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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

HEART OF ATLANTA MOTEL, INC., A Corporation, Plaintiff, v. UNITED STATES OF AMERICA, and ROBERT F. KENNEDY as Attorney General of the UNITED STATES OF AMERICA, Defendants.	CIVIL ACTION NO. 9017
GEORGE WILLIS, JR., WOODROW T. LEWIS, AND ALBERT L. DUNN, Plaintiffs, v. THE PICKRICK RESTAURANT, a Corporation, and LESTER G. MADDOX, Defendants. ROBERT F. KENNEDY, Attorney General Applicant for Intervention	CIVIL ACTION NO. 9028

MEMORANDUM OF LAW

I

Sections 201(a)(b)(1) and (2), and c(1) and (2) of the Civil Rights Act of 1964 as applied to the Heart of Atlanta Motel and the Pickrick Restaurant are constitutional exercise of the commerce power.

The power of Congress to enact a prohibition on racial discrimination and segregation by proprietors of

motels and restaurants rests upon Article I, Section 8, clauses 3 and 18 of the Constitution.[1/] These provisions expressly delegate to the Congress not only the power to "regulate Commerce . . . among the several States" but also

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1/ Congress also has such power, with respect to certain such establishments, under Section 5 of the Fourteenth Amendment.

the power to "make all laws which shall be necessary and proper for carrying into Execution the foregoing power[s] . . . ."

In our view the exercise of these powers -- among the broadest granted the national government by the Constitution -- is clearly valid as applied to the Heart of Atlanta Motel and the Pickrick Restaurant. Basically, we submit that the Congress has power, by virtue of these provisions, (1) to remove restrictions on interstate travel, (2) to eliminate artificial restrictions upon the market for goods, (3) to eliminate the causes of disruption in the flow of commerce, and (4) to remove obstacles to the natural movement of industry and trade from state to state.

Congress has in the past exercised the Commerce power to achieve results falling under each of these headings. And each of these principles is applicable to the statutory prohibitions as applied to the Heart of Atlanta Motel and the Pickrick Restaurant.

A. Congress has power to ban racial discrimination in order to remove burdensome restrictions on interstate travel.

1. The Heart of Atlanta Motel.

a. This Court has held that the operations of the Heart of Atlanta Motel (1) are in the stream of commerce, and that, in any event, (2) they affect commerce so as to subject it to congressional regulation under the Sherman Act. Marriott Hotels of Atlanta, Inc. v. Heart of Atlanta Motel, Inc., C.A. No. 8832 (N.D. Ga. July 10, 1964) (Morgan, J.).

The Marriott case was a treble damage suit arising under Sections 1 and 2 of the Sherman Act (which

prohibits contracts, combinations or conspiracies "in restaurant of trade or commerce among the general States," and also prohibits monopolizing or attempting to monopolize "any part of the trade or commerce among the several States. . . ."). Marriott claimed that Heart of Atlanta and other hotel and motel proprietors had for the forbidden purposes concocted and brought a groundless lawsuit in State court to prevent the sale to Marriott by the Atlanta Housing Authority of a piece of land on which Marriott wished to erect a motel. Heart of Atlanta moved to dismiss the complaint on the ground that its conduct was not covered by the Sherman Act. The court said that "[a]llegations of the amended complaint as to the situation of Atlanta as being a hub of trade and commerce bring this case within the doctrine of the 'continuous and indivisible stream of intercourse between the States.'" [2/] And the Court held that, in the alternative, "[e]ven if, in this modern day of travel, these hotels and motels only exert a 'substantial effect on interstate commerce,' they would be covered by the antitrust laws."

In our view both holdings of Judge Morgan are clearly correct. As we shall demonstrate, they are dispositive of this case.

b. There can be no doubt that the widespread practice of hotel and motel proprietors to refuse to provide lodging to Negro interstate travelers imposes

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2/ Citing United States v. Southeastern Underwriters, 322 U.S. 533 (1944), and United States v. Shubert, 348 U.S. 222 (1955).

on such travelers a serious practical burden and inconvenience, and effectively prevents many such persons from traveling interstate.

The Congress was made aware of this situation through the testimony of Under Secretary of Commerce Franklin D. Roosevelt, Jr. In his testimony before the Senate Commerce Committee on the subject of the effect on interstate commerce of racial discrimination and segregation,[3/] Secretary Roosevelt pointed out that Negroes, traveling from Washington, D.C. to Florida, Chicago to New Orleans, or Washington, D.C. to New Orleans, "would have an extremely slender choice in attempting to find overnight accommodations in hotels and motels serving white travelers along the same routes."[4/] He moted that the problem is so great that a special guide book is published for Negro travelers which describes hotels and motels which have agreed to serve Negroes. The Department of Commerce asked the publisher of the guide book to determine where along a given route a Negro family could expect to find "reasonable sleeping accommodations." The routes selected were from Washington, D.C. to Miami, from Washington, D.C. via Columbia, South Carolina, Atlanta,

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3/ Hearings before the Committee on Commerce, United States Senate, 88th Congress, 1st Session, on S. 1732, pp. 689-767 (July 23, 1963). S. 1732 was the Senate companion bill to H.R. 7132, which became the Civil Rights Act of 1964.

4/ Hearings, supra, pp. 692, 693.

Georgia and Tuskegee and Mobile, Alabama, to New Orleans.[5/] As Mr. Roosevelt said, "On the Miami trip, the average distance between accommodations is 141 miles, and on the New Orleans trip, it is 174 miles." He also said that "the places available are typically small, averaging only 15 units," and "it is quite obvious that a traveling family might find that they had finally reached one of these accommodations but only to find no vacancy or that it was

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5/ Hearings, supra, p. 694:

Table II. - Illustrative trip, Washington, D.C., to Miami, Fla., and Washington, D.C., to New Orleans, La., showing location of hotel-motel accommodations of "reasonable" quality readily available to Negroes

	Route	Miles
Washington, D.C., to Miami, Fla.:		
Washington to Petersburg, Va.	U.S. 1 and 301	135
Petersburg to Raleigh, N.C.	U.S. 1	150
Raleigh,N.C., to Columbia,S.C.	U.S. 1	185
Columbia to Savannah, Ga.	U.S. 1	116
Savannah to Jesup	U.S. 301	65
Jesup to Jacksonville, Fla.	U.S. 17	100
Jacksonville to Ormand Beach	U.S. 1	142
Ormand Beach to Miami	U.S. 1	232
Total mileage, Washington to Miami		1,125
Average miles between locations		141
Washington, D.C., to New Orleans, La.:		
Washington, D.C., to Columbia, S.C. (including stops shown above)		470
Columbia to Atlanta, Ga.	U.S. 29	215
Atlanta to Tuskegee Institute, Ala.	U.S. 29	134
Tuskegee Institute to Mobile, Ala.	U.S. 29 and 31	250
Mobile to New Orleans, La.	U.S. 90	148
Total mileage, Washington to New Orleans		1,217
Average miles between locations		174

filled up." Hearings, p. 694. Secretary Roosevelt continued his description of "the tremendous problem faced by Negro travelers along the highways in the South," as follows:

> In fact, even if we cut in half the average of 141 miles on the Washington to Miami trip, or the 174 miles on the New Orleans drive we would still have considerable distances over which Negroes would typically have to drive before they could expect to find reasonable accommodations open to them on the same basis as white travelers. If they get tired 40 miles out from the last available stop, they have a bitter choice to make in deciding whether to go back or push on. Frequently the choice they make will be one which violates the National Safety Council's admonition that the professional driver should stop after 6 to 8 hours driving and get a night's sleep. Hearings, pp. 694-695.

