

No. 401

In the Supreme Court of the United States

OCTOBER TERM 1935

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL., RECEIVERS OF HOOSAC
MILLS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM 1935

No. 401

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL., RECEIVERS OF HOOSAC
Mills Corporation

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts is reported in 8 Fed. Supp. 552, under the style of *Franklin Process Co. v. Hoosac Mills Corp.* (R. 14-28). The opinion of the Circuit Court of Appeals (R. 33-49) is reported in 78 F. (2d) 1.

JURISDICTION

The decree below was entered July 13, 1935 (R. 49). The petition for a writ of certiorari was filed

August 27, 1935, and was granted October 14, 1935 (R. 50). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the processing and floor-stocks taxes sought to be imposed by the Agricultural Adjustment Act, as amended, upon the Hoosac Mills Corporation, constitute a valid exercise of the powers of Congress under the Constitution.

STATUTES INVOLVED

The pertinent provisions of the Act of Congress of May 12, 1933, c. 25, 48 Stat. 31, known as the "Agricultural Adjustment Act", as amended, are set forth as Part A of the Appendix, which is separately printed.

STATEMENT

On October 7, 1933, the Franklin Process Company filed a bill of complaint against the Hoosac Mills Corporation in the District Court (R. 1), and thereupon a decree was entered appointing William M. Butler and James A. McDonough receivers of the latter corporation (R. 1-4).

On or about February 12, 1934, the United States, through Joseph P. Carney, Collector of Internal Revenue for the collection district of Massachusetts, filed a claim with the receivers seeking to collect cotton processing and floor-stocks taxes due

from the Hoosac Mills Corporation, a processor of cotton, pursuant to the provisions of the Act of Congress approved May 12, 1933, known as the Agricultural Adjustment Act (R. 9).

Said corporation, or its receivers, had previously filed with the Collector of Internal Revenue original and amended floor stocks tax returns containing an inventory of articles processed wholly or in chief value from cotton, held for sale or other disposition by it on August 1, 1933, and showing a tax liability on account thereof for the tax imposed under Section 16 and related sections of the Agricultural Adjustment Act, and also monthly processing tax returns for the period August 1, 1933, to October 7, 1933, inclusive, showing the number of pounds of cotton put in process by it during said period, and showing the tax liability on account thereof for the tax imposed under Section 9 and related sections of said Act. A portion of the taxes shown therein was paid by the Hoosac Mills Corporation, or the receivers (R. 10).

The receivers, in their first report on claims (R. 5-8), on various grounds set forth in the report, recommended that the Government's claim be disallowed (R. 8).

The Government's claim is for the unpaid balance (plus interest thereon) of processing tax in the amount of \$43,125.35, plus a penalty of \$286.30, and for the unpaid balance (plus interest thereon) of floor stocks tax in the amount of \$37,466.37

(R. 10). The District Court found that there is no dispute regarding the amount of the balance due the United States on its claim, that the total amount thereof is now due and owing to the United States from the corporation, and that it has been correctly computed (R. 11).

Pursuant to the provisions of said Act, the Secretary of Agriculture determined and, under date of July 14, 1933, proclaimed, that rental and/or benefit payments were to be made with respect to cotton, a basic agricultural commodity (R. 11).

On the same date, the Secretary of Agriculture, by regulations approved by the President, pursuant to the formula prescribed by the Act (Sec. 9), determined as of August 1, 1933, that the rate of the processing tax on cotton was 4.2 cents per pound of lint cotton, net weight, this amount equalling the difference between the current average farm price of cotton and the fair exchange value of cotton¹ (R. 11). The fair exchange value of cotton was based upon the average of farm prices of cotton during the period August, 1909, to July, 1914 (the base period), and an index re-

¹ The respondents assert (Br. in Opp. 3-4), in response to a similar statement in the petition for certiorari, that "the record fails to reveal that the tax was computed in accordance with any formula or that the rate of tax fixed equalled the difference between the 'current average farm price of cotton' and the 'fair exchange value of cotton'?" It is submitted that this statement is in complete disregard of Findings 9, 10, and 12 (R. 11, 12) and the uncontroverted evidence in the case (Addendum 2, 23).

flecting increases of current prices paid by farmers for commodities which they bought, over the prices of such commodities during said base period. The current average farm price, the average farm price during the base period, and the index were determined, respectively, in accordance with long-established practice and were based upon reports and statistics regularly collected by the Department of Agriculture (R. 11).

The Secretary, with the approval of the President, also determined conversion factors which were established to determine the amount of tax imposed or refunds to be made with respect to articles processed from cotton (R. 11).

The Secretary further determined that the marketing year for cotton began August 1, 1933 (R. 11). This determination was consistent with the cotton year recognized by the Department of Agriculture, the Department of Commerce, private agencies in the United States and foreign countries, as well as by earlier Congressional legislation, and was properly ascertained and prescribed (R. 11-12).

The District Court found that (R. 12)—

The receivers do not question the regularity of the acts of the Secretary of Agriculture under the Agricultural Adjustment Act and do not question that his regulations, and the provisions thereof, were properly and correctly promulgated and were in conformity with the said Act. They also do not

question that the rate of tax was properly computed in accordance with the provisions of the said Act. At the hearing, language questioning the legality of acts of the Secretary of Agriculture was, on motion of the receivers, stricken from the receivers' report.

The evidence introduced on behalf of the United States discloses and supports the factual grounds upon which the Congress proceeded in its declaration of an emergency and of a legislative policy, and upon which the Secretary of Agriculture proceeded in executing that policy. No evidence has been introduced in behalf of the receivers of the Hoosac Mills Corporation tending to contradict or disprove the findings made by the Congress, and the basis for such findings, in the declaration of emergency set out in the Agricultural Adjustment Act.

In addition to the showing made by the evidence submitted by the United States, as set out above, Government Exhibits 2-3, 2-4, 2-5, 2-6, 3-1, 3-2, 3-3, which are uncontested, show the nature and details of the factual formulae prescribed by Congress which are to be considered in the determination by the Secretary of Agriculture of the rates of processing taxes on basic agricultural commodities. In addition, there is in the record uncontested testimony showing the physical basis on which the Secretary of Agriculture ascertained and established

the conversion factors to determine the amount of tax imposed or refunds to be made with respect to articles processed from cotton.

The District Court rendered its opinion (R. 14–28) holding that the processing and floor-stocks taxes imposed by the Agricultural Adjustment Act do not violate any of the provisions of the Constitution and that the claim of the United States should be allowed, and in its decree (R. 13–14) allowed the same.²

Thereupon respondents appealed to the Circuit Court of Appeals, and that court, Senior Circuit Judge Bingham dissenting, reversed the decision of the District Court primarily on the ground that the Act, in violation of the Constitution, delegated the legislative power to tax to the executive branch of the Government, and secondarily on the ground that in the guise of a tax the Act purports to control production of agricultural commodities in vio-

² In response to a statement in the petition for certiorari (p. 5) that “in the stages of this litigation subsequent to the receivers’ report no specific exception has been taken by the respondents to the denial of their contention that as receivers they were not subject to the penalty or to the payment of interest after the date of the receivership”, the respondents state (Br. in Opp. 3) “the decree contains no provision requiring the payment of any penalty after the date of the receivership, and fails to fix any rate of interest to be charged after the date of the receivership.” The only penalty involved is that of \$286.30 for the month of August 1933, allowed by the decree (R. 13–14), which also specifically allowed interest “at the rate allowed by law from and including February 10, 1934, to the date of payment.”

lation of the Tenth Amendment to the Constitution. The court did not pass on the questions as to whether the processing and floor-stocks taxes are excises and not direct taxes, whether they are uniform, whether they violate the Fifth Amendment to the Constitution, and whether they are levied for the general welfare of the United States, for a public purpose and not a private one, all of which questions were argued orally to the court and discussed in the briefs presented to it.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that Congress improperly delegated to the Executive, with respect to the processing and floor-stocks taxes, the power granted to it by Article I, Section 8, Clause 1, of the Constitution.

(2) In holding that the processing and floor-stocks taxes constitute an exercise of powers, reserved to the States, in violation of the Tenth Amendment to the Constitution.

(3) In reversing the decree of the District Court.

The Government also urges that the Circuit Court of Appeals further erred:

(4) In failing to hold that the processing and floor-stocks taxes are excises and not direct taxes.

(5) In failing to hold that the processing and floor-stocks taxes are uniform throughout the United States.

(6) In failing to hold that the processing and floor-stocks taxes are not violative of the Fifth Amendment to the Constitution.

(7) In failing to hold that the processing and floor-stocks taxes are levied for the general welfare of the United States, for a public and not a private purpose.

(8) In failing to hold that the respondents are not in a position to object to the expenditure of funds appropriated by Congress from the Treasury for the purposes of the Agricultural Adjustment Act.

(9) In failing to hold that the processing and floor stocks tax provisions of the Agricultural Adjustment Act constitute a valid exercise of the taxing power of Congress under the Constitution.

(10) In failing to hold that the processing and floor-stocks taxes are levied pursuant to powers granted to Congress by the Constitution.

(11) In failing to hold that the claim of the United States for cotton processing and floor-stocks taxes under the Agricultural Adjustment Act was a valid claim and in failing to order that such claim should be allowed and paid.

SUMMARY OF ARGUMENT

These taxes are levied under the power granted to Congress by the Constitution to lay and collect taxes. We first consider the taxes separately from any questions as to the use by Congress of the revenue to be derived from them.

The Act in this respect is purely a revenue measure, its only purpose and function being to raise money. The processing tax is an excise upon a particular use of a commodity. The floor stocks tax adjustment, considered separately, is a levy on the holding of manufactured goods for a particular purpose, a type of imposition already held to be an excise by this Court. This adjustment may also be sustained as a measure in aid of, and necessary to, the effective administration of the processing tax, for without these provisions wide-spread avoidance of the processing tax would have been possible, causing grave dislocation of business and marketing conditions. Both the processing and floor stocks taxes operate uniformly throughout the United States. In selecting subjects for taxation, Congress is not confined to those which exist uniformly in every State.

There is no delegation of legislative authority with respect to the rate of the tax. Congress provided a fixed mathematical formula which fixes the rate: the difference between the current average farm price and the fair exchange value of the commodity. The fair exchange value is defined as the price for a commodity that will give it the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in the Act. Determination of the current average farm price and the fair exchange value is to be from "available statistics of the Department of Agriculture." Statistics showing the current

average farm price of commodities and the prices paid by farmers for articles they buy had been collected and tabulated according to an established procedure and regularly published by the Department of Agriculture for many years prior to the passage of the Act. Congress was familiar with these statistics and the procedure used in collecting them. Consequently, Congress' direction to compute the rate by applying the above formula to these statistics constituted a direct legislative determination of the rate of the tax. The Secretary is directed to reapply the formula whenever new price levels have been reached.

In the only circumstance in which a rate different from that fixed under the prescribed formula is called for, an appropriate standard is laid down for determining such rate. The circumstance is where the Secretary finds, after notice and opportunity for hearing, that the tax at the rate prescribed by the formula will cause such reduction in the quantity of the commodity domestically consumed as to result in the accumulation of surplus stocks of the commodity or in the depression of the farm price. Upon the finding of this fact, the Secretary may lower the tax to such a rate as will prevent the decrease in consumption. The Secretary is authorized only to lower the rate fixed under the formula—not to increase that rate. There is no improper delegation of legislative power in this provision. Moreover, this provision and that directing the reapplication of the formula are sep-

arable and have never been used with regard to the tax here in issue, so that the question of the validity of these provisions is academic.

Objections to the Act based upon the principle of separation of powers seem to rest primarily on the argument that the Secretary of Agriculture may impose the taxes whenever he sees fit. We contend that, on the contrary, the event which starts the tax is controlled by definite standards provided by Congress. The Secretary is given power to initiate reduction programs "in order to effectuate the declared policy." This policy provides a standard which calls only for determination as to whether the goal of given price levels have already been reached, or will be reached in the immediate future without reduction, whether the factors which determine farm price are such that a given reduction of production will raise the price, and whether reduction can be accomplished by voluntary methods. These matters are capable of factual determination, and the Act requires or forbids the Secretary to initiate a reduction program according to the result of these determinations.

