute is a revenue-raising measure. If anyone is regulated it is the producer, the farmer. But the tax is not levied on the farmer.\textsuperscript{43} Therefore the processing tax

\textsuperscript{389} 78 F. (2d) at 7.
\textsuperscript{40} "Grant the 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. . . . So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act. . . ." Child Labor Tax Case, note 38, supra.
\textsuperscript{41} In McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. ed. 78 (1904), the Court said of the tax on oleomargarine: "It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive."

See also Vezic Bank v. Fenno, 75 U. S. 533, 19 L. ed. 482 (1869). Of these cases Chief Justice Taft in the Child Labor Tax Case, note 38 supra, said: "In neither of these cases did the law objected to show on its face as does the law before us the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation." 259 U. S. at 42, 42 Sup. Ct. at 452, 66 L. ed. at 821. Cf. A. Magnano Company v. Hamilton, 292 U. S. 40, 44, 54 Sup. Ct. 599, 601, 78 L. ed. 1109, 1114 (1934).

Incidental regulation of a matter reasonably related to enforcement of the tax but otherwise beyond the power of Congress was upheld in United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. ed. 493 (1919), a case dealing with a special tax on the manufacture, importation and sale or gift of opium or coca leaves or their compounds or derivatives.

One of the purposes for which the processing tax money is appropriated is the payment of rentals and benefits for the reduction of acreage. The part the United States takes in the plan is to furnish the scheme of operation and the money, and to organize the growers. No governmental commands are issued to the growers. They are not ordered to reduce acreage. They are invited to do so and compensated if they accept. There is no regulation in the usual sense of the word.
is obviously not an instrument of regulation. It is not used to coerce. The Child Labor Tax Case dealing with a tax clearly appearing on its face to be a penalty is not applicable.

The Hammer and Schechter Cases which deal with the power of Congress over commerce are not in point. The Act under consideration is an exercise of the power to tax. It is true that most Federal taxing acts do not allocate the proceeds to particular use as this one does, but such an allocation does not change the nature of the provision imposing the tax nor prevent it from being a revenue-raising measure.

Does the power to lay and collect taxes, duties, imposts and excises to provide for the general welfare authorize the processing tax? We have already seen that a strong argument can be advanced to support the proposition that this tax is imposed for a public purpose. Therefore if Congress can lay taxes for any public purpose within the general welfare of the United States the processing tax is probably valid.

From the time of the drafting of the Constitution to the present the extent of the power conferred by the first paragraph of Section 8, Article 1 has been debated. Three views have been advanced. One is that the taxing power is conferred without limitation and the General Welfare Clause is a separate grant of power. As already pointed out this view is not tenable. A second view is that the expression "provide for the common defense and general welfare" is limited by the grants of power that follow it. According to this theory Congress can appropriate for the common defense and general welfare only by providing money to be used in regulating interstate and foreign commerce, in establishing an uniform rule of naturalization or bankruptcy, in coining money, establishing post offices, etc. The third view is the exact opposite of the second. It considers that the taxing power is defined by the first paragraph of Section 8 and is not restricted by the enumeration of other powers.

The third view is the strongest on both principle and authority but

However, even if the Supreme Court should consider that the provisions of the Act really amount to regulation of production or prices, the regulation would be accomplished by spending not by taxing. The Bailey Case therefore does not apply and it would seem that the spending power authorizes spending for any national public purpose.

Jennings and Sullivan, supra note 3, at 905.

Supra note 38.

Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101 (1918), a decision that Congress has no power to prohibit the transportation in interstate commerce of goods manufactured in a factory employing child labor.

Supra note 36.

The text preceding and following note 20, supra.

Supra note 5.

A thorough and convincing treatment of the question appears in Corwin, Spending Power of Congress (1923) 36 HARV. L. REV. 548. See also Kansas Gas & Electric Co. v. Independence, 79 Fed. (2d) 32, 37 (C. C. A. 10th, 1935);
the second is at least arguable. In the first draft of the Constitution the provision respecting taxation was: "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises,"\(^1\) without any qualification. Later the words, "to pay the debts, and provide for the common defense, and general welfare of the United States" were added.\(^2\) From this circumstance and from the fact that the first mention of common defense and general welfare in the Constitution was made in connection with debts, some significance is attempted to be drawn. Both Story\(^3\) and Madison\(^4\) refer to this but they reach opposite conclusions as to the meaning of the General Welfare Clause. Story adopts our third view, Madison the second. The truth is that none of the proceedings of the Convention referred to by these writers throws any light on the problem. The desirability of providing for the revolutionary debts may explain why the words were added but does not explain what they mean. The use of the words, "general welfare and common defense," in an early resolution\(^5\) of the Convention gives no information because they were there used to fix the type of debts that were to be paid, whereas no such use of them is made in the Constitution—in Section 8 of Article 1 they are separated from the word, "debts," by the conjunction, "and."

