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THE NEW DEAL AGRICULTURAL PROGRAM AND THE CONSTITUTION

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On March 16, 1933, twelve days after his first inauguration, President Franklin D. Roosevelt sent to Congress an Agricultural Adjustment Act which he characterized as "the most drastic and far-reaching piece of farm legislation ever proposed in time of peace."¹ Drafted by Frederick P. Lee, Washington legislative counsel for the Farm Bureau Federation, the measure was largely the product of the recommendations of a conference of farm leaders called in Washington on March 10.² The program called for a re-establishment of the ratio between the purchasing power of farmers and nonfarmers which prevailed from 1909 to 1914, and was based on the assumption that the farmer's economic problems were primarily the result of overproduction. Thus the measure called for farmers to reduce their acreage in seven basic commodities in return for federal benefit payments to be derived from taxes levied upon the processing of the commodities for consumption.³ Such a drastic invasion of the farm economy by the federal government naturally produced vast problems, and none was more difficult than finding a sound constitutional base upon which to rest the program.

The text of the act suggested three constitutional justifications. The language of the preamble seemed to place possible reliance upon the theory of emergency powers. It also referred to the commerce aspects of the measure when it stated that the chronic agricultural situation, which had existed during the depression, had "burdened and obstructed the normal currents of commerce." The same feature was stressed in the act's marketing

provisions where the Secretary of Agriculture was given the power to enter into marketing agreements with processors and others engaged in handling any agricultural commodity "in the current of interstate and foreign commerce." Also he was to have the power to issue licenses permitting processors and others to handle "in the currents of interstate or foreign commerce" any agricultural commodity or "any competing commodity." The object was to enable the Secretary to prevent or eliminate unfair prices and practices. But, in the final draft of the act, in light of the key processing tax provisions, it was the power of Congress to lay and collect taxes which provided the main constitutional support of the measure.⁴

This agricultural structure was augmented in 1934 and 1935 by three supplementary measures: the Bankhead Cotton Control Act, the Kerr-Smith Tobacco Control Act, and the Warren Potato Act. At the same time Congress passed a special Tobacco Inspection Act. These acts contained declarations indicating that they were based on the commerce power, but their substantive provisions were not expressly limited to transactions involving commerce.⁵

From the time the machinery was put into operation, the administration's agricultural leaders looked to the Supreme Court for some clue as to the justices' viewpoint. How closely they watched was brought home clearly in 1935 when the court, in the *Schechter Poultry* case, ruled the National Industrial Recovery Act unconstitutional because of the broad delegation of power to the N.I.R.A. administrator.⁶ The Department of Agriculture reacted speedily with proposed amendments to the A.A.A. Congress passed these amendments, revising the statute to provide standards sufficient to meet the test of delegation of power, and to limit the control over

¹ Samuel Rosenman, ed., *Public Papers and Addresses of Franklin D. Roosevelt* (13 vols., New York, 1938), 2:79.

² Donald C. Blaisdell, *Government and Agriculture* (New York, 1940), 41-42.

³ The original seven commodities: wheat, cotton, field corn, rice, tobacco, hogs, and milk were later augmented by beef, dairy cattle, peanuts, barley, flax, grain sorghums, sugar beets, sugar cane, and potatoes under the Jones-Connally Act of 1934. *U. S. Statutes at Large*, 48:528.

⁴ *Ibid.*, 48:31.

⁵ *Ibid.*, 48:598, 1275; 49:782, 731.

⁶ *Schechter Poultry Co. v. U. S.*, *U. S. Reports*, 295:495.

agriculture to products which clearly entered interstate commerce.⁷

The Schechter decision also had an impact on the licensing provisions of the A.A.A. The lower courts had previously been harsh on these provisions,⁸ and following the Schechter ruling, Congress, as a precautionary move, passed an amendment eliminating the word "license" and substituting the term "marketing order." This 1935 act also limited the applicability of the orders to designated agricultural commodities, which were "in the current of interstate or foreign commerce or . . . directly affected such commerce."⁹

Despite these various attempts to make the agriculture program conform to judicially prescribed legal standards, the taxing features of the statute were left unaltered. Large sums due in taxes became tied up in litigation, and with more than seventeen hundred separate suits in the lower federal courts challenging the whole program of crop reduction and price raising, a Supreme Court test was only a matter of time.¹⁰ The results of this test were announced January 6, 1936, in the case of *U. S. v. Butler*.¹¹ The United States had presented a claim to the receivers of the bankrupt Hoosac Cotton Mills for processing and floor taxes on cotton. The receiver recommended that the claims be disallowed. The District Court upheld the taxes as valid, and ordered them paid, but the Circuit Court of Appeals reversed the order and the case was appealed to the Supreme Court. Justice Roberts delivered the majority opinion, upholding the Circuit Court, and striking down the A.A.A. as unconstitutional.