Furthermore, respondents fail to distinguish between discretion given the Secretary in the spending of money and discretion given him in making the taxes effective. The taxes become effective upon any one of a limited number of commodities named by Congress, when the Secretary determines, and so proclaims, that rental and benefit pay-

ments with regard to such commodity should be made. This decision relates solely to the spending of money, an executive function, as to which there can arise no question of delegation of legislative power. In the making of this decision, consideration as to the time the tax is to commence is not relevant and would be improper. Congress has conditioned the commencement of the tax upon the happening of an event which occurs, without regard to the tax, during the lawful discharge of a public office.

In any event, the issue concerning improper delegation of legislative power is immaterial, because Congress has expressly ratified the assessment and collection of these taxes. By this ratification Congress has made unquestionable the exercise of its own discretion and has specifically determined itself that the taxes at the rate and upon the subjects here involved were proper and advisable. The limitation upon the right of Congress to delegate is that Congress may not abdicate its essential function of determining matters of policy. If there were any abdication here in the first instance, that abdication was cured when Congress determined the matters of policy by the ratification. Congress has not attempted to ratify acts which it could not have authorized. The acts ratified are the assessment and collection of taxes at specific rates on specific commodities. This Congress could have authorized and directed in the first instance.

The taxes imposed on respondents do not violate the Fifth Amendment. Clearly the taxing provisions of the Act have a reasonable relation to the raising of revenue. There is nothing arbitrary or capricious in levying a tax measured by the amount of a basic commodity processed by the taxpayer. Contention that the Fifth Amendment is violated because the taxes are not for a public purpose is based, not on the character and effect of the tax, but on the argument that money will be taken from the Treasury and devoted to uses not within the powers of Congress.

This argument, we submit, is the basic proposition upon which rest most of the contentions against the validity of the taxes. In answer to it, we urge, first, that respondents should not be allowed to defeat their otherwise valid taxes by challenging the appropriation contained in the Agricultural Adjustment Act. The actual use to which respondents' money will be put is indeterminable. Where the appropriation and the taxes were contained in separate Acts this Court has refused to allow the appropriation to be questioned. As a matter of public policy, no different rule should apply where the taxes and the appropriation are contained in the same Act, especially where, as here, the appropriation itself leaves uncertain the eventual disposition of the money.

Further, we submit that if the appropriation in the Act be considered, the taxes are nonetheless an exercise of the power given to Congress by Article

I, Section 8, Clause 1 of the Constitution—to lay taxes to provide for the general welfare. The general-welfare clause should be construed broadly to permit the levying of taxes to raise revenue for any purpose conducive to the national welfare. It is not limited by the subsequently enumerated powers. This is shown by the plain language employed; by settled rules of constitutional construction; by the circumstances surrounding the adoption of the clause in the constitutional and ratifying conventions; by the views of those who played a principal part in the adoption and early application of the Constitution; by the opinions of later constitutional authorities; by the continuous construction given the clause by the legislative and executive branches; and by the decisions of this Court and the inferior courts. Many of our most familiar and significant policies and institutions are based on this literal interpretation of the clause. The adoption at this late day of the narrower construction would result in grave dislocations and would measurably retard the advancement of public health, education, the sciences, and social welfare.

Moreover, as shown by the structure of our Government and the views of those creating it, the determination of what is for the general welfare, being a question of policy, is primarily for Congress to decide. This Court will not substitute its judgment for the judgment of Congress on that question.

The circumstances which called forth this legislation and the ends it was designed to accomplish can leave no doubt that there was ample reason for the determination by Congress that these taxes were levied to promote the welfare of the Nation. The entire Nation was suffering from increasing economic disintegration evident in every phase of activity. The shrinkage of rural buying power had dried up the flow of industrial products from cities to country. Previous governmental efforts to support farm prices and income had failed because of continued farm production in excess of consumption. Foreign markets for farm products had been sharply narrowed, as had been the domestic demand therefor. Record surplus stocks of basic commodities resulted and depressed farm prices far below other prices. The situation was due to causes beyond the control of farmers, and was not correcting itself. Efforts by individual States to control production (in the case of cotton) in order to reduce burdensome surpluses also had failed. It was entirely reasonable to assume that Federal efforts to aid farmers to balance production and consumption and to reduce the price-depressing farm surpluses would result in a marked increase in rural buying power and material economic improvement among the rural population, forty-four percent of the Nation's citizens. Furthermore, the known economic interdependence between agriculture and industry is so close as to make it reasonable to expect that a revival of farm

buying power would be reflected broadly in other industries through the direct and indirect effects of renewed rural spending; that incomes of industrial workers would rise faster than living costs would advance; and that improved prices and increasing farm income would be followed by expanding industrial activity and improved credit, financial and trade conditions, and increased employment, as had been true in the past. These expectations of general benefit to the entire Nation have been verified by subsequent results. It is clear, then, that the Agricultural Adjustment Act was an exercise of the power given Congress to levy taxes for the general welfare.

And since the taxes were imposed to provide for the general welfare, they also satisfy the requirement of public purpose, as it is inconceivable that a tax should be for the general or national welfare and at the same time not be for a public purpose.

The Act may also be sustained as an exercise of the fiscal powers of Congress. The sudden decrease in the amount of farm income, added to the long period of price decline and general liquidation which had characterized agriculture during the preceding decade, had brought the agricultural credit structure to the verge of collapse. Not only the commercial institutions, such as banks and insurance companies, but also the Federal fiscal agencies, which Congress had established, were endangered, and their proper functioning was impossible. Hav-

ing for its purpose the restoration of farm income, and thereby the reestablishment of the value of the agricultural assets underlying the financial system, the Act was reasonably designed to protect the fiscal agencies of the Government and to restore and maintain the credit necessary to the economic life of the country.

There is no attempt here by Congress to exercise, contrary to the Tenth Amendment, powers reserved to the States or to the People. The provisions here challenged authorize only the collection and expenditure of revenue. No rules are prescribed by which agriculture is to be governed. The control of the States or the People over local affairs is not destroyed or interfered with; the operation of State laws has not been superseded; nothing is to be done without voluntary consent. Even if there were interference, however, it would be unobjectionable under the Tenth Amendment, because the interference would be a necessary and unavoidable result of the exercise by Congress of powers given it by the Constitution.

ARGUMENT

GENERAL SCOPE OF THE AGRICULTURAL ADJUSTMENT ACT

Presented in this case is the issue of whether the Agricultural Adjustment Act imposes constitutional taxes which must be paid by respondents as receivers of the Hoosac Mills Corporation.

The Agricultural Adjustment Act is the first title of a comprehensive enactment dealing with

the economic emergency.³ As expressed in its title, the purposes of this entire statute were 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, and to provide for the orderly liquidation of joint stock land banks.

The Act opens with a declaration of emergency. Essentially, it is therein stated that the economic emergency is in part due to the disparity between the prices of agricultural as contrasted with other commodities, which disparity has largely destroyed the purchasing power of farmers, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure. Then follows a declaration of policy (Sec. 2) wherein it is stated in brief to be the policy of Congress to establish and maintain such balance between production and consumption of agricultural commodities 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 such purchasing power in a specified base period.

³ Approved May 12, 1933, c. 25, 48 Stat. 31. Section 8 (a) of the National Industrial Recovery Act, c. 90, 48 Stat. 195, provided that Title I of the Act of May 12, 1933, might "for all purposes" be thereafter referred to as the "Agricultural Adjustment Act."

To effectuate this declared policy, the Act authorizes⁴ rental or benefit payments to be made to farmers in return for a voluntary reduction in production of named basic agricultural commodities (Secs. 8 and 11). Provision is made for withdrawal of any of these commodities from the operation of the Act if the Secretary of Agriculture finds, on investigation and notice and hearing, that the conditions of production, marketing, and consumption of the commodity are such that the Act could not be effectively administered to the end of effectuating the declared policy (Sec. 11). When, however, the Secretary determines that rental or benefit payments are to be made with respect to one of the commodities and proclaims the same, there automatically becomes effective by virtue of the Act a tax on the first domestic processing of such commodity, commencing with the start of the next marketing year (Sec. 9).

The tax which the Act thus imposes is to be paid by the processor of the commodity (Sec. 9 (a)) and is to be at such rate as equals the difference between the current average farm price for the commodity and its fair exchange value determined as of the date the tax first takes effect (Sec. 9 (b)). The fair exchange value of a commodity is defined to be the price therefor that will give the commodity the same purchasing power, with respect to

⁴ After dealing with cotton-option contracts which are not here material except to the extent stated on p. 81, note, *infra*.

articles farmers buy, as such commodity had during a specified base period (Sec. 9 (c)). The current average farm price and the fair exchange value are to be ascertained from available statistics of the Department of Agriculture (Sec. 9 (c)).

One exception is made to the provision that the tax rate must comply with the above formula. If, after investigation and notice and opportunity for hearing, the Secretary of Agriculture finds that a tax at that rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, the tax is to be reduced to such rate as will prevent the occurrence of such results (Sec. 9 (b)).

The Act recognizes that after the tax is filed under the formula or under the exception to it the variables which enter into the formula or the exception may change so that a new computation would result in a different rate of tax, but it is provided that adjustments to meet this shall take place only at such times as the Secretary of Agriculture finds necessary to effectuate the declared policy (Sec. 9 (a)).

As a supplement to the processing tax proper, the Act provides for adjustments on the sale or other disposition of floor stocks of articles processed from the commodity (Sec. 16). At the time the process-

ing tax goes into effect, a tax is to be paid equivalent in amount to the processing tax which would be payable with respect to the commodity from which the articles then held for sale or other disposition were processed if the processing had occurred on such date. When the tax is wholly terminated a refund is to be made in an amount equivalent to the tax paid in respect of the commodity from which the articles then held for sale or other disposition were processed.

The tax on any commodity imposed by the Act is to terminate at the end of the marketing year current at the time the Secretary of Agriculture proclaims that rental or benefit payments are to be discontinued with respect to such commodity (Sec. 9 (a)). Collection of the taxes is by the Bureau of Internal Revenue and the receipts are paid into the Treasury of the United States (Sec. 19 (a)). The proceeds derived from the taxes and a sum of \$100,000,000 from the general funds of the Treasury were appropriated by the original Act to be available to the Secretary of Agriculture for expansion of markets, removal of surplus agricultural products, reimbursement of the Treasury for advancements, and the following purposes under the Act: Administrative expenses, rental and benefit payments, and refunds on taxes (Sec. 12). This section was amended on August 24, 1935, and as it now stands the tax proceeds are not

specifically appropriated, but there is an appropriation from the general funds of the Treasury, in an amount equivalent to the tax collections, for administrative expenses, various classes of payments to carry out the declared policy, refunds on taxes, acquisition of any agricultural commodity pledged as security for certain loans made by Federal agencies, and reimbursement of the Treasury for advances.

This, in broad outline, is the Act which the court below has found imposed unconstitutional taxes on the respondents. In support of our position that the court erred, we will show that the taxes, considered separate and apart from the use made of their proceeds, are valid; that their purpose is solely to raise revenue; that they are uniform excises; that they are not a result of an improper delegation of legislative authority and that they do not violate the Fifth Amendment. We will question the right of the respondents to defeat payment of the otherwise valid taxes by challenging the appropriation of the proceeds. And, we will show finally that if the appropriation were to be questioned, the taxes and the appropriation would be found to be not measures regulating matters reserved to the States under the Tenth Amendment, but nothing more than a levy of taxes and an appropriation of the proceeds thereof for the general welfare in the exercise of the power specifically

granted to Congress by Article I, Section 8, Clause 1, of the Constitution.⁵

I

THE TAXES ARE REVENUE MEASURES

The sole purpose of the processing and floor-stock taxes levied in the Agricultural Adjustment Act

⁵ In the last few months several District Courts in passing upon applications for injunctions against collection of processing taxes have considered the constitutionality of this Act. The District Court for the Southern District of California, in the case of *Rieder v. Rogan*, decided October 28, 1935, not yet officially reported, stated that the Act is a revenue measure, that the tax is laid for a public purpose, that there is no regulation, and that the Act violates neither the Fifth nor the Tenth Amendment. The District Court for the Western District of Missouri, in *Washburn Crosby Co. v. Nee*, decided October 3, 1935, not yet officially reported, certiorari denied November 11, 1935, held that the processing taxes accruing prior to the amendments to the Agricultural Adjustment Act in August 1935, were invalid because of improper delegation of legislative power, but held that the processing taxes levied after the amendments were valid.