It is obvious that the conditions thus described impose a serious burden upon Negro travelers. Moreover, it is obvious -- and Secretary Roosevelt so testified -- that the existence of these conditions deters many Negroes from traveling at all in areas where the problem exists. Hearings, p. 695.[6/]

Time has not permitted the incorporation in this memorandum of additional information concerning the burdens on Negro travelers which Congress had before it when considering the civil rights bill. But Secretary Roosevelt's testimony indicates the magnitude of the problem. So much,

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6/ "Some well-to-do individuals, with enough money for a midwinter vacation find it far more pleasurable to go abroad than to risk the insults and rejections which they are likely to face in many of the Florida hotels and luxury resorts. In fact, there is a steady stream of such travelers to the British West Indies." Hearings, p. 695.

indeed, can hardly be disputed. The question is, whether Congress can do anything about it.

c. Congress has in the past enacted statutes designed to remove racial restrictions and inconveniences imposed on interstate travelers. The Interstate Commerce Act, Parts I (rail carriers) and II (motor carriers), and the Federal Aviation Act each prohibit racial segregation and discrimination against rail, bus, or air carrier passengers. 49 U.S.C. 3(1), 316(d), 1374(b). Mitchell v. United States, 313 U.S. 80 (1941); Henderson v. United States, 339 U.S. 816 (1950); N.A.A.C.P. v. St. Louis - San Francisco Ry. Co., 297 I.C.C. 335 (1955); Keys v. Carolina Coach Co., 64 M.C.C. 769 (1955); Fitzgerald v. Pan American World Airways, 229 F. 2d 499 (C.A. 2, 1956).

These statutes are not limited to racial discrimination on the actual vehicles of transportation. They prohibit such discrimination also when practiced by restaurants located in the terminals of rail, bus, or air carriers. Boynton v. Virginia, 364 U.S. 454 (1960); United States v. Lassiter, 203 F. Supp. 20 (N.D. La. 1962), affirmed, 371 U.S. 10 (1963); City of Shreveport v. United States, 210 F. Supp. 708 (1962), affirmed, 316 F. 2d 928 (C.A. 5, 1963). See also, Georgia v. United States, 201 F. Supp. 813 (N.D. Ga. 1961), affirmed, 371 U.S. 9.

In Boynton v. Virginia, supra, the Supreme Court took note of the self-evident fact that "interstate passengers have to eat." It is certainly no less true that interstate travelers have to sleep, and that hotels and motels are in business precisely to cater to this need.

It is no objection that in Boynton, City of Shreveport, and Lassiter the facilities affected were located within the terminals of interstate carriers. That limitation was imposed by the three statutes governing the interstate carriers, but no such limitation is found in the Constitution itself. On settled constitutional doctrine, Congress may regulate a facility if it is "in" or a part of the stream of commerce or, even if the facility cannot be so characterized, if the practice being regulated affects commerce. See, e.g., Stafford v. Wallace,[7/] 258 U.S. 495 (1922); Wickard v. Filburn, 317 U.S. 111 (1942); Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); N.L.R.B. v. Reliance Fur Co., 371 U.S. 224 (1963).

d. "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions deemed to be an essential part of a 'flow' of interstate or foreign commerce. . . . The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its protection and advancement . . . to adopt measures 'to promote its growth and ensure its safety' . . . 'to foster,

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7/ In Stafford v. Wallace, 258 U.S. 495 (1922), the question was whether practices of the Chicago Stockyards could be regulated by Congress. The Court held that since the cattle moved through the yards from out of state and were destined to move on to other states in the form of meat they were moving in a continuous stream of interstate commerce. The Court concluded that the stockyards, which facilitated and serviced this flow or stream of commerce, was an integral part of the movement. This decision followed a similar holding in Swift & Co. v. United States, 196 U.S. 375 (1905), and the Court reiterated the principle in Minnesota v. Blasius, 290 U.S. 1 (1933).

protect, control and restrain.'" Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-37 (1937). And the power being exercised is not alone the power to regulate "Commerce . . . among the several States." As Mr. Chief Justice Stone said for the Court in United States v. Darby, 312 U.S. 100, 118 (1941):

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See McCulloch v. Maryland, 4 Wheat. 316, 421.

e. Nor is the power of Congress limited by whether the effect of discrimination on commerce be deemed direct or indirect (although in the case of a motel it is quite clear that the effect is direct). "Whatever its nature, [it] may be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Wickard v. Filburn, 317 U.S. 11, 125 (1942).

f. The power of Congress to prohibit discriminatory practices by the Heart of Atlanta Motel does not depend upon whether discrimination by Heart of Atlanta alone exerts a substantial effect upon interstate commerce. The effect of discrimination by Heart of Atlanta, combined with discrimination by other hotels or motels is certainly substantial. If that be true then Congress may act upon Heart of Atlanta without regard to whether its discrimination considered in isolation affects interstate travel.

NLRB v. Reliance Fuel Co., 371 U.S. 224 (1963); Wickard v. Filburn, 317 U.S. 111 (1942); Polish Alliance Ins. Co. v. NLRB, 322 U.S. 643 (1944); Labor Board v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 685 n. 14 (1951); Labor Board v. Fainblatt, 306 U.S. 601 (1939).

In Labor Board v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963), the Board issued an order against a retail fuel oil distrubutor "whose operations were local," 371 U.S. at 224, but which "purchased within the State a 'substantial amount' of fuel oil and related products from the Gulf Oil Corporation, "a supplier concededly engaged in interstate commerce." Id. at 224-225. The Board ruled that the operation of the retailer "affected" commerce, and that a labor dispute would burden and obstruct the free flow of commerce. The court of appeals, however, disagreed with the Board and remanded the case so that the latter might "take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce" (emphasis added). Id. at 225.

On certiorari, the Supreme Court unamiously reversed in per curiam opinion[8/], stating (371 U.S. at 226):

> Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce. Polish Alliance

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8/ Mr. Justice Black concurred in the result, without opinion.

v. Labor Board, 322 U.S. at 648. See also Labor Board v. Fainblatt, 306 U.S. at 607-608.

The Court then held that it was "beyond doubt" that "activities such as those of Reliance affect commerce and are within the constitutional reach of Congress . . .," citing Wickard v. Filburn, supra, and it concluded that "[t]hrough the National Labor Relations Act, ". . . Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce."

