XIV

Agriculture

NOTE

The power of the United States government to institute a program of 'planned economy' has been tested most effectively in the field of agriculture. The Constitution makes no reference to agriculture and farmers are sometimes thought to be leaders in a *laissez-faire* philosophy, yet, since 1789, agriculture has been constantly aided and supervised by Congress. This action has taken a variety of forms and in most cases it has come at the request of a well-organized farm bloc.[1]

As a result of individual initiative, an inheritance of highly productive land much of which was virgin soil, plus the scientific assistance of the federal government, the farmer's problem in the United States by the time of the New Deal was hailed as one of 'over-production.' While this analysis was too simple it did tend to direct the government controls toward a program of marketing regulations and restrictions on production, which were designed to stabilize prices at a higher level.[2] Farmers agreed to reduce acreage planted or marketable commodities in return for cash bounty incentives.[3] The government further eased the marketing problems by export subsidies, a food stamp program for distribution of surpluses among low income families, and the introduction of free school lunches for underprivileged children.

During World War II the government abandoned crop restriction and again turned to a program of increased production. The farmers' long experience with federal controls made the transition from peace to a war economy an easier step than for either labor or capital. The Food Production Administration was authorized to provide for the distribution, storage, and allocation of foods. There was extension of scientific research, the exemption of essential farm labor from Selective Service, priorities, rationing of scarce items, and some price control.

Over a period of years the farmer has received extensive government benefits in credit facilities. In the nineteenth century the Homestead Acts gave the pioneer farmer a special credit extension. During the twentieth century the Federal Land Banks, the Commodity Credit Corporation, the Federal Farm Mortgage Corporation, the Reconstruction Finance Corporation, and other government agencies have sought to relieve the farmers' debt burden. The improvement of rural life has also been sponsored by the federal government through rural electrification,

[1] See Gaus, John M., and Wolcott, Leon O., *Public Administration and the United States Department of Agriculture,* Chicago, 1940.

[2] See Blaisdell, Donald C., *Government and Agriculture,* New York, 1940. *Farm Policies under the New Deal,* Public Affairs Pamphlet No. 16, New York, 1938.

[3] This system provided in the Agricultural Adjustment Act of 1933 was declared unconstitutional in *United States* v. *Butler,* 297 U.S. 1 (1936). See Note, *ante,* p. 141.

relief for farm tenants, a medical care program under the Farm Security Administration, the development of model communities known as 'green belt' areas, and the rehabilitation of submarginal lands through resettlement projects and land-use programs.

The 1933 Agricultural Adjustment Act was held unconstitutional on its tax feature. The funds for the cash bounties were to be furnished by an ear-marked tax placed on manufacturers engaged in processing raw products. The Court in its interpretation of the general welfare clause held this expenditure invalid.[4] In order to avoid this criticism the 1938 Agricultural Adjustment Act omitted the tax feature and the cash bounty but secured indirect control over production through the encouragement of soil conservation and control of wheat, cotton, corn, rice, and tobacco through a scheme of marketing quotas established under the commerce clause.

Mulford v. *Smith* was an equity proceeding to prevent the collection of penalties by warehousemen handling flue-cured tobacco that was placed on the market in excess of the quota. The statute provides for a base reserve and if the Secretary of Agriculture upon investigation finds that the supply in a given year is likely to exceed this amount he is authorized to hold a referendum of the tobacco producers on the question of setting a maximum quota. If two-thirds of the tobacco growers favor a quota the amount is to be apportioned among the various states on the basis of production during the past five years with consideration for other relevant factors. Quotas for individual farmers are set by committees of local farmers whose decision is subject to committee review and appeal to the courts. A standard for the quota is set in the statute. Any farmer who sells beyond his quota is subject to a penalty, which is collected by the local warehouseman.