Roberts centered his attack on the process-

ing tax provisions, maintaining that such taxes were not a legitimate exercise of the federal taxing power, since they were levied in order to finance a system of regulating agriculture over which Congress had no power. Here Roberts relied on the *Bailey v. Drexel Furniture* case which in 1922 had outlawed a tax on goods produced by child labor.¹² The Bailey decision had stated that if a tax involved destructive rates it was in essence a penalty. The processing taxes, however, were levied for different reasons. The prohibitive child labor tax was clearly to exclude goods made by child labor from the market, and the revenue brought in, if any, was not designated for specific allocation. The processing taxes, on the other hand, were not levied for penalty purposes, but their disbursement provided the coercive factor in the scheme for federal agricultural regulation.

Roberts further had to distinguish the 1923 case of *Massachusetts v. Mellon*, in which Justice Sutherland speaking for a unanimous court had declared that the purposes to which federal expenditures were to be put presented no justiciable issue.¹³ This he did by maintaining that the revenue here involved was unalterably linked with the "unauthorized plan" of federal agricultural regulation, and could not be considered alone on its merits as a mere revenue raising measure.¹⁴

The A.A.A. had placed brief emphasis upon the commerce clause. Roberts, beginning with the assumption that the act involved was unconstitutional, was unwilling to look for any constitutional peg upon which to hang a presumption of constitutionality. He dismissed any possible commerce clause justification by stating that

the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.¹⁵

⁷ For a discussion of the full text of these amendments see Edwin G. Nourse, *Marketing Agreements Under the A.A.A.* (Washington, 1935), 423-439.

⁸ See *Hill v. Darger, Federal Supplements*, 8: 189; affirmed, *2nd Federal District Court*, 76:198; *Wallace v. Smith, ibid.*, 11:782.

⁹ *U. S. Statutes at Large*, 49:750. These changes concerned marketing, production quotas, and price fixing. They mostly affected very perishable commodities, such as fruits, vegetables, milk, and their products which were often shipped a considerable distance and had a highly localized and specialized production. The initiative in securing such agreements was left largely to producers' marketing organizations.

¹⁰ Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York, 1941), 140.

¹¹ *U. S. Reports*, 297:1.

¹² *Ibid.*, 259:20.

¹³ *Ibid.*, 262:447. Samuel J. Konefsky points out that this limitation on judicial interference with the power of the purse suggested possibilities for overcoming constitutional obstacles in the way of direct federal action, and that the 1933 Agricultural Adjustment Administration was the first major experiment with these possibilities. *Chief Justice Stone and the Supreme Court* (New York, 1945), 100-101.

¹⁴ *U. S. Reports*, 297:58-59.

¹⁵ *Ibid.*, 297:64.

Thus, over a strong and bitter dissenting opinion by Justice Stone, concurred in by Justices Brandeis and Cardozo, the court dealt a severe blow to the New Deal program for controlling production programs depending upon benefit payments raised by taxes.¹⁶ Further, although the decision had not specifically invalidated the marketing agreement provisions, it left serious doubts as to their validity.

One week after the Butler decision, a unanimous court held, in *Rickert Rice Mills v. Fontenot*, that the extensive amendments to the A.A.A., which had become law in 1935, did not "cure the infirmities of the original Act."¹⁷ The court also ordered that the taxes which had been paid under the act and which had been impounded pending the decision of the court should be returned, without reference to any procedural machinery for recovery established in the act itself.