The classic case of application of the "aggregate effect" reasoning is Wickard v. Filburn, 317 U.S. 111 (1942), where the Court sustained the validity of Agricultural Adjustment Act marketing quota regulations as applied to the production of wheat "not intended in any part for commerce but wholly for consumption on the farm." Id. at 118 (emphasis added). A wheat quota had been imposed on the farm involved of 11.1 acres, but the farmer sowed 23 acres and "harvested from his 11.9 acres of excess acreage 239 bushels." He was accordingly penalized for his overproduction. 9/

The Supreme Court sustained this regulation. "The effect of consumption of home grown wheat on interstate commerce," said Mr. Justice Jackson for a unamimous Court, "is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop . . . . The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs." Id. at 127. Continuing, the Court said (Id. at 127-128):

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. Labor Board v. Fainblatt, 306 U.S. 601, 606 et. seq.; United States v. Darby, supra, at 123

See also Mabee v. White Plain's Publishing Co., 327 U.S. 178 (1946) (applying the Fair Labor Standards

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9/ The marketing quotas, as the Court said, "not only embrace all that may be sold without penalty but also what may be consumed on the premises," and [p]enalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold." Id. at 119

Act to a newspaper whose circulation was about 9,000 copies, only 45 of which (or 1/2 of 1 per cent of its business) were mailed out of State.)

g. These principles have many times been applied to the regulation of motels and hotels.

In Hotel Employees Local No. 255 v. Leedom, 358 U.S. 99 (1958), the Supreme Court ruled that the Labor Board could not lawfully follow a policy of refusing to take jurisdiction over unfair labor practices and other labor disputes in hotels and motels as a class. Since then the Board has regulated labor relations and secondary boycotts in and affecting hotels and motels. See, e.g., Labor Board v. Citizens Hotel Co., 313 F. 2d 708 (C.A. 5, 1963); Labor Board v. Baker Hotel, 311 F. 2d 528 (C.A. 5, 1963); Labor Board v. Holiday Hotel Management Co., Inc., 311 F. 2d 380 (C.A. 10, 1962); Samoff v. Hotel, Motel, & Club Employees Union, 199 F. Supp. 265 (E.D. Pa. 1961); Sperry v. Local Joint Board, 216 F. Supp. 263 (W.D. Mo. 1963); Floridan Hotel of Tempa Inc., 124 N.L.R.B. 261 (1959); Atlanta Biltmore Hotel Corp., 128 N.L.R.B. 364 (1960); Tulsa Hotel Management Corp., 135 N.L.R.B. 968 (1962); Trade Winds Motor Hotel, 140 N.L.R.B. 567 (1963); Canal St. Hotel, 127 N.L.R.B. 880 (1960); Lamar Hotel, 127 N.L.R.B. 885 (1960); Southwest Hotels, 126 N.L.R.B. 1151 (1960).

While the Board's jurisdiction is established if even a small amount of a hotel's purchases are made in interstate channels (see, e.g., Labor v. Baker Hotel, 311 F. 2d 528, 529 (C.A. 5, 1963)), on the theory that a labor dispute in a hotel might disrupt the flow of goods in commerce (as to this principle, see infra), hotels are also regulated by the Board on the obvious ground that a labor dispute in a hotel

or motel would directly affect interstate travel. Thus, in Labor Board v. Holiday Hotel Management Co., Inc., 311 F. 2d 380 (C.A. 10, 1962), the court of appeals upheld the labor Act as applied to hotels. It felt compelled to distinguish Labor Board v. Reliance Fuel Oil Corp., 297 F. 2d 94 (C.A. 2, 1961) since that case had not yet been unanimously reversed by the Supreme Court, and in so doing the court of appeals said (311 F. 2d at 381):

> In the case at bar jurisdiction rests on a more firm basis because the relationship to interstate commerce is direct rather than indirect. The respondent here received more than $1,500 worth of goods, equipment, and supplies which were shipped directly to it from out-of-State points. While this amount is not impressive, it must be considered together with the obvious fact that 'hotels which serve a transient trade play an important role in furthering travel and in fostering commercial relationships between the inhabitants of the several states.' 10/ Labor disputes which interfere with the operations of these hotels affect the 'operations of the various media of passenger transportation' 11/ and if left unchecked would spread to other hotels in the same area with consequent far-reaching harmful effects on interstate commerce.

Similarly, in Floridan Hotel of Tampa, Inc., 124 N.L.R.B. 261 (1959), the Board in asserting jurisdiction noted that the hotel "provides necessary services to members of the traveling public who travel in interstate commerce," and that "[w]hether

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10/ Quoting Southwestern Hotels, Inc., 126 N.L.R.B. 1151, 1154 (1960).

11/ Quoting Floridan Hotel of Tampa, Inc., 124 N.L.R.B. 261 (1959).

the Board has jurisdiction ... is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board in this case." The "primary function" of the $2,400,000,000 hotel industry being "to furnish lodging facilities ... and other services to the travelling public," it followed, in the Board's view, that "the operations of the industry facilitate the movement of persons in this country...," thus subjecting the hotel to Board regulation. 124 N.L.R.B. at 262-263. To the same effect, see Atlanta Biltmore Hotel Corp., 128 N.L.R.B. 364, 367 (1960); Southwest Hotels, Inc., 126 N.L.R.B. 1151, 1154 (1960).

These decisions applying the commerce power specifically to hotels and motels underscore the "common-sense view that hotels which serve a transient trade play an important role in furthering travel and in fostering commercial relationships between the inhabitants of the several states." Southwest Hotels, Inc., 126 N.L.R.B. 1151, 1154 (1960). The power to ban discrimination in such establishments is therefore very clear.

h. It is no objection to the constitutionality of sections 201(b)(1) and (c)(1) of the Act that discrimination in motels is prohibited, not against interstate travelers alone, but against intrastate travelers as well. It has long been settled that Congress may regulate intrastate activity where Congress believes such regulation is necessary to effectuate its regulation of interstate commerce. Congress may "choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities," United States v. Darby, 312 U.S. 100, 121 (1941) and language quoted supra p. 10 ; see also, Currin v. Wallace, 306 U.S. 1 (1938); Thornton v. United States, 271 U.S. 414 (1926); Shreveport Rate Cases, 234 U.S. 342 (1914); Southern Railway v. United States, 222 U.S. 20 (1911). For example, in the Shreveport cases the Court, per the then Mr. Justice Hughes, held that Congress (through the Interstate Commerce Commission) could lawfully raise intrastate carrier rates in order to remove discrimination against interstate rail traffic.

