

*Memorandum for the Secretary*

UNITED STATES DEPARTMENT OF AGRICULTURE,  
OFFICE OF THE SOLICITOR,  
Washington, D. C., February 26, 1936.

Re: *Proposed Standard State Soil Conservation Districts Law*

Dear MR. SECRETARY:

The act of Congress entitled "An Act to provide for the protection of land resources against soil erosion, and for other purposes" (Public No. 46, 74th Cong., approved Apr. 27, 1935) has declared it to be the policy of Congress "to provide permanently for the control and prevention of soil erosion". To this end the act has conferred upon the Secretary certain broad powers to conduct research, disseminate information, conduct demonstrational projects and carry out preventive measures in a coordinated national program for the prevention and control of soil erosion. Section 3 of this act provides in part as follows:

SEC. 3. As a condition to the extending of any benefits under this Act to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of this Act, require—

(1) The enactment and reasonable safeguards for the enforcement of State and local laws imposing suitable permanent restrictions on the use of such lands and otherwise providing for the prevention of soil erosion; \* \* \*

Some months ago the Secretary asked the Land Policy Committee of the Department to work out, in cooperation with the Soil Conservation Service established under the provisions of the above-mentioned act, a standard form of soil conservation districts law which should be appropriate for adoption by the State legislatures of the several States. My office has worked with representatives of the Land Policy Committee and of the Soil Conservation Service upon this problem. There is submitted herewith for your approval a proposed standard form of State soil conservation districts law.

On June 5, 1935, the Secretary's committee on soil conservation submitted its report on recommended policies to govern the activities of the Department in its erosion control program. One of the recommendations of the report (p. 42) was that "on and after July 1, 1937, and sooner wherever feasible, all erosion control work on private lands, including new demonstration projects, be undertaken by the Soil Conservation Service only through legally constituted soil conservation associations or governmental agencies empowered to function as indicated above". The committee's report and recommendations were approved by you on June 6, 1935. The Soil Conservation Service proposes to assist in securing the adoption by the State legislatures in the several States of erosion control legislation as nearly as may be in the form of the standard act, which will be

submitted, after it has received your approval, as the recommendation of the Department of Agriculture regarding appropriate State legislation in this field.

In the balance of this memorandum I shall briefly summarize the accompanying standard act and shall indicate my opinion upon the major objections which may be raised against its validity under the Federal Constitution and under typical provisions contained in the several State constitutions.

## SUMMARY OF THE ACT

Three basic considerations have largely determined the provisions of the standard act. These may be stated as follows:

(1) Soil erosion is so intimately tied in with the farm management plan of the particular farm or with the land-use practices on given lands that the mere adoption of such engineering devices as the construction of terraces must fall far short of success in preventing and controlling erosion. A genuine attack on the problem will in most instances require considerable modification of land-use practices, including the utilization of strip cropping, contour cultivating and contour furrowing, the seeding of waste, sloping, abandoned, or eroded lands to water-conserving and soil-holding grasses and legumes, modifications in cropping programs and tillage practices, and the retirement from cultivation of steep, highly erodible tracts;

(2) Failure by particular farmers to control erosion on their lands can cause a washing and blowing of soil and water from such lands onto other lands, and thus make erosion control on such other lands difficult or impossible. It follows that the problem of erosion cannot be met by the conduct of isolated demonstrational projects by State and Federal agencies. Virtually all of the lands in particular watersheds must be brought under some form of erosion control operations for the problem to be adequately dealt with;

(3) A program for modifying land-use practices in the interest of soil conservation and prevention of soil erosion can be made effective only if farmers can be induced to cooperate in this work voluntarily. The legislation should, therefore, create machinery which can be used by the farmers if they have been educated to the desirability of taking action.

The essence of the statute may be thus stated: It provides a procedure by which soil conservation districts may be organized, such districts to be governmental subdivisions of the State and to exercise, in the main, two types of powers: (1) The power to establish and administer erosion control demonstration projects and preventive measures; (2) the power to prescribe land-use regulations in the interest of the prevention and control of erosion, such regulations to have the force of law within the district.

The act establishes a State soil conservation committee of from three to five members, the membership to be selected from such officers as the director of the State extension service, the director of the State agricultural experiment station, the State conservation commissioner or commissioner of agriculture, and a representative of the State planning board. The committee is given authority to

invite the Secretary of Agriculture of the United States to appoint one person to serve on the committee. This committee is to administer the procedures involved in establishing districts, assist the supervisors of the various districts, encourage the organization of districts where needed, facilitate an interchange of advice and experience between districts, and coordinate the programs of the several districts in the State "so far as this may be done by advice and consultation".

The procedure for creation of districts will be stated in greater detail hereinafter in connection with the discussion of some of the constitutional questions which may be raised concerning this procedure. It may be sufficient at this point to indicate that it is provided that any 25 land occupiers may file a petition with the State committee asking that a district be organized. (The act, in subsection (10) of sec. 3, defines "land occupier" to include "any person, firm, or corporation who shall hold title to, or shall be in possession of, any lands lying within a district organized under the provisions of this act, whether as owner, lessee, renter, tenant, or otherwise.") The committee is required to give public notice of a hearing to be held upon the petition, to hold such hearing, at which all interested parties may be heard, and to define the boundaries of the proposed district. Thereafter the committee is required to conduct a referendum in which all land occupiers within the proposed district may vote on the question whether a district should be created. For reasons stated below the result of the referendum is not made conclusive upon the committee, except that the committee may not complete the organization of a district unless at least a majority of the votes cast in the referendum shall have been cast in favor of organization of the district.

The governing body of each district is to consist of five supervisors, three elected by the land occupiers of the district, two appointed by the State committee. The first of the types of powers listed above as those to be exercised by the districts is covered in section 8 of the act. This section empowers the districts, through their supervisors, to conduct necessary research (but seeks to avoid duplication of research activities by requiring research projects to be initiated only in cooperation with State or Federal agencies), to conduct demonstrational projects, to carry out preventive and control measures, to acquire necessary properties and make necessary contracts, to make available to land occupiers machinery and equipment needed for control operations, to develop land-use plans and bring them to the attention of land occupiers, and to take over Federal and State erosion-control projects and administer them.

The second major set of powers conferred upon the districts is covered in sections 9 to 12. The supervisors are authorized to formulate land-use regulations in the interest of prevention and control of erosion, and to conduct hearings thereon. The regulations may not be enacted into law, however, until after they have been submitted to a referendum of the land occupiers in the district. Again, for reasons stated below, the result of the referendum is not made conclusive upon the supervisors, except that it is provided that the supervisors may not enact the regulations into law unless they shall have been approved by at least a majority of the votes cast in the referendum. It is provided

that the regulations may include requirements for the carrying on of necessary engineering operations including the construction of terraces, check dams and similar work, specifications of cropping programs, requirements with reference to methods of cultivation, provisions for retirement from cultivation of highly erosive areas, and similar means and measures. A violation of the regulations is declared to be a misdemeanor punishable in the local courts by fines, and the supervisors are empowered to provide civil penalties as well. The supervisors are authorized to file petitions in the local courts to require recalcitrant land occupiers to observe the provisions of the regulations. The courts are empowered to compel compliance and to authorize the supervisors to go upon privately owned lands and perform the necessary operations which the land occupier may fail to perform, the costs of such performance to be recovered from the land occupier.

Provision is made for a board of adjustment to be established in each district in which land-use regulations shall be in force, the board to consist of three members appointed by the State committee with the advice and approval of the district supervisors. The board of adjustment is authorized, upon proper petition by a land occupier, to authorize variances from the terms of the land-use regulations in cases where a literal application of the land-use regulations to particular lands would result in great practical difficulties or unnecessary hardship. Special provision is made for judicial review of decisions of the board of adjustment.

Provision is made for cooperation among districts and for cooperation of the districts with State and Federal agencies. All agencies of the State are directed to observe upon publicly owned lands the provisions of land-use regulations in force in any district within which such publicly owned lands may lie.

At any time after 5 years after organization of a district its operations may be terminated and the district discontinued by the State committee upon appropriate petition of the land occupiers. The committee is not authorized, however, to discontinue any district until after it shall have held a referendum upon the question of discontinuance and unless a majority of the votes cast in such referendum shall have been cast in favor of such discontinuance. Referenda upon the discontinuance of districts may not be held more often than once in 5 years.

The statute provides for financing the operations of the districts by annual appropriations to be made by the State legislature out of funds in the State treasury. The Land Policy Committee and the Soil Conservation Service have deemed this a more desirable procedure than authorizing the districts to levy property taxes or special assessments.<sup>1</sup> While it is anticipated that substantial contributions will be made by the United States through the Soil Conservation Service and other agencies to the operations of the districts, the present statute cannot, of course, provide for such contributions. The statute does, however, give authority to the districts to accept contributions and assistance from the United States or any of its agencies.

<sup>1</sup> For a further discussion of this point, see footnote 12, p. 29.

## CONSTITUTIONALITY OF THE STANDARD ACT

It has been anticipated that some of the land occupiers in any State in which the standard act above summarized may be adopted may challenge the constitutional power of the State government to enact and enforce such legislation. A careful study has been made, therefore, of the relevant court decisions upon the constitutional problems involved, and every effort has been made to bring the provisions of the legislation within the main body of these decisions.

The constitutional challenges which may be directed against this legislation will fall into two large classes. It may be argued (1) that the subject matter of the legislation is itself outside the scope of the powers which the State legislature may exercise because of the fact that those powers have been circumscribed by a number of constitutional guaranties, prominent among them the guaranty that no person may be deprived of liberty or property without due process of law, and that the proceeds of State taxation may be spent only upon public purposes. It may be argued that because of this fact land-use regulations of the type above described may not be enforced, and State funds may not be appropriated to finance the operations of the districts. (2) It may be urged that the particular procedures specified in the act, such as the provision for the organization of districts and the manner of their creation, the procedure provided for the adoption of land-use regulations, or the powers conferred upon the board of adjustment, violate certain constitutional provisions, such as the prohibition against delegation of legislative power, or the provision that no State shall deny to any person within its jurisdiction the equal protection of the laws.

I shall not attempt in this opinion to deal with any of these constitutional issues exhaustively, but shall indicate as to each of the major provisions of the act why I deem it to be within the constitutional power of the State legislature to enact.

1. THE POWER OF THE STATE UNDER THE "POLICE POWER" TO PROVIDE FOR THE PREVENTION AND CONTROL OF SOIL EROSION.

The most basic attack which can be made against the constitutionality of this legislation is the contention that the legislative power of a State does not extend to regulating the carrying on of operations upon private lands, and that this remains true even if it be demonstrated that unregulated operations are bringing about erosion of the soil and that the proposed regulations are directed to preventing and controlling such erosion. It is true that, unlike the Federal Government which is a government of delegated powers and may exercise no power not conferred upon it in the Federal Constitution, the State governments are governments of inherent power and therefore a State legislature may exercise any power not prohibited to it in the State or Federal Constitutions. To challenge Federal legislation on the ground of lack of power, it is sufficient to show that the Federal Constitution does not confer such power; but to challenge State legislation on this ground, it is necessary to find in the State or Federal Constitution a prohibition of the exercise of such power. The Federal Con-

stitution, however, in the Fourteenth Amendment provides that no State shall deprive any citizen of his liberty or property without due process of law. Almost identical guaranties are contained in every State constitution, and the guaranty of due process is held to protect the individual from interference by the State with the freedom with which he may carry on operations upon his lands. The guaranteed freedom is not, however, absolute, and that power which the State may exercise to regulate private land use or other private conduct in the public interest, even though it should interfere with the absolute liberty or property interests of the citizen, is called the police power. The present problem becomes, therefore, that of determining whether regulating private land use in the interest of erosion control, in the manner provided for in the standard act, is within the police power.