Mr. Justice Story in his *Commentaries* goes into the relation between the taxing power and the other powers at considerable length. Section 977 of the *Commentaries*\(^6\) is as follows:

"The argument in favor of the power [to make appropriations not within the scope of the other enumerated powers] is derived, in the first place from the language of the clause, conferring the power, (which it is admitted in its literal terms covers it) ; secondly, from the nature of the power, which renders it in the highest degree expedient, if not indispensable for the due operations of the national government; thirdly, from the early constant and decided maintenance of it by the government and its functionaries, as well as by many of our ablest statesmen, from the very commencement of the constitution. So that it has the language and intent of the text and the practice of the government to sustain it against an artificial doctrine, set up on the other side."

The admission, referred to by Story, that the literal terms of Clause 1 cover the broader power, was made by James Madison in a letter to

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\(^1\) JOURNAL OF THE FEDERAL CONVENTION (1819) 220.

\(^2\) Id. at 323, 326, 356, 494.

\(^3\) 1 Story, *op. cit. supra* note 5, §929.

\(^4\) 4 Elliot, *Debates* (2nd ed. 1836) 612.

\(^5\) JOURNAL OF THE FEDERAL CONVENTION (1891) 272.

\(^6\) *Supra note 5.*
Speaker Stevenson. Madison, however, argued for an interpretation contrary to the literal meaning, insisting that Congress could tax and appropriate only to carry out the other enumerated powers.

Later writers have adopted Story's view. Only one contrary opinion has been found among them. The opinion of many who participated in the drafting and adoption of the Constitution also accorded with that of Story. Some of the more prominent were George Washington, Alexander Hamilton, Andrew Jackson, James Monroe and John Q. Adams. Others of less prominence stated their agreement with this interpretation during the debates in the State Conventions. In several opinions the Supreme Court has referred to the power of Congress to tax for the general welfare without suggesting that the power is limited by the enumeration of other powers.

The executive and legislative branches of the Government have each repeatedly given this same interpretation to the taxing clause. Story was able to say in 1833 that with one exception every President of the United States had adopted this view. The notable exception was James Madison. Congress has from the beginning of its existence to the present acted in accordance with this view. Expressions by statesmen of

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Note 63 supra.
the period show clearly that early aid for internal improvements was furnished by Congress in the belief that the general welfare clause authorized such aid and that it was unnecessary to show that the improvements would affect either post roads or the raising of armies or commerce. Andrew Jackson thought that the purchase of the Louisiana Territory was an exercise of the power to spend for the general welfare and was not within the scope of any of the other powers.\textsuperscript{71} Congress has continued to spend on education, health and agriculture.\textsuperscript{72} Although unusually comprehensive and requiring an unprecedented amount of money the present program is not by any means the first aid to agriculture by the Federal Government. The very maintenance of the Department of Agriculture is an expenditure unconnected with any power except that conferred by the General Welfare Clause.

At least two appropriations similar to the A. A. A. benefits have been made by Congress in the past. The earliest was the provision for payment of bounties to the codfish industry during 1792 and the succeeding half century;\textsuperscript{73} the other, bounties to sugar-raisers to encourage the production of raw sugar in this country.\textsuperscript{74} In both of these appropriations it was provided that money was to be paid directly to individuals for their private gain. The payments served the nation only by encouraging important industries. The industries were not as important to the welfare of the public as agriculture is. Nor was business generally so much in need of aid in the periods when those bounties were granted.

The proper conclusion therefore is that the power of Congress to tax for the general welfare is not limited in any way by the enumeration of other powers in the Constitution. As Chief Justice Chase said of the words, “to pay the debts and provide for the common defense and general welfare”: “More comprehensive words could not have been used.”\textsuperscript{75}

Taxes imposed to raise money to be used for reestablishing the purchasing power of agricultural commodities are, under the present conditions of agriculture and business, imposed to provide for the general

\textsuperscript{71} 4 Elliot, Debates (2nd ed. 1836) 525, 526. But in American Insurance Company v. Canter, 26 U. S. 511, 542, 7 L. ed. 242, 255 (1828) Chief Justice Marshal said: “The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty.”

