

LEGISLATION

A Substitute for the AAA

Although invalidated on January 6, 1936 by the Supreme Court,¹ the Agricultural Adjustment Act² had during its short life accomplished a remarkable improvement in the economic condition of agriculture by neutralizing the injurious results of high protective tariffs³ which had gradually reduced the farmers' purchasing power by creating a tremendous disparity between the prices of agricultural and industrial commodities.⁴ Compared to the lean years of the post-war period, the three years of the existence of the AAA were fat and prosperous. Under the AAA, farm commodity prices, based upon a pre-war parity of 100, had advanced from 61 in 1932 to 90 in 1935.⁵ By 1932, the gross income of farmers had fallen from \$11,000,000,000 in 1923 to \$5,337,000,000; the Agricultural Adjustment Act had the stimulating effect of increasing agricultural income to \$8,114,000,000 in 1935.⁶ Again, whereas the value of farm property had decreased steadily from \$78,436,000,000 in 1920 to \$35,816,000,000 on January 1, 1933, the end of the year 1934 saw an increment of about \$2,500,000,000.⁷ But

1. *United States v. Butler*, 56 Sup. Ct. 312 (1936), 84 U. OF PA. L. REV. 547.

2. 48 STAT. 31 (1933), 7 U. S. C. A. § 601 *et seq.* (Supp. 1934).

3. *E. g.*, the Hawley-Smoot Tariff Act, 46 STAT. 590 (1930), 19 U. S. C. A. § 1001 *et seq.* (Supp. 1935). "And so long as business continues to receive the aid of the protective tariff as a means for exacting a higher price for its product than it would otherwise receive, it is in no position to complain on the ground that governmental action is being used to accomplish the same results for agriculture." Dewey, *Legal Problems Involved in Controlling Agricultural Production* (1935) 23 KY. L. J. 267, 272. For a study of the effects of the AAA upon the financial position of the farmer, see Note (1934) 9 ST. JOHN'S L. REV. 429. See also authorities cited *infra* note 4.

4. See *World Trade Barriers in Relation to Agriculture*, SEN. DOC. NO. 170 (1933); *WORLD AGRICULTURE, AN INTERNATIONAL SURVEY*, ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS (1932); *NOURSE, AMERICAN AGRICULTURE AND THE EUROPEAN MARKET* (1924). Despite the obvious aid and boon that the AAA was to the farmer, the Act did not escape censure as an unsound economic experiment. Typical of the economists' tirades against the Act is the statement of Colonel Leonard P. Ayres that the Act was a scheme to pay the farmer more for doing less. See AYRES, *ECONOMICS OF RECOVERY* (1933).

Much of the difficulty attributed to the transformation of this country from a debtor to a creditor nation was in part caused by the World War. See Jennings & Sullivan, *Legal Planning for Agriculture* (1933) 42 YALE L. J. 878, 883. This factor, of course, was reflected in the prices the farmer received; a normal example is the price of wheat. From 1910 to 1914 the average price of wheat was \$0.88 per bushel. The War pushed the price to the unprecedented sum of \$2.14 per bushel. However, by the fall of 1932, the price was \$0.32 per bushel. See *THE AGRICULTURAL SITUATION*, DEP'T OF AGRICULTURE BULLETIN (Dec. 1, 1932), at 2. The dire distress which the farmer felt up to the passage of the Agricultural Adjustment Act is also reflected in the numerous forced sales throughout the agricultural areas. See *REPORT OF THE SPECIAL COMM. OF THE ASS'N OF LAND-GRANT COLLEGES AND UNIVERSITIES* (Nov. 1932) 21.

Statistics indicate that since the World War exports of farm products have fallen off almost to the vanishing point. In 1921, the value of such exports was \$1,358,359,000; in 1922, \$1,046,598,000; in 1929, \$753,894,000; in 1931, \$373,886,000; and in 1933, \$202,975,000. See 80 CONG. REC., Feb. 20, 1936, at 2550. This has had a severe effect in view of the fact that production per farm in the United States has increased nearly 30 per cent since 1910. See BLACK, *AGRICULTURAL REFORM IN THE UNITED STATES* (1929) 13. See also QUAINANCE, *THE INFLUENCE OF FARM MACHINERY UPON PRODUCTION AND LABOR* (Am. Ec. Ass'n Publication, 3d ser., vol. 5, no. 4, 1904) 39. The ordinary inability of the farmer to export his product because of the incapacity of foreign markets to pay for the produce has been increased by the high protective tariff recently raised by the foreign governments. The wheat tariff is \$1.62 per bushel in Germany, \$0.87 per bushel in France; Spain and Italy have imposed equally effective barriers. See Jennings & Sullivan, *supra*, at 890, n. 25.