Thus, Congress may regulate intrastate activities when in its judgment it is not feasible to separate the inter- and the intrastate elements. See, e.g., Thornton v. United States, 271 U.S. 414 (1926) (intrastate cattle may be regulated where necessary to regulate interstate cattle); Currin v. Wallace, 306 U.S. 1 (1938) (local tobacco transactions may be regulated where difficult to separate

them from interstate transactions); Southern Railway Co. v. United States, 222 U.S. 20 (1911) (intrastate railroad cars may be regulated where not feasible to protect interstate travel without so soing). Indeed, in Georgia v. United States, 201 F. Supp. 813 (N.D. Ga. 1961), affirmed 371 U.S. 9 (1926), this Court ruled that the Interstate Commerce Commission Order prohibiting the use by interstate carriers of segregated terminals or vehicles was valid even if the segregation was solely with respect to local passengers. The Court held "that to the extent that such regulation of interstate vehicles and facilities affects strictly intrastate matters, this effect is incidental. Such effect as may follow from the economic touching on the operation of the motor carrier industry can not, we think, prevent the exercise by the Interstate Commerce Commission of its recognized right to regulate interstate commerce." 201 F. Supp. at 815.

These principles control here, for to make effective its prohibition of discrimination against interstate travelers Congress was required by the circumstances of travel to extend the ban to discrimination against intrastate travelers as well. Commonly, interstate travelers do not carry with them proof that they are on an interstate journey.[12/] The proceedings

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12/ Even if this could be ascertained with respect to Heart of Atlanta's out-of-state travelers, it could not in many cases be determined with respect to Georgia residents stopping at Heart of Atlanta on either the beginning or final leg of an interstate trip.

involved in proving his status would doubtless be embarrassing to an interstate Negro traveler, and Congress need not subject him to the humiliation flowing from such a public confrontation.[13/] Interstate travel is, of course, discouraged if Negroes know that members of their own race are not served and that only the "interstate Negro" is served.

Beyond that, to require a Negro interstate traveller to produce proof that he is on an interstate trip would result in precisely that sort of racial discrimination which the Act hopes to eliminate, because white interstate travelers obviously would not be required to carry any such proof with them or to produce it. A decision of the Court of Appeals for the Fifth Circuit in Baldwin v. Morgan, 287 F. 2d 750 (C.A. 5, 1961), is very much in point here. As the court there said, with reference to segregated terminal waiting rooms (287 F. 2d) at 759):

> . . .whenever a complaint is received reporting that a Negro is sitting in the "Interstate and white intrastate" waiting room, the police officer is required to, and does, demand to see the tickets to verify the interstate status. As to those in interstate status, this is itself a denial of equal protection by policemen since white interstate travelers are not subjected to like treatment (emphasis added).

13/ Moreover, like whites, many Negro interstate travelers doubtless stay in motels in cities where their friends and relatives are, but if the ban extended only to the traveler he obviously would not be able to meet with and entertain his guest in the motel, as his white interstate counterparts could conveniently do.

The possibilities for evasion which would exist if Congress extended its protective umbrella to interstate passengers alone is in itself a sufficient basis for upholding the broader ban, as Everard's Breweries v. Day, 265 U.S. 545 (1924) makes clear. The Eighteenth Amendment prohibited the sale of alcohol "for beverage purposes." In order to implement the Amendment Congress banned the prescription of alcohol for medicinal purposes as well. This was challenged on constitutional grounds and the statute was upheld. Said the Court in the Everard's case (265 U.S. at 558-560):

> It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; . . . . And it has been held that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating; Purity Extract Co. v. Lynch, 226 U.S. 192; Ruppert v. Caffey, 251 U.S. 264.

The Court sustained the Act, on the grounds that (Id. at 560-561):

> The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious . . . . The opportunity to manufacture, sell and prescribe intoxicating malt liquors for "medicinal purposes," opens many doors to clandestine traffic in them as beverages under the guise of medicines; aids evasion; and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment.

Surely this Court needs no detailed exposition of the evasions hostelers could contrive to refuse to serve Negro interstate travelers if they were permitted to put the latter to their proof of interstate

status. No reason appears why Congress must take away with its left hand what it grants with its right. It need not free interstate travelers from the burden of nonaccommodation while at the same time subjecting them to embarrassing, humiliating, inconvenient, and perhaps impossible requirements of proof of status.

2. The Pickrick Restaurant

Insofar as a restaurant (not located within a motel or hotel) is covered by section 201(b)(a) and (c)(2) of the Act because it "serves or offers to serve interstate travelers," the constitutionality of these sections may be sustained upon the same grounds advanced supra in support of the provisions banning racial discrimination in motels.

B. Congress has power to promote the flow of goods in interstate channels by removing artificial racial restrictions on the market for such goods

This proposition will be directed mainly to the validity of the restaurant provisions of the Act, but it also, of course, applies as well to the hotel and motel sections.

a. The testimony of Undersecretary Roosevelt previously referred to, is also revealing with respect to the effect of policies of racial exclusion in retail establishments, including restaurants, on the scope of the market for food and other products sold by such places. His testimony was that Negroes spend less money per capita, after discounting income differences, than do whites in restaurants, theaters, and the like, and that the disparity is especially aggravated in the South where such exclusionary practices are ubiquitous. He attributed this to racial discrimination. Hearings, supra at 695.

For example, Mr. Roosevelt testified that "Negroes in large Northern cities spend more than Southern Negroes of the same income class in all of these expenditure categories [i.e., restaurants, theaters, recreational facilities, hotels, motels] . . . , even though white families in northern cities spend less than similar families in southern cities." "In the same income group," he said, "northern Negroes spend more than northern whites for [theaters and recreation], but southern Negroes spend less than southern whites and northern Negroes.

Negroes in both the North and South spend less on 'Food eaten away from home' than white people in the same income groups, but the difference is much greater in the South." [14] Ibid. The statistics furnished the Congress by the Commerce Department are set out in the footnote.[15]

14/ He provided similar evidence with respect to "automobile operations," attributing the disparity to "the absence of suitable facilities along our important national highways. . . ." Ibid.

15/ See footnote on following page

15/ Footnote from preceding page

TABLE III.-- Average family expenditure for admissions, food eaten away from home, and automobile operations, for 3 income classes, large northern and southern cities, by race, 1950.

Income class and region	Admissions			Food eaten away from home			Automobile operation		
	Negro	White	Negroes percent of whites	Negro	White	Negroes percent of whites	Negro	White	Negroes percent of whites
$2,000 to $3,000:									
Large northern cities. .	$31	$29	107	$148	$184	80	$52	$86	60
Large southern cities. .	$23	$36	64	$113	$194	58	$52	$95	55
Northern expenditures as percent of southern.	135	81	---	131	95	---	100	91	---
$3,000 to $4,000:									
Large northern cities. .	$45	$37	122	$138	$170	81	$67	$158	42
Large southern cities. .	$37	$39	95	$117	$180	65	$86	$170	51
Northern expenditures as percent of southern.	122	95	---	118	94	---	78	93	---
$4,000 to $5,000:									
Large northern cities. .	$57	$48	119	$182	$234	78	$148	$220	67
Large southern cities. .	$39	$45	87	$166	$257	65	$136	$225	60
Northern expenditures as percent of southern.	146	107	---	110	91	---	109	98	---

Source: "Study of Consumer Expenditure Income and Saving," tabulated by Bureau of Labor Statistics, U.S. Department of Labor, for Wharton School of Finance and Commerce, University of Pennsylvania, Philadelphia, Pa., 1956-57.