\textsuperscript{72} “An exposition of the Constitution deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.” McCulloch v. Maryland, 17 U. S. 316, 4 L. ed. 579 (1819).

\textsuperscript{73} 1 Stat. 229 (1792); §991 of 1 Story, op. cit. supra note 5.

\textsuperscript{74} 26 Stat. 583 (1890). See Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294 (1892), and Chamberlayne, The Sugar Bounties (1892) 5 Harv. L. Rev. 320, in which the discussion of the General Welfare Clause is inadequate. See also note 4 supra.

\textsuperscript{75} Veazie Bank v. Fenno, 75 U. S. 533, 19 L. ed. 482 (1869).
welfare. Therefore Congress, although probably without express power to control production or prices, has implied power (resulting from the taxing power) to control them by spending money. The Tenth Amendment is not violated since no power which is delegated to the National Government can at the same time be a power reserved to the states.

An interesting sidelight on the probable decision as to the processing tax's constitutionality is furnished by the argument of Charles Evans Hughes (then an attorney at the bar, now Chief Justice) in *Smith v. Kansas City Title Company.* He argued for an interpretation of the taxing power that would leave the phrase, "general welfare," unfettered by the subsequent enumeration of powers, saying:

"The federal appropriations in 1917 in support of agriculture amounted to upwards of $29,000,000, and in 1918 to upwards of $45,000,000. There can be no question as to the continuous practical construction of the powers of Congress to raise and appropriate money to the effect that this power is not limited to the objects enumerated in the subsequent provisions but extends what may properly be deemed to be embraced within the general welfare as expressly provided in the clause which confers the taxing power itself."

Of course the Chief Justice on the bench today may take a different stand from that asserted by the advocate at the bar some fifteen years ago. If he does not, that view presented to the Court then and neither accepted nor rejected may become the view of the majority of the Court. He is generally supposed to be the balance of power between the so-called liberal and so-called conservative justices. It is therefore possible that his opinion will decide the outcome.

IV

The fourth question in the petition for *certiorari* deals with the authority delegated to the executive. Both proponents and opponents

*Cf. this statement: "Hence it is that, though Congress has not a general legislative power to provide that the Federal Government may do everything whether by way of regulation or of direct control and operation, which may conceivably secure the common defense and promote the general welfare of the United States, it nevertheless has a general power to appropriate the public moneys of the United States for these purposes." Willoughby, *op. cit. supra* note 5, at 65.

In addition to the taxing and spending power the Government relies on the comprehensive national authority over revenue, finance and currency. See brief in Supreme Court in *Hoosac Mills Case,* page 241.


The report of the case gives only an outline of the brief. The quotation given here is reproduced from footnote 84, page 579 of Corwin, *supra* note 50.
of the Act recognize that the power to legislate cannot be delegated by Congress to any person or group of persons. On the other hand it is evident that in certain types of legislation power to administer the statute must be conferred on the President or executive departments. The Supreme Court decisions recognize the obvious and assign to Congress the function of "laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply."\(^7\)

The Agricultural Adjustment Act confers on the Secretary of Agriculture power to determine the existence of facts which initiate the tax, fix its rate and bring it to an end.\(^8\) That his initiation of the tax must be based upon a determination of facts which establish a need for the tax in order to produce revenue to put into effect the policies of Congress is shown by the following provisions: The tax goes into effect when the Secretary determines that benefit and rental payments are to be made.\(^9\) His power to provide for these payments is qualified by the words "to effectuate the declared policy."\(^10\) The declared policy of Congress is to reestablish prices to farmers at a level fixed by standards set forth in the Act.\(^11\) The exercise of the other powers\(^12\) conferred on the Secretary by Section 8 are of course subject to the same qualification if this interpretation is correct. The only other possible interpretation of Section 8 is that for the purpose of effectuating the policy of Congress, Congress gives the powers mentioned but the Secretary may exercise the powers without reference to the definitely stated policy. There is nothing to indicate that this absurd situation was intended. The declared policy therefore furnishes a set of standards established by Congress in accordance with which the executive is to provide subordinate rules and determine facts to which the policy can apply. This is in accord with the requirements prescribed in the Schechter Case.\(^13\) In that case the delegation of power by the N. I. R. A. was held unconstitutional. An examination of the declaration of policy\(^14\) in that

