IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 543.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States, et al.,
Appellants,

v.

OLLIE McCLUNG, SR., et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

SUPPLEMENTAL BRIEF FOR APPELLEES.

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STATEMENT.

On October 5, 1964, the Court granted the parties' Joint Motion to Expedite Briefing and Oral Argument providing inter alia for the filing of supplemental briefs after oral argument.

This brief is filed pursuant to that order and is submitted for consideration of the Court both in reply to the opening brief of appellants and in response to certain questions raised by the Justices during oral argument.

No further statement of the case or of the facts is deemed necessary.

ARGUMENT.

INTRODUCTION.

In appellant's brief and again in the Solicitor General's oral argument, it was stated that appellant's major premise is that Congress has the power to regulate intrastate activities, not themselves a part of interstate commerce, if they have a close and substantial relation to interstate commerce. Appellees have repeatedly sought to make it clear that they have no quarrel with that premise.

Appellant's minor premise was to the effect that Congress "had ample basis upon which to find that racial discrimination at restaurants which receive from out-of-state a substantial portion of the food served, does, in fact, impose commercial burdens of national magnitude upon interstate commerce". Brief for Appellants at 26.

It is with appellant's minor premise as thus stated that appellees take issue, on two basic grounds:

1. Congress made no such finding as claimed by appellants.

2. There was no ample basis upon which any such finding could have been made.

The point from which all argument in this case must proceed is that the federal government is one of delegated powers. Every statute enacted by the federal congress must come within some specific power given under the Constitution. In Title II of the Civil Rights Act of 1964, Congress purported to exercise power given to it under both the Interstate Commerce Clause and the 14th Amendment. The issues in this case present no question under the 14th Amendment. If the statute may constitutionally be applied to appellees, it must necessarily be because,

as so applied, it comes within the authority given to Congress under the Interstate Commerce Clause. The broad principles upon which this issue must be resolved are not in substantial dispute in this case. Appellants concede that the activities of the appellees sought to be regulated by the statute are local and intrastate; that they are in no sense in, or a part of, interstate commerce. Appellants further concede that in order for the activities to be regulated in the manner attempted, there must be a finding or showing that they bear a close and substantial relation to interstate commerce. Finally, appellants concede that the statute makes no provision for a case-by-case determination of such a relationship (between discrimination in an individual restaurant and interstate commerce) and thus concede one of the principal points made in appellees' opening brief. Nor do appellants argue that the conclusive presumption of an effect on commerce established under the so-called "food test" is valid. They state:

> We have no need to argue whether the fact that a restaurant serves food which originated in other States is a sufficient basis for the regulation. Brief for Appellants at 36, 37.

They avoid that argument by attributing to Congress a legislative finding to the effect that racial discrimination at restaurants serving food, a substantial portion of which has previously crossed state lines, imposes a commercial burden upon commerce. Thus, they undertake to deny that the food test in Section 201 (c) is intended as an evidentiary presumption of an actual effect upon commerce and, instead, insist that it is merely a coverage provision bringing an individual restaurant within the scope of a finding claimed by appellants, in their minor premise, to have been made by Congress.

Appellants present no argument on the first point raised by appellees, i. e., that no such finding was made. They

are content to rest their case on that point by merely urging that formal and explicit legislative findings are not required. This hardly meets the question. Appellants themselves, in stating their minor premise, necessarily make the contention that a finding was made.[1] Most of their argument, however, is devoted to the second point mentioned above, i. e., whether Congress had any basis upon which such a finding could be based. In doing so, they rely entirely upon the legislative history of the statute.

It is appellees' contention that the legislative history is heavily persuasive in their favor on both of these points. It discredits the contention that any such finding was made and it is wholly lacking of any support for such a finding if one can be assumed.

I. The Legislative History Shows That Congress Neither Could Have Nor Did Make the Finding Claimed by Appellants.

At the outset, it should be pointed out that appellees have never in this case relied primarily upon the legislative history. It is the appellants who have done so. Appellees have taken the position that the structure, arrangement and language of the statute itself are amply persuasive that Congress made no such finding as is contended by appellants. However, appellees regard their position as supported by the legislative history. Moreover, they believe that for reasons that will be shown, there was nothing before Congress upon which any such finding, particularly relating to food which has moved in commerce, could have been based.

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[1] Appellants state that Congress "had ample basis upon which to *find* that racial discrimination, etc." Brief for Appellants, at 26.

1. There Was Nothing Before Congress to Support the Finding Claimed.

It is well to remember that appellants both in their brief and in oral argument have relied almost entirely upon certain testimony offered by the proponents of the legislation before the Senate Committee on Commerce. Significantly, appellants have at no time pointed to any testimony before that Committee or any other committee, or even in either house of Congress, that related to restaurants serving food which has previously crossed state lines or the fact that a customer selection practice at any such restaurant would in any way result in a burden upon commerce (as is specifically claimed by appellants in their minor premise).

The history of the legislation that became the Civil Rights Act of 1964 does not lend itself to a brief, comprehensive summary. Early in the 88th Congress, a large number of bills relating to civil rights in various aspects were introduced in both houses of Congress. President Kennedy had made recommendations concerning legislation of this type in both February and in June of 1963. It was clear from the beginning that a majority of the two houses of Congress favored some kind of civil rights legislation, but in the earlier stages there was considerable disagreement as to the scope of the legislation. Public accommodations provisions were included in many of the proposed bills, but there was a wide disparity of opinion as to what constitutional basis, if any, would support such legislation.

At this juncture an administration-sponsored bill was sent to the Senate. This was S. 1731. Although S. 1731 covered the general topics included in the House bill ultimately passed, there were substantial differences in structure, coverage, language and legislative technique. Hearings on S. 1731 were conducted before the Senate

Committee on the Judiciary in 1963. In early 1964, the Senate Committee on Commerce conducted hearings on S. 1732 which pertained only to public accommodations. Its provisions were identical with those in Title II of S. 1731. It was during the Senate Committee hearings that the evidence relied upon by appellants in their brief was offered. There was much discussion before the two Senate committees of facts relating to the difficulty with which Negroes plan trips, as well as to the economic effects of riots, demonstrations and boycotts. Significantly, these discussions were not directed at restaurants and at no time was any consideration given to the movement of food across state lines, or a possible burden upon that movement resulting from racial discrimination in restaurants. This was not an oversight, for as will be shown, S. 1731 and S. 1732 did not purport to cover restaurants on the basis of a food test like that now contained in the Civil Rights Act of 1964. The Senate bills were not passed.

Meanwhile, the House of Representatives was considering H. R. 7152. After hearings, the House Judiciary Committee reported the bill out favorably, but H. R. 7152 as it reached the House floor was a substitute bill that had not been considered by that committee in its emerging form. Senator Dirkson, who favored the legislation, later remarked in the Senate, "the bill [H. R. 7152] that is now before us did not receive even a one-day hearing before the House Judiciary Committee." Cong. Rec. 6237 (March 26, 1964). The House of Representatives passed H. R. 7152 as reported from the committee. It then went to the Senate in February of 1964.

In the Senate, Senator Morse tried desperately to have the bill submitted to the Senate Committee on the Judiciary in order that a legislative history for the benefit of the courts could be made. Senator Morse's motion to this effect was defeated and the lengthy debates in the Senate

began. In June of 1964, H. R. 7152 passed the Senate. Although the Senate amended certain portions of the bill, none of these is pertinent in any way to the issues raised in this case. The public accommodations provisions were not changed except in respects that are not here material.

When the bill was returned to the House, no further amendment was effected. The bill was passed as it left the Senate and became the Civil Rights Act of 1964 on July 2, 1964.

Significantly, then, the Act that is now before the Court, did not receive, in the words of Senator Dirkson, "even a one-day hearing before the House Judiciary Committee", and it received no hearing in any Senate Committee.

Since appellants in this case rely upon evidence adduced in the hearings before the Senate committees and since appellees deny that there was any evidence offered there to support any "finding" of the type claimed by appellants to have been made, it is appropriate, if not necessary, to take a closer look at the Senate bill as it was written when those hearings were conducted.

