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**Legal Studies Research Paper Series  
Paper No. 2008-40**

**THE STORY OF *WICKARD* v. *FILBURN*:  
AGRICULTURE, AGGREGATION, AND COMMERCE**

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# The Story of *Wickard v. Filburn*: Agriculture, Aggregation, and Commerce

Jim Chen<sup>\*</sup>

## *Introduction*

The story of American constitutional law is in many respects an agrarian fable. Strikingly large chunks of constitutional law originate in America's rural past.<sup>1</sup> Numerous constitutional controversies have arisen from seemingly humble disputes over crop production, animal husbandry, and the processing of agricultural commodities.<sup>2</sup>

*Wickard v. Filburn*<sup>3</sup> bridges the illusory gap between agricultural and constitutional law. *Filburn*<sup>4</sup> addresses core issues of federalism, perhaps the "oldest

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<sup>\*</sup>Dean and Professor of Law, University of Louisville. The telling of this story owes a great deal to Mary Lou Filburn Spurgeon, the daughter of Roscoe Curtiss Filburn. I have drawn heavily from an August 30, 2002, letter from Mrs. Spurgeon [hereinafter Spurgeon Letter]. One item not covered in that letter is Roscoe Filburn's decision in the early 1950s to change the spelling of his family name to "Filburn." Mrs. Spurgeon knew no specific reason for the spelling change. I shall refer to this chapter's protagonist as Roscoe *Filburn* when discussing his Supreme Court case, but as Roscoe *Filburn* when discussing his later life. The Ohio newspapers cited in this article and the Filburn family history cited in note 92 are available in the Dayton Metro Library. A version of this chapter was published as Filburn's *Legacy*, 52 Emory L.J. 1719 (2003).

<sup>1</sup>Cf. Jim Chen, *The Potable Constitution*, 15 Const. Comment. 1 (1998) (using cases involving milk and liquor to outline American constitutional law).

<sup>2</sup>See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *United States v. Butler* 297 U.S. 1 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Nebbia v. New York*, 291 U.S. 502 (1934); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). See generally 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); Geoffrey P. Miller, The True Story of Carolene Products, 1987 Sup. Ct. Rev. 397.

<sup>3</sup>317 U.S. 111 (1942).

<sup>4</sup>*Wickard v. Filburn*, of course, should be abbreviated as *Filburn* and not as *Wickard*. As Secretary of Agriculture, Claude Wickard was involved in far more cases than Roscoe Filburn, a private citizen. Once upon a time the Supreme Court understood this distinction and properly abbreviated *Filburn*. See, e.g., *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 231 n.10 (1948) (referring twice to "the *Filburn* case"). A leading Warren Court decision, 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*").

question of constitutional law.<sup>15</sup> Nearly every case about civil liberties or governmental structure can be analyzed as "a case about federalism."<sup>16</sup> Among American innovations in government, "federalism was the unique contribution of the Framers."<sup>17</sup> If indeed the American founding "split the atom of sovereignty,"<sup>18</sup> then the New Deal sustained federalism's first chain reaction. In 1942, the year in which Enrico Fermi harnessed atomic fission, the Supreme Court decided *Wickard v. Filburn*.<sup>9</sup>

*Filburn* is at once a product of its era and a beacon across legal generations. The New Deal program in *Filburn* addressed agricultural complaints dating from the end of World War I. When Roscoe Filburn won his initial victory in court, the local newspaper divided its front page between that news and a war dispatch from the Dutch East Indies.<sup>10</sup> Like art deco architecture, the photography of Margaret Bourke-White<sup>11</sup> and Walker Evans,<sup>12</sup> and Christian Dior's exuberant designs,<sup>13</sup> *Filburn* bears the cultural marks of the Jazz Age, the Great Depression, and World War II. *Filburn*, so it seems, happened only yesterday.<sup>14</sup> By the same token, *Filburn* represents a pivotal moment in the Supreme Court's centuries-long effort to define the scope of Congress's power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>15</sup>

*Filburn* and other New Deal cases involved two fiercely contested aspects of Commerce Clause jurisprudence. Each of these points of dispute can be traced to the language of the Constitution. 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

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<sup>5</sup>*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).

<sup>6</sup>*Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

<sup>7</sup>*United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

<sup>8</sup>*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>9</sup>317 U.S. 111 (1942).

<sup>10</sup>*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.

<sup>11</sup>See *Margaret Bourke-White: Photographer* (Sean Callahan, Maryann Kornely & Debra Cohen eds., 1998).

<sup>12</sup>See James Agee & Walker Evans, *Let Us Now Praise Famous Men* (1939).

<sup>13</sup>See Marie-France Pochna, *Christian Dior: The Man Who Made the World Look New* (Joanna Savill trans., 1996).

<sup>14</sup>See Frederick Lewis Allen, *Only Yesterday: An Informal History of the 1920's* (rpt. 1997).

<sup>15</sup>U.S. Const. art. I, § 8, cl. 3.

well as the purchase, sale, and exchange of commodities."<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup>

In the twenty-first century, the federal government's regulatory power reaches each of these fields. The contemporary scope of Congress's power over foreign and interstate commerce draws its strength precisely from the expectation that "the wheat grower of the Northwest, and the cotton planter of the South, [would] plant, cultivate, and harvest his [or her] crop with an eye on the prices at Liverpool, New York, and Chicago."<sup>19</sup> Before the New Deal, the "delicate, multiform, and vital interests" in these fields of enterprise at one time seemed inherently "local in all the details of their successful management."<sup>20</sup> Today's Court, by contrast, treats the regulation of commodity markets as an appropriate, even routine, subject for federal legislation.

*Filburn* has also figured prominently in the Supreme Court's treatment of the line between intrastate 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."<sup>21</sup> This division of responsibility does not mean, however, that "the power of Congress ... stop[s] at the jurisdictional lines of the several States."<sup>22</sup> 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."<sup>23</sup> The fact that certain activities simultaneously affect intrastate and interstate commerce "does not derogate from the complete and

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<sup>16</sup> *County of Mobile v. Kimball*, 102 U.S. 691, 702 (1880); accord *Kidd v. Pearson*, 128 U.S. 1, 20-21 (1888).

<sup>17</sup> *Veazie v. Moor*, 55 U.S. (14 How.) 568, 573 (1853); accord *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936).

<sup>18</sup> *Kidd*, 128 U.S. at 21.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

<sup>22</sup> *Id.*

<sup>23</sup> *Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Cases)*, 234 U.S. 342, 351 (1914).

paramount authority of Congress over the latter.<sup>24</sup>

Federal responses to agricultural crises during the early twentieth century triggered a dramatic struggle over the boundary between state and federal authority. Even before the New Deal, the Supreme Court endorsed congressional efforts to combat monopolistic threats to the free flow of livestock and grain.<sup>25</sup> Agricultural controversies 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."<sup>26</sup> The New Deal's aggressive response to global depression, which dealt extraordinarily harsh blows to American agriculture, inspired unprecedented legislation at the frontiers of Congress's authority.

By virtue of its prominence in the New Deal's agricultural debate, *Wickard v. Filburn* assumed an even greater role in the ensuing constitutional transformation. Together with *United States v. Darby*<sup>27</sup> and *NLRB v. Jones & Laughlin Steel Corp.*,<sup>28</sup> *Wickard v. Filburn* is thought to have marked a turning point, perhaps even a high-water mark, in Commerce Clause jurisprudence.<sup>29</sup> The contemporary Supreme Court has aggressively reinterpreted the Commerce Clause in "a mighty effort to put the states in what" today's Justices believe "to be their rightful place."<sup>30</sup> The Court's reinvigorated resolve to define clear "distinction[s] between what is truly national and what is truly local"<sup>31</sup> has thrown *Filburn* back into the constitutional fray.

After providing a brief survey of American agriculture and its regulation

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<sup>24</sup>*Id.*

<sup>25</sup>*See, e.g., Board of Trade v. Olsen*, 262 U.S. 1, 32 (1923) (upholding provisions of the Grain Futures Act of 1922); *Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (rejecting a challenge to the Packers and Stockyards Act).

<sup>26</sup>*Swift & Co. v. United States*, 196 U.S. 375, 398 (1905).

<sup>27</sup>312 U.S. 100 (1941).

<sup>28</sup>301 U.S. 1 (1937).

<sup>29</sup>*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." (citations omitted)); *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 "mark[ing] 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" 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*, *Darby*, and *Filburn* among decisions upholding applications of the commerce power).

<sup>30</sup>John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* 8 (2002); *see also* Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707 (2002).

<sup>31</sup>*Lopez*, 514 U.S. at 567-68.

between the World Wars, I shall describe the 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 when it was decided, but also what it represents today.

### ***Background***

American farmers suffered mightily during the Great Depression.<sup>32</sup> A mere generation earlier, American farmers were enjoying unmatched prosperity. The period immediately before World War I is memorialized as the "parity" period in federal agricultural law. "Parity" is 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."<sup>33</sup> 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."<sup>34</sup>

The years before the Great War were in fact agriculture's golden age. 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:<sup>35</sup>

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

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<sup>32</sup> See, e.g., John Steinbeck, *The Grapes of Wrath* (1939).

<sup>33</sup> 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). 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).

<sup>34</sup> 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).