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\(^8\) \S9(a).
\(^9\) Ibid.
\(^10\) \S§8(1). Note 8 supra.
\(^11\) \S2. Note 8 supra.
\(^12\) Numerous matters are left by the Act to be dealt with by regulation of the Secretary but many of them are so obviously administrative that they do not warrant notice. Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 36 Sup. Ct. 236, 60 L. ed. 493 (1916). It does not seem that the number of administrative details left within the executive's control should invalidate the delegation of power —the intimation in Taxation Under the A. A. A. (at page 78, \S§50 and 51), supra note 55, to the contrary notwithstanding.
\(^14\) "A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the
statute will show, however, that the policy is not defined with the definiteness used in the A. A. - A. By the N. I. R. A. the President was authorized to approve or adopt Codes of Fair Competition to effectuate the declared policy which included the increase of the "consumption of industrial and agricultural products by increasing purchasing power." The Act did not state how the purchasing power should be increased nor to what extent it should be increased.

The A. A. A. on the other hand defines a level to which purchasing power is to be raised and provides that the means used shall be contracts for curtailing production. Nor does the Agricultural Act use any such undefined term as "fair competition" which the Court said in the Schechter Case added nothing to the insufficient generalities given to guide the executive. In Panama Refining Company v. Ryan another attempt in the National Recovery Act to delegate power to the President was held invalid. But what that Act sought to do was to delegate the power to prohibit transportation in interstate and foreign commerce of petroleum and petroleum products produced or withdrawn from storage in excess of the amount permitted by state law, without defining the circumstances and conditions in which the transportation was to be allowed or prohibited. In other words the executive would have unlimited discretion. Not so in the case of the processing tax. The tax is to be levied only when the Secretary finds that it will carry out the declared policy of Congress. The Schechter and Ryan Cases are apparently the only cases in which the Supreme Court has ever held Congressional delegation of power to the executive unconstitutional. In neither case was a definite declaration of policy such as the A. A. A. contains made.

A delegation of power quite similar to that in the Agricultural Act
was contained in a statute upheld in the *Flexible Tariff Case.* The President was authorized to raise the duty, determine when, how much and upon what goods it should be raised. In an earlier statute, which the Supreme Court also held constitutional, the power to tax goods on which no duty was placed by the act was delegated.

The District Court in its opinion in the *Hoosac Mills Case* says, after citing many decisions: "These cases demonstrate that when Congress has gone as far as it reasonably can in declaring a policy and the means to accomplish the end sought, leaving to administrative officers the filling in of details, the statute will very likely be upheld even if no definite standard has been established and though the functions are legislative in character." The Circuit Court of Appeals in reversing the District Court attempts to dispose of these cases by pointing out differences between them and the case under review which are not sufficient to sustain a distinction. It would seem that Congress went as far as it could in laying down standards in the statute. The end sought is such as to require great flexibility in the legislation. If it be thought that this is a borderline case the chance that the Act will be sustained is still good because the Supreme Court has held delegation of power by Congress invalid in only two cases although statutes have frequently been attacked on that ground. Furthermore there is a constantly growing tendency towards the delegation of greater powers by the legislatures and toward the approval of the practice by the courts.

If the original Act should be held unconstitutional and the tax therefore invalid, the Court must determine the effect of the amendment

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4 *Supra* note 1. A state statute similar to the A. A. A. was held unconstitutional in Chas. Uhden, Inc. v. Greenough, 43 P. (2d) 983 (Wash. 1935). The court does not analyze the statute in its opinion, contenting itself with glittering generalities such as: "It is manifest that, under Secs. 2 and 7, the Legislature attempted to delegate legislative power." "The Legislature is bound by the Constitution . . . and so are we . . ."  
5 Brewster, *infra* note 96.  
6 *Taxation Under the A. A. A., supra* note 84, treats the delegation of power as probably unconstitutional but Brewster, one of the authors of that book, had previously said that there was not much likelihood of the law being held unconstitutional because of the delegation of power. Brewster, *Is the Process Tax Constitutional* (1933) 19 A. B. A. J. 419.  
7 *Schechter and Ryan Cases, supra* notes 79 and 90.  
8 "The law thereon may be said to be in a condition of flux on some phases, and the last judicial word has not yet been spoken possibly." * Merchants' Exchange v. Knott,* 212 Mo. 616, 631, 111 S. W. 565, 568 (1908).
9 2 U. S. L. Week 1114, August 20, 1935. *Id.* 1125, August 27, 1935.
approved late in August, 1935, which in terms ratifies and confirms the taxes previously initiated by determination and proclamation of the Secretary of Agriculture. The general rule is that where an act purports to be done by authority of the state a defect in that authority may be cured by the subsequent adoption of the act.\textsuperscript{100} Application of this rule to a case like the present is doubtful if Congress could not originally have given the authority to the Secretary to do the acts.\textsuperscript{101} However the amendment may be valid as a retrospective tax act. Retrospective legislation is valid\textsuperscript{102} provided it does not affect vested rights and the taxpayer has no vested right in the tax rate.\textsuperscript{103} Apparently a tax may be levied on a privilege already exercised, so long as the tax is not unreasonable or arbitrary.\textsuperscript{104} Consequently the fourth objection of the receivers to paying the levy may be overruled either because the delegation of power to the Secretary of Agriculture was constitutional or be-

