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REGULATION OF PUBLIC ACCOMMODATIONS VIA THE COMMERCE CLAUSE — THE CIVIL RIGHTS ACT OF 1964

Reba Graham Rasor

INTRODUCTION

Probably no act passed by Congress during this generation has evoked a storm of debate, both in and out of Congress, equal to that caused by the Public Accommodations Title of the Civil Rights Act of 1964. The bill was before Congress for thirteen months—longer, it is said, than any other in history. After passage, the act's validity was immediately challenged in cases which focused man-on-the-street attention on the United States Supreme Court and issues of constitutional law with an intensity not seen since the 1930's, when the Court overturned major New Deal legislation.

It is difficult to imagine a subject more unsuited to detached, academic discussion. Nevertheless, this Comment will attempt to deal with the statutory scope of the act and the extent to which it may constitutionally be applied in an approach divorced from considerations of the merit or wisdom of the legislation.

Discussion will be divided into these six parts: (1) contents of the statute, (2) historical development of the commerce clause, (3) previous application of the commerce power in racial discrimination cases, (4) previous cases applying the fourteenth amendment to prevent discrimination, (5) decisions upholding the public accommodations title, and (6) future developments.

I. CONTENTS OF THE STATUTE

Of basic importance is determining exactly what business Congress intended the act to cover. The opening section declares the right of all persons to patronize "any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion or national origin."¹ The remainder of the section is devoted to explicit definition of a "place of public accommodation," a point crucial to both the practical effectiveness and constitutional validity of the title.

First, invoking its fourteenth amendment powers, Congress declared that a place of public accommodation is any establishment where "discrimination or segregation by it is supported by State

¹ Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C.A. § 2000a (1964) (hereafter cited as Civil Rights Act of 1964; citation to Statutes at Large will be omitted).

action."² The requisite state action is declared to exist if "discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or subdivision thereof."³

Then, calling on Congress's powers under the commerce clause, the act further defines place of public accommodation as any of four types of businesses if its operations "affect commerce." The four categories are:

(1) Any place which provides lodging for transient guests, unless it contains not more than five rooms for rent and is used by the proprietor as his residence.

(2) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station.

(3) Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition and entertainment.

(4) Any business which is physically located within the premises of a covered establishment or any establishment which contains within its premises a covered establishment.⁴

Different criteria for each of the four categories determine whether establishments affect commerce. In the first category, inns, hotels and motels are presumed to affect commerce simply by being such businesses. But in the second category, the restaurant or gasoline station is presumed to affect commerce only *either* if it serves or offers to serve interstate travelers *or* if a substantial portion of the food or gasoline it sells has moved in commerce. Theaters and places of entertainment in the third category affect commerce within the meaning of the act if they customarily present films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce. Category four businesses are presumed to affect commerce if they share the same physical premises with a business covered by the act.⁵

Specifically excluded from the act is "a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the

² Civil Rights Act of 1964, 42 U.S.C.A. § 2000(a)(b) (1964).

³ *Ibid.*

⁴ Civil Rights Act of 1964, § 201(b), 42 U.S.C.A. § 2000a(b) (1964).

⁵ Civil Rights Act of 1964, § 201(c), 42 U.S.C.A. § 2000a(b) (1964).

customers or patrons of an establishment within the scope of subsection (b)" [the four enumerated categories above].⁶

Many other businesses are excluded by implication. A partial list would include service and professional establishments, such as a doctor's office, a barber shop, a beauty shop or dry cleaning shop, unless located in a covered business such as a hotel or in an office building with a covered restaurant. An apartment house or boarding house would not be covered if the persons renting rooms could be classified as permanent rather than transient occupants and if it does not serve food which has moved in commerce. Bowling alleys and skating rinks would seem not to be covered unless they contain a restaurant, nor would swimming pools be covered unless a restaurant is on the premises. Bars are not covered unless located in a covered establishment, such as a hotel or restaurant, or unless they serve enough food to be a "facility principally engaged in selling food."⁷

Remedies offered in the title are as sweeping as they are unique. Section 203 states that "no person" shall interfere with any person's enjoyment of privileges secured by the act. Specifically forbidden are (a) withholding or attempting to withhold the privileges secured by the title; (2) intimidating, threatening or coercing any person with the purpose of interfering with these privileges; or (c) punishing or attempting to punish any person for attempting to exercise these privileges. The first two are self-explanatory. The third raises a question. Is the arrest and imprisonment of persons who enter a segregated business against the wishes of the owner unlawful? If so, Congress has by statute accomplished that which the Supreme Court in a long series of increasingly hard-fought decisions had avoided deciding on the basis of the fourteenth amendment.⁸ That is, the act has given sit-in demonstrators a defense against prosecution under state trespass statutes, but only, of course, if the demonstrators can show that the business is covered by the federal act. It seems unlikely, however, that the cases will come up in this posture because the title offers other remedies which should be more satisfactory to both the business owner and the would-be patron.

Section 204 allows the person aggrieved to seek injunctive relief in a United States district court against any of the various acts forbidden by section 203. Upon application by the complainant, the court in its discretion may appoint an attorney for the complainant

⁶ Civil Rights Act of 1964, § 201(e), 42 U.S.C.A. § 2000a(e) (1964).

⁷ Whether a trailer park would be a place of lodging for transients does not seem to have been considered by Congress. BNA, *The Civil Rights Act of 1964* (1964).

⁸ *Bell v. Maryland*, 378 U.S. 226 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Lombard v. Louisiana*, 373 U.S. 267 (1963).

and allow commencement of the civil action without payment of fees, costs or security. Also in its discretion, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. The Attorney General may not initiate an action at a single, isolated act of discrimination, but he may, in the discretion of the court, intervene in such an action brought by a private person if he (the Attorney General) certifies that the case is "of general public importance."⁹ The act has been interpreted to empower the Attorney General to request a hearing by a three-judge district court in any case in which he intervenes.¹⁰ The United States, if it is a losing party, is liable for costs the same as a private person.

The Attorney General may initiate an action when he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights"¹¹ secured by the title. This provision has not yet been utilized, but it would seem to authorize the Attorney General to bring an action if he can show repeated violations by one person or single violations by a number of people in an area.¹² After filing such a complaint, the Attorney General is expressly empowered to request, after certifying that the case is of general public importance, that a three-judge court be convened. A direct appeal may be taken to the Supreme Court.¹³

Further evidence of the importance which Congress attached to civil rights litigation is shown by requirements which seem to give such cases priority in the federal judiciary. When the Attorney General certifies that a case is of public importance, section 206 directs that the clerk of the court receiving it shall "immediately" furnish a copy of the certificate to the presiding judge of the circuit, who shall "designate immediately" three judges to hear the case. The judges to whom such a case is assigned, either singly or as a three-

⁹ 42 U.S.C.A. § 2000a-3(a) (1964). In explaining this phrase on the Senate floor, then-Senator Hubert Humphrey said: "(W)here the Attorney General believes that a suit brought by an individual under Title II is important—because, for example, the points of law involved in it are of major significance or because the particular decision will constitute a precedent for a large number of establishments—he may request intervention in order to present the Government's point of view. . . ." 110 Cong. Rec. 12286-87 (1963).

¹⁰ *Willis v. Pickrick*, 231 F. Supp. 396 (N.D. Ga. 1964).

¹¹ Civil Rights Act of 1964, § 206(a), 42 U.S.C.A. § 2000a-5(a) (1964).

¹² In explaining this section, Senator Humphrey said: "It is expected that this power of the Attorney General will be an important aid to maintaining public order in cases in which repeated discrimination in public accommodations has given rise to demonstrations and public violence. Since these are among the most explosive and disruptive instances of discrimination, we felt that the Attorney General had to have power to act quickly and decisively in the interest of public peace and harmony." 110 Cong. Rec. 12286-87 (1963). In explaining this and a number of other Senate revisions to the House bill, the senator did not explain how much territory was envisioned by the word "area."

¹³ Civil Rights Act of 1964, § 206(b), 42 U.S.C.A. § 2000a-5(b) (1964).

judge court, have the duty "to assign the case for hearing at the earliest practicable date, . . . and to cause the case to be in every way expedited."¹⁴ That the federal courts have taken these requirements seriously is shown by decisions in the first two cases rendered less than three weeks after the act went into effect.¹⁵

Counterbalancing the provision for swift federal court action is section 204 (c) and (d), which will forestall resort to federal courts where possible. If the act takes place in a state which has a state or local law prohibiting such discrimination, no action can be brought under the federal act until thirty days after notice has been given to the appropriate state or local authority. After thirty days the federal court may proceed or may stay its action if local enforcement proceedings are under way.

Language of the section apparently requires that the state law be one which prohibits the same act as the one for which federal relief is sought, but not that the state remedy be equivalent.¹⁶ This section should be read in conjunction with section 207(a) which makes clear that federal jurisdiction is not contingent upon "whether the aggrieved party shall have exhausted any . . . other remedies that may be provided by law." The purpose, according to a sponsor of the act, was to "give to State and local officials . . . opportunity to achieve voluntary compliance without Federal action."¹⁷

If the act takes place in a state in which there is no state or local anti-discrimination law, the federal court may refer the matter to the Community Relations Service if the court believes voluntary compliance may be obtained in this way. If at the end of sixty days the Service has not resolved the dispute, the court may allow another sixty days, but no more.¹⁸

The Community Relations Service was established by Title X of the Act¹⁹ and was given the responsibility of bringing about peaceful, private resolution of civil rights difficulties wherever possible. The Service consists of a director, appointed for a four-year term, plus necessary civil service personnel. Conciliation efforts are to be con-

¹⁴ *Ibid.*

¹⁵ *Willis v. Pickrick*, 231 F. Supp. 396 (N.D. Ga. 1964), and *Heart of Atlanta Motel, Inc. v. United States*, 231 F. Supp. 393 (N.D. Ga. 1964) were decided July 22, 1964. The Civil Rights Act was signed by the President July 2, 1964.

¹⁶ State laws traditionally have treated discrimination as a misdemeanor and/or have awarded damages to the person discriminated against. See, e.g., Calif. Civ. Code §§ 51-54; Colo. Rev. Stat. Ann. §§ 25-1-1 to 25-2-5 (1963); Neb. Rev. Stat. §§ 20-101 to 20-102 (1962).

¹⁷ Remarks of Senator Humphrey at 110 Cong. Rec. 11286-87 (1963). It was further contended that "experience in States that have public accommodations laws is that most complaints can be settled by voluntary procedures." *Ibid.*

¹⁸ Civil Rights Act of 1964, § 204(d), 42 U.S.C.A. § 2000a-3(a) (1964).

¹⁹ Civil Rights Act of 1964, §§ 1001-4, 42 U.S.C.A. §§ 2000g-2000g-3 (1964).

ducted without publicity, and all information obtained is to be held in confidence on penalty of a fine of up to \$1,000 or imprisonment up to one year.²⁰

Finally, enforcement of the public accommodations title is subject to the contempt provisions of Title XI.²¹ This title puts special restrictions on criminal contempt proceedings in cases arising out of all the titles to the Civil Rights Act except Title I, the one relating to voting rights.²² The restrictions require that criminal contempt actions be tried to a jury, that intent to violate the act be shown and that penalties not exceed a \$1,000 fine or six months imprisonment. A defendant can be put in jeopardy only once for the same act or omission.²³

However, Title XI makes clear that the act does *not* impair the traditional powers of a federal court sitting in equity to use *civil* contempt as a coercive weapon. Section 1101 says: "Nor shall anything herein be construed to deprive courts of their power, by civil contempt proceedings, *without a jury*, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention."²⁴

The difference between civil and criminal contempt has been the subject of frequent confusion. It is discussed at length in *United States v. United Mine Workers*,²⁵ in which the distinction is made that civil contempt is a conditional sanction which gives the defendant a choice of obeying the order in the future or accepting the punishment, while criminal contempt is an unconditional punishment for past disobedience. From this it would seem that the label used by the court would make a vast difference to the defendant in the stringency of the action the court could take against him.