<sup>35</sup> See 2 U.S. Dep't of Commerce, Bureau of the Census, *U.S. Census of Population: 1950*, at 12 (1953) (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).

decades, and by 1920 the urban population exceeded the rural population.<sup>36</sup>

But raw population shifts concealed the true drivers of change. The war that made the world safe for democracy rendered the American countryside unfit for agriculture.<sup>37</sup> "The initial shock of war in 1914 ... brought an overnight collapse in the foreign sales of wheat and cotton...."<sup>38</sup> American entry into the war drove commodity prices even lower, as the urgent cultivation of 40 million new acres poured vast grain harvests out of the Plains.<sup>39</sup> Meanwhile, wartime inflation devastated purchasing power on the farm.<sup>40</sup>

Macroeconomic turmoil coincided with technological revolution. "[T]he process of economic development and specialization" during the early twentieth century transformed "functions which are necessary to the total economic process of" agriculture into "separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it."<sup>41</sup> Systematic substitution of engines for organic horsepower simultaneously raised yields, increased dependence on purchased inputs, and decreased demand for feed grains.<sup>42</sup> Many farmers, especially wheat growers, were caught in a classic price squeeze:<sup>43</sup> depressed demand and prices for their products, coupled with unbearable increases in the cost of living.<sup>44</sup>

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.<sup>45</sup> Boll weevil infestation delivered the *coup de grâce* to the South's agrarian economy.<sup>46</sup> In

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<sup>36</sup> *Id.*

<sup>37</sup> See generally Benjamin H. Hibbard, *Effects of the Great War upon Agriculture in the United States and Great Britain* 22-67 (1919) (Carnegie Endow. for Int'l Peace, Div. of Econ. & History, Preliminary Economic Studies of the War No. 11).

<sup>38</sup> Theodore Saloutos, *The American Farmer and the New Deal* 3 (1982).

<sup>39</sup> *Id.*

<sup>40</sup> See A.B. Genung, *The Purchasing Power of the Farmer's Dollar from 1913 to Date*, 117 *Annals Am. Acad. Pol. & Soc. Sci.* 22, 22-23 (1925).

<sup>41</sup> *Farmers Reservoir & Irrig. Co. v. McComb*, 337 U.S. 755, 761 (1949).

<sup>42</sup> See Saloutos, *supra* note 38, at 6, 25.

<sup>43</sup> See generally, e.g., *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 279 (1976); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376-78 (9th Cir. 1992); John E. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 *UCLA L. Rev.* 563 (1984).

<sup>44</sup> 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).

<sup>45</sup> Nicholas Lemann, *The Promised Land: The Great Black Migration and How It Changed America* 5 (1991).

<sup>46</sup> See 4 U.S. Dep't of Commerce, Bureau of the Census, *Fifteenth Census of the United States: 1930*,



"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.<sup>47</sup> "[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.'"<sup>48</sup>

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 very hard to restore American agricultural exports to prewar levels.<sup>49</sup> Political instability razed several significant European markets. Crushed by brutal reparation obligations and by hyperinflation,<sup>50</sup> Germany hiked tariffs and subsidized domestic grain production.<sup>51</sup> Fascist Italy likewise closed its markets.<sup>52</sup> The restructuring of Soviet agriculture all but barred imports.<sup>53</sup>

Catastrophically, the United States also embraced forbidding tariffs and agricultural autarky. The McNary-Haugen bills that nearly became law in 1927 and 1928 would have raised tariffs on agricultural imports in order to lift domestic commodity prices.<sup>54</sup> Herbert Hoover's election ended the McNary-Haugen plan,<sup>55</sup> but his administration implemented the notoriously protectionistic Smoot-Hawley Tariff Act.<sup>56</sup> As retaliatory tariffs rose all over the world, America's "most disastrous single

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at 12 (1933) ("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.").

<sup>47</sup>Lemann, *supra* note 45, at 6; see also Conrad Taeuber & Irene B. Taeuber, *The Changing Population of the United States* 109-11 (1958) (discussing the "dramatic speed" with which "Negroes [moved] out of the southern States" and into "very largely ... urban areas").

<sup>48</sup>Lemann, *supra* note 45, at 6.

<sup>49</sup>See generally E.G. 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).

<sup>50</sup>See generally John Maynard Keynes, *The Economic Consequences of the Peace* 235-48 (1920) (warning, with tragic accuracy, of hyperinflation's dire consequences in Germany).

<sup>51</sup>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).

<sup>52</sup>See *id.* at 262-63; N.W. Hazan, *The Agricultural Program of Fascist Italy*, 15 J. Farm Econ. 489 (1933).

<sup>53</sup>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, *Foreign Commerce and Navigation of the United States* 363 (1942) (reporting that the Soviet Union resumed its imports of American wheat and flour by the 1940s).

<sup>54</sup>See Gilbert C. Fite, *American Farmers: The New Minority* 42-47 (1981).

<sup>55</sup>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).

<sup>56</sup>Pub. L. No. 71-361, 46 Stat. 590 (1930) (codified as amended in scattered sections of 19 U.S.C.).



mistake ... in international relations" completed the rout.<sup>57</sup> Domestic supplies soared, exports evaporated, and prices crashed.<sup>58</sup> In the halcyon days before World War I, American farmers might have unloaded their wheat abroad. But the new tariffs sealed off many overseas markets. Nor would war beyond America's shores restore agricultural prosperity. Foreign aid programs such as Lend-Lease and wartime increases in demand offered only modest and evanescent relief.<sup>59</sup>

The 1932 presidential campaign thus coincided with an important moment in American agricultural history: North and South at last were united in mutual misery.<sup>60</sup> Foreclosure auctions transferred one-quarter of the land in Mississippi on a single day in April 1932.<sup>61</sup> The Farmers' Holiday Association conducted violent demonstrations throughout the Midwest.<sup>62</sup> Agricultural relief became a central plank of Franklin D. Roosevelt's presidential campaign.<sup>63</sup>

But Roosevelt's earliest efforts to deliver price and income support and debt relief to farmers met constitutional defeat. After invalidating the Farm Bankruptcy Act of 1934,<sup>64</sup> the Supreme Court dealt an even harsher blow to the New Deal's agricultural agenda. The Agricultural Adjustment Act of 1933,<sup>65</sup> which Roosevelt hailed as "the most drastic and far-reaching piece of farm legislation ever proposed in time of peace,"<sup>66</sup> drew condemnation as an open door for "government's invasion of private business."<sup>67</sup> In the 1936 decision of *United States v. Butler*, the Supreme

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<sup>57</sup>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).

<sup>58</sup>See U.S. Dep't of Agric., *Agricultural Statistics* 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 II)*, 59 Harv. L. Rev. 883, 901 (1946) (same).

<sup>59</sup>See U.S. Dep't of Agric., *1943 Annual Report of the Secretary of Agriculture* 136 (1944) (reporting increases in demand for wheat as grain, as animal feed, and as a base for alcohol).

<sup>60</sup>*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).

<sup>61</sup>See William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940*, at 23 (1963).

<sup>62</sup>See Fite, *supra* note 54, at 53-54.

<sup>63</sup>See Frank Freidel, *Franklin D. Roosevelt: The Triumph* 342-50 (1956); *cf.* Breimyer, *supra* note 34, at 342-43 (describing the "instrumental" role played by "the personality of Franklin D. Roosevelt" in the development of New Deal agricultural policy).

<sup>64</sup>See Frazier-Lemke Farm Bankruptcy Act, Pub. L. No. 73-486, 48 Stat. 1289 (1934); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935).

<sup>65</sup>Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-626 (2000)).

<sup>66</sup>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).

<sup>67</sup>Gilbert C. Fite, *Farmer Opinion and the Agricultural Adjustment Act, 1933*, 48 Miss. Valley Hist.

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."<sup>68</sup> This Tenth Amendment decision came on the heels of *A.L.A. Schechter Poultry Corp. v. United States*,<sup>69</sup> 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.

Commerce Clause jurisprudence, however, was evolving rapidly in favor of expanded federal authority. In upholding the National Labor Relations Act, the 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*<sup>70</sup> 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.<sup>71</sup> Rather, *Jones & Laughlin* measured the federal commerce power according to a regulated activity's "effect upon interstate commerce."<sup>72</sup> Expanding the "stream of commerce" metaphor that dominated commerce cases before the New Deal,<sup>73</sup> *Jones & Laughlin* authorized Congress to remove "[b]urdens and obstructions ... springing from other sources."<sup>74</sup>

This constitutional shift revitalized the New Deal's agricultural agenda. From 1935 to 1938, Congress passed four major statutes that reinstated earlier laws in all but name: the Frazier-Lemke Farm Bankruptcy Act of 1935,<sup>75</sup> the Soil Conservation and Domestic Allotment Act of 1936,<sup>76</sup> the Agricultural Marketing Agreement Act of 1937,<sup>77</sup> and the monumental Agricultural Adjustment Act of 1938.<sup>78</sup> By 1939, the new Farm Bankruptcy Act, the Agricultural Marketing Agreement Act, and the new Agricultural Adjustment Act had all withstood constitutional challenges.<sup>79</sup> The soil

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Rev. 656, 669 (1962).

<sup>68</sup>297 U.S. 1, 68, 74-75 (1936).

<sup>69</sup>295 U.S. 495 (1935).

<sup>70</sup>301 U.S. 1 (1937).

<sup>71</sup>*Id.* at 40.

<sup>72</sup>*Id.*

<sup>73</sup>*See id.* at 34-36 (citing, *inter alia*, *Stafford v. Wallace*, 258 U.S. 495 (1922)).

<sup>74</sup>*Id.* at 36; *cf. Board 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").

<sup>75</sup>Pub. L. No. 74-384, 49 Stat. 942 (1935).

<sup>76</sup>Pub. L. No. 74-461, 49 Stat. 1148 (1936).