Wholly aside from this evidence, this Court judicially knows that the practice of excluding Negroes from restaurants was, before passage of the Act, very widespread. And it is perfectly clear that the aggregate effect of this practice is to substantially restrict the market for food and other goods sold in restaurants. Indeed, that is simply a truism. Not only is the market restricted because established businesses sell less food, but also because many new restaurants are doubtless not opened because of the narrowed market resulting from the exclusionary practices. This restriction on the market, in turn, clearly retards the flow of goods in interstate channels -- and it is this result that gives Congress the power to deal with the cause.

b. Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), sustained the constitutionality of the National Labor Relations Act and its provisions compelling collective bargaining and outlawing other unfair labor practices. Declaring that the power to regulate commerce may be exerted "no matter what the source of the dangers which threaten it," 301 U.S. at 37, Mr. Chief Justice Hughes, for the Court, held that the possibility of a labor dispute at the producer's plants which would obstruct the flow of steel in commerce was sufficient justification for Congress to regulate the company's labor relations practices.

It is not, however, the existence of a labor dispute which empowers Congress to enact legislation like the Wagner Act, but the fact that a labor dispute

might cause a cessation of steel production and thereby obstruct the flow of steel in commerce. "It is the effect upon commerce, not the source of the injury, which is the criterion." Labor Board v. Jones & Laughlin Steel Corp., supra at 32. What this means is that whenever a condition exists, whatever its location,which alone or taken with similar situations, would tend to hamper or restrict the free flow of goods in interstate commerce, Congress may deal with that condition. The existence of a "dispute" vel non is constitutionally irrelevant (although, as we point out infra, the "dispute" prin iple is also plainly applicable here).

Thus, under the labor and wage and hour laws Congress has regulated a host of businesses, not only at the production end of the flow of commerce, as in the Jones & Laughlin case, but also on the receiving or retail end. See, e.g., Labor Board v. Reliance Fuel Oil Corp., supra; May Department Stores Co. v. Labor Board, 326 U.S. 376 (1945) (retail store); J.L. Brandies & Sons v. Labor Board,142 F. 2d 977 (C.A. 8, 1944), cert denied, U.S. (retail store); McLeod v. Bakery Drivers Local, 204 F. Supp. 288 (E.D. N.Y. 1962) (bakery); Retail Fruit & Vegetable Union v. Labor Board, 249 F. 2d 591 (C.A. 9, 1957) (retail store); Labor Board v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951) (local construction project); Int'l Brotherhood v. Labor Board, 341 U.S. 694 (1951) (same); Local 74 v. Labor Board, 341 U.S. 707 (1951) (same). As the court of appeals said in J. L. Brandeis & Sons v. Labor Board, (142 F. 2d at 980-981), supra:

> It is urged, also, that when shipments of out-of-state merchandise come to rest in the store interstate commerce ends and what may occur thereafter does not directly affect it. If when selling at the store stops purchasing outside the state also stops, it is fair to say that the latter is the effect of the former . . . . In determining its own jurisdiction the Board properly considered the possible effect of labor strife in the store upon the flow of merchandise purchased and shipped from outside the state to maintain the constantly diminishing stock offered for sale at retail.

c. The Labor Board has on many occasions regulated labor relations in restaurants, on the theory that disputes in restaurants tend to diminish the flow of goods in commerce, i.e., the food and other products purchased by the restaurant to serve its customers. See, e.g., Labor Board v. Morrison Cafeteria Co. of Little Rock, 311 F. 2d 534 (C.A. 8, 1963); Labor Board v. Local Joint Board, 301 F. 2d 149 (C.A. 9, 1962); Labor Board v. Childs Co., 195 F. 2d 617 (C.A. 2, 1952); Labor Board v. Laundry Drivers Local, 262 F. 2d 617 (C.A. 9, 1958); Labor Board v. Gene Compton's Corp., 262 F. 2d 653 (C.A. 9, 1959); Labor Board v. Howard Johnson Co., 317 F. 2d 1 (C.A. 3, 1963), cert. denied, 375 U.S. 920; (1963); Kennedy v. Los Angeles Joint Board, 192 F. Supp. 339 (S.D. Calif. 1961); Brennan's French Restaurant, 129 N.L.R.B. 52 (1960); Stork Restaurant, Inc. 130 N.L.R.B. 543 (1961); Joe Hunt's Restaurant, 138 N.L.R.B. 470 (1962); Childs Co., 88 N.L.R.B. 720 (1950); Childs Co., 93 N.L.R.B. 281 (1951); Bolton & Hay, 100 N.L.R.B. 361 (1952); The Stouffer Corp., 101 N.L.R.B. 1331 (1952); Mil-Bur, Inc., 94 N.L.R.B. 1161 (1951); cf. Tucker's Steak House, 4 CCH Labor L. Rep. 20,405, ¶12,840 (1964).

While some of these cases involved restaurants connected with interstate chains, others involve single, individual establishments (Brennan's French Restaurant, supra; Stork Restaurant, Inc., supra) or two commonly-owned establishments in the state doing a local business (Labor Board v. Joint Local Board, 301 F. 2d 149, supra).

These cases are direct authority for prohibiting racial discrimination in restaurants in which a "substantial portion" of the food served or other products sold has moved in commerce. As in the Labor Board restaurant cases, the activity being regulated affects commerce by diminishing the quantity of goods that would otherwise flow in interstate channels to the restaurant. Indeed, the case here is stronger than the usual labor case, for in the latter it is ordinarily the mere possibility that a labor dispute might lead to a strike which would in turn reduce purchases through interstate channels, which furnishes jurisdiction to act, while in the case of a restaurant which refuses to serve Negroes it is clear that the number of potential customers of such a place is immediately and continually restricted, which in turn reduces the quantity of goods the restaurant orders through interstate channels.

d. Aside from the labor cases, the line of authorities construing the antitrust laws also demonstrates that Congress may act to remove artificial restrictions upon the market for goods. Congress has prohibited restraints of trade, under the Sherman, Clayton, and Robinson-Patman Acts, in

a variety of situations because such restraints exert an impact upon the free flow of goods, like motion picture films, Interstate Circuit v. United States, 306 U.S. 208 (1938); White Bear Theatre v. State Theatre Corp., 129 F. 2d 600 C.A. 8, (1942); Youngclause v. Omaha Film Board, 60 F. 2d 538 (D.C. 1932); IPC Distributors v. Chicago Union, 132 F. Supp. 294 (D.C. 1955), or stage attractions, United States v. Shubert, 348 U.S. 272 (1955), or professional boxing matches, United States v. I.B.C., 348 U.S. 236 (1955), or football games, Radovich v. Nat'l Football League, 352 U.S. 445 (1957), although these activities are ordinarily thought of as "local affair[s]." United States v. I.B.C., supra at 241.