Traditionally, the police power has been defined as the power to protect and promote the public health, safety, and morals. More recent decisions of the highest courts have expanded the police power to include also the power to promote the general prosperity and welfare of the community. In *Chicago, B. & Q. R. R. Co. v. Ill. ex rel. Grimwood*, 200 U. S. 561, 592 (1906), in upholding certain procedures taken under the Illinois Farm Drainage Act, the Supreme Court of the United States said: "We hold that the police power of the State embraces regulations designed to promote the public convenience or the general welfare as well as regulations designed to promote the public health, the public safety or public morals." To the same effect is *Bacon v. Walker*, 204 U. S. 311, at 317 (1907), in which the Supreme Court upheld an Idaho Statute regulating sheep grazing and said concerning the police power: "That power is not confined \* \* \* to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people." The Supreme Court of New Mexico has recently stated the same doctrine:

The police power is necessarily expansive. It must meet new conditions and standards. On the other hand, "liberty" is contractive. It is not an absolute thing. Any Government at all encroaches upon it. "Liberty restrained by law" is our tradition. The power to regulate the conduct of an individual for the common good, the police power, has never been bounded and never will be. \* \* \* No jurist has ever attempted to enumerate all the specific objects for which the power may be legitimately invoked. To such enumeration as definitions include, by way of illustration, there is always added "the general welfare." (*State v. Henry*, 37 N. M. 536, 25 Pac. (2d) 204, (1933).)

The recent decision of the Supreme Court of the United States in *Nebbia v. New York*, 291 U. S. 502, decided March 5, 1934, has stated clearly the relationship between legislative exercise of the police power and the guarantees of due process. The court said, in part:

Under our form of government, the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But

neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. \* \* \*

Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. \* \* \* These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. \* \* \*

The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community. The State may control the use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location, or their use for certain kinds of advertising; may in certain circumstances authorize encroachments by party walls in cities; may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries, and structures likely injuriously to affect the public health or safety; or may establish zones within which certain types of buildings or businesses are permitted and others excluded. \* \* \*

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified.

Section 2 of the standard act is entitled "Legislative Determinations and Declaration of Policy." In this section it is declared as a matter of legislative determination that improper land-use practices are contributing to a progressively more serious erosion of the farm and grazing lands of the State by wind and water; that among the consequences of such erosion are the silting and sedimentation of stream channels and reservoirs; the loss of fertile soil material in

dust storms; the deposit of subsoil over alluvial plains, and the reduction in productivity or outright ruin of rich bottom lands by overwash of poor subsoil material; deterioration of soil and its fertility; loss of soil and water, which causes destruction of food and cover for wildlife; a blowing and washing of soil into streams, which silts over spawning beds, and diminishes the food supply of fish; a diminishing of the underground water reserve, which causes water shortages, intensifies periods of drought, and causes crop failures; an increase in the speed and volume of rainfall run-off, which causes severe and increasing floods, bringing suffering, disease, and death; impoverishment of families attempting to farm eroded and eroding lands; damage to roads, highways, railways, farm buildings, and other property from floods and from dust storms, and losses in navigation, hydroelectric power, municipal water supply, irrigation developments, farming, and grazing. It is then declared to be the policy of the State to provide for the conservation of the soil and soil resources of the State, and for the control and prevention of soil erosion. These legislative determinations as to the facts, while, of course, not conclusive upon the courts, are entitled to judicial consideration and deference: *Block v. Hirsh*, 256 U. S. 135, at 154 (1921); *People v. Nebbia*, 262 N. Y. 259, at 265, 186 N. E. 694 (1933); *Perry v. Keene*, 56 N. H. 514 (1876); *State v. McKay*, 137 Tenn. 280, at 306, 193 S. W. 99 (1916); *People v. Johnson*, 288 Ill. 442, at 445, 123 N. E. 543 (1919).

The question whether the police power extends to the type of regulation of land use involved in the legislation under consideration is essentially an open one. There is, however, considerable material in the cases which strongly supports the contention that the police power does extend to the types of regulation provided in the standard act. A close case in point is the decision of the Supreme Court of Iowa in 1924 in the case of *Kroon v. Jones*, 198 Iowa 1270, 201 N. W. 8. An Iowa statute (Code of 1924, sec. 7421-7423) authorized the boards of supervisors of counties of the State to establish drainage districts and to establish "embankments, revetments, retards, or any other approved system of construction which may be deemed necessary adequately to protect the banks of any river or stream, within or adjacent to any county, from wash, cutting, or erosion", and provided that the provisions of the statute should be "liberally construed to promote, embrace, and authorize the drainage, reclamation, or protection of wet and overflowed lands, or lands endangered, or liable to be endangered by wash, cutting, or erosion, within this State." The action of the board of supervisors of Mills County, Iowa, in establishing a district under the statute and in providing for the placing of retards in the Missouri River to deflect the current and protect the bank from erosion was challenged on the ground that the erosion was a private matter affecting only the land lying along the river, and therefore its prevention was outside the police power of the State. The court sustained the constitutionality of the statute, saying, in part:

It is quite clear, we think, that the benefit to be naturally expected from the proposed improvement is not confined to the land immediately at the river bank and which will be protected from actual present destruction by erosion, but that there is a very appreciable benefit to the lands

in the district generally. This results, not only from the fact that the improvement will, in the proportion that it is successful in preventing erosion and checking the movement of the river channel to the east, remove the danger of the destruction of the land by future encroachments of the river, but by lessening the danger to be apprehended from high waters, protecting the present levees, and creating a condition that will enable further work of that character to be carried out. In short, from a careful examination of the record we are satisfied that the proposed improvement comes within the purview of the statute, that it is of public utility and conducive to the public health, convenience, and welfare.

Regulation of private land use in the interest of conserving natural resources has repeatedly been sustained as a proper exercise of the police power. Thus the courts have sustained statutes prohibiting the waste of natural gas and crude oil: *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8 (1931); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210 (1932); *Sterling v. Constantine*, 287 U. S. 378 (1932); *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61 (1911); *People's Petroleum Producers Co. v. Sterling*, 60 F. (2d) 1041 (D. Tex. 1932); *People v. Associated Oil Co.*, 211 Calif. 93, 294 Pac. 717 (1930), citing cases from other States at 722; *Hague v. Wheeler*, 157 Pa. St. 324, 27 Atl. 714 (1893). The courts are particularly apt to sustain such regulation where the well-being and prosperity of the entire community is involved, as in cases where the oil industry is one of the principal industries of the State and the State derives large revenue from the taxation of that industry. See *Townsend v. State*, 147 Ind. 624, 47 N. E. 19 (1897); *Quinton Relief Oil & Gas Co. v. Corporation Commission*, 101 Okla. 164, 224 Pac. 156 (1924); *Julian Oil & Royalties Co. v. Capshaw*, 145 Okla. 237, 292 Pac. 841 (1930). Statutes designed to conserve timber resources by requiring owners of forest land to patrol their lands and to remove brush and debris likely to cause fires have been sustained: *First State Bank of Sutherlin v. Kendall Lumber Corporation*, 107 Ore. 1, 213 Pac. 142 (1923); *Chambers v. McCollum*, 47 Ida. 74, 272 Pac. 707 (1928); *State v. Pape*, 103 Wash. 319, 174 Pac. 468 (1918); *Perley v. North Carolina*, 249 U. S. 510 (1919); *In re Opinion of the Justices*, 69 Atl. 627 (Me. 1908).

In the interest of conserving the food supply of a community, legislation requiring the destruction of cedar trees to prevent the spread of cedar rust to apple orchards have been adopted in a number of States, and have been sustained: *Miller v. Schoene*, 276 U. S. 272 (1928); *Upton v. Felton*, 4 F. Supp. 585 (D. Neb. 1932); *Kelleher v. Schoene*, 14 F. (2d) 341 (W. D. Va. 1926); *Kelleher v. French*, 22 F. (2d) 341 (W. D. Va. 1927), affirmed in 278 U. S. 563 (1928); *Lemon v. Rumsey*, 108 W. Va. 242, 150 S. E. 725 (1929). Destruction of trees to exterminate types of orchard pests other than cedar rust has also been required by State legislatures, and sustained by State supreme courts: *Balch v. Glenn*, 85 Kan. 735, 119 Pac. 67 (1911) (San Jose scale and other orchard pests); *State v. Main*, 69 Conn. 123, 37 Atl. 80 (1897) (the "yellows"); *Louisiana State Board of A. & I. v. Tanzmann*, 140 La. 756, 73 So. 854 (1917) (citrus diseases); *Colvill v. Fox*, 51 Mont. 72, 149 Pac. 496 (1915) (apple scab). Similar are the

cases which have upheld the required destruction of wheat crops where corn stalks upon which corn borers could grow were present in wheat fields: *Van Gunten v. Worthley*, 25 Ohio App. 496, 159 N. E. 326 (1927); *Wallace v. Feehan*, 206 Ind. 522, 190 N. E. 438 (1934); *Wallace v. Dohner*, 89 Ind. App. 416, 165 N. E. 552 (1929). Extensive powers to abate insect pests have been conferred upon administrative boards, and sustained in *Los Angeles County v. Spencer*, 126 Cal. 670, 59 Pac. 202 (1899) (pests injurious to fruits and plants); *Graham v. Kingwell*, 218 Cal. 658, 24 P. (2d) 488 (1933) (prevention of bee diseases); *Carstens v. DeSalle*, 82 Wash. 643, 144 Pac. 934 (1914) (power delegated to commission to name diseases justifying destroying trees). These cases contain frequent statements that preservation of the food supply is a major valid objective of the police power.