S. 1731 and 1732 were alike except that the latter pertained only to Title II. They were conceived on a different basis from H. R. 7152. Sections 201 and 202 of S. 1731 are attached as an appendix to this brief.[2] Section 201 of Title II of the Civil Rights Act of 1964, formerly H. R. 7152, appears as an appendix to appellant's jurisdictional statement.

When the two are laid side by side a number of material differences are immediately apparent. While a detailed analysis of these differences would unduly lengthen this brief and still fail to eliminate the necessity

[2] The only difference between § 1732 and Title II of § 1731 was section numbers. Only § 1731 is copied herein.

for actual comparison, a few general observations as to the differences may be helpful:

First, S. 1731 contained specific legislative findings in Section 201. There are no findings in Title II of the Civil Rights Act of 1964.

Second, the findings in S. 1731 were primarily devoted to interstate commerce, but also included a finding relating to the 14th Amendment. This is in Section 201(h).

Third, none of the findings in Section 201 of S. 1731 related specifically to restaurants. The only reference to restaurants in the entire section was in Section 201(g) which was directed at an alleged difficulty encountered by business organizations in obtaining the services of skilled workers in the professions. This was in no way related to the matter of customer selection in a restaurant using food from out of state or the movement of food at all.

Fourth, retail establishments were specifically mentioned in Section 201(e) in connection with the movement of "goods sold", but restaurants, obviously treated in the bill as something different from a retail establishment, were not mentioned in that subsection.

Fifth, the term "public accommodations" to categorize the covered establishments was not used in S. 1731 as was done in the Act finally passed by Congress. Thus there is no counterpart to Section 201(b) of the Civil Rights Act of 1964.

Sixth, there is no "state action" criterion of coverage in S. 1731, as is the case in the statute itself. Thus, while power under the 14th Amendment was invoked generally as evidenced by the findings, S. 1731 did not contemplate the 14th Amendment as a separate criterion of coverage.

Seventh, S. 1731, unlike the present statute, covered retail stores and other places "which keep[s] goods for

sale." Sec. 202(a)(3). This explains the reference in the findings to retail establishments and the flow of **goods** in the interstate market.

Eighth, restaurants are included in Section 202(a)(3), but in a different generic sense from retail shops, etc. The latter category is followed by a reference to "other public place which keeps **goods** for sale", whereas restaurants, etc., are followed by a reference to "other public place engaged in selling **food** for consumption on the premises" (Emphasis supplied).

Ninth, in S. 1731 there was no separate interstate commerce test for restaurants as such. 202(a)(1)(i) of that bill related to goods, services, etc., "provided to a substantial degree to interstate travelers." Thus it was similar to Section 201(c)(2) of the present statute (although not employing the concept of "offers to serve" and therefore both far clearer and more restricted). Section 201(a)(3)(ii) applied where "a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent or hire has moved in interstate commerce." This subsection made no reference to the food served by a restaurant but only to the sale of "goods" which, as noted above, is treated separate from "food" in paragraph 202(a)(3).

Finally and significantly, under Section 202(a)(3)(iii) (of S. 1731 and S. 1732), there was a provision bringing an establishment within the Act if "the activities or operations of such place or establishment otherwise substantially affect interstate travel or the interstate movement of goods in commerce." This provision necessarily contemplated the determination of an actual effect upon interstate commerce in each individual case. This, of course, might be applicable to a restaurant. In fact, except for a restaurant serving interstate travelers to a substantial degree, it would be the only way a restaurant would be covered under the Senate bills.

From the above (and certainly other differences can be noted), it is apparent that the Senate committees considering S. 1731 and S. 1732 were not confronted with a proposed statute that in any respect relied upon a restaurant's mere serving of food that has crossed state lines to bring it under the statute. Understandably there was no reason for any such consideration on the part of the two Senate committees. No evidence on the point was offered because the proposed legislation simply was not oriented in that direction.

Under S. 1731 a restaurant would have been covered if its services, facilities, etc., were provided to a substantial degree to interstate travelers. Certainly there was evidence before the committees that interstate travel of persons was impeded by discriminatory practices in those facilities actually serving interstate travelers. Under Section 202(a)(3)(iii), a restaurant might also be brought within the coverage of the Act if its activities or operations in fact substantially affected interstate travel or the interstate movement of goods in commerce "otherwise." But this required an ad hoc determination of an effect on commerce in each individual case as is the case under the National Labor Relations Act.

There can be no argument that a particular restaurant might well have come within that coverage in a given case upon the authority of some of the National Labor Relations Board decisions. However, this is quite a different thing from saying there was a finding on the part of Congress that the racial policies of restaurants serving food which has moved in commerce has a burdensome commercial effect on interstate traffic.

The point here is that all of the testimony from Under Secretary Roosevelt, Attorney General Kennedy and others before the Senate Committee on Commerce, must be considered in the context of the proposed legislation before the Committee. It is an unwarranted distortion of the

facts to say, as do appellants, that Congress had "ample basis upon which to find" that customer selection at restaurants serving food which has crossed state lines places a commercial burden upon interstate commerce. In truth, there was no reason for an inquiry along this line and the matter was not even before either congressional committee.

2. **No Such Finding Was in Fact Made.**

Not only does the legislative history show that there was no "ample basis" for any such finding, but also that no such finding was made.

Aside from the fact that no formal findings were included in H. R. 7152 as was the case in S. 1731,[3] neither the provisions of Title II of the Civil Rights Act of 1964, nor the legislative history lends any support to the contention of appellants that such a finding was made.

Whether Congress made any such finding is, fundamentally, a matter of its intention. Appellees have at all times contended that the statute on its face shows no such finding and, indeed, persuades strongly to the contrary. The definition of "place of public accommodation" under Section 201 (b) of the Act, uses the language "if its operations affect commerce". These words are not followed by any such language as "as hereinafter further defined" or any other language that indicates that the words, "affect commerce" should be given any meaning other than a normal one. Later, in Section 201 (c), it is provided, of course, that a restaurant's operations do affect commerce if a substantial portion of the food which it serves has moved in commerce. It is difficult to see why Congress would have employed the language and arrangement of the statute if it had intended to base

[3] The importance and, in some instances, the necessity for specific findings, is discussed in a later portion of this brief.

coverage upon a finding of the type urged by appellants. It would have been far more simple and more direct to have included an additional line in Section 201 (b) (2) and eliminate the necessity for Section 201 (c) (2) entirely. Certainly the statute on its face discloses no intention to make any such determination as is relied upon by appellants.

In any event, the most that could be said to support appellants is that the statute itself is not clear insofar as Congress' intention in this regard is concerned. Under these circumstances, it is appropriate to inquire whether the legislative history throws any light upon the point.

In determining the intention of Congress, this Court has often recognized that remarks made by individual congressmen or others, either in committee hearings or on the floor of Congress, are not reliable guides as to congressional intent. Nothing said before the Senate Committee on Commerce could therefore throw any light upon congressional intent with respect to the particular point of whether Congress made any determination or finding as is contended in appellant's minor premise. This is, of course, particularly true where the bill before a committee was an entirely different one from that finally enacted into law. Committee reports are frequently looked to by the courts in determining what Congress intends. **Duplex Printing Press Co. v. Deering,** 254 U. S. 443. As shown, there was no committee report on this bill. Under these circumstances, it is appropriate to look to the statements of the floor managers during congressional debate. **U. S. v. St. Paul, M. & M. Ry.,** 247 U. S. 310. Senator Humphrey was the admitted commander of the forces seeking passage of the bill. He was supported by various other senators characterized as "captains", each assigned to a separate title of the bill. Senator Magnuson was a captain to whom Title II was assigned. Cong. Rec., 6308 (March 30, 1964).