5. 80 CONG. REC., Feb. 20, 1936, at 2556.

6. *Hearing before Committee on Agriculture and Forestry, United States Senate*, 74th Cong., 2d Sess. (1936) 76.

7. *Ibid.* The exact amount was \$38,250,000,000.

by far the most striking indicium of the plight of the farmer prior to the Agricultural Adjustment Act is the fact that in 1932 the average income per person in the United States was \$385 while the farmer's was only \$115; in 1935, however, primarily because of the AAA, the annual income per farmer was approximately \$255.⁸ The effect of the annulment of the Agricultural Adjustment Act was to station an insurmountable impediment upon the road to prosperity of 32,000,000 people, comprising the families of 6,812,350 farmers.⁹ In order to prevent a reversion of agriculture to the wretched conditions of the post-war period, numerous remedial measures¹⁰ were introduced into Congress as substitutes for the AAA, and from them emerged the Soil Conservation and Domestic Allotment Act,¹¹ approved by President Roosevelt on February 29, 1936, only fifty-three days after the rendition of the *Butler* decision.

The Soil Conservation and Domestic Allotment Act is a subsidy law which purposes "to promote the conservation and profitable use of agricultural land resources by temporary Federal aid to farmers and by providing for a permanent policy of Federal aid to States for such purposes."¹² Briefly, the Act provides for two programs: First, a temporary or "interim" program, to exist only until January 1, 1938, under which the federal government may make benefit payments directly to farmers who comply with regulations issued by the Secretary of Agriculture;¹³ and second, a permanent program of federal subsidies to the states to enable them to carry out plans, designed by themselves and approved by the Secretary of Agriculture, for effectuating the purposes of the Act.¹⁴

8. 80 CONG. REC., Feb. 19, 1936, at 2435.

9. *Id.*, Feb. 20, 1936, at 2556.

10. These included: payment of bounties for the production of agricultural commodities which the United States imports; payment of bounties for the production of crops to be used for industrial purposes; the export debenture and equalization fee plans; purchasing or leasing of land by the federal government; the domestic allotment plan to pay farmers subsidies on the basis of domestic requirements; embargoes and quotas to control importation of agricultural products; and bilateral trade agreements and the control of foreign exchange in order to develop foreign markets for farm commodities. See *N. Y. Times*, Jan. 8, 1936, at 15.

11. P. L. No. 461, 74th Cong., 2d Sess. (1936). The Act is an amendment of the Soil Conservation Act of 1935, 49 STAT. 163, 16 U. S. C. A. § 590A (Supp. 1935), which, in turn, had its origin in the *N. I. R. A.*, 48 STAT. 195, 201 (1933), 40 U. S. C. A. § 401 *et seq.* (Supp. 1935).

The original act was intended solely to prevent soil erosion by means of preventive forestry. See 79 CONG. REC. 4770, for a discussion and presentation of the original bill; for debates on the bill, see *id.* at 4804. The need for such legislation is apparent from a mere cursory survey of the present soil conditions. The fact that prevalent farm practices are exhausting soil fertility is common knowledge. In 1934, the Department of Agriculture estimated that 50,000,000 acres of farm land had been ruined and that another 50,000,000 acres were in almost equally bad shape. The Department further reported that an additional 100,000,000 acres had been seriously impaired by erosion and that erosion had set in upon yet another 100,000,000 acres. Since 1934, erosion has converted an additional 5,000,000 acres into great expanses of sand dunes, and more than 60,000,000 acres more are in the process of erosion. Indeed, studies have indicated that deterioration threatens the great bulk of 360,000,000 acres of fertile land in the United States. See Vol. 2, Official Bulletin of the U. S. Dep't of Agriculture Soil Erosion Service, April, 1935, *The Land Today and Tomorrow*, at 1; Lowdermilk, *Soil Erosion and Its Control in the United States* (1935) U. S. Dep't of Agriculture Soil Conservation Service.

12. This is the title of the Soil Conservation and Domestic Allotment Act, cited *supra* note 11.

13. P. L. No. 461, 74th Cong., 2d Sess. (1936) § 8. For a detailed description of the plan formulated by Secretary of Agriculture Wallace in pursuance of this section, see *N. Y. Times*, March 21, 1936, at 1.

