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Roscoe Filburn: The Wheat Farmer Who Went Against the Grain

"I never worked for another man in my life," Ohio farmer Roscoe Filburn once proudly declared.

That turned out to be not quite true. Thanks to President Franklin D. Roosevelt's New Deal, Filburn in 1941 found himself involuntarily working for Uncle Sam, who dictated how many acres of wheat he could plant and fined him for growing too much and using the excess to feed his family and animals, claiming the power to do so under the Constitution's Commerce Clause. Filburn refused to pay, but the Supreme Court, in the case of *Wickard v. Filburn*, held that the Roosevelt administration's policy and the law undergirding it were perfectly constitutional, paving the way for unbridled federal intervention in the name of regulating interstate commerce.

Roscoe Curtiss Filburn was born August 2, 1902, in his parents' brick farmhouse near Dayton, Ohio. His great-grandfather, Johann Peter Fillbrunn, immigrated to the United States from Germany in 1818, the first member of the Fillbrunn family to do so. The Fillbrunns had an apparent fondness for changing their names: Johann Peter Fillbrunn became Peter Fillbrun upon his arrival in America, and later dropped yet another consonant in his surname. Roscoe, having inherited the last name of Filbrun, would find it misspelled as Filburn on his famous lawsuit and eventually have it legally changed to match.

Having grown up on a farm, Filburn carried on the family tradition as a beef and dairy farmer, though he also planted winter wheat, some of which he used on the farm and some of which he sold. This sideline would bring him into conflict with the federal government.

Losing the Farm to Uncle Sam

American farmers had been riding high prior to World War I, but the war and its aftermath, coupled with trade barriers erected by both the United States and many European countries, devastated the market for U.S. agricultural products. The Depression only made matters worse.

In a research paper on *Wickard*, Jim Chen, dean and professor of law at the University of Louisville Law School, wrote:

The 1932 presidential campaign thus coincided with an important moment in American agricultural history: North and South at last were united in mutual misery. Foreclosure auctions transferred one-

quarter of the land in Mississippi on a single day in April 1932. The Farmers' Holiday Association conducted violent demonstrations throughout the Midwest. Agricultural relief became a central plank of Franklin D. Roosevelt's presidential campaign.

With typical disregard for both sound economics and the Constitution he had sworn to uphold, FDR decided that the way to rescue farmers was to increase the prices of their products by federal edict. That doing so would at the same time harm the millions of non-farmers trying desperately to feed their families evidently did not cross Roosevelt's mind.

The administration's primary means of driving up prices was to restrict the supply of farm products. The Agricultural Adjustment Act of 1933 taxed food processors in order to pay farmers to reduce their production of certain commodities. It also authorized the secretary of agriculture, then Henry Wallace, to force food processors to curb their output. The result was a massive destruction of crops and livestock.

"We had men burning oats when we were importing oats from abroad on a huge scale, killing pigs while increasing our imports of lard, cutting corn production and importing 30 million bushels of corn from abroad," John T. Flynn recounted in *The Roosevelt Myth*.

"Curiously enough," Flynn observed, "while Wallace was paying out hundreds of millions to kill millions of hogs, burn oats, plow under cotton, the Department of Agriculture issued a bulletin telling the nation that the great problem of our time was *our failure to produce enough food to provide the people with a mere subsistence diet*." (Emphasis in original.)

The Supreme Court ruled the act unconstitutional in 1936, finding that the tax on food processors fell outside the federal government's enumerated powers, particularly to the extent that it tried "to regulate and control agricultural production," heretofore considered a state function. This was in keeping with a long history of Commerce Clause jurisprudence holding that only exchange, not production, constituted commerce, and Congress was only authorized to "regulate commerce … among the several states."

Moreover, as Pepperdine University economics professor Gary Galles demonstrated in a Ludwig von Mises Institute piece, "Until 1887, the Commerce Clause was solely invoked to overturn state restrictions on interstate commerce," exactly as the Founders, as evidenced by their writings, intended. To take just one example, James Madison, the "Father of the Constitution," stated: "It is very certain that [the Commerce Clause] grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the general government, in which alone, however, the remedial power could be lodged."

By 1937, "Commerce Clause jurisprudence … was evolving rapidly in favor of expanded federal authority," wrote Chen. In an apparent response to FDR's "court-packing" scheme, a failed attempt to expand the number of justices on the court to make that body more favorable to his policies, the Supreme Court suddenly began reversing itself on the constitutionality of many New Deal measures. "This constitutional shift," Chen pointed out, "revitalized the New Deal's agricultural agenda." Congress passed a series of laws that reinstated the ones the court had struck down, including a new Agricultural Adjustment Act in 1938, and these "all withstood constitutional challenges," added Chen. Having already gotten into the business of subsidizing and making loans for crops, the federal government now possessed nearly complete control of U.S. agriculture.