The right of a state government to interfere with individual freedom and property in the interests of the general good was upheld in *Nebbia* v. *New York*[5] insofar as it applied to the price regulation of a vital food, milk. For the national government to place such regulations, however, there must be a direct or indirect connection to some delegated power. That marketing has a direct connection to interstate commerce seems easy to establish and the Court now holds that the control of production is merely incidental to a stable market. The Court went a step further in the case of *Wickard* v. *Filburn*[6] when it upheld a production quota on an individual farmer even though he may use the surplus in home consumption. It was held impossible to make scientific findings on a reserve supply unless home consumption was included in the estimates. Milk produced and sold locally has also been held to have an indirect effect on the whole marketing picture and although it be intrastate in nature it may affect interstate commerce.[7]

This same 'incidental connection' argument was used in upholding the Tennessee Valley Authority, another project directly affecting agriculture. The original Muscle Shoals project was authorized in the National Defense Act of 1916 as an experimental nitrate program needed in the conduct of war. The project

[4] See *United States* v. *Butler*, *ante*, p. 142.
[5] 291 U.S. 502 (1934). [6] 317 U.S. 111 (1942).
[7] *United States* v. *Wrightwood Dairy Company*, 315 U.S. 110 (1942).

was extended to provide flood control on the Tennessee River and to promote the conservation of natural resources. The production of electricity was considered only incidental to the exercise of other functions.[8]

The exercise of legislative authority by technical administrators has reached new heights in the field of agriculture and has raised legal questions of delegation.[9] In *United States* v. *Rock Royal Co-Operative*[10] and in *Hood and Sons* v. *United States*,[11] the Agricultural Marketing Agreement Act was upheld permitting the Secretary of Agriculture, after approval of two-thirds of the producers in the area and with the approval of the President, to set prices on milk in the metropolitan districts of New York City and Boston. In *Currin* v. *Wallace*[12] the Court upheld the Tobacco Inspection Act which gave the Secretary of Agriculture the power to establish standards of tobacco and to designate certain markets for government inspection and certification. No market was to be a 'designated market' unless it had the approval of two-thirds of the growers voting in a prescribed referendum. The administration of these agricultural referenda furnishes a significant experiment in democratic procedures.[13]

MULFORD v. SMITH
307 U.S. 38 (1939)

Appeal from a decree of a three-judge District Court which dismissed the bill in a suit brought by tobacco farmers to enjoin warehousemen from deducting, and remitting to the Secretary of Agriculture, the penalties inflicted by the Agricultural Adjustment Act of 1938 on tobacco sold for the plaintiffs in excess of the quotas assigned to their respective farms. The suit was begun in the Superior Court of Georgia. The defendants removed the case to the federal court. The United States intervened, under the Act of August 24, 1937. . .

Mr. Justice Roberts delivered the opinion of the Court.

The appellants, producers of flue-cured tobacco, assert that the Agricultural Adjustment Act of 1938,[1] is unconstitutional as it affects their 1938 crop. . .

Before coming to the merits we inquire whether the court below had jurisdiction as a federal court or as a court of equity. Though no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction under subsection (1) of § 24 of the Judicial Code, the case falls within subsection (8) which confers jurisdiction upon District Courts 'of all suits and proceedings arising under any law regulating commerce.' Maintenance of the bill for injunction is not forbidden by R.S. 3224, which applies only to a suit to restrain assessment or collection of a tax. Under the averments of the bill the defendant warehousemen would be wrongdoers if they deducted and paid over the prescribed penalties, but no action at law would be adequate to redress the

[8] *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936).

[9] See Appleby, Paul H., *Big Democracy*, New York, 1945. See *Hampton* v. *United States*, 276 U.S. 394 (1928), *ante*, p. 134.

[10] 307 U.S. 533 (1939).

[11] 307 U.S. 588 (1939).

[12] 306 U.S. 1 (1939).

[13] Howard, L. V., 'The Agricultural Referendum,' 2 *Public Administration Rev.* 9 (1942).

