

FILBURN'S LEGACY



*Jim Chen**

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I. INTRODUCTION

His name was farmer Filburn, we looked in on his wheat sales.
We caught him exceeding his quota. A criminal hard as nails.

* James L. Krusemark Professor of Law, University of Minnesota Law School <chenx064@maroon.tc.umn.edu>. Melissa Listug Klick and Kelly C. Wolford provided very capable research assistance. Kathleen Chen, Brannon P. Denning, Michael C. Dorf, Daniel A. Farber, Gil Grantmore, Ronald J. Krotoszynski, Jr., David McGowan, and Howard Wasserman supplied helpful comments. All of the Ohio newspapers cited in this Article and the Filburn family history cited below in note 114 are available in the Dayton and Montgomery County Public Library. This Article will appear in *CONSTITUTIONAL LAW STORIES* (Michael C. Dorf ed., Foundation Press 2003), and alters the focus in my previous work on *Wickard v. Filburn*, 317 U.S. 111 (1942), see Jim Chen, *Filburn's Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249 (1997), from international economic law to American constitutional law. I presented this Article at a faculty colloquium at the University of Colorado School of Law on October 31, 2003, and benefited greatly from the comments I received there.

I wish especially to thank Mary Lou Filbrun Spurgeon, whose cooperation in telling her father's story was invaluable. In fact, the photo of Roscoe Filburn which appears on the first page of this Article was given to me by Mrs. Spurgeon. I have drawn much of my history of the Filburn/Filbrun family from an August 30, 2002, letter from Mrs. Spurgeon to my research assistant, Kelly C. Wolford. One item of family history not covered in that letter is Roscoe Curtiss Filburn's decision in the early 1950s to change the spelling of his family name to "Filbrun." Mrs. Spurgeon has told me personally that she knows of no specific impetus for the spelling change. I shall refer to this Article's protagonist as Roscoe *Filburn* when discussing the litigation for which he is known among lawyers, but as Roscoe *Filbrun* when discussing his later life.

He said, "I don't sell none interstate."
 I said, "That don't mean cow flop.
 We think you're affecting commerce."
 And I set fire to his crop, HOT DAMN!
 Cause we got interstate commerce
 Ain't no where to run!
 We gone regulate you
 That's how we have fun.¹

"The United States was born in the country and has moved to the city."² America nevertheless remains rooted in its rural beginnings. Strikingly large chunks of constitutional law originate in this nation's agrarian past.³ Those who succumb to a wealthy society's "intellectual hostility . . . to the study of 'farm' law"⁴ will fail to appreciate the numerous constitutional landmarks that have arisen from seemingly humble disputes over crop production, animal husbandry, and the processing of agricultural commodities.

*Wickard v. Filburn*⁵ is the rare case that bridges the illusory gap between agricultural and constitutional law. *Filburn*⁶ is probably the second most famous Supreme Court case with an agricultural pedigree, ranking close behind *United States v. Carolene Products Co.*;⁷ a few notches ahead of *The*

¹ Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 674 (1995) (setting these lyrics to the tune of "Convoy").

² RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO FDR* 23 (1955).

³ Cf. Jim Chen, *The Potable Constitution*, 15 CONST. COMMENT. 1 (1998) (using cases involving milk, liquor, and other beverages to outline the contours of American constitutional law).

⁴ Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization and Practice*, 43 ARK. L. REV. 503, 511 (1990); see also Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613, 619 (1994) (documenting the "gulf between our apparent concerns for health and our understanding of the scientific and economic processes of agriculture").

⁵ 317 U.S. 111 (1942).

⁶ *Wickard v. Filburn*, of course, should be abbreviated as *Filburn* and not as *Wickard*. As Secretary of Agriculture, Claude R. Wickard was involved in far more cases than Roscoe C. Filburn, a farmer and private citizen. Once upon a time the Supreme Court understood this distinction and called *Filburn* by its proper short name. See, e.g., *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 231 n.10 (1948) (referring twice to "the *Filburn* case"). A leading Commerce Clause and Tenth Amendment decision of the Warren Court, however, used *Wickard* as the short form, see *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968), and by now all hope of restoring this traditional citation convention seems lost. See, e.g., *United States v. Lopez*, 514 U.S. 549, 556-58 (1995) (referring constantly to "*Wickard*"). When even the Supreme Court calls old tax cases by the name of history's most celebrated Commissioner of Internal Revenue, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 232 (1995) (referring to *Helvering v. Hallock*, 309 U.S. 106 (1940), simply as "*Helvering*"), sound citation practice lies beyond hope. See generally Gil Grantmore, *The Death of Contra*, 52 STAN. L. REV. 889 (2000).

⁷ 304 U.S. 144 (1938).

Slaughter-House Cases,⁸ *Nebbia v. New York*,⁹ *A.L.A. Schechter Poultry Corp. v. United States*,¹⁰ and *United States v. Butler*,¹¹ and far, far ahead of *Sakraida v. Ag Pro, Inc.*,¹² Justice Brennan's despised "cow shit case."¹³ Though the stories behind these cases are fascinating in their own right,¹⁴ what detains us at the moment is the arresting story of Roscoe C. Filburn's 1941 wheat harvest and how it came to figure so prominently in America's constitutional canon.¹⁵

Federalism is the oldest question of constitutional law,¹⁶ the prime mover in a legal system where nearly every case about civil liberties or governmental structure can and should be viewed as "a case about federalism."¹⁷ Among American innovations in government, "federalism was the unique contribution of the Framers."¹⁸ If indeed the American founding "split the atom of sovereignty,"¹⁹ then the New Deal sustained federalism's first chain reaction.²⁰ In 1942, the year in which Enrico Fermi harnessed atomic fission, the Supreme Court decided *Wickard v. Filburn*.²¹ *Filburn* is at once a product of its era and a beacon across legal generations. The New Deal program at issue in *Filburn* addressed agricultural complaints dating back to the end of World War I. When Roscoe Filburn won an initial victory in federal district court, the local newspaper divided its front page between that news and a dispatch on the

⁸ 83 U.S. (16 Wall.) 36 (1872).

⁹ 291 U.S. 502 (1934).

¹⁰ 295 U.S. 495 (1935).

¹¹ 297 U.S. 1 (1936).

¹² 425 U.S. 273 (1976).

¹³ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 419 (1979) (describing how Chief Justice Burger insulted Justice Brennan by assigning him *Sakraida*, a dreary "patent dispute over a water flush system designed to remove cow manure from the floor of dairy barns"); cf. *id.* at 359 (reporting Justice Brennan's characterization of *Antoine v. Washington*, 420 U.S. 194 (1975), as a "chicken-shit" case). On the significance of what Justice Harlan called "peewee" cases, *id.* at 128, see generally Ronald J. Krotoszynski, Jr., *Cohen v. California: "Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251 (1996); Neil M. Richards, *The Supreme Court Justices' "Boring" Cases*, 4 GREEN BAG 2D 401 (2001).

¹⁴ In particular, see Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989), and Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

¹⁵ See generally LEGAL CANONS (Jack Balkin & Sanford Levinson eds., 2000); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 964 (1998).

¹⁶ *New York v. United States*, 505 U.S. 144, 149 (1992); see also H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

¹⁷ *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

¹⁸ *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

¹⁹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

²⁰ Cf. *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920) (upholding an expansive view of the federal treaty power in spite of "invisible radiation" emanating from the Tenth Amendment).

²¹ 317 U.S. 111 (1942).

Allied war effort in the Dutch East Indies.²² Like art deco architecture, the photography of Margaret Bourke-White²³ and Walker Evans,²⁴ and Christian Dior's exuberant postwar designs,²⁵ *Filburn* bears the cultural marks of the historical sequence from the Jazz Age through the Great Depression and World War II. *Filburn*, so it seems, happened only yesterday.²⁶ By the same token, *Filburn* represents a pivotal moment in the Supreme Court's centuries-long effort to determine the scope of Congress's power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."²⁷

Filburn and other New Deal cases involved two fiercely contested aspects of the Court's Commerce Clause jurisprudence. Each of these points of dispute can be traced to the language of the Constitution itself. One involved the definition of "Commerce"; the other, the significance of the phrase, "among the several States." Before the New Deal, the Supreme Court distinguished sharply between commerce and productive activities such as agriculture, manufacturing, and mining. "Commerce with foreign nations and among the states," wrote the Court in 1880, "consists in intercourse and traffic, including . . . navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."²⁸ At the same time, even the expectation that "products of domestic enterprise in agriculture or manufactures, or in the arts may ultimately become the subjects of foreign [or interstate] commerce" did not entitle Congress to regulate the production of these articles.²⁹ The Court reasoned that such an expansive interpretation of Congress's power to regulate commerce would displace the traditional police power of the states over "not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining—in short, every branch of human industry."³⁰

²² Compare *U.S. Court Voids Wheat Penalty*, DAYTON SUNDAY J.-HERALD, Mar. 15, 1942, at 1, with *Allies Concede Loss of 12 Warships Off Java but Bag 8 Enemy Vessels*, DAYTON SUNDAY J.-HERALD, Mar. 15, 1942, at 1.

²³ See generally MARGARET BOURKE-WHITE, PHOTOGRAPHER (Sean Callahan et al. eds., 1998).

²⁴ See generally JAMES AGEE & WALKER EVANS, LET US NOW PRAISE FAMOUS MEN (1939).

²⁵ See generally MARIE-FRANCE POCHNA, CHRISTIAN DIOR: THE MAN WHO MADE THE WORLD LOOK NEW (Joanna Savill trans., 1996).

²⁶ See generally FREDERICK LEWIS ALLEN, ONLY YESTERDAY: AN INFORMAL HISTORY OF THE NINETEENTWENTIES (1931; rpt. 1997).

²⁷ U.S. CONST. art. I, § 8, cl. 3.

²⁸ *County of Mobile v. Kimball*, 102 U.S. 691, 702 (1880); accord *Kidd v. Pearson*, 128 U.S. 1, 20-21 (1888).

²⁹ *Veazie v. Moor*, 55 U.S. (14 How.) 568, 574 (1852); accord *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936).

³⁰ *Kidd*, 128 U.S. at 21.

At the turn of the twenty-first century, the regulatory power of the federal government reaches each of these fields. The contemporary scope of Congress's power to regulate foreign and interstate commerce draws its strength precisely from the expectation that "the wheat-grower of the northwest, and the cottonplanter of the South, [would] plant, cultivate, and harvest his [or her] crop with an eye on the prices at Liverpool, New York, and Chicago."³¹ Before the New Deal, the "delicate, multiform, and vital interests" in these fields of enterprise seemed inherently "local in all the details of their successful management."³² Today's Court, by contrast, treats the regulation of commodity markets as an appropriate, even routine, subject for federal legislation.³³

Filburn has also figured prominently in the Supreme Court's treatment of the line between intra- and interstate commerce. The Court's Commerce Clause cases have always acknowledged that congressional power does not reach "those internal concerns . . . which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the [federal] government."³⁴ This division of legal responsibility does not mean, however, that "the power of Congress . . . stop[s] at the jurisdictional lines of the several States."³⁵ Commerce Clause jurisprudence before the New Deal established that Congress's power to regulate "instruments of interstate commerce" inherently "embraces the right to control . . . all [intrastate] matters having such a close and substantial relation to interstate traffic that [federal] control is essential or appropriate."³⁶ The fact that certain activities simultaneously affect intrastate and interstate commerce "does not derogate from the complete and paramount authority of Congress over the latter."³⁷

Federal responses to agricultural crises during the early twentieth century triggered a dramatic chapter in the epic struggle to define the boundary between state and federal authority. Even before the New Deal, the Supreme

³¹ *Id.*

³² *Id.*

³³ Cf. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 129-30 (arguing that the reach of "commerce today" to "practically every activity of social life" should enable Congress "to reach, through regulation, practically every activity of social life," even though "the scope of the powers now exercised by Congress far exceeds that imagined by the framers").

³⁴ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

³⁵ *Id.*

³⁶ *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 351 (1914).

³⁷ *Id.*

Court endorsed congressional efforts to combat monopolistic threats to the free flow of livestock and grain within the national economy.³⁸ Agricultural controversies thus helped the Court envision how “commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.”³⁹ The New Deal’s aggressive response to global depression, which dealt extraordinarily harsh blows to American farms and farmers, inspired unprecedented legislation at the frontiers of Congress’s constitutional authority.

By virtue of its prominence in the New Deal debate over agricultural policy, *Wickard v. Filburn* came to assume an even greater role in the ensuing constitutional transformation. But it would be as seriously mistaken to consider *Filburn* settled law as it would be to consign that decision to America’s putatively faded agrarian past. Together with *United States v. Darby*⁴⁰ and especially *NLRB v. Jones & Laughlin Steel Corp.*,⁴¹ *Wickard v. Filburn* is widely thought to have marked a turning point, perhaps even a high-water mark, in Commerce Clause jurisprudence.⁴² Under Chief Justice William H. Rehnquist, the Supreme Court has severely undermined what had been regarded as the post-New Deal consensus on the scope of Congress’s power. A series of decisions since 1994—especially *United States v. Lopez*,⁴³ *Seminole Tribe v. Florida*,⁴⁴ and *City of Boerne v. Flores*⁴⁵—have “put a triple whammy on congressional authority.”⁴⁶ The Rehnquist Court has aggressively reinterpreted the Commerce Clause, the Tenth and Eleventh Amendments, and Section 5 of the Fourteenth Amendment in “a mighty effort to put the states in

³⁸ See, e.g., *Chi. Bd. of Trade v. Olsen*, 262 U.S. 1, 32 (1923); *Stafford v. Wallace*, 258 U.S. 495, 516 (1922).

³⁹ *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905).

⁴⁰ 312 U.S. 100 (1941).

⁴¹ 301 U.S. 1 (1937).

⁴² See *United States v. Morrison*, 529 U.S. 598, 608 (2000) (“[I]n the years since *NLRB v. Jones & Laughlin Steel Corp.*, Congress has had considerably greater latitude . . . than our previous case law permitted.”); *United States v. Lopez*, 514 U.S. 549, 556 (1995) (“*Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in an era of commerce clause jurisprudence that greatly expanded the previously defined authority of Congress”); *id.* at 573 (Kennedy, J., concurring) (describing *Jones & Laughlin* as the “case that seems to mark the Court’s definitive commitment to the practical conception of the commerce power”); *Perez v. United States*, 402 U.S. 146, 151 (1971) (describing *Darby* and *Filburn* as cases that “restored” the “broader view of the Commerce Clause announced by Chief Justice Marshall” in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (listing *Jones & Laughlin Steel*, *Darby*, and *Filburn* among decisions upholding congressional applications of the commerce power).

⁴³ 514 U.S. 549 (1995).

⁴⁴ 517 U.S. 44 (1996).

⁴⁵ 521 U.S. 507 (1997).

⁴⁶ Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1722 (2002).

what” today’s Justices believe “to be their rightful place.”⁴⁷ The Court’s reinvigorated resolve to define clear “distinction[s] between what is truly national and what is truly local” has thrown *Filburn* back into the constitutional fray.⁴⁸

After providing a brief survey of American agriculture and its regulation between the World Wars, I shall describe the specific controversy over Roscoe Filburn’s 1941 wheat crop. In its own time, *Wickard v. Filburn* represented merely one minor component of the New Deal Court’s Commerce Clause jurisprudence. Greater turmoil over the Commerce Clause at the turn of the twenty-first century has breathed new life into *Filburn*. I shall therefore examine not only what *Filburn* meant at the time of its decision, but also what it represents in our time.