The New Deal administration was determined that processors should not profit by refunds of processing taxes. Accordingly, in the 1936 revenue act, they secured the inclusions of a provision imposing an eighty per cent "windfall" tax on all processing taxes recovered from the government.¹⁸ In order to recover the taxes, the processor was required to prove that the taxes had not been passed on to his customers through an increase in price. In May of 1935, the Supreme Court approved this provision by an eight to one majority.¹⁹ In the meanwhile, New Deal leaders had found ways to keep benefit checks going to farmers, largely through the diversion of unused funds from other departments.²⁰

The necessity for a substitute to fill what one popular magazine of the day called the

"seething vacuum of the A.A.A."²¹ was immediately obvious. Unlike the N.I.R.A., which by the time of its invalidation had little support from either large or small industry or labor, the A.A.A. was continuously championed by well-organized and politically powerful farm groups, and early substitute legislation was demanded. Many farmers wanted to know what permanent steps were to be taken to replace their cancelled benefit payments for crop control.

New Deal agricultural leaders were not caught napping by the Butler decision. In fact, Basil Rauch has pointed out that the "decision might be said to have caused an expansion rather than an abandonment of the administration's agricultural program."²² Three years of the A.A.A. had demonstrated many flaws in the measure. Rigidities in administration and overcentralization needed correcting. Thus, the Program Planning Division of the A.A.A. was ready with substitute legislation shortly after the Butler case. As the administrator's report for 1936 states

the decision . . . had the effect of hastening a transition which had long been planned. This was the transition from the temporary emergency phase of the adjustment programs to a long-time phase which would give a larger place to soil conservation and improved farm-management practice.

Such a transition was originally planned by the Agricultural Adjustment Administration in late 1934 and early 1935. It was the subject of discussions with representatives of farmers, agricultural colleges, and extension workers in a series of regional conferences in 1935.

President Roosevelt in a statement on October 25, 1935, had announced the Administration's intention to shift the program to a long-time basis. Hence the Hoosac Mills decision . . . precipitated as a sudden change that which had been planned as a gradual one.²³

The background for new legislation came from an earlier attempt of Congress to provide for conservation of the country's natural resources. In 1935 Congress had passed a Soil Conservation Act in an attempt to control the recurring floods and dust storms chronic in the mid-thirties. Believing that an indirect production control plan, if tied in

¹⁶ Stone not only contended that the processing taxes were ordinary and legitimate excise taxes and constituted no coercive system or regulation, but chastised the court for its lack of self-restraint in invalidating actions of the executive and legislative branches. Konefsky, *Chief Justice Stone*, 87ff.

¹⁷ *U. S. Reports*, 297:110, 113.

¹⁸ *U. S. Statutes at Large*, 49:1747.

¹⁹ *Anniston Manufacturing Co. v. Davis*, *U. S. Reports*, 301:337.

²⁰ At the same time, at the request of the President, Congress repealed the special compulsory control legislation dealing with cotton, tobacco, and potatoes which had been passed in 1934 and 1935. The Butler decision had made it sufficiently clear that those acts could not survive the Supreme Court.

²¹ *Literary Digest*, 121:5 (January 18, 1936).

²² Basil Rauch, *The History of the New Deal, 1933-1938* (New York, 1944), 214.

²³ *U. S. Agricultural Adjustment Administration, Agricultural Conservation 1936. A Report of the Activities of the Agricultural Adjustment Administration* (Washington, 1937), 1.

with this soil conservation measure, would meet the test of constitutionality, Congress passed and the President signed on February 29, 1936, an amended Soil Conservation and Domestic Allotment Act. In attempting to avoid the Butler proscriptions, the measure made soil conservation its chief object, with indirect production control as a minor feature. Instead of bounties for curtailed production, benefit payments were to be made to farmers voluntarily cooperating with the government in the work of soil protection. The Secretary of Agriculture was authorized to make payments or grants of other aid to agricultural producers, measured in proportion to their adoption of soil conservation practices. It was expressly provided, however, that the Secretary should not have power to enter into any contract binding upon any producer.²⁴

The constitutional interdictions which had been provided by the Butler case were avoided by not providing for any special processing taxes, and by financing the payments by a direct appropriation out of the Treasury. Because of the restrictive views of the court with respect to the commerce clause indicated in the Schechter case, no reliance was placed upon that constitutional basis.

Although the attempt to conform with the Butler case's constitutional concepts was fairly successful, the tailoring process, which this need dictated, left the program critically weak.²⁵ This weakness lay in the lack of assurance that enough producers would cooperate to permit a limitation of production sufficient to raise prices. During the good crop years of 1937 and 1938, commodity surpluses and sharply declining prices appeared again. Not enough farmers accepted the voluntary system.