Statutes requiring farmers to dip their cattle to destroy tick have been upheld: *Armstrong v. Whitten*, 41 F. (2d) 241 (D. Texas, 1930); *Stine v. Lewis*, 33 Okla. 609, 127 Pac. 396 (1912); *State v. McCarty*, 5 Ala. App. 212, 59 So. 543 (1912); *Davis v. State*, 126 Ark. 260, 190 S. W. 436 (1917); *Neal v. Boog-Scott*, 247 S. W. 689 (Tex. Civ. App. 1923); *Neal v. Cain*, 247 S. W. 694 (Tex. Civ. App. 1923); *State v. Hodges*, 180 N. C. 751, 105 S. E. 417 (1920); as well as statutes making the dipping of sheep compulsory, to destroy sheep scab: *State v. Hall*, 27 Wyo. 224, 194 Pac. 476 (1921). Statutes providing for compensating farmers for cattle killed in administering programs for the reduction of scabies have been sustained: *Payne v. Jones*, 47 S. D. 488, 199 N. W. 472 (1924); and see *Moss v. Mississippi Live Stock Sanitary Board*, 154 Miss. 766, 122 So. 776 (1929). Statutes requiring the killing of tubercular cattle have been sustained whether or not they provided for compensation. The statute sustained in *City of New Orleans v. Charouleau*, 121 La. 890, 46 So. 911 (1908), and see *Houston v. State*, 98 Wis. 481, 74 N. W. 111 (1898), provided for no compensation, while the statutes sustained in *Campbell v. Manchester*, 67 N. H. 146, 36 Atl. 877 (1891) and *Cory v. Graybill*, 96 Kan. 20, 149 Pac. 417 (1915) provided for partial compensation. It may be noted here that where the State is predominantly agricultural the courts are more readily willing to extend the police power to include protection of agricultural interests: *State v. Boehm*, 92 Minn. 374, 100 N. W. 95 (1904); *Green v. Frazier*, 44 N. D. 395, 176 N. W. 11 (1920), affirmed 253 U. S. 233, (1920); *Scott v. Frazier*, 258 F. 669 (D. N. D. 1919); *State ex rel. Lyon v. McCown*, 92 S. C. 81, 75 S. E. 392 (1912); *Hill v. Ray*, 52 Mont. 378, 158 Pac. 826 (1916); *Colvill v. Fox*, 51 Mont. 72, 149 Pac. 496 (1915), and *Miller v. Schoene*, 146 Va. 175, 135 S. E. 813 (1926), affirmed 276 U. S. 272 (1928).

A number of cases have upheld the constitutionality of statutes requiring property owners to destroy weeds on their own premises: *Missouri, Kansas & Texas Railway Co. v. May*, 194 U. S. 267 (1904); *Wedemeyer v. Crouch*, 68 Wash. 14, 122 Pac. 366 (1912); *City of St. Louis v. Galt*, 179 Mo. 8, 77 S. W. 876 (1903). Statutes requiring property owners to destroy weeds on publicly owned property adjoining their land have also been sustained: *Commonwealth v. Watson*, 223 Ky. 427, 3 S. W. (2d) 1077 (1928); *Northern Pacific Ry. Co. v. Adams County*, 78 Wash. 53, 138 Pac. 307 (1914).

Regulations of land use in the interest of preserving fish and wildlife have been sustained under the police power: *Geer v. Connecticut*, 161 U. S. 519 (1895); *State v. Southern Coal & Transportation Co.*, 71 W. Va. 470, 76 S. E. 970 (1912); *Commonwealth v. Sisson*, 189 Mass. 247, 75 N. E. 619 (1905); *Connolly v. Standard Oil Co. of N. Y.*, 264 Fed. 383 (D. R. I. 1920); *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098 (1894); *Gentile v. State*, 29 Ind. 409 (1868). Legislation directed to assuring adequate drainage of farm lands has been sustained: *Eccles v. Ditto*, 23 N. M. 235, 167 Pac. 726 (1917); *Wurts v. Hoagland*, 114 U. S. 606 (1885); *Hagar v. Reclamation District No. 108*, 111 U. S. 701 (1884); *Houck v. Little River Drainage District*, 239 U. S. 254 (1915); *O'Neill v. Leamer*, 239 U. S. 244 (1915); *Hagar v. Supervisors of Yalo County*, 47 Cal. 222 (1874); *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169 (1869); *In re Bonds of Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675 (1891). But cf. *Sundquist v. Fraser*, 191 N. W. 931 (Minn. 1923). In *Chicago & Alton Railroad Co. v. Tranbarger*, 238 U. S. 67 (1915) and *Peterson v. Northern Pac. Ry. Co.*, 132 Minn. 265, 156 N. W. 121 (1916) it was held that railroad companies may constitutionally be required to maintain ditches to prevent the flooding of adjoining property that would otherwise result from their erection of embankments. In the following cases legislation providing for the organization of irrigation districts to assure an adequate supply of water and protect against drought was sustained: *Board of Directors of Modesto Irrigation Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. 237 (1891), dismissed on other grounds in 164 U. S. 179 (1896); *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379 (1888); *In re Bonds of Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675 (1891); *Hagar v. Supervisors of Yalo County*, 47 Cal. 222 (1874); *Billings Sugar Co. v. Fish*, 40 Mont. 256, 106 Pac. 565 (1910); cf. *Eden Irrigation Co. v. District Court of Weber County*, 61 Utah 103, 211 Pac. 957 (1922). The establishment of river regulating districts and conservancy districts to prevent and control floods has been sustained: *Orr v. Allen*, 245 Fed. 486 (D. Ohio 1917); *Miami County v. City of Dayton*, 92 Ohio St. 215, 110 N. E. 726 (1915); *People v. Lee*, 72 Col. 598, 213 Pac. 583 (1923); *Board of Black River Regulating Dist. v. Ogsbury*, 203 A. D. 43, 196 N. Y. S. 281 (1922); *Board of Hudson River Regulating Dist. v. Fonda, J. & G. R. Co.*, 127 Misc. 866, 217 N. Y. S. 781 (1926), affirmed on appeal in 249 N. Y. 445, 164 N. E. 541 (1928); cf. *State ex rel. Skordahl v. Flaherty*, 140 Minn. 19, 167 N. W. 122 (1918).

Statutes intended to conserve the water supply of cities have repeatedly been sustained: *Bountiful City v. De Luca*, 77 Utah 107, 292 Pac. 194 (1930) (regulated grazing of livestock within 300 feet of streams from which a municipal water supply was taken); *Topeka Supply Co. v. City of Potwin Place*, 43 Kan. 404, 23 Pac. 578 (1899); *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N. C. 196, 71 S. E. 218 (1911); *State v. Wheeler*, 44 N. J. L. 88 (1882) (the foregoing three cases all deal with emptying of sewage); *State v. Griffin*, 69 N. H. 1, 39 Atl. 260 (1897) (prohibiting throwing of sawdust); *State v. Shaw*, 22 Ore. 287, 29 Pac. 1028 (1892); *City of New York v. Kelsey*, 158 A. D. 183, 143 N. Y. S. 41, affirmed in 213 N. Y. 638, 107 N. E. 1074 (1914) (prohibiting establishment of

cemetery within half mile of source of water supply); *Perley v. North Carolina* 249 U. S. 510 (1919) (regulating forestry practices). The Supreme Court of Kansas upheld in *Chaput v. Demars*, 120 Kan. 273, 243 Pac. 311 (1926), 244 Pac. 1042 (1926), a statute requiring property owners to trim hedges bordering on public highways upon the order of the road commissioners, the court saying as justification for the statute that: "High hedges obstruct the highway, causing snow to drift in them, prevent their drying out quickly after heavy rains, render the highways more difficult to keep in proper condition, obstruct the view, and render them more dangerous."

The appositeness of the cases above discussed is obvious. Regulation of land use in the interest of erosion control is, at one and the same time, regulation to conserve natural resources, to conserve the food supply, to aid in preserving wildlife, to improve farm lands, to prevent and control floods, to protect public lands and public highways, to conserve the water supply of cities, to prevent impairment of dams and reservoirs. It is regulation in the interest of protecting and promoting the health, safety, prosperity, and general welfare of the people of the State.

Not all of the instances of legislation above discussed have required private landowners to perform particular operations, or refrain from performing particular operations, upon their own lands at their own expense, but it is important to note that the courts have repeatedly sustained land-use regulations under the police power which have done precisely that, where the purpose to be achieved was deemed sufficiently important and the interference with private right deemed necessary to accomplish the purpose. In the cedar rust cases discussed above (p. 40) the owner of the infested cedar trees was left no choice but to cut down his trees, though they possessed considerable sentimental value, and though their market value might greatly increase with further growth. Similarly, in the corn borer cases (p. 41) the property owners were required to destroy their wheat fields without compensation, to eliminate cornstalks which were prospective hosts for the corn borer. It is worth noting that the Ohio and Indiana corn borer statutes (112 Ohio Laws, 1927, p. 83; Indiana Acts, 1927, ch. 56, p. 146) in addition to authorizing the administrative destruction of agricultural products, also authorized the administrative specification of tillage practices insofar as necessary to accomplish the purpose of the legislation. The Supreme Court of California in *Graham v. Kingwell*, 218 Cal. 658, 24 Pac. (2d) 488 (1933) sustained a statute conferring power to prescribe broad regulations governing the conduct of the bee industry insofar as necessary to eradicate bee diseases.

It may, indeed, now be regarded as definitely established that the legislatures may, when acting in defense of the public health, safety, prosperity, or general welfare, require the carrying on by landowners of particular operations upon their lands at their own expense: *Perley v. North Carolina*, 249 U. S. 510 (1919); *First State Bank of Sutherlin v. Kendall Lumber Corporation*, 97 Ore. 1, 213 Pac. 142 (1923); *Chambers v. McCollum*, 47 Idaho 74, 272 Pac. 707 (1928); *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267 (1904); *Wedemeyer v.*

*Crouch*, 68 Wash. 14, 122 Pac. 366 (1912); *Commonwealth v. Watson*, 223 Ky. 427, 3 S. W. (2d) 1077 (1928); *Northern Pac. Ry. Co. v. Adams County*, 78 Wash. 53, 138 Pac. 307 (1914); *Chaput v. Demars*, 120 Kans. 273, 243 Pac. 311, 244 P. 1042 (1926); *Davis v. State*, 141 Ala. 84, 37 So. 454 (1904); *State v. Pape*, 103 Wash. 319, 174 Pac. 468; Note, 58 A. L. R. 215 (1928). It seems clear, further, from the cases immediately above cited, that the power to require such operations at the expense of the landowner may be exercised even though the benefit to flow from the operations is for the community at large rather than for the particular landowner who is required to perform.

It is my opinion, therefore, that the police power of the States should be deemed to extend to regulating land use in the interests of conserving soil resources and preventing and controlling soil erosion. I have indicated above that the standard act here considered involves, in addition to regulating land use in this manner, appropriations of funds out of the State treasury to carry on projects for the same purpose. The next question which confronts us, therefore, is: Are appropriations to finance the establishment and administration of erosion control projects for a "public purpose" and within the power of State legislatures?

2. ARE THE APPROPRIATIONS AUTHORIZED IN THE STANDARD ACT FOR A "PUBLIC PURPOSE"?

State constitutions generally provide, either expressly or by implication, that tax proceeds may be expended only for public purposes. The United States Supreme Court has strengthened this requirement by deciding that the due process clause of the Fourteenth Amendment to the Federal Constitution is violated by an appropriation by a State legislature of the proceeds of taxes for other than a public purpose: *Loan Association v. Topeka*, 20 Wall. (U. S.) 655 (1874); *Parkersburg v. Brown*, 106 U. S. 487, (1882); *Cole v. LaGrange*, 113, U. S. 1 (1885). The Supreme Court has indicated, however, that only in extreme cases will it permit its judgment as to what constitutes a public purpose to override the judgment of the State legislature when supported by the decisions of the State courts: *Jones v. City of Portland*, 245 U. S. 217 (1917); *Green v. Frazier*, 253 U. S. 233 (1920).