<sup>77</sup>Pub. L. No. 75-137, 50 Stat. 246 (1937) (codified as amended at 7 U.S.C. §§ 601-624, 671-674 (2000)).

<sup>78</sup>Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified as amended at 7 U.S.C. §§ 1281-1393 (2000)).

<sup>79</sup>*See United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 562-81 (1939) (upholding the

conservation law escaped scrutiny because "[n]o one could challenge the value" or the constitutionality "of conservation."<sup>80</sup> Payments for planting "soil-conserving" crops achieved much of the acreage reduction contemplated under the invalidated Agricultural Adjustment Act of 1933.<sup>81</sup> The Supreme Court's decision to uphold a tobacco inspection statute reinforced the Roosevelt Administration's growing sense of invulnerability.<sup>82</sup>

Among the cases in this sequence, *Mulford v. Smith*<sup>83</sup> was perhaps the most significant. Even though the marketing quotas imposed by the Agricultural Adjustment Act of 1938 intruded far more aggressively into the tobacco industry than the 1933 Act's processing taxes, *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,"<sup>84</sup> *Mulford* blessed the 1938 Act as a program "intended to foster, protect and conserve [interstate] commerce."<sup>85</sup>

The shift in Commerce Clause jurisprudence made a manifest difference. In *Mulford*'s wake, a circuit court upheld cotton marketing quotas imposed by the Agricultural Adjustment Act.<sup>86</sup> The Supreme Court endorsed Congress's power to fix commodity prices directly.<sup>87</sup> *United States v. Darby*,<sup>88</sup> 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*,<sup>89</sup> the 1918 decision that had

(...continued)

Agricultural Marketing Agreement Act); *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); 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).

<sup>80</sup>Breimyer, *supra* note 34, at 348; cf. *Mayo v. United States*, 319 U.S. 441, 446-48 (1943) (exempting fertilizer distributed by federal officials from a Florida inspection law under the theory of intergovernmental immunity).

<sup>81</sup>See Fite, *supra* note 54, at 60; Breimyer, *supra* note 34, 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).

<sup>82</sup>See *Currin v. Wallace*, 306 U.S. 1 (1939) (upholding the Tobacco Inspection Act, ch. 623, 49 Stat. 731 (1935) (codified as 7 U.S.C. §§ 511-511q (2000))).

<sup>83</sup>307 U.S. 38 (1939).

<sup>84</sup>*United States v. Butler*, 297 U.S. 1, 68 (1936).

<sup>85</sup>*Mulford*, 307 U.S. at 48.

<sup>86</sup>See *Troppy v. La Sara Farmers Gin Co.*, 113 F.2d 350, 350-52 (5th Cir. 1940).

<sup>87</sup>See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393-94 (1940); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 571 (1939); cf. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-16 (1936) (declining to review Congress's power to fix coal prices).

<sup>88</sup>312 U.S. 100 (1941).

<sup>89</sup>247 U.S. 251 (1918).

confined the commerce power "to articles which in themselves have some harmful or deleterious property,"<sup>90</sup> *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.<sup>91</sup> By 1941, the Roosevelt Administration's struggle to reinvent the Commerce Clause in its image had been waged and won.

### *The Lower Court Decision*

Roscoe Curtiss Filburn was born August 2, 1902, in Dayton, Ohio, to Martin and Mary Elizabeth Filburn.<sup>92</sup> He represented the fifth generation of an Ohio farm family.<sup>93</sup> His maternal grandparents, John and Susannah Smith, farmed a full section in Montgomery County.<sup>94</sup> The Smiths divided their 640 acres among seven children. Mary Elizabeth received the homestead, ninety-five acres of farmland, and nine additional wooded acres.<sup>95</sup> 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.<sup>96</sup> A family biography provided a quote testifying to Roscoe Filburn's "sense of pride": "I never worked for another man in my life."<sup>97</sup>

Roscoe Filburn raised dairy cattle and poultry. His family welcomed "75 ... customers ... every day for milk and eggs."<sup>98</sup> 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 held an allotment 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. In July 1941, he harvested 462 bushels in all.<sup>99</sup> His extra 11.9 acres yielded 239 bushels.

Filburn's excess harvest violated his acreage allotment. Acreage limitations were the Agricultural Adjustment Act's primary tool for controlling the supply of federally subsidized crops. Supply control has always played a crucial role in agricultural regulation. Because excessive production can stretch the gap between a

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<sup>90</sup> *Darby*, 312 U.S. at 116-17 (overruling *Hammer*).

<sup>91</sup> *Id.* at 115.

<sup>92</sup> See Jerry Allen Filbrun et al., *A Fillbrunn Family History: Various Members of the Families Fillbrunn, Filbrun, Filburn, et al., 1570-1985*, at 176 (1985) [hereinafter *Filbrun Family History*].

<sup>93</sup> See *id.* at 174.

<sup>94</sup> See Spurgeon Letter, *supra* note \* at 2.

<sup>95</sup> See *id.* at 3.

<sup>96</sup> See *Filbrun Family History*, *supra* note 92, at 174.

<sup>97</sup> *Id.* at 176.

<sup>98</sup> Spurgeon Letter, *supra* note \* at 7-8.

<sup>99</sup> See *Wheat Control Challenged*, Dayton J., July 15, 1941, at 1, 2.

commodity's market price and the target price set in a government-sponsored support program, virtually every price support mechanism is paired with some sort of supply control.<sup>100</sup> The need for supply control increases dramatically when the government extends nonrecourse loans to producers, which effectively raise minimum commodity prices.<sup>101</sup> Before the 1941 planting season, it became evident that "[t]he low prices [for wheat] were obviously the result of the excessive supply."<sup>102</sup> Only stiffer penalties on excess production could prevent already overflowing stocks from surpassing the all-time high reached in 1940.<sup>103</sup> In spite of farmers' traditional opposition, acreage restrictions seemed inevitable.<sup>104</sup>

Fear of a wheat glut and an accompanying price crash turned the spotlight to the Agricultural Adjustment Act's supply control provisions. The Act directed the Secretary of Agriculture to proclaim a national acreage allotment for each year's wheat crop, to be apportioned among states, counties, and 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 normal domestic consumption and export by more than 35 percent. The Act required the Secretary to make a proclamation to that effect by May 15. After that proclamation, but before June 10, the Secretary had to conduct a referendum of affected farmers. A compulsory national marketing quota for wheat would take effect for the marketing year unless more than one-third of participating farmers voted to suspend the quota. When Filburn planted his 1941 crop, the Act's penalty for excess wheat was 15 cents per bushel.

During spring 1941, Secretary of Agriculture Claude Wickard projected a wheat surplus and proposed a marketing quota. He scheduled a national referendum for May 31. In a radio address on May 19, Secretary Wickard mentioned a pending bill before Congress, which would have raised the nonrecourse loan rate on wheat to 85 percent of parity. The resulting increase in wheat's effective minimum market price would prompt more production, which threatened to suppress real market prices 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 1941, "as compared with the world market price of 40 cents a bushel."<sup>105</sup>

During his May 19 address, Secretary Wickard announced: "Because of the

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<sup>100</sup> See J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 Mercer L. Rev. 763, 787-88 (1993).

<sup>101</sup> See, e.g., *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064, 1067 (5th Cir. 1981).

<sup>102</sup> Stern, *supra* note 58, at 902.

<sup>103</sup> See *id.* at 901-02.

<sup>104</sup> See Fite, *supra* note 54, at 51-52.

<sup>105</sup> *Wickard v. Filburn*, 317 U.S. 111, 126 (1942).

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." He did not mention, however, that a pending amendment to the Agricultural Adjustment Act would increase the penalty on excess wheat from 15 cents per bushel to 49 cents (half of the parity loan rate, then 98 cents) and would subject a violating farm's crop to a lien in favor of the United States.

On May 26, Congress approved the pending amendment. On May 31, the Department of Agriculture conducted the wheat growers' referendum. Among those voting, 81 percent favored the marketing quota. Ohio farmers, however, voted against the quota.<sup>106</sup> 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.

Officials charged with administering the Agricultural Adjustment Act in Montgomery County assessed a penalty of 49 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 suit filed in the U.S. District Court for the Southern District of Ohio, Filburn challenged his marketing excess penalty. The majority opinion in *Filburn v. Helke*<sup>107</sup> failed even to mention the Commerce Clause. Rather, District Judge John Druffel emphasized "the fact that the law increasing the penalty was approved only five days prior to the national referendum."<sup>108</sup> He reasoned that the case hinged on whether farmers "were unintentionally misled."<sup>109</sup> The court stressed how the May 26 amendment, which more than tripled the penalty for excess wheat, contradicted Secretary Wickard's purported pledge to safeguard farmers against unfair penalties.<sup>110</sup> The court reasoned that Secretary Wickard should have warned the farmers that "increased parity loans" would expose farmers "to increased penalties for the farm marketing excess."<sup>111</sup> The court concluded that the May 26 amendment "retroactively" effected "a taking of ... property without due process."<sup>112</sup>

Judge Florence Allen, the lone dissenter, found "no equitable justification" for blocking "the fulfillment of the declared legislative will of the nation."<sup>113</sup> Judge Allen

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<sup>106</sup> See *Wheat Control Challenged*, *supra* note 99, at 1.

<sup>107</sup> 43 F. Supp. 1017 (S.D. Ohio), *rev'd sub nom. Wickard v. Filburn*, 317 U.S. 111 (1942). Carl Helke and other members of Montgomery County's agricultural committee were named as defendants.

<sup>108</sup> *Id.* at 1018. District Judge Robert Nevin joined Judge Druffel.