14. *Id.* § 7. Notwithstanding condemnation by its opponents as a rehashed AAA and as a subterfuge to circumvent the *Butler* case, this Act has precedents dating from colonial times. However, antagonists of the Act point out that in 1930 only \$160,000 was spent for the prevention of soil erosion and that in 1935 only \$27,000,000 was appropriated, while the Act in §§ 15-16 authorizes the expenditure of \$500,000,000 annually. They point out also that under the AAA the federal government paid the farmers more than \$1,300,000,000 over a three-year period (*N. Y. Times*, Feb. 7, 1936, at 4), or \$450,000,000 annually, which is

Insofar as the federal spending power is concerned, the constitutionality of the Soil Conservation and Domestic Allotment Act is based¹⁵ upon Article I, Section 8, clause 1 of the Federal Constitution, which reads as follows: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to

approximately what the government intends to spend under the Soil Conservation and Domestic Allotment Act. Senator McNary, the most ardent opponent of the Act, concluded, "All it would amount to anyway would be forty-eight little chicks under the same old hen." N. Y. Times, Jan. 26, 1936, at 35. But, as precedents reveal, we see that Congress has in the past exercised the national spending power for vocational education [Smith-Hughes Act, 39 STAT. 929 (1917), 20 U. S. C. A. §§ 11-28 (1927); 45 STAT. 1151 (1929), 20 U. S. C. A. §§ 15a-15c (Supp. 1935); 48 STAT. 792 (1934), 20 U. S. C. A. §§ 15d-15g (Supp. 1935)], education for the blind [Smith-Sears Act, 40 STAT. 617 (1918), amended by 41 STAT. 158 (1919); Fess-Kenyon Act, 41 STAT. 735 (1920), 29 U. S. C. A. §§ 31-34 (1927), amended by 43 STAT. 430 (1924), 29 U. S. C. A. § 31 *et seq.* (1927)], highway construction [39 STAT. 355 (1916), amended by 42 STAT. 212 (1921), 23 U. S. C. A. §§ 1-25 (1927), and by 48 STAT. 995 (1934), 23 U. S. C. A. §§ 6c, 20, 55-56 (Supp. 1935)], the suppression of venereal diseases [Chamberlain-Kahn Act, 40 STAT. 886 (1918), 42 U. S. C. A. § 26 (1927)], maternity and infancy hygiene [Sheppard-Towner Act, 42 STAT. 224 (1921), 24 U. S. C. A. §§ 161-174 (1927)], and relief to the unemployed [48 STAT. 22 (1933), 16 U. S. C. A. §§ 585-590 (Supp. 1935)], and unfortunates at home and abroad [45 STAT. 53 (1928) (flood relief); 45 STAT. 534 (1928), 33 U. S. C. A. §§ 702a-702e (Supp. 1935) (Jones-Reid Act); 45 STAT. 1306 (1929). Drought relief, 46 STAT. 78 (1930); 46 STAT. 1032 (1930); 46 STAT. 1039 (1931); 46 STAT. 1160 (1931); 46 STAT. 1276 (1931). Congress has also spent money in aid of victims of earthquakes, pestilence, and famine]. More specifically in line with the problem of the farmer are the federal bounties for sugar raising [26 STAT. 583 (1890)] codfisheries [1 STAT. 229 (1792)], appropriations to states for agricultural education [Morrill Acts, 12 STAT. 503 (1862) 7 U. S. C. A. §§ 301-308 (1927), amended by 14 STAT. 208 (1866), 7 U. S. C. A. § 305 (1927), and by 17 STAT. 217 (1872), by 17 STAT. 416 (1873), by 22 STAT. 484 (1883), 7 U. S. C. A. § 304 (1927), by 26 STAT. 417 (1890), 7 U. S. C. A. §§ 321-328 (1927), and by 44 STAT. 247 (1926), 7 U. S. C. A. § 304 (1927)], experimental stations [Hatch Act, 24 STAT. 440 (1887), 7 U. S. C. A. § 361 *et seq.* (1927), amended by 25 STAT. 176 (1888), 7 U. S. C. A. §§ 372 (1927) (agricultural); Adams Act, 34 STAT. 63 (1906), 7 U. S. C. A. §§ 369, 375 (1927) (agricultural); Purnell Act, 43 STAT. 970 (1925), 7 U. S. C. A. § 361 *et seq.* (1927) (forest); 43 STAT. 1108 (1925), 16 U. S. C. A. § 562 (1927) (forest); 44 STAT. 838 (1926), 16 U. S. C. A. § 562a (Supp. 1935) (forest); 44 STAT. 840 (1926), 16 U. S. C. A. § 562b (Supp. 1935) (forest); 45 STAT. 699 (1928), 16 U. S. C. A. § 581a (Supp. 1935) (forest); 45 STAT. 323 (1928), 7 U. S. C. A. §§ 387-387a (Supp. 1935) (horticultural)], for cooperative agricultural extension work [Lever-Smith Act, 38 STAT. 372 (1914), 7 U. S. C. A. §§ 341-348 (1927); Capper-Ketcham Act, 45 STAT. 711 (1928), 7 U. S. C. A. §§ 343a-343b (Supp. 1935)], for reforestation and forest fire prevention [Weeks Act, 36 STAT. 961 (1911), 16 U. S. C. A. §§ 480, 500, 513-519 *et seq.* (1927); Clarke-McNary Reforestation Act, 4 STAT. 653 (1924), 16 U. S. C. A. §§ 471, 515, 564-57d (1927); McNary-McSweeney Act, 45 STAT. 699 (1928), 16 U. S. C. A. §§ 581-581i (Supp. 1935)], and the extermination of insect pests [33 STAT. 1269 (1905), 7 U. S. C. A. §§ 141-144 (1927); 36 STAT. 331 (1910), 7 U. S. C. A. §§ 121-134 (1927); 42 STAT. 507 (1922); 42 STAT. 1289 (1923); 44 STAT. 499 (1926); 44 STAT. 976 (1927); 44 STAT. 1065 (1927), 7 U. S. C. A. § 146 (Supp. 1935); 45 STAT. 539 (1928); 45 STAT. 734 (1928), 7 U. S. C. A. § 147 (Supp. 1935)].

