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Agriculture as Interstate Commerce

CONSTITUTIONAL LAW

AGRICULTURE AS INTERSTATE COMMERCE

Plaintiff seeks declaratory judgment on the constitutionality of the Agricultural Adjustment Act of 1938,[1] as amended May 26, 1941[2] with regard to the commerce clause[3] and asks that the Secretary of Agriculture of the United States be enjoined from enforcing the marketing penalty imposed by that act upon wheat grown in excess of the 1941 marketing quota.[4] From a judgment granting the injunction,[5]

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19. Sen. Rep. No. 985, 74th Cong., 1st Sess. (1935); H. R. Rep. No. 1808, 74th Cong., 1st Sess. (1935).
20. See note 16 supra.
21. 79 Cong. Rec., Pt. 15 at 15632.
22. Jones, Mortgages (8th ed. 1928) §§1695-1746; Wiltsie, Mortgage Foreclosure (5th ed. 1939) §1199.
23. See instant case at 131 (dicta). But see Mr. Justice Murphy dissenting in instant case at 133 where he states " . . . If Congress so intended its words were poorly chosen. Congress could easily have declared that bankruptcy jurisdiction does not survive the extinguishment of the equity of redemption under state law, . . . "
24. See instant case at 130.

1. 52 Stat. 31 (1938), as amended 7 U.S.C. §1281 et seq., 7 U.S.C.A. §1281 et seq. (Supp. 1942).
2. 55 Stat. 203 (1941), 7 U.S.C. §1340 (Supp. No. 1), 7 U.S.C.A. §1340 (Supp. 1942).
3. U.S. Const. Art. I, §8, cl. 3.
4. The quota provisions in the act include all wheat grown whether for sale or for farm consumption. 54 Stat. 727 (1940), 7 U.S.C. §1301(b) (6) (A,B), 7 U.S.C.A. §1301(b) (6) (A,B) (Supp. 1942). The term "market" includes the disposal of wheat "by feeding (in any form) to poultry or livestock which, or the products of which are sold, bartered, or exchanged, or to be so disposed of." Ibid. The Court in the instant case 63 Sup. Ct. at 86 interprets this to mean that "penalties do not depend upon whether any part of the wheat either within or without the quota is sold or intended to be sold."
5. Filburn v. Helke, 43 F. Supp. 1017 (S.D. Ohio 1942).

defendant appeals. Held, reversed. Wheat grown for farm consumption has an economic effect upon interstate commerce and is subject to legislative regulation under the commerce clause. Wickard v. Filburn, — U.S. —, 63 Sup. Ct. 82 (1942).

The definition of "commerce" traditionally set forth by the courts included all manner of transportation and commercial intercourse, but did not include such productive enterprise as agriculture.[6] However, federal authority over interstate commerce is plenary and complete,[7] and by extension of the "necessary and proper" powers of Congress,[8] federal authority has been held to cover all intrastate activities which are "in the stream of,"[9] which "burden and obstruct"[10] or are "co-mingled with"[11] interstate commerce. But, as a limitation upon this power over intrastate commerce, the Court held that only those intrastate activities which "directly affect" interstate commerce could be regulated.[12] This indicates a test based upon relationship of the cause

6. See Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928); Adair v. U.S., 208 U.S. 161, 177 (1908); Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211, 241 (1899); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 203 (1885); County of Mobile v. Kimball, 102 U.S. 691, 702 (1880); Gibbons v. Ogden, 9 Wheat. 1, 193 (U.S. 1824); Willis, Constitutional Law (1936) 278-295.
7. Gibbons v. Ogden, 9 Wheat. 1, 196 (U.S. 1824).
8. U.S. Const. Art. I, §8, cl. 18, construed in McCulloch v. Maryland, 4 Wheat. 316, 421 (U.S. 1819).
9. Swift & Co. v. U.S., 196 U.S. 375 (1905); Board of Trade of Chicago v. Olsen, 262 U.S. 1 (1922); Stafford et al. v. Wallace, 258 U.S. 495 (1922); Lemke v. Farmers Grain Co. of Embden, 258 U.S. 50 (1922); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).
10. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Bedford Cut Stone Co. v. Stone Cutters Ass'n., 274 U.S. 37 (1927); Real Silk Hosiery Mills v. City of Portland, 268 U.S. 325 (1925); Shafer v. Farmers Grain Co. of Embden et al., 268 U.S. 189 (1925); Minnesota Rate Cases, 230 U.S. 352 (1913); Addyston Pipe and Steel Co. v. U.S. 175 U.S. 211 (1899); Alvies, The Commerce Power—from Gibbons v. Ogden to the Wagner Act Cases (1937) 3 Ohio St.L.J. 307.
11. Currin v. Wallace, 306 U.S. 1 (1938); Railway Commission of Wisconsin v. Chicago, Burlington & Quincy Ry., 257 U.S. 563 (1922); Minnesota Rate Cases, 230 U.S. 352 (1913); Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194 (1912).
12. Bedford Cut Stone Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); Real Silk Hosiery Mills v. City of Portland, 268 U.S. 325 (1925); Shafer v. Farmers Grain Co. of Embden et al., 268 U.S. 189 (1925); United Leather Workers Union v. Herkert, 265 U.S. 457 (1924); Board of Trade of Chicago v. Olsen, 262 U.S. 1 (1922); Stafford et al. v. Wallace, 258 U.S. 495 (1922); Lemke v. Farmers Grain Co. of Embden, 258 U.S. 50 (1922); State of N.Y. et al. v. U.S. et al., 257 U.S. 591 (1922); U.S. v. Patten, 226 U.S. 525 (1913); U.S. v. American Tobacco Co., 221 U.S. 106 (1911); Swift & Co. v. U.S., 196 U.S. 375 (1905); Northern Securities Co. v. U.S., 193 U.S. 197 (1904); Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211 (1899).