<sup>109</sup> *Id.* at 1019.

<sup>110</sup> See *id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* In the alternative, the court ruled "that the equities of the case ... favor the plaintiff." *Id.*

<sup>113</sup> *Id.* at 1020 (Allen, J., dissenting).



alone anticipated *Filburn*'s pivotal constitutional issue. Relying heavily on Supreme Court cases upholding New Deal agricultural programs<sup>114</sup> and quoting extensively from congressional findings of fact,<sup>115</sup> Judge Allen described the Agricultural Adjustment Act "as applied to wheat [as] a valid exercise of the federal commerce power."<sup>116</sup>

### *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. The Supreme Court noted probable jurisdiction.<sup>117</sup>

Three of the five questions presented by the government's initial brief focused on Secretary Wickard's May 19 radio address, the May 26 amendment, and the May 31 growers' referendum.<sup>118</sup> The fourth question 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."<sup>119</sup>

With respect to Congress's power to regulate interstate commerce, the government's brief made two crucial contributions. First, the government demonstrated that the district court could not have avoided the commerce question, at least insofar as that 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."<sup>120</sup> Because the Agricultural Adjustment Act's penalty on all wheat "marketed" in excess of a farm's allotted quota included wheat "dispose[d] of by feeding to poultry and livestock as well as by selling," Filburn 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."<sup>121</sup>

Second, the government's brief documented the duality of the wheat market.

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<sup>114</sup> See *id.* at 1022-23 (citing, *inter alia*, *Mulford v. Smith*, 307 U.S. 38 (1939); *United States v. Rock-Royal Co-op., Inc.*, 307 U.S. 533 (1939)).

<sup>115</sup> See *id.* (quoting 7 U.S.C. § 1331).

<sup>116</sup> *Id.* at 1022.

<sup>117</sup> See *Wickard v. Filburn*, 62 S. Ct. 919, 919 (1942).

<sup>118</sup> 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*].

<sup>119</sup> *Id.* The fifth question challenged Filburn's ability to sue individual members of the agricultural conservation committees for Ohio and Montgomery County. See *id.* at 2, 53, reprinted in *Landmark Briefs*, *supra* note 118, at 682, 733.

<sup>120</sup> *Id.* at 38 n.7, reprinted in *Landmark Briefs*, *supra* note 118, at 718 n.7.

<sup>121</sup> *Id.*



On one hand, the government described "[t]he vast extent of the interstate and foreign movements of wheat and flour."<sup>122</sup> On the other, the government distinguished wheat from tobacco, the crop at issue in *Mulford v. Smith*.<sup>123</sup> Unlike tobacco, wheat was "marketed by over a million farmers through almost innumerable outlets."<sup>124</sup> A "substantial quantity" of that wheat would be consumed on the farm "as feed for livestock, as seed, and, to a slight extent, as food."<sup>125</sup> 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.

Counsel for Filburn treated this aspect of the government's argument as an opportunity to distinguish *Mulford* and other decisions upholding the New Deal's agricultural programs.<sup>126</sup> The appellee's brief 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."<sup>127</sup>

On June 1, 1942, the Supreme Court ordered reargument, limited "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."<sup>128</sup> Secretary Wickard's brief on reargument recast the Commerce Clause issue in terms more amenable to expansive 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."<sup>129</sup>

By contrast, counsel for Filburn took refuge in the traditional distinction between production and shipment. The appellee's brief on reargument 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."<sup>130</sup> Filburn's brief warned that the

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<sup>122</sup> *Id.* at 12, reprinted in *Landmark Briefs*, supra note 118, at 692.

<sup>123</sup> 307 U.S. 38 (1939).

<sup>124</sup> Brief for the Appellant, at 45, reprinted in *Landmark Briefs*, supra note 118, at 725.

<sup>125</sup> *Id.* at 41, reprinted in *Landmark Briefs*, supra note 118, at 721.

<sup>126</sup> See Brief for Appellee, at 21-23, reprinted in *Landmark Briefs*, supra note 118, at 741, 761-63.

<sup>127</sup> *Id.* at 22, reprinted in *Landmark Briefs*, supra note 118, at 762.

<sup>128</sup> 62 S.Ct. 1289, 1289 (1942).

<sup>129</sup> Brief for the Appellants on Reargument, at 2, reprinted in *Landmark Briefs*, supra note 118, at 765, 770.

<sup>130</sup> Brief for the Appellee on Reargument, at 13, reprinted in *Landmark Briefs*, supra note 118, at 823, 835.

government's approach to the Commerce Clause "would not only effectually approach a centralized government but could eventually lead to absolutism by successive nullifications of all Constitutional limitations."<sup>131</sup>

After much maneuvering, the briefs in *Wickard v. Filburn* eventually reached the doctrinal basis on which this case would hang. The Supreme Court's reargument order minimized the retroactivity and equity issues that had transfixed the district court. The refocused dispute squarely presented the New Deal's final unanswered question of Commerce Clause doctrine.

### *The Supreme Court Decision*

The Supreme Court quickly dispensed with 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."<sup>132</sup> 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."<sup>133</sup> Indeed, the Court characterized a complaint based on the speech as "frivolous."<sup>134</sup> The Supreme Court made comparably short work of the district court's conclusion that federal law deprived Filburn of due process or otherwise worked an inequitable result. Insofar as the wheat program lifted prices above unregulated levels, the Court rejected Filburn's due process claim:<sup>135</sup> "It is hardly lack of due process for the Government to regulate that which it subsidizes."<sup>136</sup>

The Court devoted most of its opinion to the Commerce Clause. Yet the Court intimated that even this issue "would merit little consideration since [its] decision in *United States v. Darby*."<sup>137</sup> The lone difference between *Darby* and *Filburn* lay in "the fact that [the Agricultural Adjustment] Act extends federal regulation to production not intended in any part of commerce but wholly for consumption on the farm."<sup>138</sup> And this factor's significance appeared to have been overstated. 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

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<sup>131</sup> *Id.* at 14, reprinted in *Landmark Briefs*, *supra* note 118, at 836.

<sup>132</sup> *Wickard v. Filburn*, 317 U.S. 111, 117 (1942).

<sup>133</sup> *Id.* at 118.

<sup>134</sup> *Id.*

<sup>135</sup> *See id.* at 129-33.

<sup>136</sup> *Id.* at 131; *see also id.* at 133 ("[I]f [Filburn] could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows.").

<sup>137</sup> *Id.* at 118 (citing *United States v. Darby*, 312 U.S. 100 (1941)).

<sup>138</sup> *Id.*

nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."<sup>139</sup> Because these terms merely described conclusions without providing useful guidance toward determining which "kinds of intrastate activity [affecting] interstate commerce were ... a proper subject of federal regulation,"<sup>140</sup> 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.' "<sup>141</sup>

The Court then turned to "the economics of the wheat industry."<sup>142</sup> Its survey of this "problem industry," at home and abroad, was reminiscent of Chief Justice Hughes's description of the breathtaking scale of the Jones & Laughlin Steel Corporation.<sup>143</sup> Although other cases had 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,"<sup>144</sup> *Filburn* began but did not stop with "[c]ommerce among the states in wheat."<sup>145</sup> This was no ordinary program for rationalizing domestic distribution of a scarce commodity. The Court's survey of the "large and important" traffic between sixteen wheat-exporting states and their thirty-two wheat-importing counterparts hinted at a crisis of global proportions.<sup>146</sup> The real problem was the "abnormally large supply of wheat" that 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."<sup>147</sup> "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 1920's they averaged more than 25 per cent."<sup>148</sup> 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," the wheat program's 1941 benchmark, "with the world market

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<sup>139</sup> *Id.* at 120.

<sup>140</sup> *Id.* at 122.

<sup>141</sup> *Id.* at 124.

<sup>142</sup> *Id.* at 125.

<sup>143</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25-28 (1937).

<sup>144</sup> *Chi. Board of Trade v. Olsen*, 262 U.S. 1, 36 (1923); see also *Lenke 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" dominating "the flow of commerce from the ranges and farms of the West to the consumers in the East").

<sup>145</sup> 317 U.S. at 125.

<sup>146</sup> *Id.* at 125.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

price of 40 cents.<sup>149</sup>

Justice Jackson next focused on American farmers. Whereas many farmers in western wheat-exporting states "specializ[ed] in wheat" and sold "the crop for cash," farmers in wheat-importing regions such as New England generally used wheat for multiple purposes, from animal feed to "a nurse crop for grass seeding" and a mere "cover crop to prevent soil erosion and leaching."<sup>150</sup> (So much for the soil conservation law's characterization of wheat as a "soil-depleting" crop.<sup>151</sup>) These regional variations proved dispositive. "[C]onsumption of homegrown wheat," the Court concluded, profoundly affected interstate commerce because "it constitute[d] the most variable factor in the disappearance of the wheat crop."<sup>152</sup> Unlike the "relatively constant" amounts of wheat "consumed as food ... and use[d] as seed," on-farm wheat consumption "appear[ed] to vary in an amount greater than 20 per cent of average production."<sup>153</sup>

This observation about 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.<sup>154</sup>

This observation brought the Court's Commerce Clause analysis to a swift and decisive conclusion. Plainly the 1938 Act was designed "to increase the market price of wheat and ... to limit the volume thereof."<sup>155</sup> The power of Congress "to regulate the prices [of] ... commodities in [interstate] commerce" could no longer be questioned.<sup>156</sup> The admittedly "substantial influence" of home-consumed wheat left "no doubt that Congress may properly have [swept] wheat consumed on the farm where grown" into

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<sup>149</sup> *Id.* at 126.

