Wickard v. Filburn (1942)

John Q. Barrett[*]

When the Supreme Court of the United States announces on June 28th its decision regarding the constitutionality of the Affordable Care Act, the meaning and continuing vitality of *Wickard v. Filburn* (1942) is likely to be a central topic in the Justices' opinions.

In the 1930s and later, Roscoe Filburn owned and operated a small farm in Montgomery County, Ohio. He maintained a herd of dairy cattle, sold milk, raised poultry and sold poultry and eggs. Filburn also raised a small acreage of wheat. He sold some of this wheat, used some to feed his poultry and livestock, used some to make flour for home consumption, and used some for future seeding.

In 1938, Congress passed and President Roosevelt signed the Agricultural Adjustment Act. Seeking to stabilize farm prices, the Act authorized the U.S. Department of Agriculture to control the volume of commodities such as wheat that moved in interstate and foreign commerce, thereby avoiding surpluses and shortages and resulting low and high prices.

In 1940, the Department of Agriculture established a "marketing quota" for Filburn's 1941 wheat crop. It authorized him to plant 11.1 acres that would yield an estimated 223.11 bushels of wheat. Filburn nonetheless sowed 23 acres. His 11.9 "excess" acres yielded 239 bushels. In response, the Secretary of Agriculture fined Filburn $.49 per excess bushel—$117.11 in all. He refused to pay. He then filed a lawsuit in federal court, alleging that the Act's wheat marketing quota provisions, which applied even to wheat that a farmer grew wholly for home consumption, exceeded Congress's constitutional power "[t]o regulate Commerce … among the several States…."[1]

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[*] Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). An earlier version of this essay was posted to my Jackson Email List on June 26, 2012.

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[1] U.S. CONST., Art. I, sec. 8, cl. 3 ("the Commerce Clause").

In November 1942, the Supreme Court unanimously rejected farmer Filburn's constitutional argument. Justice Robert H. Jackson wrote for the Court—*Wickard v. Filburn* is one of his earliest and most enduringly famous Supreme Court opinions.

The crux of the *Wickard* decision was the Supreme Court's understanding that Filburn's "home-growing"—his not-buying the excess wheat that he desired to have—was commercial activity in the interstate market for wheat. As Jackson explained, even wheat that is

> never marketed … supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the [constitutionally-authorized Congressional] regulatory function quite as definitively as prohibitions or restrictions thereon. This [case's] record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of [statutory] regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

The Court also dealt, directly, with Filburn's policy objection to a law that forced him to buy what he wished not to buy:

> It is said … that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers [i.e., big-time wheat farmers]. It is the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

To read *Wickard v. Filburn*, 317 U.S. 111 (1942), in full, click here.

* * *

More than a month later, Justice Jackson received an insightful letter from his friend Sherman Minton, a former U.S. Senator who had become a U.S. Circuit Judge:

> New Albany, Ind.
> Dec 17 1942
>
> My dear Bob —
>
> This is a letter from one friend to another—not from a judge of an inferior (very inferior) Court to a Justice of the Supreme Court. I just finished reading your very interesting opinion in Wickard vs Filburn. On page 6 [317 U.S. at 120] you state "Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof."
>
> I venture to suggest that U.S. vs. Wrightwood Dairy 315 US. 110 [(1942)] is in conflict with that statement. In that case the dairy regulated didn't produce or buy a drop of milk outside of Illinois. All its milk was produced in Illinois. It was processed wholly within Illinois and never touched a drop of milk from outside the state. It was all sold + intended to be sold in Illinois. And the Supreme Court held it could be regulated because it competed with interstate milk.
>
> We are shifting our base + to make it appear that we are not we change the words we use. For instance on page 10 of the same opinion [317 U.S. at 125] you say a matter may be regulated by Congress "if it exerts a substantial economic effect on interstate Commerce," as against the old test of whether it affects directly or indirectly interstate commerce. I am afraid we will have as much trouble applying your test as the old one.

> What a pity U.S. v. Butler [(1936)] was ever written + we didn't, so far as agriculture is concerned, assume to regulate it + subsidize it under the Welfare Clause instead of the Commerce Clause. Then we wouldn't have to do so much shadow boxing to get around old opinions.
>
> If we are going to adopt the unlimited concept as to interstate Commerce why not say so + throw in the ash can the old cases that disagree[?] Let's be brutally frank.
>
> I suppose I am wrong and you are right—I never did have any finesse.
>
> Whether one agrees with you or not one must admit that you write the clearest most readable opinions of all.
>
> Sorry I didn't have time to visit with you personally when I was in Washington.
>
> With all good wishes for the holiday season, I am,
>
> Sincerely yours
>
> Shay Minton[2]

Justice Jackson promptly wrote back to Judge Minton (who seven years later would join Jackson on the Supreme Court). Jackson's letter makes clear that he—the Court—meant *Wickard v. Filburn* to be the statement of judicial deference and restraint that it has, in all the years since, come to be in U.S. constitutional law:

> December 21, 1942
>
> Honorable Sherman Minton
> U.S. Circuit Court of Appeals
> New Albany, Ind.