The story of the growth of expenditures in aid of agriculture is summarized in a compendious brief by the present Chief Justice, filed with the Court in *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 192 (1921), and available in 73 CONG. REC. 7890 (1930). In 1930 alone, \$135,000,000 was spent. See Note (1931) 25 AM. POL. SCI. REV. 628, 633. None of these vast expenditures have been held to be beyond the constitutional limits of the congressional spending power. *E. g.*, see *Campbell v. Doe*, 13 How. 244 (U. S. 1851); *Montana v. Rice*, 204 U. S. 291 (1907); *California v. Deseret Water, Oil & Irrigation Co.*, 243 U. S. 415 (1917). The Court refused to decide the validity of the sugar bounty statute in *Field v. Clark*, 143 U. S. 649 (1892). The Morrill Acts were not questioned in *Cornell Univ. v. Fiske*, 136 U. S. 152 (1890), and *Wyoming v. Irvine*, 206 U. S. 278 (1907). The Reclamation Act was not doubted in *Kansas v. Colorado*, 206 U. S. 46, 86-93 (1907). Also, it might be noted that in most cases the states immediately aligned themselves with the federal government in order to achieve the ultimate purpose. See McDONALD, FEDERAL SUBSIDIES TO THE STATES (1923) 87, 91, where the author points out that 46 states within a year accepted the Venereal Disease Act, and that 41 states within a like period accepted the Hygiene Act.

15. See SEN. REP. No. 1481, 74th Cong., 2d Sess., Ser. No. 1545 (1936) 3; H. R. REP. No. 1973, 74th Cong., 2d Sess. (1936) 3.

pay the debts and provide for the common defense and general welfare of the United States"¹⁶ From the earliest years of the country's history, well-defined differences of opinion have prevailed concerning the proper construction of this the general welfare clause.¹⁷ Not until the recent case of *United States v. Butler*¹⁸ was the Supreme Court¹⁹ called upon to define the federal spending power under this clause. In that case, the Court concluded that the more liberal Hamiltonian interpretation,²⁰ as opposed to the narrower Madisonian view,²¹ was the correct one.²² But the Court gave a rather novel and unexpected exposition of this thesis by stating that Congress may not under its power of appropriation utilize methods invasive of the reserved powers of the states.²³ As pointed out in this REVIEW,²⁴ such a construction shackled the exercise of the federal spending power with an indefinite limitation the extent of which is unknown. And it is upon such a vaguely interpreted power that the constitutionality of the Soil Conservation and Domestic Allotment Act is in part founded.

