

Wickard Vs. Filburn

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Appeal No. : 317 U.S. 111

Appellant : Wickard

Respondent : Filburn

Judgement :

Wickard v. Filburn - 317 U.S. 111 (1942)

U.S. Supreme Court Wickard v. Filburn, 317 U.S. 111 (1942)

Wickard v. Filburn

No. 59

Argued May 4, 1942

Reargued October 13, 1942

Decided November 9, 1942

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

SYLLABUS

1. Pending a referendum vote of farmers upon wheat quotas proclaimed by the Secretary of Agriculture under the Agricultural Adjustment Act of 1938, the Secretary made a radio address in which he advocated approval of the quotas and called attention to the recent enactment by Congress of the amendatory act, later approved

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May 26, 1941. The speech mentioned the provisions of the amendment for increase of loans on wheat, but not the fact that it also increased the penalty on excess production, and added that, because of the uncertain world situation, extra acreages of wheat had been deliberately planted, and "farmers should not be penalized because they have provided insurance against shortages of food." There was no evidence that the subsequent referendum vote approving the quotas was influenced by the speech.

Held, that, in any event, and even assuming that the penalties referred to in the speech were those prescribed by the Act, the validity of the vote was not thereby affected. P. [317 U. S. 117](#) .

2. The wheat marketing quota and attendant penalty provisions of the Agricultural Adjustment Act of 1938, as amended by the Act of May 26, 1941, when applied to wheat not intended in any part for commerce but wholly for consumption on the farm, are within the commerce power of Congress. P. [317 U. S. 118](#) .

3. The effect of the Act is to restrict the amount of wheat which may be produced for market and the extent as well to which one may forestall resort to the market by producing for his own needs. P. [317 U. S. 127](#) .

4. That the production of wheat for consumption on the farm may be trivial in the particular case is not enough to remove the grower from the scope of federal

regulation where his contribution, taken with that of many others similarly situated, is far from trivial. P. [317 U. S. 127](#) .

5. The power to regulate interstate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. P. [317 U. S. 128](#) .

6. A factor of such volume and variability as wheat grown for home consumption would have a substantial influence on price conditions on the wheat market, both because such wheat, with rising prices, may flow into the market and check price increases and, because, though never marketed, it supplies the need of the grower which would otherwise be satisfied by his purchases in the open market. P. [317 U. S. 128](#) .

7. The amendatory Act of May 26, 1941, which increased the penalty upon "farm marketing excess" and included in that category wheat which previously had not been subject to penalty, *held* not invalid as retroactive legislation repugnant to the Fifth Amendment when applied to wheat planted and growing before it was enacted, but harvested and threshed thereafter. P. [317 U. S. 131](#) .

43 F.Supp. 1017, reversed.

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APPEAL from a decree of the District Court of three judges which permanently enjoined the Secretary of Agriculture and other appellants from enforcing certain penalties against the appellee, a farmer, under the Agricultural Adjustment Act.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, [[Footnote 1](#)] to

the Agricultural Adjustment Act of 1938, [[Footnote 2](#)] upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act, as amended and applicable to him, were unconstitutional because not sustainable

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under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment.

The Secretary moved to dismiss the action against him for improper venue, but later waived his objection and filed an answer. The other appellants moved to dismiss on the ground that they had no power or authority to enforce the wheat marketing quota provisions of the Act, and, after their motion was denied, they answered, reserving exceptions to the ruling on their motion to dismiss. [[Footnote 3](#)] The case was submitted for decision on the pleadings and upon a stipulation of facts.