In the meanwhile, the marketing agreement provisions of the 1933 A.A.A., as amended in 1935, had also come in for serious revision. They permitted the establishment of minimum prices for milk in interstate milk sheds, and a limitation upon the quantity marketed of fruits, vegetables, and some miscellaneous commodities. Although the Butler decision had not specifically invalidated these provi-

sions, there was considerable question, especially on the part of the lower courts, whether the whole act had not by implication been voided.²⁶ Thus, in 1937, a move was made to obtain specific congressional reaffirmation of the marketing provisions, and on June 3 the Agricultural Marketing Agreement Act of 1937 was signed by the President.²⁷ The declared policy of the act was to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as would provide farmers with a purchasing power equivalent to that which they enjoyed during a designated base period in the past, and to protect the interest of the consumer in approaching and maintaining this level of prices. To effectuate this policy, the Secretary of Agriculture was authorized to determine whether such a purchasing power was being realized by the farmers. When he found that such purchasing power was not equivalent to the statutory standard, the regulatory provisions of the act were to become effective. The Secretary was also to have power, with the concurrence of certain percentages of the producers and handlers of milk and certain other products, to control prices and conditions of marketing.

Emphasis on a commerce base for the new Marketing Agreement Act seemed very promising in light of the Wagner Labor Board cases of 1937.²⁸ In these cases the Supreme Court had upheld the National Labor Relations Act which had been framed upon the assumption that production could be regulated as interstate commerce. In so doing, it reversed its previous narrow interpretation of the commerce power, and indicated its willingness to take an extremely broad viewpoint toward such legislation. With these precedents in mind, the framers of the 1937 act restated and broadened the definition of what would constitute interstate commerce in agricultural commodities. For the purpose of the new act, a marketing transaction "in respect

²⁴ Compare *U. S. v. David Buttrick Co.*, *Federal Supplements*, 15:655 and *Ganley v. Wallace*, *ibid.*, 17:115 with *Edwards v. U. S.*, *ibid.*, 14:384 (temporary injunction) and *ibid.*, 16:53 (permanent injunction).

²⁷ *U. S. Statutes at Large*, 50:246.

²⁸ *N.L.R.B. v. Jones and Laughlin Steel Co.*, *U. S. Reports*, 301:1; *N.L.R.B. v. Fruehauf Trailer Co.*, *ibid.*, 301:49; *N.L.R.B. v. Friedman-Harry Marks Clothing Co.*, *ibid.*, 301:58.

²⁴ *U. S. Statutes at Large*, 49:163, 1148.

²⁵ Philip M. Glick, "The Soil and the Law," *Journal of Farm Economics*, 20:430, 616, 628 (August, 1938).

to an agricultural commodity or the product thereof" was to be considered in interstate and foreign commerce

if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they . . . are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed.²⁹

The act provided for both quasi-legislative and quasi-judicial proceedings. Before the issuance of the regulatory order (or a marketing agreement which did not need a formal order), notice had to be given and a hearing held. Thereafter, a regulatory order might be issued which would have the force and effect of law. It was directed towards no particular individual, but towards all persons who might be affected. The quasi-judicial proceedings were to enforce the order upon an individual who might be affected by the order. It was directed at an individual rather than towards the formulation of a general regulation.

This marketing agreement machinery, along with that of the Soil Conservation Act, bridged the gap until a comprehensive farm measure could be procured. By 1938 external factors were making such a program a virtual necessity. Donald C. Blaisdell has pointed out

Economic collapse and large, unsalable surpluses of farm crops had their effect in producing the 1933 Agricultural Adjustment Administration. Drought in 1934 and the adverse Supreme Court decisions in 1935 and 1936 were largely responsible for the Soil Conservation and Domestic Allotment Act. Similarly a combination of drought in 1936 and business recession and bumper crops in 1937 set the stage for the 1938 Agricultural Adjustment Administration.³⁰

A second Agricultural Adjustment Act had been planned from the time of the passage of the 1936 Soil Conservation Act, and government agricultural leaders had begun action for such a comprehensive agricultural program late in 1936. Early in 1937, a national conference of farm leaders met in Washington, drew up proposals and, as in the case of the first A.A.A., turned to Frederick P. Lee, the special counsel of the Farm Bureau

²⁹ *U. S. Statutes at Large*, 50:248.

³⁰ Blaisdell, *Government and Agriculture*, 40.