\textsuperscript{100} Tiaco v. Forbes, 228 U. S. 549, 33 Sup. Ct. 585, 57 L. ed. 960 (1913).

\textsuperscript{101} "Whilst it is admitted that Congress had the power to levy tariff duties on goods coming into the United States from the Philippine Islands or coming into such islands from the United States after the ratification of the treaty, it is yet urged that, as that body was without authority to delegate to the President the legislative power of prescribing a tariff of duties, it hence could not, by ratification, make valid the exercise by the President of a legislative authority which could not have been delegated to him in the first instance. But the premise upon which this proposition rests presupposes that Congress, in dealing with the Philippine Islands, may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select,—a proposition which is not now open for discussion." United States v. Heinszen, 206 U. S. 370, 385, 27 Sup. Ct. 742, 746, 51 L. ed. 1098, 1103 (1907).

"If the legislature possessed the power to authorize the Act to be done it could by a retrospective act cure the evils which existed because the power thus conferred had been irregularly executed." Thompson v. Lee County, 70 U. S. 327, 331, 18 L. ed. 177, 178 (1866).

After the decision of Chas. Uhden, Inc. v. Greenough, 43 P. (2d) 983 (Wash. 1935), cited note 94 supra, the Legislature of Washington passed an Act purporting to adopt the orders made under the former act. The Supreme Court of Washington held that this act was also invalid as an attempt to ratify an unconstitutional delegation of legislative power. State of Washington v. Matson Company, 2 U. S. L. Week 1104, July 27, 1935.


\textsuperscript{103} Milliken v. United States, 283 U. S. 15, 51 Sup. Ct. 324, 75 L. ed. 809 (1931).

cause Congress made the tax legal by subsequently adopting his determination.

V

Does the Act deprive the taxpayer of property without due process of law in violation of the Fifth Amendment? In *Magnano v. Hamilton* it is said:

"Except in rare and special instances the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. . . . That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."

The Act under discussion does in form and substance involve an exertion of the taxing power as shown above. It is not arbitrary but is reasonably suited to the purpose in view. The purpose of Congress was to raise money to be used in reestablishing prices to farmers at a level that gives agricultural commodities a purchasing power equivalent to their purchasing power in the base period. If this change in price were brought about by the operation of the law of supply and demand without the intervention of government the increase in price would have to be paid by the processor and might be passed on to the consumer. Congress has provided for the additional cost to be borne in the same way under the A. A. A. "In increasing these prices [of necessities] to consumers this plan does not place an unfair tax upon them but merely restores to farmers part of that which they have lost through the price inequalities brought about during the depression." Since the decision and opinion in *Nebbia v. New York*, it seems

The discussion in the present article is limited to the constitutionality of those fundamental provisions of the Act which form the backbone of the plan and are so essential that the policy of Congress can not be carried out unless they are sustained. The Act contained a separability clause (§14, 17 U. S. C. A. §614) which will preserve the validity of the Act although nonessential details may be held invalid. Because of limits in time and space these nonessential features, such as licensing provisions, compensating and floor stock taxes, and sugar quota regulations, will not be treated.


to be settled that the requirement of due process does not prevent government price fixing by the states in business which the public interest requires shall be regulated. In this connection attention must again be called to the fact that the price fixing under the A. A. A. is accomplished not by governmental sanction but by pecuniary inducement to crop reduction.\textsuperscript{111} For these reasons—the reasonableness of the tax scheme, the public interest in the purchasing power of agricultural commodities, and the voluntary and contractual nature of the price fixing—the Fifth Amendment apparently is not violated.

VI

The two remaining objections to the tax can not both be sustained to any one tax because one assumes that the tax is direct and the other that it is indirect, but one may apply to the processing tax and the other to the floor stock tax.