As the Supreme Court has described the Sherman Act, "the end sought was the prevention of restraints to free competition in business and commercial transactions which tended to . . . control the market to the detriment of purchasers of consumers of goods and services. . . ." Apex Hosiery v. Leader, 310 U.S. 469, 493, (1940); see also Id. at 498. And see Loewe v. Lawler, 208 U.S. 274 (1908). And in Interstate Circuit v. United States, supra, the Court noted that the effect of a motion picture conspiracy was to cause some exhibitors to "increase their admission price to 25 cents, . . . and to abandon double-billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be

deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures. . . ." 306 U.S. at 219. In turn, "the effect of the restrictions upon 'low-income members of the community' patronizing the theatres of these exhibitors was to withhold from them altogether the 'best entertainment furnished by the motion picture industry. . . ." Ibid. Such a conspiracy was held to violate the law. It is not different in principle from the widespread exclusion of Negroes from restaurants.

Taken in the aggregate with the discriminatory practices of other restaurants and retail establishments generally, the racially exclusionary practices of the Pickrick Restaurant exert a substantial impact upon the movement of goods in commerce. No single establishment, of course, need be viewed in isolation for constitutional purposes. See Labor Board v. Reliance Fuel Oil Corp., Wickard v. Filburn, and other cases discussed at length supra pp. . That being so, the power of Congress to ban discrimination in the Pickrick restaurant (and in the Heart of Atlanta Motel) is established.

C. Congress has power to promote the flow of goods in interstate channels by removing the causes of disputes which obstruct that flow

As we have explained in part B, supra, a long line of labor cases establishes that Congress may remove obstructions to the flow of commerce by eliminating the causes of strikes, picketing, boycotts, and the like which in turn obstruct the free flow of goods in commerce, either by interfering with production (Labor Board v. Jones & Laughlin Steel Corp., supra) or with distribution at the receiving end (Labor Board v. Reliance Fuel Oil Corp., supra). These decisions are direct authority for the regulation by Congress of racially discriminatory practices in restaurants, which also have resulted in picketing and boycotts and which in turn have severely affected retail sales across the South. The drop in retail sales, of course, must necessarily, if left unchecked, adversely affect the flow of goods interstate.

As Undersecretary Roosevelt testified "[i]t is common knowledge that discrimination in public accommodations and demonstrations protesting such discrimination have had serious consequences for general business conditions in numerous cities in recent years." Hearings, p. 699. Among examples he cited were:

Retail sales in Birmingham, Alabama "were reported off 30 percent or more during the protest riots in the spring of 1963. That is just retail sales, . . . One local businessman said several retailers had told him their books had shown a net loss for the first time in a generation." Ibid.

Another Birmingham businessman said "there were more stores for rent in Birmingham last fall than there had been during the depression." In April, "one downtown block had 8 of its 20 stores empty, with "For Rent" signs in the windows."

Another account, from a newspaper said, "that downtown stores privately report that business in April was off 40 to 50 percent." "They were hit first by a Negro boycott and then by a tense atmosphere that kept customers at home or in suburban shops."

Another newspaper story revealed that a Birmingham chain store "was closing its downtown branch in 2 weeks because of a lack of business."

The Federal Reserve Bank in Atlanta reported that "in the 4-week period ended May 18, 1963, department store sales in Birmingham were down 15 percent below the same period in 1962." During the same period department store sales were up in Atlanta, New Orleans and Jacksonville.

With respect to Atlanta, Mr. Roosevelt testified that "after several months of intermittent demonstrations in 1960-61, and a boycott sparked by student groups to remove racial barriers in lunch counters and department store restaurants, merchants agreed that the Negro boycott of the downtown area was almost 100 percent effective." Department store sales for a one-week period in February 1961 were down 12 percent from the preceding year, according to the Federal Reserve Bank. Hearings, pp. 699-700.

In Savannah, lunch counter discrimination in downtown stores finally ended following "a 15-month boycott of the stores by Negroes. . . ." This boycott

"cut retail sales as much as 50 per cent in some places."

In the fall of 1962 businessmen in Charlotte, North Carolina, "hit by drives for desegregation of public accommodations , estimated their business was cout by 20 to 40 percent."

In Nashville, Tennessee, a boycott was maintained for seven weeks at 98 percent efficiency.

> Negroes in Nashville spend an estimated $7 million annually downtown and their absence had varying results. In one department store, they represented 12 to 15 percent of the business; in another department store, 5 percent. The transit company found its revenues dwindling seriously; the two newspapers found advertising linage figures falling. Hearings, p. 700.

Still in Nashville, "Variety stores were hit particularly hard."

> With their lunch counters a sit-in target, even those who did venture downtown avoided the food counters, which sometimes account for as much as 50 percent of the gross profit. Even businessmen not involved in the sit-ins and which had reputations of good service to Negroes found business dropping. Hearings, p. 700.

The State Budget Director of Tennessee said violence in the state associated with desegregation of public accommodations had threatened the State's credit rating, observing that "[w]e go up to New York to talk to investment bankers . . . . they start off talking about such things as these dynamitings. Sometimes that's all they talk about. . . .they only want to know all the acts of violence.." Hearings, p. 700.

Obviously, the widespread boycotts and disorders attendant upon refusals to desegregate eating places and other retail establishments resulted in a serious loss of

business to many such concerns. The impact upon the flow of food and other goods in commerce could not have been anything but substantial. In light of this, Congress has clear power to deal with the source of the trouble, the refusal to serve Negroes, or to serve them on an equal basis with whites.

It is, of course, no answer to say that Congress should have dealt with this problem in other ways than by prohibiting the racial discrimination. Once the impact upon interstate commerce is conceded, the means to be used by Congress to protect that commerce is a question which Congress, and not the courts, must decide.[16/]

16/ The same argument, needless to say, might be made as well against the National Labor Relations Act, which was the result in part of strikes, picketing, and the like in the 1930s. But Congress may decide which practices shall be prohibited, and its determination of this question is not subject to further review.

D. Congress has power to prohibit racial discrimination when its practice distorts the natural movement of persons and industries in interstate channels by creating a reluctance to locate or operate in segregated areas

The evidence is very clear that racial disturbances and the practices of racial segregation and discrimination in public accommodations which engender the disturbances, have a profound impact upon the movement from state to state of industries and individuals.

With respect to conventions, for example, Undersecretary Roosevelt testified that a "most striking example of a large organization steering away from a city because of discrimination in hotel and restaurant accommodations is provided in the case of the American Legion.17/ He said:

> The Legion had originally scheduled its 1963 convention--to be held in September--in New Orleans. However, they were informed that the availability of nonsegregated facilities could not be insured in New Orleans. The convention was then shifted to Miama, Fla., where they did receive an assurance of desegregated facilities. It is expected that attendance at the Legion convention will be as high as 50,000 persons, and that Miami will gain additional business--and this is a conservative estimate--amounting to between $4.5 million and $5 million, and tourist dollars are new dollars brought into the community.