Federation, to draft new farm legislation. This proposed second A.A.A., which has been characterized as near the top in complexity "of all the so-called 'New Deal' legislation,"³¹ was placed before Congress early in 1937 as the Pope-McGill Farm Act. In May of that year, extensive hearings were held before the Senate Committee on Agriculture and Forestry. The new measure, as considered by the committee, was entitled: "A bill to provide an adequate and balanced flow of the major agricultural commodities in interstate and foreign commerce."³² The title indicated the use of a different constitutional basis for agricultural legislation.

Although the Schechter and Butler decisions indicated potential Supreme Court opposition, the Labor Board cases had greatly broadened the then current conception of how far production could be affected by the power to regulate commerce. Hence the supporters of the agricultural program looked to these cases as a precedent for the regulation of agricultural production.

Both the Senate and House Committee hearings on the proposed legislation were concerned primarily with the economic aspects of the measure. Frederick P. Lee was called before each group, however, to testify as to the constitutional validity of the act. Lee was introduced to the Senate Committee by its chairman, Senator Ellison D. Smith of South Carolina, who in presenting him said,

We will hear Mr. Lee, who drafted the bill, and God have mercy on your souls.

Lee responded,

Senator, I would have felt the same way about it, if it had not been for the decision of the Supreme Court in the Wagner National Labor Relations Act cases.³³

Lee pointed out that the "major constitutional question" of the proposed legislation was whether Congress had the power to im-

³¹ Andrew F. Oehmann, "The Agricultural Adjustment Act of 1938," *Georgetown Law Review*, 26:680 (March, 1938).

³² U. S. Congress, *Agricultural Adjustment Act of 1937. Hearings before the Committee on Agriculture and Forestry, United States Senate* (75 Cong., 1 sess., Washington, 1937). Similar language was incorporated in the stated purpose of the measure as passed. *U. S. Statutes at Large*, 52:31.

³³ U. S. Congress, *Agricultural Adjustment Act of 1937*, p. 33.

pose a penalty on a farmer who marketed farm produce in excess of his quota. That quota was to be determined by the Secretary of Agriculture who had the power, if he found a certain crop excessive, to limit the amount marketed during the ensuing year. This he could do by allotting quotas to the producing states and farmers within those states, and imposing prohibitive penalties on any goods sold in excess of the quota. It was widely felt that imposing high penalties on such marketed quotas would in effect constitute not merely regulation of interstate commerce but actual curtailment of production. However, in response to a challenge of this concept, Lee answered:

The power of Congress . . . is not limited to those situations where the quantity going into commerce will be reduced, or where there will be an obstruction to commerce. For instance, as Chief Justice Hughes was careful to point out in considering the Wagner Act in the *Jones & Laughlin Steel Co. case*, the power of Congress extends not only to prevent burdens on commerce, but also to foster, protect, and restrain commerce. The question is not whether the uncontrolled marketing of the supply would burden or obstruct, but whether it affects interstate commerce. That is the principle the Court recognized in the Wagner National Labor Relations Act cases. It did not decide whether the particular exercise of power obstructed or prevented the flow; it decided whether or not interstate commerce was affected.³⁴

Senator Louis Schwellenbach of Washington could see how a labor dispute could affect interstate commerce, but did not see how this instance was comparable since the amount of goods shipped was not diminished. Lee explained that the power of Congress as regards interstate commerce was not limited to preventing diminution of the quantity of goods that entered into interstate commerce. Here he cited *Chicago Board of Trade v. Olsen* as a precedent, a case decided fourteen years prior to the Labor Board cases, in which the court had indicated that local activities would be regulated as interstate commerce if they affected interstate transactions.³⁵ Concerning regulation of farm employees, Lee referred specifically to the Labor Board case in which the activities of employees in a local clothing factor had been held to affect interstate commerce.³⁶ Lee then contended that

one might well say that the activities of farm employees with respect to production and marketing of crops affect interstate commerce. I know of no reason for distinguishing between industrial and agricultural labor.³⁷

Lee concluded by pointing out the shift of ground used to bring the new law under the commerce clause, indicating that it would then conform to the court's position in the Labor Board cases, which he felt to be valid and applicable.³⁸ In his testimony before the House Committee on Agriculture, he used virtually the same arguments.³⁹