Taken as a whole, the Civil Rights Act assembles for the person who can show he has suffered a discrimination within the scope of the act a powerful arsenal of legal weapons. He has an action not only against the person who discriminates, but against anyone who attempts to interfere with his efforts to enforce his rights. If he is unable to employ an attorney, the court may appoint one for him, and the action may be instituted without payment of fees, costs or

²⁰ Civil Rights Act of 1964, § 1003(b), 42 U.S.C.A. § 2000g-2(b) (1964).

²¹ Civil Rights Act of 1964, §§ 1101-6, 42 U.S.C.A. §§ 2000h-2000h-6 (1964).

²² Civil Rights Act of 1964, § 1101, 42 U.S.C.A. § 2000h (1964).

²³ Civil Rights Act of 1964, § 1102, 42 U.S.C.A. § 2000h-1 (1964).

²⁴ Civil Rights Act of 1964, § 1101, 42 U.S.C.A. § 2000h (1964). (Emphasis added.)

²⁵ 330 U.S. 258 (1947).

security. If he wins, the losing party pays all expenses, including, if the court approves, attorney's fee. Most important, if the complainant wins, his adversary will be subject to a federal court injunction, one of the most potent civil sanctions available in this country.

Balancing these are some substantial protections for the potential defendant, aside from the special safeguards for criminal contempt proceedings. The businessman is not required to act at his peril; no injunction can be issued until there has been a judicial determination that the act applies to his business.²⁶ Nor can there be any penalty unless an injunction is disobeyed. If he prevails in the action, the business owner, too, can recover costs and, in the discretion of the court, his attorney's fee.

In sum, Congress plainly wrote the act to provide swift resolution of the long and often violent controversy over who can enter a place generally open to the public. Determining what places are "public" is the only real issue left. This will be explored from the viewpoint of (1) how far the act *could* be extended within the constitutional scope of Congressional power, and (2) how far Congress *intended* the act to extend.

II. HISTORICAL DEVELOPMENT OF THE COMMERCE CLAUSE

Article I of the Constitution gives Congress power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."²⁷ The last clause of section 8 confers power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ."²⁸ Taken together, the two clauses can be construed to reach almost anything—or almost nothing. In 176 years both approaches have been tried.

Two objections were urged by opponents of the Civil Rights Act as making it beyond the scope of the commerce clause: (1) that the activities which it regulates are essentially local, and (2) that the real reason for enacting the regulation was not to protect commerce but to enlarge the rights of certain groups.²⁹ An honest advocate of the

²⁶ The only provision for enforcement is for either the person against whom discrimination is practiced or, in appropriate situations, the Attorney General to ask a federal district court for a "permanent or temporary injunction, restraining order or other order . . ." Civil Rights Act of 1964, §§ 204(a), 205(a), 42 U.S.C.A. § 2000a-3(a) (1964). Title XI provides for the traditional powers of a court of equity to enforce injunctions, with the aforementioned exceptions in cases of criminal contempt.

²⁷ U.S. Const., art. I, § 8, cl. 3.

²⁸ U.S. Const., art. I, § 8, cl. 18.

²⁹ For an interpretation of the act, holding it unconstitutional, see *McClung v. Katzenbach*, 233 F. Supp. 815 (N.D. Ala. 1964).

law could hardly deny the literal truth of both statements.³⁰ But the difficulty which besets objectors is that the cases construing the commerce power long ago passed the point of no return on both issues. The Supreme Court time and again has upheld regulations under the commerce clause even though the regulated activity (if only one isolated unit of that activity is considered) is admittedly local. Regulation under the commerce clause with a non-commercial purpose is similarly commonplace today.

How words so few and simple have come to confer such extensive power can be understood only in light of the historical development of the commerce clause. Collectively, the commerce clause cases reflect not only the evolution of the United States economy but also the changing philosophies of the proper relation of the federal government to it.

The development began in 1824 with *Gibbons v. Ogden*.³¹ A collision of state and national interests had been triggered by the invention of the steamboat, first of many technological advances which have assaulted the barriers behind which states supposedly conduct their internal affairs unmolested. As a reward for their efforts, inventors Fulton and Livingston had been granted an exclusive right to operate steamboats in New York waters. Ogden was licensed by them to operate a steam ferry on the Hudson River between New York and New Jersey. Gibbons, who was licensed by act of Congress to engage in the "coasting" trade, challenged New York's right to exclude him from the Hudson. New York state courts held that Congress could not regulate traffic which was confined entirely to New York rivers within the interior of the state.

Mr. Chief Justice Marshall wrote the opinion which held that the right granted by Congress prevailed over that granted by New York. The opinion is important primarily because of the thoroughness with which the federal commerce power was defined. As a contemporary and political associate of the Constitution's framers and a leader at the Virginia ratifying convention, the great Chief Justice sometimes seemed to speak on constitutional questions with the thundering authority of Moses come down from the mountaintop. Nor did he hesitate to do so.

In Mr. Justice Marshall's view, the New York steamer business, though wholly within that state, was part of a larger whole, national in scope. He said that "commerce, as the word is used in the "Con-

³⁰ Congress was asked to pass the act "to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law." Address by the late President John F. Kennedy on radio and television, June 11, 1963.

³¹ 6 U.S. (9 Wheat.) 1 (1824).

stitution, is a *unit, every part of which is indicated by the term.*"³² Commerce among the states could not be restricted to acts which in themselves involved the crossing of a state line. "Commerce among the states cannot stop at the external boundary of each state but may be introduced into the interior."³³ Using a phrase often relied upon since, he said commerce "among" means "commerce which *concerns* more states than one."³⁴

Mr. Justice Marshall puts limits, also often relied upon, on the scope of commerce among the states. "It is not intended that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or *affect* other states. . . . The completely internal commerce of a state, then, may be considered as reserved for the state itself."³⁵

Thus, *Gibbons v. Ogden*, like Scripture, has been used to support highly diverse viewpoints.³⁶ It is cited both in the most restrictive and the most expansive of later opinions. Suppose, for example, a chain of events in which a commodity goes from (1) producer to (2) processor to (3) wholesaler to (4) retailer to (5) consumer. The production is done wholly in Texas, the processing wholly in Massachusetts, and the wholesaler, retailer and consumer are all in Missouri. What part of this chain, if any, is commerce among the states? The restrictive view, with massive support in pre-1937 Supreme Court opinions, is that none of the enumerated activities as such is interstate commerce. Only the transfers from Texas to Massachusetts and from Massachusetts to Missouri are interstate commerce. The production in Texas and the processing in Massachusetts, as well as the transfers between the wholesaler, retailer and consumer in Missouri are, in this rationale, activities described by Mr. Justice Marshall as "completely internal, carried on between man and man in a state." The Supreme Court's post-1937 view has emphasized the Marshall definition of commerce as a "unit, every part of which is indicated by the term," and has held all five activities to be interstate commerce. With this approach, the production in Texas, for example, would not be "completely internal" because it does not qualify under the rest of the

³² *Id.* at 7. (Emphasis added.)

³³ *Ibid.*

³⁴ *Ibid.* (Emphasis added.)

³⁵ *Id.* at 7-8. (Emphasis added.)

³⁶ It is scarcely believable that as staunch a champion of national power as Mr. Chief Justice Marshall would have accepted some of the late nineteenth century opinions which purported to rely on *Gibbons v. Ogden*. For example, the Court in *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895), held the commerce power inadequate to break up a coast-to-coast monopoly in sugar refining because it regarded each individual refinery in the combine as a local operation.

definition as an activity "which does not extend to or affect other states."

At present Congress regulates a host of operations carried on wholly within one state because they are found to "affect" other states. How far the outer definitional limit of "commerce," as the word is used in the Constitution, can go in regulating matters within the states is a question on which reasonable men have differed and probably will continue to differ.

In *Gibbons v. Ogden*, Mr. Justice Marshall not only considered the proper objects of the commerce power, but the manner in which the power could be exercised. Here the power, once it is determined that the object of regulation is commerce among the states, is "plenary":

To regulate is to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, . . . the sole restraints on which they have relied, to secure them from its abuse.³⁷

In brief, the Chief Justice seems to say that, once it has been determined that an activity is "commerce among the states," Congress is limited in the way it regulates that commerce only by a regard for the upcoming elections. This viewpoint has not always been accepted by later Courts, but has been followed in recent years in upholding regulations for noncommercial ends.³⁸ Most litigation, however, has centered on whether a particular activity was a proper object of the power—*i.e.*, whether it was "completely internal" or "among the states."

Between *Gibbons v. Ogden* in 1824 and *NLRB v. Jones & Laughlin Steel Corp.*³⁹ in 1937, two disparate philosophies can be seen at work in the commerce decisions. One line of cases was based on language in *Gibbons* that the "completely internal commerce" of a state is reserved for state regulation. Another line of cases tended more toward defining interstate commerce as "commerce which concerns more states than one," despite containment of the regulated activity within one state.

Most of the nineteenth century cases dealt not with how far into the interior affairs of a state the Congress might extend its regulation

³⁷ *Id.* at 9

³⁸ *E.g.*, *United States v. Darby*, 312 U.S. 100, 115 (1941).

³⁹ 301 U.S. 1 (1937).

of commerce, but with how far the states might go in exercising their powers on commercial activities having an impact beyond the state.⁴⁰ The Court announced early that matters concededly within the federal power might appropriately be regulated by the states. *Cooley v. Board of Wardens*⁴¹ established a test based upon whether the commerce in question required uniform, national regulation or varying rules in different parts of the country. If the former, Congress alone could legislate; if the latter, the states might act.

Cooley had the virtue of flexibility, the vice of uncertainty. Beset as it was by a flood of state laws necessary—or ostensibly necessary—to protect the welfare of local citizens, the Court on occasion tried to develop more precise formulae. Mr. Justice Marshall's description of "completely internal" in *Gibbons* and of the "original package" in *Brown v. Maryland*⁴² were relied on in many cases to determine the point when commerce becomes subject to state power. Inevitably, tests developed to determine if acts were within the reach of the states were transferred into federal cases and treated as holding by negative inference that such activities were *not* within the scope of national power.⁴³

A. *The Restrictive View*

In *Kidd v. Pearson*,⁴⁴ the Court held in 1888 that the state of Iowa could prohibit manufacture of liquor in Iowa for sale outside of the state. The manufacture, it was reasoned, was not commerce. "The buying and selling and the transportation incidental thereto constitute commerce. . . ."⁴⁵ Seven years later the same reasoning was applied in *United States v. E. C. Knight Co.*,⁴⁶ a federal case. *Knight* held that the United States could not use the Sherman Anti-Trust Act to break up a monopoly in the manufacture of sugar. That the manufacturing combine was able to control almost the entire sugar market made no difference. Manufacturing, even the manufacturing of goods to be sold interstate, was a local activity subject only to local control. Interstate commerce did not begin, in the Court's view at that time, until the product was transported across state lines. Plainly, this was a contraction of Mr. Justice Marshall's view of "commerce among the states" as "commerce which concerns more states than one."

⁴⁰ See, e.g., *Passenger Cases*, 17 U.S. (7 How.) 123 (1848); *License Cases*, 16 U.S. (5 How.) 513 (1846).

⁴¹ 53 U.S. (12 How.) 299 (1851).

⁴² 7 U.S. (12 Wheat.) 262 (1827).

⁴³ See 1 Schwartz, *The Powers of Government* 185 (1963).

⁴⁴ 128 U.S. 1 (1888).

⁴⁵ *Id.* at 20.

⁴⁶ 156 U.S. 1 (1895).