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption, and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940, before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239

bushels, which, under the terms of the Act as amended on May 26, 1941, constituted farm

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marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has not paid the penalty, and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien. [[Footnote 4](#)]

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. [[Footnote 5](#)] Within prescribed limits and by prescribed standards, the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. [[Footnote 6](#)] Loans and payments to wheat farmers are authorized in stated circumstances. [[Footnote 7](#)]

The Act further provides that, whenever it appears that the total supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 percent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year, and that, during the marketing year, a compulsory national marketing quota shall be in effect with respect to the marketing

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of wheat. [[Footnote 8](#)] Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota, to determine whether they favor or oppose it; and, if more than one-

third of the farmers voting in the referendum do oppose, the Secretary must, prior to the effective date of the quota, by proclamation suspend its operation. [[Footnote 9](#)]

On May 19, 1941, the Secretary of Agriculture made a radio address to the wheat farmers of the United States in which he advocated approval of the quotas and called attention to the pendency of the amendment of May 26, 1941, which had at the time been sent by Congress to the White House, and pointed out its provision for an increase in the loans on wheat to 85 percent of parity. He made no mention of the fact that it also increased the penalty from 15 cents a bushel to one-half of the parity loan rate of about 98 cents, but stated that,

"Because of the uncertain world situation, we deliberately planted several million extra acres of wheat. . . . Farmers should not be penalized because they have provided insurance against shortages of food."

Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of Agriculture, 81 percent of those voting favored the marketing quota, with 19 percent opposed.

The court below held, with one judge dissenting, that the speech of the Secretary invalidated the referendum, and that the amendment of May 26, 1941,

"insofar as it increased the penalty for the farm marketing excess over the fifteen cents per bushel prevailing at the time of planting and subjected the entire crop to a lien for the payment thereof,"

should not be applied to the appellee because,

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as so applied, it was retroactive, and in violation of the Fifth Amendment, and, alternatively, because the equities of the case so required. 43 F.Supp. 1017. Its Judgment permanently enjoined appellants from collecting a marketing penalty of more than 15 cents a bushel on the farm marketing excess of appellee's 1941 wheat crop, from subjecting appellee's entire 1941 crop to a lien for the payment of

the penalty, and from collecting a 15-cent penalty except in accordance with the provisions of 339 of the Act as that section stood prior to the amendment of May 26, 1941. [[Footnote 10](#)] The Secretary and his codefendants have appealed. [[Footnote 11](#)]

I

The holding of the court below that the Secretary's speech invalidated the referendum is manifest error. Read as a whole and in the context of world events that constituted his principal theme, the penalties of which he spoke were more likely those in the form of ruinously low prices resulting from the excess supply, rather than the penalties prescribed in the Act. But, under any interpretation, the speech cannot be given the effect of invalidating the referendum. There is no evidence that any voter put upon the Secretary's words the interpretation that impressed the court below or was in any way misled. There is no showing that the speech influenced the outcome of the referendum. The record, in fact, does not show that any, and does not suggest a basis for even a guess as to how many, of the voting farmers dropped work to listen to "Wheat Farmers and the Battle for

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Democracy" at 11:30 in the morning of May 19th, which was a busy hour in one of the busiest of seasons. If this discourse intended reference to this legislation at all, it was, of course, a public Act, whose terms were readily available, and the speech did not purport to be an exposition of its provisions.

To hold that a speech by a Cabinet officer, which failed to meet judicial ideals of clarity, precision, and exhaustiveness, may defeat a policy embodied in an Act of Congress would invest communication between administrators and the people with perils heretofore unsuspected. Moreover, we should have to conclude that such an officer is able to do by accident what he has no power to do by design. Appellee's complaint, insofar as it is based on this speech, is frivolous, and the injunction, insofar as it rests on this ground, is unwarranted. *United States v. Rock Royal Cooperative*, [307 U. S. 533](#) .

It is urged that, under the Commerce Clause of the Constitution, Article I, 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration, since our decision in *United States v. Darby*, [312 U. S. 100](#) , [[Footnote 12](#)] sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce, but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives, so that, as related to wheat, in addition to its conventional meaning, it also means to dispose of

"by feeding (in any

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form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of. [[Footnote 13](#)]"

Hence, marketing quotas not only embrace all that may be sold without penalty, but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined, and the penalty is imposed thereon. [[Footnote 14](#)] Penalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are, at most, "indirect." In answer, the Government argues that the statute regulates neither production nor consumption, but only marketing,

and, in the alternative, that, if the Act does go beyond the regulation of marketing, it is sustainable as a "necessary and proper" [[Footnote 15](#)] implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and

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"mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." [[Footnote 16](#)] 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. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning, Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. [Gibbons v. Ogden](#), 9 Wheat. 1, [22 U. S. 194](#) -195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political, rather than from judicial, processes. *Id.* at [22 U. S. 197](#) .

