

**Constitutional Law—Regulation of Interstate Commerce in Food—
Filled Milk Act (U.S. v. Carolene Food Products Co., 58 S. Ct. 778
(1938))**

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Relying on the reasoning of that case the court in *Hering v. State Board of Education*¹² came to the conclusion that since the salute to the flag was required in public schools only and since children are not required to attend a public school, the prosecutor's children might "seek their schooling elsewhere". But where there is no school, other than the public school in the district where the children reside, or where the parents are unable to pay for other schooling, the advice "they can seek their schooling elsewhere" is impracticable. The instant case is clearly distinguishable from the *Hamilton* case. The defendants here were under a duty to send their child to school while in the *Hamilton* case, the students were not compelled to attend the university. It would seem that this case is decided on principles more vital and fundamental than were necessary to decide the *Hamilton* case.

P. S.

CONSTITUTIONAL LAW—REGULATION OF INTERSTATE COMMERCE IN FOOD—FILLED MILK ACT.—Defendant was indicted for violation of the Filled Milk Act¹ which prohibits the shipment in interstate commerce of skimmed milk compounded with any oil or fat other than milk fat so as to resemble milk or cream. On appeal by the United States from a judgment sustaining a demurrer to the indictment, *held*, reversed. The statute is not unconstitutional on its face. It is a valid regulation of interstate commerce and is not violative of the due process clause of the Fifth Amendment.² *United States v. Carolene Food Products Co.*, — U. S. —, 58 Sup. Ct. 778 (1938).

Congress may regulate interstate commerce to prevent its use in the promotion of immoral or dishonest projects.³ Its channels may be closed to those articles which are injurious to the public health.⁴ Such regulation is not invalid as invading the rights reserved to the states merely because it has the qualities of police regulation usually exer-

the light of our decisions that proposition must at once be put aside as untenable."

¹² 117 N. J. L. 455, 189 Atl. 629 (1937).

¹ 42 STAT. 1486 (1923), 1 U. S. C. § 61 (1934).

² Cf. *Hebe Co. v. Shaw*, 248 U. S. 297, 39 Sup. Ct. 125 (1918) (wherein it was held that a state law forbidding the manufacture and sale of skim milk compounded with cocoanut oil was not invalid under the Fourteenth Amendment).

³ *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92 (1902); *Lottery Case*, *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321 (1902); *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364 (1910); *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1912); *United States v. Hill*, 248 U. S. 420, 39 Sup. Ct. 143 (1918); *Brooks v. United States*, 267 U. S. 432, 45 Sup. Ct. 435 (1924).

⁴ See note 3, *supra*.

cised by the states.⁵ Accordingly, such varied items as diseased cattle,⁶ lottery tickets,⁷ adulterated foods,⁸ and stolen autos,⁹ have been excluded from interstate transportation. In line with this, the prohibition of the shipment of filled milk is a valid regulation of commerce provided it stands the test of reasonableness so as not to invade the constitutional guarantee of due process.

Before a legislative enactment will be declared arbitrary and unreasonable it must appear that the practice or article it is intended to suppress is unquestionably innocuous and in no way fraught with danger to the public health and welfare.¹⁰ If the question is a debatable one the judgment of the legislature is conclusive. In such case neither opinions of courts nor verdicts of juries may overrule legislative decision.¹¹ In this light the Filled Milk Act may not be declared void. It has been found that filled milk¹² is confused with and used instead of whole milk products.¹³ This has resulted in undernourishment and the usual diseases attendant upon malnutrition.¹⁴ The sale of filled milk has been widely recognized as inimical to the public health.¹⁵ Thus it may be said that it is at least questionable whether or not the use of filled milk is a harmless practice, and hence the legislative judgment must control.¹⁶

⁵ *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1912); *Seven Cases v. United States*, 239 U. S. 510, 36 Sup. Ct. 190 (1915).

⁶ *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92 (1902).

⁷ *Champion v. Ames*, 188 U. S. 321, 21 Sup. Ct. 321 (1902).

⁸ *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364 (1910).

⁹ *Brooks v. United States*, 267 U. S. 432, 45 Sup. Ct. 435 (1924).

¹⁰ *Price v. Illinois*, 238 U. S. 446, 35 Sup. Ct. 892 (1914) and cases cited therein.