rather than degree or magnitude of the effect.[13] Many important opinions have been written in terms of this "direct effect" test.[14] Even under this interpretation of the commerce clause, such intrastate activities as mining,[15] manufacturing[16] and agriculture[17] were almost unanimously declared to be outside federal authority by reason of the Court's limitation requiring "direct effect" upon interstate commerce.[18]

Several opinions have indicated that this "direct effect" test is arbitrary and impractical.[19] The instant case suggests that it has been used both to arrive at a result and to state results arrived at by other means.[20] Furthermore it has been criticised because it considers the relation of the cause rather than degree of effect, thus leaving

13. See Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936); Minnesota Rate Cases, 230 U.S. 352, 410 (1913); U.S. v. Ferger et al., 250 U.S. 199, 203 (1919); Temple, Federal Power over Things Which Affect Interstate Commerce (1937) 4 Ohio St.L.J. 56.

14. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); also notes 12 and 13 supra.

15. Carter v. Carter Coal Co., 298 U.S. 238 (1936); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1933); Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

16. Utah Power and Light Co. v. Pfost, 286 U.S. 165 (1932); Hammer v. Dagenhart et al., 247 U.S. 251 (1918); U.S. v. E. C. Knight, 156 U.S. 1 (1895); Kidd v. Pearson, 128 U.S. 1 (1888); License Tax Cases, 5 Wall. 462 (U.S. 1866).

17. U.S. v. Butler et al., 297 U.S. 1 (1936); Baldwin v. Seelig, 294 U.S. 511 (1935); Chassaniol v. City of Greenwood, 291 U.S. 584 (1934); Federal Compress and Warehouse Co. v. McClean, 291 U.S. 17 (1934); McCready v. Commonwealth of Virginia, 94 U.S. 391 (1876). See Industrial Ass'n of San Francisco et al. v. U.S., 268 U.S. 64, 82 (1925); Willis, Constitutional Law (1936) 294.

18. The Agricultural Adjustment Act of 1933, 48 Stat. 31, was declared unconstitutional as an unauthorized use of the taxing power to indirectly invade state authority over local agricultural production. U.S. v. Butler et al., 297 U.S. 1 (1936). The Act of 1938 was tested as to its tobacco provisions, 52 Stat. 31, 7 U.S.C. §1311 et seq., 7 U.S.C.A. §1311 et seq., in Mulford et al. v. Smith et al., 307 U.S. 38 (1939), in which the Court held that, since the tobacco provisions were couched in terms of marketing rather than acreage allotments, the Act could be upheld as a regulation of transactions in interstate commerce and not of productive enterprise. It is submitted that the same reasoning, if applied to wheat provisions of the Agricultural Adjustment Act existing at that time, 52 Stat. 31 (1938), 7 U.S.C. §1331 et seq., 7 U.S.C.A. §1331 et seq., and to the tobacco provisions as subsequently amended, 52 Stat. 31 (1938) as amended, 7 U.S.C. §1311 et seq. (Supp. 1), 7 U.S.C.A. §1311 et seq. (Supp. 1942), would render them unconstitutional as they are written in terms of "acreage allotments."

19. Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453, 466 (1938). See Mr. Justice Stone dissenting in Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927). In Swift & Co. v. U.S., 196 U.S. 375, 398 (1905), the Court said "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."

20. Instant case, 63 Sup. Ct. at 88.

federal authority fettered in situations where widespread impact upon interstate commerce may be merely the "indirect effect" of an intrastate activity.[21]

In 1936,[22] however, this test was definitely abandoned by a decision[23] holding that labor relations of a manufacturing enterprise could be regulated by federal authority. Here the term "substantial effect" was substituted for "direct effect"; the question was treated as one of degree of effect rather than relation of the source; and the court relied on the "necessary and proper" powers of Congress to uphold this regulation as "an appropriate means" of protecting interstate commerce.[24] This break from the old "direct effect" test is now well established in the decisions rendered since 1936,[25] with the possible exception of Mulford et al. v. Smith et al.[26] in which the court was able to reach a similar result although apparently adhering to the old concept.[27] In these cases local productive enterprise is brought within federal authority under the commerce clause.[28]

The instant case is a further development of this new interpretation of the commerce power. It marks a more or less formal adoption of an economic measure[29] of federal authority over interstate commerce, which has only been hinted at in previous cases.[30] The court takes judicial notice of the economics of the wheat industry, and concludes that farm consumption of wheat is such a variable factor

21. U.S. v. Wrightwood Dairy Co., 315 U.S. 110, 115 (1942); Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453, 466, 467 (1938); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-41 (1937).

22. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

23. National Labor Relations Board v. Jones & Laughlin Steel Corp. v. U.S., 301 U.S. 1 (1937).

24. National Labor Relations Board v. Jones & Laughlin Steel Corp. v. U.S., 301 U.S. at 36-41. See also the dissenting opinion in that case at 76 et seq. which indicates the sharp departure from precedent.

25. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); U.S. v. Wrightwood Dairy Co., 315 U.S. 110 (1942); U.S. v. Darby Lumber Co., 312 U.S. 100 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); U.S. v. Rock Royal Cooperative Inc. et al., 307 U.S. 533 (1939); National Labor Relations Board v. Fainblatt, 306 U.S. 601 (1939); Consolidated Edison Co. et al. v. National Labor Relations Board, 305 U.S. 197 (1938); Santa Cruz Fruit Packing Co. v. U.S., 303 U.S. 453 (1938); Fruehauf Trailer Co. v. National Labor Relations Board, 301 U.S. 49 (1937).

26. 307 U.S. 38 (1939).

27. See note 22 supra.

28. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (mining); U.S. v. Rock Royal Cooperative Inc. et al., 307 U.S. 533 (1939) (dairy industry); National Labor Relations Board v. Fainblatt, 306 U.S. 601 (1939) (clothing manufacture).

29. Instant case Sup. Ct. at 88.

30. U.S. v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942); U.S. v. Darby Lumber Co., 312 U.S. 100, 123 (1941); National Labor Relation Board v. Fainblatt, 306 U.S. 601, 606 (1939); Shreveport Rate Cases, 234 U.S. 342, 351 (1914).

that it must be controlled to make federal regulation effective.[31] The language of the court indicates that all legal tests have been abandoned in favor of a purely economic test for determination of the extent of federal authority in this field.[32] However, in practical effect, the decision seems merely to further define the term "substantial effect" now used by the Court as a legal test.

Apparently Congress may now regulate any intrastate activity which "substantially affects" interstate commerce, and that "substantial effect" may be merely the economic impact of some intrastate activity, regardless of its source or its relation to interstate commerce.[33]

CONSTITUTIONAL LAW

MILITARY TRIAL OF SABOTEURS

Seven men, allegedly sent to the United States by the German Reich to sabotage war industries, landed within an American defense zone, proceeded ashore and buried their uniforms and equipment. Several days later they were captured and held in custody by the Provost Marshal of the Military District of Washington for trial before a Military Commission created by the President, on charges of violation of the law of war, certain Articles of War, and conspiracy. Applications for leave to file petitions for habeas corpus were presented in their behalf to the Federal District Court and upon denial, appeals were perfected to the United States Supreme Court. Held, that the charge alleged an offense which the President was authorized to order tried by a military commission, that the commission was lawfully constituted, and that the accused were not entitled to trial by jury in the civil courts. United States ex rel, Quirin v. Cox, 317 U.S. —, 63 Sup. Ct. 1 (1942).

The important question to be determined is the status of the petitioners, that is, whether they are lawful combatants or unlawful combatants.

The right of the President as President and Commander-in-chief of the Army and Navy, under the Constitution and Articles of War,

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31. "Consumption (of wheat) on the farm where grown appears to vary in an amount greater than 20 per cent of average production." . . . "It can hardly be denied that a factor of such volume and variability . . . would have a substantial influence on price and market conditions." Instant case 63 Sup. Ct. at 90, 91.

32. Instant case, 63 Sup. Ct. at 88.

33. It is apparent that this shift from the "direct effect" test to a test of "substantial effect" which may be merely economic leaves the Supreme Court with greater discretionary powers than heretofore exercised by that judiciary. Interestingly enough some of the members of the Supreme Court have evidenced a fear that such a broad interpretation of the commerce clause would result in a breakdown of our federal system of government. See Apex Hosiery Co. v. Leader et al., 310 U.S. 469, 513 (1940); Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936); U.S. v. Butler, 297 U.S. 1, 75 (1936); Schechter Poultry Corp. v. U.S., 295 U.S. 495, 546 (1935); Hammer v. Dagenhart et al., 247 U.S. 251, 276 (1918); U.S. v. E. C. Knight, 156 U.S. 1, 15 (1895). See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 95, 96 (1937) (dissenting opinion).