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For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state

activity which it was claimed discriminated against or burdened interstate commerce. During this period, there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision, the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause. [[Footnote 17](#)]

It was not until 1887, with the enactment of the Interstate Commerce Act, [[Footnote 18](#)] that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act [[Footnote 19](#)] and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but

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little scope to the power of Congress. *United States v. Knight Co.*, [156 U. S. 1](#) . [[Footnote 20](#)] These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power. [[Footnote 21](#)]

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the

principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden, supra*.

Not long after the decision of *United States v. Knight Co., supra*, Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, [196 U. S. 375](#) , [196 U. S. 398](#) . It was soon demonstrated that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation. [[Footnote 22](#)] In some cases sustaining the exercise of federal power over intrastate matters, the term "direct"

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was used for the purpose of stating, rather than of reaching, a result; [[Footnote 23](#)] in others, it was treated as synonymous with "substantial" or "material"; [[Footnote 24](#)] and in others it was not used at all. [[Footnote 25](#)] Of late, its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.

In the *Shreveport Rate Cases*, [234 U. S. 342](#) , the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of

"matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."

Id. at [234 U. S. 351](#) .

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, exemplified

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by this statement, has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production," nor can consideration of its economic effects be foreclosed by calling them "indirect." The present Chief Justice has said in summary of the present state of the law:

"The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence, the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

United States v. Wrightwood Dairy Co., [315 U. S. 110](#) , [315 U. S. 119](#) .

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. [[Footnote 26](#)] The same consideration might help in determining whether, in the absence of Congressional action, it would be permissible for the state

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to exert its power on the subject matter, even though, in so doing, it to some degree affected interstate commerce. But even if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states, on average, have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply, as well as for wheat for export and carry-over.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 percent of total production, while, during the 1920's, they averaged more than 25 percent. The decline in the export trade has left a large surplus in production which, in connection with an abnormally large supply of wheat and other grains in recent years, caused congestion in a number of markets; tied up railroad cars, and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Importing countries have taken measures to stimulate production and self-sufficiency. The four large exporting countries of Argentina,

Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed, in part at least, to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government. [[Footnote 27](#)]

In the absence of regulation, the price of wheat in the United States would be much affected by world conditions. During 1941, producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about \$1.16 a bushel, as compared with the world market price of 40 cents a bushel.

Differences in farming conditions, however, make these benefits mean different things to different wheat growers. There are several large areas of specialization in wheat, and the concentration on this crop reaches 27 percent of the crop land, and the average harvest runs as high as

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155 acres. Except for some use of wheat as stock feed and for seed, the practice is to sell the crop for cash. Wheat from such areas constitutes the bulk of the interstate commerce therein.

On the other hand, in some New England states, less than one percent of the crop land is devoted to wheat, and the average harvest is less than five acres per farm. In 1940, the average percentage of the total wheat production that was sold in each state, as measured by value ranged from 29 percent thereof in Wisconsin to 90 percent in Washington. Except in regions of large-scale production, wheat is usually grown in rotation with other crops; for a nurse crop for grass seeding, and as a cover crop to prevent soil erosion and leaching. Some is sold, some kept for seed, and a percentage of the total production much larger than in areas of specialization is consumed on the farm and grown for such purpose. Such farmers, while growing some wheat, may even find the balance of their interest on the consumer's side.

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 percent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent, as well, to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the

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scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. *Labor Board v. Fairblatt*, [306 U. S. 601](#) , [306 U. S. 606](#) *et seq.*; *United States v. Darby supra* at [312 U. S. 123](#) .