¹¹ *Price v. Illinois*, 238 U. S. 446, 35 Sup. Ct. 892 (1914); *cf. Rast v. Van Deman & Leis*, 240 U. S. 342, 36 Sup. Ct. 370 (1915).

¹² "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, powdered, dried, or desiccated. * * *" 42 STAT. 1486 (1923), 21 U. S. C. § 61 (1934).

¹³ Such confusion is encouraged by their identical taste and appearance, by the practice of grocers in offering it as a product "just as good" as milk, by the inability of people to read labels, and by the practice of hotels and boarding houses in serving the product to guests who have no way of knowing that they are using filled milk.

¹⁴ See Report of the House Committee on Agriculture, H. R. REP. No. 365, 67th Cong., 1st Sess. (1930); Report of the Senate Committee on Agriculture and Forestry, SEN. REP. No. 987, 67th Cong., 4th Sess. (1930).

¹⁵ Statutes in over thirty states now prohibit the sale of filled milk. Instant case at 782, n. 3.

¹⁶ Yet state laws restricting commerce in this product have been declared void. *People v. Carolene Products Co.*, 345 Ill. 166, 177 N. E. 698 (1931); *Carolene Products Co. v. McLoughlin*, 365 Ill. 62, 5 N. E. (2d) 447 (1936); *Carolene Products Co. v. Thomson*, 276 Mich. 172, 267 N. W. 608 (1936); *Carolene Products Co. v. Banning*, 131 Neb. 429, 268 N. W. 313 (1936).

In the case of *Carolene Products Co. v. Evaporated Milk Ass'n*,¹⁷ the constitutionality of the Filled Milk Act was also involved. There, the plaintiff (defendant in the principal case) attacked the validity of the Act on the basis of the decision in *Hammer v. Dagenhart*.¹⁸ In that case a statute prohibiting the transportation in interstate commerce of goods made by child labor was declared unconstitutional because it was a regulation not of commerce, but of child labor, a local matter.¹⁹ The court pointed out, however, that, unlike the case in which lottery tickets had been banned from interstate commerce,²⁰ the products of child labor were of themselves harmless, and the use of interstate commerce was not necessary to effect an evil.²¹ The situation in the case of filled milk resembles the one in the *Lottery* case²² rather than the one in *Hammer v. Dagenhart*. The products of child labor as such have no deleterious effect on the consumer; the use of filled milk does have such an effect, and in such case the principle enunciated in *Hammer v. Dagenhart* has no application. It was in this view that the constitutionality of the Filled Milk Act was upheld in the Circuit Court.

A. W.

CONSTITUTIONAL LAW—RIGHT OF FREEDOM FROM INVASION IN ONE'S HOUSE—POLICE POWER.—Petitioner made a motion for an injunction to restrain the defendant from stationing police officers on his premises. The defendant justified this action because of (1) the suspicious external appliances such as peepholes, etc., used in connection with the supposed "grocery" and (2) the absence of any explanation by the petitioner as to why thirty to fifty men habitually loitered in the basement of the store. *Held*, injunction denied. The right of freedom from invasion in one's house depends on obedience to law and cannot be used to shield the commission of crime. Police officers may properly be stationed on private premises to prevent the commission of crime. *Oriental Merchants Association v. Valentine*, 167 Misc. 373, 3 N. Y. Supp. (2d) 229 (1938).

The fundamental principle that every person shall be protected in the enjoyment of his life, liberty and his property may be traced back to the Magna Carta and is now embodied, in some form, in every one

¹⁷ 93 F. (2d) 202 (C. C. A. 7th, 1938).

¹⁸ 247 U. S. 251, 38 Sup. Ct. 529 (1917).

¹⁹ *Cf.* *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42 Sup. Ct. 449 (1921) (a tax on the net income of employers of child labor was held not a proper exercise of the taxing power but a regulation of child labor).

²⁰ See note 7, *supra*.

²¹ See *Hammer v. Dagenhart*, 247 U. S. 251, 271, 38 Sup. Ct. 529 (1917); *Brooks v. United States*, 267 U. S. 432, 438, 45 Sup. Ct. 435 (1924).

²² See note 7, *supra*.