As a part of his formal opening speech in favor of H. R. 5172, Senator Humphrey offered in support of his argument on constitutionality of Title II the legal opinion of some 22 eminent lawyers from whom he had requested an opinion. Since their opinion was relied upon by Senator Humphrey and since the opinion necessarily was based upon the writers' conception of the application and effect of Title II, what was said in that opinion may appropriately be examined in discerning a congressional intent with respect to the claimed finding. The opinion was fully adopted and approved by Senator Humphrey and the other principal managers of the bill in the Senate.

The opinion dated March 30, 1964, addressed to Senators Humphrey and Kuchel, is signed by Messrs. Harrison Tweed and Bernard G. Segal and joined in by 20 other eminent lawyers. It states:

> With respect to title II, the congressional authority for its enactment is expressly stated in the bill to rest on the commerce clause of the Constitution and on the 14th amendment. The reliance upon both these powers to accomplish the stated purpose of title II is sound. Discriminatory practices, though free from any State compulsion, support, or encouragement, **may** so burden the channels of interstate commerce as to justify legally, congressional regulation under the commerce clause. On the other hand, conduct having an insufficient bearing on interstate commerce to warrant action under the commerce clause may be regulated by the Congress where the conduct is so attributable to the State as to come within the concept of State action under the 14th Amendment. Cong. Rec. 6832 (April 7, 1964). (Emphasis supplied.)

It is submitted that the above language clearly contemplates that discriminatory practices "may", in an in-

dividual case, sufficiently burden commerce to justify congressional regulation under the commerce clause but that on the other hand, it "may" not. Appellees have previously taken the position that the inclusion of a 14th Amendment aspect by use of the "state action" test in and of itself indicates that no overall congressional finding of an aggregate commercial effect was made. The above language confirms this. The ultimate question is what the **Congress** intended with respect to any such finding. With the explanation of the Act made by Senator Humphrey and the other captains supporting him and with the above legal opinion before them, it can hardly be stated that the members of the Senate were even conscious of any finding of the type imagined by appellants.

Senator Magnuson made a lengthy address on the floor of the Senate specifically as to Title II. His role as self-described was to expand inquiry as to the constitutionality, wisdom, intent and effect of Title II. Cong. Rec. 7169 (April 9, 1964). One of the reasons for doing this, he said, was to build a legislative history to aid the courts, *ibid.* At the beginning of his remarks, he informed the Senate that the provisions of Title II in H. R. 7152 were "very substantially like that" considered by the Committee on Commerce, *ibid.* So saying, he announced that he would "draw upon the facts, convictions and ideas developed in the course of those hearings in discussing the need for such legislation, the power of Congress to act in this field, and the intended application of the terms of this bill." *Ibid.*

Thus, he started by equating the "intended application" of H. R. 1752 to the Senate bill which, as we have shown, did not include a food test for restaurants. In his remarks, he listed what he referred to as "serious economic burdens, resulting from discriminatory practices in establishments dealing with the general public." His enumeration of "burdens" was largely patterned on the proposed find-

ings contained in S. 1731. Again, there was no mention of a determination that discrimination in restaurants serving food which has crossed state lines is a burden upon interstate commerce. The burdens referred to by Senator Magnuson might have supported the interstate traveler test or the entire application of the statute to motels and hotels, but it in no way even purported to apply to restaurants on the basis of a food test. Cong. Rec. 7173 (April 9, 1964).

Finally, in his section-by-section analysis of the present statute, Senator Magnuson, after noting that Section 201 (b) defines certain establishments as places of public accommodations "if their operations affect commerce," explained Section 201 (c) as follows:

> Section 201 (c) provides **the criteria for determining** whether the operations of an establishment affect commerce. Cong. Rec. 7175 (April 9, 1964). (Emphasis supplied.)

Appellees have never contended that Congress did not intend the serving of food which has crossed state lines to be a "criterion" for determining an effect on commerce. Indeed, they have at all times objected to that means on the grounds that the criterion thus legislated was a conclusive presumption of the specific fact that alone could give Congress power over the particular establishment. Certainly Senator Magnuson's remarks are not consistent with a congressional declaration in the terms of, or even resembling the finding claimed by appellants.

The legislative history of this statute is voluminous. While we have not counted the pages of the Congressional Record in 1963 and 1964 which are devoted to the civil rights proposals that finally emerged as the present statute, it is safe to say that they number in the thousands. It is indeed strange that throughout those thousands of pages there is not, so far as appellees can find, a single word of testimony relating to the specific finding claimed

by appellants, i. e., that discrimination in restaurants serving food which has crossed state lines has a substantial and close effect on interstate commerce. On the other hand, the legislative history is replete with references to National Labor Relations Board cases where it has been determined on an ad hoc basis that a specific labor dispute would affect commerce. The legislative history in this instance is not clear on many things, but to appellees it seems abundantly clear that the members of Congress intended that, insofar as a restaurant was concerned, there must be an actual effect upon commerce determined by the courts. If this be true, then the invalidity of the conclusive presumption as to the food served renders Title II unconstitutional as to appellees.

II. **Prior Statutes Provide No Precedent for Title II.**

The appellants' brief relies heavily upon prior statutes and prior decisions of the Court which involve the regulation of "intrastate" or "local" activities under the commerce power. Their contention thus appears to be simply that since it has been done before, it can be done here. Our reply is twofold. First, merely because a particular "local" business may be reached by the federal commerce power for one purpose plainly does not demonstrate that even the same business may be reached for other purposes and in regard to other activities. Secondly, an analysis of past legislation and decisions involving the commerce power demonstrates that the present statute, insofar as it applies to appellees by virtue of the anterior movement of food through commerce, departs markedly from any prior statute sustained as an exercise of the commerce power.

It has been said that no commerce-power legislation regulating activities "local" in nature has been sustained by this court unless those local activities are in commerce, are found to affect commerce, or are so commingled with activities in interstate commerce that their regulation is

necessary to achieve the regulation of those interstate. See both the court's opinion and the dissenting opinion in **United States v. Five Gambling Devices,** 346 U. S. 411, 446-48, 460. So far as we are able to determine, this still holds true. Title II of the present statute, insofar as pertinent here, is incapable of being regarded as within the scope of any of the other statutes or decisions. For the purpose of so showing, and for the subsidiary purpose of showing the existence of factual determinations of an "effect" on commerce by the regulated activity where such effect was the source of the commerce power, we shall attempt to review those prior statutes and decisions.

1. **Statutes Regulating Goods or Activities "In Commerce."**

Statutes of this sort include, of course, the regulation of the actual movement of particular articles and persons between the states as well as the instrumentalities by which that movement is effectuated. And due to the local orientation of our society until relatively recent years, this was the chief area in which the commerce power needed to be exercised. This, of course, is the most elemental use of the commerce power, for it comes within the express terms of the constitutional grant. And since it does, there is no need of a finding of the existence of an effect on commerce or other auxiliary source of power.

(a) **Statutes Regulating the Movement of Goods in Commerce.** Statutes of this character regulate the actual movement of articles and persons across state lines (including whether they may be moved at all and, corollarially, the conditions upon which they may be moved). In the main, such regulations are directed at **specific** articles or specific practices in respect to articles (or persons) which Congress deems deleterious in and of themselves. Just as the states for similar reasons may outlaw them locally, so can Congress deny them the use

of the channels of interstate commerce through its "power to keep the channels of such commerce free from the transportation of illicit or harmful articles." **McDermott v. Wisconsin,** 228 U. S. 115, 128, (with regard to the Food & Drug Act of 1906, 34 Stat. 768). Such statutes therefore purport to regulate personal conduct only insofar as the conduct relates specifically to an article which moves or is intended for movement in commerce. Their application is expressly limited accordingly. Thus, the act regulating traffic in lottery tickets requires that they be "carried in interstate or foreign commerce" (18 U. S. C., § 1301); the Mann Act applies only to one who "transports in interstate . . . commerce . . . any woman" or who "obtains any ticket" for such transportation (18 U. S. C., § 2421); stolen property must be transported in or be a part of interstate commerce (18 U. S. C., §§ 2312-2317); the Gambling Devices Act requires transportation of the device "to any place in a state . . . from any place outside of such state" (15 U. S. C., § 1172); the Kidnapping Act requires transportation of the person "in interstate commerce" (18 U. S. C., § 1201); the Fur Products Labeling Act and the Textile Fiber Products Act apply only to such products introduced or manufactured for introduction into or sold in commerce between states (15 U. S. C., § 69; 15 U. S. C., § 70); the Fair Labor Standards Act applies only to an employee "who is engaged in commerce or in the production of goods for commerce" (29 U. S. C., §§ 206, 207); the Federal Food, Drug and Cosmetic Act applies only to such articles as are introduced or received in interstate commerce (21 U. S. C., § 331); and the Ashurst-Summers Act (49 Stat. 494) applied only to prison-made goods to be shipped or transported in interstate . . . commerce," see **Kentucky Whip & Collar Co. v. Illinois Cent. R. R.,** 299 U. S. 334.