The new A.A.A. did not become law during the regular sessions of the Seventy-fifth Congress. It was given high priority at a special session called in December 1937. During debate, the constitutionality of the compulsory marketing quotas was questioned as an improper use of the commerce power. The Republican minority of the House Committee even claimed that the plan was designed to embarrass the Supreme Court and start a new campaign against the judiciary.⁴⁰ Such opposition was overcome, however, and on February 16, 1938, in the next regular session of Congress, the final bill was signed by the President.⁴¹

The Agricultural Adjustment Act of 1938 in its final form included five major sections dealing with a variety of farm problems. Title III was the most important section, and embodied most of the provisions which raised constitutional issues.⁴² It dealt with loans, parity payments, consumer safeguards, and marketing quotas, and its basic operation involved a number of steps. If, in any year, production of one of the basic commodities (wheat, corn, cotton, rice, or tobacco) threat-

³⁷ U. S. Congress, *Agricultural Adjustment Act of 1937*, p. 36.

³⁸ *Ibid.*, 40.

³⁹ U. S. Congress, *General Farm Legislation. Hearing before the Committee on Agriculture, House of Representatives* (75 Cong., 1 sess., serial C, Washington, 1937), 30-35.

⁴⁰ "Farm Bill Faces Veto or Court," *Business Week*, 15-16 (December 4, 1937).

⁴¹ *U. S. Statutes at Large*, 52:31.

⁴² Title I consisted of amendments to the Soil Conservation and Domestic Allotment Act of 1936. Title II authorized the Secretary of Agriculture to intervene on behalf of agriculture in cases before the Interstate Commerce Commission with respect to freight rates on agricultural commodities. Title IV related to Cotton Pool Participation Trust Certificates, and Title V was the new Crop Insurance Act.

³⁴ *Ibid.*, 34-35.

³⁵ *U. S. Reports*, 262:1.

³⁶ *N.L.R.B. v. Friedman-Harry Marks Clothing Co.*, *ibid.*, 301:58.

ened to create a surplus, the new Agricultural Adjustment Administration was to take a referendum among the producers of a given crop on the desirability of imposing limitations for the next crop year.⁴³ If two thirds of the producers involved voted favorably, the A.A.A. could then establish quotas on that crop. These quotas would be first apportioned among the states according to the amount of the product raised during a specific preceding period. The state quota was then to be allocated among the farmers. These farm quotas were to be worked out by local committees of farmers according to standards prescribed by the act. If a farmer's acreage allotment was not sufficient and he suffered a reduction in income, he might be compensated by a government subsidy. On the other hand, he might raise more acres of the crop, but, if he marketed products from excess acreage during a period of surplus, he would be subject to fine. On surplus crops so produced he might, however, receive loans from the Commodity Credit Corporation in the Department of Agriculture in amounts calculated according to parity prices.⁴⁴ Such surplus crops were to be stored under government seal until a time of scarcity, when the farmer might sell them at the parity price and repay his loans.

Three processes involved in the act need careful differentiation as to their constitutional base. The first two, the making of cash payments to farmers in return for conservation practices under the soil conservation provisions, and the extension of loans on agricultural commodities, found their constitutional justification in the power of Congress to tax. The third, the assignment of marketing quotas, was based upon the power to regulate commerce. The latter was most important. The system of payments only incidentally constituted the force behind the act. Compliance was sought not so much by induce-

⁴³ L. V. Howard, "The Agricultural Referendum," *Public Administration Review*, 2:9 (Winter, 1942).

⁴⁴ Parity prices as defined in the new act were the same as those specified in the Marketing Agreement Act of 1937, but differed slightly from the definition used between 1933 and 1937. The prices were based as before on the average price of the given commodity during the years 1909-1914. For a detailed discussion of the differences in the various measures as to parity see Murray R. Benedict, *Farm Policy of the United States, 1790-1950* (New York, 1953), chaps. 14 and 15.

ments as by the penalties levied if a surplus threatened interstate and foreign commerce. The charge that this penalty in effect curtailed production was true. However, the effect was to regulate commerce, and the Labor Board decisions indicated that the court would focus its attention on the regulation of commerce rather than the curtailment of production.⁴⁵

The position of the Supreme Court concerning the new act differed considerably from its position toward the 1933 legislation. The 1938 measure purportedly aimed at keeping surpluses out of the interstate and foreign markets, a fact which made the court's job one of merely testing the statute in terms of interstate and foreign commerce. The question in each case became the validity of the penalty imposed on the marketing of crops produced above a set quota. If a farmer did not like his specific crop allotment, he could appeal to the courts. If, on the other hand, a farmer marketed more than his allotment, the warehouseman had to pay to the Secretary of Agriculture a penalty equal to one half the market price of the excess and could then deduct this amount from the prices paid the producer. The farmer's only recourse in this instance was to seek an injunction to restrain the warehouseman from deducting penalties from the sale price of the goods. In both instances, the validity of the commerce base was in dispute.

