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Supreme Court of the United States.

UNITED STATES
v.
CAROLENE PRODUCTS CO.
No. 640.

Argued April 6, 1938.
Decided April 25, 1938.

The Carolene Products Company was indicted for shipping in interstate commerce a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. Judgment sustaining a demurrer to the indictment, and the United States appeals.

Reversed.

Mr. Justice McREYNOLDS dissenting.

Appeal from the District Court of the United States for the Southern District of Illinois.

Messrs. Homer S. Cummings, Atty. Gen., and Brien McMahon, Asst. Atty. Gen., for appellant.

Mr. George N. Murdock, of Chicago, Ill., for appellee.

Mr. Justice STONE delivered the opinion of the Court.

The question for decision is whether the Filled Milk Act of Congress of March 4, 1923, c. 262, 42 Stat. 1486, 21 U.S.C. ss 61-63, 21 U.S.C.A. s 61-63,[FN1] which prohibits the shipment in ***146** interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

FN1 The relevant portions of the statute are as follows:

Section 61. * * * (c) The term 'filled milk' means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, Powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated.'

s 62. * * * It is declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to * * * ship or deliver for shipment in interstate or foreign commerce, any filled milk.

Section 63 imposes as penalties for violations a fine of not more than $1,000 or imprisonment of not more

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than one year, or both.

Appellee was indicted in the District Court for Southern Illinois for violation of the act by the shipment in interstate commerce of certain packages of Milnut, a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. The indictment states, in the words of the statute, section 2, 21 U.S.C.A. s 62, that Milnut is an adulterated article of food, injurious to the public health, and that it is not a prepared food product of the type excepted from the prohibition of the act. The trial court sustained a demurrer to the indictment on the authority of an earlier case in the same court, United States v. Carolene Products Co., D.C., 7 F.Supp. 500. The case was brought here on appeal under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, 18 U.S.C. s 682, 18 U.S.C.A. s 682. The Court of Appeals for the Seventh Circuit has meanwhile, in another case, upheld the Filled Milk Act as an appropriate exercise of the commerce power in Carolene Products Co. v. Evaporated Milk Ass'n, 7 Cir., 93 F.2d 202.

Appellee assails the statute as beyond the power of Congress over interstate commerce, and hence an invasion of a field of action said to be reserved to the states by the Tenth Amendment. Appellee also complains that the ***147** statute denies to it equal ****781** protection of the laws, and in violation of the Fifth Amendment, deprives it of its property without due process of law, particularly in that the statute purports to make binding and conclusive upon appellee the legislative declaration that appellee's product is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud on the public.

[The Court found the prohibition to be within Congress's Commerce Power.]

Document1zzF71938122797Second. The prohibition of shipment of appellee's product in interstate commerce does not infringe [the Due Process Clause of] the Fifth Amendment. Twenty years ago this Court, in Hebe Co. v. Shaw, 248 U.S. 297, 39 S.Ct. 125, 63 L.Ed. 255, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the Legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute.

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There is nothing in the Constitution which compels a Legislature, either national or state, to ignore such evidence, nor need it disregard the other evidence which amply supports the conclusions of the Congressional committees that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult. FN3

FN3 There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are

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essential growth producing and disease preventing elements in the diet. See Dr. Henry C. Sherman, The Meaning of Vitamin A, in Science, Dec. 21, 1928, p. 619; Dr. E. V. McCollum et al., The Newer Knowledge of Nutrition, 1929 Ed., pp. 134, 170, 176, 177; Dr. A. S. Root, Food Vitamins (N. Car. State Board of Health, May, 1931), p. 2; Dr. Henry C. Sherman, Chemistry of Food and Nutrition (1932), p. 367; Dr. Mary S. Rose, The Foundations of Nutrition. 1933, p. 237.

Document1zzF101938122797Document1zzF111938122797Third. We may assume for present purposes that no pronouncement of a Legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.

Document1zzF121938122797Document1zzF131938122797But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. ***Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.***[FN4] . . .

[*PL*: I have italicized and put these words in bold type because they really put a dagger through the heart of economic substantive due process. Note, thought, that Justice Stone speaks only of "legislation affecting ordinary commercial transactions." It is at this point that he dropped "the most famous footnote in constitutional history," footnote four to Carolene Products. Read the footnote, which follows immediately below, carefully. It has been interpreted as saying that individual liberties are to be treated in a "preferred position" to economic ones, though the law clerk who drafted it in the first instance, later Columbia Professor Louis Lusky, wrote two books arguing for a narrower interpretation.]

FN4 There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U.S. 359, 369, 370, 51 S.Ct. 532, 535, 536, 75 L.Ed. 1117, 73 A.L.R. 1484; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, decided March 28, 1938.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under

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the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458; on restraints upon the dissemination of information, see Near v. Minnesota, 283 U.S. 697, 713-714, 718-720, 722, 51 S.Ct. 625, 630, 632, 633, 75 L.Ed. 1357; Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108; Whitney v. California, 274 U.S. 357, 373-378, 47 S.Ct. 641, 647, 649, 71 L.Ed. 1095; Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278.

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, or national, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446; Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047; Farrington v. Tokushige, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646, or racial minorities. Nixon v. Herndon, supra; Nixon v. Condon, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428, 4 L.Ed. 579; South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734, decided February 14, 1938, note 2, and cases cited.

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Document1zzF181938122797The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce. As the statute is not unconstitutional on its face, the demurrer should have been overruled and the judgment will be reversed.

Reversed.

Mr. Justice BLACK concurs in the result and in all of the opinion except the part marked Third.

Mr. Justice McREYNOLDS thinks that the judgment should be affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice BUTLER.

I concur in the result. Prima facie the facts alleged in the indictment are sufficient to constitute a violation of the statute. But they are not sufficient conclusively to establish guilt of the accused. At the trial it may introduce evidence to show that the declaration of the act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation. Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 55 L.Ed. 78, 32 L.R.A.,N.S., 226, Ann.Cas.1912A, 463; Manley v. Georgia, 279 U.S. 1, 6, 49 S.Ct. 215, 217, 73 L.Ed. 575. The provisions on which the indictment rests should if possible be construed to avoid the serious question of constitutionality. Federal Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, 307, 44 S.Ct. 336, 337, 68 L.Ed. 696, 32 A.L.R. 786; Panama R.R. Co. v. Johnson, 264 U.S. 375, 390, 44 S.Ct. 391, 395,

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68 L.Ed. 748; Missouri Pac. R.R. v. Boone, 270 U.S. 466, 472, 46 S.Ct. 341, 343, 70 L.Ed. 688; Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346, 48 S.Ct. 194, 198, 72 L.Ed. 303. If construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive, they are repugnant to the Fifth Amendment. Weaver v. Palmer Bros. Co., 270 U.S. 402, 412, 413, 46 S.Ct. 320, 322, 70 L.Ed. 654. See People v. Carolene Products Co., 345 Ill. 166, 177 N.E. 698. Carolene Products Co. v. McLaughlin, 365 Ill. 62, 5 N.E.2d 447; Carolene Products Co. v. Thomson, 276 Mich. 172, 267 N.W. 608.
http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=594&FindType=Y&SerialNum=1936108791rslt Carolene Products Co. v. Banning, 131 Neb. 429, 268 N.W. 313. The allegation of the indictment that Milnut is an adulterated article of food, injurious to the public health, tenders an issue of fact to be determined upon evidence. U.S. 1938.

U.S. v. Carolene Products Co.
304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234
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