The standard act authorizes appropriations to defray the administrative expenses of the various agencies provided for in the act, and to provide a sum of money to be divided annually among the districts in the State to finance the establishment and operation by the districts of erosion-control projects of various types. From the conclusion above stated to the effect that the police power of the State extends to regulating land use in the interest of erosion control, it will follow that the State may appropriate money to cover the necessary administrative expenses in effectuating such regulation. It would be futile for a court to hold that the legislature may prescribe certain regulations but may not appropriate money to enforce them. The appropriation for administrative expenses may therefore be said to stand or fall with the conclusion that this legislation is

within the police power of the States. See *Neal v. Boog-Scott*, 247 S. W. 689 (Tex. Civ. App. 1923) and *Neal v. Cain*, 247 S. W. 694 (Tex. Civ. App. 1923).

A good deal of the work of the districts will, however, consist of construction and other work to be performed upon privately owned lands. Under section 8 of the standard act the districts will have power, upon obtaining the consent of the land occupier, to build terraces and check dams upon his lands; to contribute labor and materials to the performance of control operations upon privately owned lands; to lend, for a small charge or without charge, the use of agricultural machinery and equipment; to distribute seeds and seedlings, and otherwise generally to assist private landowners to control erosion on their lands. The purpose of this work is, of course, to make erosion control effective, and section 2 of the act summarizes in detail the ways in which such erosion control activities will redound to the benefit of the entire State. Yet it cannot be denied that individual land occupiers will be receiving private benefit from such expenditure of the appropriations.

The general rule seems to be that where the benefit to the individual is but incidental to the object of achieving a benefit to the general public, the appropriation will be held to be for a public purpose: *Kentucky Live Stock Breeders' Association v. Hager*, 120 Ky. 125, 85 S. W. 738 (1905); *State v. Robinson*, 35 Neb. 401, 53 N. W. 213 (1892); *Merchants Union Barb-Wire Co. v. Brown*, 64 Ia. 275, 20 N. W. 434 (1884); *Millard v. Roberts*, 202 U. S. 429 (1906); *In re Opinions of the Justices*, 118 Me. 503, 106 Atl. 865 (1919); *City of Kearney v. Woodruff*, 115 Fed. 90 (C. C. A. 8th 1902) cf. *Allied Architects' Association of Los Angeles v. Payne*, 192 Cal. 431, 221 Pac. 209 (1923). It is not always possible to predict whether the court will hold the private benefit to be merely incidental or to be the major object of the legislation. Thus, in *State ex. rel. Moody v. Williams*, 43 Nev. 290, 185 Pac. 459 (1919), the court invalidated expenditures for reclamation purposes involving loans to individual farmers. On the other hand, in *Kentucky Live Stock Breeders' Association v. Hager*, and *State v. Robinson*, both *supra*, the court sustained an appropriation to a private organization for the conduct of a State agricultural fair, and in *Merchants Union Barb-Wire Co. v. Brown*, *supra*, the Iowa Supreme Court sustained an appropriation of moneys to a nonprofit company to assist that company in defending patent infringement suits, the company having been organized to furnish barbed wire to farmers at cost.

In the case of land settlement schemes where public funds have been appropriated to make loans to settlers, the benefit derived by the settlers has been considered merely incidental to the public welfare involved in opening up agricultural lands to cultivation: *State ex. rel. State Reclamation Board v. Clausen*, 110 Wash. 525, 188 Pac. 538 (1920); *Wheelon v. South Dakota Land Settlement Board*, 43 S. Dak. 551, 181 N. W. 359 (1921); *Veterans' Welfare Board v. Jordan*, 189 Cal. 124, 208 Pac. 284 (1922); *McMahan v. Olcott*, 65 Ore. 537, 133 Pac. 836 (1913). On the other hand, direct bounties to farmers and agricultural industries have been held unconstitutional as not for a public purpose: *Oxnard Beet Sugar Co. v. State*, 73 Neb. 57, 66; 102 N. W. 80, 105 N. W. 716 (1905);

*Michigan Sugar Co. v. Auditor General*, 124 Mich. 674, 83 N. W. 625 (1900); *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 454 (1903) (the three foregoing cases involving sugar bounties); *Deal v. Mississippi County*, 107 Mo. 464, 18 S. W. 24 (1891) (bounty for planting trees). On the related question of whether loans to farmers to purchase seed and for other relief purposes in times of emergency are appropriations for a public purpose the courts have divided, such appropriations having been sustained in: *Cobb v. Parnell*, 183 Ark. 429, 36 S. W. (2d) 388 (1931); *State ex rel. Cryderman v. Wienrich*, 54 Mont. 390, 170 Pac. 942 (1918); and *State v. Nelson County*, 1 N. D. 88, 45 N. W. 33 (1890), and having been disapproved in *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568 (1898); *Pasty v. Colgan*, 97 Cal. 251, 31 Pac. 1133 (1893); *State ex rel. Griffith v. Osawakee Tp.*, 14 Kans. 418 (1875), and *In re Opinion of the Judges*, 59 S. D. 469, 240 N. W. 600 (1932).

General expenditures for the benefit of agriculture have been upheld on the specific ground that they tend to preserve farm lands from erosion: *Kroon v. Jones*, 198 Iowa 1270, 201 N. W. 8 (1924) (see discussion of this case herein, p. 39); *Perkins v. Board of Comr's of Cook County*, 271 Ill. 449, 111 N. E. 580 (1916); but cf. *State v. Donald*, 151 N. W. 331 (Wis. 1915). In *Scott v. Frazier*, 258 Fed. 669 (D. N. Dak. 1919) and *Green v. Frazier*, 44 N. D. 395, 176 N. W. 11, affirmed in 253 U. S. 233 (1920), the entry of the State into the warehouse and grain elevator business was sustained in part on the ground that the State purpose was to protect farmers from manipulative marketing practices, and in part on the ground that soil conservation would be thereby promoted. It is important to recognize that both on the question earlier considered as to the limits of the police power, and on the present question of what appropriations may be said to be for a public purpose, the reported decisions must be considered in the light of the year in which they were decided. There is considerable movement in the judicial decisions in these fields. Thus, the courts originally divided sharply on the question of the constitutional propriety of using public funds for the drainage of lands for agricultural purposes. The following cases held such expenditures to be for a public purpose: *Hagar v. Reclamation District No. 108*, 111 U. S. 701 (1884); *Houck v. Little River Drainage District*, 239 U. S. 254 (1915); *Miller & Lux v. Sacramento and San Joaquin Drainage District*, 256 U. S. 129 (1921); *Billings Sugar Co. v. Fish*, 40 Mont. 256, 106 Pac. 565 (1910); *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, reversed on other grounds in 18 N. J. Eq. 518 (1866); *Drainage Dist. No. 1 v. Richardson County*, 86 Neb. 355, 125 N. W. 796 (1910), and *Brown v. Keener*, 74 N. C. 714 (1876), while in the following cases such expenditure was held invalid: *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672 (1888); *In re Theresa Drainage District*, 90 Wis. 301, 63 N. W. 288 (1895); *In re Tuthill*, 163 N. Y. 133, 57 N. E. 303 (1900). Today, however, there is very little tendency to deny the propriety of appropriations for such purposes: cf. *Drainage Dist. No. 1 v. Richardson County*, 86 Neb. 355, 125 N. W. 796 (1910); *City of Huntington v. Amiss*, 167 Ind. 375, 79 N. E. 199 (1906); *Sisson v. Board of Sup'rs of Buena Vista County*, 128 Iowa 442, 104 N. W. 454 (1905); *Grand River Drainage Dist. v. Moseley*, 220 S. W. 886 (Mo. 1920); *Lucas v.*

*Blaine*, 42 Ohio App. 177, 181 N. E. 269 (1931). Similarly, the validity of expenditures of public money for irrigation projects is established: *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 163 (1896); *In re Madera Irrigation District*, 92 Cal. 276, 28 Pac. 272 (1891); *McMahan v. Olcott*, 65 Ore. 537, 133 Pac. 836 (1913); *Cummings v. Hyatt*, 54 Neb. 35, 74 N. W. 411 (1898); cf. *Billings Sugar Co. v. Fish*, 40 Mont. 256, 106 Pac. 565 (1910).

Section 2 of the standard act recites the numerous ways in which public purposes are advanced by the conduct of erosion-control operations. It seems to me to be difficult to escape the conviction that since the present appropriations have for their tendency and object the control and prevention of soil erosion, the preservation of natural resources, the control of floods, the prevention of the impairment of dams and reservoirs, the preservation of wildlife, the protection of the tax base, and the promotion of the health and general welfare of the people of the State, they are for a public purpose. The benefits received by individuals from operations upon their lands are incidental to these public benefits precisely because the harm sustained by the public from uncontrolled erosion so far exceeds the decline in the value of agricultural lands which a single farmer may sustain from mining his soil and permitting his topsoil to wash and blow away.

The discussion thus far brings us to the conclusion that it is within the power of the State legislatures to provide for regulation of private land-use in the manner specified in the standard act in the interest of erosion control and, further, that it is within their power to appropriate funds out of the State treasuries to finance the establishment and operation of erosion-control projects. The present inquiry into the constitutionality of the standard act would terminate here, therefore, if that act itself contained the land-use regulations, enacted into law by the State legislature and made applicable over the entire State, and if the statute, similarly, itself defined what projects should be established and delegated appropriate authority to State officials to establish and administer them. That is not, however, what the standard act does. In order to realize the maximum amount of local participation in, and control of, erosion-control operations, the statute provides instead for the organization, in accordance with specified procedures, of soil conservation districts. It is the governing bodies of the districts which are authorized to enact land-use regulations into law and to establish and administer erosion-control projects; and it is to the districts that the appropriated funds are to be made available for expenditure. We come, therefore, upon a second set of constitutional problems—problems with reference to the procedures specified for the creation of districts, the expenditure of funds, and the adoption of land-use regulations.

### 3. DO THE STATE LEGISLATURES HAVE POWER TO PROVIDE FOR THE ORGANIZATION OF SOIL CONSERVATION DISTRICTS AS NEW GOVERNMENTAL SUBDIVISIONS OF THE STATES?

It is clear from the standard act that the soil conservation districts which the statute provides for are not mere administrative boards or agencies of the State government. The standard act recites in section 8 that "A soil conservation



district organized under the provisions of this act shall constitute a governmental subdivision of this State and a public body, corporate and politic, exercising public powers". (To the same effect is sec. 3 (1)). Section 9 of the act confers upon the supervisors of the districts authority to act as a legislative body for the district, and as such legislative body to enact into law land-use regulations which will govern land-use operations upon lands within the districts. Similarly, section 12 directs the supervisors under certain circumstances to establish a board of adjustment as an administrative agency, such establishment to be effected by an ordinance to be adopted by the supervisors. It is important that there be kept clearly in mind the distinction between a governmental subdivision of a State, familiar instances of which are the county, town, city, and incorporated village, and an administrative board or agency, such as a railroad commission, a bureau of the State government, an election board, and the like. The State soil conservation committee provided for in section 4 of the standard act is, for example, an administrative board and is not a governmental subdivision of the State. It should be noted, too, that the "districts" now commonly provided for in State legislation, such as sanitary, power, road, reclamation, irrigation, and drainage districts, are generally established merely as administrative agencies to operate particular engineering or other properties, without legislative or other powers within the "district". The soil conservation districts are more closely similar to cities and counties than to such "districts".