The District Court for the Eastern District of Pennsylvania, in *F. G. Vogt & Sons v. Rothensies*, 11 Fed. Supp. 225, held that the processing tax is invalid because of improper delegation of legislative power, but further stated that the remaining contentions against the constitutionality of the Act were not sound (C. C. H., 1935, Vol. 3-A, Par. 9583). The District Court of Maryland, in the case of *John A. Gebelein, Inc. v. Milbourne*, decided August 13, 1935, not officially reported but may be found in C. C. H., 1935, Vol. 3-A, Par. 9538, held the processing tax to be invalid because not imposed for the general welfare of the United States and because of an invalid delegation of legislative power. See also the supplemental opinion of the District Court in that case dated October 1, 1935, not officially reported but found in C. C. H., 1935, Vol. 3-A, Par. 9583.

is to raise revenue. The provisions of the Act itself, the manner of its enactment, and the practical operation of the taxes thereunder all compel this conclusion.

All the indicia of a revenue measure are present in the wording and structure of the Act. The title expresses the purpose of raising revenue for extraordinary expenses incurred by reason of the emergency. Substantially the same statement opens the section levying the processing tax (Sec. 9 (a)). Collection is to be by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Proceeds are to be paid into the Treasury of the United States (Sec. 19 (a)). All consistent provisions of the ordinary revenue laws are made applicable (Sec. 19 (b)). Loans from the Government to assist processors in paying the taxes are authorized (Sec. 19 (c)). Provision is made for compensating and floor-stocks taxes so that competing articles will all bear an equal share of the burden (Secs. 15 and 16). Appropriation is made of the revenues expected to result (Sec. 12). Provision is made for refunds (Sec. 12 (b)). Nothing is to be found in the Act indicating that the tax has been imposed for any purpose other than the securing of money.

Likewise, the manner of enactment of the Act stamps it as a revenue measure. The Act originated in the House of Representatives, in conformity with Article I, Section 7, Clause 2, of the Constitution. Moreover, it is stated in the Committee

Report (H. Rep. No. 6, 73d Cong., 1st Sess., p. 5) that one of the purposes of the Act was "to provide additional revenues for the Government."

In its actual operation the taxes are intended to and do produce money in very large sums. From the date of the passage of the Act to September 30, 1935, total tax collections under the Act have amounted to \$933,825,150.03.⁶

Thus, no similarity exists between the taxes in this case and those held bad in the *Child Labor Tax Case*, 259 U. S. 20, and *Hill v. Wallace*, 259 U. S. 44. The decisive question in considering the validity of a tax when attacked on the grounds sustained in those decisions is, as stated by this Court in *United States v. Doremus*, 249 U. S. 86, 94, "Have the provisions in question any relation to the raising of revenue?" An affirmative answer to that question is required in this case.

The taxes here are distinguishable from those held invalid in the *Child Labor Tax Case*, *supra*, and *Hill v. Wallace*, *supra*, for the reason that the purpose of the Acts in those cases was not to raise revenue but to regulate. The taxes imposed, which were really penalties (*Graham v. du Pont*, 262 U. S. 234), were designed to compel compliance with the

⁶ Treasury Department publication entitled "Internal Revenue Collections, Fiscal Year 1935", p. 6; also Comparative Statement of Internal Revenue Collections for the Months of July, August, and September, 1935, released for publication August 21, 1935, September 20, 1935, and October 18, 1935, respectively.

detailed regulation prescribed by the Acts—not to raise revenue. The Court pointed out in the *Child Labor Tax Case* that had the Act imposed an exaction upon the use of a commodity or other thing of value it would have been a true excise, and “we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax”⁷ (p. 36). Furthermore, it was apparent in that case that the Act was an attempt to accomplish indirectly under the guise of taxation that which the Court had previously condemned when it was sought directly to exercise the commerce power for the same purpose. See *Hammer v. Dagenhart*, 247 U. S. 251.

The regulatory features of the Acts involved in the *Child Labor Tax Case* and the *Hill* case negatived any purpose to raise revenue and overcame the statutory characterization of the exaction as a tax. The purpose of Congress in those cases would have been best served if the taxes had resulted in no revenue

⁷ This is the point of distinction between that case (and *Hill v. Wallace*), on the one hand, and *United States v. Doremus, supra*, and *McCray v. United States*, 195 U. S. 27, on the other. In the latter cases statutes were sustained despite the motives of Congress in enacting them and the natural effect of the high rates imposed. If a statute is so constructed, and the incidence of a levy so arranged, as to be capable of raising revenue, it is no concern of the Court that the rate of the levy is made so prohibitive as to have the practical effect of destroying the source of revenue.

at all. These features are entirely absent from the statute here involved, which would have failed dismally had it not raised large amounts of revenue. The processors taxed under the Agricultural Adjustment Act cannot avoid the tax by arranging their business to accord with any regulations or desires of Congress. The levy is not enforced against one manufacturer and lifted from another because of "scienter", as in the *Child Labor Tax case*. The amount of tax is based solely upon the amount of the commodity processed. The incidence of the tax effects no price fixing or other regulation whatsoever. Its result on prices and on the business taxed is no different from that of any other manufacturer's excise. The only purpose, the only effect, the only outcome of the tax is the raising of money.

The majority of the court below stated in their opinion that "the main purpose of Congress * * * was not to raise revenue, but to control and regulate the production of what is termed the basic products of agriculture * * *" (R. 34). The opinion as a whole, however, makes clear that they were speaking of regulation which they felt was brought about not by the incidence or threat of the tax but by the use of the money raised by the tax. For example, they later stated (R. 39) that the taxes "are obviously intended to provide funds for the rental and benefit payments", expressly recognizing that the purpose of the taxes was to raise money.

The challenge to the tax sustained below, then, is that the proceeds are used for an unlawful purpose. However, that issue does not come under the doctrine exemplified by the *Child Labor Tax Case* and *Hill v. Wallace*, which is that a tax is bad where it is not intended to raise money but rather is intended to cause those subject to it to comply with certain regulations in order to avoid the tax. The use of the tax funds and its effect, if any, upon the validity of the tax itself are entirely different questions and will be discussed fully later in the brief (see *infra*, pp. 122–279). We are here dealing only with the incidence of the tax and we submit that it is solely a revenue measure and cannot be successfully assailed on the ground that its purpose is to accomplish something other than the raising of money.

II

THE PROCESSING TAX IS AN EXCISE

Of the taxes here at issue, the larger part is due under the processing tax proper. That levy is on the processing of certain basic commodities. In the case of cotton the term “processing” means the spinning, manufacturing, or other processing, except ginning (Sec. 9 (d) (2)). The tax is upon that particular use of the commodity.

No decision of this Court classifies such a tax as direct. In addition to capitation taxes and taxes upon land, which have always been so recognized (*Hylton v. United States*, 3 Dall. 171, 177), direct

taxes are those imposed upon persons solely because of their general ownership of property (*Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601). The imposition of the tax here in question depends upon the processing of cotton. It is not imposed upon the owner because he owns the cotton. It is not even imposed because he has the right to process it. There is no tax unless the cotton is actually processed. It is a tax upon the actual use of the cotton in that particular manner. Such a tax is an excise.

The classification of taxes as direct or as excises has not been made a matter of precise definition. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U. S. 345, 349. It is necessary, therefore, to consider the decisions dealing with the subject. The following have been sustained as indirect taxes, or excises:

Taxes on particular types of sales, *Nicol v. Ames*, 173 U. S. 509; *Thomas v. United States*, 192 U. S. 363. A tax upon the use of carriages for the conveyance of persons, *Hylton v. United States*, *supra*. A tax upon the issue of notes by any state bank, *Veazie Bank v. Fenno*, 8 Wall. 533. A tax upon manufactured tobacco having reference to its origin and intended use, *Patton v. Brady*, 184 U. S. 608. A tax upon the manufacture and sale of colored oleomargarine, *McCray v. United States*, *supra*. A succession tax upon the devolution of title to real estate, *Scholey v. Rew*, 23 Wall. 331.

A tax upon the transmission of property at death, *Knowlton v. Moore*, 178 U. S. 41. Taxes on doing business by particular methods, *Flint v. Stone Tracy Co.*, 220 U. S. 107; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397; *Stratton's Independence v. Howbert*, 231 U. S. 399; *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179; *Stanton v. Baltic Mining Co.*, 240 U. S. 103. A tax upon the use of foreign-built yachts, *Billings v. United States*, 232 U. S. 261. A tax on the transmission of property by gift *inter vivos*, *Bromley v. McCaughn*, 280 U. S. 124.⁸

These decisions illustrate the statement in *Knowlton v. Moore*, *supra*, p. 88, that "Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc." Depending as it does upon the use of cotton in a particular manner, i. e., processing, the tax here considered falls into the

⁸ The following state taxes have also been held to be indirect taxes or excises under state constitutional provisions making much the same distinction between excise and property taxes as does the Federal Constitution between excise and direct taxes (see in this connection Cooley on Taxation, Vol. I, 4th Ed., pp. 125-143) :

A tax on gasoline sold or used, *Bowman v. Continental Oil Co.*, 256 U. S. 642. A tax on motor fuel imported and used, *Monamotor Oil Co. v. Johnson*, 292 U. S. 86. A tax on gross receipts, intended to reach all sales, *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292. A tax on the transfer of property in trust to be again transferred after death, *Keeney v. New York*, 222 U. S. 525. A tax on gasoline used or sold, *Edelman v. Boeing Air Transp.*, 289 U. S. 249.

same class as the examples given above. In fact, it is so closely analogous to many of the taxes upheld in the above-cited cases as to be indistinguishable. Congress considered the levy to be an ordinary manufacturer's excise (H. Rep. No. 6, 73d Cong., 1st Sess., p. 5). We submit that its character as such is not open to serious question.

III

THE FLOOR-STOCKS TAX ADJUSTMENT MAY BE SUSTAINED EITHER AS AN EXCISE OR AS AN AUXILIARY TO THE PROCESSING TAX

Of the taxes here involved, those which were not levied as processing taxes proper arise under a supplementary revenue provision authorizing what is known as the floor-stocks tax adjustment (Sec. 16). This provision deals with floor stocks of articles processed from a basic commodity, which are held for sale or other disposition at the inception and termination of the processing tax on that commodity. At the inception, a tax is imposed on floor stocks in an amount equivalent to the processing tax which would have been payable if the articles had been manufactured after the tax went into effect. At the termination, refund is made of an amount equivalent to the processing or floor-stocks tax paid on the articles included in the floor stocks remaining on hand.

The floor-stocks tax imposed at the inception may be sustained either (1) as a separate excise, or (2) as an auxiliary measure designed to prevent

obstructions to the effective administration of the processing tax.

1. The floor stocks tax adjustment is an excise

In operation and effect, the levy under the floor-stocks adjustment is a tax on the holding for sale of certain articles. It is so interpreted by the Secretary of the Treasury and the Commissioner of Internal Revenue (Treasury Regulations 82, Art. 2). Viewed in this light, the imposition is a true excise upon certain kinds of property, having reference to the origin and intended use. From the standpoint of origin, it looks to goods processed and on hand on the effective date. From the standpoint of use, it looks to the ultimate sale of those processed goods.

This Court has already sustained a similar tax imposed upon goods held for sale. *Patton v. Brady*, 184 U. S. 608. That case involved a statute putting a tax on manufactured tobacco held and intended for sale at the time of the passage of the Act. Patton had purchased manufactured tobacco on which all taxes imposed under existing law had been paid, and he held the tobacco for sale at the time the new law was enacted. This Court dismissed his objections to the tax, holding that (p. 623) "the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer."