True, some of these statutes and others like them reach "local" conduct at either extremity of the injurious article's interstate journey. Thus, the Mann Act proscribes

the purchase of tickets for the prohibited transportation; the Fur Products Labeling Act reaches the manufacture and sale of the article which will be or has been shipped interstate (15 U. S. C., § 692); the Food, Drug and Cosmetic Act reaches acts resulting in misbranding of the articles done subsequent to the interstate movement and before their sale to the ultimate consumer (21 U. S. C., § 331(k)); and the Fair Labor Standards Act of 1938 regulates the wages and hours of employees engaged in the manufacture of articles destined for shipment in interstate commerce (29 U. S. C., §§ 206, 207). But in all such cases the regulated activity must be directly related to the articles which are intended for or have moved in interstate commerce. Congress having deemed the article or its movement injurious it can, by virtue of its power to exclude it altogether, restrict its movement except on prescribed conditions. The power is over the particular article, not the "local" activity itself. Thus, it was said of the convict-goods act, "as the Congress could prohibit the interstate transportation of convict-made goods . . . the Congress could require packages containing convict-made goods to be labeled . . ."[4]; of the Fair Labor Standards Act, "The obvious purpose of the act was not only to prevent the interstate transportation of the **proscribed product**, but to stop the initial step toward transportation, production with the purpose of so transporting it"[5]; of the Food, Drug and Cosmetic Act, "Congress may determine . . . the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure."[6]

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[4] *Kentucky Whip & Collar Co. v. Illinois Cent. R. R.*, 299 U. S. 334, 352-53.

[5] *United States v. Darby*, 312 U. S. 110, 117 (emphasis added), and see *Roland Elec. Co. v. Walling*, 326 U. S. 657, 669.

[6] *McDermott v. Wisconsin*, 228 U. S. 115, 135. And see *United States v. Sullivan*, 332 U. S. 689, 696.

Contrastingly, Congress has not in Title II sought to restrict the interstate movement of food; it did not and could not regard food or its movement injurious; and the proscribed "local" activities have no connection, either logically or on the face of the statute, with the article which has moved in commerce.

(b) **Statutes Regulating Instrumentalities of Commerce.** The other principal area of federal commerce clause regulation of acts shown to be **in** commerce is, that over instrumentalities of interstate commerce. Like those regulating specific articles or their movement, these statutes in the main are by their terms applicable only to instrumentalities actually engaged in interstate commerce. Thus, the Interstate Commerce Act is limited to "common carriers engaged in the transportation . . . [of commodities or persons] from one state . . . to any other state," (49 U. S. C., § 1); the Railway Labor Act is limited to a "carrier" which is "subject to the Interstate Commerce Act," (45 U. S. C., § 157, First); the Hours of Service Act of 1907 regulates "common carriers, their officers, agents and employees, engaged in the transportation of passengers or property . . . from one state . . . to any other state," (45 U. S. C., §§ 61-64); the act regulating bills of lading applies to bills of lading "issued . . . for the transportation of goods . . . from a place in one state to a place in another state" (49 U. S. C., § 81); and the Employers' Liability Act of 1908 applies only to a "common carrier by railroad while engaging in commerce between any of the several states," and to injury to an employee "while he is employed by such carrier in such commerce" (45 U. S. C., § 51).

The primary design and purpose of the above statutes and others like them thus is to embrace chiefly articles or activities in interstate commerce. Insofar as pertinent here, Title II in design and purpose embraces purely local activities only.

2. **Statutes Extending Interstate Regulation to Commingled Intrastate Activities.**

When Congress has undertaken to regulate predominantly interstate traffic and activities, as in statutes of the above sort, it often has been necessary to extend the reach of a particular regulation to include **also** "intrastate" activities or commodities. This has been done only where the "local" activities are so intermingled with the interstate that separation is impractical or impossible, and their regulation therefore, is necessary to make the interstate regulation effective. Moreover, in many such instances the interrelationship, either physically or economically, between the "intrastate" and the "interstate" has been so close that practically and rationally both are actually "in commerce," and the decisions have so considered them. This essentially has been the basis for the extension of interstate regulation to otherwise "local" activities in three principal types of regulatory statutes: (1) those regulating instrumentalities of interstate commerce; (2) those establishing economic regulation of particular commodities produced for and sold in interstate commerce; and (3) those prohibiting or regulating interstate traffic of particular articles having dangerous or otherwise deleterious propensities. Some examples, not intended to be exhaustive, of statutes having "local" application in this context are set out below.

(a) **Statutes Regulating "Local" Activities in Association With Control of Interstate Instrumentalities.** A railroad or other instrumentality of commerce which is engaged in **both** interstate and intrastate commerce has been subjected to federal regulation in respect to "intrastate" matters when they cannot practically be separated from interstate activities for purposes of regulation. This was the basis for applying the Safety Appliance Act, 45 U. S. C., §§ 1-16, to trains moving intrastate over the line

of an interstate carrier, in **Southern Ry. v. United States,** 222 U. S. 20; the Hours of Service Act, 45 U. S. C., § 61, to employees whose duties included both dealing with trains moving in interstate and those moving in intrastate commerce, in **Baltimore & O. R. R. v. I. C. C.,** 221 U. S. 612; the Railway Labor Act, 45 U. S. C., §§ 151 et seq., to an interstate carrier's "back shop" employees working on equipment used in the carrier's transportation service, 97% of which was interstate, in **Virginian Ry. v. System Federation No. 40,** 300 U. S. 515, 554-57; the Employers' Liability Act of 1908, 45 U. S. C., § 51, to an injury to the interstate employee of an interstate carrier although the injury is caused by an intrastate employee, in **Second Employers' Liability Cases,** 223 U. S. 48. The same consideration was paramount in applying the Interstate Commerce Act, 49 U. S. C., § 1 et seq., in **Shreveport Rate Case,** 234 U. S. 342, 353, to the intrastate rates of an interstate carrier which discriminated against the carrier's interstate traffic and consequently injuriously affected interstate commerce, since federal regulation can be employed to "prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operation to the injury of interstate commerce." In that case, the adverse effect upon commerce was found judicially. *Id.*, 234 U. S. at 346. Thus, in each of these statutes "intrastate" activities were reached only when the carrier was engaged in interstate commerce and when the intrastate activities were inextricably bound to those obviously interstate.

(b) **Statutes in Which "Local" Activities Are Reached in Association With Economic Regulation of Interstate Commodities.** Statutes of this sort regulate specific commodities, or their sale and movement, in interstate commerce. Therefore, the principal thrust in each is the control of activities purely interstate, and the statutory language is drawn accordingly to reach primarily those

transactions which are in commerce. Thus, they basically are economic regulations of activities in interstate commerce. In their application it is recognized that in order to achieve the major objective of the statute—control of the movement of the regulated commodity in interstate commerce—it sometimes is necessary to extend the control to goods which themselves do not actually move interstate. In every instance, however, the extension of regulation to the "local" activities is predicated upon the fact that those activities are so interwoven either physically or economically with the interstate flow that to treat them separately would be impossible practically and would impair or destroy the effectiveness of the regulation of interstate activities. Indeed, in most cases where this has been done the "local" activity as a practical matter was but a part of the interstate flow of the regulated commodity. In each instance control of "intrastate" matters was merely a necessary incident of effective control over interstate elements to which the statute was primarily directed.