The first question which confronts us at this point is: Do the State legislatures have authority to provide for the creation of new governmental subdivisions, to function in addition to the traditional governmental subdivisions such as the county, town, city, and the like? While this question has been directly passed upon by the highest courts of only a few States, it seems clear that, with the possible exception of New York, the State legislatures will be held to have power to create the soil conservation districts as new governmental subdivisions of the respective States, as provided for in the standard act. In the following States it has been directly held that the State legislature may, in its discretion, create such additional municipalities or other governmental subdivisions of the State as it shall deem necessary or appropriate: *California: In re Bonds of Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675 (1891); *Illinois: Board of Education of Chicago v. Upham*, 357 Ill. 263, 191 N. E. 876 (1934); *People ex rel Weis v. Bowman*, 247 Ill. 276, 93 N. E. 244 (1910); *West Chicago Park Commission v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 (1894); *Wilson v. Board of Trustees of Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203 (1890); *Maine: Kennebec Water District v. City of Waterville*, 96 Me. 234, 52 Atl. 774 (1902); *Eaton v. Thayer*, 128 Atl. 475 (Me. 1925); *Michigan: Kuhn ex rel McRae v. Thompson*, 168 Mich. 511, 134 N. W. 722 (1912); *Missouri: Harris v. William R. Compton Bond & Mortgage Co.*, 244 Mo. 664, 149 S. W. 602 (1912); *North Carolina: Newsom v. Earnheart*, 86 N. C. 391 (1882); *Oregon: Shaw v. Harris*, 54 Ore. 424, 103 Pac. 777; *Washington: Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580 (1912). Cf. *Kentucky: Board of Trustees of Town of*

*New Castle v. Scott*, 125 Ky. 545, 101 S. W. 944 (1907); *South Carolina: Briggs v. Greenville County*, 135 S. E. 153 (S. C. 1926).

While the decisions available in the States of New Jersey and Pennsylvania raise some doubt, it is probable that in these States as well it will be held that the legislature may create new governmental subdivisions of the type provided for in the standard act: See *Van Cleve v. Passaic Valley Sewerage Com'rs.*, 71 N. J. L. 574, 60 Atl. 214 (1905); *Lydecker v. Drainage & Water Com'rs. of Englewood*, 41 N. J. L. 154 (1878); *Dillon, Municipal Corporations* (5th ed. 1911) sec. 1434; *In re Corporation of Wyoming Valley Water Supply District*, 27 Luzerne Legal Register (Pa.) 191 (1932). It may well be, however, that if the Court of Appeals of New York will adhere to its decisions in *People ex rel Yost v. Becker*, 203 N. Y. 201, 96 N. E. 381 (1911) and *Miller v. Cavana*, 223 N. Y. 601, 119 N. E. 1059 (1918), then the present constitution of New York will be held to prohibit the legislature of that State from organizing governmental subdivisions within the State other than counties, towns, cities, and villages. In the *Becker* case the New York court held that the recognition given in the State constitution to counties, towns, cities, and villages is an implied prohibition against the creation of other subdivisions vested with similar powers. However, the New York courts have sustained the organization of districts given power only to administer certain engineering or other properties and not given general governmental powers: *Village of Kensington v. Town of N. Hempstead*, 236 App. Div. 340, 258 N. Y. Supp. 355 (1932), aff'd 261 N. Y. 260, 185 N. E. 94 (1933), sustaining collection of taxes by park district; *People ex rel Desiderio v. Conolly*, 238 N. Y. 326, 144 N. E. 629 (1924), sustaining issuance of bonds to finance operations of sewer district; *Kenwell v. Lee*, 261 N. Y. 113, 184 N. E. 692 (1933), involving creation of water supply district. In the last two cited cases the court stated that the territories of the sewer and water supply districts were "special administrative areas" and hence not within the doctrine of the *Becker* case.

There is no way of determining in advance what the New York court will answer to this question. I believe that in the case of New York the difficulty should be pointed out to the legislative committees of the State legislature. If they should determine that the precedent of the *Becker* case will make an adverse decision almost certain, then the statute can be readily revised to meet the special situation in New York. The revised statute can authorize the existing counties of the State to undertake the erosion-control programs specified in the act and to exercise the powers granted in sections 8 to 12 inclusive. It will still be possible to provide that the governing bodies of the counties shall adopt land-use regulations only after advisory referenda and in accordance with the other procedures specified in the act. The standard act as now submitted provides for the organization of new districts rather than for utilizing existing counties, because of the opinion held by members of the Land Policy Committee and of the Soil Conservation Service that it will be best to organize the districts on a watershed or other appropriate basis rather than in accordance with highly arbitrary county boundary lines. Because of the *Becker* decision it

may, however, be necessary to organize the districts on a county basis in the State of New York.

We come next to the question whether, in those States in which new governmental subdivisions may be organized, the doctrine of separation of governmental powers will be held to be applicable to such subdivisions. Governmental subdivisions of the States may be authorized to exercise, over the territory committed to them, the complete range of governmental powers which the State itself may exercise over the territory of the State. It is within the power of the State legislature to confer upon governmental subdivisions broad or narrow powers as the legislature shall see fit. Additional powers may be conferred upon such governmental subdivisions from time to time and powers formerly exercised may be taken away. (A familiar instance of the grant of new powers to governmental subdivisions is the movement now under way for State legislatures to adopt enabling acts conferring upon counties of the State the power to zone rural areas within the county.) The standard act specifies in detail what powers the soil conservation districts may exercise. (See particularly secs. 8 to 12, inclusive.)

Governmental powers are traditionally considered to be divisible into three types: Legislative, executive, and judicial. Since the soil conservation districts are to be governmental subdivisions and not merely administrative boards, the three types of powers may be conferred upon them. Most, if not all, of the State constitutions establish a separation of powers among the legislature, the executive, and the courts and forbid delegations of power by one of these agencies to another. It has become well established, however, that the requirement of separation of powers contained in the respective State constitutions is applicable only to the State government, and is not applicable to governmental subdivisions of the several States. A single governing body of such a governmental subdivision may, therefore, be authorized to exercise legislative, executive, and judicial powers: Charles W. Tooke, *Construction and Operation of Municipal Powers*, 7 *Temple Law Quarterly* 267 at 283, April 1933 (in which the author says: "The constitutional doctrine of the separation of the powers of government does not apply to the subordinate agencies of the state and therefore the authority to enact ordinances or to do other acts within the scope of municipal powers may be conferred upon local administrative bodies"); 12 *Corpus Juris* 804 (in which the rule is stated as follows: "The application of the 'distributive' clause is confined mainly to the sphere of central government; it finds little observance in municipal corporations, or in other units of local government; thus, a commission form of government with blended powers may be established by statute unless otherwise prohibited by the constitution"); *State v. Lane*, 181 Ala. 646, 62 So. 31 (1913); *Ford v. Mayor and Council of Brunswick*, 134 Ga. 820, 68 S. E. 733 (1910); *City of Spartanburg v. Parris*, 85 S. C. 227, 67 S. E. 246 (1910); *State ex rel Simpson v. City of Mankato*, 117 Minn. 458, 136 N. W. 264 (1912); *People v. Provines*, 34 Cal. 520; *Eckerson v. City of Des Moines*, 137 Iowa 452, 115 N. W. 177 (1908); *Kaufman v. Tallahassee*, 84 Fla. 634, 94 So. 697, 30 A. L. R. 471 (1922); *Sarlls v. State ex rel Trimble*, 201

Ind. 88, 166 N. E. 270 (1929); cf. *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884; *State ex rel Baughn v. Ure*, 91 Neb. 31, 135 N. W. 224 (1912); *Barnes v. City of Kirksville*, 266 Mo. 270, 180 S. W. 545 (1915); *Brown v. City of Galveston*, 97 Tex. 1, 75 S. W. 488 (1903); *Mayor, etc. City of Jackson v. State ex rel Howie*, 102 Miss. 663, 59 So. 873 (1912); *Larsen v. Salt Lake City*, 44 Utah 437, 141 Pac. 98 (1914); *State ex rel Hunt v. Tausick*, 64 Wash. 69, 116 Pac. 651 (1911).

It is common, in practice, for such governing bodies to exercise both legislative and executive powers, but a separate agency is generally established to exercise judicial powers within the subdivision. The standard act observes this prevailing practice. The boards of supervisors of the districts are authorized to act as both the legislative body and the executive officers of the district. For exercise of judicial power within the district, it is provided that recourse is to be had to the existing local courts. (Compare secs. 10 and 12 of the act.) Inasmuch as legal problems arising out of the operations of the districts will necessarily be problems arising out of the operation of a State statute under which the districts will have been organized, the courts of the States and localities will be able to exercise their usual jurisdiction over the interpretation and enforcement of State legislation.

#### 4. CONSTITUTIONAL VALIDITY OF THE PROCEDURES SPECIFIED FOR ORGANIZING THE DISTRICTS.

The two basic steps involved in the organization of districts of any kind in the several States are: the determination of what lands shall be included within the boundaries of the district and the determination whether the district, once the boundaries have been properly defined, shall be created. On the basis of the due process clause, the courts have surrounded the making of these two determinations with constitutional safeguards. I shall discuss (1) the requirements with reference to the fixing of boundaries for districts and (2) the allowable procedures for determining whether a district shall be created.

It is now well settled that, if the legislature is itself willing to prescribe what shall be the boundaries of a district or other subdivision which it wishes to create, due process of law does not require that the landowners affected be given notice and an opportunity to be heard on the question whether their lands shall be included within, or excluded from, the defined boundaries: *Browning v. Hooper*, 269 U. S. 396 (1926); *Oregon Short Line v. Clark County Highway District*, 22 F. (2d) 681 (D. Ida. 1927); *Valley Farms Co. v. Westchester*, 261 U. S. 155 (1923); *Hancock v. Muskegee*, 250 U. S. 454 (1919). Where, however, a tax or assessment district is to be created and the legislature has not, in the statute providing for creation of such districts, itself defined the boundaries of the district, the owners of the property affected must be given notice and an opportunity for a hearing on the inclusion of their property within the proposed boundaries, before an administrative official who is authorized to determine the relevant questions, either before the boundaries are fixed or before the tax or assessment is levied upon any property by virtue of its inclusion within the

boundaries: *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896); *Browning v. Hooper*, 269 U. S. 396 (1926); *Connor v. Board of Commissioners of Logan County*, 12 F. (2d) 789 (D. Ohio 1926); *Oregon Short Line v. Clark County Highway District*, 17 F. (2d) 125 (D. Idaho 1927); *Elliott v. Wille*, 112 Neb. 78, 86, 198 N. W. 861, 200 N. W. 347 (1924); *Ruwe v. School District*, 120 Neb. 668, 234 N. W. 789 (1931); *State ex rel Merriman v. Ball*, 116 Tex. 527, 296 S. W. 1085 (1927); *In re Bonds of Orosi*, 235 Pac. (Calif. 1004) (1925); *Embree v. Kansas City & Liberty Boulevard Road District*, 240 U. S. 242 (1916).