The second question raised in the government's petition for \textit{certiorari} is whether the taxes are invalid in that they are not uniform and therefore violate the provision of Article 1, Section 8, Clause 1 of the Constitution.\textsuperscript{112} It is now well settled that this provision of the Constitution only requires geographical uniformity.\textsuperscript{113} Classes may be created and conditions imposed so long as the conditions and basis of classification apply to all parts of the United States alike.\textsuperscript{114} The argument of the taxpayer is based upon the provision of Section 11 of the Act which authorizes the Secretary of Agriculture to exclude from the operation of the Act any basic commodity or any regional classification thereof. It is true that the exercise of this authority by the Secretary might result in the same commodity being taxed if it came from one part of the country and exempt if produced in another. This could occur however only if the Secretary found that conditions were different in the two sections. The rule is therefore uniform. The fact that the appli-


\textsuperscript{111} Supra notes 43, 41.

\textsuperscript{112} Quoted in third paragraph of this article.


cation of the rule to the different sections would bring different results does not make the rule unconstitutional.\textsuperscript{115}

VII

Are the taxes imposed by the Agricultural Adjustment Act direct taxes and invalid because not apportioned under the provision of Article 1, Section 9, Clause 4 of the Constitution? A strong argument can be advanced for the proposition that the floor stock taxes are direct taxes.\textsuperscript{116} The discussion here will be limited to the processing taxes because, although the floor taxes are important, they are not essential to the execution of the purpose of Congress and if found to be invalid may be eliminated in accordance with the separability clause of the Act, leaving the rest of the statute constitutional.\textsuperscript{117} The question remains whether the processing tax is a direct tax or an excise tax.

The Supreme Court is at present committed to the doctrine that direct taxes in the constitutional sense embrace all levies on real or personal property because of its ownership.\textsuperscript{118} On the other hand those taxes which are imposed upon the exercise of a privilege connected with ownership are not direct.\textsuperscript{119} The processing tax seems to fall clearly within the second class. The charge is based upon the processing, that is upon the privilege or act of processing.\textsuperscript{120} The tax therefore is not subject to the provisions of Article 1, Section 9, Clause 4. The conclusion that the tax is not direct makes it of course subject to the requirement of uniformity but as shown above that requirement has been complied with.

In conclusion, the constitutionality\textsuperscript{121} of the processing tax depends first upon the proper construction of the General Welfare Clause of the Constitution. An interpretation which limits the taxing and spending power to purposes connected with the other enumerated powers will be


\textsuperscript{118} Cases supra notes 114, 115.

\textsuperscript{119} 48 STAT. 528, 7 U. S. C. A. §609(a) (1934 Supp.).

\textsuperscript{120} If the Supreme Court should decide in the Hoosac Mills Case that the A. A. A. is unconstitutional the decision would probably not settle the hundreds of suits for injunction which have been filed by tax payers all over the country because the Hoosac Case is a receivership proceeding and does not involve the question of the availability to a taxpayer of the remedy by injunction. The Supreme Court has itself granted temporary injunctions in eight cases brought by rice processors. 3 U. S. L. Week 209, Nov. 26, 1935.
contrary to the practical construction given by the legislative and executive branches of the government since the adoption of the Constitution.

Second, it depends upon whether the purpose of the A. A. A. appropriations is public or not. The cases make the answer to this question obscure. On principle the purpose is clearly public.

Third, it depends upon the validity or invalidity of the delegation of power to the Secretary of Agriculture. This seems to be the greatest danger point in the government’s case. The delegation does not necessarily make the Act unconstitutional, however, because the declared policy of Congress is much more definite than it was in the N. I. R. A.

If factors other than technical rules of law are to enter into the decision, some of them at least seem to favor the sustaining of the Act. It is time that Mr. Justice Brandeis, if he believes in social experimentation, give some encouragement to the New Deal since the two decisions against the N. I. R. A. certainly have had the opposite effect. Furthermore, in view of the long established high tariff policy which discriminates against the farmer and in favor of the manufacturer (processor) social justice seems to require some such adjustment as is attempted by the statute in question.

122 Frankfurter, Mr. Justice Brandeis and the Constitution (1931) 45 Harv. L. Rev. 33, 44; Mason, Mr. Justice Brandeis and the Constitution (1932) 80 U. Pa. L. Rev. 799, 823; Hamilton, The Jurist’s Art (1931) 31 Col. L. Rev. 1073; Richberg, The Industrial Liberalism of Justice Brandeis (1931) Id. 1094.

123 WALLACE, op. cit. supra note 31, 137 and c. c. 7, 11.