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Constitutional Law—Intra-State Produced and Consumed Wheat under the Commerce Clause

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Notes

Constitutional Law — Intra-State Produced and Consumed Wheat Under the Commerce Clause

The defendant, who operates a farm in Oklahoma, was notified by the County Committee authorized to administer marketing quotas for wheat under the provisions of the Agricultural Adjustment Act of 1938[1] that his farm wheat acreage allotment for 1956 was 0 acres, that his excess acreage of wheat was 43 acres, and that his farm marketing excess—upon which a civil penalty applies—was 473 bushels. Following defendant's refusal to pay the penalty of $506.11 thus incurred, the United States brought action to recover this penalty. Defendant alleged, by way of affirmative defenses, that the Agricultural Adjustment Act of 1938 is unconstitutional and the conditions precedent to valid establishment of a wheat acreage allotment for defendant's farm had not been complied with. At the trial, defendant's evidence did not controvert the complaint's factual allegations, but defendant testified that he had used all of his farm marketing excess wheat as feed for livestock subsequently marketed in the State of Oklahoma. The district court ruled only on the constitutional question raised by the defendant. It held that the Commerce Clause[2] does not empower Congress to regulate production of wheat which is used as feed on the farm and that the defendant was therefore entitled to judgment.[3] The case was reversed without opinion by the United States Supreme Court.[4]

On its facts, the instant case is nearly identical to *Wickard v. Filburn*[5] which held that the provisions of the Agricultural Ad-

[1] Agricultural Adjustment Act of 1938, § 1 et seq. as amended 52 Stat. 31, 7 U.S.C. § 1281 et seq. The suit was specifically instituted under 52 Stat. 66, 7 U.S.C. § 1376 to collect civil penalties, according to communication from W. B. West III, United States Attorney. The opinion erroneously states the action was brought under the Agricultural Marketing Act of 1946 § 202 et seq., 60 Stat. 1087, 7 U.S.C. § 1621 et seq.

[2] United States Const. art. 1, § 8, cl. 3.

[3] United States v. Haley, 166 F. Supp. 336 (N.D. Tex. 1958).

[4] Order 587 Per Curiam, 27 L. Week 3235 (1959).

[5] 317 U.S. 111 (1942).

justment Act of 1938 imposing civil penalties on the farm marketing excess of wheat are within the power of Congress under the Commerce Clause even though the wheat is wholly consumed on the farm. A major difference in the two cases is that in the *Wickard case,* the farmer, who was seeking to enjoin collection of the penalty, stipulated that his wheat, kept and fed on the farm, affected interstate commerce and that all the farm-consumed wheat in the United States amounted to over one fifth of the national production. The court accepted this as an intrastate market of such weight that, if unregulated, would have sufficient strength to defeat the interstate market trends in volume and in price. In the instant case there was no stipulation that the defendant's wheat affected interstate commerce and there was no proof offered by the government to show an effect on interstate commerce.

The Supreme Court's reversal of the instant case solely on the authority of *Wickard* makes activity in the area of agriculture, not in or affecting interstate commerce, subject to control by the Federal Government, a result that earlier courts viewed with alarm.[6] Fields in which the Court has reversed earlier stands to bring a particular activity within the ambit of interstate commerce include refining of sugar,[7] livestock commission men at stockyards,[8] mining of coal,[9] insurance,[10] petroleum sales,[11] shipment of goods

[6] Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E. C. Knight Co., 156 U.S. 1 (1895); Schecter Corporation v. United States, 295 U.S. 495 (1935).

[7] United States v. E. C. Knight Co., 156 U.S. 1 (1895) holding sugar refiner not within Anti Trust Act. Contra, Mandeville Island and Farms v. American Crystan Sugar Co., 334 U.S. 219 (1948) holding sugar refiner within Sherman Act.

[8] Hopkins v. United States, 171 U.S. 578 (1898). Contra, Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1934).

[9] Carter v. Carter Coal Co., 298 U.S. 238 (1936); Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922). Contra, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). Cf. Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) holding iron mining not to be in interstate commerce.

[10] Paul v. Virginia, 8 Wall. 168 (1869). Contra, United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944); Polish National Alliance v. National Labor Relations Board, 322 U.S. 725 (1944).

[11] United States v. DeWitt, 9 Wall. 41 (1870). Contra, Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 572 (1934).

produced by child labor,[12] and dealing in contracts.[13] Among inconsistencies that have occured is a 1919 case[14] holding a cook, who prepared meals for bridge carpenters who maintained railroad bridges, engaged in interstate commerce for purposes of the Federal Employers Liability Act while a 1943 decision[15] held a cook, who cooked for maintenance-of-way men on a railroad, outside of the interstate commerce clause for purposes of the Fair Labor Standards Act and the recent decisions holding major league baseball clubs not within the Sherman Act[16] while football players[17] and boxing[18] are held within the Sherman Act. That the Supreme Court still recognizes a line between activities Congress can reach through the Commerce Clause is apparent in the building maintenance worker cases[19] and a case holding taxi cabs that take passengers from their homes to the Chicago railroad station not to be in interstate commerce.[20]

De minimis non curat lex does not thwart the power of Congress over interstate commerce. The Supreme Court reversed a decision of the court of appeals which had applied the maxim to exclude a newspaper from the Fair Labor Standards Act that sold

[12] United States v. Darby, 312 U.S. 100 (1941), expressly overruling Hammer v. Dagenhart, 247 U.S. 251 (1918).