<sup>150</sup> *Id.* at 126-27.

<sup>151</sup> See *supra* text accompanying note 80.

<sup>152</sup> *Filburn*, 317 U.S. at 127.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 127-28.

<sup>155</sup> *Id.* at 128.

<sup>156</sup> *Id.*

the overall marketing quota system, lest unchecked on-farm consumption "defeat[] and obstruct[] [Congress's] purpose to stimulate trade therein at increased prices."<sup>157</sup>

### *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."<sup>158</sup> More audacious critics expressed "wonder as to the limits of [Congress's] tremendous and constantly growing power."<sup>159</sup>

*Filburn* itself gave no hint of having altered the landscape so dramatically. One of the New Deal's front-line warriors believed that the case contributed relatively little to Commerce Clause jurisprudence: "*Wickard v. Filburn* adds little to the *Darby* case...."<sup>160</sup> In truth, much of the heavy lifting had already been performed. *Darby* and the cases it spawned<sup>161</sup> had all but gutted the shaky distinction between commerce and manufacturing, mining, and agriculture.<sup>162</sup> Not even the "aggregation" argument originated in *Filburn*; a Term earlier, *Darby* had already deployed similar reasoning.<sup>163</sup> 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."<sup>164</sup>

To the extent it relitigated established propositions, *Filburn* seems more

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<sup>157</sup> *Id.* at 128-29.

<sup>158</sup> Note, *The Supreme Court of the United States During the October Term, 1942: Part I*, 43 Colum. L. Rev. 837, 845 (1943).

<sup>159</sup> John J. Trenam, Note, *Commerce Power Since the Schechter Case*, 31 Geo. L.J. 201, 202 (1943).

<sup>160</sup> Stern, *supra* note 58, at 908.

<sup>161</sup> See *United States v. Darby*, 312 U.S. 100 (1941); *Gray v. Powell*, 314 U.S. 402 (1941); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *Kirschbaum v. Walling*, 316 U.S. 517 (1942); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942). All of these cases were cited in *Filburn*, 317 U.S. at 118 & n.12.

<sup>162</sup> 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, 549-50 (1935); see also *United States v. E.C. Knight Co.*, 156 U.S. 1, 14-16 (1895).

<sup>163</sup> 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).

<sup>164</sup> *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939), cited in *Filburn*, 317 U.S. at 128.

analogous to the deservedly obscure *Wrightwood Dairy* case,<sup>165</sup> which revisited the recently 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."<sup>166</sup> Indeed, two Terms after *Filburn*, the Supreme Court felt no need to cite *Filburn* for the proposition that the scope of the Commerce Clause "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."<sup>167</sup> Even *Filburn's* specific holding – that home-consumed 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.<sup>168</sup> To be sure, the Supreme Court did acknowledge that *Filburn* had made it impossible to sustain a constitutionally significant distinction between "production" and "commerce."<sup>169</sup> On the whole, *Filburn* helped build the New Deal's Commerce Clause consensus: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."<sup>170</sup>

This view of *Filburn* persisted for decades. Despite its reputation for activism, the Warren Court cut little, if any, new ground on federalism. The decisions upholding the Civil Rights Act of 1964 as a proper exercise of Congress's commerce power<sup>171</sup> rank among the Warren Court's least innovative – and, consequently, most secure – decisions.<sup>172</sup> *Katzenbach v. McClung*<sup>173</sup> confirmed *Filburn's* principle that a

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<sup>165</sup> *Wrightwood Dairy*, 315 U.S. at 110.

<sup>166</sup> Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946 (Part I)*, 59 Harv. L. Rev. 645, 689 (1946).

<sup>167</sup> *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944).

<sup>168</sup> *United States v. Ohio*, 385 U.S. 9 (1966) (per curiam), *summarily rev'g* 354 F.2d 549 (6th Cir. 1965).

<sup>169</sup> *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 228 (1948).

<sup>170</sup> *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).

<sup>171</sup> See generally Richard C. Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases* (2001).

<sup>172</sup> 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 spur "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).

<sup>173</sup> 379 U.S. 294 (1964).

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."<sup>174</sup> *Heart of Atlanta Motel, Inc. v. United States*<sup>175</sup> 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 sway, the Court nonetheless accepted "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses."<sup>176</sup> Both *Heart of Atlanta* and *McClung* adopted a rational basis standard of review for challenges to congressional uses of the commerce power.<sup>177</sup> *McClung* also observed that Congress's failure to include "formal findings" is "not fatal."<sup>178</sup>

The Warren Court's most significant Commerce Clause decision, *Maryland v. Wirtz*,<sup>179</sup> upheld the extension of the Fair Labor Standards Act to hospitals, institutions, and schools operated by state and local governments. In response to the argument that these employers lay beyond 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 falling within a rationally defined class of activities has been put entirely to rest."<sup>180</sup>

As in many other areas of constitutional law,<sup>181</sup> the Burger Court actually outperformed the predecessor Warren Court in extending Commerce Clause

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<sup>174</sup> *McClung*, 379 U.S. at 301 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)).

<sup>175</sup> 379 U.S. at 241.

<sup>176</sup> *Caminetti v. United States*, 242 U.S. 470, 491 (1917); accord *Heart of Atlanta*, 379 U.S. at 256; see also *Champion v. Ames*, 188 U.S. 321 (1903).

<sup>177</sup> 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 252 ("[T]he means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution....").

<sup>178</sup> *McClung*, 379 U.S. at 304 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

<sup>179</sup> 392 U.S. 183 (1968).

<sup>180</sup> *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).

<sup>181</sup> See, e.g., *The Burger Court: The Counter-Revolution That Wasn't* (Vincent Blasi ed., 1983); Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* 349 (3d ed. 1992) ("The Burger 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, "ultimately disappointed conservatives" by moving "in liberal directions" on many issues, "most notably in abortion and affirmative action").



jurisprudence. *Perez v. United States*<sup>182</sup> upheld the application of the Consumer Credit Protection Act to a "loan shark" who allegedly engaged in strictly local extortion. Citing *Filburn*, *Darby*, *Heart of Atlanta*, and *McClung*, *Perez* 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.<sup>183</sup>

### *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*,<sup>184</sup> "described the Federal commerce power with a breadth never yet exceeded,"<sup>185</sup> Chief Justice Rehnquist designated *Filburn* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."<sup>186</sup> 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."<sup>187</sup>

*Filburn* stands for the proposition that "substantial economic effect[s]" outweigh facile distinctions between "direct" and "indirect" effects of economic behavior. Justice Jackson 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."<sup>188</sup> *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.' "<sup>189</sup> Later cases have endorsed these propositions, at least superficially.<sup>190</sup>

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<sup>182</sup> 402 U.S. 146 (1971).

<sup>183</sup> *Id.* at 154 (quoting *Wirtz*, 392 U.S. at 193).

<sup>184</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>185</sup> 317 U.S. at 120 (citing *Gibbons*, 22 U.S. at 194-95).

<sup>186</sup> *United States v. Lopez*, 514 U.S. 549, 560 (1995); accord *United States v. Morrison*, 529 U.S. 598, 610 (2000).

<sup>187</sup> 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); see also Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 129-30 (observing that "commerce today" reaches "practically every activity of social life" and that "the scope of the powers now exercised by Congress far exceeds that imagined by the framers").

<sup>188</sup> *Filburn*, 317 U.S. at 120.

<sup>189</sup> *Id.* at 125.

<sup>190</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S.

Critically, *Filburn* has added the "aggregation" maneuver to constitutional law's rhetorical 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."<sup>191</sup> *Filburn*'s aggressive stand against willful judicial ignorance of actions "trivial in themselves" influences even *Dormant* Commerce Clause doctrine: the "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."<sup>192</sup> One critic has lamented *Filburn*'s contribution to the erosion of the Supreme Court's respect for state legislative judgments in *Dormant* Commerce Clause cases.<sup>193</sup>

These criticisms carry greater weight with a Court that pays closer heed to the role of the states within the federal system. Federalism, once thought to have passed into the mists of history,<sup>194</sup> rides again. Still, the scholarly consensus is that the federal "commerce power has swelled to a proportion that would leave the framers 'rubbing their eyes' with amazement."<sup>195</sup> The most strident advocates of decentralized government assert that *Wickard v. Filburn* "cannot pass the 'giggle test.'"<sup>196</sup>

The contemporary revival of the constitutional prerogatives of the states has affected not only *Filburn* but also Commerce Clause jurisprudence at large. In 1995, *United States v. Lopez*<sup>197</sup> 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 (. . . continued)

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. Virginia Surface Mining Ass'n*, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring); *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968).

<sup>191</sup>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).

<sup>192</sup>*Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); accord *Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., concurring in the judgment).

<sup>193</sup>See Maltz, *supra* note 187, at 129-30.

<sup>194</sup>See, e.g., Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1486 (1994) ("[T]o what extent should judges regulate the allocation of power between state and national governments? And the usual answer ... has been 'hardly at all.'"); William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709, 1721 (1985) ("[J]udicial enforcement of the constitutional position on federalism is at an end.").

<sup>195</sup>Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 Rutgers L.J. 631, 658 (2000) (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)).

<sup>196</sup>Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167, 173 (1996).