However, before the substance of the Act may be considered, the most immediate obstacle that presents itself is whether its constitutionality may be appropriately challenged. For, under the decisions in the *Mellon* cases,²⁵ there is considerable doubt whether there is anyone who has the power to raise the

16. The general welfare clause in the Preamble of the Constitution confers no power upon Congress. *Jacobson v. Massachusetts*, 197 U. S. 11, 22 (1905). Moreover, the phrase "to provide for the general welfare" in the taxing clause qualifies the power to lay and collect taxes, and does not grant substantive power to provide for the general welfare independent of the taxing power. *Loughborough v. Blake*, 5 Wheat. 317, 318 (U. S. 1820); *Ward v. Maryland*, 12 Wall. 418, 427-428 (U. S. 1870). Otherwise, the federal government would be a government of unlimited powers. I STORY, COMMENTARIES UPON THE CONSTITUTION (5th ed. 1891) § 907. The true construction doubtless is not that Congress shall have power to provide for the general welfare, but that Congress shall have power to lay and collect taxes in order to provide for the general welfare. *United States v. Butler*, 56 Sup. Ct. 312, 318-319 (1936). Furthermore, the power to tax necessarily implies the correlative power to spend the national revenues. *Field v. Clark*, 143 U. S. 649, 695 (1892); *United States v. Realty Co.*, 163 U. S. 427, 440 (1896). For, unless the power to appropriate is coextensive with the power to tax, Congress can not accomplish the objects for which it lays and collects taxes.

17. According to the Madisonian view, the federal spending power under the general welfare clause is restricted in its application by the succeeding specifically enumerated powers, and is merely a means of carrying these others into effect. THE FEDERALIST NO. 41; 6 WRITINGS OF JAMES MADISON (Hunt's ed. 1906) 354-357; I RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS (1898) 584-586; 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON (1865) 134-139. Hamilton on the other hand, in flat contradiction to the Madisonian thesis, maintained that the national spending power is not instrumental, but a substantive power independent of the other delegated powers and limited only by the requirement that it be exercised to promote "the general welfare of the United States." 4 WORKS OF ALEXANDER HAMILTON (Lodge's ed. 1904) 70 *et seq.*, 151. In this position, Hamilton was supported by Mr. Justice Story. I STORY, *op. cit. supra* note 16, §§ 923-924. For a discussion of the contrary views of Hamilton and Madison, see Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 U. OF PA. L. REV. 131. Professor Corwin espouses the Hamiltonian philosophy. A vigorous defense of the Madisonian construction can be found in Post, *The Constitutionality of Federal Spending for the General Welfare* (1935) 22 VA. L. REV. 1.

18. 56 Sup. Ct. 312 (1936), 84 U. OF PA. L. REV. 547.

19. The question of the federal spending power under the general welfare clause was several times noticed, but always reserved by the Supreme Court prior to the Mellon cases. *Field v. Clark*, 143 U. S. 649, 695 (1892); *United States v. Realty Co.*, 163 U. S. 427, 440 (1896). In the companion cases of *Massachusetts v. Mellon*, and *Frothingham v. Mellon*, 262 U. S. 447 (1923), 72 U. OF PA. L. REV. 72, counsel vigorously argued the merits and the demerits of the Hamiltonian and Madisonian views, but the Court disposed of the cases for want of jurisdiction without committing itself to any interpretation.

20. See *supra* note 17.

21. *Ibid.*

22. *United States v. Butler*, 56 Sup. Ct. 312, 319 (1936).

23. *Id.* at 319-320.

24. (1936) 84 U. OF PA. L. REV. 547. For another criticism of the *Butler* case, see Collier, *Judicial Bootstraps and the General Welfare Clause* (1936) 4 GEO. WASH. L. REV. 211.

25. *Massachusetts v. Mellon*, *Frothingham v. Mellon*, 262 U. S. 447 (1923), 72 U. OF PA. L. REV. 72.

question of unconstitutionality of the present Act. In those cases the Court held that if a state refuses to accept benefits under a federal subsidy act, it may not sue in behalf of its citizens (*parens patriæ*) to restrain expenditures of moneys by the national government, and also that a taxpayer has no grounds for an injunction because his interest in the money in the federal treasury is much too minute. In the *Butler* case, the Court held that the plaintiff taxpayer had a standing before the Court and that the issue was in a justiciable form, for the reason that taxes collected in pursuance of the AAA were earmarked. But the Soil Conservation and Domestic Allotment Act levies no tax. Therefore, unless the tax measure that is eventually passed to sustain the burden of the present Act is sufficiently related to the Act to make the collection of the tax appear as a necessary element in the functioning of the Act, the Court would, by allowing a suit to test the constitutionality of the Act, be overruling its prior decisions.

If the Court admits that the particular plaintiff has a standing in court to test the validity of the Act, the most serious objection, under the general welfare clause, that will probably be levied against the Act as a valid exercise of the federal power of subsidization is that it falls within the ban of the *Butler* decision because it regulates agricultural production and thus invades the reserved powers of the states. Many may differ with the Court as to whether regulation of agricultural production is a valid subject for Congressional legislation, but in view of the Court's pronouncement in the *Butler* case, it must be assumed that it is not. The problem then arises how far and in what manner Congress may aid agriculture without "regulating" it. In its simplest form, the query is, When does "aiding" cease and "regulating" begin?