II. BACKGROUND: THE AGRICULTURAL NEW DEAL

The plight of American farmers during the Great Depression is the stuff of legend.⁴⁹ A mere generation earlier, though, American farmers were enjoying golden years like none other in the nation’s history. The period immediately before World War I would eventually be memorialized as the “parity” period in federal agricultural law. As defined in current law, “parity” refers to the ratio of current prices, wages, interest rates, and taxes paid by farmers relative to “the general level of such prices, wages, rates, and taxes during the period January 1910 to December 1914, inclusive.”⁵⁰ After its initial articulation during the 1920s,⁵¹ the notion that the government should preserve “the ratio of the prices farmers receive for the products they sell to the prices they pay for goods and services” at a level enjoyed during the “parity” period became a rallying point for those “advocating increased income for farmers.”⁵²

⁴⁷ JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* 8 (2002).

⁴⁸ *Lopez*, 514 U.S. at 567-68.

⁴⁹ See, e.g., JOHN STEINBECK, *THE GRAPES OF WRATH* (1939).

⁵⁰ 7 U.S.C. § 1301(a)(1)(C) (2000); see also *United States v. Butler*, 297 U.S. 1, 54 (1936) (reporting the use of a “base period” of August 1909 through July 1914 in the determination of price and income support levels under the Agricultural Adjustment Act of 1933).

⁵¹ See generally, e.g., GEORGE N. PEEK & HUGH S. JOHNSON, *EQUALITY FOR AGRICULTURE* (1922); William R. Camp, *The Organization of Agriculture in Relation to the Problem of Price Stabilization*, 32 J. POL. ECON. 282 (1924).

⁵² Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 336 (1983); see also PETER H. IRONS, *THE NEW DEAL LAWYERS* 115-16 (1982) (describing the application of the parity principle in the drafting of the Agricultural Adjustment Act of 1933).

The final years before the Great War were in fact American agriculture's golden age. By 1920, the United States was no longer a predominantly rural country. The 1920 Census was the first to report a higher urban than rural population; in the following decade, the urban population of the United States would grow by an unprecedented 15 million.⁵³ The significance of these demographic trends in a larger historic perspective became apparent in the first decennial census after World War II:

In 1790, 1 out of every 20 of the 3,929,214 inhabitants of the United States was living in urban territory. In every decade thereafter, with the exception of that from 1810 to 1820, the rate of growth of the urban population exceeded that of the rural population. By 1860, one out of five persons was included in the urban population. The process of urbanization continued in the following decades, and by 1920 the urban population exceeded the rural population.⁵⁴

America ultimately could not answer the Great War's musical question, "How 'Ya Gonna Keep 'Em Down on the Farm (After They've Seen Paree)?"⁵⁵

But raw population shifts concealed the true drivers of change. Winning the war that made the world safe for democracy rendered the American countryside unfit for agriculture.⁵⁶ "The initial shock of war in 1914 . . . brought an overnight collapse in the foreign sales of wheat and cotton . . ."⁵⁷ American entry into the war drove commodity prices even lower, as the urgent cultivation of forty million new acres poured vast grain harvests out of the Great Plains.⁵⁸ Meanwhile, war-time inflation devastated purchasing power on the farm.⁵⁹

Macroeconomic turmoil coincided with an epochal leap forward in agricultural technology. As it has throughout agricultural history, "the process of economic development and specialization" throughout the early twentieth century transformed "functions which are necessary to the total economic

⁵³ See 2 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1950, at 12 (1953) (Characteristics of the Population / Number of Inhabitants, General and Detailed Characteristics of the Population / United States Summary) (reporting an increase of 14,796,850 in the urban population of the United States between 1920 and 1930).

⁵⁴ *Id.*

⁵⁵ Hear Sam M. Lewis & Joe Young, *How 'Ya Gonna Keep 'Em Down on the Farm (After They've Seen Paree)?* (Waterson, Berlin & Snyder Co. 1919).

⁵⁶ See generally BENJAMIN H. HIBBARD, EFFECTS OF THE GREAT WAR UPON AGRICULTURE IN THE UNITED STATES AND GREAT BRITAIN 22-67 (1919).

⁵⁷ THEODORE SALOUTOS, THE AMERICAN FARMER AND THE NEW DEAL 3 (1982).

⁵⁸ *Id.*

⁵⁹ See A.B. Genung, *The Purchasing Power of the Farmer's Dollar from 1913 to Date*, 117 ANNALS AM. ACAD. POL. & SOC. SCI. 22 (1925).

process of" agriculture into "separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it."⁶⁰ Systematic substitution of internal combustion engines for organic horsepower simultaneously raised yields, increased dependence on purchased inputs, and decreased demand for feed grains.⁶¹ Many American farmers, especially wheat growers, were caught in a classic price squeeze:⁶² depressed demand and prices for their products, coupled with unbearable increases in the cost of living and production.⁶³

Nowhere was the transformation more dramatic than in the South. Full deployment of the mechanical cotton picker between the World Wars rendered "obsolete the sharecropper system" that had taken root after the Civil War.⁶⁴ Boll weevil infestation delivered the *coup de grâce* to the South's agrarian economy.⁶⁵ In "one of the largest and most rapid mass internal movements of people in history," six and a half million black Americans would eventually leave the rural South.⁶⁶ "[W]hen the migration ended" by the end of the 1960s, "black America was . . . less than a quarter rural; 'urban' had become a euphemism for 'black.'"⁶⁷

⁶⁰ *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 761 (1949); see also *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996) (clarifying the distinction between primary agricultural activities and "practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations") (quoting 29 U.S.C. § 203(f) (1994)).

⁶¹ See SALOUTOS, *supra* note 57, at 6, 25.

⁶² See generally, e.g., *FPC v. Conway Corp.*, 426 U.S. 271, 279 (1976); *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1376-77 (9th Cir. 1992); John E. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 UCLA L. REV. 563 (1984).

⁶³ For an explanation of the "agricultural treadmill," the farm-flavored variant of the price squeeze, see WILLARD W. COCHRANE, *FARM PRICES: MYTH AND REALITY* 85-107 (1958); WILLARD C. COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS* 378-95 (1979).

⁶⁴ NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 5 (1991).

⁶⁵ See 4 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *FIFTEENTH CENSUS OF THE UNITED STATES: 1930, AGRICULTURE* 12 (1932) ("[The boll weevil] was probably responsible for more changes in the number of farms, farm acreage, and farm population [during the 1920s] than all other causes put together."); cf. *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 457 (Tex. 1997) (observing that the boll weevil still "presents a major economic threat to the Texas cotton industry" and "causes an estimated \$20 million in crop loss in Texas every year").

⁶⁶ LEMANN, *supra* note 64, at 6; see also CONRAD TAEUBER & IRENE B. TAEUBER, *THE CHANGING POPULATION OF THE UNITED STATES* 109-11 (1958) (describing the internal migration "of Negroes from the South to the other parts of the country" as a phenomenon that had "increased with dramatic speed" as "Negroes [moved] out of the southern States" and into "very largely . . . urban areas").

⁶⁷ LEMANN, *supra* note 64, at 6.

White or black, tenant or freehold, American farmers found no succor in peacetime. Triumph in the Great War paradoxically destroyed foreign markets. Transformed by victory from a global debtor into a creditor, the United States became a nation of importers. A rosy balance of payments made it extremely difficult to restore American agricultural exports to prewar levels.⁶⁸ Political instability razed several significant European markets. Crushed by brutal reparation obligations and by hyperinflation,⁶⁹ Germany hiked tariffs and subsidized domestic grain production.⁷⁰ Fascist Italy likewise closed its markets.⁷¹ The restructuring of Soviet agriculture all but barred imports.⁷²

Amid the global lurch toward forbidding tariffs and agricultural autarky, the United States adopted the same disastrous policies. The McNary-Haugen bills that nearly became law in 1927 and 1928 would have raised a tariff wall against agricultural imports in order to lift sagging domestic commodity prices.⁷³ Herbert Hoover's election ended the McNary-Haugen plan,⁷⁴ but his administration implemented the notoriously protectionist Smoot-Hawley Tariff Act.⁷⁵ As retaliatory tariff barriers rose all over the world, America's "most disastrous single mistake . . . in international relations" completed the rout in agricultural markets.⁷⁶ Domestic supplies soared, exports evaporated, and prices crashed.⁷⁷ In the halcyon days before World War I and the Great De-

⁶⁸ See, e.g., E.C. Nourse, *The Trend of Agricultural Exports*, 36 J. POL. ECON. 330 (1928); Rexford Guy Tugwell, *The Problem of Agriculture*, 39 POL. SCI. Q. 549 (1924).

⁶⁹ See generally JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* 235-48 (1920) (warning, with tragic accuracy, that hyperinflation portended dire political consequences for Germany).

⁷⁰ See Leo Pasvolksy, *International Relations and Financial Conditions in Foreign Countries Affecting the Demand for American Agricultural Products*, 14 J. FARM ECON. 257, 260-62 (1932).

⁷¹ See *id.* at 262-63; N.W. Hazan, *The Agricultural Program of Fascist Italy*, 15 J. FARM ECON. 489 (1933).

⁷² See Mordecai Ezekiel, *European Competition in Agricultural Production with Special Reference to Russia*, 14 J. FARM ECON. 267, 271-73 (1932). But cf. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *FOREIGN COMMERCE AND NAVIGATION OF THE UNITED STATES FOR THE CALENDAR YEAR 1942*, at 5, 346 (1942) (reporting that the Soviet Union had resumed its role as a leading importer of American wheat and flour by the 1940s).

⁷³ See GILBERT C. FITE, *AMERICAN FARMERS: THE NEW MINORITY* 42-47 (1931) (describing the McNary-Haugen plan from its inception in the "parity" movement, see generally PEEK & JOHNSON, *supra* note 51, to two vetoes by President Coolidge and its eventual death upon the election of President Hoover).

⁷⁴ See KENNETH FINEGOLD & THEDA SKOCPOL, *STATE AND PARTY IN AMERICA'S NEW DEAL* 75-81 (1995); Jon Lauck, Note, *Against the Grain: The North Dakota Wheat Pooling Plan and the Liberalization Trend in World Agricultural Markets*, 8 MINN. J. GLOBAL TRADE 289, 293-97 (1999).

⁷⁵ Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1202-1681 (2000)).

⁷⁶ Richard N. Cooper, *Trade Policy as Foreign Policy*, in U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY 291, 291 (Robert M. Stern ed., 1987).

⁷⁷ See U.S. DEP'T OF AGRICULTURE, *AGRICULTURAL STATISTICS 1942*, at 10, 20, 22 (1942) (noting a two-thirds decline in wheat prices between 1929 and 1932 and additional price drops in 1938, 1940, and 1941); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946 (Part Two)*, 59 HARV. L. REV. 883, 901 (1946) (same).

pression, American farmers might have unloaded their harvests abroad. But newly erected tariff barriers sealed off many overseas markets. Nor would war beyond America's shores restore agricultural prosperity. Foreign aid programs such as Lend-Lease and general wartime increases in demand offered only modest and evanescent relief.⁷⁸

The 1932 presidential campaign thus coincided with an important moment in American agricultural history: North and South at last were united in mutual misery.⁷⁹ Foreclosure auctions moved one-quarter of the land in Mississippi on a single day in April 1932.⁸⁰ The Farmers' Holiday Association organized and carried out violent demonstrations throughout the Midwest.⁸¹ Agricultural relief became a central plank of Franklin D. Roosevelt's presidential campaign. A series of meetings with farm leaders at Hyde Park set the future administration's agricultural agenda.⁸²

But Roosevelt's earliest efforts to deliver price and income support⁸³ and debt relief⁸⁴ to farmers met constitutional defeat. After invalidating the Farm Bankruptcy Act of 1934,⁸⁵ the Supreme Court dealt an even harsher blow to the New Deal's agricultural agenda. Ever since it advanced the agrarian component of the legislative package that Congress delivered during the first hundred days of the Roosevelt Administration, the Agricultural Adjustment Act of 1933⁸⁶ had always served as a lightning rod. What Roosevelt hailed as "the most drastic and far-reaching piece of farm legislation proposed in time of peace"⁸⁷ drew opponents' condemnation as an open door for "a Government

⁷⁸ See U.S. DEP'T OF AGRICULTURE, REPORT OF THE SECRETARY OF AGRICULTURE 1943, at 135-36 (1944) (reporting increases in demand for wheat as grain, as animal feed, and as a base for alcohol).

⁷⁹ Cf. Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1316-19 (1995) (contrasting the northern and southern traditions in American agriculture); Paul S. Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. REV. 475, 476-80 (1975) (same).

⁸⁰ See WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940, at 23 (1963).

⁸¹ See FITE, *supra* note 73, at 53-54.

⁸² See FRANK FREIDEL, FRANKLIN D. ROOSEVELT: THE TRIUMPH 342-50 (1956).

⁸³ See Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-627 (2000)).

⁸⁴ See Frazier-Lemke Farm Bankruptcy Act, ch. 869, 48 Stat. 1289 (1934).

⁸⁵ See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594-98 (1935).

⁸⁶ Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31.

⁸⁷ Franklin D. Roosevelt, "New Means to Rescue Agriculture"—*The Agricultural Adjustment Act*, in 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 74, 79 (1938); cf. Breimyer, *supra* note 52, at 342-43 (describing the "instrumental" role played by "the personality of Franklin D. Roosevelt" in the development of New Deal agricultural policy).

agent [into] every back yard.”⁸⁸ In the 1936 decision of *United States v. Butler*,⁸⁹ the Supreme Court held that the Act’s tax on agricultural processors unconstitutionally “invade[d] the reserved rights of the states” insofar as it purported “to regulate and control agricultural production, a matter beyond the powers delegated to the federal government.”⁹⁰ This Tenth Amendment decision came on the heels of *A.L.A. Schechter Poultry Corp. v. United States*,⁹¹ which invalidated the National Industrial Recovery Act. Both the National Industrial Recovery Act and the Agricultural Adjustment Act—the figurative hammer and sickle of Roosevelt’s Hundred Days—lay in ruins.

The Court’s Commerce Clause jurisprudence, however, was evolving rapidly to accommodate more expansive federal regulation. The crucial step came in the 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*⁹² In upholding the National Labor Relations Act, *Jones & Laughlin* blurred the distinction between commerce and productive activities such as manufacturing and agriculture. Whether regulated entities are “engaged in production is not determinative,” wrote Chief Justice Charles Evans Hughes.⁹³ Rather, *Jones & Laughlin* measured the federal commerce power according to a regulated activity’s “effect upon interstate commerce.”⁹⁴ Expanding the “stream of commerce” metaphor that dominated agricultural disputes before the New Deal,⁹⁵ *Jones & Laughlin* authorized Congress to remove “[b]urdens and obstructions . . . springing from other sources.”⁹⁶

The shift in constitutional jurisprudence revitalized Roosevelt’s agricultural agenda. By the end of Roosevelt’s second term, Congress and a more compliant Court restored the basic architecture of the New Deal’s agricultural policy. From 1935 to 1938, Congress passed four major statutes that reinstated earlier New Deal laws in all but name: the Frazier-Lemke Farm Bankruptcy Act of 1935,⁹⁷ the Soil Conservation and Domestic Allotment Act of 1936,⁹⁸

⁸⁸ Gilbert C. Fite, *Farmer Opinion and the Agricultural Adjustment Act, 1933*, 48 MISS. VALLEY HIST. REV. 656, 669 (1962).