Statutes and decisions in which "intrastate" affairs have been subjected to regulation on this basis include the Grain Futures Act of 1922, 42 Stat. 998, **Board of Trade v. Olsen,** 262 U. S. 1; the Agricultural Marketing Agreement Act of 1937, 7 U. S. C., § 608c, **United States v. Wrightwood Dairy Co.,** 315 U. S. 110; the Tobacco Inspection Act, 7 U. S. C., § 511a; **Currin v. Wallace,** 306 U. S. 1; the Agricultural Adjustment Act of 1938, 7 U. S. C., §§ 1281 et seq., **Mulford v. Smith,** 307 U. S. 38, **Wickard v. Filburn,** 307 U. S. 111; and the Fair Labor Standards Act of 1938, 29 U. S. C., §§ 201 et seq., **United States v. Darby,** 312 U. S. 100.

The Grain Futures Act of 1922 regulated transactions in grain futures at the Chicago Board of Trade, the intermediary through which grain moving on through bills of lading from other states through Chicago to destina-

tions outside of Illinois was sold; thus, the statute applied only to transactions in commodities in actual interstate transit. Not only were the regulated activities "such an incident of that [interstate] commerce, and so intermingled with it," **Board of Trade v. Olsen**, 262 U. S. 36, but indeed, like the activities regulated in the Stockyards & Packers Act of 1921, and **Stafford v. Wallace**, 258 U. S. 495, they "cannot be separated from the [interstate] movement to which they contribute, and necessarily take on its character." *Id.*, 262 U. S. at 35. And, although the regulated activities thus were "in" commerce, quite detailed statutory findings of their effect upon the interstate movement of the commodity nevertheless were made by Congress and relied upon by the court. *Id.*, 262 U. S. at 4-5, 10-15, 37.

Similarly, the Tobacco Inspection Act of 1935, which likewise was directed at a single, predominantly interstate commodity in providing for inspection and grading of leaf tobacco at auction warehouses, was chiefly the regulation of "sales in interstate or foreign commerce . . . subject to congressional regulation." **Currin v. Wallace**, 306 U. S. at 10. Consequently, the basis for extending the regulation in respect to some intrastate sales was simply because "[t]he fact that intrastate and interstate sales are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care," citing **Shreveport Rate Case**, supra. *Id.*, 306 U. S. at 11.

The Agricultural Adjustment Act of 1938, and **Mulford v. Smith**, 307 U. S. 38, presented the same situation, where the dominant aim and impact of the economically directed legislation was in respect to commodities moving in interstate commerce—which "constitutes interstate commerce", *Id.*, 307 U. S. at 48—and locally destined tobacco was subjected to regulation only insofar as it was so inter-

mingled physically with that sold interstate that "[r]egulation, to be effective, must, and therefore may constitutionally, apply to all sales." Id., 307 U. S. at 47. Similarly, in **Wickard v. Filburn**, 317 U. S. 111, the local disposition of wheat was so commingled economically with the interstate movement of the commodity that its regulation too was necessary to effectuate the major economic purpose of control over the interstate movement.[7] The Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 608c, which was directed at regulation of the price of milk moving in interstate commerce, could regulate also the price of intrastate milk found to directly affect interstate commerce in milk since the "national power to regulate the price of milk moving interstate . . . extends to such control over intrastate transaction as is necessary and appropriate to make the regulation of the interstate commerce effective." **United States v. Wrightwood Dairy Co.**, 315 U. S. 110, 121. And the Fair Labor Standards Act may be applied to employees engaged in producing both interstate and intrastate goods. **United States v. Darby**, 312 U. S. 100, 118.[8] For the same reason, federal control of interstate sales of colored oleomargarine was extended by amendment in 1950 (64 Stat. 20, 21 U. S. C., § 347) to intrastate sales precisely because "[t]he regulation of the whole is necessary in order to provide effective regulation of that part which originates from outside the state of consumption."[9]

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[7] "[A] factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions . . . [and] if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." *Wickard v. Filburn,* 317 U. S. at 138, 139.

[8] "[I]t would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce". *United States v. Darby,* 312 U. S. 100, 118.

[9] Senate Report No. 308, 81st Cong., 2nd Sess.; 1950 U. S. Code, Cong. News, at 1973.

Since in each of the above statutes the subject of the regulation was predominantly activities and commodities actually in interstate commerce, a legislative finding of its effect on commerce would seem unnecessary. Yet each contains such a statutory finding.[10] And in some, as the milk price control statute involved in **United States v. Wrightwood Dairy Co.**, 315 U. S. 110, it was required additionally that the effect be determined in administrative proceedings subject to judicial review. *Id.*, 315 U. S. at 116.

With respect to the Fair Labor Standards Act in its application to employees not "engaged" in but producing goods for commerce, it has been already noted that (1) it was an exercise of the power to prevent the introduction of the goods into interstate commerce and applied only to activities directly connected with the preparation of those goods for commerce, and (2) it applied to "local" activities only if there is a physical mingling of work on interstate and intrastate articles. Unlike Title II, which like anti-trust and labor legislation is directed at the **activities** themselves which might affect the flow of commerce generally, the Fair Labor Standards Act points to the **goods** themselves. There, the commerce power was invoked on and derived from that basis. Accordingly, the volume of interstate movement and the effect on commerce in general is not important; an employee might be covered if one or two per cent of the articles he has worked on move interstate. Pointing up this distinction further is the fact that the Fair Labor Standards Act is based upon the **future** movement of the particular article worked on; consequently, an employee can be covered one week and not the next.

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[10] Tobacco Inspection Act, 7 U. S. C., § 511a; Agricultural Adjustment Act, 7 U. S. C., § 1311, 7 U. S. C., § 1331; Agricultural Marketing Agreement Act, 7 U. S. C., § 601; Fair Labor Standards Act, 29 U. S. C., § 202; colored oleomargarine act, 21 U. S. C., § 347a.

(c) **Statutes in Which Control of Local Activities Is Necessary to the Effective Control of the Interstate Movement of Harmful Articles.** The other area in which "local" activities have been subjected to regulation is in statutes in which Congress has undertaken the control or prohibition of movement in interstate commerce of particular articles of injurious character and it has been necessary to extend the control to local activities connected with that particular article's movement or use in order to make the interstate control effective. Examples of this type of "local" regulation are the Food, Drug and Cosmetic Act, 21 U. S. C., § 331 (k), **U. S. v. Sullivan,** 332 U. S. 689, and the regulation of interstate bills of lading, 49 U. S. C., § 121, **United States v. Ferger,** 250 U. S. 205. See also the dissenting opinion of Mr. Justice Clark in **United States v. Five Gambling Devices,** 346 U. S. 441, 460-463, regarding the power to require manufacturers of gambling devices to report both interstate and intrastate sales in order to effectively control those made interstate.

Thus, in **United States v. Ferger,** supra, the power to prohibit fictitious or forged bills of lading under which no goods actually moved interstate was sustained because it was necessary to the effective regulation of interstate bills of lading and therefore in aid of Congress' primary power over an instrumentality of commerce.