[13] Nathan v. Louisiana, 8 How. 73 (1850). Contra, North American Co. v. Securities & Exchange Comm., 327 U.S. 686 (1946).

[14] Philadelphia B. & W. R. R. Co. v. Smith, 250 U.S. 101 (1919).

[15] McLeod v. Threlkeld, 319 U.S. 491 (1943).

[16] Federal Baseball Club v. National League, 259 U.S. 200 (1922); followed in Toolson v. New York Yankees, Inc. 346 U.S. 356 (1953). The court distinguished Federal Baseball in the later case by saying the earlier decision held that baseball was not intended by Congress to be covered by the Sherman Act.

[17] Radovich v. National Football League, 352 U.S. 445 (1956). Cf. United States v. Shubert, 348 U.S. 222 (1955) holding business of producing, booking, and presenting legitimate theatrical attractions in interstate commerce within the Sherman Act.

[18] International Boxing Club v. United States, 258 U.S. 342 (1959).

[19] Borden Company v. Borella, 325 U.S. 679 (1945) and Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946) holding maintenance workers on buildings which house concerns engaged in interstate commerce within the Fair Labor Standards Act. Contra, 10 East 40th Street Building Inc. v. Callus, 325 U.S. 578 (1945) holding maintenance workers on a building housing tenants, part of whom are and part are not engaged in occupations necessary for the production of goods in interstate commerce not within the Fair Labor Standards Act.

[20] United States v. Yellow Cab Co., 332 U.S. 218 (1947).

one half of one per cent of its papers (40 copies) out of the state.[21] The newspaper case varied significantly from the *Wickard case* or the instant case since the government had to prove that papers entered commerce and affected commerce regardless of how trifling the infraction might be considered.

The Supreme Court has perhaps gone the farthest to extend federal control in the agricultural area. A 1939 case[22] upholding the power of the Secretary of Agriculture to fix the price of milk paid a farmer before his milk entered commerce was broadened by a 1942 decision[23] in which the federal milk orders were held applicable to a completely intrastate dairy that purchased and sold all of its milk within the borders of Illinois. Maintenance employees of a non-profit ditch company whose sole activity was the collection, storage and distribution to farmers of water for irrigation which might raise products which might enter commerce have been held subject to Congressional control within the Fair Labor Standards Act,[24] even though the act excludes agricultural laborers.

Though the *Wickard case*,[25] earlier followed without question,[26] may have imposed the current far-reaching definition of interstate commerce first upon agriculture, there is evidence that the unlimited definition has also touched other areas of activity. The sale of sulfathiazole tablets six months after they had been brought into the state and had passed through the hands of a wholesaler to a retailer have been held within the Federal Food, Drug and Cosmetic Act.[27] Employees of an architect who drew plans for facilities that may be used for interstate commerce have also been held engaged in interstate commerce for purposes of the Fair

[21] Mabee v. White Plains Pub. Co., 327 U.S. 178 (1946).

[22] United States v. Rock Royal Co-operative, 307 U.S. 533 (1939).

[23] United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942).

[24] Farmers Reservoir and Irrigation Co. v. McComb, 337 U.S. 755 (1949).

[25] Note 5 supra.

[26] United States v. Stangland, 242 F.2d 843 (7th Cir. 1957); Donaldson v. United States, 285 F.2d 591 (6th Cir. 1958); United States v. Kissinger, 250 F.2d 940 (3rd Cir. 1958), certiorari denied, 356 U.S. 958 (1957); United States v. Mumma, 237 F.2d 795 (3rd Cir. 1956), certiorari denied, 352 U.S. 1003 (1956); Shafer v. United States, 229 F.2d 124 (4th Cir. 1956), certiorari denied, 351 U.S. 931 (1955), all rejecting the contention that the farm-marketing excess provisions of the Agricultural Adjustment Act of 1938 are not within the federal commerce power in reliance upon Wickard v. Filburn.

[27] United States v. Sullivan, 332 U.S. 689 (1948).

Labor Standards Act,[28] and a small town bakery operation in competition with another small town baker, one of several corporations having interlocking ownership and management of other corporations engaged in interstate business, has been held to be within the Clayton Act and the Robinson Patman Act.[29]

The Supreme Court's refusal to re-examine the *Wickard case* lends credence to a contention that the Court has discarded all semblance of the literal meaning of interstate commerce in favor of an econoic definition applied to a situation where Congress determines that a volume of possible small quantities of a product may reach and impede interstate commerce. The decision also supports a theory that "commerce . . . among the several States" in the 18th Century context meant commerce among individuals within the state.[30]

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[28] Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207 (1959).

[29] Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).

[30] CROSSKEY, POLITICS AND THE CONSTITUTION, 83 (1953).