Roscoe's Rebellion

Not all farmers were ready to cede their independence, Roscoe Filburn among them. Pursuant to the 1938 act, Secretary of Agriculture Claude Wickard in 1940 imposed an acreage quota on all wheat farmers in an effort to prevent what he considered to be overproduction. Filburn was ordered to plant no more than 11.1 acres of wheat at a yield of 20.1 bushels per acre or pay a penalty of 15 cents per bushel of excess wheat, including wheat "dispose[d] of by feeding to poultry and livestock as well as by selling." The farmer, under the mistaken belief that an American could still do as he pleased with his own property, proceeded that fall to plant more than double his allotment, from which he harvested 239 bushels of wheat over his quota the following July. He stored the excess wheat for use on his farm.

Under the initial order from Wickard, Filburn would have been liable for $35.85 in penalties ($578.26 in 2016 dollars). But on May 19, 1941, in a radio address to farmers, Wickard proposed a new marketing quota for that year's wheat harvest, urging farmers, who had to approve it by a two-thirds vote, to do so under the threat of "no quotas, no loans." He also informed farmers of a bill before Congress to increase the value of federal crop loans. "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 … and would subject a violating farm's crop to a lien in favor of the United States," chronicled Chen.

The amendment passed Congress on May 26. The Agriculture Department conducted the marketing-order referendum just five days later; it passed overwhelmingly. Although Ohio farmers had voted it down, they were nonetheless subjected to it, and so Filburn's fine increased to $117.11 ($1,888.98 in 2016), the government imposed a lien against his entire wheat crop, and his marketing card — another New Deal "innovation" requiring a farmer to get the government's permission to sell his crops — was withheld until he paid up.

Filburn, then still known as Filbrun, refused and "joined with 35 or 40 other farmers, who hired an attorney to start proceedings in a suit against the government's policy," according to a family history. "The attorney needed one farmer's name in which to place the suit. Roscoe's situation fit the case best and so his name (misspelled as Filburn) was chosen."

The case, *Filburn v. Helke*, was heard by a three-judge panel of the U.S. District Court for the Southern District of Ohio. Carl Helke, Montgomery County Agricultural Adjustment Administration chairman, and Wickard were named as defendants. According to a March 1942 Associated Press report, the suit "was the first of its kind in the nation."

The court ruled in favor of Filburn. Although the farmer had challenged the Agricultural Adjustment Act's penalties on Commerce Clause grounds, arguing that using his own wheat to feed his family and livestock did not constitute commerce, the majority opinion focused its energies on Wickard's radio address, with its convenient omission of facts that might have turned farmers against the referendum, along with the timing of the amendment's passage and the referendum. The court declared the amendment invalid insofar as it retroactively increased the penalty for excess wheat and subjected the entire crop to a lien, which "amounts to a taking of plaintiff's property without due process." The Commerce Clause did not merit a single mention in the opinion.

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Clause for Alarm

This was to change drastically when Wickard appealed to the Supreme Court. Indeed, the court made it clear early on that the entire case hinged on the extent of Congress' power to regulate interstate commerce, ordering reargument on this question alone. Wickard, naturally, argued that the government could regulate even crops consumed on the farm "as a means of regulating the amount of wheat marketed and the interstate price structure." Filburn presciently countered that the government's reading of the Commerce Clause "would not only effectually approach a centralized government but could eventually lead to absolutism by successive nullifications of all Constitutional limitations."

Since the court had already given its imprimatur to both marketing quotas (*Mulford v. Smith* [1939]) and outright government price-fixing (*United States v. Darby* [1941]), it should hardly have come as a shock when it unanimously overturned the district court's decision.

Farmers, the court noted, were informed of their quotas in advance and had ample opportunity either to abide by them or to dispose of their excess crops in government-approved ways without penalty. What's more, they were almost certainly guaranteed considerably higher prices for their crops by virtue of the quotas than they would have received on the free market. Even retroactively increasing the penalties was, the court declared, insufficient to void them.

"We can hardly find a denial of due process in these circumstances, particularly since it is even doubtful that appellee's burdens under the program outweigh his benefits," Justice Robert Jackson wrote. "It is hardly lack of due process for the government to regulate that which it subsidizes."

Still the question remained: Was this regulation outside the scope of Congress' enumerated powers? Filburn's wheat, after all, had never entered the stream of commerce, interstate or otherwise. Could Congress regulate non-commerce under the Commerce Clause?

Pre-1937 cases suggested it could not, because production and consumption did not constitute commerce. But since its abrupt about-face on the New Deal's constitutionality, the court, despite its professed deference to precedent, had practically obliterated all such distinctions.

"Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us," the court maintained. "But even if appellee's activity be local, and though it may not be regarded as commerce, it 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.'" (Emphasis added.)

The clear intent of the Agricultural Adjustment Act was to boost prices for farm products to levels deemed acceptable to Congress and the administration. A free market was simply too messy and its outcome too uncertain, the court seemed to say. Recent grain overproduction 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"; and "in the absence of regulation, the price of wheat in the United States would be much affected by world conditions." Fortunately, the beneficent central plans of Washington had brought "cooperat[ive]" farmers a windfall: In 1941, their wheat sold at $1.16 a bushel as compared to the world market price of 40 cents a bushel.