<sup>197</sup>514 U.S. 549 (1995).

that the individual knows, or has reasonable cause to believe, is a school zone."<sup>198</sup> The Supreme Court held "that the Act exceeds the authority of Congress '[t]o regulate Commerce ... among the several States.'" <sup>199</sup> 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.<sup>200</sup> Among these cases, the Chief Justice singled out *Filburn* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."<sup>201</sup>

Chief Justice Rehnquist summarized "three broad categories of activity that Congress may regulate under its commerce power":<sup>202</sup>

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.<sup>203</sup>

The gun possession lacked an evident connection "with 'commerce' or any sort of economic enterprise."<sup>204</sup> *Lopez* 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."<sup>205</sup> Although the Chief Justice putatively affirmed older cases relieving Congress of the need "to make formal findings as to the substantial burdens that an activity has on interstate commerce,"<sup>206</sup> he complained that the absence of findings left "no ... substantial effect" on commerce "visible to the naked eye."<sup>207</sup> Chief Justice Rehnquist accordingly refused to "authorize a general federal police power" that extended potentially to subjects at the heart of traditional state regulation, "such as family law and direct regulation of education."<sup>208</sup> The Chief Justice declared himself "unwilling" to erase the "distinction between what is truly

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<sup>198</sup> 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V. 1993).

<sup>199</sup> *Lopez*, 514 U.S. at 551 (quoting U.S. Const. art. I, § 8, cl. 3).

<sup>200</sup> *Id.* at 556.

<sup>201</sup> *Id.* at 560.

<sup>202</sup> *Id.* at 558.

<sup>203</sup> *Id.* at 558-59 (citations omitted).

<sup>204</sup> *Id.* at 561.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 562-63 (citing *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); *Perez v. United States*, 402 U.S. 146, 156 (1971)).

<sup>207</sup> *Id.* at 563.

<sup>208</sup> *Id.* at 564-65.

national and what is truly local.<sup>209</sup>

In 2000, the Court confirmed that *Lopez* was no fluke. Contrary to commentary treating *Lopez* as an aberration,<sup>210</sup> the Court kept narrowing its interpretation of the Commerce Clause. *United States v. Morrison*<sup>211</sup> invalidated the Violence Against Women Act (VAWA). Chief Justice Rehnquist distilled four "significant considerations" from that case.<sup>212</sup> 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."<sup>213</sup> Second, a "jurisdictional element" in the text of a statute "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."<sup>214</sup> Third, though congressional findings regarding the activity's impact on interstate commerce are not indispensable, *Morrison* reaffirmed *Lopez*'s preference for findings.<sup>215</sup> Finally, the Chief Justice emphasized the "attenuated" nature of "the link between gun possession" and the "effect on interstate commerce" alleged in *Lopez*.<sup>216</sup>

VAWA failed the *Lopez* test. "Gender-motivated crimes of violence," Chief Justice Rehnquist wrote, "are not, in any sense of the phrase, economic activity."<sup>217</sup> Nor did VAWA contain a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."<sup>218</sup> *Morrison* differed from *Lopez* insofar as Congress made "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."<sup>219</sup> These findings 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."<sup>220</sup> *Morrison* considered these findings' connection of sex-based violence with interstate commerce to be so

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<sup>209</sup> *Id.* at 567-568.

<sup>210</sup> 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").

<sup>211</sup> 529 U.S. 598 (2000).

<sup>212</sup> *Id.* at 609.

<sup>213</sup> *Id.* at 611.

<sup>214</sup> *Id.* at 612.

<sup>215</sup> See *id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 613.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 614.

<sup>220</sup> *Id.*

"substantially weakened" that their use as a foundation for federal legislation would "completely obliterate the Constitution's distinction between national and local authority."<sup>221</sup> The Court feared that the 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 employment, production, transit, or consumption."<sup>222</sup> This reasoning curbed *Filburn's* "aggregation": "We ... reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."<sup>223</sup>

*Lopez* and *Morrison* arguably undervalued "the traditional national interest in the uniform enforcement of civil rights."<sup>224</sup> Some critics believe that *Lopez* and *Morrison* have "single[d] out civil rights laws as being uniquely beyond the scope of Congress's commerce power."<sup>225</sup> Federal environmental law, too, seems shakier.<sup>226</sup> *Lopez* and *Morrison* may transform the traditional rule counseling the interpretation of statutes so as to avoid constitutional doubts<sup>227</sup> into a roving commission to limit statutes that a majority of Justices dislike. Indeed, in subsequent cases involving the federal arson statute<sup>228</sup> and the Clean Water Act,<sup>229</sup> the post-*Morrison* Court appeared to do exactly that.

*Wickard v. Filburn's* aggregation principle remains valid, but it operates only when the actors or activities at issue are commercial. Gun possession or sex-motivated violence will not qualify, at least when they lack a visible connection to overtly economic activity. This shift restores certain elements of Commerce Clause

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<sup>221</sup> *Id.* at 615.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 617.

<sup>224</sup> See Julie Goldscheid, *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).

<sup>225</sup> 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).

<sup>226</sup> See generally Christine A. Klein, *The Environmental Commerce Clause*, 27 Harv. Envtl. L. Rev. 1 (2003).

<sup>227</sup> See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>228</sup> 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*).

<sup>229</sup> See *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001) (invalidating the Corps's migratory bird rule in order "to avoid the significant constitutional and federalism questions raised" by the Corps's interpretation of the statutory term "navigable waters").

jurisprudence that prevailed before the New Deal. 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."<sup>230</sup> Justice Breyer's dissent argued that *Lopez*'s treatment of *Filburn* and its cognate cases "is not consistent" with those cases' actual holdings.<sup>231</sup> To the extent that the *Lopez* purported to rely on the New Deal's vision of the Commerce Clause, the decision engaged in "cite and switch," the strategy of paying nominal homage to precedent before ignoring or eviscerating it.<sup>232</sup>

Formally, at least, *Lopez* overruled no precedents. Justice Thomas's concurrence, by contrast, hinted that the Court "must [eventually] modify [its] Commerce Clause jurisprudence,"<sup>233</sup> perhaps by restoring a narrow definition of "commerce" distinct from agriculture, manufacturing, and other activities leading to "the production of goods."<sup>234</sup> Justice Thomas contended that the Court has expanded the Commerce Clause to such an extent that it has rendered "many of Congress' other enumerated powers ... wholly superfluous."<sup>235</sup> In *Morrison*, Justice Thomas again wrote separately to argue "that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers."<sup>236</sup> Accepting Justice Thomas's gloss on the Commerce Clause would very tightly constrain congressional power. Realistically, the Court will not adopt a sharp, categorical distinction between commerce and other economic activities such as agriculture, manufacturing, and mining.

The 2005 decision of *Gonzales v. Raich*<sup>237</sup> provides a more realistic view of Commerce Clause jurisprudence. *Raich* involved the application of the federal Controlled Substances Act to marijuana. California exempts limited amounts of medical marijuana from criminal prohibition; federal law does not. Because neither *Lopez* nor *Morrison* had overruled Commerce Clause precedents, a majority of Justices in *Raich* reaffirmed Congress's power to regulate the channels of interstate commerce, to regulate and protect the instrumentalities of interstate commerce (including persons or things), and to regulate activities that substantially affect

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<sup>230</sup> *United States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting).

<sup>231</sup> *Id.* at 628 (Breyer, J., dissenting).

<sup>232</sup> See 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).

<sup>233</sup> *Lopez*, 514 U.S. at 602 (Thomas, J., concurring).

<sup>234</sup> *Id.* at 587.

<sup>235</sup> *Id.* at 588; 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).

<sup>236</sup> *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J. concurring).

<sup>237</sup> 545 U.S. 1 (2005).

interstate commerce.<sup>238</sup> *Raich* treated *Wickard v. Filburn* as controlling precedent:

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.... In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.<sup>239</sup>

*Raich* distinguished *Lopez* and *Morrison* by characterizing the marijuana trade as “quintessentially economic.”<sup>240</sup> Concurring in the judgment, Justice Scalia agreed that marijuana and other controlled substances “are fungible commodities,” “never more than an instant from the interstate market” even though “grown at home and possessed for personal use.”<sup>241</sup> *Raich*’s ability to analogize home-consumed marijuana to home-consumed wheat overcame three dissenting Justices’ objection that “the Court’s definition of economic activity ... threatens to sweep all of productive human activity into federal regulatory reach.”<sup>242</sup>

*Filburn*’s legacy today is a mirror image of *Filburn*’s original meaning. Whereas *Filburn* once extended Congress’s reach to seemingly trivial activities whose aggregate economic effect reached national or global levels, *Filburn* now marks the extreme boundary of federal power. Distinctions between commerce and production, once a hallmark of formalist Commerce Clause 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.”<sup>243</sup> With no hint of irony, today’s Court has treated the economic character of Roscoe Filburn’s farm as a basis for restoring a formal distinction between commercial and

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<sup>238</sup> *Id.* at 16-17.

<sup>239</sup> *Id.* at 18-19.

<sup>240</sup> *Id.* at 25.

<sup>241</sup> *Id.* at 40 (Scalia, J., concurring in the judgment).

<sup>242</sup> *Id.* at 49 (O’Connor, J., dissenting); see also *id.* at 70 (Thomas, J., dissenting) (suggesting that the *Raich* majority was “rewriting” the Commerce Clause to “cover[] the entire web of human activity”).