Atlanta, on the other hand, gained much convention business after some hotels had desegregated. And in Birmingham, "prior to disturbances in that city in April and May of [1963]," inquiries received from

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17/ Hearings, p. 696

"various Southeastern States" indicated "a positive interest in Birmingham as a convention site." But "this interest waned substantially following the April and May demonstrations."18/

The effect of segregation practices in places of amusement and entertainment is also important. For example, the Metropolitan Opera Company canceled its annual season in Birmingham because municipal authorities "failed to desegregate theatre facilities." Actors Equity "adopted a rule. . . written into every contract, that performers need not perform in theatres where discrimination is practiced either against performers or patons. White and Negro performers have been enforcing this rule, and refusing to appear." And entertainers in the American Guild of Variety artists have also been refusing to book where either the stage or the audience is segregated. Prominent entertainers have refused to play to segregated audiences. Ibid.

Segregation in public accommodations also results in "difficulty in recruiting professional personnel and skilled labor," who are in "short supply," and who are "unwilling to live and work in an environment in which racial discrimination in public accommodations is dominant." Ibid.

18/ Apparently this was the result of hotel discrimination, which caused the National Music Teachers Association and "possibly" the Southern Baptist Convention of Nashville Tennessee, not to convene in Birmingham. The latter group "had been negotiating for convention facilities in 1963 for some 6,000 to 8,000 delegates," Hearings. p. 697.

Specifically, "demonstrations and other forms of protect against" discrimination in restaurants, among other places, "created a general atmosphere which firghten away trained local people and persuades others not to migrate to some places where their services may be in great demand."[19/]

More importantly, "the pattern of plant locations is also distorted, because many firms turn away from such areas as plant sites . . . . these decisions frequently have an adverse impact on local efforts to redevelop communities by attracting new firms."

The effects of public accommodations discrimination on plant location and investment are striking. A company had planned to make steel products in Birmingham but after the 1961 freedom rider riot there in 1961 the company "decided Birmingham was out of the question and eventually built its plant in Tennessee, although it has to ship its steel from Birmingham." Another Birmingham bank official said that the city had "been hurt and hurt bad." He stated that the city had lost a pilot plant that a large Ohio company had considered

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19/ Thus, he testified, the "experiences of the Alabama Medical Center in Birmingham are typical." This Center, the city's second largest industry, had had difficulty attracting "topflight scientists" because of "Birmingham's adverse publicity over sit-in demonstrations." Similarly, in Little Rock, "when protests over 'segregated public accommodations further inflamed the environment,' recruitment of technical personnel became "extremely difficult." Id. at 698. The recruitment program at the medical center of the University of Arkansas was "brought to a virtual standstill" because "[s]o many of the persons" approached to join the faculty "are diverted by the events that have been taking place in the community."

building there, "and lost it strictly because of the unrest down there."[20]

The story has been the same in Little Rock. As the Undersecretary testified,

> In the 2 years before the crisis over schools and desegregation of public accommodations erupted into violence in Little Rock in September 1957, industrial investments totaled $248 million in Arkansas. During the period, Little Rock alone gained 10 new plants, worh $3.4 million, which added 1,072 jobs in the city. In the 2 years after the turbulence which brought Federal troops to the city, not a single comapny employing more than 15 workers moved into the Little Rock area. Industrial investments in the state as a whold dropped to $190 million from $248 million of the 2 years before desegregation.

20/ "The pilot plant," the bank officer said, "in its first stage was scheduled to cost about $3 million and if it had worked out, the company was thinking in terms of a further investment of $40 to $50 million. Wee, we asked for it, and now we're getting it." Hearings, p. 699.

The effect of racial discrimination in public accommodations elsewhere on the movement of persons and industries interstate being so pronounced, particularly with respect to the location of new plants and the consequent retardation of industrial development of the South as a region, we submit that Congress has the power to remove the cause which obstructs the natural flow of that commerce. This is not a novel exercise of the commerce power. Many years ago Congress acted, interestingly enough, to relieve the South and the West of the impact of price discrimination upon the industrial development of these two regions.

In United States Steel Corp. 8 F.T.C. 1 (1924), the Federal Trade Commission considered charges that the steel company and others had maintained a steel pricing system dependent upon "basing points," known as the "Pittsburg plus" system. The system operated so that the price of steel quoted to companies who wished to process it into other products was always the hase price plus the cost of shipping the steel from Pittsburgh, even, for example, if the steel were manufactured (as much was) in Birmingham. The economic consequences for the South and West were considered at length by the Commission, which issued a cease-and-desist order against this practice.

Thus the Commission found that the "business of Western manufacturers generally cannot grow to the extent of the business of their Eastern competitors because of respondents' Pittsburgh Plus prices," and that "in Birmingham, . . . where respondents' Pittsburgh Plus price on wire and wire products is $15.30 per ton higher than respondents' Pittsburgh price, it would be impossible for any steel user buying steel from respondents' Birmingham plant to compete with respondent in cases where respondents wanted the business." 8 F.T.C. at 28, 30.

Again, the Commission found that "the Pittsburgh Plus system retards the steel producing development and steel consumption of every section of the United States except Pittsburgh," 8 F.T.C. at 35. More steel was shipped by eastern mills into the West than vice verse, as a result of this system. Id. at 43. Another result was that "the mills in the Pittsburgh district increased their capacity twice as much as those in the Chicago district. . . ." Id. at 47

If the price differential were eliminated, the Commission found, "the capacity and production of the plants of the southern steel users would be very materially increased." All of these manufacturers "complain because of their inability to grow under the handicap. . . . "Id. at 53. For example, "New Orleans' steel-using shops" were "stagnating," whereas, "if they were permitted to buy steel without the differential, they would be able to materially increase their business." Ibid.

In conclusion the Commission found that (Id. at 55-56:

> . . . the steel producing and steel consuming industries in the South are greatly hampered by the higher prices charged for steel there as against the prices charged in the North to the Pittsburgh and other eastern consumers.
>
> . . . the elimination of this very serious discrimination . . . would greatly increase the steel producing industry in the South . . . . the plants of the southern steel users are kept working at small capacity, while those of the North have a vast amount of business which would go to Southern plants if the differential were removed.

See, also, Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).

It seems evident that if Congress has the power to promote the growth of industry in the South by prohibiting widespread price discrimination, it may achieve the same result by eliminating racial discrimination. This, then, provides an additional source of Commerce clause authority to support the ban on discrimination in all types of public accommodations.