Cases involving the constitutionality of the conglomerate agricultural program began to reach the Supreme Court in the 1938-1939 term. The first, *Currin v. Wallace*, involved the Tobacco Inspection Act of 1935.⁴⁶ Chief Justice Hughes speaking for the court declared that under its power to regulate interstate commerce, Congress could validly prescribe the conditions under which interstate sales of agricultural goods could be made. Cases which followed involving the Agricultural Marketing Agreement Act and Marketing Act provisions further dealt with the

⁴⁵ In an attempt to insure against a simple adverse decision imperiling the whole program, the usual separability clause declared that if any provision of the new act was not within the commerce power "such provision shall not be held invalid if it is within the power of Congress to provide for the general welfare or any other power of the Congress." *U. S. Statutes at Large*, 52:69.

⁴⁶ *U. S. Reports*, 306:1.

commerce power. The first two, *U. S. v. Rock Royal Cooperative* and *H. P. Hood and Sons v. U. S.*, concerned the marketing order provisions of the first A.A.A. which had not been clearly invalidated by the Butler decision and had later been incorporated into the Agricultural Marketing Act of 1937.⁴⁷ These provisions permitted the establishment of minimum prices for milk in interstate milk areas and limitations upon the quantity marketed of certain other commodities.⁴⁸ In both cases the United States brought action to compel compliance with the orders of the Secretary of Agriculture concerning marketing of milk, and in both, the validity of the Agricultural Marketing Act of 1937 was challenged.

The ruling of the court in each case made clear that the commerce clause was to provide the basis for agricultural regulation. Justice Reed in the *Rock Royal* case reaffirmed the *Currin v. Wallace* ruling, pointing out that "where commodities are brought for use beyond state lines, the sale is a part of interstate commerce" and hence subject to federal control.⁴⁹ Since the sales being regulated were interstate sales, Congress had as much power to regulate the price in such interstate transactions as the states had to regulate their internal commerce. Reed further declared that intrastate, as well as interstate, commerce in milk could be regulated since the two, in the case considered, admittedly commingled in moving to market.

In the light of the seeming definitiveness of these decisions, it seemed unusual for the court to have been called upon again in 1942 to render a further decision on the validity of the Agricultural Marketing Act. However, since there was a slight difference in the factual situation, the court accepted the case of *U. S. v. Wrightwood Dairy* and through it extended national power in the domain of commerce.⁵⁰ The dispute involved a milk order by the Secretary of Agriculture in the Chicago milk area. Here, however, the milk was produced in the state and was not physically intermingled with milk that crossed the state line, but was sold in competition with

milk of others engaged in interstate commerce. Despite the respondent's claim that the federal government had no power of regulation in such an intrastate situation, the court again upheld the measure. The power of Congress over interstate commerce, Chief Justice Stone wrote, was plenary and complete in itself and the reach of that power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."⁵¹ He further declared that: "It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power."⁵² This, he insisted, Congress had recognized when it passed the Marketing Act.

With the *Wrightwood* case, the validity of the Agricultural Marketing Act was thoroughly established and later cases dealt only with certain procedural aspects of the act.⁵³ The largest number of cases involving the act and orders issued under it have been instituted by the government under section 8a (6) which vested U. S. District Courts with jurisdiction to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement made or issued under the act. In cases of this character, the government had usually sought mandatory and prohibitory injunctions. As two students of the measure have pointed out:

Conduct of all this litigation has been attended with a notable degree of success, due largely to the effective presentation to the courts of the philosophy imbedded in the statute and to the recognition by the courts of the validity of this philosophy as a legitimate basis for regulation in the economic realm.⁵⁴

The constitutionality of the Agricultural Adjustment Act of 1938 had frequently been challenged in Congress and was tested in court as soon as it was put into operation. The initial case, *Mulford v. Smith*, brought by tobacco growers seeking to market tobacco in excess of their quotas, challenged the valid-

⁴⁷ *Ibid.*, 307:533, 588.