The draftsmen of the Soil Conservation and Domestic Allotment Act have optimistically reasoned, on the basis of certain dicta of Mr. Justice Roberts in the *Butler* case, that the AAA "regulated" solely because, under it, the farmers assumed a contractual obligation not to produce more than a limited amount.²⁶ The bounties offered to farmers who would accept the Secretary of Agriculture's offer were such that in the light of the farmers' stringent financial and economic situation the farmers were "coerced" into accepting the offer. Again, although one may disagree with the majority opinion's definition of "coercion",²⁷ it is very unlikely that the majority will, within a very short time, listen favorably to a redefinition of the term. That, therefore, must also be accepted, and was so accepted by the draftsmen of the new Act, who have substituted for the AAA's offer of a bilateral contract, something which may be termed either an offer of a unilateral contract or a condition of a gift.²⁸ In either event, the farmer will never be under a contractual obligation to limit production. But, from an economic viewpoint, there is just as much "coercion" in the new Act as in the old. If a farmer was compelled to accept the government's offer of a bilateral contract, he will be equally compelled to do the acts necessary either to constitute an acceptance of the offer of a unilateral contract or to satisfy the conditions requisite to the awarding of the gift.

26. 56 Sup. Ct. 312, 322 (1936): "We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is to be expended only in payment under contracts whereby the parties bind themselves to regulation by the federal government."

27. *Id.* at 321: "The power to confer or withhold unlimited benefits is the power to coerce or destroy." Compare this statement with that of Mr. Justice Stone, "Threat of loss, not hope of gain is the essence of economic coercion." *Id.* at 326.

28. In order to get within the seeming loophole of the *Butler* decision, namely that some form of conditional gift might be upheld, the Secretary of Agriculture is expressly denied the power to enter into any contract obligating any farmer [§ 8 (b)]; and furthermore the Act clearly states that the purposes of the Act must be accomplished by *voluntary* action [§ 7 (a)].

However, assuming that the Court should find no "regulation" of agricultural production and therefore no violation of the reserved powers of the states there still would remain a strong obstruction in the path of constitutionality—the limits within which Congress may delegate its authority to the Secretary of Agriculture. In answering this problem two questions present themselves. The first is whether Congress is legislating and merely prescribing broad mandates, or is leaving to administrative officials what amounts practically to a policy-making power. The second question, frequently an unspoken one, is that of the necessity involved in the particular case.

These problems are presented rather squarely in Section 7 (a) (5) wherein one of the purposes of the Act is declared to be "re-establishment at as rapid a rate as the Secretary of Agriculture determines to be practicable and in the public interest of the ratio between the purchasing power of the net income per person on farms and that of the income per person not on farms that prevailed during the five year period, August 1909-July 1914 inclusive as determined from statistics available in the United States Department of Agriculture. . . ." Section 8 (b) gives the Secretary power to carry out such purposes by ". . . making payments or grants to agricultural producers . . . in amounts determined by the Secretary to be fair and reasonable in connection with the effectuation of such purposes . . ." ²⁹ The last part of Section 8 (b) purports to establish certain standards. It provides that "In determining the amount of any payment or grant measured by (1) or (2) ³⁰ the Secretary shall take into consideration the productivity of the land affected by the farming practices adopted during the year with respect to which such payment is made. . . . In carrying out the provisions of this section, the Secretary shall, as far as practicable, protect the interests of small producers . . . [and] encourage and provide for soil conserving and soil rebuilding practices rather than the growing of soil-depleting commercial crops."

It would seem clear that Section 7 (a) (5) sets up a standard which is in itself as vague and incapable of exact definition as any measuring rod can possibly be. This alone however constitutes no unanswerable objection to the Act's validity. In *United States v. Chemical Foundation* ³¹ the United States Supreme