Nothing in the Civil Rights Cases, 109 U.S. 3 (1883), creates any question as to congressional power under the Commerce Clause to prohibit segregation and discrimination in places of public accommodation. In the Civil Rights Cases the Court did not pass upon the power of Congress to enact similar legislation under the Commerce Clause, "as the sections in question [were] not conceived in any such view" and the statute had to stand or fall under the Fourteenth Amendment. 109 U.S. at 19. This is made clear by Butts v. Merchants & Miners Transp. Co., 230 U.S. 126 (1913), where it was argued that the act of 1875, declared invalid in the Civil Rights Cases, should be held valid as applied to a vessel under the exclusive admiralty or foreign commerce jurisdiction of the Federal Government. The Supreme Court said that in the Civil Rights Cases it was held that the statutes of 1875 received "no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power. . . ." 230 U.S. at 132. The Court held that the statute was not severable.

II

The Civil Rights Act does not take the property of either the motel owner or the restaurant owner without just compensation, nor does it deprive them of liberty or property without due process of law

It is clearly established that incidental injury to property which results from the effect of regulatory legislation are not "takings" for which compensation must be made. ". . . [f]or consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material . . . . If, under any power, a contract or other property is taken for public use, the government is liable; but if injured or distroyed by lawful action, without a taking, the Government is not liable." Omnia Co. v. United States, 261 U.S. 502, 510 (1923). The United States has the same power under the Fifth Amendment to impose restrictions upon property which result in depreciation of the property's value as the state has pursuant to its police power. Calhoun v. Massie, 253 U.S. 170 (1920).

In Bowles v. Willingham, 321 U.S. 503 the Court dealt with the question of the incidental taking of property by virtue of price ceilings under the Emergency Price Control Act. There the Court said:

> . . . Mr. Justice Holmes, speaking for the Court, stated in Block v. Hirsh, supra, p. 155: 'The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notice that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain,

> under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.' A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power. L'Hote v. New Orleans, 177 U.S. 587,598; Welch v. Swasey, 214 U.S. 91; Hebe Co. v. Shaw, 248 U.S. 298; Pierce Oil Corp. v. City of Hope, 248 U.S. 498; Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 157; Euclid v. Ambler Realty Co., 272 U.S. 365; West Coast Hotel Co. v. Parrish, 300 U.S. 379. And the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. Hamilton v. Kentucky Distilleries Co., supra; United States v. Darby, 312 U.S. 100.

See also Matveychuk v. United States, 116 Ct. Cl. 859 (1950) and Snyder v. United States, 113 Ct. Cl. 61 (1949), cert. denied, 337 U.S. 325 where the Court held that price ceilings of the Price Control Act of 1942 did not constitute a taking under the Fifth Amendment.

In United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) the Court considered the question whether a gold mine which the government had ordered to be closed in 1942 for the purpose of preserving mining equipment and manpower in gold mines could recover compensation from the United States for the alleged taking. The Court held that closing of the gold mine did not constitute a taking within the meaning of the Fifth Amendment stating ". . . the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily considered to establish the owners right to compensation." 357 U.S. at 157, 158. It would seem that if the owner of a gold mine need not be compensated when the gold mine is closed entirely by a government regulation, a fortiori the owner of a motel would not have to be compensated where the motel is merely required to accept guests on a nondiscriminatory basis. See also Jacob Ruppert v. Caffey, 351 U.S. 264 (1920) where the prohibition by the Federal Government of the sale of non-intoxicating beer was held not to be an appropriation of private property for which compensation was required; United States v. General Motors, 323 U.S. 373, 379 (1945); United States v. Darby, 312 U.S. 100, 125 (1941); German Alliance Insurance Co. v. Kansas, 233 U.S. 389 (1914); Legal Tender Cases, 12 Wall. 457, 551 (1870).

This rule is applicable to non-discrimination regulations. In John R. Thompson Co. v. District of Columbia, 346 U.S. 100 (1953), the Court unanimously affirmed a conviction under the District restaurant nondiscrimination law, construing as it did so a federal home rule statute under which, in the Court's view, Congress granted to local government legislative power "as broad as the police power of a state so as to include a law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia." 346 U.S. at 110. Of course, the District of Columbia is subject to the restrictions of the Fifth Amendment and it is hardly likely that the Court would have affirmed the convictions had it thought the restauranteur's property had been taken without due process or just compensation.

And in Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), a criminal conviction for violation of a state statute prohibiting racial discrimination was upheld as applied to a water carrier, without the slightest suggestion in the opinion that the law deprived the carrier owner of property without due process of law.

These cases, too, dispose of the contention that the law deprives any proprietor of liberty or property without due process.

Similarly, in Railway Mail Association v. Corsi, 326 U.S. 88 (1945), the validity of a New York statute outlawing racial discrimination in labor unions was sustained. The statute was challenged as contrary to the due process clause of the Fourteenth Amendment "as an interference with its right of selection to membership and abridgement of its property rights and liberty of contract" (emphasis added). 326 U.S. at 93. The Court summarily rejected all these contentions. Mr. Justice Frankfurter, concurring, said that "[e]laborately to argue against this contention is to dignify a claim devoid of constitutional substance." Id. at 98. See also Continental Airlines v. Colorado Anti-Discrimination Comm., 372 U.S. 714 (1963).

III

The damage action against the United States will lie only in the Court of Claims, and in any event no anticipatory damage action will lie against the United States in any court

A. The District Court has no jurisdiction of the plaintiff's claim for damages since the amount requested is in excess of $10,000

Plaintiff's claim for damages in the amount of $11,000,000.00 may not be entertained by this Court. Section 1346(a)(2) of Title 28 United States Code, provides, in pertinent part, as follows:

> (a) The District Court which has original jurisdiction concurrent with the Court of Claims of:
>
> > (2) Any other civil action or claim against the United States not exceeding $10,000 in amount founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contact with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

This limitation placed upon the District Courts has been followed in innumerable decisions United States v. Sherwood, 312 U.S. 584, 591. Claims for damages in excess of $10,000 founded upon the Constitution must be brought in the Court of Claims, Section 1491, Title 28, United States Code.

B. Since plaintiff has not yet suffered any injury his damage action is anticipatory and such an action will not lie

Neither section 1346(a)(2) nor 1491 permit a suit against the United States for anticipated damages in advance of an actual taking. See Thompson v. United States, 215 F. 2d 744, 745 (C.A. 9, 1954); Rank v. United States, 142 F. Supp. 1, 160 (S.D. Calif., 1956), affirmed in part and reversed in part (for other reasons) sub nom. California v. Rank, 293 F. 2d 340 (C.A. 9, 1961), affirmed in part and reversed in part (for other reasons) sub nom. Dugan v. Rank, 372 U.S. 609 (1963). Here the Heart of Atlanta Motel is clearly suing for anticipated damages. By its own allegations, there will be damages suffered if the motel is required to accept Negroes on a nondiscriminatory basis. Even assuming that there would be a taking of property at the time when the motel is forced to accept Negroes on a nondiscriminatory basis, that time has not yet arrived and hence the plaintiff is merely anticipating damages in advance of the taking.

Respectfully submitted,

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