There is some ground for the contention that where the entity to be created is not to be a tax or assessment district but a municipal corporation, due process does not require that notice and an opportunity for hearing be extended on the question of where the boundaries shall be laid. (See *Ford v. Incorporated Town of North Des Moines*, 80 Ia. 626, 45 N. W. 1031 (1890); *Goodrich Falls Electric Co. v. Howard*, 86 N. H. 512, 171 Atl. 761 (1934); *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896); but compare *People ex rel Shumway v. Bennett*, 29 Mich. 451 (1874); *Territory ex rel Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405 (1890); *Ruwe v. School District*, 120 Neb. 668, 234 N. W. 749 (1931); *In re Bonds of Orosi Public Utility District*, 196 Cal. 43, 235 Pac. 1004 (1925)). It is difficult to determine whether the districts provided for in the standard act are to be considered assessment districts or municipalities for the purposes of the rule under discussion. The soil conservation districts are not given authority to levy any property taxes or assessments. However, the scope of the land-use regulations which they are authorized to enact into law is sufficiently broad so that it may be anticipated that particular landowners may be required to undertake operations upon their lands which may prove expensive. While this is not strictly an "assessment" yet in its economic effects it may be said to be analogous to an assessment. It is worth noting that in some cases the courts have drawn analogies between compulsory road labor and special assessments levied for the maintenance of roads: *Cooper v. Ray*, 148 Ind. 328, 47 N. E. 668 (1897); *Pleasant v. Kost*, 29 Ill. 490 (1863); *Fox v. Rockford*, 38 Ill. 451 (1865); *Amenia v. Stamford*, 6 Johns (N. Y.) 92 (1810); *Starksborough v. Hinesburgh*, 13 Vt. 215 (1841). It should be noted, too, that while the soil conservation districts are governmental subdivisions of the State rather than mere administrative boards, their legislative and other governmental powers extend only over the field of control of soil erosion. It may well be argued, therefore, that they are not municipalities in the full sense, since it is common for true municipalities to have general governmental power over the territory within their boundaries. For all of these reasons it seems to me the part of wisdom to regard these districts as subject to the same requirements as to procedural due process to which they would be subject if they had authority to levy taxes and assessments in the strict sense.

The procedure prescribed in the standard act observes the requirements summarized above in determining the location of the boundaries. Section 5 of the act provides that any 25 land occupiers may file a petition with the State soil conservation committee asking that a soil conservation district be organized to function in the territory described in the petition. Within 30 days after such

a petition has been filed, the State committee is required to give notice of a proposed hearing upon all questions in connection with the petition. After such hearing, the State committee is required to determine whether there is need in the public interest for a district to function in the territory considered and, if it should determine this question in the affirmative, the committee is required to define the boundaries of the proposed district. The statute thus provides notice and opportunity for hearing upon the question of location of the boundaries, and provides for administrative determination of where the boundaries shall lie.

It is important, however, that the statute shall not involve an improper delegation of legislative power to the State committee. To avoid falling into that difficulty, it is necessary that the statute contain an explicit standard which is to guide the State committee in making its administrative determinations. Such a standard is provided in the present act. Section 5 provides, in part, that: "In making such determination and in defining such boundaries, the committee shall give due weight and consideration to the topography of the area considered and of the State, the composition of soils therein, the distribution of erosion, the prevailing land-use practices, the desirability and necessity of including within the boundaries the particular lands under consideration and the benefits such lands may receive from being included within such boundaries, the relation of the proposed area to existing watersheds and agricultural regions, and to other soil conservation districts already organized or proposed for organization under the provisions of this act, and such other physical, geographical, and economic factors as are relevant, having due regard to the legislative determinations set forth in section 2 of this act."

The courts have divided on the question whether, assuming the boundaries of a proposed district are properly determined, the issue of whether the district shall come into existence may be submitted to a referendum of the appropriate persons in the district, the result of such referendum to determine the issue. (See *State ex rel County Attorney v. Lamont*, 105 Kan. 134, 181 Pac. 617 (1919); *People ex rel Unger v. Kennedy*, 207 N. Y. 533, 101 N. E. 442 (1913); *Johnson v. Park Commissioners*, 202 Ind. 282, 174 N. E. 91 (1930); *Commonwealth v. Judges*, 8 Pa. St. 391 (1848); *People ex rel Caldwell v. Reynolds*, 10 Ill. 1 (1848); *Ford v. North Des Moines*, 80 Iowa 626, 45 N. W. 1031 (1891); *Bray v. Stewart*, 239 Mich. 341, 214 N. W. 193 (1927); *Goodrich Falls v. Howard*, 86 N. H. 512, 171 Atl. 761 (1934).) In most of the States the question has not been directly passed upon. However, even in the States in which it has been held that the determination of this issue may not be left to those eligible to vote in a referendum on the question, it seems, nevertheless, to be the rule that it is legitimate to provide for a referendum if the result of such referendum is merely made advisory to a designated administrative board, so that such board must itself determine whether the district shall come into existence, subject to a standard to be stated in the statute, giving due consideration to the result of the referendum, but not being bound thereby. It is clear, therefore, that if the statute is drawn in accordance with this formula it will be deemed valid in all of the States,

whatever their rule may be on the power to make the referendum conclusive. The standard act has been drawn so as to comply with this formula and it is therefore anticipated that the procedure should be held valid in all States.

Subsection B of section 5 of the standard act, thus requires the State committee to determine whether there is need for the organization of a district, and to define the boundaries of the district in accordance with the standard quoted above. Subsection C of section 5 then provides that thereafter the committee shall consider the question whether the operation of a district within such boundaries is administratively practicable and feasible. It is provided that to assist the committee in the determination of such administrative practicability and feasibility it shall be the duty of the committee to hold a referendum within the proposed district upon the proposition of the creation of the district. After such referendum, the committee is directed to determine whether the operation of the district within the defined boundaries is administratively practicable and feasible, and the statute provides that "In making such determination the committee shall give due regard and weight to the attitudes of the occupiers of lands lying within the defined boundaries, the number of land occupiers eligible to vote in such referendum who shall have voted, the proportion of the votes cast in such referendum in favor of the creation of the district to the total number of votes cast, the approximate wealth and income of the land occupiers of the proposed district, the probable expense of carrying on erosion-control operations within such district, and such other economic and social factors as may be relevant to such determination, having due regard to the legislative determinations set forth in section 2 of this act; provided, however, that the committee shall not have authority to determine that the operation of the proposed district within the defined boundaries is administratively practicable and feasible unless at least a majority of the votes cast in the referendum upon the proposition of creation of the district shall have been cast in favor of the creation of such district". Under this provision, the State committee will have power to decide that the district shall not be created even though the referendum yields a majority vote in favor of such creation. The committee will not, however, have authority to decide that the district shall be created where the referendum has yielded a majority of the votes opposed to such creation.

The courts have in some cases indicated that they will not assume that the discretion to be exercised by an administrative board after such a referendum will not be the exercise of genuine discretion, or that the entire procedure is a subterfuge to avoid the effect of the rule against delegation of legislative power to those eligible to vote in the referendum. In the present case, however, there is no room for argument that the procedure is intended merely as a subterfuge. If we assume, for example, that within a proposed district, 500 land occupiers are eligible to vote but only 40 of them do in fact vote in the referendum on the creation of the district, and that the result of the vote in that referendum is 22 in favor of creation and 18 opposed, the State committee may very well decide that despite the technically affirmative majority vote, the result of that referendum should be regarded as adverse and may decide that operation of the district

is not administratively feasible. It should be noted, also, that the standard quoted above requires the State committee to consider not alone the vote in the referendum but also such other relevant matters as the attitudes of land occupiers, whether or not they have voted, the probable expense of carrying on erosion-control operations within the district, the approximate wealth and income of the land occupiers and other relevant economic and social data.

For all of these reasons it is my opinion that the procedures prescribed in section 5 of the standard act for creating the districts and fixing their boundaries are valid, in that they do not involve improper delegations of legislative power and they conform to the safeguards required by the due process guaranty.

##### 5. CONSTITUTIONAL VALIDITY OF THE PROCEDURES SPECIFIED FOR ADOPTING AND ENFORCING LAND-USE REGULATIONS.

The question of the constitutional power of the State legislature to require by law modifications in land-use practices of the type provided for in the standard act, in the interest of erosion control, has been considered above and we have concluded that the enactment of such regulations is within the police power (pp. 36, 44). The validity of the procedures specified in the act for adoption and enforcement of such regulations may, however, likewise be challenged. It is my opinion that the procedures provided in the standard act do not violate any constitutional requirements or guaranties.

Section 9 of the act provides that the supervisors of any district may formulate tentative land-use regulations for the conservation of soil and soil resources and the prevention and control of erosion. They may conduct hearings upon the tentative regulations to assist them in this work. It is provided that the supervisors shall not have authority to enact the land-use regulations into law until after the regulations have been submitted to a referendum of the land occupiers on the question of approval of the regulations. The approval of the proposed regulations by a majority of the votes cast in the referendum does not make the adoption of the regulations compulsory upon the supervisors. The supervisors may not, however, enact the proposed regulations into law unless at least a majority of the votes cast in the referendum have been cast for approval of the regulations.

The supervisors of the soil conservation districts in adopting land-use regulations under this procedure will be acting as legislative bodies. Provisions against delegation of legislative power to administrative boards are hence wholly inapplicable. There is no provision in any of the State constitutions, and certainly none in the Federal Constitution, prohibiting the holding of referenda or plebiscites upon particular issues on any subject whatsoever where a legislative body may wish to ascertain the state of public opinion upon an issue or program which is under consideration by the legislature.

It has, indeed, been held that a provision for submission of a regulatory statute to a referendum, the statute not to go into effect unless it is approved by a stated number of votes in such referendum, is an improper delegation of legislative power to the eligible voters. (See *Weir v. Cram*, 37 Iowa 649

(1873); *Lammert v. Lidwell*, 62 Mo. 188 (1876); *Wright v. Cunningham*, 115 Tenn. 445, 91 S. W. 293 (1905).) The cases are in considerable confusion on this point so that it is very difficult to ascertain what is the rule even in particular States, and it is almost impossible to determine whether there is a general rule and if so, what that is. However, the procedure prescribed in section 9 of the standard act makes it unnecessary to determine what the rule may be, since the statute expressly provides that the vote in the referendum shall not be conclusive upon the supervisors. The referendum is, therefore, advisory merely and the authority to enact land-use regulations into law will have been conferred by the State legislature (upon its adoption of the standard act) upon the supervisors of the districts in their capacities as the legislative bodies of such districts. That the State legislatures have power to create new subdivisions to exercise legislative power within designated boundaries has been shown earlier herein (p. 47).

Two constitutional questions may be raised concerning the procedures provided for enforcement of the land-use regulations. These may be briefly here considered.