<sup>243</sup> 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, 108 (1999).



noncommercial activities, precisely the distinction that *Wickard v. Filburn* rejected.<sup>244</sup>

### ***Postscript: The Nature of the Farm***

Contemporary Commerce Clause jurisprudence distorts the legacy of *Wickard v. Filburn*. Read in proper historical and economic perspective, *Filburn* cannot fairly be conscripted to support sharp 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 economic enterprise is strictly local. Economic, environmental, and political "interconnection" across jurisdictional boundaries "has become too real to ignore"; the "existence of transboundary communities inevitably creates a drive away from localism in all spheres."<sup>245</sup> In a world where virtually every legal endeavor is transforming "from a strictly local undertaking into a global commitment,"<sup>246</sup> no subject is "effectively controlled by a single national sovereign."<sup>247</sup> Today's global reality makes it not only implausible but also unacceptable to credit Roscoe Filburn's complaint that federal regulation invaded an exclusively local sphere of control. In a political system so closely tied to its agrarian roots, the proper cure for constitutional formalism lies in agricultural literacy. A page of economic history is worth volumes of legal logic.<sup>248</sup>

*Wickard v. Filburn* was at heart a case about wheat.<sup>249</sup> Ah, "*wheat*, the king of all grains!"<sup>250</sup> Earlier agricultural decisions had involved tobacco<sup>251</sup> or milk.<sup>252</sup> Wheat differed in two key respects. First, neither tobacco nor milk can match wheat's global reach. One of the leading plant species in humanity's larder,<sup>253</sup> wheat is grown widely

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<sup>244</sup> 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").

<sup>245</sup> Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 Stan. L. Rev. 1247, 1271 (1996).

<sup>246</sup> Jim Chen, *Fugitives and Agrarians in a World Without Frontiers*, 18 Cardozo L. Rev. 1031, 1051 (1996).

<sup>247</sup> John H. Jackson, *Reflections on International Economic Law*, 17 U. Pa. J. Int'l Econ. L. 17, 25 (1996).

<sup>248</sup> Cf. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); see also Oliver Wendell Holmes, Jr., *The Common Law* 1 (Little Brown & Co. 1990) (1881) ("The life of the law has not been logic: it has been experience.").

<sup>249</sup> See Stern, *supra* note 58, at 901.

<sup>250</sup> O.E. Rölvaa, *Giants in the Earth* 110 (Lincoln Colcord & O.E. Rölvaa trans., 1927).

<sup>251</sup> See *Mulford v. Smith*, 307 U.S. 38 (1939); *Currin v. Wallace*, 306 U.S. 1 (1939).

<sup>252</sup> See *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

<sup>253</sup> See generally Robert Prescott-Allen & Christine Prescott-Allen, *How Many Plants Feed the World?*,

and shipped even further.<sup>254</sup> The outbreak of world war magnified the importance of the wheat market. With the rest of the world locked in mortal struggle, the United States did not suffer a wheat shortage. Rather, it complained that a wheat surplus was depressing prices paid to farmers. Second, wheat differed from 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."<sup>255</sup> Dairy disputes seem invariably to arise from the economic dependence of relatively numerous producers on relatively few "handlers" of milk.<sup>256</sup> 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."<sup>257</sup> A clever regulator (or monopolist) can control these markets by a single bottleneck.

*Filburn* arose from wheat's exceptional mobility and versatility. At least in Roscoe Filburn's day, many producers could either sell wheat or use it on the farm as animal feed. Whereas a quantitative limit on tobacco reaching warehouses or cotton reaching gins would "reach[] virtually the entire supply" of those commodities,<sup>258</sup> 85 percent of the corn produced during the 1930s moved in commerce as cornfed livestock, poultry, or their milk or egg byproducts.<sup>259</sup> A smaller but comparable portion of the wheat crop was likewise converted into meat, milk, poultry, and eggs. On-farm consumption of wheat "appear[ed] to vary in an amount greater than 20 per cent of average production."<sup>260</sup> Integrated farmers could evade a marketing quota by redirecting wheat to the feed bin.<sup>261</sup> Congress thus decided to treat corn and wheat

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4 Conservation Biology 365, 366 (1990).

<sup>254</sup> See Moshe Feldman et al., *Wheats, in Evolution of Crop Plants* 184, 184-92 (J. Smartt & N.W. Simmonds eds., 2d ed. 1995); Jim Longmire & Walter H. Gardiner, Econ. Res. Serv., U.S. Dep't of Agric., *Long-Term Developments in Trade in Feeds and Livestock Products* 2 (1984) (reporting that 90% of wheat traded internationally is used as food).

<sup>255</sup> Stern, *supra* note 58, at 902.

<sup>256</sup> See *Zuber v. Allen*, 396 U.S. 168, 172-74 (1969); Reuben A. Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J.L. & Econ. 51 (1967).

<sup>257</sup> *Queensboro Farms Prods. v. Wickard*, 137 F.2d 969, 972 (2d Cir. 1943) ("[T]he 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").

<sup>258</sup> Stern, *supra* note 58, at 902.

<sup>259</sup> See H.R. Rep. No. 75-1645, at 24 (1937); Stern, *supra* note 58, at 902.

<sup>260</sup> *Wickard v. Filburn*, 317 U.S. 111, 127 (1942).

<sup>261</sup> 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 58, at 903.

"alike with respect to the feeding of poultry or livestock for market."<sup>262</sup>

A similar strategy governed the New Deal's other agricultural programs. In *Currin v. Wallace*, regulators could not separate tobacco destined for domestic markets from tobacco earmarked to go abroad.<sup>263</sup> Nor could milk marketing orders target distinct intrastate and interstate markets for milk.<sup>264</sup> These problems differed in degree but not in kind from problems arising from wheat's versatility. *Filburn* assumed that regulators could not distinguish wheat consumed on the farm from wheat sold on the open market. The only difference was that the warehouse in *Currin*, relative to the global wheat market in *Filburn*, is more obviously "the throat where tobacco enters the stream of commerce."<sup>265</sup>

Contemporary lawyers often believe that Roscoe Filburn converted his excess wheat into bread.<sup>266</sup> 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.<sup>267</sup> To consume 239 excess bushels,<sup>268</sup> the Filburn family would have had to consume nearly forty-four one-pound loaves of bread *each day* for a year.<sup>269</sup> In Filburn's time, farmers fed twenty times more wheat to livestock than they ground into flour for home use.<sup>270</sup>

Transforming a field crop into grocery staples requires nothing more mysterious than feeding farm animals. This act, and not the tilling of crop fields, may have been the first step in the development of agriculture.<sup>271</sup> By converting excess wheat into milk, meat, poultry, and eggs, the Filburn farm engaged in an age-old

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<sup>262</sup> S. Rep. No. 76-1668, at 2 (1940), *quoted in* Stern, *supra* note 58, at 902.

<sup>263</sup> 306 U.S. 1, 11 (1939) ("[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.").

<sup>264</sup> See *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120-21 (1942); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 568-69 (1939).

<sup>265</sup> *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).

<sup>266</sup> See, e.g., *National 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); *Village 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).

<sup>267</sup> Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 748-49 & n.316 (1995).

<sup>268</sup> See *Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

<sup>269</sup> One bushel of wheat yields 67 loaves of bread. See Tex. Wheat Producers Bd. & Ass'n, *Fun Facts*, at <http://www.texaswheat.org/Facts/funfact.htm> (visited May 10, 2003).

<sup>270</sup> See U.S. Dep't of Agric., *Field and Seed Crops by States, 1949-54*, at 8 (1957) (reporting wheat consumption statistics for 1944).

<sup>271</sup> See Constance Holden, *Bringing Home the Bacon*, 264 Sci. 1398, 1398 (1994).

practice of regulated firms:<sup>272</sup> manipulating investments between a regulated line of business (wheat) and nonregulated lines (meat, dairy, poultry, and eggs). The Department of Agriculture responded in equally time-honored fashion by treating each 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."<sup>273</sup> Acreage limitations allowed the wheat program to control prices and supply not only in the regulated market, but also in several derivative product markets.<sup>274</sup> Meanwhile, the Federal Extension Service was exhorting farmers to feed as much of their wheat to livestock, ostensibly to beef up America's wartime diet, but not coincidentally also to ease the wheat glut.<sup>275</sup>

*Filburn's* "aggregation" doctrine reflects economic reality. Simultaneous, uncoordinated acts by vertically integrated, diversified producers take on a significance vastly outstripping that of any single farmer. Like ants, cities, and the Internet, agricultural markets exhibit the "emergent behavior" of a complex adaptive system.<sup>276</sup> Neither *Filburn* nor any other farmer acting alone exercised enough power to affect global prices merely by deciding either to sell wheat or to integrate wheat production with other farm activities. *Filburn* had to take the price as he found it; finding the price insufficient, he sought an alternative use. Such "price taking" is the farmer's lot in a world dominated by agribusiness purchasers.<sup>277</sup> But each farmer's seemingly discrete act, multiplied many times, profoundly affected prices and supplies in the larger market. The relatively inelastic demand for wheat as food and seed<sup>278</sup> transformed on-farm consumption into the legal equivalent of 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."<sup>279</sup> "Untouched, unassailable, undefiled, that mighty

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<sup>272</sup> See, e.g., *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581 (1945); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); *City of Houston v. Southwestern Bell Tel. Co.*, 259 U.S. 318 (1922); *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

<sup>273</sup> Stern, *supra* note 58, at 903.

<sup>274</sup> See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *In re Montana-Dakota Utils. Co.*, 278 N.W.2d 189 (S.D. 1979).

<sup>275</sup> See U.S. Dep't of Agric., *Annual Report of the Secretary of Agriculture* 69, 80 (1941).

<sup>276</sup> Stephen Johnson, *Emergence: The Connected Lives of Ants, Brains, Cities, and Software* 18 (2001).

<sup>277</sup> See *National 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 840-41 (White, J., dissenting) (same); *Tigner v. Texas*, 310 U.S. 141, 145 (1940) (same).

<sup>278</sup> 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 58, at 904.