29. Delegations in terms fully as vague as those within this act have been upheld in the past. It must be noted however that such precedents did not cover a field the subject matter of which was as broad as that here involved. See (1935) 83 U. of PA. L. REV. 526, 527 n.: "Martin v. Mott, 12 Wheat. 19 (U. S. 1827) ('such number of militia . . . as he may judge necessary'); Field v. Clark, 143 U. S. 649 (1892) ('reciprocally unequal and unreasonable', 'suspend . . . for such time as he shall deem just'); Buttfield v. Stranahan, 192 U. S. 470 (1904) ('establish uniform standards of purity, quality and fitness'); Union Bridge Co. v. United States, 204 U. S. 364 (1907) ('unreasonable obstruction of navigation'); United States v. Grimaud, 220 U. S. 506 (1911) ('such rules . . . as will insure the objects of such reservation'); *Avent v. United States*, 266 U. S. 127 (1924) ('interest of the public'); *United States v. Chemical Foundation, Inc.*, 272 U. S. 1 (1926) ('in the public interest'); *Radio Comm. v. Nelson Bros. Co.*, 289 U. S. 266 (1933) ('public convenience, interest or necessity'). In *Avent v. United States*, *supra*, it was said by Mr. Justice Holmes, at 130, ". . . the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed."

But *cf.* *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935). In the latter case because the N. R. A. provided no standard for administration, Justice Cardozo said: "The extension becomes as wide as the field of industrial regulation. . . . This is delegation running riot." *Id.* at 553. See generally, on the subject of delegation, CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 140, 148, 223n.

30. (1) as provided for by 8 (b) determines the amount of the grant on the basis of the farmers' treatment or use of their land, or a part thereof, for soil restoration, soil conservation, or the prevention of erosion. Under (2), changes in the use of the farm land necessitated by the Act are to be considered in fixing the amount of the payment.

31. 272 U. S. 1 (1926). See also *Federal Radio Comm. v. Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266 (1933); *Sholes v. Beresford*, 286 U. S. 374 (1932); *Mahler v. Ely*, 264 U. S. 32 (1924); *Butte City Water Co. v. Banker*, 196 U. S. 119 (1895); *Erhoults v. Board*, 113 U. S. 527 (1885).

Court sustained a statute in which the only standard to guide the Executive was that he act "in the public interest" in connection with the policies therein outlined.

The tariff cases have often been cited as authority in this connection,³² but these cases involved a relatively small field of operation, their object being to afford the government an additional "ace" in negotiations with foreign powers. In the Act here under discussion, however, the scene of application is nation-wide. Importance is lent to this fact by *A. L. A. Schechter Poultry Corp. v. United States*³³ and *Panama Refining Co. v. Ryan*,³⁴ which imply that had the National Industrial Recovery Act not been applied to such a vast field of industry it perhaps would have been held constitutional. Undoubtedly, there are strong reasons for the wide power entrusted to the Secretary of Agriculture in the Soil Conservation and Domestic Allotment Act. The problem is national in scope and it is impracticable for Congress to legislate in detail;³⁵ on this basis it would seem sufficient that the Act prescribe broad statutory mandates within the confines of which the administrative officer should be allowed to make rules and regulations, subject of course, to eventual court review. But where the mandate is so broad as to amount to a power to say what the law is or should be, it is equivalent to a dispensing power³⁶ and under our theory of government invalid.

That the Act is a nest of words whose content varies with the individual reading them, is obvious. Thus, in Section 7 (a) (5) we find a series of phrases: "at as rapid a rate as is determined to be practicable", "and in the

32. Such an analogy is an excellent illustration of the danger of attempting to develop from the body of decided cases abstract logical guides to decisions. In *Field v. Clark*, 143 U. S. 649 (1892), a statute was upheld which gave to the President the power summarily to remove from the free list of imports commodities of certain foreign countries if the duties imposed by such nations on our products were deemed by him to be reciprocally unequal and unreasonable. And in *Hampton v. United States*, 276 U. S. 394 (1928), a similar statute giving the Executive the power to decrease or increase the tariff upon any imported article to the extent of fifty per cent of the tariff imposed by Congress, whenever he should find that our products were under a competitive disadvantage as against those of other nations, was upheld. [See also *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294 (1933).] Neither of these is as a practical matter so directly in point as they would seem to be at first glance. In both the statute merely allowed the Executive to determine when a certain state of facts existed upon which a previously determined policy of Congress was to go into effect. Realistically viewed of course the President in acting under such authorization was determining not merely that a certain state of facts existed, but a delicate question of policy affected by national and international considerations as well. Yet as early as 1813 the embargo power was held to be validly entrusted to the Executive by Congress. *The Brig Aurora*, 7 Cranch 382 (U. S. 1813). See also *Waymon v. Southard*, 10 Wheat. 42 (U. S. 1825).

While the distinction is one of degree, the Soil Conservation and Domestic Allotment Act much more clearly gives the Secretary of Agriculture not merely the power of acting in a given way upon determining in his discretion that a certain state of facts exists, but also the power of determining in what way he shall act, thus creating in him the power to fashion any policy he thinks best.