To the argument that it was a direct tax, the Court replied (p. 619) :

* * * it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use.

Exactly the same reasoning is applicable to the floor-stocks tax. As a levy on goods *held for sale*, it cannot be distinguished from the tax involved in *Patton v. Brady, supra*.

The contention that the floor-stocks tax is of such nature as to be a direct tax under the doctrine of *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288, is without merit. The basis of that decision was (p. 294) that "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale, or keeping for future consumption or sale", and that "The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." No transfer of the property by its owner to others nor any particular use nor the holding for any particular use thereof by him was the occasion for the tax.

It is sometimes urged that this case stands for the proposition that a tax upon the only use to which property may be put is a direct tax, but all that this

Court really determined was that a tax on so indispensable a part of ownership as the right to secure possession of the property was a tax on ownership itself. It may be questioned whether this Court meant to hold that a tax on the only use that could be made of the property was a direct tax if that use was not indispensable to possession of the property, for when this case was later considered in *Bromley v. McCaughn*, 280 U. S. 124, this Court discussed it in such a way as to leave the inference that possibly a tax on the only use might be good. It should be borne in mind in connection with the *Kentucky Distilleries Co.* case that the tax was on an only and an involuntary use, since the law had first compelled the owner to place his property in the storehouse and then laid a tax upon the removal therefrom. To be truly comparable to the use there taxed, the law here under consideration would have to compel the owner to process the commodity and then tax him upon that use. Such is not the case. The respondents here carried on the processing completely voluntarily and in so doing, they, of their own accord, took the risk that the Government might place an excise on their right to hold the processed article for sale.

But assuming that the *Kentucky Distilleries Co.* case does establish the doctrine in support of which it is sometimes urged, it can have no application here for the reason that the owner may make other uses of the processed commodity than that upon

which the tax is imposed. The floor stocks tax is applicable when the commodity is “held for sale or other disposition.” Under the rule of *ejusdem generis* it seems clear that the effect of the phrase “other disposition” is restricted to dispositions of the same general kind as sales. *Alabama v. Montague*, 117 U. S. 602, 609, 610; *United States v. Florida East Coast Ry. Co.*, 222 Fed. 33, 36 (C. C. A. 5th); *Southern Ry. Co. v. Columbia Compress Co.*, 280 Fed. 344, 347 (C. C. A. 4th). The regulations issued under the Act, accordingly, specify that an article held for consumption is not taxable.⁹ In addition, the Act provides that refund will be made of the tax imposed on floor stocks delivered to an organization for charitable distribu-

⁹ Regulations 82, Art. 2. That Congress intended this to be the construction of the phrase “other disposition” is further indicated by the fact that the exemption from the processing tax (provided by Section 15 (b) of the Act) for farmers who have their products processed for consumption by their own families, employees, or households, is not repeated in connection with the floor stocks adjustment. Clearly Congress did not intend to levy a floor stocks tax upon goods held by farmers for consumption any more than it intended to make farmers liable for the processing of their products for their own consumption. It would appear that a specific exemption from the floor stocks tax was omitted as unnecessary because Congress intended that no consumers should be subject to that tax and hence that farmers in their capacity as consumers should also be exempt. Furthermore, the exemption from the floor stocks tax of retail stocks disposed of within 30 days (Section 16 (b)) would seem hardly to be consistent with a tax on goods held for consumption.

tion or use (Sec. 15 (c); Regulations 82, Art. 20). Refund will also be made of the tax paid upon floor stocks which are exported (Sec. 17 (a)). And the tax does not apply to retail stocks which are disposed of within thirty days after the tax takes effect (Sec. 16 (b)). Certainly it cannot be said that this levy is on the only use to which the property may be put.

That the floor stocks tax is not one upon property as such and is not one upon a person solely because of his ownership of property is further made evident when it is considered that any tax imposed on an article which is still held when the processing tax terminates will be refunded.¹⁰ In other words, the burden of the tax is lifted unless the owner disposes of his commodity during the existence of the tax. The tax is not on the property but on the use of the property in a particular manner. As the cases cited under point II, *supra*,

¹⁰ Sec. 16 (a) (2). This result holds true even to the extent of reductions in the rate of the processing tax after the initial imposition but before its termination, since Section 16 (e) of the Act, as amended (Act of June 26, 1934, c. 759, 48 Stat. 1241, Sec. 1, and Act of March 18, 1935, Pub. No. 20, 74th Cong., Sec. 10), provides that if such a reduction occurs, thereupon there shall be refunded on floor stocks an amount equivalent to the difference between (1) the rate of the processing tax payable or paid immediately before the decrease in rate and (2) the rate of the processing tax which would have been payable with respect to the commodity from which processed if the processing had occurred on the date of such reduction.

indicate, such a levy has always been held to be an excise.¹¹

Every consideration, then, refutes the argument that the floor-stocks adjustment levies a direct tax. Viewed separately as an imposition in and of itself, it is an excise on a particular use of an article processed from a particular commodity.

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

The floor-stocks tax adjustment may also be sustained as an auxiliary measure designed to prevent obstructions to the effective administration of the processing tax. Undoubtedly Congress so intended it (H. Rep. No. 6, 73d Cong., 1st sess., pp. 5, 6). Very serious possibilities faced Congress if the processing tax were adopted without any supplemental adjustment on floor stocks. In advance of the effective date of the tax, it would be likely that

¹¹ It should also be noted that although it is possible that a tax may be classified as indirect even though its burden cannot be shifted (see *Knowlton v. Moore*, 178 U. S. 41; *Nicol v. Ames*, 173 U. S. 509; *Standard Oil Co. v. McLaughlin*, 67 F. (2d) 111 (C. C. A. 9th)), it has been said that ordinarily all taxes paid primarily by persons who can shift the burden upon someone else are considered indirect taxes. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 558. The floor-stocks levy is of this latter kind. It is imposed only in cases where the article is not consumed by the person who must pay the tax. It is imposed only where the article is transferred, by sale or other disposition, to someone else prior to consumption, for if the article is not sold any tax paid is refunded upon termination of the processing tax. In this transfer there is presented to the taxpayer the opportunity of shifting the burden of the tax.

processing operations would be greatly increased in order to avoid the tax by having on hand very large floor stocks of tax-exempt goods. Likewise, in advance of termination of the tax, it would be likely that processing operations would be curtailed unduly in order to avoid the tax by putting off until afterwards all possible work. Under the Act it was probable that processors would have considerable advance notice of both events (Sec. 9 (a)).¹²

If such avoidance were permitted the result would be most unfortunate, not only for the Government, but also for those processors who did not attempt to avoid the tax and for market conditions in the particular trade affected. Those who had avoided the tax would enjoy a high competitive advantage in the market, both after the tax was imposed and after it had terminated. Those who had not operated their business with an eye to avoidance would be penalized. A wide-spread shifting of business from one processor to another, out of its ordinary channels, and an uneven production of goods would result, causing a grave dislocation of normal market conditions and much confusion in industry. Certainly if at any time in the nation's history such consequences would have been unfortunate, it was during the period in which this Act was passed. The desire of Congress was that the processing tax should create as little business disturbance as possible.

¹² Compare the increased imports of cotton in anticipation of increased tariff duties thereon (Addendum, 69).

In view of these results which were to be anticipated if adjustments were not made on floor stocks, the provisions adopted by Congress in that regard were necessary and proper for carrying into execution the processing tax which Congress had determined to impose. The levy on floor stocks at the time the processing tax took effect prevented avoidance of the processing tax and prevented competitive inequalities and market disruptions due to the inception of the tax. The refund authorized at the time the processing tax terminated prevented competitive inequalities and market disruptions after the termination of that tax. The net effect of the adjustment is that one tax—a processing tax—is imposed on the normal operations of the processor during the life of the tax. The floor stocks tax adjustment thus is an adjunct necessary to the successful operation of the processing tax.

That a measure may be valid as being reasonably necessary and proper to the exercise of the taxing power of Congress, even though standing alone its constitutionality might be subject to doubt, has long been recognized. For example, in *Tyler v. United States*, 281 U. S. 497, this Court held that there might be included in the gross estate the value of property held as tenants by the entirety, even though there was no transfer of legal title within the meaning of the ordinary legal principles applicable to devolution of property. It was there said (p. 505) :

The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in

part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end.

In *Taft v. Bowers*, 278 U. S. 470, this Court upheld a provision requiring the donee of property to use the donor's basis in measuring the taxable gain from the sale of property acquired by gift. This Court sustained this imposition against the donee of taxes on income which had actually accrued in the hands of the donor before making the gift, as a provision "entirely proper for enforcing a general scheme of lawful taxation."

In *Milliken v. United States*, 283 U. S. 15, there were involved the provisions of the Revenue Act of 1918, which, for tax purposes, made gifts in contemplation of death a part of a decedent's estate. The aim of Congress prompting the enactment of these provisions was the same as that which prompted the enactment of the floor-stocks tax provisions of the Agricultural Adjustment Act; namely, the enforcing and equalizing of a general scheme of taxation. This Court there observed (pp. 23, 24-25) :

It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation * * *.

* * * * *

Further, as an appropriate and indeed necessary measure to secure the effective administration of a system of death taxes, we think the present tax is to be supported as an incident and in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent's estate at death.¹³

¹³ See also *Helvering v. City Bank Farmers Trust Co.*, decided by this Court Nov. 11, 1935; *Corliss v. Bowers*, 281 U. S. 376, 378; *Nichols v. Coolidge*, 274 U. S. 531, 542; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 176; *Nigro v. United States*, 276 U. S. 332, 351, 353; *United States v. Doremus*, 249 U. S. 86, 95. The same rule has been applied to many powers of Congress other than the taxing power. For instance, in *Brown v. United States*, 8 Cranch 110, and *United States v. Chemical Foundation*, 272 U. S. 1, 11, the confiscation of private property without compensation to the owner, even though expressly prohibited by the Fifth Amendment, was approved as auxiliary to the war powers. Similarly, as being necessary and proper for carrying into execution the war powers, approval was given to the action of Congress in prohibiting the sale of nonintoxicating liquors in *Jacob Ruppert v. Caffey*, 251 U. S. 264. As being necessary and proper to make effective the Eighteenth Amendment, the power to prohibit physicians from prescribing intoxicating malt liquors for medicinal purposes was upheld in *Everard's Breweries v. Day*, 265 U. S. 545. See also *Lambert v. Yellowley*, 272 U. S. 581, 594, involving a limitation of permissible prescriptions of intoxicating liquors for medicinal purposes. Likewise, as being necessary and proper for carrying into execution the power to regulate commerce among the several States, Congress was permitted to regulate business done in stockyards in connection with the regulation of the business of the packers done in interstate commerce, *Stafford v. Wallace*, 258 U. S. 495, 513; to require safety appliances upon cars, even when used in intrastate commerce, *Southern Ry. Co. v. United States*, 222 U. S. 20; and to regulate freight rates even to the extent of affecting intrastate rates, *American*

As this Court stated in *District of Columbia v. Brooke*, 214 U. S. 138, 150, in levying a tax “not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated.” Congress, in levying the processing tax, considered its administration and the ways in which it might be defeated, and found it necessary to supplement the processing tax with a floor stocks tax adjustment. That provision is a reasonable and proper means of enforcing and equalizing the general scheme of the processing tax, and whether or not it would be constitutional as a separate tax, it is valid under the rule of the above cases.

It is submitted, therefore, that considered either as a separate excise or as an auxiliary measure designed to defeat obstructions to the effective administration of the processing tax, the floor stocks tax adjustment must be sustained. In any event, it is submitted that the floor stocks tax adjustment is separable (see Section 14) from the processing tax provisions to which it is merely supplementary.

Express Co. v. Caldwell, 244 U. S. 617. And in *Chicago Board of Trade v. Olsen*, 262 U. S. 1, it was held that Congress, in order to make effective its regulation under the interstate commerce clause of the sales of grain on exchanges, also had the power to impose certain regulations upon boards of trade which made no such sales.