The *Knight* view, which chopped off from the definition of interstate commerce those activities which occur before and after interstate transport, was subsequently extended to agriculture,⁴⁷ mining⁴⁸ and oil production.⁴⁹ This restricted view, though modified in construing subsequent anti-trust cases,⁵⁰ provided the authority by which the Court forty years later invalidated the legislation of the First New Deal. In *Schechter Poultry Corp. v. United States*⁵¹ the Court cited *Kidd v. Pearson*,⁵² the decision underlying *Knight*, in denying federal power to regulate New York poultry slaughterhouses handling chickens shipped in from other states for sale in New York. By this time the commerce clause had been extended to intrastate operations which "directly" affected interstate commerce.⁵³ But in *Schechter* the Court relied on geographic factors to find that the poultry houses were too remote from interstate commerce to "affect" it in constitutional terms. It emphasized that "the flow in interstate commerce had ceased" and that the poultry "had come to a permanent rest within the State."⁵⁴

*Railroad Retirement Bd. v. Alton R.R.*⁵⁵ is illustrative of a line of cases representing the undoubted high water mark in strict construction of the commerce clause. The Court held a compulsory pension plan for railroad employees void because it was not "necessary" to the regulation of commerce. The same basic approach was evident in *Hammer v. Dagenhart*⁵⁶ in 1918, in which the court held that a law banning shipment in interstate commerce of goods produced by child labor was beyond the constitutional powers of Congress. It was conceded that the law was a regulation of commerce among the states; the objection was that it was not *intended* as such. The Court found that the real purpose was to regulate conditions under which the

⁴⁷ *United States v. Butler*, 297 U.S. 1 (1936).

⁴⁸ *Oliver Iron Co. v. Lord*, 262 U.S. 172 (1923).

⁴⁹ *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210 (1923).

⁵⁰ *Int'l Bhd. of Teamsters, Local 167, v. United States*, 291 U.S. 293 (1934); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

⁵¹ 295 U.S. 495 (1935).

⁵² *Id.* at 547. See also *Kidd v. Pearson*, 128 U.S. 1 (1888).

⁵³ See cases cited in discussion in *Schechter Corp. v. United States*, 295 U.S. 495, 544-49 (1935).

⁵⁴ 295 U.S. at 543. The same philosophy underlaid other decisions of the early thirties. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (which invalidated a scheme for regulating prices, wages and hours in coal mining); *United States v. Butler*, 297 U.S. 1 (1936) (which struck down the first Agricultural Adjustment Act because regulation of farming "invades the reserved powers of the states").

⁵⁵ 295 U.S. 330 (1935).

⁵⁶ 247 U.S. 251 (1918). In a similar vein is an earlier case, *Adair v. United States*, 208 U.S. 161 (1908), which held unconstitutional a law prohibiting the use of "yellow dog" contracts for employees of interstate railroads. It was aimed at employment contracts which require that the employee agree not to join a labor union.

goods were manufactured. Relying on prior cases⁵⁷ defining manufacture as a local activity within state control, the state held that the act invaded the reserved powers of the states. Today, *Hammer v. Dagenhart* is remembered chiefly for Mr. Justice Homes' dissent.⁵⁸ "I should have thought that the most conspicuous decisions of this Court," he said, "had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State."⁵⁹

Hammer v. Dagenhart might be regarded as that view of the commerce clause which extends it to "almost nothing." In the *Hammer* view, it is not sufficient that the operative reach of the statute be confined to interstate commerce. The statute is invalid if its consequent effects regulate local activities. On its face, it is a standard almost impossible to achieve. Hardly ever will an interstate regulation fail to have repercussions reaching into local affairs.

Underlying the *Knight-Hammer-Schechter* cases was a concern as old as the republic, that the balance of power between federal and state governments might be upset to the detriment of the states. In *Knight* the Court declared: "Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."⁶⁰ This language is echoed in *Schechter* in which it was said: "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."⁶¹

This belief that a liberal construction of the commerce and "necessary and proper" clauses opens the floodgate for extension of federal power to the most minute detail of local activity is still a subject of debate, not limited only to the courts. The argument is often made that opening this floodgate makes—or has made—without benefit of a constitutional convention, a fundamental change in the federal-state system as envisioned by the founding fathers.

⁵⁷ E.g., *Kidd v. Pearson*, 128 U.S. 1 (1888).

⁵⁸ 247 U.S. 251, 277 (1918).

⁵⁹ *Id.* at 278.

⁶⁰ *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

⁶¹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

B. *The Expansive View*

The fundamental change, if such there has been, began and developed simultaneously with the flowering of the *Knight-Hammer-Schechter* doctrine.⁶² Its beginnings are most easily traced from the enactment of the Interstate Commerce Act⁶³ and the myriad railroad cases that followed. Actually, there probably were at least three lines of cases which expanded the commerce power in the late nineteenth and early twentieth century. They include (1) the railroad cases, (2) the "current of commerce" cases, and (3) the police-type regulation cases.

1. *The Railroad Cases* Passage of the Interstate Commerce Act in 1887 resulted, as has often been the case with commerce clause developments, from the impact of technology on the nation's economy. When the golden spike was driven in Utah in 1869 to complete the spanning of the continent with rails, the stage was already set for an affirmative assertion of the long-dormant national power over commerce. By the 1850's the railroads had become the dominant method of transportation. As older, competing methods were squeezed out, the railway corporations themselves began to combine and form monopolies.

A community served by a single railroad became utterly dependent on that railroad for its economic well-being. In time there were many such communities whose inhabitants complained bitterly to their congressmen of railroad abuses of power through rebates and discriminatory rates, and of the ineffectiveness of local regulation to combat these practices. The railroads—vast, vital, undeniably interstate and, above all, enormously powerful—plainly met the *Cooley*⁶⁴ requirement of subject matter imperatively calling for national regulation.

The installation of the Interstate Commerce Commission to see that rates were "just and reasonable" was the beginning of a long and often stormy relationship between the federal government and American railroads. Those who deplore the present expanse of federal regulation might justifiably cite the Interstate Commerce Act as the means by which the camel got his nose under the tent, for it was the leading edge of laws and decisions which eventually thrust federal standards deep into local affairs.

In 1893, just six years after rate regulation was enacted, Congress

⁶² See 1 Schwartz, *The Powers of Government* 189 (1963).

⁶³ 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1-1542 (1958).

⁶⁴ See note 41 *supra*, and accompanying text.

passed the Railroad Safety Appliance Act.⁶⁵ In 1903 the act was amended in an apparent effort to make clear that the safety requirements were to apply to *all* vehicles used by a railroad engaged in interstate commerce.⁶⁶ In 1911, in *Southern Ry v. United States*,⁶⁷ the Court was faced with the question whether Congress could require a railroad operating interstate to use the safety devices on vehicles making intrastate runs. The Court answered "yes" with no apparent qualms as to whether the regulation of intrastate matter invaded the reserved powers of the state over local undertakings.

Without discussion, the Court found the object of the law, protection of the safety of those employed in moving interstate commerce, to be within the constitutional authority of Congress. Because of the commingling of interstate and intrastate traffic, with both classes of traffic at times being carried in the same car, the Court found it was necessary to regulate intrastate traffic in order to make effective the protection of interstate commerce. Groundwork for this decision had been laid in 1871 in *The Daniel Ball*,⁶⁸ in which the Court held that a steamer operating intrastate was subject to congressional power because it carried goods on one leg of an interstate journey. As in the safety appliance case, the intrastate vessel had become "commingled" with the interstate flow.

This reasoning was carried a step further in 1914 in the famous *Shreveport Rate Case*.⁶⁹ The problem was that the rate set by the Texas Railroad Commission for intrastate runs to Dallas and Houston was substantially lower than the rate set by the Interstate Commerce Commission for a trip of about the same distance from the same East Texas area to Shreveport, Louisiana. The ICC ordered the intrastate rates raised, and its order was sustained by the Supreme Court. Where intrastate commerce competes with interstate commerce, the Court held the national government might impose such regulation of intrastate rates as was appropriate to the regulation of interstate commerce and necessary to its efficiency. Thus, *competing* intrastate commerce was put on the same footing as *commingled* intrastate commerce.

The *Shreveport* rule was reaffirmed in 1922 in a case growing out of the Transportation Act of 1920,⁷⁰ which prescribed the procedure for returning the railroads to private ownership after World War I. The act empowered the ICC to set rates to enable the railroads to earn

⁶⁵ 27 Stat. 531 (1893), as amended, 45 U.S.C. §§ 1-43 (1958).

⁶⁶ 32 Stat. 943 (1903), 45 U.S.C. §§ 8-10 (1958).

⁶⁷ 222 U.S. 20 (1911).

⁶⁸ 77 U.S. (10 Wall.) 557 (1871).

⁶⁹ *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914).

⁷⁰ 41 Stat. 456 (codified in scattered sections of 49 U.S.C.).

a "fair return" on their value and, for the first time, directly authorized the Commission to deal with intrastate rates which discriminated to the detriment of interstate commerce. Since the "fair return" provided for in the act was for the carriers' property taken as a whole, low intrastate rates would have had to be offset by correspondingly high rates for interstate traffic. The Wisconsin Railroad Commission set low intrastate rates, and the ICC ordered them increased to the fares set for interstate traffic. In *Railroad Comm'n v. Chicago, Burlington & Quincy R.R.*,⁷¹ the Court upheld the ICC, saying, "Effective control of one [interstate commerce] must embrace some control over the other [intrastate commerce], in view of the blending of both in actual operation."⁷² *Shreveport*, the Court made clear, was not a momentary aberration.

The first Federal Employers' Liability Act⁷³ had a harder time in the courts than the Safety Appliance Act which preceded it, although both were aimed at improving the lot of railroad employees. The first FELA was held invalid in 1908 because it apparently extended to the injuries of railroad employees engaged in intrastate commerce.⁷⁴ A second statute passed in 1910 was explicitly limited to injuries suffered by employees while engaged in interstate, foreign or territorial commerce.⁷⁵ Thirty years and many decisions later the second (1910) statute was amended to extend FELA protection to employees whose duties "affect" interstate commerce.⁷⁶

Two other early twentieth century statutes should be mentioned as part of the push given by railroad regulations to extend federal commerce powers. The Railway Labor Act of 1926⁷⁷ set out procedures for settling disputes between employers and employees, serving as a model for the National Labor Relations Act⁷⁸ nine years later. The Adamson Act of 1916⁷⁹ regulated wages and decreed an eight-hour day for employees engaged in the operation of interstate carriers. In a five-to-four decision, the Court in *Wilson v. New*⁸⁰ held in 1917 that this wage and hour regulation was necessary and proper for carrying out the regulation of commerce. Eighteen years

⁷¹ 257 U.S. 563 (1922).

⁷² *Id.* at 588.

⁷³ Ch. 3073, 34 Stat. 232 (1906).

⁷⁴ Employers' Liability Cases, 207 U.S. 463 (1908).

⁷⁵ 36 Stat. 291 (1910), 45 U.S.C. § 51 (1958), upheld in *Mondue v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912).

⁷⁶ 53 Stat. 1404 (1939), 45 U.S.C. §§ 51 (1958).

⁷⁷ 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-161 (1958).

⁷⁸ 49 Stat. 449 (1935) (codified in scattered sections of 29 U.S.C.).

⁷⁹ 39 Stat. 721 (1916), 45 U.S.C. §§ 65-66 (1958).

⁸⁰ 243 U.S. 332 (1917).

later in *Alton*⁸¹ the ground had shifted a bit, and a pension plan was found *not* to be necessary.

2. *The "Current of Commerce" Cases* The second liberalizing force at work on the limits of the commerce clause in the early twentieth century is seen in the "current of commerce" cases. The first of these was *Swift & Co. v. United States*⁸² in 1905. At issue was whether the Sherman Act,⁸³ which prohibited a restraint of trade in interstate commerce, applied to sales of cattle in Midwestern stockyards. The cattle were shipped in from the West to the stockyards and there sold by local commission men to dealers or packers, who then usually moved them out for future sales as fresh meat in other states. In holding that the Sherman Act applied, Mr. Justice Holmes declared:

[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser in the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.⁸⁴

The Packers and Stockyards Act of 1921⁸⁵ was upheld in *Stafford v. Wallace*⁸⁶ by the application of the same reasoning to similar facts. In *Stafford*, Mr. Chief Justice Taft refused to look on the sale at the stockyards as a mere local transaction to be considered apart from the well-understood west-to-east flow. "The stockyards," he said, "are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East. . . ."⁸⁷ A year later in 1923, *Chicago Bd. of Trade v. Olsen*⁸⁸ used the "current of commerce" doctrine to uphold the Grain Futures Act.⁸⁹

3. *Police-type Regulation Cases* The third line of cases expanding the commerce clause in the early twentieth century were those in which the power over commerce was used with noncommercial motives. Unquestionably the leading case is *Caminetti v. United States*,⁹⁰

⁸¹ See note 55 *supra*, and accompanying text.