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. [[Footnote 28](#)] One of the primary purposes of the Act in question was to increase the market price of wheat, and, to that end, to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market, and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it 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 regulatory

function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress

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may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, 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. It is of 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. [[Footnote 29](#)] 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.

III

The statute is also challenged as a deprivation of property without due process of law contrary to the Fifth Amendment, both because of its regulatory effect on the appellee and because of its alleged retroactive effect. The court below sustained the plea on the ground of forbidden retroactivity, "or, in the alternative, that the equities of the case as shown by the record favor the plaintiff." 43 F.Supp. 1017, 1019. An Act of Congress is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely

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because it is deemed in a particular case to work an inequitable result.

Appellee's claim that the Act works a deprivation of due process even apart from its allegedly retroactive effect is not persuasive. Control of total supply, upon which the whole statutory plan is based, depends upon control of individual supply. Appellee's claim is not that his quota represented less than a fair share of the national quota, but that the Fifth Amendment requires that he be free from penalty for planting wheat and disposing of his crop as he sees fit.

We do not agree. In its effort to control total supply, the Government gave the farmer a choice which was, of course, designed to encourage cooperation and discourage noncooperation. The farmer who planted within his allotment was, in effect, guaranteed a minimum return much above what his wheat would have brought if sold on a world market basis. Exemption from the applicability of quotas was made in favor of small producers. [[Footnote 30](#)] The farmer who produced in excess of his quota might escape penalty by delivering his wheat to the Secretary, or by storing it with the privilege of sale without penalty in a later year to fill out his quota, or irrespective of quotas if they are no longer in effect, and he could obtain a loan of 60 percent of the rate for cooperators, or about 59 cents a bushel, on so much of his wheat as would be subject to penalty if marketed. [[Footnote 31](#)] Finally, he might make other disposition of his wheat, subject to the penalty. It is agreed

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that, as the result of the wheat programs, he is able to market his wheat at a price "far above any world price based on the natural reaction of supply and demand." We can hardly find a denial of due process in these circumstances, particularly since it is even doubtful that appellee's burdens under the program outweigh his benefits. It is hardly lack of due process for the Government to regulate that which it subsidizes.

The amendment of May 26, 1941, is said to be invalidly retroactive in two respects: first, in that it increased the penalty from 15 cents to 49 cents a bushel; secondly, in that, by the new definition of "farm marketing excess," it subjected to the penalty wheat which had theretofore been subject to no penalty at all, *i.e.*,

wheat not "marketed" as defined in the Act.

It is not to be denied that, between seed time and harvest, important changes were made in the Act which affected the desirability and advantage of planting the excess acreage. The law, as it stood when the appellee planted his crop, made the quota for his farm the normal or the actual production of the acreage allotment, whichever was greater, plus any carry-over wheat that he could have marketed without penalty in the preceding marketing year. [[Footnote 32](#)] The Act also provided that the farmer who, while quotas were in effect, marketed wheat in excess of the quota for the farm on which it was produced should be subject to a penalty of 15 cents a bushel on the excess so marketed. [[Footnote 33](#)] Marketing of wheat was defined as including disposition "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, . . ." [[Footnote 34](#)] The amendment of May 26,

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1941, made before the appellee had harvested the growing crop, changed the quota and penalty provisions. The quota for each farm became the actual production of acreage planted to wheat, less the normal or the actual production, whichever was smaller, of any excess acreage. [[Footnote 35](#)] Wheat in excess of this quota, known as the "farm marketing excess" and declared by the amendment to be "regarded as available for marketing," was subjected to a penalty fixed at 50 percent of the basic loan rate for cooperators, [[Footnote 36](#)] or 49 cents, instead of the penalty of 15 cents which obtained at the time of planting. At the same time, there was authorized an increase in the amount of the loan which might be made to noncooperators such as the appellee upon wheat which "would be subject to penalty if marketed" from about 34 cents per bushel to about 59 cents. [[Footnote 37](#)] The entire crop was subjected by the amendment to a lien for the payment of the penalty.