(1) Section 10 of the act provides that the supervisors shall have authority to go upon any lands within the district to determine whether land-use regulations adopted under section 9 of the act are being observed. The provision in the Fourth Amendment to the Federal Constitution that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated \* \* \* is binding only upon the Federal Government and is hence inapplicable to State legislation. Similar provisions are, however, common in State constitutions which, in fact, frequently copy the precise wording of the Fourth Amendment. (Cf. Minnesota Constitution, art. I, sec. 10; Colorado Constitution, art. II, sec. 7; Florida Constitution, "Declaration of Rights", sec. 22; Georgia Constitution, art. II, sec. 1, par. XVI.) It is generally held that lands and open fields are not within the protection of the "search and seizure" clauses: *Hester v. United States*, 265 U. S. 57 (1924); *United States v. Western & Atlantic R. Co.*, 297 F. 482 (D. C. Ga. 1924) cf. *Smith v. United States*, 2 F. (2d) 714 (C. C. A. 4th, 1924); *Boyd v. United States*, 286 F. 930 (C. C. A. 4th, 1923); *Koscielski v. State*, 199 Ind. 546, 158 N. E. 902 (1927); *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 3 A. L. R. 1500 (1918); *Brent v. Commonwealth*, 194 Ky. 504, 240 S. W. 45 (1922); *State v. Arnold*, 84 Mont. 348, 275 Pac. 757 (1929); *State v. George*, 32 Wyo. 223, 231 Pac. 683 (1924).

The constitutions of some of the States add the word "possessions" to the list of things protected by the search and seizure clause. Mississippi has held that open fields are included within the word "possessions": *Falkner v. State*, 134 Miss. 253, 98 So. 691 (1924). It is generally held, however, that lands and fields are not included within the term "possessions": *Brent v. Commonwealth*, 194 Ky. 504, 240 S. W. 45 (1922); *Melton v. State*, 49 S. W. (2d) 803, (Tex. Cr. App. 1932); *Wolfe v. State*, 110 Tex. Cr. App. 124, 9 S. W. (2d) 350 (1928); *McTyre v. State* 113 Tex. Cr. App. 31, 19 S. W. (2d) 49 (1929); *Cotton v.*

*Commonwealth*, 200 Ky. 329, 254 S. W. 1061 (1923); *Simmons v. Commonwealth*, 210 Ky. 33, 275 S. W. 369 (1925). It should be noted, however, that the lot or portion of land adjacent to the dwelling and other buildings occupied, generally referred to as the "curtilage", is within the protection of the search and seizure clause. (See *Mullen v. Commonwealth*, 220 Ky. 656, 295 S. W. 987 (1928); *Welch v. State*, 154 Tenn. 60, 289 S. W. 510 (1926).)

The search-and-seizure prohibition should not, however, raise any serious difficulty. If in any State a court should hold that the provision for inspection of lands violates that prohibition, this provision of the act will fall, but it is separable from the remaining provisions. (Compare sec. 17 of the act.) In a State in which such a decision has been rendered, the supervisors will be required to secure a search warrant before inspecting lands, but this requirement should not be difficult to comply with. It is apparently well established that public officers entering private lands in the performance of public functions, where the entry is authorized by statute and is made in good faith, are not liable in trespass. (See cases collected in note in 90 A. L. R. 1481 (1934); *Wallace v. Feehan*, 190 N. E. 438 (Ind. 1934). Nor may their entry be enjoined. (*Ryan v. Amazon Petroleum Co.*, 71 F. (2d) 1, (C. C. A. 5th, 1934); *Van Gunten v. Worthley, Administrator of the European Corn Borer Control*, 25 Ohio App. 496, 159 N. E. 326 (1927); *Wallace v. Donher*, 89 Ind. App. 416, 165 N. E. 552 (1929).) Nor do the courts recognize a right of privacy in open fields. (Cf. *People v. Ring*, 267 Mich. 657, 255 N. W. 373 (1935).)

(2.) Section 11 of the act provides that upon the failure by any land occupier to perform any work upon his lands required under the regulations, the supervisors may file a petition with the local courts upon the basis of which the court may order the land occupier to perform the work in accordance with the regulations within a time to be specified in the order of the court, and may authorize the supervisors to enter upon the lands involved and perform the work if the land occupier shall fail so to perform within the time specified. When the work has been completed, the court may enter judgment for the cost of the work, with interest at the rate of 5 percent, against the occupier. The supervisors may collect the amount of such judgment in the usual manner and, further, they may certify such amount to the appropriate local officials who will collect the amount of the judgment in the same way as are taxes against such lands.

The cases sustaining the power of a State under its police power to require landowners to carry on operations upon their own lands at their own expense have been summarized above (p. —). It is not uncommon for statutes to provide that upon failure by the landowner to abide by the statutory requirements, administrative officers may perform the work at the owner's expense. Such enforcement procedures are sustained where the regulation itself is held to be within the police power: *Lawton v. Steele*, 152 U. S. 133 (1894); *Eccles v. Ditto*, 23 N. M. 235, 167 Pac. 726 (1917); *City of Salem v. Eastern Railroad Co.*, 98 Mass. 431 (1868). An illustrative case is *First State Bank of Sutherlin v. Kendall Lumber Corporation*, 107 Ore. 1, 213 Pac. 142 (1923). An Oregon statute (Laws 1913, ch. 247, p. 483) required owners of timberland to set up adequate

patrols during the dry season and empowered the State forester to furnish a patrol in the event of failure of a landowner so to do. The expense of the patrol furnished by the forester was to be reported by him to the appropriate county court, and the amount extended on the assessment roll of the county, to be collected as are taxes. The defendants attacked the constitutionality of this statute on the ground that the procedure for the collection of expenses was an exercise of the taxing power and as such invalid for failure to provide for a uniform and equal rate of taxation. The court sustained the statute against this attack and concluded that it did not involve exercise of the tax power but was, rather, a reasonable and proper police regulation designed to protect the forests of the State from destruction by fire. Similar conclusions were reached as to similar procedures in *State v. Pape*, 103 Wash. 319, 174 Pac. 468 (1918), and *Chambers v. McCollum*, 47 Idaho 74, 274 Pac. 707 (1928).

There can be no doubt that adequate notice, opportunity for hearing, and opportunity for judicial review are provided, since the supervisors may not perform the work at the expense of the owner except by filing a petition to such effect with the local court, and securing a court order authorizing them to perform the work, after appropriate judicial hearing. Similarly, the costs to be recovered from the owner are to be determined by the court after the work has been completed and after a hearing thereon by the court. (Compare *Miller v. Schoene*, 276 U. S. 272, at 281 (1928).)

#### 6. CONSTITUTIONALITY OF SECTION 12, PROVIDING FOR BOARDS OF ADJUSTMENT.

It is anticipated that the land-use problems on different tracts of land within a district will differ sufficiently so that it may become undesirable to enforce the provisions of land-use regulations to the strict letter upon all tracts within the district. It has therefore been considered important to provide a procedure whereby variances may be permitted from the strict terms of the regulations in cases where application of the letter of the regulations would result in great practical difficulties or unnecessary hardship. As a first step toward meeting this difficulty, section 9 of the act provides that the supervisors may classify the lands within the district with reference to such factors as soil type, degree of slope, degree of erosion threatened or existing, cropping and tillage practices in use, and other relevant factors and may provide regulations varying with the type or class of land affected but uniform as to all lands within each class or type. Members of the Land Policy Committee and the Soil Conservation Service have felt, however, that it is further necessary to provide for making variances in the terms of the regulations in the case of particular tracts. It will be obvious that the procedure designed to meet this difficulty will almost certainly be subjected to severe scrutiny and constitutional attack.

Section 12 provides that where the supervisors of a district have adopted an ordinance prescribing land-use regulations under section 9 of the act, they shall further provide by ordinance for the establishment of a board of adjustment. The board of adjustment is to consist of three members holding office for terms of three years and appointed by the State committee with the advice and ap-

proval of the supervisors. The members are to be removable for neglect of duty or malfeasance in office, after notice and hearing, but for no other reason. They are to receive compensation on a per diem basis for time spent on the work of the board. Subsection C provides that any land occupier may file a petition with the board of adjustment alleging that there are great practical difficulties or unnecessary hardship in the way of his carrying out upon his lands the strict letter of the land-use regulations, and praying the board to authorize a variance. The board must hold a public hearing upon the petition, and is authorized, where it shall find "great practical difficulties or unnecessary hardship" to exist, to permit "such variance from the terms of the land-use regulations, in their application to the lands of the petitioner, as will relieve such great practical difficulties or unnecessary hardship and will not be contrary to the public interest, and such that the spirit of the land-use regulations shall be observed, the public health, safety, and welfare secured, and substantial justice done". The board is required to record, in addition to its determination of the case, "findings of fact as to the specific conditions which establish such great practical difficulties or unnecessary hardship". The petitioner, intervening parties, or the supervisors are permitted (in subsec. D) to appeal to the local courts for review of the order of the board. Such review is not to be *de novo*, but only of the record made before the board, and the findings of the board as to the facts, if supported by evidence, are to be conclusive. This procedure will probably be challenged on several grounds, which will be here briefly considered in turn.

(1.) In order that the procedure shall not involve an improper delegation of legislative power to the board of adjustment, it is necessary that the statute define a standard which shall state the policy to be observed by the board in its adjudications, and shall draw the line to be observed by the board in distinguishing between the properties which are to be required to conform to the strict letter of the regulations and those in favor of which variances may be allowed. In the present instance, it is literally impossible to state in the statute a standard which shall not leave quite a field open for the judgment and discretion of the board of adjustment. The very nature of the case is such that a legislature cannot define all the varying circumstances which shall be considered to present "great practical difficulties or unnecessary hardship." It is precisely because of this inability under the circumstances that it is necessary to provide for a board of adjustment. Where the legislature has been as specific as the particular subject under regulation will permit, the statute is generally held not to involve an improper delegation of legislative power. (See *Buttfield v. Stranahan*, 192 U. S. 470 (1904).)