⁸⁹ 297 U.S. 1 (1936).

⁹⁰ *Id.* at 68.

⁹¹ 295 U.S. 495 (1935).

⁹² 301 U.S. 1 (1937).

⁹³ *Id.* at 40.

⁹⁴ *Id.*

⁹⁵ See *id.* at 34-36 (citing, *inter alia*, *Stafford v. Wallace*, 258 U.S. 495 (1922)).

⁹⁶ *Chi. Bd. of Trade v. Olsen*, 262 U.S. 1, 32 (1923) (characterizing grain futures transactions as “a constantly recurring burden and obstruction to [interstate] commerce,” even though those transactions were “not in and of themselves interstate commerce”).

⁹⁷ Act of Aug. 28, 1935, ch. 792, 49 Stat. 942.

the Agricultural Marketing Agreement Act of 1937,⁹⁹ and the monumental Agricultural Adjustment Act of 1938.¹⁰⁰ By 1939, the new Farm Bankruptcy Act, the Agricultural Marketing Agreement Act, and the new Agricultural Adjustment Act had all withstood constitutional challenges.¹⁰¹ The soil conservation law escaped legal scrutiny because “[n]o one could challenge the value” or the constitutionality “of conservation.”¹⁰² Payments for planting “soil-conserving” crops thus restored most of the acreage reduction agenda of the invalidated Agricultural Adjustment Act of 1933.¹⁰³ The Supreme Court’s decision to uphold a tobacco inspection statute undoubtedly reinforced the Roosevelt Administration’s growing sense of invulnerability.¹⁰⁴

Among the cases in this triumphant sequence, *Mulford v. Smith*¹⁰⁵ was perhaps the most significant. Even though the tobacco marketing quotas imposed by the Agricultural Adjustment Act of 1938 intruded far more aggressively into the farm economy than the processing taxes inspired by the 1933 Act, *Mulford* approved the 1938 Act with little fanfare. Whereas the 1933 Act had been condemned merely three years earlier as an unconstitutional “plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government,”¹⁰⁶ *Mulford* blessed the 1938 Act as a program “intended to foster, protect and conserve [interstate] commerce.”¹⁰⁷

⁹⁸ Act of Feb. 29, 1936, ch. 104, 49 Stat. 1148.

⁹⁹ Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 671-674 (2000)).

¹⁰⁰ Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. §§ 1281-1393 (2000)).

¹⁰¹ See *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 562-81 (1939) (upholding the Agricultural Marketing Agreement Act of 1937); *Mulford v. Smith*, 307 U.S. 38, 47-51 (1939) (upholding the Agricultural Adjustment Act of 1938); *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440, 470 (1937) (upholding the Farm Bankruptcy Act of 1935); see also *H.P. Hood & Sons v. United States*, 307 U.S. 588, 595 (1939) (regarding *Rock Royal* as “determinative” of the constitutionality of the Agricultural Marketing Agreement Act).

¹⁰² *Breimyier*, *supra* note 52, at 348; cf. *Mayo v. United States*, 319 U.S. 441, 446-48 (1943) (exempting fertilizer distributed by federal agriculture officials from a Florida inspection law under the theory of intergovernmental immunity).

¹⁰³ See FITE, *supra* note 73, at 60; *Breimyier*, *supra* note 52, at 348-49 & n.65; Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333, 343 (1995).

¹⁰⁴ See *Curran v. Wallace*, 306 U.S. 1 (1939) (upholding the Tobacco Inspection Act, Act of Aug. 23, 1935, ch. 623, 49 Stat. 731).

¹⁰⁵ 307 U.S. 38 (1939).

¹⁰⁶ *United States v. Butler*, 297 U.S. 1, 68 (1936).

¹⁰⁷ *Mulford*, 307 U.S. at 48.

This shift in Commerce Clause jurisprudence made a manifest difference. In *Mulford*'s immediate wake, a circuit court upheld cotton marketing quotas imposed by the Agricultural Adjustment Act.¹⁰⁸ Other Supreme Court cases established Congress's power to fix commodity prices directly.¹⁰⁹ *United States v. Darby*,¹¹⁰ which upheld the Fair Labor Standards Act of 1938, resolved most of the important remaining Commerce Clause issues. In addition to overruling *Hammer v. Dagenhart*,¹¹¹ the 1918 decision that had confined Congress's commerce power "to articles which in themselves have some harmful or deleterious property,"¹¹² *Darby* renounced any judicial authority to question Congress's "motive and purpose" in framing legislation "to make effective [the federal] conception of public policy" for interstate commerce.¹¹³ By 1941, in short, the Roosevelt Administration's struggle to reinvent the Commerce Clause in its image had been waged and won.

III. REVISITING *WICKARD V. FILBURN*

A. *The Lower Court Decision*

Roscoe Curtiss Filburn was born August 2, 1902, in Dayton, Ohio.¹¹⁴ He represented the fifth generation of an Ohio farm family.¹¹⁵ His maternal grandparents, John and Susannah Smith, purchased and farmed a full section in Montgomery County.¹¹⁶ The Smiths divided their 640 acres among seven children. Mary Elizabeth, known as Lizzie, received the homestead, ninety-five acres of farmland, and nine additional wooded acres.¹¹⁷ Roscoe Filburn's middle name, Curtiss, was the first name of the physician who saved the arm of his father, Martin, after a threshing accident.¹¹⁸ A family biography provided a

¹⁰⁸ See *Troppy v. LaSara Farmers Gin Co.*, 113 F.2d 350 (5th Cir. 1940).

¹⁰⁹ See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393-94 (1940); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 571 (1939); cf. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-16 (1936) (declining to rule on Congress's power to fix coal prices).

¹¹⁰ 312 U.S. 100 (1941).

¹¹¹ 247 U.S. 251 (1918).

¹¹² *Darby*, 312 U.S. at 116 (overruling *Hammer*).

¹¹³ *Id.* at 115.

¹¹⁴ See JERRY ALLEN FILBRUN, JEANETTE FILBRUN HOWELL & PHYLLIS FILBRUN MCNELLY, A FILBRUNN FAMILY HISTORY: VARIOUS MEMBERS OF THE FAMILIES FILBRUNN, FILBRUN, FILBURN, ET AL., 1570-1985, at 176 (1985) [hereinafter FILBRUN FAMILY HISTORY].

¹¹⁵ See *id.* at 174.

¹¹⁶ See Letter from Mary Lou Filbrun Spurgeon to Kelly C. Wolford (Aug. 30, 2002) (on file with author) [hereinafter Spurgeon Letter].

¹¹⁷ See FILBRUN FAMILY HISTORY, *supra* note 114, at 174.

¹¹⁸ See *id.*

single quote testifying to Roscoe Filburn's "sense of pride": "I never worked for another man in my life."¹¹⁹

A lifelong farmer, Roscoe Filburn raised dairy cattle and poultry. His daughter reports that the family welcomed "75 . . . customers . . . every day for milk and eggs."¹²⁰ Roscoe Filburn also planted winter wheat each fall and harvested the crop the following summer. Filburn sold part of his wheat crop, fed part to his cattle and poultry, ground part into flour for household consumption, and kept the rest as seed for the following season. Under the terms of the 1938 Act, he had been allotted an entitlement to cultivate 11.1 acres of wheat at a normal yield of 20.1 bushels per acre. In fall 1940, Filburn planted not 11.1 but 23 acres of wheat. In July 1941, he harvested 462 bushels in all.¹²¹ His extra 11.9 acres yielded 239 bushels of wheat.

Filburn's excess harvest violated his acreage allotment under the Agricultural Adjustment Act of 1938. Acreage limitations were the Act's primary tool for controlling the supply of federally subsidized crops. Supply control has always played a crucial role in rationalizing agricultural regulation. Because excessive production can stretch the gap between the market price for a commodity and the target price set in a government-sponsored support program, virtually every price support mechanism is paired with some sort of supply control.¹²² The need to engage in some form of price control increases dramatically when the government extends nonrecourse loans to producers, which effectively raise minimum commodity prices paid to participating producers.¹²³ Before the 1941 planting season, it became evident that "[t]he low prices [for wheat] were obviously the result of the excessive supply."¹²⁴ Only stiffer penalties on excess production could prevent already overflowing stocks from surpassing the all-time high, which had been reached in 1940.¹²⁵ Some constraint on production seemed inevitable in spite of farmers' traditional opposition to acreage restrictions.¹²⁶

¹¹⁹ *Id.* at 176.

¹²⁰ Spurgeon Letter, *supra* note 116.

¹²¹ See *Wheat Control Challenged*, DAYTON J., July 15, 1941, at 1, 2.

¹²² See J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763, 787-88 (1993).

¹²³ See, e.g., *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064, 1067 (5th Cir. 1981).

¹²⁴ Stern, *supra* note 77, at 902.

¹²⁵ See *id.* at 901-02.

¹²⁶ See FITE, *supra* note 73, at 51-52.

Fear of a wheat glut and an accompanying price crash turned the spotlight to the supply control provisions of the Agricultural Adjustment Act. The Act directed the Secretary of Agriculture to proclaim a national acreage allotment for each year's wheat crop, which in turn would be apportioned among the states, their constituent counties, and ultimately among individual farms. Potential production limits were triggered in any marketing year (beginning July 1) in which the Secretary projected that the total wheat supply would exceed a normal year's domestic consumption and export by more than thirty-five percent. Under the terms of the Act, however, the Secretary was required to make a proclamation to that effect by May 15. After the issuance of such a proclamation, but before June 10, the Secretary would be required to conduct a referendum of affected wheat farmers. A compulsory national marketing quota for wheat would take effect for the marketing year unless more than one-third of farmers participating in the referendum voted to suspend the quota. When Filburn planted his 1941 crop, the Act penalized farm marketing excess in wheat at fifteen cents per bushel.¹²⁷

During the spring of 1941, Secretary of Agriculture Claude R. Wickard projected a wheat surplus for the coming marketing year and accordingly proposed a marketing quota. He scheduled a national referendum among wheat growers for May 31. In a nationwide radio address on May 19, Secretary Wickard urged wheat farmers to support the referendum. Secretary Wickard mentioned a pending bill before Congress, which if passed would raise the nonrecourse loan rate on wheat to eighty-five percent of parity. The resulting increase in the effective minimum market price would prompt more wheat production, which in turn threatened to suppress real market prices for wheat and thereby to increase the government's price support obligations. The wheat program would have delivered "an average price . . . of about \$1.16 a bushel," for the 1941 crop year, "as compared with the world market price of 40 cents a bushel."¹²⁸

During his May 19 address, Secretary Wickard announced: "Because of the uncertain world situation, we deliberately planted several million extra acres of wheat this year. . . . Farmers should not be penalized because they have provided insurance against shortages of food. The nation wants farmers safeguarded against unfair penalties." Secretary Wickard did not mention, however, that the pending amendment to the Agricultural Adjustment Act would

¹²⁷ Wickard v. Filburn, 317 U.S. 111, 126 (1942).

¹²⁸ *Id.*

increase the penalty on farm marketing excess from fifteen cents per bushel to forty-nine cents (one-half of the parity loan rate, which was then ninety-eight cents) and would subject a violating farm's entire wheat crop to a lien in favor of the United States in the amount of the penalty.

On May 26, Congress approved the pending amendment to the Agricultural Adjustment Act. On May 31, the Department of Agriculture conducted the wheat growers' referendum. Among those voting, eighty-one percent favored the marketing quota announced by Secretary Wickard. Ohio farmers, however, voted against the quota.¹²⁹ Thanks to the overwhelming national vote, both the increase in the loan rate on wheat and the strengthened penalty for exceeding individual marketing quotas took effect.

The County Agricultural Conservation Committee, charged with administering the Agricultural Adjustment Act in Montgomery County, Ohio, assessed a penalty of forty-nine cents on each of Filburn's 239 excess bushels and imposed a lien on his entire wheat crop against the \$117.11 penalty. Pending payment, the County Committee also withheld Filburn's marketing card, which he needed in order to sell his wheat.

In a lawsuit filed in the U.S. District Court for the Southern District of Ohio, Filburn challenged the farm marketing excess penalty assessed against him. The majority opinion in this case, styled *Filburn v. Helke*,¹³⁰ failed even to mention the Commerce Clause. Rather, District Judge Robert R. Nevin's opinion for the court emphasized "the circumstances surrounding the referendum," particularly "the fact that the law increasing the penalty was approved only five days prior to the national referendum."¹³¹ According to the court, the case hinged on "whether . . . the necessary two-thirds of the wheat farmers voluntarily voted affirmatively or were unintentionally misled in so voting in the referendum."¹³² The court stressed how the actual effect of the May 26, 1941, amendment—which more than tripled the penalty for farm marketing excess—contradicted Secretary Wickard's purported pledge to safeguard farmers against unfair penalties for deliberately planted excess acreage.¹³³ "[T]he equities of the situation," the court reasoned, "demanded that the Secretary . . . forewarn the farmers that in accepting the benefits of

¹²⁹ See *Wheat Control Challenged*, *supra* note 121, at 2.

¹³⁰ 43 F. Supp. 1017 (S.D. Ohio), *rev'd sub nom.* *Wickard v. Filburn*, 317 U.S. 111 (1942). Carl R. Helke and other members of the County Committee for Montgomery County were named as defendants in Filburn's suit.

¹³¹ *Id.* at 1018. District Judge John H. Druffel joined Judge Nevin in the majority.

¹³² *Id.* at 1019.

¹³³ See *id.*

increased parity loans they were also subjecting themselves to increased penalties for the farm marketing excess.”¹³⁴ The court concluded that the May 26 amendment “operated retroactively” and thereby effected “a taking of [Filburn’s] property without due process.”¹³⁵ In the alternative, the court ruled “that the equities of the case . . . favor[ed] the plaintiff.”¹³⁶ The court thereupon enjoined the County Committee from collecting any penalty against Filburn for farm marketing excess beyond the fifteen cents per bushel authorized by “the Agricultural Adjustment Act of 1938 as it was in effect prior to May 26, 1941.”¹³⁷

Circuit Judge Florence Allen, the lone dissenter, found “no equitable justification for [judicial] interference . . . with the fulfillment of the declared legislative will of the nation.”¹³⁸ Among the members of the district court panel, Judge Allen alone anticipated the constitutional issue for which the *Filburn* litigation would ultimately be known. Relying heavily on Supreme Court cases upholding New Deal agricultural programs¹³⁹ and quoting extensively from congressional findings of fact,¹⁴⁰ Judge Allen reasoned, on the authority of *United States v. Darby*,¹⁴¹ that Filburn’s “local activities . . . affect[ed] the exercise of the granted power of Congress to regulate interstate commerce in sufficient measure that [the prescribed] regulation is an appropriate and hence permissible means of attaining that legitimate end.”¹⁴² She described the Agricultural Adjustment Act “as applied to wheat [as] a valid exercise of the federal commerce power.”¹⁴³

B. The Briefs

The district court’s decision to enjoin enforcement of the Agricultural Adjustment Act on constitutional grounds entitled Secretary Wickard to appeal directly to the Supreme Court. He did so on March 25, 1942. The Supreme Court noted probable jurisdiction on March 30.¹⁴⁴

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1019-20.