In **United States v. Sullivan,** supra, it was held that Congress' power to regulate for the ultimate consumer's protection the labeling of drugs moving across state lines could be applied to acts resulting in their mislabeling done while the drugs were held for sale to the public by a retail druggist who had purchased them from the interstate consignee. Under that statute, the Food, Drug and Cosmetic Act, 21 U. S. C. § 331, the potentially injurious character of the article itself was the subject of the regulation. Consequently, the effectiveness of Congress' obvious power over its interstate movement would

have been entirely thwarted if the control over its labeling had not been extended to the ultimate purchaser. The fact of its movement to the retail druggist was not the source of any congressional power except in respect to the labeling of that particular article.[11] Those statutes and decisions therefore afford no analogy to what Title II attempts to do. Thus, an application of the food-test concept of commerce power to the facts in the **Sullivan** case would achieve the remarkable result that Mr. Sullivan's drug store, because of his purchase of several bottles of sulfathiazole which previously had moved in commerce, could be regulated in any manner whatever irrespective of a lack of connection with the injurious quality of the drug. Congress could prescribe the seating capacity of his establishment, the magazines he could sell, the minimum age of customers he could serve. And since the government's position is that mere receipt at some point after movement in commerce in itself was the source of power in **Sullivan**, the power to regulate in general the activities of the ultimate consumer would be established as well. It may be said that such regulation might not be reasonable, but appellants have urged **Sullivan** and **Mandel** as authority for the existence of Congress' **power** to regulate, not for the reasonableness of its exercise.

Similarly, in oral argument, the Solicitor General, in response to a question by the Court, agreed substantially that Congress could make it a federal offense to hit one's wife with a baseball bat because the bat had moved in commerce. The government necessarily assumed that position because under Title II's food-movement test the movement of food is tied not to the proscribed activity but to the operation generally of restaurants, and even

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[11] See also *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U. S. 385, 391, which on the same grounds held the requirements of the Fur Products Labeling Act, 15 U. S. C., § 69, could be applied to fur in the hands of a retailer after interstate shipment.

the operations of a restaurant might or might not in a given case actually affect commerce. To bring that illustration within the context of the Sullivan decision, assume Congress finds that narrow-handled baseball bats are injurious to the public and, therefore, prescribes a minimum diameter for bats moving in commerce. To effectuate this law Congress could prohibit a person from whittling the handle of a bat which had moved in commerce. That would be the **Sullivan** case. But could Congress also prohibit this person from hitting his wife with the bat? Or, more in accord with the food-movement test of Title II, could the government regulate the recipient of the bat in conduct which intrinsically is unconnected with the bat? This underscores the weakness of the appellants' reliance upon dissimilar prior statutes and decisions in which "local" activities have been reached under the commerce power; for, the fact that they have been reached as to some activities plainly does not establish that they may be similarly reached as to others.

More generally, Title II, insofar as it applies to appellees, is unlike any of the statutes in which "intrastate" activities have been reached because they are commingled with those interstate activities or movement to which the regulation is principally directed. Other than those regulating instrumentalities engaged in commerce, all of those statutes significantly were regulations of the interstate movement of a particular commodity or of particular goods. The articles or commodities themselves were the subject of regulation. Only those local activities which were intrinsically a part of the interstate movement of the commodity or articles were regulated—not activities which only affected the interstate flow of goods in general. Local activities thus were reached only in association with the broader scheme to regulate activities actually in commerce, and then only when the control of the interstate elements would be defeated without

regulation of the local. In each of the statutes establishing broad economic regulation of a commodity or articles, Congress made specific legislative findings of the impact of the regulated activities upon the interstate movement of the commodity; and where purely intrastate commodities were expressly made subject to regulation, as was local milk in the Agricultural Marketing Agreement Act and **United States v. Wrightwood Dairy Co.**, 315 U. S. 110, provision has been made also for determination in individual cases of an effect on the interstate movement of that commodity. Title II, on the other hand, regulates **only** local activities which have no intrinsic connection with interstate commerce other than their possible effect upon the general flow of goods. The Act is **not** directed predominately at interstate activities of which the local activity is but an incidental aspect; the regulation of the local activity is the sole object of the statute. The Act is not an economic regulation of a commodity or the regulation of deleterious articles, but a regulation of activities in and of themselves. Consequently, the only statutes and decisions which bear any similarity to the Act are those such as the Sherman Act and the National Labor Relations Act which also reach isolated intrastate activities but only upon a determination of their effect upon the general flow of commerce.

3. Statutes Regulating Local Activities When Found on an Ad Hoc Basis to Affect Commerce.

Although there are other statutes[12] in which the power to regulate local activities is acquired on the basis of an

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[12] For example, the Agricultural Marketing Agreement Act, 21 U. S. C., § 608C; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; and the Interstate Commerce Act, 49 U. S. C., § 13 (4); *North Carolina v. United States*, 325 U. S. 507, 511; *King v. United States*, 344 U. S. 254, 267-76; *Shreveport Rate Case*, 234 U. S. 342, 357-59, in each of which an administrative finding of an effect on commerce, subject to judicial review, is contemplated.

ad hoc finding of an effect on commerce the primary ones are the National Labor Relations Act, 29 U. S. C., § 151 et seq., and the anti-trust statutes. In these statutes, as in the pertinent part of Title II, the object and impact of the regulation is in respect to activities which might have no connection with interstate commerce other than an effect upon its general flow. Consequently, the power to regulate such activities always has been made dependent upon a determination that the particular activity involved in a particular case will have an effect on commerce.

In appellees' initial brief, particularly at pages 14 through 17, the requirement and practice under the National Labor Relations Act of a case-by-case determination of the effect of a labor dispute or other activity upon the flow of commerce is discussed. It was noted that the required effect must be prospective, evidence of past interstate purchases being only the basis for an inference that there will be like purchases in the future. See, e. g., **N. L. R. B. v. Denver Bldg. and Constr. Trades Council**, 341 U. S. 675, 683-84; **J. L. Brandeis & Sons v. N. L. R. B.**, 142 F. 2d 977, 980 (C. A. 8).

The same determination is a requisite of regulation of "local" conduct under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C., § 1, et. seq. Thus, Section 1 of the Sherman Act, 15 U. S. C., § 1, proscribes only combinations or conspiracies "in restraint of trade or commerce among the several states," and Section 2, 15 U. S. C., § 2, similarly applies only to persons who monopolize "trade or commerce among the several states." A section—one case, **United States v. Employing Plasterers Ass'n.**, 347 U. S. 186, illustrates how the existence of a "restraint" of commerce depends upon a factual inquiry of the effect of an otherwise "local" conspiracy upon interstate commerce in precisely the manner provided in the Labor

Relations Act. The government's complaint in that case alleged that a conspiracy constituting a restraint on 60 per cent of the plastering business in the Chicago area adversely affected the otherwise continuing flow of plastering materials from out-of-state origins to Illinois job sites. Regarding the averments as charging only a "local restraint" not reached by the act, the district court dismissed the complaint. This Court reversed since the government's allegations of the effect on commerce should be "taken into account in deciding whether the government is entitled to have its case tried," id., 347 U. S. at 188, and must necessarily be resolved by a factual determination. For, as Mr. Justice Black observed, id., 347 U. S. at 189:

> [I]t goes too far to say that the government could not possibly produce **enough evidence** to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. That wholly local business restraints **can** produce the effects condemned by the Sherman Act is no longer open to question. [Emphasis added.]

The government's proof would of course be subject to rebuttal by the defendants. In every case in which the unlawful activity is local, a similar determination is required. See, *e.g.*, **United States v. Yellow Cab Co.**, 332 U. S. 218; **United States v. Women's Sportswear Ass'n**, 336 U. S. 460.

The reason for requiring such a case-by-case determination is that therein lies the only source of the government's power over the activity. As was stated by Mr. Justice Stone in **Apex Hosiery Co. v. Leader**, 310 U. S. 469, 485, 498:

> [I]n the application of the Sherman Act . . . it is the nature of the restraint and its effect on interstate

> commerce and not the amount of the commerce which are the tests of violation.
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> . . . . . .
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> This court has since repeatedly recognized that the restraints at which the Sherman law is aimed . . . are only those which, **for constitutional reasons**, are confined to transactions in or which affect interstate commerce [Emphasis added].