[1] 52 Stat. 31, as amended 26 March 1938, 52 Stat. 120, 7 April 1938, 52 Stat. 202, 31 May 1938, 52 Stat. 586, and 20 June 1938, 52 Stat. 775; U.S.C. Supp. IV, Title 7, §§ 1281, *et seq.*

damage thus inflicted. It appears that the total of the penalties involved in this suit is some $374,000. The allegation that the warehousemen would be unable to respond in actions for sums aggregating this amount has, therefore, reasonable basis. Before any such action could be initiated the penal sum would have been paid to the Secretary of Agriculture and by him to the Treasurer of the United States and covered into the general funds of the Treasury. No action could be maintained against the warehousemen or either of these officials for disposing of the penal sums in accordance with the terms of the Act unless prior notice not to do so had been served upon each of them. In the light of the fact that the appellants received notice of their quotas only a few days before the actual marketing season opened, the maintenance of actions based upon collection of the penalties would have been a practical impossibility. We are of opinion, therefore, that a case is stated for the interposition of a court of equity.

The appellants plant themselves upon three propositions: (1) that the Act is a statutory plan to control agricultural production and, therefore, beyond the powers delegated to Congress; (2) that the standard for calculating farm quotas is uncertain, vague, and indefinite, resulting in an unconstitutional delegation of legislative power to the Secretary; (3) that, as applied to appellants' 1938 crop, the Act takes their property without due process of law.

First. The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse.[2] The record discloses that at least two-thirds of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination. In Georgia nearly one hundred per cent of the tobacco so sold is purchased by extrastate purchasers. In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective, must, and therefore may constitutionally, apply to all sales.[3] This court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce.[4] Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce,[5] and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation.[6]

[2] *Currin* v. *Wallace*, 306 U.S. 1; compare *Townsend* v. *Yeomans*, 301 U.S. 441.

[3] *The Minnesota Rate Cases*, 230 U.S. 352; *The Shreveport Case*, 234 U.S. 342; *Currin* v. *Wallace*, *supra*.

[4] *Currin* v. *Wallace*, *supra*; and see *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 290; *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 198. Compare *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50.

[5] *Champion* v. *Ames*, 188 U.S. 321; *Hipolite Egg Co.* v. *United States*, 220 U.S. 45; *Hoke* v. *United States*, 227 U.S. 308; *Brooks* v. *United States*, 267 U.S. 432; *Gooch* v. *United States*, 297 U.S. 124.

[6] Story, *Commentaries on the Constitution* (4th ed.), §§ 965, 1079, 1081, 1089.

The provisions of the Act under review constitute a regulation of interstate and foreign commerce within the competency of Congress under the power delegated to it by the Constitution.

Second. The appellants urge that the standard for allotting farm quotas is so uncertain, vague, and indefinite that it amounts to a delegation of legislative power to an executive officer and thus violates the Constitutional requirement that laws shall be enacted by the Congress.

What has been said in summarizing the provisions of the Act sufficiently discloses that definite standards are laid down for the government of the Secretary, first, in fixing the quota and, second, in its allotment amongst states and farms. He is directed to adjust the allotments so as to allow for specified factors which have abnormally affected the production of the state or the farm in question in the test years. Certainly fairness requires that some such adjustment shall be made. The Congress has indicated in detail the considerations which are to be held in view in making these adjustments, and, in order to protect against arbitrary action, has afforded both administrative and judicial review to correct errors. This is not to confer unrestrained arbitrary power on an executive officer. In this aspect the Act is valid within the decisions of this court respecting delegation to administrative officers.[7]

Third. In support of their contention that the Act, as applied to the crop year 1938, deprives them of their property without due process of law in violation of the Fifth Amendment, the appellants rely on the following undisputed facts.

Tobacco growers in southern Georgia and northern Florida began to arrange for the planting of their 1938 crop in December, 1937, when it was necessary for them to prepare beds for the planting of the seeds. Thereafter it was necessary to cultivate the seed beds, sow and water the seed, cover the beds with cloth, and otherwise care for the plants until they were large enough to be transplanted. At the date of approval of the Act each of the plaintiffs had planted his seed beds and, about the middle of March, began transplanting into the fields, which were prepared and fertilized at large expense. The plants were thereafter cultivated and sprayed, and harvesting began during June and continued during July, followed by the curing and grading of the tobacco.