⁸² 196 U.S. 375 (1905).

⁸³ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-4 (1958).

⁸⁴ *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905).

⁸⁵ 42 Stat. 159 (1921), as amended, 7 U.S.C. §§ 181-231 (1958).

⁸⁶ 258 U.S. 495 (1922).

⁸⁷ 258 U.S. at 516.

⁸⁸ 262 U.S. 1 (1923).

⁸⁹ 42 Stat. 998 (1922), as amended, 7 U.S.C. §§ 1-17 (1958) (now known as the Commodity Exchange Act).

⁹⁰ 242 U.S. 470 (1917).

which construed the Mann Act.⁹¹ The act was designed as a weapon against white slave traffic, but the Court held that it could be applied in a situation in which an "immoral purpose," but no "prostitution for hire," was shown. "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses . . . is no longer open to question."⁹² Relying on *Hoke v. United States*,⁹³ the Court declared that the power of Congress over commerce is "complete in itself."⁹⁴ As an incident to it, Congress "may adopt not only means necessary but convenient to its exercise, and the means may have the quality of *police regulations*."⁹⁵

The *Lottery Case*⁹⁶ upheld in 1903 an act forbidding the transport of lottery tickets in interstate commerce. It was the first of a host of laws having "the quality of police regulations" which were enacted under the commerce power. Among others were acts aimed at the transport of stolen cars,⁹⁷ impure food and drugs,⁹⁸ stolen goods,⁹⁹ kidnapped persons,¹⁰⁰ fraudulent securities,¹⁰¹ fugitive felons and witnesses.¹⁰²

In the midst of these patently noncommercial acts aimed at subjects generally regarded as within state power came *Hammer v. Dagenhart*.¹⁰³ Here the Court refused to allow a ban on the shipment of goods made by child labor. Previous "police regulations," such as the Lottery Act and the Pure Food and Drug Act, were distinguished on the ground that in *Hammer* the evil at which the law was aimed was ended and the goods themselves were harmless by the time they reached the stream of commerce.¹⁰⁴ Mr. Justice Holmes did not find this distinction persuasive.¹⁰⁵ *Hammer* underlines the existence in the commerce cases of two forces set on a collision course.

⁹¹ 18 U.S.C. §§ 2421-24 (1958).

⁹² 242 U.S. at 491.

⁹³ 227 U.S. 308 (1913).

⁹⁴ *Caminetti v. United States*, 242 U.S. 470, 492 (1917), quoting from *Hoke v. United States*, 227 U.S. 308, 323 (1913).

⁹⁵ *Ibid.* (Emphasis added.)

⁹⁶ *Champion v. Ames* 188 U.S. 321 (1903).

⁹⁷ National Motor Vehicle Theft Act, 18 U.S.C. §§ 2312-13 (1958), upheld in *Brooks v. United States*, 267 U.S. 432 (1925).

⁹⁸ Federal Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768 (1906), upheld in *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

⁹⁹ National Stolen Property Act, 18 U.S.C. § 2314 (1958), applied in *United States v. Sheridan*, 329 U.S. 379 (1946).

¹⁰⁰ Federal Kidnapping Act, 18 U.S.C. § 1201 (1958), applied in *Gooch v. United States*, 297 U.S. 124 (1936).

¹⁰¹ Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. §§ 77a-77aa (1958), applied in *Jones v. SEC*, 298 U.S. 1 (1935).

¹⁰² 18 U.S.C. § 1073 (1958), upheld in *Hemans v. United States*, 163 F.2d 228 (6th Cir. 1947), *cert. denied*, 332 U.S. 801 (1947).

¹⁰³ 247 U.S. 251 (1918).

¹⁰⁴ *Id.* at 271.

¹⁰⁵ *Id.* at 277. See note 59 *supra* and accompanying text.

C. *The Return To Gibbons v. Ogden*

Commerce cases since 1937, beginning with the historic decision of *NLRB v. Jones & Laughlin Steel Corp.*,¹⁰⁶ are a distinct body of law. Seldom is such a sharp cut-off seen as in pre- and post-1937 commerce law. Between 1937 and 1942, the authority of the *Knight-Hammer-Schechter* line of cases was completely destroyed. *Hammer* was explicitly overruled in *United States v. Darby*.¹⁰⁷ *Knight* and *Schechter*, though never overruled, were effectively obliterated by *Jones & Laughlin* and *Wickard v. Filburn*.¹⁰⁸

How did such a change come about? Many explanations have been offered, often tied in with the 1936 election results and a court-packing plan submitted to Congress in 1937. Certainly it was evident by late 1936 that the New Deal, despite one catastrophic setback after another in the Supreme Court, was a spectacular success at the polls.

Another explanation might be that the expansive forces at work for some thirty years in the railroad, "current of commerce" and police regulation cases finally won out. It can not be said that *Shreveport, Swift & Co.* and *Caminetti* made *Jones & Laughlin* inevitable, but they clearly laid the foundation. From Marshall's day forward the broad construction doctrine had never been entirely without champions. Mr. Justice Harlan dissented in the *Knight* case,¹⁰⁹ and Mr. Justice Holmes in *Hammer*.¹¹⁰ In *Schechter*, Mr. Justice Cardozo concurred, but put more emphasis on the invalid delegation of power than on remoteness from interstate commerce.¹¹¹ In *Carter*, decided a year later with the same restrictive approach as *Schechter*, Mr. Justice Cardozo dissented, asserting that "the [commerce] power is as broad as the need that evokes it."¹¹²

Jones & Laughlin upheld the National Labor Relations Act, in which Congress declared its intention to remove the obstruction to interstate commerce caused by labor disputes. The chosen means was the prohibition of unfair labor practices "affecting commerce."¹¹³ The defendant steel company relied on seemingly ample prior authority in challenging the law. It cited, among others, *Schechter*,¹¹⁴ *Carter*,¹¹⁵

¹⁰⁶ 301 U.S. 1 (1937).

¹⁰⁷ 312 U.S. 100, 117 (1941).

¹⁰⁸ 317 U.S. 111 (1942).

¹⁰⁹ *United States v. E. C. Knight & Co.*, 156 U.S. 1, 18 (1895).

¹¹⁰ *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918).

¹¹¹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

¹¹² *Carter v. Carter Coal Co.*, 298 U.S. 238, 328 (1936).

¹¹³ 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 152, 158 (1947) (Emphasis added.)

¹¹⁴ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹¹⁵ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

*Oliver Iron Mining Co. v. Lord*¹¹⁶ and *Kidd v. Pearson*.¹¹⁷ It contended that the act could not be used constitutionally to regulate its relationship with its employees in its iron and steel works at Aliquippa, Pennsylvania, because (1) this plant was engaged in production, a local activity not subject to the federal power and (2) the law was not in reality a regulation of interstate commerce but a regulation of labor relations that invaded the reserved power of the states.¹¹⁸ Eleven months earlier such an assault had been practically a certain method for overturning acts of Congress.

In *Laughlin*, the Court began by taking note of the immensity of the company's widespread operations. It owned iron mines in Michigan and Minnesota, and coal mines in Pennsylvania. Ore and coal were sent via the Great Lakes to the Pennsylvania mill where they were made into steel and shipped out on the company's railroads to warehouses scattered throughout the country. The Labor Board had found that the Aliquippa works were like a "heart," drawing in raw material from the mining states and pumping out steel to all parts of the nation. It was an obvious analogy to Mr. Chief Justice Taft's description of the stockyards as a "throat" through which the current of commerce in cattle flowed.

The Court accepted this analogy and relied on the current of commerce cases by name. It did not stop there, however, but went on to declare that the commerce power extended further than just to things definitely "in" interstate commerce. It relied on the railroad cases which had extended the power to intrastate commerce. "That power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it."¹¹⁹

Jones & Laughlin, a five to four decision, distinguished *Schechter*, leaving it almost intact. In *Schechter*, the Court had said that a local activity could be regulated as an incident to the regulation of interstate commerce only if the local activity had a *direct* effect on commerce. The effect of the operations of the New York poultry houses had been found to be too indirect for this purpose. In dealing with the Jones & Laughlin Corporation, an industrial giant, there was no such problem. The Court said, "In view of respondent's far-flung activities, it is idle to say that the effect [of a labor dispute] would be indirect or remote. It is obvious that it would be immediate and . . . catastrophic."¹²⁰

¹¹⁶ 262 U.S. 172 (1923).

¹¹⁷ 128 U.S. 1 (1888).

¹¹⁸ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 25 (1937).

¹¹⁹ *Id.* at 37.

¹²⁰ *Id.* at 41.

During the four years following *Jones & Laughlin* the Court upheld application of the National Labor Relations Act to several industries smaller than the mammoth steel company. Then in 1941, in *United States v. Darby*,¹²¹ the Court squarely faced and disposed of lingering questions posed by *Knight-Hammer-Schechter*. The respondent was a Georgia lumber mill which operated with the admitted intent of placing its product in interstate commerce. The respondent's business was regulated by the Fair Labor Standards Act¹²² in two ways. First, the act prohibited the shipment in interstate commerce of goods produced under substandard working conditions. In this it paralleled the child labor law invalidated in *Hammer*. But this act went further and prescribed wage and hour requirements for employees "engaged in commerce or the production of goods for commerce."¹²³

In *Darby*, the government was not able, as it had been in *Jones & Laughlin*, to show that the respondent's activities had a great impact on interstate commerce. The Fair Labor Standards Act was a scarcely disguised use of the commerce power to regulate local working conditions. It could not with consistency be upheld if *Hammer*, which denied use of the commerce power to control indirectly matters reserved to the states, was retained. The Court accepted the issues in this posture and overruled *Hammer*.¹²⁴

While *Jones & Laughlin* had relied on the railroad and current of commerce cases, *Darby* leaned heavily on the police regulation cases as justification for use of the commerce power for extraneous purposes. Cases upholding Congress's power to prohibit crossing of state lines by lottery tickets, noxious goods, kidnapped persons and improperly labeled food and drugs were cited as authority for the proposition that Congress may prohibit use of the channels of interstate commerce for any purpose it disapproves. The *Hammer* distinction that the evil aimed at must follow interstate shipment was declared "abandoned."¹²⁵

The Court went on to sustain the direct regulation of production by joining the "necessary and proper" clause with the commerce clause. "[H]aving . . . adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it [Congress] may choose the means reasonably adapted to the attainment of the permitted end,

¹²¹ 312 U.S. 100 (1941).

¹²² 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-11 (1958).

¹²³ 312 U.S. at 110.

¹²⁴ *Id.* at 117.

¹²⁵ *Id.* at 116.

even though they involve control of intrastate activities.¹²⁶ In so ruling, the Court repeated the theme of Mr. Chief Justice Marshall's famous opinion in *McCulloch v. Maryland*¹²⁷ to the effect that "if the end be legitimate," Congress may use any appropriate means to reach it.

The Court dealt also with the problem of whether Darby's volume of business was sufficient to have any real effect on interstate commerce. "It [Congress] recognized that in present day industry, competition by a small part may affect the whole and that the *total effect* of the competition of *many small producers may be great*."¹²⁸ Congress, the Court said, had found that such enterprises as Darby's had a depressing effect on commerce. By paying substandard wages, they were able to sell their goods at low prices, thus forcing down prices and wages for other similar firms competing in the interstate market.