The penalty provided by the amendment can be postponed or avoided only by storing the farm marketing excess according to regulations promulgated by the Secretary or by delivering it to him without compensation;

and the penalty is incurred and becomes due on threshing. [[Footnote 38](#)] Thus, the penalty was contingent upon an act which appellee committed not before, but after, the enactment of the statute, and, had he chosen to cut his excess and cure it or feed it as hay, or to reap and feed it with the head and straw together, no penalty would have been demanded. Such manner of consumption is not uncommon. Only when he threshed, and thereby made it a part of the bulk of wheat overhanging the market, did he become subject to penalty. He has made no effort to show that the value of his excess wheat consumed without threshing was less than it would have been had it been threshed while subject to the statutory provisions in force at the time of planting. Concurrently with the increase in the amount of the penalty, Congress authorized a substantial increase in the amount of the loan which might be made to cooperators upon stored farm marketing excess wheat. That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law. *Cf. Mulford v. Smith*, [307 U. S. 38](#) .

Reversed.

[[Footnote 1](#)]

55 Stat. 203, 7 U.S.C. (Supp. No. I) 1340.

[[Footnote 2](#)]

52 Stat. 31, as amended, 7 U.S.C. 1281 *et seq.*

[[Footnote 3](#)]

Because of the conclusion reached as to the merits, we need not consider the question whether these appellants would be proper if our decision were otherwise.

[[Footnote 4](#)]

Wheat -- 507, 728.240, 728.248, 6 Federal Register 2695, 2699-2701.

[[Footnote 5](#)]

331, 7 U.S.C. 1331.

[[Footnote 6](#)]

335, 7 U.S.C. 1335.

[[Footnote 7](#)]

302(b)(h), 303, 7 U.S.C. 1302(b)(h), 1303; 10 of the amendment of May 26, 1941, 7 U.S.C. (Supp. I), 1340(10).

[[Footnote 8](#)]

335(a), 7 U.S.C. 1335(a).

[[Footnote 9](#)]

336, 7 U.S.C. 1336.

[[Footnote 10](#)]

7 U.S.C. 1339. This imposed a penalty of 15 per bushel upon wheat marketed in excess of the farm marketing quota while such quota was in effect. See *also* amendments of July 26, 1939, 53 Stat. 1126, 7 U.S.C. 1335(c), and of July 2, 1940, 54 Stat. 727, 7 U.S.C. 1301(b)(6)(A), (B).

[[Footnote 11](#)]

50 Stat. 752-753, 3, 28 U.S.C. 380a.

[[Footnote 12](#)]

See *also* *Gray v. Powell*, [314 U. S. 402](#) ; *United States v. Wrightwood Dairy Co.*, [315 U. S. 110](#) ; *Cloverleaf Co. v. Patterson*, [315 U. S. 148](#) ; *Kirschbaum Co. v.*

Walling, [316 U. S. 517](#) ; *Overnight Transportation Co. v. Missel*, [316 U. S. 572](#) .

[[Footnote 13](#)]

54 Stat. 727, 7 U.S.C. 1301(b)(6)(A), (B).

[[Footnote 14](#)]

1, 2, of the amendment of May 26, 1941; Wheat -- 507, 728.251, 6 Federal Register 2695, 2701.

[[Footnote 15](#)]

Constitution, Article I, 8, cl. 18.

[[Footnote 16](#)]

After discussing and affirming the cases stating that such activities were "local," and could be regulated under the Commerce Clause only if by virtue of special circumstances their effects upon interstate commerce were "direct," the opinion of the Court in *Carter v. Carter Coal Co.*, [298 U. S. 238](#) , [298 U. S. 308](#) , stated that:

"The distinction between a direct and an indirect effect turns not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. . . . the matter of degree has no bearing upon the question here, since that question is not what is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce? but what is the relation between the activity or condition and the effect?"

See also cases cited *infra*, notes [17 and](#) | [17 and](#) S. 111fn21|>21.

[[Footnote 17](#)]

[Veazie v. Moor](#), 14 How. 568, [55 U. S. 573](#) -574; *Kidd v. Pearson*, [128 U. S. 222](#) .

