Michigan Law Review

Volume 41 | Issue 4

1943

# CONSTITUTIONAL LAW - INTERSTATE COMMERCE - AGRICULTURAL ADJUSTMENT ACT

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CONSTITUTIONAL LAW — INTERSTATE COMMERCE — AGRICULTURAL ADJUSTMENT ACT — Under the terms of the Agricultural Adjustment Act of 1938,[1] the Secretary of Agriculture is authorized, whenever it appears that the nation's wheat supply will exceed a certain amount, so to proclaim and to put into effect a marketing quota. A referendum must be conducted among the farmers, and if more than one-third oppose, the operation of the quota must be suspended. In July, 1940, the appellee was given notice of an allotment for his 1941 crop. This notice preceded his fall planting of that crop, and another notice a year later preceded its harvesting. The amendment of May 26, 1941,[2] however, changed the penalty and quota provisions and provided for an increase in the loans on wheat. A referendum conducted on May 31, 1941 resulted in approval by approximately four-fifths of those voting, although it was claimed by the appellee that this was ineffective because of a radio address by the Secretary of Agriculture a week before, failing to mention the amendment's penalty increase. The appellee harvested an excessive crop, failed to pay the new penalty and took none of the steps provided to postpone or avoid it. He was, therefore, refused a marketing card by his county Agricultural Conservation Committee, which card is necessary to protect a buyer from liability to the extent of the penalty. He sought an injunction against the enforcement of this penalty in so

[1] 52 Stat. L. 31 (1938), as amended, 7 U. S. C. (1940), § 1281 et seq.
[2] 55 Stat. L. 203, 7 U. S. C. (Supp. 1941) § 1340.

far as it affected him and a declaratory judgment that the amended quota provisions were unconstitutional. The district court by its injunction restored the appellee to the position he would have had under the terms of the act prior to the May 26 amendment.[3] On appeal to the United States Supreme Court, *held*, that the judgment of the court below should be reversed. The amendment is within the commerce power and not violative of the due process clause of the Fifth Amendment. *Wickard v. Filburn*, (U. S. 1942) 63 S. Ct. 82.

The principal case cannot be called surprising. It is supported by strong authority, at least of a recent vintage,[4] and, according to Justice Jackson, by Marshall's interpretation of the Constitution.[5] At the same time it stands along with the *Darby* case,[6] for the obliteration of a vast amount of precedent built up during the interim period.[7] The local character of production and manufactur-

[3] Filburn v. Helke, (D. C. Ohio, 1942) 43 F. Supp. 1017.

[4] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937); Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379 (1939); National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668 (1939); Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648 (1939); United States v. Rock Royal Co-Operative, 307 U. S. 533, 59 S. Ct. 993 (1939); Troppy v. La Sara Farmers Gin Co., (C. C. A. 5th, 1940) 113 F. (2d) 350; United States v. Darby, 312 U. S. 100, 61 S. Ct. 451 (1941); United States v. Wrightwood Dairy Co., 315 U. S. 110, 62 S. Ct. 523 (1942); Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 62 S. Ct. 491 (1942); Kirschbaum Co. v. Walling, 316 U. S. 517, 62 S. Ct. 1116 (1942); Overnight Motor Transp. Co. v. Missel, 316 U. S. 572, 62 S. Ct. 1216 (1942).

There are, of course, earlier cases that carry an intimation of the court's present position. Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276 (1905); Southern Ry. v. United States, 222 U. S. 20, 32 S. Ct. 2 (1911); Houston, E. & W. T. Ry. v. United States, 234 U. S. 342, 34 S. Ct. 833 (1914); Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397 (1922).