Darby's cumulative standard for measuring effect on commerce was carried to its logical extreme a year later in *Wickard v. Filburn*.¹²⁹ Filburn was a farmer whose wheat quota for the year 1938 was eleven acres. Instead, he planted twenty-three acres and fed the 239 bushels harvested from the excess acreage to animals on his farm. He was fined forty-nine cents a bushel for raising excess wheat under the Agricultural Adjustment Act of 1938,¹³⁰ successor to the act invalidated in *United States v. Butler*.¹³¹ Filburn protested that his action could not possibly "affect" interstate commerce because (1) he never marketed the wheat, and (2) the amount raised was so small.

Filburn's first line of defense was that the Agricultural Adjustment Act sought to regulate production and consumption, though the government disclaimed any motive except to regulate interstate marketing of farm products. The Court treated all such distinctions as immaterial. The criterion was not whether a thing is local or interstate, production or marketing, but whether the activity sought to be regulated has "*a substantial economic effect on interstate commerce*."¹³²

In sustaining the Agricultural Adjustment Act, Mr. Justice Jackson's opinion progressed step by step. The purpose of the regulation was to prevent a glut of the interstate wheat market. To do this effectively, Congress found it necessary to control not only supply

¹²⁶ *Id.* at 121.

¹²⁷ 17 U.S. (4 Wheat.) 415 (1819).

¹²⁸ 312 U.S. at 123. (Emphasis added.)

¹²⁹ 317 U.S. 111 (1942).

¹³⁰ 52 Stat. 31 (1938), as amended, 7 U.S.C. §§ 1281-1393 (1958).

¹³¹ 297 U.S. 1 (1936).

¹³² 317 U.S. at 125. (Emphasis added.)

but also demand. By producing and feeding to his animals 239 extra bushels of wheat, Filburn reduced the demand on the interstate market by that much. Hence, Congress could prohibit Filburn's demand-reducing act.

An analogy was drawn to the *Shreveport Rate Case*,¹³³ in which the regulation of intrastate rates was permitted because they competed with interstate rates. Justice Jackson said, "[I]f 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."¹³⁴

Filburn's second and seemingly strongest objection, *i.e.*, that his effect on the market, if any, was trivial, was disposed of by application of the cumulative effect rule. "[H]is contribution, taken together with that of many others similarly situated" was held to be "far from trivial."¹³⁵

If *Hammer* represented the proposition that the commerce clause, strictly interpreted, applies to "almost nothing," *Wickard v. Filburn* as surely stands for the thesis that, liberally interpreted, the clause reaches "almost everything." Predictably, *Wickard* has been relentlessly criticized, and nearly a quarter century later it is still a highly controversial case. Dean Griswold, though not critical of the decision, characterized *Wickard* as "very close to the borderline."¹³⁶ Be that as it may, the *Wickard* doctrine is firmly entrenched in constitutional law. The High Court has shown no inclination to abandon or modify it, and the opinion has been cited again and again in subsequent cases, including the decisions upholding the Civil Rights Act of 1964.¹³⁷

If they have done anything, the cases decided since 1942 have expanded the application of *Laughlin*, *Darby* and *Wickard*. After *Darby*, the Fair Labor Standards Act was applied to a multitude of occupations on the ground that they were "necessary to the production" of goods for interstate commerce. Among these were the employees of such independent contractors as an electrician;¹³⁸ a window

¹³³ *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914).

¹³⁴ 317 U.S. at 138. (Emphasis added.)

¹³⁵ *Ibid.*

¹³⁶ Erwn N. Griswold, Dean, Harvard University Law School, as reported in *Hearings on H.R. 7152 Before the Senate Committee on Commerce*, 88th Cong., 1st Sess., ser. 26, pt. 1, at 776 (1963), hereafter cited as *Senate Commerce Committee Hearings*.

¹³⁷ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 295 (1964).

¹³⁸ *Roland Elec. Co. v. Walling*, 326 U.S. 657 (1946).

cleaning firm;¹³⁹ and an architectural firm,¹⁴⁰ the greater part of whose work was done for an industrial plant producing goods for commerce. In *Mabee v. White Plains Publishing Co.*,¹⁴¹ the wage and hour law was applied to a newspaper whose circulation was about 9,000 copies, of which only forty-five copies—about one-half of one per cent of its total volume—were mailed out of state.

The National Labor Relations Act similarly has been extended to reach enterprises having much less effect on commerce than Jones & Laughlin Co. In *Meat Cutters v. Fairlawn Meats, Inc.*,¹⁴² the act was applied to an Akron, Ohio, retailer even though all its sales were intrastate and only slightly more than \$100,000 of its annual purchases of almost \$900,000 came from outside Ohio. If proof were needed that *Schechter*, although never overruled, is dead, *Fairlawn* supplied it. The new approach was summarized in *United States v. Women's Sportswear Ass'n*: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."¹⁴³ As recently as 1963, in *NLRB v. Reliance Fuel Oil Corp.*,¹⁴⁴ the Court upheld NLRB jurisdiction over Reliance because a "substantial amount" of the fuel which it sold locally had, though purchased locally, originally come from out of state.

In *United States v. Sullivan*,¹⁴⁵ the Court extended the coverage of the Federal Food, Drug and Cosmetic Act¹⁴⁶ to prohibit the sale by a retail druggist of improperly labeled tablets, even though the tablets were obtained by the retailer locally six months earlier and had been labeled properly while in interstate commerce.

As *Sullivan* and the window cleaning case indicate, the commerce clause today allows Congress to regulate fairly remote events occurring both before and after interstate shipment. And the link to interstate commerce, as indicated by the one-half of one per cent production in *Mabee*, may be relatively tenuous so long as it is definitely shown. The "de minimis" limitation is apparently of no help to a business if it is one of many similar establishments over the country.

III. PREVIOUS APPLICATION OF THE COMMERCE CLAUSE TO RACIAL DISCRIMINATION

The part just completed treated the historical development of the

¹³⁹ *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946).

¹⁴⁰ *Mitchell v. Lublin, McGaughey & Associates*, 358 U.S. 207 (1959).

¹⁴¹ 327 U.S. 178 (1946).

¹⁴² 353 U.S. 20 (1957).

¹⁴³ 336 U.S. 460, 464 (1949).

¹⁴⁴ 371 U.S. 224 (1963).

¹⁴⁵ 332 U.S. 689 (1948).

¹⁴⁶ 52 Stat. 1040 (1938), 21 U.S.C. § 301 (1958).

commerce clause in general. This part will deal with cases prior to 1964 in which the commerce clause was applied—or was refused application—in race discrimination situations.

Nineteenth century cases provide little but confusion. In *Hall v. DeCuir*¹⁴⁷ in 1878, the Court struck down a law prohibiting segregation on public carriers passed by a Louisiana reconstruction legislature. It was held to be a void restriction on interstate commerce. In 1890, *Louisville, N.O. & Tex. Ry. v. Mississippi*¹⁴⁸ upheld a Mississippi law requiring segregation on carriers. It was not a burden on interstate commerce, the Court said, because it only applied intrastate. Between these two cases came the *Civil Rights Cases*¹⁴⁹ in 1883, in which the Court invalidated an act very similar to the Public Accommodations Title in the 1964 act.

The *Civil Rights Cases* arose out of an 1875 act¹⁵⁰ which was squarely based on the power Congress thought it had been granted by the fourteenth amendment. The Court gave only brief, glancing treatment to commerce clause aspects, but produced eighty-one years of uncertainty whether such a law based on the commerce power would be constitutional. The chief source of doubt was the Court's statement that "no one will contend that the power to pass it [the 1875 Civil Rights Act] was contained in the Constitution before the adoption of the last three amendments [thirteenth, fourteenth and fifteenth]."¹⁵¹

Another statement made by the Court pointed in the opposite direction. Having held that the fourteenth amendment did not give Congress authority to pass such a law, the Court added:

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce . . . among the several states. . . . In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof.¹⁵²

In the final analysis, the cases are not authority either way on the commerce power, for the issue was stated, but not decided: "And whether Congress, in the exercise of its power to regulate commerce amongst the several states, might or might not pass a law regulating rights in public conveyances passing from one state to

¹⁴⁷ 95 U.S. 485 (1878).

¹⁴⁸ 133 U.S. 587 (1890).

¹⁴⁹ 109 U.S. 3 (1883).

¹⁵⁰ Ch. 114, §§ 3-5, 18 Stat. 335 (1875).

¹⁵¹ 109 U.S. at 10.

¹⁵² *Id.* at 18.

another, is also a question which is not now before us, as the sections in question are not conceived in any such view."¹⁵³

The law was substantially unchanged until 1941, when the Court first allowed use of the Interstate Commerce Act as a weapon against segregation on interstate carriers. The act declares that "it shall be unlawful for any common carrier subject to the provisions of this chapter to make, give or cause any undue or unreasonable preference or advantage to any particular person . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."¹⁵⁴ Designed originally to prevent rate discrimination and rebates, the provision offered a ready-made tool for eliminating discrimination from transportation. Similar statutes apply to motor carriers¹⁵⁵ and air carriers.¹⁵⁶ In a series of cases, these three statutes were applied to outlaw segregation in trains,¹⁵⁷ diner cars,¹⁵⁸ buses¹⁵⁹ and airlines.¹⁶⁰ Because of the plenary power of Congress over commerce, it applied equally whether the segregation was required by state law or by regulation of the carrier.¹⁶¹

In *Boynton v. Virginia*,¹⁶² nondiscrimination was required in a bus terminal restaurant operated as an "integral part" of the carrier's service. In *Baldwin v. Morgan*,¹⁶³ nondiscrimination was required in waiting rooms, with the further stipulation that a Negro passenger could not be required to prove he was making an interstate trip before using the so-called "interstate and white" waiting room.

The limits of the usefulness of the Interstate Commerce Act in desegregation became apparent in *Williams v. Howard Johnson's Restaurant*.¹⁶⁴ The United States Court of Appeals for the Fourth Circuit held that the Interstate Commerce Act applies only to common carriers and cannot be applied in the case of a highway restaurant. The Court also rejected the contention that the commerce clause was self-executing and provided authority, even without a specific statute, for removing any restriction on commerce.

¹⁵³ *Id.* at 19.

¹⁵⁴ Interstate Commerce Act, 24 Stat. 379 (1887), as amended 49 U.S.C. § 3 (1958).

¹⁵⁵ Motor Carrier Act, 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(d) (1958).

¹⁵⁶ Air Carrier Economic Regulation Act, 52 Stat. 973 (1938), as amended, 49 U.S.C. § 1374(b) (1958).

¹⁵⁷ *Mitchell v. United States*, 313 U.S. 80 (1941).

¹⁵⁸ *Henderson v. United States*, 339 U.S. 816 (1950).

¹⁵⁹ *Morgan v. Virginia*, 328 U.S. 373 (1946).

¹⁶⁰ *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956).

¹⁶¹ *Chance v. Lambeth*, 186 F.2d 879 (4th Cir. 1951).

¹⁶² 364 U.S. 454 (1960).

¹⁶³ 287 F.2d 750 (5th Cir. 1961).

¹⁶⁴ 268 F.2d 845 (4th Cir. 1959).

IV. THE CIVIL RIGHTS ACT AND THE FOURTEENTH AMENDMENT

When the Public Accommodations Title was being considered by the Senate Commerce Committee in 1963, one of the act's supporters urged basing the bill on the fourteenth amendment so as to avoid "stretching the commerce clause."¹⁶⁵ Representatives of the Justice Department, though expressing sympathy with the senator's concern, demurred.

The problem was the decision in the *Civil Rights Cases*¹⁶⁶ in 1883. As the Justice Department pointed out, the act proposed in 1963 was, except for its commerce clause provisions, "indistinguishable" from the act before the Court in 1883.¹⁶⁷ But in 1883, only fifteen years after the fourteenth amendment was adopted, the Supreme Court held that the amendment only reached discrimination attributable to the action of a state. It was held not to empower Congress to legislate against discrimination by individuals.

This distinction between private and state action has been scrupulously observed by the Court ever since. The decision, though occasionally questioned in a concurring opinion,¹⁶⁸ has never been abandoned and has often been cited as controlling law.¹⁶⁹ The only significant developments between 1883 and 1964 were (1) changes in the standard required of the state in giving "equal protection of the law" and (2) some expansion and refinement of the "state action" concept.

