

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
ROBERT H. JACKSON

May 25, 1942

My dear Chief: Re 1080 - Wickard v. Filburn.

I have read with care the cases you cited to me. I agree with them wholeheartedly and would not depart from them. I particularly like your statement in Carolene Products of the principle.

However, the latter concerned principally the validity of the act in question under the due process clause, and the other cases concern the same clause of the Fourteenth Amendment. In such cases if a rational basis is perceived it of course is not the Court's function to balance the reasons.

And so it would be under the commerce clause if the subject of the regulation were interstate commerce. But here, admittedly, it is not. Activities that are neither interstate nor commerce are regulated because of their effect on interstate commerce.

The Constitution drew a line between state and federal power and here the Congress wants to cross that line admittedly. I suppose that before we give it our approval there must be some finding that it is warranted by facts and conditions. Otherwise, the federal compact was pretty meaningless if Congress is to be sole judge of the extent of its own commerce power. As you have well pointed out in the Darby case, sometimes the Court has been required to determine the facts that carry federal power across the line; sometimes administrative bodies do it; sometimes Congress has done it -- but only, I think, where the effect was obvious to the naked judicial eye.

If I am wrong about the proposition that whereas regulation of interstate commerce itself requires no

The Chief Justice

-2-

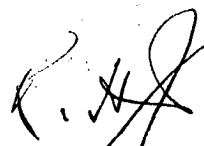
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justification beyond the will of Congress, but regulation of what is neither interstate nor commerce does depend on at least a reasonably probable effect of some kind, not too indirect, remote or trivial, then we have no function but to stamp this Act O.K. ✓

The performance of the Court below and of the plaintiff's counsel gives little hope that they would much sharpen the real issue, and I am afraid that most of the Government men feel too sure of the Court to bother with enlightening it.

So I would avoid the row with Black (I notice he dissented from that part of your Carolene opinion) on the method and with such meagre help as we will get from reargument settle down in the fall to deciding the merits. And, if a completely baffled mind can be called an open one, mine is.

Respectfully,



Robert H. Jackson