¹³⁸ *Id.* at 1020 (Allen, J., dissenting).

¹³⁹ *See id.* at 1022-23 (citing, *inter alia*, *Mulford v. Smith*, 307 U.S. 38 (1939); *United States v. Rock-Royal Coop., Inc.*, 307 U.S. 533 (1939)).

¹⁴⁰ *See id.* (quoting 7 U.S.C. § 1331).

¹⁴¹ 312 U.S. 100, 118 (1941).

¹⁴² *Filburn*, 43 F. Supp. at 1023 (Allen, J., dissenting).

¹⁴³ *Id.* at 1022.

¹⁴⁴ *See Wickard v. Filburn*, 62 S. Ct. 919 (1942).

Three of the five questions presented by the government's initial brief focused on the legal interaction of the Secretary's May 19 radio address, the May 26 amendment to the Act, and the May 31 wheat growers' referendum.¹⁴⁵ The fifth question in the brief challenged Filburn's ability to maintain his action against individual members of the agricultural conservation committees for Ohio and for Montgomery County.¹⁴⁶ The fourth question, however, raised the issue on which *Wickard v. Filburn* would ultimately hinge: "Whether the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938, as amended on May 26, 1941, are within the commerce power of Congress."¹⁴⁷

With respect to the critical question of Congress's power to regulate interstate commerce, the government's Supreme Court brief made two crucial contributions. First, the government demonstrated that the district court opinion could not have avoided the commerce question, at least insofar as the lower court's "disposition of the case . . . of necessity [was] inconsistent with appellee[] [Filburn's] position that [the disputed] regulation [was] not within the commerce power."¹⁴⁸ Because the Agricultural Adjustment Act's penalty on all wheat "marketed" in excess of a farm's allotted quota—whether fifteen cents per bushel (as it had been before the May 26, 1941, amendment) or forty-nine cents (as it became by virtue of that amendment)—included wheat "dispose[d] of by feeding to poultry and livestock as well as by selling," Filburn effectively attacked the Act on constitutional grounds to the extent that the Act "subject[ed] to penalties wheat used on the farm, such as that fed to livestock, as well as wheat which is sold."¹⁴⁹

Second, the government's brief documented the odd duality of the wheat market. On one hand, the government described in detail "[t]he vast extent of the interstate and foreign movements of wheat and flour."¹⁵⁰ On the other, the government distinguished wheat from tobacco, the crop whose marketing program the Court had upheld in *Mulford v. Smith*.¹⁵¹ Unlike tobacco, wheat was "marketed by over a million farmers through almost innumerable

¹⁴⁵ See Brief for the Appellants at 2, reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 677, 682 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

¹⁴⁶ See *id.* at 2, 53, reprinted in LANDMARK BRIEFS, *supra* note 145, at 682, 733.

¹⁴⁷ *Id.* at 2, reprinted in LANDMARK BRIEFS, *supra* note 145, at 682.

¹⁴⁸ *Id.* at 38 n.7, reprinted in LANDMARK BRIEFS, *supra* note 145, at 718 n.7.

¹⁴⁹ *Id.*, reprinted in LANDMARK BRIEFS, *supra* note 145, at 718 n.7.

¹⁵⁰ *Id.* at 12, reprinted in LANDMARK BRIEFS, *supra* note 145, at 692.

¹⁵¹ 307 U.S. 38 (1939).

outlets.”¹⁵² A “substantial quantity” of that wheat would be consumed on wheat farms themselves “as feed for livestock, as seed, and, to a slight extent, as food.”¹⁵³ These traits complicated the regulation of wheat to an enormous degree. The government’s emphasis on this unique combination of commercial significance and regulatory difficulty would prove pivotal in the Supreme Court’s ultimate resolution of the dispute.

Counsel for Filburn treated this aspect of the government’s argument as an opportunity to distinguish this controversy from *Mulford* and other decisions upholding the New Deal’s agricultural programs.¹⁵⁴ Despite having devoted most of its argument to the heavily contested events of May 1941 (speech, amendment, referendum), appellee’s brief triumphantly concluded with what it considered a fatal concession by the government: “Practically all farmers sell locally, indicating that wheat does not come within the category of milk and other farm products that are sold directly in interstate commerce.”¹⁵⁵

On June 1, 1942, the Supreme Court ordered reargument in *Wickard v. Filburn*.¹⁵⁶ The Court limited reargument “to the question whether the Act, insofar as it deals with wheat consumed on the farm of the producer, is within the power of Congress to regulate commerce.”¹⁵⁷ Secretary Wickard’s brief on reargument recast the Commerce Clause question in terms more amenable to an expansive view of federal authority: “The question . . . is not whether Congress can regulate consumption on the farm, but whether, as a means of regulating the amount of wheat marketed and the interstate price structure, Congress has the power to control the total available supply of wheat, including . . . that which is consumed on the farm.”¹⁵⁸

By contrast, counsel for appellee Filburn took refuge in the traditional distinction between production and shipment. The brief for the appellee on reargument thus characterized the government’s contention “that feed, seed and food consumed on the farm where it has been raised is a form of competition with commercial products [as] a *reductio ad absurdum* of the theory of competition.”¹⁵⁹ In concluding, Filburn’s brief warned that the

¹⁵² Brief for the Appellants at 45, reprinted in LANDMARK BRIEFS, *supra* note 145, at 725.

¹⁵³ *Id.* at 41, reprinted in LANDMARK BRIEFS, *supra* note 145, at 721.

¹⁵⁴ See Brief for the Appellee at 20-23, reprinted in LANDMARK BRIEFS, *supra* note 145, at 741, 760-63.

¹⁵⁵ *Id.* at 22, reprinted in LANDMARK BRIEFS, *supra* note 145, at 762.

¹⁵⁶ 62 S. Ct. 1289 (1942).

¹⁵⁷ *Id.* at 1289.

¹⁵⁸ Brief for the Appellants on Reargument at 2, reprinted in LANDMARK BRIEFS, *supra* note 145, at 765, 770.

¹⁵⁹ Brief for the Appellee on Reargument at 13, reprinted in LANDMARK BRIEFS, *supra* note 145, at 823, 835.

government's proposed interpretation of the Commerce Clause "would not only effectually approach a centralized government but could eventually lead to absolutism by successive nullifications of all Constitutional limitations."¹⁶⁰

After much maneuvering, the briefs in *Wickard v. Filburn* eventually reached the doctrinal basis on which this landmark case would be decided. The Supreme Court's reargument order minimized the retroactivity and equity issues that had figured so prominently in the district court. The parties responded by refocusing the dispute as one squarely presenting the final question of Commerce Clause doctrine left unanswered by the New Deal Court.

C. *The Supreme Court Decision*

The Supreme Court quickly disposed of the dispute over Secretary Wickard's radio address. Justice Jackson's opinion for a unanimous Court dismissed as "manifest error" the district court's holding "that the Secretary's speech invalidated the referendum."¹⁶¹ The Court refused to permit "a speech by a Cabinet officer," even one that might have "failed to meet judicial ideals of clarity, precision, and exhaustiveness," to "defeat a policy embodied in an Act of Congress."¹⁶² Indeed, the Court went so far as to characterize a complaint based on the speech as "frivolous."¹⁶³

Part III of the Supreme Court's opinion made comparably short work of the district court's conclusion that the amended Agricultural Adjustment Act deprived Filburn of due process or otherwise worked an inequitable result. Insofar as the wheat program lifted wheat prices above the level that would prevail in an unregulated market, the Court rejected Filburn's due process claim.¹⁶⁴ Wrote Justice Jackson, "It is hardly lack of due process for the Government to regulate that which it subsidizes."¹⁶⁵

As the reargument order had foreshadowed, the Court devoted most of its opinion to the Commerce Clause question. Yet the Court intimated that even this issue "would merit little consideration since our decision in *United States*

¹⁶⁰ *Id.* at 14.

¹⁶¹ *Wickard v. Filburn*, 317 U.S. 111, 117 (1942).

¹⁶² *Id.* at 118.

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 130-31.

¹⁶⁵ *Id.* at 131; *see also id.* at 133 ("[I]t only appears that, if [Filburn] 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.").

v. Darby.”¹⁶⁶ The lone difference between *Darby* and *Filburn*, according to the Justices, lay in “the fact that [the Agricultural Adjustment] Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.”¹⁶⁷ And the significance of even this factor appeared to have been overstated. Deflecting the briefs’ emphasis on the distinction between agriculture and commerce and on the directness *vel non* of the impact of *Filburn*’s activities on the interstate economy, the Court reasoned “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.”¹⁶⁸ Because these terms merely described earlier opinions’ conclusions without providing useful guidance toward determining which “kinds of intrastate activity [affecting] interstate commerce were . . . a proper subject of federal regulation,”¹⁶⁹ the Court rejected “the mechanical application of legal formulas” purporting to “find[] the activity in question to be ‘production’” or to call the relevant economic effects “‘indirect.’”¹⁷⁰

The Court thereupon turned to “the economics of the wheat industry,” which it characterized as having been “a problem industry for some years.”¹⁷¹ The resulting survey of the wheat market, at home and abroad, was reminiscent of Chief Justice Hughes’s description of the breathtaking scale of the Jones and Laughlin Steel Corporation’s industrial operations.¹⁷² Although other Supreme Court cases have hinged on the perceived need to maintain “the flow of wheat from the West to the mills and distributing points of the East and Europe,”¹⁷³ *Filburn* began but did not stop with “[c]ommerce among the states in wheat.”¹⁷⁴ This was no ordinary program for rationalizing the domestic distribution of a scarce commodity. The Court’s survey of the “large and important” traffic

¹⁶⁶ *Id.* at 118 (citing *United States v. Darby*, 312 U.S. 100 (1941)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 120.

¹⁶⁹ *Id.* at 122.

¹⁷⁰ *Id.* at 124.

¹⁷¹ *Id.* at 125.

¹⁷² See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25-28 (1937).

¹⁷³ *Chi. Bd. of Trade v. Olsen*, 262 U.S. 1, 36 (1923); see also *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 53-54 (1922); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290-91 (1921); *Munn v. Illinois*, 94 U.S. 113, 131 (1876); cf. *Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (describing “the various stockyards of the country as great national public utilities” that dominated “the flow of commerce from the ranges and farms of the West to the consumers in the East”).

¹⁷⁴ 317 U.S. at 125.

between sixteen wheat-exporting states and their thirty-two wheat-importing counterparts hinted at a crisis of global proportions.¹⁷⁵ The real problem was the “abnormally large supply of wheat” that throughout the 1930s had “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.”¹⁷⁶ “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 per cent of total production, while during the 1920s they averaged more than 25 per cent.”¹⁷⁷ The Court’s review of market conditions left no doubt that the appropriate economic baseline was not local, but global. It compared the “average price . . . of about \$1.16 a bushel,” which the wheat program established for the 1941 crop year, “with the world market price of 40 cents a bushel.”¹⁷⁸

Justice Jackson then turned his attention back toward the United States and the practices of individual American wheat farmers. Whereas many farmers in western wheat-exporting states “specializ[ed] in wheat” and typically sold “the crop for cash,”¹⁷⁹ farmers in wheat-importing regions such as New England generally used wheat for a wider variety of purposes, ranging from animal feed to “a nurse crop for grass seeding” to a mere “cover crop to prevent soil erosion and leaching.”¹⁸⁰ (So much for the soil conservation law’s fraudulent characterization of wheat as a “soil-depleting” crop.)¹⁸¹ These regional variations proved dispositive. “[C]onsumption of homegrown wheat,” the Court concluded, had a strong impact on interstate commerce because “it constitute[d] the most variable factor in the disappearance of the wheat crop.”¹⁸² Unlike the “relatively constant” amounts of wheat “consumed as food . . . and use[d] as seed,” on-farm consumption of wheat “appear[ed] to vary in an amount greater than 20 percent of average production.”¹⁸³

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 126.

¹⁷⁹ *Id.* at 126-27.

¹⁸⁰ *Id.* at 127.

¹⁸¹ See *supra* text accompanying note 103.

¹⁸² *Filburn*, 317 U.S. at 127.

¹⁸³ *Id.*

This crucial observation about the consumption of homegrown wheat enabled the Court to make the “aggregation” argument for which *Wickard v. Filburn* is best known today:

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 scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.¹⁸⁴

This observation brought the Court's Commerce Clause analysis to a swift and decisive conclusion. Plainly the Agricultural Adjustment Act of 1938 was designed “to increase the market price of wheat and . . . to limit the volume thereof that could affect the market.”¹⁸⁵ The power of Congress “to regulate the prices at which commodities in [interstate] commerce are dealt in” could no longer be questioned.¹⁸⁶ The admittedly “substantial influence” of home-consumed wheat “on price and market conditions” left “no doubt that Congress may properly have considered that wheat consumed on the farm where grown” needed to be swept into the overall marketing quota system, lest unchecked on-farm consumption “defeat[] and obstruct[] [Congress's] purpose to stimulate trade therein at increased prices.”¹⁸⁷

IV. *FILBURN'S LEGACY*

A. *Filburn's Immediate Impact*

Some of *Filburn's* earliest critics detected a threat to state sovereignty. At their meekest, commentators demurred that *Filburn* rested “primarily upon a rather extended concept of competition.”¹⁸⁸ More audacious critics expressed

¹⁸⁴ *Id.* at 127-28.

¹⁸⁵ *Id.* at 128.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 128-29.

¹⁸⁸ Note, *The Supreme Court of the United States During the October Term, 1942: I*, 43 COLUM. L. REV. 837, 845 (1943).

“wonder as to the limits of [Congress’s] tremendous and constantly growing power” to regulate interstate commerce.¹⁸⁹

But the *Filburn* opinion itself gave no hint of having altered the legal landscape in such a dramatic fashion. One of the New Deal’s front-line legal warriors believed that the case contributed relatively little to Commerce Clause jurisprudence: “*Wickard v. Filburn* adds little to the *Darby* case insofar as the pronouncement of affirmative guiding principles is concerned.”¹⁹⁰ In truth, much of the heavy lifting had already been performed. *Darby* and the cases it spawned¹⁹¹ had all but gutted the shaky distinction between commerce and manufacturing, mining, and agriculture.¹⁹² Not even the “aggregation” argument originated in *Filburn*; a Term earlier, *Darby* had already deployed similar reasoning.¹⁹³ In an even earlier case, the Supreme Court acknowledged that Congress’s “plenary” power over interstate commerce “extends to all such commerce be it great or small” and that the Court had never thought such power “to be constitutionally restricted because in any particular case the volume of the commerce affected may be small.”¹⁹⁴ *Filburn* followed all of these cases as a matter of course.

To the extent it relitigated propositions established by earlier cases, *Filburn* seems more analogous to the contemporaneous and deservedly obscure *Wrightwood Dairy* case,¹⁹⁵ which forced the Court to revisit the already vindicated Agricultural Marketing Agreement Act when a federal appeals court “inexplicabl[y]” held “that intrastate milk competing in the same market with interstate was not subject to the commerce power.”¹⁹⁶ Just as *United States v.*

¹⁸⁹ John J. Trenam, Note, *Commerce Power Since the Schechter Case*, 31 GEO. L.J. 201, 202 (1943).