⁴⁸ "Agricultural Marketing Agreement Act — Milk Regulation," *New York University Law Quarterly Review*, 17:86 (November, 1939).

⁴⁹ *U. S. Reports*, 307:568-569. A similar holding was reached in the *Hood* case.

⁵⁰ *Ibid.*, 315:110.

⁵¹ *Ibid.*, 315:119.

⁵² *Ibid.*, 315:121.

⁵³ *Stark v. Wickard*, *ibid.*, 321:288; *U. S. v. Ruzicka*, *ibid.*, 329:287.

⁵⁴ Ashley Sellers and Jesse E. Baskette, Jr., "Agricultural Marketing Agreement and Order Programs, 1933-1943," *Georgetown Law Journal*, 33:123, 146 (January, 1945).

ity of the Secretary of Agriculture's promulgation and enforcement of tobacco quotas.⁵⁵ Justice Roberts, who had written the Butler decision outlawing the first A.A.A., reflected the court's altered viewpoint in his majority opinion upholding the measure. Roberts stated that the act did not purport to control production. It set no limit upon the acreage which might be planted, and imposed no penalty for the planting and producing of tobacco in excess of the marketing quota. It purported to be solely a regulation of interstate commerce, which it reached and affected at the place where tobacco entered the stream of commerce—the marketing warehouse. Such restriction, Roberts pointed out, was valid since

Any rule . . . 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.⁵⁶

The case was highly significant in the evolution of governmental power under the commerce clause. It established the power of the federal government to regulate the quantity of a commodity which could be sold, a type of regulation which in practical effect would control the amount produced in an interstate industry. Also, since the legislative motive was held irrelevant, the fact that an act was designed to control production need not make it suspect, even though the production was only indirectly affecting interstate commerce. Thus, Roberts, in effect, sanctioned under the commerce power the type of agricultural regulation unsuccessfully attempted under the taxing power.

The removal of the categorical distinction between commerce and production came in 1942 in *Wickard v. Filburn*.⁵⁷ The case involved the validity of the wheat-marketing quota provisions of the 1938 A.A.A. Congress had amended these provisions in May 1941 to authorize the Secretary of Agriculture to fix marketing quotas for all wheat except that insulated by storage. Filburn was the owner and operator of a small farm. Part of his wheat crop he sold; a part he fed to his dairy herd; some he used to make flour; and some was for the following season's seeding. He planted and harvested wheat in excess of

the acreage allotment which he received and was thus subject to a penalty under the measure. Rather than storing the additional wheat which he had grown, or giving it up to the Secretary of Agriculture, either of which would have eliminated penalty, he sought an injunction against the enforcement of the act and asked for a declaratory judgment that the wheat marketing quota provisions of the act, as amended, were unconstitutional because not sustainable under the commerce clause.

Justice Jackson rendered the decision which has been characterized as "the most important opinion under the commerce clause since *Gibbons v. Ogden*."⁵⁸ The argument had been made that since Filburn's wheat was not to be sold in interstate commerce, it could not be reached by the statute because this would involve federal control of the production and consumption of wheat. This Jackson rejected. He pointed out that the purpose and effect of the act was to regulate marketing which constituted interstate commerce. He had no doubt that Congress might include in its scheme Filburn's wheat and other wheat similarly situated, since this was necessary to the effective operation of the marketing program. As to the consumption of the wheat on the farm itself, Jackson maintained that even if such wheat "is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchase in the open market."⁵⁹

The underlying purpose of the act, on the basis of the congressional record, Jackson stated, was to stimulate trade at increased prices. Under such circumstances, he maintained that wheat consumed on the farm where grown, even if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing the purpose of the act. Hence Jackson totally rejected the commerce production distinction, so much a part of the earlier interpretation of the commerce clause.

Whether the subject of the regulation in question was production, consumption, or marketing, is, therefore, not material for purposes of deciding the question of federal power before us.⁶⁰

⁵⁵ Kenneth C. Sears, "The Supreme Court and the New Deal," *University of Chicago Law Review*, 12:140 (February, 1945).

⁵⁶ *U. S. Reports*, 317:111.

⁵⁷ *Ibid.*, 317:124.

⁵⁵ *U. S. Reports*, 307:38.

⁵⁶ *Ibid.*, 307:48.

⁵⁷ *Ibid.*, 317:111.