[[Footnote 18](#)]

24 Stat. 379, 49 U.S.C. 1, *et seq.*

[[Footnote 19](#)]

26 Stat. 209, 15 U.S.C. 1, *et seq.*

[[Footnote 20](#)]

See also *Hopkins v. United States*, [171 U. S. 578](#) ; *Anderson v. United States*, [171 U. S. 604](#) .

[[Footnote 21](#)]

Employers' Liability Cases, [207 U. S. 463](#) ; *Hammer v. Dagenhart*, [247 U. S. 251](#) ; *Railroad Retirement Board v. Alton R. Co.*, [295 U. S. 330](#) ; *Schechter Corp. v. United States*, [295 U. S. 495](#) ; *Carter v. Carter Coal Co.*, [298 U. S. 238](#) ; *cf.* [76 U. S.](#) *Dewitt*, 9 Wall. 41; *Trade-Mark Cases*, [100 U. S. 82](#) ; *Hill v. Wallace*, [259 U. S. 44](#) ; *Heisler v. Thomas Colliery Co.*, [260 U. S. 245](#) , [260 U. S. 259](#) -260; *Oliver Iron Co. v. Lord*, [262 U. S. 172](#) , [262 U. S. 178](#) -179; *Utah Power & Light Co. v. Pfof*, [286 U. S. 165](#) .

[[Footnote 22](#)]

Northern Securities Co. v. United States, [193 U. S. 197](#) ; *Swift & Co. v. United States*, *supra*; *Loewe v. Lawlor*, [208 U. S. 274](#) ; *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, [221 U. S. 612](#) ; *Southern Ry. Co. v. United States*, [222 U. S. 20](#) ; *Second Employers' Liability Cases*, [223 U. S. 1](#) ; *United States v. Patten*, [226 U. S. 525](#) .

[[Footnote 23](#)]

United Leather Workers v. Herkert Co., [265 U. S. 457](#) , [265 U. S. 471](#) ; *cf.* *Apex Hosiery Co. v. Leader*, [310 U. S. 469](#) , [310 U. S. 511](#) ; *Di Santo v. Pennsylvania*, [273 U. S. 34](#) , [273 U. S. 44](#) (dissent); *Northern Securities Co. v. United States*, [193 U. S. 197](#) , [193 U. S. 395](#) ; *Standard Oil Co. v. United*

States, [221 U. S. 1](#) , [221 U. S. 66](#) -69.

[[Footnote 24](#)]

In *Santa Cruz Co. v. Labor Board*, [303 U. S. 453](#) , [303 U. S. 466](#) -467, Chief Justice Hughes said:

"'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree, and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.'"

[[Footnote 25](#)]

Baltimore & Ohio R. Co. v. Interstate Commerce Commission, [221 U. S. 612](#) ; *Second Employers' Liability Cases*, [223 U. S. 1](#) ; *Interstate Commerce Commission v. Goodrich Transit Co.*, [224 U. S. 194](#) .

[[Footnote 26](#)]

Cf. Federal Trade Commission v. Bunte Bros., [312 U. S. 349](#) .

[[Footnote 27](#)]

It is interesting to note that all of these have federated systems of government, not, of course, without important differences. In all of them, wheat regulation is by the national government. In Argentina, wheat may be purchased only from the national Grain Board. A condition of sale to the Board, which buys at pegged prices, is the producer's agreement to become subject to restrictions on planting. See Nolan, Argentine Grain Price Guaranty, Foreign Agriculture (Office of Foreign Agricultural Relations, Department of Agriculture) May, 1942, pp. 185, 202. The Australian system of regulation includes the licensing of growers, who may not sow more than the amount licensed, and who may be compelled to cut part of their crops for hay if a heavy crop is in prospect. See Wright, Australian Wheat

Stabilization, Foreign Agriculture (Office of Foreign Agricultural Relations, Department of Agriculture) September, 1942, pp. 329, 336. The Canadian Wheat Board has wide control over the marketing of wheat by the individual producer. 4 Geo. VI, c. 25, 5. Canadian wheat has also been the subject of numerous Orders in Council. *E.g.*, 6 Proclamations and Orders in Council (1942) 183, which gives the Wheat Board full control of sale, delivery, milling and disposition by any person or individual. See also Wheat Acreage Reduction Act, 1942, 6 Geo. VI, c. 10.