[5] There are a number of adherents to the view that the present Court is reurning to the early days of this country's constitutional history. Probably the foremost writer in this school of thought is Professor Corwin of Princeton University. See CORWIN, THE COMMERCE POWER VERSUS STATES' RIGHTS (1936). Also CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941). Accord: Roper, "The Constitution: Discovered or Discarded," 16 NOTRE DAME LAWYER 97 (1941). Support for this view stems from a literal interpretation of Marshall's language in Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1 (1824), though it must be remembered that there are disadvantages to be encountered in transplanting language over a century out of its setting. There is also authority to the effect that the founding fathers had a rather narrow conception of the commerce power. See ALFANGE, THE SUPREME COURT AND THE NATIONAL WILL 130-137 (1937); Alvies, "The Commerce Power—from Gibbons v. Ogden to the Wagner Act Cases," 3 OHIO ST. L. J. 307 at 313 (1937); Abel, "The Commerce Clause in the Constitutional Convention and in Contemporary Comment," 25 MINN. L. REV. 432 at 472-479 (1941); KALLENBACH, FEDERAL COOPERATION WITH THE STATES 9-10 (1942).

[6] United States v. Darby, 312 U. S. 100, 61 S. Ct. 451 (1941).

[7] Among the leading cases are: Veazie v. Moor, 14 How. (55 U. S.) 567 (1852); Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6 (1888); United States v. E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249 (1895); Employers' Liability Cases, 207 U. S. 463, 28 S. Ct. 141 (1908); Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529 (1918); Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526 (1923);

ing and the "direct effect" test are dealt with as things of the past.[8] In Justice Jackson's words, the Court now considers "the mechanical application of legal formulas no longer feasible." [9] If these terms were meant to be derogatory of justices of an earlier day, they seem hardly applicable. The very concept of law connotes the application of rules and principles and it is highly improbable that those formulas dealing with the commerce clause were ever found capable of neat mechanical application. Realistically viewed, the new position may be simply regarded as the position of increased power in the federal government. It still seems that the regulation must be in some way reasonably related to interstate commerce—a "formula" despite its great laxity.[10] The Court is well supported in its restricted view of due process. Here, too, we would have found disagreement in the past although the economic protections of the due process clause did not survive as persistently as the negative implications of the commerce clause.[11] The problem of retroactivity was not a difficult one in view of the *Mulford* case.[12] The fact that the appellee could have postponed or avoided the penalty by storing the excess under regulations of the Secretary of Agriculture or by delivering it up to the secretary must have dulled the edge of any such claim. The secretary's allegedly misleading radio speech was probably properly discounted in the principal case, especially in view of absence of showing on the appellee's part that he or other farmers were misled by it. Had such a showing been made, however, the solution would not be so easy. Justice Jackson's allusion to the "perils herefore unsuspected" that would result from allowing a cabinet officer's speech to "defeat a policy embodied in an Act of Congress" [13] presupposes a Congress satisfied by the mere superficial adherence to the terms of its enactments.[14] The question of improper delegation of author-

Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83 (1922); Railroad Retirement Board v. Alton R. R., 295 U. S. 330, 55 S. Ct. 758 (1935); Schecter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935); Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855 (1936).

[8] Professor Corwin has compiled a list of what he considers some of the misconceptions of the past. See CORWIN, THE COMMERCE POWER VERSUS STATES' RIGHTS 18 (1936). The principal case stands for an especially marked departure from former criteria because the quota set up applied to wheat to be used on the farms in feeding livestock as well as to wheat to be sold in commerce.

[9] 63 S. Ct. 82 at 88 (1942).

[10] The fact that Justice Jackson spends considerable time dealing with the interrelationship of the economics of wheat production, use, marketing, etc., appears to substantiate this.

[11] See Munn v. Illinois, 94 U. S. 113 (1877); Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383 (1898); Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934). All of these cases deal with state legislation under the Fourteenth Amendment but no important distinction can be made between the Court's view of the substantive aspects of that due process clause and the due process clause in the Fifth Amendment restraining the federal government.

[12] Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648 (1939).

[13] 63 S. Ct. 82 at 85 (1942).

[14] It must be admitted that this problem caused the Court little concern in United States v. Rock Royal Co-Operative, 307 U. S. 533, 59 S. Ct. 993 (1939), though there too there was no evidence of actual misguidance.

ity, raised in the district court, was not discussed by the Supreme Court. There is no reason to think that it would have accorded this argument any greater weight than did the lower court.[15]

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[15] United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480 (1911); Avent v. United States, 266 U. S. 127, 45 S. Ct. 34 (1924); Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348 (1928); New York Central Securities Corp. v. United States, 287 U. S. 12, 53 S. Ct. 45 (1932); Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379 (1939); Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648 (1939).