It follows that where it is determined that the local activity neither is in the course of nor has a demonstrably substantial effect upon trade or commerce between the states, it is not subject to the statute. See, *e. g.*, **United States v. Yellow Cab Co.**, 332 U. S. 218; **Industrial Ass'n v. United States**, 268 U. S. 64. Of course, when the proscribed activity is actually conducted through the channels of interstate and is therefore "in" commerce, it is in no sense a "local" activity, and can accordingly be regulated. See, *e. g.*, **Moore v. Mead's Fine Bread Co.**, 348 U. S. 115 (Robinson-Patman Act, 15 U. S. C., § 13(a) and 13a); **Lorain Journal Co. v. United States**, 342 U. S. 143.

Quite apparently, in view of its use only of the word "affect" in connection with commerce, the food-movement basis of power in Title II was patterned after these decisions under the Labor Relations Act, the Sherman Act, and similar statutes. To do so was necessary, in fact, inasmuch as this portion of Title II, like the Sherman and Labor Relations Acts, seeks to regulate local activities neither in commerce nor associated with regulated interstate activities. Appellants' brief cites many decisions and statutes invoking the commerce power, but there is not one, and we are aware of none, in which an actual ad hoc factual determination of the proscribed activity's effect on commerce was not made or provided for when that effect was the only source of the government's power to regulate. Their brief cites many Labor Board cases and some Sherman Act decisions, but "[d]ecisions under

this type of legislation give the government no support, for no such determination [of the activity's effect on commerce] is required by this Act, and the government asserts no such finding is necessary." **United States v. Five Gambling Devices,** 346 U. S. 441, 447.

In their brief (Br. 55) appellants cite only four cases in support of their position that provision for a judicial or administrative finding of an effect on commerce is unnecessary: **Southern Ry. v. United States,** 222 U. S. 20; **Baltimore and O. R. Co. v. I. C. C.,** 221 U. S. 612; **Wickard v. Filburn,** 317 U. S. 111; and **United States v. Ferger,** 250 U. S. 199. All of these cases were discussed above and, as was shown there, involve statutes under which local activities were reached only because their control was associated and mixed with and necessary to the effectuation of related interstate activities or commodities. Indeed, three of cases, **Southern Ry. v. United States; Baltimore & O. R. Co. v. I. C. C.,** and **Ferger,** involved statutes regulating instrumentalities of commerce —the Safety Appliance Act, the Railway Labor Act, and the act regulating interstate bills of lading,[13] respectively. We know of no statute of the type involved in this case in which provision for such a finding on a case-by-case basis has not been made.

Again, at page 49 of their brief, appellants cite six cases for the proposition that legislative findings are unnecessary. Three of those—**Southern Ry. v. United States; Baltimore & O. R. Co. v. I. C. C.,** and **United States v. Ferger**—are among those referred to in the preceding paragraph and involve statutes regulating instrumentalities of commerce. Of course power over such instrumentalities is within the express terms of the constitutional grant of the commerce power and findings of an effect on commerce are patently unnecessary. The

[13] Bills of lading for interstate shipments are "instrumentalities" of commerce—*United States v. Ferger,* 250 U. S. at 204.

others—**Virginian Ry. v. System Federation No. 40**, 300 U. S. 515; **United States v. Sullivan**, 332 U. S. 689; and **F. T. C. v. Mandel Bros., Inc.**, 359 U. S. 385—have also been dealt with in this brief and similarly involve statutes regulating activities closely associated with interstate movements. Thus, the statute in **Virginian Ry. v. System Federation** was the Hours of Service Act (railroads), regulating instrumentalities of commerce and made applicable to employees working on both interstate and intrastate equipment. Of course the **Sullivan** and **Mandel** cases both involved statutes regulating the misbranding of articles moving interstate. Similarly, all of the statutes[14] cited in footnote 31 at page 49 of appellants' brief, for their statement that some statutes contain no findings, either regulate instrumentalities of commerce or regulate the character of articles moving interstate. On the other hand, in every instance in which the existence of the commerce power is not apparent upon the face of the statute (as it is in the statutes and decisions cited by appellants) and the activity regulated thus might well be associated from interstate traffic, the factual basis upon which the commerce power exists has been made to appear either by express legislative findings or on an ad hoc basis. As we have noted above, this has been true even where the regulated "local" activity is closely associated with and often a part of regulated interstate activities. For all of the statutes regulating "local" activities in conjunction with control of commodities and their interstate movement have contained such findings.[15]

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[14] Railway Labor Act, 45 U. S. C., § 151; Safety Appliance Acts, 45 U. S. C., § 8, 49 U. S. C., § 26; Bills of Lading Act, 49 U. S. C., § 121; Fur Products Labeling Act. 15 U. S. C., § 69; Automobile Information Disclosure Act, 15 U. S. C., § 1231; Textile Fiber Products Identification Act, 15 U. S. C., § 70.

[15] As in the Grain Futures Act of 1922, 42 Stat. 998; the Tobacco Inspection Act, 7 U. S. C., § 511a; the Fair Labor Standards Act, 29 U. S. C., § 202; and the Colored Oleomargarine statute, 21 U. S. C., § 347a.

And in instances where the local activity is not associated thusly with broader regulation of interstate activities or movement (as here, the Labor Relations Act and the Sherman Act), the statutes have contained not just legislative findings but uniformly a provision for an *ad hoc* determination of the effect of the activity upon commerce; certainly, no such statute has precluded such a determination, as does Title II. Perhaps then, the explanation for the absence of express legislative findings in older statutes lies in the fact that they mainly regulated only things and activities actually in commerce, and only recently with the expansion and increasing complexity of our nation has it been necessary to use the commerce power in order to regulate "local" activities.[16]

In summary, appellees submit that there is no statutory precedent to support the Solicitor General's position in this case; that his reliance upon the prior statutes men-

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[16] Likewise inapposite are the cases—*U. S. v. Carolene Products Company,* 304 U. S. 144, *Townsend v. Yeomans,* 301 U. S. 441, and others—cited in appellants' brief (Br. 50-53) in support of their contention that, absent express legislative findings, the existence of facts necessary to sustain the constitutionality of a statute will be presumed. In none of those cases was there any question of the legislature's *power* to legislate. The only constitutional inquiry was whether the legislation was a reasonable and necessary exercise of that power. In each instance the power—the legislative jurisdiction —obviously existed. Thus, *Carolene Products* involved the federal Filled Milk Act (21 U. S. C., § 61-63) prohibiting the shipment in interstate commerce of products found to be injurious. That statute, like the Mann Act, the Fur Products Labeling Act and others, thus regulated only articles moving across state lines, over which Congress' power could not be questioned. The only facts presumed were those supporting the legislative "judgment", 304 U. S., at 152, in characterizing the regulated products as "injurious". *Townsend v. Yeomans* involved a state statute regulating commercial transactions within the state. It was enacted under the police power which embraces all persons and activities within the state. The question involved was only whether the statute was so unreasonable that due process was denied. In the present case appellees question the power of Congress. No case of which the appellees are aware has even intimated that the facts upon which this power itself is derived are presumed to exist.

tioned betrays a recognition of the fatal defect in appellant's case. None of the statutes is apposite, yet they define the high water mark of congressional power over local affairs. In Title II, there is no regulation of any article, product, or interstate traffic. The regulation applies only to conduct in isolation from articles or activities directly in commerce. True, it might "affect" commerce indirectly in a particular case as has been recognized in Sherman Act and Labor Board cases, but on the other hand, it might not. Whether it would in a given case, would depend upon the facts as is true under those statutes.

Seemingly Congress recognized this in applying the Act only to restaurants whose operations affect commerce. But it departed from the teaching of the very precedents upon which the appellants rely in legislating a conclusive presumption on the specific ultimate fact which is indispensably required for congressional power.

Again, it is the **power** of Congress under the Constitution with which we are here concerned and "[t]he power to create presumptions is not a means of escape from constitutional restrictions." **Bailey v. Alabama**, 219 U. S. at 239; see **Heiner v. Donnan**, 285 U. S. 312[17] and **Tot v. United States**, 319 U. S. 463.