[[Footnote 28](#)]

Swift & Co. v. United States, [196 U. S. 375](#) ; *Stafford v. Wallace*, [258 U. S. 495](#) ; *Chicago Board of Trade v. Olsen*, [262 U. S. 1](#) ; *Coronado Coal Co. v. United Mine Workers*, [268 U. S. 295](#) ; *United States v. Trenton Potteries Co.*, [273 U. S. 392](#) ; *Tagg Bros. & Moorhead v. United States*, [280 U. S. 420](#) ; *Standard Oil Co. of Indiana v. United States*, [283 U. S. 163](#) ; *Currin v. Wallace*, [306 U. S. 1](#) ; *Mulford v. Smith*, [307 U. S. 38](#) ; *United States v. Rock Royal Cooperative*, *supra*; *United States v. Socony-Vacuum Oil Co.*, [310 U. S. 150](#) ; *Sunshine Anthracite Coal Co. v. Adkins*, [310 U. S. 381](#) ; *United States v. Darby*, *supra*; *United States v. Wrightwood Dairy Co.*, *supra*; *Federal Power Commission v. Pipeline Co.*, [315 U. S. 575](#) .

[[Footnote 29](#)]

Cf. [17 U. S. Maryland](#), 4 Wheat. 316, [17 U. S. 413](#) -415, [17 U. S. 435](#) -436; *Gibbons v. Ogden*, *supra* at [22 U. S. 197](#) ; *Stafford v. Wallace*, [258 U. S. 495](#) , [258 U. S. 521](#) ; *Chicago Board of Trade v. Olsen*, [262 U. S. 1](#) , [262 U. S. 37](#) ; *Helvering v. Gerhardt*, [304 U. S. 405](#) , [304 U. S. 412](#) .

[[Footnote 30](#)]

Section 7 of the amendment of May 26, 1941 provided that a farm marketing quota should not be applicable to any farm on which the acreage planted to wheat is not in excess of fifteen acres. When the appellee planted his wheat the quota was inapplicable to any farm on which the normal production of the acreage planted to wheat was less than 200 bushels. 335(d) of the Agricultural Adjustment Act of

1938, as amended by 54 Stat. 232.

[[Footnote 31](#)]

6, 10(c) of the amendment of May 26, 1941.

[[Footnote 32](#)]

335(c) as amended July 26, 1939, 53 Stat. 1126, 7 U.S.C. 1335(c).

[[Footnote 33](#)]

339, 7 U.S.C. 1339.

[[Footnote 34](#)]

301(b)(6)(A), (B), as amended July 2, 1940, 54 Stat. 727, 7 U.S.C. 1301(b)(6)(A), (B).

[[Footnote 35](#)]

By an amendment of December 26, 1941, 55 Stat. 872, effective as of May 26, 1941, it was provided that the farm marketing excess should not be larger than the amount by which the actual production exceeds the normal production of the farm wheat acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary, provision being made for adjustment of the penalty in the event of a downward adjustment in the amount of the farm marketing excess.

[[Footnote 36](#)]

1, 2, 3 of the amendment of May 26, 1941.

[[Footnote 37](#)]

Section 302(b) had provided for a loan to noncooperators of 60% of the basic loan rate for cooperators, which in 1940 was 64. See United States Department of Agriculture Press Release, May 20, 1940. The same percentage was employed in 10(c) of the amendment of May 26, 1941, and the increase in the amount of the

loan is the result of an increase in the basic loan rate effected by 10(a) of the amendment.

[[Footnote 38](#)]

Wheat -- 507, 728.251(b), 6 Federal Register 2695, 2701.

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