All of these activities involved labor and expense. The production of flue-cured tobacco requires, at prevailing price levels, a cash outlay of between thirty and forty dollars per acre for fertilizer, plant bed covering, twine, poison, etc. The use of animals and permanent and semi-permanent equipment demands an average expenditure, over a period of years, ranging from twenty to thirty dollars an acre. The labor expended per acre is between three hundred and four hundred man-hours. The total cost per pound varies from ten cents to twenty cents.

The marketing season for flue-cured tobacco in Georgia and Florida commences about August 1st of each year. Each of the appellants was notified of the quota of his farm shortly before the opening of the auction markets. Prior to the receipt of notice each of them had largely, if not wholly, completed planting, cultivating, harvesting, curing and grading his tobacco. Until receipt of notice none knew, or could have known, the exact amount of his quota, although, at the time of filing the bill, each had concluded from available information that he would probably market tobacco in excess of any quota for his farm.

The Act was approved February 16, 1938. The Secretary proclaimed a quota

[7] *United States* v. *Grimaud*, 220 U.S. 506; *Avent* v. *United States*, 266 U.S. 127; *Hampton & Co.* v. *United States*, 276 U.S. 394; *New York Central Securities Corp.* v. *United States*, 287 U.S. 12; *Currin* v. *Wallace*, *supra*.

for flue-cured tobacco on February 18th and, on the same date, issued instructions for holding a referendum on March 12th. March 25th the Secretary proclaimed the result of the referendum which was favorable to the imposition of a national marketing quota. In June he issued regulations governing the fixing of farm quotas within the states. July 22nd he determined the apportionment as between states and issued regulations relative to the records to be kept by warehousemen and others. Shortly before the markets opened each appellant received notice of the allotment to his farm.

On the basis of these facts it is argued that the statute operated retroactively and therefore amounted to a taking of appellants' property without due process. The argument overlooks the circumstance that the statute operates not on farm production, as the appellants insist, but upon the marketing of their tobacco in interstate commerce. The law, enacted in February, affected the marketing which was to take place about August 1st following, and so was prospective in its operation upon the activity it regulated. The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later year; and the circumstance that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

The decree is

Affirmed.

MR. JUSTICE BUTLER, dissenting. . .

The Act declares that, if more than the amount fixed for a farm is marketed, the warehouseman shall pay to the Secretary a penalty equal to one-half the price of the excess, but it authorizes him to retain that amount from the farmer raising and bringing it to market for sale. If, without resort to a warehouseman, the farmer sells directly to one in this country, the purchaser is required to pay the penalty but is authorized to take the amount from the purchase price. If the farmer sells directly to one outside the United States he is required to pay the penalty to the Secretary. Thus, in any event, the penalty is effectively laid upon the farmer. Enforcement of the Act will compulsorily take from plaintiffs an amount of money equal to one-half of the market value of all tobacco raised and sold by them in excess of the prescribed quotas.

In *United States* v. *Butler*, 297 U.S. 1, we held the federal government without power to control farm production. We condemned the statutory plan there sought to be enforced as repugnant to the Tenth Amendment. That scheme was devised and put in effect under the guise of exertion of power to tax. We held it to be in excess of the powers delegated to the federal government; found the tax, the appropriation of the money raised, and the directions for its disbursement, to be but the means to an unconstitutional end; showed that the Constitution confers no power to regulate production and that therefore legislation for that purpose is forbidden; emphasized the principle established by earlier decisions that a prohibited end may not be attained under pretext of exertion of powers which are granted; and finally we declared that, if Congress may use its power to tax and to spend compulsorily to regulate subjects within the reserved power of the States, that power 'would become the instrument for total subversion of the governmental powers reserved to the individual States.'