<sup>279</sup> *Chicago Bd. of Trade v. Olsen*, 262 U.S. 1, 40 (1923); cf. *Santa Cruz Fruit Packing Co. v. NLRB*,

world-force, that nourisher of nations, wrapped in Nirvanic calm, indifferent to the human swarm, gigantic, resistless, moved onward in its appointed grooves.<sup>1280</sup> Congress unquestionably had power to regulate this market.

Of course, congressional power provides no guarantee that the federal government will achieve its goals.<sup>281</sup> Confronted with the plea that the wheat program was favoring western monocultures over integrated operations in the east, *Filburn* pleaded judicial impotence: "[W]ith the wisdom, workability, or fairness, of [this] plan of regulation we have nothing to do."<sup>282</sup> Neither half of the Commerce Clause "protects the particular structure or methods of operation in a ... market."<sup>283</sup> The wheat program upheld in *Wickard v. Filburn* had distinct (and not altogether desirable) distributional consequences. Wealth transfers under the Agricultural Adjustment Act followed the usual practice of "lev[ying] the heaviest taxes against poorer people to subsidize mainly richer farmers."<sup>284</sup> In a nation whose agricultural policy "[h]as [f]ocused on [l]osers,"<sup>285</sup> 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"<sup>286</sup> – have become virtually extinct since the Supreme Court last entertained a constitutional challenge to federal regulation of farm prices and incomes.

*Filburn* 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, could switch freely between selling wheat on the open market, storing it to await higher prices, and feeding it to farm animals. As *Filburn* recognized, however, farm organization varied greatly by region. Western

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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).

<sup>280</sup> Frank Norris, *The Octopus: A Story of California* 360 (Doubleday & Co. rpt. 1947) (1901).

<sup>281</sup> 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.").

<sup>282</sup> *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").

<sup>283</sup> *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).

<sup>284</sup> 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); see also Jim Chen, *The American Ideology*, 48 Vand. L. Rev. 809, 860-62, 875 (1995) (outlining the distributive case against raising food prices to boost farmers' incomes).

<sup>285</sup> 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).

<sup>286</sup> *Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

wheat-exporting states "specializ[ed] in wheat," such that "the concentration on this crop reache[d] 27 percent of the crop land, and the average harvest r[an] as high as 155 acres."<sup>287</sup> By contrast, some states in New England – a net wheat-importing region and the cradle of the American family farm<sup>288</sup> – devoted "less than one percent of the crop land ... to wheat" and harvested "less than five acres per farm."<sup>289</sup> 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.<sup>290</sup>

*Filburn* openly acknowledged Agricultural Adjustment Act's threat 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."<sup>291</sup> There is no better statement in the *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.<sup>292</sup>

Careful parsing of *Wickard v. Filburn* confirms what Coase described in *The Nature of the Firm*. *Filburn* 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."<sup>293</sup> In the three decades after *Wickard v. Filburn*, the proportion of American wheat consumed on the farm where it was grown dwindled from 16 to 5 percent.<sup>294</sup>

The Department of Agriculture won a Pyrrhic victory, for the statute upheld in *Filburn* accelerated the destruction of farmers like Roscoe Filburn. Shortly after *Filburn*, agricultural analysts began asking Coase's unsettling question: "Why is not all production carried on by one big firm?"<sup>295</sup> 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;

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<sup>287</sup> *Id.* at 126-27.

<sup>288</sup> See Taylor, *supra* note 60, 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).

<sup>289</sup> *Filburn*, 317 U.S. at 127.

<sup>290</sup> Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) ("The exigencies of the nation may require, that the 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.").

<sup>291</sup> *Filburn*, 317 U.S. at 128.

<sup>292</sup> See R.H. Coase, *The Nature of the Firm*, 4 *Economica* 386, 388-89, 392 (1937).

<sup>293</sup> 317 U.S. at 129.

<sup>294</sup> See USDA Econ. & Statistics Sys., *State-Level Wheat Statistics*, at <http://jan.mannlib.cornell.edu/data-sets/crops/89016/whtus.wk1> (last visited Aug. 31, 2003).

<sup>295</sup> Coase, *supra* note 292, at 394.



and the storage, processing, and distribution of farm commodities and items made from them.<sup>296</sup> 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 even most of [their] clothing” – was fading.<sup>297</sup> 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.”<sup>298</sup> 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*; the nature of the firm dictates the destiny of the farm.<sup>299</sup>

In fairness to the New Deal, 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.”<sup>300</sup> 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 grain ever since.<sup>301</sup> Abundant 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.<sup>302</sup>

Humans, too, joined the exodus. In the half-century after the war, the farm population of the United States fell from roughly one quarter to less than two percent.<sup>303</sup> America’s rise to superpower status all but dictated these demographic shifts. Rural depopulation is a direct consequence of economic growth. Rising urban incomes prompt farmers to abandon farming for city jobs, and the remaining rural landscape hosts fewer, larger farms.<sup>304</sup>

*Filburn* and the commodity programs it blessed surely hastened the fading of

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<sup>296</sup>John H. Davis & Ray A. Goldberg, *A Concept of Agribusiness* 2 (1957).

<sup>297</sup>*Id.* at 4.

<sup>298</sup>*Id.* at 1.

<sup>299</sup>See Douglas W. Allen & Dean Lueck, *The Nature of the Farm*, 41 J.L. & Econ. 343 (1998); Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 Drake L. Rev. 361, 402 (1997).

<sup>300</sup>Fite, *supra* note 54, at 123.

<sup>301</sup>See David Goodman & Michael Redclift, *Refashioning Nature: Food, Ecology, and Culture* 109-10 (1991).

<sup>302</sup>See *id.*; James R. Simpson & Donald E. Farris, *The World’s Beef Business* 37, 51 (1982).

<sup>303</sup>See Chen & Adams, *supra* note 299, at 381 & n.129; see also Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 Neb. L. Rev. 210, 218-20 (1993).

<sup>304</sup>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 exodus from farming).



the agrarian dream.<sup>305</sup> For a program whose "major objectives have been to preserve or restore existing structures or conditions," the agricultural policy of the United States has failed even on its own dubious terms.<sup>306</sup> The New Deal's intended beneficiaries have the bitterest view of its agricultural legacy. Hell has no fury like a duped agrarian: advocates for small American farmers have neither forgotten nor forgiven the federal government for its complicity in the trend toward fewer, larger, more industrialized farms.<sup>307</sup>

The path from barnyard to suburb is the dominant narrative in American history. *Wickard v. Filburn*'s protagonist vividly epitomizes this historical sequence. Roscoe Curtiss Filbrun – he changed the spelling of his family name roughly a decade after losing his Supreme Court case<sup>308</sup> – 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.<sup>309</sup> The Salem Mall in Dayton, Ohio, now occupies much of the land farmed by Filbrun's extended family.<sup>310</sup> Roscoe Filbrun took a leading role in facilitating zoning changes and in developing water and sewage systems for the mall.<sup>311</sup> The ninety-five acres that he farmed became a residential subdivision; the adjoining nine acres of forest became commercial real estate.<sup>312</sup> A street on the land that was his is named Filbrun Lane in his honor.<sup>313</sup> Neither child of Roscoe and Virginia McConnell Filbrun adopted agriculture as a profession. Their daughter, Mary Lou Filbrun Spurgeon, taught organ.<sup>314</sup> 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 the business. Roscoe Filbrun, Sr., lifelong farmer, thus became

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<sup>305</sup> See Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. Ill. U. L. Rev. 659 (1994).

<sup>306</sup> Johnson, *supra* note 285, at 308.

<sup>307</sup> 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); *The New Agrarianism: Land, Culture, and the Community of Life* (Eric T. Freyfogle ed., 2001). For a guide to distinctions between left and right in agricultural policy, see Curtis E. Beus & Riley E. Dunlap, *Conventional Versus Alternative Agriculture: The Paradigmatic Roots of the Debate*, 55 Rural Soc. 590 (1990).

<sup>308</sup> See *supra* note \*.

<sup>309</sup> See *Filbrun Family History*, *supra* note 92, at 176; Spurgeon Letter, *supra* note \*, at 4-5.

<sup>310</sup> See *Filbrun Family History*, *supra* note 92, at 174, 176.

<sup>311</sup> See *id.* at 176.

<sup>312</sup> See Spurgeon Letter, *supra* note \*, at 5.

<sup>313</sup> See *Filbrun Family History*, *supra* note 92, at 175, 176; Spurgeon Letter, *supra* note \*, at 3.

<sup>314</sup> See *Filbrun Family History*, *supra* note 92, at 177.

the owner of a ladies' dress shop.<sup>315</sup> Roscoe Jr. (called Tommy) grew up helping his father on the farm, but eventually worked an office job.<sup>316</sup> Tommy's son, John Curtiss Filbrun, carried into a third generation the name of the doctor who saved Martin Filburn's arm.<sup>317</sup>

Roscoe Curtiss Filbrun, Sr., died on October 4, 1987, 85 years old and full of days. His family, like America, "was born in the country and ... moved to the city".<sup>318</sup>

[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.<sup>319</sup>

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<sup>315</sup> See *Background of the Beverly Shop*, Ohio Apparel Reg., Jan. 1956, at 15.

<sup>316</sup> See *Filbrun Family History*, *supra* note 92, at 177; Spurgeon Letter, *supra* note \*, at 16.

<sup>317</sup> See *Filbrun Family History*, *supra* note 92, at 177.

<sup>318</sup> Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 23 (1955).

<sup>319</sup> Toni Morrison, *Jazz* 33 (1992).