A statutory precedent closely similar to the present provision is available. In 1926 the Advisory Committee on Zoning, appointed by the Secretary of Commerce of the United States, recommended to the State legislatures for adoption a standard State zoning enabling act to enable municipalities to adopt zoning regulations. Section 7 of that act provided for a board of adjustment which was empowered "to authorize upon appeal in specific cases such variance

from the terms of the [zoning] ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." A large number of States have adopted zoning enabling acts closely following the form of that recommended act and including the recommended section 7. In many of the States this provision has not been involved in litigation. Some of the States have varied the wording of the provision somewhat from the form quoted above. The question of the power of the State legislatures to confer such power upon boards of adjustment in these zoning enabling acts has been passed upon by the highest courts of nine States. In the following, the provision has been sustained as not involving an improper delegation of legislative power: *Georgia: McCord v. Ed. Bond & Condon Co.*, 175 Ga. 667, 165 S. E. 590 (1932); *Montana: Freeman v. Board of Adjustment*, 34 Pac. (2d) 534 (1934); *Ohio: L & M Investment Co. v. Cutler*, 125 Ohio St. 12, 180 N. E. 379 (1932); *Oklahoma: Re Dawson*, 136 Okla. 113, 277 Pac. 226 (1928); *Tennessee: Spencer-Sturla Co. v. Memphis*, 155 Tenn. 70, 290 S. W. 608 (1927); *Wyoming: In re McInerney* 34 Pac. (2d) 35 (1934). In the following, the provision has been held invalid for improper delegation: *Illinois: Welton v. Hamilton*, 344 Ill. 82, 176 N. E. 333 (1931); *Maryland: Lewis v. Baltimore*, 164 Md. 146, 164 Atl. 220 (1933); *Goldman v. Crowther*, 147 Md. 282, 128 Atl. 50 (1925), but see *R. B. Construction Co. v. Jackson*, 152 Md. 671, 137 Atl. 278 (1927); *Oregon: Roman Catholic Archbishop v. Baker*, 140 Ore. 600, 15 Pac. (2d) 391 (1932). In the following cases the constitutionality of similar provisions for boards of adjustment was involved, but the question was not considered in the opinion: *Connecticut: Thayer v. Board of Appeals*, 114 Conn. 15, 157 Atl. 273 (1931); *Indiana: Board of Zoning Appeals v. Waintrup*, 193 N. E. 701 (1935); *Iowa: Zimmerman v. O'Mera*, 215 Iowa 1140, 245 N. W. 715 (1932); *Call Bond & Mortgage Co. v. Sioux City*, 259 N. W. 33 (Iowa 1935); *Kentucky: Gumm v. Lexington*, 247 Ky. 139, 56 S. W. (2d) 703 (1932); *Michigan: Beardsley v. Evangelical Lutheran Bethlehem Church*, 261 Mich. 458, 246 N. W. 180 (1930); *Missouri: State ex rel Nigro v. Kansas City*, 325 Mo. 95, 27 S. W. (2d) 1030 (1930); *New Jersey: Bellofatto v. Board of Adjustment* 6 N. J. Mis. Rep. 512, 141 Atl. 781 (1928); and cases cited in note, 86 A. L. R. 695 (1933); *North Dakota: Livingston v. Peterson*, 59 N. Dak. 104, 228 N. W. 816 (1930); *Rhode Island: Harrison v. Hopkins*, 48 R. I. 42, 135 Atl. 154 (1926).

In *L. & M. Investment Co. v. Cutler*, 125 Ohio St. 12, 180 N. E. 379 (1932), the Supreme Court of Ohio held that the board must be required to make specific findings of fact as to the hardship and difficulties which may be involved. It is believed that such a provision would be an important improvement over the provision recommended in the standard State zoning enabling act. The standard State soil conservation districts law, in section 12 C, expressly requires such findings of fact to be made.

Section 12 of the standard act differs sufficiently, in the direction of greater particularity and detailed specification, from the statutes disapproved in the

States of Oregon, Maryland, and perhaps Illinois, as indicated above, to present room for belief that the courts which decided those cases may nevertheless sustain the present provision. It should be noted, also, that the present act prescribes with some detail a special procedure for judicial review of the action of the board of adjustment. This procedure may in itself be sufficient to induce the courts to regard with less disfavor the powers to be exercised by the board of adjustment.

If, in a particular State, the court should hold that the procedure in section 12 improperly delegates legislative power to the board of adjustment, section 12 must be deemed separable from the remainder of the act. In such State, therefore, after such decision, the statute may be enforced without recourse to a board of adjustment to make variances in cases of special hardship.

(2) The Fourteenth Amendment to the Federal Constitution and parallel provisions in State constitutions provide that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Under this provision it has become established that State statutes must operate with geographical uniformity and that, while the legislature may make classifications in accordance with actual differences of fact or of situation, the laws must operate equally upon all members of the same class. The provision in section 9 of the standard act authorizing the supervisors to classify lands within the district and to provide different regulations for the different types or classes of land, does not violate the "equal protection" clause, since this is but an exercise of the legislative power to make reasonable classifications and the section expressly requires that the regulations shall be "uniform as to all lands within each class or type."

A more difficult problem under the "equal protection" clause is presented by the provision in section 12 authorizing the board of adjustment to permit variations in the regulations under the circumstances discussed above. I am of the opinion, however, that this power should not be deemed to violate the equal protection guaranty inasmuch as this is but a further exercise of the power to make reasonable classifications. The provisions in section 12 amount in substance to an attempt by the legislature to erect a special class of lands which shall cut across the other classifications, this special class being defined as those lands which are so peculiarly circumstanced that, in order to avoid unusual difficulty or hardship, special provision must be made for them. (See *Borden's Farm Products Co., Inc. v. Ten Eyck*, — U. S. —, 56 Sup. Ct. 453, decided Feb. 10, 1936.)

(3) I believe it is clear that the requirements of due process of law are complied with in the procedural safeguards which are thrown about the action of the board of adjustment. The board may act only upon presentation of a petition to it and after notice to the parties concerned. Its meetings are required to be public and the record of its proceedings is a public record. The method provided for appointing, compensating, and removing members of the board is such as to assure them an independent status. The board is required to enter its determinations upon the record and to make and record specific find-

ings of fact to support its determinations. The standard stated to guide the action of the board is as specific as the nature of the facts will permit. Procedure is provided whereby anyone aggrieved by an order of the board may obtain immediate review of the order in the local courts.

The hearing is not to be *de novo* but is upon the record made before the board, with the board's findings of fact conclusive, if supported by evidence. Although there was, for a time, doubt as to the constitutionality of conferring upon an administrative board the power to make such conclusive findings of fact because of the decision in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920), it seems to be now established that such power may validly be conferred: *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 273 U. S. 52 (1927); *Tagg Bros. & Moorhead v. U. S.*, 280 U. S. 420, at 443 to 444 (1930); *Voehl v. Indem. Ins. Co. of North America*, 288 U. S. 162, at 166 (1933); *Federal Radio Commission v. Nelson Bros. B. & M. Co.*, 289 U. S. 266, at 276 (1933); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, at 73 (1934); *Helfrick v. Dahlstrom Metallic Door Co.*, 256 N. Y. 199, 176 N. E. 141 (1931), *aff'd* 284 U. S. 594 (1932). Cf. *N. Y. Central Railway Co. v. White*, 243 U. S. 188, 194, 207; *Mountain Timber Co. v. Wash.*, 243 U. S. 219. It seems likely that the rule of the decision in *Ohio Valley Water Co. v. Ben Avon Borough*, cited above, is limited to cases involving determination by administrative commissions of rates to be charged by utility companies. Here again, however, it should be noted that the provision making the board's findings of fact conclusive if supported by evidence is separable and hence the rest of the statute will be unaffected by a decision that the court may award a trial *de novo*, or may, on the record, make its own findings of fact despite this provision in the statute.

7. THE STANDARD ACT IS DEVOTED TO A SINGLE SUBJECT AND THAT SUBJECT IS ADEQUATELY EXPRESSED IN THE TITLE OF THE ACT.

While the Federal Constitution contains no such provision with reference to legislation by the Congress, it is common for State constitutions to require that acts of the State legislature shall be limited to a single subject and that such subject shall be adequately expressed in the title of the act. The provision in the Minnesota Constitution (art. IV, sec. 27) may be quoted as typical: "No law shall embrace more than one subject, which shall be expressed in its title."

It should be noted that we are here dealing with two distinct constitutional requirements, inasmuch as a statute may be limited to one subject but that subject may not be adequately expressed in the title; similarly, a statute may have all of its subjects adequately expressed in its title and yet contain legislative provisions on distinct subjects.

With reference, first, to the requirement that a statute be limited to a single subject, it is settled that the provision is not violated where the statute deals with one central subject matter, and every provision of the act is germane to such subject matter. (*First State Bank of Sutherlin v. Kendall Lumber Corp.*, 107 Ore. 1, 213 Pac. 142 (1923); *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469

(1896); *State ex rel Bigham v. Powers*, 124 Tenn. 553, 137 S. W. 1110 (1911); *Reclamation District No. 1500 v. Superior Court*, 171 Cal. 672, 154 Pac. 845 (1916); *Blake v. People*, 109 Ill. 504 (1884); *Sny Island Levee Drainage District v. Shaw*, 252 Ill. 142, 96 N. E. 984 (1911); *Missouri K. & T. R. Co. v. Rockwall County Levee District*, 117 Tex. 34, 297 S. W. 206 (1927); *Boise City v. Baxter*, 41 Idaho 368, 238 Pac. 1029 (1925); *Pioneer Irrigation District v. Bradley*, 8 Idaho 310, 68 Pac. 295 (1902); *Banks v. State*, 124 Ga. 15, 52 S. E. 74 (1905).

The standard act is entirely devoted to the single subject of the organization of soil conservation districts and the conferring upon such districts of appropriate powers for the conservation of soil and soil resources and the prevention and control of soil erosion. While the powers conferred fall into the two large classes of spending money in conducting erosion-control operations and projects, and legislating to regulate land use in the interest of erosion control, nevertheless both of these classes of powers are to be exercised by the same governmental subdivisions and for a single set of closely related purposes. It has been held that a statute which authorized the creation of new reclamation districts may also validate the bonds of existing districts: *Missouri K. & T. R. Co. v. Rockwall County Levee District*, 117 Tex. 34, 297 S. W. 206 (1927); that in a statute providing for the organization of drainage and levee districts provision may be made for the levying of certain taxes, for the creation of several distinct types of districts, for several methods of establishing districts, for exercise by the districts of the power of eminent domain, and for a grant of authority to districts to build bridges: *State ex rel Bigham v. Powers*, 124 Tenn. 553, 137 S. W. 1110 (1911); that a statute providing for the organization of reclamation districts may authorize the building of levees: *Reclamation District No. 1500 v. Superior Court*, 171 Cal. 672, 154 Pac. 845 (1916); that criminal and other penalties may be included in a general regulatory statute: *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469 (1896); and that a statute creating the commission form of government for cities may contain provisions on all matters usually connected with a comprehensive plan of city government, and may confer various types of powers upon the cities: *Boise City v. Baxter*, 41 Idaho 368, 238 Pac. 1029 (1925). Statutes providing for the establishment and operation of levee and flood control districts, which are in many respects similar to the soil conservation districts to be organized under the standard act, have been attacked as embracing more than one subject, because of the comprehensive scope of the powers conferred and procedures prescribed in the statutes, in a number of States and have been uniformly sustained: *Arkansas: Dickinson v. Cypress Creek Drainage Dist.*, 139 Ark. 76, 213 S. W. 1 (1919); *California: Reclamation District No. 1500 v. Superior Court*, 171 Cal. 672, 154 Pac. 845 (1916); *Illinois: Blake v. People*, 109 Ill. 504 (1884); *Sny Island Levee Drainage District v. Shaw*, 252 Ill. 142, 96 N. E. 984 (1911); *Indiana: Marion, B. & E. Traction Co. v. Simmons*, 180 Ind. 289, 102 N. E. 132 (1913); *Newtonson v. Kline*, 185 Ind. 63, 113 N. E. 376 (1916); *Iowa: Richman v. Muscatine County*, 77 Iowa 513, 42 N. W. 422 (1889); *Louisiana: Excelsior Planting & Mfg. Co. v. Green*, 39 La. Ann. 455, 1 So. 873 (1887); *Dehon v. LaFourche Basin Levee Bd.*,