IV

THE PROCESSING AND FLOOR STOCKS TAXES ARE UNIFORM THROUGHOUT THE UNITED STATES

As excises, the processing and floor stocks taxes satisfy the constitutional requirement of uniformity. It is settled that this requirement is simply that of geographical uniformity. *Knowlton v. Moore*, 178 U. S. 41, 96. The tax must operate with the same force and effect in every place where the subject of it is found. *Head Money Cases*, 112 U. S. 580, 594; *Knowlton v. Moore*, *supra*; *Patton v. Brady*, 184 U. S. 608; *Billings v. United States*, 232 U. S. 261, 282; *Brushaber v. Union Pac. R. R.*, 240 U. S. 1, 24; *LaBelle Iron Works v. United States*, 256 U. S. 377; *Bromley v. McCaughn*, 280 U. S. 124, 138. Certainly the taxes here involved so operate.

Any contention that the uniform application of the processing and floor stocks taxes is destroyed by Section 11 of the Act is not well taken. That section defines "basic agricultural commodity" as meaning certain enumerated articles "and any regional or market classification, type, or grade thereof." Nothing in this provision permits the tax to operate with different force and effect in different states. An argument to the contrary would ignore common agricultural usage. Section 11 merely permits the separation, for the purposes of the Act, of varieties with quite different char-

acteristics and uses which are already recognized and dealt with by the trade as distinct commodities.

Due to the effect of climate and soil—which plainly have regional differentiations—the varieties of a crop may differ primarily according to the geographical location of the crop. An example of this is furnished by tobacco, the only crop to which these provisions of Section 11 have so far been found applicable. Tobacco Regulations, Series 2, recognize the following as separate market classifications of tobacco under Section 11: cigar-leaf, Maryland, Burley, flue-cured, fire-cured, and dark air-cured. A number of these have the effect of and may properly be described as regional classifications. For instance, Maryland tobacco can be grown only in the counties of southern Maryland, and Burley tobacco is produced primarily in central and northeastern Kentucky, southern Ohio and Indiana, western West Virginia, central and eastern Tennessee, and sections of Virginia, North Carolina, Missouri, and Arkansas. See Service and Regulatory Announcements, No. 118, Bureau of Agricultural Economics, Department of Agriculture, November 1929. However, it is plain that these classifications are made not in order to tax one part of the Nation differently from another, but in order to recognize actual existing distinctions between different varieties of the crop.

The fact that articles of a variety classified separately under Section 11 may exist or be pro-

duced in only one part of the Nation is immaterial. In selecting subjects for taxation, Congress is not confined to those which exist uniformly in the several States. *Florida v. Mellon*, 273 U. S. 12, 17; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 173; *Knowlton v. Moore*, *supra*, p. 108; *Head Money Cases*, *supra*; *Patton v. Brady*, *supra*; *Clark Distilling Co. v. West'n Md. Ry. Co.*, 242 U. S. 311, 326; *Poe v. Seaborn*, 282 U. S. 101, 117; *Phillips v. Commissioner*, 283 U. S. 589. Congress may make any reasonable classification for tax purposes which it wishes, and as long as the tax operates uniformly in regard to each class, the tax is valid. *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49–50.¹⁴

Moreover, since no regional classifications of cotton have ever been announced by the Secretary of Agriculture, the respondents have shown no basis on which they may raise any question in regard thereto. It will be time enough to consider such a complaint when classification is attempted. *Yazoo & Miss. R. R. v. Jackson Vinegar Co.*, 226 U. S. 217, 219; *United States v. Sullivan*, 274 U. S. 259. A litigant can be heard to ques-

¹⁴ Since this Court has discussed the matter of classification identically in connection with the requirement of uniformity (*Alaska Fish Co. v. Smith*, *supra*; *Nicol v. Ames*, 173 U. S. 509) and under the Fifth Amendment (*McCray v. United States*, 195 U. S. 27), the question is fully developed only once in this brief in our argument on the Fifth Amendment, *infra*, p. 116, and the Court is respectfully referred to that presentation for further citation of authorities on this point.

tion only those matters which are being or are about to be applied to his disadvantage. *Utah Power and L. Co. v. Pfost*, 286 U. S. 165, 186; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282; *Oliver Iron Co. v. Lord*, 262 U. S. 172, 180–181; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *Gorieb v. Fox*, 274 U. S. 603, 606. As was stated in *Hicklin v. Coney*, 290 U. S. 169, 172–173:

Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court in saying that the Commission had never exercised such a power, “if any it has under the act”, and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions. [Citing cases.]

This Court will not assume in advance, as would be necessary here were the taxes to be held nonuniform because of Section 11, that an unconstitutional administrative order will be issued. *Ex Parte La Prade*, 289 U. S. 444, 458; *First National Bank v. Albright*, 208 U. S. 548; *Edelman v. Boeing Air Transp.*, 289 U. S. 249, 253; *Gilchrist v. Interborough Co.*, 279 U. S. 159; *Prentis v. Atlantic Coast Line*, 211 U. S. 210; *Henderson Water Co. v. Corp. Comm.*, 269 U. S. 278.

We submit, then, that respondents cannot object to Section 11 as destroying the otherwise obvious uniformity of the taxes, and, further, that even if they could, such objection would not be well taken.

THE TAXES INVOLVED IN THIS CASE ARE NOT INVALID
BECAUSE OF IMPROPER DELEGATION OF LEGISLATIVE
POWER

A principal ground upon which the court below found the tax to be unconstitutional was that there had been an improper delegation of legislative power. We submit that careful analysis will show this objection to be fallacious.

The issue of delegation of power presented by this case is whether the processing and floor stocks taxes here involved were imposed in violation of the principle that the legislature may not abdicate its powers. The validity of the Secretary of Agriculture's authority to enter into marketing agreements, to issue licenses, and to determine rates of tax on competing commodities is not here involved in any sense, since these provisions are entirely separate and no action thereunder has been taken with respect to respondents. Moreover, there is no basis presented by the record in this case upon which any adequate determination of the validity of such action could be made. In order fully to dispose of respondents' contentions, the government will, however, develop in detail each part of the administrative process bearing in any way upon the taxes here involved, to which objections have been or may be made—which will necessarily extend the discussion.

Complaint has been made that the Act unlawfully authorizes the Secretary to determine (1) the rate of taxation or adjustments thereof in connection with the processing tax and the floor stocks tax, (2) the time at which the taxes should take effect, and (3) the time at which they should terminate. Each of these will be discussed under the main headings below.

1. Congress has not unlawfully delegated to the Secretary power to determine the rate of the tax

Respondents contend that Congress has invested the Secretary with power to fix the tax rate in the first instance, and also to adjust the rate from time to time. On the contrary, however, the rate of the tax is defined with detailed exactness by Congress with respect to both (a) the processing tax and (b) the floor stocks tax, the Secretary being merely directed to make certain prescribed mathematical computations. No issue is raised by the present case as to whether legislative power has been improperly delegated with respect to adjustments in the tax rate, but even if this question were presented, there has been no improper delegation of power in this respect.

a. Determination of the rate of the processing tax

Subsections (b) and (c) of Section 9 provide that:

The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and

the fair exchange value of the commodity * * *.

* * * the fair exchange value of the commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodities had during the base period ¹⁵ * * *; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture.

The formula established by these sections, when read in the light of the widely used official statistics gathered for many years by the Department of Agriculture, requires the simplest of mathematical computations from figures designated by Congress.¹⁶

¹⁵ By Section 2 (1) the base period for cotton is fixed as August 1909 to July 1914.

¹⁶ The accuracy of the mathematical computations is not at issue—an allegation that the rate was not in accordance with the act was stricken from the receivers' report upon the receivers' own motion (R. 8, 12). For that reason there was no necessity for the computation to be set forth in detail in the record. However, since the Circuit Court of Appeals apparently misunderstood the method followed it may be well to set it forth in full. The average farm price of lint cotton during the base period was 12.4 cents per pound gross weight or 12.9 cents net weight, i. e., after deducting the weight of the tare. (Official statistics show this weight to be 22 pounds and treat bales of 500 pounds gross weight as equivalent to bales of 478 pounds net. See, e. g., Yearbook of Agriculture, 1933, United States Department of Agriculture, p. 472, Table 103, note 6. With respect to the significance of tare in relation to the weight of cotton, generally,

Since January 1908, the Department of Agriculture has collected and published at monthly intervals current average farm prices of various crops, including cotton (Addendum 16). These publications have received wide-spread recognition and distribution throughout the country and are furnished to the press (Addendum 17-18). They have been known to and used extensively by members of Congress (Addendum 18). Since 1909 the Department has also collected information on prices of articles farmers buy and since 1928 has published at quarterly intervals an index of prices based on this information (Addendum 18).¹⁷ This

see Addendum 20-21.) The average farm price as of June 15, 1933, published June 27, 1933 (the latest statistics available to the Secretary of Agriculture on July 14, 1933, when the rate was determined (R. 15)), was 8.7 cents per pound gross weight or 9.1 cents net weight. The record shows only the gross weight figures (R. 16, 22, 25). When the rate was determined, the latest index of prices of articles farmers buy was that of June 15, 1933, published June 27, 1933 (R. 23-24). This was 103 percent of such prices during the base period (R. 24). Consequently the fair exchange value (12.9 cents \times 103 percent) was 13.3 cents per pound, net weight, and the tax rate (13.3 cents—9.1 cents) was 4.2 cents per pound, net weight. The original data, on which the computations were based, extended only to the first decimal place. Consequently, the rate itself was not carried beyond the first decimal.

¹⁷ See also Index Numbers of Prices Paid by Farmers for Commodities Bought 1910-1934, Bureau of Agricultural Economics, Division of Statistical and Historical Research, United States Department of Agriculture, June 1933, and September 1934.

index has also received wide distribution and has been used by members of Congress (Addendum 20). Both studies have been collected according to a regularly established and unvarying procedure (Addendum 16-20).¹⁸

The method by which the fair exchange value, or parity price, is determined from these two sets of statistics is as follows: The average farm price during the base period is multiplied by the current index of prices farmers pay. Thus, if cotton sold for 12 cents per pound during the base period and if the index of prices of articles farmers buy has risen 10% since that time, the parity price, i. e., the comparable present-day price for cotton equivalent in purchasing power to the base period price, would be 110% of 12 cents or 13.2 cents per pound. This method of determining the parity price was regularly used during the Congressional hearings on the present Act, prior to its passage, and on related measures, to demonstrate concretely the results of the application of the formula.¹⁹

¹⁸ See also Index Numbers of Prices Paid by Farmers for Commodities Bought, *supra*.

¹⁹ Secretary Wallace, in testifying before the Senate Committee on Agriculture and Forestry, described "parity price", the popular term used instead of the statutory expression "fair exchange value", as:

"The basic relationship existing from 1909 to 1914 between the particular commodity and the prices of things which the farmers bought. The price of things which farmers are buying today costs them about 104 percent of that basic period. The price of wheat in the basic period

Furthermore, the studies referred to are the only studies of the kind compiled and published by the Department of Agriculture and are the official figures used by the Department in its varied activities (Addendum 20). It is further significant that the figures are compiled by the Bureau of Agricultural Economics. (Addendum 18, 20; see Index Numbers of Prices Paid by Farmers for Commodities Bought, *supra*, p. 51, note 17.) The Agricultural Adjustment Act is administered by a separate agency within the Department (Section 10 (a)). Thus Congress has designated a well-known and clearly defined formula to be applied to equally well-known official statistics regularly gathered wholly independently of the Act.

was, we will say, 90 cents; 104 percent of 90 cents would be roughly, 94 cents. That is the way in which we ascertain it." (Hearings before Senate Committee on Agriculture and Forestry, on H. R. 3835, 73d Cong., 1st Sess., p. 25.)