¹⁹⁰ Stern, *supra* note 77, at 908.

¹⁹¹ See *Overnight Transp. Co. v. Missel*, 316 U.S. 572 (1942); *Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942); *Cloverleaf Co. v. Patterson*, 315 U.S. 148 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Gray v. Powell*, 314 U.S. 402 (1941). All of these cases were cited in *Filburn*, 317 U.S. at 118 & n.12.

¹⁹² See *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935); see also *United States v. E.C. Knight Co.*, 156 U.S. 1, 14, 16 (1895).

¹⁹³ See 312 U.S. at 121 (“A familiar . . . exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled.”); *id.* at 123 (“[I]n present day industry, competition by a small part may affect the whole and . . . the total effect of the competition of many small producers may be great.”); accord, e.g., *Filburn v. Helke*, 43 F. Supp. 1017, 1022 (S.D. Ohio) (Allen, J., dissenting), *rev’d sub nom. Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁹⁴ *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939), cited in *Filburn*, 317 U.S. at 128.

¹⁹⁵ *Wrightwood Dairy*, 315 U.S. at 110.

¹⁹⁶ Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946 (Part I)*, 59 HARV. L. REV. 645, 689 (1946).

*Rock Royal Co-operative, Inc.*¹⁹⁷ had already blessed the Agricultural Marketing Agreement Act of 1937 in advance of *Wrightwood Dairy, Mulford v. Smith*¹⁹⁸ upheld the Agricultural Adjustment Act of 1938 before *Filburn* reached the Southern District of Ohio. As a matter of immediate political impact, *Mulford* greatly outweighed *Filburn*. Indeed, two Terms after *Filburn* was decided, the Supreme Court felt no need to cite that case for the proposition that the scope of Congress's Commerce Clause power "is not to be determined by confining judgment to the quantitative effect of the activities immediately" at issue in a single controversy, but rather in light of the prospect that "the total incidence" of events resembling "the immediate situation . . . if left unchecked[,] may well become far-reaching in its harm to commerce."¹⁹⁹ Even *Filburn*'s specific holding—that homegrown wheat falls within Congress's power over interstate commerce—failed to take firm root in the lower courts. As late as 1966, the Supreme Court summarily reversed a federal circuit court decision exempting on constitutional grounds wheat grown at state mental and penal institutions from federal acreage limitations.²⁰⁰ To be sure, the Supreme Court did acknowledge in *Filburn*'s immediate wake that the case had made it impossible to sustain a constitutionally significant distinction between "production" and "manufacturing" on one hand and "commerce" on the other.²⁰¹ On the whole, *Filburn* helped build a Commerce Clause consensus that emerged over the entire course of the New Deal: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."²⁰²

This modest view of *Filburn* persisted for decades. Despite its reputation for judicial activism, the Warren Court cut relatively little if any new ground on federalism. The Warren Court's Commerce Clause jurisprudence rates among that era's least innovative—and consequently, its most secure—doctrinal developments.²⁰³ The decisions upholding the Civil Rights Act of 1964 as proper exercises of Congress's commerce power—*Heart of Atlanta*

¹⁹⁷ 307 U.S. 533 (1939).

¹⁹⁸ 307 U.S. 38 (1939).

¹⁹⁹ *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944).

²⁰⁰ *United States v. Ohio*, 385 U.S. 9 (1966) (per curiam), *summarily rev'g* 354 F.2d 549 (6th Cir. 1965).

²⁰¹ *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 229 (1948).

²⁰² *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949); *accord Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

²⁰³ Cf. Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 926 (2001) (describing the "perverse incentive[s]" that give rise to "original, creative, even brilliant" constitutional theories that are also "quite obviously wrong"). See generally Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987); Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

*Motel, Inc. v. United States*²⁰⁴ and *Katzenbach v. McClung*²⁰⁵—did little more than reaffirm the New Deal's Commerce Clause sequence.²⁰⁶ *McClung*, perhaps better known as "Ollie's Barbecue," confirmed *Wickard v. Filburn*'s principle that a single actor's impact on interstate commerce, though "trivial by itself," may nevertheless fall within "the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, is far from trivial."²⁰⁷ *Heart of Atlanta* reaffirmed an even older Commerce Clause principle. In the early twentieth century, when distinctions between commerce and production and between direct and indirect effects held full sway, the Court fully accepted "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses."²⁰⁸ (Indeed, the notion that Congress may direct its commerce power against immoral activity is at least as old as *Champion v. Ames*,²⁰⁹ the celebrated "Lottery Case.") Both *Heart of Atlanta* and *McClung* adopted a rational basis standard of review for challenges to congressional uses of the commerce power.²¹⁰ *McClung* added one final observation: that "Congress . . . included no formal findings" was "not fatal to the validity of the statute" under review.²¹¹

If the Warren Court covered any new ground in Commerce Clause jurisprudence, it did so in *Maryland v. Wirtz*.²¹² That decision upheld the extension of the Fair Labor Standards Act to hospitals, institutions, and schools operated by state and local governments.²¹³ In response to the argument that this class of employers lay beyond "the reach of the federal power," *Wirtz* invoked *Filburn*'s aggregation principle: "The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances

²⁰⁴ 379 U.S. 241 (1964).

²⁰⁵ 379 U.S. 294 (1964).

²⁰⁶ See generally RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES (2001).

²⁰⁷ *McClung*, 379 U.S. at 301 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)).

²⁰⁸ *Caminetti v. United States*, 242 U.S. 470, 491 (1917); accord *Heart of Atlanta*, 379 U.S. at 256.

²⁰⁹ 188 U.S. 321 (1903).

²¹⁰ See *McClung*, 379 U.S. at 303-04 ("[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."); *Heart of Atlanta*, 379 U.S. at 258 ("The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."); *id.* at 262 ("[T]he means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution. . . . The Constitution requires no more.").

²¹¹ *McClung*, 379 U.S. at 304 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

²¹² 392 U.S. 183 (1968).

²¹³ See *id.* at 188-93.

falling within a rationally defined class of activities has been put entirely to rest.²¹⁴

As in many other areas of constitutional law,²¹⁵ the Burger Court actually outperformed the predecessor Warren Court in extending Commerce Clause jurisprudence. *Filburn*'s fame may owe its greatest debt to the Burger Court decision of *Perez v. United States*.²¹⁶ *Perez* upheld the application of the Consumer Credit Protection Act against a "loan shark" whose allegedly extortionate credit transactions took place on a strictly local scale. Citing *Filburn*, *Darby*, *Heart of Atlanta*, and *McClung*, the *Perez* Court concluded that loan sharks as a class fell "within the reach of federal power," even if individual acts of extortion were "'trivial'" and local in nature.²¹⁷

B. *Filburn's Significance Today*

Filburn is regarded today as the high-water mark of the New Deal's constitutional revolution. Even though *Filburn* itself observed that "Chief Justice Marshall," in *Gibbons v. Ogden*,²¹⁸ "described the federal commerce power with a breadth never yet exceeded,"²¹⁹ Chief Justice Rehnquist designated *Filburn* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."²²⁰ However one chooses to gauge its strength relative to *Gibbons*,²²¹ *Filburn* still rates as one of the most significant points on the jurisprudential arc that began with *NLRB v. Jones & Laughlin*

²¹⁴ *Id.* at 192-93 (citing *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944); *McClung*, 379 U.S. at 301).

²¹⁵ See, e.g., HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 349 (3d ed. 1992) ("The Burger Court, far from reversing or otherwise undoing its predecessor Warren Court, was marked by a generally surprising penchant for judicial activism, even in such unexpected areas as civil rights and civil liberties."); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1116 (1994) (observing that the Burger Court, far from "engag[ing] in wholesale reversals of liberal precedents," merely "limit[ed] rights for criminal defendants" and "ultimately disappointed conservatives" by moving "in liberal directions on so many other important issues, most notably in abortion and affirmative action"). See generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).

²¹⁶ 402 U.S. 146 (1971).

²¹⁷ *Id.* at 154 (quoting *Wirtz*, 392 U.S. at 193).

²¹⁸ 22 U.S. (9 Wheat.) 1 (1824).

²¹⁹ 317 U.S. at 120 (citing *Gibbons*, 22 U.S. at 194-95).

²²⁰ *United States v. Lopez*, 514 U.S. 549, 560 (1995); accord *United States v. Morrison*, 529 U.S. 598, 610 (2000).

²²¹ Cf. Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 359 (1998) (ranking *Gibbons* as the second most influential decision in Supreme Court history, behind only *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

*Steel Corp.*²²² One commentator has summarized what was once the post-New Deal consensus on the meaning of the Commerce Clause: “In the wake of *Jones & Laughlin* and *Wickard v. Filburn*, it has become clear that . . . Congress has authority to regulate virtually all private economic activity.”²²³

Filburn stands for the proposition that “substantial economic effect[s]” outweigh facile judicial distinctions in Commerce Clause cases between “direct” and “indirect” effects of economic behavior.²²⁴ Justice Jackson’s opinion unequivocally declared 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.”²²⁵ *Filburn* likewise held that even local, noncommercial activity “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.’”²²⁶ Later cases have routinely endorsed these propositions, at least superficially.²²⁷ Critically, *Filburn* has added the “aggregation” maneuver to constitutional law’s argumentative arsenal. Thanks to *Filburn*, Congress may reach any economic actor “trivial by itself” as long as its “contribution” to the national economy, “taken together with that of many other[]” actors “similarly situated, is far from trivial.”²²⁸ *Filburn*’s aggressive stand against willful judicial ignorance of actions “trivial by themselves” influences even *Dormant* Commerce Clause doctrine: “[T]he practical effect” of a state law “must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every State adopted similar legislation.”²²⁹ One advocate of

²²² 301 U.S. 1 (1937).

²²³ Earl M. Maltz, *The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause—A Case Study in the Decline of State Autonomy*, 19 HARV. J.L. & PUB. POL’Y 121, 129 (1995).

²²⁴ 317 U.S. at 125.

²²⁵ *Id.* at 120.

²²⁶ *Id.* at 125.

²²⁷ See, e.g., *United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S. 549, 556 (1995); *New York v. United States*, 505 U.S. 144, 158 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 308 (1981); *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968).

²²⁸ 317 U.S. at 127-28; accord, e.g., *Lopez*, 514 U.S. at 556; *Perez v. United States*, 402 U.S. 146, 151-52 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 275 (1964) (Black, J., concurring).

²²⁹ *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); accord *Wyoming v. Oklahoma*, 502 U.S. 437, 453-54

greater state autonomy has lamented *Filburn's* contribution to the erosion of the Supreme Court's respect for state legislative judgments in its Dormant Commerce Clause cases.²³⁰

These criticisms have grown stronger in an age when the Tenth Amendment has been promoted from a "truism"²³¹ to a serious statutory and constitutional player.²³² Federalism, thought as recently as the early 1990s to have passed into the mists of legal history,²³³ rides again. Still, the consensus among constitutional scholars is that the federal "commerce power has swelled to a proportion that would leave the framers 'rubbing their eyes' with amazement."²³⁴ For advocates of decentralized government, *Wickard v. Filburn* is at best an immolation of the framers' federalism, at worst the paradigmatic instance of the toothless Commerce Clause jurisprudence that took root after *Jones & Laughlin*. An especially harsh critic asserts that *Filburn* "cannot pass the 'giggle test.'"²³⁵

The Rehnquist Court's ongoing campaign to revive the constitutional prerogatives of the states has arguably transformed not only *Wickard v. Filburn* but also the larger Commerce Clause jurisprudence represented by that case. Among contemporary cases, *United States v. Lopez*²³⁶ bears chief responsibility for placing *Filburn* at the frontier of Congress's Commerce Clause power. *Lopez* invalidated the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."²³⁷

(1992); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., concurring in the judgment).

²³⁰ See Maltz, *supra* note 223, at 129-30.

²³¹ *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The [Tenth] [A]mendment states but a truism that all is retained which has not been surrendered."); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (Marshall, C.J.) (describing the language of the Tenth Amendment as "leaving the question, whether [a] particular power . . . has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the [Constitution as a] whole instrument").

²³² See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); cf. *Reno v. Condon*, 528 U.S. 141 (2000).

²³³ See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1486 (1994); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1721 (1985). Assessments in this strain typically relied on the assumption—almost laughably erroneous in retrospect—that *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), represented the Supreme Court's final word on federalism.

²³⁴ Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 658 (2000).

²³⁵ Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 173 (1996).

²³⁶ 514 U.S. 549 (1995).

²³⁷ 18 U.S.C. § 922(q)(1)(A) (1994).

The Supreme Court held “that the Act exceeds the authority of Congress ‘[t]o regulate Commerce . . . among the several States.’”²³⁸ Chief Justice Rehnquist acknowledged *Jones & Laughlin, Darby*, and *Filburn* as the New Deal cases “that greatly expanded the previously defined authority of Congress under” the Commerce Clause.²³⁹ Among these cases, the Chief Justice singled out *Filburn* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.”²⁴⁰

Without purporting to overrule any precedent, Chief Justice Rehnquist summarized the “three broad categories of activity that Congress may regulate under its commerce power”:²⁴¹

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.²⁴²

According to the Court, the gun possession statute’s greatest weakness lay in its apparent lack of connection “with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”²⁴³ The Court also faulted the absence of a “jurisdictional element which would ensure, through case-by-case inquiry, that the [proscribed activity] in question affects interstate commerce.”²⁴⁴ Although the Chief Justice putatively affirmed older cases relieving Congress of the obligation “to make formal findings as to the substantial burdens that an activity has on interstate commerce,”²⁴⁵ he complained that their absence in this controversy left “no . . . substantial effect” on commerce “visible to the naked eye.”²⁴⁶ Chief Justice Rehnquist accordingly rejected a lenient standard of review that would “authorize a general federal police power” drawn from the Commerce Clause and extending

²³⁸ *Lopez*, 514 U.S. at 551 (quoting U.S. CONST. art. I, § 8, cl. 3).

²³⁹ *Id.* at 556.

²⁴⁰ *Id.* at 560.

²⁴¹ *Id.* at 558.

²⁴² *Id.* at 558-59 (citations omitted).

²⁴³ *Id.* at 561.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 562 (citing *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964), and *Perez v. United States*, 402 U.S. 146, 156 (1971)).

²⁴⁶ *Id.* at 563.

potentially to subjects at the heart of traditional state regulation, “such as family law and direct regulation of education.”²⁴⁷ Declining what he considered an invitation “to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States,” the Chief Justice declared himself “unwilling” to erase the “distinction between what is truly national and truly local.”²⁴⁸

In at least a formal sense, *Lopez* overruled none of the Court’s Commerce Clause precedent. Justice Thomas’s concurrence, by contrast, hinted that the Court “must [eventually] modify [its] Commerce Clause jurisprudence,”²⁴⁹ perhaps by restoring a narrow definition of “commerce” distinct from agriculture, manufacturing, and other activities leading to “the production of goods.”²⁵⁰ But Justice Thomas’s comments in a concurring opinion about the proper conception of commerce were just that: comments in a concurring opinion.²⁵¹ Nevertheless, after *Lopez*, the New Deal vision of the Commerce Clause no longer commands as much authority as before. To the extent that the Court purported to rely on those cases, *Lopez* represented a classic instance of “cite and switch,” the Court’s emerging strategy of paying nominal homage to precedent before proceeding to ignore or eviscerate it.²⁵²

Five years later, the Court confirmed that *Lopez* was no fluke. Contrary to the expectations of observers who treated *Lopez* as an aberration,²⁵³ a narrowing interpretation of Congress’s Commerce Clause powers had taken firm hold. In *United States v. Morrison*,²⁵⁴ the Court invalidated the Violence Against Women Act (VAWA). Petitioner Christy Brzonkala sought a remedy

²⁴⁷ *Id.* at 564-65.