After failure of that measure, Congress, assuming power under the commerce clause, enacted the provisions authorizing the quotas and penalties the validity of which is questioned in this case. Plaintiffs contend that the Act is a plan to control agricultural production and therefore beyond the powers delegated to Congress. The Court impliedly concedes that such a plan would be beyond congressional power, but says that the provisions do

not purport to control production, set no limit upon the acreage which may be planted or produced and impose no penalty upon planting and production in excess of marketing quota. Mere inspection of the statute and Secretary's regulations unmistakably discloses purpose to raise price by lessening production. Whatever may be its declared policy or appearance, the enactment operates to control quantity raised by each farmer. It is wholly fallacious to say that the penalty is not imposed upon production. The farmer raises tobacco only for sale. Punishment for selling is the exact equivalent of punishment for raising the tobacco. The Act is therefore invalid. . .

Assuming that, under *Currin* v. *Wallace,* 306 U.S. 1, plaintiffs' sales in interstate commerce at defendants' auction markets are to be deemed subject to federal power under the commerce clause, the Court now rules that, within suggested limits so vague as to be unascertainable, the exercise of power under that clause, 'the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce.'

That ruling is contrary alike to reason and precedent. To support it, the Court merely cites the following cases:

The Lottery Case, (*Champion* v. *Ames*) 188 U.S. 321, held that an Act of Congress prohibiting transportation of lottery tickets in interstate commerce is not inconsistent with any limitation or restriction imposed upon exercise of the powers granted to Congress. After demonstrating the illicit character of lottery tickets, the Court said (p. 357): 'We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. . . [p. 358] It is a kind of traffic which no one can be entitled to pursue as of right.'

Hipolite Egg Co. v. *United States,* 220 U.S. 45, held within federal power the provisions of the Food and Drug Act forbidding transportation in interstate commerce of food 'debased by adulteration' and authorizing articles so transported to be seized as contraband.

Hoke v. *United States,* 227 U.S. 308, sustained congressional prohibition of interstate transportation of women for immoral purposes.

Brooks v. *United States,* 267 U.S. 432, upheld a statute of the United States making it a crime to transport a stolen automobile in interstate commerce.

Gooch v. *United States,* 297 U.S. 124, construed an Act of Congress making it a crime to transport a kidnapped person in interstate commerce.

Plainly these cases give no support to the view that Congress has power generally to prohibit or limit, as it may choose, transportation in interstate commerce of corn, cotton, rice, tobacco, or wheat. Our decisions establish the contrary:

Wilson v. *New,* 243 U.S. 332, upheld an Act regulating hours of service of employees of interstate carriers by rail. The Court, following the teaching of earlier decisions, said (p. 346): 'The extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation. The powers possessed by government to deal with a subject are neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry-goods and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets and by the obvious consideration that such right to prohibit could

not be applied to pig iron, steel rails, or most of the vast body of commodities.'

Hammer v. *Dagenhart,* 247 U.S. 251, held repugnant to the commerce clause and to the Tenth Amendment an Act prohibiting transportation in interstate commerce of articles made at factories in which child labor was employed. The Court said (p. 269): 'In other words, the power [granted by the commerce clause] is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that the adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate. . . [p. 276] In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.'

Heretofore, in cases involving the power of Congress to forbid or condition transportation in interstate commerce, this Court has been careful to determine whether, in view of the nature and character of the subject, the measure could be sustained as an appropriate regulation of commerce. If Congress had the absolute power now attributed to it by the decision just announced, the opinions in these cases were unnecessary and utterly beside the mark.

For reasons above suggested, I am of opinion:

The penalty is laid on the farmer to prevent production in excess of his quota. It is therefore invalid.

If the penalty is imposed for marketing in interstate commerce, it is a regulation not authorized by the commerce clause.

To impose penalties for marketing in excess of quotas not disclosed before planting and cultivation is to deprive plaintiffs of their liberty and property without due process of law.

The judgment of the district court should be reversed.

MR. JUSTICE MCREYNOLDS concurs in this opinion.