The evolution of "equal protection" will be considered first. In 1896 the long reign of Jim Crow began when *Plessy v. Ferguson*¹⁷⁰ construed the "equal protection" requirement to be satisfied by "separate but equal." This principle was undermined in the post-World War II law school cases.¹⁷¹ In *Sweatt v. Painter*,¹⁷² the University of Texas was required to admit Sweatt to its law school because the state's law school for Negroes, hastily thrown together after the instigation of Sweatt's suit, was not and never could be equal. Physical inequalities were noted, but the Court also relied on intangible differences such as the white school's tie with the dominant white culture of the state.

¹⁶⁵ Senate Commerce Committee Hearings, *supra* note 136, pt. 1, at 154-55.

¹⁶⁶ 109 U.S. 3 (1883). See text accompanying note 149 *supra*.

¹⁶⁷ Senate Commerce Committee Hearings, *supra* note 136, pt. 2, at 1299.

¹⁶⁸ *E.g.*, *Bell v. Maryland*, 378 U.S. 226, 242 (1964) (opinion of Mr. Justice Douglas); *Id.* at 286 (opinion of Mr. Justice Goldberg).

¹⁶⁹ *E.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁷⁰ 163 U.S. 537 (1896).

¹⁷¹ *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950).

¹⁷² 339 U.S. 629 (1950).

This line of thinking culminated in the epoch-making case of *Brown v. Board of Education*,¹⁷³ in which it was held that "separate educational facilities are inherently unequal."¹⁷⁴ Though *Brown* rejected the separate but equal doctrine only with respect to schools, a series of cases followed swiftly applying the same principle to other tax-supported facilities such as parks,¹⁷⁵ bathing beaches¹⁷⁶ and golf courses.¹⁷⁷

Other pre-1964 cases expanded the fourteenth amendment's scope slightly by attributing certain acts of private persons to the state. *Smith v. Allwright*¹⁷⁸ and *Terry v. Adams*¹⁷⁹ required private political organizations which had, in effect, taken over the state function of holding elections to be subject to the same constitutional requirements as the state. Thus was the White Man's Primary outlawed. A variation on this theme was *Marsh v. Alabama*,¹⁸⁰ in which a company-owned town was restrained from abridging first amendment rights in the same way that a municipality would be, by application of the fourteenth amendment. Gulf Shipbuilding Corporation, which owned the town, had attempted to forbid the distribution of religious tracts.

*Screws v. United States*¹⁸¹ construed a statute,¹⁸² enacted pursuant to the fourteenth amendment, which forbids depriving anyone of constitutional rights by an act done "under color of any law." Georgia peace officers had killed a prisoner in their custody. The Court held the statute applied to their action even though the acts were violations of state law. "It is clear," said the Court, "that under 'color' of law means 'pretense' of law."¹⁸³

Other cases found "state action" where the private operation was very closely tied to that of a public agency. In *Burton v. Wilmington Parking Authority*,¹⁸⁴ a private restaurant leased space from a facility built with public funds for a public purpose. The Court found that the restaurant was "an integral part of a public build-

¹⁷³ 347 U.S. 483 (1954).

¹⁷⁴ 347 U.S. at 483.

¹⁷⁵ *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122 (5th Cir. 1958) *aff'd per curiam* 358 U.S. 54 (1959).

¹⁷⁶ *Baltimore City v. Dawson*, 220 F.2d 386 (4th Cir. 1955), *aff'd per curiam*, 350 U.S. 877 (1955).

¹⁷⁷ *Homes v. City of Atlanta*, 223 F.2d 93 (5th Cir. 1955) *aff'd per curiam*, 350 U.S. 879 (1955).

¹⁷⁸ 321 U.S. 649 (1944).

¹⁷⁹ 345 U.S. 461 (1953).

¹⁸⁰ 326 U.S. 501 (1946). *But see* *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

¹⁸¹ 325 U.S. 91 (1945).

¹⁸² 18 U.S.C. § 242 (1958).

¹⁸³ 325 U.S. at 111.

¹⁸⁴ 365 U.S. 715 (1961).

ing" and held that discrimination by it was forbidden by the fourteenth amendment.¹⁸⁵ Similar reasoning was involved in *Boman v. Birmingham Transit Co.*,¹⁸⁶ which invalidated a city bus company's requirement of segregated seating. It was noted in *Boman* that (1) the company had a franchise from the city for use of the public streets, and (2) a city ordinance authorized the company to issue seating rules and made disobedience of these rules a breach of the peace.

*Shelley v. Kraemer*¹⁸⁷ made the greatest extension of the fourteenth amendment to date. State court enforcement of racially restrictive deed covenants was held to be unconstitutional state action. The Court relied, in part, on *Buchanan v. Warley*,¹⁸⁸ which had invalidated city zoning ordinances based on color. In *Shelley*, the Court was careful to make clear that the covenants themselves were unobjectionable. The *Civil Rights Cases*¹⁸⁹ were cited and the basic principle reiterated that the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful."¹⁹⁰ The unconstitutional state action was the "intervention of the state courts"¹⁹¹ to prevent a sale between a willing seller and willing purchaser. *Barrows v. Jackson*¹⁹² followed *Shelley* by refusing to allow an action for damages for breach of a restrictive covenant.

Some of the language of *Shelley* seemed to open the door to invalidation of any act of private discrimination made effective with the aid of state law enforcement. For example, it was said that "the Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals."¹⁹³ Whatever this may mean, the Court has consistently declined to extend it into other fact situations.¹⁹⁴ This was made abundantly clear in the sit-in cases decided in the early 1960's.¹⁹⁵ The Court was strenuously urged to use the *Shelley*

¹⁸⁵ *Id.* at 724.

¹⁸⁶ 280 F.2d 531 (5th Cir. 1960).

¹⁸⁷ 334 U.S. 1 (1948).

¹⁸⁸ 245 U.S. 60 (1917).

¹⁸⁹ 109 U.S. 3 (1883).

¹⁹⁰ 334 U.S. at 13.

¹⁹¹ *Id.* at 19.

¹⁹² 346 U.S. 249 (1953).

¹⁹³ 334 U.S. at 22.

¹⁹⁴ See *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958), *cert. denied sub nom.* Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia, 357 U.S. 570 (1958); *Gordon v. Gordon*, 332 Mass. 197, 124 N.E.2d 228 (1955), *cert. denied*, 349 U.S. 947 (1955).

¹⁹⁵ *Bell v. Maryland*, 378 U.S. 226 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Griffin v. Maryland*, 378 U.S. 130 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Garner v. Louisiana*, 368 U.S. 157 (1961).

approach to invalidate state trespass convictions of demonstrators refused service at private restaurants. In the background was the strife and bitter feeling that accompanied the Negro push for civil rights during that period. Though obviously sympathetic with the demonstrators, a majority of the Court was unwilling to hold that state trespass convictions, like state enforcement of restrictive covenants, violated the fourteenth amendment. Instead, the Court resorted to seemingly strained construction and tortured reasoning to invalidate the convictions on other grounds.¹⁹⁶

All the conflicting viewpoints and apparently insoluble problems involved in trying to apply the fourteenth amendment to private discrimination came to a head in *Bell v. Maryland*,¹⁹⁷ last of the long series of 1963-64 sit-in cases. The seventy pages of opinions indicated a three-way split among the justices. Justices Warren, Goldberg and Douglas would have applied the fourteenth amendment to dismiss the convictions. Mr. Justice Douglas declared that segregation was a "relic of slavery" and that the state, in enforcing segregation, was denying a constitutional right.¹⁹⁸ Mr. Justice Goldberg, with whom the Chief Justice concurred, agreed with the first Mr. Justice Harlan, who had dissented in the *Civil Rights Cases*.¹⁹⁹ Justice Goldberg contended that "the historical evidence demonstrates that the traditional rights of access to places of public accommodation" were secured to Negroes by the fourteenth amendment.²⁰⁰

Mr. Justice Black, with whom Justices White and Harlan concurred, replied with equal conviction that the "historical evidence" showed nothing of the sort. Referring to the Congressional debates out of which the post-Civil War amendments developed, he declared

¹⁹⁶ *Lombard v. Louisiana*, 373 U.S. 267 (1962) dealt with the conviction of sit-in demonstrators under the state's criminal mischief statute which forbade refusal to leave a place after being asked to by the manager. Louisiana had no statute requiring segregation in eating places, but the mayor and chief of police had made public announcements that sit-in demonstrations would not be permitted. The court said: "As we interpret the New Orleans city officials' statements, they have determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct." 373 U.S. at 273.

In *Peterson v. City of Greenville*, 373 U.S. 244 (1962), the city had an ordinance requiring segregation in eating places, but the demonstrators were convicted under a local trespass statute. The manager of the lunch counter testified that he refused to serve the Negroes because it "violated local custom." 373 U.S. at 246. The Court found that the refusal was state action because in enacting a segregation statute, the state reserved to itself the decision whether eating places should discriminate.

For discussion of the decisions in this and other sit-in cases, see Kurland, *Foreword: Equal In Origin and Equal In Title to the Legislative and Executive Branches of the Government*, 78 Harv. L. Rev. 143, 158 (1964).

¹⁹⁷ 378 U.S. 226 (1964).

¹⁹⁸ *Id.* at 242.

¹⁹⁹ *Id.* at 286.

²⁰⁰ *Id.* at 316.

that "not one of the speakers mentioned privately owned accommodations."²⁰¹ The fourteenth amendment, said Mr. Justice Black, does not reach the individual's decision to discriminate on his private property, nor does it require the individual to forego police protection and resort to self-help in carrying out his decision. *Shelley* was distinguished in that it involved a willing seller, as opposed to the unwilling restaurant owner.

A majority was achieved in *Bell v. Maryland* by a decision which in effect, avoided a decision. Justices Warren and Goldberg joined with Justices Brennan, Clark and Stewart in remanding for a state court determination whether, under state law, the convictions were barred by the subsequent enactment of a state public accommodations law. The Maryland Supreme Court, as prior cases indicated it would, on remand said the convictions were not barred.²⁰²

A solution was finally achieved in *Hamm v. City of Little Rock*.²⁰³ Here the Court held that all the old sit-in convictions must be vacated because the Civil Rights Act of 1964 applied retroactively to protect the demonstrators' actions. The Court relied on the old common law doctrine of abatement in holding that punishment could not be inflicted for acts no longer unlawful. In dissenting, Mr. Justice Black, joined by Justices Harlan, Stewart and White, objected sharply to the majority's ignoring of the Federal Savings Statute.²⁰⁴

Considering the fourteenth amendment cases, from the *Civil Rights Cases* to *Bell v. Maryland*, it is obvious that the Justice Department had reason for advising the Senate that the amendment's "adequacy" as ground for a new public accommodations law was "subject to significant doubts."²⁰⁵ As finally enacted, the act attempts to reach only those acts of discrimination which previous cases have indicated may be attributed to the state.²⁰⁶ It may be that the only purpose the provisions based on the fourteenth amendment will serve

²⁰¹ *Id.* at 337. See generally Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights, The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

²⁰² *Bell v. State*, 236 Md. 356, 204 A.2d 54 (1964).

²⁰³ 379 U.S. 306 (1964).

²⁰⁴ 379 U.S. at 318-28.

²⁰⁵ *Hearings Before the Senate Committee on Commerce*, 88th Cong., 1st Sess., ser. 26, pt. 2, at 1299 (1963).