²⁴⁸ *Id.* at 567-68.

²⁴⁹ *Id.* at 602 (Thomas, J., concurring).

²⁵⁰ *Id.* at 587.

²⁵¹ *Cf.* *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980) (“The comments in the dissenting opinion about . . . the correct statement of the equal protection rational-basis standard . . . are just that: comments in a dissenting opinion.”); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2229 (1996) (contending that Justice Thomas’s narrow view of “commerce” “hardly reflects” the understanding of the term “contemporaneous with the framing of the Constitution”).

²⁵² Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087, 2093 (2002).

²⁵³ See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 141 (1995) (predicting that *Lopez* would have a “limited” impact “on broader questions of federal power”); Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 693 (1996) (“As a practical matter, *Lopez* has deprived Congress of very little power.”); cf. John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 176 (1998) (pondering whether *Lopez* would be “destined to be a ‘but see’ citation”).

²⁵⁴ 529 U.S. 598 (2000).

under VAWA after she was raped by fellow students at the Virginia Polytechnic Institute. Chief Justice Rehnquist, writing for the same five-Justice majority that decided *Lopez*, distilled four “significant considerations” from that case.²⁵⁵ First, the putatively “economic” nature of the regulated “endeavor” is crucial to judicial approval of “federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce.”²⁵⁶ Second, a “jurisdictional element” in the text of a statute “may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce.”²⁵⁷ Third, though congressional findings regarding the activity’s impact on interstate commerce are not indispensable, *Morrison* reaffirmed *Lopez*’s preference for findings.²⁵⁸ Finally, the Chief Justice emphasized the “attenuated” nature of “the link between gun possession” and the “effect on interstate commerce” alleged in *Lopez*.²⁵⁹

VAWA failed these tests. “Gender-motivated crimes of violence,” Chief Justice Rehnquist wrote, “are not, in any sense of the phrase, economic activity.”²⁶⁰ Nor did VAWA contain a “jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.”²⁶¹ But VAWA differed from the gun possession statute in *Lopez*: Congress made “numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.”²⁶² These findings nevertheless proved unavailing. Chief Justice Rehnquist refused to treat “the existence of congressional findings . . . , by itself,” as “sufficient . . . to sustain the constitutionality of Commerce Clause legislation.”²⁶³ *Morrison* characterized these findings’ connection of sex-based violence with interstate commerce as so “substantially weakened” that their use as a foundation for Commerce Clause legislation would “completely obliterate the Constitution’s distinction between national and local authority.”²⁶⁴ The Court feared that the inexorable extension of “the but-for causal chain from the initial occurrence of violent crime” would permit “Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on

²⁵⁵ *Id.* at 609.

²⁵⁶ *Id.* at 611.

²⁵⁷ *Id.* at 612.

²⁵⁸ *See id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 613.

²⁶¹ *Id.*

²⁶² *Id.* at 614.

²⁶³ *Id.*

²⁶⁴ *Id.* at 615.

employment, production, transit, or consumption.”²⁶⁵ This reasoning yielded a stunning limitation on the “aggregation” principle that had been a hallmark of Commerce Clause jurisprudence since *Wickard v. Filburn*: “We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”²⁶⁶

For his part, Justice Thomas wrote a separate concurrence to repeat his view, first articulated in *Lopez*, “that the very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with th[e] Court’s early Commerce Clause cases.”²⁶⁷ He urged the Court to “replace[] its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding.”²⁶⁸

Morrison merely punctuates—albeit loudly—the restructuring of Commerce Clause jurisprudence that began with *Lopez*. Especially when read in conjunction with the Fourteenth Amendment decision of *City of Boerne v. Flores*,²⁶⁹ these decisions demonstrate the Supreme Court’s determination to “treat[] the federal legislative process as akin to agency or lower court decisionmaking” and thereby to “undermine[] Congress’s ability to decide for itself how and whether to create a record in support of pending legislation.”²⁷⁰

This structural shift in the Court’s attitude toward Congress threatens a drastic reduction in Congress’s legislative prerogatives. The new vision of the Commerce Clause “evoke[s] a bygone era of reduced federal presence, a greater role for common law courts, and a minimization of the activist regulatory state.”²⁷¹ The contemporary Court has arguably devalued “the traditional national interest in the uniform enforcement of civil rights,” an interest informed by awareness of the states’ historical shortcomings in civil rights enforcement and, indeed, of state actors’ more than occasional forays into affirmatively “discriminatory conduct.”²⁷² At an extreme, some critics

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 617.

²⁶⁷ *Id.* at 627 (Thomas, J., concurring).

²⁶⁸ *Id.*

²⁶⁹ 521 U.S. 507 (1997).

²⁷⁰ Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001).

²⁷¹ Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1260 (2003).

²⁷² Julie Goldschie, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 131-32 (2000). For traditional expressions of federal distrust of the states in the realm of civil rights enforcement, see, for example,

believe that *Lopez* and *Morrison* have “single[d] out civil rights laws as being uniquely beyond the scope of Congress’s commerce power.”²⁷³ Federal environmental law, too, seems suddenly shakier.²⁷⁴ A more modest forecast concerns the aggressive use of the traditional rule counseling the interpretation of statutes so as to avoid raising doubts about their constitutionality.²⁷⁵ *Lopez* and *Morrison* may transform this interpretive canon into a roving commission to construe all meaningful life out of regulatory statutes that offend a majority of the Justices. Indeed, in subsequent cases involving the federal arson statute²⁷⁶ and the Clean Water Act,²⁷⁷ the post-*Morrison* Court appeared to do exactly that. The sheer scope and the low visibility of statutory law²⁷⁸ make this strategy especially insidious.

Whether these consequences will ever flow from *Lopez* and *Morrison* remains fodder for scholarly conjecture. These cases’ undisputable doctrinal innovations are remarkable in their own right. Thanks to these decisions, *Wickard v. Filburn* no longer commands the respect that it once enjoyed, along with *Jones & Laughlin* and *Darby*, within Commerce Clause jurisprudence. The aggregation principle remains nominally good law, but it operates only when the actors or activities at issue are commercial. Gun possession or sex-

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 722 (1989); *Patsy v. Bd. of Regents*, 457 U.S. 496, 505-06 (1982); and *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

²⁷³ Louis J. Virelli III & David S. Leibowitz, “*Federalism Whether They Want It or Not*”: *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 976 (2001).

²⁷⁴ See generally Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003).

²⁷⁵ See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979); cf. *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (counseling reliance on nonconstitutional grounds of decision in favor of constitutional adjudication); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

²⁷⁶ See *Jones v. United States*, 529 U.S. 848, 859 (2000) (holding that the arson statute “covers only property currently used in commerce or in an activity affecting commerce,” in order to avoid casting doubt on the statute’s constitutionality after *Lopez*).

²⁷⁷ See *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (invalidating the Corps’s “Migratory Bird Rule” in order “to avoid the significant constitutional and federalism questions raised” by the rule’s interpretation of the statutory term, “navigable waters”).

²⁷⁸ Cf. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983) (saying of statutory interpretation that “nothing else as important in the law receives so little attention”). See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (describing the use of substantive canons of statutory interpretation as “stealth” constitutional law); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 81-87 (1994) (same).

motivated violence will not qualify, at least when they lack any visible connection to overtly economic activity. This shift effectively links today's Commerce Clause outlook with the jurisprudence that prevailed before the New Deal.²⁷⁹ As Justice Souter observed in his *Lopez* dissent, "[t]he distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly."²⁸⁰ Justice Breyer went further in his dissent, contending that Chief Justice Rehnquist's interpretation of *Filburn* and its cognate cases "is not consistent" with the actual holding of those cases.²⁸¹ Accepting Justice Thomas's gloss on the majority positions in *Lopez* and *Morrison* would impose an even tighter constraint on Congress's discretion to wield its Commerce Clause powers. Justice Thomas's position would also prevent the expansion of the Commerce Clause to such an extent that it would render "many of Congress' other enumerated powers . . . wholly superfluous."²⁸² There is little realistic chance, however, that the Court will follow this path. A sharp, categorical distinction between commerce and other economic activities such as agriculture, manufacturing, and mining has not commanded a Supreme Court majority since *Carter v. Carter Coal Co.*,²⁸³ *A.L.A. Schechter Poultry Corp. v. United States*,²⁸⁴ and *United States v. E.C. Knight Co.*²⁸⁵—all cases that presumably had been shelved by *Filburn* and the rest of the New Deal's sequence of Commerce Clause cases.

Whether the lower courts ultimately adopt the basic formulation developed by Chief Justice Rehnquist or the variant promoted by Justice Thomas, *Filburn*'s place in Commerce Clause jurisprudence has changed. Indeed, six decades after the case was decided, *Filburn*'s legacy appears in many respects to be the mirror image of *Filburn*'s original meaning. Whereas *Filburn* once extended Congress's regulatory reach to seemingly trivial activities whose aggregate economic effect reached national or global levels, it now marks the extreme boundary of federal regulatory power. Distinctions between commerce and production, once a hallmark of formalist Commerce Clause

²⁷⁹ See Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 233 (2000) (observing how contemporary doctrines of federalism bolster "those who reflexively oppose activist national government").

²⁸⁰ *United States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting).

²⁸¹ *Id.* at 628 (Breyer, J., dissenting).

²⁸² *Id.* at 588 (Thomas, J., concurring); accord Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206, 1208-09 (1998).

²⁸³ 298 U.S. 238, 303 (1936).

²⁸⁴ 295 U.S. 495 (1935).

²⁸⁵ 156 U.S. 1, 14 (1895).

jurisprudence, today hold no sway. Even advocates of a more constrained view of the Commerce Clause concede that the constitutional definition of "commerce" "includes . . . the production of . . . merchandise through activities such as manufacturing, farming, and mining."²⁸⁶ With no hint of irony, today's Court has treated the economic character of Roscoe Filburn's dispute with the Department of Agriculture as a basis for restoring a formal distinction between commercial and noncommercial activities, the very distinction that *Wickard v. Filburn* rejected.²⁸⁷

V. CONSTITUTIONAL REALISM AND THE NATURE OF THE FARM

*Whatever the law sows, that it will also reap.*²⁸⁸

The Rehnquist Court's revisionist Commerce Clause jurisprudence distorts the legacy of *Wickard v. Filburn*. Read in proper historical and economic perspective, Justice Jackson's opinion cannot be fairly conscripted to support sharp constitutional distinctions between the commercial and the noncommercial or between production and traffic. An agriculturally literate understanding of *Filburn* makes it impossible to argue that any realm of profitable enterprise is strictly local, let alone private. Economic, environmental, and political "interconnection" across arbitrary jurisdictional boundaries "has become too real to ignore"; the "existence of transboundary communities inevitably creates a drive away from localism in all spheres."²⁸⁹ After "two world wars," the "global interdependence" of humans who now "share a common destiny . . . is a historical fact, a political fact, an economic fact, [and] a sociological fact."²⁹⁰ In a world where virtually every legal endeavor is transforming "from a strictly local undertaking into a global commitment,"²⁹¹ one must strain to find "any subject that [is] effectively

²⁸⁶ Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 102 (1999).

²⁸⁷ See Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 743 (2003) (observing that Chief Justice Rehnquist's attempt to impose a commercial limitation on the aggregation principle is "contradicted by the *Wickard* Court's analysis").

²⁸⁸ Cf. *Galatians* 6:7.

²⁸⁹ Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1271 (1996); see also Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283 (1997).

²⁹⁰ Harold J. Berman, *World Law*, 18 FORDHAM INT'L L.J. 1617, 1621 (1995).

²⁹¹ Jim Chen, *Fugitives and Agrarians in a World Without Frontiers*, 18 CARDOZO L. REV. 1031, 1051 (1996).

controlled by a single national sovereign.”²⁹² The realities of today’s global society make it not only implausible but also normatively unacceptable to credit Roscoe Filburn’s complaint that federal regulation invaded an exclusively local, even private, sphere of control.²⁹³ In a constitutional system no more than one degree removed from its agrarian roots, the proper cure for constitutional formalism lies in agricultural literacy. A “page of history,” boosted by a dose of economic savvy, is worth far more than volumes of legal logic.²⁹⁴

Wickard v. Filburn, whatever else it might have represented, was at heart a case about wheat.²⁹⁵ Ah, “*wheat*, the king of all grains!”²⁹⁶ Earlier decisions on Congress’s power to regulate agriculture had involved tobacco²⁹⁷ or milk.²⁹⁸ Wheat differed in two key respects. First, neither tobacco nor milk can match wheat’s global reach.²⁹⁹ One of the leading plant species in humanity’s collective larder,³⁰⁰ wheat is grown widely and shipped even further.³⁰¹ The outbreak of world war magnified the importance of the wheat market. With the rest of the world locked in a mortal struggle between democracy and totalitarianism, however, the United States did not suffer a wheat shortage, but rather complained that a surplus of the grain was depressing prices paid to farmers. Second, wheat differed from the other commodities in New Deal agricultural controversies—tobacco, milk, cotton—in that wheat can be used as readily by its producer as it can be sold to a processor. Because “[f]armers did not use raw cotton or tobacco themselves,” they “brought nearly all to the tobacco warehouse or the cotton gin for marketing.”³⁰² For their part, dairy

²⁹² John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT’L ECON. L. 17, 25 (1996).

²⁹³ See generally Jim Chen, *Epiphytic Economics and the Politics of Place*, 10 MINN. J. GLOBAL TRADE 1 (2001); Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157 (2000); Jim Chen, *Pax Mercatoria: Globalization as a Second Chance at “Peace for Our Time,”* 24 FORDHAM INT’L L.J. 217 (2000).

²⁹⁴ N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921); see also OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1923) (“The life of the law has not been logic: it has been experience.”).

²⁹⁵ See Stern, *supra* note 77, at 901-02.

²⁹⁶ O.E. RÖLVAAG, GIANTS IN THE EARTH 110 (Lincoln Colcord & O.E. Rölvaag trans., 1927).

²⁹⁷ See *Mulford v. Smith*, 307 U.S. 38 (1939); *Currin v. Wallace*, 306 U.S. 1 (1939).

²⁹⁸ See *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533 (1939).

²⁹⁹ Cf. JAMES LONGMIRE & WALTER H. GARDINER, ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., LONG TERM DEVELOPMENTS IN TRADE IN FEED AND LIVESTOCK PRODUCTS 2 (1984) (reporting that ninety percent of wheat traded internationally is used as food).

³⁰⁰ See generally Robert Prescott-Allen & Christine Prescott-Allen, *How Many Plants Feed the World?*, 4 CONSERVATION BIOL. 365 (1990).

³⁰¹ See generally Moshe Feldman et al., *Wheats*, in EVOLUTION OF CROP PLANTS 184, 184-92 (J. Smartt & N.W. Simmonds eds., 2d ed. 1995).