33. 295 U. S. 495 (1935).

34. 295 U. S. 388 (1935), 83 U. OF PA. L. REV. 526.

35. The Supreme Court has repeatedly stressed this fact though the cases cited *supra* notes 33 and 34 seem to limit this to what the court feels is the necessary maximum of vagueness. See *Union Bridge Co. v. United States*, 204 U. S. 364 (1907); *Interstate Commerce Comm. v. Goodrich Transit Co.*, 224 U. S. 194 (1912). Thus, for example, the present Act, in prescribing the prerequisites to adoption of the plan (Section 7 (d) (2)), provides that "no such plan shall be approved unless by its terms, it provides for such methods of administration—as the Secretary finds necessary for the effective administration of the plan". Case authority in point sustains this section of the Act. It would not be feasible for Congress to attempt to prescribe the minute details of local plans which would vary with the geography and climate as well as the type of farm organization in a given state.

36. So the failure of the National Industrial Recovery Act to define "fair competition" was a primary reason given by the Court for holding the statute unconstitutional in the *Schechter* case.

general public interest", "to assist voluntary action", "normal domestic human consumption", "adequate to meet consumer demand at prices fair to both consumers and producers." It should be emphasized that no one of these "standards" is too vague, since examples of statutes containing similar language in which the delegation has been upheld may readily be pointed out.³⁷ But never before has any statute containing such a number of variables in a single section ever been enacted.

Other sections are equally standardless. For example, Section 7 (e) provides: "Such plan shall be approved if the Secretary finds that there is a reasonable prospect that—(1) substantial accomplishment in effectuating the purposes of this section will be brought about through the operation of such plan and (2) the operation of such a plan will result in as substantial a furtherance of such accomplishment as may reasonably be achieved through the action of such state." If the policies declared in Section 7 (a) (5) were definite and clear, and not at all contradictory, it is quite likely that this section interpreted in the light of such declaration would set up a sufficiently definite test which the state plans must meet as a prerequisite for Secretarial approval.³⁸

Section 8 (b) presents another interesting aspect of the problem of delegation. It prescribes certain factors that "are to be taken into consideration" in determining the allotment of each state, and the interests that are to be protected by the Secretary in carrying out the Act, so far as the purposes declared in Sections 7 (a) (1) to 7 (a) (4) are concerned. Any one of these standards in itself would be a sufficient guide to the Secretary, assuming that there was a single definite purpose underlying the whole act.³⁹ But not satisfied with a single broad mandate, the drafters of the statute have incorporated therein provisions that the interests of small producers must be protected, that soil conservation shall be encouraged, that the productivity of the land during the period in which payments are made must be considered, and the interests of tenants and sharecroppers protected in addition.⁴⁰ And when to these "standards" is added the ever-present "as far as practicable", it is perfectly clear that the Secretary of Agriculture may do exactly as he sees fit. There is not even the slightest indication of which interest is primary or to which factors Congress desires the administrative agency to attach the most weight.⁴¹

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37. See *supra* note 29.

38. But the Secretary of Agriculture cannot make rules and regulations for any and every purpose. *Williamson v. United States*, 207 U. S. 462 (1908). And where the violation of administrative regulations is made criminal, such regulations must clearly come within the statute. *United States v. George*, 228 U. S. 14 (1913). This is a possible basis for distinguishing *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495 (1935).

39. *Interstate Commerce Comm. v. Cincinnati Ry.*, 167 U. S. 479 (1894); *Monongahela Bridge Co. v. United States*, 216 U. S. 177 (1910).

40. See the last few sentences of § 8 (b).

41. While not specifically involving the problem of delegation, section 14 will probably influence the viewpoint of the Supreme Court in the determination of the constitutionality of the entire Act. It provides that "the facts constituting the bases for any payment or grant or the amount thereof authorized to be made under Section 7 or Section 8 hereof, when officially determined in conformity with rules or regulations prescribed by the Secretary of Agriculture, shall be reviewable only by the Secretary of Agriculture". This raises an independent problem in constitutional law which cannot be discussed here. But in the light of a recent decision by the Supreme Court [*Crowell v. Benson*, 285 U. S. 22 (1932)] it would seem extremely unlikely that such finality of administrative action where a constitutional question might conceivably be involved would meet with judicial approval. The implications of this case have not as yet been fully explored by subsequent cases, but the breadth of the language there employed lends credence to the view that individuals affected by application of the Act here under discussion could challenge its constitutionality as regarded its application to their particular case.