²⁰⁶ For example, § 201(d) says that discrimination is supported by state action if it is (1) carried on under color of any law, statute, ordinance or regulation; (2) carried on under color of any custom or usage required or enforced by officials of the state or subdivision; or (3) is required by action of the state or political subdivision. Civil Rights Act of 1964, § 201(d), 42 U.S.C.A. § 2000a(d) (1964). The first provision parallels *Peterson v. City of Greenville*, 373 U.S. 244 (1963), where the existence of a segregation ordinance made the owner's refusal to serve Negroes "state action." It was presumed the owner acted in compliance with the ordinance. The second provision is apparently based on *Lombard v. Louisiana*, 373 U.S. 267 (1963), in which city officials announced they would not permit Negroes to seek service at segregated lunch counters.

is to give state officials opposing desegregation detailed advice on what acts to avoid. It is also possible, however, that the fact that the act relies on the fourteenth amendment may keep alive the *Bell v. Maryland* controversy. A slight shift in Court membership could make these provisions very potent indeed.

V. DECISIONS UPHOLDING THE PUBLIC ACCOMMODATIONS TITLE

Less than six months after the Civil Rights Act of 1964 was passed, the Supreme Court put to rest questions of its constitutionality in *Heart of Atlanta Motel, Inc. v. United States*²⁰⁷ and *Katzenbach v. McClung*.²⁰⁸ Briefly stated, the decisions, both unanimous, upheld application of the act to a motel and a restaurant under Congress's power through the commerce clause. Fourteenth amendment questions were neither presented nor decided. Mr. Justice Clark wrote the opinions. Mr. Justice Black, too, probably spoke for all when he said in his concurring opinion, "It requires no novel or strained interpretation of the Commerce Clause to sustain Title II as applied in either of these cases."²⁰⁹

Heart of Atlanta Motel has 216 rooms and is readily accessible from two interstate highways and two state highways. It solicits out-of-state patronage via advertising in national magazines and by billboards and highway signs. Approximately seventy-five per cent of its guests are persons from outside Georgia.²¹⁰

Respondent in *McClung* operates Ollie's Barbecue, which is eleven blocks or more from the nearest highway, railroad station or bus station. It purchases food valued at approximately \$150,000 each year, of which \$69,783 or forty-six per cent of the total is meat from out of state. It conceded that it was covered by section 201 (c) (2) pertaining to restaurants which obtain a substantial portion of the food they serve from interstate commerce.²¹¹

Petitioner in *Heart of Atlanta* asserted that the act deprived it of fifth amendment rights in that it was denied the right to choose its customers, which resulted in a taking of its liberty and property without due process of law and a taking of property without just compensation.²¹² The Court rejected both the liberty and property arguments. It relied on "a long line of cases" to the effect that "prohibition of racial discrimination in public accommodations" does

²⁰⁷ 379 U.S. 241 (1964).

²⁰⁸ 379 U.S. 294 (1964).

²⁰⁹ 379 U.S. at 270-71.

²¹⁰ 379 U.S. at 243.

²¹¹ *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964).

²¹² 379 U.S. at 244.

not interfere with personal liberty, at least not liberty as protected by the Constitution.²¹³

The property argument was disposed of by citing cases holding that similar state and District of Columbia statutes did not violate "due process." The Court expressed doubt that the motel or restaurant would in the long run suffer economic loss as a result of the act. But even if it did, this was held not sufficient to invalidate legislation considered to be a reasonable means of carrying out a constitutional purpose.²¹⁴

"The fact that 'a member of the class which is regulated may suffer economic losses not shared by others, . . .'" said Mr. Justice Clark, "'has never been a barrier' to such legislation."²¹⁵ The *Legal Tender Cases*²¹⁶ were cited as authority that such regulation was not a "taking" in fifth amendment terms.²¹⁷ Mr. Justice Black said the act "does not even come close to being a 'taking' in the constitutional sense."²¹⁸

Predictably, the Court "found no merit" in Heart of Atlanta's contention that requiring it to serve all comers violated the thirteenth amendment's prohibition against slavery. The act, it said, does nothing more than "codify the common law innkeeper rule."²¹⁹

Both opinions made frequent reference to the record of congressional hearings on the act. The apparent reason for this was to cure what the three-judge court in *McClung* had regarded as one of several fatal flaws in the act—the absence of congressional findings of fact.²²⁰ As the lower court pointed out, previous ground-breaking acts under the commerce power, such as the National Labor Relations Act, included preambles carefully setting out the findings of Congress on the ways in which the conduct to be regulated affected interstate and foreign commerce. The Civil Rights Act contained no such findings. This left the door wide open, so the lower court felt, for a judicial finding, which it made, that there was no connection between Ollie's Barbecue and interstate commerce.²²¹

Omission of the usual congressional findings was not for lack of data submitted to Congress by several of the executive departments.²²² From the record of proceedings, it appears that the usual recital may

²¹³ 379 U.S. at 260.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ 79 U.S. (12 Wall.) 457 (1870).

²¹⁷ 379 U.S. at 261.

²¹⁸ *Id.* at 277.

²¹⁹ *Id.* at 261.

²²⁰ *McClung v. Katzenbach*, 233 F. Supp. 815, 823 (N.D. Ala. 1964).

²²¹ *Id.* at 823-25.

²²² Senate Commerce Committee Hearings, *supra* note 205, pt. 1, at 2.

have been omitted because the proposed findings were more distasteful to opponents of the bill than the operative provisions.²²³

The Supreme Court, however, was not hindered by the omission. Mr. Justice Clark emphasized that the Congress had "conducted prolonged hearings" and amassed "an impressive array of testimony that discrimination had a . . . highly restrictive effect upon interstate travel. . . ."²²⁴ In the course of the opinions almost all of the findings originally offered by the Justice Department were noted.²²⁵

²²³ Senate Commerce Committee Hearings, *supra* note 205, pt. 1, at 103-105.

²²⁴ 379 U.S. at 300.

²²⁵ Senate Commerce Committee Hearings, *supra* note 205, pt. 1, at 2 contains proposed findings by the Justice Department:

The American people have become increasingly mobile during the last generation, and millions of American citizens travel each year from state to state by rail, air, bus, automobile and other means. A substantial number of such travelers are members of minority racial and religious groups. These citizens, particularly Negroes, are subjected in many places to discrimination and segregation, and they are frequently unable to obtain the goods and services available to other interstate travelers.

Negroes and members of other minority groups who travel interstate are frequently unable to obtain adequate lodging accommodations during their travels, with the result that they may be compelled to stay at hotels or motels of poor and inferior quality, travel great distances from their normal routes to find adequate accommodations or make detailed arrangements for lodging far in advance of scheduled interstate travel.

Negroes and members of other minority groups who travel interstate are frequently unable to obtain adequate food service at convenient places along their routes, with the result that many are dissuaded from traveling interstate, while others must travel considerable distances from their intended routes in order to obtain adequate food service.

Goods, services and persons in the amusement and entertainment industries commonly move in interstate commerce, and the entire American people benefit from the increased cultural and recreational opportunities afforded thereby. Practices of audience discrimination and segregation artificially restrict the number of persons to whom the interstate amusement and entertainment industries may offer their goods and services. The burdens imposed on interstate commerce by such practice and the obstructions to the free flow of commerce which result therefrom are serious and substantial.

Retail establishments in all states of the Union purchase a wide variety and a large volume of goods from business concerns located in other states and in foreign nations. Discriminatory practices in such establishments, which in some instances have led to the withholding of patronage by those affected by such practices, inhibit and restrict the normal distribution of goods in the interstate market.

Fraternal, religious, scientific, and other organizations engaged in interstate operations are frequently dissuaded from holding conventions in cities which they would otherwise select because the public facilities in such cities are available only on a segregated basis.

Business organizations are frequently hampered in obtaining the services of skilled workers and persons in the professions who are likely to encounter discrimination based on race, creed, color or national origin in restaurants, retail stores and places of amusement in the area where their services are needed. Business organizations which seek to avoid subjecting their employees to such discrimination and to avoid the strife resulting therefrom are restricted in the choice of locations for their offices and plants. Such discrimination thus reduces the mobility of the national labor force and prevents the most effective allocation of national resources, including the interstate movement of industries, particularly in some of the areas of the Nation most in need of industrial and commercial expansion and development.

In the main, both opinions relied on the long line of commerce clause cases, from *Gibbons v. Ogden*²²⁶ to *Wickard v. Filburn*²²⁷ and beyond. They are less remarkable in the scope they give the commerce power than some previous cases, such as *Mabee*,²²⁸ *Martino*²²⁹ and *Fairlawn*.²³⁰ But like these cases, the 1964 civil rights cases pose again the question of where, if anywhere, the chain of causes and effects linked to interstate commerce ends.

The three-judge court which held the Public Accommodations Title unconstitutional in the *McClung* case²³¹ indicated where it felt the stopping place should be. Said the per curiam opinion:

[U]nlike Tennyson's brook, interstate commerce does not run on forever. At some time it must come to an end within the boundaries of some state. . . . [W]e have found [no case] which has held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce.²³²

Congress, said the federal district court sitting in Alabama, had legislated a conclusive presumption for which there was no rational support when it declared that a restaurant affected commerce if it bought a substantial amount of its products from out of state. Thus, the lower court concluded, Congress could not control Ollie's retailing practices merely because it purchased forty-six per cent of its meat from Hormel, an out-of-state firm. To reach this result the court had to ignore *Fairlawn Meats* and *Reliance Fuel* and cite such discredited cases as *Schechter* and *Carter Coal*.²³³ The opinion was probably the last moment of glory for the latter two cases.

In reversing, the Supreme Court looked to the congressional com-

The discriminatory practices described above are in all cases encouraged, fostered or tolerated in some degree by the governmental authorities of the states in which they occur, which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers. Such discriminatory practices, particularly when their cumulative effect throughout the Nation is considered, take on the character of action by the states and therefore fall within the ambit of the equal protection clause of the fourteenth amendment to the constitution of the United States.

The burdens on and obstructions to commerce which are described above can best be removed by invoking the powers of Congress under the fourteenth amendment and the commerce clause of the Constitution of the United States to prohibit discrimination based on race, color, religion or national origin in certain public establishments.

²²⁶ 6 U.S. (9 Wheat.) 1 (1824). See note 31 *supra*, and accompanying text.

²²⁷ 317 U.S. 111 (1942). See note 129 *supra*, and accompanying text.

²²⁸ See note 141 *supra* and accompanying text.

²²⁹ See note 139 *supra* and accompanying text.

²³⁰ See note 142 *supra* and accompanying text.

²³¹ 233 F. Supp. 815 (N.D. Ala. 1964).

²³² *Id.* at 823-24.

²³³ *Id.* at 823, n. 14.

mittee hearings to support the presumption that discrimination by a restaurant which buys from interstate commerce affects that commerce. Congress had determined that a limitation on the market at the end point caused an "artificial restriction" on the flow of merchandise interstate. "The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys," said the Court, citing the committee hearings.²³⁴

The *McClung* opinion was confined to answering the question "whether Title II, as applied to a restaurant receiving about \$70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress."²³⁵ It answers this question affirmatively. This shows that the outer constitutional limit of the commerce power is not where the Alabama judges declared it to be. It does not, however, say that the act as applied in *McClung* represents the full breadth of Congress's power to regulate a restaurant. Mr. Justice Clark's recitation in the opinion of the effects of restaurant discrimination on interstate travel indicate the constitutional standard would not necessarily depend on the restaurant's serving *any* particular percentage of out-of-state food.

Certainly, in the light of *Darby*²³⁶ and *Wickard v. Filburn*,²³⁷ the constitutional standard would be much broader than the scope of the act. Where, then, is the limit?

It may be, as suggested by Mr. Chief Justice Marshall, that the "sole restraint" on Congress in regulating commerce is that which constituents exercise at the polls.²³⁸ Another sort of limitation has been indicated by Professor Paul Freund. In a memorandum to the Senate Commerce Committee while the Civil Rights Act was being considered, Professor Freund expressed the opinion that the proposed law was within the reasonable reach of the commerce power, and compared it with the Child Labor Law:

If a producer wishes to preserve the supposed advantages of child labor, he must confine himself to a market in his own state. Under the suggested provision, if a retail establishment not otherwise subject to the commerce definition of the act wishes to preserve the supposed advantage of a racially selected clientele, it must confine itself to dispensing products of its own state.²³⁹

Such regulations have been found reasonable, he said, because inter-

²³⁴ *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964).