The Report of the House Committee on Agriculture, under the heading "The Object of the Bill", states that "If the basic agricultural commodities were now at price levels which would give them at farm prices a value equivalent to their pre-war purchasing power the prices therefor would be approximately as set out in the following tables * * *." The tables referred to list prices of February 15, 1933, and "Parity price as of Feb. 15, 1933." 73d Cong., 1st Sess., H. Rep. No. 6, p. 2.

See also pages 27-30, Hearing on Agricultural Adjustment Program before House Committee on Agriculture, December 1932, Serial M, containing tables prepared by Bureau of Agricultural Economics, Department of Agriculture, showing 1910-1914 and 1922-1931 farm prices and indices of prices paid by farmers and the method of computing "parity prices" by multiplication of 1910-1914 prices by current index of prices paid by farmers.

Average farm prices and prices of things farmers buy were not to be determined by means of any investigations or studies to be instituted as a result of the Act, although *Hampton & Co. v. United States*, 276 U. S. 394, is direct authority that this would have involved no improper delegation of legislative power. Current average farm prices, average farm prices during the base period, and the index of the costs of articles farmers buy (with the base period as the norm) all had been and were determined regularly and officially by the Department of Agriculture long before the Act was passed. Base period prices were physically in existence when the Act was passed and were directly designated by the Act. The later figures could be compiled only in the future and were to be compiled by a Bureau not charged with the administration of the Act. The record contains no contention, and it cannot be presumed, that in the preparation of the statistics to which the statutory formula was applied in the case of cotton, there was any variation from the normal procedure. *United States v. Chemical Foundation*, 272 U. S. 1, 14, 15. Indeed, the record shows affirmatively that the reports and statistics to which the formula was so applied were gathered in accordance with the established practice (R. 16, Finding 11; Addendum 18, 19).

Congress not only “legislated on the subject as far as was reasonably practicable” (*Buttfield v. Stranahan*, 192 U. S. 470, 496); its mandate required the exercise of no discretion or judgment by the Secretary of Agriculture. Such a mandate involves no question of delegation of power, but is a direct legislative determination of the rate of the tax. As stated by this Court in *Michigan Central Railroad v. Powers*, 201 U. S. 245, 297:

* * * where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events * * * created without reference to the matter of that rate, there is no abdication of the legislative function, but on the contrary, a direct legislative determination of the rate.

b. Determination of the rate of the floor stocks tax

Section 16 (a) provides for a tax adjustment (Floor Stocks Tax) as to any article already processed from any commodity, with respect to which the processing tax is to be levied, held for sale or other disposition on the date the processing tax first takes effect. The amount of this tax adjustment is to be—

equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed, if the processing had occurred on such date.

And Section 10 (c) authorizes the Secretary of Agriculture, with the approval of the President, to establish by regulation "conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed * * *."

Pursuant to these provisions, the Secretary of Agriculture, by regulations approved by the President, established conversion factors which determined the amount of the tax imposed upon stocks of articles processed from cotton (R. 11, Finding 8; Addendum 2-4). This involved a purely mathematical, although necessarily detailed, computation based upon the proportion of cotton contained in various articles manufactured from cotton (Addendum 22-23). This was based upon statistics collected by officials of the Department of Agriculture (*Ibid.*), was directly related to the researches normally carried on by the Department (*Ibid.*) and was merely such an administrative determination as the Congress could properly direct the Secretary of Agriculture to perform. The collection of statistics determining the portion of the rate of the processing tax to be allocated to the various articles manufactured from cotton and the consequent mathematical computations were too complex to permit of Congressional action and were of such a nature as to be properly carried out by administrative officials under the directions

of Congress.²⁰ Cf. *Monongahela Bridge v. United States*, 216 U. S. 177, 193; *United States v. Grimaud*, 220 U. S. 506, 516; *United States v. Shreveport Grain & El. Co.*, 287 U. S. 77, 85.

c. Adjustments in the tax rate

Section 9 (a) of the Act provides that the rate of the processing tax determined as of the date the tax first takes effect shall be adjusted by the Secretary to conform to the requirements of Section 9 (b) at such intervals as he finds necessary to effectuate the declared policy. Section 9 (b), in addition to establishing the formula for the ascertainment of the maximum rate, also directs the Secretary to establish a lower and different rate under certain conditions. It has been contended that the fact that Congress authorized the adjustments contemplated by these provisions invalidates the entire taxation program.

No action has been taken by the Secretary pursuant to either of these sections resulting in any adjustment of the rate of the processing tax on cotton. Respondents have not been affected by these

²⁰ The amended regulations, which apply to refunds and to compensating taxes under Sections 15, 16 and 17, establishing conversion factors for articles processed from cotton fixed more than 1,000 conversion factors for various classes of articles. Cotton Regulations, Series 2, Supplement 2, Agricultural Adjustment Administration, United States Department of Agriculture (November 29, 1933).

provisions, and consequently, the question of their validity is not properly involved here.²¹ Furthermore, these provisions are entirely separable from the rest of the Act. It is significant that the Act has been administered with regard to cotton for several years without the exercise of the adjustment provisions. It is plain that if they were eliminated "a workable plan" for the raising of revenue "would still remain." See *Weller v. New York*, 268 U. S. 319, 325. However necessary the application of the adjustment provisions may be to carry out the purposes of Congress with respect to other commodities, this fact clearly indicates that its application to the cotton taxes is not necessary, and sustains the presumption arising from the Congressional declaration of separability in Section 14. (See *Champlin Refining*

²¹ See *Walsh v. Columbus, etc., Railroad Co.*, 176 U. S. 469; *Smiley v. Kansas*, 196 U. S. 447, 457; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 242; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *District of Columbia v. Brooke*, 214 U. S. 138, 149, 152; *Yazoo & Miss. R. R. v. Jackson Vinegar Co.*, 226 U. S. 217, 219; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Brazee v. Michigan*, 241 U. S. 340, 343-344; *Gorieb v. Fox*, 274 U. S. 603, 606; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 287; *Massachusetts v. Mellon*, 262 U. S. 447, 488; *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 42; *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 186; *Champlin Mfg. Co. v. Commission*, 286 U. S. 210, 234-235; *Stephenson v. Binford*, 287 U. S. 251, 277; *Hicklin v. Coney*, 290 U. S. 169, 172; *Louis. & Nash. R. R. Co. v. Finn*, 235 U. S. 601, 610; *United States v. Sullivan*, 274 U. S. 259, 264; *Oliver Iron Co. v. Lord*, 262 U. S. 172, 180-181.

Co. v. Commission, 286 U. S. 210, 235, as to the Congressional intent.) Respondents should not be allowed to escape compliance with applicable and valid taxes by asserting the invalidity of other separable provisions which have not been and may never be put into effect.²²

In any event, it is submitted that the authority conferred upon the Secretary by these provisions is not unlawful.

(1) Section 9 (a) provides that the rate of tax determined in conformity with the requirements of Section 9 (b) "shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements." In other words, the Secretary is to ascertain from time to time the difference between the current average farm price and the fair exchange value and adjust the rate accordingly.

If the Secretary could be empowered to ascertain, as of the date of the first imposition of a processing tax, the difference between the current farm price

²² The same holds true with respect to the compensating taxes provided for in Section 15 (d) and referred to by the court below. These taxes, which can become effective only after notice and opportunity for hearing, are designed to protect processors of basic commodities from competitive disadvantages. The imposition of such taxes on other taxpayers cannot adversely affect respondents, and they cannot properly question the Secretary's powers with respect thereto. Moreover, Section 15 (d) is separable and even if invalid would not affect the taxes here involved imposed under Section 9 (a). For these reasons we do not deem it necessary to discuss compensating taxes.

and the fair exchange value of a commodity subject to the processing tax, it follows that he could also be authorized to ascertain that difference from time to time as the specified conditions changed materially. Such subsequent action, in any sound and practical sense, can be only based upon a finding that a new difference between the current farm price and the parity price—genuinely representative of a change in the basic conditions affecting prices, not a mere fluctuation due to speculation or other temporary causes—had been reached. Congress could not foretell when such a change would occur, nor the extent of such changes when they did occur. It was proper and necessary to leave the ascertainment of this fact to the Secretary of Agriculture, who by reason of the continual reports received and computations made, with respect to farm prices and to prices of articles farmers buy, by experts within his Department was regularly informed of these matters and peculiarly qualified to make such determinations.

The Tariff Act of 1922, sustained in *Hampton & Co. v. United States, supra*, empowered the President to determine when the duties fixed in the Act or by his proclamation failed to equalize the differences between foreign and domestic costs. Obviously he was to ignore temporary fluctuations in those differences and to act only when the investigations of the Tariff Commission disclosed that a new level of difference had been reached. The very same kind of determination is required of the Sec-

retary of Agriculture by this Act. Indeed, the authority here conferred upon the Secretary is less than the power of the President under the Tariff Act sustained in *Field v. Clark*, 143 U. S. 649. There the President could suspend the operation of the statute "for such time as he shall deem just." With respect to this power, this court said (p. 693) :

He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress.

So here, the discretion in respect to the time of adjustment related only to the enforcement of the policy established by Congress—a policy far more definite than that upheld in *Field v. Clark*.

(2) Section 9 (b) provides that if the Secretary has reason to believe that the processing tax (at a rate equal to the difference between the current farm price and the fair exchange value of the commodity taxed) :

* * * will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If, thereupon, the Secretary finds that such result will occur, then the processing tax * * * shall be at such

rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity.

It seems obvious that this authorizes only a *lowering* of the rate of tax, since plainly an *increase* of rate could not aid consumption of the taxed commodity. This was expressly set forth in the Committee Reports as the Congressional intention.²³

With this in mind the need and validity of the provision become clear. The Agricultural Adjustment Act was designed to aid producers of agricultural products and thereby to promote the welfare of the nation generally. Any loss of markets for agricultural products through decrease in domestic consumption as a result of processing taxes was naturally to be avoided, as far as possible. Consequently, Congress provided that if a given rate of tax at the prescribed amount would cause such a decrease in consumption as to increase surpluses or to lower prices, the Secretary—after public hearing and full notice—was to determine such a lower rate as was necessary to avoid these results.

It is to be noted that the result of this determination would be not the imposition of additional taxes, but a partial relief from existing taxes. A statute which “grants the taxpayer the *benefit* of discretionary action” by an administrative official

²³ H. Rep. No. 6, 73d Cong., 1st Sess., p. 5; H. Rep. No. 100, 73d Cong., 1st Sess., pp. 9–10.

has been upheld by this Court, even though the statute was construed to preclude judicial review of the exercise of broad discretion there involved. *Heiner v. Diamond Alkali Co.*, 288 U. S. 502, 507. Moreover, Congress obviously patterned the procedure to be followed here upon the provisions of the present Tariff Act, the precursor of which was sustained although it went much further than the present Act in that it permitted the *imposition* of *increased* duties.²⁴ *Hampton & Co. v. United States*, 276 U. S. 394. An investigation involving hearings and notice is required here as it was in that Act. It is submitted that the determination required is of no less certainty than that required by the Tariff Act of 1922 and is as equally within the special competence of the experts of the Department of Agriculture as the determination under the Tariff Act was within that of the Tariff Commission.

We submit, therefore, that there was no unlawful delegation of authority in the original determination of the rate of the tax, that respondents are not in a position to question the adjustment provisions, and that even if they were, no unlawful delegation would be found. We submit the delegation of necessary administrative detail of this kind was not improper.

²⁴ See H. Rep. No. 6, 73d Cong., 1st Sess., p. 5: "In their legal aspects these flexible tax provisions are similar to the provisions of the Tariff Act of 1930 providing for the flexible tariff."