³⁰² Stern, *supra* note 77, at 902.

disputes seem invariably to arise from the economic dependence of relatively numerous producers on relatively few "handlers" of milk.³⁰³ The seemingly "bucolic" and "seren[e]" practice of "milking . . . animals in order to make use of their lactic secretions for human food" has "often provok[ed] as much human strife and nastiness as strong alcoholic beverages."³⁰⁴ A clever regulator (or monopolist) can target a single bottleneck by which to command these markets.

In short, the singularly instructive regulatory conflict in *Filburn* arose from two special characteristics of wheat: its exceptional mobility and its incredible versatility. At least in Roscoe Filburn's day, many wheat producers could choose either to sell their crop or to keep the crop for on-farm use as animal feed. In agricultural terms, wheat more readily resembled corn than it resembled tobacco or cotton. Whereas a "regulation of the quantity of" tobacco reaching warehouses or cotton reaching gins would "reach[] virtually the entire supply" of these commodities,³⁰⁵ eighty-five percent of the corn produced in the Corn Belt during the 1930s moved in commerce in the guise of cornfed livestock, poultry, or their milk or egg byproducts.³⁰⁶ A smaller but comparable portion of the wheat crop was likewise converted into meat, poultry, milk, or eggs. Consumption of wheat "on the farm where grown appear[ed] to vary in an amount greater than 20 per cent of average production."³⁰⁷ This cushion in on-farm wheat consumption would defeat a simpler supply control strategy, for integrated farmers could evade a marketing quota merely by redirecting wheat to the feeding bin.³⁰⁸ Congress thus decided to treat corn and wheat "alike with respect to the feeding of poultry or livestock for market."³⁰⁹

By adopting the proper level of abstraction, we should be able to see a similar strategy at work in other New Deal agricultural programs. In *Currin v.*

³⁰³ See generally *Zuber v. Allen*, 396 U.S. 168, 172-74 (1969) (describing the economics of the dairy industry); Reuben A. Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J.L. & ECON. 51 (1967) (same).

³⁰⁴ *Queensboro Farm Prods., Inc. v. Wickard*, 137 F.2d 969, 974 (2d Cir. 1943) (Frank, J.) (lamenting that "the domestication of milk has not been accompanied by a successful domestication of some of the meaner human impulses in all those engaged in the milk industry").

³⁰⁵ Stern, *supra* note 77, at 902.

³⁰⁶ See H.R. REP. NO. 75-1645, at 24 (1937); Stern, *supra* note 77, at 902.

³⁰⁷ *Wickard v. Filburn*, 317 U.S. 111, 127 (1942).

³⁰⁸ See J.B. Hutson, *Acreage Allotments, Marketing Quotas, and Commodity Loans as Means of Agricultural Adjustment*, in U.S. DEP'T OF AGRIC., YEARBOOK OF AGRICULTURE, 1940: FARMERS IN A CHANGING WORLD 551, 555 (1940); Stern, *supra* note 77, at 903.

³⁰⁹ S. REP. NO. 76-1668, at 2 (1940), *quoted in* Stern, *supra* note 77, at 902.

Wallace,³¹⁰ there was no way to separate tobacco destined for domestic markets from tobacco earmarked to go abroad.³¹¹ Nor could the New Deal's masters of milk marketing identify distinct intrastate and interstate markets for milk.³¹² These problems differed in degree but not in kind from problems that arose from wheat's on-farm versatility. *Filburn* rested on the proposition that regulators could not distinguish wheat consumed on the farm from wheat sold on the open market. The only difference was that the tobacco warehouse in *Currin* seems more tangible than the global wheat market in *Filburn*; a single warehouse is more obviously "the throat where tobacco enters the stream of commerce."³¹³

Contemporary lawyers often believe that Roscoe Filburn converted his excess wheat into home-baked loaves of bread.³¹⁴ In reality, the notion that "Farmer Filburn was . . . an organic home baker who had decided to raise wheat for a few loaves of bread" boggles the imagination.³¹⁵ To consume the 239 excess bushels at issue in the July 1941 wheat harvest,³¹⁶ the Filburns would have had to consume nearly forty-four one-pound loaves of bread *each day* for the following year.³¹⁷ In Filburn's time, farmers fed twenty times more wheat to livestock than they ground into flour for home use.³¹⁸ Roscoe Filburn,

³¹⁰ 306 U.S. 1 (1939).

³¹¹ See *id.* at 11 ("[T]he transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale.").

³¹² See *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120-21 (1942); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 568-69 (1939). Contemporaneous Dormant Commerce Clause cases disputed the extent to which milk was crossing state lines. Compare *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (condemning a state milk-pricing statute as raising "a barrier to traffic between one state and another as effective as if customs duties . . . had been laid upon the thing transported"), with *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 353 (1939) (observing that "[o]nly a small fraction [of milk] produced by farmers in Pennsylvania is shipped out of the Commonwealth").

³¹³ *Mulford v. Smith*, 307 U.S. 38, 47 (1939); cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 35 (1937) (using a similar "throat" metaphor to describe an impediment to interstate commerce); *Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (same).

³¹⁴ See, e.g., *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130-31 (7th Cir.) (describing *Filburn* as a case involving a "farmer's consumption of bread baked from [his] own wheat"), *cert. denied*, 515 U.S. 1143 (1995); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir.) (citing *Filburn* for the proposition "that wheat a farmer bakes into bread and eats at home is part of 'interstate commerce'"), *cert. denied*, 513 U.S. 930 (1994).

³¹⁵ Merritt, *supra* note 1, at 748-49 & n.316.

³¹⁶ See *Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

³¹⁷ I assume that one bushel of wheat yields sixty-seven loaves of bread. See Texas Wheat Producers Board & Ass'n, *Fun Facts*, at <http://www.texaswheat.org/Facts/funfact.htm> (last visited May 10, 2003).

³¹⁸ See U.S. DEP'T OF AGRIC., FIELD AND SEED CROPS BY STATES, 1949-54, at 8 (1957) (Stat. Bull. No. 208) (reporting wheat consumption statistics for 1944).

successful farmer that he was, surely did not stray from this proven path to agricultural profitability.

Transforming a field crop into grocery staples requires nothing more mysterious than the feeding of farm animals. New anthropological evidence suggests that this act, and not the tilling of crop fields, may have been the first step in the development of agriculture.³¹⁹ If not as old as civilization, one variant of the practice is at least as old as regulation. By converting excess wheat into milk, meat, poultry, and eggs, the Filburn farm engaged in a time-honored practice of regulated firms: manipulating investments between a regulated line of business (wheat) and nonregulated lines (meat, dairy, poultry, and eggs). The Department of Agriculture responded in like fashion by treating each wheat farmer's total acreage in wheat as a workable surrogate for the "impossible task" of "computing the actual quantity of wheat marketed by each farmer in the form of wheat or meat."³²⁰ Reliance on acreage limitations allowed the wheat program to control prices and supply not only in the market for the regulated commodity, but also in several derivative product markets.³²¹ Ironically, the Federal Extension Service, another office within the Department of Agriculture, was exhorting American farmers to feed as much of their wheat crop to livestock, ostensibly to beef up the protein profile of America's war-time diet, but not coincidentally to ease the wheat glut.³²²

What we now call *Filburn's* "aggregation" doctrine reflects economic reality. The simultaneous, uncoordinated acts of vertically integrated, diversified wheat producers take on a significance vastly outstripping that of any single farmer. Like ants, cities, and the Internet, this segment of twentieth century American agriculture exhibited the "emergent behavior" of a "complex adaptive system[]." ³²³ To be sure, neither Filburn nor any other farmer acting alone exercised enough power to affect global prices merely by deciding either to sell wheat or to consume it by integrating wheat production with other on-farm activities. Filburn had to take the market price as he found it; finding the price

³¹⁹ See Constance Holden, *Bringing Home the Bacon*, 264 SCIENCE 1398 (1994).

³²⁰ Stern, *supra* note 77, at 903. For a hint of the intricacy inherent in regulating the price of farm commodities, see Scott Kilman, *Why the Price of Milk Depends on the Distance from Eau Claire, Wisconsin*, WALL ST. J., May 20, 1991, at A1 ("Milk is sort of like the international gold system. . . . Only a handful of people claim to understand it, and most of them are lying.").

³²¹ Classic cases illustrating this regulatory technique include *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and *In re Montana-Dakota Utilities Co.*, 278 N.W.2d 189 (S.D. 1979).

³²² See U.S. DEP'T OF AGRIC., ANNUAL REPORT OF THE SECRETARY OF AGRICULTURE 69, 80 (1941).

³²³ STEPHEN JOHNSON, EMERGENCE: THE CONNECTED LIVES OF ANTS, BRAINS, CITIES, AND SOFTWARE 18 (2001). See generally JOHN H. HOLLAND, EMERGENCE: FROM CHAOS TO ORDER (1998).

less than fully satisfactory, he sought an alternative use for his wheat. Such "price taking" has been the farmer's lot in a world dominated by agribusiness purchasers.³²⁴ But each wheat farmer's seemingly discrete act, multiplied across a large population, profoundly affected prices and supplies in the larger market. The relatively inelastic demand for wheat as food and seed³²⁵ transformed on-farm consumption into the legal equivalent of wheat sales on Chicago's Board of Trade, where even the pre-New Deal Court easily discerned that "[s]ales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."³²⁶ "Untouched, unassailable, undefiled, that mighty world-force, that nourisher of nations, wrapped in Nirvanic calm, indifferent to the human swarm, gigantic, resistless, moved onward in its appointed grooves."³²⁷ Congress unquestionably had the power to regulate this market.

Of course, merely because Congress has regulatory authority and exercises its constitutional prerogatives provides no guarantee that the federal government will achieve its intended objectives.³²⁸ The wheat program upheld in *Wickard v. Filburn* had distinct—and not altogether desirable—distributional consequences. As a superficial matter, the Agricultural Adjustment Act effected no visible disruptions of domestic or international traffic in wheat.³²⁹ Wealth transfers under the Act followed the usual agricultural practice of "lev[ying] the heaviest taxes against poorer people to subsidize mainly richer farmers."³³⁰ In a productive powerhouse of a nation

³²⁴ See *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 825-26 (1978) (describing the "price taking" that occurs when farmers in an almost perfectly competitive market must sell to concentrated agribusiness purchasers); *id.* at 829 (Brennan, J., concurring) (same); *id.* at 840 (White, J., dissenting) (same); *Tigner v. Texas*, 310 U.S. 141, 145 (1940) (same); *cf.* CEDRIC B. COWING, *POPULISTS, PLUNGERS AND PROGRESSIVES: A SOCIAL HISTORY OF STOCK AND COMMODITY SPECULATION, 1890-1936*, at 265 (1965) (identifying dissatisfaction with the economic imbalance between farmers and middlemen as the root of agrarian political unrest); Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 *YALE J. ON REG.* 279, 286-87 (1997) (same).

³²⁵ See *Wickard v. Filburn*, 317 U.S. 111, 127 (1942) ("The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant."); Stern, *supra* note 77, at 904.

³²⁶ *Chi. Bd. of Trade v. Olsen*, 262 U.S. 1, 40 (1923); *cf.* *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 464 (1938) (detecting readily "a continuous flow of interstate commerce" in a stream of "fruits and vegetables . . . grown in California" and shipped entirely within that state).

³²⁷ FRANK NORRIS, *THE OCTOPUS: A STORY OF CALIFORNIA* 360 (Doubleday & Co. 1947) (1901).

³²⁸ *Cf.* *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring in the judgment) ("[A] law can be both economic folly and constitutional.").

³²⁹ *Cf.* *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978) (refusing to find a Dormant Commerce Clause violation where state law did "not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies").

³³⁰ Robert Tempest Masson & Philip M. Eisenstat, *The Pricing Policies and Goals of Federal Milk Order Regulations: Time for Reevaluation*, 23 *S.D. L. REV.* 662, 663 (1978); *cf.* J.Q. WILSON, *THE POLITICS OF*

whose agricultural policy “has focused on losers,”³³¹ Roscoe Filburn himself symbolized the most thoroughly vanquished. Farms like his—farms “maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs” in addition to cultivating “a small acreage of winter wheat”³³²—have become virtually extinct in the six decades since the Supreme Court last entertained a constitutional challenge to federal regulation of farm prices and incomes.

Filburn, to put it bluntly, drove the final sinker into the pinewood coffin of the American family farm. Only a farm like Filburn’s, one integrating grain production with livestock or poultry operations or both, could switch freely between selling wheat on the open market, storing it to await higher prices, and feeding it to farm animals. As the *Filburn* Court recognized, however, farm organization varied greatly by region. The wheat-exporting states of the West and Midwest “specializ[ed] in wheat,” such that “the concentration on this crop reach[ed] 27 per cent of the crop land, and the average harvest [ran] as high as 155 acres.”³³³ By contrast, some states in New England—a net wheat-importing region and the cradle of the American family farm³³⁴—devoted “less than one per cent of the crop land . . . to wheat” and harvested “less than five acres per farm.”³³⁵ Thanks to the uneven geographic distribution of wheat specialists versus integrated farmers, the program upheld in *Filburn* systematically shifted wealth from smaller, integrated farms in the east (including Ohio) to larger, specialized farms in the west. A political system based on proportional representation might muster some opposition to such a transparently regional wealth transfer,³³⁶ but one cannot expect this sort of resistance in a federalist nation whose Senators represent acres, not people.³³⁷

REGULATION 368-69 (1980) (defining “client politics” as the likely result “[w]hen the benefits of a prospective policy are concentrated but the costs widely distributed”). See generally Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 860-62, 875 (1995) (outlining the distributive case against using higher food prices to boost farmers’ incomes).

³³¹ D. Gale Johnson, *U.S. Agricultural Programs as Industrial Policy*, in *INDUSTRIAL POLICY FOR AGRICULTURE IN THE GLOBAL ECONOMY* 307, 308 (S.R. Johnson & S.A. Martin eds., 1993).

³³² *Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

³³³ *Id.* at 126-27.

³³⁴ See Taylor, *supra* note 79, at 476-80; cf. MARK KRAMER, *THREE FARMS: MAKING MILK, MEAT, AND MONEY FROM THE AMERICAN SOIL* 20, 38-42 (2d ed. 1987) (describing the especially tenuous economic position of New England farmers).

³³⁵ *Filburn*, 317 U.S. at 127.

³³⁶ Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) (“The exigencies of the nation may require that . . . treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed.”).

³³⁷ *Contra Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“Legislators represent people, not trees or acres.”).

The *Filburn* Court openly acknowledged the threat that the Agricultural Adjustment Act posed to traditional agriculture. Justice Jackson admitted that wheat which “is never marketed . . . supplies a need of the man who grew it, which would otherwise be reflected by purchases in the open market.”³³⁸ There is no better statement in *United States Reports* of Ronald Coase’s Nobel Prize-winning observation that vertical integration and open-market purchases are flip sides of the same economic phenomenon.³³⁹ Although the so-called Coase theorem, which posits the negotiability of any legal rule,³⁴⁰ is the foundational principle of “law and economics,” Coase’s first blockbuster has drawn relatively little attention from lawyers, judges, and legal academics. Only two federal courts have ever cited *The Nature of the Firm*.³⁴¹

Pending a wholesale reinvention of American law’s intellectual infrastructure, careful parsing of *Wickard v. Filburn* will serve as a workable surrogate for *The Nature of the Firm*. The *Filburn* Court openly admitted that the wheat program “forc[ed] some farmers into the market to buy what they could provide for themselves” and therefore served as “an unfair promotion of the markets and prices of specializing wheat growers.”³⁴² In the three decades after *Wickard v. Filburn*, the proportion of American wheat that was consumed on the farm where it was grown dwindled from sixteen to five percent. The following table tracks the decline of on-farm consumption of wheat after *Wickard v. Filburn*.³⁴³

Criticisms of the Senate as an undemocratic institution are legion. See, e.g., Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997); William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENT. 159 (1995); Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENT. 213 (1995); cf. *Reynolds*, 377 U.S. at 571-77 (refusing to extract any significant implications for constitutionally mandated equality in legislative representation from the geographically based organization of the Senate).