²³⁵ *Id.* at 298.

²³⁶ *United States v. Darby*, 312 U.S. 100 (1941).

²³⁷ 317 U.S. 111 (1942).

²³⁸ *Gibbons v. Ogden*, 6 U.S. (9 Wheat) 1, 9 (1824).

²³⁹ Statement by Prof. Paul A. Freund, Harvard Law School, as reported in Senate Commerce Committee Hearings, *supra* note 205, pt. 2, at 1185.

state commerce is utilized to make possible the disapproved operation. Professor Freund went on to indicate where he felt the limit would lie:

Adoption of such a proposal would by no means obliterate the limits on congressional power under the Commerce Clause. Like the great variety of regulations that have been sustained, this one rests on a *functional relationship* between the facilities of interstate commerce and the abuse or evil at which the federal measure is directed. It would thus differ fundamentally from hypothetical excesses of federal authority such, for example, as a federal code of marriage or divorce enforced by closing of the channels of interstate commerce to violators of the code.²⁴⁰

One fact cannot be avoided. In our highly sophisticated economy, interstate commerce comes to everyone's doorstep. Counsel for the Heart of Atlanta, in arguing before the Supreme Court, urged the Court to view the Constitution as the framers intended in 1789. But, observed one reporter, "[C]omparing 1789 standards to 1964, the commerce clause exists in different worlds. Then commerce was a trickle. Modern American capitalism requires that it be a torrent."²⁴¹

VI. FUTURE APPLICATION AND INTERPRETATION OF THE ACT

After *Heart of Atlanta* and *McClung*, two questions remain: (1) Will the states in which segregation traditionally has been practiced choose to avoid federal regulation by enacting their own public accommodation laws? (2) How far will the act be extended under its commerce clause provisions?

When the federal act passed, thirty-two states had public accommodations laws of their own.²⁴² In recognition of this, Congress has

²⁴⁰ *Ibid.*

²⁴¹ Footlick, *The Court, Congress, and the Commerce Clause*, *The National Observer*, Oct. 12, 1964, p. 10, col. 5.

²⁴² Alaska Stat. §§ 11.60.230-11.60.240 (1962); Calif. Civ. Code §§ 51-54; Colo. Rev. Stat. Ann. §§ 25-1-1 to 25-2-5 (1953); Conn. Gen. Stat. Ann. §§ 53-35 (1961); Del. Code Ann. tit. 6, §§ 4501-16 (Supp. 1964); Idaho Code Ann. §§ 18-7301 through 18-7303 (Supp. 1963); Ill. Ann. Stat. ch. 38, §§ 13-1 to 13-4 (Smith-Hurd 1961), ch. 43, § 133 (Smith-Hurd 1944); Ind. Ann. Stat. §§ 10-901 to 10-914 (1961); Iowa Code Ann. §§ 735.1-735.2 (1950); Kan. Gen. Stat. Ann. § 21-2424 (Supp. 1962); Me. Rev. Stat. Ann. § 17.1301 (1954); Md. Ann. Code, art. 49B, § 11 (Supp. 1964); Mass. Ann. Laws, ch. 140, §§ 5, 8 (1957); ch. 272, §§ 92A, 98 (1963); Mich. Stat. Ann. §§ 28.343-28.344 (1962); Minn. Stat. Ann. § 327.09 (1947); Mont. Rev. Codes Ann. § 64-211 (1962); Neb. Rev. Stat. §§ 20-101 to 20-102 (1954); N.H. Rev. Stat. Ann. §§ 354:1, 354:3, 354:4, 354:5 (1963); N.M. Stat. Ann. §§ 49-8-1 to 49-8-6 (Supp. 1963); N.Y. Civil Rights Law §§ 40, 41 (1946); N.Y. Executive Law §§ 290-301 (1964); N.Y. Pen. Law §§ 513-15 (1944); N.D. Cent. Code, § 12-22-30 (Supp. 1963); Ohio Rev. Code Ann. §§ 2901.35, 2901.36 (Page 1954); Ore. Rev. Stat. §§ 30.670, 30.675, 30.680 (1963); Pa. Stat. Ann. tit. 18, § 4654 (1963); R.I. Gen. Laws Ann. §§ 11-24-1 to 11-24-6 (1956); S.D. Sess. Laws 1963, c. 58 Vt. Stat. Ann. tit. 13, §§ 1451, 1452 (1958); Wash. Rev. Code Ann. §§ 49.60 to 49.60.170, 99.1010 (1962); Wis. Stat. Ann. § 942.04 (1958); Wyo. Stat. Ann. §§ 6-83.1, 6-83.2 (1963).

provided that suit may not be brought in federal court until, in effect, state remedies have been given a chance to operate.²⁴³ The states having these laws do not, of course, include the Southern and, except for Maryland, the Border States. These states, which include Texas, now have the choice of accepting federal control of rights and remedies in the field of public accommodations or enacting state statutes giving substantially the same protection.

Resentment of federal intervention in local affairs is traditionally strongest in those areas in which there are no state public accommodation statutes. But it does not necessarily follow that this desire for local control will manifest itself in state civil rights acts. As southerners themselves will concede, their history does not show that a facility for accepting and adapting to changing conditions is among the regional virtues.²⁴⁴ It seems probable that in those parts of the country where resentment of the federal act is strongest, a state act would be equally obnoxious.

Another possible course open to states that wish to keep the matter in local hands would be to establish either state or city conciliation boards. These could be on the order of the Community Relations Service provided for in the federal statute, but made up of local people familiar with local problems and feelings. Unofficial groups of this type operated successfully in some areas prior to passage of the Civil Rights Act.²⁴⁵ The federal statute allows for delay to let a state act only in those states in which a state or local law prohibits discrimination. Hence, such a local conciliation board, unaided by a local anti-discrimination law, would have to act in advance of the development of difficulties.

If the states do not choose to act, enforcement will be on the basis of the federal law. If this should be the case, how far will the federal act extend? How tiny, how remote from the national commercial life must a place be before it is beyond the scope of the act? The answer will depend on what yardstick the courts use in deciding whether a business "affects commerce."

If the courts use the *Wickard v. Filburn*²⁴⁶ and *Mabee v. White Plains Publishing Co.*²⁴⁷ yardsticks, every hot dog stand in the

²⁴³ Civil Rights Act of 1964, §§ 204(c), 207(b), 42 U.S.C.A. §§ 2000a-3(c), 2000a-6(b) (1964).

²⁴⁴ After passage of the Civil Rights Act of 1964, United States Representative Charles Weltner of Georgia said to his colleagues: "I would urge that we now move on to the unfinished task of building a new South. We must not remain forever bound to another lost cause." Time, July 10, 1964, p. 26, col. 3.

²⁴⁵ In this area, progress in Texas was cited by Governor John Connally in a statement printed in Senate Commerce Committee Hearings, *supra* note 205, pt. 2, at 1165.

²⁴⁶ 317 U.S. 111 (1942). See text accompanying note 129 *supra*.

²⁴⁷ 327 U.S. 178 (1946). See text accompanying note 141 *supra* and accompanying text.

country would be covered. In *Wickard* the wheat raised on eleven acres was held to affect commerce; in *Mabee* the sending of forty-five copies of a newspaper, whose total circulation was only 9,000, across state lines brought the whole operation under the commerce power. By this reasoning, the mustard, obtained through interstate commerce and dispensed by the smallest hot dog stand, would, if multiplied by all the hot dog stands in the country, surely affect commerce. Similarly, race discrimination by the nation's thousands of hot dog stands would inhibit travel by those discriminated against.

There is ground for arguing, however, that in the public accommodations title, Congress did not intend to extend its authority so far. The Supreme Court said in *NLRB v. Reliance Fuel Oil Corp.*²⁴⁸ that in the National Labor Relations Act the Congress intended and did use the commerce power with "the fullest *jurisdictional* breadth constitutionally permissible."²⁴⁹ In the public accommodations law, however, Congress appears to have stopped short of this "fullest breadth."

In the National Labor Relations Act,²⁵⁰ the scope of application is set out by a definition of "affecting commerce" in very broad terms. It means, according to section 152, "in commerce or burdening or obstructing commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." The public accommodations law gives a more detailed and, possibly, more restricted definition of "affecting commerce" for restaurants.

An eating place "affects commerce" only if (1) it serves or offers to serve interstate travelers or (2) a substantial portion of the food which it serves has moved in commerce.²⁵¹ In the *McClung* case the amount required to make up a "substantial portion" was not argued. Approximately forty-six per cent of the meat barbecued at Ollie's had come from out of state, and the respondent did not contest that this was substantial. This leaves open the question of whether the act also would apply to a restaurant which obtained a smaller percentage of its food from interstate commerce. Theoretically, a restaurant could be run without any resort to the interstate market, and some probably obtain only a few things—*e.g.*, seasonings, bottled sauces, coffee and tea—through interstate channels.

When then-Attorney General Robert Kennedy appeared before

²⁴⁸ 371 U.S. 224 (1963).

²⁴⁹ *Id.* at 226.

²⁵⁰ National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 152 (1958).

²⁵¹ Civil Rights Act of 1964, § 201(c)(c); 42 U.S.C.A. § 2000a(c)(2) (1964).

the Senate Commerce Committee, he was pressed several times for a definition of "substantial portion." His repeated reply was that the courts have construed "substantial" as "more than minimal."²⁵² Obviously, with the *Wickard v. Filburn* approach, "minimal" would reach the disappearing point. The Court might hold, however, that by specifically restricting the definition of restaurants "affecting commerce," Congress only intended to reach those that were dependent on interstate commerce in a significant way, either for customers or products.

This line of thinking seems to be reflected in the following passage from Mr. Justice Black's concurring opinion in *Heart of Atlanta*:

I recognize that every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws. I recognize too that some isolated and remote lunchroom which sells only to local people and buys *almost* all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, *just as such establishment is not covered by the present Act.*²⁵³ (Emphasis added.)

In looking at "remote" effects on commerce, however, Mr. Justice Black would not abandon the cumulative test. He said:

But in deciding the constitutional power of Congress in cases like the two before us, we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow.²⁵⁴

One might speculate that, when measuring the effect of food bought from interstate commerce, no cumulative test would be applied because the statute expressly provides that it will apply only if *that restaurant* obtains a *substantial portion* from commerce. Because, however, the other test—serving or offering to serve intrastate travelers—is not limited to places who rely on interstate travelers for any specified portion of their patronage, the cumulative test might be applicable here.

Previous cases suggest that service or lack of service to interstate travelers will not be relied upon often, chiefly because it is difficult to determine.²⁵⁵ Whatever the restaurant's clientele, the food issue

²⁵² Senate Commerce Committee Hearings, *supra* note 205, pt. 1, at 58.

²⁵³ 379 U.S. at 275.

²⁵⁴ *Ibid.*

²⁵⁵ *Willis v. Pickrick*, 231 F. Supp. 396, 399 (N.D. Ga. 1964).

almost always will be present in any place of consequence. Today's restaurant customer is accustomed to a varied fare gathered from many places.

The other two groups of businesses covered, hotels and places of entertainment, suggest few, if any future questions. A motel or hotel attracting enough business to stay alive commercially is not likely to be cut off from interstate trade.²⁵⁶ Coverage of the entertainment industry by the commerce power has already been extensively litigated in anti-trust cases.²⁵⁷

After two stormy decades, future civil rights litigation may shake down to deciding hair-splitting questions such as the difference between a "substantial" and "minimal" amount of catsup. If so, the act will have accomplished what the Supreme Court said Congress intended—"to obliterate the effect of a distressing chapter of our history."²⁵⁸

²⁵⁶ Hotels and motels have been held subject to the National Labor Relations Act. *Hotel Employees Local No. 225 v. Leedom*, 358 U.S. 99 (1958); *NLRB v. Citizens Hotel Co.*, 313 F.2d 708 (1963).

²⁵⁷ See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

²⁵⁸ *Hamm v. City of Rock Hill*, 379 U.S. 306, 315 (1964).