2. There is no improper delegation of legislative power to the Secretary of Agriculture as to the time when the processing taxes become effective

Aside from the determination of the rate of taxation, it is contended, secondly, that the Act improperly confers upon the Secretary unfettered discretion to determine when the taxes shall be imposed. This argument takes several forms—it is applied (a) to the determination of the marketing year during which the taxes are effective, (b) to the initiation of the taxes for any subsequent marketing year or for any commodity, and (c) to the termination thereof. Each of these contentions will be treated under the separate headings below.

a. The determination of the marketing year involves no exercise of legislative powers

It cannot seriously be contended that the Secretary of Agriculture may initiate a processing tax upon any particular day in the year which he may choose. Section 9 (a) specifies that processing taxes are to become effective "*from the beginning of the marketing year*" of the commodity with respect to which such tax is levied. (Italics supplied.) That section also provides that:

The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture. * * *

No delegation of law-making power is involved in this provision. Each agricultural commodity has a well-defined annual period within which its

marketing takes place.²⁵ Congress directed the Secretary of Agriculture to ascertain and prescribe that period for each commodity involved in the Act. In the case of cotton, the only commodity before this Court, the commercial custom in the industry and the physical facts as to the seasonal nature of the production of the crop, have made August 1 the universally accepted date for the beginning of the marketing year for each new cotton crop (R. 11-12, Finding 11; Addendum 21-22). Since the year 1914, the date of August 1 as the beginning of the cotton marketing year has been officially adopted by the Departments of Agriculture and Commerce, by other governmental and by private agencies (*Ibid.*). Congress itself has recognized this date.²⁶

²⁵ Prior to the beginning of this marketing period the reserve stocks (or so-called "carry-over") of the commodity are at a minimum. The Yearbook of Agriculture, and other official and nonofficial statistical publications, have long classified crop data in marketing years beginning at the time of the start of new-crop movement. See Yearbook of Agriculture, 1932, United States Department of Agriculture, pp. 588-593 (for wheat), pp. 615-616 (for corn), pp. 666-671 (for cotton), pp. 787-788 (for hogs).

²⁶ The Act entitled "An Act authorizing the Secretary of Agriculture to collect and publish statistics of the grade and staple length of cotton" (c. 337, 44 Stat. 1372) provided that "The Secretary of Agriculture be, and he is hereby, authorized and directed to collect and publish annually, * * * statistics or estimates concerning the grades and staple length of stocks of cotton, known as the carry-over, on hand the 1st of August of each year * * *."

It is plain that no unlawful discretion is exercised by the Secretary of Agriculture in the determination of the date on which the current marketing year for cotton begins. He is merely directed to make findings as to commercial practice (see *Houston v. St. Louis Packing Co.*, 249 U. S. 479; *Brougham v. Blanton Mfg. Co.*, 249 U. S. 495; *Buttfield v. Stranahan*, 192 U. S. 470), and as to a well-recognized fact relating to the production and marketing of cotton.

- b. Congress has established definite and readily ascertainable standards which, when found applicable to the facts and conditions in the industry, require the Secretary to initiate reduction programs involving rental or benefit payments**

It is contended that no adequate standard is provided to govern the initiation of reduction programs involving rental or benefit payments and that because the tax is to become effective upon the initiation of reduction programs involving rental or benefit payments, the tax provisions are invalid. On the contrary, however, Congress has directed the Secretary to make rental or benefit payments whenever he finds certain readily ascertainable objective conditions and, consequently, the initiation of the processing tax is not dependent upon unfettered administrative discretion.

Section 9 (a) provides that "a processing tax shall be in effect * * * from the beginning of the marketing year * * * next following the date" upon which the Secretary makes a required

determination (and proclamation of such determination) to put into operation the rental or benefit payment provisions of Section 8 (1). The latter section empowers the Secretary to initiate a program of voluntary acreage reduction and “to provide for rental or benefit payments in connection therewith”; but such a program may only be initiated “in order to effectuate the declared policy” of the Act. The “declared policy”, thus incorporated by reference, is embodied in Section 2 and (unlike Section 1 of the National Industrial Recovery Act) prescribes a definite and certain standard within which the authority conferred by Section 8 (1) is to be exercised. Thus, the authority conferred upon the Secretary by Section 8 (1) is to be exercised, under Section 2, in order—

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

Certain limitations are attached to this authority, as follows:

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the pre-war period, August 1909–July 1914.

This section sets forth a clear and unequivocal legislative standard—the raising of the purchasing power of agricultural commodities to the level which these commodities had in the base period, i. e., the attainment of the “parity price.” To guide the Secretary in the accomplishment of the desired objective, a consideration of “the current consumptive demand in domestic and foreign markets” is required to insure that the object of Congress will be accomplished by “gradual correction of the present inequalities” in the purchasing power of agricultural and other commodities. As a further guide to the Secretary, it is provided that the consumers' interest is to be protected by the restriction in Section 2 (3) upon the percentage of

the consumers' retail expenditures for agricultural commodities which is to be returned to the farmer. The standard is thus much more definite than many which have been upheld as constitutional by this Court. Cf. *Buttfield v. Stranahan*, 192 U. S. 470, 496; *Monongahela Bridge v. United States*, 216 U. S. 177, 192; *Mahler v. Eby*, 264 U. S. 32, 40; *Avent v. United States*, 266 U. S. 127, 130; *United States v. Shreveport Grain & El. Co.*, 287 U. S. 77, 85. To require more, it will be shown, would impose upon Congress a restriction which would render it unable "to perform the high duties assigned to it." *McCulloch v. Maryland*, 4 Wheat. 316, 421.

Moreover, we are not here concerned with the substantive contents of administrative rules or regulations but only with the time when authorized administration is to become operative. The question here, then, is altogether different from the question before this Court in *Schechter Corp. v. United States*, 295 U. S. 495. Nor is the situation comparable to that involved in *Panama Refining Co. v. Ryan*, 293 U. S. 388, where the statutory provision contained no indication whatever as to the time when the provision should be made operative—where there was no state of facts to be found upon which the operation of the law could be made dependent.

Analysis of the statute here involved indicates that the Secretary is to initiate rental or benefit payment programs when he finds (1) that current

prices of a given commodity are below the prescribed parity price and (2) that such a program will in fact result in raising current prices toward the prescribed goal.

(1) At any given time the price level established as the end to be achieved by reduction programs is capable of ready and exact ascertainment

The "declared policy", set forth in Section 2 and discussed above, directs the establishment and maintenance of such a balance between the production and consumption of agricultural commodities and such marketing conditions therefor as will reestablish prices to farmers at levels 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.²⁷ The

²⁷ It should again be noted that the sole test here relevant as to the lawfulness of this standard is its definiteness as a Congressional direction of when *some* reduction of production should be secured by voluntary methods under Section 8 (1), not as a guide for the substantive contents of elaborate regulatory provisions (Cf. *Schechter Poultry Corporation v. United States*, 295 U. S. 495). The limitations of subsections (2) and (3) of Section 2, referred to above, do not enlarge the discretion involved in determining when to make rental or benefit payments. Subsection (2) provides for a gradual approach to the parity price level. This affects only the *amount* of reduction attempted in any year, not the *fact* of reduction. The processing tax becomes effective upon a determination to make *any* rental or benefit payments. Subsection (3) provides that in any event the parity level must not be so high as to make the farm price a greater percentage of the retail price than it was during the base period. This protects the consumers'

definition in Section 9 (c) of the fair exchange value, one of the factors used in the computation of the rate of tax referred to above, makes clear the definiteness of the price level for agricultural commodities chosen by Congress as the goal which the Act was designed to achieve. Section 9 (c) defines the fair exchange value of a commodity as the price that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period. It further specifies that the fair exchange value is to be "ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

It has already been shown at length (*supra*, pp. 49-55) that the determination of these prescribed price levels is a matter of purely mathematical computation involving no exercise of administrative discretion under this Act.

(2) ~~The determination of whether a voluntary reduction program would in fact raise farm prices to the desired level involves only such discretion as may properly be vested in an administrative official engaged in carrying out the terms of any legislative enactment~~

(1) The determination of whether existing factors that affect farm prices are such that a reduction of domestic production will result in a raising of farm prices requires merely the use of such

interests by setting a ceiling to farm prices regardless of the increase in costs of articles farmers buy. This additional factor does not decrease the definiteness of the standard.

studies of the factors affecting prices as the Department's experts have long been engaged in making.²⁸

Where the total supply available for domestic consumption is predominantly of American production, it will be seen that a decrease of American production would mean a decrease of the total domestic supply and this in turn would of necessity tend to raise domestic prices. This determination, we submit, does not involve any application of judgment, but consists merely in the ascertainment of existing facts. It must be remembered that the determination relevant to the point under discussion is simply whether *any* reduction will result in *any* price increase.²⁹ This requires a preliminary consideration by the Secretary as to whether foreign production is available in sufficient quantities to replace on the domestic market any reduction that might be made in domestic production. If that be the fact reduction of do-

²⁸ See bibliography entitled "Price Studies of the U. S. Department of Agriculture showing Demand-Price, Supply-Price, and Price-Production Relationships", compiled by Louise O. Bercaw, Library, U. S. Bureau of Agricultural Economics (1935). See also 2 Econometrica, Journal of the Econometric Society, 399 (No. 4, October 1934), Price Analysis, Selected References on the Theoretical Aspects of Supply and Demand Curves and Related Subjects; Agricultural Economics Bibliography, No. 14, Factors Affecting Prices (1926), Bureau of Agricultural Economics, U. S. Dept. of Agriculture; Agricultural Economics Bibliography No. 48, Price Analysis (1933), Bureau of Agricultural Economics, U. S. Dept. of Agriculture; Farmers' Response to Price, A Selected Bibliography (1933), Bureau of Agricultural Economics, U. S. Dept. of Agriculture.

²⁹ See note, supra, p. 70.

mestic production would not result in any decrease in available supply for the domestic market and consequently would not result in any increase in domestic prices. The existence of such a fact would mean that the Secretary of Agriculture could not determine that the making of rental or benefit payments would effectuate the declared policy, and, therefore, no tax could become effective. This requires simply the use of facts currently collected by official agencies and the use of analyses and forecasts as to the price, supply and demand outlook made with routine regularity by the Department since 1923. (See *infra*, p. 201.)

It must be remembered again that this determination is not dependent upon the exactness with which the official forecasts utilized by the Secretary indicate the effect upon prices of any given amount of reduction. The test is simply whether a given reduction will result in *some* increase in prices. Where demand is relatively stable, the amount of the total available supply is the prime conditioner of price. Further, when the trend of a changing demand can be determined with relative accuracy, the effect upon price, at any time, of a change in available supply is susceptible of equally definite ascertainment.

Demand had been relatively stable at a very low level for the nine months preceding the passage of the Act.³⁰ A reduction of supply must of neces-

³⁰ See course of income of industrial workers and of factory employment during this period as shown, *infra*, by Charts 7 (p. 222) and 8 (p. 223), respectively.

sity have brought increased price. A determination that the reduction of the production of any particularly basic commodity would raise the price of that commodity is thus seen to be considerably more susceptible of definite ascertainment than is the difference between foreign and domestic costs of production, the ascertainment of which may be made the condition for the imposition of increased import duties. *Hampton & Co. v. United States*, 276 U. S. 394. Costs are made up in large part of a series of estimates—estimates of the value of materials some of which may have no current market price, estimates of the amount of plant and other capital equipment consumed in the process of producing a unit of goods, estimates of the amount of labor and capital to be allocated to each of several joint products all resulting from the same process, and the like.³¹ Also in the *Hampton* case the sources upon which the estimates of costs were based must of

³¹After an elaborate study the Special Committee of the Senate on Investigation of the Munitions Industry has recently found that "costs are in the last analysis matters of opinion and are not susceptible of scientific determination." S. Rep. No. 944, Part 2, 74th Cong., 1st Sess., p. 6, par. 3, see especially pp. 19–24 (as to difficulties of valuation), 27–36 (as to valuation difficulties in determining depreciation and similar cost items), and 85–91. In the *Hampton* case the Court of Customs Appeals said (14 Ct. Cus. App. 350, 366) :

"The statements of many persons are cited, some of whom are present or past members of the United States Tariff Commission, to the effect that *it is impossible to precisely establish the cost of production of an article. This may be conceded.* It is likewise impossible to ascertain, aside from the realm of mathematics, with scientific accuracy, most of the things upon which our lives and human governments depend. At most, we must be content with a reasonable

necessity have been far from complete. In the present case the Secretary of Agriculture was not dependent upon data within the control of domestic or foreign concerns. The amount of the imports of any commodity and of past domestic production, the quantities recently consumed, and such matters are the subject of routine official collection.