III. A Mere Hypothetically Rational Basis for the Exercise of Federal Power Is Not Sufficient.

During oral argument, it was contended that in order to hold for the appellees the Court would have to say there was no conceivable rational basis for the legislation. This becomes relevant only if it be assumed for

[17] "If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantial law." 285 U. S. at 329.

argument (which appellees continue to deny) that Congress made any declaration or finding of the kind urged by the Solicitor General. Appellees insist nevertheless, that such a rule is not in accordance with the Court's historic concept of judicial review.

It must be remembered that we are still talking about the power of Congress and not the wisdom or workability of the legislation. Admittedly when legislation comes within a specific constitutional grant of federal power Congress, like a state legislature acting under the police power, has broad discretion as to the means to be used to correct whatever problem it may be dealing with. But it has never been held that Congress may by legislative fiat merely say that it is acting under granted power and thus foreclose judicial inquiry on the subject.

It is for the Court to say whether there is sufficient basis to conclude that a particular local activity has a sufficiently close and substantial effect on interstate commerce to bring that activity within federal authority in the manner attempted. Unless such judicial review is recognized and exercised, the federal government will become one of unlimited power, rather than one of limited and delegated power as conceived in the constitution.

The Court has never been sterilized so as to limit it in the manner suggested—not where the existence of federal power has been in issue. For example, in holding that Congress exceeded its power under Article I to govern the land and naval forces of the United States by attempting to subject a discharged serviceman and other civilians to Court Martial trials, the Court rejected abundant argument that there was a rational connection between government of the armed service and offenses committed by such persons. **United States ex rel. Toth v. Quarles**, 350 U. S. 11; **Reid v. Covert**, 354 U. S. 1; **Kinsella v. United States ex rel. Singleton**, 361 U. S. 235. In **Toth**, the offense had

been committed while the accused was actually on active duty in the Air Force. Surely such an offense bears a far closer and more substantial connection to the government of the Air Force than the selection of local customers at Ollie's Barbecue bears to interstate commerce in food. Yet the Court struck down the congressional judgment that people like Toth should be subjected to military authority.

Despite vast federal power over war and foreign affairs, the Court has held that Congress exceeded its granted powers in providing for the loss of nationality of a person convicted of wartime desertion. **Trop v. Dulles**, 356 U. S. 86. In doing so, the Court rejected persuasive argument that a rational connection existed between such a measure and the conduct of war and foreign relations. The Court examined the matter for itself (See opinion of Mr. Justice Brennan, 356 U. S. at 105-114).

Neither the Court Martial cases nor the expatriation case were based on any prohibition of the Bill of Rights. They were based on the grounds that Congress had exceeded its Article I authority. The Court exercised its independent judgment in deciding that. That is all the appellees ask of the Court here. Even if it be assumed, for argument, that there was a congressional declaration that the choice of customers in a restaurant has a substantial effect upon interstate commerce, solely and exclusively because a portion of the food served has moved in commerce, can it be said that this Court is limited to the inquiry merely of whether there might conceivably be some remote and hypothetically rational basis for the declaration?

The Courts Martial and expatriation cases also show that the Court's inquiry into "rational basis" is not an aridly logical one. In the case at bar Congress has attempted to move into a field never before subjected to federal control. Section 201 (c) (2) controls the persons,

all of whom are local, who may be permitted to gather in an eating place. This is a novel assertion of federal power. It not only impinges upon the right of association of the customers of Ollie's Barbecue, but also upon important rights of the appellees themselves. For this reason, it is appropriate that this Court take an exceedingly close look to see that there is a solid basis for saying that the activities regulated in this statute have a demonstrated substantial and close effect upon commerce. Certainly because of the far-reaching implications of this legislation the Court should take a closer look than, for example, in the case of controlling the supply and demand of wheat. For wheat is a commodity moving daily in the channels of commerce, and it was only to control that movement that the statute upheld in **Wickard v. Filburn**, supra, was enacted. Contrastingly, the impact on commerce resulting from the kind of people who are permitted to gather in local places like appellees' restaurant could be exceedingly thin at most. Certainly it has not been sufficiently demonstrated in this record for the congressional *ipse dixit* to stand.

Furthermore, it is worth at least passing comment to note that in none of the landmark decisions relied upon by appellants has the Court approached its function of judicial review on any such sterile basis as is urged by the Solicitor General, e. g., **Wickard v. Filburn**, 317 U. S. 11; **United States v. Darby**, 312 U. S. 100; **NLRB v. Jones & Laughlin Steel Corp.**, 301 U. S. 1. In each of these cases the Court recognized its function as requiring it to examine the factual basis upon which the exertion of federal commerce power was purportedly based. In each case the Court went to lengths to discover, not on the basis of some hypothetical rationality that **might** have existed, but on the basis of substantial and genuine facts shown in the record, that Congress has permissibly concluded that the regulation was necessary to remove a

burden upon commerce. The Court did not imagine a state of facts, not made know to it, that would support the legislative actions. Those statutes were upheld on the basis of a demonstrated factual situation in the light of which Congress was entitled to conclude that the local activities involved should be regulated for the protection of commerce.

The record in this case fails to show even the barest basis for an exercise of commerce clause power as against these appellees.

CONCLUSION.

The position urged by appellees in this case does not require the Court to be insensible to current affairs. Inevitably, there is here a conflict between the concept of human equality and individual rights under the Constitution. Very early in the history of our republic in **Marbury v. Madison,** 1 Cranch. 137, . . ., Chief Justice Marshall stated:

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited *and acts allowed, are of [*177 equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it" [1 Cranch. at 176-77].

Appellant's case is founded on a concept of the interstate commerce clause which has never been recognized by the Courts. While the wisdom of legislation is a matter for

the Congress it is within the Court's proper prerogative to look with deep concern at an assertion of power never heretofore upheld.

We have undertaken in our briefs in this case and in oral argument to demonstrate that Title II, insofar as the food test relating to restaurants is concerned, would apply to local activities having no demonstrable effect upon interstate commerce. While the injury that would be done the appellees has been shown to be substantial, it is with the deeper and broader implications of the rationale necessarily assumed by the Solicitor General that appellees are most concerned. No social problem is so great as to justify erosion of constitutional liberties.

Appellees recognize that because of the almost unprecedented haste with which this case has been presented to the Court and because of the unusually important constitutional issues involved, there may be points upon which the Court will desire further briefs or further argument. Appellees will welcome the opportunity of presenting either or both.

Respectfully submitted,

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APPENDIX A.

Title II—Injunctive Relief Against Discrimination in Public Accommodations.

Findings.

Sec. 201. (a) 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.

(b) 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.

(c) Negroes and members of other minority groups who travel interstate are frequently unable to obtain 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.

(d) 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 practices and the obstructions to the free flow of commerce which result therefrom are serious and substantial.

(e) 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.

(f) 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 either not open to all members of racial or religious minority groups or are available only on a segregated basis.

(g) 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 location 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.

(h) 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.

(i) 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.

Right to Nondiscrimination in Place of Public Accommodation.

Sec. 202. (a) All persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the following public establishments:

(1) any hotel, motel, or other public place engaged in furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce;

(2) any motion picture house, theater, sports arena, stadium, exhibition hall, or other public place of amusement or entertainment which customarily presents motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce; and

(3) any retail shop, department store, market, drugstore, gasoline station, or other public place which keeps goods for sale, any restaurant, lunchroom, lunch counter, soda fountain, or other public place engaged in selling food for consumption on the premises, and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire, if—

(i) the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers,

(ii) a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce,

(iii) the activities or operations of such place or establishment otherwise substantially affect interstate travel or the interstate movement of goods in commerce, or

(iv) such place or establishment is an integral part of an establishment included under this subsection.

For the purpose of this subsection, the term "integral part" means physically located on the premises occupied by an establishment, or located contiguous to such premises and owned, operated, or controlled, directly or indirectly, by or for the benefit of, or leased from the persons

or business entities which own, operate or control an establishment.

(b) The provisions of this title shall not apply to a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (a).