³³⁸ *Filburn*, 317 U.S. at 128.

³³⁹ See R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388, 392 (1937) (n.s.).

³⁴⁰ See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

³⁴¹ See *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1067 (7th Cir. 1992) (citing Coase as indirect support for the proposition that “[c]ommon ownership of corporations is designed in part to bring transactions within the affiliated group that would otherwise have been made with unrelated firms”); *Clajon Gas Co. v. Commissioner*, 119 T.C. 197, 215-16 (2002) (Beghe, J., dissenting) (describing *The Nature of the Firm* as “rais[ing] and answer[ing] a basic question about the concept of the firm and its boundaries”). To be sure, courts have cited other works by Coase to the same effect. See, e.g., *United States v. Smith*, 26 F.3d 739, 744 (7th Cir. 1994) (citing RONALD COASE, *THE FIRM, THE MARKET, AND THE LAW* 6-7 (1988) for the proposition that conspirators, like corporations, reduce transaction costs by agreeing to organize what otherwise would be market transactions); *United States v. Townsend*, 924 F.2d 1385, 1394-95 (7th Cir. 1991) (same).

³⁴² 317 U.S. at 129.

³⁴³ See USDA Economics & Statistics System, at <http://usda.mannlib.comell.edu> (derived from whtus.wk1) (last visited Sept. 26, 2003). All figures marked with a “” are expressed in thousands of tons.

Year	Used on farm [†]	Sold [†]	% on-farm use
1944	173,354	886,757	16.35%
1946	161,306	990,812	14.00%
1948	174,541	1,120,370	13.48%
1950	142,536	876,808	13.98%
1952	136,140	1,170,300	10.42%
1954	84,398	884,398	8.71%
1956	84,419	920,978	8.40%
1958	88,025	1,369,410	6.04%
1960	68,061	1,286,648	5.02%
1962	53,023	1,038,935	4.86%
1964	72,620	1,210,751	5.66%
1966	72,188	1,232,701	5.53%
1968	98,852	1,457,783	6.35%
1970	95,300	1,256,258	7.05%
1972	84,964	1,461,245	5.50%
1974	87,534	1,694,384	4.91%
1976	104,755	2,044,025	4.88%
1978	83,151	1,692,373	4.68%

The Department of Agriculture won a Pyrrhic victory, for the statute upheld in *Filburn* accelerated the destruction of the very type of farmer who lost this case. Shortly after *Filburn*, agricultural analysts were seriously asking the question that Coase had posed to students of industrial organization: "Why is not all production carried on by one big firm?"³⁴⁴ By 1957, Harvard economists invented a new word, *agribusiness*, to describe "the sum total of *all* operations involved in the manufacture and distribution of farm supplies; production operations on the farm; and the storage, processing, and distribution of farm commodities and items made from them."³⁴⁵ Traditional agriculture—"more or less a self-contained industry" characterized by "typical farm famil[ies]" that "produced [their] own food, fuel, shelter, draft animals, feed, tools, and implements and most of [their] clothing"—was becoming an endangered species.³⁴⁶ Marginal farms folded, average farm size mushroomed, and industry began performing "virtually all [the] operations relating to growing, processing, storing, and merchandising food and fiber" that had been "a function of the farm."³⁴⁷ Vertical integration *on* the farm yielded to vertical integration *of* the farm. There is but a vowel's difference between the *firm* and the *farm*;³⁴⁸ the nature of the firm dictates the destiny of the farm.³⁴⁹

In fairness to the architects of the Agricultural Adjustment Act of 1938, the traditional farm economy was already doomed. "Whatever the government did or did not do, it seemed certain by the late 1940s and 1950s that the decline in the number of farms and farmers was irreversible."³⁵⁰ The social, economic, and technological changes wrought by world war ordained as much. Full deployment of mechanical power, fertilizer, and pesticides has sustained the flow of cheap grain since World War II.³⁵¹ Abundant, cheap feed has all but displaced home-grown grain and has shifted a large proportion of American livestock from private pastures and open range to feedlots.³⁵²

³⁴⁴ Coase, *supra* note 339, at 394.

³⁴⁵ JOHN H. DAVIS & RAY A. GOLDBERG, A CONCEPT OF AGRIBUSINESS 2 (1957) (emphasis added).

³⁴⁶ *Id.* at 4.

³⁴⁷ *Id.* at 1.

³⁴⁸ See Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361, 402 (1997) (equating concerns about "farm size" with concerns about "firm size").

³⁴⁹ See generally Douglas W. Allen & Dean Lueck, *The Nature of the Farm*, 41 J.L. & ECON. 343 (1998).

³⁵⁰ FITE, *supra* note 73, at 123.

³⁵¹ See DAVID GOODMAN & MICHAEL REDCLIFT, REFASHIONING NATURE: FOOD, ECOLOGY, AND CULTURE 109-10 (1991).

³⁵² See *id.*; JAMES R. SIMPSON & DONALD E. FARRIS, THE WORLD'S BEEF BUSINESS 37, 51 (1982). I do not mean to suggest that grazing on federal lands has lost its traditional rancor; quite the contrary is true. See, e.g., *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 732 (2000) (describing how "increased competition for forage"

Humans, too, joined the exodus. In the half-century after the war, the farm population of the United States fell from roughly twenty-five percent of the total to less than two percent.³⁵³ America's rise to superpower status all but dictated these demographic shifts, for rural depopulation is a direct consequence of economic growth. Rising urban incomes prompt farmers to abandon farming for city jobs, and the rural landscape that remains hosts fewer, larger farms.³⁵⁴ At an extreme, the rapid "[d]epopulation of the rural Great Plains" prompts a most embarrassing question: "Is North Dakota necessary?"³⁵⁵ It is well past time for America to admit that its true Manifest Destiny lies in restoring 139,000 square miles of economically and ecologically exhausted turf on the Great Plains to their precolonial function: buffalo habitat.³⁵⁶

But *Filburn* and the commodity programs it blessed surely hastened the fading of the agrarian dream. The scholarly consensus is that federal intervention has exacerbated the inequities of modern agriculture.³⁵⁷ For a program whose "major objectives have been to preserve or restore existing structures or conditions," American agricultural policy has failed even on its own economically dubious terms.³⁵⁸ The intended beneficiaries of the New Deal have the bitterest view of its agricultural legacy. "Hell has no fury like a

among cattle and sheep ranchers led historically "to overgrazing, diminished profits, and [open] hostility among forage competitors").

³⁵³ See Chen & Adams, *supra* note 348, at 381 & n.129; Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 218-20 (1993).

³⁵⁴ See Yoav Kislev & Willis Peterson, *Prices, Technology, and Farm Size*, 90 J. POL. ECON. 578, 579 (1982); cf. Andrew P. Barkley, *The Determinants of the Migration of Labor Out of Agriculture in the United States, 1940-84*, 72 AM. J. AGRIC. ECON. 567, 571 (1990) (evaluating the impact of higher nonfarm wages on the exodus from farming).

³⁵⁵ Jon Margolis, *The Reopening of the Frontier*, N.Y. TIMES, Oct. 15, 1995, § 6, at 51, 54.

³⁵⁶ See Frank J. Popper & Deborah Epstein Popper, *The Great Plains: From Dust to Dust*, PLANNING, Dec. 1987, at 12, 17-18. Later writers have even more aggressively advocated the Poppers' radioactively controversial "buffalo commons" proposal. See, e.g., WARD CHURCHILL, *STRUGGLE FOR THE LAND: INDIGENOUS RESISTANCE TO GENOCIDE, ECOCIDE AND EXPROPRIATION IN CONTEMPORARY NORTH AMERICA* 421-33 (1993) (proposing the restoration of the "buffalo commons" region to the indigenous peoples who occupied the Great Plains before white settlement); ANNE MATTHEWS, *WHERE THE BUFFALO ROAM* (1992) (proposing the creation of a "buffalo commons" and creative ways to pay for it); Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 127, 144-45 (1994) (same); see also Nicholas D. Kristof, *Make Way for Buffalo*, N.Y. TIMES, Oct. 29, 2003, at A25 (suggesting that the establishment of "the world's largest nature park" may be the "last, best hope" for the remaining inhabitants of the Great Plains).

³⁵⁷ See generally Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659 (1994) (reviewing the economic and legal literature).

³⁵⁸ Johnson, *supra* note 331, at 308.

duped agrarian":³⁵⁹ advocates for small American farmers have neither forgotten nor forgiven the federal government for its apparent complicity in the rout. The agrarian left has uniformly condemned federal farm programs for accelerating the trend toward fewer, larger, more industrialized farms.³⁶⁰

The path from barnyard to suburb is the dominant narrative in American history. No personal or family history illustrates the sequence as vividly as that of *Wickard v. Filburn*'s protagonist. Roscoe Curtiss Filbrun—he changed the spelling of his family name roughly a decade after losing his Supreme Court case³⁶¹—represented the fifth and final generation of Ohio farmers in his family. In 1966, a quarter-century after initiating his attack on the agricultural New Deal, he persuaded other successors to his grandparents' original 640-acre farmstead to sell their land for development.³⁶² The Salem Mall in Dayton, Ohio now occupies much of the land farmed by Filbrun's extended family.³⁶³ Roscoe Filbrun took a leading role in facilitating zoning changes and in developing sewage and water systems for the mall.³⁶⁴ The ninety-five acres that he farmed became a residential subdivision; the adjoining nine acres of forest became commercial real estate.³⁶⁵ A street on the land that was his is named Filbrun Lane in his honor.³⁶⁶ Neither child of Roscoe and Virginia McConnell Filbrun adopted agriculture as a profession.³⁶⁷ Their daughter, Mary Lou Filbrun Spurgeon, teaches organ.³⁶⁸ When Mary Lou's husband served overseas in the Army during the 1950s, her father bought the Beverly Shop in nearby Brookville, and Mary Lou joined her mother in managing this distinctly nonagricultural family business. Roscoe Filbrun, Sr., lifelong farmer, thus became the legal owner of a ladies' dress shop.³⁶⁹ Roscoe Jr.

³⁵⁹ Chen, *supra* note 330, at 846.

³⁶⁰ See, e.g., MARTY STRANGE, *FAMILY FARMING: A NEW ECONOMIC VISION* 131-34 (1988); INGOLF VOGELER, *THE MYTH OF THE FAMILY FARM: AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE* 170-85 (1981). See generally *THE NEW AGRARIANISM: LAND, CULTURE, AND THE COMMUNITY OF LIFE* (Eric T. Freyfogle ed., 2001). For a guide to the arcane distinctions between left and right in agricultural policy, see generally Curtis E. Beus & Riley E. Dunlap, *Conventional Versus Alternative Agriculture: The Paradigmatic Roots of the Debate*, 55 *RURAL SOCIOLOGY* 590 (1990).

³⁶¹ See *supra* p. 1719.

³⁶² See *FILBRUN FAMILY HISTORY*, *supra* note 114, at 176; Spurgeon Letter, *supra* note 116.

³⁶³ See *FILBRUN FAMILY HISTORY*, *supra* note 114, at 174, 176.

³⁶⁴ See *id.* at 176.

³⁶⁵ See Spurgeon Letter, *supra* note 116.

³⁶⁶ See *FILBRUN FAMILY HISTORY*, *supra* note 114, at 175, 176; Spurgeon Letter, *supra* note 116.

³⁶⁷ Cf. Waylon Jennings & Willie Nelson, *Mamas Don't Let Your Babies Grow Up To Be Cowboys*, on *WAYLON AND WILLIE* (1978).

³⁶⁸ See *FILBRUN FAMILY HISTORY*, *supra* note 114, at 177.

³⁶⁹ See *Background of the Beverly Shop*, OHIO APPAREL REG., Jan. 1956, at 15.

(called Tommy) grew up helping his father on the farm, but eventually worked as an office clerk.³⁷⁰ Tommy's son, John Curtiss Filbrun, carries into a third generation the name of the doctor who saved Martin Filburn's arm.³⁷¹

Roscoe Curtiss Filbrun, Sr., died on October 4, 1987, eighty-five years old and full of days. His family, like America, was born in the country and moved to the city:

[H]ow soon country people forget. When they fall in love with a city, it is forever, and it is like forever. As though there never was a time when they didn't love it. The minute they arrive at the train station or get off the ferry and glimpse the wide streets and the wasteful lamps lighting them, they know they are born for it. There, in a city, they are not so much new as themselves: their stronger, riskier selves.³⁷²

What, after *Filburn*, is truth?³⁷³ As the Court has observed in its Dormant Commerce Clause cases, neither half of "the commerce clause protects the particular structure or methods of operation in a . . . market."³⁷⁴ Confronted with the plea that the wheat program was favoring western monocultures over integrated operations in the east, the Court pleaded judicial impotence: "with the wisdom, workability, or fairness, of [this] plan of regulation we have nothing to do."³⁷⁵ By demanding a robust judicial defense of constitutional structures protecting federalism, the Rehnquist Court effectively suggests that *Filburn's* brand of judicial deference to congressional power "follow[s] the example of Pontius Pilate, whose washing of hands has, for two thousand years, held central place as the condemnable paradigm of terminal leave from judgment."³⁷⁶ But a circumspect look at the agricultural economics of the New Deal vindicates *Filburn* and the Commerce Clause jurisprudence it embodied. *Filburn* involved precisely the type of complex policy judgment that defies legal categories such as commerce versus production or direct versus indirect effects on commerce. Privileging logic over experience in constitutional

³⁷⁰ See FILBRUN FAMILY HISTORY, *supra* note 114, at 177; Spurgeon Letter, *supra* note 116.

³⁷¹ See FILBRUN FAMILY HISTORY, *supra* note 114, at 177.

³⁷² TONI MORRISON, JAZZ 33 (1992).

³⁷³ See *John* 18:38.

³⁷⁴ *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978); *accord* *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93-94 (1987).

³⁷⁵ *Wickard v. Filburn*, 317 U.S. 111, 129 (1942); *cf.* *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (consigning arguments over the "social utility" of contested lines of business "to the legislature, not to us").

³⁷⁶ MILNER S. BALL, THE WORD AND THE LAW 138 (1993); *cf.* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 626-31 (1949) (depicting the fictional Justice Tatting's abdication from a death penalty appeal).

adjudication undermines the faith that this country's fundamental law presumptively vests in legislators who enjoy superior expertise and accountability relative to their judicial counterparts. Whatever consequences flow from congressional intervention in the interstate economy, whether positive or negative, are readily addressed in larger markets for goods, ideas, and votes. You shall know the truth, and the truth shall set you free.³⁷⁷

³⁷⁷ See *John* 8:32.