Recalcitrant farmers such as Filburn threatened the entire scheme. Thus, concluded the court:

It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market, and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

And with that, the last remaining obstacle to unfettered federal power was swept away; under the guise of regulating interstate commerce, the federal government could now penalize someone for *not* engaging in commerce. Even the *New York Times* was aghast at the decision. “If the farmer who grows feed for consumption on his own farm competes with commerce, would not the housewife who makes herself a dress do so equally?” the paper asked. “The net of the ruling, in short, seems to be that Congress can regulate every form of economic activity if it so decides.”

Filburn’s Legacy

The courts certainly read the decision that way. For over half a century after *Wickard*, the Supreme Court did not strike down a single law on Commerce Clause grounds. It merely ratified any regulation Congress chose to impose so long as lawmakers claimed the regulated activity, in the aggregate, affected interstate commerce — and sometimes even if they didn’t.

While the court began to chip away at the post-*Wickard* consensus ever so slightly around the turn of the century, voiding the Gun-Free School Zones Act of 1990 and a portion of the Violence Against Women Act of 1994 despite the government’s claims that the activities proscribed by those laws affected interstate commerce, *Wickard* remained available to justices eager to declare patently unconstitutional laws valid.

When deciding in favor of the Affordable Care Act (ObamaCare) in 2012, Chief Justice John Roberts chose not to do so on Commerce Clause grounds, arguing that “the Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.” The court’s four liberal justices, while agreeing with Roberts’ ruling, criticized that particular line of reasoning because the court’s acceptance of it might resurrect pre-New Deal jurisprudence that “routinely thwarted legislative efforts to regulate the economy in the interest of those who labor to sustain it.”

Conservative justices, too, can take advantage of the post-*Wickard* legal climate, as in *Gonzales v. Raich* (2005). In that case, involving two California women who grew their own marijuana for medicinal use as permitted under state law, the court ruled that federal law banning the cultivation of marijuana for any reason overrode state law permitting it. The court cited *Wickard* in its opinion, arguing that just as Filburn’s consumption of his own wheat affected interstate commerce in wheat, so did the women’s consumption of home-grown marijuana affect interstate commerce in marijuana, even though such commerce was prohibited. Although five of the six justices siding with the government were moderate-to-liberal, the late Justice Antonin Scalia, a self-proclaimed “originalist,” concurred. While denying that

the growing of small quantities of marijuana was comparable to Filburn's large output of wheat, and thus that it fell under the *Wickard* precedent, Scalia nevertheless found room in many other New Deal-era decisions to contend that prohibiting the cultivation of even trivial amounts of marijuana — one of the women had only six plants — fell within Congress' authority since "marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market."

And what of Roscoe Filburn? He paid his fine and went back to farming. But his small farm, like thousands of others across the country, was doomed. Although that was partly the result of market forces, the law Filburn had failed to overturn, along with many other New Deal measures, "accelerated the destruction of farmers like Roscoe Filburn," penned Chen. As even the Supreme Court admitted in its decision, the Agricultural Adjustment Act overwhelmingly benefited large farms at the expense of small ones. Small farms that generated a variety of products were denied flexibility in determining what to produce and how to dispose of it. Large farms that specialized in one or a few products, meanwhile, reaped a windfall from the law's above-market prices — prices smaller farmers like Filburn were then forced to pay for products they had previously produced for themselves. Economist Rexford Tugwell, a member of FDR's "Brain Trust," "later acknowledged that it benefited only about 20 percent of American farmers, primarily … big commercial farmers," Jim Powell wrote in *FDR's Folly*. Indeed, the New Deal, by and large, was a boon to Big Business at the expense of the "little guy" the act was supposedly helping.

In 1966, seeing the writing on the wall, Filburn persuaded the other successors to his grandparents' farm to join with him in selling their property for development. The farmer who had fought for his way of life all the way to the Supreme Court gave it up and took an active role in enabling a housing development and shopping mall to be built on the land that once was farmed by his family.

Filburn died at age 85 on October 4, 1987, no longer a farmer but a part of suburbia. The only physical indications of his presence on the farm are the still-standing yellow house once owned by his family and a street named Filbrun Lane that runs through the land. The political legacy of Filburn's valiant but futile effort to restrain the federal government, however, remains with us to this day, a vivid reminder of the decentralized Republic bequeathed to us by the Founders and squandered by generations of Americans and their leaders in the name of "progress."

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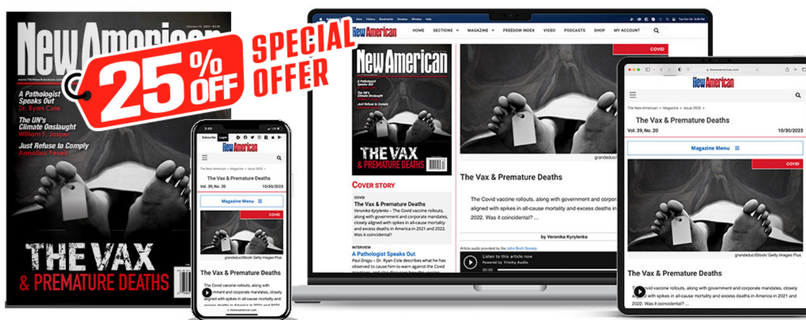

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