[2] Letter from Judge Sherman Minton to Justice Robert H. Jackson, Dec. 17, 1942 (original), *in* Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 125, Folder 8. An image of this letter is attached at the end of this file.

Dear Shea [sic]:

I am glad to have your letter and sorry that we did not have a chance to chat longer when you were here.

You are right in criticizing the sentence in my opinion in the Wickard case. Of course what I meant to refer to was exclusive of the competition theory which I dealt with later under the general discussion of the Shreveport [(1914)] doctrine.

If we were to be brutally frank, as you suggest, I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. All of the efforts to set up formulae to confine the commerce power have failed. When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge.

However, in the Wickard case the effect is easily apparent, although whether the effect is good or ill might be difficult to say. There is probably a good deal of wisdom in the policy of our earlier judges in going only so far as the immediate case requires in making a constitutional decision. I admit, however, that if I could have found a more satisfactory formula, I would have come out with it, and I know that the Wickard case is by no means a simple or satisfactory solution. I really know of no place where we can bound the doctrine of competition as expounded in the Shreveport, the Wrightwood, and the Wickard cases. I suppose that soy beans compete with wheat, and buckwheat competes with soy beans, and a man who spends his money for corn liquor affects the interstate commerce in corn because he withdraws that much purchasing power from that market. The Shreveport case and those that follow seem to me to be best understood as a sort of strategic retreat by the courts from the effort to control the action of Congress in the field of interstate commerce.

I always read your opinions with interest, and from them I gather, although it is only from between the lines, that

> you are really enjoying judicial work. It is quite a violent change from the kind of life you and I had been leading, but it certainly has its compensations.
>
> When you are in town, I hope you will come in and see me.
>
> Sincerely yours,
>
> [/s/ Robert H. Jackson][3]

Twelve years later, just before his death, Justice Jackson wrote three lectures that he had agreed to deliver at Harvard University in 1955. In one, he reiterated his broad view of the national power that the Commerce Clause confers:

> There can be no doubt that in the original Constitution the states surrendered to the Federal Government the power to regulate interstate commerce, or commerce among the states. They did so in light of a disastrous experience in which commerce and prosperity were reduced to the vanishing point by states discriminating against each other through devices of regulation, taxation and exclusion. It is more important today than it was then that we remain one commercial and economic unit and not a collection of parasitical states preying upon each other's commerce. I make no concealment of and offer no apology for my philosophy that the federal interstate commerce power should be strongly supported and that the impingement of the states upon that commerce which moves among them should be restricted to narrow limits.[4]

[3] Letter from Justice Robert H. Jackson to Judge Sherman Minton, Dec. 21, 1942 (unsigned carbon copy of typed letter), *in* Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 125, Folder 8.

[4] ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955).

United States Circuit Court of Appeals
For the Seventh Circuit

Chambers of
Judge Sherman Minton

New Albany Ind
Dec 17 1942

My dear Bob -

This is a letter from one friend to another - Not from a judge of an inferior (Very inferior) Court to a Justice of the Supreme Court.

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is in Conflict with that statement. In that Case the dairy regulation didn't produce or buy a drop of milk outside of Illinois. All its milk was produced in Illinois. It was processed wholly within Illinois & never touched a drop of milk from outside the State. It was all sold & intended to be sold in Illinois. And the Supreme Court held it Could be regulated because it Competed with interstate milk.

We are shifting our base & to make it appear that we are not we change the words we use. For instance on page 10 of the same opinion you say a matter may be regulated by Congress "if its exerts a substantial economic effect on interstate Commerce", as against the old test of whether it affects directly or indirectly interstate Commerce. I am afraid we will have as much trouble applying your test as the old one.

What a pity Mo. v Butler was ever written & we didn't, so far as agriculture is concerned, assume to regulate it & subsidize it under the welfare Clause instead of the Commerce Clause. Then we would not have to do so much shadow boxing to get around old opinions.

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Sorry I didn't have time to visit with you personally when I was in Washington.

With all good wishes for the Holiday Season, I am,

Sincerely yours

Thos Pinkney

Hon Robt H Jackson

Washington