As pointed out above, the determination which was controlling was simply that *a reduction* would result in *an increase* of price. In the *Hampton* case the finding of *some* difference between domestic and foreign costs was in itself of no significance, since the increase or decrease in the *rate of duty* was the *exact* difference between the two. Any difference due to the exercise of judgment in estimating costs directly affected the amount of tax to be collected. The authority upheld in that case went beyond the authority here conferred, which is more nearly analogous to that sustained in *Field v.*

accuracy, and this, we believe, is all that is required in the administration of the law now before us." (Italics added.)

See also W. H. Wynne, *A Tariff Commission at Work*, 33 Journal of the Canadian Bankers' Association (January and July 1926), pp. 184, 195-197, 421, 423; P. O. Wright, *The New Tariff Examined*, Review of Reviews, November 1922, pp. 498, 502; T. W. Page, *Making the Tariff in the United States*, 83-99. Finally it should be noted that averages to be ascertained under the Tariff Act of 1922 required that the determination of the costs as estimated for the production of a given article by any single producer had to be blended with the widely disparate costs of other producers (cf. S. Rep. No. 944, Part 2, *supra*, pp. 56-59) in a weighted or bulk line average by methods necessitating a wide exercise of judgment. *Ibid.*

Clark, 143 U. S. 649, under which duties *fixed by Congress* were to become effective when the President found simply that foreign regulations of imports were more burdensome than our own.

(2) But the very determination that a voluntary reduction program [the only action authorized by Section 8 (1)] would raise prices requires, in any practical sense, a determination that a sufficient number of farmers would cooperate in such a proposed program. The Secretary of Agriculture had in the Extension Service of the Department with its experienced farm agents in 2,200 counties a ready nucleus for the machinery necessary to determine the sentiment of farmers.³² The holding of meetings of farmers throughout the country, the conferring with representatives of farmers' organizations and other methods of ascertaining the practicability of programs in the respective basic commodities involving millions of farmers was necessarily left to administrative determination and the Secretary of Agriculture by virtue of the facilities and regular functions of his Department, was eminently qualified for this task.³³

³² See Report of the Secretary of Agriculture, 1933, p. 67; Agricultural Adjustment, A Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934, p. 17.

³³ For examples of the manner in which producer sentiment was ascertained see Agricultural Adjustment, *supra*, pp. 23 (cotton), 47-49 (wheat), 103-105, 119-123 (corn and hogs); Agricultural Adjustment in 1934, A Report of the Administration of the Agricultural Adjustment Act, February 15, 1934, to December 31, 1934, pp. 132-133 (milk and its products).

Under the Agricultural Adjustment Act the test was whether farmers would cooperate in a voluntary reduction program. Upon this cooperation depended the efficacy of the Congressional policy. The determination of it could not have been made by Congress as a practical matter. Wheat was produced on 1,208,000 farms in 1929, cotton on 1,987,000, corn on 4,149,000, and hogs on 3,535,000.³⁴ Moreover, farmers' sentiment was not likely to be static. Congress laid down a simple standard to be applied under changing and complex conditions. Cf. *Monongahela Bridge v. United States*, 216 U. S. 177, 193; *United States v. Grimaud*, 220 U. S. 506, 516; *United States v. Shreveport Grain & El. Co.*, 287 U. S. 77, 85. Its application required no judgment as to policy as in the case of motion-picture censorship (*Mutual Film Corp. v. Ohio Industrial Comm.*, 236 U. S. 230) or the allocation of railroad cars to shippers in such order as would suit the needs of the Nation (*Avent v. United States*, 266 U. S. 127). The determination was one of fact.

(3) Whenever the Secretary of Agriculture determines that the current farm price of any basic agricultural commodity is less than the parity price announced by Congress and that a voluntary program involving rental or benefit payments would result in an increase of the current farm price toward the parity level, it becomes his duty, under the act, to initiate a reduction program

In the foregoing discussion of the issue of delegation of power as here presented we have demonstrated that the Act fixed definite standards under which the Secretary of Agriculture was au-

³⁴ Fifteenth Census of the United States, 1930, Agriculture, Vol. IV, pp. 735, 815, 729, and 549, respectively.

thorized to make rental and benefit payments. It will be seen that this authority, if the Congress had stopped here, would be far removed from the authority which respondents contend exists—namely, an authority to *impose* taxes whenever he chose. Had Congress stopped at this point and had the Secretary's functions been directed solely toward the ascertaining of conditions, the existence of which was made a prerequisite to imposition of the tax, the result would be more accurately defined as an authorization, though not a requirement, to impose a tax under certain definite conditions. Were this the true construction of the Act, the taxes here imposed would nonetheless be valid. Cf. *Selective Draft Law Cases*, 245 U. S. 366, 375, 389; *Avent v. United States*, 266 U. S. 127, 130; *United States v. Chemical Foundation*, 272 U. S. 1, 12; *Colorado v. United States*, 271 U. S. 153, 166; *N. Y. Central Securities Co. v. United States*, 287 U. S. 12, 24; *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 279, 285.

However, even this issue is not presented by this case. The Act requires the Secretary of Agriculture to initiate reduction programs and make rental or benefit payments in connection therewith whenever the conditions referred to above are found to exist.

The declared policy is the considered opinion of Congress as to results which should be achieved in the public interest. Congress had declared the existence of an emergency and had determined that the conditions in "the basic indus-

try of agriculture" rendered "imperative the immediate enactment" of the Act. Obviously, the mere enactment of the law without assurance of its execution could not have been rendered imperative. This Act was the outgrowth of years of Congressional investigation and deliberation and of wide-spread public discussion of measures designed to relieve agricultural distress by raising farm prices.³⁵ These measures were in the main concerned with the great basic commodities.³⁶

³⁵ See Black, Agricultural Reform in the United States (1929) pp. 182-308, 321-338, 349-479. In the 70th Congress, there were introduced 32 bills seeking to raise farm prices by bounties on exports or on domestic production, disposal of surplus, and price fixing. See Agricultural Relief Measures Relating to the Raising of Farm Prices, 70th Congress, December 5, 1927, to March 3, 1929, compiled by Louise O. Bercaw, Library, Bureau of Agricultural Economics, U. S. Dept. of Agriculture. In the 71st Congress such measures totaled 24. See similar compilation by Vajen H. Fischer for 71st Congress. In the 72d Congress 65 such bills were introduced. See similar compilation by Vajen H. Fischer for 72d Congress.

³⁶ See references cited in foregoing footnote. George N. Peek, who later became the first Administrator of the Act, told the Senate Finance Committee, which in February 1933 was investigating "present economic problems of the United States," that emergency legislation should cover only the export commodities, citing wheat, cotton, hogs, and "possibly tobacco." Investigation of Economic Problems, Hearings before the Committee on Finance, United States Senate, 72d Cong., 2d Sess., Part 1, p. 126. The president of the American Farm Bureau Federation, speaking on behalf of his own organization and thirteen other leading farm groups, testified before the Senate Committee on Agriculture and Forestry that plans to increase farm prices to pre-war pur-

The mandate of Congress expressed in the present Act was not to go into effect regardless of drought, increased demand due to foreign war, and the other factors which might independently bring the desired increase in price, or regardless of the availability of foreign products and other factors which might nullify the effectiveness of any reduction attempted. It further included powers designed to decrease marketing waste and inefficiency, and to expand markets.³⁷ But the basic purpose of the Act—amply demonstrated by the major operations under it—was to halt the mounting surpluses of the great imperishable farm products. (For a description of the surpluses of these products and their effect upon agricultural prices and income see *infra*, pp. 193–197.) Foreign trade had reached a

chasing power by reduction of production “must be applied to basic products which have a price-determining effect on other products, and on which the tariff is not effective because of exportable surpluses.” Agricultural Adjustment Relief Plan, Hearings before the Committee on Agriculture and Forestry, United States Senate, 72d Cong., 2d Sess., pp. 13–14. See also Agricultural Adjustment Program, Hearing before the Committee on Agriculture, House of Representatives (Serial M), 72d Cong., 2d sess., pp. 9–10. Senator Wheeler of the Senate Committee on Agriculture and Forestry said in the course of the hearings on the present Act, “If you can raise the price of the basic commodities, wheat, cotton, and corn, in this country, the rest of them will take care of themselves.” Agricultural Emergency Act to Increase Farm Purchasing Power, Hearings before the Committee on Agriculture and Forestry, United States Senate, 73d Cong., 1st Sess., p. 47.

³⁷ See Sections 8 (2), 8 (3), and 12 (b).

low point from which no immediate relief was in sight, domestic purchasing power was prostrate. The immediate primary purpose of the Agricultural Adjustment Act was to secure by voluntary methods a reduction of the production of basic crops and to do it as promptly as possible.³⁸ The President's message transmitting the draft of the Act stated:

The proposed legislation is necessary now for the simple reason that the spring crops will soon be planted and if we wait for another month or six weeks the effect on the prices of this year's crops will be wholly lost. (H. R. Doc. No. 5, 73d Cong., 1st Sess.)

³⁸ That voluntary reduction under the provisions of Section 8 (1) was to be accomplished immediately is borne out not only by the legislative history of the Act and by the manifest phenomena of the agricultural situation when the Act was passed, but also by specific provisions in the Act. Section 6 (a), one of the sections providing for cotton options, conferred a right to an option upon any farmer who agreed to reduce his cotton production in 1933—the year the Act was passed. Section 7 authorizes the issuance of cotton options in combination with rental or benefit payments. The mandatory nature of the duty laid upon the Secretary of Agriculture to reduce production is further indicated by Section 11 which provides for the exclusion from the operation of the Act of any commodity as to which investigation, including notice and opportunity for hearing, has demonstrated that the Act cannot be administered so as to effectuate the declared policy with respect to the commodity. If the Secretary had authority to apply the provisions of the Act or not, as he saw fit, there would have been no necessity for a specific provision requiring hearings in the event administration was found to be impossible as a practical matter. See also Section 13.

The language by which the duty of securing reduction was imposed upon the Secretary of Agriculture does not militate against this construction. Section 8 provides that "in order to effectuate the declared policy, the Secretary of Agriculture shall have *power*—(1) To provide for reduction * * *." Section 9 (a) adds that "When the Secretary of Agriculture determines that rental or benefit payments are to be made * * * he shall proclaim such determination." This Court has recognized that Congress customarily as a matter of form uses expressions of this kind when directing high executive officials to perform some duty. The weaker terms "may", "it shall be lawful", and "authorized" have frequently been construed as mandatory and not merely permissive. *Mason v. Pearson*, 9 How. 248, 258; *Supervisors v. United States*, 4 Wall. 435, 446; *City of Galena v. Amy*, 5 Wall. 705; *Ritchie v. Franklin County*, 22 Wall. 67; *Michaelson v. United States*, 266 U. S. 42, 70; *Int. Com. Comm. v. Goodrich Transit Co.*, 224 U. S. 194; *Intermountain Rate Cases*, 234 U. S. 476; *First National Bank v. Union Trust Co.*, 244 U. S. 416; *Avent v. United States*, 266 U. S. 127.

The Tariff Act of 1922 did not in express language direct the President to investigate the differences in costs of production. Indeed the language was very similar to the provision in Section 9 (a) that "when the Secretary of Agriculture determines

that rental or benefit payments are to be made * * * he shall proclaim such determination" and thereafter "a processing tax shall be in effect."³⁹ This Court said of the language used in the Tariff Act (*Hampton & Co. v. United States*, 276 U. S. 394, 405) :

There was no specific provision by which action by the President might be invoked under this Act, but it was presumed that the President would through this body of advisers keep himself advised of the necessity for investigation or change, and then would proceed to pursue his duties under the Act and reach such conclusion as he might find justified by the investigation, and proclaim the same if necessary.

³⁹ Section 315 (a) provided that: "* * * whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations, such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported * * *." Tariff Act of Sept. 21, 1922, c. 356, 42 Stat. 858, 941.